

Petillon

RM 60

harm | härm |

noun

physical injury, especially that which is deliberately inflicted: *it's fine as long as no one is inflicting harm on anyone else.*

- **material damage:** *it's unlikely to do much harm to the engine.*
- **actual or potential ill effect or danger:** *I can't see any harm in it.*

verb [with object]

physically injure: *the villains didn't harm him.*

- **damage the health of:** *smoking when pregnant can harm your baby.*
- **have an adverse effect on:** *this could harm his Olympic prospects.*

PHRASES

come to no harm

be unhurt or undamaged: *yachts with experienced crews generally come to no harm.*

do more harm than good

inadvertently make a situation worse rather than better: *hasty legislation does more harm than good.*

do no harm (also do someone no harm)

used to indicate that a situation or action will not hurt someone, whether or not it will provide any benefit: *the diet of milk and zwieback certainly did him no harm.*

mean no harm

not intend to cause damage or insult: *this was cruel, but they meant no harm by it.*

no harm done

used to reassure someone that what they have done has caused no real damage: *there's no harm done in this case but you really must be chary of giving invitations to people we don't know.*

no harm, no foul

mainly US used to indicate that a mistake or instance of misconduct should be excused because it has not caused damage: *strictly speaking it was petty trespassing, but no harm, no foul.*

[originally in the context of sport: compare **foul (noun)**.]

out of harm's way

in a safe place: *some of the fortune was placed overseas out of harm's way.*

there is no harm in —

the specified course of action may not be guaranteed success but is at least unlikely to have unwelcome repercussions: *other stores may be offering similar deals—there's no harm in asking.*

ORIGIN

Old English *hearm* (noun), *hearmian* (verb), of Germanic origin; related to German *Harm* and Old Norse *harmr* 'grief, sorrow'.

Petillion

RM 61

RECORDED VOICE: This meeting is now being recorded.

BECKY BURR: Thank you very much for getting that started. I'd like to start, if we could, with the supplemental rules [inaudible], which is one of the two documents I sent around, if you could bring that up.

I was actually looking for the [rule?] document.

Thank you. So, for everybody's information, as you know, the current provider for the IRP dispute resolution in ICANN is by International Center for Dispute Resolution. And the ICPR dispute resolution rules are the basis which independent review is conducted. In addition, ICANN has supplemental rules that [inaudible] the [ICDR?] rules into certain... So harmonize the [ICDR] rules as applied in the [IRP?] context to the ICANN bylaws.

One of the things that we need to be in a position to do in fairly short order, is modify the supplemental procedures to conform to the new bylaws which will go into effect. And so, what we propose to do is walk through the current wheels, have a discussion among the group with respect to modifications to the current rules, this is a fairly near-term deliverable that we have to do.

Then, focus on the [IRP?] for providers and panelists, and then walk through, in [lower?] detail, the rules by which the IRPs would be conducted, not just the supplemental rules, but [inaudible] detailed scope. So this, I think, this meeting or the next meeting will focus on

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the supplemental rules. And we have several documents that are in the works, and David [inaudible] has been working very intensely on this, but has no voice, and so we're not going to [inaudible] today, but David, I'm sure everybody joins me in hoping that you feel better very soon.

So, just in terms of the [ICGR?] rules, as we go through these things, we're going to need to add some definitions, these definitions here are pretty plain vanilla. But we think that we will need to use this to define covered actions and disputes and other things that are in the new bylaws.

One of the things that is... Do I have scroll control for everybody or do I need to tell people where I am?

In any case, I'm on scope. This provision will need to be modified to reflect the scope of the conflicts, the covered disputes which would be defined above, and those covered disputes, of course, would be actions or failures to act in violation of the bylaws, or articles of incorporation, or the other disputes the IANA related disputes that are covered here.

Going down to the covered and the number of independent review panelists, actually we're going to have to add a section here on the independent review panel itself, and the standing panel, but we're also going to ask to provide, that the standing panel may not be in place when things kick off. The number of panelists here is three, which is what we decided to go forward.

I think more important for our conversation is that, are the provisions of the conduct in the independent review. And I'd like to have some discussion on this point, because it is not something that the CCWG

discussed in length. ICANN has traditionally, its supplemental rules have essentially said only the hearings would be in-person only, in an extraordinary event.

I have to say that ICANN, and I won't speak for ICANN, but based on my knowledge of IRP, ICANN has not been entirely successful in holding the line. I think that the panelists have largely made determinations about when they thought it would be helpful for them to have in-person hearings, but the goal of this, the sort of overall goal here is to try to have the disputes be resolved [inaudible] through electronic conversations, telephone conferences, in order to keep costs down.

And obviously, the evidence issues here are that, and written statements, all of that stuff has to be submitted in writing in advance, and the in-person hearing shall be limited to argument only. So, I would like to open it up for discussion here regarding [inaudible] conduct, the extent to which we want to hold the line on making in-person hearings, the extraordinary event, whether we want to say this should be determined by the panelists based on, you know, sort of keeping in mind what the need for efficiency and for [inaudible].

Kavouss has asked in the chat, what the status of the supplementary rules? The rules that are up here right now, are the rules that are in force at the moment, as part of ICANN's existing independent review process. We will need to modify these rules to ensure that they reflect the new bylaws provisions here. I see Amy's hand.

AMY STATHOS: Yes, hi Becky, thank you. I just wanted to respond to that in terms of the status, just a couple of points kind of more global before you get in more detail. One, the one thing that I wanted to point out is that the ICVR was instrumental in helping develop these supplemental procedures, as their group looked at the documents in relation to the bylaws when the...

Let's say, for example, when the bylaws changed back in 2013. So I just wanted to point out that the ICVR will also have a role in ensuring that what the supplementary procedures say, are consistent with the bylaws. So I just wanted to make sure that we pointed that out.

BECKY BURR: Okay, that's great.

AMY STATHOS: Yeah, they would just simply expect what we say, their group will make sure, since they are the ones that have to operate pursuant to those supplementary procedures.

BECKY BURR: Okay, so that probably means that we need to get those two ICVR in a timely fashion for them to weigh-in on the consistency.

AMY STATHOS: Right, yeah. They do have to have a loop in there for sure, possibly two depending on their internal work.

BECKY BURR: So Amy, could you talk just for a bit about your, ICANN's experience with the ICVR and with the supplemental [inaudible] with respect to, you know, the conduct of these disputes during telephone conferences as opposed to in-person hearings and the like? I think there is probably, there has been a variety of responses based on the different IRPs.

AMY SATHOS: Sure. And this kind of goes to a point that we made previously about kind of the decision making roles of the various parties involved, meaning the provider itself, the panel, and then potentially what we had talked about earlier, which would be one designated member of the standing panel once that is in place. We've had all different kinds of hearings when it gets to the final hearing.

Initially, we actually do always have a scheduling hearing or call, conference call, with just the parties before the panel is in place, and that's a standing operating procedure. And then we will have another scheduling call once the panel is in place, but the final hearing we've done many different ways.

We've done... And it has all been based on what the parties have asked for, as well as what the panel believes it needs to help it make its decision. So we've had pure telephonic, we've had video conferences, we've had video conferences where all of the panels are, panelists are in separate places, and they all decided to gather. We've had in-person hearings as well.

The in-person hearings are, in terms of everybody in the same room, is the rarest because of the costs and expense, I think most people are conscious of that, but it really has been across the board.

BECKY BURR: Okay. So, it really does depend on... In that case, the call about what kind of hearing is appropriate is made by the panel, I take it?

AMY STATHOS: Yes, they do take the parties' input, but they are the ultimate decision maker. At least currently.

BECKY BURR: Okay. Any comments on that? So I think what Amy has suggested is that the experience in [inaudible] has been, it has varied quite a bit, depending on the IRP and make nature of the dispute, that panel has made the determination based on input from all of the parties to the dispute. And so one question going forward, I think is you know, do we want to have that reality reflected here in the language as opposed to the language about it being an extraordinary event?

Or do we really want to retain the extraordinary event, [inaudible] show that the result would be telephone conferences. Any comments on that from participants?

We have no views?

Okay. Well, we'll continue to sort of walk through this. Kavouss?

KAVOUSS ARASTEH: Yes, good day. I have a simple question. You said that ICGR may modify the supplementary [inaudible]. I asked the question, whether they can do it without referring back to community, or whether they just propose something to be changed? Just a simple procedure question. Thank you.

BECKY BURR: So I think that Amy's response is, although of course, we do [inaudible] have an important role in ensuring that this procedure are consistent with the bylaws, the ICGR, what they would do, would review whatever comes out of our process to ensure that it is consistent with the bylaws. In other words, they could come back to us and say, we don't think that you've fully implemented the bylaws.

They couldn't say, you have to do something that is inconsistent with the bylaws.

Okay. Also in this conduct of the independent review panel, the panel which had responsibility for determining the timetable. Now we do have, in the bylaws a sort of goal of having this be completed, having an IRP be completed within six months. And so, these rules would have to be modified to reflect that. Upon having said that, of course, our six-months is not a hard and fast, it must be done, the panel has to conduct the hearing, but...

And they have to, you know, ultimately determine the timeline that fits the dispute and serves equity and fairness and the like. But we will be

modifying this to reflect the CCWG's conclusion that we need to strive to make things, to make this process more efficient. Okay, then going down to the next section on written statements.

The current revisions limit initial written submissions to 25 pages each, double spaced, and in 12-point font. And this, of course, does not... That would be the sort of argument that the parties would put forth. That would not include evidence, or witness statements, or the like. And here, the IRT may request additional written submissions from the parties to review and from other groups, if they wish. And I know that they have actually, in the past, made such requests.

I just want to test out here that the page limit. It is certainly quite common in US courts to have page limits, and the page limits vary from court to court. So each court sets its own rules. I think, 25 pages is on the more condensed end of the scale, but I've never seen, and anything more than, you know, 50 in the federal courts. So, and in some courts, the limit is actual a word limit as opposed to a page limit.

Any comments on the page limit? Meanwhile, David, I think going back to the conduct of the independent review, that suggestion that claimant certified that the claim is brought in good faith and believe that it qualifies as a legitimate IRP, and not for improper purposes and I can certainly make sense, I am sure that there is some kind of certification required under the standard [ICBR?] rules, though it's probably not specific to this. Kavouss.

KAVOUSS ARASTEH: Yes. Not on page limit. I have one question about the last, one line, sorry, the last line of the section five, mainly, why we said parties and not party? How many parties there are? Because we mentioned that the one who [inaudible]... and other parties. Why two? Thank you.

BECKY BURR: So ICANN is a party, and the claimant, whether it's a SO or an individual claimant, would be a party, so there are always at least two parties. I don't think it's the Board, but I think it's the internet, it's ICANN, it's the corporation that's the party, if I have that right. But we also will be talking about sort of the possibility of consolidating planes, where we may be adding parties, so if two different claimants have very similar claims for purposes of efficiency and justice, we would bring all of those claims together.

So we could have, you know, three or four parties in that case. Okay, I don't see any other comments on page limits, so I'm going to take it, for the moment, we are comfortable with 25-page limit, recognizing that it doesn't cover evidence, that it is essentially the arguments that's to be made by the parties.

Okay. The next provision, provision six, talks about summary dismissal, and provides that an IRP panel may summarily dismiss any request for independent review, where the requestor has not demonstrated that it meets the standing requirements for initiating the independent review, or where there is a settlement. Now we also provide in the bylaws that a panel may dismiss a request that lacks substance that is frivolous or [inaudible].

And so, we have this [inaudible], frivolous, or [inaudible] request. I seem to recall that we, that [inaudible] the term [inaudible] in another context, so we would have to review that to make sure that we would reflect the CCWG's views here.

Kavouss?

KAVOUSS ARASTEH:

Yes. Two small questions. One question is that, why they put standing [inaudible] requirement? Does it make it change if it meets the requirements for initiating the independent review? Why you put the Board [standing]? This is question one.

Question two is just, [inaudible] the consistency. These standing requirements for requirements on those, the things that we have already mentioned in the CCWG recommendation and in bylaw, and would it possible to cross-reference them? Saying that unstipulated in, that means that, you know, what is the standing requirements? This is just for clarification. Thank you.

BECKY BURR:

So, I believe that we would need to define the requirements for bringing a case. And the concept of standing is a legal concept that says, essentially, you have been, you know, you have met, that you are materially effected in, consistent with the language in the bylaws and the like. I'm going to ask Amy and the other experts here on the panel. It seems to... If I was a provider, I would not want to have rules of

procedures that were referred out to another document that could change.

I think I would want the onerous to be on if ICANN's bylaws were to change somehow, we would have to come back and affirmatively modify the rules, but the rules themselves should be pretty self-contained. So that, I think, is why I would structure the way that it structures here. Yes, Kavouss, is that a new hand?

KAVOUSS ARASTEH:

Yes. Just a suggestion. Usually, in other area, in the terms of the standing to say, the requirement is enforced. That is what you said, [inaudible] therefore the standing, [inaudible] suggesting, in terms of the standing, whether it could say, requirement enforced. Thank you.

BECKY BURR:

Okay. I mean, I think the term standing is not absolutely necessary here. We need to make it clear what those requirements are, and that's really what matters. So, are there any other issues related to summary dismissal here? Here we have, you know, the notion is that a panel [inaudible], needs to be formed and before this call is made, one question is, do we want to provide a procedure that, you know, allows for a sort of expedited review of a request before a panel is actually formed?

So say by the, you know, the president or the chair of the standing panel, or by, you know, well, or do we feel that it is necessary to actually

have the panels formed before a decision to dismiss is taken? Any thoughts on that?

Okay. Kavouss?

KAVOUSS ARASTEH: Are we on section seven please?

BECKY BURR: We are just moving to section seven now. [CROSSTALK]

KAVOUSS ARASTEH: I'll wait. [Inaudible] come to that, thank you.

BECKY BURR: Okay. Greg?

GREG SHATAN: Thank you. Greg Shatan. Sorry if this has been covered before. I joined late. The paragraph on summary dismissal doesn't make it clear whether the IRP panel can dismiss the [inaudible], or if the other party, essentially ICANN, needs to essentially move for dismissal. As to whether the panel, I guess that should be clarified.

As to whether the panel should be formed, [inaudible] that if they're going to be reviewing 25 page submissions, that should go to the panel in question and not to the standing panel, otherwise the standing panel

kind of ends up being an overall gatekeeper for initial consideration of cases, which I think would be a different format.

BECKY BURR:

Thanks Greg. Do you have a view on whether the panel should be able to dismiss something, even if it hasn't received a request for...? So for example, it gets done moving papers, ICANN has not requested dismissal, and it determines on its own that the papers are deficient.

GREG SHATAN:

I haven't really formed a view yet. I can think of good arguments for both, possibly a different standard. I don't know if we want to overly complicate things. It seems that if something is, as it says, it rises or lowers the level of being [inaudible], frivolous, or [inaudible], so that seems to me to be something that should be responding, or self-determined by the panel.

I guess, in a sense, it's a question of, you know, how we want the procedure to go. But I don't have a firm thought at the moment, yet.

BECKY BURR:

Okay. Any other views on that? So, to me, I think, there are two questions. One is, if the claimant simply fails to demonstrate that they are harmed, that they have been harmed, or that they will be harmed, and therefore they don't meet the requirements, and that's apparent to the panelists based on the information that's submitted to the party, I guess I'm not sure that it's absolutely necessary that ICANN should have

to, you know, put together the papers after dismissal, although I suspect it wouldn't in any case.

The frivolous or [inaudible] call I think is, you know, I agree with Greg. We need to think what the standard for that would be. But what I'm seeing from the group is that as to summary dismissal, the sentiment of the group is that the panel should be formed, and it's the panel session make a determination for summary dismissal, as opposed to appointing a particular [inaudible], or any particular [inaudible].

Okay. Going now to section seven, the interim measure of protection. Now this is a place where the CCWG did have substantive views on requests for interim relief. So essentially, that we would call prospective relief or injunctive relief, relief in the nature don't do something, don't change the status quo while this is being articulated. And there was a very clear standard for that there.

So the, that is something that definitely needs to be put in place. Now, here... So the ICANN bylaws actually contemplate a standing panel, although a standing panel is not, doesn't really exist. But one of the questions is sort of, do we want essentially the panel to be able to designate an emergency panelist who would adjudicate requests for interim relief, and in the event that the standing panel is in place?

So while the ICDR to appoint an emergency panelist to review and rule on requests for emergency relief. As you may recall, the standards that we have set for, this kind of relief is harm for which there is no adequate remedy in the absence of the emergency relief. Either likelihood on the success of the merits, or sufficiently serious questions

related to the merits, and then a balance of hardships, tipping decidedly towards the party seeking relief. So we do have a standard that will put in here directly from the bylaws, but so one question I have is, does anybody have thoughts on essentially providing that an emergency panel will be designated by the standing panel, according to its rules, and in the event that there is no standing panel in place, but the ICDR rules would come into play to determine, to appoint an emergency panelist?

Any objections to that? Kavouss?

KAVOUSS ARASTEH:

No objections, but the only thing is that the emergency panel, how it is established is the [inaudible] the initial panel cannot be, because of one of the reasons. How is this possible to have an emergency? Is it a different criteria to establish emergency panel? Or is it the same criteria as the standard panel? Just a question for clarification.

BECKY BURR:

No, I'm talking about an emergency panelist. So if there is a panel, then the panel itself would say, would appoint one of its members to deal with the request for interrogatory or injunctive relief. If there is no standing panel yet, and there is a request for interim protection, then the ICDR has rules for appointing an emergency panelist, and we would default to those rules, you know, it would be somebody who was entirely neutral, and who did not have, you know, and who had no conflict of interest, but they would called in and appointed by this ITDR,

to rule on a request for interim protection, while the panel is being formed.

Greg?

GREG SHATAN:

Thanks. Greg Shatan again. It's unclear to me, here, whether again, this is something that is only [inaudible], or if it's required motion, or it can, if there can be a motion of some sort in order to seek what is essentially a preliminary injunction or equitable relief on an interim basis. And unclear also, maybe this is at the next level of detail, whether there is something that needs to be separately argued in the papers, or separate papers need to be submitted to support interim relief.

So I think we need to clarify that again, what is the process by which this happens? At this point, you know, only seems to start with the recommendation of a panel, of an IRP panel, or of an emergency panelist, but it's unclear, again, whether this is entirely self-started [inaudible], or whether this is, can be or must be based on the complainant's request for interim relief. Thanks.

BECKY BURR:

All excellent questions. So I think the questions that Greg has served up are very important, are if a party... Does a party have to ask for interim relief? Or can a panel decide on its own? I think the way this is setup, is that the, it could go either way. I am not... You know, I could go either way on this. I could say, you know, if somebody is filing a claim, then the onerous is on them to request a stay.

And if that is the case, then we have to say, go back to our, you know, our page limits and say, you know, does that have to be argued within the 25 pages? Or do we give them, you know, separate place to argue, make the case that there is harm for which no adequate remedy is available?

That there is a likelihood of success on the merits, or serious questions related to the merits? Or and that, you know, the balance of hardships tips towards them? So again, questions on that. Amy?

AMY STATHOS:

Hi. Thanks Becky. So a couple of points one, to date, this had been a request by the moving party. So there has never been a time where the panel has taken its own initiative to say something. One of the things that we have to also appreciate is that in some cases it may be difficult for a panel, without argument from the parties seeking the injunctive relief, or whatever else it might be, to understand exactly what they would halt or stop.

So just to date, it has always been, there has been a separate argument made by the party. Occasionally it has been as part of their initial submission, and occasionally it has been a separate paper. It has not been one way that it has gone to date.

BECKY BURR:

Okay. Thank you, that's very helpful. Greg?

GREG SHATAN:

Thanks. Greg Shatan again. That's very helpful background. I think it leads to the point I was going to make, which is that I think that items six and seven, or at least how they are initiated, need to be viewed kind of together essentially as to whether the panelists, or even the standing panel, or emergency panelist, has kind of broad powers to kind of manage the case to either throw it out, or to stop ICANN in its tracks based entirely on the panel's own judgement of what has to happen, or whether it's incumbent on the parties to essentially at least, initiate and make the case for these sorts of things.

So, and I think that's kind of a philosophical question. How much power does the panel have to kind of, you know, make or break the case at any given time, versus how much they're serving as kind of a decider of issues put before it by the party, such that the issue of summary dismissal needs to be put before it by ICANN, and the issue of interim measures needs to be put before it by the complaint?

Seems to me that procedurally, overall, I think we have to kind of at least consider whether we need to be consistent across the two. And if we're being inconsistent, we need to justify why we're being inconsistent. And thinking back to some other discussions we've had on other groups, typically, I'm no litigator anymore at least, while of course, can in exceptional circumstances do all kinds of things, typically they rely on what's put before them in most cases by the parties.

So if you have a great lawyer who argues a novel theory, he may win a case that a more plodding lawyer who can't come up with a new theory would lose. So not up to the judge to say, did you ever consider X, Y, Z. So, here again, I think my tendency would be to put more of the

onerous on the parties to initiate either interim measures of relief or dismissal, rather than giving the panel kind of really broad self-starting powers of disposal and interim relief. Thanks.

BECKY BURR: Okay, thank you Greg. Okay, Kavouss.

KAVOUSS ARASTEH: Yes. I don't think that we could give the power of dismissal to any party. The party said something, and the dismissal is by someone else. The one who submits something could not ask for a dismissal. So dismissal is as it is today. I have no problem for the interim, but I don't think we should link up this [inaudible]. Thank you.

BECKY BURR: Thank you. Okay. We will need to think about that as we put together the draft and make sure that we're consistent on it. I, like Greg, don't have a problem suggesting that the claimant should be in the position of making this request and demonstrating that the request meets the criteria for the interim relief, but that's something we'll get a chance to review once we get a draft in front of you. Yes Kavouss?

KAVOUSS ARASTEH: Thank you. Sorry, old hand, I'm sorry.

BECKY BURR:

Okay. All right. The standard of review, I think this will change significantly. This is the, because the standard of review is set out in the bylaws, and was a significant portion of the CCWG's work. We've discussed it at length. So that is going to entirely change. Also, the declarations and [inaudible] effective in IRP declaration, well first of all, these are [inaudible] decisions, and again the CCWG report does address the form and effect of those decisions, that this language will change significantly.

And likewise the cost, the allocation of costs are provided for in the CCWG report and the bylaws. So, we sort of walked our way through this, and my hope is that we will be able to have, for review, a draft on our call next week. My understanding at the ICANN legal has been working through a draft document which would be done, be reviewed by [inaudible] and Ed, but I'm hoping they're sufficiently forewarned that we would actually be able to really look at finalized, or finalized subject to our review, language to get this done.

And I know that David is also doing some work that will help us make sure that we've crossed the T's and dotted the I's. Avri [Inaudible] speaking slowly today, which I doubt, but also notes that she's not sure that she agrees that the panel shouldn't be able to initiate protection. Is that consistent with the question of making this more acceptable, a more accessible tool [inaudible]?

And I think probably what we should do... We're not making, you know, any calls, any final decisions in one call. And I think we're introducing a lot of new material that people would want to think about over time. Can I just ask, Amy or Stan if we think, you know, we're going to be

sufficiently far enough along to get a draft to [inaudible] and Ed and then be able to actually review a draft language next week at this time?

AMY STATHOS: Hi Becky. This is Amy. Yeah, I think we'll be in a good place to do that.

BECKY BURR: Okay, great. So Holly is making a request to let us know when [inaudible] will have the document to review. So you guys can work that out offline, but it would be great if we could get it in time to distribute it to the group in advance. Greg?

GREG SHATAN: Thanks. Greg, just following up on Avri's point. I think that, without wanting to mimic the American judicial system too much, that just generally has a broader ability to act, in essence to aid, a complainant when the complainant is pro se, in other words, engaging in this so it has the benefit of council, and will grant certain liberties to a pro se litigant to one that's represented.

So, I don't know if we want to... As we consider how to make this accessible, you know, the issue of representation, and if it's not just the most creative, the question of what the panel, you know, can't necessarily make the case for the complainant, but how all of this will work and, you know, whether in essence it's a legal aid for complainants who, you know, won't be represented.

I think there are a bunch of issues around accessibility, and the power of the panelists to do what they think is right, which is a double-edged sword, of course. And the extent to which the competence and thoughtfulness of the complainants is what, you know, tends to hold the order of the day.

So that's, I think again, just a bunch of different things to consider as we look at how these cases go forward. And again, we shouldn't be making stuff up entirely, but we should also be looking at arbitral norms probably more than judicial norms. Thanks.

BECKY BURR:

That's a completely fair question. We do have some language in the report, regarding the development of a pro bono [inaudible] that goes into it. David has asked about how ICANN tracks based [ICVR?] rules and rule changes. And David the response is, they do, and not very often, we're notified in advance.

So, thanks everybody. What we will do next week is endeavor to get the draft language out there. David is working on a document that will help us make sure that we've gotten everything that we need. Now just to be clear, you know, these are the supplemental rules. We will have a chance as we go forward looking at the rules more broadly to, you know, to make sure that we've crossed all of our T's and dotted our I's, but we do need to ensure a baseline so that the proper rules are in effect when the new bylaws go into place, which is why we're moving reasonably quickly on this.

So, we will spend at least one more session on these interim rules next week. and I think with that, we're prepared to give back 30 minutes of your day or your evening, depending on where you are.


And Kavouss has noted that whatever we come up with, under the supplementary rules, must remain within the envelope of the bylaws, and that is absolutely correct. Everything that we do is constrained by that.

Okay, thanks everybody. Talk to you next week.

[END OF TRANSCRIPTION]

Petillion

RM 62

 KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds [Baker v. State](#), Vt.,
December 20, 1999

115 S.Ct. 2097
Supreme Court of the United States

ADARAND CONSTRUCTORS, INC.,
Petitioner

v.




Federico PENA, Secretary of
Transportation, et al.

No. 93-1841.

Argued Jan. 17, 1995.

Decided June 12, 1995.

Synopsis

Subcontractor that was not awarded guardrail portion of federal highway project brought action challenging constitutionality of federal program designed to provide highway contracts to disadvantaged business enterprises. The United States District Court for the District of Colorado, Jim R. Carrigan, J., granted summary judgment in favor of defendants,  [790 F.Supp. 240](#), and subcontractor appealed. The Court of Appeals affirmed,  [16 F.3d 1537](#), and certiorari was granted. The Supreme Court, Justice O'Connor, held that: (1) subcontractor had standing to seek forward-looking declaratory and injunctive relief; (2) all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by reviewing court under strict scrutiny, overruling  [Metro Broadcasting](#), [497 U.S. 547](#), [110 S.Ct. 2997](#), [111 L.Ed.2d 445](#); and (3) remand was required to determine whether challenged program satisfied strict scrutiny.

Vacated and remanded.

Justice O'Connor filed opinion joined by Justice Kennedy.

Justices Scalia and Thomas filed opinions concurring in part and concurring in judgment.

Justice Stevens filed dissenting opinion in which Justice Ginsburg joined.


Justice Souter filed dissenting opinion in which Justices Ginsburg and Breyer joined.

Justice Ginsburg filed dissenting opinion in which Justice Breyer joined.

West Headnotes (9)

[1] **Declaratory Judgment**  Subjects of relief in general

[118A](#)Declaratory Judgment
[118AIII](#)Proceedings
[118AIII\(C\)](#)Parties
[118Ak299](#)Proper Parties
[118Ak300](#)Subjects of relief in general
(Formerly [92k42.2\(2\)](#))

Subcontractor that was not awarded guardrail portion of federal highway contract as result of contract's subcontractor compensation clause, offering financial incentives to prime contractor for hiring disadvantaged subcontractor, had standing to seek forward-looking declaratory and injunctive relief against future use of such compensation clauses on equal protection grounds; evidence indicated that government let contracts involving guardrail work that contained such clauses at least once per year in state, that subcontractor was likely to bid on each such contracts, and was required to compete for such contracts against small disadvantaged businesses. (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) [U.S.C.A. Const.Amend. 5](#); [Small Business Act](#), § 2[8](d)(2, 3),  [15 U.S.C.A. § 637\(d\)\(2, 3\)](#).

[95 Cases that cite this headnote](#)

[2] **Action**  Persons entitled to sue
Federal Civil Procedure  In general;
injury or interest

13Action
13IGrounds and Conditions Precedent
13k13Persons entitled to sue
170AFederal Civil Procedure
170AIIParties
170AII(A)In General
170Ak103.1Standing in General
170Ak103.2In general; injury or interest


Fact of past injury, while presumably affording plaintiff standing to claim damages, does nothing to establish real and immediate threat that plaintiff would again suffer similar injury in the future. (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) [U.S.C.A. Const. Art. 3, § 1 et seq.](#)

[88 Cases that cite this headnote](#)

[3] **Constitutional Law**  Government contracts

92Constitutional Law
92VIEnforcement of Constitutional Provisions
92VI(A)Persons Entitled to Raise Constitutional Questions; Standing
92VI(A)11Equal Protection
92k925Government contracts (Formerly 92k42.2(2))


Subcontractor that challenged subcontractor compensation clause of government highway contract, offering financial incentives to prime contractor for hiring disadvantaged subcontractors was not required to demonstrate that it had been, or would be, low bidder on government contract to have standing to challenge clause on equal protection grounds. (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) [U.S.C.A. Const.Amend. 5](#); Small Business Act, §

2[8](d)(2, 3),  [15 U.S.C.A. § 637\(d\)\(2, 3\)](#).

[66 Cases that cite this headnote](#)

[4] **Constitutional Law**  Public contracts

92Constitutional Law
92XXVIEqual Protection
92XXVI(E)Particular Issues and Applications
92XXVI(E)11Contracts
92k3677Public contracts (Formerly 92k219.1)

To extent subcontractor compensation program, offering financial incentives to prime contractors on government projects for hiring disadvantaged subcontractors, was based on disadvantage, not race, it was subject to relaxed equal protection scrutiny. (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) [U.S.C.A. Const.Amend. 5](#); Small Business Act, § 2[8](d)(2, 3),  [15 U.S.C.A. § 637\(d\)\(2, 3\)](#).

[35 Cases that cite this headnote](#)

[5] **Constitutional Law**  Race, national origin, or ethnicity

92Constitutional Law
92XXVIEqual Protection
92XXVI(A)In General
92XXVI(A)6Levels of Scrutiny
92k3069Particular Classes
92k3078Race, national origin, or ethnicity (Formerly 92k215)

All governmental action based on race should be subject to detailed judicial inquiry to ensure that personal right to equal protection of the laws has not been infringed. (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and

concurring in judgment.) [U.S.C.A. Const.Amends. 5, 14.](#)


[40 Cases that cite this headnote](#)

(Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) [U.S.C.A. Const.Amends. 5, 14.](#)

[266 Cases that cite this headnote](#)

[6] **Constitutional Law**  Race, national origin, or ethnicity

92Constitutional Law
92XXVIEqual Protection
92XXVI(A)In General
92XXVI(A)6Levels of Scrutiny
92k3069Particular Classes
92k3078Race, national origin, or ethnicity
(Formerly 92k215)

All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by reviewing court under strict scrutiny; in other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interest; overruling  [Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445.](#) (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) [U.S.C.A. Const.Amends. 5, 14.](#)

[460 Cases that cite this headnote](#)

[7] **Constitutional Law**  Race, national origin, or ethnicity

92Constitutional Law
92XXVIEqual Protection
92XXVI(A)In General
92XXVI(A)6Levels of Scrutiny
92k3069Particular Classes
92k3078Race, national origin, or ethnicity
(Formerly 92k215)

Federal racial classifications, like those of a state, must serve compelling governmental interest and must be narrowly tailored to further that interest.

[8] **Constitutional Law**  Race, national origin, or ethnicity

92Constitutional Law
92XXVIEqual Protection
92XXVI(A)In General
92XXVI(A)6Levels of Scrutiny
92k3069Particular Classes
92k3078Race, national origin, or ethnicity
(Formerly 92k215)

When race-based action is necessary to further compelling interest, such action is within constitutional constraints if it satisfies “narrow tailoring” test Supreme Court has set out in previous cases. (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) [U.S.C.A. Const.Amends. 5, 14.](#)

[110 Cases that cite this headnote](#)

[9] **Federal Courts**  Particular cases

170BFederal Courts
170BXVISupreme Court
170BXVI(E)Proceedings
170Bk3211Determination and Disposition of Cause
170Bk3216Reversal, Vacation, and Remand
170Bk3216(2)Particular cases
(Formerly 170Bk462)

Remand was required to determine whether subcontractor compensation clauses in federal highway contracts, offering financial incentives to prime contractor for hiring disadvantaged subcontractors, with presumption that

minority-owned subcontractors were disadvantaged, served compelling governmental interest, as required by strict scrutiny equal protection test. (Per opinion of Justice O'Connor, with three Justices concurring and one Justice concurring in part and concurring in judgment.) Small Business Act, § 2[8](d)(2, 3), 15 U.S.C.A. § 637(d)(2, 3); Surface Transportation and Uniform Relocation Assistance Act of 1987, § 106(c)(1), 23 U.S.C.A. § 101 note; 13 C.F.R. § 124.106(a), (b)(1); 48 C.F.R. § 19.703(a)(2); 49 C.F.R. § 23.62; 49 C.F.R. Part 23, Subpart D, App. C.

83 Cases that cite this headnote

**2099 Syllabus*

*200 Most federal agency contracts must contain a subcontractor compensation clause, which gives a prime contractor a financial incentive to hire subcontractors certified as small businesses controlled by socially and economically disadvantaged individuals, and requires the contractor to presume that such individuals include minorities or any other individuals found to be disadvantaged by the Small Business Administration (SBA). The prime contractor under a federal highway construction contract containing such a clause awarded a subcontract to a company that was certified as a small disadvantaged business. The record does not reveal how the company obtained its certification, but it could have been by any one of three routes: under one of two SBA programs—known as the 8(a) and 8(d) programs—or by a state agency under relevant Department of Transportation regulations. Petitioner Adarand Constructors, Inc., which submitted the low bid on the subcontract but was not a certified business, filed suit against respondent federal officials, claiming that the race-based presumptions used in subcontractor compensation clauses violate the equal protection component of the Fifth Amendment's Due Process Clause. The District Court granted respondents

summary judgment. In affirming, the Court of Appeals assessed the constitutionality of the federal race-based action under a lenient standard, resembling intermediate scrutiny, which it determined was required by [**2100 Fullilove v. Klutznick](#), 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902, and [Metro Broadcasting, Inc. v. FCC](#), 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445.

Held: The judgment is vacated, and the case is remanded.




[16 F.3d 1537 \(CA10 1994\)](#), vacated and remanded.






Justice O'CONNOR delivered an opinion with respect to Parts I, II, III–A, III–B, III–D, and IV, which was for the Court except insofar as it might be inconsistent with the views expressed in Justice SCALIA's concurrence, concluding that:


1. Adarand has standing to seek forward-looking relief. It has met the requirements necessary to maintain its claim by alleging an invasion of a legally protected interest in a particularized manner, and by showing that it is very likely to bid, in the relatively near future, on another Government contract offering financial incentives to a prime contractor *201 for hiring disadvantaged subcontractors. See [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351. Pp. 2104–2105.


2. All racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. Pp. 2105–2114; 2117–2118.


(a) In [Richmond v. J.A. Croson Co.](#), 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854, a majority of the Court held that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. While [Croson](#) did not consider what standard of review the Fifth Amendment requires for such action taken by the Federal Government, the Court's cases through [Croson](#) had established three general propositions with respect to governmental racial classifications. First, skepticism: " 'Any preference based on racial or ethnic criteria must necessarily receive a most searching examination,' "

 *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 273–274, 106 S.Ct. 1842, 1847, 90 L.Ed.2d 260. Second, consistency: “[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification,”  *Croson, supra*, at 494, 109 S.Ct., at 722. And third, congruence: “Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment,”  *Buckley v. Valeo*, 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659. Taken together, these propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny. Pp. 2105–2111.

(b) However, a year after  *Croson*, the Court, in  *Metro Broadcasting*, upheld two federal race-based policies against a Fifth Amendment challenge. The Court repudiated the long-held notion that “it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government” than it does on a State to afford equal protection of the laws,  *Bolling v. Sharpe*, 347 U.S. 497, 500, 74 S.Ct. 693, 694, 98 L.Ed. 884, by holding that congressionally mandated “benign” racial classifications need only satisfy intermediate scrutiny. By adopting that standard,  *Metro Broadcasting* departed from prior cases in two significant respects. First, it turned its back on  *Croson’s* explanation that strict scrutiny of governmental racial classifications is essential because it may not always be clear that a so-called preference is in fact benign. Second, it squarely rejected one of the three propositions established by this Court’s earlier cases, namely, congruence between the standards applicable to federal and state race-based action, and in doing so also undermined the other two. Pp. 2111–2112.

(c) The propositions undermined by  *Metro Broadcasting* all derive from the basic principle that the Fifth and Fourteenth Amendments protect persons, not groups. It follows from that principle that all governmental *202 action based on race—a group classification long recognized as in most circumstances irrelevant and therefore prohibited—should be subjected to detailed judicial inquiry to ensure that the personal right to equal protection has not been infringed. Thus, strict

scrutiny is the proper standard for analysis of all racial classifications, whether **2101 imposed by a federal, state, or local actor. To the extent that  *Metro Broadcasting* is inconsistent with that holding, it is overruled. Pp. 2112–2114.

(d) The decision here makes explicit that federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest. Thus, to the extent that  *Fullilove* held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling. Requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications a detailed examination, as to both ends and means. It is not true that strict scrutiny is strict in theory, but fatal in fact. Government is not disqualified from acting in response to the unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country. When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the “narrow tailoring” test set out in this Court’s previous cases. Pp. 2117–2126.

3. Because this decision alters the playing field in some important respects, the case is remanded to the lower courts for further consideration. The Court of Appeals did not decide whether the interests served by the use of subcontractor compensation clauses are properly described as “compelling.” Nor did it address the question of narrow tailoring in terms of this Court’s strict scrutiny cases. Unresolved questions also remain concerning the details of the complex regulatory regimes implicated by the use of such clauses. P. 2118.

Justice SCALIA agreed that strict scrutiny must be applied to racial classifications imposed by all governmental actors, but concluded that government can never have a “compelling interest” in discriminating on the basis of race in order to “make up” for past racial discrimination in the opposite direction. Under the Constitution there can be no such thing as either a creditor or a debtor race. We are just one race in the eyes of government. P. 2118.

O’CONNOR, J., announced the judgment of the Court and delivered an opinion with respect to Parts I, II, III–A, III–B, III–D, and IV, which was

for the Court except insofar as it might be inconsistent with the views expressed in the concurrence of SCALIA, J., and an opinion with respect to Part III–C. Parts I, II, III–A, III–B, III–D, and IV of that opinion were joined by REHNQUIST, C.J., and KENNEDY and THOMAS, JJ., and by *203 SCALIA, J., to the extent heretofore indicated; and Part III–C was joined by KENNEDY, J. SCALIA, J., *post*, p. 2118, and THOMAS, J., *post*, p. 2119, filed opinions concurring in part and concurring in the judgment. STEVENS, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post*, p. 2120. SOUTER, J., filed a dissenting opinion, in which GINSBURG and BREYER, JJ., joined, *post*, p. 2131. GINSBURG, J., filed a dissenting opinion, in which BREYER, J., joined, *post*, p. 2134.

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Opinion

*204 Justice O’CONNOR announced the judgment of the Court and delivered an opinion with respect to Parts I, II, III–A, III–B, III–D, and IV, which is for the Court except insofar as it might be inconsistent with the views expressed in Justice SCALIA’s concurrence, and an opinion with respect to Part III–C in which Justice KENNEDY joins.

Petitioner Adarand Constructors, Inc., claims that the Federal Government’s practice of giving general contractors on Government projects a financial incentive to hire subcontractors controlled by “socially and economically disadvantaged individuals,” and in particular, the Government’s use of race-based presumptions in identifying such individuals, violates the equal protection component of the Fifth Amendment’s Due Process Clause. The Court of Appeals rejected Adarand’s claim. We conclude, however, that courts should analyze cases of this kind under **2102 a different standard of review than the one the Court of Appeals applied. We therefore *205 vacate the Court of Appeals’ judgment and remand the case for further proceedings.

I

In 1989, the Central Federal Lands Highway Division (CFLHD), which is part of the United States Department of Transportation (DOT), awarded the prime contract for a highway construction project in Colorado to Mountain Gravel & Construction Company. Mountain Gravel then solicited bids from subcontractors for the guardrail portion of the contract. Adarand, a Colorado-based highway construction company specializing in guardrail work, submitted the low bid. Gonzales Construction Company also submitted a bid.

The prime contract’s terms provide that Mountain Gravel would receive additional compensation if it hired subcontractors certified as small businesses controlled by “socially and economically disadvantaged individuals,” App. 24. Gonzales is certified as such a business; Adarand is not. Mountain Gravel awarded the subcontract to Gonzales, despite Adarand’s low bid, and Mountain Gravel’s Chief Estimator has submitted an affidavit stating that Mountain Gravel would have accepted Adarand’s bid, had it not been for the additional payment it received by hiring Gonzales instead. *Id.*, at 28–31. Federal law requires that a subcontracting clause similar to the one used here must appear in most federal agency contracts, and it also requires the clause to state that “[t]he contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans, and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act.” 15 U.S.C. §§ 637(d)(2), (3). Adarand claims that the presumption set forth in that statute discriminates on the basis of *206 race in violation of the Federal Government’s Fifth Amendment obligation not to deny anyone equal protection of the laws.

These fairly straightforward facts implicate a complex scheme of federal statutes and regulations, to which we now turn. The Small Business Act

(Act), 72 Stat. 384, as amended, [15 U.S.C. § 631 et seq.](#), declares it to be “the policy of the United States that small business concerns, [and] small business concerns owned and controlled by socially and economically disadvantaged individuals, ... shall have the maximum practicable opportunity to participate in the performance of contracts let by any Federal agency.” § 8(d)(1), [15 U.S.C. § 637\(d\)\(1\)](#). The Act defines “socially disadvantaged individuals” as “those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities,” § 8(a)(5), [15 U.S.C. § 637\(a\)\(5\)](#), and it defines “economically disadvantaged individuals” as “those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.” § 8(a)(6)(A), [15 U.S.C. § 637\(a\)\(6\)\(A\)](#).

In furtherance of the policy stated in § 8(d)(1), the Act establishes “[t]he Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals” at “not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year.” [15 U.S.C. § 644\(g\)\(1\)](#). It also requires the head of each federal agency to set agency-specific goals for participation by businesses controlled by socially and economically disadvantaged individuals. *Ibid.*

The Small Business Administration (SBA) has implemented these statutory directives in a variety of ways, two of which are relevant here. One is the “8(a) program,” [*207](#) which is available to small businesses controlled by socially and economically disadvantaged individuals as the SBA has defined those terms. The 8(a) program confers a wide range of benefits on participating businesses, see, e.g., [13 CFR §§ 124.303–124.311, 124.403 \(1994\)](#); [48 CFR subpt. 19.8 \(1994\)](#), one of which is automatic eligibility for subcontractor compensation provisions of the kind at issue in [**2103](#) this case, [15 U.S.C. § 637\(d\)\(3\)\(C\)](#) (conferring presumptive eligibility on anyone “found to be disadvantaged ... pursuant to section 8(a) of the Small Business Act”). To participate in the 8(a) program, a business must be “small,” as defined in [13 CFR § 124.102 \(1994\)](#); and it must be 51%

owned by individuals who qualify as “socially and economically disadvantaged,” § 124.103. The SBA presumes that black, Hispanic, Asian Pacific, Subcontinent Asian, and Native Americans, as well as “members of other groups designated from time to time by SBA,” are “socially disadvantaged,” § 124.105(b)(1). It also allows any individual not a member of a listed group to prove social disadvantage “on the basis of clear and convincing evidence,” as described in § 124.105(c). Social disadvantage is not enough to establish eligibility, however; SBA also requires each 8(a) program participant to prove “economic disadvantage” according to the criteria set forth in [§ 124.106\(a\)](#).

The other SBA program relevant to this case is the “8(d) subcontracting program,” which unlike the 8(a) program is limited to eligibility for subcontracting provisions like the one at issue here. In determining eligibility, the SBA presumes social disadvantage based on membership in certain minority groups, just as in the 8(a) program, and again appears to require an individualized, although “less restrictive,” showing of economic disadvantage, [§ 124.106\(b\)](#). A different set of regulations, however, says that members of minority groups wishing to participate in the 8(d) subcontracting program are entitled to a race-based presumption of social *and* economic disadvantage. [48 CFR §§ 19.001, *208 19.703\(a\)\(2\) \(1994\)](#). We are left with some uncertainty as to whether participation in the 8(d) subcontracting program requires an individualized showing of economic disadvantage. In any event, in both the 8(a) and the 8(d) programs, the presumptions of disadvantage are rebuttable if a third party comes forward with evidence suggesting that the participant is not, in fact, either economically or socially disadvantaged. [13 CFR §§ 124.111\(c\)–\(d\), 124.601–124.609 \(1994\)](#).

The contract giving rise to the dispute in this case came about as a result of the Surface Transportation and Uniform Relocation Assistance Act of 1987, [Pub.L. 100–17, 101 Stat. 132 \(STURAA\)](#), a DOT appropriations measure. Section 106(c)(1) of STURAA provides that “not less than 10 percent” of the appropriated funds “shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.” 101 Stat. 145. STURAA adopts the Small Business Act’s definition of “socially and economically disadvantaged individual,” including the applicable

race-based presumptions, and adds that “women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection.” § 106(c)(2)(B), 101 Stat. 146. STURAA also requires the Secretary of Transportation to establish “minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection.” § 106(c)(4), 101 Stat. 146. The Secretary has done so in 49 CFR pt. 23, subpt. D (1994). Those regulations say that the certifying authority should presume both social and economic disadvantage (*i.e.*, eligibility to participate) if the applicant belongs to certain racial groups, or is a woman. 49 CFR § 23.62 (1994); 49 CFR pt. 23, subpt. D, App. C (1994). As with the SBA programs, third parties may come forward with evidence in an effort to rebut the presumption of disadvantage for a particular business. 49 CFR § 23.69 (1994).

The operative clause in the contract in this case reads as follows:

***209** “*Subcontracting.* This subsection is supplemented to include a Disadvantaged Business Enterprise (DBE) Development and Subcontracting Provision as follows:

“Monetary compensation is offered for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals....

“A small business concern will be considered a DBE after it has been certified as such by the U.S. Small Business Administration or any State Highway Agency. Certification by other Government agencies, ****2104** counties, or cities may be acceptable on an individual basis provided the Contracting Officer has determined the certifying agency has an acceptable and viable DBE certification program. If the Contractor requests payment under this provision, the Contractor shall furnish the engineer with acceptable evidence of the subcontractor(s) DBE certification and shall furnish one certified copy of the executed subcontract(s).

.....

“The Contractor will be paid an amount computed as follows:

“1. If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount.

“2. If subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount.” App. 24–26.

To benefit from this clause, Mountain Gravel had to hire a subcontractor who had been certified as a small disadvantaged business by the SBA, a state highway agency, or some other certifying authority acceptable to the contracting officer. Any of the three routes to such certification described above—SBA’s 8(a) or 8(d) program, or certification by a State ***210** under the DOT regulations—would meet that requirement. The record does not reveal how Gonzales obtained its certification as a small disadvantaged business.

After losing the guardrail subcontract to Gonzales, Adarand filed suit against various federal officials in the United States District Court for the District of Colorado, claiming that the race-based presumptions involved in the use of subcontracting compensation clauses violate Adarand’s right to equal protection. The District Court granted the Government’s motion for summary judgment. [Adarand Constructors, Inc. v. Skinner](#), 790 F.Supp. 240 (1992). The Court of Appeals for the Tenth Circuit affirmed. [16 F.3d 1537](#) (1994). It understood our decision in [Fullilove v. Klutznick](#), 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), to have adopted “a lenient standard, resembling intermediate scrutiny, in assessing” the constitutionality of federal race-based action. [16 F.3d](#), at 1544. Applying that “lenient standard,” as further developed in [Metro Broadcasting, Inc. v. FCC](#), 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990), the Court of Appeals upheld the use of subcontractor compensation clauses. [16 F.3d](#), at 1547. We granted certiorari. 512 U.S. 1288, 115 S.Ct. 41, 129 L.Ed.2d 936 (1994).

[1] [2] Adarand, in addition to its general prayer for “such other and further relief as to the Court seems just and equitable,” specifically seeks declaratory and injunctive relief against any *future* use of subcontractor compensation clauses. App. 22–23 (complaint). Before reaching the merits of Adarand’s challenge, we must consider whether Adarand has standing to seek forward-looking relief. Adarand’s allegation that it has lost a contract in the past because of a subcontractor compensation clause of course entitles it to seek damages for the loss of that contract (we express no view, however, as to whether sovereign immunity would bar such relief on these facts). But as we explained in [Los Angeles v. Lyons](#), 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), the fact of past injury, “while presumably affording [the plaintiff] standing to claim damages ..., does *211 nothing to establish a real and immediate threat that he would again” suffer similar injury in the future. [Id.](#), at 105, 103 S.Ct., at 1667.

[3] If Adarand is to maintain its claim for forward-looking relief, our cases require it to allege that the use of subcontractor compensation clauses in the future constitutes “an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.” [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) (footnote, citations, and internal quotation marks omitted). Adarand’s claim that the Government’s use of subcontractor compensation clauses denies it equal protection of the laws of course alleges an invasion of a legally protected interest, and it does so in a manner that is “particularized” **2105 as to Adarand. We note that, contrary to respondents’ suggestion, see Brief for Respondents 29–30, Adarand need not demonstrate that it has been, or will be, the low bidder on a Government contract. The injury in cases of this kind is that a “discriminatory classification prevent[s] the plaintiff from competing on an equal footing.” [Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville](#), 508 U.S. 656, 667, 113 S.Ct. 2297, 2304, 124 L.Ed.2d 586 (1993). The aggrieved party “need not allege that he would have obtained the benefit but for the barrier in order to establish standing.” [Id.](#), at 666, 113 S.Ct., at 2303.

It is less clear, however, that the future use of

subcontractor compensation clauses will cause Adarand “imminent” injury. We said in [Lujan](#) that “[a]lthough ‘imminence’ is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is ‘certainly impending.’” [Lujan, supra](#), at 565, n. 2, 112 S.Ct., at 2138, n. 2. We therefore must ask whether Adarand has made an adequate showing that sometime in the relatively near future it will bid on another Government contract that offers financial incentives to a prime contractor for hiring disadvantaged subcontractors.

*212 We conclude that Adarand has satisfied this requirement. Adarand’s general manager said in a deposition that his company bids on every guardrail project in Colorado. See Reply Brief for Petitioner 5–A. According to documents produced in discovery, the CFLHD let 14 prime contracts in Colorado that included guardrail work between 1983 and 1990. Plaintiff’s Motion for Summary Judgment in No. 90–C–1413, Exh. I, Attachment A (D.Colo.). Two of those contracts do not present the kind of injury Adarand alleges here. In one, the prime contractor did not subcontract out the guardrail work; in another, the prime contractor was itself a disadvantaged business, and in such cases the contract generally does not include a subcontractor compensation clause. *Ibid.*; see also *id.*, Supplemental Exhibits, Deposition of Craig Actis 14 (testimony of CFLHD employee that 8(a) contracts do not include subcontractor compensation clauses). Thus, statistics from the years 1983 through 1990 indicate that the CFLHD lets on average 1 ½ contracts per year that could injure Adarand in the manner it alleges here. Nothing in the record suggests that the CFLHD has altered the frequency with which it lets contracts that include guardrail work. And the record indicates that Adarand often must compete for contracts against companies certified as small disadvantaged businesses. See *id.*, Exh. F, Attachments 1–3. Because the evidence in this case indicates that the CFLHD is likely to let contracts involving guardrail work that contain a subcontractor compensation clause at least once per year in Colorado, that Adarand is very likely to bid on each such contract, and that Adarand often must compete for such contracts against small disadvantaged businesses, we are satisfied that Adarand has standing to bring this lawsuit.

III

[4] Respondents urge that “[t]he Subcontracting Compensation Clause program is ... a program based on *disadvantage*, not on race,” and thus that it is subject only to “the most *213 relaxed judicial scrutiny.” Brief for Respondents 26. To the extent that the statutes and regulations involved in this case are race neutral, we agree. Respondents concede, however, that “the race-based rebuttable presumption used in some certification determinations under the Subcontracting Compensation Clause” is subject to some heightened level of scrutiny. *Id.*, at 27. The parties disagree as to what that level should be. (We note, incidentally, that this case concerns only classifications based explicitly on race, and presents none of the additional difficulties posed by laws that, although facially race neutral, result in racially disproportionate impact and are motivated by a racially discriminatory purpose. See generally [Arlington Heights v. Metropolitan Housing Development Corp.](#), 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977); [Washington v. Davis](#), 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976).)

Adarand’s claim arises under the Fifth Amendment to the Constitution, which provides that “No person shall ... be deprived **2106 of life, liberty, or property, without due process of law.” Although this Court has always understood that Clause to provide some measure of protection against *arbitrary* treatment by the Federal Government, it is not as explicit a guarantee of *equal* treatment as the Fourteenth Amendment, which provides that “No State shall ... deny to any person within its jurisdiction the equal protection of the laws” (emphasis added). Our cases have accorded varying degrees of significance to the difference in the language of those two Clauses. We think it necessary to revisit the issue here.

A

Through the 1940’s, this Court had routinely taken

the view in non-race-related cases that, “[u]nlike the Fourteenth Amendment, the Fifth contains no equal protection clause and it provides no guaranty against discriminatory legislation by Congress.”

[Detroit Bank v. United States](#), 317 U.S. 329, 337, 63 S.Ct. 297, 301, 87 L.Ed. 304 (1943); see also, *e.g.*, [Helvering v. Lerner Stores Corp.](#), 314 U.S. 463, 468, 62 S.Ct. 341, 343, 86 L.Ed. 482 (1941); [LaBelle Iron Works v. United States](#), 256 U.S. 377, 392, 41 S.Ct. 528, 532, 65 L.Ed. 998 (1921) (“Reference is made to cases decided under the equal protection clause of the Fourteenth Amendment ...; but clearly they are not in point. The Fifth Amendment has no equal protection clause”). When the Court first faced a Fifth Amendment equal protection challenge to a federal racial classification, it adopted a similar approach, with most unfortunate results. In [Hirabayashi v. United States](#), 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943), the Court considered a curfew applicable only to persons of Japanese ancestry. The Court observed—correctly—that “[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality,” and that “racial discriminations are in most circumstances irrelevant and therefore prohibited.” *Id.*, at 100, 63 S.Ct., at 1385. But it also cited [Detroit Bank](#) for the proposition that the Fifth Amendment “restrains only such discriminatory legislation by Congress as amounts to a denial of due process,” [320 U.S.](#), at 100, 63 S.Ct., at 1385, and upheld the curfew because “circumstances within the knowledge of those charged with the responsibility for maintaining the national defense afforded a rational basis for the decision which they made.” *Id.*, at 102, 63 S.Ct., at 1386.

Eighteen months later, the Court again approved wartime measures directed at persons of Japanese ancestry. [Korematsu v. United States](#), 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), concerned an order that completely excluded such persons from particular areas. The Court did not address the view, expressed in cases like [Hirabayashi](#) and [Detroit Bank](#), that the Federal Government’s obligation to provide equal protection differs significantly from that of the States. Instead, it began by noting that “all legal restrictions which

curtail the civil rights of a single racial group are immediately suspect ... [and] courts must subject them to the most rigid scrutiny.” 323 U.S., at 216, 65 S.Ct., at 194. That promising dictum might be read to undermine the view that the Federal Government is under a lesser obligation to avoid injurious racial classifications *215 than are the States. Cf. *id.*, at 234–235, 65 S.Ct., at 202 (Murphy, J., dissenting) (“[T]he order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment”). But in spite of the “most rigid scrutiny” standard it had just set forth, the Court then inexplicably relied on “the principles we announced in the *Hirabayashi* case,” *id.*, at 217, 65 S.Ct., at 194, to conclude that, although “exclusion from the area in which one’s home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m.,” *id.*, at 218, 65 S.Ct., at 195, the racially discriminatory order was nonetheless within the Federal Government’s power.”

**2107 In *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954), the Court for the first time explicitly questioned the existence of any difference between the obligations of the Federal Government and the States to avoid racial classifications. *Bolling* did note that “[t]he ‘equal protection of the laws’ is a more explicit safeguard of prohibited unfairness than ‘due process of law,’ ” *id.*, at 499, 74 S.Ct., at 694. But *Bolling* then concluded that, “[i]n view of [the] decision that the Constitution prohibits the states from maintaining racially segregated public schools, it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government.” *Id.*, at 500, 74 S.Ct., at 695.

Bolling’s facts concerned school desegregation, but its reasoning was not so limited. The Court’s observations that “[d]istinctions between citizens solely because of their ancestry are by their very nature odious,” *Hirabayashi, supra*, 320 U.S., at 100, 63 S.Ct., at 1385, and that “all legal restrictions which curtail the civil rights of a single racial group are immediately suspect,” *216 *Korematsu, supra*, 323 U.S., at 216, 65 S.Ct., at 194, carry no less force in the context of federal action than in the context of action by the

States—indeed, they first appeared in cases concerning action by the Federal Government.

Bolling relied on those observations, 347 U.S., at 499, n. 3, 74 S.Ct., at 694, n. 3, and reiterated “ ‘that the Constitution of the United States, in its present form, forbids, so far as civil and political rights are concerned, discrimination by the General Government, or by the States, against any citizen because of his race,’ ” *id.*, at 499, 74 S.Ct., at 694 (quoting *Gibson v. Mississippi*, 162 U.S. 565, 591, 16 S.Ct. 904, 910, 40 L.Ed. 1075 (1896)) (emphasis added). The Court’s application of that general principle to the case before it, and the resulting imposition on the Federal Government of an obligation equivalent to that of the States, followed as a matter of course.

Later cases in contexts other than school desegregation did not distinguish between the duties of the States and the Federal Government to avoid racial classifications. Consider, for example, the following passage from *McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 13 L.Ed.2d 222, a 1964 case that struck down a race-based state law:

“[W]e deal here with a classification based upon the race of the participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications ‘constitutionally suspect,’ *Bolling v. Sharpe*, 347 U.S. 497, 499 [74 S.Ct. 693, 694]; and subject to the ‘most rigid scrutiny,’ *Korematsu v. United States*, 323 U.S. 214, 216 [65 S.Ct. 193, 194]; and ‘in most circumstances irrelevant’ to any constitutionally acceptable legislative purpose, *Hirabayashi v. United States*, 320 U.S. 81, 100 [63 S.Ct. 1375, 1385].” *Id.*, at 191–192, 85 S.Ct., at 288.

McLaughlin’s reliance on cases involving federal action for the standards applicable to a case involving state legislation *217 suggests that the Court understood the standards for federal and state racial classifications to be the same.

Cases decided after *McLaughlin* continued to treat the equal protection obligations imposed by the Fifth and the Fourteenth Amendments as

indistinguishable; one commentator observed that “[i]n case after case, fifth amendment equal protection problems are discussed on the assumption that fourteenth amendment precedents are controlling.” Karst, *The Fifth Amendment’s Guarantee of Equal Protection*, 55 N.C.L.Rev. 541, 554 (1977). [Loving v. Virginia](#), 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), which struck down a race-based state law, cited [Korematsu](#) for the proposition that “the Equal Protection Clause demands that racial classifications ... be subjected to the ‘most rigid scrutiny.’ ” [388 U.S.](#), at 11, 87 S.Ct., at 1823. The various opinions in [Frontiero v. Richardson](#), 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), which concerned sex discrimination by the Federal Government, took their equal protection standard of review from [Reed v. Reed](#), 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225 (1971), a case that invalidated sex discrimination by a State, without mentioning ****2108** any possibility of a difference between the standards applicable to state and federal action. [Frontiero](#), 411 U.S. at 682–684, 93 S.Ct., at 1768–1769 (plurality opinion of Brennan, J.); [id.](#), at 691, 93 S.Ct., at 1772 (Stewart, J., concurring in judgment); [id.](#), at 692, 93 S.Ct., at 1773 (Powell, J., concurring in judgment). Thus, in 1975, the Court stated explicitly that “[t]his Court’s approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.” [Weinberger v. Wiesenfeld](#), 420 U.S. 636, 638, n. 2, 95 S.Ct. 1225, 1228, n. 2, 43 L.Ed.2d 514; see also [Buckley v. Valeo](#), 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659 (1976) (“Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment”); [United States v. Paradise](#), 480 U.S. 149, 166, n. 16, 107 S.Ct. 1053, 1064, n. 16, 94 L.Ed.2d 203 (1987) (plurality opinion of Brennan, J.) (“[T]he reach of the equal protection guarantee of the Fifth Amendment is coextensive with that of the Fourteenth”). We do not understand a few contrary suggestions appearing in cases in which we found special deference to ***218** the political branches of the Federal Government to be appropriate, e.g., [Hampton v. Mow Sun Wong](#), 426 U.S. 88, 100, 101–102, n. 21, 96 S.Ct. 1895, 1903, 1904–1905, n. 21, 48 L.Ed.2d 495 (1976) (federal power over immigration), to detract

from this general rule.

B

Most of the cases discussed above involved classifications burdening groups that have suffered discrimination in our society. In 1978, the Court confronted the question whether race-based governmental action designed to *benefit* such groups should also be subject to “the most rigid scrutiny.” [Regents of Univ. of Cal. v. Bakke](#), 438 U.S. 265, 98 S.Ct. 2733, 57 L.Ed.2d 750, involved an equal protection challenge to a state-run medical school’s practice of reserving a number of spaces in its entering class for minority students. The petitioners argued that “strict scrutiny” should apply only to “classifications that disadvantage ‘discrete and insular minorities.’ ” [Id.](#), at 287–288, 98 S.Ct., at 2747 (opinion of Powell, J.) (citing [United States v. Carolee Products Co.](#), 304 U.S. 144, 152, n. 4, 58 S.Ct. 778, 784, n. 4, 82 L.Ed. 1234 (1938)). [Bakke](#) did not produce an opinion for the Court, but Justice Powell’s opinion announcing the Court’s judgment rejected the argument. In a passage joined by Justice White, Justice Powell wrote that “[t]he guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color.” [438 U.S.](#), at 289–290, 98 S.Ct., at 2748. He concluded that “[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.” [Id.](#), at 291, 98 S.Ct., at 2748. On the other hand, four Justices in [Bakke](#) would have applied a less stringent standard of review to racial classifications “designed to further remedial purposes,” see [id.](#), at 359, 98 S.Ct., at 2783 (Brennan, White, Marshall, and Blackmun, JJ., concurring in judgment in part and dissenting in part). And four Justices thought the case should be decided on statutory grounds. [Id.](#), at 411–412, 421, 98 S.Ct., at 2809–2810, 2815 (STEVENS, J., joined by Burger, C.J., and Stewart and REHNQUIST, ***219** JJ., concurring in judgment in part and dissenting in part).

Two years after [Bakke](#), the Court faced another challenge to remedial race-based action, this time involving action undertaken by the Federal Government. In [Fullilove v. Klutznick](#), 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), the Court upheld Congress' inclusion of a 10% set-aside for minority-owned businesses in the Public Works Employment Act of 1977. As in [Bakke](#), there was no opinion for the Court. Chief Justice Burger, in an opinion joined by Justices White and Powell, observed that “[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination to make sure that it does not conflict with constitutional guarantees.” [448 U.S., at 491, 100 S.Ct., at 2781](#). That opinion, however, “d[id] not adopt, either expressly or implicitly, the formulas of analysis articulated in such cases as [\[Bakke\]](#).” [Id., at 492, 100 S.Ct., at 2781](#). It employed instead ***2109** a two-part test which asked, first, “whether the *objectives* of th[e] legislation are within the power of Congress,” and second, “whether the limited use of racial and ethnic criteria, in the context presented, is a constitutionally permissible *means* for achieving the congressional objectives.” [Id., at 473, 100 S.Ct., at 2772](#). It then upheld the program under that test, adding at the end of the opinion that the program also “would survive judicial review under either ‘test’ articulated in the several [Bakke](#) opinions.” [Id., at 492, 100 S.Ct., at 2781](#). Justice Powell wrote separately to express his view that the plurality opinion had essentially applied “strict scrutiny” as described in his [Bakke](#) opinion—*i.e.*, it had determined that the set-aside was “a necessary means of advancing a compelling governmental interest”—and had done so correctly. [448 U.S., at 496, 100 S.Ct., at 2783–2784](#) (concurring opinion). Justice Stewart (joined by then-Justice REHNQUIST) dissented, arguing that the Constitution required the Federal Government to meet the same strict standard as the States when enacting racial classifications, [id., at 523, and n. 1, 100 S.Ct., at 2797, and n. 1](#), and that the program before the Court failed that standard. Justice STEVENS also dissented, ***220** arguing that “[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification,” [id., at 537, 100 S.Ct., at 2805](#), and that the program before the Court could not be

characterized “as a ‘narrowly tailored’ remedial measure.” [Id., at 541, 100 S.Ct., at 2807](#). Justice Marshall (joined by Justices Brennan and Blackmun) concurred in the judgment, reiterating the view of four Justices in [Bakke](#) that any race-based governmental action designed to “remed[y] the present effects of past racial discrimination” should be upheld if it was “substantially related” to the achievement of an “important governmental objective”—*i.e.*, such action should be subjected only to what we now call “intermediate scrutiny.” [448 U.S., at 518–519, 100 S.Ct., at 2795](#).

In [Wygant v. Jackson Bd. of Ed.](#), 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), the Court considered a Fourteenth Amendment challenge to another form of remedial racial classification. The issue in [Wygant](#) was whether a school board could adopt race-based preferences in determining which teachers to lay off. Justice Powell’s plurality opinion observed that “the level of scrutiny does not change merely because the challenged classification operates against a group that historically has not been subject to governmental discrimination,” [id., at 273, 106 S.Ct., at 1846](#), and stated the two-part inquiry as “whether the layoff provision is supported by a compelling state purpose and whether the means chosen to accomplish that purpose are narrowly tailored.” [Id., at 274, 106 S.Ct., at 1847](#). In other words, “racial classifications of any sort must be subjected to ‘strict scrutiny.’ ” [Id., at 285, 106 S.Ct., at 1852](#) (O’CONNOR, J., concurring in part and concurring in judgment). The plurality then concluded that the school board’s interest in “providing minority role models for its minority students, as an attempt to alleviate the effects of societal discrimination,” [id., at 274, 106 S.Ct., at 1847](#), was not a compelling interest that could justify the use of a racial classification. It added that “[s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy,” [id., at 276, 106 S.Ct., at 1848](#), and insisted instead that “a public employer ... must ***221** ensure that, before it embarks on an affirmative-action program, it has convincing evidence that remedial action is warranted. That is, it must have sufficient evidence to justify the conclusion that there has been prior discrimination,” [id., at 277, 106 S.Ct., at](#)

1848–1849. Justice White concurred only in the judgment, although he agreed that the school board’s asserted interests could not, “singly or together, justify this racially discriminatory layoff policy.” [Id.](#), at 295, 106 S.Ct., at 1858. Four Justices dissented, three of whom again argued for intermediate scrutiny of remedial race-based government action. [Id.](#), at 301–302, 106 S.Ct., at 1861–1862 (Marshall, J., joined by Brennan and Blackmun, JJ., dissenting).

The Court’s failure to produce a majority opinion in [Bakke](#), [Fullilove](#), and [Wygant](#) left unresolved the proper analysis for remedial race-based governmental action. See [**2110 United States v. Paradise](#), 480 U.S., at 166, 107 S.Ct., at 1063 (plurality opinion of Brennan, J.) (“[A]lthough this Court has consistently held that some elevated level of scrutiny is required when a racial or ethnic distinction is made for remedial purposes, it has yet to reach consensus on the appropriate constitutional analysis”); [Sheet Metal Workers v. EEOC](#), 478 U.S. 421, 480, 106 S.Ct. 3019, 3052, 92 L.Ed.2d 344 (1986) (plurality opinion of Brennan, J.). Lower courts found this lack of guidance unsettling. See, e.g., [Kromnick v. School Dist. of Philadelphia](#), 739 F.2d 894, 901 (CA3 1984) (“The absence of an Opinion of the Court in either [Bakke](#) or [Fullilove](#) and the concomitant failure of the Court to articulate an analytic framework supporting the judgments makes the position of the lower federal courts considering the constitutionality of affirmative action programs somewhat vulnerable”), cert. denied, 469 U.S. 1107, 105 S.Ct. 782, 83 L.Ed.2d 777 (1985); [Williams v. New Orleans](#), 729 F.2d 1554, 1567 (CA5 1984) (en banc) (Higginbotham, J., concurring specially); [South Florida Chapter of Associated General Contractors of America, Inc. v. Metropolitan Dade County, Fla.](#), 723 F.2d 846, 851 (CA11), cert. denied, 469 U.S. 871, 105 S.Ct. 220, 83 L.Ed.2d 150 (1984).

The Court resolved the issue, at least in part, in 1989. [Richmond v. J.A. Croson Co.](#), 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), concerned a [*222](#) city’s determination that 30% of its contracting work should go to minority-owned businesses. A majority of the Court in [Croson](#) held that “the standard of review under the Equal Protection Clause is not dependent on the race of

those burdened or benefited by a particular classification,” and that the single standard of review for racial classifications should be “strict scrutiny.” [Id.](#), at 493–494, 109 S.Ct., at 722 (opinion of O’CONNOR, J., joined by REHNQUIST, C.J., and White and KENNEDY, JJ.); [id.](#), at 520, 109 S.Ct., at 735 (SCALIA, J., concurring in judgment) (“I agree ... with Justice O’CONNOR’s conclusion that strict scrutiny must be applied to all governmental classification by race”). As to the classification before the Court, the plurality agreed that “a state or local subdivision ... has the authority to eradicate the effects of private discrimination within its own legislative jurisdiction,” [id.](#), at 491–492, 109 S.Ct., at 720–721, but the Court thought that the city had not acted with “a ‘strong basis in evidence for its conclusion that remedial action was necessary,’ ” [id.](#), at 500, 109 S.Ct., at 725 (majority opinion) (quoting [Wygant, supra](#), at 277, 106 S.Ct., at 1849 (plurality opinion)). The Court also thought it “obvious that [the] program is not narrowly tailored to remedy the effects of prior discrimination.” [488 U.S.](#), at 508, 109 S.Ct., at 729–730.







With [Croson](#), the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments. But [Croson](#) of course had no occasion to declare what standard of review the Fifth Amendment requires for such action taken by the Federal Government. [Croson](#) observed simply that the Court’s “treatment of an exercise of congressional power in [Fullilove](#) cannot be dispositive here,” because [Croson](#)’s facts did not implicate Congress’ broad power under § 5 of the Fourteenth Amendment. [Id.](#), at 491, 109 S.Ct., at 720 (plurality opinion); see also [id.](#), at 522, 109 S.Ct., at 737 (SCALIA, J., concurring in judgment) (“[W]ithout revisiting what we held in [Fullilove](#) ..., I do not believe our decision in that case controls the one before us here”). On the other hand, the Court subsequently indicated that [Croson](#) had at least some bearing on federal race-based action [*223](#) when it vacated a decision upholding such action and remanded for further consideration in light of [Croson. H.K. Porter Co. v. Metropolitan Dade County](#), 489 U.S. 1062,




109 S.Ct. 1333, 103 L.Ed.2d 804 (1989); see also [Shurberg Broadcasting of Hartford, Inc. v. FCC](#), 876 F.2d 902, 915, n. 16 (CA DC 1989) (opinion of Silberman, J.) (noting the Court's action in *H.K. Porter Co.*), rev'd *sub nom.* [Metro Broadcasting, Inc. v. FCC](#), 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990). Thus, some uncertainty persisted with respect to the standard of review for federal racial classifications. See, e.g., [Mann v. Albany](#), 883 F.2d 999, 1006 (CA11 1989) (*Croson* "may be applicable to race-based classifications imposed by Congress"); [Shurberg](#), 876 F.2d, at 910 (noting the difficulty of extracting general principles **2111 from the Court's fractured opinions); [id.](#), at 959 (Wald, J., dissenting from denial of rehearing en banc) ("Croson certainly did not resolve the substantial questions posed by congressional programs which mandate the use of racial preferences"); [Winter Park Communications, Inc. v. FCC](#), 873 F.2d 347, 366 (CA DC 1989) (Williams, J., concurring in part and dissenting in part) ("The unresolved ambiguity of [Fullilove](#) and [Croson](#) leaves it impossible to reach a firm opinion as to the evidence of discrimination needed to sustain a congressional mandate of racial preferences"), aff'd *sub nom.* [Metro Broadcasting, supra](#).


Despite lingering uncertainty in the details, however, the Court's cases through [Croson](#) had established three general propositions with respect to governmental racial classifications. First, skepticism: "Any preference based on racial or ethnic criteria must necessarily receive a most searching examination," [Wygant](#), 476 U.S., at 273, 106 S.Ct., at 1847 (plurality opinion of Powell, J.); [Fullilove](#), 448 U.S., at 491, 100 S.Ct., at 2781 (opinion of Burger, C.J.); see also [id.](#), at 523, 100 S.Ct., at 2798 (Stewart, J., dissenting) ("[A]ny official action that treats a person differently on account of his race or ethnic origin is inherently suspect"); [McLaughlin](#), 379 U.S., at 192, 85 S.Ct., at 288 ("[R]acial classifications [are] 'constitutionally suspect' "); [Hirabayashi](#), 320 U.S., at 100, 63 S.Ct., at 1385 ("Distinctions *224 between citizens solely because of their ancestry are by their very nature odious to a free people"). Second, consistency:


"[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification," [Croson](#), 488 U.S., at 494, 109 S.Ct., at 722 (plurality opinion); [id.](#), at 520, 109 S.Ct., at 735 (SCALIA, J., concurring in judgment); see also [Bakke](#), 438 U.S., at 289–290, 98 S.Ct., at 2747–2748 (opinion of Powell, J.), *i.e.*, all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized. And third, congruence: "Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment," [Buckley v. Valeo](#), 424 U.S., at 93, 96 S.Ct., at 670; see also [Weinberger v. Wiesenfeld](#), 420 U.S., at 638, n. 2, 95 S.Ct., at 1228, n. 2; [Bolling v. Sharpe](#), 347 U.S., at 500, 74 S.Ct., at 694. Taken together, these three propositions lead to the conclusion that any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny. Justice Powell's defense of this conclusion bears repeating here:


"If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, [\[Korematsu\]](#), but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process. When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling *225 governmental interest. The Constitution guarantees that right to every person regardless of his background. [Shelley v. Kraemer](#), 334 U.S. [1, 22, 68 S.Ct. 836, 846, 92 L.Ed. 1161 (1948)]." [Bakke, supra](#), 438 U.S., at 299, 98 S.Ct., at 2753 (opinion of Powell, J.) (footnote omitted).

A year later, however, the Court took a surprising turn.  *Metro Broadcasting, Inc. v. FCC*, involved a Fifth Amendment challenge to two race-based policies of the Federal Communications Commission (FCC). In  *Metro Broadcasting*, the Court repudiated the long-held notion that “it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government” than it does on a State to afford equal protection of the laws,  **2112 *Bolling, supra*, at 500, 74 S.Ct., at 694. It did so by holding that “benign” federal racial classifications need only satisfy intermediate scrutiny, even though  *Croson* had recently concluded that such classifications enacted by a State must satisfy strict scrutiny. “[B]enign” federal racial classifications, the Court said, “—even if those measures are not ‘remedial’ in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve *important* governmental objectives within the power of Congress and are *substantially related* to achievement of those objectives.”  *Metro Broadcasting*, 497 U.S., at 564–565, 110 S.Ct., at 3008–3009 (emphasis added). The Court did not explain how to tell whether a racial classification should be deemed “benign,” other than to express “confiden[ce] that an ‘examination of the legislative scheme and its history’ will separate benign measures from other types of racial classifications.”  *Id.*, at 564, n. 12, 110 S.Ct., at 3009, n. 12 (citation omitted).


Applying this test, the Court first noted that the FCC policies at issue did not serve as a remedy for past discrimination.  *Id.*, at 566, 110 S.Ct., at 3009. Proceeding on the assumption that the policies were nonetheless “benign,” it concluded that they served the “important governmental objective” of “enhancing broadcast diversity,”  *id.*, at 566–567, 110 S.Ct., at 3009–3010, and that they were *226 “substantially related” to that objective,  *id.*, at 569, 110 S.Ct., at 3011. It therefore upheld the policies.


By adopting intermediate scrutiny as the standard of review for congressionally mandated “benign” racial classifications,  *Metro Broadcasting* departed from prior cases in two significant



respects. First, it turned its back on  *Croson’s* explanation of why strict scrutiny of all governmental racial classifications is essential:


“Absent searching judicial inquiry into the justification for such race-based measures, there is simply no way of determining what classifications are ‘benign’ or ‘remedial’ and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics. Indeed, the purpose of strict scrutiny is to ‘smoke out’ illegitimate uses of race by assuring that the legislative body is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen ‘fit’ this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.”  *Croson, supra*, at 493, 109 S.Ct., at 721 (plurality opinion of O’CONNOR, J.).

We adhere to that view today, despite the surface appeal of holding “benign” racial classifications to a lower standard, because “it may not always be clear that a so-called preference is in fact benign,”

 *Bakke, supra*, at 298, 98 S.Ct., at 2752 (opinion of Powell, J.). “[M]ore than good motives should be required when government seeks to allocate its resources by way of an explicit racial classification system.” Days, Fullilove, 96 Yale L.J. 453, 485 (1987).

Second,  *Metro Broadcasting* squarely rejected one of the three propositions established by the Court’s earlier equal protection cases, namely, congruence between the standards applicable to federal and state racial classifications, and in so doing also undermined the other two—skepticism of all racial *227 classifications and consistency of treatment irrespective of the race of the burdened or benefited group. See *supra*, at 2110–2111.

Under  *Metro Broadcasting*, certain racial classifications (“benign” ones enacted by the Federal Government) should be treated less skeptically than others; and the race of the benefited group is critical to the determination of which standard of review to apply.  *Metro Broadcasting* was thus a significant departure from much of what had come before it.

[5] [6] The three propositions undermined by  *Metro Broadcasting* all derive from the basic

principle that the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*. It follows from that principle that all governmental action based on race—a *group* classification long recognized as “in most circumstances irrelevant and therefore prohibited,”

☐ ***2113** *Hirabayashi*, 320 U.S., at 100, 63 S.Ct., at 1385—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed. These ideas have long been central to this Court’s understanding of equal protection, and holding “benign” state and federal racial classifications to different standards does not square with them. “[A] free people whose institutions are founded upon the doctrine of equality,” ☐ *ibid.*, should tolerate no retreat from the principle that government may treat people differently because of their race only for the most compelling reasons. Accordingly, we hold today that all racial classifications, imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests. To the extent that ☐ *Metro Broadcasting* is inconsistent with that holding, it is overruled.

In dissent, Justice STEVENS criticizes us for “deliver[ing] a disconcerting lecture about the evils of governmental racial classifications,” *post*, at 2120. With respect, we believe his criticisms reflect a serious misunderstanding of our opinion.

***228** Justice STEVENS concurs in our view that courts should take a skeptical view of all governmental racial classifications. *Ibid.* He also allows that “[n]othing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account.” *Post*, at 2122. What he fails to recognize is that strict scrutiny *does* take “relevant differences” into account—indeed, that is its fundamental purpose. The point of carefully examining the interest asserted by the government in support of a racial classification, and the evidence offered to show that the classification is needed, is precisely to distinguish legitimate from illegitimate uses of race in governmental decisionmaking. See *supra*, at 2112. And Justice STEVENS concedes that “some cases may be difficult to classify,” *post*, at 2122, and n. 4; all the more reason, in our view, to

examine all racial classifications carefully. Strict scrutiny does not “trea[t] dissimilar race-based decisions as though they were equally objectionable,” *post*, at 2121; to the contrary, it evaluates carefully all governmental race-based decisions *in order to decide* which are constitutionally objectionable and which are not. By requiring strict scrutiny of racial classifications, we require courts to make sure that a governmental classification based on race, which “so seldom provide[s] a relevant basis for disparate treatment,” ☐ *Fullilove*, 448 U.S., at 534, 100 S.Ct., at 2803 (STEVENS, J., dissenting), is legitimate, before permitting unequal treatment based on race to proceed.

Justice STEVENS chides us for our “supposed inability to differentiate between ‘invidious’ and ‘benign’ discrimination,” because it is in his view sufficient that “people understand the difference between good intentions and bad.” *Post*, at 2121. But, as we have just explained, the point of strict scrutiny is to “differentiate between” permissible and impermissible governmental use of race. And Justice STEVENS himself has already explained in his dissent in ☐ *Fullilove* why “good intentions” alone are not enough to sustain ***229** a supposedly “benign” racial classification: “[E]ven though it is not the actual predicate for this legislation, a statute of this kind inevitably is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race. Because that perception—*especially when fostered by the Congress of the United States*—can only exacerbate rather than reduce racial prejudice, it will delay the time when race will become a truly irrelevant, or at least insignificant, factor. *Unless Congress clearly articulates the need and basis for a racial classification, and also tailors the classification to its justification*, the Court should not uphold this kind of statute.” ☐ *Fullilove*, 448 U.S., at 545, 100 S.Ct., at 2809 (dissenting opinion) (emphasis added; footnote omitted); see also ☐ *id.*, at 537, 100 S.Ct., at 2805 (“Racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification”); ☐ *Croson*, 488 U.S., at 516–517, 109 S.Ct., at 734 (STEVENS, J., concurring in part and concurring in judgment) ***2114** (“Although [the legislation at issue] stigmatizes the disadvantaged class with the unproven charge of past racial discrimination, it

actually imposes a greater stigma on its supposed beneficiaries”); *supra*, at 2112; but cf. *post*, at 2121–2122 (STEVENS, J., dissenting). These passages make a persuasive case for requiring strict scrutiny of congressional racial classifications.

Perhaps it is not the standard of strict scrutiny itself, but our use of the concepts of “consistency” and “congruence” in conjunction with it, that leads Justice STEVENS to dissent. According to Justice STEVENS, our view of consistency “equate[s] remedial preferences with invidious discrimination,” *post*, at 2122, and ignores the difference between “an engine of oppression” and an effort “to foster equality in society,” or, more colorfully, “between a ‘No Trespassing’ sign and a welcome mat,” *post*, at 2120, 2121. It does nothing of the kind. The principle of consistency simply means that whenever the government treats any person unequally because *230 of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution’s guarantee of equal protection. It says nothing about the ultimate validity of any particular law; that determination is the job of the court applying strict scrutiny. The principle of consistency explains the circumstances in which the injury requiring strict scrutiny occurs. The application of strict scrutiny, in turn, determines whether a compelling governmental interest justifies the infliction of that injury.

Consistency *does* recognize that any individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be. This Court clearly stated that principle in [Croson](#), see [488 U.S.](#), at 493–494, 109 S.Ct., at 721–722 (plurality opinion); [id.](#), at 520–521, 109 S.Ct., at 735–736 (SCALIA, J., concurring in judgment); see also [Shaw v. Reno](#), 509 U.S. 630, 643, 113 S.Ct. 2816, 2824–2845, 125 L.Ed.2d 511 (1993); [Powers v. Ohio](#), 499 U.S. 400, 410, 111 S.Ct. 1364, 1370, 113 L.Ed.2d 411 (1991). Justice STEVENS does not explain how his views square with [Croson](#), or with the long line of cases understanding equal protection as a personal right.

Justice STEVENS also claims that we have ignored any difference between federal and state legislatures. But requiring that Congress, like the States, enact racial classifications only when doing so is necessary to further a “compelling interest”

does not contravene any principle of appropriate respect for a coequal branch of the Government. It is true that various Members of this Court have taken different views of the authority § 5 of the Fourteenth Amendment confers upon Congress to deal with the problem of racial discrimination, and the extent to which courts should defer to Congress’ exercise of that authority. See, e.g., [Metro Broadcasting](#), 497 U.S., at 605–606, 110 S.Ct., at 3030–3031 (O’CONNOR, J., dissenting); [Croson](#), 488 U.S., at 486–493, 109 S.Ct., at 717–722 (opinion of O’CONNOR, J., joined by REHNQUIST, C.J., and White, J.); [id.](#), at 518–519, 109 S.Ct., at 734–735 (KENNEDY, J., concurring in part and concurring in judgment); [id.](#), at 521–524, 109 S.Ct., at 736–738 (SCALIA, J., concurring in judgment); [*231 Fullilove](#), 448 U.S., at 472–473, 100 S.Ct., at 2771–2772 (opinion of Burger, C.J.); [id.](#), at 500–502, and nn. 2–3, 515, and n. 14, 100 S.Ct., at 2786–2787, and nn. 2–3, 2793, and n. 14 (Powell, J., concurring); [id.](#), at 526–527, 100 S.Ct., at 2799–2800 (Stewart, J., dissenting). We need not, and do not, address these differences today. For now, it is enough to observe that Justice STEVENS’ suggestion that any Member of this Court has repudiated in this case his or her previously expressed views on the subject, *post*, at 2123–2125, 2127, is incorrect.

C

“Although adherence to precedent is not rigidly required in constitutional cases, any departure from the doctrine of *stare decisis* demands special justification.” [Arizona v. Rumsey](#), 467 U.S. 203, 212, 104 S.Ct. 2305, 2311, 81 L.Ed.2d 164 (1984). In deciding whether this case presents such justification, we recall Justice Frankfurter’s admonition that “*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, **2115 when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.” [Helvering v. Hallock](#), 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604

(1940). Remaining true to an “intrinsicly sounder” doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error and would likely make the unjustified break from previously established doctrine complete. In such a situation, “special justification” exists to depart from the recently decided case.

As we have explained, [Metro Broadcasting](#) undermined important principles of this Court’s equal protection jurisprudence, established in a line of cases stretching back over 50 years, see *supra*, at 2105–2112. Those principles together stood for an “embracing” and “intrinsicly sound[ed]” understanding of equal protection “verified by experience,” namely, that the Constitution imposes upon federal, state, and local governmental actors the same obligation to respect ***232** the personal right to equal protection of the laws. This case therefore presents precisely the situation described by Justice Frankfurter in [Helvering](#): We cannot adhere to our most recent decision without colliding with an accepted and established doctrine.

We also note that [Metro Broadcasting’s](#) application of different standards of review to federal and state racial classifications has been consistently criticized by commentators. See, e.g., Fried, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 *Harv.L.Rev.* 107, 113–117 (1990) (arguing that [Metro Broadcasting’s](#) adoption of different standards of review for federal and state racial classifications placed the law in an “unstable condition,” and advocating strict scrutiny across the board); Comment, *Metro Broadcasting, Inc. v. FCC: Requiem for a Heavyweight*, 69 *Texas L.Rev.* 125, 145–146 (1990) (same); Linder, Review of Affirmative Action After *Metro Broadcasting v. FCC: The Solution Almost Nobody Wanted*, 59 *UMKC L.Rev.* 293, 297, 316–317 (1991) (criticizing “anomalous results as exemplified by the two different standards of review”); Katz, Public Affirmative Action and the Fourteenth Amendment: The Fragmentation of Theory After [Richmond v. J.A. Croson Co.](#) and [Metro Broadcasting, Inc. v. Federal Communications Commission](#), 17 *T. Marshall L.Rev.* 317, 319, 354–355, 357 (1992) (arguing that “the current fragmentation of doctrine must be seen as a dangerous and seriously flawed approach to

constitutional interpretation,” and advocating intermediate scrutiny across the board).

Our past practice in similar situations supports our action today. In [United States v. Dixon](#), 509 U.S. 688, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993), we overruled the recent case of [Grady v. Corbin](#), 495 U.S. 508, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990), because [Grady](#) “lack[ed] constitutional roots” and was “wholly inconsistent with earlier Supreme Court precedent.” [Dixon](#), *supra*, at 704, 712, 113 S.Ct., at 2860, 2864. In [Solorio v. United States](#), 483 U.S. 435, 107 S.Ct. 2924, 97 L.Ed.2d 364 (1987), we overruled [O’Callahan v. Parker](#), 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969), which had caused “confusion” and had rejected “an unbroken line of decisions from 1866 to 1960.” [Solorio](#), ***233** *supra*, at 439–441, 450–451, 107 S.Ct., at 2926–2928, 2932–2933. And in [Continental T.V., Inc. v. GTE Sylvania Inc.](#), 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977), we overruled [United States v. Arnold, Schwinn & Co.](#), 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), which was “an abrupt and largely unexplained departure” from precedent, and of which “[t]he great weight of scholarly opinion ha[d] been critical.” [Continental T.V.](#), *supra*, at 47–48, 58, 97 S.Ct., at 2556, 2561. See also, e.g., [Payne v. Tennessee](#), 501 U.S. 808, 830, 111 S.Ct. 2597, 2611, 115 L.Ed.2d 720 (1991) (overruling [Booth v. Maryland](#), 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and [South Carolina v. Gathers](#), 490 U.S. 805, 109 S.Ct. 2207, 104 L.Ed.2d 876 (1989)); [Monell v. New York City Dept. of Social Servs.](#), 436 U.S. 658, 695–701, 98 S.Ct. 2018, 2038–2041, 56 L.Ed.2d 611 (1978) (partially overruling [Monroe v. Pape](#), 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961), because [Monroe](#) was a “departure from prior practice” that had not ****2116** engendered substantial reliance); [Swift & Co. v. Wickham](#), 382 U.S. 111, 128–129, 86 S.Ct. 258, 267–268, 15 L.Ed.2d 194 (1965) (overruling [Kesler v. Department of Public Safety of Utah](#), 369 U.S. 153, 82 S.Ct. 807, 7 L.Ed.2d 641 (1962), to reaffirm “pre-[Kesler](#) precedent” and restore the law to the “view ... which this Court has traditionally taken” in older cases).

It is worth pointing out the difference between the applications of *stare decisis* in this case and in [Planned Parenthood of Southeastern Pa. v. Casey](#), 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). [Casey](#) explained how considerations of *stare decisis* inform the decision whether to overrule a long-established precedent that has become integrated into the fabric of the law. Overruling precedent of that kind naturally may have consequences for “the ideal of the rule of law,” [id.](#), at 854, 112 S.Ct., at 2808. In addition, such precedent is likely to have engendered substantial reliance, as was true in [Casey](#) itself, [id.](#), at 856, 112 S.Ct., at 2809 (“[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail”). But in this case, as we have explained, we do not face a precedent of that kind, because [Metro Broadcasting](#) itself departed from our prior cases—and did so quite recently. By refusing to follow [Metro Broadcasting](#), then, we do not depart from the fabric of the law; we restore it. We also note that reliance on a case that has recently departed from precedent is likely to be minimal, particularly where, as here, the rule set forth in that case is unlikely to affect primary conduct in any event. Cf. [Allied-Bruce Terminix Cos. v. Dobson](#), 513 U.S. 265, 272, 115 S.Ct. 834, 838–839, 130 L.Ed.2d 753 (1995) (declining to overrule [Southland Corp. v. Keating](#), 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984), where “private parties have likely written contracts relying upon [Southland](#) as authority” in the 10 years since [Southland](#) was decided).

Justice STEVENS takes us to task for what he perceives to be an erroneous application of the doctrine of *stare decisis*. But again, he misunderstands our position. We have acknowledged that, after [Croson](#), “some uncertainty persisted with respect to the standard of review for federal racial classifications,” *supra*, at 2110, and we therefore do not say that we “merely restor[e] the *status quo ante*” today, *post*, at 2127. But as we have described *supra*, at 2105–2113, we think that well-settled legal principles pointed

toward a conclusion different from that reached in [Metro Broadcasting](#), and we therefore disagree with Justice STEVENS that “the law at the time of that decision was entirely open to the result the Court reached,” *post*, at 2127. We also disagree with Justice STEVENS that Justice Stewart’s dissenting opinion in [Fullilove](#) supports his “novelty” argument, see *post*, at 2128, and n. 13. Justice Stewart said that “[u]nder our Constitution, any official action that treats a person differently on account of his race or ethnic origin is inherently suspect and presumptively invalid,” and that “[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.” [Fullilove](#), 448 U.S., at 523, and n. 1, 100 S.Ct., at 2798, and n. 1. He took the view that “[t]he hostility of the Constitution to racial classifications by government has been manifested in many cases decided by this Court,” and that “our cases have made clear that the Constitution is ***235** wholly neutral in forbidding such racial discrimination, whatever the race may be of those who are its victims.” [Id.](#), at 524, 100 S.Ct., at 2798. Justice Stewart gave no indication that he thought he was addressing a “novel” proposition, *post*, at 2128. Rather, he relied on the fact that the text of the Fourteenth Amendment extends its guarantee to “persons,” and on cases like [Buckley](#), [Loving](#), [McLaughlin](#), [Bolling](#), [Hirabayashi](#), and [Korematsu](#), see [Fullilove](#), *supra*, at 524–526, 100 S.Ct., at 2798–2800, as do we today. There is nothing new about the notion that Congress, like the States, may treat people differently because of their race only for compelling reasons.

“The real problem,” Justice Frankfurter explained, “is whether a principle shall prevail over its later misapplications.” [Helvering](#), ****2117** 309 U.S., at 122, 60 S.Ct., at 453. [Metro Broadcasting](#)’s untenable distinction between state and federal racial classifications lacks support in our precedent, and undermines the fundamental principle of equal protection as a personal right. In this case, as between that principle and “its later misapplications,” the principle must prevail.

D

[7] Our action today makes explicit what Justice Powell thought implicit in the [Fullilove](#) lead opinion: Federal racial classifications, like those of a State, must serve a compelling governmental interest, and must be narrowly tailored to further that interest. See [Fullilove](#), 448 U.S., at 496, 100 S.Ct., at 2783–84 (concurring opinion). (Recall that the lead opinion in [Fullilove](#) “d[id] not adopt ... the formulas of analysis articulated in such cases as [\[Bakke\]](#).” [Id.](#), at 492, 100 S.Ct., at 2781 (opinion of Burger, C.J.).) Of course, it follows that to the extent (if any) that [Fullilove](#) held federal racial classifications to be subject to a less rigorous standard, it is no longer controlling. But we need not decide today whether the program upheld in [Fullilove](#) would survive strict scrutiny as our more recent cases have defined it.

*236 Some have questioned the importance of debating the proper standard of review of race-based legislation. See, e.g., *post*, at 2122 (STEVENS, J., dissenting); [Croson](#), 488 U.S., at 514–515, and n. 5, 109 S.Ct., at 733, and n. 5 (STEVENS, J., concurring in part and concurring in judgment); cf. [Metro Broadcasting](#), 497 U.S., at 610, 110 S.Ct., at 3033 (O’CONNOR, J., dissenting) (“This dispute regarding the appropriate standard of review may strike some as a lawyers’ quibble over words”). But we agree with Justice STEVENS that, “[b]ecause racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classification be clearly identified and unquestionably legitimate,” and that “[r]acial classifications are simply too pernicious to permit any but the most exact connection between justification and classification.” [Fullilove](#), *supra*, at 533–535, 537, 100 S.Ct., at 2803–2804, 2805 (dissenting opinion) (footnotes omitted). We think that requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination, both as to ends and as to means. [Korematsu](#) demonstrates vividly that even “the most rigid scrutiny” can sometimes fail to detect an illegitimate racial classification, compare [Korematsu](#), 323 U.S., at 223, 65 S.Ct., at 197

(“To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race”), with [Pub.L. 100–383](#), § 2(a), 102 Stat. 903–904 (“[T]hese actions [of relocating and interning civilians of Japanese ancestry] were carried out without adequate security reasons ... and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership”). Any retreat from the most searching judicial inquiry can only increase the risk of another such error occurring in the future.

[8] *237 Finally, we wish to dispel the notion that strict scrutiny is “strict in theory, but fatal in fact.” [Fullilove](#), *supra*, at 519, 100 S.Ct., at 2795 (Marshall, J., concurring in judgment). The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it. As recently as 1987, for example, every Justice of this Court agreed that the Alabama Department of Public Safety’s “pervasive, systematic, and obstinate discriminatory conduct” justified a narrowly tailored race-based remedy. See [United States v. Paradise](#), 480 U.S., at 167, 107 S.Ct., at 1064 (plurality opinion of Brennan, J.); [id.](#), at 190, 107 S.Ct., at 1076 (STEVENS, J., concurring in judgment); [id.](#), at 196, 107 S.Ct., at 1079–1080 (O’CONNOR, J., dissenting). When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the “narrow tailoring” test this Court has set out in previous cases.

**2118 IV

[9] Because our decision today alters the playing field in some important respects, we think it best to remand the case to the lower courts for further consideration in light of the principles we have announced. The Court of Appeals, following [Metro Broadcasting](#) and [Fullilove](#), analyzed the case in terms of intermediate scrutiny. It upheld

the challenged statutes and regulations because it found them to be “narrowly tailored to achieve [their] *significant governmental purpose* of providing subcontracting opportunities for small disadvantaged business enterprises.” [16 F.3d, at 1547](#) (emphasis added). The Court of Appeals did not decide the question whether the interests served by the use of subcontractor compensation clauses are properly described as “compelling.” It also did not address the question of narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was “any consideration of the use of *238 race-neutral means to increase minority business participation” in government contracting, [Croson, supra, at 507, 109 S.Ct., at 729](#), or whether the program was appropriately limited such that it “will not last longer than the discriminatory effects it is designed to eliminate,” [Fullilove, supra, at 513, 100 S.Ct., at 2792–2793](#) (Powell, J., concurring).

Moreover, unresolved questions remain concerning the details of the complex regulatory regimes implicated by the use of subcontractor compensation clauses. For example, the SBA’s 8(a) program requires an individualized inquiry into the economic disadvantage of every participant, see [13 CFR § 124.106\(a\)](#) (1994), whereas the DOT’s regulations implementing STURAA [§ 106\(c\)](#) do *not* require certifying authorities to make such individualized inquiries, see [49 CFR § 23.62](#) (1994); [49 CFR pt. 23, subpt. D, App. C](#) (1994). And the regulations seem unclear as to whether 8(d) subcontractors must make individualized showings, or instead whether the race-based presumption applies both to social *and* economic disadvantage, compare [13 CFR § 124.106\(b\)](#) (1994) (apparently requiring 8(d) participants to make an individualized showing), with [48 CFR § 19.703\(a\)\(2\)](#) (1994) (apparently allowing 8(d) subcontractors to invoke the race-based presumption for social and economic disadvantage). See generally Part I, *supra*. We also note an apparent discrepancy between the definitions of which socially disadvantaged individuals qualify as economically disadvantaged for the 8(a) and 8(d) programs; the former requires a showing that such individuals’ ability to compete has been impaired “as compared to others in the same or similar line of business *who are not socially disadvantaged*,” [13 CFR § 124.106\(a\)\(1\)\(i\)](#) (1994) (emphasis added), while the latter requires that showing only “as compared

to others in the same or similar line of business,” [§ 124.106\(b\)\(1\)](#). The question whether any of the ways in which the Government uses subcontractor compensation clauses can survive strict scrutiny, and any relevance distinctions such as these may have to that question, should *239 be addressed in the first instance by the lower courts.

Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, concurring in part and concurring in the judgment.

I join the opinion of the Court, except Part III–C, and except insofar as it may be inconsistent with the following: In my view, government can never have a “compelling interest” in discriminating on the basis of race in order to “make up” for past racial discrimination in the opposite direction. See [Richmond v. J.A. Croson Co., 488 U.S. 469, 520, 109 S.Ct. 706, 735–736, 102 L.Ed.2d 854 \(1989\)](#) (SCALIA, J., concurring in judgment). Individuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race. That concept is alien to the Constitution’s focus upon the individual, see [Amdt. 14, § 1](#) (“[N]or shall any State ... deny to any person” the equal protection of the laws) (emphasis added), and its rejection of dispositions based on race, see [Amdt. 15, § 1](#) (prohibiting abridgment of the right to vote “on account of race”), or based on blood, see [Art. III, § 3](#) (“[N]o Attainder of Treason *2119 shall work Corruption of Blood”); [Art. I, § 9, cl. 8](#) (“No Title of Nobility shall be granted by the United States”). To pursue the concept of racial entitlement—even for the most admirable and benign of purposes—is to reinforce and preserve for future mischief the way of thinking that produced race slavery, race privilege and race hatred. In the eyes of government, we are just one race here. It is American.

It is unlikely, if not impossible, that the challenged program would survive under this understanding of


strict scrutiny, but I am content to leave that to be decided on remand.

***240** Justice [THOMAS](#), concurring in part and concurring in the judgment.

I agree with the majority's conclusion that strict scrutiny applies to *all* government classifications based on race. I write separately, however, to express my disagreement with the premise underlying Justice STEVENS' and Justice GINSBURG's dissents: that there is a racial paternalism exception to the principle of equal protection. I believe that there is a "moral [and] constitutional equivalence," *post*, at 2120 (STEVENS, J., dissenting), between laws designed to subjugate a race and those that distribute benefits on the basis of race in order to foster some current notion of equality. Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law.

That these programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. There can be no doubt that the paternalism that appears to lie at the heart of this program is at war with the principle of inherent equality that underlies and infuses our Constitution. See Declaration of Independence ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness").

These programs not only raise grave constitutional questions, they also undermine the moral basis of the equal protection principle. Purchased at the price of immeasurable human suffering, the equal protection principle reflects our Nation's understanding that such classifications ultimately have a destructive impact on the individual and our society. Unquestionably, "[i]nvidious [racial] discrimination is an engine ***241** of oppression," *post*, at 2120 (STEVENS, J., dissenting). It is also true that "[r]emedial" racial preferences may

reflect "a desire to foster equality in society," *ibid*. But there can be no doubt that racial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called "benign" discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are "entitled" to preferences. Indeed, Justice STEVENS once recognized the real harms stemming from seemingly "benign" discrimination. See  [Fullilove v. Klutznick](#), 448 U.S. 448, 545, 100 S.Ct. 2758, 2809, 65 L.Ed.2d 902 (1980) (STEVENS, J., dissenting) (noting that "remedial" race legislation "is perceived by many as resting on an assumption that those who are granted this special preference are less qualified in some respect that is identified purely by their race").

In my mind, government-sponsored racial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice.* In each instance, it is racial discrimination, plain and simple.

****2120 *242** Justice [STEVENS](#), with whom Justice [GINSBURG](#) joins, dissenting.

Instead of deciding this case in accordance with controlling precedent, the Court today delivers a disconcerting lecture about the evils of governmental racial classifications. For its text the Court has selected three propositions, represented by the bywords "skepticism," "consistency," and "congruence." See *ante*, at 2110–2111. I shall comment on each of these propositions, then add a few words about *stare decisis*, and finally explain why I believe this Court has a duty to affirm the judgment of the Court of Appeals.

I

The Court's concept of skepticism is, at least in principle, a good statement of law and of common sense. Undoubtedly, a court should be wary of a governmental decision that relies upon a racial classification. "Because racial characteristics so seldom provide a relevant basis for disparate treatment, and because classifications based on race are potentially so harmful to the entire body politic," a reviewing court must satisfy itself that the reasons for any such classification are "clearly identified and unquestionably legitimate."

[Fullilove v. Klutznick](#), 448 U.S. 448, 533–535, 100 S.Ct. 2758, 2804, 65 L.Ed.2d 902 (1980) (STEVENS, J., dissenting). This principle is explicit in Chief Justice Burger's opinion, [id.](#), at 480, 100 S.Ct., at 2775–2776; in Justice Powell's concurrence, [id.](#), at 496, 100 S.Ct., at 2783–2784; and in my dissent in [Fullilove](#), [id.](#), at 533–534, 100 S.Ct., at 2803–2804. I welcome its renewed endorsement by the Court today. But, as the opinions in [Fullilove](#) demonstrate, substantial agreement on the standard to be applied in deciding difficult cases does not necessarily lead to agreement on how those cases actually should or will be resolved. In my judgment, because uniform standards are often anything but uniform, we should evaluate the Court's comments on "consistency," "congruence," and *stare decisis* with the same type of skepticism that the Court advocates for the underlying issue.

*243 II


The Court's concept of "consistency" assumes that there is no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority. In my opinion that assumption is untenable. There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to



eradicate racial subordination. Invidious discrimination is an engine of oppression, subjugating a disfavored group to enhance or maintain the power of the majority. Remedial race-based preferences reflect the opposite impulse: a desire to foster equality in society. No sensible conception of the Government's constitutional obligation to "govern impartially," [Hampton v. Mow Sun Wong](#), 426 U.S. 88, 100, 96 S.Ct. 1895, 1903, 48 L.Ed.2d 495 (1976), should ignore this distinction.¹

**2121 *244 To illustrate the point, consider our cases addressing the Federal Government's discrimination against Japanese-Americans during World War II, [Hirabayashi v. United States](#), 320 U.S. 81, 63 S.Ct. 1375, 87 L.Ed. 1774 (1943), and [Korematsu v. United States](#), 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944). The discrimination at issue in those cases was invidious because the Government imposed special burdens—a curfew and exclusion from certain areas on the West Coast²—on the members of a minority class defined by racial and ethnic characteristics. Members of the same racially defined class exhibited exceptional heroism in the service of our country during that war. Now suppose Congress decided to reward that service with a federal program that gave all Japanese-American veterans an extraordinary preference in Government employment. Cf. [Personnel Administrator of Mass. v. Feeney](#), 442 U.S. 256, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). If Congress had done so, the same racial characteristics that motivated the discriminatory burdens in [Hirabayashi](#) and [Korematsu](#) would have defined the preferred class of veterans. Nevertheless, "consistency" surely would not require us to describe the incidental burden on everyone else in the country as "odious" or "invidious" as those terms were used in those cases. We should reject a concept of "consistency" that would view the special preferences that the National Government has provided to Native Americans since 1834³ *245 as comparable to the official discrimination against African-Americans that was prevalent for much of our history.



The consistency that the Court espouses would disregard the difference between a "No Trespassing" sign and a welcome mat. It would treat a Dixiecrat Senator's decision to vote against Thurgood Marshall's confirmation in order to keep


African-Americans off the Supreme Court as on a par with President Johnson's evaluation of his nominee's race as a positive factor. It would equate a law that made black citizens ineligible for military service with a program aimed at recruiting black soldiers. An attempt by the majority to exclude members of a minority race from a regulated market is fundamentally different from a subsidy that enables a relatively small group of newcomers to enter that market. An interest in "consistency" does not justify treating differences as though they were similarities.

The Court's explanation for treating dissimilar race-based decisions as though they were equally objectionable is a supposed inability to differentiate between "invidious" and "benign" discrimination. *Ante*, at 2111–2112. But the term "affirmative action" is common and well understood. Its presence in everyday parlance shows that people understand the difference between good intentions and bad. As with any legal concept, some cases **2122 may be difficult to classify,⁴ but our equal protection jurisprudence has identified a critical difference between state action that imposes burdens on a *246 disfavored few and state action that benefits the few "in spite of" its adverse effects on the many.  *Feeney*, 442 U.S., at 279, 99 S.Ct., at 2296.

Indeed, our jurisprudence has made the standard to be applied in cases of invidious discrimination turn on whether the discrimination is "intentional," or whether, by contrast, it merely has a discriminatory "effect."  *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976). Surely this distinction is at least as subtle, and at least as difficult to apply, see  *id.*, at 253–254, 96 S.Ct., at 2054 (concurring opinion), as the usually obvious distinction between a measure intended to benefit members of a particular minority race and a measure intended to burden a minority race. A state actor inclined to subvert the Constitution might easily hide bad intentions in the guise of unintended "effects"; but I should think it far more difficult to enact a law intending to preserve the majority's hegemony while casting it plausibly in the guise of affirmative action for minorities.

Nothing is inherently wrong with applying a single standard to fundamentally different situations, as long as that standard takes relevant differences into account. For example, if the Court in all equal protection cases were to insist that differential

treatment be justified by relevant characteristics of the members of the favored and disfavored classes that provide a legitimate basis for disparate treatment, such a standard would treat dissimilar cases differently while still recognizing that there is, after all, only one Equal Protection Clause. See  *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 451–455, 105 S.Ct. 3249, 3260–3262, 87 L.Ed.2d 313 (1985) (STEVENS, J., concurring);  *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 98–110, 93 S.Ct. 1278, 1329–1336, 36 L.Ed.2d 16 (1973) (Marshall, J., dissenting). Under such a standard, subsidies for disadvantaged businesses may be constitutional though special taxes on such businesses would be invalid. But a single standard that purports to equate remedial preferences with invidious discrimination cannot be defended in the name of "equal protection."

*247 Moreover, the Court may find that its new "consistency" approach to race-based classifications is difficult to square with its insistence upon rigidly separate categories for discrimination against different classes of individuals. For example, as the law currently stands, the Court will apply "intermediate scrutiny" to cases of invidious gender discrimination and "strict scrutiny" to cases of invidious race discrimination, while applying the same standard for benign classifications as for invidious ones. If this remains the law, then today's lecture about "consistency" will produce the anomalous result that the Government can more easily enact affirmative-action programs to remedy discrimination against women than it can enact affirmative-action programs to remedy discrimination against African-Americans—even though the primary purpose of the Equal Protection Clause was to end discrimination against the former slaves. See  *Associated General Contractors of Cal., Inc. v. San Francisco*, 813 F.2d 922 (CA9 1987) (striking down racial preference under strict scrutiny while upholding gender preference under intermediate scrutiny). When a court becomes preoccupied with abstract standards, it risks sacrificing common sense at the altar of formal consistency.

As a matter of constitutional and democratic principle, a decision by representatives of the majority to discriminate against the members of a minority race is fundamentally different from those same representatives' decision to impose incidental

costs on the majority of their constituents in order to provide a benefit to a disadvantaged minority.⁵ Indeed, *248 as I have previously argued, the former is virtually always repugnant to **2123 the principles of a free and democratic society, whereas the latter is, in some circumstances, entirely consistent with the ideal of equality. [Wygant v. Jackson Bd. of Ed.](#), 476 U.S. 267, 316–317, 106 S.Ct. 1842, 1869–70, 90 L.Ed.2d 260 (1986) (STEVENS, J., dissenting).⁶ *249 By insisting on a doctrinaire notion of “consistency” in the standard applicable to all race-based governmental actions, the Court obscures this essential dichotomy.

III

The Court’s concept of “congruence” assumes that there is no significant difference between a decision by the Congress of the United States to adopt an affirmative-action program and such a decision by a State or a municipality. In my opinion that assumption is untenable. It ignores important practical and legal differences between federal and state or local decisionmakers.

These differences have been identified repeatedly and consistently both in opinions of the Court and in separate opinions authored by Members of today’s majority. Thus, in [Metro Broadcasting, Inc. v. FCC](#), 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445 (1990), in which we upheld a federal program designed **2124 to foster racial diversity in broadcasting, we identified the special “institutional *250 competence” of our National Legislature. [Id.](#), at 563, 110 S.Ct., at 3008. “It is of overriding significance in these cases,” we were careful to emphasize, “that the FCC’s minority ownership programs have been specifically approved—indeed, mandated—by Congress.” [Ibid.](#) We recalled the several opinions in [Fullilove](#) that admonished this Court to “ ‘approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to “provide for the ... general Welfare of the United States” and “to enforce, by appropriate legislation,” the equal protection guarantees of the Fourteenth



Amendment.’” [Fullilove](#), 448 U.S., at 472 [100 S.Ct., at 2771]; see also [id.](#), at 491 [100 S.Ct., at 2781]; [id.](#), at 510, and 515–516, n. 14 [100 S.Ct., at 2791, 2794, n. 14] (Powell, J., concurring); [id.](#), at 517–520 [100 S.Ct., at 2794–2796] (MARSHALL, J., concurring in judgment).” [497 U.S.](#), at 563, 110 S.Ct., at 3008. We recalled that the opinions of Chief Justice Burger and Justice Powell in [Fullilove](#) had “explained that deference was appropriate in light of Congress’ institutional competence as the National Legislature, as well as Congress’ powers under the Commerce Clause, the Spending Clause, and the Civil War Amendments.” [497 U.S.](#), at 563, 110 S.Ct., at 3008 (citations and footnote omitted).


The majority in [Metro Broadcasting](#) and the plurality in [Fullilove](#) were not alone in relying upon a critical distinction between federal and state programs. In his separate opinion in [Richmond v. J.A. Croson Co.](#), 488 U.S. 469, 520–524, 109 S.Ct. 706, 735–738, 102 L.Ed.2d 854 (1989), Justice SCALIA discussed the basis for this distinction. He observed that “it is one thing to permit racially based conduct by the Federal Government—whose legislative powers concerning matters of race were explicitly enhanced by the Fourteenth Amendment, see U.S. Const., Amdt. 14, § 5—and quite another to permit it by the precise entities against whose conduct in matters of race that Amendment was specifically directed, see Amdt. 14, § 1.” [Id.](#), at 521–522, 109 S.Ct., at 736. Continuing, Justice SCALIA explained why a “sound distinction between federal and state (or local) action based on race rests not only upon the substance of the *251 Civil War Amendments, but upon social reality and governmental theory.” [Id.](#), at 522, 109 S.Ct., at 737.

“What the record shows, in other words, is that racial discrimination against any group finds a more ready expression at the state and local than at the federal level. To the children of the Founding Fathers, this should come as no surprise. An acute awareness of the heightened danger of oppression from political factions in small, rather than large, political units dates to the very beginning of our national history. See G. Wood, *The Creation of the American*


Republic, 1776–1787, pp. 499–506 (1969). As James Madison observed in support of the proposed Constitution’s enhancement of national powers:

“ ‘The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plan of oppression. Extend the sphere and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other.’ The Federalist No. 10, pp. 82–84 (C. Rossiter ed. 1961).” *Id.*, at 523 (opinion concurring in judgment).

In her plurality opinion in  *Croson*, Justice O’CONNOR also emphasized the importance of this distinction when she responded to the city’s argument that  *Fullilove* was controlling. She wrote:



252** “What appellant ignores is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to ‘enforce’ may at times also include the power to define *2125** situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations. The Civil War Amendments themselves worked a dramatic change in the balance between congressional and state power over matters of race.”  **488 U.S.**, at 490, 109 S.Ct., at 720 (joined by REHNQUIST, C.J., and White, J.) (citations omitted).

An additional reason for giving greater deference to the National Legislature than to a local lawmaking body is that federal affirmative-action programs represent the will of our entire Nation’s elected representatives, whereas a state or local program may have an impact on nonresident entities who played no part in the decision to enact

it. Thus, in the state or local context, individuals who were unable to vote for the local representatives who enacted a race-conscious program may nonetheless feel the effects of that program. This difference recalls the goals of the Commerce Clause, U.S. Const., Art. I, § 8, cl. 3, which permits Congress to legislate on certain matters of national importance while denying power to the States in this area for fear of undue impact upon out-of-state residents. See  *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767–768, n. 2, 65 S.Ct. 1515, 1519–1520, n. 2, 89 L.Ed. 1915 (1945) (“[T]o the extent that the burden of state regulation falls on interests outside the state, it is unlikely to be alleviated by the operation of those political restraints normally exerted when interests within the state are affected”).

Ironically, after all of the time, effort, and paper this Court has expended in differentiating between federal and state affirmative action, the majority today virtually ignores the issue. See *ante*, at 2114–2115. It provides not a word of direct explanation for its sudden and enormous departure from ***253** the reasoning in past cases. Such silence, however, cannot erase the difference between Congress’ institutional competence and constitutional authority to overcome historic racial subjugation and the States’ lesser power to do so.

Presumably, the majority is now satisfied that its theory of “congruence” between the substantive rights provided by the Fifth and Fourteenth Amendments disposes of the objection based upon divided constitutional powers. But it is one thing to say (as no one seems to dispute) that the Fifth Amendment encompasses a general guarantee of equal protection as broad as that contained within the Fourteenth Amendment. It is another thing entirely to say that Congress’ institutional competence and constitutional authority entitles it to no greater deference when it enacts a program designed to foster equality than the deference due a state legislature.⁷ The latter is an extraordinary proposition; and, as the foregoing discussion demonstrates, our precedents have rejected it explicitly and repeatedly.⁸

****2126 *254** Our opinion in  *Metro Broadcasting* relied on several constitutional provisions to justify the greater deference we owe to Congress when it acts with respect to private individuals.  **497 U.S.**, at 563, 110 S.Ct., at

3008. In the programs challenged in this case, Congress has acted both with respect to private individuals and, as in [Fullilove](#), with respect to the States themselves.⁹ When Congress does this, it draws its power directly from § 5 of the Fourteenth Amendment.¹⁰ That section reads: *255 “The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.” One of the “provisions of this article” that Congress is thus empowered to enforce reads: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const., Amdt. 14, § 1. The Fourteenth Amendment directly empowers Congress at the same time it expressly limits the States.¹¹ This is no accident. It represents our Nation’s consensus, achieved after hard experience throughout our sorry history of race relations, that the Federal Government must be the primary defender of racial minorities against the States, some of which may be inclined to oppress such minorities. A rule of “congruence” that ignores a purposeful “incongruity” so fundamental to our system of government is unacceptable.

In my judgment, the Court’s novel doctrine of “congruence” is seriously misguided. Congressional deliberations about a matter as important as affirmative action should be accorded far greater deference than those of a State or municipality.

IV

The Court’s concept of *stare decisis* treats some of the language we have used in explaining our decisions as though it *256 were more important than our actual holdings. In my opinion that treatment is incorrect.

This is the third time in the Court’s entire history that it has considered the constitutionality of a federal affirmative-action program. On each of the two prior occasions, the first in 1980, [Fullilove](#)

[v. Klutznick](#), 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 and the second in 1990, [**2127 Metro Broadcasting, Inc. v. FCC](#), 497 U.S. 547, 110 S.Ct. 2997, 111 L.Ed.2d 445, the Court upheld the program. Today the Court explicitly overrules [Metro Broadcasting](#) (at least in part), *ante*, at 2112–2113, and undermines [Fullilove](#) by recasting the standard on which it rested and by calling even its holding into question, *ante*, at 2116–2117. By way of explanation, Justice O’CONNOR advises the federal agencies and private parties that have made countless decisions in reliance on those cases that “we do not depart from the fabric of the law; we restore it.” *Ante*, at 2116. A skeptical observer might ask whether this pronouncement is a faithful application of the doctrine of *stare decisis*.¹² A brief comment on each of the two ailing cases may provide the answer.

In the Court’s view, our decision in [Metro Broadcasting](#) was inconsistent with the rule announced in [Richmond v. J.A. Croson Co.](#), 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989). *Ante*, at 2111–2112. But two decisive distinctions separate those two cases. First, [Metro Broadcasting](#) involved a federal program, whereas [Croson](#) involved a city ordinance. [Metro Broadcasting](#) thus drew primary support from [Fullilove](#), which predated [Croson](#) and which [Croson](#) distinguished on the grounds of the federal-state dichotomy that the majority today discredits. Although Members of today’s majority trumpeted the importance of that distinction in [Croson](#), they now reject it in the name of “congruence.” It is therefore *257 quite wrong for the Court to suggest today that overruling [Metro Broadcasting](#) merely restores the *status quo ante*, for the law at the time of that decision was entirely open to the result the Court reached. *Today’s* decision is an unjustified departure from settled law.

Second, [Metro Broadcasting](#)’s holding rested on more than its application of “intermediate scrutiny.” Indeed, I have always believed that, labels notwithstanding, the Federal Communications Commission (FCC) program we upheld in that case would have satisfied any of our various standards in affirmative-action

cases—including the one the majority fashions today. What truly distinguishes [Metro Broadcasting](#) from our other affirmative-action precedents is the distinctive goal of the federal program in that case. Instead of merely seeking to remedy past discrimination, the FCC program was intended to achieve future benefits in the form of broadcast diversity. Reliance on race as a legitimate means of achieving diversity was first endorsed by Justice Powell in [Regents of Univ. of Cal. v. Bakke](#), 438 U.S. 265, 311–319, 98 S.Ct. 2733, 2759–2763, 57 L.Ed.2d 750 (1978). Later, in [Wygant v. Jackson Bd. of Ed.](#), 476 U.S. 267, 106 S.Ct. 1842, 90 L.Ed.2d 260 (1986), I also argued that race is not always irrelevant to governmental decisionmaking, see [id.](#), at 314–315, 98 S.Ct., at 2760–61 (STEVENS, J., dissenting); in response, Justice O’CONNOR correctly noted that, although the school board had relied on an interest in providing black teachers to serve as role models for black students, that interest “should not be confused with the very different goal of promoting racial diversity among the faculty.” [Id.](#), at 288, n., 106 S.Ct., at 1854, n. She then added that, because the school board had not relied on an interest in diversity, it was not “necessary to discuss the magnitude of that interest or its applicability in this case.” [Ibid.](#)



Thus, prior to [Metro Broadcasting](#), the interest in diversity had been mentioned in a few opinions, but it is perfectly clear that the Court had not yet decided whether that interest had sufficient magnitude to justify a racial classification. [Metro Broadcasting](#), of course, answered that question in the *258 affirmative. The majority today overrules [Metro Broadcasting](#) only insofar as it is “inconsistent with [the] holding” that strict scrutiny applies to “benign” racial classifications promulgated by the Federal Government. *Ante*, at 2112. The proposition that fostering diversity may provide a sufficient interest to justify such a program is *not* inconsistent with the Court’s holding today—indeed, the question is not remotely presented in this case—and I do not take the Court’s **2128 opinion to diminish that aspect of our decision in [Metro Broadcasting](#).


The Court’s suggestion that it may be necessary in the future to overrule [Fullilove](#) in order to restore the fabric of the law, *ante*, at 2117, is even


more disingenuous than its treatment of [Metro Broadcasting](#). For the Court endorses the “strict scrutiny” standard that Justice Powell applied in [Bakke](#), see *ante*, at 2111, and acknowledges that he applied that standard in [Fullilove](#) as well, *ante*, at 2108–2109. Moreover, Chief Justice Burger also expressly concluded that the program we considered in [Fullilove](#) was valid under any of the tests articulated in [Bakke](#), which of course included Justice Powell’s. [448 U.S.](#), at 492, 100 S.Ct., at 2781–82. The Court thus adopts a standard applied in [Fullilove](#) at the same time it questions that case’s continued vitality and accuses it of departing from prior law. I continue to believe that the [Fullilove](#) case was incorrectly decided, see [id.](#), at 532–554, 100 S.Ct., at 2802–2814 (STEVENS, J., dissenting), but neither my dissent nor that filed by Justice Stewart, [id.](#), at 522–532, 100 S.Ct., at 2797–2803, contained any suggestion that the issue the Court was resolving had been decided before.¹³ As was true *259 of [Metro Broadcasting](#), the Court in [Fullilove](#) decided an important, novel, and difficult question. Providing a different answer to a similar question today cannot fairly be characterized as merely “restoring” previously settled law.

V


The Court’s holding in [Fullilove](#) surely governs the result in this case. The Public Works Employment Act of 1977 (1977 Act), 91 Stat. 116, which this Court upheld in [Fullilove](#), is different in several critical respects from the portions of the Small Business Act (SBA), 72 Stat. 384, as amended, [15 U.S.C. § 631 et seq.](#), STURAA, 101 Stat. 132, challenged in this case. Each of those differences makes the current program designed to provide assistance to DBE’s significantly less objectionable than the 1977 categorical grant of \$400 million in exchange for a 10% set-aside in public contracts to “a class of investors defined solely by racial characteristics.”

 *Fullilove*, 448 U.S., at 532, 100 S.Ct., at 2803 (STEVENS, J., dissenting). In no meaningful respect is the current scheme more objectionable than the 1977 Act. Thus, if the 1977 Act was constitutional, then so must be the SBA and STURAA. Indeed, even if my dissenting views in  *Fullilove* had prevailed, this program would be valid.

Unlike the 1977 Act, the present statutory scheme does not make race the sole criterion of eligibility for participation in the program. Race does give rise to a rebuttable presumption of social disadvantage which, at least under STURAA,¹⁴ gives rise to a second rebuttable presumption *260 of economic disadvantage. 49 CFR § 23.62 (1994). But a small business may qualify as a DBE, by showing that it is both socially and economically disadvantaged, even if it receives neither of these presumptions. 13 CFR §§ 124.105(c), 124.106 (1995);  48 CFR § 19.703 (1994); 49 CFR pt. 23, subpt. D., App. A and C (1994). Thus, the current **2129 preference is more inclusive than the 1977 Act because it does not make race a necessary qualification.

More importantly, race is not a sufficient qualification. Whereas a millionaire with a long history of financial successes, who was a member of numerous social clubs and trade associations, would have qualified for a preference under the 1977 Act merely because he was an Asian-American or an African-American, see  *Fullilove*, 448 U.S., at 537–538, 540, 543–544, and n. 16, 546, 100 S.Ct., at 2805–2806, 2806–2807, 2808–2809, and n. 16, 2809–2810 (STEVENS, J., dissenting), neither the SBA nor STURAA creates any such anomaly. The DBE program excludes members of minority races who are not, in fact, socially or economically disadvantaged.¹⁵ 13 CFR § 124.106(a)(1)(ii) (1995); 49 CFR § 23.69 (1994). The presumption of social disadvantage reflects the unfortunate fact that irrational racial prejudice—along with its lingering effects—still survives.¹⁶ The presumption of economic disadvantage *261 embodies a recognition that success in the private sector of the economy is often attributable, in part, to social skills and relationships. Unlike the 1977 set-asides, the current preference is designed to overcome the social and economic disadvantages that are often associated with racial characteristics. If, in a particular case, these disadvantages are not present,

the presumptions can be rebutted. 13 CFR §§ 124.601–124.610 (1995); 49 CFR § 23.69 (1994). The program is thus designed to allow race to play a part in the decisional process only when there is a meaningful basis for assuming its relevance. In this connection, I think it is particularly significant that the current program targets the negotiation of subcontracts between private firms. The 1977 Act applied entirely to the award of public contracts, an area of the economy in which social relationships should be irrelevant and in which proper supervision of government contracting officers should preclude any discrimination against particular bidders on account of their race. In this case, in contrast, the program seeks to overcome barriers of prejudice between private parties—specifically, between general contractors and subcontractors. The SBA and STURAA embody Congress’ recognition that such barriers may actually handicap minority firms seeking business as subcontractors from established leaders in the industry that have a history of doing business with their golfing partners. Indeed, minority subcontractors may face more obstacles than direct, intentional racial prejudice: They may face particular barriers simply because they are more likely to be new in the business and less likely to know others in the business. Given such difficulties, Congress could reasonably find that a minority subcontractor is less likely to receive favors from the entrenched businesspersons who award subcontracts only to people with whom—or with whose friends—they have an existing relationship. This program, then, if in part a remedy for past discrimination, is most importantly a *262 forward-looking response to practical problems faced by minority subcontractors.

The current program contains another forward-looking component that the 1977 set-asides did not share. Section 8(a) of the SBA provides for periodic review of the status of DBE’s,  15 U.S.C. §§ 637(a)(1)(B)–(C) (1988 ed., Supp. V); 13 CFR § 124.602(a) (1995),¹⁷ and DBE status can be challenged **2130 by a competitor at any time under any of the routes to certification. 13 CFR § 124.603 (1995); 49 CFR § 23.69 (1994). Such review prevents ineligible firms from taking part in the program solely because of their minority ownership, even when those firms were once disadvantaged but have since become successful. The emphasis on review also indicates the Administration’s anticipation that after their presumed disadvantages have been overcome,

firms will “graduate” into a status in which they will be able to compete for business, including prime contracts, on an equal basis. 13 CFR § 124.208 (1995). As with other phases of the statutory policy of encouraging the formation and growth of small business enterprises, this program is intended to facilitate entry and increase competition in the free market.

Significantly, the current program, unlike the 1977 set-aside, does not establish any requirement—numerical or otherwise—that a general contractor must hire DBE subcontractors.

The program we upheld in [Fullilove](#) required that 10% of the federal grant for every federally funded project be expended on minority business enterprises. In contrast, the current program contains no quota. Although it provides monetary incentives to general contractors to hire DBE subcontractors, it does not require them to hire DBE’s, *263 and they do not lose their contracts if they fail to do so. The importance of this incentive to general contractors (who always seek to offer the lowest bid) should not be underestimated; but the preference here is far less rigid, and thus more narrowly tailored, than the 1977 Act. Cf. [Bakke](#), 438 U.S., at 319–320, 98 S.Ct., at 2763–2764 (opinion of Powell, J.) (distinguishing between numerical set-asides and consideration of race as a factor).

Finally, the record shows a dramatic contrast between the sparse deliberations that preceded the 1977 Act, see [Fullilove](#), 448 U.S., at 549–550, 100 S.Ct., at 2811–2812 (STEVENS, J., dissenting), and the extensive hearings conducted in several Congresses before the current program was developed.¹⁸ However we might *264 evaluate the benefits and costs—both fiscal and social—of this or any other affirmative-action program, our obligation to give deference to Congress’ policy choices is much more demanding in this case than it was in [Fullilove](#). If the 1977 program of race-based set-asides satisfied the strict scrutiny dictated by Justice Powell’s vision of the Constitution—a vision the Court expressly endorses today—it must follow as night follows the day that the Court of Appeals’ judgment upholding this more carefully crafted program should be affirmed.

**2131 VI

My skeptical scrutiny of the Court’s opinion leaves me in dissent. The majority’s concept of “consistency” ignores a difference, fundamental to the idea of equal protection, between oppression and assistance. The majority’s concept of “congruence” ignores a difference, fundamental to our constitutional system, between the Federal Government and the States. And the majority’s concept of *stare decisis* ignores the force of binding precedent. I would affirm the judgment of the Court of Appeals.

Justice SOUTER, with whom Justice GINSBURG and Justice BREYER join, dissenting.

As this case worked its way through the federal courts prior to the grant of certiorari that brought it here, petitioner Adarand Constructors, Inc., was understood to have raised only one significant claim: that before a federal agency may exceed the goals adopted by Congress in implementing a race-based remedial program, the Fifth and Fourteenth Amendments require the agency to make specific findings of *265 discrimination, as under [Richmond v. J.A. Croson Co.](#), 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), sufficient to justify surpassing the congressional objective. See [16 F.3d 1537, 1544 \(CA10 1994\)](#) (“The gravamen of Adarand’s argument is that the CFLHD must make particularized findings of past discrimination to justify its race-conscious SCC program under *Croson* because the precise goals of the challenged SCC program were fashioned and specified by an agency and not by Congress”); [Adarand Constructors, Inc. v. Skinner](#), 790 F.Supp. 240, 242 (Colo.1992) (“Plaintiff’s motion for summary judgment seeks a declaratory judgment and permanent injunction against the DOT, the FHA and the CFLHD until specific findings of discrimination are made by the defendants as allegedly required by [City of Richmond v. Croson](#) ”); cf. Complaint ¶ 28, App. 20 (federal regulations violate the Fourteenth and Fifteenth Amendments by requiring “the use of racial and gender preferences in the award of federally financed highway construction contracts, without any findings of past discrimination in the

award of such contracts”).

Although the petition for certiorari added an antecedent question challenging the use, under the Fifth and Fourteenth Amendments, of any standard below strict scrutiny to judge the constitutionality of the statutes under which respondents acted, I would not have entertained that question in this case. The statutory scheme must be treated as constitutional if [Fullilove v. Klutznick](#), 448 U.S. 448, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980), is applied, and petitioner did not identify any of the factual premises on which [Fullilove](#) rested as having disappeared since that case was decided.

As the Court’s opinion explains in detail, the scheme in question provides financial incentives to general contractors to hire subcontractors who have been certified as disadvantaged business enterprises (DBE’s) on the basis of certain race-based presumptions. See generally *ante*, at 2102–2103. These statutes (or the originals, of which the current ones are reenactments) have previously been justified as providing ***266** remedies for the continuing effects of past discrimination, see, e.g., [Fullilove, supra](#), at 465–466, 100 S.Ct., at 2768 (citing legislative history describing SBA § 8(a) as remedial); *S.Rep. No. 100–4*, p. 11 (1987) U.S.Code Cong. & Admin.News 1987, pp. 66, 76 (Committee Report stating that the DBE provision of STURAA was “necessary to remedy the discrimination faced by socially and economically disadvantaged persons”), and the Government has so defended them in this case, Brief for Respondents 33. Since petitioner has not claimed the obsolescence of any particular fact on which the [Fullilove](#) Court upheld the statute, no issue has come up to us that might be resolved in a way that would render [Fullilove](#) inapposite. See, e.g., [16 F.3d](#), at 1544 (“Adarand has stipulated that section 502 of the Small Business Act ... satisfies the evidentiary requirements of [Fullilove](#) ”); Memorandum of Points and Authorities in Support of Plaintiff’s Motion for Summary Judgment in No. 90–C–1413 (D.Colo.), p. 12 ([Fullilove](#) is not applicable to the case at bar because “[f]irst and foremost, [Fullilove](#) stands for only one proposition relevant ****2132** here: the ability of the U.S. Congress, under certain limited circumstances, to adopt a race-base[d] remedy”).

In these circumstances, I agree with Justice STEVENS’s conclusion that *stare decisis* compels the application of [Fullilove](#). Although [Fullilove](#) did not reflect doctrinal consistency, its several opinions produced a result on shared grounds that petitioner does not attack: that discrimination in the construction industry had been subject to government acquiescence, with effects that remain and that may be addressed by some preferential treatment falling within the congressional power under § 5 of the Fourteenth Amendment.¹ ***267** [Fullilove](#), 448 U.S., at 477–478, 100 S.Ct., at 2774–2775 (opinion of Burger, C.J.); *id.*, at 503, 100 S.Ct., at 2787 (Powell, J., concurring); *id.*, at 520–521, 100 S.Ct., at 2796–2797 (Marshall, J., concurring in judgment). Once [Fullilove](#) is applied, as Justice STEVENS points out, it follows that the statutes in question here (which are substantially better tailored to the harm being remedied than the statute endorsed in [Fullilove](#), see *ante*, at 2128–2130 (STEVENS, J., dissenting)) pass muster under Fifth Amendment due process and Fourteenth Amendment equal protection.

The Court today, however, does not reach the application of [Fullilove](#) to the facts of this case, and on remand it will be incumbent on the Government and petitioner to address anew the facts upon which statutes like these must be judged on the Government’s remedial theory of justification: facts about the current effects of past discrimination, the necessity for a preferential remedy, and the suitability of this particular preferential scheme. Petitioner could, of course, have raised all of these issues under the standard employed by the [Fullilove](#) plurality, and without now trying to read the current congressional evidentiary record that may bear on resolving these issues I have to recognize the possibility that proof of changed facts might have rendered [Fullilove](#) ‘s conclusion obsolete as judged under the [Fullilove](#) plurality’s own standard. Be that as it may, it seems fair to ask whether the statutes will meet a different fate from what [Fullilove](#) would have decreed. The answer is, quite probably not, though of course there will be some interpretive forks in the road before the significance of strict scrutiny for congressional remedial statutes becomes entirely clear.

The result in [Fullilove](#) was controlled by the plurality for whom Chief Justice Burger spoke in announcing the judgment. Although his opinion did not adopt any label for the standard it applied, and although it was later seen as calling for less than strict scrutiny, [Metro Broadcasting, Inc. v. FCC](#), 497 U.S. 547, 564, 110 S.Ct. 2997, 3008, 111 L.Ed.2d 445 (1990), none other than Justice Powell joined the plurality opinion as comporting with his own view that a strict scrutiny standard should be applied to all injurious race-based classifications. [Fullilove, supra](#), at 495–496, 100 S.Ct., at 2783 (concurring opinion) (“Although I would place greater emphasis than THE CHIEF JUSTICE on the need to articulate judicial standards of review in conventional terms, I view his opinion announcing the judgment as substantially in accord with my views”). Chief Justice Burger’s noncategorical approach is probably best seen not as more lenient than strict scrutiny but as reflecting his conviction that the treble-tiered scrutiny structure merely embroidered on a single standard of reasonableness whenever an equal protection challenge required a balancing of justification against probable harm. See [Cleburne v. Cleburne Living Center, Inc.](#), 473 U.S. 432, 451, 105 S.Ct. 3249, 3260, 87 L.Ed.2d 313 (1985) (STEVENS, J., concurring, joined by Burger, C.J.). Indeed, the Court’s very recognition today that strict scrutiny can be compatible with the survival of a classification so reviewed demonstrates that our concepts of equal protection enjoy a greater elasticity than the standard categories might suggest. See *ante*, at 2117 (“[W]e wish to dispel the notion that strict scrutiny is ‘strict in theory, **2133 but fatal in fact.’” [Fullilove, supra](#), at 519 [100 S.Ct., at 2795–2796] (Marshall, J., concurring in judgment)); see also [Missouri v. Jenkins](#), 515 U.S., at 112, 115 S.Ct., at 2061 (O’CONNOR, J., concurring) (“But it is not true that strict scrutiny is ‘strict in theory, but fatal in fact’”).

In assessing the degree to which today’s holding portends a departure from past practice, it is also worth noting that nothing in today’s opinion implies any view of Congress’s § 5 power and the deference due its exercise that differs from the views expressed by the [Fullilove](#) plurality. The Court simply notes the observation in [Croson](#) “that the Court’s ‘treatment of an exercise of

congressional power in [Fullilove](#) cannot be dispositive here,’ because [Croson](#) ‘s facts did not implicate Congress’s broad power under § 5 of the Fourteenth Amendment,” *ante*, at 2110, and explains that there is disagreement *269 among today’s majority about the extent of the § 5 power, *ante*, at 2114–2115. There is therefore no reason to treat the opinion as affecting one way or another the views of § 5 power, described as “broad,” *ante*, at 2110, “unique,” [Fullilove](#), 448 U.S., at 500, 100 S.Ct., at 2786 (Powell, J., concurring), and “unlike [that of] any state or political subdivision,” [Croson](#), 488 U.S., at 490, 109 S.Ct., at 720 (opinion of O’CONNOR, J.). See also [Jenkins, post](#), at 113, 115 S.Ct., at 2061 (O’CONNOR, J., concurring) (“Congress ... enjoys ‘discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,’” [Croson](#), 488 U.S., at 490, 109 S.Ct., at 720 (quoting [Katzenbach v. Morgan](#), 384 U.S., at 651 [86 S.Ct., at 1723])”). Thus, today’s decision should leave § 5 exactly where it is as the source of an interest of the National Government sufficiently important to satisfy the corresponding requirement of the strict scrutiny test.

Finally, I should say that I do not understand that today’s decision will necessarily have any effect on the resolution of an issue that was just as pertinent under [Fullilove](#) ‘s unlabeled standard as it is under the standard of strict scrutiny now adopted by the Court. The Court has long accepted the view that constitutional authority to remedy past discrimination is not limited to the power to forbid its continuation, but extends to eliminating those effects that would otherwise persist and skew the operation of public systems even in the absence of current intent to practice any discrimination. See [Albemarle Paper Co. v. Moody](#), 422 U.S. 405, 418, 95 S.Ct. 2362, 2372, 45 L.Ed.2d 280 (1975) (“Where racial discrimination is concerned, ‘the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future’”), quoting [Louisiana v. United States](#), 380 U.S. 145, 154, 85 S.Ct. 817, 822, 13 L.Ed.2d 709 (1965). This is so whether the remedial authority is exercised by a court, see [ibid.](#); [Green v. School Bd. of New Kent Cty.](#), 391 U.S. 430, 437, 88

S.Ct. 1689, 1693–1694, 20 L.Ed.2d 716 (1968), the Congress, see [Fullilove, supra](#), 448 U.S., at 502, 100 S.Ct., at 2787 (Powell, J., concurring), or some other legislature, see [*270 Croson, supra](#), 488 U.S., at 491–492, 109 S.Ct., at 720–721 (opinion of O’CONNOR, J.). Indeed, a majority of the Court today reiterates that there are circumstances in which Government may, consistently with the Constitution, adopt programs aimed at remedying the effects of past invidious discrimination. See, e.g., *ante*, at 2113–2114, 2117–2118 (opinion of O’CONNOR, J.); *ante*, at 2120 (STEVENSON, J., with whom GINSBURG, J., joins, dissenting); *post*, at 2135, 2136 (GINSBURG, J., with whom BREYER, J. joins, dissenting); [Jenkins, 515 U.S., at 112, 115 S.Ct., at 2061](#) (O’CONNOR, J., concurring) (noting the critical difference “between unconstitutional discrimination and narrowly tailored remedial programs that legislatures may enact to further the compelling governmental interest in redressing the effects of past discrimination”).

When the extirpation of lingering discriminatory effects is thought to require a catch-up mechanism, like the racially preferential inducement under the statutes considered here, the result may be that some members of the historically favored race are hurt by that remedial mechanism, however innocent they may be of any personal responsibility for any discriminatory conduct. When this ****2134** price is considered reasonable, it is in part because it is a price to be paid only temporarily; if the justification for the preference is eliminating the effects of a past practice, the assumption is that the effects will themselves recede into the past, becoming attenuated and finally disappearing. Thus, Justice Powell wrote in his concurring opinion in [Fullilove](#) that the “temporary nature of this remedy ensures that a race-conscious program will not last longer than the discriminatory effects it is designed to eliminate.” [448 U.S., at 513, 100 S.Ct., at 2792–2793](#); *ante*, at 2117–2118 (opinion of the Court).

Surely the transition from the [Fullilove](#) plurality view (in which Justice Powell joined) to today’s strict scrutiny (which will presumably be applied as Justice Powell employed it) does not signal a change in the standard by which the burden of a remedial racial preference is to be judged as reasonable or not at any given time. If in

the District Court [Adarand *271](#) had chosen to press a challenge to the reasonableness of the burden of these statutes,² more than a decade after [Fullilove](#) had examined such a burden, I doubt that the claim would have fared any differently from the way it will now be treated on remand from this Court.

Justice [GINSBURG](#), with whom Justice [BREYER](#) joins, dissenting.

For the reasons stated by Justice SOUTER, and in view of the attention the political branches are currently giving the matter of affirmative action, I see no compelling cause for the intervention the Court has made in this case. I further agree with Justice STEVENSON that, in this area, large deference is owed by the Judiciary to “Congress’ institutional competence and constitutional authority to overcome historic racial subjugation.” *Ante*, at 2125 (STEVENSON, J., dissenting); see *ante*, at 2126.¹ I write separately to underscore not the differences the several opinions in this case display, but the considerable field of agreement—the common understandings and concerns—revealed in opinions that together speak for a majority of the Court.

***272 I**

The statutes and regulations at issue, as the Court indicates, were adopted by the political branches in response to an “unfortunate reality”: “[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country.” *Ante*, at 2117 (lead opinion). The United States suffers from those lingering effects because, for most of our Nation’s history, the idea that “we are just one race,” *ante*, at 2119 (SCALIA, J., concurring in part and concurring in judgment), was not embraced. For generations, our lawmakers and judges were unprepared to say that there is in this land no superior race, no race inferior to any other. In [Plessy v. Ferguson, 163 U.S. 537, 16 S.Ct.](#)

1138, 41 L.Ed. 256 (1896), not only did this Court endorse the oppressive practice of race segregation, but even Justice Harlan, the advocate of a “color-blind” Constitution, stated:

“The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.” *Id.*, at 559, 16 S.Ct., at 1146 (dissenting opinion).

Not until *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), which held unconstitutional Virginia’s ban on interracial marriages, could one say with security that the Constitution and this Court would abide no measure “designed to maintain White Supremacy.” *Id.*, at 11, 87 S.Ct., at 1823.²

*273 The divisions in this difficult case should not obscure the Court’s recognition of the persistence of racial inequality and a majority’s acknowledgment of Congress’ authority to act affirmatively, not only to end discrimination, but also to counteract discrimination’s lingering effects. *Ante*, at 2117 (lead opinion); see also *ante*, at 2133 (SOUTER, J., dissenting). Those effects, reflective of a system of racial caste only recently ended, are evident in our workplaces, markets, and neighborhoods. Job applicants with identical resumes, qualifications, and interview styles still experience different receptions, depending on their race.³ White and African-American consumers still encounter different deals.⁴ People of color looking for housing still face discriminatory treatment by landlords, real estate agents, and mortgage lenders.⁵

*274 Minority entrepreneurs sometimes fail to gain contracts though they are the low bidders, and they are sometimes refused work even after winning contracts.⁶ Bias both conscious and unconscious, reflecting traditional and unexamined habits of thought,⁷ keeps up barriers that must come down if equal opportunity and nondiscrimination are ever genuinely to become this country’s law and practice.


**2136 Given this history and its practical consequences, Congress surely can conclude that a carefully designed affirmative action program may help to realize, finally, the “equal protection of the laws” the Fourteenth Amendment has promised since 1868.⁸

*275 II

The lead opinion uses one term, “strict scrutiny,” to describe the standard of judicial review for all governmental classifications by race. *Ante*, at 2117–2118. But that opinion’s elaboration strongly suggests that the strict standard announced is indeed “fatal” for classifications burdening groups that have suffered discrimination in our society. That seems to me, and, I believe, to the Court, the enduring lesson one should draw from *Korematsu v. United States*, 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944); for in that case, scrutiny the Court described as “most rigid,” *id.*, at 216, 65 S.Ct., at 194, nonetheless yielded a pass for an odious, gravely injurious racial classification. See *ante*, at 2106 (lead opinion). A *Korematsu*-type classification, as I read the opinions in this case, will never again survive scrutiny: Such a classification, history and precedent instruct, properly ranks as prohibited.

For a classification made to hasten the day when “we are just one race,” *ante*, at 2119 (SCALIA, J., concurring in part and concurring in judgment), however, the lead opinion has dispelled the notion that “strict scrutiny” is “fatal in fact.” *Ante*, at 2117 (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 519, 100 S.Ct. 2758, 2795–2796, 65 L.Ed.2d 902 (1980) (Marshall, J., concurring in judgment)). Properly, a majority of the Court calls for review that is searching, in order to ferret out classifications in reality malign, but masquerading as benign. See *ante*, at 2113–2114 (lead opinion). The Court’s once lax review of sex-based classifications demonstrates the need for such suspicion. See, e.g., *Hoyt v. Florida*, 368 U.S. 57, 60, 82 S.Ct. 159, 161–162, 7 L.Ed.2d 118 (1961) (upholding women’s “privilege” of automatic exemption from jury service); *Goesaert v. Cleary*, 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163 (1948) (upholding Michigan law barring women from employment as bartenders); see also Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U.L.Rev. 675 (1971). Today’s decision thus

usefully reiterates that the purpose of strict scrutiny “is precisely to distinguish legitimate from *276 illegitimate uses of race in governmental decisionmaking,” *ante*, at 2113 (lead opinion), “to ‘differentiate between’ permissible and impermissible governmental use of race,” *ibid.*, to distinguish “‘between a “No Trespassing” sign and a welcome mat,’ ” *ante*, at 2114.

Close review also is in order for this further reason. As Justice SOUTER points out, *ante*, at 2133–2134 (dissenting opinion), and as this very case shows, some members of the historically favored race can be hurt by catchup mechanisms designed to cope with the lingering effects of entrenched racial subjugation. Court review can ensure that preferences are not so large as to trammel unduly upon the opportunities of others or interfere too harshly with legitimate expectations of persons in once-preferred groups. See, *e.g.*,  [Bridgeport](#)

[Guardians, Inc. v. Bridgeport Civil Service Comm’n](#), 482 F.2d 1333, 1341 (CA2 1973).





* * *

While I would not disturb the programs challenged in this case, and would leave their improvement to the political branches, I see today’s decision as one that allows our precedent to evolve, still to be informed by and responsive to changing conditions.

All Citations

515 U.S. 200, 115 S.Ct. 2097, 132 L.Ed.2d 158, 67 Fair Empl.Prac.Cas. (BNA) 1828, 66 Empl. Prac. Dec. P 43,556, 78 Rad. Reg. 2d (P & F) 357, 63 USLW 4523, 40 Cont.Cas.Fed. (CCH) P 76,756

Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See  [United States v. Detroit Lumber Co.](#), 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.
- * Justices Roberts, Murphy, and Jackson filed vigorous dissents; Justice Murphy argued that the challenged order “falls into the ugly abyss of racism.”  [Korematsu](#), 323 U.S., at 233, 65 S.Ct., at 202. Congress has recently agreed with the dissenters’ position, and has attempted to make amends. See Pub.L. 100–383, § 2(a), 102 Stat. 903 (“The Congress recognizes that ... a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II”).
- * It should be obvious that every racial classification helps, in a narrow sense, some races and hurts others. As to the races benefited, the classification could surely be called “benign.” Accordingly, whether a law relying upon racial taxonomy is “benign” or “malign,” *post*, at 2136 (GINSBURG, J., dissenting); see also, *post*, at 2122 (STEVENS, J., dissenting) (addressing differences between “invidious” and “benign” discrimination), either turns on “‘whose ox is gored,’ ”  [Regents of Univ. of Cal. v. Bakke](#), 438 U.S. 265, 295, n. 35, 98 S.Ct. 2733, 2751, n. 35, 57 L.Ed.2d 750 (1978) (Powell, J.) (quoting, A. Bickel, *The Morality of Consent* 133 (1975)), or on distinctions found only in the eye of the beholder.
- 1 As Justice GINSBURG observes, *post*, at 2136, the majority’s “flexible” approach to “strict scrutiny” may well take into account differences between benign and invidious programs. The majority specifically notes that strict scrutiny can accommodate “‘relevant differences,’ ” *ante*, at 2113; surely the intent of a government actor and the effects of a program are relevant to its constitutionality. See  [Missouri v. Jenkins](#), 515 U.S. 70, 112, 115 S.Ct. 2038, 2060–2061, 132 L.Ed.2d 63 (1995) (O’CONNOR, J., concurring) (“[T]ime and again, we have recognized the ample authority legislatures possess to combat racial injustice.... It is only by applying strict scrutiny that we can distinguish between unconstitutional discrimination and narrowly tailored remedial programs that legislatures may enact to further the compelling governmental interest in redressing the effects of past discrimination”). Even if this is so, however, I think it is unfortunate that the majority insists on applying the label “strict scrutiny” to benign race-based programs. That label has usually been understood to spell the death of any governmental action to which a court may apply it. The Court suggests today that “strict scrutiny” means something different—something less strict—when applied to benign racial classifications. Although I agree that benign programs deserve different treatment than invidious programs, there is a danger that the fatal language of “strict

scrutiny” will skew the analysis and place well-crafted benign programs at unnecessary risk.

- 2 These were, of course, neither the sole nor the most shameful burdens the Government imposed on Japanese-Americans during that War. They were, however, the only such burdens this Court had occasion to address in [Hirabayashi](#) and [Korematsu](#). See [Korematsu](#), 323 U.S., at 223, 65 S.Ct., at 197 (“Regardless of the true nature of the assembly and relocation centers ... we are dealing specifically with nothing but an exclusion order”).
- 3 See [Morton v. Mancari](#), 417 U.S. 535, 541, 94 S.Ct. 2474, 2478, 41 L.Ed.2d 290 (1974). To be eligible for the preference in 1974, an individual had to “ ‘be one fourth or more degree Indian blood and be a member of a Federally-recognized tribe.’ ” [Id.](#), at 553, n. 24, 94 S.Ct., at 2484, quoting 44 BIAM 335, 3.1 (1972). We concluded that the classification was not “racial” because it did not encompass all Native Americans. [417 U.S., at 553–554, 94 S.Ct., at 2484–2485](#). In upholding it, we relied in part on the plenary power of Congress to legislate on behalf of Indian tribes. [Id.](#), at 551–552, 94 S.Ct., at 2483–2484. In this case Respondents rely, in part, on the fact that not all members of the preferred minority groups are eligible for the preference, and on the special power to legislate on behalf of minorities granted to Congress by § 5 of the Fourteenth Amendment.
- 4 For example, in [Richmond v. J.A. Croson Co.](#), 488 U.S. 469, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989), a majority of the members of the city council that enacted the race-based set-aside were of the same race as its beneficiaries.
- 5 In his concurrence, Justice THOMAS argues that the most significant cost associated with an affirmative-action program is its adverse stigmatic effect on its intended beneficiaries. *Ante*, at 2119. Although I agree that this cost may be more significant than many people realize, see [Fullilove v. Klutznick](#), 448 U.S. 448, 545, 100 S.Ct. 2758, 2809, 65 L.Ed.2d 902 (1980) (STEVENS, J., dissenting), I do not think it applies to the facts of this case. First, this is not an argument that petitioner Adarand, a white-owned business, has standing to advance. No beneficiaries of the specific program under attack today have challenged its constitutionality—perhaps because they do not find the preferences stigmatizing, or perhaps because their ability to opt out of the program provides them all the relief they would need. Second, even if the petitioner in this case were a minority-owned business challenging the stigmatizing effect of this program, I would not find Justice THOMAS’ extreme proposition—that there is a moral and constitutional equivalence between an attempt to subjugate and an attempt to redress the effects of a caste system, *ante*, at 2119—at all persuasive. It is one thing to question the wisdom of affirmative-action programs: There are many responsible arguments against them, including the one based upon stigma, that Congress might find persuasive when it decides whether to enact or retain race-based preferences. It is another thing altogether to equate the many well-meaning and intelligent lawmakers and their constituents—whether members of majority or minority races—who have supported affirmative action over the years, to segregationists and bigots. Finally, although Justice THOMAS is more concerned about the potential effects of these programs than the intent of those who enacted them (a proposition at odds with this Court’s jurisprudence, see [Washington v. Davis](#), 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), but not without a strong element of common sense, see [id.](#), at 252–256, 96 S.Ct., at 2053–2055 (STEVENS, J., concurring); [id.](#), at 256–270, 96 S.Ct., at 2055–2062 (BRENNAN, J., dissenting)), I am not persuaded that the psychological damage brought on by affirmative action is as severe as that engendered by racial subordination. That, in any event, is a judgment the political branches can be trusted to make. In enacting affirmative-action programs, a legislature intends to remove obstacles that have unfairly placed individuals of equal qualifications at a competitive disadvantage. See [Fullilove](#), 448 U.S., at 521, 100 S.Ct., at 2796–2797 (Marshall, J., concurring in judgment). I do not believe such action, whether wise or unwise, deserves such an invidious label as “racial paternalism,” *ante*, at 2119 (opinion of THOMAS, J.). If the legislature is persuaded that its program is doing more harm than good to the individuals it is designed to benefit, then we can expect the legislature to remedy the problem. Significantly, this is not true of a government action based on invidious discrimination.
- 6 As I noted in [Wygant](#):
“There is ... a critical difference between a decision to *exclude* a member of a minority race because of his or her skin color and a decision to *include* more members of the minority in a school faculty for that reason.

“The exclusionary decision rests on the false premise that differences in race, or in the color of a person’s skin, reflect real differences that are relevant to a person’s right to share in the blessings of a free society. As noted, that premise is ‘utterly irrational,’ [Cleburne v. Cleburne Living Center](#), 473 U.S. 432, 452, 105 S.Ct. 3249, 3261, 87 L.Ed.2d 313 (1985), and repugnant to the principles of a free and democratic society. Nevertheless, the fact that persons of different races do, indeed have differently colored skin, may give rise to a belief that there is some significant difference between such persons. The inclusion of minority teachers in the educational process inevitably tends to dispel that illusion whereas their exclusion could only tend to foster it. The inclusionary decision is consistent with the principle that all men are created equal; the exclusionary decision is at war with that principle. One decision accords with the Equal Protection Clause of the Fourteenth Amendment; the other does not. Thus, consideration of whether the consciousness of race is exclusionary or inclusionary plainly distinguishes the Board’s valid purpose in this case from a race-conscious decision that would reinforce assumptions of inequality.” [476 U.S.](#), at 316–317, 106 S.Ct., at 1869 (dissenting opinion).

7 Despite the majority’s reliance on [Korematsu v. United States](#), 323 U.S. 214, 65 S.Ct. 193, 89 L.Ed. 194 (1944), *ante*, at 2106, that case does not stand for the proposition that federal remedial programs are subject to strict scrutiny. Instead, [Korematsu](#) specifies that “all legal restrictions *which curtail the civil rights of a single racial group* are immediately suspect.” [323 U.S.](#), at 216, 65 S.Ct., at 194, quoted *ante*, at 2106 (emphasis added). The programs at issue in this case (as in most affirmative-action cases) do not “curtail the civil rights of a single racial group”; they benefit certain racial groups and impose an indirect burden on the majority.

8 We have rejected this proposition outside of the affirmative-action context as well. In [Hampton v. Mow Sun Wong](#), 426 U.S. 88, 100, 96 S.Ct. 1895, 1903–1904, 48 L.Ed.2d 495 (1976), we held: “The federal sovereign, like the States, must govern impartially. The concept of equal justice under law is served by the Fifth Amendment’s guarantee of due process, as well as by the Equal Protection Clause of the Fourteenth Amendment. Although both Amendments require the same type of analysis, see [Buckley v. Valeo](#), 424 U.S. 1, 93, 96 S.Ct. 612, 670, 46 L.Ed.2d 659 [(1976)], the Court of Appeals correctly stated that the two protections are not always coextensive. Not only does the language of the two Amendments differ, but more importantly, there may be overriding national interests which justify selective federal legislation that would be unacceptable for an individual State. On the other hand, when a federal rule is applicable to only a limited territory, such as the District of Columbia, or an insular possession, and when there is no special national interest involved, the Due Process Clause has been construed as having the same significance as the Equal Protection Clause.”

9 The funding for the preferences challenged in this case comes from the Surface Transportation and Uniform Relocation Assistance Act of 1987 (STURAA), 101 Stat. 132, in which Congress has granted funds to the States in exchange for a commitment to foster subcontracting by disadvantaged business enterprises, or “DBE’s.” STURAA is also the source of funding for DBE preferences in federal highway contracting. Approximately 98% of STURAA’s funding is allocated to the States. Brief for Respondents 38, n. 34. Moreover, under STURAA States are empowered to certify businesses as “disadvantaged” for purposes of receiving subcontracting preferences in both state and federal contracts. STURAA [§ 106\(c\)\(4\)](#), [101 Stat.](#) 146. In this case, Adarand has sued only the federal officials responsible for implementing federal highway contracting policy; it has not directly challenged DBE preferences granted in state contracts funded by STURAA. It is not entirely clear, then, whether the majority’s “congruence” rationale would apply to federally regulated state contracts, which may conceivably be within the majority’s view of Congress’ § 5 authority even if the federal contracts are not. See [Metro Broadcasting](#), 497 U.S., at 603–604, 110 S.Ct., at 3029–3030 (O’CONNOR, J., dissenting). As I read the majority’s opinion, however, it draws no distinctions between direct federal preferences and federal preferences achieved through subsidies to States. The extent to which STURAA intertwines elements of direct federal regulations with elements of federal conditions on grants to the States would make such a distinction difficult to sustain.

10 Because Congress has acted with respect to the States in enacting STURAA, we need not revisit today the difficult question of § 5’s application to pure federal regulation of individuals.

11 We have read § 5 as a positive grant of authority to Congress, not just to punish violations, but also to define and

expand the scope of the Equal Protection Clause. [Katzenbach v. Morgan](#), 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966). In [Katzenbach](#), this meant that Congress under § 5 could require the States to allow non-English-speaking citizens to vote, even if denying such citizens a vote would not have been an independent violation of § 1. [Id.](#), at 648–651, 86 S.Ct., at 1722–1724. Congress, then, can expand the coverage of § 1 by exercising its power under § 5 when it acts to foster equality. Congress has done just that here; it has decided that granting certain preferences to minorities best serves the goals of equal protection.

12 Our skeptical observer might also notice that Justice O’CONNOR’s explanation for departing from settled precedent is joined only by Justice KENNEDY. *Ante*, at 2100. Three Members of the majority thus provide no explanation whatsoever for their unwillingness to adhere to the doctrine of *stare decisis*.

13 Of course, Justice Stewart believed that his view, disapproving of racial classifications of any kind, was consistent with this Court’s precedents. See *ante*, at 2116, citing [448 U.S.](#), at 523–526, 100 S.Ct., at 2797–2799. But he did not claim that the question whether the Federal Government could engage in race-conscious affirmative action had been decided before [Fullilove](#). The fact that a Justice dissents from an opinion means that he disagrees with the result; it does not usually mean that he believes the decision so departs from the fabric of the law that its reasoning ought to be repudiated at the next opportunity. Much less does a dissent bind or authorize a later majority to reject a precedent with which it disagrees.

14 STURAA accords a rebuttable presumption of both social and economic disadvantage to members of racial minority groups. 49 CFR § 23.62 (1994). In contrast, § 8(a) of the SBA accords a presumption only of social disadvantage, [13 CFR § 124.105\(b\) \(1995\)](#); the applicant has the burden of demonstrating economic disadvantage, *id.*, [§ 124.106](#). Finally, § 8(d) of the SBA accords at least a presumption of social disadvantage, but it is ambiguous as to whether economic disadvantage is presumed or must be shown. See [15 U.S.C. § 637\(d\)\(3\)](#) (1988 ed. and Supp. V); [13 CFR § 124.601 \(1995\)](#).

15 The Government apparently takes this exclusion seriously. See [Autek Systems Corp. v. United States](#), 835 F.Supp. 13 (DC 1993) (upholding Small Business Administration decision that minority business owner’s personal income disqualified him from DBE status under § 8(a) program), *aff’d*, [43 F.3d 712 \(CA DC 1994\)](#).

16 “The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it.” *Ante*, at 2117.
“Our findings clearly state that groups such as black Americans, Hispanic Americans, and Native Americans, have been and continue to be discriminated against and that this discrimination has led to the social disadvantagement of persons identified by society as members of those groups.” 124 Cong.Rec. 34097 (1978)

17 The Department of Transportation strongly urges States to institute periodic review of businesses certified as DBE’s under STURAA, 49 CFR pt. 23, subpt. D, App. A (1994), but it does not mandate such review. Respondents point us to no provisions for review of § 8(d) certification, although such review may be derivative for those businesses that receive § 8(d) certification as a result of § 8(a) or STURAA certification.

18 Respondents point us to the following legislative history: H.R. 5612, To amend the Small Business Act to Extend the current SBA 8(a) Pilot Program: Hearing on H.R. 5612 before the Senate Select Committee on Small Business, 96th Cong., 2d Sess. (1980); Small and Minority Business in the Decade of the 1980’s (Part 1): Hearings before the House Committee on Small Business, 97th Cong., 1st Sess. (1981); Minority Business and Its Contribution to the U.S. Economy: Hearing before the Senate Committee on Small Business, 97th Cong., 2d Sess. (1982); Federal Contracting Opportunities for Minority and Women–Owned Businesses—An Examination of the 8(d) Subcontracting Program: Hearings before the Senate Committee on Small Business, 98th Cong., 1st Sess. (1983); Women Entrepreneurs—Their Success and Problems: Hearing before the Senate Committee on Small Business, 98th Cong., 2d Sess. (1984); State of Hispanic Small Business in America: Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise, and General Small Business Problems of the House Committee on Small Business, 99th Cong., 1st Sess. (1985); Minority Enterprise and General Small Business Problems: Hearing before the Subcommittee on SBA and SBIC Authority, Minority Enterprise, and General Small Business Problems of the House Committee on Small Business, 99th Cong., 2d Sess. (1986); Disadvantaged Business Set–Asides in

Transportation Construction Projects: Hearings before the Subcommittee on Procurement, Innovation, and Minority Enterprise Development of the House Committee on Small Business, 100th Cong., 2d Sess. (1988); Barriers to Full Minority Participation in Federally Funded Highway Construction Projects: Hearing before a Subcommittee of the House Committee on Government Operations, 100th Cong., 2d Sess. (1988); Surety Bonds and Minority Contractors: Hearing before the Subcommittee on Commerce, Consumer Protection, and Competitiveness of the House Committee on Energy and Commerce, 100th Cong., 2d Sess. (1988); Small Business Problems: Hearings before the House Committee on Small Business, 100th Cong., 1st Sess. (1987). See Brief for Respondents 9–10, n. 9.

1 If the statutes are within the § 5 power, they are just as enforceable when the National Government makes a construction contract directly as when it funnels construction money through the States. In any event, as Justice STEVENS has noted, see *ante*, at 2122–2123, n. 5, 2123, n. 6, it is not clear whether the current challenge implicates only Fifth Amendment due process or Fourteenth Amendment equal protection as well.

2 I say “press a challenge” because petitioner’s Memorandum in Support of Summary Judgment did include an argument challenging the reasonableness of the duration of the statutory scheme; but the durational claim was not, so far as I am aware, stated elsewhere, and, in any event, was not the gravamen of the complaint.

1 On congressional authority to enforce the equal protection principle, see, e.g., [Heart of Atlanta Motel, Inc. v. United States](#), 379 U.S. 241, 286, 85 S.Ct. 348, 373, 13 L.Ed.2d 258 (1964) (Douglas, J., concurring) (recognizing Congress’ authority, under § 5 of the Fourteenth Amendment, to “pu[t] an end to all obstructionist strategies and allo[w] every person—whatever his race, creed, or color—to patronize all places of public accommodation without discrimination whether he travels interstate or intrastate.”); [id.](#), at 291, 293, 85 S.Ct., at 375, 377 (Goldberg, J., concurring) (“primary purpose of the Civil Rights Act of 1964 ... is the vindication of human dignity”; “Congress clearly had authority under both § 5 of the Fourteenth Amendment and the Commerce Clause” to enact the law); G. Gunther, *Constitutional Law* 147–151 (12th ed. 1991).

2 The Court, in 1955 and 1956, refused to rule on the constitutionality of antimiscegenation laws; it twice declined to accept appeals from the decree on which the Virginia Supreme Court of Appeals relied in [Loving](#). See [Naim v. Naim](#), 197 Va. 80, 87 S.E.2d 749, vacated and remanded, 350 U.S. 891, 76 S.Ct. 151, 100 L.Ed. 784 (1955), reinstated and aff’d, 197 Va. 734, 90 S.E.2d 849, appeal dism’d, 350 U.S. 985, 76 S.Ct. 472, 100 L.Ed. 852 (1956). [Naim](#) expressed the state court’s view of the legislative purpose served by the Virginia law: “to preserve the racial integrity of [Virginia’s] citizens”; to prevent “the corruption of blood,” “a mongrel breed of citizens,” and “the obliteration of racial pride.” [197 Va.](#), at 90, 87 S.E.2d, at 756.

3 See, e.g., H. Cross, G. Kennedy, J. Mell, & W. Zimmermann, *Employer Hiring Practices: Differential Treatment of Hispanic and Anglo Job Seekers* 42 (Urban Institute Report 90–4, 1990) (e.g., Anglo applicants sent out by investigators received 52% more job offers than matched Hispanics); M. Turner, M. Fix, & R. Struyk, *Opportunities Denied, Opportunities Diminished: Racial Discrimination in Hiring* xi (Urban Institute Report 91–9, 1991) (“In one out of five audits, the white applicant was able to advance farther through the hiring process than his black counterpart. In one out of eight audits, the white was offered a job although his equally qualified black partner was not. In contrast, black auditors advanced farther than their white counterparts only 7 percent of the time, and received job offers while their white partners did not in 5 percent of the audits.”).

4 See, e.g., Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 *Harv.L.Rev.* 817, 821–822, 819, 828 (1991) (“blacks and women simply cannot buy the same car for the same price as can white men using identical bargaining strategies”; the final offers given white female testers reflected 40 percent higher markups than those given white male testers; final offer markups for black male testers were twice as high, and for black female testers three times as high as for white male testers).



5 See, e.g., *A Common Destiny: Blacks and American Society* 50 (G. Jaynes & R. Williams eds. 1989) (“[I]n many metropolitan areas one-quarter to one-half of all [housing] inquiries by blacks are met by clearly discriminatory responses.”); M. Turner, R. Struyk, & J. Yinger, U.S. Dept. of Housing and Urban Development, *Housing Discrimination Study: Synthesis* i-vii (Sept. 1991) (1989 audit study of housing searches in 25 metropolitan areas; over half of African–American and Hispanic testers seeking to rent or buy experienced some form of unfavorable treatment compared to paired white testers); Leahy, *Are Racial Factors Important for the Allocation of Mortgage*


Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)

115 S.Ct. 2097, 67 Fair Empl.Prac.Cas. (BNA) 1828, 66 Empl. Prac. Dec. P 43,556...

Money?, 44 Am.J.Econ. & Soc. 185, 193 (1985) (controlling for socioeconomic factors, and concluding that “even when neighborhoods appear to be similar on every major mortgage-lending criterion except race, mortgage-lending outcomes are still unequal”).


6 See, e.g.,  [Associated General Contractors v. Coalition for Economic Equity](#), 950 F.2d 1401, 1415 (CA9 1991) (detailing examples in San Francisco).

7 Cf.  [Wygant v. Jackson Bd. of Ed.](#), 476 U.S. 267, 318, 106 S.Ct. 1842, 1870, 90 L.Ed.2d 260 (1986) (STEVENS, J., dissenting);  [Califano v. Goldfarb](#), 430 U.S. 199, 222–223, 97 S.Ct. 1021, 1034–1035, 51 L.Ed.2d 270 (1977) (STEVENS, J., concurring in judgment).

8 On the differences between laws designed to benefit a historically disfavored group and laws designed to burden such a group, see, e.g., Carter, When Victims Happen To Be Black, [97 Yale L.J. 420, 433–434 \(1988\)](#) (“[W]hatever the source of racism, to count it the same as racialism, to say that two centuries of struggle for the most basic of civil rights have been mostly about freedom from racial categorization rather than freedom from racial oppression, is to trivialize the lives and deaths of those who have suffered under racism. To pretend ... that the issue presented in  [Bakke](#) was the same as the issue in *Brown* is to pretend that history never happened and that the present doesn’t exist.”).

Petillion



RM 63

 KeyCite Yellow Flag - Negative Treatment
Declined to Extend by [American Humanist Association v. Greenville County School District](#), 4th Cir.(S.C.), June 21, 2016
129 S.Ct. 1142
Supreme Court of the United States

Priscilla SUMMERS, et al.,
Petitioners,
v.
EARTH ISLAND INSTITUTE et al.

No. 07-463.
|
Argued Oct. 8, 2008.
|
Decided March 3, 2009.

Synopsis

Background: Environmental organizations brought action to enjoin United States Forest Service from applying its regulations to exempt salvage sale of timber on 238 acres of fire-damaged federal land from the notice, comment, and appeal process set forth in the Forest Service Decisionmaking and Appeals Reform Act. The United States District Court for the Eastern District of California, James K. Singleton, Chief Judge,  [376 F.Supp.2d 994](#), invalidated five regulations and issued nationwide injunction against their application. The parties appealed. The United States Court of Appeals for the Ninth Circuit, [Schroeder](#), Chief Judge,  [490 F.3d 687](#), affirmed and remanded. Certiorari was granted.

Holdings: The Supreme Court, Justice [Scalia](#), held that:

[1] organizations did not retain standing to challenge regulations absent live dispute over their concrete application;

[2] organizations did not have standing based on member's purported intention to visit unnamed National Forests in the future;

[3] Supreme Court would not consider affidavits filed with District Court after it had entered its

judgment; and

[4] organizations did not have standing based on alleged procedural injury.

Reversed in part and affirmed in part.

Justice [Kennedy](#) filed concurring opinion.

Justice [Breyer](#) filed dissenting opinion in which Justices [Stevens](#), [Souter](#), and [Ginsburg](#) joined.



West Headnotes (19)

[1] **Federal Courts**  Injury, harm, causation, and redress

170BFederal Courts
170BIII Case or Controversy Requirement
170BIII(A) In General
170Bk2105 Injury, harm, causation, and redress
(Formerly 170Bk12.1)

In limiting the judicial power to “Cases” and “Controversies,” Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. U.S.C.A. Const. Art. 3, § 2, cl. 1.

105 Cases that cite this headnote

[2] **Constitutional Law**  Encroachment on Legislature
Constitutional Law  Encroachment on Executive

92Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2470 In general
92Constitutional Law

92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)3 Encroachment on Executive
92k2540 In general

Except when necessary in the execution of their function of redressing or preventing actual or imminently threatened injury to persons caused by private or official violation of law, courts have no charter to review and revise legislative and executive action; this limitation is founded in concern about the proper, and properly limited, role of the courts in a democratic society. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[87 Cases that cite this headnote](#)

[3] **Federal Civil Procedure** → In general; injury or interest

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest

The doctrine of standing requires federal courts to satisfy themselves that the plaintiff has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[261 Cases that cite this headnote](#)

[4] **Federal Civil Procedure** → In general; injury or interest

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest

Plaintiff bears the burden of showing that he has Article III standing for each type

of relief sought. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[264 Cases that cite this headnote](#)

[5] **Injunction** → Persons entitled to apply; standing

212 Injunction
212V Actions and Proceedings
212V(A) In General
212k1505 Persons entitled to apply; standing (Formerly 212k114(2))

To have Article III standing to seek injunctive relief, a plaintiff must show that: (1) he is under threat of suffering injury in fact that is concrete and particularized; (2) the threat is actual and imminent, not conjectural or hypothetical; (3) the threat is fairly traceable to the challenged action of the defendant; and (4) it is likely that a favorable judicial decision will prevent or redress the injury. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[978 Cases that cite this headnote](#)

[6] **Constitutional Law** → Encroachment on Legislature
Constitutional Law → Encroachment on Executive
Federal Civil Procedure → In general; injury or interest

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)2 Encroachment on Legislature
92k2470 In general
92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)3 Encroachment on Executive
92k2540 In general
170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General

170Ak103.2 In general; injury or interest

The Article III standing requirement assures that there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party; where that need does not exist, allowing courts to oversee legislative or executive action would significantly alter the allocation of power away from a democratic form of government. U.S.C.A. Const. Art. 3, § 2, cl. 1.

40 Cases that cite this headnote

[7] **Federal Civil Procedure** → Rights of third parties or public

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.4 Rights of third parties or public

When the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily substantially more difficult to establish. U.S.C.A. Const. Art. 3, § 2, cl. 1.

38 Cases that cite this headnote

[8] **Associations** → Right of Action; Persons Entitled to Sue; Standing

41 Associations
41VI Actions and Judicial Proceedings
41VI(B) Right of Action; Persons Entitled to Sue; Standing
41k271 In general
(Formerly 41k20(1))

Organizations can assert the standing of their members. U.S.C.A. Const. Art. 3, § 2, cl. 1.

93 Cases that cite this headnote

[9] **Environmental Law** → Cognizable interests and injuries, in general
Woods and Forests → Forest reservations, preserves, or parks

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek649 Persons Entitled to Sue or Seek Review; Standing
149Ek651 Cognizable interests and injuries, in general
411 Woods and Forests
411k8 Forest reservations, preserves, or parks

While generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice. U.S.C.A. Const. Art. 3, § 2, cl. 1.

90 Cases that cite this headnote

[10] **Woods and Forests** → Forest reservations, preserves, or parks

411 Woods and Forests
411k8 Forest reservations, preserves, or parks

Although environmental organization member's threatened injury from United States Forest Service's application of its regulations to exempt salvage sale of timber on 238 acres of fire-damaged federal land from the notice, comment, and appeal process set forth in the Forest Service Decisionmaking and Appeals Reform Act was sufficient to establish Article III standing for organization to bring action to enjoin Forest Service from applying its regulations to exempt this sale, organization did not retain standing to challenge the regulations once the member's injury was remedied when the parties settled their dispute concerning the particular sale; there was no longer a

concrete application of the regulations that threatened imminent harm to the member's interests in viewing the flora and fauna in the area of the salvage sale. U.S.C.A. Const. Art. 3, § 2, cl. 1; 16 U.S.C.A. § 1612 note; 36 C.F.R. §§ 215.4(a), 215.12(f).

74 Cases that cite this headnote

[11] **Environmental Law** Organizations, associations, and other groups
Woods and Forests Forest reservations, preserves, or parks

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek649 Persons Entitled to Sue or Seek Review; Standing
149Ek652 Organizations, associations, and other groups
411 Woods and Forests
411k8 Forest reservations, preserves, or parks

Environmental organizations did not have Article III standing to bring action to enjoin United States Forest Service from applying its regulations exempting projects categorically excluded from documentation in an environmental impact statement (EIS) or environmental assessment (EA) from the notice, comment, and appeal process set forth in the Forest Service Decisionmaking and Appeals Reform Act based on assertions of organization member that he had suffered injury in the past from development on Forest Service land, and that he had visited many National Forests and planned to visit several unnamed National Forests in the future; member's asserted past injury was not tied to application of the regulations, and member failed to allege that any particular timber sale or other project claimed to be unlawfully subject to the regulations would impede a specific and concrete plan of his to enjoy the National Forests. U.S.C.A. Const. Art. 3, § 2, cl. 1; 16 U.S.C.A. § 1612 note; 36 C.F.R.

§§ 215.4(a), 215.12(f).

59 Cases that cite this headnote

[12] **Environmental Law** Organizations, associations, and other groups
Woods and Forests Forest reservations, preserves, or parks

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek649 Persons Entitled to Sue or Seek Review; Standing
149Ek652 Organizations, associations, and other groups
411 Woods and Forests
411k8 Forest reservations, preserves, or parks

Supreme Court would not consider affidavits submitted by members of environmental organizations to the district court, for purpose of establishing organizations' Article III standing to bring action to enjoin United States Forest Service from applying its regulations exempting projects categorically excluded from documentation in an environmental impact statement (EIS) or environmental assessment (EA) from the notice, comment, and appeal process set forth in the Forest Service Decisionmaking and Appeals Reform Act, where affidavits were submitted after district court had issued nationwide injunction against application of the regulations and after the Government had filed its notice of appeal. U.S.C.A. Const. Art. 3, § 2, cl. 1; 16 U.S.C.A. § 1612 note; 36 C.F.R. §§ 215.4(a), 215.12(f).

27 Cases that cite this headnote

[13] **Environmental Law** Organizations, associations, and other groups
Woods and Forests Forest reservations, preserves, or parks

149EEnvironmental Law
149EXIIIJudicial Review or Intervention
149Ek649Persons Entitled to Sue or Seek
Review; Standing
149Ek652Organizations, associations, and
other groups
411Woods and Forests
411k8Forest reservations, preserves, or parks

Environmental organizations did not have Article III standing to bring action to enjoin United States Forest Service from applying its regulations exempting projects categorically excluded from documentation in an environmental impact statement (EIS) or environmental assessment (EA) from the notice, comment, and appeal process set forth in the Forest Service Decisionmaking and Appeals Reform Act, on grounds that they had suffered procedural injury, namely that they had been denied the ability to file comments on some Forest Service actions and would continue to be so denied; organizations had no concrete interest affected by the regulations. U.S.C.A. Const. Art. 3, § 2, cl. 1; 16 U.S.C.A. § 1612 note; 36 C.F.R. §§ 215.4(a), 215.12(f).

[21 Cases that cite this headnote](#)

[14] **Federal Civil Procedure** In general; injury or interest

170AFederal Civil Procedure
170AIIParties
170AII(A)In General
170Ak103.1Standing in General
170Ak103.2In general; injury or interest

Deprivation of a procedural right without some concrete interest that is affected by the deprivation, a procedural right in vacuo, is insufficient to create Article III standing. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[274 Cases that cite this headnote](#)

[15] **Federal Civil Procedure** In general; injury or interest

170AFederal Civil Procedure
170AIIParties
170AII(A)In General
170Ak103.1Standing in General
170Ak103.2In general; injury or interest

Only a person who has been accorded a procedural right to protect his concrete interests can have standing to assert that right without meeting all the normal standards for redressability and immediacy. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[209 Cases that cite this headnote](#)

[16] **Federal Civil Procedure** In general; injury or interest

170AFederal Civil Procedure
170AIIParties
170AII(A)In General
170Ak103.1Standing in General
170Ak103.2In general; injury or interest

Unlike redressability, the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute. U.S.C.A. Const. Art. 3, § 2, cl. 1.

[136 Cases that cite this headnote](#)

[17] **Federal Civil Procedure** Rights of third parties or public
Federal Courts Injury, harm, causation, and redress

170AFederal Civil Procedure
170AIIParties
170AII(A)In General
170Ak103.1Standing in General
170Ak103.4Rights of third parties or public

170B Federal Courts
170BIII Case or Controversy Requirement
170BIII(A) In General
170Bk2105 Injury, harm, causation, and redress
(Formerly 170Bk12.1)

It would exceed Article III's limitations if, at the behest of Congress and in the absence of any showing of concrete injury, the courts were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws. [U.S.C.A. Const. Art. 3, § 2, cl. 1.](#)

[11 Cases that cite this headnote](#)

[18] **Federal Civil Procedure**  In general; injury or interest

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest

To establish Article III standing, the party bringing suit must show that the action injures him in a concrete and personal way. [U.S.C.A. Const. Art. 3, § 2, cl. 1.](#)

[71 Cases that cite this headnote](#)

[19] **Federal Civil Procedure**  In general; injury or interest

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest



The court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties. [U.S.C.A. Const. Art. 3, § 2, cl. 1.](#)

[75 Cases that cite this headnote](#)

****1145 Syllabus***

After the U.S. Forest Service approved the Burnt Ridge Project, a salvage sale of timber on 238 acres of fire-damaged federal land, respondent environmentalist organizations filed suit to enjoin the Service from applying its regulations exempting such small sales from the notice, comment, and appeal process it uses for more significant land management decisions, and to challenge other regulations that did not apply to Burnt Ridge. The District Court granted a preliminary injunction against ****1146** the sale, and the parties then settled their dispute as to Burnt Ridge. Although concluding that the sale was no longer at issue, and despite the Government's argument that respondents therefore lacked standing to challenge the regulations, the court nevertheless proceeded to adjudicate the merits of their challenges, invalidating several regulations, including the notice and comment and the appeal provisions. Among its rulings, the Ninth Circuit affirmed the determination that the latter regulations, which were applicable to Burnt Ridge, were contrary to law, but held that challenges to other regulations not at issue in that project were not ripe for adjudication.

Held: Respondents lack standing to challenge the regulations still at issue absent a live dispute over a concrete application of those regulations. Pp. 1148 – 1153.

(a) In limiting the judicial power to “Cases” and “Controversies,” Article III restricts it to redressing or preventing actual or imminently threatened injury to persons caused by violation of law. See, e.g.,  [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 559–560, 112 S.Ct. 2130, 119 L.Ed.2d 351. The standing doctrine reflects this fundamental limitation, requiring that “the plaintiff ... ‘alleg[e] such a personal stake in the outcome of the controversy’ as to warrant *his* invocation of federal-court jurisdiction,”  [Warth v. Seldin](#), 422 U.S. 490, 498–499, 95 S.Ct. 2197, 45 L.Ed.2d 343. Here, respondents can demonstrate standing only if application of the regulations will affect *them* in such a manner. Pp. 1148 – 1149.

(b) As organizations, respondents can assert their

members' standing. Harm to their members' recreational, or even their mere esthetic, interests in the national forests will suffice to establish the requisite concrete and particularized injury, see [Sierra Club v. Morton](#), 405 U.S. 727, 734–736, 92 S.Ct. 1361, 31 L.Ed.2d 636, but generalized harm to the forest or the environment will not alone suffice. Respondents have identified no application of the invalidated regulations that threatens imminent and concrete harm to their members' interests. Respondents' argument that they have standing based on Burnt Ridge fails because, after voluntarily settling the portion of their lawsuit relevant to Burnt Ridge, respondents and their members are no longer under threat of injury from that project. The remaining affidavit submitted in support of standing fails to establish that any member has concrete plans to visit a site where the challenged regulations are being applied in a manner that will harm that member's concrete interests. Additional affidavits purporting to establish standing were submitted after judgment had already been entered and notice of appeal filed, and are thus untimely. Pp. 1149 – 1151.

(c) Respondents' argument that they have standing because they have suffered procedural injury—*i.e.*, they have been denied the ability to file comments on some Forest Service actions and will continue to be so denied—fails because such a deprivation without some concrete interest affected thereby is insufficient to create Article III standing. See, *e.g.*, *Defenders of Wildlife*, *supra*, at 572 , n. 7, 112 S.Ct. 2130. Pp. 1151 – 1152.

(d) The dissent's objections are addressed and rejected. Pp. 1152 – 1153.

[490 F.3d 687](#), reversed in part and affirmed in part.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, and ALITO, JJ., joined. KENNEDY, J., filed a concurring opinion, *post*, p. 1153. BREYER, J., filed a dissenting opinion, in which STEVENS, **1147 SOUTER, and GINSBURG, JJ., joined, *post*, pp. 1153 – 1158.

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Opinion

Justice SCALIA delivered the opinion of the Court.

*490 Respondents are a group of organizations dedicated to protecting the environment. (We will refer to them collectively as “Earth Island.”) They seek to prevent the United States Forest Service from enforcing regulations that exempt small fire-rehabilitation and timber-salvage projects from the notice, comment, and appeal process used by the Forest Service for more significant land management decisions. We must determine whether respondents have standing to challenge the regulations in the absence of a live dispute over a concrete application of those regulations.

I

In 1992, Congress enacted the Forest Service Decisionmaking and Appeals Reform Act (Appeals Reform Act or Act), [Pub.L. 102–381](#), Tit. III, § 322, 106 Stat. 1419, note following [16 U.S.C. § 1612](#). Among other things, this required the Forest Service to establish a notice, comment, and appeal process for “proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans developed under the Forest and Rangeland Renewable Resources Planning Act of 1974.” *Ibid*.

The Forest Service's regulations implementing the Act provided that certain of its procedures would not be applied to projects that the Service considered categorically excluded from the requirement to file an environmental impact statement (EIS) or environmental assessment (EA). 36 CFR §§ 215.4(a) (notice and comment), 215.12(f) (appeal) (2008). Later amendments to the Forest Service's manual of implementing procedures, adopted by rule after notice and comment, provided that fire-rehabilitation activities on areas of less than 4,200 acres, and salvage-timber sales of 250 acres or less, did not cause a significant environmental impact and thus would be categorically exempt from the requirement to file an EIS or EA. 68 Fed.Reg. 33824 (2003) (Forest Service Handbook (FSH) 1909.15, ch. 30, § 31.2(11)); 68 Fed.Reg. 44607 (FSH 1909.15, ch. 30, § 31.2(13)). This had the effect of excluding these projects from the notice, comment, and appeal process.

In the summer of 2002, fire burned a significant area of the Sequoia National Forest. In September 2003, the Service issued a decision memo approving the Burnt Ridge Project, a salvage sale of timber on 238 acres damaged by that fire. Pursuant to its categorical exclusion of salvage sales of less than 250 acres, the Forest Service did not provide notice in a form consistent with the Appeals Reform Act, did not provide a period of public comment, and did not make an appeal process available.

In December 2003, respondents filed a complaint in the Eastern District of California, challenging the failure of the Forest Service to apply to the Burnt Ridge Project § 215.4(a) of its regulations implementing the Appeals Reform Act (requiring prior notice and comment), and § 215.12(f) of the regulations (setting forth an appeal procedure). The complaint also challenged six other Forest Service regulations implementing the Act that were not applied to the Burnt Ridge Project. They are irrelevant to this appeal.

The District Court granted a preliminary injunction against the Burnt Ridge salvage-timber sale. Soon thereafter, the parties settled their dispute over the Burnt Ridge Project and the District Court concluded that "the Burnt Ridge timber sale is not at issue in this case." *Earth Island Inst. v. Pengilly*, 376 F.Supp.2d 994, 999 (E.D.Cal.2005).

The Government argued that, with the Burnt Ridge dispute settled, and with no other project before the court in which respondents were threatened with injury in fact, respondents *492 lacked standing to challenge the regulations; and that absent a concrete dispute over a particular project a challenge to the regulations would not be ripe. The District Court proceeded, however, to adjudicate the merits of Earth Island's challenges. It invalidated five of the regulations (including §§ 215.4(a) and 215.12(f)), *id.*, at 1011, and entered a nationwide injunction against their application, *Earth Island Inst. v. Ruthenbeck*, No. CIV F-03-6386 JKS, 2005 WL 5280466, *2 (Sept. 20, 2005).

The Ninth Circuit held that Earth Island's challenges to regulations not at issue in the Burnt Ridge Project were not ripe for adjudication because there was "not a sufficient 'case or controversy'" before the court to sustain a facial challenge. *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 696 (2007) (amended opinion). It affirmed, however, the District Court's determination that §§ 215.4(a) and 215.12(f), which were applicable to the Burnt Ridge Project, were contrary to law, and upheld the nationwide injunction against their application.

The Government sought review of the question whether Earth Island could challenge the regulations at issue in the Burnt Ridge Project, and if so whether a nationwide injunction was appropriate relief. We granted certiorari, 552 U.S. 1162, 128 S.Ct. 1118, 169 L.Ed.2d 846 (2008).

II

[1] [2] In limiting the judicial power to "Cases" and "Controversies," Article III of the Constitution restricts it to the traditional role of Anglo-American courts, which is to redress or prevent actual or imminently threatened injury to persons caused by private or official violation of law. Except when necessary in the execution of that function, courts have no charter to review and revise legislative and executive action. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555,

559–560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992); [Los Angeles v. Lyons](#), 461 U.S. 95, 111–112, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). This limitation “is founded in concern about the proper—and *493 properly limited—role of the courts in a democratic society.” [Warth v. Seldin](#), 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). See [United States v. Richardson](#), 418 U.S. 166, 179, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974).

****1149** [3] [4] [5] [6] The doctrine of standing is one of several doctrines that reflect this fundamental limitation. It requires federal courts to satisfy themselves that “the plaintiff has ‘alleged such a personal stake in the outcome of the controversy’ as to warrant *his* invocation of federal-court jurisdiction.” [Warth](#), *supra*, at 498–499, 95 S.Ct. 2197. He bears the burden of showing that he has standing for each type of relief sought. See [Lyons](#), *supra*, at 105, 103 S.Ct. 1660. To seek injunctive relief, a plaintiff must show that he is under threat of suffering “injury in fact” that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury. [Friends of Earth, Inc. v. Laidlaw Environmental Services \(TOC\), Inc.](#), 528 U.S. 167, 180–181, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). This requirement assures that “there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party,” [Schlesinger v. Reservists Comm. to Stop the War](#), 418 U.S. 208, 221, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974). Where that need does not exist, allowing courts to oversee legislative or executive action “would significantly alter the allocation of power ... away from a democratic form of government,” [Richardson](#), *supra*, at 188, 94 S.Ct. 2940 (Powell, J., concurring).

[7] The regulations under challenge here neither require nor forbid any action on the part of respondents. The standards and procedures that they prescribe for Forest Service appeals govern only the conduct of Forest Service officials engaged in project planning. “[W]hen the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily ‘substantially more

difficult’ to establish.” [Defenders of *494 Wildlife](#), *supra*, at 562, 112 S.Ct. 2130. Here, respondents can demonstrate standing only if application of the regulations by the Government will affect *them* in the manner described above.

[8] [9] It is common ground that the respondent organizations can assert the standing of their members. To establish the concrete and particularized injury that standing requires, respondents point to their members’ recreational interests in the national forests. While generalized harm to the forest or the environment will not alone support standing, if that harm in fact affects the recreational or even the mere esthetic interests of the plaintiff, that will suffice. [Sierra Club v. Morton](#), 405 U.S. 727, 734–736, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).

[10] Affidavits submitted to the District Court alleged that organization member Ara Marderosian had repeatedly visited the Burnt Ridge site, that he had imminent plans to do so again, and that his interests in viewing the flora and fauna of the area would be harmed if the Burnt Ridge Project went forward without incorporation of the ideas he would have suggested if the Forest Service had provided him an opportunity to comment. The Government concedes this was sufficient to establish Article III standing with respect to Burnt Ridge. Brief for Petitioners 28. Marderosian’s threatened injury with regard to that project was originally one of the bases for the present suit. After the District Court had issued a preliminary injunction, however, the parties settled their differences on that score. Marderosian’s injury in fact with regard to that project has been remedied, and it is, as the District Court pronounced, “not at issue in this case.” [376 F.Supp.2d](#), at 999. We know of no precedent for the proposition that when a ****1150** plaintiff has sued to challenge the lawfulness of certain action or threatened action but has settled that suit, he retains standing to challenge the basis for that action (here, the regulation in the abstract), apart from any concrete application that threatens imminent harm to his interests. Such a holding would fly in the face of Article III’s injury-in-fact requirement. See [Lyons](#), *supra*, at 111, 103 S.Ct. 1660.

***495** [11] [12] Respondents have identified no other application of the invalidated regulations that threatens imminent and concrete harm to the

interests of their members. The only other affidavit relied on was that of Jim Bensman.* He asserted, first, that he had suffered injury in the past from development on Forest Service land. That does not suffice for several reasons: because it was not tied to application of the challenged regulations, because it does not identify any particular site, and because it relates to past injury rather than imminent future injury that is sought to be enjoined.

Bensman’s affidavit further asserts that he has visited many national forests and plans to visit several unnamed national forests in the future. Respondents describe this as a mere failure to “provide the name of each timber sale that affected [Bensman’s] interests,” Brief for Respondents 44. It is much more (or much less) than that. It is a failure to allege that *any* particular timber sale or other project claimed to be unlawfully subject to the regulations will impede a specific and concrete plan of Bensman’s to enjoy the national forests. The national forests occupy more than 190 million acres, an area larger than Texas. See Meet the Forest Service, <http://www.fs.fed.us/aboutus/meetfs.shtml> (as visited Feb. 27, 2009, and available in Clerk of Court’s case file). There may be a chance, but is hardly a likelihood, that Bensman’s wanderings will bring him to a parcel about to be affected by a project unlawfully subject to the regulations. Indeed, without further specification it is impossible to tell *which* projects are (in respondents’ view) unlawfully subject to the regulations. The allegations here present a weaker likelihood of concrete harm than that which we found insufficient in [Lyons](#), 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675, where a plaintiff who alleged *496 that he had been injured by an improper police chokehold sought injunctive relief barring use of the hold in the future. We said it was “no more than conjecture” that Lyons would be subjected to that chokehold upon a later encounter. [Id.](#), at 108, 103 S.Ct. 1660. Here we are asked to assume not only that Bensman will stumble across a project tract unlawfully subject to the regulations, but also that the tract is about to be developed by the Forest Service in a way that harms his recreational interests, and that he would have commented on the project but for the regulation. Accepting an intention to visit the national forests as adequate to confer standing to challenge any Government action affecting any portion of those forests would be tantamount to

eliminating the requirement of concrete, particularized injury in fact.

The Bensman affidavit does refer specifically to a series of projects in the Allegheny National Forest that are subject to the challenged regulations. It does not assert, however, any firm intention to visit their locations, saying only that Bensman “‘want[s] to’ ” go there. Brief for Petitioners 6. This vague desire to return is **1151 insufficient to satisfy the requirement of imminent injury: “Such ‘some day’ intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the ‘actual or imminent’ injury that our cases require.” [Defenders of Wildlife](#), 504 U.S., at 564, 112 S.Ct. 2130.

[13] [14] [15] Respondents argue that they have standing to bring their challenge because they have suffered procedural injury, namely, that they have been denied the ability to file comments on some Forest Service actions and will continue to be so denied. But deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing. Only a “person who has been accorded a procedural right to protect *his concrete interests* can assert that right without meeting all the normal standards for redressability and immediacy.” [Id.](#), at 572, n. 7, 112 S.Ct. 2130 (emphasis added). *497 Respondents alleged such injury in their challenge to the Burnt Ridge Project, claiming that but for the allegedly unlawful abridged procedures they would have been able to oppose the project that threatened to impinge on their concrete plans to observe nature in that specific area. But Burnt Ridge is now off the table.

[16] [17] [18] It makes no difference that the procedural right has been accorded by Congress. That can loosen the strictures of the redressability prong of our standing inquiry—so that standing existed with regard to the Burnt Ridge Project, for example, despite the possibility that Earth Island’s allegedly guaranteed right to comment would not be successful in persuading the Forest Service to avoid impairment of Earth Island’s concrete interests. See *ibid.* Unlike redressability, however, the requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute.

“[I]t would exceed [Article III’s] limitations if, at the behest of Congress and in the absence of any showing of concrete injury, we were to entertain citizen suits to vindicate the public’s nonconcrete interest in the proper administration of the laws. ... [T]he party bringing suit must show that the action injures him in a concrete and personal way.” [Id.](#), at 580–581[, 112 S.Ct. 2130] (KENNEDY, J., concurring in part and concurring in judgment).

III

The dissent proposes a hitherto unheard-of test for organizational standing: whether, accepting the organization’s self-description of the activities of its members, there is a statistical probability that some of those members are threatened with concrete injury. Since, for example, the Sierra Club asserts in its pleadings that it has more than “‘700,000 members nationwide, including thousands of members in California’ who ‘use and enjoy the Sequoia National Forest,’ ” *post*, at 1154 (opinion of BREYER, J.), it is probable (according to the dissent) that some (unidentified) members have planned to *498 visit some (unidentified) small parcels affected by the Forest Service’s procedures and will suffer (unidentified) concrete harm as a result. This novel approach to the law of organizational standing would make a mockery of our prior cases, which have required plaintiff-organizations to make specific allegations establishing that at least one identified member had suffered or would suffer harm. In [Defenders of Wildlife](#), *supra*, at 563, 112 S.Ct. 2130, we held that the organization lacked standing because it failed to “submit affidavits ... showing, through specific facts ... that one or more of [its] members would ... be ‘directly’ affected” **1152 by the allegedly illegal activity. [Morton](#), 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636, involved the same Sierra Club that is a party in the present case, and a project in the Sequoia National Forest. The principal difference from the present case is that the challenged project was truly massive, involving the construction of motels, restaurants, swimming pools, parking lots, and other structures on 80 acres of the Forest, plus ski lifts, ski trails, and a 20-mile access highway. We did not engage in an

assessment of statistical probabilities that one of the Sierra Club’s members would be adversely affected, but held that the Sierra Club lacked standing. We said:

“The Sierra Club failed to allege that it or its members would be affected in any of their activities or pastimes by the Disney development. Nowhere in the pleadings or affidavits did the Club state that its members use Mineral King for any purpose, much less that they use it in any way that would be significantly affected by the proposed actions of the respondents.” [Id.](#), at 735, 92 S.Ct. 1361.

And in [FW/PBS, Inc. v. Dallas](#), 493 U.S. 215, 235, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), we noted that the affidavit provided by the city to establish standing would be insufficient because it did not name the individuals who were harmed by the challenged license-revocation program. This requirement of naming the affected members has never been dispensed with in light of *499 statistical probabilities, but only where *all* the members of the organization are affected by the challenged activity. See, e.g., [NAACP v. Alabama ex rel. Patterson](#), 357 U.S. 449, 459, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) (all organization members affected by release of membership lists).

[19] A major problem with the dissent’s approach is that it accepts the organizations’ self-descriptions of their membership, on the simple ground that “no one denies” them, *post*, at 1156. But it is well established that the court has an independent obligation to assure that standing exists, regardless of whether it is challenged by any of the parties. [Bender v. Williamsport Area School Dist.](#), 475 U.S. 534, 541, 106 S.Ct. 1326, 89 L.Ed.2d 501 (1986). Without individual affidavits, how is the court to assure itself that the Sierra Club, for example, has “‘thousands of members’ ” who “‘use and enjoy the Sequoia National Forest’ ”? And, because to establish standing plaintiffs must show that they “use the area affected by the challenged activity and not an area roughly in the vicinity of” a project site, [Defenders of Wildlife](#), 504 U.S., at 566, 112 S.Ct. 2130 (internal quotation marks omitted), how is the court to assure itself that some of these members plan to make use of the specific sites upon which projects may take place? Or that these same individuals will find their recreation burdened by the Forest

Service’s use of the challenged procedures? While it is certainly possible—perhaps even likely—that one individual will meet all of these criteria, that speculation does not suffice. “Standing,” we have said, “is not ‘an ingenious academic exercise in the conceivable’ ... [but] requires ... a factual showing of perceptible harm.” *Ibid.* In part because of the difficulty of verifying the facts upon which such probabilistic standing depends, the Court has required plaintiffs claiming an organizational standing to identify members who have suffered the requisite harm—surely not a difficult task here, when so many thousands are alleged to have been harmed.

The dissent would have us replace the requirement of “ ‘imminent’ ” harm, which it acknowledges our cases establish, *500 see *post*, at 1155, with the requirement of “ ‘a realistic threat’ that recurrence of the challenged activity would cause [the plaintiff] **1153 harm ‘in the reasonably near future,’ ” *post*, at 1156. That language is taken, of course, from an opinion that did *not* find standing, so the seeming expansiveness of the test made not a bit of difference. The problem for the dissent is that the timely affidavits no more meet that requirement than they meet the usual formulation. They fail to establish that the affiants’ members will *ever* visit one of the small parcels at issue.

The dissent insists, however, that we should also have considered the late-filed affidavits. It invokes [Federal Rule of Civil Procedure 15\(d\)](#) (West 2008 rev. ed.), which says that “[t]he court may permit supplementation even though the original pleading is defective in stating a claim or defense.” So also does Rule 21 permit joinder of parties “at any time.” But the latter no more permits joinder of parties, than the former permits the supplementation of the record, in the circumstances here: *after the trial is over, judgment has been entered, and a notice of appeal has been filed*. The dissent cites no instance in which “supplementation” has been permitted to resurrect and alter the outcome in a case that has gone to judgment, and indeed after notice of appeal had been filed. If [Rule 15\(b\)](#) allows additional facts to be inserted into the record after appeal has been filed, we are at the threshold of a brave new world of trial practice in which Rule 60 has been swallowed whole by [Rule 15\(b\)](#).

* * *

Since we have resolved this case on the ground of standing, we need not reach the Government’s contention that plaintiffs have not demonstrated that the regulations are ripe for review under the Administrative Procedure Act. We likewise do not reach the question whether, if respondents *501 prevailed, a nationwide injunction would be appropriate. And we do not disturb the dismissal of respondents’ challenge to the remaining regulations, which has not been appealed.

The judgment of the Court of Appeals is reversed in part and affirmed in part.

It is so ordered.

Justice [KENNEDY](#), concurring.

I join in full the opinion of the Court. As the opinion explains, “deprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing.” *Ante*, at 1151. The procedural injury must “impair a separate concrete interest.” [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 572, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

This case would present different considerations if Congress had sought to provide redress for a concrete injury “giv[ing] rise to a case or controversy where none existed before.” [Id.](#), at 580, 112 S.Ct. 2130 (KENNEDY, J., concurring in part and concurring in judgment). Nothing in the statute at issue here, however, indicates Congress intended to identify or confer some interest separate and apart from a procedural right.

Justice [BREYER](#), with whom Justice [STEVENS](#), Justice [SOUTER](#), and Justice [GINSBURG](#) join, dissenting.



The Court holds that the Sierra Club and its members (along with other environmental organizations) do not suffer any “ ‘concrete injury’ ” when the Forest Service sells timber for logging on many thousands of small (250-acre or less) woodland parcels without following legally required procedures—procedures which, if followed, could lead the Service to cancel or to modify the sales. *Ante*, at 1151. Nothing in ****1154** the record or the law justifies this counterintuitive conclusion.

***502 I**

A

The plaintiffs, respondents in this case, are five environmental organizations. The Earth Island Institute, a California organization, has over 15,000 members in the United States, over 3,000 of whom “use and enjoy the National Forests of California for recreational, educational, aesthetic, spiritual and other purposes.” Corrected Complaint for Declaratory and Injunctive Relief in Case No. CIV-F-03-630 REC DLB (ED Cal.), ¶ 8, App. 31 (hereinafter Complaint). The Sequoia ForestKeeper, a small organization, has “100 plus” members who “use the forests of the Southern Sierra Nevada for activities such as hiking, bird and animal watching, aesthetic enjoyment, quiet contemplation, fishing and scientific study.” *Id.*, ¶ 9, at 32. Heartwood, Inc., located in Illinois and Indiana, is a coalition of environmental organizations with “members” who “continually use the National Forests for the purposes of ecological health, recreation, aesthetic enjoyment, and other purposes.” *Id.*, ¶ 10, at 33. The Center for Biological Diversity, located in Arizona, California, New Mexico, and Washington, has over 5,000 members who “use Forest Service lands,” and who are “dedicated to the preservation, protection, and restoration of biological diversity, native species and ecosystems in the Western United States and elsewhere.” *Id.*, ¶ 11, at 33. The Sierra Club has more than “700,000 members

nationwide, including thousands of members in California” who “use and enjoy the Sequoia National Forest” for “outdoor recreation and scientific study of various kinds, including nature study, bird-watching, photography, fishing, canoeing, hunting, backpacking, camping, solitude, and a variety of other activities.” *Id.*, ¶ 12, at 34.

These five organizations point to a federal law that says the Forest Service “shall establish a notice and comment process,” along with a procedure for filing administrative ***503** “appeals,” for “proposed actions ... concerning projects and activities implementing land and resource management plans ...” § 322, 106 Stat. 1419, note following **16 U.S.C. § 1612**. They add that the Service has exempted from “notice, comment, and appeal” processes its decisions that allow, among other things, salvage-timber sales on burned forest lands of less than 250 acres in size.  **36 CFR §§ 215.4(a),  215.12(f) (2008)**; see also **68 Fed.Reg. 44607–44608 (2003)** (describing projects exempted). And they claim that the Service’s refusal to provide notice, comment, and appeal procedures violates the statute. Complaint ¶¶ 105–106, App. 61.

B

The majority says that the plaintiffs lack *constitutional* standing to raise this claim. It holds that the dispute between the five environmental groups and the Forest Service consists simply of an abstract challenge; it does not amount to the concrete “Cas[e]” or “Controvers[y]” that the Constitution grants federal courts the power to resolve. Art. III, § 2, cl. 1. I cannot agree that this is so.

To understand the *constitutional* issue that the majority decides, it may prove helpful to imagine that Congress enacted a *statutory* provision that expressly permitted environmental groups like respondents here to bring cases just like the present one, provided (1) that the group has members who have used salvage-timber parcels in the past and are likely to do so in the future, and (2) that the group’s members have opposed Forest Service

timber sales ****1155** in the past (using notice, comment, and appeal procedures to do so) and will likely use those procedures to oppose salvage-timber sales in the future. The majority cannot, and does not, claim that such a statute would be unconstitutional. See [Massachusetts v. EPA](#), 549 U.S. 497, 516–518, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007); [Sierra Club v. Morton](#), 405 U.S. 727, 734–738, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). How then can it find the present case constitutionally unauthorized?

***504** I believe the majority answers this question as follows: It recognizes, as this Court has held, that a plaintiff has constitutional standing if the plaintiff demonstrates (1) an “injury in fact,” (2) that is “fairly traceable” to the defendant’s “challenged action,” and which (3) a “favorable [judicial] decision” will likely prevent or redress.

[Friends of Earth, Inc. v. Laidlaw Environmental Services \(TOC\), Inc.](#), 528 U.S. 167, 180–181, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000). The majority does not deny that the plaintiffs meet the latter two requirements. It focuses only upon the first, the presence of “actual,” as opposed to “conjectural or hypothetical,” injury. [Id.](#), at 180, 120 S.Ct. 693. In doing so, it properly agrees that the “organizations” here can “assert the standing of their members.” *Ante*, at 1149. It points out that injuries to the “members’ recreational” or even “mere esthetic interests ... will suffice.” *Ibid*. It does not claim that the *procedural* nature of the plaintiffs’ claim makes the difference here, for it says only that “deprivation of a procedural right *without some concrete interest*” thereby affected, *i.e.*, “a procedural right *in vacuo*,” would prove “insufficient to create Article III standing.” *Ante*, at 1151 (emphasis added); see also [EPA, supra](#), at 517–518, 127 S.Ct. 1438. The majority assumes, as do I, that these unlawful Forest Service procedures will lead to substantive actions, namely, the sales of salvage timber on burned lands, that might not take place if the proper procedures were followed. But the majority then finds that the plaintiffs have not sufficiently demonstrated that these salvage-timber sales cause the plaintiffs an actual injury, that is, harm to the recreational, esthetic, or other environmental interests of organization members. *Ante*, at 1149 – 1150. To put the matter in terms of my hypothetical statute, the majority holds that the plaintiff organizations, while showing that they have members who have used salvage-timber sale parcels in the past (*i.e.*, parcels

that the Service does not subject to the notice, comment, and appeal procedures required by law), have failed to show that they have members likely to use such parcels in the future.

***505 II**


How can the majority credibly claim that salvage-timber sales, and similar projects, are unlikely to harm the asserted interests of the members of these environmental groups? The majority apparently does so in part by arguing that the Forest Service actions are not “imminent”—a requirement more appropriately considered in the context of ripeness or the necessity of injunctive

relief. See [Ohio Forestry Assn., Inc. v. Sierra Club](#), 523 U.S. 726, 734, 118 S.Ct. 1665, 140 L.Ed.2d 921 (1998). I concede that the Court has sometimes used the word “imminent” in the context of constitutional standing. But it has done so primarily to emphasize that the harm in question—the harm that was not “imminent”—was merely “conjectural” or “hypothetical” or otherwise speculative. [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal quotation marks omitted). Where the Court has directly focused upon the matter, *i.e.*, where, as here, a plaintiff has *already* been subject to the injury it ****1156** wishes to challenge, the Court has asked whether there is a *realistic likelihood* that the challenged future conduct will, in fact, recur and harm the plaintiff.

That is what the Court said in [Los Angeles v. Lyons](#), 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), a case involving a plaintiff’s attempt to enjoin police use of chokeholds. The Court wrote that the plaintiff, who had been subject to the unlawful chokehold in the past, would have had standing had he shown “a *realistic threat*” that reoccurrence of the challenged activity would cause him harm “in the reasonably near future.”

[Id.](#), at 107, n. 7, 108, 103 S.Ct. 1660 (emphasis added). Precedent nowhere suggests that the “realistic threat” standard contains identification requirements more stringent than the word “realistic” implies. See [Blum v. Yaretsky](#), 457 U.S. 991, 1000, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982).

How could the Court impose a stricter criterion? Would courts deny *standing* to a holder of a future interest in property who complains that a life tenant's waste of the land will almost inevitably hurt the value of his interest—though he will have no personal interest for several years into the future? *506 Would courts deny *standing* to a landowner who complains that a neighbor's upstream dam constitutes a nuisance—even if the harm to his downstream property (while bound to occur) will not occur for several years? Would courts deny *standing* to an injured person seeking a protection order from future realistic (but nongeographically specific) threats of further attacks?


To the contrary, a threat of future harm may be realistic even where the plaintiff cannot specify precise times, dates, and GPS coordinates. Thus, we recently held that Massachusetts has *standing* to complain of a procedural failing, namely, the Environmental Protection Agency's failure properly to determine whether to restrict carbon dioxide emissions, even though that failing would create Massachusetts-based harm which (though likely to occur) might not occur for several decades.  *EPA*, 549 U.S., at 522–523, 127 S.Ct. 1438.


The Forest Service admits that it intends to conduct thousands of further salvage-timber sales and other projects exempted under the challenged regulations “in the reasonably near future.” See Defendants' Motion to Clarify and Amend Judgment in No. CIV–F–03–6386–JKS–DLB (ED Cal.), pp. 13–14. How then can the Court deny that the plaintiffs have shown a “realistic” threat that the Forest Service will continue to authorize (without the procedures claimed necessary) salvage-timber sales, and other Forest Service projects, that adversely affect the recreational, esthetic, and environmental interests of the plaintiffs' members?

Consider: Respondents allege, and the Government has conceded, that the Forest Service took wrongful actions (such as selling salvage timber) “thousands” of times in the two years prior to suit. *Id.*, at 6; see also *id.*, Exh. 2, Decl. of Gloria Manning, Associate Deputy Chief for National Forest System ¶ 6, p. 3 (identifying 3,377 “proposed decisions,” “[a]s of July 1, 2005,” that would be excluded from notice, comment, and appeal procedures). The Complaint alleges, and no

one denies, that the organizations, the Sierra Club for *507 example, have hundreds of thousands of members who use forests regularly across the Nation for recreational, scientific, esthetic, and environmental purposes. Complaint ¶¶ 8–12, App. 31–34. The Complaint further alleges, and no one denies, that these organizations (and their members), believing that actions such as salvage-timber sales harm those interests, regularly oppose salvage-timber sales (and similar actions) in proceedings before the agency. *Ibid.* And the Complaint alleges, and no **1157 one denies, that the organizations intend to continue to express their opposition to such actions in those proceedings in the future. *Ibid.*

Consider further: The affidavit of a member of Sequoia ForestKeeper, Ara Marderosian, attached to the Complaint, specifies that Marderosian had visited the Burnt Ridge Project site in the past and intended to return. The majority concedes that this is sufficient to show that Marderosian had standing to challenge the Burnt Ridge Project. The majority must therefore agree that “at least one identified member ha[s] suffered ... harm.” *Ante*, at 1151. Why then does it find insufficient the affidavit, also attached to the Complaint, of Jim Bensman, a member of Heartwood, Inc.? That affidavit states, among other things, that Bensman has visited 70 national forests, that he has visited some of those forests “hundreds of times,” that he has often visited the Allegheny National Forest in the past, that he has “probably commented on a thousand” Forest Service projects including salvage-timber sale proposals, that he intends to continue to comment on similar Forest Service proposals, and that the Forest Service plans in the future to conduct salvage-timber sales on 20 parcels in the Allegheny National Forest—one of the forests he has visited in the past. ¶¶ 6, 13, App. E to Pet. for Cert. 68a, 69a, 71a.


The Bensman affidavit does not say *which particular sites* will be affected by future Forest Service projects, but the Service itself has conceded that it will conduct thousands of exempted projects in the future. Why is more specificity *508 needed to show a “realistic” threat that a project will impact land Bensman uses? To know, virtually for certain, that snow will fall in New England this winter is not to know the name of each particular town where it is bound to arrive. The law of standing does not require the latter kind of specificity. How could it? And  *Sierra Club*

v. Morton, 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636, on which the majority so heavily relies, involved plaintiffs who challenged (true, a “massive”) development, but only on a single previously determined site, about 80 acres in size, in a portion of the forest with a “limited ... number of visitors.”  *Id.*, at 728, 92 S.Ct. 1361. The Court’s unwillingness to infer harm to the Sierra Club’s members there does not demand a similar unwillingness here, where the challenge is to procedures affecting “thousands” of sites, involving hundreds of times as much acreage, where the precise location of each may not yet be known. In *Sierra Club v. Morton*, it may have been unreasonable simply to assume that members would suffer an “injury in fact.” But here, given the very different factual circumstances, it is unreasonable to believe they would not.

Whatever doubt may remain is settled by the affidavits the plaintiffs submitted after the Burnt Ridge dispute was settled (while the other claims in the Complaint remained alive). The majority says it will not consider those affidavits because they were submitted “[a]fter the District Court had entered judgment.” *Ante*, at 1150, n. But the plaintiffs submitted the affidavits after judgment (in opposition to the Government’s motion for a stay) because the Burnt Ridge dispute on which they had relied to show standing at the outset of suit had by that point been settled. No longer wishing to rely solely on evidence of their members’ interest in that particular project, the plaintiff organizations submitted several other affidavits. Why describe this perfectly sensible response to the settlement of some of the Complaint’s claims as a “retroactiv[e]” attempt to “me[e]t the challenge to their standing at the time of judgment”? *Ibid.* *509 In fact, the Government did not challenge standing until that **1158 point, so of course respondents (who all agree had standing at the outset) did not respond with affidavits until later—when their standing was challenged. This can hardly be characterized as an attempt to “resurrect and alter the outcome” in the case. *Ante*, at 1153. Regardless, the Constitution does not bar the filing of further affidavits, nor does any statute. The Federal Rules of Civil Procedure contain no such bar. Indeed, those Rules provide a judge with liberal discretion to permit a plaintiff to amend a complaint—even after one dispute (of several) is settled. So why would they not permit the filing of affidavits—at least with the judge’s permission? See *Fed. Rule Civ. Proc. 15(d)* (West 2008 rev. ed.) (“The court may permit

supplementation even though the original pleading is defective in stating a claim or defense”).

The affidavits in question describe a number of then-pending Forest Service projects, all excluded from notice, comment, and appeal under the Forest Service regulations and all scheduled to take place on parcels that the plaintiff organizations’ members use. Erik Ryberg, for example, a member of the Center for Biological Diversity, described in his affidavit a proposed logging project scheduled for the Payette National Forest—an area with which he is “personally familiar.” ¶ 6, App. 90. A second affidavit filed by Jim Bensman described a salvage-timber sale scheduled for the Hoosier National Forest—an area Bensman had visited “multiple times” and to which he planned to return in the coming weeks—and one planned for the Daniel Boone National Forest—also used by Bensman—which would “impact [Heartwood’s] members[’] use of the areas.” ¶¶ 8–9, *id.*, at 85–86. The affidavits also describe, among other things, the frequency with which the organizations’ members routinely file administrative appeals of salvage-timber sales and identify a number of proposed and pending projects that certain Sierra Club members wished to appeal. See Decl. of Rene Voss *510 ¶ 3, *id.*, at 94 (describing a proposed logging and prescribed burn planned for the Gallatin National Forest); Decl. of Craig Thomas ¶¶ 3, 13, *id.*, at 95, 98 (describing Thomas’ “use” and “enjoy[ment]” of the “Sierra Nevada national forests for recreational, aesthetic, scientific and professional pursuits,” and attesting to “eighteen separate logging projects,” all categorically excluded, proposed for one such forest tract).

These allegations and affidavits more than adequately show a “realistic threat” of injury to plaintiffs brought about by reoccurrence of the challenged conduct—conduct that the Forest Service thinks lawful and *admits* will reoccur. Many years ago the Ninth Circuit warned that a court should not “be blind to what must be necessarily known to every intelligent person.”  *In re Wo Lee*, 26 F. 471, 475 (1886). Applying that standard, I would find standing here.

* * *

Summers v. Earth Island Institute, 555 U.S. 488 (2009)

129 S.Ct. 1142, 67 ERC 1961, 173 L.Ed.2d 1, 77 USLW 4146, 72 Fed.R.Serv.3d 1183...


I recognize that the Government raises other claims and bases upon which to deny standing or to hold that the case is not ripe for adjudication. I believe that these arguments are without merit. But because the majority does not discuss them here, I shall not do so either.

With respect, I dissent.

All Citations

555 U.S. 488, 129 S.Ct. 1142, 173 L.Ed.2d 1, 67 ERC 1961, 77 USLW 4146, 72 Fed.R.Serv.3d 1183, 09 Cal. Daily Op. Serv. 2568, 2009 Daily Journal D.A.R. 3035, 21 Fla. L. Weekly Fed. S 670

Footnotes


- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See  [United States v. Detroit Timber & Lumber Co.](#), 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
- * After the District Court had entered judgment, and after the Government had filed its notice of appeal, respondents submitted additional affidavits to the District Court. We do not consider these. If respondents had not met the challenge to their standing at the time of judgment, they could not remedy the defect retroactively.

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Not Followed as Dicta [U.S. ex rel. Riley v. St. Luke's Episcopal Hosp.](#), S.D.Tex., October 21, 1997

112 S.Ct. 2130
Supreme Court of the United States

Manuel LUJAN, Jr., Secretary of the
Interior, Petitioner

v.





DEFENDERS OF WILDLIFE, et al.

No. 90-1424.

|
Argued Dec. 3, 1991.

|
Decided June 12, 1992.

Synopsis

Environmental groups brought action challenging regulation of the Secretary of the Interior which required other agencies to confer with him under the Endangered Species Act only with respect to federally funded projects in the United States and on the high seas. The United States District Court for the District of Minnesota, [Donald D. Alsop](#), Chief Judge, dismissed for lack of standing,  [658 F.Supp. 43](#). The Court of Appeals for the Eighth Circuit reversed,  [851 F.2d 1035](#). The District Court entered judgment in favor of environmental groups,  [707 F.Supp. 1082](#), and the Court of Appeals affirmed,  [911 F.2d 117](#). On certiorari, the Supreme Court, Justice [Scalia](#), held that: (1) plaintiffs did not assert sufficiently imminent injury to have standing, and (2) plaintiffs' claimed injury was not redressable.

Reversed and remanded.

Justice [Kennedy](#) filed an opinion concurring in part and concurring in the judgment in which Justice [Souter](#) joined.

Justice [Stevens](#) filed an opinion concurring in the judgment.

Justice [Blackmun](#) dissented and filed an opinion in which Justice [O'Connor](#) joined.

West Headnotes (19)

[1] **Constitutional Law**  Separation of Powers

92Constitutional Law
92XXSeparation of Powers
92XX(A)In General
92k2330In general
(Formerly 92k50)

Constitution's central mechanism of separation of powers depends largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts. [U.S.C.A. Const. Art. 1, § 1](#); [Art. 2, § 1, cl. 1](#); [Art. 3, § 1 et seq.](#)

[26 Cases that cite this headnote](#)

[2] **Federal Civil Procedure**  In general; injury or interest

170AFederal Civil Procedure
170AIIParties
170AII(A)In General
170Ak103.1Standing in General
170Ak103.2In general; injury or interest
(Formerly 170Ak103.1)

Though some of its elements express merely prudential considerations that are part of judicial self-government, core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III. [U.S.C.A. Const. Art. 3, § 1 et seq.](#)

[2037 Cases that cite this headnote](#)

[3] **Federal Civil Procedure**  In general;

[injury or interest](#)

Federal Civil Procedure [🔑](#)Causation;
redressability

Federal Civil Procedure [🔑](#)Rights of
third parties or public

[170A](#)Federal Civil Procedure

[170AII](#)Parties

[170AII\(A\)](#)In General

[170Ak103.1](#)Standing in General

[170Ak103.2](#)In general; injury or interest

[170A](#)Federal Civil Procedure

[170AII](#)Parties

[170AII\(A\)](#)In General

[170Ak103.1](#)Standing in General

[170Ak103.3](#)Causation; redressability

[170A](#)Federal Civil Procedure

[170AII](#)Parties

[170AII\(A\)](#)In General

[170Ak103.1](#)Standing in General

[170Ak103.4](#)Rights of third parties or public

Irreducible constitutional minimum of standing requires that plaintiff have suffered an injury in fact, which is an invasion of a legally protected interest which is concrete and particularized and actual or imminent rather than conjectural or hypothetical; that there be a causal connection between the injury and conduct complained of so that the injury is fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party who is not before the court; and that it be likely, as opposed to merely speculative, that injury will be redressed by a favorable decision.

[16570 Cases that cite this headnote](#)

[4] **Federal Civil Procedure** [🔑](#)In general;
[injury or interest](#)

[170A](#)Federal Civil Procedure

[170AII](#)Parties

[170AII\(A\)](#)In General

[170Ak103.1](#)Standing in General

[170Ak103.2](#)In general; injury or interest

In order for injury to be “particularized,” it must affect the plaintiff in a personal

and individual way.

[1710 Cases that cite this headnote](#)

[5] **Federal Civil Procedure** [🔑](#)In general;
[injury or interest](#)

[170A](#)Federal Civil Procedure

[170AII](#)Parties

[170AII\(A\)](#)In General

[170Ak103.1](#)Standing in General

[170Ak103.2](#)In general; injury or interest

(Formerly 170Bk247)

Party invoking federal jurisdiction bears the burden of establishing elements of standing.

[4504 Cases that cite this headnote](#)

[6] **Federal Civil Procedure** [🔑](#)In general;
[injury or interest](#)
Federal Civil Procedure [🔑](#)Pleading

[170A](#)Federal Civil Procedure

[170AII](#)Parties

[170AII\(A\)](#)In General

[170Ak103.1](#)Standing in General

[170Ak103.2](#)In general; injury or interest

[170A](#)Federal Civil Procedure

[170AII](#)Parties

[170AII\(A\)](#)In General

[170Ak103.1](#)Standing in General

[170Ak103.5](#)Pleading

Elements of standing are not merely pleading requirements but, rather, are an indispensable part of the plaintiff’s case, and each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, with the manner and degree of evidence required at successive stages of litigation.

[2482 Cases that cite this headnote](#)

[7] **Federal Civil Procedure**  In general; injury or interest
Federal Civil Procedure  Burden of proof

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest
170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2542 Evidence
170Ak2544 Burden of proof

At the pleading stage, general factual allegations of injury resulting from defendant's conduct may suffice to establish standing; in response to summary judgment motion, plaintiff can no longer rest on mere allegations but must set forth by affidavit or other evidence the specific facts which will be taken as true for purposes of summary judgment; at the final stage, those facts, if controverted, must be supported adequately by the evidence adduced at trial. [Fed.Rules Civ.Proc.Rule 56\(e\)](#), 28 U.S.C.A.

[3461 Cases that cite this headnote](#)


[8] **Federal Civil Procedure**  Causation; redressability

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.3 Causation; redressability

When plaintiff's asserted injury arises from the government's allegedly unlawful regulation or lack of regulation of someone else, causation and redressability required for standing hinge on response of the regulated or regulable third party to the government action or inaction and on the response of others as

well.

[1425 Cases that cite this headnote](#)

[9] **Environmental Law**  Cognizable interests and injuries, in general


149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek649 Persons Entitled to Sue or Seek Review; Standing
149Ek651 Cognizable interests and injuries, in general
(Formerly 187k3.5, 187k31/2)

Desire to use or observe animal species, even for purely aesthetic purposes, is a cognizable interest for standing purposes.

[176 Cases that cite this headnote](#)

[10] **Federal Civil Procedure**  Burden of proof

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(C) Summary Judgment
170AXVII(C)3 Proceedings
170Ak2542 Evidence
170Ak2544 Burden of proof

To survive summary judgment motion for dismissal of suit under Endangered Species Act for lack of standing, environmental groups had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad but, also that one or more of the groups' members would thereby be directly affected, apart from their special interest in the subject. Endangered Species Act of 1973, § 11(g), as amended,  16 U.S.C.A. § 1540(g).

[194 Cases that cite this headnote](#)

[11] **Environmental Law** — Organizations, associations, and other groups

149EEnvironmental Law
149EXIIIJudicial Review or Intervention
149Ek649Persons Entitled to Sue or Seek Review; Standing
149Ek652Organizations, associations, and other groups
(Formerly 187k3.5, 187k31/2)

Affidavits in which members of organizations stated that they had previously traveled to places in the world where projects being funded by the Agency for International Development (AID) were taking place and that they hoped to be able to return and observe endangered species in those locations did not show that damage to species from the projects would produce imminent injury to them, and organizations thus did not have standing to challenge regulation of the Secretary of the Interior requiring that other agencies consult under the Endangered Species Act only with respect to actions in the United States or on the high seas. Endangered Species Act of 1973, § 7(a)(2), as amended, 16 U.S.C.A. § 1536(a)(2).

109 Cases that cite this headnote

[12] **Federal Civil Procedure** — In general; injury or interest

170AFederal Civil Procedure
170AIIParties
170AII(A)In General
170Ak103.1Standing in General
170Ak103.2In general; injury or interest

Imminence of injury is demanded for standing even when the alleged harm does not depend upon affirmative actions of third parties which are beyond the plaintiff's control.

767 Cases that cite this headnote

[13] **Environmental Law** — Cognizable interests and injuries, in general

149EEnvironmental Law
149EXIIIJudicial Review or Intervention
149Ek649Persons Entitled to Sue or Seek Review; Standing
149Ek651Cognizable interests and injuries, in general
(Formerly 199k25.15(4.1), 199k25.15(4) Health and Environment)

“Ecosystem nexus,” under which a person who uses any part of a continuous ecosystem may be considered adversely affected by activity, does not provide basis for standing to challenge the activity.

65 Cases that cite this headnote

[14] **Environmental Law** — Other particular parties

149EEnvironmental Law
149EXIIIJudicial Review or Intervention
149Ek649Persons Entitled to Sue or Seek Review; Standing
149Ek656Other particular parties
(Formerly 187k3.5, 187k31/2)


Persons seeking to challenge regulation of the Secretary of the Interior which required other agencies to consult under the Endangered Species Act only with respect to federally funded projects in the United States and on the high seas, and not in other countries, could not obtain standing under a “animal nexus” approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing, or under a “vocational nexus” approach, under which anyone with a professional interest in the animals can sue. Endangered Species Act of 1973, § 7(a)(2), as amended, 16 U.S.C.A. §

1536(a)(2).

62 Cases that cite this headnote

[15] **Environmental Law** — Organizations, associations, and other groups

149EEnvironmental Law
149EXIIIJudicial Review or Intervention
149Ek649Persons Entitled to Sue or Seek Review; Standing
149Ek652Organizations, associations, and other groups
(Formerly 187k3.5, 187k31/2)

Harm allegedly suffered by members of environmental groups as result of federal funding of projects in other countries which might threaten endangered species could not be redressed in action against Secretary of the Interior challenging his regulation which required consultation under the Endangered Species Act by other governmental agencies only with respect to funding of projects in the United States and on the high seas, and groups thus lacked standing, as other agencies denied the authority of the Secretary to order consultation and would not be bound by an order and action to which they were not a party. (Per Justice Scalia with the Chief Justice and two Justices concurring and two Justices concurring in part and in the judgment.) Endangered Species Act of 1973, § 7(a)(2), as amended,  16 U.S.C.A. § 1536(a)(2).

101 Cases that cite this headnote

[16] **Federal Civil Procedure** — Causation; redressability


170AFederal Civil Procedure
170AIIParties
170AII(A)In General
170Ak103.1Standing in General
170Ak103.3Causation; redressability

Existence of federal jurisdiction ordinarily depends upon facts as they exist when the complaint is filed, and later participation in a suit by those parties necessary for plaintiffs' injury to be redressed will not give plaintiffs standing when their injury was not redressable by any of the parties to the suit at the time that it was filed. (Per Justice Scalia with the Chief Justice and two Justices concurring and two Justices concurring in part and in the judgment.)

2073 Cases that cite this headnote

[17] **Environmental Law** — Other particular parties

149EEnvironmental Law
149EXIIIJudicial Review or Intervention
149Ek649Persons Entitled to Sue or Seek Review; Standing
149Ek656Other particular parties
(Formerly 187k3.5, 187k31/2)



Members of environmental groups who asserted injury due to lack of opportunity to observe endangered species as a result of projects in other countries partially funded by the Agency for International Development (AID) did not show an injury which would be redressable as a result of challenge to regulation of the Secretary of the Interior which required AID to consult under the Endangered Species Act only with respect to projects in the United States and on the high seas where AID provided less than 10% of the funding for project about which plaintiffs complained and there was nothing to indicate that the project would be suspended or do less harm to endangered species if that funding were eliminated. (Per Justice Scalia with Chief Justice and two Justices concurring and two Justices concurring in part and in judgment.) Endangered Species Act of 1973, § 7(a)(2), as amended,  16 U.S.C.A. § 1536(a)(2).

362 Cases that cite this headnote

858 Cases that cite this headnote

[18] Environmental Law → Other particular parties

149E Environmental Law
 149EXIII Judicial Review or Intervention
 149Ek649 Persons Entitled to Sue or Seek Review; Standing
 149Ek656 Other particular parties (Formerly 187k3.5, 187k31/2)

Persons challenging regulation of the Secretary of the Interior requiring other agencies to consult with him under the Endangered Species Act only with respect to funding of projects in the United States and on the high seas did not have standing on basis of the “citizen-suit” provision of the Endangered Species Act. Endangered Species Act of 1973, §§ 7(a)(2), 11(g), as amended,  16 U.S.C.A. §§ 1536(a)(2),  1540(g).

34 Cases that cite this headnote

[19] Federal Civil Procedure → Rights of third parties or public

170A Federal Civil Procedure
 170AII Parties
 170AII(A) In General
 170Ak103.1 Standing in General
 170Ak103.4 Rights of third parties or public

Plaintiff raising only a generally available grievance about government, and claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large does not state an **Article III** case or controversy. U.S.C.A. Const. Art. 3, § 1 et seq.

****2133 Syllabus***

Section 7(a)(2) of the Endangered Species Act of 1973 divides responsibilities regarding the protection of endangered species between petitioner Secretary of the Interior and the Secretary of Commerce, and requires each federal agency to consult with the relevant Secretary to ensure that any action funded by the agency is not likely to jeopardize the continued existence or habitat of any endangered or threatened species. Both Secretaries initially promulgated a joint regulation extending § 7(a)(2)’s coverage to actions taken in foreign nations, but a subsequent joint rule limited the section’s geographic scope to the United States and the high seas. Respondents, wildlife conservation and other environmental organizations, filed an action in the District Court, seeking a declaratory judgment that the new regulation erred as to § 7(a)(2)’s geographic scope and an injunction requiring the Secretary of the Interior to promulgate a new rule restoring his initial interpretation. The Court of Appeals reversed the District Court’s dismissal of the suit for lack of standing. Upon remand, on cross-motions for summary judgment, the District Court denied the Secretary’s motion, which renewed his objection to standing, and granted respondents’ motion, ordering the Secretary to publish a new rule. The Court of Appeals affirmed.

****2134 Held:** The judgment is reversed, and the case is remanded.

 911 F.2d 117, (CA 8 1990), reversed and remanded.

Justice **SCALIA** delivered the opinion of the Court, except as to Part III–B, concluding that respondents lack standing to seek judicial review of the rule. Pp. 2135–2140, 2142–2146.

(a) As the parties invoking federal jurisdiction, respondents bear the burden of showing standing by establishing, *inter alia*, that they have suffered an injury in fact, *i.e.*, a concrete and particularized,

actual or imminent invasion of a legally protected interest. To survive a summary judgment motion, they must set forth by affidavit or other evidence specific facts to support their claim. Standing is particularly difficult to show here, since third parties, rather than respondents, are the object of the Government action or inaction to which respondents object. Pp. 2135–2137.

*556 b) Respondents did not demonstrate that they suffered an injury in fact. Assuming that they established that funded activities abroad threaten certain species, they failed to show that one or more of their members would thereby be directly affected apart from the members' special interest in the subject. See [Sierra Club v. Morton](#), 405 U.S. 727, 735, 739, 92 S.Ct. 1361, 1366, 1368, 31 L.Ed.2d 636. Affidavits of members claiming an intent to revisit project sites at some indefinite future time, at which time they will presumably be denied the opportunity to observe endangered animals, do not suffice, for they do not demonstrate an "imminent" injury. Respondents also mistakenly rely on a number of other novel standing theories. Their theory that any person using any part of a contiguous ecosystem adversely affected by a funded activity has standing even if the activity is located far away from the area of their use is inconsistent with this Court's opinion in [Lujan v. National Wildlife Federation](#), 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695. And they state purely speculative, nonconcrete injuries when they argue that suit can be brought by anyone with an interest in studying or seeing endangered animals anywhere on the globe and anyone with a professional interest in such animals. Pp. 2137–2140.

(c) The Court of Appeals erred in holding that respondents had standing on the ground that the statute's citizen-suit provision confers on all persons the right to file suit to challenge the Secretary's failure to follow the proper consultative procedure, notwithstanding their inability to allege any separate concrete injury flowing from that failure. This Court has consistently held that a plaintiff claiming only a generally available grievance about government, unconnected with a threatened concrete interest of his own, does not state an Article III case or controversy. See, e.g., [Fairchild v. Hughes](#), 258 U.S. 126, 129–130, 42 S.Ct. 274, 275, 66 L.Ed. 499. Vindicating the public interest is the function of the Congress and the Chief Executive. To allow that interest to be

converted into an individual right by a statute denominating it as such and permitting all citizens to sue, regardless of whether they suffered any concrete injury, would authorize Congress to transfer from the President to the courts the Chief Executive's most important constitutional duty, to "take Care that the Laws be faithfully executed," Art. II, § 3. Pp. 2142–2146.

SCALIA, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, and IV, in which REHNQUIST, C.J., and WHITE, KENNEDY, SOUTER, and THOMAS, JJ., joined, and an opinion with respect to Part III–B, in which REHNQUIST, C.J., and WHITE and THOMAS, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which SOUTER, J., joined, *post*, p. 2146. STEVENS, J., filed an opinion concurring in the judgment, *post*, **2135 *557 p. 2147. BLACKMUN, J., filed a dissenting opinion, in which O'CONNOR, J., joined, *post*, p. 2151.

Attorneys and Law Firms

Edwin S. Kneedler argued the cause for petitioner. With him on the briefs were *Solicitor General Starr*, *Acting Assistant Attorney General Hartman*, *Deputy Solicitor General Wallace*, *Robert L. Klarquist*, *David C. Shilton*, *Thomas L. Sansonetti*, and *Michael Young*.

Brian B. O'Neill argued the cause for respondents. With him on the brief were *Steven C. Schroer* and *Richard A. Duncan*.*

* *Terence P. Ross*, *Daniel J. Popeo*, and *Richard A. Samp* filed a brief for the Washington Legal Foundation et al. as *amici curiae* urging reversal.

Briefs of *amici curiae* urging affirmance were filed for the City of Austin et al. by *William A. Butler*, *Angus E. Crane*, *Michael J. Bean*, *Kenneth Oden*, *James M. McCormack*, and *Wm. Robert Irvin*; for the American Association of Zoological Parks & Aquariums et al. by *Ronald J. Greene* and *W. Hardy Callcott*; for the American Institute of Biological Sciences by *Richard J. Wertheimer* and *Charles M. Chambers*; and for the Ecotropical Foundation of Brazil et al. by *Durwood J. Zaelke*.

A brief of *amici curiae* was filed for the State of Texas et al. by *Patrick J. Mahoney*, *Dan Morales*,

Attorney General of Texas, *Will Pryor*, First Assistant Attorney General, *Mary F. Keller*, Deputy Attorney General, and *Nancy N. Lynch*, *Mary Ruth Holder*, and *Shannon J. Kilgore*, Assistant Attorneys General, *Grant Woods*, Attorney General of Arizona, *Winston Bryant*, Attorney General of Arkansas, *Daniel E. Lungren*, Attorney General of California, *Robert A. Butterworth*, Attorney General of Florida, *Michael E. Carpenter*, Attorney General of Maine, *Frank J. Kelley*, Attorney General of Michigan, *Hubert H. Humphrey III*, Attorney General of Minnesota, *Robert J. Del Tufo*, Attorney General of New Jersey, *Robert Abrams*, Attorney General of New York, *Lee Fisher*, Attorney General of Ohio, and *Jeffrey L. Amestoy*, Attorney General of Vermont, *Victor A. Kovner*, *Leonard J. Koerner*, *Neal M. Janey*, and *Louise H. Renne*.

Opinion

Justice **SCALIA** delivered the opinion of the Court with respect to Parts I, II, III–A, and IV, and an opinion with respect to Part III–B, in which THE CHIEF JUSTICE, Justice **WHITE**, and Justice **THOMAS** join.

This case involves a challenge to a rule promulgated by the Secretary of the Interior interpreting § 7 of the Endangered *558 Species Act of 1973 (ESA), 87 Stat. 884, 892, as amended, 16 U.S.C. § 1536, in such fashion as to render it applicable only to actions within the United States or on the high seas. The preliminary issue, and the only one we reach, is whether respondents here, plaintiffs below, have standing to seek judicial review of the rule.

I

The ESA, 87 Stat. 884, as amended, 16 U.S.C. § 1531 *et seq.*, seeks to protect species of animals against threats to their continuing existence caused by man. See generally *TVA v. Hill*, 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978). The ESA instructs the Secretary of the Interior to promulgate by regulation a list of those species

which are either endangered or threatened under enumerated criteria, and to define the critical habitat of these species. 16 U.S.C. §§ 1533, 1536. Section 7(a)(2) of the Act then provides, in pertinent part:

“Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior], insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical.” 16 U.S.C. § 1536(a)(2).

In 1978, the Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), on behalf of the Secretary of the Interior and the Secretary of Commerce respectively, promulgated a joint regulation stating that the obligations imposed by § 7(a)(2) extend to actions taken in foreign nations. 43 Fed.Reg. 874 (1978). The next year, however, the Interior Department began to reexamine its position. Letter from Leo Kuliz, Solicitor, Department of the Interior, to Assistant Secretary, Fish and Wildlife and Parks, Aug. 8, 1979. A revised joint regulation, reinterpreting § 7(a)(2) to require consultation only for actions taken in the United States or on the high seas, was proposed in 1983, 48 Fed.Reg. 29990, and promulgated in 1986, 51 Fed.Reg. 19926; 50 CFR 402.01 (1991).

Shortly thereafter, respondents, organizations dedicated to wildlife conservation and other environmental causes, filed this action against the Secretary of the Interior, seeking a declaratory judgment that the new regulation is in error as to the geographic scope of § 7(a)(2) and an injunction requiring the Secretary to promulgate a new regulation restoring the initial interpretation. The District Court granted the Secretary’s motion to dismiss for lack of standing. *Defenders of Wildlife v. Hodel*, 658 F.Supp. 43, 47–48 (Minn.1987). The Court of Appeals for the Eighth Circuit reversed by a divided vote. *Defenders of Wildlife v. Hodel*, 851 F.2d 1035 (1988). On remand, the Secretary moved for summary judgment on the standing issue, and respondents moved for summary judgment on the merits. The

District Court denied the Secretary's motion, on the ground that the Eighth Circuit had already determined the standing question in this case; it granted respondents' merits motion, and ordered the Secretary to publish a revised regulation.

[Defenders of Wildlife v. Hodel](#), 707 F.Supp. 1082 (Minn.1989). The Eighth Circuit affirmed.

[911 F.2d 117](#) (1990). We granted certiorari, [500 U.S. 915](#), [111 S.Ct. 2008](#), [114 L.Ed.2d 97](#) (1991).

II

[1] [2] While the Constitution of the United States divides all power conferred upon ****2136** the Federal Government into "legislative Powers," [Art. I, § 1](#), "[t]he executive Power," [Art. II, § 1](#), and "[t]he judicial Power," [Art. III, § 1](#), it does not attempt to define those terms. To be sure, it limits the jurisdiction of federal courts to "Cases" and "Controversies," but an executive inquiry can bear the name "case" (the Hoffa case) and a legislative dispute can bear the name "controversy" (the Smoot-Hawley controversy). Obviously, then, the Constitution's central mechanism of separation of powers depends ****560** largely upon common understanding of what activities are appropriate to legislatures, to executives, and to courts. In *The Federalist No. 48*, Madison expressed the view that "[i]t is not infrequently a question of real nicety in legislative bodies whether the operation of a particular measure will, or will not, extend beyond the legislative sphere," whereas "the executive power [is] restrained within a narrower compass and ... more simple in its nature," and "the judiciary [is] described by landmarks still less uncertain." *The Federalist No. 48*, p. 256 (Carey and McClellan eds. 1990). One of those landmarks, setting apart the "Cases" and "Controversies" that are of the justiciable sort referred to in [Article III](#)—"serv[ing] to identify those disputes which are appropriately resolved through the judicial process," [Whitmore v. Arkansas](#), [495 U.S. 149](#), [155](#), [110 S.Ct. 1717](#), [1722](#), [109 L.Ed.2d 135](#) (1990)—is the doctrine of standing. Though some of its elements express merely prudential considerations that are part of judicial self-government, the core component of standing is an essential and unchanging part of the case-or-controversy requirement of [Article III](#). See,

e.g., [Allen v. Wright](#), [468 U.S. 737](#), [751](#), [104 S.Ct. 3315](#), [3324](#), [82 L.Ed.2d 556](#) (1984).

[3] [4] Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, see [id.](#), at 756, [104 S.Ct.](#), at 3327; [Warth v. Seldin](#), [422 U.S. 490](#), [508](#), [95 S.Ct. 2197](#), [2210](#), [45 L.Ed.2d 343](#) (1975); [Sierra Club v. Morton](#), [405 U.S. 727](#), [740–741](#), n. 16, [92 S.Ct. 1361](#), [1368–1369](#), n. 16, [31 L.Ed.2d 636](#) (1972);¹ and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " [Whitmore, supra](#), [495 U.S.](#), at 155, [110 S.Ct.](#), at 1723 (quoting [Los Angeles v. Lyons](#), [461 U.S. 95](#), [102](#), [103 S.Ct. 1660](#), [1665](#), [75 L.Ed.2d 675](#) (1983)). Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." [Simon v. Eastern Ky. Welfare *561 Rights Organization](#), [426 U.S. 26](#), [41–42](#), [96 S.Ct. 1917](#), [1926](#), [48 L.Ed.2d 450](#) (1976). Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." [Id.](#), at 38, 43, [96 S.Ct.](#), at 1924, 1926.

[5] [6] [7] The party invoking federal jurisdiction bears the burden of establishing these elements. See [FW/PBS, Inc. v. Dallas](#), [493 U.S. 215](#), [231](#), [110 S.Ct. 596](#), [608](#), [107 L.Ed.2d 603](#) (1990); [Warth, supra](#), [422 U.S.](#), at 508, [95 S.Ct.](#), at 2210. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. See [Lujan v. National Wildlife Federation](#), [497 U.S. 871](#), [883–889](#), [110 S.Ct. 3177](#), [3185–3189](#), [111 L.Ed.2d 695](#) (1990); [Gladstone, Realtors v. Village of Bellwood](#), [441 U.S. 91](#), [114–115](#), and n. 31, [99 S.Ct. 1601](#), [1614–1615](#), and n. 31, [60 L.Ed.2d 66](#) (1979); [**2137 Simon, supra](#), [426 U.S.](#), at 45, n. 25, [96 S.Ct.](#), at 1927, and n. 25; [Warth,](#)

supra, 422 U.S., at 527, and n. 6, 95 S.Ct., at 2219, and n. 6 (Brennan, J., dissenting). At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *National Wildlife Federation, supra*, 497 U.S., at 889, 110 S.Ct., at 3189. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed.Rule Civ.Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be "supported adequately by the evidence adduced at trial." *Gladstone, supra*, 441 U.S., at 115, n. 31, 99 S.Ct., at 1616, n. 31.

[8] When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the summary judgment stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at issue. If he is, there is ordinarily little question that the action or inaction has *562 caused him injury, and that a judgment preventing or requiring the action will redress it. When, however, as in this case, a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. The existence of one or more of the essential elements of standing "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615, 109 S.Ct. 2037, 2044, 104 L.Ed.2d 696 (1989) (opinion of KENNEDY, J.); see also *Simon, supra*, 426 U.S., at 41–42, 96 S.Ct., at 1925, 1926; and it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury. *E.g.*, *Warth, supra*, 422 U.S., at 505, 95

S.Ct., at 2208. Thus, when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is ordinarily "substantially more difficult" to establish. *Allen, supra*, 468 U.S., at 758, 104 S.Ct., at 3328; *Simon, supra*, 426 U.S., at 44–45, 96 S.Ct., at 1927; *Warth, supra*, 422 U.S., at 505, 95 S.Ct., at 2208.

III

We think the Court of Appeals failed to apply the foregoing principles in denying the Secretary's motion for summary judgment. Respondents had not made the requisite demonstration of (at least) injury and redressability.

A

[9] [10] Respondents' claim to injury is that the lack of consultation with respect to certain funded activities abroad "increas[es] the rate of extinction of endangered and threatened species." Complaint ¶ 5, App. 13. Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purpose of *563 standing. See, *e.g.*, *Sierra Club v. Morton*, 405 U.S., at 734, 92 S.Ct., at 1366. "But the 'injury in fact' test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured." *Id.*, at 734–735, 92 S.Ct., at 1366. To survive the Secretary's summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by **2138 funded activities abroad, but also that one or more of respondents' members would thereby be "directly" affected apart from their " 'special interest' in th[e] subject." *Id.*, at 735, 739, 92 S.Ct., at 1366, 1368. See generally *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 2441, 53 L.Ed.2d

383 (1977).

[11] [12] With respect to this aspect of the case, the Court of Appeals focused on the affidavits of two Defenders' members—Joyce Kelly and Amy Skilbred. Ms. Kelly stated that she traveled to Egypt in 1986 and “observed the traditional habitat of the endangered Nile crocodile there and intend[s] to do so again, and hope[s] to observe the crocodile directly,” and that she “will suffer harm in fact as the result of [the] American ... role ... in overseeing the rehabilitation of the Aswan High Dam on the Nile ... and [in] develop [ing] ... Egypt's ... Master Water Plan.” App. 101. Ms. Skilbred averred that she traveled to Sri Lanka in 1981 and “observed th[e] habitat” of “endangered species such as the Asian elephant and the leopard” at what is now the site of the Mahaweli project funded by the Agency for International Development (AID), although she “was unable to see any of the endangered species”; “this development project,” she continued, “will seriously reduce endangered, threatened, and endemic species habitat including areas that I visited ... [, which] may severely shorten the future of these species”; that threat, she concluded, harmed her because she “intend[s] to return to Sri Lanka in the future and hope[s] to be more fortunate in spotting at least the endangered elephant and leopard.” *Id.*, at 145–146. When Ms. Skilbred was asked *564 at a subsequent deposition if and when she had any plans to return to Sri Lanka, she reiterated that “I intend to go back to Sri Lanka,” but confessed that she had no current plans: “I don’t know [when]. There is a civil war going on right now. I don’t know. Not next year, I will say. In the future.” *Id.*, at 318.

We shall assume for the sake of argument that these affidavits contain facts showing that certain agency-funded projects threaten listed species—though that is questionable. They plainly contain no facts, however, showing how damage to the species will produce “imminent” injury to Ms. Kelly and Skilbred. That the women “had visited” the areas of the projects before the projects commenced proves nothing. As we have said in a related context, “Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects.” *Lyons*, 461 U.S., at 102, 103 S.Ct., at 1665 (quoting *O’Shea v. Littleton*, 414 U.S. 488, 495–496, 94 S.Ct. 669, 676, 38 L.Ed.2d 674 (1974)). And the affiants’ profession of an

“inten[t]” to return to the places they had visited before—where they will presumably, this time, be deprived of the opportunity to observe animals of the endangered species—is simply not enough. Such “some day” intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the “actual or imminent” injury that our cases require. See *supra*, at 2136.²

**2139 [13] *565 Besides relying upon the Kelly and Skilbred affidavits, respondents propose a series of novel standing theories. The first, inelegantly styled “ecosystem nexus,” proposes that any person who uses *any part* of a “contiguous ecosystem” adversely affected by a funded activity has standing even if the activity is located a great distance away. This approach, as the Court of Appeals correctly observed, is inconsistent with our opinion in *National Wildlife Federation*, which held that a plaintiff claiming injury from environmental damage *566 must use the area affected by the challenged activity and not an area roughly “in the vicinity” of it. *497 U.S.*, at 887–889, 110 S.Ct., at 3188–3189; see also *Sierra Club*, 405 U.S., at 735, 92 S.Ct., at 1366. It makes no difference that the general-purpose section of the ESA states that the Act was intended in part “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,” 16 U.S.C. § 1531(b). To say that the Act protects ecosystems is not to say that the Act creates (if it were possible) rights of action in persons who have not been injured in fact, that is, persons who use portions of an ecosystem not perceptibly affected by the unlawful action in question.

[14] Respondents’ other theories are called, alas, the “animal nexus” approach, whereby anyone who has an interest in studying or seeing the endangered animals anywhere on the globe has standing; and the “vocational nexus” approach, under which anyone with a professional interest in such animals can sue. Under these theories, anyone who goes to see Asian elephants in the Bronx Zoo, and anyone who is a keeper of Asian elephants in the Bronx Zoo, has standing to sue because the Director of the Agency for International Development (AID) did not consult with the Secretary regarding the AID-funded project in Sri Lanka. This is beyond all reason. Standing is not “an ingenious academic

exercise in the conceivable,” [United States v. Students Challenging Regulatory Agency Procedures \(SCRAP\)](#), 412 U.S. 669, 688, 93 S.Ct. 2405, 2416, 37 L.Ed.2d 254 (1973), but as we have said requires, at the summary judgment stage, a factual showing of perceptible harm. It is clear that the person who observes or works with a particular animal threatened by a federal decision is facing perceptible harm, since the very subject of his interest will no longer exist. It is even plausible—though it goes to the outermost limit of plausibility—to think that a person who observes or works with animals ***2140** of a particular species in the very area of the world where that species is threatened by a federal decision is facing such harm, since some animals that ***567** might have been the subject of his interest will no longer exist, see [Japan Whaling Assn. v. American Cetacean Society](#), 478 U.S. 221, 231, n. 4, 106 S.Ct. 2860, 2866, n. 4, 92 L.Ed.2d 166 (1986). It goes beyond the limit, however, and into pure speculation and fantasy, to say that anyone who observes or works with an endangered species, anywhere in the world, is appreciably harmed by a single project affecting some portion of that species with which he has no more specific connection.³


***568 B**


Besides failing to show injury, respondents failed to demonstrate redressability. Instead of attacking the separate decisions to fund particular projects allegedly causing them harm, respondents chose to challenge a more generalized level of Government action (rules regarding consultation), the invalidation of which would affect all overseas projects. This programmatic approach has obvious practical advantages, but also obvious difficulties insofar as proof of causation or redressability is concerned. As we have said in another context, “suits challenging, not specifically identifiable Government violations of law, but the particular programs agencies establish to carry out their legal obligations ... [are], even when premised on allegations of several instances of violations of law, ... rarely if ever appropriate for federal-court adjudication.” [Allen](#), 468 U.S., at 759–760, 104 S.Ct., at 3329.

^[15] The most obvious problem in the present case is redressability. Since the agencies funding the projects were not parties to the case, the District Court could accord relief only against the Secretary: He could be ordered to revise his regulation to require consultation for foreign projects. But this would not remedy respondents’ alleged injury unless the funding agencies were bound by the Secretary’s regulation, which is very much an open question. Whereas in other contexts the ESA is quite explicit as to the Secretary’s controlling authority, see, e.g., [16 U.S.C. § 1533\(a\)\(1\)](#) (“The Secretary shall” promulgate regulations determining endangered species); [§ 1535\(d\)\(1\) *2141](#) (“The Secretary is authorized to provide financial assistance to any State”), with respect to consultation the initiative, and hence arguably the initial responsibility for determining statutory necessity, lies with ***569** the agencies, see [§ 1536\(a\)\(2\)](#) (“Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any” funded action is not likely to jeopardize endangered or threatened species) (emphasis added). When the Secretary promulgated the regulation at issue here, he thought it was binding on the agencies, see [51 Fed.Reg. 19928 \(1986\)](#). The Solicitor General, however, has repudiated that position here, and the agencies themselves apparently deny the Secretary’s authority. (During the period when the Secretary took the view that [§ 7\(a\)\(2\)](#) did apply abroad, AID and FWS engaged in a running controversy over whether consultation was required with respect to the Mahaweli project, AID insisting that consultation applied only to domestic actions.)


^[16] Respondents assert that this legal uncertainty did not affect redressability (and hence standing) because the District Court itself could resolve the issue of the Secretary’s authority as a necessary part of its standing inquiry. Assuming that it is appropriate to resolve an issue of law such as this in connection with a threshold standing inquiry, resolution by the District Court would not have remedied respondents’ alleged injury anyway, because it would not have been binding upon the agencies. They were not parties to the suit, and there is no reason they should be obliged to honor an incidental legal determination the suit produced.⁴ The ***570** Court of Appeals tried to finesse this problem by simply proclaiming that “[w]e are satisfied that an injunction requiring the Secretary to publish [respondents’ desired]


regulatio[n] ... would result in consultation.”


 *Defenders of Wildlife*, 851 F.2d, at 1042, 1043–1044. We do not know what would justify that confidence, particularly when the Justice Department (presumably after consultation with the agencies) has taken the ****2142** position that the regulation is not binding.⁵ The ***571** short of the matter is that redress of the only injury in fact respondents complain of requires action (termination of funding until consultation) by the individual funding agencies; and any relief the District Court could have provided in this suit against the Secretary was not likely to produce that action.


^[17] A further impediment to redressability is the fact that the agencies generally supply only a fraction of the funding for a foreign project. AID, for example, has provided less than 10% of the funding for the Mahaweli project. Respondents have produced nothing to indicate that the projects they have named will either be suspended, or do less harm to listed species, if that fraction is eliminated. As in  *Simon*, 426 U.S., at 43–44, 96 S.Ct., at 1926–1927, it is entirely conjectural whether the nonagency activity that affects respondents will be altered or affected by the agency activity they seek to achieve.⁶ There is no standing.


IV

^[18] The Court of Appeals found that respondents had standing for an additional reason: because they had suffered a “procedural injury.” The so-called “citizen-suit” provision of the ESA provides, in pertinent part, that “any person may commence ***572** a civil suit on his own behalf (A) to enjoin any person, including the United States and any other governmental instrumentality or agency ... who is alleged to be in violation of any provision of this chapter.”  16 U.S.C. § 1540(g). The court held that, because § 7(a)(2) requires interagency consultation, the citizen-suit provision creates a “procedural righ[t]” to consultation in all “persons”—so that *anyone* can file suit in federal court to challenge the Secretary’s (or presumably any other official’s) failure to follow the assertedly correct consultative procedure, notwithstanding his

or her inability to allege any discrete injury flowing from that failure.  911 F.2d, at 121–122. To understand the remarkable nature of this holding one must be clear about what it does *not* rest upon: This is not a case where plaintiffs are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs (*e.g.*, the procedural requirement for a hearing prior to denial of their license application, or the procedural requirement for an environmental impact statement before a federal facility is constructed next door to them).⁷ Nor is it simply a case where concrete injury has been ****2143** suffered by many persons, as in mass fraud or mass tort situations. Nor, finally, is it the ***573** unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government’s benefit, by providing a cash bounty for the victorious plaintiff. Rather, the court held that the injury-in-fact requirement had been satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental “right” to have the Executive observe the procedures required by law. We reject this view.⁸

^[19] We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that ***574** no more directly and tangibly benefits him than it does the public at large—does not state an **Article III** case or controversy. For example, in  *Fairchild v. Hughes*, 258 U.S. 126, 129–130, 42 S.Ct. 274, 275, 66 L.Ed. 499 (1922), we dismissed a suit challenging the propriety of the process by which the Nineteenth Amendment was ratified. Justice Brandeis wrote for the Court:

“[This is] not a case within the meaning of ... **Article III**.... Plaintiff has [asserted] only the right, possessed by every citizen, to require that the Government be administered according to law and that the public moneys be not wasted. Obviously this general right does not entitle a private citizen to institute in the federal courts a suit....”  *Ibid.*

In  *Massachusetts v. Mellon*, 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923), we dismissed for lack of **Article III** standing a taxpayer suit challenging the propriety of certain federal expenditures. We said:

“The party who invokes the power [of judicial review] must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.... Here the parties plaintiff have no such case.... [T]heir complaint ... is merely that officials of the executive department of the government are executing and will execute ****2144** an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.” *Id.*, at 488–489, 43 S.Ct., at 601.

In *Ex parte Levitt*, 302 U.S. 633, 58 S.Ct. 1, 82 L.Ed. 493 (1937), we dismissed a suit contending that Justice Black’s appointment to this Court violated the Ineligibility Clause, Art. I, § 6, cl. 2. ***575** “It is an established principle,” we said, “that to entitle a private individual to invoke the judicial power to determine the validity of executive or legislative action he must show that he has sustained or is immediately in danger of sustaining a direct injury as the result of that action and it is not sufficient that he has merely a general interest common to all members of the public.” 302 U.S., at 634, 58 S.Ct., at 1. See also *Doremus v. Board of Ed. of Hawthorne*, 342 U.S. 429, 433–434, 72 S.Ct. 394, 396–397, 96 L.Ed. 475 (1952) (dismissing taxpayer action on the basis of *Mellon*).

More recent cases are to the same effect. In *United States v. Richardson*, 418 U.S. 166, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974), we dismissed for lack of standing a taxpayer suit challenging the Government’s failure to disclose the expenditures of the Central Intelligence Agency, in alleged violation of the constitutional requirement, Art. I, § 9, cl. 7, that “a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.” We held that such a suit rested upon an impermissible “generalized grievance,” and was inconsistent with “the framework of Article III” because “the impact on [plaintiff] is plainly undifferentiated and ‘common to all members of the public.’ ”

Richardson, supra, at 171, 176–177, 94 S.Ct., at 2944, 2946. And in *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974), we dismissed for the same reasons a citizen-taxpayer suit contending that it was a violation of the Incompatibility Clause, Art. I, § 6, cl. 2, for Members of Congress to hold commissions in the military Reserves. We said that the challenged action, “standing alone, would adversely affect only the generalized interest of all citizens in constitutional governance.... We reaffirm *Levitt* in holding that standing to sue may not be predicated upon an interest of th[is] kind....” *Schlesinger, supra*, at 217, 220, 94 S.Ct., at 2930, 2932. Since *Schlesinger* we have on two occasions held that an injury amounting only to the alleged violation of a right to have the Government act in accordance with law was not judicially cognizable because ***576** “ ‘assertion of a right to a particular kind of Government conduct, which the Government has violated by acting differently, cannot alone satisfy the requirements of Art. III without draining those requirements of meaning.’ ” *Allen*, 468 U.S., at 754, 104 S.Ct., at 3326; *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 483, 102 S.Ct. 752, 764, 70 L.Ed.2d 700 (1982). And only two Terms ago, we rejected the notion that Article III permits a citizen suit to prevent a condemned criminal’s execution on the basis of “ ‘the public interest protections of the Eighth Amendment’ ”; once again, “[t]his allegation raise [d] only the ‘generalized interest of all citizens in constitutional governance’ ... and [was] an inadequate basis on which to grant ... standing.” *Whitmore*, 495 U.S., at 160, 110 S.Ct., at 1725.

To be sure, our generalized-grievance cases have typically involved Government violation of procedures assertedly ordained by the Constitution rather than the Congress. But there is absolutely no basis for making the Article III inquiry turn on the source of the asserted right. Whether the courts were to act on their own, or at the invitation of Congress, in ignoring the concrete injury requirement described in our cases, they would be discarding a principle fundamental ****2145** to the separate and distinct constitutional role of the Third Branch—one of the essential elements that identifies those “Cases” and “Controversies” that are the business of the courts rather than of the

political branches. “The province of the court,” as Chief Justice Marshall said in [Marbury v. Madison](#), 5 U.S. (1 Cranch) 137, 170, 2 L.Ed. 60 (1803), “is, solely, to decide on the rights of individuals.” Vindicating the *public* interest (including the public interest in Government observance of the Constitution and laws) is the function of Congress and the Chief Executive. The question presented here is whether the public interest in proper administration of the laws (specifically, in agencies’ observance of a particular, statutorily prescribed procedure) can be converted into an individual right by a statute that denominates it as such, and *577 that permits all citizens (or, for that matter, a subclass of citizens who suffer no distinctive concrete harm) to sue. If the concrete injury requirement has the separation-of-powers significance we have always said, the answer must be obvious: To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an “individual right” vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to “take Care that the Laws be faithfully executed,” Art. II, § 3. It would enable the courts, with the permission of Congress, “to assume a position of authority over the governmental acts of another and co-equal department,” [Massachusetts v. Mellon](#), 262 U.S., at 489, 43 S.Ct., at 601, and to become “‘virtually continuing monitors of the wisdom and soundness of Executive action.’” [Allen, supra](#), 468 U.S., at 760, 104 S.Ct., at 3329 (quoting [Laird v. Tatum](#), 408 U.S. 1, 15, 92 S.Ct. 2318, 2326, 33 L.Ed.2d 154 (1972)). We have always rejected that vision of our role:

“When Congress passes an Act empowering administrative agencies to carry on governmental activities, the power of those agencies is circumscribed by the authority granted. This permits the courts to participate in law enforcement entrusted to administrative bodies only to the extent necessary to protect justiciable individual rights against administrative action fairly beyond the granted powers.... This is very far from assuming that the courts are charged more than administrators or legislators with the protection of the rights of the people. Congress and the Executive supervise the acts of administrative agents.... But under [Article III](#), Congress established courts to

adjudicate cases and controversies as to claims of infringement of individual rights whether by unlawful action of private persons or by the exertion of unauthorized administrative power.”

[Stark v. Wickard](#), 321 U.S. 288, 309–310, 64 S.Ct. 559, 571, 88 L.Ed. 733 (1944) (footnote omitted).

*578 “Individual rights,” within the meaning of this passage, do not mean public rights that have been legislatively pronounced to belong to each individual who forms part of the public. See also [Sierra Club](#), 405 U.S., at 740–741, n. 16, 92 S.Ct., at 1369, n. 16.

Nothing in this contradicts the principle that “[t]he ... injury required by [Art. III](#) may exist solely by virtue of ‘statutes creating legal rights, the invasion of which creates standing.’” [Warth](#), 422 U.S., at 500, 95 S.Ct., at 2206 (quoting [Linda R. S. v. Richard D.](#), 410 U.S. 614, 617, n. 3, 93 S.Ct. 1146, 1148, n. 3, 35 L.Ed.2d 536 (1973)). Both of the cases used by [Linda R. S.](#) as an illustration of that principle involved Congress’ elevating to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law (namely, injury to an individual’s personal interest in living in a racially integrated community, see [Trafficante v. Metropolitan Life Ins. Co.](#), 409 U.S. 205, 208–212, 93 S.Ct. 364, 366–368, 34 L.Ed.2d 415 (1972), and injury to a company’s interest in marketing its product free from competition, see [Hardin v. Kentucky Utilities Co.](#), 390 U.S. 1, 6, 88 S.Ct. 651, 654, 19 L.Ed.2d 787 (1968)). As we said in [Sierra Club](#), “[Statutory] broadening [of] the categories of injury that may be alleged in support **2146 of standing is a different matter from abandoning the requirement that the party seeking review must himself have suffered an injury.” [405 U.S.](#), at 738, 92 S.Ct., at 1368. Whether or not the principle set forth in [Warth](#) can be extended beyond that distinction, it is clear that in suits against the Government, at least, the concrete injury requirement must remain.

* * *

We hold that respondents lack standing to bring this action and that the Court of Appeals erred in denying the summary judgment motion filed by the United States. The opinion of the Court of Appeals

is hereby reversed, and the cause is remanded for proceedings consistent with this opinion.

It is so ordered.

*579 Justice [KENNEDY](#), with whom Justice [SOUTER](#) joins, concurring in part and concurring in the judgment.

Although I agree with the essential parts of the Court's analysis, I write separately to make several observations.

I agree with the Court's conclusion in Part III–A that, on the record before us, respondents have failed to demonstrate that they themselves are “among the injured.” [Sierra Club v. Morton](#), 405 U.S. 727, 735, 92 S.Ct. 1361, 1366, 31 L.Ed.2d 636 (1972). This component of the standing inquiry is not satisfied unless

“[p]laintiffs ... demonstrate a ‘personal stake in the outcome.’ ... Abstract injury is not enough. The plaintiff must show that he ‘has sustained or is immediately in danger of sustaining some direct injury’ as the result of the challenged official conduct and the injury or threat of injury must be both ‘real and immediate,’ not ‘conjectural’ or ‘hypothetical.’ ” [Los Angeles v. Lyons](#), 461 U.S. 95, 101–102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983) (citations omitted).


While it may seem trivial to require that Ms. Kelly and Skilbred acquire airline tickets to the project sites or announce a date certain upon which they will return, see *ante*, at 2138, this is not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis, see [Sierra Club v. Morton](#), *supra*, 405 U.S., at 735, n. 8, 92 S.Ct., at 1366, n. 8, nor do the affiants claim to have visited the sites since the projects commenced. With respect to the Court's discussion of respondents' “ecosystem nexus,” “animal nexus,” and “vocational nexus” theories, *ante*, at 2139–2140, I agree that on this record respondents' showing is insufficient to establish standing on any of these bases. I am not willing to foreclose the possibility, however, that in different circumstances a nexus theory similar to those proffered here might support a claim to standing. See [Japan Whaling Assn. v. American](#)

[Cetacean Society](#), 478 U.S. 221, 231, n. 4, 106 S.Ct. 2860, 2866, n. 4, 92 L.Ed.2d 166 (1986) (“[R]espondents ... undoubtedly have alleged a sufficient ‘injury in fact’ in that *580 the whale watching and studying of their members will be adversely affected by continued whale harvesting”).

In light of the conclusion that respondents have not demonstrated a concrete injury here sufficient to support standing under our precedents, I would not reach the issue of redressability that is discussed by the plurality in Part III–B.

I also join Part IV of the Court's opinion with the following observations. As Government programs and policies become more complex and farreaching, we must be sensitive to the articulation of new rights of action that do not have clear analogs in our common-law tradition. Modern litigation has progressed far from the paradigm of *Marbury* suing *Madison* to get his commission, [Marbury v. Madison](#), 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), or *Ogden* seeking an injunction to halt *Gibbons'* steamboat operations, [Gibbons v. Ogden](#), 22 U.S. (9 Wheat.) 1, 6 L.Ed. 23 (1824). In my view, Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before, **2147 and I do not read the Court's opinion to suggest a contrary view. See [Warth v. Seldin](#), 422 U.S. 490, 500, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975); *ante*, at 2145–2146. In exercising this power, however, Congress must at the very least identify the injury it seeks to vindicate and relate the injury to the class of persons entitled to bring suit. The citizen-suit provision of the Endangered Species Act does not meet these minimal requirements, because while the statute purports to confer a right on “any person ... to enjoin ... the United States and any other governmental instrumentality or agency ... who is alleged to be in violation of any provision of this chapter,” it does not of its own force establish that there is an injury in “any person” by virtue of any “violation.” [16 U.S.C. § 1540\(g\)\(1\)\(A\)](#).


The Court's holding that there is an outer limit to the power of Congress to confer rights of action is a direct and necessary consequence of the case and controversy limitations found in [Article III](#). I agree that it would exceed those limitations if, at the behest of Congress and in the absence *581 of any

showing of concrete injury, we were to entertain citizen suits to vindicate the public's nonconcrete interest in the proper administration of the laws. While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that "the legal questions presented ... will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action."  [Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.](#), 454 U.S. 464, 472, 102 S.Ct. 752, 758, 70 L.Ed.2d 700 (1982). In addition, the requirement of concrete injury confines the Judicial Branch to its proper, limited role in the constitutional framework of Government.

An independent judiciary is held to account through its open proceedings and its reasoned judgments. In this process it is essential for the public to know what persons or groups are invoking the judicial power, the reasons that they have brought suit, and whether their claims are vindicated or denied. The concrete injury requirement helps assure that there can be an answer to these questions; and, as the Court's opinion is careful to show, that is part of the constitutional design.


With these observations, I concur in Parts I, II, III–A, and IV of the Court's opinion and in the judgment of the Court.

Justice [STEVENS](#), concurring in the judgment.

Because I am not persuaded that Congress intended the consultation requirement in § 7(a)(2) of the Endangered Species Act of 1973 (ESA),  [16 U.S.C. § 1536\(a\)\(2\)](#), to apply to activities in foreign countries, I concur in the judgment of reversal. I do not, however, agree with the Court's conclusion *582 that respondents lack standing because the threatened injury to their interest in protecting the environment and studying endangered species is not "imminent." Nor do I agree with the plurality's additional conclusion that respondents' injury is not "redressable" in this

litigation.

I

In my opinion a person who has visited the critical habitat of an endangered species has a professional interest in preserving the species and its habitat, and intends to revisit them in the future has standing to challenge agency action that threatens their destruction. Congress has found that a wide variety of endangered species of fish, wildlife, and plants are of "aesthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."  **[2148 16 U.S.C. § 1531\(a\)\(3\)](#). Given that finding, we have no license to demean the importance of the interest that particular individuals may have in observing any species or its habitat, whether those individuals are motivated by esthetic enjoyment, an interest in professional research, or an economic interest in preservation of the species. Indeed, this Court has often held that injuries to such interests are sufficient to confer standing,¹ and the Court reiterates that holding today. See *ante*, at 2137.

The Court nevertheless concludes that respondents have not suffered "injury in fact" because they have not shown that the harm to the endangered species will produce "imminent" injury to them. See *ante*, at 2138. I disagree. An injury to an individual's interest in studying or enjoying a species and its natural habitat occurs when someone (whether it be the Government or a private party) takes action that harms that species and habitat. In my judgment, *583 therefore, the "imminence" of such an injury should be measured by the timing and likelihood of the threatened environmental harm, rather than—as the Court seems to suggest, *ante*, at 2138–2139, and n. 2—by the time that might elapse between the present and the time when the individuals would visit the area if no such injury should occur.

To understand why this approach is correct and consistent with our precedent, it is necessary to consider the purpose of the standing doctrine. Concerned about "the proper—and properly limited—role of the courts in a democratic society," we have long held that "[Art. III](#) judicial

power exists only to redress or otherwise to protect against injury to the complaining party.” [Warth v. Seldin](#), 422 U.S. 490, 498–499, 95 S.Ct. 2197, 2205, 45 L.Ed.2d 343 (1975). The plaintiff must have a “personal stake in the outcome” sufficient to “assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult ... questions.” [Baker v. Carr](#), 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). For that reason, “[a]bstract injury is not enough. It must be alleged that the plaintiff ‘has sustained or is immediately in danger of sustaining some direct injury’ as the result of the challenged statute or official conduct.... The injury or threat of injury must be both ‘real and immediate,’ not ‘conjectural,’ or ‘hypothetical.’ ” [O’Shea v. Littleton](#), 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974) (quoting [Golden v. Zwickler](#), 394 U.S. 103, 109–110, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969)).

Consequently, we have denied standing to plaintiffs whose likelihood of suffering any concrete adverse effect from the challenged action was speculative. See, e.g., [Whitmore v. Arkansas](#), 495 U.S. 149, 158–159, 110 S.Ct. 1717, 1724–1725, 109 L.Ed.2d 135 (1990); [Los Angeles v. Lyons](#), 461 U.S. 95, 105, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983); [O’Shea](#), 414 U.S., at 497, 94 S.Ct., at 676. In this case, however, the likelihood that respondents will be injured by the destruction of the endangered species is not speculative. If respondents are genuinely interested in the preservation of the endangered species and intend to study or observe these animals in the future, their injury will occur as soon as the animals are destroyed. Thus the only potential *584 source of “speculation” in this case is whether respondents’ intent to study or observe the animals is genuine.² In my view, Joyce Kelly and Amy Skilbred have **2149 introduced sufficient evidence to negate petitioner’s contention that their claims of injury are “speculative” or “conjectural.” As Justice BLACKMUN explains, *post*, at 2152–2153, a reasonable finder of fact could conclude, from their past visits, their professional backgrounds, and their affidavits and deposition testimony, that Ms. Kelly and Ms. Skilbred will return to the project sites and, consequently, will be injured by the destruction of the endangered species and critical

habitat.

The plurality also concludes that respondents’ injuries are not redressable in this litigation for two reasons. First, respondents have sought only a declaratory judgment that the Secretary of the Interior’s regulation interpreting § 7(a)(2) to require consultation only for agency actions in the United States or on the high seas is invalid and an injunction requiring him to promulgate a new regulation requiring consultation for agency actions abroad as well. But, the plurality opines, even if respondents succeed and a new regulation is *585 promulgated, there is no guarantee that federal agencies that are not parties to this case will actually consult with the Secretary. See *ante*, at 2140–2142. Furthermore, the plurality continues, respondents have not demonstrated that federal agencies can influence the behavior of the foreign governments where the affected projects are located. Thus, even if the agencies consult with the Secretary and terminate funding for foreign projects, the foreign governments might nonetheless pursue the projects and jeopardize the endangered species. See *ante*, at 2142. Neither of these reasons is persuasive.

We must presume that if this Court holds that § 7(a)(2) requires consultation, all affected agencies would abide by that interpretation and engage in the requisite consultations. Certainly the Executive Branch cannot be heard to argue that an authoritative construction of the governing statute by this Court may simply be ignored by any agency head. Moreover, if Congress has required consultation between agencies, we must presume that such consultation will have a serious purpose that is likely to produce tangible results. As Justice BLACKMUN explains, *post*, at 2156–2157, it is not mere speculation to think that foreign governments, when faced with the threatened withdrawal of United States assistance, will modify their projects to mitigate the harm to endangered species.

II

Although I believe that respondents have standing, I nevertheless concur in the judgment of reversal

because I am persuaded that the Government is correct in its submission that § 7(a)(2) does not apply to activities in foreign countries. As with all questions of statutory construction, the question whether a statute applies extraterritorially is one of congressional intent. [Foley Bros., Inc. v. Filardo](#), 336 U.S. 281, 284–285, 69 S.Ct. 575, 577, 93 L.Ed. 680 (1949). We normally assume that “Congress is primarily concerned with domestic conditions,” [id.](#), at 285, 69 S.Ct., at 577, and therefore presume that “ ‘legislation of Congress, unless a *586 contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States,’ ” [**2150 EEOC v. Arabian American Oil Co.](#), 499 U.S. 244, 248, 111 S.Ct. 1227, 1230, 113 L.Ed.2d 274 (1991) (quoting [Foley Bros.](#), 336 U.S., at 285, 69 S.Ct., at 577).

Section 7(a)(2) provides, in relevant part:

“Each Federal agency shall, in consultation with and with the assistance of the Secretary [of the Interior or Commerce, as appropriate³], insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an ‘agency action’) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section....”
[16 U.S.C. § 1536\(a\)\(2\).](#)

Nothing in this text indicates that the section applies in foreign countries.⁴ Indeed, the only geographic reference in *587 the section is in the “critical habitat” clause,⁵ which mentions “affected States.” The Secretary of the Interior and the Secretary of Commerce have consistently taken the position that they need not designate critical habitat in foreign countries. See [42 Fed.Reg. 4869 \(1977\)](#) (initial regulations of the Fish and Wildlife Service and the National Marine Fisheries Service on behalf of the Secretary of the Interior and the Secretary of Commerce). Consequently, neither Secretary interprets § 7(a)(2) to require federal agencies to engage in consultations to ensure that their actions in foreign countries will not adversely affect the critical habitat of endangered or

threatened species.

That interpretation is sound, and, in fact, the Court of Appeals did not question it.⁶ There is, moreover, no indication that Congress intended to give a different geographic scope to the two clauses in § 7(a)(2). To the contrary, Congress recognized that one of the “major causes” of extinction of *588 endangered species is the “destruction of **2151 natural habitat.” [S.Rep. No. 93–307, p. 2 \(1973\)](#); see also [H.Rep. No. 93–412, p. 2](#); [H.Rep. No. 93–412, p. 2 \(1973\)](#), U.S.Code Cong. & Admin.News 1973, pp. 2989, 2990; [TVA v. Hill](#), 437 U.S. 153, 179, 98 S.Ct. 2279, 2294, 57 L.Ed.2d 117 (1978). It would thus be illogical to conclude that Congress required federal agencies to avoid jeopardy to endangered species abroad, but not destruction of critical habitat abroad.

The lack of an express indication that the consultation requirement applies extraterritorially is particularly significant because other sections of the ESA expressly deal with the problem of protecting endangered species abroad. Section 8, for example, authorizes the President to provide assistance to “any foreign country (with its consent) ... in the development and management of programs in that country which [are] ... necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to [section 1533](#) of this title.” [16 U.S.C. § 1537\(a\)](#). It also directs the Secretary of the Interior, “through the Secretary of State,” to “encourage” foreign countries to conserve fish and wildlife and to enter into bilateral or multilateral agreements. [§ 1537\(b\)](#). Section 9 makes it unlawful to import endangered species into (or export them from) the United States or to otherwise traffic in endangered species “in interstate or foreign commerce.” §§ 1538(a)(1)(A), (E), (F). Congress thus obviously thought about endangered species abroad and devised specific sections of the ESA to protect them. In this context, the absence of any explicit statement that the consultation requirement is applicable to agency actions in foreign countries suggests that Congress did not intend that § 7(a)(2) apply extraterritorially.

Finally, the general purpose of the ESA does not evince a congressional intent that the consultation requirement be applicable to federal agency actions abroad. The congressional findings explaining the need for the ESA emphasize that “various species of fish, wildlife, and plants in the United States

have been rendered extinct as a consequence *589 of economic growth and development untempered by adequate concern and conservation,” and that these species “are of aesthetic, ecological, educational, historical, recreational, and scientific value to the *Nation and its people*.” §§ 1531(1), (3) (emphasis added). The lack of similar findings about the harm caused by development in other countries suggests that Congress was primarily concerned with balancing development and conservation goals in this country.⁷

In short, a reading of the entire statute persuades me that Congress did not intend the consultation requirement in § 7(a)(2) to apply to activities in foreign countries. Accordingly, notwithstanding my disagreement with the Court’s disposition of the standing question, I concur in its judgment.

Justice BLACKMUN, with whom Justice O’CONNOR joins, dissenting.

I part company with the Court in this case in two respects. First, I believe that respondents have raised genuine issues of fact—sufficient to survive summary judgment—both as to injury and as to redressability. Second, I question the Court’s breadth of language in rejecting standing for “procedural” injuries. I fear the Court seeks to impose fresh limitations on the constitutional **2152 authority of Congress to allow *590 citizen suits in the federal courts for injuries deemed “procedural” in nature. I dissent.

I

Article III of the Constitution confines the federal courts to adjudication of actual “Cases” and “Controversies.” To ensure the presence of a “case” or “controversy,” this Court has held that Article III requires, as an irreducible minimum, that a plaintiff allege (1) an injury that is (2) “fairly traceable to the defendant’s allegedly unlawful conduct” and that is (3) “likely to be redressed by the requested relief.” Allen v. Wright, 468 U.S.

737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556 (1984).

A

To survive petitioner’s motion for summary judgment on standing, respondents need not prove that they are actually or imminently harmed. They need show only a “genuine issue” of material fact as to standing. Fed.Rule Civ.Proc. 56(c). This is not a heavy burden. A “genuine issue” exists so long as “the evidence is such that a reasonable jury could return a verdict for the nonmoving party [respondents].” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). This Court’s “function is not [it]self to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Id., at 249, 106 S.Ct., at 2511.

The Court never mentions the “genuine issue” standard. Rather, the Court refers to the type of evidence it feels respondents failed to produce, namely, “affidavits or other evidence showing, through specific facts” the existence of injury. Ante, at 2137. The Court thereby confuses respondents’ evidentiary burden (i.e., affidavits asserting “specific facts”) in withstanding a summary judgment motion under Rule 56(e) with the standard of proof (i.e., the existence of a “genuine issue” of “material fact”) under Rule 56(c).

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Were the Court to apply the proper standard for summary judgment, I believe it would conclude that the sworn affidavits and deposition testimony of Joyce Kelly and Amy Skilbred advance sufficient facts to create a genuine issue for trial concerning whether one or both would be imminently harmed by the Aswan and Mahaweli

projects. In the first instance, as the Court itself concedes, the affidavits contained facts making it at least “questionable” (and therefore within the province of the factfinder) that certain agency-funded projects threaten listed species.¹ *Ante*, at 2138. The only remaining issue, then, is whether Kelly and Skilbred have shown that they personally would suffer imminent harm.

I think a reasonable finder of fact could conclude from the information in the affidavits and deposition testimony that either Kelly or Skilbred will soon return to the project sites, thereby satisfying the “actual or imminent” injury standard. The Court dismisses **2153 Kelly’s and Skilbred’s general statements *592 that they intended to revisit the project sites as “simply not enough.” *Ibid.* But those statements did not stand alone. A reasonable finder of fact could conclude, based not only upon their statements of intent to return, but upon their past visits to the project sites, as well as their professional backgrounds, that it was likely that Kelly and Skilbred would make a return trip to the project areas. Contrary to the Court’s contention that Kelly’s and Skilbred’s past visits “prov[e] nothing,” *ibid.*, the fact of their past visits could demonstrate to a reasonable factfinder that Kelly and Skilbred have the requisite resources and personal interest in the preservation of the species endangered by the Aswan and Mahaweli projects to make good on their intention to return again. Cf. [Los Angeles v. Lyons](#), 461 U.S. 95, 102, 103 S.Ct. 1660, 1665, 75 L.Ed.2d 675 (1983) (“Past wrongs were evidence bearing on whether there is a real and immediate threat of repeated injury”) (internal quotation marks omitted). Similarly, Kelly’s and Skilbred’s professional backgrounds in wildlife preservation, see App. 100, 144, 309–310, also make it likely—at least far more likely than for the average citizen—that they would choose to visit these areas of the world where species are vanishing.

By requiring a “description of concrete plans” or “specification of *when* the some day [for a return visit] will be,” *ante*, at 8, the Court, in my view, demands what is likely an empty formality. No substantial barriers prevent Kelly or Skilbred from simply purchasing plane tickets to return to the Aswan and Mahaweli projects. This case differs from other cases in which the imminence of harm turned largely on the affirmative actions of third parties beyond a plaintiff’s control. See [Whitmore v. Arkansas](#), 495 U.S. 149, 155–156,

110 S.Ct. 1717, 1723, 109 L.Ed.2d 135 (1990) (harm to plaintiff death-row inmate from fellow inmate’s execution depended on the court’s one day reversing plaintiff’s conviction or sentence and considering comparable sentences at resentencing); [Los Angeles v. Lyons](#), 461 U.S., at 105, 103 S.Ct., at 1667 (harm dependent on police’s arresting plaintiff again *593 and subjecting him to chokehold); [Rizzo v. Goode](#), 423 U.S. 362, 372, 96 S.Ct. 598, 605, 46 L.Ed.2d 561 (1976) (harm rested upon “what one of a small, unnamed minority of policemen might do to them in the future because of that unknown policeman’s perception of departmental disciplinary procedures”); [O’Shea v. Littleton](#), 414 U.S. 488, 495–498, 94 S.Ct. 669, 675–677, 38 L.Ed.2d 674 (1974) (harm from discriminatory conduct of county magistrate and judge dependent on plaintiffs’ being arrested, tried, convicted, and sentenced); [Golden v. Zwickler](#), 394 U.S. 103, 109, 89 S.Ct. 956, 960, 22 L.Ed.2d 113 (1969) (harm to plaintiff dependent on a former Congressman’s (then serving a 14–year term as a judge) running again for Congress). To be sure, a plaintiff’s unilateral control over his or her exposure to harm does not *necessarily* render the harm nonspeculative. Nevertheless, it suggests that a finder of fact would be far more likely to conclude the harm is actual or imminent, especially if given an opportunity to hear testimony and determine credibility.

I fear the Court’s demand for detailed descriptions of future conduct will do little to weed out those who are genuinely harmed from those who are not. More likely, it will resurrect a code-pleading formalism in federal court summary judgment practice, as federal courts, newly doubting their jurisdiction, will demand more and more particularized showings of future harm. Just to survive summary judgment, for example, a property owner claiming a decline in the value of his property from governmental action might have to specify the exact date he intends to sell his property and show that there is a market for the property, lest it be surmised he might not sell again. A nurse turned down for a job on grounds of her race had better be prepared to show on what date she was prepared to start work, that she had arranged daycare for her child, and that she **2154 would not have accepted work at another hospital instead. And a Federal Tort Claims Act plaintiff alleging loss of consortium should make sure to

furnish this Court with a “description of concrete plans” for her nightly schedule of attempted activities.

*594 2

The Court also concludes that injury is lacking, because respondents’ allegations of “ecosystem nexus” failed to demonstrate sufficient proximity to the site of the environmental harm. *Ante*, at 2139. To support that conclusion, the Court mischaracterizes our decision in [Lujan v. National Wildlife Federation](#), 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), as establishing a general rule that “a plaintiff claiming injury from environmental damage must use the area affected by the challenged activity.” *Ante*, at 2139. In [National Wildlife Federation](#), the Court required specific geographical proximity because of the particular type of harm alleged in that case: harm to the plaintiff’s visual enjoyment of nature from mining activities. [497 U.S.](#), at 888, 110 S.Ct., at 3188. One cannot suffer from the sight of a ruined landscape without being close enough to see the sites actually being mined. Many environmental injuries, however, cause harm distant from the area immediately affected by the challenged action. Environmental destruction may affect animals traveling over vast geographical ranges, see, e.g., [Japan Whaling Assn. v. American Cetacean Society](#), 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986) (harm to American whale watchers from Japanese whaling activities), or rivers running long geographical courses, see, e.g., [Arkansas v. Oklahoma](#), 503 U.S. 91, 112 S.Ct. 1046, 117 L.Ed.2d 239 (1992) (harm to Oklahoma residents from wastewater treatment plant 39 miles from border). It cannot seriously be contended that a litigant’s failure to use the precise or exact site where animals are slaughtered or where toxic waste is dumped into a river means he or she cannot show injury.

The Court also rejects respondents’ claim of vocational or professional injury. The Court says that it is “beyond all reason” that a zoo “keeper” of Asian elephants would have standing to contest his Government’s participation in the eradication of all

the Asian elephants in another part of the world. *Ante*, at 2139. I am unable to see how the distant location of the destruction *necessarily* (for purposes of ruling *595 at summary judgment) mitigates the harm to the elephant keeper. If there is no more access to a future supply of the animal that sustains a keeper’s livelihood, surely there is harm.

I have difficulty imagining this Court applying its rigid principles of geographic formalism anywhere outside the context of environmental claims. As I understand it, environmental plaintiffs are under no special constitutional standing disabilities. Like other plaintiffs, they need show only that the action they challenge has injured them, without necessarily showing they happened to be physically near the location of the alleged wrong. The Court’s decision today should not be interpreted “to foreclose the possibility ... that in different circumstances a nexus theory similar to those proffered here might support a claim to standing.” *Ante*, at 2146 (KENNEDY, J., concurring in part and concurring in judgment).

B

A plurality of the Court suggests that respondents have not demonstrated redressability: a likelihood that a court ruling in their favor would remedy their injury. [Duke Power Co. v. Carolina Environmental Study Group, Inc.](#), 438 U.S. 59, 74–75, and n. 20, 98 S.Ct. 2620, 2630–2631, and n. 20, 57 L.Ed.2d 595 (1978) (plaintiff must show “substantial likelihood” that relief requested will redress the injury). The plurality identifies two obstacles. The first is that the “action agencies” (e.g., AID) cannot be required to undertake consultation with petitioner Secretary, because they are not directly bound as parties to the suit and are otherwise not indirectly **2155 bound by being subject to petitioner Secretary’s regulation. Petitioner, however, officially and publicly has taken the position that his regulations regarding consultation under § 7 of the Act are binding on action agencies. 50 CFR § 402.14(a) (1991).² And he has previously *596 taken the same position in this very litigation, having stated in his answer to the complaint that petitioner “admits the Fish and

Wildlife Service (FWS) was designated the lead agency for the formulation of regulations concerning section 7 of the [Endangered Species Act].” App. 246. I cannot agree with the plurality that the Secretary (or the Solicitor General) is now free, for the convenience of this appeal, to disavow his prior public and litigation positions. More generally, I cannot agree that the Government is free to play “Three-Card Monte” with its description of agencies’ authority to defeat standing against the agency given the lead in administering a statutory scheme.

Emphasizing that none of the action agencies are parties to this suit (and having rejected the possibility of their being indirectly bound by petitioner’s regulation), the plurality concludes that “there is no reason they should be obliged to honor an incidental legal determination the suit produced.” *Ante*, at 2141. I am not as willing as the plurality is to assume that agencies at least will not try to follow the law. Moreover, I wonder if the plurality has not overlooked the extensive involvement from the inception of this litigation by the Department of State and AID.³ Under *597 principles of collateral estoppel, these agencies are precluded from subsequently relitigating the issues decided in this suit.

“[O]ne who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record.” *Souffront v. Compagnie des Sucrieries de Puerto Rico*, 217 U.S. 475, 487, 30 S.Ct. 608, 612, 54 L.Ed. 846 (1910).

This principle applies even to the Federal Government. In *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979), this Court held that the Government was estopped from relitigating in federal court the constitutionality of Montana’s gross receipts tax, because that issue previously had been litigated in state court by an individual contractor whose litigation had been financed and controlled by the Federal Government. “Thus, although not a party, the United States plainly had a sufficient ‘laboring **2156 oar’ in the conduct of the

state-court litigation to actuate principles of estoppel.” *Id.*, at 155, 99 S.Ct., at 974. See also *United States v. Mendoza*, 464 U.S. 154, 164, n. 9, 104 S.Ct. 568, 574, n. 9, 78 L.Ed.2d 379 (1984) (Federal Government estopped where it “constituted a ‘party’ in all but a technical sense”). In my view, the action agencies have had sufficient “laboring oars” in this litigation since its inception to be bound from subsequent *598 relitigation of the extraterritorial scope of the § 7 consultation requirement.⁴ As a result, I believe respondents’ injury would likely be redressed by a favorable decision.

*599 The second redressability obstacle relied on by the plurality is that “the [action] agencies generally supply only a fraction of the funding for a foreign project.” *Ante*, at 2142. What this Court might “generally” take to be true does not eliminate the existence of a genuine issue of fact to withstand **2157 summary judgment. Even if the action agencies supply only a fraction of the funding for a particular foreign project, it remains at least a question for the finder of fact whether threatened withdrawal of that fraction would affect foreign government conduct sufficiently to avoid harm to listed species.

The plurality states that “AID, for example, has provided less than 10% of the funding for the Mahaweli project.” *Ibid.* The plurality neglects to mention that this “fraction” amounts to \$170 million, see App. 159, not so paltry a sum for a country of only 16 million people with a gross national product of less than \$6 billion in 1986 when respondents filed *600 the complaint in this action. Federal Research Division, Library of Congress, Sri Lanka: A Country Study (Area Handbook Series) xvi-xvii (1990).

The plurality flatly states: “Respondents have produced nothing to indicate that the projects they have named will ... do less harm to listed species, if that fraction is eliminated.” *Ante*, at 2142. As an initial matter, the relevant inquiry is not, as the plurality suggests, what will happen if AID or other agencies stop funding projects, but what will happen if AID or other agencies comply with the consultation requirement for projects abroad. Respondents filed suit to require consultation, not a termination of funding. Respondents have raised at least a genuine issue of fact that the projects harm endangered species and that the actions of AID and other United States agencies can mitigate that

harm.

The plurality overlooks an Interior Department memorandum listing eight endangered or threatened species in the Mahaweli project area and recounting that “[t]he Sri Lankan government has requested the assistance of AID in mitigating the negative impacts to the wildlife involved.” App. 78. Further, a letter from the Director of the Fish and Wildlife Service to AID states:

“The Sri Lankan government lacks the necessary finances to undertake any long-term management programs to avoid the negative impacts to the wildlife. The donor nations and agencies that are financing the [Mahaweli project] will be the key as to how successfully the wildlife is preserved. If wildlife problems receive the same level of attention as the engineering project, then the negative impacts to the environment can be alleviated. This means that there has to be long-term funding in sufficient amounts to stem the negative impacts of this project.” *Id.*, at 216.

*601 I do not share the plurality’s astonishing confidence that, on the record here, a factfinder could only conclude that AID was powerless to ensure the protection of listed species at the Mahaweli project.

As for the Aswan project, the record again rebuts the plurality’s assumption that donor agencies are without any authority to protect listed species. Kelly asserted in her affidavit—and it has not been disputed—that the Bureau of Reclamation was “overseeing” the rehabilitation of the Aswan project. *Id.*, at 101. See also *id.*, at 65 (Bureau of Reclamation publication stating: “In 1982, the Egyptian government ... requested that Reclamation serve as its engineering advisor for the nine-year [Aswan] rehabilitation project”).

I find myself unable to agree with the plurality’s analysis of redressability, based as it is on its invitation of executive lawlessness, ignorance of principles of collateral estoppel, unfounded assumptions about causation, and erroneous conclusions about what the record does not say. In my view, respondents have satisfactorily shown a genuine issue of fact as to whether their injury would likely be redressed by a decision in their favor.

II

The Court concludes that any “procedural injury” suffered by respondents is insufficient to confer standing. It rejects the view that the “injury-in-fact requirement [is] satisfied by congressional conferral upon *all* persons of an abstract, self-contained, noninstrumental **2158 ‘right’ to have the Executive observe the procedures required by law.” *Ante*, at 2143. Whatever the Court might mean with that very broad language, it cannot be saying that “procedural injuries” *as a class* are necessarily insufficient for purposes of Article III standing.

Most governmental conduct can be classified as “procedural.” Many injuries caused by governmental conduct, therefore, are categorizable at some level of generality as *602 “procedural” injuries. Yet, these injuries are not categorically beyond the pale of redress by the federal courts. When the Government, for example, “procedurally” issues a pollution permit, those affected by the permittee’s pollutants are not without standing to sue. Only later cases will tell just what the Court means by its intimation that “procedural” injuries are not constitutionally cognizable injuries. In the meantime, I have the greatest of sympathy for the courts across the country that will struggle to understand the Court’s standardless exposition of this concept today.

The Court expresses concern that allowing judicial enforcement of “agencies’ observance of a particular, statutorily prescribed procedure” would “transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed,’ Art. II, § 3.” *Ante*, at 2145. In fact, the principal effect of foreclosing judicial enforcement of such procedures is to transfer power into the hands of the Executive at the expense—not of the courts—but of Congress, from which that power originates and emanates.

Under the Court’s anachronistically formal view of the separation of powers, Congress legislates pure, substantive mandates and has no business structuring the procedural manner in which the Executive implements these mandates. To be sure, in the ordinary course, Congress does legislate in black-and-white terms of affirmative commands or negative prohibitions on the conduct of officers of the Executive Branch. In complex regulatory areas,

however, Congress often legislates, as it were, in procedural shades of gray. That is, it sets forth substantive policy goals and provides for their attainment by requiring Executive Branch officials to follow certain procedures, for example, in the form of reporting, consultation, and certification requirements.

The Court recently has considered two such procedurally oriented statutes. In [Japan Whaling Assn. v. American Cetacean Society](#), 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986), the Court examined a ***603** statute requiring the Secretary of Commerce to certify to the President that foreign nations were not conducting fishing operations or trading which “diminis[h] the effectiveness” of an international whaling convention. [Id.](#), at 226, 106 S.Ct., at 2864. The Court expressly found standing to sue. [Id.](#), at 230–231, n. 4, 106 S.Ct., at 2865–2866, n. 4. In [Robertson v. Methow Valley Citizens Council](#), 490 U.S. 332, 348, 109 S.Ct. 1835, 1844, 104 L.Ed.2d 351 (1989), this Court considered injury from violation of the “action-forcing” procedures of the National Environmental Policy Act (NEPA), in particular the requirements for issuance of environmental impact statements.

The consultation requirement of § 7 of the Endangered Species Act is a similar, action-forcing statute. Consultation is designed as an integral check on federal agency action, ensuring that such action does not go forward without full consideration of its effects on listed species. Once consultation is initiated, the Secretary is under a duty to provide to the action agency “a written statement setting forth the Secretary’s opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat.” [16 U.S.C. § 1536\(b\)\(3\)\(A\)](#). The Secretary is also obligated to suggest “reasonable and prudent alternatives” to prevent jeopardy to listed species. *Ibid.* The action agency must undertake as well its own “biological ****2159** assessment for the purpose of identifying any endangered species or threatened species” likely to be affected by agency action. [§ 1536\(c\)\(1\)](#). After the initiation of consultation, the action agency “shall not make any irreversible or irretrievable commitment of resources” which would foreclose the “formulation or implementation of any reasonable and prudent alternative measures” to avoid jeopardizing listed

species. [§ 1536\(d\)](#). These action-forcing procedures are “designed to protect some threatened concrete interest,” *ante*, at 2143, n. 8, of persons who observe and work with endangered or threatened species. That is why I am mystified by the Court’s unsupported conclusion that “[t]his is not a case where plaintiffs ***604** are seeking to enforce a procedural requirement the disregard of which could impair a separate concrete interest of theirs.” *Ante*, at 2142.

Congress legislates in procedural shades of gray not to aggrandize its own power but to allow maximum Executive discretion in the attainment of Congress’ legislative goals. Congress could simply impose a substantive prohibition on Executive conduct; it could say that no agency action shall result in the loss of more than 5% of any listed species. Instead, Congress sets forth substantive guidelines and allows the Executive, within certain procedural constraints, to decide how best to effectuate the ultimate goal. See [American Power & Light Co. v. SEC](#), 329 U.S. 90, 105, 67 S.Ct. 133, 142, 91 L.Ed. 103 (1946). The Court never has questioned Congress’ authority to impose such procedural constraints on Executive power. Just as Congress does not violate separation of powers by structuring the procedural manner in which the Executive shall carry out the laws, surely the federal courts do not violate separation of powers when, at the very instruction and command of Congress, they enforce these procedures.

To prevent Congress from conferring standing for “procedural injuries” is another way of saying that Congress may not delegate to the courts authority deemed “executive” in nature. *Ante*, at 2145 (Congress may not “transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed,’ Art. II, § 3”). Here Congress seeks not to delegate “executive” power but only to strengthen the procedures it has legislatively mandated. “We have long recognized that the nondelegation doctrine does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches.” [Touby v. United States](#), 500 U.S. 160, 165, 111 S.Ct. 1752, 1756, 114 L.Ed.2d 219 (1991). “Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive *or* judicial actors.” [Ibid.](#) (emphasis added).

*605 Ironically, this Court has previously justified a relaxed review of congressional delegation to the Executive on grounds that Congress, in turn, has subjected the exercise of that power to judicial review. [INS v. Chadha](#), 462 U.S. 919, 953–954, n. 16, 103 S.Ct. 2764, 2785–2786, n. 16, 77 L.Ed.2d 317 (1983); [American Power & Light Co. v. SEC](#), 329 U.S., at 105–106, 67 S.Ct. at 142–143. The Court’s intimation today that procedural injuries are not constitutionally cognizable threatens this understanding upon which Congress has undoubtedly relied. In no sense is the Court’s suggestion compelled by our “common understanding of what activities are appropriate to legislatures, to executives, and to courts.” *Ante*, at 2136. In my view, it reflects an unseemly solicitude for an expansion of power of the Executive Branch.

It is to be hoped that over time the Court will acknowledge that some classes of procedural duties are so enmeshed with the prevention of a substantive, concrete harm that an individual plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty. For example, in the context of the NEPA requirement of environmental-impact statements, **2160 this Court has acknowledged “it is now well settled that NEPA itself does not mandate particular results [and] simply prescribes the necessary process,” but “*these procedures are almost certain to affect the agency’s substantive decision.*” [Robertson v. Methow Valley Citizens Council](#), 490 U.S., at 350, 109 S.Ct., at 1846 (emphasis added). See also [Andrus v. Sierra Club](#), 442 U.S. 347, 350–351, 99 S.Ct. 2335, 2337, 60 L.Ed.2d 943 (1979) (“If environmental concerns are not interwoven into the fabric of agency planning, the ‘action-forcing’ characteristics of [the environmental-impact statement requirement] would be lost”). This acknowledgment of an inextricable link between procedural and substantive harm does not reflect improper appellate factfinding. It reflects nothing more than the proper deference owed to the judgment of a coordinate branch—Congress—that certain procedures are directly tied to protection against a substantive harm.

Footnotes

*606 In short, determining “injury” for Article III standing purposes is a fact-specific inquiry. “Typically ... the standing inquiry requires careful judicial examination of a complaint’s allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted.” [Allen v. Wright](#), 468 U.S., at 752, 104 S.Ct., at 3325. There may be factual circumstances in which a congressionally imposed procedural requirement is so insubstantially connected to the prevention of a substantive harm that it cannot be said to work any conceivable injury to an individual litigant. But, as a general matter, the courts owe substantial deference to Congress’ substantive purpose in imposing a certain procedural requirement. In all events, “[o]ur separation-of-powers analysis does not turn on the labeling of an activity as ‘substantive’ as opposed to ‘procedural.’ ” [Mistretta v. United States](#), 488 U.S. 361, 393, 109 S.Ct. 647, 665, 102 L.Ed.2d 714 (1989). There is no room for a *per se* rule or presumption excluding injuries labeled “procedural” in nature.

III

In conclusion, I cannot join the Court on what amounts to a slash-and-burn expedition through the law of environmental standing. In my view, “[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury.”

[Marbury v. Madison](#), 1 Cranch 137, 163, 2 L.Ed. 60 (1803).

I dissent.

All Citations

504 U.S. 555, 112 S.Ct. 2130, 119 L.Ed.2d 351, 34 ERC 1785, 60 USLW 4495, 22 Env’tl. L. Rep. 20,913

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See [United States v. Detroit Lumber Co.](#), 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 By particularized, we mean that the injury must affect the plaintiff in a personal and individual way.

2 The dissent acknowledges the settled requirement that the injury complained of be, if not actual, then at least *imminent*, but it contends that respondents could get past summary judgment because “a reasonable finder of fact could conclude ... that ... Kelly or Skilbred will soon return to the project sites.” *Post*, at 2152. This analysis suffers either from a factual or from a legal defect, depending on what the “soon” is supposed to mean. If “soon” refers to the standard mandated by our precedents—that the injury be “imminent,” [Whitmore v. Arkansas](#), 495 U.S. 149, 155, 110 S.Ct. 1717, 1723, 109 L.Ed.2d 135 (1990)—we are at a loss to see how, as a factual matter, the standard can be met by respondents’ mere profession of an intent, some day, to return. But if, as we suspect, “soon” means nothing more than “in this lifetime,” then the dissent has undertaken quite a departure from our precedents. Although “imminence” is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is “ ‘certainly impending,’ ” [id.](#), at 158, 110 S.Ct., at 1725 (emphasis added). It has been stretched beyond the breaking point when, as here, the plaintiff alleges only an injury at some indefinite future time, and the acts necessary to make the injury happen are at least partly within the plaintiff’s own control. In such circumstances we have insisted that the injury proceed with a high degree of immediacy, so as to reduce the possibility of deciding a case in which no injury would have occurred at all. See, e.g., [id.](#), at 156–160, 110 S.Ct., at 1723–1726; [Los Angeles v. Lyons](#), 461 U.S. 95, 102–106, 103 S.Ct. 1660, 1665–1667, 75 L.Ed.2d 675 (1983).


There is no substance to the dissent’s suggestion that imminence is demanded only when the alleged harm depends upon “the affirmative actions of third parties beyond a plaintiff’s control,” *post*, at 2153. Our cases mention third-party-caused contingency, naturally enough; but they also mention the plaintiff’s failure to show that he will soon expose *himself* to the injury, see, e.g., [Lyons, supra](#), at 105–106, 103 S.Ct., at 1666–1667; [O’Shea v. Littleton](#), 414 U.S. 488, 497, 94 S.Ct. 669, 676, 38 L.Ed.2d 674 (1974); [Ashcroft v. Mattis](#), 431 U.S. 171, 172–173, n. 2, 97 S.Ct. 1739, 1740 n. 2, 52 L.Ed.2d 219 (1977) (*per curiam*). And there is certainly no reason in principle to demand evidence that third persons will take the action exposing the plaintiff to harm, while *presuming* that the plaintiff himself will do so.

Our insistence upon these established requirements of standing does not mean that we would, as the dissent contends, “demand ... detailed descriptions” of damages, such as a “nightly schedule of attempted activities” from plaintiffs alleging loss of consortium. *Post*, at 2153. That case and the others posited by the dissent all involve *actual* harm; the existence of standing is clear, though the precise extent of harm remains to be determined at trial. Where there is no actual harm, however, its imminence (though not its precise extent) must be established.

3 The dissent embraces each of respondents’ “nexus” theories, rejecting this portion of our analysis because it is “unable to see how the distant location of the destruction *necessarily* (for purposes of ruling at summary judgment) mitigates the harm” to the plaintiff. *Post*, at 2154. But summary judgment must be entered “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” [Celotex Corp. v. Catrett](#), 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Respondents had to adduce facts, therefore, on the basis of which it could reasonably be found that concrete injury to their members was, as our cases require, “certainly impending.” The dissent may be correct that the geographic remoteness of those members (here in the United States) from Sri Lanka and Aswan does not “*necessarily*” prevent such a finding—but it assuredly does so when no further facts have been brought forward (and respondents have produced none) showing that the impact upon animals in those distant places will in some fashion be reflected here. The dissent’s position to the contrary reduces to the notion that distance *never* prevents harm, a proposition we categorically reject. It cannot be that a person with an interest in an animal automatically has standing to enjoin federal threats to that species of animal, anywhere in the world. Were that the case, the plaintiff in [Sierra Club](#), for example, could have avoided the necessity of establishing anyone’s use of Mineral King by merely identifying one of its members interested in an endangered species of flora or fauna at that location. Justice BLACKMAN’s accusation that a special rule is being crafted for “environmental

claims," *post*, at 2154, is correct, but *he* is the craftsman.

Justice STEVENS, by contrast, would allow standing on an apparent "animal nexus" theory to all plaintiffs whose interest in the animals is "genuine." Such plaintiffs, we are told, do not have to visit the animals because the animals are analogous to family members. *Post*, at 2148–2149, and n. 2. We decline to join Justice STEVENS in this Linnaean leap. It is unclear to us what constitutes a "genuine" interest; how it differs from a "nongenuine" interest (which nonetheless prompted a plaintiff to file suit); and why such an interest in animals should be different from such an interest in anything else that is the subject of a lawsuit.

- 4 We need not linger over the dissent's facially impracticable suggestion, *post*, at 2154–2155, that one agency of the Government can acquire the power to direct other agencies by simply claiming that power in its own regulations and in litigation to which the other agencies are not parties. As for the contention that the other agencies will be "collaterally estopped" to challenge our judgment that they are bound by the Secretary of the Interior's views, because of their participation in this suit, *post*, at 2155–2156: Whether or not that is true now, it was assuredly not true when this suit was filed, naming the Secretary alone. "The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed.*"  [Newman–Green, Inc. v. Alfonzo–Larrain](#), 490 U.S. 826, 830, 109 S.Ct. 2218, 2222, 104 L.Ed.2d 893 (1989) (emphasis added). It cannot be that, by later participating in the suit, the State Department and AID retroactively created a redressability (and hence a jurisdiction) that did not exist at the outset.

The dissent's rejoinder that redressability *was* clear at the outset because the *Secretary* thought the regulation binding on the agencies, *post*, at 2156, n. 4, continues to miss the point: The *agencies* did not *agree* with the Secretary, nor would they be bound by a district court holding (as to this issue) in the Secretary's favor. There is no support for the dissent's novel contention, *ibid.*, that [Rule 19 of the Federal Rules of Civil Procedure](#), governing joinder of indispensable parties, somehow alters our longstanding rule that jurisdiction is to be assessed under the facts existing when the complaint is filed. The redressability element of the [Article III](#) standing requirement and the "*complete relief*" referred to by [Rule 19](#) are not identical. Finally, we reach the dissent's contention, *post*, at 2156, n. 4, that by refusing to waive our settled rule for purposes of this case we have made "federal subject-matter jurisdiction ... a one-way street running the Executive Branch's way." That is so, we are told, because the Executive can dispel jurisdiction where it previously existed (by either conceding the merits or by pointing out that nonparty agencies would not be bound by a ruling), whereas a plaintiff cannot retroactively create jurisdiction based on postcomplaint litigation conduct. But *any* defendant, not just the Government, can dispel jurisdiction by conceding the merits (and presumably thereby suffering a judgment) or by demonstrating standing defects. And permitting a defendant to point out a pre-existing standing defect late in the day is not remotely comparable to permitting a plaintiff to *establish* standing on the basis of the defendant's litigation conduct occurring after standing is erroneously determined.

- 5 Seizing on the fortuity that the case has made its way to *this* Court, Justice STEVENS protests that no agency would ignore "an authoritative construction of the [ESA] by this Court." *Post*, at 2149. In that he is probably correct; in concluding from it that plaintiffs have demonstrated redressability, he is not. Since, as we have pointed out above, standing is to be determined as of the commencement of suit; since at that point it could certainly not be known that the suit would reach this Court; and since it is not likely that an agency would feel compelled to accede to the legal view of a district court expressed in a case to which it was not a party; redressability clearly did not exist.
- 6 The dissent criticizes us for "overlook[ing]" memoranda indicating that the Sri Lankan Government solicited and required AID's assistance to mitigate the effects of the Mahaweli project on endangered species, and that the Bureau of Reclamation was advising the Aswan project. *Post*, at 2157–2158. The memoranda, however, contain no indication whatever that the projects will cease or be less harmful to listed species in the absence of AID funding. In fact, the Sri Lanka memorandum suggests just the opposite: It states that AID's role will be to *mitigate* the "negative impacts to the wildlife," *post*, at 2157, which means that the termination of AID funding would *exacerbate* respondents' claimed injury.
- 7 There is this much truth to the assertion that "procedural rights" are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy. Thus, under our case law, one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years. (That is why we do not rely, in the present case, upon the Government's argument that, *even if* the other agencies were obliged to consult

with the Secretary, they might not have followed his advice.) What respondents' "procedural rights" argument seeks, however, is quite different from this: standing for persons who have no concrete interests affected—persons who live (and propose to live) at the other end of the country from the dam.


8 The dissent's discussion of this aspect of the case, *post*, at 2157–2160, distorts our opinion. We do *not* hold that an individual cannot enforce procedural rights; he assuredly can, so long as the procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing. The dissent, however, asserts that there exist "classes of procedural duties ... so enmeshed with the prevention of a substantive, concrete harm that an individual plaintiff may be able to demonstrate a sufficient likelihood of injury just through the breach of that procedural duty." *Post*, at 2159. If we understand this correctly, it means that the Government's violation of a certain (undescribed) class of procedural duty satisfies the concrete-injury requirement by itself, without any showing that the procedural violation endangers a concrete interest of the plaintiff (apart from his interest in having the procedure observed). We cannot agree. The dissent is unable to cite a single case in which we actually found standing solely on the basis of a "procedural right" unconnected to the plaintiff's own concrete harm. Its suggestion that we did so in [Japan Whaling Assn. v. American Cetacean Soc.](#), 478 U.S. 221, 106 S.Ct. 2860, 92 L.Ed.2d 166 (1986), and [Robertson v. Methow Valley Citizens Council](#), 490 U.S. 332, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989), *post*, at 2158–2159, is not supported by the facts. In the former case, we found that the environmental organizations had standing because the "whale watching and studying of their members w[ould] be adversely affected by continued whale harvesting," see [478 U.S.](#), at 230–231, n. 4, 106 S.Ct., at 2866, n. 4; and in the latter we did not so much as mention standing, for the very good reason that the plaintiff was a citizens' council for the area in which the challenged construction was to occur, so that its members would obviously be concretely affected, see [Methow Valley Citizens Council v. Regional Forester](#), 833 F.2d 810, 812–813 (CA9 1987).

1 See, e.g., [Sierra Club v. Morton](#), 405 U.S. 727, 734, 92 S.Ct. 1361, 1365, 31 L.Ed.2d 636 (1972); [United States v. Students Challenging Regulatory Agency Procedures \(SCRAP\)](#), 412 U.S. 669, 686–687, 93 S.Ct. 2405, 2415–2416, 37 L.Ed.2d 254 (1973); [Japan Whaling Assn. v. American Cetacean Society](#), 478 U.S. 221, 230–231, n. 4, 106 S.Ct. 2860, 2866, n. 4, 92 L.Ed.2d 166 (1986).


2 As we recognized in [Sierra Club v. Morton](#), 405 U.S., at 735, 92 S.Ct. at 1366, the impact of changes in the esthetics or ecology of a particular area does "not fall indiscriminately upon every citizen. The alleged injury will be felt directly only by those who use [the area,] and for whom the aesthetic and recreational values of the area will be lessened..." Thus, respondents would not be injured by the challenged projects if they had not visited the sites or studied the threatened species and habitat. But, as discussed above, respondents did visit the sites; moreover, they have expressed an intent to do so again. This intent to revisit the area is significant evidence tending to confirm the genuine character of respondents' interest, but I am not at all sure that an intent to revisit would be indispensable in every case. The interest that confers standing in a case of this kind is comparable, though by no means equivalent, to the interest in a relationship among family members that can be immediately harmed by the death of an absent member, regardless of when, if ever, a family reunion is planned to occur. Thus, if the facts of this case had shown repeated and regular visits by the respondents, cf. *ante*, at 2146 (opinion of KENNEDY, J.), proof of an intent to revisit might well be superfluous.



3 The ESA defines "Secretary" to mean "the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970." [16 U.S.C. § 1532\(15\)](#). As a general matter, "marine species are under the jurisdiction of the Secretary of Commerce and all other species are under the jurisdiction of the Secretary of the Interior." [51 Fed.Reg. 19926 \(1986\)](#) (preamble to final regulations governing interagency consultation promulgated by the Fish and Wildlife Service and the National Marine Fisheries Service on behalf of the Secretary of the Interior and the Secretary of Commerce).

4 Respondents point out that the duties in § 7(a)(2) are phrased in broad, inclusive language: "Each Federal agency" shall consult with the Secretary and ensure that "any action" does not jeopardize "any endangered or threatened species" or destroy or adversely modify the "habitat of such species." See Brief for Respondents 36; [16 U.S.C. § 1536\(a\)\(2\)](#). The Court of Appeals correctly recognized, however, that such inclusive language, by itself, is not sufficient to overcome the presumption against the extraterritorial application of statutes. [911 F.2d 117, 122](#)

(CA8 1990); see also  [Foley Bros., Inc. v. Filardo](#), 336 U.S. 281, 282, 287–288, 69 S.Ct. 575, 578–579, 93 L.Ed. 680 (1949) (statute requiring an 8–hour day provision in “ [e]very contract made to which the United States ... is a party’ ” is inapplicable to contracts for work performed in foreign countries).

5 Section 7(a)(2) has two clauses which require federal agencies to consult with the Secretary to ensure that their actions (1) do not jeopardize threatened or endangered species (the “endangered species clause”), and (2) are not likely to destroy or adversely affect the habitat of such species (the “critical habitat clause”).

6 Instead, the Court of Appeals concluded that the endangered species clause and the critical habitat clause are “severable,” at least with respect to their “geographical scope,” so that the former clause applies extraterritorially even if the latter does not.  [911 F.2d](#), at 125. Under this interpretation, federal agencies must consult with the Secretary to ensure that their actions in foreign countries are not likely to threaten any endangered species, but they need not consult to ensure that their actions are not likely to destroy the critical habitats of these species. I cannot subscribe to the Court of Appeals’ strained interpretation, for there is no indication that Congress intended to give such vastly different scope to the two clauses in § 7(a)(2).

7 Of course, Congress also found that “the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to [several international agreements],” and that “encouraging the States ... to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation’s international commitments....”  [16 U.S.C. §§ 1531\(4\), \(5\)](#). The Court of Appeals read these findings as indicative of a congressional intent to make § 7(a)(2)’s consultation requirement applicable to agency action abroad. See  [911 F.2d](#), at 122–123. I am not persuaded, however, that such a broad congressional intent can be gleaned from these findings. Instead, I think the findings indicate a more narrow congressional intent that the United States abide by its international commitments.

1 The record is replete with genuine issues of fact about the harm to endangered species from the Aswan and Mahaweli projects. For example, according to an internal memorandum of the Fish and Wildlife Service, no fewer than eight listed species are found in the Mahaweli project area (Indian elephant, leopard, purple-faced langur, toque macaque, red face malkoha, Bengal monitor, mugger crocodile, and python). App. 78. The memorandum recounts that the Sri Lankan Government has specifically requested assistance from the Agency for International Development (AID) in “mitigating the negative impacts to the wildlife involved.” *Ibid*. In addition, a letter from the Director of the Fish and Wildlife Service to AID warns: “The magnitude of the Accelerated Mahaweli Development Program could have massive environmental impacts on such an insular ecosystem as the Mahaweli River system.” *Id.*, at 215. It adds: “The Sri Lankan government lacks the necessary finances to undertake any long-term management programs to avoid the negative impacts to the wildlife.” *Id.*, at 216. Finally, in an affidavit submitted by petitioner for purposes of this litigation, an AID official states that an AID environmental assessment “showed that the [Mahaweli] project could affect several endangered species.” *Id.*, at 159.

2 This section provides in part:
“(a) *Requirement for formal consultation.* Each Federal agency shall review its actions at the earliest possible time to determine whether any action may affect listed species or critical habitat. If such a determination is made, formal consultation is required....”
The Secretary’s intent to make the regulations binding upon other agencies is even clearer from the discussion accompanying promulgation of the consultation rules. See [51 Fed.Reg. 19928 \(1986\)](#) (“Several commenters stated that Congress did not intend that the Service interpret or implement section 7, and believed that the Service should recast the regulations as ‘nonbinding guidelines’ that would govern only the Service’s role in consultation.... The Service is satisfied that it has ample authority and legislative mandate to issue this rule, and believes that uniform consultation standards and procedures are necessary to meet its obligations under section 7”).

3 For example, petitioner’s motion before the District Court to dismiss the complaint identified four attorneys from the Department of State and AID (an agency of the Department of State) as “counsel” to the attorneys from the Justice Department in this action. One AID lawyer actually entered a formal appearance before the District Court on behalf of AID. On at least one occasion petitioner requested an extension of time to file a brief, representing

that “[a]n extension is necessary for the Department of Justice to consult with ... the Department of State [on] the brief.” See Brief for Respondents 31, n. 8. In addition, AID officials have offered testimony in this action.

4 The plurality now suggests that collateral-estoppel principles can have no application here, because the participation of other agencies in this litigation arose *after* its inception. Borrowing a principle from this Court’s statutory diversity jurisdiction cases and transferring it to the constitutional standing context, the Court observes: “The existence of federal jurisdiction ordinarily depends on the facts *as they exist when the complaint is filed*”. *Ante*, at 2141, n. 4 (quoting [Newman–Green, Inc. v. Alfonso–Larrain](#), 490 U.S. 826, 830, 109 S.Ct. 2218, 2222, 104 L.Ed.2d 893 (1989)). See also [Mollan v. Torrance](#), 9 Wheat. 537, 539, 6 L.Ed. 154 (1824) (Marshall, C.J.). The plurality proclaims that “[i]t cannot be” that later participation of other agencies in this suit retroactively created a jurisdictional issue that did not exist at the outset. *Ante*, at 2141, n. 4.

The plurality, however, overlooks at least three difficulties with this explanation. In the first place, assuming that the plurality were correct that events as of the initiation of the lawsuit are the only proper jurisdictional reference point, were the Court to follow this rule in this case there would be no question as to the compliance of other agencies, because, as stated at an earlier point in the opinion: “When the Secretary promulgated the regulation at issue here, he thought it was binding on the agencies.” *Ante*, at 2141. This suit was commenced in October 1986, just three months after the regulation took effect. App. 21; [51 Fed.Reg. 19926 \(1986\)](#). As the plurality further admits, questions about compliance of other agencies with the Secretary’s regulation arose only by later participation of the Solicitor General and other agencies in the suit. *Ante*, at 2141. Thus, it was, to borrow the plurality’s own words, “assuredly not true when this suit was filed, naming the Secretary alone,” *ante*, at 2141, n. 4, that there was any question before the District Court about other agencies being bound.

Second, were the plurality correct that, for purposes of determining redressability, a court may look only to facts as they exist when the complaint is filed, then the Court by implication would render a nullity part of [Rule 19 of the Federal Rules of Civil Procedure](#). [Rule 19](#) provides in part for the joinder of persons if “in the person’s absence complete relief cannot be accorded among those already parties.” This presupposes nonredressability at the outset of the litigation. Under the plurality’s rationale, a district court would have no authority to join indispensable parties, because it would, as an initial matter, have no jurisdiction for lack of the power to provide redress at the outset of the litigation.


Third, the rule articulated in [Newman–Green](#) is that the existence of federal jurisdiction “*ordinarily*” depends on the facts at the initiation of the lawsuit. This is no ironclad *per se* rule without exceptions. Had the Solicitor General, for example, taken a position during this appeal that the § 7 consultation requirement does in fact apply extraterritorially, the controversy would be moot, and this Court would be without jurisdiction.

In the plurality’s view, federal subject-matter jurisdiction appears to be a one-way street running the Executive Branch’s way. When the Executive Branch wants to dispel jurisdiction over an action against an agency, it is free to raise at any point in the litigation that other nonparty agencies might not be bound by any determinations of the one agency defendant. When a plaintiff, however, seeks to preserve jurisdiction in the face of a claim of nonredressability, the plaintiff is not free to point to the involvement of nonparty agencies in subsequent parts of the litigation. The plurality does not explain why the street runs only one way—why some actions of the Executive Branch subsequent to initiation of a lawsuit are cognizable for jurisdictional purposes but others simply are not.

More troubling still is the distance this one-way street carries the plurality from the underlying purpose of the standing doctrine. The purpose of the standing doctrine is to ensure that courts do not render advisory opinions rather than resolve genuine controversies between adverse parties. Under the plurality’s analysis, the federal courts are to ignore their *present* ability to resolve a concrete controversy if at some distant point in the past it could be said that redress could not have been provided. The plurality perverts the standing inquiry.

Petillon

RM 65

 KeyCite Yellow Flag - Negative Treatment
Disagreement Recognized by [Haymond v. Lundy](#), E.D.Pa.,
March 18, 2002

120 S.Ct. 693
Supreme Court of the United States

FRIENDS OF THE EARTH,
INCORPORATED, et al., Petitioners,

v.



LIDLAW ENVIRONMENTAL
SERVICES (TOC), INC.

No. 98-822.

|
Argued Oct. 12, 1999.

|
Decided Jan. 12, 2000.

Synopsis

Environmental groups brought action pursuant to citizen suit provision of Clean Water Act (CWA) against holder of National Pollutant Discharge Elimination System (NPDES) permit, alleging, inter alia, violation of mercury discharge limits, and seeking declaratory and injunctive relief, civil penalties, costs, and attorney fees. The United States District Court for the District of South Carolina, [Joseph F. Anderson, Jr., J.](#),  [956 F.Supp. 588](#), found numerous permit violations, imposed penalty of \$405,800, and denied request for declaratory and injunctive relief. Appeal was taken. The Court of Appeals for the Fourth Circuit,  [149 F.3d 303](#), vacated and remanded with instructions to dismiss. Certiorari was granted. The Supreme Court, Justice [Ginsburg](#), held that: (1) groups had standing to bring citizen suit seeking both injunctive relief and civil penalties; (2) action was not rendered moot by permit holder's compliance with permit limits or its shut down of facility, absent showing that violations could not reasonably be expected to recur; and (3) Supreme Court would not address groups' request for attorneys' fees.

Judgment of Court of Appeals reversed and remanded.

Justice [Stevens](#) filed concurring opinion.




Justice [Kennedy](#) filed concurring opinion.

Justice [Scalia](#) filed dissenting opinion in which Justice [Thomas](#) joined.

West Headnotes (22)

[1] [Environmental Law](#)  Notice requirements

[149E](#)Environmental Law
[149EXIII](#)Judicial Review or Intervention
[149Ek659](#)Notice requirements
(Formerly 199k25.15(4.1) Health and Environment)

Purpose of notice to the alleged violator, under Clean Water Act's citizen suit provision, is to give violator an opportunity to bring itself into complete compliance with the Act and thus render unnecessary a citizen suit. Federal Water Pollution Control Act, § 505(a), (b)(1)(A), (g), as amended,  [33 U.S.C.A. §§ 1365\(a\)](#),  (b)(1)(A),  (g).

12 Cases that cite this headnote



[2] [Environmental Law](#)  Persons Entitled to Sue or Seek Review; Standing

[149E](#)Environmental Law
[149EXIII](#)Judicial Review or Intervention
[149Ek649](#)Persons Entitled to Sue or Seek Review; Standing
[149Ek650](#)In general
(Formerly 199k25.15(4.1) Health and Environment)

Citizens lack statutory standing under Clean Water Act's citizen suit provision to sue for violations that have ceased by the time the complaint is filed. Federal Water Pollution Control Act, § 505(a), as

amended,  33 U.S.C.A. § 1365(a).

[35 Cases that cite this headnote](#)

- [3] **Federal Civil Procedure**  In general; injury or interest
Federal Civil Procedure  Causation; redressability

170AFederal Civil Procedure
170AIIParties
170AII(A)In General
170Ak103.1Standing in General
170Ak103.2In general; injury or interest
170AFederal Civil Procedure
170AIIParties
170AII(A)In General
170Ak103.1Standing in General
170Ak103.3Causation; redressability

To satisfy Article III's standing requirements, a plaintiff must show: (1) it has suffered an injury in fact that is concrete and particularized and is actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. [U.S.C.A. Const. Art. 3, § 2, cl. 1.](#)

[3175 Cases that cite this headnote](#)


- [4] **Associations**  Suits on Behalf of Members; Associational or Representational Standing

41Associations
41VIActions and Judicial Proceedings
41VI(B)Right of Action; Persons Entitled to Sue; Standing
41k276Suits on Behalf of Members; Associational or Representational Standing
41k277In general
(Formerly 41k20(1))


An association has standing to bring suit on behalf of its members when its

members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. [U.S.C.A. Const. Art. 3, § 2, cl. 1.](#)

[623 Cases that cite this headnote](#)

- [5] **Environmental Law**  Organizations, associations, and other groups

149EEnvironmental Law
149EXIIIJudicial Review or Intervention
149Ek649Persons Entitled to Sue or Seek Review; Standing
149Ek652Organizations, associations, and other groups
(Formerly 199k25.15(4.1) Health and Environment)

Environmental groups alleged sufficient injury in fact to establish standing to seek injunctive relief in action against holder of National Pollutant Discharge Elimination System (NPDES) permit for alleged violation of mercury discharge limits, pursuant to citizen suit provision of Clean Water Act (CWA), even if there was no resulting injury to the environment, as group members alleged that, although they would like to use affected river for recreational purposes, they would not do so due to permit holder's alleged discharges. [U.S.C.A. Const. Art. 3, § 2, cl. 1.](#); Federal Water Pollution Control Act, § 505(a, g), as amended,  33 U.S.C.A. § 1365(a, g).

[324 Cases that cite this headnote](#)


- [6] **Environmental Law**  Cognizable interests and injuries, in general

149EEnvironmental Law
149EXIIIJudicial Review or Intervention
149Ek649Persons Entitled to Sue or Seek


Review; Standing
[149Ek651](#)Cognizable interests and injuries, in general
(Formerly 199k25.15(3.3) Health and Environment)

Environmental plaintiffs adequately allege injury in fact, for standing purposes, when they aver that they use the affected area and are persons for whom the aesthetic and recreational values of the area will be lessened by the challenged activity. [U.S.C.A. Const. Art. 3, § 2, cl. 1.](#)

[475 Cases that cite this headnote](#)

[7] **Environmental Law**  Organizations, associations, and other groups

[149E](#)Environmental Law
[149EXIII](#)Judicial Review or Intervention
[149Ek649](#)Persons Entitled to Sue or Seek Review; Standing
[149Ek652](#)Organizations, associations, and other groups
(Formerly 199k25.15(4.5) Health and Environment)

Environmental groups had standing to seek civil penalties in action against holder of National Pollutant Discharge Elimination System (NPDES) permit for allegedly ongoing violation of mercury discharge limits, pursuant to citizen suit provision of Clean Water Act (CWA), even though such penalties are paid to government, not private plaintiffs, since penalties would encourage permit holder to discontinue current violations and deter it from committing future ones. [U.S.C.A. Const. Art. 3, § 2, cl. 1.](#); Federal Water Pollution Control Act, § 505(a, g), as amended,  [33 U.S.C.A. § 1365\(a, g\).](#)

[157 Cases that cite this headnote](#)

[8] **Federal Civil Procedure**  In general;

[injury or interest](#)


[170A](#)Federal Civil Procedure
[170AII](#)Parties
[170AII\(A\)](#)In General
[170Ak103.1](#)Standing in General
[170Ak103.2](#)In general; injury or interest

A plaintiff must demonstrate standing separately for each form of relief sought.

[649 Cases that cite this headnote](#)

[9] **Federal Courts**  Environment and health

[170B](#)Federal Courts
[170BIII](#)Case or Controversy Requirement
[170BIII\(B\)](#)Particular Cases, Contexts, and Questions
[170Bk2165](#)Environment and health
(Formerly 170Bk13.25)

Neither National Pollutant Discharge Elimination System (NPDES) permit holder's substantial compliance with its permit nor its subsequent shutdown of hazardous waste incinerator facility from which it discharged pollutants rendered moot environmental groups' citizen suit, under Clean Water Act, seeking civil penalty for violation of permit's mercury discharge limits, absent clear showing that violations could not reasonably be expected to recur, notwithstanding groups' failure to appeal district court's denial of injunctive relief. Federal Water Pollution Control Act, § 505(a, g), as amended,  [33 U.S.C.A. § 1365\(a, g\).](#)

[295 Cases that cite this headnote](#)

[10] **Federal Courts**  Voluntary cessation of challenged conduct

[170B](#)Federal Courts
[170BIII](#)Case or Controversy Requirement
[170BIII\(A\)](#)In General
[170Bk2108](#)Mootness

[170Bk2114](#) Voluntary cessation of challenged conduct
(Formerly [170Bk12.1](#))

A defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice under the mootness doctrine; if it did, the courts would be compelled to leave the defendant free to return to his old ways.

[676 Cases that cite this headnote](#)

- [11] **Federal Courts** Voluntary cessation of challenged conduct
Federal Courts Weight and sufficiency

[170B](#) Federal Courts
[170BIII](#) Case or Controversy Requirement
[170BIII\(A\)](#) In General
[170Bk2108](#) Mootness
[170Bk2114](#) Voluntary cessation of challenged conduct
(Formerly [170Bk12.1](#))
[170B](#) Federal Courts
[170BIII](#) Case or Controversy Requirement
[170BIII\(C\)](#) Objections, Proceedings, and Determination
[170Bk2199](#) Evidence; Affidavits
[170Bk2202](#) Weight and sufficiency
(Formerly [170Bk12.1](#))

A case might become moot based on a defendant's voluntary conduct if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur, but the heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.

[1437 Cases that cite this headnote](#)

- [12] **Federal Civil Procedure** In general; injury or interest

[170A](#) Federal Civil Procedure
[170AII](#) Parties
[170AII\(A\)](#) In General
[170Ak103.1](#) Standing in General
[170Ak103.2](#) In general; injury or interest

In a lawsuit brought to force compliance, it is the plaintiff's burden to establish standing by demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue, and that the threatened injury is certainly impending.

[610 Cases that cite this headnote](#)

- [13] **Federal Civil Procedure** In general; injury or interest
Federal Courts Mootness

[170A](#) Federal Civil Procedure
[170AII](#) Parties
[170AII\(A\)](#) In General
[170Ak103.1](#) Standing in General
[170Ak103.2](#) In general; injury or interest
[170B](#) Federal Courts
[170BIII](#) Case or Controversy Requirement
[170BIII\(A\)](#) In General
[170Bk2108](#) Mootness
[170Bk2109](#) In general
(Formerly [170Bk12.1](#))

There are circumstances in which the prospect that a defendant will engage in or resume harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness.

[124 Cases that cite this headnote](#)

- [14] **Federal Courts** Mental Health

[170B](#) Federal Courts
[170BIII](#) Case or Controversy Requirement
[170BIII\(B\)](#) Particular Cases, Contexts, and Questions
[170Bk2166](#) Mental Health
[170Bk2167](#) In general
(Formerly [170Bk13](#))

When a mentally disabled patient files a lawsuit challenging her confinement in a segregated institution, her postcomplaint transfer to a community-based program will not moot the action, despite the fact that she would have lacked initial standing had she filed the complaint after the transfer.

[131 Cases that cite this headnote](#)

[15] Federal Civil Procedure  In general; injury or interest

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest

If a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum.

[234 Cases that cite this headnote](#)

[16] Federal Courts  Rights and interests at stake; adverseness


170B Federal Courts
170BIII Case or Controversy Requirement
170BIII(A) In General
170Bk2104 Rights and interests at stake; adverseness
(Formerly 170Bk12.1)

District courts cannot retain jurisdiction over cases in which one or both of the parties plainly lacks a continuing interest, as when the parties have settled or a plaintiff pursuing a nonsurviving claim has died, notwithstanding the sunk costs to the judicial system.

[43 Cases that cite this headnote](#)

[17] Environmental Law  Determination, Judgment, and Relief

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek694 Determination, Judgment, and Relief
149Ek695 In general
(Formerly 199k25.15(12) Health and Environment)

Under Clean Water Act's citizen suit provision, the district court has discretion to determine which form of relief is best suited, in the particular case, to abate current violations and deter future ones. Federal Water Pollution Control Act, § 505(a), as amended,  33 U.S.C.A. § 1365(a).

[23 Cases that cite this headnote](#)

[18] Injunction  Discretionary Nature of Remedy

212 Injunction
212I Injunctions in General; Permanent Injunctions in General
212I(A) Nature, Form, and Scope of Remedy
212k1008 Discretionary Nature of Remedy
212k1009 In general
(Formerly 212k1)


A federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law.

[2 Cases that cite this headnote](#)

[19] Environmental Law  Penalties and fines

149E Environmental Law
149EV Water Pollution
149Ek223 Penalties and fines

(Formerly 149Ek702, 199k25.7(24) Health and Environment)

Denial of injunctive relief in action brought under Clean Water Act's citizen suit provision does not necessarily mean that the district court has concluded there is no prospect of future violations for civil penalties to deter. Federal Water Pollution Control Act, § 505(a, g), as amended,  33 U.S.C.A. § 1365(a, g).

[42 Cases that cite this headnote](#)

[20] Federal Civil Procedure  **Nature and extent of relief in general**

170A Federal Civil Procedure
170AXVII Judgment
170AXVII(D) On Trial of Issues
170Ak2582 Nature and extent of relief in general

Federal courts should aim to ensure the framing of relief no broader than required by the precise facts.

[33 Cases that cite this headnote](#)

[21] Environmental Law  **Injunction**

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek699 Injunction
149Ek700 In general
(Formerly 199k25.15(2.1) Health and Environment)


A district court in a Clean Water Act citizen suit properly may conclude that an injunction would be an excessively intrusive remedy, because it could entail continuing superintendence of the permit holder's activities by a federal court, which is a process burdensome to court and permit holder alike. Federal Water Pollution Control Act, § 505(a), as

amended,  33 U.S.C.A. § 1365(a).

[6 Cases that cite this headnote](#)


[22] Federal Courts  **Particular cases**

170B Federal Courts
170BXVI Supreme Court
170BXVI(E) Proceedings
170Bk3211 Determination and Disposition of Cause
170Bk3216 Reversal, Vacation, and Remand
170Bk3216(2) Particular cases
(Formerly 170Bk460.1)

Supreme Court would not address plaintiff's entitlement to attorneys' fees under catalyst theory, on appeal from dismissal for mootness of citizen suit under Clean Water Act, but would have district court address request for fees in the first instance, where district court had stayed time for petition for attorneys' fees until time for appeal had expired or, if either party appealed, until appeal was resolved. Federal Water Pollution Control Act, § 505(d), as amended,  33 U.S.C.A. § 1365(d).

[15 Cases that cite this headnote](#)

****696 *167 Syllabus***

Defendant-respondent Laidlaw Environmental Services (TOC), Inc., bought a facility in Roebuck, South Carolina, that included a wastewater treatment plant. Shortly thereafter, the South Carolina Department of Health and Environmental Control (DHEC), acting under the Clean Water Act (Act),  33 U.S.C. § 1342(a)(1), granted Laidlaw a National Pollutant Discharge Elimination System (NPDES) permit. The permit authorized Laidlaw to discharge treated water into the North Tyger River, but limited, among other things, the discharge of pollutants into the waterway. Laidlaw began to discharge various pollutants into the waterway; these discharges, particularly of mercury, an

extremely toxic pollutant, repeatedly exceeded the limits set by the permit.

On April 10, 1992, plaintiff-petitioners Friends of the Earth and Citizens Local Environmental Action Network, Inc. (referred to collectively here, along with later joined plaintiff-petitioner Sierra Club, as “FOE”), notified Laidlaw of their intention to file a citizen suit against it under the Act, [33 U.S.C. § 1365\(a\)](#), after the expiration of the requisite 60-day notice period. DHEC acceded to Laidlaw’s request to file a lawsuit against the company. On the last day before FOE’s 60-day notice period expired, DHEC and Laidlaw reached a settlement requiring Laidlaw to pay \$100,000 in civil penalties and to make “every effort” to comply with its permit obligations.

On June 12, 1992, FOE filed this citizen suit against Laidlaw, alleging noncompliance with the NPDES permit and seeking declaratory and injunctive relief and an award of civil penalties. Laidlaw moved for summary judgment on the ground that FOE lacked Article III standing to bring the lawsuit. After examining affidavits and deposition testimony from members of the plaintiff organizations, the District ****697** Court denied the motion, finding that the plaintiffs had standing. The District Court also denied Laidlaw’s motion to dismiss on the ground that the citizen suit was barred under [§ 1365\(b\)\(1\)\(B\)](#) by DHEC’s prior action against the company. After FOE initiated this suit, but before the District Court rendered judgment on January 22, 1997, Laidlaw violated the mercury discharge limitation in its permit 13 times and committed 13 monitoring and 10 reporting violations. In issuing its judgment, the ***168** District Court found that Laidlaw had gained a total economic benefit of \$1,092,581 as a result of its extended period of noncompliance with the permit’s mercury discharge limit; nevertheless, the court concluded that a civil penalty of \$405,800 was appropriate. In particular, the District Court found that the judgment’s “total deterrent effect” would be adequate to forestall future violations, given that Laidlaw would have to reimburse the plaintiffs for a significant amount of legal fees and had itself incurred significant legal expenses. The court declined to order injunctive relief because Laidlaw, after the lawsuit began, had achieved substantial compliance with the terms of its permit.

FOE appealed as to the amount of the District Court’s civil penalty judgment, but did not appeal

the denial of declaratory or injunctive relief. The Fourth Circuit vacated the District Court’s order and remanded with instructions to dismiss the action. Assuming, *arguendo*, that FOE initially had standing, the appellate court held that the case had become moot once Laidlaw complied with the terms of its permit and the plaintiffs failed to appeal the denial of equitable relief. Citing [Steel Co. v. Citizens for Better Environment](#), 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210, the court reasoned that the only remedy currently available to FOE, civil penalties payable to the Government, would not redress any injury FOE had suffered. The court added that FOE’s failure to obtain relief on the merits precluded recovery of attorneys’ fees or costs because such an award is available only to a “prevailing or substantially prevailing party” under [§ 1365\(d\)](#). According to Laidlaw, the entire Roebuck facility has since been permanently closed, dismantled, and put up for sale, and all discharges from the facility have permanently ceased.

Held: The Fourth Circuit erred in concluding that a citizen suitor’s claim for civil penalties must be dismissed as moot when the defendant, after commencement of the litigation, has come into compliance with its NPDES permit. Pp. 703–712.

(a) The Constitution’s case-or-controversy limitation on federal judicial authority, Art. III, § 2, underpins both standing and mootness doctrine, but the two inquiries differ in crucial respects. Because the Fourth Circuit was persuaded that the case had become moot, it simply assumed that FOE had initial standing. See [Arizonaans for Official English v. Arizona](#), 520 U.S. 43, 66–67, 117 S.Ct. 1055, 137 L.Ed.2d 170. But because this Court concludes that the Court of Appeals erred as to mootness, this Court has an obligation to assure itself that FOE had [Article III](#) standing at the outset of the litigation. Pp. 703–704.

(b) FOE had [Article III](#) standing to bring this action. This Court has held that to satisfy [Article III](#)’s standing requirements, a plaintiff must show “injury in fact,” causation, and redressability. [Lujan v. Defenders *169 of Wildlife](#), 504 U.S.555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351. An association has standing to bring suit on behalf of its members when its members would have standing to sue in their own right, the interests at stake are germane to the organization’s purpose,

and neither the claim asserted nor the relief requested requires individual members' participation in the lawsuit. [Hunt v. Washington State Apple Advertising Comm'n](#), 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383. The relevant showing for Article III standing is not injury to the environment but injury to the plaintiff. To ****698** insist on the former rather than the latter is to raise the standing hurdle higher than the necessary showing for success on the merits in a citizen's NPDES permit enforcement suit. Here, injury in fact was adequately documented by the affidavits and testimony of FOE members asserting that Laidlaw's pollutant discharges, and the affiants' reasonable concerns about the effects of those discharges, directly affected those affiants' recreational, aesthetic, and economic interests. See, e.g., [Sierra Club v. Morton](#), 405 U.S. 727, 735, 92 S.Ct. 1361, 31 L.Ed.2d 636. These submissions present dispositively more than the mere "general averments" and "conclusory allegations" found inadequate in [Lujan v. National Wildlife Federation](#), 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695, or the "'some day' intentions" to visit endangered species halfway around the world held insufficient in [Defenders of Wildlife](#), 504 U.S., at 564, 112 S.Ct. 2130. Pp. 704–706.

(c) Laidlaw argues that FOE lacked standing to seek civil penalties payable to the Government, because such penalties offer no redress to citizen plaintiffs. For a plaintiff who is injured or threatened with injury due to illegal conduct ongoing at the time of suit, a sanction that effectively abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description. Insofar as they encourage defendants to discontinue current violations and deter future ones, they afford redress to citizen plaintiffs injured or threatened with injury as a result of ongoing unlawful conduct. The Court need not explore the outer limits of the principle that civil penalties provide sufficient deterrence to support redressability, because the civil penalties sought here carried a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress FOE's injuries—as the District Court reasonably found when it assessed a penalty of \$405,800. *Steel Co.* is not to the contrary. That case held that private plaintiffs may not sue to assess penalties for wholly past violations, [523 U.S.](#), at 106–107, 118 S.Ct. 1003, but did not address standing to seek penalties

for violations ongoing at the time of the complaint that could continue into the future if undeterred, see [id.](#), at 108, 118 S.Ct. 1003. Pp. 706–708.

(d) FOE's civil penalties claim did not automatically become moot once the company came into substantial compliance with its permit. A defendant's voluntary cessation of a challenged practice ordinarily does ***170** not deprive a federal court of its power to determine the legality of the practice. [City of Mesquite v. Aladdin's Castle, Inc.](#), 455 U.S. 283, 289, 102 S.Ct. 1070, 71 L.Ed.2d 152. If it did, courts would be compelled to leave the defendant free to return to its old ways. Thus, the standard for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: A case might become moot if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. [United States v. Concentrated Phosphate Export Assn.](#), 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344. The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to recur lies with the party asserting mootness. *Ibid.* The Court of Appeals incorrectly conflated this Court's case law on initial standing, see, e.g., *Steel Co.*, with its case law on mootness, see, e.g., *City of Mesquite*. Such confusion is understandable, given this Court's repeated description of mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)." [E.g., Arizonans](#), 520 U.S., at 68, n. 22, 117 S.Ct. 1055. Careful reflection, however, reveals that this description of mootness is not comprehensive. For example, a defendant claiming that its voluntary compliance moots a case bears a formidable burden. By contrast, it is the plaintiff's burden, in a ****699** lawsuit brought to force compliance, to establish standing by demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue and that the threatened injury is certainly impending. [Whitmore v. Arkansas](#), 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135. The plain lesson is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness. Further, if mootness were simply "standing set in a time

frame,” the exception to mootness for acts that are “capable of repetition, yet evading review” could not exist. See, e.g., [Olmstead v. L.C.](#), 527 U.S. 581, 594, n. 6, 119 S.Ct. 2176, 144 L.Ed.2d 540. Standing admits of no similar exception; if a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum. See, e.g., [Steel Co.](#), 523 U.S., at 109, 118 S.Ct. 1003. Standing doctrine ensures, among other things, that the resources of the federal courts are devoted to disputes in which the parties have a concrete stake. Yet by the time mootness is an issue, abandonment of the case may prove more wasteful than frugal. Courts have no license to retain jurisdiction over cases in which one or both of the parties plainly lacks a continuing interest, see, e.g., [Arizonans](#), 520 U.S., at 67, 117 S.Ct. 1055, but the foregoing examples highlight an important difference *171 between the two doctrines, see generally [Honig v. Doe](#), 484 U.S. 305, 329–332, 108 S.Ct. 592, 98 L.Ed.2d 686 (REHNQUIST, C. J., concurring).

Laidlaw’s argument that FOE doomed its own civil penalty claim to mootness by failing to appeal the denial of injunctive relief misconceives the statutory scheme. Under [§ 1365\(a\)](#), the district court has discretion to determine which form of relief is best suited to abate current violations and deter future ones. See [Weinberger v. Romero—Barcelo](#), 456 U.S. 305, 313, 102 S.Ct. 1798, 72 L.Ed.2d 91. Denial of injunctive relief does not necessarily mean that the district court has concluded there is no prospect of future violations to deter. Indeed, it meant no such thing in this case; the District Court denied injunctive relief, but expressly based its award of civil penalties on the need for deterrence. A district court properly may conclude that an injunction would be too intrusive, because it could entail continuing and burdensome superintendence of the permit holder’s activities by a federal court. See [City of Mesquite](#), 455 U.S., at 289, 102 S.Ct. 1070. Both Laidlaw’s permit compliance and the facility closure might moot this case, but only if one or the other event made it absolutely clear that violations could not reasonably be expected to recur. [Concentrated Phosphate Export Assn.](#), 393 U.S., at 203, 89 S.Ct. 361. These are disputed factual matters that have not been aired in the lower courts; they remain open for consideration on remand. Pp. 708–711.

(e) This Court does not resolve FOE’s argument that it is entitled to attorneys’ fees on the theory that a plaintiff can be a “prevailing party” under [§ 1365\(d\)](#) if it was the “catalyst” that triggered a favorable outcome. Although the Circuits have divided as to the continuing validity of the catalyst theory following [Farrar v. Hobby](#), 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494, it would be premature for this Court to address the question here. The District Court stayed the time for a petition for attorneys’ fees until the time for appeal had expired or until any appeal was resolved. Thus, when the Fourth Circuit addressed the availability of counsel fees, no order was before it either denying or awarding fees. It is for the District Court, not this Court, to address in the first instance any request for reimbursement of costs, including fees. Pp. 711–712.

[149 F.3d 303](#), reversed and remanded.

GINSBURG, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and STEVENS, O’CONNOR, **700 KENNEDY, SOUTER, and BREYER, JJ., joined. STEVENS, J., *post*, p. 712, and KENNEDY, J., *post*, p. 713, filed concurring opinions. SCALIA, J., filed a dissenting opinion, in which THOMAS, J., joined, *post*, p. 713.

Attorneys and Law Firms

*172 Bruce J. Terris, Washington, DC, for petitioners.

Jeffrey P. Minear, Washington, DC, for United States as amicus curiae, by special leave of the Court.

Donald A. Cockrill, Greenville, SC, for respondent.

Opinion

*173 Justice GINSBURG delivered the opinion of the Court.

This case presents an important question concerning the operation of the citizen-suit provisions of the Clean Water Act. Congress authorized the federal district courts to entertain Clean Water Act suits initiated by “a person or

persons having an interest which is or may be adversely affected.” 33 U.S.C. §§ 1365(a), (g). To impel future compliance with the Act, a district court may prescribe injunctive relief in such a suit; additionally or alternatively, the court may impose civil penalties payable to the United States Treasury. § 1365(a). In the Clean Water Act citizen suit now before us, the District Court determined that injunctive relief was inappropriate because the defendant, after the institution of the litigation, achieved substantial compliance with the terms of its discharge permit. 956 F.Supp. 588, 611 (D.S.C.1997). The court did, however, assess a civil penalty of \$405,800. *Id.*, at 610. The “total deterrent effect” of the penalty would be adequate to forestall future violations, the court reasoned, taking into account that the defendant “will be required to reimburse plaintiffs for a significant amount of legal fees and has, itself, incurred significant legal expenses.” *Id.*, at 610–611.

The Court of Appeals vacated the District Court’s order. 149 F.3d 303 (C.A.4 1998). The case became moot, the appellate court declared, once the defendant fully complied with the terms of its permit and the plaintiff failed to appeal the denial of equitable relief. “[C]ivil penalties payable to the government,” the Court of Appeals stated, “would not redress any injury Plaintiffs have suffered.” *Id.*, at 307. Nor were attorneys’ fees in order, the Court of Appeals noted, because absent relief on the merits, plaintiffs could not qualify as prevailing parties. *Id.*, at 307, n. 5.

We reverse the judgment of the Court of Appeals. The appellate court erred in concluding that a citizen suitor’s claim for civil penalties must be dismissed as moot when the *174 defendant, albeit after commencement of the litigation, has come into compliance. In directing dismissal of the suit on grounds of mootness, the Court of Appeals incorrectly conflated our case law on initial standing to bring suit, see, e.g., *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), with our case law on postcommencement mootness, see, e.g., *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982). A defendant’s voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case. The Court of Appeals also

misperceived the remedial potential of civil penalties. Such penalties may serve, as an alternative to an injunction, to deter future violations and thereby redress the injuries that prompted a citizen suitor to commence litigation.

I

A

In 1972, Congress enacted the Clean Water Act (Act), also known as the Federal Water Pollution Control Act, 86 Stat. **701 816, as amended, 33 U.S.C. § 1251 *et seq.* Section 402 of the Act, 33 U.S.C. § 1342, provides for the issuance, by the Administrator of the Environmental Protection Agency (EPA) or by authorized States, of National Pollutant Discharge Elimination System (NPDES) permits. NPDES permits impose limitations on the discharge of pollutants, and establish related monitoring and reporting requirements, in order to improve the cleanliness and safety of the Nation’s waters. Noncompliance with a permit constitutes a violation of the Act. § 1342(h).

[1] [2] Under § 505(a) of the Act, a suit to enforce any limitation in an NPDES permit may be brought by any “citizen,” defined as “a person or persons having an interest which is or may be adversely affected.” 33 U.S.C. §§ 1365(a), (g). Sixty days before initiating a citizen suit, however, the would-be plaintiff must give notice of the alleged violation to the EPA, the State in which the alleged violation occurred, *175 and the alleged violator. § 1365(b)(1)(A). “[T]he purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus ... render unnecessary a citizen suit.” *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 60, 108 S.Ct. 376, 98 L.Ed.2d 306 (1987). Accordingly, we have held that citizens lack statutory standing under § 505(a) to sue for violations that have ceased by the time the complaint is filed. *Id.*, at 56–63, 108 S.Ct.

376. The Act also bars a citizen from suing if the EPA or the State has already commenced, and is “diligently prosecuting,” an enforcement action.

📄 33 U.S.C. § 1365(b)(1)(B).

The Act authorizes district courts in citizen-suit proceedings to enter injunctions and to assess civil penalties, which are payable to the United States Treasury. 📄 § 1365(a). In determining the amount of any civil penalty, the district court must take into account “the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.” § 1319(d). In addition, the court “may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines such award is appropriate.” 📄 § 1365(d).

B

In 1986, defendant-respondent Laidlaw Environmental Services (TOC), Inc., bought a hazardous waste incinerator facility in Roebuck, South Carolina, that included a wastewater treatment plant. (The company has since changed its name to Safety-Kleen (Roebuck), Inc., but for simplicity we will refer to it as “Laidlaw” throughout.) Shortly after Laidlaw acquired the facility, the South Carolina Department *176 of Health and Environmental Control (DHEC), acting under 📄 33 U.S.C. § 1342(a)(1), granted Laidlaw an NPDES permit authorizing the company to discharge treated water into the North Tyger River. The permit, which became effective on January 1, 1987, placed limits on Laidlaw’s discharge of several pollutants into the river, including—of particular relevance to this case—mercury, an extremely toxic pollutant. The permit also regulated the flow, temperature, toxicity, and pH of the effluent from the facility, and imposed monitoring and reporting obligations.

Once it received its permit, Laidlaw began to discharge various pollutants into the waterway;

repeatedly, Laidlaw’s discharges exceeded the limits set by the permit. In particular, despite experimenting with several technological fixes, Laidlaw consistently failed to meet the permit’s stringent 1.3 ppb (parts per billion) daily average limit on mercury discharges. The District Court later found that Laidlaw **702 had violated the mercury limits on 489 occasions between 1987 and 1995. 📄 956 F.Supp., at 613–621.

On April 10, 1992, plaintiff-petitioners Friends of the Earth (FOE) and Citizens Local Environmental Action Network, Inc. (CLEAN) (referred to collectively in this opinion, together with later joined plaintiff-petitioner Sierra Club, as “FOE”) took the preliminary step necessary to the institution of litigation. They sent a letter to Laidlaw notifying the company of their intention to file a citizen suit against it under § 505(a) of the Act after the expiration of the requisite 60-day notice period, *i.e.*, on or after June 10, 1992. Laidlaw’s lawyer then contacted DHEC to ask whether DHEC would consider filing a lawsuit against Laidlaw. The District Court later found that Laidlaw’s reason for requesting that DHEC file a lawsuit against it was to bar FOE’s proposed citizen suit through the operation of 📄 33 U.S.C. § 1365(b)(1)(B). 📄 890 F.Supp. 470, 478 (D.S.C.1995). DHEC agreed to file a lawsuit against Laidlaw; the company’s lawyer *177 then drafted the complaint for DHEC and paid the filing fee. On June 9, 1992, the last day before FOE’s 60-day notice period expired, DHEC and Laidlaw reached a settlement requiring Laidlaw to pay \$100,000 in civil penalties and to make “ ‘every effort’ ” to comply with its permit obligations. 📄 *Id.*, at 479–481.

On June 12, 1992, FOE filed this citizen suit against Laidlaw under § 505(a) of the Act, alleging noncompliance with the NPDES permit and seeking declaratory and injunctive relief and an award of civil penalties. Laidlaw moved for summary judgment on the ground that FOE had failed to present evidence demonstrating injury in fact, and therefore lacked Article III standing to bring the lawsuit. Record, Doc. No. 43. In opposition to this motion, FOE submitted affidavits and deposition testimony from members of the plaintiff organizations. Record, Doc. No. 71 (Exhs. 41–51). The record before the District Court also included affidavits from the organizations’ members submitted by FOE in support of an earlier

motion for preliminary injunctive relief. Record, Doc. No. 21 (Exhs. 5–10). After examining this evidence, the District Court denied Laidlaw’s summary judgment motion, finding—albeit “by the very slimmest of margins”—that FOE had standing to bring the suit. App. in No. 97–1246(C.A.4), pp. 207–208 (Tr. of Hearing 39–40 (June 30, 1993)).

Laidlaw also moved to dismiss the action on the ground that the citizen suit was barred under 33 U.S.C. § 1365(b)(1)(B) by DHEC’s prior action against the company. The United States, appearing as *amicus curiae*, joined FOE in opposing the motion. After an extensive analysis of the Laidlaw–DHEC settlement and the circumstances under which it was reached, the District Court held that DHEC’s action against Laidlaw had not been “diligently prosecuted”; consequently, the court allowed FOE’s citizen suit to proceed. *178 890 F.Supp., at 499.¹ The record indicates that after FOE initiated the suit, but before the District Court rendered judgment, Laidlaw violated the mercury discharge limitation in its permit 13 times. 956 F.Supp., at 621. The District Court also found that Laidlaw had committed 13 monitoring and 10 reporting violations during this period. *Id.*, at 601. The last recorded mercury discharge violation occurred in January 1995, long after the complaint was filed but about two years before judgment was rendered. *Id.*, at 621.

**703 On January 22, 1997, the District Court issued its judgment. 956 F.Supp. 588 (D.S.C.). It found that Laidlaw had gained a total economic benefit of \$1,092,581 as a result of its extended period of noncompliance with the mercury discharge limit in its permit. *Id.*, at 603. The court concluded, however, that a civil penalty of \$405,800 was adequate in light of the guiding factors listed in 33 U.S.C. § 1319(d). 956 F.Supp., at 610. In particular, the District Court stated that the lesser penalty was appropriate taking into account the judgment’s “total deterrent effect.” In reaching this determination, the court “considered that Laidlaw will be required to reimburse plaintiffs for a significant amount of legal fees.” *Id.*, at 610–611. The court declined to grant FOE’s request for injunctive relief, stating that an injunction was inappropriate because “Laidlaw has been in substantial compliance with all parameters in its NPDES permit since at least

August 1992.” *Id.*, at 611.

*179 FOE appealed the District Court’s civil penalty judgment, arguing that the penalty was inadequate, but did not appeal the denial of declaratory or injunctive relief. Laidlaw cross-appealed, arguing, among other things, that FOE lacked standing to bring the suit and that DHEC’s action qualified as a diligent prosecution precluding FOE’s litigation. The United States continued to participate as *amicus curiae* in support of FOE.

On July 16, 1998, the Court of Appeals for the Fourth Circuit issued its judgment. 149 F.3d 303. The Court of Appeals assumed without deciding that FOE initially had standing to bring the action, *id.*, at 306, n. 3, but went on to hold that the case had become moot. The appellate court stated, first, that the elements of Article III standing—*injury, causation, and redressability*—must persist at every stage of review, or else the action becomes moot. *Id.*, at 306. Citing our decision in *Steel Co.*, the Court of Appeals reasoned that the case had become moot because “the only remedy currently available to [FOE]—civil penalties payable to the government—would not redress any injury [FOE has] suffered.” 149 F.3d, at 306–307. The court therefore vacated the District Court’s order and remanded with instructions to dismiss the action. In a footnote, the Court of Appeals added that FOE’s “failure to obtain relief on the merits of [its] claims precludes any recovery of attorneys’ fees or other litigation costs because such an award is available only to a ‘prevailing or substantially prevailing party.’ ” *Id.*, at 307, n. 5 (quoting 33 U.S.C. § 1365(d)).

According to Laidlaw, after the Court of Appeals issued its decision but before this Court granted certiorari, the entire incinerator facility in Roebuck was permanently closed, dismantled, and put up for sale, and all discharges from the facility permanently ceased. Respondent’s Suggestion of Mootness 3.

We granted certiorari, 525 U.S. 1176, 119 S.Ct. 1111, 143 L.Ed.2d 107 (1999), to resolve the inconsistency between the Fourth Circuit’s decision in this *180 case and the decisions of several other Courts of Appeals, which have held that a defendant’s compliance with its permit after

the commencement of litigation does not moot claims for civil penalties under the Act. See, e.g.,

[Atlantic States Legal Foundation, Inc. v. Stroh Die Casting Co.](#), 116 F.3d 814, 820 (C.A.7), cert. denied, 522 U.S. 981, 118 S.Ct. 442, 139 L.Ed.2d 379 (1997); [Natural Resources Defense Council, Inc. v. Texaco Rfg. and Mktg., Inc.](#), 2 F.3d 493, 503–504 (C.A.3 1993); [Atlantic States Legal Foundation, Inc. v. Pan American Tanning Corp.](#), 993 F.2d 1017, 1020–1021 (C.A.2 1993); [Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.](#), 897 F.2d 1128, 1135–1136 (C.A.11 1990).

II

A

The Constitution’s case-or-controversy limitation on federal judicial authority, **704 Art. III, § 2, underpins both our standing and our mootness jurisprudence, but the two inquiries differ in respects critical to the proper resolution of this case, so we address them separately. Because the Court of Appeals was persuaded that the case had become moot and so held, it simply assumed without deciding that FOE had initial standing. See [Arizonans for Official English v. Arizona](#), 520 U.S. 43, 66–67, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) (court may assume without deciding that standing exists in order to analyze mootness). But because we hold that the Court of Appeals erred in declaring the case moot, we have an obligation to assure ourselves that FOE had Article III standing at the outset of the litigation. We therefore address the question of standing before turning to mootness.

[3] [4] In [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992), we held that, to satisfy Article III’s standing requirements, a plaintiff must show (1) it has suffered an “injury in fact” that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly

traceable to the challenged action of the defendant; and *181 3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.

[Hunt v. Washington State Apple Advertising Comm’n](#), 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

[5] Laidlaw contends first that FOE lacked standing from the outset even to seek injunctive relief, because the plaintiff organizations failed to show that any of their members had sustained or faced the threat of any “injury in fact” from Laidlaw’s activities. In support of this contention Laidlaw points to the District Court’s finding, made in the course of setting the penalty amount, that there had been “no demonstrated proof of harm to the environment” from Laidlaw’s mercury discharge violations. [956 F.Supp.](#), at 602; see also *ibid.* (“[T]he NPDES permit violations at issue in this citizen suit did not result in any health risk or environmental harm.”).


The relevant showing for purposes of Article III standing, however, is not injury to the environment but injury to the plaintiff. To insist upon the former rather than the latter as part of the standing inquiry (as the dissent in essence does, *post*, at 713–714) is to raise the standing hurdle higher than the necessary showing for success on the merits in an action alleging noncompliance with an NPDES permit. Focusing properly on injury to the plaintiff, the District Court found that FOE had demonstrated sufficient injury to establish standing. App. in No. 97–1246(CA4), at 207–208 (Tr. of Hearing 39–40). For example, FOE member Kenneth Lee Curtis averred in affidavits that he lived a half-mile from Laidlaw’s facility; that he occasionally drove over the North Tyger River, and that it looked and smelled polluted; and that he would like to fish, camp, swim, and picnic in and near *182 the river between 3 and 15 miles downstream from the facility, as he did when he was a teenager, but would not do so because he was concerned that the water was polluted by Laidlaw’s discharges. Record, Doc. No. 71 (Exhs. 41, 42). Curtis reaffirmed these statements in extensive deposition testimony. For example, he


testified that he would like to fish in the river at a specific spot he used as a boy, but that he would not do so now because of his concerns about Laidlaw's discharges. *Ibid.* (Exh. 43, at 52–53; Exh. 44, at 33).



Other members presented evidence to similar effect. CLEAN member Angela Patterson attested that she lived two miles from the facility; that before Laidlaw operated **705 the facility, she picnicked, walked, birdwatched, and waded in and along the North Tyger River because of the natural beauty of the area; that she no longer engaged in these activities in or near the river because she was concerned about harmful effects from discharged pollutants; and that she and her husband would like to purchase a home near the river but did not intend to do so, in part because of Laidlaw's discharges. Record, Doc. No. 21 (Exh. 10). CLEAN member Judy Pruitt averred that she lived one-quarter mile from Laidlaw's facility and would like to fish, hike, and picnic along the North Tyger River, but has refrained from those activities because of the discharges. *Ibid.* (Exh. 7). FOE member Linda Moore attested that she lived 20 miles from Roebuck, and would use the North Tyger River south of Roebuck and the land surrounding it for recreational purposes were she not concerned that the water contained harmful pollutants. Record, Doc. No. 71 (Exhs. 45, 46). In her deposition, Moore testified at length that she would hike, picnic, camp, swim, boat, and drive near or in the river were it not for her concerns about illegal discharges. *Ibid.* (Exh. 48, at 29, 36–37, 62–63, 72). CLEAN member Gail Lee attested that her home, which is near Laidlaw's facility, had a lower value than similar homes located farther from the facility, and that she believed the pollutant discharges accounted *183 for some of the discrepancy. Record, Doc. No. 21 (Exh. 9). Sierra Club member Norman Sharp averred that he had canoed approximately 40 miles downstream of the Laidlaw facility and would like to canoe in the North Tyger River closer to Laidlaw's discharge point, but did not do so because he was concerned that the water contained harmful pollutants. *Ibid.* (Exh. 8).



^[6] These sworn statements, as the District Court determined, adequately documented injury in fact. We have held that environmental plaintiffs adequately allege injury in fact when they aver that they use the affected area and are persons “for whom the aesthetic and recreational values of the


area will be lessened” by the challenged activity.

 *Sierra Club v. Morton*, 405 U.S. 727, 735, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972). See also

 *Defenders of Wildlife*, 504 U.S., at 562–563, 112 S.Ct. 2130 (“Of course, the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest for purposes of standing.”).

Our decision in  *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), is not to the contrary. In that case an environmental organization assailed the Bureau of Land Management's “land withdrawal review program,” a program covering millions of acres, alleging that the program illegally opened up public lands to mining activities. The defendants moved for summary judgment, challenging the plaintiff organization's standing to initiate the action under the Administrative Procedure Act, 5 U.S.C. § 702. We held that the plaintiff could not survive the summary judgment motion merely by offering “averments which state only that one of [the organization's] members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action.”  497 U.S., at 889, 110 S.Ct. 3177.

In contrast, the affidavits and testimony presented by FOE in this case assert that Laidlaw's discharges, and the affiant members' reasonable concerns about the effects of *184 those discharges, directly affected those affiants' recreational, aesthetic, and economic interests. These submissions present dispositively more than the mere “general averments” and “conclusory allegations” found inadequate in  *National Wildlife Federation. Id.*, at 888, 110 S.Ct. 3177. Nor can the affiants' conditional statements—that they would use the nearby North Tyger River for recreation if Laidlaw were not discharging pollutants into it—be equated with the speculative **706 “‘some day’ intentions” to visit endangered species halfway around the world that we held insufficient to show injury in fact in  *Defenders of Wildlife*. 504 U.S., at 564, 112 S.Ct. 2130.

 *Los Angeles v. Lyons*, 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), relied on by the dissent, *post*, at 714, does not weigh against standing in this case. In *Lyons*, we held that a

plaintiff lacked standing to seek an injunction against the enforcement of a police chokehold policy because he could not credibly allege that he faced a realistic threat from the policy. [¶] 461 U.S., at 107, n. 7, 103 S.Ct. 1660. In the footnote from *Lyons* cited by the dissent, we noted that “[t]he reasonableness of Lyons’ fear is dependent upon the likelihood of a recurrence of the allegedly unlawful conduct,” and that his “subjective apprehensions” that such a recurrence would even *take place* were not enough to support standing. [¶] *Id.*, at 108, n. 8, 103 S.Ct. 1660. Here, in contrast, it is undisputed that Laidlaw’s unlawful conduct—discharging pollutants in excess of permit limits—was occurring at the time the complaint was filed. Under *Lyons*, then, the only “subjective” issue here is “[t]he reasonableness of [the] fear” that led the affiants to respond to that concededly ongoing conduct by refraining from use of the North Tyger River and surrounding areas. Unlike the dissent, *post*, at 714, we see nothing “improbable” about the proposition that a company’s continuous and pervasive illegal discharges of pollutants into a river would cause nearby residents to curtail their recreational use of that waterway and would subject them to other economic and aesthetic harms. The proposition is entirely *185 reasonable, the District Court found it was true in this case, and that is enough for injury in fact.

[7] Laidlaw argues next that even if FOE had standing to seek injunctive relief, it lacked standing to seek civil penalties. Here the asserted defect is not injury but redressability. Civil penalties offer no redress to private plaintiffs, Laidlaw argues, because they are paid to the Government, and therefore a citizen plaintiff can never have standing to seek them.

[8] Laidlaw is right to insist that a plaintiff must demonstrate standing separately for each form of relief sought. See, *e.g.*, [¶] *Lyons*, 461 U.S., at 109, 103 S.Ct. 1660 (notwithstanding the fact that plaintiff had standing to pursue damages, he lacked standing to pursue injunctive relief); see also [¶] *Lewis v. Casey*, 518 U.S. 343, 358, n. 6, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996) (“[S]tanding is not dispensed in gross.”). But it is wrong to maintain that citizen plaintiffs facing ongoing violations never have standing to seek civil penalties.

We have recognized on numerous occasions that “all civil penalties have some deterrent effect.”

[¶] *Hudson v. United States*, 522 U.S. 93, 102, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997); see also, *e.g.*,

[¶] *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 778, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994). More specifically, Congress has found that civil penalties in Clean Water Act cases do more than promote immediate compliance by limiting the defendant’s economic incentive to delay its attainment of permit limits; they also deter future violations. This congressional determination warrants judicial attention and respect. “The legislative history of the Act reveals that Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties. ... [The district court may] seek to deter future violations by basing the penalty on its economic impact.”

[¶] *Tull v. United States*, 481 U.S. 412, 422–423, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987).

It can scarcely be doubted that, for a plaintiff who is injured or faces the threat of future injury due to illegal conduct ongoing at the time of suit, a sanction that effectively *186 abates that conduct and prevents its recurrence provides a form of redress. Civil penalties can fit that description. To the extent that they encourage **707 defendants to discontinue current violations and deter them from committing future ones, they afford redress to citizen plaintiffs who are injured or threatened with injury as a consequence of ongoing unlawful conduct.

The dissent argues that it is the *availability* rather than the *imposition* of civil penalties that deters any particular polluter from continuing to pollute. *Post*, at 718–719. This argument misses the mark in two ways. First, it overlooks the interdependence of the availability and the imposition; a threat has no deterrent value unless it is credible that it will be carried out. Second, it is reasonable for Congress to conclude that an actual award of civil penalties does in fact bring with it a significant quantum of deterrence over and above what is achieved by the mere prospect of such penalties. A would-be polluter may or may not be dissuaded by the existence of a remedy on the books, but a defendant once hit in its pocketbook will surely think twice before polluting again.²

We recognize that there may be a point at which the deterrent effect of a claim for civil penalties

becomes so insubstantial or so remote that it cannot support citizen standing. The fact that this vanishing point is not easy to ascertain does not detract from the deterrent power of such penalties in the ordinary case. Justice Frankfurter's observations for *187 the Court, made in a different context nearly 60 years ago, hold true here as well:

"How to effectuate policy—the adaptation of means to legitimately sought ends—is one of the most intractable of legislative problems. Whether proscribed conduct is to be deterred by *qui tam* action or triple damages or injunction, or by criminal prosecution, or merely by defense to actions in contract, or by some, or all, of these remedies in combination, is a matter within the legislature's range of choice. Judgment on the deterrent effect of the various weapons in the armory of the law can lay little claim to scientific basis." [Tigner v. Texas](#), 310 U.S. 141, 148, 60 S.Ct. 879, 84 L.Ed. 1124 (1940).³

In this case we need not explore the outer limits of the principle that civil penalties provide sufficient deterrence to support redressability. Here, the civil penalties sought by FOE carried with them a deterrent effect that made it likely, as opposed to merely speculative, that the penalties would redress FOE's injuries by abating current violations and preventing future ones—as the District Court reasonably found when it assessed a penalty of \$405,800. [956 F.Supp.](#), at 610–611.

Laidlaw contends that the reasoning of our decision in *Steel Co.* directs the conclusion that citizen plaintiffs have no standing to seek civil penalties under the Act. We disagree. *Steel Co.* established that citizen suitors lack standing to seek civil penalties for violations that have abated by the time of suit. [523 U.S.](#), at 106–107, 118 S.Ct. 1003. We specifically noted in that case that there was no allegation in the complaint of any continuing or imminent violation, and that no basis for such an allegation appeared to exist. [Id.](#), at 108, 118 S.Ct. 1003; see also [Gwaltney](#), 484 U.S., at 59, 108 S.Ct. 376 ("the harm sought to be addressed by *188 the citizen suit lies in the **708 present or the future, not in the past"). In short, *Steel Co.* held that private plaintiffs, unlike the Federal Government, may not sue to assess penalties for wholly past violations, but our decision in that case did not reach the issue of standing to seek penalties for violations that are ongoing at the time of the

complaint and that could continue into the future if undeterred.⁴

*189 B

Satisfied that FOE had standing under Article III to bring this action, we turn to the question of mootness.

^[9] ^[10] ^[11] The only conceivable basis for a finding of mootness in this case is Laidlaw's voluntary conduct—either its achievement by August 1992 of substantial compliance with its NPDES permit or its more recent shutdown of the Roebuck facility. It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." [City of Mesquite](#), 455 U.S., at 289, 102 S.Ct. 1070. "[I]f it did, the courts would be compelled to leave '[t]he defendant ... free to return to his old ways.'" [Id.](#), at 289, n. 10, 102 S.Ct. 1070 (citing [United States v. W.T. Grant Co.](#), 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1303 (1953)). In accordance with this principle, the standard we have announced for determining whether a case has been mooted by the defendant's voluntary conduct is stringent: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." [United States v. Concentrated Phosphate Export Assn.](#), 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968). The "heavy burden of persua[ding]" the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness. *Ibid.*

The Court of Appeals justified its mootness disposition by reference to *Steel Co.*, which held that citizen plaintiffs lack standing to seek civil penalties for wholly past violations. In relying on *Steel Co.*, the Court of Appeals confused mootness with standing. The confusion is understandable, given this Court's repeated statements that the doctrine of mootness **709 can be described as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must

continue throughout its existence (mootness).”

¹² *Arizonans for Official English*, 520 U.S., at 68, n. 22, 117 S.Ct. 1055 (quoting ¹³ *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980), in turn ¹⁴ quoting Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973)) (internal quotation marks omitted).

[12] [13] Careful reflection on the long-recognized exceptions to mootness, however, reveals that the description of mootness as “standing set in a time frame” is not comprehensive. As just noted, a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur. ¹⁵ *Concentrated Phosphate Export Assn.*, 393 U.S., at 203, 89 S.Ct. 361. By contrast, in a lawsuit brought to force compliance, it is the plaintiff’s burden to establish standing by demonstrating that, if unchecked by the litigation, the defendant’s allegedly wrongful behavior will likely occur or continue, and that the “threatened injury [is] certainly impending.” ¹⁶ *Whitmore v. Arkansas*, 495 U.S. 149, 158, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (citations and internal quotation marks omitted). Thus, in *Lyons*, as already noted, we held that a plaintiff lacked initial standing to seek an injunction against the enforcement of a police chokehold policy because he could not credibly allege that he faced a realistic threat arising from the policy. ¹⁷ 461 U.S., at 105–110, 103 S.Ct. 1660. Elsewhere in the opinion, however, we noted that a citywide moratorium on police chokeholds—an action that surely diminished the already slim likelihood that any particular individual would be choked by police—would not have mooted an otherwise valid claim for injunctive relief, because the moratorium by its terms was not permanent. ¹⁸ *Id.*, at 101, 103 S.Ct. 1660. The plain lesson of these cases is that there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness.

[14] [15] Furthermore, if mootness were simply “standing set in a time frame,” the exception to mootness that arises when the defendant’s allegedly unlawful activity is “capable of

repetition, yet evading review,” could not exist. When, for example, ¹⁹ a mentally disabled patient files a lawsuit challenging her confinement in a segregated institution, her postcomplaint transfer to a community-based program will not moot the action, ²⁰ *Olmstead v. L.C.*, 527 U.S. 581, 594, n. 6, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999), despite the fact that she would have lacked initial standing had she filed the complaint after the transfer. Standing admits of no similar exception; if a plaintiff lacks standing at the time the action commences, the fact that the dispute is capable of repetition yet evading review will not entitle the complainant to a federal judicial forum. ²¹ See *Steel Co.*, 523 U.S., at 109, 118 S.Ct. 1003 (“ ‘the mootness exception for disputes capable of repetition yet evading review ... will not revive a dispute which became moot before the action commenced’ ”) (quoting ²² *Renne v. Geary*, 501 U.S. 312, 320, 111 S.Ct. 2331, 115 L.Ed.2d 288 (1991)).

We acknowledged the distinction between mootness and standing most recently in *Steel Co.*:

“The United States ... argues that the injunctive relief does constitute remediation because ‘there is a presumption of [future] injury when the defendant has voluntarily ceased its illegal activity in response to litigation,’ even if that occurs before a complaint is filed.... This makes a sword out of a shield. The ‘presumption’ the Government refers to has been applied to refute ²³ the assertion of mootness by a defendant who, when sued in a complaint that alleges present or threatened injury, ceases the complained-of activity.... It is an immense and unacceptable stretch to call the presumption into service as a substitute for the allegation of present or threatened injury upon which initial standing must be based.” ²⁴ 523 U.S., at 109, 118 S.Ct. 1003.

[16] Standing doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake. In contrast, by the time mootness is an issue, the case has been brought and litigated, often (as here) for years. To ²⁵ abandon the case at an advanced stage may prove more wasteful than frugal. This argument from sunk costs⁵ does not license courts to retain jurisdiction over cases in which one or both of the

parties plainly lack a continuing interest, as when the parties have settled or a plaintiff pursuing a nonsurviving claim has died. See, e.g., [DeFunis v. Odegaard](#), 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974) (*per curiam*) (non-class-action challenge to constitutionality of law school admissions process mooted when plaintiff, admitted pursuant to preliminary injunction, neared graduation and defendant law school conceded that, as a matter of ordinary school policy, plaintiff would be allowed to finish his final term); [Arizonans](#), 520 U.S., at 67, 117 S.Ct. 1055 (non-class-action challenge to state constitutional amendment declaring English the official language of the State became moot when plaintiff, a state employee who sought to use her bilingual skills, left state employment). But the argument surely highlights an important difference between the two doctrines. See generally [Honig v. Doe](#), 484 U.S. 305, 329–332, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988) (REHNQUIST, C. J., concurring).

[17] [18] [19] [20] [21] In its brief, Laidlaw appears to argue that, regardless of the effect of Laidlaw's compliance, FOE doomed its own civil penalty claim to mootness by failing to appeal the District Court's denial of injunctive relief. Brief for Respondent 14–17. This argument misconceives the statutory scheme. Under [§ 1365\(a\)](#), the district court has discretion to determine which form of relief is best suited, in the particular case, to abate current violations and deter future ones. “[A] federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law.” *193 [Weinberger v. Romero-Barcelo](#), 456 U.S. 305, 313, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982). Denial of injunctive relief does not necessarily mean that the district court has concluded there is no prospect of future violations for civil penalties to deter. Indeed, it meant no such thing in this case. The District Court denied injunctive relief, but expressly based its award of civil penalties on the need for deterrence. See [956 F.Supp.](#), at 610–611. As the dissent notes, *post*, at 717, federal courts should aim to ensure “ ‘the framing of relief no broader than required by the precise facts.’ ” [Schlesinger v. Reservists Comm. to Stop the War](#), 418 U.S. 208, 222, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974). In accordance with this aim, a district court in a Clean Water Act citizen suit properly may conclude that an injunction would be an excessively intrusive

remedy, because it could entail continuing superintendence of the permit holder's activities by a federal court—a process burdensome to court and permit holder alike. See [City of Mesquite](#), 455 U.S., at 289, 102 S.Ct. 1070 (although the defendant's voluntary cessation of the challenged practice does not moot the case, **711 “[s]uch abandonment is an important factor bearing on the question whether a court should exercise its power to enjoin the defendant from renewing the practice”).

Laidlaw also asserts, in a supplemental suggestion of mootness, that the closure of its Roebuck facility, which took place after the Court of Appeals issued its decision, mooted the case. The facility closure, like Laidlaw's earlier achievement of substantial compliance with its permit requirements, might moot the case, but—we once more reiterate—only if one or the other of these events made it absolutely clear that Laidlaw's permit violations could not reasonably be expected to recur. [Concentrated Phosphate Export Assn.](#), 393 U.S., at 203, 89 S.Ct. 361. The effect of both Laidlaw's compliance and the facility closure on the prospect of future violations is a disputed factual matter. FOE points out, for example—and Laidlaw does not appear to contest—that Laidlaw retains its *194 NPDES permit. These issues have not been aired in the lower courts; they remain open for consideration on remand.⁶

C

[22] FOE argues that it is entitled to attorneys' fees on the theory that a plaintiff can be a “prevailing party” for purposes of [33 U.S.C. § 1365\(d\)](#) if it was the “catalyst” that triggered a favorable outcome. In the decision under review, the Court of Appeals noted that its Circuit precedent construed our decision in [Farrar v. Hobby](#), 506 U.S. 103, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992), to require rejection of that theory. [149 F.3d](#), at 307, n. 5 (citing [S-1 & S-2 v. State Bd. of Ed. of N. C.](#), 21 F.3d 49, 51 (C.A.4 1994) (en banc)). [Cf. Foreman v. Dallas County](#), 193 F.3d 314, 320 (C.A.5 1999) (stating, in dicta, that “[a]fter *Farrar* ... the continuing validity of the catalyst theory is in

serious doubt”).

Farrar acknowledged that a civil rights plaintiff awarded nominal damages may be a “prevailing party” under 42 U.S.C. § 1988. 506 U.S., at 112, 113 S.Ct. 566. The case involved no catalytic effect. Recognizing that the issue was not presented for this Court’s decision in *Farrar*, several Courts of Appeals have expressly concluded that *Farrar* did not repudiate the catalyst theory. See *Marbley v. Bane*, 57 F.3d 224, 234 (C.A.2 1995); *Baumgartner v. Harrisburg Housing Authority*, 21 F.3d 541, 546–550 (C.A.3 1994); *Zinn v. Shalala*, 35 F.3d 273, 276 (C.A.7 1994); *Little Rock School Dist. v. Pulaski County Special Sch. Dist., # 1*, 17 F.3d 260, 263, n. 2 (C.A.8 1994); *Kilgour v. Pasadena*, 53 F.3d 1007, 1010 (C.A.9 1995); *195 *Beard v. Teska*, 31 F.3d 942, 951–952 (C.A.10 1994); *Morris v. West Palm Beach*, 194 F.3d 1203, 1207 (C.A.11 1999). Other Courts of Appeals have likewise continued to apply the catalyst theory notwithstanding *Farrar*. *Paris v. United States Dept. of Housing and Urban Development*, 988 F.2d 236, 238 (C.A.1 1993); *Citizens Against Tax Waste v. Westerville City School*, 985 F.2d 255, 257 (C.A.6 1993).

It would be premature, however, for us to address the continuing validity of the catalyst theory in the context of this case. The District Court, in an order separate from the one in which it imposed civil penalties against Laidlaw, stayed the time for a petition for attorneys’ fees until the time for appeal had expired or, if either party appealed, until the appeal was resolved. See 149 F.3d, at 305 (describing order staying time for attorneys’ fees petition). In the opinion accompanying its order on penalties, the District Court stated **712 only that “this court has considered that Laidlaw will be required to reimburse plaintiffs for a significant amount of legal fees,” and referred to “potential fee awards.” 956 F.Supp., at 610–611. Thus, when the Court of Appeals addressed the availability of counsel fees in this case, no order was before it either denying or awarding fees. It is for the District Court, not this Court, to address in the first instance any request for reimbursement of costs, including fees.

* * *

For the reasons stated, the judgment of the United States Court of Appeals for the Fourth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS, concurring.

Although the Court has identified a sufficient reason for rejecting the Court of Appeals’ mootness determination, it is important also to note that the case would not be moot *196 even if it were absolutely clear that respondent had gone out of business and posed no threat of future permit violations. The District Court entered a valid judgment requiring respondent to pay a civil penalty of \$405,800 to the United States. No postjudgment conduct of respondent could retroactively invalidate that judgment. A record of voluntary postjudgment compliance that would justify a decision that injunctive relief is unnecessary, or even a decision that any claim for injunctive relief is now moot, would not warrant vacation of the valid money judgment.

Furthermore, petitioners’ claim for civil penalties would not be moot even if it were absolutely clear that respondent’s violations could not reasonably be expected to recur because respondent achieved substantial compliance with its permit requirements after petitioners filed their complaint but before the District Court entered judgment. As the Courts of Appeals (other than the court below) have uniformly concluded, a polluter’s voluntary postcomplaint cessation of an alleged violation will not moot a citizen-suit claim for civil penalties even if it is sufficient to moot a related claim for injunctive or declaratory relief.* This conclusion is consistent with the structure of the Clean Water Act, which attaches liability for civil penalties at the time a permit violation occurs. 33 U.S.C. § 1319(d) (“Any person who violates *197 [certain provisions of the Act or certain permit conditions and limitations] shall be subject to a civil penalty ...”). It is also consistent with the character of civil

penalties, which, for purposes of mootness analysis, should be equated with punitive damages rather than with injunctive or declaratory relief.

See [Tull v. United States](#), 481 U.S. 412, 422–423, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987). No one contends that a defendant’s postcomplaint conduct could moot a claim for punitive damages; civil penalties should be treated the same way.

The cases cited by the Court in its discussion of the mootness issue all involved requests for injunctive or declaratory relief. In only one, [Los Angeles v. Lyons](#), 461 U.S. 95, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983), did the plaintiff seek damages, and **713 in that case the opinion makes it clear that the inability to obtain injunctive relief would have no impact on the damages claim. [Id.](#), at 105, n. 6, 109, 103 S.Ct. 1660. There is no precedent, either in our jurisprudence, or in any other of which I am aware, that provides any support for the suggestion that postcomplaint factual developments that might moot a claim for injunctive or declaratory relief could either moot a claim for monetary relief or retroactively invalidate a valid money judgment.

Justice [KENNEDY](#), concurring.

Difficult and fundamental questions are raised when we ask whether exactions of public fines by private litigants, and the delegation of Executive power which might be inferable from the authorization, are permissible in view of the responsibilities committed to the Executive by Article II of the Constitution of the United States. The questions presented in the petition for certiorari did not identify these issues with particularity; and neither the Court of Appeals in deciding the case nor the parties in their briefing before this Court devoted specific attention to the subject. In my view these matters are best reserved for a later case. With this observation, I join the opinion of the Court.

*198 Justice [SCALIA](#), with whom Justice [THOMAS](#) joins, dissenting.

The Court begins its analysis by finding injury in fact on the basis of vague affidavits that are

undermined by the District Court’s express finding that Laidlaw’s discharges caused no demonstrable harm to the environment. It then proceeds to marry private wrong with public remedy in a union that violates traditional principles of federal standing—thereby permitting law enforcement to be placed in the hands of private individuals. Finally, the Court suggests that to avoid mootness one needs even less of a stake in the outcome than the Court’s watered-down requirements for initial standing. I dissent from all of this.

I

Plaintiffs, as the parties invoking federal jurisdiction, have the burden of proof and persuasion as to the existence of standing. [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (hereinafter *Lujan*); [FW/PBS, Inc. v. Dallas](#), 493 U.S. 215, 231, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). The plaintiffs in this case fell far short of carrying their burden of demonstrating injury in fact. The Court cites affiants’ testimony asserting that their enjoyment of the North Tyger River has been diminished due to “concern” that the water was polluted, and that they “believed” that Laidlaw’s mercury exceedances had reduced the value of their homes. *Ante*, at 704–705. These averments alone cannot carry the plaintiffs’ burden of demonstrating that they have suffered a “concrete and particularized” injury, [Lujan](#), 504 U.S., at 560, 112 S.Ct. 2130. General allegations of injury may suffice at the pleading stage, but at summary judgment plaintiffs must set forth “specific facts” to support their claims. [Id.](#), at 561, 112 S.Ct. 2130. And where, as here, the case has proceeded to judgment, those specific facts must be “ ‘supported adequately by the evidence adduced at trial,’ ” *ibid.* (quoting [Gladstone, Realtors v. Village of Bellwood](#), 441 U.S. 91, 115, n. 31, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979)). In this case, the affidavits themselves are *199 woefully short on “specific facts,” and the vague allegations of injury they do make are undermined by the evidence adduced at trial.

Typically, an environmental plaintiff claiming

injury due to discharges in violation of the Clean Water Act argues that the discharges harm the environment, and that the harm to the environment injures him. This route to injury is barred in the present case, however, since the District Court concluded after considering all the evidence that there had been “no demonstrated proof of harm to the environment,” **714 956 F.Supp. 588, 602 (D.S.C.1997), that the “permit violations at issue in this citizen suit did not result in any health risk or environmental harm,” *ibid.*, that “[a]ll available data ... fail to show that Laidlaw’s actual discharges have resulted in harm to the North Tyger River,” *id.*, at 602–603, and that “the overall quality of the river exceeds levels necessary to support ... recreation in and on the water,” *id.*, at 600.

The Court finds these conclusions unproblematic for standing, because “[t]he relevant showing for purposes of Article III standing ... is not injury to the environment but injury to the plaintiff.” *Ante*, at 704. This statement is correct, as far as it goes. We have certainly held that a demonstration of harm to the environment is not *enough* to satisfy the injury-in-fact requirement unless the plaintiff can demonstrate how he personally was harmed. *E.g.*, *Lujan, supra*, at 563, 112 S.Ct. 2130. In the normal course, however, a lack of demonstrable harm to the environment will translate, as it plainly does here, into a lack of demonstrable harm to citizen plaintiffs. While it is perhaps possible that a plaintiff could be harmed even though the environment was not, such a plaintiff would have the burden of articulating and demonstrating the nature of that injury. Ongoing “concerns” about the environment are not enough, for “[i]t is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff’s subjective apprehensions,” *Los Angeles v. Lyons*, 461 U.S. 95, 107, n. 8, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). At the very least, in *200 the present case, one would expect to see evidence supporting the affidavits’ bald assertions regarding decreasing recreational usage and declining home values, as well as evidence for the improbable proposition that Laidlaw’s violations, even though harmless to the environment, are somehow responsible for these effects. Cf. *Gladstone, supra*, at 115, 99 S.Ct. 1601 (noting that standing could be established by “convincing evidence” that a decline in real estate values was attributable to the defendant’s conduct). Plaintiffs here have made no

attempt at such a showing, but rely entirely upon unsupported and unexplained affidavit allegations of “concern.”

Indeed, every one of the affiants deposed by Laidlaw cast into doubt the (in any event inadequate) proposition that subjective “concerns” actually affected their conduct. Linda Moore, for example, said in her affidavit that she would use the affected waterways for recreation if it were not for her concern about pollution. Record, Doc. No. 71 (Exhs. 45, 46). Yet she testified in her deposition that she had been to the river only twice, once in 1980 (when she visited someone who lived by the river) and once after this suit was filed. Record, Doc. No. 62 (Moore Deposition 23–24). Similarly, Kenneth Lee Curtis, who claimed he was injured by being deprived of recreational activity at the river, admitted that he had not been to the river since he was “a kid,” *ibid.* (Curtis Deposition, pt. 2, p. 38), and when asked whether the reason he stopped visiting the river was because of pollution, answered “no,” *id.*, at 39. As to Curtis’s claim that the river “looke[d] and smell[ed] polluted,” this condition, if present, was surely not caused by Laidlaw’s discharges, which according to the District Court “did not result in any health risk or environmental harm.” 956 F.Supp., at 602. The other affiants cited by the Court were not deposed, but their affidavits state either that they *would* use the river if it were not polluted or harmful (as the court subsequently found it is not), Record, Doc. No. 21 (Exhs. 7, *201 8, and 9), or said that the river looks polluted (which is also incompatible with the court’s findings), *ibid.* (Exh. 10). These affiants have established nothing but “subjective apprehensions.”

The Court is correct that the District Court explicitly found standing—albeit “by the very slimmest of margins,” and as “an awfully close call.” App. in No. 97–1246 (C.A.4), pp. 207–208 (Tr. of Hearing 39–40 (June 30, 1993)). That cautious finding, **715 however, was made in 1993, long before the court’s 1997 conclusion that Laidlaw’s discharges did not harm the environment. As we have previously recognized, an initial conclusion that plaintiffs have standing is subject to reexamination, particularly if later evidence proves inconsistent with that conclusion. *Gladstone*, 441 U.S., at 115, and n. 31, 99 S.Ct. 1601; *Wyoming v. Oklahoma*, 502 U.S. 437, 446, 112 S.Ct. 789, 117 L.Ed.2d 1 (1992). Laidlaw challenged the existence of injury in fact on appeal

to the Fourth Circuit, but that court did not reach the question. Thus no lower court has reviewed the injury-in-fact issue in light of the extensive studies that led the District Court to conclude that the environment was not harmed by Laidlaw's discharges.

Inexplicably, the Court is untroubled by this, but proceeds to find injury in fact in the most casual fashion, as though it is merely confirming a careful analysis made below. Although we have previously refused to find standing based on the "conclusory allegations of an affidavit," [Lujan v. National Wildlife Federation](#), 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990), the Court is content to do just that today. By accepting plaintiffs' vague, contradictory, and unsubstantiated allegations of "concern" about the environment as adequate to prove injury in fact, and accepting them even in the face of a finding that the environment was not demonstrably harmed, the Court makes the injury-in-fact requirement a sham. If there are permit violations, and a member of a plaintiff environmental organization lives near the offending plant, it would be difficult not to satisfy today's lenient standard.

*202 II

The Court's treatment of the redressability requirement—which would have been unnecessary if it resolved the injury-in-fact question correctly—is equally cavalier. As discussed above, petitioners allege ongoing injury consisting of diminished enjoyment of the affected waterways and decreased property values. They allege that these injuries are caused by Laidlaw's continuing permit violations. But the remedy petitioners seek is neither recompense for their injuries nor an injunction against future violations. Instead, the remedy is a statutorily specified "penalty" for past violations, payable entirely to the United States Treasury. Only last Term, we held that such penalties do not redress any injury a citizen plaintiff has suffered from past violations. [Steel Co. v. Citizens for a Better Environment](#), 523 U.S. 83, 106–107, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). The Court nonetheless finds the

redressability requirement satisfied here, distinguishing *Steel Co.* on the ground that in this case petitioners allege ongoing violations; payment of the penalties, it says, will remedy petitioners' injury by deterring future violations by Laidlaw. [Ante](#), at 706–707. It holds that a penalty payable to the public "remedies" a threatened private harm, and suffices to sustain a private suit.

That holding has no precedent in our jurisprudence, and takes this Court beyond the "cases and controversies" that Article III of the Constitution has entrusted to its resolution. Even if it were appropriate, moreover, to allow Article III's remediation requirement to be satisfied by the indirect private consequences of a public penalty, those consequences are entirely too speculative in the present case. The new standing law that the Court makes—like all expansions of standing beyond the traditional constitutional limits—has grave implications for democratic governance. I shall discuss these three points in turn.

*203 A

In [Linda R.S. v. Richard D.](#), 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973), the plaintiff, mother of an illegitimate child, sought, on behalf of herself, her child, and all others similarly situated, an injunction against discriminatory application of Art. 602 of the Texas Penal Code. ****716** Although that provision made it a misdemeanor for "any parent" to refuse to support his or her minor children under 18 years of age, it was enforced only against married parents. That refusal, the plaintiff contended, deprived her and her child of the equal protection of the law by denying them the deterrent effect of the statute upon the father's failure to fulfill his support obligation. The Court held that there was no Article III standing. There was no "direct" relationship," it said, "between the alleged injury and the claim sought to be adjudicated," since "[t]he prospect that prosecution will, at least in the future, result in payment of support can, at best, be termed only speculative." [Id.](#), at 618, 93 S.Ct. 1146. "[Our cases] demonstrate that, in American jurisprudence

at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.” [Id.](#), at 619, 93 S.Ct. 1146.

Although the Court in *Linda R.S.* recited the “logical nexus” analysis of [Flast v. Cohen](#), 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968), which has since fallen into desuetude, “it is clear that standing was denied ... because of the unlikelihood that the relief requested would redress appellant’s claimed injury.” [Duke Power Co. v. Carolina Environmental Study Group, Inc.](#), 438 U.S. 59, 79, n. 24, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978). There was no “logical nexus” between nonenforcement of the statute and Linda R. S.’s failure to receive support payments because “[t]he prospect that prosecution will ... result in payment of support” was “speculative,” [Linda R. S.](#), *supra*, at 618, 93 S.Ct. 1146—that is to say, it was uncertain whether the relief would prevent the injury.¹ Of [*204](#) course precisely the same situation exists here. The principle that “in American jurisprudence ... a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another” applies no less to prosecution for civil penalties payable to the State than to prosecution for criminal penalties owing to the State.

The Court’s opinion reads as though the only purpose and effect of the redressability requirement is to assure that the plaintiff receive *some* of the benefit of the relief that a court orders. That is not so. If it were, a federal tort plaintiff fearing repetition of the injury could ask for tort damages to be paid not only to himself but to other victims as well, on the theory that those damages would have at least some deterrent effect beneficial to him. Such a suit is preposterous because the “remediation” that is the traditional business of Anglo-American courts is relief specifically tailored to the plaintiff’s injury, and not *any* sort of relief that has some incidental benefit to the plaintiff. Just as a “generalized grievance” that affects the entire citizenry cannot satisfy the injury-in-fact requirement even though it aggrieves the plaintiff along with everyone else, see [Lujan](#), 504 U.S., at 573–574, 112 S.Ct. 2130, so also a generalized remedy that deters all future unlawful activity against all persons cannot satisfy the remediation requirement, even though it deters (among other things) repetition of this particular

unlawful activity against these particular plaintiffs.

Thus, relief against prospective harm is traditionally afforded by way of an injunction, the scope of which is limited by the scope of the threatened injury. [Lewis v. Casey](#), 518 U.S. 343, 357–360, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996); [Lyons](#), 461 U.S., at 105–107, and n. 7, 103 S.Ct. 1660. In seeking to overturn that tradition by [**717](#) giving an individual plaintiff [*205](#) the power to invoke a public remedy, Congress has done precisely what we have said it cannot do: convert an “undifferentiated public interest” into an “individual right” vindicable in the courts. [Lujan](#), *supra*, at 577, 112 S.Ct. 2130; [Steel Co.](#), 523 U.S., at 106, 118 S.Ct. 1003. The sort of scattershot redress approved today makes nonsense of our statement in [Schlesinger v. Reservists Comm. to Stop the War](#), 418 U.S. 208, 222, 94 S.Ct. 2925 (1974), that the requirement of injury in fact “insures the framing of relief no broader than required by the precise facts.” A claim of particularized future injury has today been made the vehicle for pursuing generalized penalties for past violations, and a threshold showing of injury in fact has become a lever that will move the world.

B

As I have just discussed, it is my view that a plaintiff’s desire to benefit from the deterrent effect of a public penalty for past conduct can never suffice to establish a case or controversy of the sort known to our law. Such deterrent effect is, so to speak, “speculative as a matter of law.” Even if that were not so, however, the deterrent effect in the present case would surely be speculative as a matter of fact.

The Court recognizes, of course, that to satisfy Article III [Article III](#), it must be “likely,” as opposed to “merely speculative,” that a favorable decision will redress plaintiffs’ injury, [Lujan](#), *supra*, at 561, 112 S.Ct. 2130. See *ante*, at 704. Further, the Court recognizes that not *all* deterrent effects of *all* civil penalties will meet this standard—though it declines to “explore the outer

limits” of adequate deterrence, *ante*, at 707. It concludes, however, that in the present case “the civil penalties sought by FOE carried with them a deterrent effect” that satisfied the “likely [rather than] speculative” standard. *Ibid.* There is little in the Court’s opinion to explain why it believes this is so.

The Court cites the District Court’s conclusion that the penalties imposed, along with anticipated fee awards, provided *206 “adequate deterrence.” *Ante*, at 703, 707; 956 F.Supp., at 611. There is absolutely no reason to believe, however, that this meant “deterrence adequate to prevent an injury to these plaintiffs that would otherwise occur.” The statute does not even *mention* deterrence in general (much less deterrence of future harm to the particular plaintiff) as one of the elements that the court should consider in fixing the amount of the penalty. (That element can come in, if at all, under the last, residual category of “such other matters as justice may require.” 33 U.S.C. § 1319(d).) The statute does require the court to consider “the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good-faith efforts to comply with the applicable requirements, [and] the economic impact of the penalty on the violator...” *Ibid.*, see 956 F.Supp., at 601. The District Court meticulously discussed, in subsections (a) through (e) of the portion of its opinion entitled “Civil Penalty,” *each one* of those specified factors, and then—under subsection (f) entitled “Other Matters As Justice May Require,” it discussed “1. Laidlaw’s Failure to Avail Itself of the Reopener Clause,” “2. Recent Compliance History,” and “3. The Ever-Changing Mercury Limit.” There is no mention whatever—in this portion of the opinion or anywhere else—of the degree of deterrence necessary to prevent future harm to these particular plaintiffs. Indeed, neither the District Court’s final opinion (which contains the “adequate deterrence” statement) nor its earlier opinion dealing with the preliminary question whether South Carolina’s previous lawsuit against Laidlaw constituted “diligent prosecution” that would bar citizen suit, see 33 U.S.C. § 1365(b)(1)(B), displayed *any awareness* that deterrence of *future injury to the plaintiffs* was necessary to support standing.

**718 The District Court’s earlier opinion did, however, quote with approval the passage from a

District Court case which began: “ ‘Civil penalties seek to deter pollution by discouraging *207 future violations. To serve this function, the amount of the civil penalty must be high enough to insure that polluters cannot simply absorb the penalty as a cost of doing business.’ ” App. 122, quoting *PIRG v. Powell Duffryn Terminals, Inc.*, 720 F.Supp. 1158, 1166 (D.N.J. 1989). When the District Court concluded the “Civil Penalty” section of its opinion with the statement that “[t]aken together, this court believes the above penalty, potential fee awards, and Laidlaw’s own direct and indirect litigation expenses provide adequate deterrence under the circumstances of this case,” 956 F.Supp., at 611, it was obviously harking back to this general statement of what the statutorily prescribed factors (and the “as justice may require” factors, which in this case did not include particularized or even generalized deterrence) were designed to achieve. It meant no more than that the court believed the civil penalty it had prescribed met the statutory standards.

The Court points out that we have previously said “ ‘all civil penalties have some deterrent effect,’ ” *ante*, at 706 (quoting *Hudson v. United States*, 522 U.S. 93, 102, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997)). That is unquestionably true: As a general matter, polluters as a class are deterred from violating discharge limits by the *availability* of civil penalties. However, none of the cases the Court cites focused on the deterrent effect of a single *imposition* of penalties on a particular lawbreaker. Even less did they focus on the question whether that particularized deterrent effect (if any) was enough to redress the injury of a citizen plaintiff in the sense required by Article III. They all involved penalties pursued by the government, not by citizens. See *id.*, at 96, 118 S.Ct. 488; *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 773, 114 S.Ct. 1937, 128 L.Ed.2d 767 (1994); *Tull v. United States*, 481 U.S. 412, 414, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987).

If the Court had undertaken the necessary inquiry into whether significant deterrence of the plaintiffs’ feared injury was “likely,” it would have had to reason something like this: Strictly speaking, no polluter is deterred by a penalty for *208 past pollution; he is deterred by the *fear* of a penalty for *future* pollution. That fear will be virtually nonexistent if the prospective polluter knows that

all emissions violators are given a free pass; it will be substantial under an emissions program such as the federal scheme here, which is regularly and notoriously enforced; it will be even higher when a prospective polluter subject to such a regularly enforced program has, as here, been the object of public charges of pollution and a suit for injunction; and it will surely be near the top of the graph when, as here, the prospective polluter has already been subjected to *state* penalties for the past pollution. The deterrence on which the plaintiffs must rely for standing in the present case is the marginal increase in Laidlaw's fear of future penalties that will be achieved by adding federal penalties for Laidlaw's past conduct.

I cannot say for certain that this marginal increase is zero; but I can say for certain that it is entirely speculative whether it will make the difference between these plaintiffs' suffering injury in the future and these plaintiffs' going unharmed. In fact, the assertion that it will "likely" do so is entirely farfetched. The speculativeness of that result is much greater than the speculativeness we found excessive in [Simon v. Eastern Ky. Welfare Rights Organization](#), 426 U.S. 26, 43, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976), where we held that denying § 501(c)(3) charitable-deduction tax status to hospitals that refused to treat indigents was not sufficiently likely to assure future treatment of the indigent plaintiffs to support standing. And it is much greater than the speculativeness ****719** we found excessive in *Linda R.S. v. Richard D.*, discussed *supra*, at 715–716, where we said that "[t]he prospect that prosecution [for nonsupport] will ... result in payment of support can, at best, be termed only speculative," [410 U.S.](#), at 618, 93 S.Ct. 1146.

In sum, if this case is, as the Court suggests, within the central core of "deterrence" standing, it is impossible to imagine what the "outer limits" could possibly be. The Court's expressed reluctance to define those "outer limits" ***209** serves only to disguise the fact that it has promulgated a revolutionary new doctrine of standing that will permit the entire body of public civil penalties to be handed over to enforcement by private interests.

C

Article II of the Constitution [Article II of the Constitution](#) commits it to the President to "take Care that the Laws be faithfully executed," [Art. II, § 3](#), and provides specific methods by which all persons exercising significant executive power are to be appointed, [Art. II, § 2](#). As Justice KENNEDY'S concurrence correctly observes, the question of the conformity of this legislation with [Article II](#) has not been argued—and I, like the Court, do not address it. But [Article III](#), no less than [Article II](#), has consequences for the structure of our government, see [Schlesinger](#), 418 U.S., at 222, 94 S.Ct. 2925, and it is worth noting the changes in that structure which today's decision allows.

By permitting citizens to pursue civil penalties payable to the Federal Treasury, the Act does not provide a mechanism for individual relief in any traditional sense, but turns over to private citizens the function of enforcing the law. A Clean Water Act plaintiff pursuing civil penalties acts as a self-appointed mini-EPA. Where, as is often the case, the plaintiff is a national association, it has significant discretion in choosing enforcement targets. Once the association is aware of a reported violation, it need not look long for an injured member, at least under the theory of injury the Court applies today. See *supra*, at 700–702. And once the target is chosen, the suit goes forward without meaningful public control.² The availability of civil penalties vastly disproportionate ***210** to the individual injury gives citizen plaintiffs massive bargaining power—which is often used to achieve settlements requiring the defendant to support environmental projects of the plaintiffs' choosing. See Greve, [The Private Enforcement of Environmental Law](#), 65 *Tulane L.Rev.* 339, 355–359 (1990). Thus is a public fine diverted to a private interest.

To be sure, the EPA may foreclose the citizen suit by itself bringing suit. [33 U.S.C. § 1365\(b\)\(1\)\(B\)](#). This allows public authorities to avoid private enforcement only by accepting private direction as to when enforcement should be undertaken—which is no less constitutionally bizarre. Elected officials are entirely deprived of their discretion to decide that a given violation should not be the object of suit at all, or that the enforcement decision should be postponed.³ See

§ 1365(b)(1)(A) (providing that citizen plaintiff need only wait **720 60 days after giving notice of the violation to the government before proceeding with action). This is the predictable and inevitable consequence of the Court's allowing the use of public remedies for private wrongs.

III

Finally, I offer a few comments regarding the Court's discussion of whether FOE's claims became moot by reason of Laidlaw's substantial compliance with the permit limits. I do not disagree with the conclusion that the Court reaches. Assuming that the plaintiffs had standing to pursue civil penalties in the first instance (which they did not), their claim *211 might well not have been mooted by Laidlaw's voluntary compliance with the permit, and leaving this fact-intensive question open for consideration on remand, as the Court does, *ante*, at 711, seems sensible.⁴ In reaching this disposition, however, the Court engages in a troubling discussion of the purported distinctions between the doctrines of standing and mootness. I am frankly puzzled as to why this discussion appears at all. Laidlaw's claimed compliance is squarely within the bounds of our "voluntary cessation" doctrine, which is the basis for the remand. *Ante*, at 710.⁵ *212 There is no reason to engage in an interesting academic excursus upon the differences between mootness and standing in order to invoke this obviously applicable rule.⁶

**721 Because the discussion is not essential—indeed, not even relevant—to the Court's decision, it is of limited significance. Nonetheless, I am troubled by the Court's too-hasty retreat from our characterization of mootness as "the doctrine of standing set in a time frame." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68, n. 22, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997). We have repeatedly recognized that what is required for litigation to continue is essentially identical to what is required for litigation to begin: There must be a justiciable case or controversy as required by Article III. "Simply stated, a case is moot when the issues presented are no longer 'live' or the

parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969). A court may not *213 proceed to hear an action if, subsequent to its initiation, the dispute loses "its character as a present, live controversy of the kind that must exist if [the court is] to avoid advisory opinions on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48, 90 S.Ct. 200, 24 L.Ed.2d 214 (1969) (*per curiam*). See also *Preiser v. Newkirk*, 422 U.S. 395, 401, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975); *Steffel v. Thompson*, 415 U.S. 452, 459, n. 10, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). Because the requirement of a continuing case or controversy derives from the Constitution, *Liner v. Jafco, Inc.*, 375 U.S. 301, 306, n. 3, 84 S.Ct. 391, 11 L.Ed.2d 347 (1964), it may not be ignored when inconvenient, *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116, 40 S.Ct. 448, 64 L.Ed. 808 (1920) (moot question cannot be decided, "[h]owever convenient it might be"), or, as the Court suggests, to save "sunk costs," compare *ante*, at 710, with *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990) ("[R]easonable caution is needed to be sure that mooted litigation is not pressed forward ... solely in order to obtain reimbursement of sunk costs").

It is true that mootness has some added wrinkles that standing lacks. One is the "voluntary cessation" doctrine to which the Court refers. *Ante*, at 708. But it is inaccurate to regard this as a reduction of the basic requirement for standing that obtained at the beginning of the suit. A genuine controversy must exist at both stages. And just as the initial suit could be brought (by way of suit for declaratory judgment) before the defendant actually violated the plaintiff's alleged rights, so also the initial suit can be continued even though the defendant has stopped violating the plaintiff's alleged rights. The "voluntary cessation" doctrine is nothing more than an evidentiary presumption that the controversy reflected by the violation of alleged rights continues to exist. *Steel Co.*, 523 U.S., at 109, 118 S.Ct. 1003. Similarly, the fact that we do not find cases moot when the challenged conduct is "capable of repetition, yet evading review" does not demonstrate that the requirements for mootness and for standing differ. "Where the conduct has ceased for the time being *214 but there is a demonstrated probability that it will

recur, a real-life controversy between parties with a personal stake in the outcome continues to exist.”

☐ *Honig v. Doe*, 484 U.S. 305, 341, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988) (SCALIA, J., dissenting) (emphasis deleted).

Part of the confusion in the Court’s discussion is engendered by the fact that it compares standing, on the one hand, with mootness *based on voluntary cessation*, on the other hand. ☐ *Ante*, at 709. The required showing that it is “absolutely clear” that the conduct “could not reasonably be expected to recur” is *not* the threshold showing required for mootness, but the heightened showing required in a particular category of cases where we have sensibly concluded that there is reason to be skeptical that cessation of violation means **722 cessation of live controversy. For claims of mootness based on changes in circumstances other than voluntary cessation, the showing we have required is less taxing, and the inquiry is indeed properly characterized as one of “‘standing set in a time frame.’” See ☐ *Arizonans, supra*, at 67, 68, n. 22, 117 S.Ct. 1055 (case mooted where plaintiff’s change in jobs deprived case of “still vital claim for prospective relief”); ☐ *Spencer v. Kemna*, 523 U.S. 1, 7, 118 S.Ct. 978, 140 L.Ed.2d 43 (1998) (case mooted by petitioner’s completion of his sentence, since “throughout the litigation, the plaintiff must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision” (internal quotation marks omitted)); ☐ *Lewis, supra*, at 478–480, 116 S.Ct. 2174 (case against State mooted by change in federal law that eliminated parties’ “personal stake” in the outcome).

In sum, while the Court may be correct that the parallel between standing and mootness is imperfect due to realistic evidentiary presumptions

that are by their nature applicable only in the mootness context, this does not change the underlying principle that “‘[t]he requisite personal interest that must exist at the commencement of the litigation ... must continue throughout its existence....’” ☐ *215 *Arizonans, supra*, at 68, n. 22, 117 S.Ct. 1055 (quoting ☐ *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980)).

* * *

By uncritically accepting vague claims of injury, the Court has turned the Article III Article III requirement of injury in fact into a “mere pleading requirement,” ☐ *Lujan*, 504 U.S., at 561, 112 S.Ct. 2130; and by approving the novel theory that public penalties can redress anticipated private wrongs, it has come close to “mak[ing] the redressability requirement vanish,” ☐ *Steel Co., supra*, at 107, 118 S.Ct. 1003. The undesirable and unconstitutional consequence of today’s decision is to place the immense power of suing to enforce the public laws in private hands. I respectfully dissent.

All Citations

528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610, 49 ERC 1769, 163 A.L.R. Fed. 749, 68 USLW 4044, 30 Env’t. L. Rep. 20,246, 00 Cal. Daily Op. Serv. 289, 2000 Daily Journal D.A.R. 375, 2000 CJ C.A.R. 142, 13 Fla. L. Weekly Fed. S 37

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See ☐ *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

¹ The District Court noted that “Laidlaw drafted the state—court complaint and settlement agreement, filed the lawsuit against itself, and paid the filing fee.” ☐ 890 F.Supp., at 489. Further, “the settlement agreement between DHEC and Laidlaw was entered into with unusual haste, without giving the Plaintiffs the opportunity to intervene.” *Ibid.* The court found “most persuasive” the fact that “in imposing the civil penalty of \$100,000 against Laidlaw, DHEC failed to recover, or even to calculate, the economic benefit that Laidlaw received by not complying with its

permit.” [id.](#), at 491.

2 The dissent suggests that there was little deterrent work for civil penalties to do in this case because the lawsuit brought against Laidlaw by DHEC had already pushed the level of deterrence to “near the top of the graph.” *Post*, at 718. This suggestion ignores the District Court’s specific finding that the penalty agreed to by Laidlaw and DHEC was far too low to remove Laidlaw’s economic benefit from noncompliance, and thus was inadequate to deter future violations. [890 F.Supp. 470, 491–494, 497–498 \(D.S.C.1995\)](#). And it begins to look especially farfetched when one recalls that Laidlaw itself prompted the DHEC lawsuit, paid the filing fee, and drafted the complaint. See *supra*, at 702, n. 1.

3 In *Tigner* the Court rejected an equal protection challenge to a statutory provision exempting agricultural producers from the reach of the Texas antitrust laws.

4 In insisting that the redressability requirement is not met, the dissent relies heavily on [Linda R.S. v. Richard D., 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 \(1973\)](#). That reliance is sorely misplaced. In *Linda R. S.*, the mother of an out-of-wedlock child filed suit to force a district attorney to bring a criminal prosecution against the absentee father for failure to pay child support. [id.](#), at 616, 93 S.Ct. 1146. In finding that the mother lacked standing to seek this extraordinary remedy, the Court drew attention to “the special status of criminal prosecutions in our system,” [id.](#), at 619, 93 S.Ct. 1146, and carefully limited its holding to the “unique context of a challenge to [the nonenforcement of] a criminal statute,” [id.](#), at 617, 93 S.Ct. 1146. Furthermore, as to redressability, the relief sought in *Linda R. S.*—a prosecution which, if successful, would automatically land the delinquent father in jail for a fixed term, [id.](#), at 618, 93 S.Ct. 1146, with predictably negative effects on his earning power—would scarcely remedy the plaintiff’s lack of child support payments. In this regard, the Court contrasted “the civil contempt model whereby the defendant ‘keeps the keys to the jail in his own pocket’ and may be released whenever he complies with his legal obligations.” *Ibid.* The dissent’s contention, *post*, at 716, that “precisely the same situation exists here” as in *Linda R. S.* is, to say the least, extravagant.

Putting aside its mistaken reliance on *Linda R. S.*, the dissent’s broader charge that citizen suits for civil penalties under the Act carry “grave implications for democratic governance,” *post*, at 715, seems to us overdrawn. Certainly the Federal Executive Branch does not share the dissent’s view that such suits dissipate its authority to enforce the law. In fact, the Department of Justice has endorsed this citizen suit from the outset, submitting *amicus* briefs in support of FOE in the District Court, the Court of Appeals, and this Court. See *supra*, at 702, 703. As we have already noted, *supra*, at 701, the Federal Government retains the power to foreclose a citizen suit by undertaking its own action. [33 U.S.C. § 1365\(b\)\(1\)\(B\)](#). And if the Executive Branch opposes a particular citizen suit, the statute allows the Administrator of the EPA to “intervene as a matter of right” and bring the Government’s views to the attention of the court. [§ 1365\(c\)\(2\)](#).

5 Of course we mean sunk costs to the judicial system, not to the litigants. [Lewis v. Continental Bank Corp., 494 U.S. 472, 110 S.Ct. 1249, 108 L.Ed.2d 400 \(1990\)](#) (cited by the dissent, *post*, at 721), dealt with the latter, noting that courts should use caution to avoid carrying forward a moot case solely to vindicate a plaintiff’s interest in recovering attorneys’ fees.

6 We note that it is far from clear that vacatur of the District Court’s judgment would be the appropriate response to a finding of mootness on appeal brought about by the voluntary conduct of the party that lost in the District Court. See [U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18, 115 S.Ct. 386, 130 L.Ed.2d 233 \(1994\)](#) (mootness attributable to a voluntary act of a nonprevailing party ordinarily does not justify vacatur of a judgment under review); see also [Walling v. James V. Reuter, Inc., 321 U.S. 671, 64 S.Ct. 826, 88 L.Ed. 1001 \(1944\)](#).

* [Comfort Lake Assn. v. Dresel Contracting, Inc., 138 F.3d 351, 356 \(C.A.8 1998\)](#); [Atlantic States Legal Foundation, Inc. v. Stroh Die Casting Co., 116 F.3d 814, 820\(C.A.7\)](#), cert. denied, 522 U.S. 981, 118 S.Ct. 442, 139 L.Ed.2d 379 (1997); [Natural Resources Defense Council v. Texaco Refining & Mktg., Inc., 2 F.3d 493, 502–503 \(C.A.3 1993\)](#); [Atlantic States Legal Foundation, Inc. v. Pan Am. Tanning Corp., 993 F.2d 1017, 1020–1021 \(C.A.2](#)

1993); [Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.](#), 897 F.2d 1128, 1134–1137 (C.A.11 1990); [Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd.](#), 890 F.2d 690, 696–697 (C.A.4 1989). Cf. [Powell v. McCormack](#), 395 U.S. 486, 496, n. 8, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969) (“Where several forms of relief are requested and one of these requests subsequently becomes moot, the Court has still considered the remaining requests”).

1 The decision in *Linda R.S.* did not turn, as today’s opinion imaginatively suggests, on the father’s short-term inability to pay support if imprisoned. *Ante*, at 708, n. 4. The Court’s only comment upon the imprisonment was that, unlike imprisonment for civil contempt, it would not condition the father’s release upon payment. The Court then continued: “The prospect that prosecution will, at least in the future”—*i.e.*, upon completion of the imprisonment—“result in payment of support can, at best, be termed only speculative.” [Linda R. S.](#), 410 U.S., at 618, 93 S.Ct. 1146.

2 The Court points out that the Government is allowed to intervene in a citizen suit, see [ante](#), at 708, n. 4; [33 U.S.C. § 1365\(c\)\(2\)](#), but this power to “bring the Government’s views to the attention of the court,” [ante](#), at 708, n. 4, is meager substitute for the power to decide whether prosecution will occur. Indeed, according the Chief Executive of the United States the ability to intervene does no more than place him on a par with John Q. Public, who can intervene—whether the Government likes it or not—when the United States files suit. [§ 1365\(b\)\(1\)\(B\)](#).

3 The Court observes that “the Federal Executive Branch does not share the dissent’s view that such suits dissipate its authority to enforce the law,” since it has “endorsed this citizen suit from the outset.” *Ante*, at 708, n. 4. Of course, in doubtful cases a long and uninterrupted history of Presidential acquiescence and approval can shed light upon the constitutional understanding. What we have here—acquiescence and approval by a single administration—does not deserve passing mention.

4 In addition to the compliance and plant-closure issues, there also remains open on remand the question whether the current suit was foreclosed because the earlier suit by the State was “diligently prosecuted.” See [33 U.S.C. § 1365\(b\)\(1\)\(B\)](#). Nothing in the Court’s opinion disposes of the issue. The opinion notes the District Court’s finding that Laidlaw itself played a significant role in facilitating the State’s action. *Ante*, at 702, n. 1, 707, n. 2. But there is no incompatibility whatever between a defendant’s facilitation of suit and the State’s diligent prosecution—as prosecutions of felons who confess their crimes and turn themselves in regularly demonstrate. Laidlaw was entirely within its rights to prefer state suit to this private enforcement action; and if it had such a preference it would have been prudent—given that a State must act within 60 days of receiving notice of a citizen suit, see [§ 1365\(b\)\(1\)\(A\)](#), and given the number of cases state agencies handle—for Laidlaw to make sure its case did not fall through the cracks. South Carolina’s interest in the action was not a feigned last minute contrivance. It had worked with Laidlaw in resolving the problem for many years, and had previously undertaken an administrative enforcement action resulting in a consent order. [890 F.Supp. 470, 476 \(D.S.C.1995\)](#). South Carolina has filed an *amicus* brief arguing that allowing citizen suits to proceed despite ongoing state enforcement efforts “will provide citizens and federal judges the opportunity to relitigate and second-guess the enforcement and permitting actions of South Carolina and other States.” Brief for South Carolina as *Amicus Curiae* 6.


5 Unlike Justice STEVENS’ concurrence, the opinion for the Court appears to recognize that a claim for civil penalties is moot when it is clear that no future injury to the plaintiff at the hands of the defendant can occur. The concurrence suggests that civil penalties, like traditional damages remedies, cannot be mooted by absence of threatened injury. The analogy is inapt. Traditional money damages are payable to compensate for the harm of past conduct, which subsists whether future harm is threatened or not; civil penalties are privately assessable (according to the Court) to deter threatened future harm to the plaintiff. Where there is no threat to the plaintiff, he has no claim to deterrence. The proposition that impossibility of future violation does not moot the case holds true, of course, for civil-penalty suits by the government, which do not rest upon the theory that some particular future harm is being prevented.

6 The Court attempts to frame its exposition as a corrective to the Fourth Circuit, which it claims “confused mootness

with standing.” *Ante*, at 708. The Fourth Circuit’s conclusion of nonjusticiability rested upon the belief (entirely correct, in my view) that the only remedy being pursued on appeal, civil penalties, would not redress FOE’s claimed injury. [149 F.3d 303, 306 \(1998\)](#). While this might be characterized as a conclusion that FOE had no standing to pursue civil penalties from the outset, it can also be characterized, as it was by the Fourth Circuit, as a conclusion that, when FOE declined to appeal denial of the declaratory judgment and injunction, and appealed only the inadequacy of the civil penalties (which it had no standing to pursue) the *case as a whole became moot*. Given the Court’s erroneous conclusion that civil penalties can redress private injury, it of course rejects both formulations—but neither of them necessitates the Court’s academic discourse comparing the mootness and standing doctrines.

Petillon

RM 66

 KeyCite Yellow Flag - Negative Treatment
Not Followed on State Law Grounds [Duncan v. FedEx Office and Print Services, Inc.](#), Ill.App. 1 Dist., January 25, 2019
136 S.Ct. 1540
Supreme Court of the United States

SPOKEO, INC., petitioner

v.

[Thomas ROBINS.](#)



No. 13–1339.

Argued Nov. 2, 2015.

Decided May 16, 2016.

As Revised May 24, 2016.

Synopsis

Background: Consumer brought action alleging that website operator published inaccurate information about him, in violation of the Fair Credit Reporting Act (FCRA). The United States District Court for the Central District of California, [Otis D. Wright, II, J.](#),  2011 WL 597867, dismissed complaint, and consumer appealed. The United States Court of Appeals for the Ninth Circuit, [O’Scannlain](#), Circuit Judge,  742 F.3d 409, reversed and remanded. Certiorari was granted.

Holdings: The Supreme Court, Justice [Alito](#), held that:

[1] Court of Appeals failed to determine whether website operator’s alleged violations of the FCRA caused concrete injury required for Article III standing, and

[2] consumer could not satisfy the injury-in-fact demands of Article III standing by alleging a bare procedural violation of the FCRA.

Vacated and remanded.

Justice [Thomas](#) filed a concurring opinion.

Justice [Ginsburg](#) filed a dissenting opinion, in which Justice [Sotomayor](#) joined.

West Headnotes (26)

[1] **Constitutional Law**  Separation of Powers

92Constitutional Law
92XXSeparation of Powers
92XX(A)In General
92k2330In general

The Constitution confers limited authority on each branch of the Federal Government. [U.S.C.A. Const. Art. 1, § 1](#); [U.S.C.A. Const. Art. 2, § 1, cl. 2](#); [U.S.C.A. Const. Art. 3, § 1](#).

1 Cases that cite this headnote

[2] **Constitutional Law**  Nature and scope in general

92Constitutional Law
92XXSeparation of Powers
92XX(C)Judicial Powers and Functions
92XX(C)1In General
92k2450Nature and scope in general

In order to remain faithful to the Constitution’s tripartite structure, the power of the Federal Judiciary may not be permitted to intrude upon the powers given to the other branches. [U.S.C.A. Const. Art. 3, § 1](#).

6 Cases that cite this headnote

[3] **Federal Courts**  Case or Controversy Requirement

170BFederal Courts
170BIII Case or Controversy Requirement
170BIII(A) In General
170Bk2101 In general

No principle is more fundamental to the judiciary's proper role in the country's system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies. [U.S.C.A. Const. Art. 3, § 2, cl. 1.](#)

66 Cases that cite this headnote

- [4] **Federal Civil Procedure** In general; injury or interest
Federal Courts Case or Controversy Requirement

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest
170B Federal Courts
170BIII Case or Controversy Requirement
170BIII(A) In General
170Bk2101 In general

Standing to sue is a doctrine rooted in the traditional understanding of an Article III case or controversy. [U.S.C.A. Const. Art. 3, § 2, cl. 1.](#)

237 Cases that cite this headnote

- [5] **Federal Civil Procedure** In general; injury or interest

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest

The Article III standing doctrine limits the category of litigants empowered to maintain a lawsuit in federal court to seek

redress for a legal wrong. [U.S.C.A. Const. Art. 3, § 2, cl. 1.](#)

190 Cases that cite this headnote

- [6] **Constitutional Law** Nature and scope in general
Federal Civil Procedure In general; injury or interest

92 Constitutional Law
92XX Separation of Powers
92XX(C) Judicial Powers and Functions
92XX(C)1 In General
92k2450 Nature and scope in general
170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest

The law of Article III standing serves to prevent the judicial process from being used to usurp the powers of the political branches and confines the federal courts to a properly judicial role. [U.S.C.A. Const. Art. 3, § 2, cl. 1.](#)

68 Cases that cite this headnote

- [7] **Federal Civil Procedure** In general; injury or interest
Federal Civil Procedure Causation; redressability

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest
170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.3 Causation; redressability

The irreducible constitutional minimum of Article III standing consists of three elements, as the plaintiff must have: (1)

suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. [U.S.C.A. Const. Art. 3, § 2, cl. 1.](#)

[1953 Cases that cite this headnote](#)

[8] **Federal Civil Procedure**  In general; injury or interest

[170A](#)Federal Civil Procedure
[170AII](#)Parties
[170AII\(A\)](#)In General
[170Ak103.1](#)Standing in General
[170Ak103.2](#)In general; injury or interest

The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing the elements of Article III standing. [U.S.C.A. Const. Art. 3, § 2, cl. 1.](#)

[308 Cases that cite this headnote](#)

[9] **Federal Civil Procedure**  Pleading

[170A](#)Federal Civil Procedure
[170AII](#)Parties
[170AII\(A\)](#)In General
[170Ak103.1](#)Standing in General
[170Ak103.5](#)Pleading

Where a case is at the pleading stage, the plaintiff must clearly allege facts demonstrating each element of Article III standing. [U.S.C.A. Const. Art. 3, § 2, cl. 1.](#)

[372 Cases that cite this headnote](#)

[10] **Federal Civil Procedure**  Representation of class; typicality; standing in general

[170A](#)Federal Civil Procedure
[170AII](#)Parties
[170AII\(D\)](#)Class Actions
[170AII\(D\)I](#)In General
[170Ak164](#)Representation of class; typicality; standing in general

That a suit may be a class action adds nothing to the question of Article III standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong. [U.S.C.A. Const. Art. 3, § 2, cl. 1.](#)

[108 Cases that cite this headnote](#)

[11] **Federal Civil Procedure**  In general; injury or interest

[170A](#)Federal Civil Procedure
[170AII](#)Parties
[170AII\(A\)](#)In General
[170Ak103.1](#)Standing in General
[170Ak103.2](#)In general; injury or interest

Injury in fact is the first and foremost of Article III standing's three elements. [U.S.C.A. Const. Art. 3, § 2, cl. 1.](#)

[157 Cases that cite this headnote](#)

[12] **Federal Civil Procedure**  In general; injury or interest

[170A](#)Federal Civil Procedure
[170AII](#)Parties
[170AII\(A\)](#)In General
[170Ak103.1](#)Standing in General
[170Ak103.2](#)In general; injury or interest

Injury in fact is a constitutional requirement for standing, and Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing. [U.S.C.A. Const.](#)

[Art. 3, § 2, cl. 1.](#)

[447 Cases that cite this headnote](#)

[13] Federal Civil Procedure  **In general; injury or interest**

[170A](#)Federal Civil Procedure
[170AII](#)Parties
[170AII\(A\)](#)In General
[170Ak103.1](#)Standing in General
[170Ak103.2](#)In general; injury or interest

To establish injury in fact required for Article III standing, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical. [U.S.C.A. Const. Art. 3, § 2, cl. 1.](#)



[1749 Cases that cite this headnote](#)

[14] Federal Civil Procedure  **In general; injury or interest**

[170A](#)Federal Civil Procedure
[170AII](#)Parties
[170AII\(A\)](#)In General
[170Ak103.1](#)Standing in General
[170Ak103.2](#)In general; injury or interest

For an injury to be “particularized,” as required for Article III standing, it must affect the plaintiff in a personal and individual way. [U.S.C.A. Const. Art. 3, § 2, cl. 1.](#)

[388 Cases that cite this headnote](#)

[15] Federal Civil Procedure  **Rights of third parties or public**
Federal Courts  **Injury, harm, causation, and redress**

[170A](#)Federal Civil Procedure
[170AII](#)Parties
[170AII\(A\)](#)In General
[170Ak103.1](#)Standing in General
[170Ak103.4](#)Rights of third parties or public
[170B](#)Federal Courts
[170BIII](#)Case or Controversy Requirement
[170BIII\(A\)](#)In General
[170Bk2105](#)Injury, harm, causation, and redress

The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance, under the requirement for Article III standing that the plaintiff suffer a particularized injury. [U.S.C.A. Const. Art. 3, § 2, cl. 1.](#)

[134 Cases that cite this headnote](#)

[16] Federal Civil Procedure  **In general; injury or interest**

[170A](#)Federal Civil Procedure
[170AII](#)Parties
[170AII\(A\)](#)In General
[170Ak103.1](#)Standing in General
[170Ak103.2](#)In general; injury or interest


Particularization is necessary to establish the injury in fact required for Article III standing, but it is not sufficient. [U.S.C.A. Const. Art. 3, § 2, cl. 1.](#)

[442 Cases that cite this headnote](#)

[17] Federal Courts  **Particular cases**

[170B](#)Federal Courts
[170BXVI](#)Supreme Court
[170BXVI\(E\)](#)Proceedings
[170Bk3211](#)Determination and Disposition of Cause
[170Bk3216](#)Reversal, Vacation, and Remand
[170Bk3216\(2\)](#)Particular cases

Court of Appeals failed to determine whether website operator’s alleged procedural violations of the Fair Credit

Reporting Act (FCRA), in publishing inaccurate information about consumer on its “people search engine,” entailed a degree of risk sufficient to meet the requirement for Article III standing that an injury in fact be concrete, warranting remand; Court of Appeals instead addressed only the particularization of the consumer’s alleged injury, noting that consumer alleged that operator violated his statutory rights, not just the statutory rights of other people, and that consumer’s personal interests in the handling of his credit information were individualized rather than collective. [U.S.C.A. Const. Art. 3, § 2, cl. 1](#); Fair Credit Reporting Act of 1970, § 602 et seq.,  [15 U.S.C.A. § 1681 et seq.](#)

[66 Cases that cite this headnote](#)

[18] **Federal Civil Procedure**  In general; injury or interest

[170A](#)Federal Civil Procedure
[170AII](#)Parties
[170AII\(A\)](#)In General
[170Ak103.1](#)Standing in General
[170Ak103.2](#)In general; injury or interest

A “concrete injury,” as required for Article III standing, must be de facto; that is, it must actually exist. [U.S.C.A. Const. Art. 3, § 2, cl. 1](#).

[206 Cases that cite this headnote](#)

[19] **Federal Civil Procedure**  In general; injury or interest

[170A](#)Federal Civil Procedure
[170AII](#)Parties
[170AII\(A\)](#)In General
[170Ak103.1](#)Standing in General
[170Ak103.2](#)In general; injury or interest

The concreteness of an injury required for Article III standing is quite different from particularization. [U.S.C.A. Const. Art. 3,](#)

[§ 2, cl. 1.](#)

[163 Cases that cite this headnote](#)

[20] **Federal Civil Procedure**  In general; injury or interest

[170A](#)Federal Civil Procedure
[170AII](#)Parties
[170AII\(A\)](#)In General
[170Ak103.1](#)Standing in General
[170Ak103.2](#)In general; injury or interest

A concrete injury, as required for Article III standing, is not necessarily synonymous with tangible, and although tangible injuries are perhaps easier to recognize, intangible injuries can nevertheless be concrete. [U.S.C.A. Const. Art. 3, § 2, cl. 1.](#)


[106 Cases that cite this headnote](#)

[21] **Federal Civil Procedure**  In general; injury or interest

[170A](#)Federal Civil Procedure
[170AII](#)Parties
[170AII\(A\)](#)In General
[170Ak103.1](#)Standing in General
[170Ak103.2](#)In general; injury or interest

In determining whether an intangible harm constitutes injury in fact, as required for Article III standing, both history and the judgment of Congress play important roles. [U.S.C.A. Const. Art. 3, § 2, cl. 1.](#)

[146 Cases that cite this headnote](#)

[22] **Federal Civil Procedure**  In general; injury or interest
Federal Courts  Case or Controversy Requirement

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest
170B Federal Courts
170BIII Case or Controversy Requirement
170BIII(A) In General
170Bk2101 In general

Because the doctrine of standing derives from the Article III case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider, in the standing analysis, whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts. *U.S.C.A. Const. Art. 3, § 2, cl. 1.*

243 Cases that cite this headnote

[23] **Federal Civil Procedure** — In general; injury or interest

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest

Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement of Article III standing whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. *U.S.C.A. Const. Art. 3, § 2, cl. 1.*

367 Cases that cite this headnote

[24] **Federal Civil Procedure** — In general; injury or interest

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest

Article III standing requires a concrete injury even in the context of a statutory violation. *U.S.C.A. Const. Art. 3, § 2, cl. 1.*

716 Cases that cite this headnote

[25] **Federal Civil Procedure** — In general; injury or interest

170A Federal Civil Procedure
170AII Parties
170AII(A) In General
170Ak103.1 Standing in General
170Ak103.2 In general; injury or interest

The violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact required for Article III standing; in other words, a plaintiff in such a case need not allege any additional harm beyond the one Congress has identified. *U.S.C.A. Const. Art. 3, § 2, cl. 1.*

424 Cases that cite this headnote

[26] **Finance, Banking, and Credit** — Credit reporting

172H Finance, Banking, and Credit
172HXVII Federal Regulation of Consumer Finance and Credit
172HXVI(K) Enforcement, Remedies, and Proceedings
172HXVI(K)4 Actions
172Hk1594 Parties; Standing
172Hk1597 Credit reporting (Formerly 108Ak4 Credit Reporting Agencies)

Consumer could not satisfy the injury-in-fact demands of Article III standing by alleging a bare procedural

violation of the Fair Credit Reporting Act (FCRA) by website operator, in allegedly publishing inaccurate information about consumer; a violation of one of the FCRA's procedural requirements could have resulted in no harm, as not all inaccuracies caused harm or presented any material risk of harm. [U.S.C.A. Const. Art. 3, § 2, cl. 1](#); Fair Credit Reporting Act of 1970, § 602 et seq., [15 U.S.C.A. § 1681 et seq.](#)

[289 Cases that cite this headnote](#)

***1542** *Syllabus**

The Fair Credit Reporting Act of 1970 (FCRA) requires consumer reporting ***1543** agencies to “follow reasonable procedures to assure maximum possible accuracy of” consumer reports, [15 U.S.C. § 1681e\(b\)](#), and imposes liability on “[a]ny person who willfully fails to comply with any requirement [of the Act] with respect to any” individual, § 1681n(a).

Petitioner Spokeo, Inc., an alleged consumer reporting agency, operates a “people search engine,” which searches a wide spectrum of databases to gather and provide personal information about individuals to a variety of users, including employers wanting to evaluate prospective employees. After respondent Thomas Robins discovered that his Spokeo-generated profile contained inaccurate information, he filed a federal class-action complaint against Spokeo, alleging that the company willfully failed to comply with the FCRA's requirements.

The District Court dismissed Robins' complaint, holding that he had not properly pleaded injury in fact as required by Article III. The Ninth Circuit reversed. Based on Robins' allegation that “Spokeo violated *his* statutory rights” and the fact that Robins' “personal interests in the handling of his credit information are *individualized*,” the court held that Robins had adequately alleged an injury in fact.

Held : Because the Ninth Circuit failed to consider both aspects of the injury-in-fact requirement, its Article III standing analysis was incomplete. Pp.

1546 – 1550.


(a) A plaintiff invoking federal jurisdiction bears the burden of establishing the “irreducible constitutional minimum” of standing by demonstrating (1) an injury in fact, (2) fairly traceable to the challenged conduct of the defendant, and (3) likely to be redressed by a favorable judicial decision. [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 560–561, 112 S.Ct. 2130, 119 L.Ed.2d 351. Pp. 1546 – 1547.


(b) As relevant here, the injury-in-fact requirement requires a plaintiff to show that he or she suffered “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” [Lujan, supra](#), at 560, 112 S.Ct. 2130. Pp. 1547 – 1550.

(1) The Ninth Circuit's injury-in-fact analysis elided the independent “concreteness” requirement. Both observations it made concerned only “particularization,” *i.e.*, the requirement that an injury “affect the plaintiff in a personal and individual way,” [Lujan, supra](#), at 560, n. 1, 112 S.Ct. 2130 but an injury in fact must be both concrete *and* particularized, see, *e.g.*, [Susan B. Anthony List v. Driehaus](#), 573 U.S. —, —, 134 S.Ct. 2334, 189 L.Ed.2d 246. Concreteness is quite different from particularization and requires an injury to be “*de facto*,” that is, to actually exist. Pp. 1547 – 1548.

(2) The Ninth Circuit also failed to address whether the alleged procedural violations entail a degree of risk sufficient to meet the concreteness requirement. A “concrete” injury need not be a “tangible” injury. See, *e.g.*, [Pleasant Grove City v. Summum](#), 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed.2d 853. To determine whether an intangible harm constitutes injury in fact, both history and the judgment of Congress are instructive. Congress is well positioned to identify intangible harms that meet minimum Article III requirements, but a plaintiff does not automatically satisfy the injury-in-fact requirement whenever a statute grants a right and purports to authorize a suit to vindicate it. Article III standing requires a concrete injury even in the context of a statutory violation. This does not mean, however, that the risk of real harm cannot satisfy that requirement. See, *e.g.*, [*1544 Clapper v. Amnesty Int'l USA](#),

568 U.S. —, 133 S.Ct. 1138, 185 L.Ed.2d 264.

The violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact; in such a case, a plaintiff need not allege any *additional* harm beyond the one identified by Congress, see  *Federal Election Comm'n v. Akins*, 524 U.S. 11, 20–25, 118 S.Ct. 1777, 141 L.Ed.2d 10. This Court takes no position on the correctness of the Ninth Circuit's ultimate conclusion, but these general principles demonstrate two things: that Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk and that Robins cannot satisfy the demands of Article III by alleging a bare procedural violation. Pp. 1548 – 1550.

 742 F.3d 409, vacated and remanded.

ALITO, J., delivered the opinion of the Court, in which ROBERTS, C.J., and KENNEDY, THOMAS, BREYER, and KAGAN, JJ., joined. THOMAS, J., filed a concurring opinion. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined.

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Opinion


Justice ALITO delivered the opinion of the Court.

This case presents the question whether respondent Robins has standing to maintain an action in federal court against petitioner Spokeo under the Fair Credit Reporting Act of 1970 (FCRA or Act), 84 Stat. 1127, as amended,  15 U.S.C. § 1681 *et seq.*

Spokeo operates a “people search engine.” If an individual visits Spokeo’s Web site and inputs a person’s name, a phone number, or an e-mail address, Spokeo conducts a computerized search in a wide variety of databases and provides information about the subject of the search. Spokeo performed such a search for information about Robins, and some of the information it gathered and then disseminated was incorrect. When Robins learned of these inaccuracies, he filed a complaint on his own behalf and on behalf of a class of similarly situated individuals.

The District Court dismissed Robins’ complaint for lack of standing, but a panel of the Ninth Circuit reversed. The Ninth Circuit noted, first, that Robins had alleged that “Spokeo violated *his* statutory rights, not just the statutory rights of other people,” and, second, that “Robins’s personal interests in the handling of his credit information are individualized rather than collective.”  742 F.3d 409, 413 (2014). Based on these two observations, the *1545 Ninth Circuit held that Robins had adequately alleged injury in fact, a requirement for standing under Article III of the Constitution.  *Id.*, at 413–414.

This analysis was incomplete. As we have explained in our prior opinions, the injury-in-fact requirement requires a plaintiff to allege an injury that is both “concrete *and* particularized.”

 *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180–181, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (emphasis added). The Ninth Circuit’s analysis focused on the second characteristic (particularity), but it overlooked the first (concreteness). We therefore vacate the decision below and remand for the Ninth Circuit to consider *both* aspects of the injury-in-fact requirement.

I

The FCRA seeks to ensure “fair and accurate credit reporting.” § 1681(a)(1). To achieve this end, the Act regulates the creation and the use of “consumer report[s]”¹ by “consumer reporting agenc[ies]”² for certain specified purposes, including credit transactions, insurance, licensing, consumer-initiated business transactions, and employment. See §§ 1681a(d)(1)(A)-(C); § 1681b. Enacted long before the advent of the Internet, the FCRA applies to companies that regularly disseminate information bearing on an individual’s “credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.” § 1681a(d)(1).

The FCRA imposes a host of requirements concerning the creation and use of consumer reports. As relevant here, the Act requires consumer reporting agencies to “follow reasonable procedures to assure maximum possible accuracy of” consumer reports, § 1681e(b); to notify providers and users of consumer information of their responsibilities under the Act, § 1681e(d); to limit the circumstances in which such agencies provide consumer reports “for employment purposes,” § 1681b(b)(1); and to post toll-free numbers for consumers to request reports, § 1681j(a).

The Act also provides that “[a]ny person who willfully fails to comply with any requirement [of the Act] with respect to any [individual³] is liable to that [individual]” for, among other things, either “actual damages” or statutory damages of \$100 to \$1,000 per violation, costs of the action and attorney’s fees, and possibly punitive damages. § 1681n(a).

*1546 Spokeo is alleged to qualify as a “consumer reporting agency” under the FCRA.⁴ It operates a Web site that allows users to search for information about other individuals by name, e-mail address, or phone number. In response to an inquiry submitted online, Spokeo searches a wide spectrum of databases and gathers and provides information such as the individual’s address, phone number, marital status, approximate age, occupation,

hobbies, finances, shopping habits, and musical preferences. App. 7, 10–11. According to Robins, Spokeo markets its services to a variety of users, including not only “employers who want to evaluate prospective employees,” but also “those who want to investigate prospective romantic partners or seek other personal information.” Brief for Respondent 7. Persons wishing to perform a Spokeo search need not disclose their identities, and much information is available for free.

At some point in time, someone (Robins’ complaint does not specify who) made a Spokeo search request for information about Robins, and Spokeo trawled its sources and generated a profile. By some means not detailed in Robins’ complaint, he became aware of the contents of that profile and discovered that it contained inaccurate information. His profile, he asserts, states that he is married, has children, is in his 50’s, has a job, is relatively affluent, and holds a graduate degree. App. 14. According to Robins’ complaint, all of this information is incorrect.

Robins filed a class-action complaint in the United States District Court for the Central District of California, claiming, among other things, that Spokeo willfully failed to comply with the FCRA requirements enumerated above.

The District Court initially denied Spokeo’s motion to dismiss the complaint for lack of jurisdiction, but later reconsidered and dismissed the complaint with prejudice. App. to Pet. for Cert. 23a. The court found that Robins had not “properly pled” an injury in fact, as required by Article III. *Ibid.*

The Court of Appeals for the Ninth Circuit reversed. Relying on Circuit precedent,⁵ the court began by stating that “the violation of a statutory right is usually a sufficient injury in fact to confer standing.” 742 F.3d, at 412. The court recognized that “the Constitution limits the power of Congress to confer standing.” *Id.*, at 413. But the court held that those limits were honored in this case because Robins alleged that “Spokeo violated *his* statutory rights, not just the statutory rights of other people,” and because his “personal interests in the handling of his credit information are individualized rather than collective.” *Ibid.* (emphasis in original). The court thus concluded that Robins’ “alleged violations of [his] statutory rights [were] sufficient to satisfy the injury-in-fact requirement of Article III.” *Id.*, at 413–414.

We granted certiorari. 575 U.S. —, 135 S.Ct. 1892, 191 L.Ed.2d 762 (2015).

II

A

^{[1][2]} The Constitution confers limited authority on each branch of the Federal Government. It vests Congress with enumerated *1547 “legislative Powers,” Art. I, § 1; it confers upon the President “[t]he executive Power,” Art. II, § 1, cl. 1; and it endows the federal courts with “[t]he judicial Power of the United States,” Art. III, § 1. In order to remain faithful to this tripartite structure, the power of the Federal Judiciary may not be permitted to intrude upon the powers given to the other branches. See [DaimlerChrysler Corp. v. Cuno](#), 547 U.S. 332, 341, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006); [Lujan v. Defenders of Wildlife](#), 504 U.S. 555, 559–560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

^[3] Although the Constitution does not fully explain what is meant by “[t]he judicial Power of the United States,” Art. III, § 1, it does specify that this power extends only to “Cases” and “Controversies,” Art. III, § 2. And “‘[n]o principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.’” [Raines v. Byrd](#), 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997).

^{[4][5][6]} Standing to sue is a doctrine rooted in the traditional understanding of a case or controversy. The doctrine developed in our case law to ensure that federal courts do not exceed their authority as it has been traditionally understood. See [id.](#), at 820, 117 S.Ct. 2312. The doctrine limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong. See [Valley Forge Christian College v.](#)

[Americans United for Separation of Church and State, Inc.](#), 454 U.S. 464, 473, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982); [Warth v. Seldin](#), 422 U.S. 490, 498–499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). In this way, “[t]he law of Article III standing ... serves to prevent the judicial process from being used to usurp the powers of the political branches,” [Clapper v. Amnesty Int’l USA](#), 568 U.S. —, —, 133 S.Ct. 1138, 1146, 185 L.Ed.2d 264 (2013); [Lujan, supra](#), at 576–577, 112 S.Ct. 2130 and confines the federal courts to a properly judicial role, see [Warth, supra](#), at 498, 95 S.Ct. 2197.

^{[7][8][9][10]} Our cases have established that the “irreducible constitutional minimum” of standing consists of three elements. [Lujan](#), 504 U.S., at 560, 112 S.Ct. 2130. The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. [Id.](#), at 560–561, 112 S.Ct. 2130; [Friends of the Earth, Inc.](#), 528 U.S., at 180–181, 120 S.Ct. 693. The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements. [FW/PBS, Inc. v. Dallas](#), 493 U.S. 215, 231, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). Where, as here, a case is at the pleading stage, the plaintiff must “clearly ... allege facts demonstrating” each element. [Warth, supra](#), at 518, 95 S.Ct. 2197.⁶

B

^{[11][12]} This case primarily concerns injury in fact, the “[f]irst and foremost” of standing’s three elements. [Steel Co. v. Citizens for Better Environment](#), 523 U.S. 83, 103, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Injury in fact is a constitutional requirement, and “[i]t is settled that Congress *1548 cannot erase Article III’s standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.” [Raines, supra](#), at 820, n. 3, 117 S.Ct. 2312; see [Summers v. Earth Island Institute](#), 555 U.S. 488, 497, 129 S.Ct. 1142, 173 L.Ed.2d 1

(2009); [Gladstone, Realtors v. Village of Bellwood](#), 441 U.S. 91, 100, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979) (“In no event ... may Congress abrogate the Art. III minima”).

[13] To establish injury in fact, a plaintiff must show that he or she suffered “an invasion of a legally protected interest” that is “concrete and particularized” and “actual or imminent, not conjectural or hypothetical.” [Lujan](#), 504 U.S., at 560, 112 S.Ct. 2130 (internal quotation marks omitted). We discuss the particularization and concreteness requirements below.

1

[14][15] For an injury to be “particularized,” it “must affect the plaintiff in a personal and individual way.” *Ibid.*, n. 1; see also, e.g., [Cuno, supra](#), at 342, 126 S.Ct. 1854 (“ ‘plaintiff must allege personal injury’ ”); [Whitmore v. Arkansas](#), 495 U.S. 149, 155, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990) (“ ‘distinct’ ”); [Allen v. Wright](#), 468 U.S. 737, 751, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (“personal”); [Valley Forge, supra](#), at 472, 102 S.Ct. 752 (standing requires that the plaintiff “ ‘personally has suffered some actual or threatened injury’ ”); [United States v. Richardson](#), 418 U.S. 166, 177, 94 S.Ct. 2940, 41 L.Ed.2d 678 (1974) (not “undifferentiated”); [Public Citizen, Inc. v. National Hwy. Traffic Safety Admin.](#), 489 F.3d 1279, 1292–1293 (C.A.D.C.2007) (collecting cases).⁷

[16][17] Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be “concrete.” Under the Ninth Circuit’s analysis, however, that independent requirement was elided. As previously noted, the Ninth Circuit concluded that Robins’ complaint alleges “concrete, *de facto*” injuries for essentially two reasons. [742 F.3d](#), at 413. First, the court noted that Robins “alleges that Spokeo violated *his* statutory rights, not just the statutory rights of other people.” *Ibid.* Second, the court wrote that “Robins’s personal interests in the handling of his credit information are *individualized rather than*

collective.” *Ibid.* (emphasis added). Both of these observations concern particularization, not concreteness. We have made it clear time and time again that an injury in fact must be both concrete and particularized. See, e.g., [Susan B. Anthony List v. Driehaus](#), 573 U.S. —, —, 134 S.Ct. 2334, 2341–2342, 189 L.Ed.2d 246 (2014); [Summers, supra](#), at 493, 129 S.Ct. 1142; [Sprint Communications Co. v. APCC Services, Inc.](#), 554 U.S. 269, 274, 128 S.Ct. 2531, 171 L.Ed.2d 424 (2008); [Massachusetts v. EPA](#), 549 U.S. 497, 517, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007).

[18][19] A “concrete” injury must be “*de facto*”; that is, it must actually exist. See Black’s Law Dictionary 479 (9th ed. 2009). When we have used the adjective “concrete,” we have meant to convey the usual meaning of the term—“real,” and not “abstract.” Webster’s Third New International Dictionary 472 (1971); Random House Dictionary of the English Language 305 (1967). Concreteness, therefore, is quite different from particularization.

*1549 2

[20] “Concrete” is not, however, necessarily synonymous with “tangible.” Although tangible injuries are perhaps easier to recognize, we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete. See, e.g., [Pleasant Grove City v. Sumnum](#), 555 U.S. 460, 129 S.Ct. 1125, 172 L.Ed.2d 853 (2009) (free speech); [Church of Lukumi Babalu Aye, Inc. v. Hialeah](#), 508 U.S. 520, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (free exercise).

[21][22] In determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles. Because the doctrine of standing derives from the case-or-controversy requirement, and because that requirement in turn is grounded in historical practice, it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts. See [Vermont Agency of](#)

Natural Resources v. United States ex rel. Stevens, 529 U.S. 765, 775–777, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000). In addition, because Congress is well positioned to identify intangible harms that meet minimum Article III requirements, its judgment is also instructive and important. Thus, we said in *Lujan* that Congress may “elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.” 504 U.S., at 578, 112 S.Ct. 2130. Similarly, Justice Kennedy’s concurrence in that case explained that “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” *Id.*, at 580, 112 S.Ct. 2130 (opinion concurring in part and concurring in judgment).

^{[23][24]} Congress’ role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.

See *Summers*, 555 U.S., at 496, 129 S.Ct. 1142 (“[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation ... is insufficient to create Article III standing”); see also *Lujan, supra*, at 572, 112 S.Ct. 2130.

^[25] This does not mean, however, that the risk of real harm cannot satisfy the requirement of concreteness. See, e.g., *Clapper v. Amnesty Int’l USA*, 568 U.S. —, 133 S.Ct. 1138, 185 L.Ed.2d 264. For example, the law has long permitted recovery by certain tort victims even if their harms may be difficult to prove or measure. See, e.g., *Restatement (First) of Torts* §§ 569 (libel), 570 (slander *per se*) (1938). Just as the common law permitted suit in such instances, the violation of a procedural right granted by statute can be sufficient in some circumstances to constitute injury in fact. In other words, a plaintiff in such a case need not allege any *additional* harm beyond the one Congress has identified. See *Federal Election Comm’n v. Akins*, 524 U.S. 11, 20–25, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998) (confirming that a group of voters’ “inability to obtain information”

that Congress had decided to make public is a sufficient injury in fact to satisfy Article III); *Public Citizen v. Department of Justice*, 491 U.S. 440, 449, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989) (holding that two advocacy organizations’ *1550 failure to obtain information subject to disclosure under the Federal Advisory Committee Act “constitutes a sufficiently distinct injury to provide standing to sue”).

^[26] In the context of this particular case, these general principles tell us two things: On the one hand, Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk. On the other hand, Robins cannot satisfy the demands of Article III by alleging a bare procedural violation. A violation of one of the FCRA’s procedural requirements may result in no harm. For example, even if a consumer reporting agency fails to provide the required notice to a user of the agency’s consumer information, that information regardless may be entirely accurate. In addition, not all inaccuracies cause harm or present any material risk of harm. An example that comes readily to mind is an incorrect zip code. It is difficult to imagine how the dissemination of an incorrect zip code, without more, could work any concrete harm.⁸

Because the Ninth Circuit failed to fully appreciate the distinction between concreteness and particularization, its standing analysis was incomplete. It did not address the question framed by our discussion, namely, whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement. We take no position as to whether the Ninth Circuit’s ultimate conclusion—that Robins adequately alleged an injury in fact—was correct.

* * *

The judgment of the Court of Appeals is vacated, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

Justice THOMAS, concurring.

The Court vacates and remands to have the Court of Appeals determine “whether the particular procedural violations alleged in this case entail a degree of risk sufficient to meet the concreteness requirement.” *Ante*, at 1550. In defining what constitutes a concrete injury, the Court explains that “concrete” means “ ‘real,’ ” and “not ‘abstract,’ ” but is not “necessarily synonymous with ‘tangible.’ ” *Ante*, at 1548 – 1549.

I join the Court’s opinion. I write separately to explain how, in my view, the injury-in-fact requirement applies to different types of rights. The judicial power of common-law courts was historically limited depending on the nature of the plaintiff’s suit. Common-law courts more readily entertained suits from private plaintiffs who alleged a violation of their own rights, in contrast to private plaintiffs who asserted claims vindicating public rights. Those limitations persist in modern standing doctrine.

I

A

Standing doctrine limits the “judicial power” to “ ‘cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.’ ”

” [Vermont Agency of Natural Resources v. United States ex rel. Stevens](#), 529 U.S. 765, 774, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000) (quoting [Steel Co. v. Citizens for a Better Environment](#), 523 U.S. 83, 102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)). To understand the limits that standing imposes on “the judicial Power,” therefore, we must “refer directly to the traditional, fundamental *1551 limitations upon the powers of common-law courts.” [Honig v. Doe](#), 484 U.S. 305, 340, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988) (Scalia, J., dissenting). These limitations preserve separation of powers by preventing the judiciary’s entanglement in disputes that are primarily political in nature. This concern is generally absent when a

private plaintiff seeks to enforce only his personal rights against another private party.

Common-law courts imposed different limitations on a plaintiff’s right to bring suit depending on the type of right the plaintiff sought to vindicate. Historically, common-law courts possessed broad power to adjudicate suits involving the alleged violation of private rights, even when plaintiffs alleged only the violation of those rights and nothing more. “Private rights” are rights “belonging to individuals, considered as individuals.” 3 W. Blackstone, Commentaries *2 (hereinafter Blackstone). “Private rights” have traditionally included rights of personal security (including security of reputation), property rights, and contract rights. See 1 [id.](#), at *130–*139; Woolhandler & Nelson, [Does History Defeat Standing Doctrine?](#), 102 Mich. L. Rev. 689, 693 (2004). In a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded. Thus, when one man placed his foot on another’s property, the property owner needed to show nothing more to establish a traditional case or controversy. See *Entick v. Carrington*, 2 Wils. K.B. 275, 291, 95 Eng. Rep. 807, 817 (1765). Many traditional remedies for private-rights causes of action—such as for trespass, infringement of intellectual property, and unjust enrichment—are not contingent on a plaintiff’s allegation of damages beyond the violation of his private legal right. See Brief for Restitution and Remedies Scholars as *Amici Curiae* 6–18; see also *Webb v. Portland Mfg. Co.*, 29 F.Cas. 506, 508 (No. 17,322) (Me.1838) (stating that a legal injury “imports damage in the nature of it” (internal quotation marks omitted)).

Common-law courts, however, have required a further showing of injury for violations of “public rights”—rights that involve duties owed “to the whole community, considered as a community, in its social aggregate capacity.” 4 Blackstone *5. Such rights include “free navigation of waterways, passage on public highways, and general compliance with regulatory law.” Woolhandler & Nelson, 102 Mich. L. Rev., at 693. Generally, only the government had the authority to vindicate a harm borne by the public at large, such as the violation of the criminal laws. See *id.*, at 695–700. Even in limited cases where private plaintiffs could bring a claim for the violation of public rights, they had to allege that the violation caused them “some

extraordinary damage, beyond the rest of the [community].” 3 Blackstone *220 (discussing nuisance); see also *Commonwealth v. Webb*, 27 Va. 726, 729 (Gen.Ct.1828).^{*} An action to redress a public nuisance, for example, was historically considered an action to vindicate the violation of a public right at common law, lest “every subject in the kingdom” be able to “harass the offender with separate actions.” 3 Blackstone *219; see also 4 *id.*, at *167 (same). But if the plaintiff could allege “special damage” as *1552 the result of a nuisance, the suit could proceed. The existence of special, individualized damage had the effect of creating a private action for compensatory relief to an otherwise public-rights claim. See 3 *id.*, at *220. Similarly, a plaintiff had to allege individual damage in disputes over the use of public lands. *E.g.*, *Robert Marys’s Case*, 9 Co. Rep. 111b, 112b, 77 Eng. Rep. 895, 898–899 (K.B. 1613) (commoner must establish not only *injuria* [legal injury] but also *damnum* [damage] to challenge another’s overgrazing on the commons).

B

These differences between legal claims brought by private plaintiffs for the violation of public and private rights underlie modern standing doctrine and explain the Court’s description of the injury-in-fact requirement. “Injury in fact” is the first of three “irreducible” requirements for Article III standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). The injury-in-fact requirement often stymies a private plaintiff’s attempt to vindicate the infringement of *public* rights. The Court has said time and again that, when a plaintiff seeks to vindicate a public right, the plaintiff must allege that he has suffered a “concrete” injury particular to himself. See *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221–223, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974) (explaining this where plaintiffs sought to enforce the Incompatibility Clause, Art. I, § 6, cl. 2, against Members of Congress holding reserve commissions in the Armed Forces); see also *Lujan, supra*, at 572–573, 112 S.Ct. 2130 (evaluating standing where plaintiffs sought to

enforce the Endangered Species Act); *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 183–184, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (Clean Water Act). This requirement applies with special force when a plaintiff files suit to require an executive agency to “follow the law”; at that point, the citizen must prove that he “has sustained or is immediately in danger of sustaining a direct injury as a result of that [challenged] action and it is not sufficient that he has merely a general interest common to all members of the public.” *Ex parte Levitt*, 302 U.S. 633, 634, 58 S.Ct. 1, 82 L.Ed. 493 (1937) (*per curiam*). Thus, in a case where private plaintiffs sought to compel the U.S. Forest Service to follow certain procedures when it regulated “small fire-rehabilitation and timber-salvage projects,” we held that “deprivation of a procedural right without some concrete interest that is affected by the deprivation ... is insufficient to create Article III standing,” even if “accorded by Congress.” *Summers v. Earth Island Institute*, 555 U.S. 488, 490, 496–497, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009).

But the concrete-harm requirement does not apply as rigorously when a private plaintiff seeks to vindicate his own private rights. Our contemporary decisions have not required a plaintiff to assert an actual injury beyond the violation of his personal legal rights to satisfy the “injury-in-fact” requirement. See, *e.g.*, *Carey v. Phipus*, 435 U.S. 247, 266, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978) (holding that nominal damages are appropriate when a plaintiff’s constitutional rights have been infringed but he cannot show further injury).

The separation-of-powers concerns underlying our public-rights decisions are not implicated when private individuals sue to redress violations of their own private rights. But, when they are implicated, standing doctrine keeps courts out of political disputes by denying private litigants the right to test the abstract legality of government action. See *Schlesinger, supra*, at 222, 94 S.Ct. 2925. And by limiting *1553 Congress’ ability to delegate law enforcement authority to private plaintiffs and the courts, standing doctrine preserves executive discretion. See *Lujan, supra*, at 577, 112 S.Ct. 2130 (“To permit Congress to convert the undifferentiated public interest in executive officers’ compliance with the law into an

‘individual right’ vindicable in the courts is to permit Congress to transfer from the President to the courts the Chief Executive’s most important constitutional duty, to ‘take Care that the Laws be faithfully executed’ ”). But where one private party has alleged that another private party violated his private rights, there is generally no danger that the private party’s suit is an impermissible attempt to police the activity of the political branches or, more broadly, that the legislative branch has impermissibly delegated law enforcement authority from the executive to a private individual. See Hessick, [Standing, Injury in Fact, and Private Rights](#), 93 Cornell L. Rev. 275, 317–321 (2008).

C

When Congress creates new private causes of action to vindicate private or public rights, these Article III principles circumscribe federal courts’ power to adjudicate a suit alleging the violation of those new legal rights. Congress can create new private rights and authorize private plaintiffs to sue based simply on the violation of those private rights. See [Warth v. Seldin](#), 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). A plaintiff seeking to vindicate a statutorily created private right need not allege actual harm beyond the invasion of that private right. See [Havens Realty Corp. v. Coleman](#), 455 U.S. 363, 373–374, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) (recognizing standing for a violation of the Fair Housing Act); [Tennessee Elec. Power Co. v. TVA](#), 306 U.S. 118, 137–138, 59 S.Ct. 366, 83 L.Ed. 543 (1939) (recognizing that standing can exist where “the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege”). A plaintiff seeking to vindicate a public right embodied in a federal statute, however, must demonstrate that the violation of that public right has caused him a concrete, individual harm distinct from the general population. See [Lujan, supra](#), at 578, 112 S.Ct. 2130 (noting that, whatever the scope of Congress’ power to create new legal rights, “it is clear that in suits against the Government, at least, the concrete injury requirement must remain”). Thus, Congress

cannot authorize private plaintiffs to enforce *public* rights in their own names, absent some showing that the plaintiff has suffered a concrete harm particular to him.

II

Given these principles, I agree with the Court’s decision to vacate and remand. The Fair Credit Reporting Act creates a series of regulatory duties. Robins has no standing to sue Spokeo, in his own name, for violations of the duties that Spokeo owes to the public collectively, absent some showing that he has suffered concrete and particular harm. See *supra*, at 1546 – 1547. These consumer protection requirements include, for example, the requirement to “post a toll-free telephone number on [Spokeo’s] website through which consumers can request free annual file disclosures.” App. 23, First Amended Complaint ¶ 74; see [15 U.S.C. § 1681j](#); [16 CFR § 610.3\(a\)\(1\) \(2010\)](#); [16 CFR § 610.3\(a\)\(1\) \(2010\)](#).

But a remand is required because one claim in Robins’ complaint rests on a statutory provision that could arguably establish a private cause of action to vindicate the violation of a privately held right. [Section 1681e\(b\)](#) requires Spokeo to “follow reasonable procedures to assure maximum *1554 possible accuracy of the information concerning the individual about whom the report relates.” [§ 1681e\(b\)](#) (emphasis added). If Congress has created a private duty owed personally to Robins to protect *his* information, then the violation of the legal duty suffices for Article III injury in fact. If that provision, however, vests any and all consumers with the power to police the “reasonable procedures” of Spokeo, without more, then Robins has no standing to sue for its violation absent an allegation that he has suffered individualized harm. On remand, the Court of Appeals can consider the nature of this claim.

Justice GINSBURG, with whom Justice SOTOMAYOR joins, dissenting.

In the Fair Credit Reporting Act of 1970 (FCRA or Act), 15 U.S.C. § 1681 *et seq.*, Congress required consumer reporting agencies, whenever preparing a consumer report, to “follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.” § 1681e(b). To promote adherence to the Act’s procedural requirements, Congress granted adversely affected consumers a right to sue noncomplying reporting agencies. § 1681n (willful noncompliance); § 1681o (negligent noncompliance).¹ Thomas Robins instituted suit against Spokeo, Inc., alleging that Spokeo was a reporting agency governed by the FCRA, and that Spokeo maintains on its Web site an inaccurate consumer report about Robins. App. 13.

In particular, Robins alleged that Spokeo posted “a picture ... purport [ing] to be an image of Robins [that] was not in fact [of him],” and incorrectly reported that Robins “was in his 50s, ... married, ... employed in a professional or technical field, and ... has children.” *Id.*, at 14. Robins further alleged that Spokeo’s profile of him continues to misrepresent “that he has a graduate degree, that his economic health is ‘Very Strong [,]’ and that his wealth level [is in] the ‘Top 10%.’ ” *Ibid.* Spokeo displayed that erroneous information, Robins asserts, when he was “out of work” and “actively seeking employment.” *Ibid.* Because of the misinformation, Robins stated, he encountered “[imminent and ongoing] actual harm to [his] employment prospects.” *Ibid.*² As Robins elaborated on brief, Spokeo’s report made him appear overqualified for jobs he might have gained, expectant of a higher salary than employers would be willing to pay, and less mobile because of family responsibilities. See Brief for Respondent 44.

I agree with much of the Court’s opinion. Robins, the Court holds, meets the particularity requirement for standing under Article III. See *ante*, at 1548, 1550 (remanding only for concreteness inquiry). The Court acknowledges that Congress has the authority to confer rights and delineate claims for relief where none existed before. *Ante*, at 1549; see *Federal Election Comm’n v. Akins*, 524 U.S. 11, 19–20, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998) (holding that inability to procure information to

which Congress has created a right in the Federal Election Campaign Act of 1971 qualifies as concrete injury satisfying Article III’s standing requirement); *Public Citizen v. Department of Justice*, 491 U.S. 440, 449, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989) (holding that plaintiff advocacy organizations’ inability to obtain information that Congress made subject to disclosure under the Federal Advisory Committee Act “constitutes a sufficiently distinct injury to provide standing to sue”); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982) (identifying, as Article III injury, violation of plaintiff’s right, secured by the Fair Housing Act, to “truthful information concerning the availability of housing”).³ Congress’ connection of procedural requirements to the prevention of a substantive harm, the Court appears to agree, is “instructive and important.”

Ante, at 1549; see *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (KENNEDY, J., concurring in part and concurring in judgment) (“As Government programs and policies become more complex and far reaching, we must be sensitive to the articulation of new rights of action....”); Brief for Restitution and Remedies Scholars et al. as *Amici Curiae* 3 (“Congress cannot authorize individual plaintiffs to enforce generalized rights that belong to the whole public. But Congress can create new individual rights, and it can enact effective remedies for those rights.”). See generally Sunstein, *Informational Regulation and Informational Standing: Akins and Beyond*, 147 U. Pa. L. Rev. 613 (1999).

I part ways with the Court, however, on the necessity of a remand to determine whether Robins’ particularized injury was “concrete.” See *ante*, at 1550. Judged by what we have said about “concreteness,” Robins’ allegations carry him across the threshold. The Court’s opinion observes that time and again, our decisions have coupled the words “concrete *and* particularized.” *Ante*, at 1548 (citing as examples, *Susan B. Anthony List v. Driehaus*, 573 U.S. —, —, 134 S.Ct. 2334, 2341, 189 L.Ed.2d 246 (2014); *Summers v. Earth Island Institute*, 555 U.S. 488, 493, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009); *Sprint Communications Co. v. APCC Services, Inc.*, 554 U.S. 269, 274, 128 S.Ct. 2531, 171 L.Ed.2d 424 (2008); *Massachusetts v. EPA*, 549 U.S. 497,

517, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007)). True, but true too, in the four cases cited by the Court, and many others, opinions do not discuss the separate offices of the terms “concrete” and “particularized.”

Inspection of the Court’s decisions suggests that the particularity requirement bars complaints raising generalized grievances, seeking relief that no more benefits the plaintiff than it does the public at large. See, e.g., [Lujan](#), 504 U.S., at 573–574, 112 S.Ct. 2130 (a plaintiff “seeking relief that no more directly and tangibly benefits him than it does the public at large does not state an Article III case or controversy” (punctuation omitted)); [Perkins v. Lukens Steel Co.](#), 310 U.S. 113, 125, 60 S.Ct. 869, 84 L.Ed. 1108 (1940) (plaintiffs lack standing because they failed to show injury to “a particular right of their own, as distinguished from the public’s interest in the administration of the law”). Robins’ claim does not present a question of that character. He seeks redress, not for harm to the citizenry, but for Spokeo’s spread of misinformation specifically about him.

Concreteness as a discrete requirement for standing, the Court’s decisions indicate, *1556 refers to the reality of an injury, harm that is real, not abstract, but not necessarily tangible. See *ante*, at 1548 – 1549; *ante*, at 1543 (THOMAS, J., concurring). Illustrative opinions include [Akins](#), 524 U.S., at 20, 118 S.Ct. 1777 (“[C]ourts will not pass upon abstract, intellectual problems, but adjudicate concrete, living contests between adversaries.” (internal quotation marks and alterations omitted)); [Diamond v. Charles](#), 476 U.S. 54, 67, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986) (plaintiff’s “abstract concern does not substitute for the concrete injury required by Art [icle] III” (internal quotation marks and ellipsis omitted)); [Los Angeles v. Lyons](#), 461 U.S. 95, 101, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983) (“Plaintiffs must demonstrate a personal stake in the outcome.... Abstract injury is not enough.” (internal quotation marks omitted)); [Babbitt v. Farm Workers](#), 442 U.S. 289, 297–298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979) (“The difference between an abstract question and a ‘case or controversy’ is one of degree, of course, and is not discernable by any precise test. The basic inquiry is whether the conflicting contentions of the parties present a real, substantial controversy between parties having

adverse legal interests, a dispute definite and concrete, not hypothetical or abstract.” (citation, some internal quotation marks, and ellipsis omitted)); [Simon v. Eastern Ky. Welfare Rights Organization](#), 426 U.S. 26, 40, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976) (“organization’s abstract concern ... does not substitute for the concrete injury required by Art. III”); [California Bankers Assn. v. Shultz](#), 416 U.S. 21, 69, 94 S.Ct. 1494, 39 L.Ed.2d 812 (1974) (“There must be ... concrete adverseness”; “[a]bstract injury is not enough.” (internal quotation marks omitted)); [Railway Mail Assn. v. Corsi](#), 326 U.S. 88, 93, 65 S.Ct. 1483, 89 L.Ed. 2072 (1945) (controversy must be “definite and concrete, not hypothetical or abstract”); [Coleman v. Miller](#), 307 U.S. 433, 460, 59 S.Ct. 972, 83 L.Ed. 1385 (1939) (opinion of Frankfurter, J.) (“[I]t [is] not for courts to pass upon ... abstract, intellectual problems but only ... concrete, living contest [s] between adversaries call[ing] for the arbitrament of law.”).








Robins would not qualify, the Court observes, if he alleged a “bare” procedural violation, *ante*, at 1549, one that results in no harm, for example, “an incorrect zip code,” *ante*, at 1550. Far from an incorrect zip code, Robins complains of misinformation about his education, family situation, and economic status, inaccurate representations that could affect his fortune in the job market. See Brief for Center for Democracy & Technology et al. as *Amici Curiae* 13 (Spokeo’s inaccuracies bore on Robins’ “ability to find employment by creating the erroneous impression that he was overqualified for the work he was seeking, that he might be unwilling to relocate for a job due to family commitments, or that his salary demands would exceed what prospective employers were prepared to offer him.”); Brief for Restitution and Remedies Scholars et al. as *Amici Curiae* 35 (“An applicant can lose [a] job for being over-qualified; a suitor can lose a woman if she reads that he is married.”). The FCRA’s procedural requirements aimed to prevent such harm. See 115 Cong. Rec. 2410–2415 (1969). I therefore see no utility in returning this case to the Ninth Circuit to underscore what Robins’ complaint already conveys concretely: Spokeo’s misinformation “cause[s] actual harm to [his] employment prospects.” App. 14.

For the reasons stated, I would affirm the Ninth Circuit's judgment.

136 S.Ct. 1540, 194 L.Ed.2d 635, 100 Empl. Prac. Dec. P 45,556, 84 USLW 4263, 16 Cal. Daily Op. Serv. 4997, 2016 Daily Journal D.A.R. 4566, 26 Fla. L. Weekly Fed. S 128

All Citations



Footnotes

- * The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See  [United States v. Detroit Timber & Lumber Co.](#), 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.
- 1 The Act defines the term “consumer report” as:
“any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for—
“(A) credit or insurance to be used primarily for personal, family, or household purposes;
“(B) employment purposes; or
“(C) any other purpose authorized under section 1681b of this title.”
 [15 U.S.C. § 1681a\(d\)\(1\)](#).
- 2 “The term ‘consumer reporting agency’ means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.”  [§ 1681a\(f\)](#).
- 3 This statutory provision uses the term “consumer,” but that term is defined to mean “an individual.”  [§ 1681a\(c\)](#).
- 4 For purposes of this opinion, we assume that Spokeo is a consumer reporting agency.
- 5 See  [Edwards v. First American Corp.](#), 610 F.3d 514 (C.A.9 2010), cert. granted *sub nom.* [First American Financial Corp. v. Edwards](#), 564 U.S. 1018, 131 S.Ct. 3022, 180 L.Ed.2d 843 (2011), cert. dism’d as improvidently granted, 567 U.S. —, 132 S.Ct. 2536, 183 L.Ed.2d 611 (2012) (*per curiam*).
- 6 “That a suit may be a class action ... adds nothing to the question of standing, for even named plaintiffs who represent a class ‘must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong.’ ”  [Simon v. Eastern Ky. Welfare Rights Organization](#), 426 U.S. 26, 40, n. 20, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976) (quoting  [Warth](#), 422 U.S., at 502, 95 S.Ct. 2197).
- 7 The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance. The victims’ injuries from a mass tort, for example, are widely shared, to be sure, but each individual suffers a particularized harm.
- 8 We express no view about any other types of false information that may merit similar treatment. We leave that issue for the Ninth Circuit to consider on remand.
- * The well-established exception for *qui tam* actions allows private plaintiffs to sue in the government’s name for the violation of a public right. See [Vermont Agency of Natural Resources v. United States ex rel. Stevens](#), 529 U.S. 765,

Spokeo, Inc. v. Robins, 136 S.Ct. 1540 (2016)

100 Empl. Prac. Dec. P 45,556, 194 L.Ed.2d 635, 84 USLW 4263...

773–774, 120 S.Ct. 1858, 146 L.Ed.2d 836 (2000).

- 1 Congress added the right of action for willful violations in 1996 as part of the Consumer Credit Reporting Reform Act, 110 Stat. 3009–426.
- 2 Because this case remains at the pleading stage, the court of first instance must assume the truth of Robins’ factual allegations. In particular, that court must assume, subject to later proof, that Spokeo is a consumer reporting agency under  15 U.S.C. § 1681a(f) and that, in preparing consumer reports, Spokeo does not employ reasonable procedures to ensure maximum possible accuracy, in violation of the FCRA.
- 3 Just as the right to truthful information at stake in  *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982), was closely tied to the Fair Housing Act’s goal of eradicating racial discrimination in housing, so the right here at stake is closely tied to the FCRA’s goal of protecting consumers against dissemination of inaccurate credit information about them.

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**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
Independent Review Panel**

CASE # 50 2013 001083

DECLARATION ON THE IRP PROCEDURE

In the matter of an Independent Review Process (IRP) pursuant to the Internet Corporation for Assigned Names and Number's (ICANN's) Bylaws, the *International Dispute Resolution Procedures (ICDR Rules)* of the International Centre for Dispute Resolution (ICDR), and the *Supplementary Procedures for ICANN Independent Review Process*

Between: DotConnectAfrica Trust;
("Claimant" or "DCA Trust")

Represented by Mr. Arif H. Ali, Ms. Marguerite Walter and Ms. Erica Franzetti of Weil, Gotshal, Manges, LLP located at 1300 Eye Street, NW, Suite 900, Washington, DC 20005, U.S.A.

And

Internet Corporation for Assigned Names and Numbers (ICANN);
("Respondent" or "ICANN")

Represented by Mr. Jeffrey A. LeVee of Jones Day, LLP located at 555 South Flower Street, Fiftieth Floor, Los Angeles, CA 90071, U.S.A.

Claimant and Respondent will together be referred to as "Parties".

IRP Panel:
Babak Barin, *Chair*
Prof. Catherine Kessedjian
Hon. Richard C. Neal (Ret.)

I. BACKGROUND

- 1) DCA Trust is a non-profit organization established under the laws of the Republic of Mauritius on 15 July 2010 with its registry operation – DCA Registry Services (Kenya) Limited – as its principal place of business in Nairobi, Kenya. DCA Trust was formed with the charitable purpose of, among other things, advancing information technology education in Africa and providing a continental Internet domain name to provide access to internet services for the people of Africa and for the public good.
- 2) In March 2012, DCA Trust applied to ICANN for the delegation of the .AFRICA top-level domain name in its 2012 General Top-Level Domains (“gTLD”) Internet Expansion Program (the “New gTLD Program”), an internet resource available for delegation under that program.
- 3) ICANN is a non-profit corporation established under the laws of the State of California, U.S.A., on 30 September 1998 and headquartered in Marina del Rey, California. According to its Articles of Incorporation, ICANN was established for the benefit of the Internet community as a whole and is tasked with carrying out its activities in conformity with relevant principles of international law, international conventions, and local law.
- 4) On 4 June 2013, the ICANN Board New gTLD Program Committee (“NGPC”) posted a notice that it had decided not to accept DCA Trust’s application.
- 5) On 19 June 2013, DCA Trust filed a request for reconsideration by the ICANN Board Governance Committee (“BGC”), which denied the request on 1 August 2013.
- 6) On 19 August 2013, DCA Trust informed ICANN of its intention to seek relief before an Independent Review Panel under ICANN’s Bylaws. Between August and October 2013, DCA Trust and ICANN participated in a Cooperative Engagement Process (“CEP”) to try and resolve the issues relating to DCA Trust’s application. Despite several meetings, no resolution was reached.
- 7) On 24 October 2013, DCA Trust filed a Notice of Independent Review Process with the ICDR in accordance with Article IV, Section 3, of ICANN’s Bylaws.

II. SUMMARY OF THE PARTIES’ POSITIONS ON THE MERITS

- 8) According to DCA Trust, the central dispute between it and ICANN in the Independent Review Process (“IRP”) invoked by DCA Trust in October 2013 and described in its Amended Notice of Independent Review Process submitted to ICANN on 10 January 2014 arises out of:

“(1) ICANN’s breaches of its Articles of Incorporation, Bylaws, international and local law, and other applicable rules in the administration of applications for the .AFRICA top-level domain name in its 2012 General Top-Level Domains (“gTLD”) Internet Expansion Program (the “New gTLD Program”); and (2) ICANN’s wrongful decision that DCA’s application for .AFRICA should not proceed [...]”¹

- 9) According to DCA Trust, “ICANN’s administration of the New gTLD Program and its decision on DCA’s application were unfair, discriminatory, and lacked appropriate due diligence and care, in breach of ICANN’s Articles of Incorporation and Bylaws.”² DCA Trust also advanced that “ICANN’s violations materially affected DCA’s right to have its application processed in accordance with the rules and procedures laid out by ICANN for the New gTLD Program.”³
- 10) In its 10 February 2014 [sic]⁴ Response to DCA Trust’s Amended Notice, ICANN submitted that in these proceedings, “DCA challenges the 4 June 2013 decision of the ICANN Board New gTLD Program Committee (“NGPC”), which has delegated authority from the ICANN Board to make decisions regarding the New gTLD. In that decision, the NGPC unanimously accepted advice from ICANN’s Governmental Advisory Committee (“GAC”) that DCA’s application for .AFRICA should not proceed. DCA argues that the NGPC should not have accepted the GAC’s advice. DCA also argues that ICANN’s subsequent decision to reject DCA’s Request for Reconsideration was improper.”⁵
- 11) ICANN argued that the challenged decisions of ICANN’s Board “were well within the Board’s discretion” and the Board “did exactly what it was supposed to do under its Bylaws, its Articles of Incorporation, and the Applicant Guidebook (“Guidebook”) that the Board adopted for implementing the New gTLD Program.”⁶
- 12) Specifically, ICANN also advanced that “ICANN properly investigated and rejected DCA’s assertion that two of ICANN’s Board members had conflicts of interest with regard to the .AFRICA applications, [...] numerous African countries issued “warnings” to ICANN regarding DCA’s application, a signal from those governments that they had serious concerns regarding DCA’s application; following the issuance of those warnings, the GAC issued “consensus advice” against DCA’s application; ICANN then accepted the GAC’s advice, which was entirely consistent with ICANN’s Bylaws and the

¹ Claimant’s Amended Notice of Independent Review Process, *para.* 2.

² *Ibid.*

³ *Ibid.*

⁴ ICANN’s Response to Claimant’s Amended Notice contains a typographical error; it is dated “February 10, 2013” rather than 2014.

⁵ ICANN’s Response to Claimant’s Amended Notice, *para.* 4. Underlining is from the original text.

⁶ *Ibid.*, *para.* 5.

Guidebook; [and] ICANN properly denied DCA's Request for Reconsideration."⁷

13) In short, ICANN argued that in these proceedings, "the evidence establishes that the process worked exactly as it was supposed to work."⁸

14) In the merits part of these proceedings, the Panel will decide the above and other related issues raised by the Parties in their submissions.

III. PROCEDURAL BACKGROUND LEADING TO THIS DECISION

15) On 24 April 2013, 12 May, 27 May and 4 June 2014 respectively, the Panel issued a Procedural Order No. 1, a Decision on Interim Measures of Protection, a list of questions for the Parties to brief in their 20 May 2014 memorials on the procedural and substantive issues identified in Procedural Order No. 1 ("12 May List of Questions"), a Procedural Order No. 2 and a Decision on ICANN's Request for Partial Reconsideration of certain portions of its Decision on Interim Measures of Protection. The Decision on Interim Measures of Protection and the Decision on ICANN's Request for Partial Reconsideration of certain portions of the Decision on Interim Measures of Protection have no bearing on this Declaration. Consequently, they do not require any particular consideration by the Panel in this Declaration.

16) In Procedural Order No. 1 and the 12 May List of Questions, based on the Parties' submissions, the Panel identified a number of questions relating to the future conduct of these proceedings, including the method of hearing of the merits of DCA Trust's amended Notice of Independent Review Process that required further briefing by the Parties. In Procedural Order No. 1, the Panel identified some of these issues as follows:

B. Future conduct of the IRP proceedings, including the hearing of the merits of Claimant's Amended Notice of Independent Review Process, if required.

Issues:

- a) Interpretation of the provisions of ICANN's Bylaws, the *International Dispute Resolution Procedures* of the ICDR, and the *Supplementary Procedures for ICANN Independent Review Process* (together the "IRP Procedure"), including whether or not there should be *viva voce* testimony permitted.
- b) Document request and exchange.
- c) Additional filings, including any memoranda and hearing exhibits (if needed and appropriate).

⁷ *Ibid.*

⁸ ICANN's Response to Claimant's Amended Notice, *para.* 6. Underlining is from the original text.

- d) Consideration of method of hearing of the Parties, i.e., telephone, video or in-person and determination of a location for such a hearing, if necessary or appropriate, and consideration of any administrative issues relating to the hearing.

17) In that same Order, in light of: (a) the exceptional circumstances of this case; (b) the fact that some of the questions raised by the Parties implicated important issues of fairness, due process and equal treatment of the parties (“Outstanding Procedural Issues”); and (c) certain *primaie impressionis* or first impression issues that arose in relation to the IRP Procedure, the Panel requested the Parties to file two rounds of written memorials, including one that followed the 12 May List of Questions.

18) On 5 and 20 May 2014, the Parties filed their submissions with supporting material for consideration by the Panel.

IV. ISSUES TO BE DECIDED BY THE PANEL

19) Having read the Parties’ submissions and supporting material, and listened to their respective arguments by telephone, the Panel answers the following questions in this Declaration:

- 1) Does the Panel have the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings?
- 2) If so, what directions does the Panel give the Parties with respect to the Outstanding Procedural Issues?
- 3) Is the Panel's decision concerning the IRP Procedure and its future Declaration on the Merits in this proceeding binding?

Summary of the Panel’s findings

20) The Panel is of the view that it has the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings and consequently, it issues the procedural directions set out in paragraphs 58 to 61, 68 to 71 and 82 to 87 (below), which directions may be supplemented in a future procedural order. The Panel also concludes that this Declaration and its future Declaration on the Merits of this case are binding on the Parties.

V. ANALYSIS OF THE ISSUES AND REASONS FOR THE DECISION

1) Can the Panel interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings?

Interpretation and Future Conduct of the IRP Proceedings

DCA Trusts' Submissions

21) In its 5 May 2014 Submission on Procedural Issues ("DCA Trust First Memorial"), DCA Trust submitted, *inter alia*, that:

"[Under] California law and applicable federal law, this IRP qualifies as an arbitration. It has all the characteristics that California courts look to in order to determine whether a proceeding is an arbitration: 1) a third-party decision-maker; 2) a decision-maker selected by the parties; 3) a mechanism for assuring the neutrality of the decision-maker; 4) an opportunity for both parties to be heard; and 5) a binding decision[...]. Thus, the mere fact that ICANN has labeled this proceeding an independent review process rather than an arbitration (and the adjudicator of the dispute is called a Panel rather than a Tribunal) does not change the fact that the IRP – insofar as its procedural framework and the legal effects of its outcome are concerned – is an arbitration."⁹

22) According to DCA Trust, the IRP Panel is a neutral body appointed by the parties and the ICDR to hear disputes involving ICANN. Therefore, it "qualifies as a third-party decision-maker for the purposes of defining the IRP as an arbitration."¹⁰ DCA Trust submits that, "ICANN's Bylaws contain its standing offer to arbitrate, through the IRP administered by the ICDR, disputes concerning Board actions alleged to be inconsistent with the Articles of Incorporation or the Bylaws."¹¹

23) DCA Trust submits that, it "accepted ICANN's standing offer to arbitrate by submitting its Notice of Independent Review [...] to the ICDR on 24 October 2013 [...] when the two party-appointed panelists were unable to agree on a chairperson, the ICDR made the appointment pursuant to Article 6 of the ICDR Rules, amended and effective 1 June 2009. The Parties thus chose to submit their dispute to the IRP Panel for resolution, as with any other arbitration."¹²

24) According to DCA Trust, "the Supplementary Procedures provide that the IRP is to be comprised of 'neutral' [individuals] and provide that the panel shall be comprised of members of a standing IRP Panel or as selected by the

⁹ DCA Trust First Memorial, *para.* 4 and 5.

¹⁰ *Ibid*, *para.* 8.

¹¹ *Ibid*, *para.* 9.

¹² *Ibid*.

parties under the ICDR Rules. The ICDR Rules [...] provide that panelists serving under the rules, ‘shall be impartial and independent’, and require them to disclose any circumstances giving rise to ‘justifiable doubts’ as to their impartiality and independence [...] The IRP therefore contains a mechanism for ensuring the neutrality of the decision-maker, just like any other arbitration.”¹³

25) DCA Trust further submitted that the “IRP affords both parties an opportunity to be heard, both in writing and orally” and the “governing instruments of the IRP – *i.e.*, the Bylaws, the ICDR Rules, and the Supplementary Procedures – confirm that the IRP is final and binding.” According to DCA Trust, the “IRP is the final accountability and review mechanism available to the parties materially affected by ICANN Board decisions. The IRP is also the only ICANN accountability mechanism conducted by an independent third-party decision-maker with the power to render a decision resolving the dispute and naming a prevailing party [...] The IRP represents a fundamentally different stage of review from those that precede it. Unlike reconsideration or cooperative engagement, the IRP is conducted pursuant to a set of independently developed international arbitration rules (as minimally modified) and administered by a provider of international arbitration services, not ICANN itself.”¹⁴

26) As explained in its 20 May 2014 Response to the Panel’s Questions on Procedural Issues (“DCA Trust Second Memorial”), according to DCA Trust, “the IRP is the ***sole forum*** in which an applicant for a new gTLD can seek independent, third-party review of Board actions. Remarkably, ICANN makes no reciprocal waivers and instead retains all of its rights against applicants in law and equity. ICANN cannot be correct that the IRP is a mere ‘corporate accountability mechanism’. Such a result would make ICANN – the caretaker of an immensely important (and valuable) global resource – effectively judgment-proof.”¹⁵

27) Finally DCA Trust submitted that:

“[It] is [...] critical to understand that ICANN created the IRP as an alternative to allowing disputes to be resolved by courts. By submitting its application for a gTLD, DCA agreed to eight pages of terms and conditions, including a nearly page-long string of waivers and releases. Among those conditions was the waiver of all of its rights to challenge ICANN’s decision on DCA’s application in court. For DCA and other gTLD applicants, the IRP is their only recourse; no other legal remedy is available. The very design of this process is evidence that the IRP is fundamentally unlike the forms of

¹³ *Ibid*, paras. 10, 11 and 12.

¹⁴ *Ibid*, paras. 13, 16, 21 and 23.

¹⁵ DCA Trust Second Memorial, *para.* 6. Bold and italics are from the original text.

administrative review that precede it and is meant to provide a final and binding resolution of disputes between ICANN and persons affected by its decisions.”¹⁶

ICANN’s Submissions

28) In response, in its first memorial entitled ICANN’s Memorandum Regarding Procedural Issues filed on 5 May 2014 (“ICANN First Memorial”), ICANN argued, *inter alia*, that:

“[This] proceeding is *not* an arbitration. Rather, an IRP is a truly unique ‘Independent Review’ process established in ICANN’s Bylaws with the specific purpose of providing for ‘independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws’. Although ICANN is using the International Center [sic] for Dispute Resolution (‘ICDR’) to administer these proceedings, nothing in the Bylaws can be construed as converting these proceedings into an ‘arbitration’, and the Bylaws make clear that these proceedings are not to be deemed as the equivalent of an ‘international arbitration.’ Indeed, the word ‘arbitration’ does not appear in the relevant portion of the Bylaws, and as discussed below, the ICANN Board retains full authority to accept or reject the declaration of all IRP Panels [...] ICANN’s Board had the authority to, and did, adopt Bylaws establishing internal accountability mechanisms and defining the scope and form of those mechanisms. Cal. Corp. Code § 5150(a) (authorizing the board of a non-profit public benefit corporation to adopt and amend the corporation’s bylaws).”¹⁷

29) In its 20 May 2014 Further Memorandum Regarding Procedural Issues (“ICANN Second Memorial”), ICANN submitted that many of the questions that the Panel posed “are outside the scope of this Independent Review Proceeding [...] and the Panel’s mandate.”¹⁸ According to ICANN:

“The Panel’s mandate is set forth in ICANN’s Bylaws, which limit the Panel to ‘comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and [...] declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.’”¹⁹

The Panel’s Decision on its power to interpret and determine the IRP Procedure

(i) Mission and Core Values of ICANN

30) ICANN is not an ordinary California non-profit organization. Rather, ICANN has a large international purpose and responsibility, to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular, to ensure the stable and secure operation of the Internet’s unique identifier systems.

¹⁶ DCA Trust First Memorial, *para.* 22.

¹⁷ ICANN First Memorial, *paras.* 10 and 11. Bold and italics are from the original text.

¹⁸ ICANN Second Memorial, *para.* 2.

¹⁹ *Ibid.*

31) ICANN coordinates the allocation and assignment of the three sets of unique identifiers for the Internet. ICANN's special and important mission is reflected in the following provisions of its Articles of Incorporation:

3. This Corporation is a [non-profit] public benefit corporation and is not organized for the private gain of any person. It is organized under the California [Non-profit] Public Benefit Corporation Law for charitable and public purposes. The Corporation is *organized, and will be operated, exclusively for charitable, educational, and scientific purposes ...* In furtherance of the foregoing purposes, and in *recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization*, the Corporation shall, except as limited by Article 5 hereof, *pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet* by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).

4. The Corporation *shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law* and, to the extent appropriate and consistent with these Articles and its Bylaws, through *open and transparent processes* that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations. [Emphasis by way of italics is added]

32) In carrying out its mission, ICANN must be accountable to the global internet community for operating in a manner that is consistent with its Bylaws, and with due regard for its core values.

33) In performing its mission, among others, the following core values must guide the decisions and actions of ICANN: preserve and enhance the operational stability, security and global interoperability of the internet, employ open and transparent policy development mechanisms, make decisions by applying documented policies neutrally and objectively, with integrity and fairness and remain accountable to the internet community through mechanisms that enhance ICANN's effectiveness.

34) The core values of ICANN as described in its Bylaws are deliberately expressed in general terms, so as to provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each situation will necessarily depend on many factors that cannot be fully anticipated or enumerated.

(ii) Accountability of ICANN

35) Consistent with its large and important international responsibilities, ICANN's Bylaws acknowledge a responsibility to the community and a need for a means of holding ICANN accountable for compliance with its mission and "core values." Thus, Article IV of ICANN's Bylaws, entitled "Accountability and Review," states:

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

36) ICANN's Bylaws establish three accountability mechanisms: the Independent Review Process and two other avenues: Reconsideration Requests and the Ombudsman.

37) ICANN's BGC is the body designated to review and consider Reconsideration Requests. The Committee is empowered to make final decisions on certain matters, and recommendations to the Board of Directors on others. ICANN's Bylaws expressly provide that the Board of Directors "*shall not be bound to follow the recommendations of the BGC.*"

38) ICANN's Bylaws provide that the "charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Reconsideration Policy [...] or the Independent Review Policy have not been invoked." The Ombudsman's powers appear to be limited to "clarifying issues" and "using conflict resolution tools such as negotiation, facilitation, and 'shuttle diplomacy.'" The Ombudsman is specifically barred from "instituting, joining, or supporting in any way any legal actions challenging ICANN's structure, procedures, processes, or any conduct by the ICANN Board, staff, or constituent bodies."

39) The avenues of accountability for applicants that have disputes with ICANN do *not* include resort to the courts. Applications for gTLD delegations are governed by ICANN's Guidebook, which provides that applicants waive all right to resort to the courts:

"Applicant hereby releases ICANN [...] from any and all claims that arise out of, are based upon, or are in any way related to, any action or failure to act by ICANN [...] in connection with ICANN's review of this application, investigation, or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS

OF ANY OTHER LEGAL CLAIM AGAINST ICANN ON THE BASIS OF ANY OTHER LEGAL CLAIM.”²⁰

40) Thus, assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, the ultimate “accountability” remedy for applicants is the IRP.

(iii) IRP Procedures

41) The Bylaws of ICANN as amended on 11 April 2013, in Article IV (Accountability and Review), Section 3 (Independent Review of Board Actions), paragraph 1, require ICANN to put in place, in addition to the reconsideration process identified in Section 2, a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with ICANN’s Articles of Incorporation or Bylaws.

42) Paragraphs 7 and 8 of Section 2 of the Bylaws, require all IRP proceedings to be administered by an international dispute resolution provider appointed by ICANN, and for that IRP Provider (“IRPP”) to, with the approval of the ICANN’s Board, establish operating rules and procedures, which shall implement and be consistent with Section 3.

43) In accordance with the above provisions, ICANN selected the ICDR, the international division of the American Arbitration Association, to be the IRPP.

44) With the input of the ICDR, ICANN prepared a set of Supplementary Procedures for ICANN IRP (“Supplementary Procedures”), to “supplement the [ICDR’s] International Arbitration Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws.”

45) According to the Definitions part of the Supplementary Procedures, “Independent Review or IRP” refers to “the procedure that takes place upon filing of a request to review ICANN Board actions or inactions alleged to be inconsistent with ICANN’s Bylaws or Articles of Incorporation”, and “International Dispute Resolution Procedures or Rules” refers to the ICDR’s International Arbitration Rules (“ICDR Rules”) that will govern the process in combination with the Supplementary Rules.

46) The Preamble of the Supplementary Rules indicates that these “procedures supplement the [ICDR] Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws” and Article

²⁰ Applicant Guidebook, Terms and Conditions for Top Level Domain Applications, *para.* 6. Capital letters are from the original text.

2 of the Supplementary Procedures requires the ICDR to apply the Supplementary Procedures, *in addition* to the ICDR Rules, in all cases submitted to it in connection with Article IV, Section 3(4) of ICANN's Bylaws. In the event there is any inconsistency between the Supplementary Procedures and the ICDR Rules, ICANN requires the Supplementary Procedures to govern.

- 47)The online Oxford English Dictionary defines the word “supplement” as “a thing added to something else in order to complete or enhance it”. Supplement, therefore, means to complete, add to, extend or supply a deficiency. In this case, according to ICANN’s desire, the Supplementary Rules were designed to “add to” the ICDR Rules.
- 48)A key provision of the ICDR Rules, Article 16, under the heading “Conduct of Arbitration” confers upon the Panel the power to “conduct [proceedings] in whatever manner [the Panel] considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.”
- 49)Another key provision, Article 36 of the ICDR Rules, directs the Panel to “interpret and apply these Rules insofar as they relate to its powers and duties”. Like in all other ICDR proceedings, the details of exercise of such powers are left to the discretion of the Panel itself.
- 50)Nothing in the Supplementary Procedures either expressly or implicitly conflicts with or overrides the general and broad powers that Articles 16 and 36 of the ICDR Rules confer upon the Panel to interpret and determine the manner in which the IRP proceedings are to be conducted and to assure that each party is given a fair opportunity to present its case.
- 51)To the contrary, the Panel finds support in the “Independent Review Process Recommendations” filed by ICANN, which indicates that the Panel has the *discretion* to run the IRP proceedings in the manner it thinks appropriate. [Emphasis added].
- 52)Therefore, the Panel is of the view that it has the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings, and it does so here, with specificity in relation to the issues raised by the Parties as set out below.

2) What directions does the Panel give the Parties with respect to the Outstanding Procedural Issues?

a) Document request and exchange

Parties' Submissions

- 53) In the DCA Trust First Memorial, DCA Trust seeks document production, since according to it, "information potentially dispositive of the outcome of these proceedings is in ICANN's possession, custody or control."²¹ According to DCA Trust, in this case, "ICANN has submitted witness testimony that, among other things, purports to rely on secret documents that have not been provided." Given that these proceedings may be "DCA's only opportunity to present and have its claims decided by an independent decision-maker", DCA Trust argues "that further briefing on the merits should be allowed following any and all document production in these proceedings."²²
- 54) According to DCA Trust, "by choosing the ICDR Rules, the Parties also chose the associated ICDR guidelines including the Guidelines for Arbitrators Concerning Exchanges of Information ("ICDR Guidelines"). The ICDR Guidelines provide that 'parties shall exchange, in advance of the hearing, all documents upon which each intends to rely' [...]"²³ DCA Trust submits that, "nothing in the Bylaws or Supplementary Procedures excludes such document production, leaving the ICDR Rules to cover the field."²⁴
- 55) DCA Trust therefore, requests that the Panel issue a procedural order providing the Parties with an opportunity to request documents from one another, and to seek an order from the Panel compelling production of documents if necessary.
- 56) ICANN agrees with DCA Trust, that pursuant to the ICDR Guidelines, which it refers to as "Discovery Rules", "a party must request that a panel order the production of documents."²⁵ According to ICANN, "those documents must be 'reasonably believed to exist and to be relevant and material to the outcomes of the case,' and requests must contain 'a description of specific documents or classes of documents, along with an explanation of their materiality to the outcome of the case."²⁶ ICANN argues, however, that despite the requirement by the Supplementary Rules that, '**all necessary evidence** to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation

²¹ DCA Trust First Memorial, *para.* 61.

²² *Ibid*, *paras.* 61 and 66.

²³ *Ibid*, *para.* 67.

²⁴ *Ibid*.

²⁵ ICANN First Memorial, *para.* 28.

²⁶ *Ibid*.

should be part of the [initial written] submission’, DCA Trust has not to date “provided any indication as to what information it believes the documents it may request may contain and has made no showing that those documents could affect the outcome of the case.”²⁷

57) ICANN further submits that, “while ICANN recognizes that the Panel may order the production of documents within the parameters set forth in the Discovery Rules, ICANN will object to any attempts by DCA to propound broad discovery of the sort permitted in American civil litigation.”²⁸ In support of its contention, ICANN refers to the ICDR Guidelines and states that those Guidelines have made it ‘clear that its Discovery Rules do not contemplate such broad discovery. The introduction of these rules states that their purpose is to promote ‘the goal of providing a simpler, less expensive and more expeditious form of dispute resolution than resort to national courts.’ According to ICANN, the ICDR Guidelines note that:

“One of the factors contributing to complexity, expense and delay in recent years has been the migration from court systems into arbitration of procedural devices that allow one party to a court proceeding access to information in the possession of the other, without full consideration of the differences between arbitration and litigation. The purpose of these guidelines is to make it clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process.”²⁹

The Panel’s directions concerning document request and exchange

58) Seeing that the Parties are both in agreement that some form of documentary exchange is permitted under the IRP Procedure, and considering that Articles 16 and 19 of the ICDR Rules respectively specify, *inter alia*, that, “[s]ubject to these Rules the [Panel] may conduct [these proceedings] in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case” and “at any time during the proceedings, the tribunal may order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate”, the Panel concludes that some document production is necessary to allow DCA Trust to present its case.

59) The Panel is not aware of any international dispute resolution rules, which prevent the parties to benefit from some form of document production. Denying document production would be especially unfair in the circumstances of this case given ICANN’s reliance on internal confidential documents, as advanced by DCA Trust. In any event, ICANN’s espoused goals

²⁷ *Ibid*, para. 29. Bold and italics are from the original text.

²⁸ *Ibid*, para. 30.

²⁹ ICDR Guidelines for Arbitrators on Exchanges of Information, Introduction.

of accountability and transparency would be disserved by a regime that truncates the usual and traditional means of developing and presenting a claim.

60)The Panel, therefore, orders a reasonable documentary exchange in these proceedings with a view to maintaining efficiency and economy, and invites the Parties to agree by or before 29 August 2014, on a form, method and schedule of exchange of documents between them. If the Parties are unable to agree on such a documentary exchange process, the Panel will intervene and, with the input of the Parties, provide further guidance.

61)In this last regard, the Panel directs the Parties attention to paragraph 6 of the ICDR Guidelines, and advises, that it is very “receptive to creative solutions for achieving exchanges of information in ways that avoid costs and delay, consistent with the principles of due process expressed in these Guidelines.”

b) Additional filings, including memoranda and hearing exhibits

Parties’ Submissions

62)In the DCA Trust First Memorial, DCA Trust submits that:

“[The] plain language of the Supplementary Procedures pertaining to written submissions clearly demonstrates that claimants in IRPs are not limited to a single written submission incorporating all evidence, as argued by ICANN. Section 5 of the Supplementary Procedures states that ‘initial written submissions of the parties shall not exceed 25 pages.’ The word ‘initial’ confirms that there may be subsequent submissions, subject to the discretion of the Panel as to how many additional written submissions and what page limits should apply.”³⁰

63)DCA Trust also submits that, “Section 5 of the Supplementary Procedures [...] provides that ‘[a]ll necessary evidence to demonstrate the requestor’s claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission.’ Use of the word ‘should’—and not ‘shall’—confirms that it is desirable, but not required that all necessary evidence be included with the Notice of Independent Review. Plainly, the Supplementary Procedures do not preclude a claimant from adducing additional evidence nor would it make any sense if they did given that claimants may, subject to the Panel’s discretion, submit document requests.”³¹

64)According to DCA Trust, in addition, “section 5 of the Supplementary Procedures provides that ‘the Panel may request additional written submissions from the party seeking review, the Board, the Supporting

³⁰ DCA Trust First Memorial, *para.* 57.

³¹ *Ibid*, *para.* 58.

Organizations, or from other parties.’ Thus, the Supplementary Procedures clearly contemplate that additional written submissions may be necessary to give each party a fair opportunity to present its case.”³²

65) In response, ICANN submits that, DCA Trust “has no automatic right to additional briefing under the Supplementary Procedures.”³³ According to ICANN, “paragraph 5 of the Supplementary Procedures, which governs written statements, provides:

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. ***All necessary evidence to demonstrate the requestor’s claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission.*** Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. ***The IRP Panel may request additional written submissions from the party seeking review,*** the Board, the Supporting Organizations, or from other parties.” [Bold and italics are ICANN’s]

ICANN adds:

“This section clearly provides that DCA [Trust’s] opportunity to provide briefing and evidence in this matter has concluded, subject only to a request for additional briefing from the Panel. DCA has emphasized that the rule references the ‘initial’ written submission, but the word ‘initial’ refers to the fact that the Panel ‘may request additional written submissions,’ not that DCA [Trust] has some ‘right’ to a second submission. There is no Supplementary Rule that even suggests the possibility of a second submission as a matter of right. The fact that DCA [Trust] has twice failed to submit evidence in support of its claims is not justification for allowing DCA [Trust] a third attempt.”³⁴

66) ICANN further notes, that in its 20 April 2014 letter to the Panel, ICANN already submitted that, “DCA [Trust’s] argument that it submitted its papers ‘on the understanding that opportunities would be available to make further submissions’ is false. ICANN stated in an email to DCA [Trust’s] counsel on 9 January 2014—prior to the submission of DCA [Trust’s] Amended Notice—that the Supplementary [Procedures] bar the filing of supplemental submissions absent a request from the Panel.”³⁵

67) According to ICANN:

“[The] decision as to whether to allow supplemental briefing is within the Panel’s discretion, and ICANN urges the Panel to decline to permit supplemental briefing for two reasons. First, despite having months to consider how DCA [Trust] might respond to ICANN’s presentation on the merits, DCA [Trust] has never even attempted to explain

³² *Ibid*, para. 59.

³³ ICANN First Memorial, para. 24.

³⁴ *Ibid*.

³⁵ *Ibid*, para. 25.

what it could say in additional briefing that would refute the materials in ICANN's presentation. [...] The fact that DCA is unable to identify supplemental witnesses six months after filing its Notice of IRP is strong indication that further briefing would not be helpful in this case. Second, as ICANN has explained on multiple occasions, DCA [Trust] has delayed these proceedings substantially, and further briefing would compound that delay [...] as ICANN noted in its letter of 20 April 2014, despite DCA [Trust's] attempts to frame this case as implicating issues 'reach[ing] far beyond the respective rights of the parties as concerns the delegation of .AFRICA,' the issues in this case are in fact extremely limited in scope. This Panel is authorized only to address whether ICANN violated its Bylaws or Articles of Incorporation *in its handling of DCA's Application for .AFRICA*. The parties have had the opportunity to submit briefs and evidence regarding that issue. DCA [Trust] has given no indication that it has further dispositive arguments to make or evidence to present. The Panel should resist DCA's attempt to delay these proceedings even further via additional briefing."³⁶

The Panel's directions concerning additional filings

- 68) As with document production, in the face of Article 16 of the ICDR Rules, the Panel is of the view that both Parties ought to benefit from additional filings. In this instance again, while it is possible as ICANN explains, that the drafters of the Supplementary Procedures may have desired to preclude the introduction of additional evidence not submitted with an initial statement of claim, the Panel is of the view that such a result would be inconsistent with ICANN's core values and the Panel's obligation to treat the parties fairly and afford both sides a reasonable opportunity to present their case.
- 69) Again, every set of dispute resolution rules, and every court process that the Panel is aware of, allows a claimant to supplement its presentation as its case proceeds to a hearing. The goal of a fair opportunity to present one's case is in harmony with ICANN's goals of accountability, transparency, and fairness.
- 70) The Panel is aware of and fully embraces the fact that ICANN tried to curtail unnecessary time and costs in the IRP process. However, this may not be done at the cost of a fair process for both parties, particularly in light of the fact that the IRP is the exclusive dispute resolution mechanism provided to applicants.
- 71) Therefore, the Panel will allow the Parties to benefit from additional filings and supplemental briefing going forward. The Panel invites the Parties in this regard to agree on a reasonable exchange timetable. If the Parties are unable to agree on the scope and length of such additional filings and supplemental briefing, the Panel will intervene and, with the input of the Parties, provide further guidance.

³⁶ *Ibid*, paras. 26 and 27.

c) Method of Hearing and Testimony

Parties' Submissions

72) In the DCA Trust First Memorial, DCA Trust submitted that:

“[The] parties agree that a hearing on the merits is appropriate in this IRP. DCA [Trust] respectfully requests that the Panel schedule a hearing on the merits after document discovery has concluded and the parties have had the opportunity to file memorials on the merits. Although the Panel clearly has the authority to conduct a hearing in-person, in the interest of saving time and minimizing costs, DCA [Trust] would agree to a video hearing, as stated during the April 22 hearing on procedural matters.”³⁷

73) In response, ICANN submitted that, “during the 22 April 2014 Call, ICANN agreed that this IRP is one in which a telephonic or video conference would be helpful and offered to facilitate a video conference.”³⁸ In addition, in the ICANN First Memorial, ICANN argued that according to Article IV, Section 3.12 of the Bylaws and paragraph 4 of the Supplementary Procedures, the IRP should conduct its proceedings by email and otherwise via Internet to the maximum extent feasible and in the extraordinary event that an in-person hearing is deemed necessary by the panel, the in-person hearing shall be limited to argument only.

74) ICANN also advanced, that:

“[It] does not believe [...] that this IRP is sufficiently ‘extraordinary’ so as to justify an in-person hearing, which would dramatically increase the costs for the parties. As discussed above, the issues in this IRP are straightforward – limited to whether ICANN’s Board acted consistent with its Bylaws and Articles of Incorporation in relation to DCA’s application for. AFRICA. – and can, easily [...], be resolved following a telephonic oral argument with counsel and the Panel.”³⁹

75) In the DCA Trust First Memorial, DCA Trust also argued that, in “April 2013, ICANN amended its Bylaws to limit telephonic or in-person hearings to ‘argument only.’ At some point after the *ICM* Panel’s 2009 decision in *ICM v. ICANN*, ICANN also revised the Supplementary Procedures to limit hearings to ‘argument only.’ Accordingly, and as ICANN argued at the procedural hearing, ICANN’s revised Bylaws and Supplementary Procedures suggest that there is to be no cross-examination of witnesses at the hearing. However, insofar as neither the Supplementary Procedures nor the Bylaws expressly exclude cross-examination, this provision remains ambiguous.”⁴⁰

³⁷ DCA Trust First Memorial, *para.* 63.

³⁸ ICANN First Memorial, *para.* 36.

³⁹ *Ibid*, *para.* 36.

⁴⁰ DCA Trust First Memorial, *para.* 64.

76)DCA Trust submitted that:

“[Regardless] of whether the parties themselves may examine witnesses at the hearing, it is clear that the Panel may do so. Article 16(1) provides that the Panel ‘may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.’ It is, moreover, customary in international arbitration for tribunal members to question witnesses themselves – often extensively – in order to test their evidence or clarify facts that are in dispute. In this case, ICANN has submitted witness testimony that, among other things, purports to rely on secret documents that have not been provided. As long as those documents are withheld from DCA [Trust], it is particularly important for that witness testimony to be fully tested by the Panel, if not by the parties. Particularly in light of the important issues at stake in this matter and the general due process concerns raised when parties cannot test the evidence presented against them, DCA [Trust] strongly urges the Panel to take full advantage of its opportunity to question witnesses. Such questioning will in no way slow down the proceedings, which DCA [Trust] agrees are to be expedited – but not at the cost of the parties’ right to be heard, and the Panel’s right to obtain the information it needs to render its decision.”⁴¹

77)In response, ICANN submitted that:

“[Both] the Supplementary Procedures and ICANN’s Bylaws unequivocally and unambiguously prohibit live witness testimony in conjunction with any IRP.” Paragraph 4 of the Supplementary Procedures, which according to ICANN governs the “Conduct of the Independent Review”, demonstrates this point. According to ICANN, “indeed, two separate phrases of Paragraph 4 explicitly prohibit live testimony: (1) the phrase limiting the in-person hearing (and similarly telephonic hearings) to ‘argument only,’ and (2) the phrase stating that ‘all evidence, including witness statements, must be submitted in advance.’ The former explicitly limits hearings to the argument of counsel, excluding the presentation of any evidence, including any witness testimony. The latter reiterates the point that *all evidence, including witness testimony*, is to be presented in writing and prior to the hearing. Each phrase unambiguously excludes live testimony from IRP hearings. Taken together, the phrases constitute irrefutable evidence that the Supplementary Procedures establish a truncated hearing procedure.”⁴²

78)ICANN added:

“[Paragraph] 4 of the Supplementary Procedures is based on the exact same and unambiguous language in Article IV, Section 3.12 of the Bylaws, which provides that ‘[i]n the unlikely event that a telephonic or in-person hearing is convened, **the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance**.’” [...] While DCA [Trust] may prefer a different procedure, the Bylaws and the Supplementary Procedures could not be any clearer in this regard. Despite the Bylaws’ and Supplementary Procedures’ clear and unambiguous prohibition of live witness testimony, DCA [Trust] attempts to argue that the Panel should instead be guided by Article 16 of the ICDR Rules, which states that subject to the ICDR Rules, ‘the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each

⁴¹ *Ibid*, paras. 65 and 66.

⁴² ICANN First Memorial, paras. 15 and 16.

party has the right to be heard and is given a fair opportunity to present its case.’ However, as discussed above, the Supplementary Procedures provide that ‘[i]n the event there is any inconsistency between these Supplementary Procedures and [ICDR’s International Arbitration Rules], these Supplementary Procedures will govern,’ and the Bylaws require that the ICDR Rules ‘be consistent’ with the Bylaws. As such, the Panel **does not have discretion** to order live witness testimony in the face of the Bylaws’ and Supplementary Procedures’ clear and unambiguous prohibition of such testimony.”⁴³

79) ICANN further submitted:

“[During] the 22 April Call, DCA vaguely alluded to ‘due process’ and ‘constitutional’ concerns with prohibiting cross-examination. As ICANN did after public consultation, and after the *ICM* IRP, ICANN has the right to establish the rules for these procedures, rules that DCA agreed to abide by when it filed its Request for IRP. First, ‘constitutional’ protections do not apply with respect to a *corporate accountability mechanism*. Second, ‘due process’ considerations (though inapplicable to corporate accountability mechanisms) were already considered as part of the design of the revised IRP. And the United States Supreme Court has repeatedly affirmed the right of parties to tailor unique rules for dispute resolution processes, including even *binding arbitration proceedings* (which an IRP is not). The Supreme Court has specifically noted that ‘[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. . . . And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution’.”⁴⁴

80) According to ICANN:

“[The] U.S. Supreme Court has explicitly held that the right to tailor unique procedural rules includes the right to dispense with certain procedures common in civil trials, including the right to cross-examine witnesses [...] Similarly, international arbitration norms recognize the right of parties to tailor their own, unique arbitral procedures. ***‘Party autonomy is the guiding principle in determining the procedure to be followed in international arbitration.’*** It is a principle that is endorsed not only in national laws, but by international arbitral institutions worldwide, as well as by international instruments such as the New York Convention and the Model Law.”⁴⁵

81) In short, ICANN advanced that:

“[Even] if this were a formal ‘arbitration’, ICANN would be entitled to limit the nature of these proceedings so as to preclude live witness testimony. The fact that this proceeding is not an arbitration further reconfirms ICANN’s right to establish the rules that govern these proceedings [...] DCA [Trust] argues that it will be prejudiced if cross-examination of witnesses is not permitted. However, the procedures give both parties equal opportunity to present their evidence—the inability of either party to examine witnesses at the hearing would affect both the Claimant and ICANN equally. In this instance, DCA [Trust] did not submit witness testimony with its Amended Notice (as clearly it should have). However, were DCA [Trust] to present any written witness statements in support of its position, ICANN would not be entitled to cross examine

⁴³ *Ibid*, paras. 17 and 18. Bold and italics are from the original text.

⁴⁴ *Ibid*, para. 19.

⁴⁵ *Ibid*, paras. 20 and 21. Bold and italics are from the original text.

those witnesses, just as DCA [Trust] is not entitled to cross examine ICANN's witnesses. Of course, the parties are free to argue to the IRP Panel that witness testimony should be viewed in light of the fact that the rules do not permit cross-examination."⁴⁶

The Panel's directions on method of hearing and testimony

- 82) The considerations and discussions under the prior headings addressing document exchange and additional filings apply to the hearing and testimony issues raised in this IRP proceeding as well.
- 83) At this juncture, the Panel is of the preliminary view that at a minimum a video hearing should be held. The Parties appear to be in agreement. However, the Panel does not wish to close the door to the possibility of an in-person hearing and live examination of witnesses, should the Panel consider that such a method is more appropriate under the particular circumstances of this case after the Parties have completed their document exchange and the filing of any additional materials.
- 84) While the Supplementary Procedures appear to limit both telephonic and in-person hearings to "argument only", the Panel is of the view that this approach is fundamentally inconsistent with the requirements in ICANN's Bylaws for accountability and for decision making with objectivity and fairness.
- 85) Analysis of the propriety of ICANN's decisions in this case will depend at least in part on evidence about the intentions and conduct of ICANN's top personnel. ICANN should not be allowed to rely on written statements of these officers and employees attesting to the propriety of their actions without an appropriate opportunity in the IRP process for DCA Trust to challenge and test the veracity of such statements.
- 86) The Panel, therefore, reserves its decision to order an in-person hearing and live testimony pending a further examination of the representations that will be proffered by each side, including the filing of any additional evidence which this Decision permits. The Panel also permits both Parties at the hearing to challenge and test the veracity of statements made by witnesses.
- 87) Having said this, the Panel acknowledges the Parties' desire that the IRP proceedings be as efficient and economical as feasible, consistent with the overall objectives of a fair and independent proceeding. The Panel will certainly bear this desire and goal in mind as these proceedings advance further.

⁴⁶ *Ibid*, paras. 22 and 23.

3) Is the Panel's Decision on the IRP Procedure and its future Declaration on the Merits in this proceeding binding?

DCA Trust's Submissions

88) In addition to the submissions set out in the earlier part of this Decision, DCA Trust argues that, the language used in the Bylaws to describe the IRP process is demonstrative that it is intended to be a binding process. When the language in the Bylaws for reconsideration is compared to that describing the IRP, DCA Trust explains:

“[It] is clear that the declaration of an IRP is intended to be final and binding [...] For example, the Bylaws provide that the [ICANN] [Board Governance Committee] BGC ‘shall act on a Reconsideration Request on the basis of the written public record’ and ‘shall make a final determination or recommendation.’ The Bylaws even expressly state that **‘the Board shall not be bound to follow the recommendations’** of the BGC. By contrast, the IRP Panel makes **‘declarations’** — defined by ICANN in its Supplementary Procedures as ‘decisions/opinions’— that **‘are final and have precedential value.’** The IRP Panel ‘shall specifically designate the prevailing party’ and may allocate the costs of the IRP Provider to one or both parties. Moreover, nowhere in ICANN’s Bylaws or the Supplementary Procedures does ICANN state that the Board shall not be bound by the declaration of the IRP. If that is what ICANN intended, then it certainly could have stated it plainly in the Bylaws, as it did with reconsideration. The fact that it did not do so is telling.”⁴⁷

89) In light of the foregoing, DCA Trust advances:

“[The] IRP process is an arbitration in all but name. It is a dispute resolution procedure administered by an international arbitration service provider, in which the decision-makers are neutral third parties chosen by the parties to the dispute. There are mechanisms in place to assure the neutrality of the decision-makers and the right of each party to be heard. The IRP Panel is vested with adjudicative authority that is equivalent to that of any other arbitral tribunal: it renders decisions on the dispute based on the evidence and arguments submitted by the parties, and its decisions are binding and have *res judicata* and precedential value. The procedures appropriate and customary in international arbitration are thus equally appropriate in this IRP. But in any event, and as discussed below, the applicable rules authorize the Panel to conduct this IRP in the manner it deems appropriate regardless of whether it determines that the IRP qualifies as an arbitration.”⁴⁸

ICANN's Submissions

90) In response, ICANN submits that:

“[The] provisions of Article IV, Section 3 of the ICANN Bylaws, which govern the Independent Review process and these proceedings, make clear that the declaration of the Panel will not be binding on ICANN. Section 3.11 gives the IRP panels the authority

⁴⁷ DCA Trust First Memorial, *paras.* 33, 34 and 35. Bold and italics are from the original text.

⁴⁸ *Ibid.* *para.* 44.

to ‘declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws’ and ‘recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.’ Section 3.21 provides that ‘[w]here feasible, the Board shall consider the IRP Panel declaration at the Board’s next meeting.’ Section 3 never refers to the IRP panel’s declaration as a ‘decision’ or ‘determination.’ It does refer to the ‘Board’s subsequent action on [the IRP panel’s] declaration [...]’ That language makes clear that the IRP’s declarations are advisory and not binding on the Board. Pursuant to the Bylaws, the Board has the discretion to consider an IRP panel’s declaration and take whatever action it deems appropriate.”⁴⁹

91) According to ICANN:

“[This] issue was addressed extensively in the *ICM* IRP, a decision that has precedential value to this Panel. The *ICM* Panel specifically considered the argument that the IRP proceedings were ‘arbitral and not advisory in character,’ and unanimously concluded that its declaration was ‘not binding, but rather advisory in effect.’ At the time that the *ICM* Panel rendered its declaration, Article IV, Section 3 of ICANN’s Bylaws provided that ‘IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators . . . nominated by that provider.’ ICM unsuccessfully attempted to rely on that language in arguing that the IRP constituted an arbitration, and that the IRP panel’s declaration was binding on ICANN. Following that IRP, that language was removed from the Bylaws with the April 2013 Bylaws amendments, further confirming that, under the Bylaws, an IRP panel’s declaration is not binding on the Board.”⁵⁰

92) ICANN also submits that:

“[The] lengthy drafting history of ICANN’s independent review process confirms that IRP panel declarations are not binding. Specifically, the Draft Principles for Independent Review, drafted in 1999, state that ‘the ICANN Board should retain ultimate authority over ICANN’s affairs – after all, it is the Board ... that will be chosen by (and is directly accountable to) the membership and supporting organizations.’ And when, in 2001, the Committee on ICANN Evolution and Reform (‘ERC’) recommended the creation of an independent review process, it called for the creation of ‘a process to require non-binding arbitration by an international arbitration body to review any allegation that the Board has acted in conflict with ICANN’s Bylaws.’ The individuals who actively participated in the process also agreed that the review process would not be binding. As one participant stated: IRP ‘decisions will be nonbinding, because the Board will retain final decision-making authority’.”⁵¹

93) According to ICANN:

“[The] only IRP Panel ever to issue a declaration, the *ICM* IRP Panel, unanimously rejected the assertion that IRP Panel declarations are binding and recognized that an IRP panel’s declaration ‘is not binding, but rather advisory in effect.’ Nothing has occurred since the issuance of the *ICM* IRP Panel’s declaration that changes the fact that IRP Panel declarations are not binding. To the contrary, in April 2013, following the

⁴⁹ ICANN First Memorial, *para.* 33,

⁵⁰ *Ibid*, *para.* 34,

⁵¹ ICANN Second Memorial, *para.* 5,

ICM IRP, in order to clarify even further that IRPs are not binding, all references in the Bylaws to the term ‘arbitration’ were removed as part of the Bylaws revisions. ICM had argued in the IRP that the use of the word ‘arbitration’ in the portion of the Bylaws related to Independent Review indicated that IRPs were binding, and while the *ICM* IRP Panel rejected that argument, to avoid any lingering doubt, ICANN removed the word ‘arbitration’ in conjunction with the amendments to the Bylaws.”⁵²

94) ICANN further submits that:

“[The] amendments to the Bylaws, which occurred following a community process on the proposed IRP revisions, added, among other things, a sentence stating that ‘declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.’ DCA argues that this new language, which does not actually use the word ‘binding,’ nevertheless provides that IRP Panel declarations are binding, trumping years of drafting history, the sworn testimony of those who participated in the drafting process, the plain text of the Bylaws, and the reasoned declaration of a prior IRP panel. DCA is wrong.”⁵³

95) According to ICANN:

“[The] language DCA references was added to ICANN’s Bylaws to meet recommendations made by ICANN’s Accountability Structures Expert Panel (‘ASEP’). The ASEP was comprised of three world-renowned experts on issues of corporate governance, accountability, and international dispute resolution, and was charged with evaluating ICANN’s accountability mechanisms, including the Independent Review process. The ASEP recommended, *inter alia*, that an IRP should not be permitted to proceed on the same issues as presented in a prior IRP. The ASEP’s recommendations in this regard were raised in light of the second IRP constituted under ICANN’s Bylaws, where the claimant presented claims that would have required the IRP Panel to [re-evaluate] the declaration of the IRP Panel in the *ICM* IRP. To prevent claimants from challenging a prior IRP Panel declaration, the ASEP recommended that ‘[t]he declarations of the IRP, and ICANN’s subsequent actions on those declarations, should have precedential value.’ The ASEP’s recommendations in this regard did not convert IRP Panel declarations into binding decisions.”⁵⁴

96) Moreover, ICANN argues:

“[One] of the important considerations underlying the ASEP’s work was the fact that ICANN, while it operates internationally, is a California non-profit public benefit corporation subject to the statutory law of California as determined by United States courts. That law requires that ICANN’s Board retain the ultimate responsibility for decision-making. As a result, the ASEP’s recommendations were premised on the understanding that the declaration of the IRP Panel is not ‘binding’ on the Board. In any event, a declaration clearly can be both non-binding and precedential.”⁵⁵

97) In short, ICANN argues that the IRP is *not* binding. According to ICANN, “not only is there no language in the Bylaws stating that IRP Panel declarations

⁵² *Ibid*, para. 6.

⁵³ *Ibid*, para. 7.

⁵⁴ *Ibid*, paras. 8 and 9.

⁵⁵ *Ibid*, paras. 9 and 10.

are binding on ICANN, there is no language stating that an IRP Panel even may determine if its advisory Declarations are binding.”⁵⁶ According to ICANN, words such as “arbitration” and “arbitrator” were removed from the Bylaws to ensure that the IRP Panel’s declarations do not have the force of normal commercial arbitration. ICANN also argues that DCA Trust, “fails to point to a *single piece of evidence* in all of the drafting history of the Bylaws or any of the amendments to indicate that ICANN intended, through its 2013 amendments, to convert a non-binding procedure into a binding one.”⁵⁷ Finally, ICANN submits that “it is not within the scope of this Panel’s authority to declare whether IRP Panel declarations are binding on ICANN’s Board...the Panel does not have the authority to re-write ICANN’s Bylaws or the rules applicable to this proceeding. The Panel’s mandate is strictly limited to ‘comparing contested actions of the Board [and whether it] has acted consistently with the provisions of those Articles of Incorporation and Bylaws, and [...] declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws’.”⁵⁸

The Panel’s Decision on Binding or Advisory nature of IRP decisions, opinions and declarations

98) Various provisions of ICANN’s Bylaws and the Supplementary Procedures support the conclusion that the Panel’s decisions, opinions and declarations are binding. There is certainly nothing in the Supplementary Rules that renders the decisions, opinions and declarations of the Panel either advisory or non-binding.⁵⁹

99) In paragraph 1, the Supplementary Procedures define “Declaration” as the “decisions and/or opinions of the IRP Panel”. In paragraph 9, the Supplementary Procedures require any Declaration of a three-member IRP Panel to be signed by the majority and in paragraph 10, under the heading “Form and Effect of an IRP Declaration”, they require Declarations to be in writing, based on documentation, supporting materials and arguments submitted by the parties. The Supplementary Procedures also require the Declaration to “specifically designate the prevailing party”.⁶⁰

⁵⁶ ICANN letter of 2 June 2014 addressed to the Panel.

⁵⁷ *Ibid.* Italics are from the original decision.

⁵⁸ *Ibid.*

⁵⁹ The Reconsideration process established in the Bylaws expressly provides that ICANN’s “Board *shall not be bound to follow* the recommendations” of the BGC for action on requests for reconsideration. No similar language in the Bylaws or Supplementary Procedures limits the effect of the Panel’s IRP decisions, opinions and declarations to an advisory or non-binding effect. It would have been easy for ICANN to clearly state somewhere that the IRP’s decisions, opinions or declarations are “advisory”—this word appears in the Reconsideration Process.

⁶⁰ Moreover, the word “Declaration” in the common law legal tradition is often synonymous with a binding decision. According to Black’s Law Dictionary (7th Edition 1999) at page 846, a “declaratory

- 100) Section 10 of the Supplementary Procedures, resembles Article 27 of the ICDR Rules. Whereas Article 27 refers to “Awards”, section 10 refers to “Declarations”. Section 10 of the Supplementary Procedures, however, is silent on whether Declarations made by the IRP Panel are “final and binding” on the parties.
- 101) As explained earlier, as per Article IV, Section 3, paragraph 8 of the Bylaws, the Board of Directors of ICANN has given its approval to the ICDR to establish a set of operating rules and procedures for the conduct of the IRP set out in section 3. The operating rules and procedures established by the ICDR are the ICDR Rules as referred to in the preamble of the Supplementary Procedures. These Rules have been supplemented⁶¹ with the Supplementary Procedures.
- 102) This is clear from two different parts of the Supplementary Procedures. First, in the preamble, where the Supplementary Procedures state that: “These procedures supplement the International Centre for Dispute Resolution’s International Arbitration Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws”.
- 103) And second, under section 2 entitled (Scope), that states that the “ICDR will apply these Supplementary Procedures, in addition to the INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, in all cases submitted to the ICDR in connection with the Article IV, Section 3(4) of the ICANN Bylaws”. It is therefore clear that ICANN intended the operating rules and procedures for the independent review to be an international set of arbitration rules supplemented by a particular set of additional rules.
- 104) There is also nothing inconsistent between section 10 of the Supplementary Procedures and Article 27 of the ICDR Rules.
- 105) One of the hallmarks of international arbitration is the binding and final nature of the decisions made by the adjudicators. Binding arbitration is the essence of what the ICDR Rules, the ICDR itself and its parent, the American Arbitration Association, offer. The selection of the ICDR Rules as the baseline

judgment” is, “a binding adjudication that establishes the rights and other legal obligations of the parties without providing for or ordering enforcement”.

⁶¹ As explained by the Panel before, the word “supplement” means to complete, add to, extend or supply a deficiency. The Supplementary Procedures, therefore, *supplement* (not replace or supersede) the ICDR Rules. As also indicated by the Panel before, in the event there is any inconsistency between the Supplementary Procedures and the ICDR Rules, ICANN requires the Supplementary Procedures to govern.

set of procedures for IRP's, therefore, points to a binding adjudicative process.

106) Furthermore, the process adopted in the Supplementary Procedures is an adversarial one where counsel for the parties present competing evidence and arguments, and a panel decides who prevails, when and in what circumstances. The panelists who adjudicate the parties' claims are also selected from among experienced arbitrators, whose usual charter is to make binding decisions.

107) The above is further supported by the language and spirit of section 11 of ICANN's Bylaws. Pursuant to that section, the IRP Panel has the authority to summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious. Surely, such a decision, opinion or declaration on the part of the Panel would not be considered advisory.

108) Moreover, even if it could be argued that ICANN's Bylaws and Supplementary Procedures are ambiguous on the question of whether or not a decision, opinion or declaration of the IRP Panel is binding, in the Panel's view, this ambiguity would weigh against ICANN's position. The relationship between ICANN and the applicant is clearly an adhesive one. There is no evidence that the terms of the application are negotiable, or that applicants are able to negotiate changes in the IRP.

109) In such a situation, the rule of *contra proferentem* applies. As the drafter and architect of the IRP Procedure, it was open to ICANN and clearly within its power to adopt a procedure that expressly and clearly announced that the decisions, opinions and declarations of IRP Panels were advisory only. ICANN did not adopt such a procedure.

110) ICANN points to the extensive public and expert input that preceded the formulation of the Supplementary Procedures. The Panel would have expected, were a mere advisory decision, opinion or declaration the objective of the IRP, that this intent be clearly articulated somewhere in the Bylaws or the Supplementary Procedures. In the Panel's view, this could have easily been done.

111) The force of the foregoing textual and construction considerations as pointing to the binding effect of the Panel's decisions and declarations are reinforced by two factors: 1) the exclusive nature of the IRP whereby the non-binding argument would be clearly in contradiction with such a factor⁶²;

⁶² If the waiver of judicial remedies ICANN obtains from applicants is enforceable, and the IRP process is non-binding, as ICANN contends, then that process leaves TLD applicants and the Internet community with no compulsory remedy of any kind. This is, to put it mildly, a highly watered down notion of "accountability". Nor is such a process "independent", as the ultimate decision maker,

and, 2) the special, unique, and publicly important function of ICANN. As explained before, ICANN is not an ordinary private non-profit entity deciding for its own sake who it wishes to conduct business with, and who it does not. ICANN rather, is the steward of a highly valuable and important international resource.

112) Even in ordinary private transactions, with no international or public interest at stake, contractual waivers that purport to give up *all* remedies are forbidden. Typically, this discussion is found in the Uniform Commercial Code Official Comment to section 2719, which deals with “Contractual modification or limitation of remedy.” That Comment states:

“Under this section parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect. However, *it is the very essence of a sales contract that at least minimum adequate remedies be available.* If the parties intend to conclude a contract for sale within this Article *they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract.*” [Panel’s emphasis by way of italics added]

113) The need for a minimum adequate remedy is indisputably more important where, as in this case, the party arguing that there is no compulsory remedy is the party entrusted with a special, internationally important and valuable operation.

114) The need for a compulsory remedy is concretely shown by ICANN’s longstanding failure to implement the provision of the Bylaws and Supplementary Procedures requiring the creation of a standing panel. ICANN has offered no explanation for this failure, which evidences that a self-policing regime at ICANN is insufficient. The failure to create a standing panel has consequences, as this case shows, delaying the processing of DCA Trust’s claim, and also prejudicing the interest of a competing .AFRICA applicant.

115) Moreover, assuming for the sake of argument that it is acceptable for ICANN to adopt a remedial scheme with no teeth, the Panel is of the opinion that, at a minimum, the IRP should forthrightly explain and acknowledge that the process is merely advisory. This would at least let parties know before embarking on a potentially expensive process that a victory before the IRP panel may be ignored by ICANN. And, a straightforward acknowledgment that the IRP process is intended to be merely advisory might lead to a legislative or executive initiative to create a truly independent compulsory process. The Panel seriously doubts that the Senators questioning former ICANN President Stuart Lynn in 2002 would have been satisfied had they

ICANN, is also a party to the dispute and directly interested in the outcome. Nor is the process “neutral,” as ICANN’s “core values” call for in its Bylaws.

understood that a) ICANN had imposed on all applicants a waiver of all judicial remedies, *and* b) the IRP process touted by ICANN as the “ultimate guarantor” of ICANN accountability was only an advisory process, the benefit of which accrued only to ICANN.⁶³

ICM Case

116)The Parties in their submissions have discussed the impact on this Decision of the conclusions reached by the IRP panel in the matter of *ICM v. ICANN* (“*ICM Case*”). Although this Panel is of the opinion that the decision in the *ICM Case* should have no influence on the present proceedings, it discusses that matter for the sake of completeness.

117)In the *ICM Case*, another IRP panel examined the question centrally addressed in this part of this Decision: whether declarations and/or decisions by an IRP panel are binding, or merely advisory. The *ICM Case* panel concluded that its decision was advisory.⁶⁴

118)In doing so, the *ICM Case* panel noted that the IRP used an “international arbitration provider” and “arbitrators nominated by that provider,” that the ICDR Rules were to “govern the arbitration”, and that “arbitration connotes a binding process.” These aspects of the IRP, the panel observed, were “suggestive of an arbitral process that produces a binding award.”⁶⁵ But, the panel continued, “there are other indicia that cut the other way, and more deeply.” The panel pointed to language in the Interim Measures section of the Supplementary Procedures empowering the panel to “recommend” rather than order interim measures, and to language requiring the ICANN Board to “consider” the IRP declaration at its next meeting, indicating, in the panel’s view, the lack of binding effect of the Declaration.

119)The *ICM Case* panel specifically observed that “the relaxed temporal proviso to do no more than ‘consider’ the IRP declaration, and to do so at the next meeting of the Board ‘where feasible’, emphasized that it is not binding. If the IRP’s declaration were binding, there would be nothing to consider but rather a determination or decision to implement in a timely manner. The Supplementary Procedures adopted for IRP, in the article on ‘Form and Effect of an IRP Declaration’, significantly omit provision of Article 27 of the ICDR Rules specifying that an award ‘shall be final and binding on the parties’. Moreover, the preparatory work of the IRP provisions...confirms that the

⁶³ See in this regard the Memorandum of Jack Goldsmith dated 29 July 2010 at <https://cyber.law.harvard.edu/pubrelease/icann/pdfs/Jack%20Goldsmith%20on%20ICANN-final.pdf>, referred to in footnote 58 of DCA Trust’s Second Memorial.

⁶⁴ *ICM Case*, footnote 30. The panel’s brief discussion on this issue appears in *paras.* 132-134 of the *ICM Decision*.

⁶⁵ *Ibid*, *para.* 132.

intention of the drafters of the IRP process was to put in place a process that produced declarations that would not be binding and that left ultimate decision-making authority in the hands of the Board.”⁶⁶

120)Following the issuance of the *ICM* Case Declaration, ICANN amended its Bylaws, and related Supplementary Procedures governing IRPs, removing most, but not all, references to “arbitration”, and adding that the “declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.”

Difference between this IRP and the *ICM* Case

121)According to DCA Trust, the panel in the *ICM* Matter, “based its decision that its declaration would not be binding, ‘but rather advisory in effect,’ on specific language in both a ***different*** set of Bylaws and a ***different*** set of Supplementary Procedures than those that apply in this dispute...one crucial difference in the Bylaws applicable during the *ICM* was the absence of the language describing panel declarations as ‘final and precedential’.”⁶⁷ The Panel agrees.

122)Section 3(21) of the 11 April 2013 ICANN Bylaws now provides: “Where feasible, the Board shall consider the IRP Panel declaration at the Board’s next meeting. The declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.” At the time the *ICM* Matter was decided, section 3(15) of Article IV of ICANN’s Bylaws did not contain the second sentence of section 3(21).

123)As explained in the DCA Trust First Memorial:

“[In] finding that the IRP was advisory, the *ICM* Panel also relied on the fact that the Bylaws gave the IRP [panel] the authority to ‘declare,’ rather than ‘decide’ or ‘determine,’ whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or the Bylaws. However, the *ICM* Panel did not address the fact that the Supplementary Procedures, which govern the process in combination with the ICDR Rules, defined ‘declaration’ as ‘decisions/opinions of the IRP’. If a ‘declaration’ is a ‘decision’, then surely a panel with the authority to ‘declare’ has the authority to ‘decide’.”⁶⁸

The Panel agrees with DCA Trust.

124)Moreover, as explained by DCA Trust:

⁶⁶ *Ibid*, para. 133.

⁶⁷ DCA Trust First Memorial, para. 36. Bold and italics are from the original text.

⁶⁸ *Ibid*, para. 39.

“[The] *ICM* Panel [...] found it significant that the Supplementary Procedures adopted for the IRP omitted Article 27 of the ICDR Rules – which specifies that an award ‘shall be final and binding on the parties.’ On that basis, the *ICM* Panel concluded that Article 27 did not apply. ICANN’s Supplementary Rules, however, were – and continue to be – silent on the effect of an award. In the event there is inconsistency between the Supplementary Procedures and the ICDR Rules, then the Supplementary Procedures govern; but there is nothing in the applicable rules suggesting that an **omission** of an ICDR Rule means that it does not apply. Indeed, the very same Supplementary Procedures provide that ‘the ICDR’s International Arbitration Rules [...] will govern the process **in combination** with these Supplementary Procedures. Furthermore, it is only in the event there is ‘any inconsistency’ between the Supplementary Procedures and the ICDR Rules that the Supplementary Procedures govern.”⁶⁹

Again, the Panel agrees with DCA Trust.

125) With respect, therefore, this Panel disagrees with the panel in the *ICM* Case that the decisions and declarations of the IRP panel are not binding. In reaching that conclusion, in addition to failing to make the observations set out above, the *ICM* panel did not address the issue of the applicant’s waiver of all judicial remedies, it did not examine the application of the *contra proferentem* doctrine, and it did not examine ICANN’s commitment to accountability and fair and transparent processes in its Articles of Incorporation and Bylaws.

126) ICANN argues that the panel’s decision in the *ICM* Case that declarations are not binding is dispositive of the question. ICANN relies on the provision in the Bylaws, quoted above, (3(21)) to the effect that declarations “have precedential value.” Like certain other terms in the IRP and Supplementary Procedures, the Panel is of the view that this phrase is ambiguous. Legal precedent may be either binding or persuasive.⁷⁰ The Bylaws do not indicate which kind of precedent is intended.

127) *Stare decisis* is the legal doctrine, which gives binding precedential effect, typically to earlier decisions on a settled point of law, decided by a higher court. The doctrine is not mandatory, as illustrated by the practice in common law jurisdictions of overruling earlier precedents deemed unwise or unworkable. In the present case, there is no “settled” law in the usual sense of a body of cases approved by a court of ultimate resort, but instead, a single decision by one panel on a controversial point, which this Panel, with respect, considers to be unconvincing.

128) Therefore, the Panel is of the view that the ruling in the *ICM* Case is *not* persuasive and binding upon it.

⁶⁹ *Ibid*, para. 40. Bold and italics are from the original text.

⁷⁰ Black’s Law Dictionary, (7th Edition 1999), p. 1195.

VI. DECLARATION OF THE PANEL

129)Based on the foregoing and the language and content of the IRP Procedure, the Panel is of the view that it has the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings.

130)Based on the foregoing and the language and content of the IRP Procedure, the Panel issues the following procedural directions:

(i) The Panel orders a reasonable documentary exchange in these proceedings with a view to maintaining efficacy and economy, and invites the Parties to agree by or before 29 August 2014, on a form, method and schedule of exchange of documents between them;

(ii) The Panel permits the Parties to benefit from additional filings and supplemental briefing going forward and invites the Parties to agree on a reasonable exchange timetable going forward;

(iii) The Panel allows a video hearing as per the agreement of the Parties, but reserves its decision to order an in-person hearing and live testimony pending a further examination of the representations that will be proffered by each side, including the filing of any additional evidence which this Decision permits; and

(iv) The Panel permits both Parties at the hearing to challenge and test the veracity of statements made by witnesses.

If the Parties are unable to agree on a reasonable documentary exchange process or to agree on the scope and length of additional filings and supplemental briefing, the Panel will intervene and, with the input of the Parties, provide further guidance.

131)Based on the foregoing and the language and content of the IRP Procedure, the Panel concludes that this Declaration and its future Declaration on the Merits of this case are binding on the Parties.

132)The Panel reserves its views with respect to any other issues raised by the Parties for determination at the next stage of these proceedings. At that time, the Panel will consider the Parties' respective arguments in those regards.

133)The Panel reserves its decision on the issue of costs relating to this stage of the proceeding until the hearing of the merits.

This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

This Declaration on the IRP Procedure has thirty-three (33) pages.

Thursday, 14 August 2014

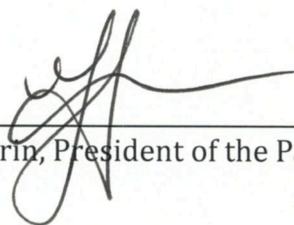
Place of the IRP, Los Angeles, California.



Professor Catherine Kessedjian



Hon. Richard C. Neal



Babak Barin, President of the Panel

Petillion

RM 68

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

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30 Apr 2020

A Special Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors was held telephonically on 30 April 2020 at 19:30 UTC.

Maarten Botterman, Chair, promptly called the meeting to order.

In addition to the Chair, the following Directors participated in all or part of the meeting: Becky Burr, Ron da Silva, Sarah Deutsch, Chris Disspain, Avri Doria, Rafael Lito Ibarra, Danko Jevtović, Akinori Maemura, Göran Marby (President and CEO), Mandla Msimang, Ihab Osman, Nigel Roberts, León Sánchez (Vice Chair), Matthew Shears, and Tripti Sinha.

The following Board Liaisons participated in all or part of the meeting: Harald Alvestrand (IETF (Internet Engineering Task Force) Liaison), Manal Ismail (GAC (Governmental Advisory Committee) Liaison), Merike Kão (SSAC (Security and Stability Advisory Committee) Liaison), and Kaveh Ranjbar (RSSAC (Root Server System Advisory Committee) Liaison).

Secretary: John Jeffrey (General Counsel and Secretary).

The following ICANN (Internet Corporation for Assigned Names and Numbers) Executives and Staff participated in all or part of the meeting: Susanna Bennett (SVP, Chief Operations Officer), Xavier Calvez (Chief Financial Officer), Mandy Carver (Senior Vice President for Government and Intergovernmental Organization (IGO (Intergovernmental Organization)) Engagement), Sally Newell Cohen (SVP, Global Communications), Sally Costerton (Sr Advisor to President & SVP, Global Stakeholder Engagement), Sam Eisner (Deputy General Counsel), Jamie Hedlund (SVP, Contractual Compliance & Consumer Safeguard and Managing Director - Washington D.C. Office), John Jeffrey (General Counsel and Secretary), Sheila Johnson (Deputy General Counsel), Vinciane Koenigsfeld (Senior Director, Board Operations), Elizabeth Le (Associate General Counsel), Karen Lentz (Senior Director, Policy Research & Data Services), David Olive (Senior Vice President, Policy Development Support), Erika Randall (Associate General Counsel), Ashwin Rangan (SVP Engineering & Chief Information Officer), Jennifer Scott (Senior Counsel), Amy Stathos (Deputy General Counsel), Theresa Swinehart (Senior Vice President, Multistakeholder Strategy and Strategic Initiatives), Russ Weinstein (Sr. Director, gTLD (generic Top Level Domain) Accounts and Services), and Gina Villavicencio (SVP, Global Human Resources).

1. **Main Agenda:**

a. **Public Interest Registry (PIR) Change of Control**

[Rationale for Resolutions 2020.04.30.01 – 2020.04.30.02](#)

1. Main Agenda:

a. Public Interest Registry (PIR) Change of Control

The Chair introduced the agenda item and called for conflicts of interest. Sarah Deutsch recused herself from participation in voting out of an abundance of caution and in compliance with ICANN (Internet Corporation for Assigned Names and Numbers)'s Conflicts of Interest Policy. The Chair noted that as part of the Board's ongoing deliberations on the proposed change of control request that Public Interest Registry (PIR) submitted to ICANN (Internet Corporation for Assigned Names and Numbers), the Board discussed and considered alternative draft resolutions for potential Board action as part of an earlier briefing. Based on that discussion, the proposed action before the Board is to withhold ICANN (Internet Corporation for Assigned Names and Numbers)'s consent to PIR's requested change of

control.

The Board discussed the proposed final version of the resolutions and reviewed how its prior feedback was reflected in the version being considered for approval. Avri Doria indicated that she would be voting against the resolution and explained her views about how the public interest would be better served by ICANN (Internet Corporation for Assigned Names and Numbers) granting its consent to PIR's request. Following Avri's comments to the Board during the meeting, she provided her written statement, setting out her reasons for voting against the resolutions.

Ihab Osman moved and León Sánchez seconded the proposed resolutions. After discussion, the Board took the following action:

Whereas, Public Interest Registry (PIR) is currently a non-profit organization incorporated in the State of Pennsylvania, and serves as the registry operator for seven top-level domains: [.ORG \(/resources/agreement/org-2019-06-30-en\)](#); [.ONG \(/resources/agreement/ong-2014-03-06-en\)](#); [.NGO \(Nongovernmental Organization\) \(/resources/agreement/ngo-2014-03-06-en\)](#); [.xn--c1avg \(/resources/agreement/xn--c1avg-2013-11-14-en\)](#) (Cyrillic script); [.xn--i1b6bla6a2e \(/resources/agreement/xn--i1b6b1a6a2e-2013-11-14-en\)](#) (Devanagari script); [.xn--nqv7f \(/resources/agreement/xn--nqv7f-2013-11-14-en\)](#) (Chinese 2-character script); and [.xn--nqv7fs00ema \(/resources/agreement/xn--nqv7fs00ema-2013-11-14-en\)](#) (Chinese 4-character script). PIR has a registry agreement with ICANN (Internet Corporation for Assigned Names and Numbers) for each of these seven TLDs (PIR's Registry Agreements).

Whereas, on 13 November 2019, [PIR announced \(https://thenew.org/the-internet-society-public-interest-registry-a-new-era-of-opportunity/\)](https://thenew.org/the-internet-society-public-interest-registry-a-new-era-of-opportunity/) that the Internet Society (ISOC (Internet Society)), PIR's parent organization, had reached an agreement with Ethos Capital, under which Ethos Capital or its affiliated entities (collectively, Ethos Capital) will ultimately acquire PIR and all of its assets from ISOC (Internet Society). On **14 November 2019 (/en/system/files/correspondence/cimbolic-to-icann-14nov19-en.pdf)**, PIR formally notified ICANN (Internet Corporation for Assigned Names and Numbers) of a change of control in advance of closing the proposed transaction.

Whereas, Section 7.5 of PIR's Registry Agreements with ICANN (Internet Corporation for Assigned Names and Numbers) require that PIR seek ICANN (Internet Corporation for Assigned Names and Numbers)'s written approval for the change of control, and that ICANN (Internet Corporation for Assigned Names and Numbers) must not unreasonably withhold that approval. Section 7.5 of PIR's Registry Agreements also gives ICANN (Internet Corporation for Assigned Names and Numbers) the right to request additional information from PIR regarding the proposed transaction.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) and PIR have mutually agreed to five extensions of time within which ICANN (Internet Corporation for Assigned Names and Numbers) must respond to the PIR change of control notification. ICANN (Internet Corporation for Assigned Names and Numbers) is obligated to provide PIR a response by 4 May 2020.

Whereas, following ICANN (Internet Corporation for Assigned Names and Numbers)'s receipt of formal notice of PIR's Change of Control Request, at the direction of the ICANN (Internet Corporation for Assigned Names and Numbers) Board, ICANN (Internet Corporation for Assigned Names and Numbers) org has conducted extensive due diligence on the proposed transaction in order to understand whether it would be reasonable under PIR's Registry Agreements for ICANN (Internet Corporation for Assigned Names and Numbers) to either approve or withhold consent to the proposed change of control. ICANN (Internet Corporation for Assigned Names and Numbers) org has on three occasions requested additional information from PIR (on 9 December 2019, 19 February 2020, and 3 April 2020) and in each instance PIR provided written responses to ICANN (Internet Corporation for Assigned Names and Numbers) org. Each of ICANN (Internet Corporation for Assigned Names and Numbers) org's requests is publicly available. PIR's responses have also been made publicly available to the extent that PIR has consented to such public disclosure. The ICANN (Internet Corporation for Assigned Names and Numbers) Board has access to all non-public information provided by PIR to ICANN (Internet Corporation for Assigned Names and Numbers) org.

Whereas, in response to ICANN (Internet Corporation for Assigned Names and Numbers) org's final set of questions, PIR provided ICANN (Internet Corporation for Assigned Names and Numbers) with an updated draft of proposed Public Interest Commitments (PICs) for the .ORG Registry to try to address some of the key commitments being made to the .ORG community and other interested parties. This updated draft PIC was made available on icann.org for public consideration. After consideration of additional input on the PICs, PIR identified that it would be willing to make further modifications in order to support ICANN (Internet Corporation for Assigned Names and Numbers)'s enforcement powers and clarify the role of the proposed "Stewardship Council".

Whereas, in January 2020, the Office of the Attorney General of the State of California (CA-AGO) requested information from ICANN (Internet Corporation for Assigned Names and Numbers) regarding the proposed transfer of PIR from ISOC (Internet Society) to Ethos Capital in order to "analyze the impact to the nonprofit community including ICANN (Internet Corporation for Assigned Names and Numbers)." ICANN (Internet Corporation for Assigned Names and Numbers) is a California not-for-profit public benefit corporation, and the CA-AGO is responsible for supervising not-for-profit organizations in California.

Whereas, on 15 April 2020, ICANN (Internet Corporation for Assigned Names and Numbers) received a [letter \(/en/system/files/correspondence/becerra-to-botterman-marby-15apr20-en.pdf\)](#) from the CA-AGO "urg[ing] ICANN (Internet Corporation for Assigned Names and Numbers) to reject the transfer of control over the .ORG Registry" and advising ICANN (Internet Corporation for Assigned Names and Numbers) that "ICANN (Internet Corporation for Assigned Names and Numbers) must exercise its authority to withhold approval." The CA-AGO cited numerous factors, including the size of the .ORG registry, the unique nature of the .ORG registry, the CA-AGO's conclusion that many questions remain unanswered by PIR, and the unknown nature of Ethos Capital, its range of proposed subsidiaries and its investors, a lack of transparency regarding Ethos Capital's future plans, and the financial impact of a US\$360 million loan necessary to complete the transaction. The CA-AGO also questioned the financial viability and potential for failure of the .ORG registry in the future. The CA-AGO provided his reasoning for how these factors supported its assessment and how the CA-AGO considered this in light of its understanding of ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and Bylaws. The CA-AGO declared California's public interest in the .ORG registry running as a home for noncommercial entities, and that this public interest would be better served by withholding approval of the change of control. The CA-AGO declared that he would take "whatever action necessary to protect . . . the nonprofit community."

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Board has been active in its oversight of ICANN (Internet Corporation for Assigned Names and Numbers) org's evaluation of PIR's Change of Control Request. The Board has: received regular updates on ICANN (Internet Corporation for Assigned Names and Numbers) org's review of the request as well as the status of the CA-AGO's investigation of ICANN (Internet Corporation for Assigned Names and Numbers); overseen ICANN (Internet Corporation for Assigned Names and Numbers) org in its continued engagement with PIR to obtain additional information; had all of PIR's responses (non-public and public) made available for review; received a petition from protesters outside of ICANN (Internet Corporation for Assigned Names and Numbers)'s Los Angeles offices during the Board's January 2020 Board workshop; engaged with the ISOC (Internet Society) Board of Directors for information from ISOC (Internet Society)'s perspective; convened a public forum in March 2020 during ICANN67 to hear the ICANN (Internet Corporation for Assigned Names and Numbers) community's concerns; and considered the PICs that PIR proposes for inclusion in the .ORG Registry Agreement and requested ICANN (Internet Corporation for Assigned Names and Numbers) org to make a public notice over the same. **The Board has received approximately 30 briefings from ICANN (Internet Corporation for Assigned Names and Numbers) org on this issue, representing over 30 hours of scheduled meetings. Each Board member also devoted substantial time to prepare for these briefings. The collective Board hours devoted in preparation for this decision count at least a thousand hours.**

Resolved (2020.04.30.01), the ICANN (Internet Corporation for Assigned Names and Numbers) Board directs ICANN (Internet Corporation for Assigned Names and Numbers)'s President and CEO to withhold ICANN (Internet Corporation for Assigned

Names and Numbers)'s consent to PIR's Change of Control Request pursuant to Section 7.5 of PIR's Registry Agreements, thereby rejecting PIR's request. The Board finds the withholding of consent is reasonable in light of the balancing of all of the circumstances addressed or discussed by the Board.

Thirteen members of the Board voted in favor of Resolution 2020.04.30.01. Avri Doria and Danko Jevtović voted against the Resolution. A [voting statement \(/en/system/files/files/director-voting-statement-resolutions-pir-change-of-control-30apr20-en.pdf\)](/en/system/files/files/director-voting-statement-resolutions-pir-change-of-control-30apr20-en.pdf) was provided by Avri. Sarah Deutsch abstained from voting on the Resolution. The Resolution carried.

Resolved (2020.04.30.02), the above decision is without prejudice to PIR to submit a new notice of indirect change of control and entity conversion for consideration if PIR successfully achieves an entity conversion approval in Pennsylvania through the Pennsylvania Court, which the [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) Board and org will consider when evaluating any new notice.

Twelve members of the Board voted in favor of Resolution 2020.04.30.02. Avri Doria, Danko Jevtović, and Ihab Osman voted against the Resolution. A [voting statement \(/en/system/files/files/director-voting-statement-resolutions-pir-change-of-control-30apr20-en.pdf\)](/en/system/files/files/director-voting-statement-resolutions-pir-change-of-control-30apr20-en.pdf) was provided by Avri. Sarah Deutsch abstained from voting on the Resolution. The Resolution carried.

Rationale for Resolutions 2020.04.30.01 – 2020.04.30.02

The Board's action in withholding consent for the change of control of Public Interest Registry (PIR) pursuant to the terms of PIR's Registry Agreements is both reasonable and in the public interest. The Board was presented with a unique and complex situation – a request to approve a fundamental change of control over one of the longest-standing and largest registries, that also includes a change in corporate form from a viable not-for-profit entity to a for-profit entity with a US\$360 million debt obligation, and with new and untested community engagement mechanisms relying largely upon [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) contractual compliance enforcement to hold the new entity accountable to the .ORG community. [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) is being asked to agree to contract with a wholly different form of entity; instead of contracting with the mission-based not-for-profit that has responsibly operated the .ORG registry for nearly 20 years, with the protections for its own community embedded in its mission and status as a not-for-profit entity. If [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) were to consent, [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) would have to trust that the new proposed for-profit entity that no longer has the embedded protections that come from not-for-profit status, which has fiduciary obligations to its new investors and is obligated to service and repay US\$360 million in debt, would serve the same benefits to the .ORG community.

While PIR's current parent entity, the Internet Society ([ISOC \(Internet Society\)](#)), would obtain a US\$1 billion endowment to secure its future through the proposed transaction, that is not within the scope of [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s consideration. The valuation of PIR is notable; in 2002, [ISOC \(Internet Society\)](#) was awarded the ability to operate the .ORG registry through a purpose-built non-profit developed to support the unique nature of the .ORG community. PIR's responsible operation of the .ORG registry since that time created this US\$1 billion value – value that [ISOC \(Internet Society\)](#) is looking to realize through engaging in a transaction that will result in the conversion of PIR into a profit-making entity. The [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) Board has considered the reasonableness of consent to the change of control as it relates to the new form of entity [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) is asked to contract with for the registry agreements themselves, including in light of [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s mission to support and enhance the security, stability and resiliency of the Internet's unique identifiers. The [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) Board understands that while technically [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) will still hold a contract with PIR, the changes in the form of that entity are of meaningful significance to the Board's consideration of the Change of Control Request. On the whole, the [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) Board determines that the public interest is better served in withholding consent as a result of various factors that

create unacceptable uncertainty over the future of the third largest gTLD (generic Top Level Domain) registry.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board's action should not be read to provide any commentary on the propriety of for-profit entities operating gTLD (generic Top Level Domain) registries, nor as any prohibition or judgment on the role of private equity firms controlling registry operators. The considerations in front of the Board here are specific to this transaction, particularly in light of the long-standing history of the .ORG registry.

Background

Created in 1985, .ORG is one of the original TLDs in the Domain Name (Domain Name) System (DNS (Domain Name System)). In 2002, through a [competitive bidding process conducted by ICANN \(Internet Corporation for Assigned Names and Numbers\) \(/news/announcement-2002-10-14-en\)](#), ICANN (Internet Corporation for Assigned Names and Numbers) selected a proposal submitted by ISOC (Internet Society) to establish a wholly owned subsidiary, PIR, to serve as the .ORG registry operator, which PIR has been since 2003. ISOC (Internet Society) is the sole member of PIR. Prior to 2003, .ORG was operated by VeriSign, Inc (previously Network Solutions, Inc.), the registry operator of the .COM and .NET gTLDs. PIR is the registry operator for seven gTLDs in total. In addition to .ORG, it operates [.ONG \(/resources/agreement/ong-2014-03-06-en\)](#); [.NGO \(Nongovernmental Organization\) \(/resources/agreement/ngo-2014-03-06-en\)](#); [.xn--c1avg \(/resources/agreement/xn--c1avg-2013-11-14-en\)](#) (Cyrillic script); [.xn--i1b6bla6a2e \(/resources/agreement/xn--i1b6bla6a2e-2013-11-14-en\)](#) (Devanagari script); [.xn--nqv7f \(/resources/agreement/xn--nqv7f-2013-11-14-en\)](#) (Chinese 2-character script); and [.xn--nqv7fs00ema \(/resources/agreement/xn--nqv7fs00ema-2013-11-14-en\)](#) (Chinese 4-character script). Since its establishment, PIR has operated as a non-profit organization, incorporated in the State of Pennsylvania.

In winning the bid to operate .ORG, ISOC (Internet Society) purpose-built the not-for-profit entity, PIR, to serve the needs of the .ORG registry and the noncommercial community. PIR represents its mission as "for the benefit of [its] end user consumers and the Internet as a whole". Under U.S. tax regulations, PIR was established as a "Supporting Organization (Supporting Organization)" to ISOC (Internet Society), which has obligated PIR to act in support of ISOC (Internet Society) as well as ISOC (Internet Society)'s mission. PIR contributes a portion of its revenue every year to ISOC (Internet Society); for 2018, the most recent year reported, PIR provided over US\$48 million to ISOC (Internet Society) while also serving PIR's mission through "improv[ing] the stability and security of the .ORG registry and deliver[ing] a robust Education and Outreach program that enlightens non-profits and NGOs". PIR holds itself out as "entrusted by millions to operate in the public interest" and "refus[ing] to compromise [its] ethical standards for the sake of expediency, popularity or profitability." This is the entity that has responsibly served as the registry operator and steward for the .ORG (and other) registries since 2002. PIR's Registry Agreements are between ICANN (Internet Corporation for Assigned Names and Numbers) and PIR. PIR's most recent U.S. tax filing for 2018 report nearly US\$95 million in revenue, with nearly US\$50 million of that revenue distributed as grants in service of PIR's mission.

Timeline of events

On 13 November 2019, [PIR announced \(https://thenew.org/the-internet-society-public-interest-registry-a-new-era-of-opportunity/\)](https://thenew.org/the-internet-society-public-interest-registry-a-new-era-of-opportunity/) that ISOC (Internet Society), its parent organization, had reached an agreement with Ethos Capital, under which Ethos Capital will acquire PIR and all of its assets from ISOC (Internet Society). The proposed transaction would result in PIR converting from a Pennsylvania non-profit corporation to a for-profit Pennsylvania limited liability company and Ethos Capital acquiring 100% ownership of PIR from the Internet Society (ISOC (Internet Society)). Ethos Capital envisions a "new" PIR, which would convert from its historical not-for-profit status to a for-profit entity controlled by a private capital firm. Through the proposed transaction, ISOC (Internet Society) – with which ICANN (Internet Corporation for Assigned Names and Numbers) does not have a contract for any of the registries that PIR operates – would receive US\$1 billion as an endowment for its future. Upon completion of the transaction, PIR would no longer have the obligation to provide support to ISOC (Internet Society) or serve any other charitable purpose, but instead would be subject to a US\$360 million debt obligation to service in support of the Ethos/PIR transaction. PIR would convert into

a new for-profit entity (if authorized by the relevant regulatory authorities) that would be responsible for contracting with ICANN (Internet Corporation for Assigned Names and Numbers) for the operation of the PIR registries. The current iteration of the not-for-profit PIR would no longer exist.

On [14 November 2019 \(/en/system/files/correspondence/cimbolic-to-icann-14nov19-en.pdf\)](#), PIR formally submitted to ICANN (Internet Corporation for Assigned Names and Numbers) a "Notice of Indirect Change of Control and Entity Conversion" (Change of Control Request) in advance of closing the proposed transaction between Ethos Capital and ISOC (Internet Society). After review of the information provided by PIR in the 14 November submission, ICANN (Internet Corporation for Assigned Names and Numbers) requested additional information from PIR on 9 December 2019. Additionally, on [9 December 2019 \(/en/system/files/correspondence/jeffrey-to-sullivan-nevett-09dec19-en.pdf\)](#), John Jeffrey, ICANN (Internet Corporation for Assigned Names and Numbers) org's General Counsel and Secretary, sent a letter to the CEOs of both PIR and ISOC (Internet Society), requesting both organizations to commit to completing the process in an open and transparent manner, including agreeing to the publication of questions from ICANN (Internet Corporation for Assigned Names and Numbers) org and the responses from PIR. PIR responded to ICANN (Internet Corporation for Assigned Names and Numbers) org's request for additional information on 20 December 2019, and later agreed to [publication of PIR's responsive materials, documents \(/news/announcement-2020-01-11-en\)](#) subject to limited redaction by PIR.

As the initial deadline for ICANN (Internet Corporation for Assigned Names and Numbers) org to respond to PIR by either providing or withholding consent to the proposed change of control was 19 January 2020, ICANN (Internet Corporation for Assigned Names and Numbers) and PIR agreed on [17 January 2020 \(/en/system/files/correspondence/namazi-to-nevett-17jan20-en.pdf\)](#) to extend the deadline by 30 days to 17 February 2020. On [14 February 2020 \(/en/system/files/correspondence/jeffrey-to-nevett-14feb20-en.pdf\)](#), the deadline was extended again by mutual agreement to 29 February 2020. On [19 February 2020 \(/en/system/files/correspondence/jeffrey-to-nevett-19feb20-en.pdf\)](#), ICANN (Internet Corporation for Assigned Names and Numbers) org requested additional information from PIR as part of its diligence process, and on [21 February 2020 \(/en/system/files/correspondence/jeffrey-to-nevett-21feb20-en.pdf\)](#) agreed with PIR to an extension to 20 March 2020. PIR responded to ICANN (Internet Corporation for Assigned Names and Numbers)'s information request on [4 March 2020 \(/en/system/files/correspondence/cimbolic-to-jeffrey-04mar20-en.pdf\)](#). On [17 March 2020 \(/en/system/files/correspondence/jeffrey-to-nevett-17mar20-en.pdf\)](#), the two organizations agreed to an extension to 20 April 2020, and on 16 April 2020, a final extension was agreed upon, giving ICANN (Internet Corporation for Assigned Names and Numbers) until 4 May 2020 to respond to PIR's request. On 3 April 2020, ICANN (Internet Corporation for Assigned Names and Numbers) provided PIR with two sets of questions for additional information. One set of questions are in follow-up to previous ICANN (Internet Corporation for Assigned Names and Numbers) inquiries designed to further understand the proposed transaction and its potential effect on PIR and the .ORG top-level domain (TLD (Top Level Domain)). The second set of questions relate specifically to the PICs proposed by PIR to be included in the .ORG registry agreement. Following receipt of the questions, [PIR submitted an updated proposal for its PICs \(/en/system/files/correspondence/cimbolic-to-jeffrey-07apr20-en.pdf\)](#) on [7 April 2020 \(/sites/default/files/tlds/org/org-proposed-spec11-06apr20-en.pdf\)](#). On [8 April 2020 \(/news/blog/pir-transaction-and-proposed-public-interest-commitments-update\)](#), ICANN (Internet Corporation for Assigned Names and Numbers) posted a public notice that PIR provided an updated proposal. On 12 April 2020, PIR submitted to ICANN (Internet Corporation for Assigned Names and Numbers) responses to the other questions posed on 3 April 2020. While PIR identified many portions of those responses as confidential, and therefore ICANN (Internet Corporation for Assigned Names and Numbers) org could not post those portions on its website, the ICANN (Internet Corporation for Assigned Names and Numbers) Board was provided with access to all materials submitted by PIR.

ICANN (Internet Corporation for Assigned Names and Numbers)'s Evaluation Process

Due to the circumstances of the proposed PIR change of control, including its planned conversion to a for-profit entity, ICANN (Internet Corporation for Assigned Names and

Numbers) org requested extensive additional information from PIR, including regarding details of the transaction structure, financing and other funding sources, the parties involved, the role of the Pennsylvania authorities, information related to financial resources and operational and technical capability, how the "new" PIR would be responsive to the needs of the non-commercial community, what input the .ORG community had provided to PIR on the proposed transaction and how that community input would be reflected in the operations of the "new" PIR. This evaluation of the proposed transaction, which includes the diligence imposed by the ICANN (Internet Corporation for Assigned Names and Numbers)-adopted specification or policy on registry operator criteria in effect, incorporated review of financial resources, operational and technical capabilities, the transaction structure, background screening and other components. This diligence process is part of ICANN (Internet Corporation for Assigned Names and Numbers) org's responsibility in evaluating this proposed Change of Control Request, and the Board has remained apprised of ICANN (Internet Corporation for Assigned Names and Numbers) org's review throughout the process.

ICANN (Internet Corporation for Assigned Names and Numbers) org's evaluation of PIR's Change of Control Request was more comprehensive than the evaluation that ICANN (Internet Corporation for Assigned Names and Numbers) org has conducted over other change of control requests. This was necessary under the circumstances and due to the extremely unique nature of the proposed change. This Change of Control Request for PIR's Registry Agreements includes the largest registry to date to be subject to the change of control process, and we understand the proposed transaction is the most complex that has been submitted for review. Hundreds of pages of supporting documentation have been produced by PIR in multiple responses, detailing multiple levels of new entities intended for creation to support the future PIR LLC in operating under PIR's Registry Agreements. Section 7.5 of PIR's Registry Agreements with ICANN (Internet Corporation for Assigned Names and Numbers) require that PIR seek ICANN (Internet Corporation for Assigned Names and Numbers)'s written approval for the change of control, and that ICANN (Internet Corporation for Assigned Names and Numbers) must not unreasonably withhold that approval. Section 7.5 of PIR's Registry Agreements also gives ICANN (Internet Corporation for Assigned Names and Numbers) the right to request additional information from PIR regarding the proposed transaction. PIR's Registry Agreements also permit ICANN (Internet Corporation for Assigned Names and Numbers) to evaluate the proposed change of control transaction under the totality of the circumstances, including the public interest and the interests of the .ORG community

The Board has deliberated and discussed this issue with ICANN (Internet Corporation for Assigned Names and Numbers) org on approximately 30 separate occasions, receiving current updates and providing ICANN (Internet Corporation for Assigned Names and Numbers) org with direction concerning next steps. ICANN (Internet Corporation for Assigned Names and Numbers) org has devoted countless hours in consideration of all aspects of PIR's request, and the collective hours from Board members devoted to consideration of this issue total in the thousands. This intensive review is required under the circumstances, as ICANN (Internet Corporation for Assigned Names and Numbers) is bound to, and it is in the public interest for ICANN (Internet Corporation for Assigned Names and Numbers) to uphold, the principles that ICANN (Internet Corporation for Assigned Names and Numbers)'s multistakeholder community agreed to include within ICANN (Internet Corporation for Assigned Names and Numbers)'s contracts. ICANN (Internet Corporation for Assigned Names and Numbers) is responsible for conducting a thorough review and evaluation to ensure that a change of control review is more than just an exercise of checking boxes. The ICANN (Internet Corporation for Assigned Names and Numbers) Board and org, in the extensive evaluation of the proposed transaction, returned multiple times to PIR for more information, as well as to ISOC (Internet Society), to understand the impact of the proposed transaction

In reviewing the financial stability of PIR following the consummation of the proposed transaction, the ICANN (Internet Corporation for Assigned Names and Numbers) Board noted that, following the transaction, PIR would have a significant amount of debt, and be obligated to service and ultimately repay a loan in the amount of US\$360 million. The Board noted that the incurrence of this debt was not for the benefit of PIR or the .ORG community, but for the financial interests of ISOC (Internet Society), Ethos Capital and the other investors in the transaction. While PIR has provided financial projections to

ICANN (Internet Corporation for Assigned Names and Numbers) org that show the capacity of PIR to generate sufficient cash flow to service the loan and repay the debt at maturity, financial projections are by their nature speculative and generally unreliable, and do not account for unforeseen circumstances. As such, if PIR's financial projections are materially inaccurate, PIR could potentially fail to generate the cash flow needed to repay the debt at maturity, and there can be no certainty that PIR or Ethos Capital will be able to refinance the debt at maturity if necessary. Accordingly, the ICANN (Internet Corporation for Assigned Names and Numbers) Board believes that burdening PIR with significant debt obligations could create uncertainty as to the long-term financial stability of PIR, particularly in light of the current and likely ongoing economic uncertainty.

Much of the public discourse around the proposed transaction also focused on the question of how the .ORG registrants would be protected and served. Both the ICANN (Internet Corporation for Assigned Names and Numbers) and the PIR/.ORG communities have been very vocal about the proposed transaction. Almost immediately after the transaction was announced by ISOC (Internet Society)/PIR/Ethos Capital, the ICANN (Internet Corporation for Assigned Names and Numbers) org and Board started receiving correspondence related to the matter, with the first letter of concern coming from the Internet Commerce Association on 15 November 2019, just two days after the announcement. In total, ICANN (Internet Corporation for Assigned Names and Numbers) has received over 30 letters regarding this proposed transaction. A full inventory of the correspondence with relevant links to those publicly available on [ICANN \(Internet Corporation for Assigned Names and Numbers\)'s correspondence page \(/resources/pages/correspondence\)](#), is available in [Appendix A to this Rationale \(/en/system/files/files/resolutions-appx-a-org-correspondence-30apr20-en.pdf\)](#). At ICANN67, the ICANN (Internet Corporation for Assigned Names and Numbers) Board dedicated an entire live streamed [public forum \(https://67.schedule.icann.org/meetings/1152519\)](#) to hear from the ICANN (Internet Corporation for Assigned Names and Numbers) community about the proposed PIR transaction, and published both a [transcript of the event \(https://static.ptbl.co/static/attachments/237710/1583796929.pdf?1583796929\)](#), and [answers \(https://static.ptbl.co/static/attachments/237792/1583976880.pdf?1583976880\)](#) to questions that were not addressed in real time during the forum. Many of these communications focus specifically on the fact that, since 2002, PIR has been responsible for operating .ORG in a manner that serves the needs of the .ORG community, and that the information the public could access regarding the impact of the proposed transaction did not support the .ORG community in the same way. Many commenters discussed their concerns with the conversion of PIR to a for-profit entity, as for-profit entities held by private venture firms are understood to have a profit motive. In addition, commenters discussed their concerns with the removal of the protections embedded into PIR's not-for-profit mission of responsiveness to and engagement with its community, and discussed how that could impact the very policies able to be instituted at the registry level. The Board understands these concerns; the .ORG community has relied on PIR's commitments for nearly 20 years, and the proposed transaction fundamentally changes the PIR/.ORG community relationship. The Board must take that history into account, as well as the lack of meaningful engagement with that community in the design of the proposed transaction, as part of the reasonableness of withholding consent to PIR's request.

Part of how ICANN (Internet Corporation for Assigned Names and Numbers) tried to address these community – and ICANN (Internet Corporation for Assigned Names and Numbers)'s – concerns was by continuously urging PIR, ISOC (Internet Society), and Ethos Capital to provide full transparency regarding the proposed transaction. Similarly, ICANN (Internet Corporation for Assigned Names and Numbers) has attempted to provide the maximum amount of transparency possible throughout this process. This has included publishing the requests for information and the answers (subject to requested redaction by PIR for confidentiality reasons) to ICANN (Internet Corporation for Assigned Names and Numbers) org's questions. Additionally, ICANN (Internet Corporation for Assigned Names and Numbers) org has published several blogs and announcements from ICANN (Internet Corporation for Assigned Names and Numbers) to the ICANN (Internet Corporation for Assigned Names and Numbers) community designed to provide updates on the process.

Beginning in December 2019, PIR, ISOC (Internet Society) and Ethos Capital began engaging with the .ORG community. They utilized webinars, blog posts, and press

releases among other things in an attempt to listen and assuage concerns from their community related to this proposed transaction. According to PIR and Ethos Capital, "we consistently heard three primary concerns expressed for the transaction: (1) pricing; (2) commitment to free expression; and (3) use of registrant and user data." On 21 February 2020, PIR and Ethos Capital proposed to the .ORG community to voluntarily adopt a legally binding amendment to the .ORG registry agreement in the form of a **Public Interest Commitment ("PIC")**

(<https://static1.squarespace.com/static/5dd7f6113c431419c139b89d/t/5e4fd13faf4f647b886ca187/1582289215311/20200220+PIC.pdf>)

following the closing of the proposed sale of PIR to address concerns voiced by some in the .ORG Community. From 3 March through 13 March 2020, PIR conducted what it called a "Public Engagement Period" where PIR and Ethos Capital collected written feedback about their proposed PIC, and addressed the feedback in a summary on their [website \(https://www.keypointsabout.org/public-engagement\)](https://www.keypointsabout.org/public-engagement) dedicated to the proposed transaction. PIR submitted a proposed PIC to ICANN (Internet Corporation for Assigned Names and Numbers) for consideration on 16 March 2020. On 7 April 2020, PIR submitted an **updated PIC** (</sites/default/files/tlds/org/org-proposed-spec11-06apr20-en.pdf>) to ICANN (Internet Corporation for Assigned Names and Numbers) for consideration, with **changes addressing certain of the questions ICANN (Internet Corporation for Assigned Names and Numbers) posed** (</en/system/files/correspondence/cimbolic-to-jeffrey-07apr20-en.pdf>) regarding the 16 March proposal.

The 7 April version of the PIC outlines five primary commitments for PIR:

1. A commitment to restrict price increases based on a specified formula until June 2027 (2 years prior to the end of the term of the current Registry Agreement). This includes a table clearly listing the maximum allowable wholesale price of a .ORG domain name for each of the 8 years.
2. The creation of a Stewardship Council to provide independent advice to the registry operator regarding modifications proposed by PIR to certain registry policies regarding: (x) censorship and freedom of expression; and (y) use of .ORG registrant and user data (the "Designated Policies"). The Stewardship Council would have the binding right to veto any modification to the Designated Policies.
3. To establish a "Community Enablement Fund" (without a specific fund amount) to provide support for initiatives benefiting .ORG registrants.
4. To produce and publish an Annual Report that self-assesses compliance with the PIC. The Annual Report will also include a transparency report disclosing the number of .ORG domain name registrations that were suspended or terminated by Registry Operator during the preceding year under Registry Operator's Anti-Abuse Policy or pursuant to court order.
5. A commitment to allow any subsequent revisions to the PIC to undergo ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment process as part of ICANN (Internet Corporation for Assigned Names and Numbers)'s consideration of such proposed revisions.

Following ICANN (Internet Corporation for Assigned Names and Numbers) org and Board's review of the proposed PIC, ICANN (Internet Corporation for Assigned Names and Numbers) shared feedback with PIR regarding the commitment related to the Stewardship Council and its role. PIR noted its intention to revise the PIC in line with the concerns identified by ICANN (Internet Corporation for Assigned Names and Numbers), and PIR committed that its PIC could be updated to support the Stewardship Council having powers related to enforcement as well as development of relevant policies, and in a way to make ICANN (Internet Corporation for Assigned Names and Numbers) org's enforcement powers capable of objective application. The Board notes that a majority of the comments received during the public notice period continue to raise concerns and questions about the future commitments for how PIR will continue to serve the .ORG community, as well as about the process within ICANN (Internet Corporation for Assigned Names and Numbers) to reach a decision on PIR's request.

Other than the pricing issues, the items addressed in the proposed PIC are similar to those that are currently embedded within PIR's structure. Whereas PIR today has an **Advisory Council** (<https://thenew.org/org-people/about-pir/team/advisory-council/>)

embedded into its structure to serve as an intermediary between end users and PIR, and remaining accountable to that group is within PIR and ISOC (Internet Society)'s control, the "new" PIR would look to ICANN (Internet Corporation for Assigned Names and Numbers) to enforce that community relationship through an untested "Stewardship Council" through the PICs governing PIR's relationship with that Stewardship Council, including on matters of PIR's internal policies. Although the PICs address some of the accountability concerns, the ICANN (Internet Corporation for Assigned Names and Numbers) Board is not satisfied that ICANN (Internet Corporation for Assigned Names and Numbers) org should be the new backstop for holding PIR accountable to its community as contemplated under the PICs. PIR has operated for nearly 20 years with internal mechanisms to support and protect its community. PIR and Ethos clearly recognize that responsiveness to the .ORG community is an important element for the success of this proposed transaction; it is unreasonable to now expect ICANN (Internet Corporation for Assigned Names and Numbers) to accept that burden of enforcement in order to allow PIR and Ethos' preferred corporate structure to move forward. In addition, while intended to include members who are independent of PIR and Ethos Capital, the membership of the Stewardship Council is subject to the approval of PIR's board of directors and, as a result, could become captured by or beholden to the for-profit interests of PIR's owners and therefore are unlikely to be truly independent of Ethos Capital or PIR's board. The Board's concerns here have also been raised by many people or entities who shared their thoughts with ICANN (Internet Corporation for Assigned Names and Numbers) after public notice was provided on the 7 April 2020 revision to PIR's revised PIC.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board also remains concerned with the lack of transparency concerning Ethos Capital's exit strategy for the PIR investment or its plans relating to capital disbursements from PIR's operations to Ethos Capital and the other investors. Ethos Capital has maintained that its investment horizon is 10 years and that it has no current plans to distribute excess PIR capital to investors. ICANN (Internet Corporation for Assigned Names and Numbers) cannot be assured that Ethos Capital's investment horizon will not change (as there is no enforceable commitment in this respect) or the minority investors in the transaction will not pressure Ethos Capital to pursue an exit from PIR prior to 10 years. In addition, while PIR has advised ICANN (Internet Corporation for Assigned Names and Numbers) that there will be certain limitations on PIR's ability to distribute capital to its investors (such as covenants in credits agreements relating to the US\$360 million of debt incurred to help finance the transaction), the Board cannot be assured that such distributions will not be made, which could cause PIR to be drained of its financial resources.

In addition, ICANN (Internet Corporation for Assigned Names and Numbers) considered the fact that Ethos Capital is a recently formed private equity firm, without a history of success in owning and operating a registry operator. While it is anticipated that PIR's existing management team will continue post-closing, there is no guarantee that such management will in fact remain at PIR post-closing for an extended period of time. In addition, the fact that Ethos Capital's founder was a managing partner that led his prior private equity firm's acquisition of Donuts only demonstrates a track record of acquisition and does not demonstrate an ability or track record of successfully operating a registry operator, particularly one of the size of .ORG. Thus, Ethos Capital's lack of experience and success in operating a registry operator is concerning for a registry with over 10.5 million domain name registrations.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board also considered the information provided by PIR concerning the investors involved in the transaction, and noted that PIR declined to provide the specific ownership interests of the investors in the transaction (it only provided general categories of ownership levels). In addition, ICANN (Internet Corporation for Assigned Names and Numbers) has not been provided detailed information concerning various minority investors (many of whom are entities, likely with additional investors), including vehicles through which significant minority investors (the apparent second largest investor to Ethos Capital) will make its investment.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board also considered the ability of PIR to engage in the business operations and practices that Ethos Capital and PIR argue will benefit the .ORG community solely as a result of the transaction. No evidence has been provided to ICANN (Internet Corporation for Assigned Names and Numbers) that demonstrates that PIR (as a non-profit entity) is not

currently able to pursue these valuable business initiatives, which could benefit the .ORG community, without the risks associated with the consummation of the transaction.

Since the time that ISOC (Internet Society), PIR and Ethos Capital announced the proposed transaction, there has been misunderstanding of ICANN (Internet Corporation for Assigned Names and Numbers)'s role. Many have been looking to ICANN (Internet Corporation for Assigned Names and Numbers) to answer questions that are better posed to ISOC (Internet Society) or to Ethos Capital. Many appear to be looking to ICANN (Internet Corporation for Assigned Names and Numbers) to cure an apparent lack of engagement by ISOC (Internet Society) with ISOC (Internet Society)'s community through engagement with ICANN (Internet Corporation for Assigned Names and Numbers) and the ICANN (Internet Corporation for Assigned Names and Numbers) community, even though many of the decisions made by ISOC (Internet Society) in solicitation and acceptance of Ethos Capital's proposal are outside of the type of decisions that are able to be changed through ICANN (Internet Corporation for Assigned Names and Numbers). However, the ICANN (Internet Corporation for Assigned Names and Numbers) Board has endeavored to, and encouraged and directed ICANN (Internet Corporation for Assigned Names and Numbers) org to, allow for engagement opportunities, such as the public forum highlighted above. The Board is aware of and has considered each of the letters sent to it, and has followed this issue very closely.

Reviews by the California and Pennsylvania Authorities of the Proposed Transaction

California Attorney General

On 23 January 2020, ICANN (Internet Corporation for Assigned Names and Numbers) received a subpoena from the Office of the Attorney General of the State of California (CA-AGO) regarding the proposed transfer of PIR from ISOC (Internet Society) to Ethos Capital. The CA-AGO, which by statute supervises the operations of all not-for-profit entities in California, including ICANN (Internet Corporation for Assigned Names and Numbers), states that it is "analyz[ing] the impact to the nonprofit community, including to ICANN (Internet Corporation for Assigned Names and Numbers)." Subsequent to ICANN (Internet Corporation for Assigned Names and Numbers)'s receipt of this letter, the CA-AGO requested more time to complete his review. The letter served as one factor in ICANN (Internet Corporation for Assigned Names and Numbers) org requesting more time from PIR to complete the review of the transaction, as the ICANN (Internet Corporation for Assigned Names and Numbers) Board and org had already identified that ICANN (Internet Corporation for Assigned Names and Numbers) needed additional information for its due diligence, and additional time was needed for ICANN (Internet Corporation for Assigned Names and Numbers)'s review.

On 15 April 2020, ICANN (Internet Corporation for Assigned Names and Numbers) received another [letter \(/en/system/files/correspondence/becerra-to-botterman-marby-15apr20-en.pdf\)](#) from the CA-AGO regarding PIR's change of control request. In this letter, the CA-AGO "urge[d] ICANN (Internet Corporation for Assigned Names and Numbers) to reject the [proposed] transfer of control" based on a determination that it "raises serious concerns." Citing ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment to pursue the public interest as expressed in its Articles of Incorporation, the CA-AGO opined that, if permitted to purchase PIR, "Ethos Capital . . . will no longer have the unique characteristics that ICANN (Internet Corporation for Assigned Names and Numbers) valued at the time that it selected PIR as the nonprofit to be responsible for the .ORG registry."

The CA-AGO cited concerns such as the uncertainty about Ethos Capital as a brand-new entity, the private investors involved in financing the transaction, and the future operation of the .ORG registry, including the adequacy of PIR's future revenues and a lack of transparency regarding Ethos Capital's future plans. Based on the foregoing, the CA-AGO deemed these risks particularly serious in light of "the unique nature of the .ORG community" and concluded that approval of the transaction "may place at risk the operational stability of the .ORG registry." The CA-AGO also highlighted its concerns with how PIR's need to service debt obligations could impact the continued viability of the .ORG registry. In light of these and other concerns, the CA-AGO concluded that "the .ORG registry and the global Internet community – of which innumerable Californians are a part – are better served if ICANN (Internet Corporation for Assigned Names and Numbers) withholds approval of the proposed sale and transfer of PIR and the .ORG

registry to the private equity firm Ethos Capital." The CA-AGO stated that "[i]n light of . . . the objectives stated in ICANN (Internet Corporation for Assigned Names and Numbers)'s articles of incorporation and bylaws . . . ICANN (Internet Corporation for Assigned Names and Numbers) must exercise its authority to withhold approval."

ICANN (Internet Corporation for Assigned Names and Numbers) is a non-profit public benefit corporation organized under the laws of the state of California. As such, the CA-AGO asserts authority over ICANN (Internet Corporation for Assigned Names and Numbers) in several relevant respects. Because ICANN (Internet Corporation for Assigned Names and Numbers) is registered as a charitable nonprofit corporation, the CA-AGO asserts regulatory power over ICANN (Internet Corporation for Assigned Names and Numbers) pursuant to the California Supervision of Trustees and Fundraisers for Charitable Purposes Act. *See, e.g.*, Cal. Gov. Code section 12596 (authorizing Attorney General to maintain action "to enforce a charitable trust" with respect to covered charitable entities); section 12598(a) (authorizing Attorney General to maintain action "for ensuring compliance with trusts" as to such entities; authorizing Attorney General action "for ensuring compliance with . . . articles of incorporation", and authorizing Attorney General to "protect[] assets held by charitable trusts and public benefits corporations"). The CA-AGO also asserts more general corporate regulatory authority over ICANN (Internet Corporation for Assigned Names and Numbers) pursuant to its powers under the California Corporate Code. *See, e.g.*, Cal. Corp. Code section 5250 (authorizing the CA-AGO to address a "fail[ure] to comply with trusts which [a corporation] has assumed" and authorizing the Attorney General to redress a "depart[ure] from the purposes for which [a corporation] is formed").

The CA-AGO explained his understanding of what ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and Bylaws, and the mission defined therein, compel ICANN (Internet Corporation for Assigned Names and Numbers) to do when considering PIR's request. In his authority to speak for the public interest for California, the CA-AGO determined that California's public interest in the .ORG registry running as a home for noncommercial entities, and that the public interest would be better served by ICANN (Internet Corporation for Assigned Names and Numbers) withholding approval of the change of control. As the CA-AGO's letter observes, his determination is buoyed by the significant opposition received from other organizations and politicians, with virtually no counterbalancing support except from the parties involved in the transaction and their advisors.

The Board recognizes that the CA-AGO's 15 April 2020 letter might not reflect all recent information submitted by PIR to ICANN (Internet Corporation for Assigned Names and Numbers) or directly to the CA-AGO in connection with the PIR's request. That, combined with the CA-AGO's closing note that he continues its investigation and will take "whatever action necessary to protect . . . the nonprofit community" support ICANN (Internet Corporation for Assigned Names and Numbers) in its determination that it is reasonable to withhold consent at this time. The ICANN (Internet Corporation for Assigned Names and Numbers) Board's action is also reasonable in light of its consideration of the role of the CA-AGO in overseeing whether ICANN (Internet Corporation for Assigned Names and Numbers) is acting in compliance with its Articles of Incorporation. The Board takes the CA-AGO's inputs seriously both in the substance and in impact. Further, in considering the CA-AGO's letter as part of its overall evaluation process, the Board also considered the statement by the CA-AGO that approval of PIR's change of control request would be in contravention of the CA-AGO's declared public interest, and considered that statement in line with all of the other circumstances of the transaction as available to the Board, and concurs in some of the factors that contribute to the CA-AGO's urged outcome.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board considers the CA-AGO's letter as one aspect of support for the reasonableness of withholding consent from the requested change of control, but the letter does not alone determine or require this outcome. The Board considers all of the aspects of the proposed transaction and the information available to the Board.

Pennsylvania Attorney General

The Pennsylvania Attorney General also has a role in oversight of PIR, and in reviewing the proposed conversion of PIR from a not-for-profit to a for-profit entity. The ICANN (Internet Corporation for Assigned Names and Numbers) Board understands that the

Pennsylvania process will not be completed prior to 4 May 2020, and therefore ICANN (Internet Corporation for Assigned Names and Numbers) does not know at this time either the PA Attorney general's view on the proposed conversion of PIR to for-profit status, or whether the relevant court in Pennsylvania will authorize the conversion. The Board notes that the lack of approval from the Pennsylvania authorities has remained an area of concern for the Board, and weighs towards the reasonableness of the Board's withholding consent at this time. The Board notes that understanding how the Pennsylvania authorities evaluate Pennsylvania's public interest in considering the proposed conversion is a relevant and missing piece of information today.

Conclusion

The Board's action is in line with ICANN (Internet Corporation for Assigned Names and Numbers)'s mission because ICANN (Internet Corporation for Assigned Names and Numbers) has performed significant due diligence to comply with its contractual obligation to consider PIR's request, and to meet the responsibility of coordinating the unique identifiers in a responsible manner. ICANN (Internet Corporation for Assigned Names and Numbers)'s actions are thereby in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and Bylaws' public interest mandates, and are also aligned with how the CA-AGO explained his views of the public interest. Taking this action supports ICANN (Internet Corporation for Assigned Names and Numbers)'s ability to continue performing all aspects of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission. Specifically, as it relates to the operation of the impacted registries, the ICANN (Internet Corporation for Assigned Names and Numbers) Board has no indication that the security and stability of those registries is at risk, or to the unique identifier system, if ICANN (Internet Corporation for Assigned Names and Numbers) does not consent. The public interest is also served on balance through this action, in supporting the multistakeholder model and the contractual principles entrusted to ICANN (Internet Corporation for Assigned Names and Numbers), and in taking the necessary steps to maintain the stability and viability of ICANN (Internet Corporation for Assigned Names and Numbers) as an entity. The ICANN (Internet Corporation for Assigned Names and Numbers) Board must take into account all circumstances here. The not-for-profit PIR entity has enjoyed a close and responsible relationship with its community for nearly 20 years. Now that PIR has been a successful entity, growing to US\$1 billion in valuation, ICANN (Internet Corporation for Assigned Names and Numbers) is asked to allow PIR to be sold to an untested private equity firm, removing the protections of the not-for-profit status and burdening the entity with US\$360 million in debt in the midst of current and likely ongoing economic uncertainty. Along with that, when pressed for information on how the sale will continue to serve and bring value to the .ORG community, the solution is for ICANN (Internet Corporation for Assigned Names and Numbers) to take on enforcement responsibility for the PIR/community relationship and for reliance on an untested Stewardship Council model and other PICs. ICANN (Internet Corporation for Assigned Names and Numbers) entrusted to PIR the responsibility to serve the public interest in its operation of the .ORG registry, and now ICANN (Internet Corporation for Assigned Names and Numbers) is being asked to transfer that trust to a new entity without a public interest mandate. This proposed transaction has posed difficult questions to the ICANN (Internet Corporation for Assigned Names and Numbers) Board and the community, and the totality of the circumstances supports a denial in this instance. If PIR is able to provide additional information that resolves the concerns raised by the Board, PIR remains able to re-submit or initiate a new Change of Control Request.

The Chair called the meeting to a close.

Published on 21 May 2020

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RM 69

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

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30 Apr 2020

1. Main Agenda:

a. Public Interest Registry (PIR) Change of Control

[Rationale for Resolutions 2020.04.30.01 – 2020.04.30.02](#)

1. Main Agenda:

After one Board member recused themselves from participation in voting out of an abundance of caution and in compliance with ICANN (Internet Corporation for Assigned Names and Numbers)'s Conflicts of Interest Policy, the ICANN (Internet Corporation for Assigned Names and Numbers) Board took the following action:

a. Public Interest Registry (PIR) Change of Control

Whereas, Public Interest Registry (PIR) is currently a non-profit organization incorporated in the State of Pennsylvania, and serves as the registry operator for seven top-level domains: [.ORG \(/resources/agreement/org-2019-06-30-en\)](#); [.ONG \(/resources/agreement/ong-2014-03-06-en\)](#); [.NGO \(Nongovernmental Organization\) \(/resources/agreement/ngo-2014-03-06-en\)](#); [.xn--c1avg \(/resources/agreement/xn--c1avg-2013-11-14-en\)](#) (Cyrillic script); [.xn--i1b6bla6a2e \(/resources/agreement/xn--i1b6b1a6a2e-2013-11-14-en\)](#) (Devanagari script); [.xn--nqv7f \(/resources/agreement/xn--nqv7f-2013-11-14-en\)](#) (Chinese 2-character script); and [.xn--nqv7fs00ema \(/resources/agreement/xn--nqv7fs00ema-2013-11-14-en\)](#) (Chinese 4-character script). PIR has a registry agreement with ICANN (Internet Corporation for Assigned Names and Numbers) for each of these seven TLDs (PIR's Registry Agreements).

Whereas, on 13 November 2019, [PIR announced \(https://thenew.org/the-internet-society-public-interest-registry-a-new-era-of-opportunity/\)](https://thenew.org/the-internet-society-public-interest-registry-a-new-era-of-opportunity/) that the Internet Society (ISOC (Internet Society)), PIR's parent organization, had reached an agreement with Ethos Capital, under which Ethos Capital or its affiliated entities (collectively, Ethos Capital) will ultimately acquire PIR and all of its assets from ISOC (Internet Society). On **14 November 2019** ([/en/system/files/correspondence/cimbolic-to-icann-14nov19-en.pdf](#)), PIR formally notified ICANN (Internet Corporation for Assigned Names and Numbers) of a change of control in advance of closing the proposed transaction.

Whereas, Section 7.5 of PIR's Registry Agreements with ICANN (Internet Corporation for Assigned Names and Numbers) require that PIR seek ICANN (Internet Corporation for Assigned Names and Numbers)'s written approval for the change of control, and that ICANN (Internet Corporation for Assigned Names and Numbers) must not unreasonably withhold that approval. Section 7.5 of PIR's Registry Agreements also gives ICANN (Internet Corporation for Assigned Names and Numbers) the right to request additional information from PIR regarding the proposed transaction.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) and PIR have mutually agreed to five extensions of time within which ICANN (Internet Corporation for Assigned Names and Numbers) must respond to the PIR change of control notification. ICANN (Internet Corporation for Assigned Names and Numbers) is obligated to provide PIR a response by 4 May 2020.

Whereas, following ICANN (Internet Corporation for Assigned Names and Numbers)'s receipt of formal notice of PIR's Change of Control Request, at the direction of the ICANN (Internet

Corporation for Assigned Names and Numbers) Board, ICANN (Internet Corporation for Assigned Names and Numbers) org has conducted extensive due diligence on the proposed transaction in order to understand whether it would be reasonable under PIR's Registry Agreements for ICANN (Internet Corporation for Assigned Names and Numbers) to either approve or withhold consent to the proposed change of control. ICANN (Internet Corporation for Assigned Names and Numbers) org has on three occasions requested additional information from PIR (on 9 December 2019, 19 February 2020, and 3 April 2020) and in each instance PIR provided written responses to ICANN (Internet Corporation for Assigned Names and Numbers) org. Each of ICANN (Internet Corporation for Assigned Names and Numbers) org's requests is publicly available. PIR's responses have also been made publicly available to the extent that PIR has consented to such public disclosure. The ICANN (Internet Corporation for Assigned Names and Numbers) Board has access to all non-public information provided by PIR to ICANN (Internet Corporation for Assigned Names and Numbers) org.

Whereas, in response to ICANN (Internet Corporation for Assigned Names and Numbers) org's final set of questions, PIR provided ICANN (Internet Corporation for Assigned Names and Numbers) with an updated draft of proposed Public Interest Commitments (PICs) for the .ORG Registry to try to address some of the key commitments being made to the .ORG community and other interested parties. This updated draft PIC was made available on icann.org for public consideration. After consideration of additional input on the PICs, PIR identified that it would be willing to make further modifications in order to support ICANN (Internet Corporation for Assigned Names and Numbers)'s enforcement powers and clarify the role of the proposed "Stewardship Council".

Whereas, in January 2020, the Office of the Attorney General of the State of California (CA-AGO) requested information from ICANN (Internet Corporation for Assigned Names and Numbers) regarding the proposed transfer of PIR from ISOC (Internet Society) to Ethos Capital in order to "analyze the impact to the nonprofit community including ICANN (Internet Corporation for Assigned Names and Numbers)." ICANN (Internet Corporation for Assigned Names and Numbers) is a California not-for-profit public benefit corporation, and the CA-AGO is responsible for supervising not-for-profit organizations in California.

Whereas, on 15 April 2020, ICANN (Internet Corporation for Assigned Names and Numbers) received a [letter \(/en/system/files/correspondence/becerra-to-botterman-marby-15apr20-en.pdf\)](#) from the CA-AGO "urg[ing] ICANN (Internet Corporation for Assigned Names and Numbers) to reject the transfer of control over the .ORG Registry" and advising ICANN (Internet Corporation for Assigned Names and Numbers) that "ICANN (Internet Corporation for Assigned Names and Numbers) must exercise its authority to withhold approval." The CA-AGO cited numerous factors, including the size of the .ORG registry, the unique nature of the .ORG registry, the CA-AGO's conclusion that many questions remain unanswered by PIR, and the unknown nature of Ethos Capital, its range of proposed subsidiaries and its investors, a lack of transparency regarding Ethos Capital's future plans, and the financial impact of a US\$360 million loan necessary to complete the transaction. The CA-AGO also questioned the financial viability and potential for failure of the .ORG registry in the future. The CA-AGO provided his reasoning for how these factors supported its assessment and how the CA-AGO considered this in light of its understanding of ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and Bylaws. The CA-AGO declared California's public interest in the .ORG registry running as a home for noncommercial entities, and that this public interest would be better served by withholding approval of the change of control. The CA-AGO declared that he would take "whatever action necessary to protect . . . the nonprofit community."

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Board has been active in its oversight of ICANN (Internet Corporation for Assigned Names and Numbers) org's evaluation of PIR's Change of Control Request. The Board has: received regular updates on ICANN (Internet Corporation for Assigned Names and Numbers) org's review of the request as well as the status of the CA-AGO's investigation of ICANN (Internet Corporation for Assigned Names and Numbers); overseen ICANN (Internet Corporation for Assigned Names and Numbers) org in its continued engagement with PIR to obtain additional information; had all of PIR's responses (non-public and public) made available for review; received a petition from protesters outside of ICANN (Internet Corporation for Assigned Names and Numbers)'s Los Angeles offices during the Board's January 2020 Board workshop; engaged with the ISOC (Internet Society) Board of Directors for information

from ISOC (Internet Society)'s perspective; convened a public forum in March 2020 during ICANN67 to hear the ICANN (Internet Corporation for Assigned Names and Numbers) community's concerns; and considered the PICs that PIR proposes for inclusion in the .ORG Registry Agreement and requested ICANN (Internet Corporation for Assigned Names and Numbers) org to make a public notice over the same. The Board has received approximately 30 briefings from ICANN (Internet Corporation for Assigned Names and Numbers) org on this issue, representing over 30 hours of scheduled meetings. Each Board member also devoted substantial time to prepare for these briefings. The collective Board hours devoted in preparation for this decision count at least a thousand hours.

Resolved (2020.04.30.01), the ICANN (Internet Corporation for Assigned Names and Numbers) Board directs ICANN (Internet Corporation for Assigned Names and Numbers)'s President and CEO to withhold ICANN (Internet Corporation for Assigned Names and Numbers)'s consent to PIR's Change of Control Request pursuant to Section 7.5 of PIR's Registry Agreements, thereby rejecting PIR's request. The Board finds the withholding of consent is reasonable in light of the balancing of all of the circumstances addressed or discussed by the Board.

Resolved (2020.04.30.02), the above decision is without prejudice to PIR to submit a new notice of indirect change of control and entity conversion for consideration if PIR successfully achieves an entity conversion approval in Pennsylvania through the Pennsylvania Court, which the ICANN (Internet Corporation for Assigned Names and Numbers) Board and org will consider when evaluating any new notice.

Rationale for Resolutions 2020.04.30.01 – 2020.04.30.02

The Board's action in withholding consent for the change of control of Public Interest Registry (PIR) pursuant to the terms of PIR's Registry Agreements is both reasonable and in the public interest. The Board was presented with a unique and complex situation – a request to approve a fundamental change of control over one of the longest-standing and largest registries, that also includes a change in corporate form from a viable not-for-profit entity to a for-profit entity with a US\$360 million debt obligation, and with new and untested community engagement mechanisms relying largely upon ICANN (Internet Corporation for Assigned Names and Numbers) contractual compliance enforcement to hold the new entity accountable to the .ORG community. ICANN (Internet Corporation for Assigned Names and Numbers) is being asked to agree to contract with a wholly different form of entity; instead of contracting with the mission-based not-for-profit that has responsibly operated the .ORG registry for nearly 20 years, with the protections for its own community embedded in its mission and status as a not-for-profit entity. If ICANN (Internet Corporation for Assigned Names and Numbers) were to consent, ICANN (Internet Corporation for Assigned Names and Numbers) would have to trust that the new proposed for-profit entity that no longer has the embedded protections that come from not-for-profit status, which has fiduciary obligations to its new investors and is obligated to service and repay US\$360 million in debt, would serve the same benefits to the .ORG community.

While PIR's current parent entity, the Internet Society (ISOC (Internet Society)), would obtain a US\$1 billion endowment to secure its future through the proposed transaction, that is not within the scope of ICANN (Internet Corporation for Assigned Names and Numbers)'s consideration. The valuation of PIR is notable; in 2002, ISOC (Internet Society) was awarded the ability to operate the .ORG registry through a purpose-built non-profit developed to support the unique nature of the .ORG community. PIR's responsible operation of the .ORG registry since that time created this US\$1 billion value – value that ISOC (Internet Society) is looking to realize through engaging in a transaction that will result in the conversion of PIR into a profit-making entity. The ICANN (Internet Corporation for Assigned Names and Numbers) Board has considered the reasonableness of consent to the change of control as it relates to the new form of entity ICANN (Internet Corporation for Assigned Names and Numbers) is asked to contract with for the registry agreements themselves, including in light of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission to support and enhance the security, stability and resiliency of the Internet's unique identifiers. The ICANN (Internet Corporation for Assigned Names and Numbers) Board understands that while technically ICANN (Internet Corporation for Assigned Names and Numbers) will still hold a contract with PIR, the changes in the form of that entity are of meaningful significance to the Board's consideration of the Change of Control Request. On the whole, the ICANN (Internet Corporation for Assigned Names and Numbers) Board determines that the public interest is

better served in withholding consent as a result of various factors that create unacceptable uncertainty over the future of the third largest gTLD (generic Top Level Domain) registry.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board's action should not be read to provide any commentary on the propriety of for-profit entities operating gTLD (generic Top Level Domain) registries, nor as any prohibition or judgment on the role of private equity firms controlling registry operators. The considerations in front of the Board here are specific to this transaction, particularly in light of the long-standing history of the .ORG registry.

Background

Created in 1985, .ORG is one of the original TLDs in the Domain Name (Domain Name) System (DNS (Domain Name System)). In 2002, through a [competitive bidding process conducted by ICANN \(Internet Corporation for Assigned Names and Numbers\) \(/news/announcement-2002-10-14-en\)](#), ICANN (Internet Corporation for Assigned Names and Numbers) selected a proposal submitted by ISOC (Internet Society) to establish a wholly owned subsidiary, PIR, to serve as the .ORG registry operator, which PIR has been since 2003. ISOC (Internet Society) is the sole member of PIR. Prior to 2003, .ORG was operated by VeriSign, Inc (previously Network Solutions, Inc.), the registry operator of the .COM and .NET gTLDs. PIR is the registry operator for seven gTLDs in total. In addition to .ORG, it operates [.ONG \(/resources/agreement/ong-2014-03-06-en\)](#); [.NGO \(Nongovernmental Organization\) \(/resources/agreement/ngo-2014-03-06-en\)](#); [.xn--c1avg \(/resources/agreement/xn--c1avg-2013-11-14-en\)](#) (Cyrillic script); [.xn--i1b6bla6a2e \(/resources/agreement/xn--i1b6b1a6a2e-2013-11-14-en\)](#) (Devanagari script); [.xn--nqv7f \(/resources/agreement/xn--nqv7f-2013-11-14-en\)](#) (Chinese 2-character script); and [.xn--nqv7fs00ema \(/resources/agreement/xn--nqv7fs00ema-2013-11-14-en\)](#) (Chinese 4-character script). Since its establishment, PIR has operated as a non-profit organization, incorporated in the State of Pennsylvania.

In winning the bid to operate .ORG, ISOC (Internet Society) purpose-built the not-for-profit entity, PIR, to serve the needs of the .ORG registry and the noncommercial community. PIR represents its mission as "for the benefit of [its] end user consumers and the Internet as a whole". Under U.S. tax regulations, PIR was established as a "Supporting Organization (Supporting Organization)" to ISOC (Internet Society), which has obligated PIR to act in support of ISOC (Internet Society) as well as ISOC (Internet Society)'s mission. PIR contributes a portion of its revenue every year to ISOC (Internet Society); for 2018, the most recent year reported, PIR provided over US\$48 million to ISOC (Internet Society) while also serving PIR's mission through "improv[ing] the stability and security of the .ORG registry and deliver[ing] a robust Education and Outreach program that enlightens non-profits and NGOs". PIR holds itself out as "entrusted by millions to operate in the public interest" and "refus[ing] to compromise [its] ethical standards for the sake of expediency, popularity or profitability." This is the entity that has responsibly served as the registry operator and steward for the .ORG (and other) registries since 2002. PIR's Registry Agreements are between ICANN (Internet Corporation for Assigned Names and Numbers) and PIR. PIR's most recent U.S. tax filing for 2018 report nearly US\$95 million in revenue, with nearly US\$50 million of that revenue distributed as grants in service of PIR's mission.

Timeline of events

On 13 November 2019, [PIR announced \(https://thenew.org/the-internet-society-public-interest-registry-a-new-era-of-opportunity/\)](https://thenew.org/the-internet-society-public-interest-registry-a-new-era-of-opportunity/) that ISOC (Internet Society), its parent organization, had reached an agreement with Ethos Capital, under which Ethos Capital will acquire PIR and all of its assets from ISOC (Internet Society). The proposed transaction would result in PIR converting from a Pennsylvania non-profit corporation to a for-profit Pennsylvania limited liability company and Ethos Capital acquiring 100% ownership of PIR from the Internet Society (ISOC (Internet Society)). Ethos Capital envisions a "new" PIR, which would convert from its historical not-for-profit status to a for-profit entity controlled by a private capital firm. Through the proposed transaction, ISOC (Internet Society) – with which ICANN (Internet Corporation for Assigned Names and Numbers) does not have a contract for any of the registries that PIR operates – would receive US\$1 billion as an endowment for its future. Upon completion of the transaction, PIR would no longer have the obligation to provide support to ISOC (Internet Society) or serve any other charitable purpose, but instead would be subject to a US\$360 million debt obligation to service in support of the Ethos/PIR transaction. PIR

would convert into a new for-profit entity (if authorized by the relevant regulatory authorities) that would be responsible for contracting with ICANN (Internet Corporation for Assigned Names and Numbers) for the operation of the PIR registries. The current iteration of the not-for-profit PIR would no longer exist.

On **14 November 2019** ([/en/system/files/correspondence/cimbolic-to-icann-14nov19-en.pdf](#)), PIR formally submitted to ICANN (Internet Corporation for Assigned Names and Numbers) a "Notice of Indirect Change of Control and Entity Conversion" (Change of Control Request) in advance of closing the proposed transaction between Ethos Capital and ISOC (Internet Society). After review of the information provided by PIR in the 14 November submission, ICANN (Internet Corporation for Assigned Names and Numbers) requested additional information from PIR on 9 December 2019. Additionally, on **9 December 2019** ([/en/system/files/correspondence/jeffrey-to-sullivan-nevett-09dec19-en.pdf](#)), John Jeffrey, ICANN (Internet Corporation for Assigned Names and Numbers) org's General Counsel and Secretary, sent a letter to the CEOs of both PIR and ISOC (Internet Society), requesting both organizations to commit to completing the process in an open and transparent manner, including agreeing to the publication of questions from ICANN (Internet Corporation for Assigned Names and Numbers) org and the responses from PIR. PIR responded to ICANN (Internet Corporation for Assigned Names and Numbers) org's request for additional information on 20 December 2019, and later agreed to **publication of PIR's responsive materials, documents** ([/news/announcement-2020-01-11-en](#)) subject to limited redaction by PIR.

As the initial deadline for ICANN (Internet Corporation for Assigned Names and Numbers) org to respond to PIR by either providing or withholding consent to the proposed change of control was 19 January 2020, ICANN (Internet Corporation for Assigned Names and Numbers) and PIR agreed on **17 January 2020** ([/en/system/files/correspondence/namazi-to-nevett-17jan20-en.pdf](#)) to extend the deadline by 30 days to 17 February 2020. On **14 February 2020** ([/en/system/files/correspondence/jeffrey-to-nevett-14feb20-en.pdf](#)), the deadline was extended again by mutual agreement to 29 February 2020. On **19 February 2020** ([/en/system/files/correspondence/jeffrey-to-nevett-19feb20-en.pdf](#)), ICANN (Internet Corporation for Assigned Names and Numbers) org requested additional information from PIR as part of its diligence process, and on **21 February 2020** ([/en/system/files/correspondence/jeffrey-to-nevett-21feb20-en.pdf](#)) agreed with PIR to an extension to 20 March 2020. PIR responded to ICANN (Internet Corporation for Assigned Names and Numbers)'s information request on **4 March 2020** ([/en/system/files/correspondence/cimbolic-to-jeffrey-04mar20-en.pdf](#)). On **17 March 2020** ([/en/system/files/correspondence/jeffrey-to-nevett-17mar20-en.pdf](#)), the two organizations agreed to an extension to 20 April 2020, and on 16 April 2020, a final extension was agreed upon, giving ICANN (Internet Corporation for Assigned Names and Numbers) until 4 May 2020 to respond to PIR's request. On 3 April 2020, ICANN (Internet Corporation for Assigned Names and Numbers) provided PIR with two sets of questions for additional information. One set of questions are in follow-up to previous ICANN (Internet Corporation for Assigned Names and Numbers) inquiries designed to further understand the proposed transaction and its potential effect on PIR and the .ORG top-level domain (TLD (Top Level Domain)). The second set of questions relate specifically to the PICs proposed by PIR to be included in the .ORG registry agreement. Following receipt of the questions, **PIR submitted an updated proposal for its PICs** ([/en/system/files/correspondence/cimbolic-to-jeffrey-07apr20-en.pdf](#)) on **7 April 2020** ([/sites/default/files/tlds/org/org-proposed-spec11-06apr20-en.pdf](#)). On **8 April 2020** ([/news/blog/pir-transaction-and-proposed-public-interest-commitments-update](#)), ICANN (Internet Corporation for Assigned Names and Numbers) posted a public notice that PIR provided an updated proposal. On 12 April 2020, PIR submitted to ICANN (Internet Corporation for Assigned Names and Numbers) responses to the other questions posed on 3 April 2020. While PIR identified many portions of those responses as confidential, and therefore ICANN (Internet Corporation for Assigned Names and Numbers) org could not post those portions on its website, the ICANN (Internet Corporation for Assigned Names and Numbers) Board was provided with access to all materials submitted by PIR.

ICANN (Internet Corporation for Assigned Names and Numbers)'s Evaluation Process

Due to the circumstances of the proposed PIR change of control, including its planned conversion to a for-profit entity, ICANN (Internet Corporation for Assigned Names and Numbers) org requested extensive additional information from PIR, including regarding details of the transaction structure, financing and other funding sources, the parties involved,

the role of the Pennsylvania authorities, information related to financial resources and operational and technical capability, how the "new" PIR would be responsive to the needs of the non-commercial community, what input the .ORG community had provided to PIR on the proposed transaction and how that community input would be reflected in the operations of the "new" PIR. This evaluation of the proposed transaction, which includes the diligence imposed by the ICANN (Internet Corporation for Assigned Names and Numbers)-adopted specification or policy on registry operator criteria in effect, incorporated review of financial resources, operational and technical capabilities, the transaction structure, background screening and other components. This diligence process is part of ICANN (Internet Corporation for Assigned Names and Numbers) org's responsibility in evaluating this proposed Change of Control Request, and the Board has remained apprised of ICANN (Internet Corporation for Assigned Names and Numbers) org's review throughout the process.

ICANN (Internet Corporation for Assigned Names and Numbers) org's evaluation of PIR's Change of Control Request was more comprehensive than the evaluation that ICANN (Internet Corporation for Assigned Names and Numbers) org has conducted over other change of control requests. This was necessary under the circumstances and due to the extremely unique nature of the proposed change. This Change of Control Request for PIR's Registry Agreements includes the largest registry to date to be subject to the change of control process, and we understand the proposed transaction is the most complex that has been submitted for review. Hundreds of pages of supporting documentation have been produced by PIR in multiple responses, detailing multiple levels of new entities intended for creation to support the future PIR LLC in operating under PIR's Registry Agreements. Section 7.5 of PIR's Registry Agreements with ICANN (Internet Corporation for Assigned Names and Numbers) require that PIR seek ICANN (Internet Corporation for Assigned Names and Numbers)'s written approval for the change of control, and that ICANN (Internet Corporation for Assigned Names and Numbers) must not unreasonably withhold that approval. Section 7.5 of PIR's Registry Agreements also gives ICANN (Internet Corporation for Assigned Names and Numbers) the right to request additional information from PIR regarding the proposed transaction. PIR's Registry Agreements also permit ICANN (Internet Corporation for Assigned Names and Numbers) to evaluate the proposed change of control transaction under the totality of the circumstances, including the public interest and the interests of the .ORG community

The Board has deliberated and discussed this issue with ICANN (Internet Corporation for Assigned Names and Numbers) org on approximately 30 separate occasions, receiving current updates and providing ICANN (Internet Corporation for Assigned Names and Numbers) org with direction concerning next steps. ICANN (Internet Corporation for Assigned Names and Numbers) org has devoted countless hours in consideration of all aspects of PIR's request, and the collective hours from Board members devoted to consideration of this issue total in the thousands. This intensive review is required under the circumstances, as ICANN (Internet Corporation for Assigned Names and Numbers) is bound to, and it is in the public interest for ICANN (Internet Corporation for Assigned Names and Numbers) to uphold, the principles that ICANN (Internet Corporation for Assigned Names and Numbers)'s multistakeholder community agreed to include within ICANN (Internet Corporation for Assigned Names and Numbers)'s contracts. ICANN (Internet Corporation for Assigned Names and Numbers) is responsible for conducting a thorough review and evaluation to ensure that a change of control review is more than just an exercise of checking boxes. The ICANN (Internet Corporation for Assigned Names and Numbers) Board and org, in the extensive evaluation of the proposed transaction, returned multiple times to PIR for more information, as well as to ISOC (Internet Society), to understand the impact of the proposed transaction

In reviewing the financial stability of PIR following the consummation of the proposed transaction, the ICANN (Internet Corporation for Assigned Names and Numbers) Board noted that, following the transaction, PIR would have a significant amount of debt, and be obligated to service and ultimately repay a loan in the amount of US\$360 million. The Board noted that the incurrence of this debt was not for the benefit of PIR or the .ORG community, but for the financial interests of ISOC (Internet Society), Ethos Capital and the other investors in the transaction. While PIR has provided financial projections to ICANN (Internet Corporation for Assigned Names and Numbers) org that show the capacity of PIR to generate sufficient cash flow to service the loan and repay the debt at maturity, financial projections are by their nature speculative and generally unreliable, and do not account for unforeseen circumstances. As

such, if PIR's financial projections are materially inaccurate, PIR could potentially fail to generate the cash flow needed to repay the debt at maturity, and there can be no certainty that PIR or Ethos Capital will be able to refinance the debt at maturity if necessary. Accordingly, the [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) Board believes that burdening PIR with significant debt obligations could create uncertainty as to the long-term financial stability of PIR, particularly in light of the current and likely ongoing economic uncertainty.

Much of the public discourse around the proposed transaction also focused on the question of how the .ORG registrants would be protected and served. Both the [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) and the PIR/.ORG communities have been very vocal about the proposed transaction. Almost immediately after the transaction was announced by [ISOC \(Internet Society\)/PIR/Ethos Capital](#), the [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) org and Board started receiving correspondence related to the matter, with the first letter of concern coming from the Internet Commerce Association on 15 November 2019, just two days after the announcement. In total, [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) has received over 30 letters regarding this proposed transaction. A full inventory of the correspondence with relevant links to those publicly available on [ICANN \(Internet Corporation for Assigned Names and Numbers\)'s correspondence page \(/resources/pages/correspondence\)](#), is available in [Appendix A to this Rationale \(/en/system/files/files/resolutions-appx-a-org-correspondence-30apr20-en.pdf\)](#). At ICANN67, the [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) Board dedicated an entire live streamed [public forum \(https://67.schedule.icann.org/meetings/1152519\)](#) to hear from the [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) community about the proposed PIR transaction, and published both a [transcript of the event \(https://static.ptbl.co/static/attachments/237710/1583796929.pdf?1583796929\)](#), and [answers \(https://static.ptbl.co/static/attachments/237792/1583976880.pdf?1583976880\)](#) to questions that were not addressed in real time during the forum. Many of these communications focus specifically on the fact that, since 2002, PIR has been responsible for operating .ORG in a manner that serves the needs of the .ORG community, and that the information the public could access regarding the impact of the proposed transaction did not support the .ORG community in the same way. Many commenters discussed their concerns with the conversion of PIR to a for-profit entity, as for-profit entities held by private venture firms are understood to have a profit motive. In addition, commenters discussed their concerns with the removal of the protections embedded into PIR's not-for-profit mission of responsiveness to and engagement with its community, and discussed how that could impact the very policies able to be instituted at the registry level. The Board understands these concerns; the .ORG community has relied on PIR's commitments for nearly 20 years, and the proposed transaction fundamentally changes the PIR/.ORG community relationship. The Board must take that history into account, as well as the lack of meaningful engagement with that community in the design of the proposed transaction, as part of the reasonableness of withholding consent to PIR's request.

Part of how [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) tried to address these community – and [ICANN \(Internet Corporation for Assigned Names and Numbers\)'s](#) – concerns was by continuously urging PIR, [ISOC \(Internet Society\)](#), and Ethos Capital to provide full transparency regarding the proposed transaction. Similarly, [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) has attempted to provide the maximum amount of transparency possible throughout this process. This has included publishing the requests for information and the answers (subject to requested redaction by PIR for confidentiality reasons) to [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) org's questions. Additionally, [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) org has published several blogs and announcements from [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) to the [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) community designed to provide updates on the process.

Beginning in December 2019, PIR, [ISOC \(Internet Society\)](#) and Ethos Capital began engaging with the .ORG community. They utilized webinars, blog posts, and press releases among other things in an attempt to listen and assuage concerns from their community related to this proposed transaction. According to PIR and Ethos Capital, "we consistently heard three primary concerns expressed for the transaction: (1) pricing; (2) commitment to free expression; and (3) use of registrant and user data." On 21 February 2020, PIR and Ethos Capital proposed to the .ORG community to voluntarily adopt a legally binding

amendment to the .ORG registry agreement in the form of a Public Interest Commitment ("PIC") (<https://static1.squarespace.com/static/5dd7f6113c431419c139b89d/t/5e4fd13faf4f647b886ca187/1582289215311/20200220+PIC.pdf>) following the closing of the proposed sale of PIR to address concerns voiced by some in the .ORG Community. From 3 March through 13 March 2020, PIR conducted what it called a "Public Engagement Period" where PIR and Ethos Capital collected written feedback about their proposed PIC, and addressed the feedback in a summary on their website (<https://www.keypointabout.org/public-engagement>) dedicated to the proposed transaction. PIR submitted a proposed PIC to ICANN (Internet Corporation for Assigned Names and Numbers) for consideration on 16 March 2020. On 7 April 2020, PIR submitted an updated PIC ([/sites/default/files/tlds/org/org-proposed-spec11-06apr20-en.pdf](https://www.icann.org/sites/default/files/tlds/org/org-proposed-spec11-06apr20-en.pdf)) to ICANN (Internet Corporation for Assigned Names and Numbers) for consideration, with changes addressing certain of the questions ICANN (Internet Corporation for Assigned Names and Numbers) posed ([/en/system/files/correspondence/cimbolic-to-jeffrey-07apr20-en.pdf](https://www.icann.org/en/system/files/correspondence/cimbolic-to-jeffrey-07apr20-en.pdf)) regarding the 16 March proposal.

The 7 April version of the PIC outlines five primary commitments for PIR:

1. A commitment to restrict price increases based on a specified formula until June 2027 (2 years prior to the end of the term of the current Registry Agreement). This includes a table clearly listing the maximum allowable wholesale price of a .ORG domain name for each of the 8 years.
2. The creation of a Stewardship Council to provide independent advice to the registry operator regarding modifications proposed by PIR to certain registry policies regarding: (x) censorship and freedom of expression; and (y) use of .ORG registrant and user data (the "Designated Policies"). The Stewardship Council would have the binding right to veto any modification to the Designated Policies.
3. To establish a "Community Enablement Fund" (without a specific fund amount) to provide support for initiatives benefiting .ORG registrants.
4. To produce and publish an Annual Report that self-assesses compliance with the PIC. The Annual Report will also include a transparency report disclosing the number of .ORG domain name registrations that were suspended or terminated by Registry Operator during the preceding year under Registry Operator's Anti-Abuse Policy or pursuant to court order.
5. A commitment to allow any subsequent revisions to the PIC to undergo ICANN (Internet Corporation for Assigned Names and Numbers)'s public comment process as part of ICANN (Internet Corporation for Assigned Names and Numbers)'s consideration of such proposed revisions.

Following ICANN (Internet Corporation for Assigned Names and Numbers) org and Board's review of the proposed PIC, ICANN (Internet Corporation for Assigned Names and Numbers) shared feedback with PIR regarding the commitment related to the Stewardship Council and its role. PIR noted its intention to revise the PIC in line with the concerns identified by ICANN (Internet Corporation for Assigned Names and Numbers), and PIR committed that its PIC could be updated to support the Stewardship Council having powers related to enforcement as well as development of relevant policies, and in a way to make ICANN (Internet Corporation for Assigned Names and Numbers) org's enforcement powers capable of objective application. The Board notes that a majority of the comments received during the public notice period continue to raise concerns and questions about the future commitments for how PIR will continue to serve the .ORG community, as well as about the process within ICANN (Internet Corporation for Assigned Names and Numbers) to reach a decision on PIR's request.

Other than the pricing issues, the items addressed in the proposed PIC are similar to those that are currently embedded within PIR's structure. Whereas PIR today has an Advisory Council (<https://thenew.org/org-people/about-pir/team/advisory-council/>) embedded into its structure to serve as an intermediary between end users and PIR, and remaining accountable to that group is within PIR and ISOC (Internet Society)'s control, the "new" PIR would look to ICANN (Internet Corporation for Assigned Names and Numbers) to enforce that community relationship through an untested "Stewardship Council" through the PICs governing PIR's relationship with that Stewardship Council, including on matters of PIR's

internal policies. Although the PICs address some of the accountability concerns, the ICANN (Internet Corporation for Assigned Names and Numbers) Board is not satisfied that ICANN (Internet Corporation for Assigned Names and Numbers) org should be the new backstop for holding PIR accountable to its community as contemplated under the PICs. PIR has operated for nearly 20 years with internal mechanisms to support and protect its community. PIR and Ethos clearly recognize that responsiveness to the .ORG community is an important element for the success of this proposed transaction; it is unreasonable to now expect ICANN (Internet Corporation for Assigned Names and Numbers) to accept that burden of enforcement in order to allow PIR and Ethos' preferred corporate structure to move forward. In addition, while intended to include members who are independent of PIR and Ethos Capital, the membership of the Stewardship Council is subject to the approval of PIR's board of directors and, as a result, could become captured by or beholden to the for-profit interests of PIR's owners and therefore are unlikely to be truly independent of Ethos Capital or PIR's board. The Board's concerns here have also been raised by many people or entities who shared their thoughts with ICANN (Internet Corporation for Assigned Names and Numbers) after public notice was provided on the 7 April 2020 revision to PIR's revised PIC.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board also remains concerned with the lack of transparency concerning Ethos Capital's exit strategy for the PIR investment or its plans relating to capital disbursements from PIR's operations to Ethos Capital and the other investors. Ethos Capital has maintained that its investment horizon is 10 years and that it has no current plans to distribute excess PIR capital to investors. ICANN (Internet Corporation for Assigned Names and Numbers) cannot be assured that Ethos Capital's investment horizon will not change (as there is no enforceable commitment in this respect) or the minority investors in the transaction will not pressure Ethos Capital to pursue an exit from PIR prior to 10 years. In addition, while PIR has advised ICANN (Internet Corporation for Assigned Names and Numbers) that there will be certain limitations on PIR's ability to distribute capital to its investors (such as covenants in credits agreements relating to the US\$360 million of debt incurred to help finance the transaction), the Board cannot be assured that such distributions will not be made, which could cause PIR to be drained of its financial resources.

In addition, ICANN (Internet Corporation for Assigned Names and Numbers) considered the fact that Ethos Capital is a recently formed private equity firm, without a history of success in owning and operating a registry operator. While it is anticipated that PIR's existing management team will continue post-closing, there is no guarantee that such management will in fact remain at PIR post-closing for an extended period of time. In addition, the fact that Ethos Capital's founder was a managing partner that led his prior private equity firm's acquisition of Donuts only demonstrates a track record of acquisition and does not demonstrate an ability or track record of successfully operating a registry operator, particularly one of the size of .ORG. Thus, Ethos Capital's lack of experience and success in operating a registry operator is concerning for a registry with over 10.5 million domain name registrations.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board also considered the information provided by PIR concerning the investors involved in the transaction, and noted that PIR declined to provide the specific ownership interests of the investors in the transaction (it only provided general categories of ownership levels). In addition, ICANN (Internet Corporation for Assigned Names and Numbers) has not been provided detailed information concerning various minority investors (many of whom are entities, likely with additional investors), including vehicles through which significant minority investors (the apparent second largest investor to Ethos Capital) will make its investment.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board also considered the ability of PIR to engage in the business operations and practices that Ethos Capital and PIR argue will benefit the .ORG community solely as a result of the transaction. No evidence has been provided to ICANN (Internet Corporation for Assigned Names and Numbers) that demonstrates that PIR (as a non-profit entity) is not currently able to pursue these valuable business initiatives, which could benefit the .ORG community, without the risks associated with the consummation of the transaction.

Since the time that ISOC (Internet Society), PIR and Ethos Capital announced the proposed transaction, there has been misunderstanding of ICANN (Internet Corporation for Assigned Names and Numbers)'s role. Many have been looking to ICANN (Internet Corporation for

Assigned Names and Numbers) to answer questions that are better posed to ISOC (Internet Society) or to Ethos Capital. Many appear to be looking to ICANN (Internet Corporation for Assigned Names and Numbers) to cure an apparent lack of engagement by ISOC (Internet Society) with ISOC (Internet Society)'s community through engagement with ICANN (Internet Corporation for Assigned Names and Numbers) and the ICANN (Internet Corporation for Assigned Names and Numbers) community, even though many of the decisions made by ISOC (Internet Society) in solicitation and acceptance of Ethos Capital's proposal are outside of the type of decisions that are able to be changed through ICANN (Internet Corporation for Assigned Names and Numbers). However, the ICANN (Internet Corporation for Assigned Names and Numbers) Board has endeavored to, and encouraged and directed ICANN (Internet Corporation for Assigned Names and Numbers) org to, allow for engagement opportunities, such as the public forum highlighted above. The Board is aware of and has considered each of the letters sent to it, and has followed this issue very closely.

Reviews by the California and Pennsylvania Authorities of the Proposed Transaction

California Attorney General

On 23 January 2020, ICANN (Internet Corporation for Assigned Names and Numbers) received a subpoena from the Office of the Attorney General of the State of California (CA-AGO) regarding the proposed transfer of PIR from ISOC (Internet Society) to Ethos Capital. The CA-AGO, which by statute supervises the operations of all not-for-profit entities in California, including ICANN (Internet Corporation for Assigned Names and Numbers), states that it is "analyz[ing] the impact to the nonprofit community, including to ICANN (Internet Corporation for Assigned Names and Numbers)." Subsequent to ICANN (Internet Corporation for Assigned Names and Numbers)'s receipt of this letter, the CA-AGO requested more time to complete his review. The letter served as one factor in ICANN (Internet Corporation for Assigned Names and Numbers) org requesting more time from PIR to complete the review of the transaction, as the ICANN (Internet Corporation for Assigned Names and Numbers) Board and org had already identified that ICANN (Internet Corporation for Assigned Names and Numbers) needed additional information for its due diligence, and additional time was needed for ICANN (Internet Corporation for Assigned Names and Numbers)'s review.

On 15 April 2020, ICANN (Internet Corporation for Assigned Names and Numbers) received another [letter \(/en/system/files/correspondence/becerra-to-botterman-marby-15apr20-en.pdf\)](#) from the CA-AGO regarding PIR's change of control request. In this letter, the CA-AGO "urge[d] ICANN (Internet Corporation for Assigned Names and Numbers) to reject the [proposed] transfer of control" based on a determination that it "raises serious concerns." Citing ICANN (Internet Corporation for Assigned Names and Numbers)'s commitment to pursue the public interest as expressed in its Articles of Incorporation, the CA-AGO opined that, if permitted to purchase PIR, "Ethos Capital . . . will no longer have the unique characteristics that ICANN (Internet Corporation for Assigned Names and Numbers) valued at the time that it selected PIR as the nonprofit to be responsible for the .ORG registry."

The CA-AGO cited concerns such as the uncertainty about Ethos Capital as a brand-new entity, the private investors involved in financing the transaction, and the future operation of the .ORG registry, including the adequacy of PIR's future revenues and a lack of transparency regarding Ethos Capital's future plans. Based on the foregoing, the CA-AGO deemed these risks particularly serious in light of "the unique nature of the .ORG community" and concluded that approval of the transaction "may place at risk the operational stability of the .ORG registry." The CA-AGO also highlighted its concerns with how PIR's need to service debt obligations could impact the continued viability of the .ORG registry. In light of these and other concerns, the CA-AGO concluded that "the .ORG registry and the global Internet community – of which innumerable Californians are a part – are better served if ICANN (Internet Corporation for Assigned Names and Numbers) withholds approval of the proposed sale and transfer of PIR and the .ORG registry to the private equity firm Ethos Capital." The CA-AGO stated that "[i]n light of . . . the objectives stated in ICANN (Internet Corporation for Assigned Names and Numbers)'s articles of incorporation and bylaws . . . ICANN (Internet Corporation for Assigned Names and Numbers) must exercise its authority to withhold approval."

ICANN (Internet Corporation for Assigned Names and Numbers) is a non-profit public benefit corporation organized under the laws of the state of California. As such, the CA-AGO asserts authority over ICANN (Internet Corporation for Assigned Names and Numbers) in several

relevant respects. Because ICANN (Internet Corporation for Assigned Names and Numbers) is registered as a charitable nonprofit corporation, the CA-AGO asserts regulatory power over ICANN (Internet Corporation for Assigned Names and Numbers) pursuant to the California Supervision of Trustees and Fundraisers for Charitable Purposes Act. See, e.g., Cal. Gov. Code section 12596 (authorizing Attorney General to maintain action "to enforce a charitable trust" with respect to covered charitable entities); section 12598(a) (authorizing Attorney General to maintain action "for ensuring compliance with trusts" as to such entities; authorizing Attorney General action "for ensuring compliance with . . . articles of incorporation", and authorizing Attorney General to "protect[] assets held by charitable trusts and public benefits corporations"). The CA-AGO also asserts more general corporate regulatory authority over ICANN (Internet Corporation for Assigned Names and Numbers) pursuant to its powers under the California Corporate Code. See, e.g., Cal. Corp. Code section 5250 (authorizing the CA-AGO to address a "fail[ure] to comply with trusts which [a corporation] has assumed" and authorizing the Attorney General to redress a "depart[ure] from the purposes for which [a corporation] is formed").

The CA-AGO explained his understanding of what ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and Bylaws, and the mission defined therein, compel ICANN (Internet Corporation for Assigned Names and Numbers) to do when considering PIR's request. In his authority to speak for the public interest for California, the CA-AGO determined that California's public interest in the .ORG registry running as a home for noncommercial entities, and that the public interest would be better served by ICANN (Internet Corporation for Assigned Names and Numbers) withholding approval of the change of control. As the CA-AGO's letter observes, his determination is buoyed by the significant opposition received from other organizations and politicians, with virtually no counterbalancing support except from the parties involved in the transaction and their advisors.

The Board recognizes that the CA-AGO's 15 April 2020 letter might not reflect all recent information submitted by PIR to ICANN (Internet Corporation for Assigned Names and Numbers) or directly to the CA-AGO in connection with the PIR's request. That, combined with the CA-AGO's closing note that he continues its investigation and will take "whatever action necessary to protect . . . the nonprofit community" support ICANN (Internet Corporation for Assigned Names and Numbers) in its determination that it is reasonable to withhold consent at this time. The ICANN (Internet Corporation for Assigned Names and Numbers) Board's action is also reasonable in light of its consideration of the role of the CA-AGO in overseeing whether ICANN (Internet Corporation for Assigned Names and Numbers) is acting in compliance with its Articles of Incorporation. The Board takes the CA-AGO's inputs seriously both in the substance and in impact. Further, in considering the CA-AGO's letter as part of its overall evaluation process, the Board also considered the statement by the CA-AGO that approval of PIR's change of control request would be in contravention of the CA-AGO's declared public interest, and considered that statement in line with all of the other circumstances of the transaction as available to the Board, and concurs in some of the factors that contribute to the CA-AGO's urged outcome.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board considers the CA-AGO's letter as one aspect of support for the reasonableness of withholding consent from the requested change of control, but the letter does not alone determine or require this outcome. The Board considers all of the aspects of the proposed transaction and the information available to the Board.

Pennsylvania Attorney General

The Pennsylvania Attorney General also has a role in oversight of PIR, and in reviewing the proposed conversion of PIR from a not-for-profit to a for-profit entity. The ICANN (Internet Corporation for Assigned Names and Numbers) Board understands that the Pennsylvania process will not be completed prior to 4 May 2020, and therefore ICANN (Internet Corporation for Assigned Names and Numbers) does not know at this time either the PA Attorney General's view on the proposed conversion of PIR to for-profit status, or whether the relevant court in Pennsylvania will authorize the conversion. The Board notes that the lack of approval from the Pennsylvania authorities has remained an area of concern for the Board, and weighs towards the reasonableness of the Board's withholding consent at this time. The Board notes that understanding how the Pennsylvania authorities evaluate Pennsylvania's public interest in considering the proposed conversion is a relevant and missing piece of

information today.

Conclusion

The Board's action is in line with ICANN (Internet Corporation for Assigned Names and Numbers)'s mission because ICANN (Internet Corporation for Assigned Names and Numbers) has performed significant due diligence to comply with its contractual obligation to consider PIR's request, and to meet the responsibility of coordinating the unique identifiers in a responsible manner. ICANN (Internet Corporation for Assigned Names and Numbers)'s actions are thereby in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation and Bylaws' public interest mandates, and are also aligned with how the CA-AGO explained his views of the public interest. Taking this action supports ICANN (Internet Corporation for Assigned Names and Numbers)'s ability to continue performing all aspects of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission. Specifically, as it relates to the operation of the impacted registries, the ICANN (Internet Corporation for Assigned Names and Numbers) Board has no indication that the security and stability of those registries is at risk, or to the unique identifier system, if ICANN (Internet Corporation for Assigned Names and Numbers) does not consent. The public interest is also served on balance through this action, in supporting the multistakeholder model and the contractual principles entrusted to ICANN (Internet Corporation for Assigned Names and Numbers), and in taking the necessary steps to maintain the stability and viability of ICANN (Internet Corporation for Assigned Names and Numbers) as an entity. The ICANN (Internet Corporation for Assigned Names and Numbers) Board must take into account all circumstances here. The not-for-profit PIR entity has enjoyed a close and responsible relationship with its community for nearly 20 years. Now that PIR has been a successful entity, growing to US\$1 billion in valuation, ICANN (Internet Corporation for Assigned Names and Numbers) is asked to allow PIR to be sold to an untested private equity firm, removing the protections of the not-for-profit status and burdening the entity with US\$360 million in debt in the midst of current and likely ongoing economic uncertainty. Along with that, when pressed for information on how the sale will continue to serve and bring value to the .ORG community, the solution is for ICANN (Internet Corporation for Assigned Names and Numbers) to take on enforcement responsibility for the PIR/community relationship and for reliance on an untested Stewardship Council model and other PICs. ICANN (Internet Corporation for Assigned Names and Numbers) entrusted to PIR the responsibility to serve the public interest in its operation of the .ORG registry, and now ICANN (Internet Corporation for Assigned Names and Numbers) is being asked to transfer that trust to a new entity without a public interest mandate. This proposed transaction has posed difficult questions to the ICANN (Internet Corporation for Assigned Names and Numbers) Board and the community, and the totality of the circumstances supports a denial in this instance. If PIR is able to provide additional information that resolves the concerns raised by the Board, PIR remains able to re-submit or initiate a new Change of Control Request.

Published on 30 April 2020

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

17 Dec 2020

1. **Consent Agenda:**

- a. **Appointment of Root Server System Advisory Committee (Advisory Committee) (RSSAC (Root Server System Advisory Committee)) Chair**
Rationale for Resolution 2020.12.17.01

- b. **Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) Member Appointments**
Rationale for Resolutions 2020.12.17.02 – 2020.12.17.03

- c. **Contingency Plans for 2021 Key Signing Key Ceremonies**
Rationale for Resolution 2020.12.17.04

- d. **Change to Credit Card Payments Processing Service Agreement**
Rationale for Resolutions 2020.12.17.05 – 2020.12.17.06

2. **Main Agenda:**

- a. **2020 Strategic Outlook Trends Report**
Rationale for Resolutions 2020.12.17.07 – 2020.12.17.08

- b. **ICANN (Internet Corporation for Assigned Names and Numbers) Organization Risk Appetite Statement**

Rationale for Resolution 2020.12.17.09

- c. **Afilias Change of Control Approval Request**
- d. **AOB**

3. **Executive Session:**

- a. **President and CEO At-Risk Compensation for First Half of FY21**

Rationale for Resolution 2020.12.17.10

1. **Consent Agenda:**

- a. **Appointment of Root Server System Advisory Committee (Advisory Committee) (RSSAC (Root Server System Advisory Committee)) Chair**

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws call for the establishment of the Root Server System Advisory Committee (Advisory Committee) (RSSAC (Root Server System Advisory Committee)) with the role to advise the ICANN (Internet Corporation for Assigned Names and Numbers) community and ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors on matters relating to the operation, administration, security, and integrity of the Internet's Root Server System.

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws call for the RSSAC (Root Server System Advisory Committee) to be led by a chair appointed by the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors.

Whereas, the RSSAC (Root Server System Advisory Committee) went through a 30-day nomination period for the RSSAC (Root Server System Advisory

Committee) chair election process.

Whereas, Fred Baker was the only candidate and re-elected by acclamation on 1 December 2020.

Whereas, the RSSAC (Root Server System Advisory Committee) has recommended to the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors the appointment of Fred Baker as the RSSAC (Root Server System Advisory Committee) chair.

Resolved (2020.12.17.01), the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors appoints Fred Baker as the RSSAC (Root Server System Advisory Committee) chair through 31 December 2022.

Rationale for Resolution 2020.12.17.01

In September 2019, the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors approved a Bylaws amendment pertaining to the RSSAC (Root Server System Advisory Committee) leadership. As a result, the RSSAC (Root Server System Advisory Committee) leadership composition transitioned from two co-chairs to a chair and a vice chair. The current term for the RSSAC (Root Server System Advisory Committee) chair Fred Baker expires 31 December 2020.

The appointment of the RSSAC (Root Server System Advisory Committee) chair is not anticipated to have any fiscal impact on the ICANN (Internet Corporation for Assigned Names and Numbers) organization that has not already been accounted for in the budgeted resources necessary for ongoing support of the RSSAC (Root Server System Advisory Committee).

This resolution is an organizational administrative function for which no public comment is required. The appointment of the RSSAC (Root Server System

Advisory Committee) chair contributes to the commitment of the ICANN (Internet Corporation for Assigned Names and Numbers) organization to strengthen the security, stability, and resiliency of the DNS (Domain Name System) in the public interest and in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s mission.

b. **Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) Member Appointments**

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws set out three-year terms for SSAC (Security and Stability Advisory Committee) members, and require the SSAC (Security and Stability Advisory Committee), through its internal processes, to make recommendations to the ICANN (Internet Corporation for Assigned Names and Numbers) Board for appointment to those terms.

Whereas, in November 2020 the SSAC (Security and Stability Advisory Committee) Membership Committee initiated an annual review of two SSAC (Security and Stability Advisory Committee) members whose terms are ending 31 December 2020 and submitted to the SSAC (Security and Stability Advisory Committee) its recommendations for reappointments in December 2020.

Whereas, on 14 December 2020, the SSAC (Security and Stability Advisory Committee) members approved the reappointments.

Whereas, the SSAC (Security and Stability Advisory Committee) recommends that the Board reappoint the following SSAC (Security and Stability Advisory Committee) members to three-year terms: Tim April and Andrei Kolesnikov.

Whereas, the SSAC (Security and Stability Advisory Committee) Membership Committee, on behalf of the SSAC (Security and Stability Advisory Committee), recommends that the Board should appoint Matthew Thomas to the SSAC (Security and Stability Advisory Committee) for a three-year term beginning on 01 January 2021 and ending on 31 December 2023.

Resolved (2020.12.17.02), the Board accepts the recommendation of the SSAC (Security and Stability Advisory Committee) and reappoints the following SSAC (Security and Stability Advisory Committee) members to three-year terms beginning 01 January 2021 and ending 31 December 2023: Tim April and Andrei Kolesnikov.

Resolved (2020.12.17.03), the Board accepts the recommendation of the SSAC (Security and Stability Advisory Committee) and appoints Matthew Thomas to the SSAC (Security and Stability Advisory Committee) for a three-year term beginning 01 January 2021 and ending on 31 December 2023.

Rationale for Resolutions 2020.12.17.02 – 2020.12.17.03

The SSAC (Security and Stability Advisory Committee) is a diverse group of individuals whose expertise in specific subject matters enables the SSAC (Security and Stability Advisory Committee) to fulfill its role and execute its mission. Since its inception, the SSAC (Security and Stability Advisory Committee) has invited to its membership individuals with deep knowledge and experience in technical and security areas that are critical to the security and stability of the Internet's naming and address allocation systems.

The SSAC (Security and Stability Advisory Committee)'s continued operation as a competent body is dependent on the accumulation of talented subject matter experts who have consented to

volunteer their time and energies to the execution of the SSAC (Security and Stability Advisory Committee) mission.

This resolution is an organizational administrative function for which no public comment is required. The appointment of SSAC (Security and Stability Advisory Committee) members is in the public interest and in furtherance of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission as it contributes to the commitment of the ICANN (Internet Corporation for Assigned Names and Numbers) to strengthen the security, stability, and resiliency of the DNS (Domain Name System).

c. **Contingency Plans for 2021 Key Signing Key Ceremonies**

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers), through its affiliate PTI, must regularly generate cryptographic signatures that allow the root zone to be properly authenticated using DNSSEC (DNS Security Extensions). This work is currently performed every three months using "key signing ceremonies" involving trusted community representatives from throughout the world, governed by the DNSSEC (DNS Security Extensions) Practice Statement.

Whereas, in April 2020, the Board resolved to authorize contingency plans to hold these ceremonies in a modified format in response to the challenges posted by the COVID-19 pandemic.

Whereas, the COVID-19 pandemic continues to challenge ICANN (Internet Corporation for Assigned Names and Numbers)'s ability to perform the key ceremonies according to policy, due to global travel restrictions and guidance from governments and health authorities to limit gatherings of people.

Resolved (2020.12.17.04), the Board finds the

contingency plans continue to be in the best interests of ICANN (Internet Corporation for Assigned Names and Numbers) and in the global public interest, and authorizes the President and CEO, or his designee(s), in consultation with the PTI President, to take all necessary steps to perform the key signing ceremonies as provided in the contingency plans during 2021.

Rationale for Resolution 2020.12.17.04

1. Introduction

The Root Zone (Root Zone) Key Signing Key (Root KSK) is managed using a system that deliberately disperses a number of trusted roles both logically and geographically as a security measure that is designed to reduce risk of collusion between parties to perform unplanned activity. In normal operations, many of these trusted role-players need to converge at one of two ICANN (Internet Corporation for Assigned Names and Numbers)-managed sites (key management facilities, or KMFs) to perform "ceremonies" where each performs their role to perform essential KSK procedures, typically once every three months.

Due to the Coronavirus pandemic, ICANN (Internet Corporation for Assigned Names and Numbers) org staff's mobility has been curtailed and other companies that supply these trusted roles have enacted similar policies. Further, governments have implemented travel restrictions that have a similar effect of reducing mobility. There is a significant risk that these factors continue to impede the ability to hold key signing ceremonies in a normal manner. Without effective contingency plans, the inability to perform successful KSK operations would ultimately mean a widespread catastrophic

failure of the DNS (Domain Name System).

2. **Board Remit**

The Board's action on this matter is in-line with decision making it took in April 2020 at the beginning of the pandemic. This resolution seeks to extend the contingency plans beyond the period originally envisaged.

3. **Proposal**

The Board's action today is to authorize the ICANN (Internet Corporation for Assigned Names and Numbers) President and CEO, in consultation with the PTI President, to continue to take all necessary steps to perform the key signing ceremonies as outlined in the following contingency plans. The ceremony management approach in the contingency plans continues to adapt ceremony operations to facilitate maximum safe participation and deciding upon alternatives where participation is not possible. It also provides for additional operational resiliency by performing signing operations for additional calendar quarters until ceremony operations can safely resume in their normal format.

The associated procedures and policies allow for operations in this format following adjustments adopted by ICANN (Internet Corporation for Assigned Names and Numbers)'s Policy Management Authority on 6 April 2020. In particular, the DNSSEC (DNS Security Extensions) Practice Statement¹ (DPS) formally governs how KSK management is performed, and has been revised to allow for implementation of the presented options following proper authorization by management.

3.1 KSK Ceremony 42 (2021Q1)

Staff has taken lessons learned planning and conducting KSK Ceremony 41, improved details based upon community feedback, and proposes to perform KSK Ceremony 42 in a similar manner which satisfies the broader Internet community and our DPS requirements. The ceremony would be held in the first quarter of 2021, with prospective attendees to be polled on the precise date upon adoption of this resolution.

3.1.1 Graduated set of options for ceremony performance

As with the 41st KSK ceremony held in April 2020, the final configuration of the ceremony will be held based on an assessment of the viability of a graduated set of options. These options provide for alternate mixes of personnel based on the nature of the restrictions around the time the ceremony is due to be held. In all cases, the ceremonies continue to be held in a public and transparent manner, with the ability for community members to participate remotely to assure confidence in how the ceremony is conducted. Compensative controls are effectively implemented to provide assurances regarding the custody of all secure elements used in the ceremony.

3.1.2 Signing for additional

calendar quarters

The coronavirus pandemic is expected to continue to significantly impact operations well into 2021. To limit the impact on the ability to hold quarterly key ceremonies, the plan again provides for generating signatures for an extended nine month period. This relieves the need to hold a subsequent key signing ceremony until the fourth quarter of 2021.

3.2 KSK Ceremony 43 (2021Q4)

A successfully held ceremony in the first quarter of 2021, which generates nine months of signatures, would require the subsequent key ceremony to be held in the fourth quarter of 2021.

Staff will continue to monitor the pandemic and prepare for all possible scenarios for this ceremony in accordance with the graduated approach. Should widespread vaccination programs prove to be successful, and international travel limitations be relaxed, it is conceivable a late-2021 ceremony could be conducted in its normal format with international in-person participation.

4. Stakeholder Consultation

The original contingency plan was developed in early 2020 through wide community engagement, including expected ceremony participants, the third-party auditor, the root

zone maintainer, the vendors that support the key ceremony, the trusted community representatives and former ceremony attendees, ICANN (Internet Corporation for Assigned Names and Numbers)'s Root Zone (Root Zone) Evolution Review Committee, and a number of relevant industry mailing lists. Subsequent to the April 2020 ceremony, the feedback received was universally positive that the modified format met the objectives and retained community trust in KSK management.

Many of these same parties have been apprised of our intention to extend the contingency plan into 2021 and have supported these efforts.

5. **Fiscal Impact**

This proposal is not anticipated to have a material fiscal impact beyond normal operational costs associated with KSK management.

6. **Public Consultation Requirements**

This matter relates to IANA (Internet Assigned Numbers Authority) Naming Functions operations, performed by PTI under contract from ICANN (Internet Corporation for Assigned Names and Numbers). Procedures that are used in KSK operations must be approved by the Policy Management Authority, an internal ICANN (Internet Corporation for Assigned Names and Numbers) Org committee. There is no formal public comment requirement, however, IANA (Internet Assigned Numbers Authority) staff will continue to consult with the trusted community representatives and other stakeholders to implement and adapt these plans.

7. Public Interest

The Board's action is within the public interest and within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission as it will help to continue to ensure the stable and secure operation of the Internet's unique identifier systems. The inability to conduct key signing ceremonies in a timely manner would result in widespread DNS (Domain Name System) resolution failure globally as DNSSEC (DNS Security Extensions) would cease to function. The Board's action will help ensure that DNSSEC (DNS Security Extensions)-enabled devices will be able to resolve any domain names.

8. Key Risks

The following risk considerations were factored into the Board's deliberations on this action.

8.1 Travel of attendees is interrupted

The primary risk that this plan is designed to address is the inability of attendees to safely attend the key ceremony. The suggested mitigation is the graduated approach to different options to hold the ceremony, up to and including holding a ceremony only with staff in the Los Angeles metropolitan area, that will not require air or interstate travel, and with safety precautions for the individual attendees.

8.2 Facility operator suspends access to facility

The company that provides the facilities in which the KMFs are based may

suspend access as part of their response to the pandemic. The suggested mitigation would be to advocate to their senior management, through trusted proxies if necessary, to make an exception given the requirement to hold this ceremony to support critical Internet infrastructure and Internet operation. ICANN (Internet Corporation for Assigned Names and Numbers) has been in discussion with the local and national authorities about issuance of special guidance should it be necessary to retain the access needed to perform the key ceremony.

8.3 Government suspends access to the facility, and/or constrains travel

Governments at different levels may impose restrictions on travel or gatherings that impede the ability to hold the ceremony. ICANN (Internet Corporation for Assigned Names and Numbers) can advocate for exceptions to be made through the appropriate channels, as described in the previous section, noting the requirement to hold this ceremony to support critical Internet infrastructure and Internet operation. In particular, ICANN (Internet Corporation for Assigned Names and Numbers) has existing relationships with governments that can be used to seek such exemptions.

8.4 Staff become ill or otherwise indisposed

The minimum essential personnel may be incapable of performing the ceremony because they themselves are

ill, quarantined or otherwise unavailable. The primary mitigation is PTI staff and other support staff from ICANN (Internet Corporation for Assigned Names and Numbers) Org have been implementing social distancing since the beginning of March 2020 to limit potential transfer of illness. Additionally, there is approximately a three-month window to traverse the options presented, with sufficient slack to allow the exact date within each option to be adjusted to allow for recovery and still be held. There is also depth in staffing such that essential roles can be performed by different personnel if needed.

d. **Change to Credit Card Payments Processing Service Agreement**

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) has established a need to enter into a new contract for the processing of credit card payments, supported by *[REDACTED-FOR NEGOTIATION PURPOSES]*.

Whereas, the Board Finance Committee has reviewed the financial implication of contracting with *[REDACTED-FOR NEGOTIATION PURPOSES]*.

Whereas, both the organization and the Board Finance Committee have recommended that the Board authorize the President and CEO, or his designee(s), to take all actions necessary to execute the new contract with *[REDACTED-FOR NEGOTIATION PURPOSES]* and to make all necessary disbursements pursuant to the contract.

Resolved (2020.12.17.05) the Board authorizes the President and CEO, or his designee(s), to take all necessary actions to execute a new contract with

[REDACTED-FOR NEGOTIATION PURPOSES] and to make all necessary disbursements pursuant to the contract.

Resolved (2020.12.17.06), specific items within this resolution shall remain confidential for negotiation purposes pursuant to Article 3, section 3.5(b) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws until the President and CEO determines that the confidential information may be released.

Rationale for Resolutions 2020.12.17.05 – 2020.12.17.06

ICANN (Internet Corporation for Assigned Names and Numbers) org has partnered with *[REDACTED-FOR NEGOTIATION PURPOSES]* for the processing of credit card payments since September 2007. Over the years, the volume of payments that ICANN (Internet Corporation for Assigned Names and Numbers) receives by credit cards has increased and the tiered rate structure negotiated in 2007 is no longer favorable to ICANN (Internet Corporation for Assigned Names and Numbers). However, ICANN (Internet Corporation for Assigned Names and Numbers) wishes to continue offering this convenient method of payment to its stakeholders through its longtime partner and reputable service provider, *[REDACTED-FOR NEGOTIATION PURPOSES]*.

ICANN (Internet Corporation for Assigned Names and Numbers) determined that under a new rate structure, *[REDACTED-FOR NEGOTIATION PURPOSES]* provided the most cost savings and best product value following a formal Request for Proposal (RFP) to identify potential service providers against 10 nominees and three participants.

[REDACTED-FOR NEGOTIATION PURPOSES] offers minimal transition efforts and a good history of transferring funds between the issuing bank and

ICANN (Internet Corporation for Assigned Names and Numbers), without delays or disputes. *[REDACTED-FOR NEGOTIATION PURPOSES]* also meets ICANN (Internet Corporation for Assigned Names and Numbers)'s three primary objectives:

1. Secure services that meet global and local laws and regulations.
2. Reduce ICANN (Internet Corporation for Assigned Names and Numbers)'s cost associated with credit card merchant fees.
3. Migrate to a payment gateway service, increasing efficiency and accuracy for payments received by credit card.

ICANN (Internet Corporation for Assigned Names and Numbers) has also negotiated favorable terms. The initial term of the new contract is three years with an automatic one-year renewal period. The contract can be canceled at any time with 60-days advance notice. The *[REDACTED-FOR NEGOTIATION PURPOSES]* fees are fixed for the contract term and will not increase.

After careful analysis, the Board agrees with the organization that the new contract is a more cost-effective solution for offering payments by credit cards at this time. The Board understands that the organization will continue to review other payment alternatives to further reduce the expense associated with these services and it will implement a process of regularly reviewing the fees billed by the service provider.

Executing the contract on favorable terms is in the public interest as it will lower ICANN (Internet Corporation for Assigned Names and Numbers)'s expenses without any impact to the services ICANN (Internet Corporation for Assigned Names and Numbers) provides to its community and therefore is

also consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission.

There is a positive fiscal impact in that the new contract will result in a significant decrease in credit card processing fees. There is no anticipated impact to the security, stability, and resiliency of the domain name system.

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

2. Main Agenda:

a. 2020 Strategic Outlook Trends Report

Whereas, following community and ICANN (Internet Corporation for Assigned Names and Numbers) organization inputs received between November 2019 and March 2020 on key trends anticipated to impact ICANN (Internet Corporation for Assigned Names and Numbers) in the coming years, the Board conducted an analysis, and concluded that the strategic objectives for ICANN (Internet Corporation for Assigned Names and Numbers), as reflected in the Strategic Plan for Fiscal Years 2021-2025, do not need to change.

Whereas, on 22 October 2020, the Board formed a Strategic Planning Committee to oversee the annual strategic outlook (trends) process to identify relevant trends and events that inform ICANN (Internet Corporation for Assigned Names and Numbers)'s strategic planning and prioritization efforts. Prior to that date, the Board relied upon the use of a Board Working Group on Strategic Planning. This working group, as supported by ICANN (Internet Corporation for Assigned Names and Numbers) organization, played a central role in reviewing and analyzing the results of the trend work and the related opportunities, risks, and impacts on ICANN (Internet Corporation for

Assigned Names and Numbers). The working group articulated this work into a set of proposed priority trends, related impacts, and associated strategic and/or tactical recommendations for full-Board consideration.

Whereas, members of the ICANN (Internet Corporation for Assigned Names and Numbers) Board and ICANN (Internet Corporation for Assigned Names and Numbers) organization held a webinar with the community on 06 October 2020 to present the Strategic Outlook process and methods used to conduct the analysis.

Resolved (2020.12.17.07), the Board affirms that the ICANN (Internet Corporation for Assigned Names and Numbers) Strategic Plan for Fiscal Years 2021 to 2025 shall remain in force and unchanged, with no restatement of the Strategic Plan needed at this time.

Resolved (2020.12.17.08), the Board recognizes that there may be a future need to evolve this Strategic Plan, such as to address funding realities identified through the update of ICANN (Internet Corporation for Assigned Names and Numbers)'s Five-Year Operating and Financial Plan, or mid-course modifications during the life of the Strategic Plan. If such change is needed, the Board will direct the ICANN (Internet Corporation for Assigned Names and Numbers) org on the scope of further actions.

Rationale for Resolutions 2020.12.17.07 – 2020.12.17.08

On 23 June 2019, the Board adopted (/resources/board-material/resolutions-2019-06-23-en#2.a) the ICANN (Internet Corporation for Assigned Names and Numbers) Strategic Plan for Fiscal Years 2021 to 2025 and directed that as part of the on-going annual planning cycle with the community, new trends or shifts in existing trends be factored into the annual iteration of ICANN (Internet Corporation for Assigned

Names and Numbers's plans as appropriate. These efforts are conducted under a process known as the Strategic Outlook trend identification process.

The Strategic Outlook trend identification is an annual process, which ensures ICANN (Internet Corporation for Assigned Names and Numbers) has a consistent way to: identify and track trends; prepare for opportunities; mitigate or avoid challenges; inform strategic and operational planning and prioritization.

It is a joint effort between the ICANN (Internet Corporation for Assigned Names and Numbers) organization, the community, and the ICANN (Internet Corporation for Assigned Names and Numbers) Board to engage on emerging or evolving trends that affect ICANN (Internet Corporation for Assigned Names and Numbers). Trends indicate general directions in which things are developing or changing, that have or could have an impact on ICANN (Internet Corporation for Assigned Names and Numbers), its mission, its operations, or its ecosystem. Trends can be internal or external, organization-specific, community-related, or go beyond ICANN (Internet Corporation for Assigned Names and Numbers)'s ecosystem as ICANN (Internet Corporation for Assigned Names and Numbers) does not operate in a vacuum.

ICANN (Internet Corporation for Assigned Names and Numbers) org has found the exercise to be beneficial to help surface opportunities and challenges that lay ahead, inform planning, help with prioritization considerations, and risk management.

Between November 2019 and March 2020, ICANN (Internet Corporation for Assigned Names and Numbers) org convened 21 Strategic Outlook trends identification sessions with 398 participants from the community and the organization, resulting in 1,853 data points collected. Community sessions outputs have been published on the Strategic Planning page

of the icann.org website.

Between April and September 2020, the Strategic Planning Board Working Group, as supported by ICANN (Internet Corporation for Assigned Names and Numbers) org, conducted a thorough analysis of the trend session data inputs received, including assessing the trends, risks, opportunities, and potential impacts on ICANN (Internet Corporation for Assigned Names and Numbers). The details of this analysis and associated recommendations have been documented in the *2020 Strategic Outlook Trends Report* document attached to this paper for reference.

The Board Strategic Planning Committee, on the basis of the work accomplished by the Strategic Planning Board Working Group in place prior to the [formation \(/resources/board-material/resolutions-2-2020-10-22-en#1.c\)](#) of the committee, recommends keeping the ICANN (Internet Corporation for Assigned Names and Numbers) Strategic Plan for Fiscal Years 2021 to 2025 unchanged, with no restatement of the Strategic Plan needed at this time.

This resolution is not expected to have a fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers), though the changes anticipated to ICANN (Internet Corporation for Assigned Names and Numbers)'s Operating Plan might have impact once approved. This action is expected to have a positive impact on the security, stability and resiliency of the domain name system (DNS (Domain Name System)) as it continues to support ICANN (Internet Corporation for Assigned Names and Numbers)'s strategic work in this area.

This resolution serves ICANN (Internet Corporation for Assigned Names and Numbers)'s mission in ensuring a secure and stable operation of the Internet's unique identifier systems. The ICANN (Internet Corporation for Assigned Names and Numbers) Strategic Plan for Fiscal Years 2021-2025 builds upon ICANN (Internet

Corporation for Assigned Names and Numbers's mission so that it may continue to effectively fulfil its aims and meet new and continuously evolving challenges and opportunities.

This resolution is in the public interest as the Strategic Plan guides ICANN (Internet Corporation for Assigned Names and Numbers)'s activities and informs ICANN (Internet Corporation for Assigned Names and Numbers)'s operating plans and budgets to fulfil its mission in fiscal years 2021 through 2025. The Strategic Plan serves the public interest by articulating the path towards a new vision to be a champion of the single, open, and globally interoperable Internet. The Strategic Plan complies with ICANN (Internet Corporation for Assigned Names and Numbers)'s commitments and is guided by ICANN (Internet Corporation for Assigned Names and Numbers)'s core values.

This is an Organizational Administrative Function that has been subject to community consultation as noted above, and is not requiring further public comment.

b. **ICANN (Internet Corporation for Assigned Names and Numbers) Organization Risk Appetite Statement**

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Board previously recognized the benefit of and need for a Risk Management Framework to guide the ICANN (Internet Corporation for Assigned Names and Numbers) organization in managing risks it faces.

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Board previously set a target model for the Risk Management Framework including a Risk Appetite Statement.

Whereas, risk management involves the identification of vulnerabilities to the organization and therefore it

would not be prudent to publish the Risk Appetite Statement.

Resolved (2020.12.17.09), the Board approves the ICANN (Internet Corporation for Assigned Names and Numbers) Organization Risk Appetite Statement and directs the President and CEO, or his designee(s), to publish a summary of it.

Rationale for Resolution 2020.12.17.09

This Risk Appetite Statement articulates the level of risk which ICANN (Internet Corporation for Assigned Names and Numbers) organization is willing to take and retain on a broad level to deliver its mission.

The ICANN (Internet Corporation for Assigned Names and Numbers) Organization Risk Appetite Statement:

- Communicates to personnel that they need to pursue objectives within acceptable risk limits.
- Provides input for prioritization for planning and budgeting.
- Guides the Board and in its decision making and can be considered as part of the rationale that accompanies Board resolutions.
- Informs performance management and incentive measurement, and guides personnel to make decisions that are aligned to the organizational risk appetite.
- Encourages a risk management, not risk aversion, culture so that risk management is a responsibility shared across the organization and for which all personnel are accountable.
- Enhances ICANN (Internet Corporation for Assigned Names and Numbers)'s reputation by demonstrating that the organization is committed to proactively managing risk.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board and the ICANN (Internet Corporation for Assigned Names and Numbers) Executive Team require that a robust Risk Management Framework be developed and implemented for ICANN (Internet Corporation for Assigned Names and Numbers) organization. As part of the Target Operating Model for Risk Management, a Risk Appetite Statement is part of a mature framework.

The Board of Directors and the ICANN (Internet Corporation for Assigned Names and Numbers) org Executive Team are responsible for making informed decisions to set the level of accepted risk. The Risk Appetite Statement specifies the risks the organization is willing to take and retain, thereby demonstrating the risk appetite of the leadership of ICANN (Internet Corporation for Assigned Names and Numbers) which can then be used to guide the operations of ICANN (Internet Corporation for Assigned Names and Numbers).

Note that by design any Risk Appetite Statement is a high-level articulation of the risks faced by an organization. The intention is to provide a concise overview that is accessible to all personnel and the Board. Further, risks often involve vulnerabilities or threats to the organization, and it would be imprudent for any organization to provide public details of such risks.

The Risk Appetite Statement was developed by the organization's Risk Management function in collaboration with representation of every organization function. The Risk Appetite Statement was reviewed by the organization Executive Team and approved by the ICANN (Internet Corporation for Assigned Names and Numbers) President and CEO for consideration by the Board Risk Committee. The Board Risk Committee reviewed and recommended that the Board approve the ICANN (Internet Corporation for

Assigned Names and Numbers) organization Risk Appetite Statement. The Board received a presentation on the Risk Appetite Statement earlier in 2020.

Adopting the Risk Appetite Statement is in the public interest and is also fully consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s mission as it articulates the risk appetite of the leadership of ICANN (Internet Corporation for Assigned Names and Numbers) which can then be used to guide the operations of ICANN (Internet Corporation for Assigned Names and Numbers) organization more efficiently and consistently from a risk management perspective.

Adopting the BRC's recommendation has no financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) that was not otherwise anticipated; and it formalizes the Risk Management Framework of ICANN (Internet Corporation for Assigned Names and Numbers) organization, and strengthens its approach to managing the risks it faces, therefore could have a positive impact on the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function that does not require Public Comment.

c. **Afilias Change of Control Approval Request**

No Resolutions taken.

d. **AOB**

No Resolutions taken.

3. Executive Session:

a. **President and CEO At-Risk Compensation for First Half of FY21**

Whereas, each Board member has confirmed that he/she does not have a conflict of interest with respect to establishing the amount of payment to the President and CEO for the first half of FY21 at-risk compensation component.

Whereas, the Compensation Committee recommended that the Board approve payment to the President and CEO for the first half of his FY21 at-risk compensation.

Resolved (2020.12.17.10), the Board hereby approves a payment to the President and CEO for his annual at-risk compensation component for the first half of FY21.

Rationale for Resolution 2020.12.17.10

When the President and CEO was hired, he was offered a base salary, plus an at-risk component of his compensation package. This same structure exists today. Consistent with all personnel with the ICANN (Internet Corporation for Assigned Names and Numbers) organization, the President and CEO is to be evaluated against specific goals, which the President and CEO sets in coordination with the Compensation Committee and the Board.

The President and CEO provided to the Compensation Committee his self-assessment of his mid-year achievements towards his FY21 goals. After reviewing, the Compensation Committee discussed and agreed with the President and CEO's self-assessment. Following discussion, the Compensation Committee recommended that the Board approve payment to the President and CEO for his at-risk compensation for the first half of FY21. The Board agrees with the Compensation Committee's recommendation.

Taking this decision is in furtherance of ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and is in the public interest in that it helps ensure that President and CEO is sufficiently compensated in line with his performance in furtherance of the Mission, and which reflects that his goals are consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Strategic and Operating plans.

While the decision to pay the President and CEO his at-risk compensation for the first half of FY21 will have a fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers), it is an impact that was contemplated in the FY21 budget. This decision will not have an impact on the security, stability or resiliency of the domain name system.

Published on 21 December 2020

¹ <https://www.iana.org/dnssec/dps> (<https://www.iana.org/dnssec/dps>)

Petillion

RM 71

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

17 Dec 2020

Formal Minutes are still to be approved by the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

Note: This Preliminary Report has not been approved by the Board and does not constitute minutes. It does set forth the unapproved reporting of the resolutions from that meeting. Details on voting and abstentions will be provided in the Minutes, when approved at a future meeting.

NOTE ON ADDITIONAL INFORMATION INCLUDED WITHIN PRELIMINARY REPORT – ON RATIONALES – Where available, a draft Rationale for each of the Board's actions is presented under the associated Resolution. A draft Rationale is not final until approved with the minutes of the Board meeting.

A Special Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors was held telephonically on 17 December 2020 at 21:00 UTC.

Maarten Botterman, Chair, promptly called the meeting to order.

In addition to the Chair, the following Directors participated in all or part of the meeting: Becky Burr, Ron da Silva, Sarah Deutsch, Avri Doria, Rafael Lito Ibarra, Danko Jevtović, Akinori Maemura, Göran Marby (President and CEO), Mandla Msimang, Ihab Osman, Patricio Poblete, Nigel Roberts, León Sánchez (Vice Chair), and Matthew Shears.

The following Board members sent their apologies: Tripti Sinha.

The following Board Liaisons participated in all or part of the meeting: Harald Alvestrand (IETF (Internet Engineering Task Force) Liaison), Manal Ismail (GAC (Governmental Advisory

Committee) Liaison), Merike Käo (SSAC (Security and Stability Advisory Committee) Liaison), and Kaveh Ranjbar (RSSAC (Root Server System Advisory Committee) Liaison).

Secretary: John Jeffrey (General Counsel and Secretary).

The following ICANN (Internet Corporation for Assigned Names and Numbers) Executives and Staff participated in all or part of the meeting: Michelle Bright (Board Content Coordination Director), Xavier Calvez (SVP, Planning & Chief Financial Officer), Franco Carrasco (Board Operations Specialist), Sally Newell Cohen (SVP, Global Communications), Sally Costerton (Sr. Advisor to President & SVP, Global Stakeholder Engagement), Samantha Eisner (Deputy General Counsel), Larisa Gurnick (VP, Review Operations & Accountability), Jamie Hedlund (SVP, Contractual Compliance & Consumer Safeguards), John Jeffrey (General Counsel and Secretary), Aaron Jimenez (Board Operations Specialist), Vinciane Koenigsfeld (Senior Director, Board Operations), Elizabeth Le (Associate General Counsel), David Olive (SVP, Policy Development Support), Lisa Saulino (Board Operations Specialist), Amy Stathos (Deputy General Counsel), and Theresa Swinehart (SVP, Global Domains & Strategy).

This is a Preliminary Report of the Special Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors, which was held telephonically on 17 December 2020 at 21:00 UTC.

1. Consent Agenda:

- a. **Appointment of Root Server System Advisory Committee (Advisory Committee) (RSSAC (Root Server System Advisory Committee)) Chair**
Rationale for Resolution 2020.12.17.01

- b. **Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) Member Appointments**
Rationale for Resolutions 2020.12.17.02 – 2020.12.17.03

c. **Contingency Plans for 2021 Key Signing Key Ceremonies**

Rationale for Resolution 2020.12.17.04

d. **Change to Credit Card Payments Processing Service Agreement**

Rationale for Resolutions 2020.12.17.05 – 2020.12.17.06

2. **Main Agenda:**

a. **2020 Strategic Outlook Trends Report**

Rationale for Resolutions 2020.12.17.07 – 2020.12.17.08

b. **ICANN (Internet Corporation for Assigned Names and Numbers) Organization Risk Appetite Statement**

Rationale for Resolution 2020.12.17.09

c. **Afilias Change of Control Approval Request**

d. **AOB**

3. **Executive Session:**

a. **President and CEO At-Risk Compensation for First Half of FY21**

Rationale for Resolution 2020.12.17.10

1. **Consent Agenda:**

The Chair opened the meeting and introduced the items on the Consent Agenda. The Chair called for a vote and the Board took the following action.

Resolved, the following resolutions in this Consent Agenda are approved.

a. **Appointment of Root Server System Advisory Committee (Advisory**

Committee) (RSSAC (Root Server System Advisory Committee)) Chair

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws call for the establishment of the Root Server System Advisory Committee (Advisory Committee) (RSSAC (Root Server System Advisory Committee)) with the role to advise the ICANN (Internet Corporation for Assigned Names and Numbers) community and ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors on matters relating to the operation, administration, security, and integrity of the Internet's Root Server System.

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws call for the RSSAC (Root Server System Advisory Committee) to be led by a chair appointed by the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors.

Whereas, the RSSAC (Root Server System Advisory Committee) went through a 30-day nomination period for the RSSAC (Root Server System Advisory Committee) chair election process.

Whereas, Fred Baker was the only candidate and re-elected by acclamation on 1 December 2020.

Whereas, the RSSAC (Root Server System Advisory Committee) has recommended to the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors the appointment of Fred Baker as the RSSAC (Root Server System Advisory Committee) chair.

Resolved (2020.12.17.01), the ICANN (Internet Corporation for Assigned Names and Numbers)

Board of Directors appoints Fred Baker as the RSSAC (Root Server System Advisory Committee) chair through 31 December 2022.

Rationale for Resolution 2020.12.17.01

In September 2019, the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors approved a Bylaws amendment pertaining to the RSSAC (Root Server System Advisory Committee) leadership. As a result, the RSSAC (Root Server System Advisory Committee) leadership composition transitioned from two co-chairs to a chair and a vice chair. The current term for the RSSAC (Root Server System Advisory Committee) chair Fred Baker expires 31 December 2020.

The appointment of the RSSAC (Root Server System Advisory Committee) chair is not anticipated to have any fiscal impact on the ICANN (Internet Corporation for Assigned Names and Numbers) organization that has not already been accounted for in the budgeted resources necessary for ongoing support of the RSSAC (Root Server System Advisory Committee).

This resolution is an organizational administrative function for which no public comment is required. The appointment of the RSSAC (Root Server System Advisory Committee) chair contributes to the commitment of the ICANN (Internet Corporation for Assigned Names and Numbers) organization to strengthen the security, stability, and resiliency of the DNS (Domain Name System) in the public interest and in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s mission.

b. **Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) (SSAC (Security and Stability Advisory Committee)) Member Appointments**

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws set out three-year terms for SSAC (Security and Stability Advisory Committee) members, and require the SSAC (Security and Stability Advisory Committee), through its internal processes, to make recommendations to the ICANN (Internet Corporation for Assigned Names and Numbers) Board for appointment to those terms.

Whereas, in November 2020 the SSAC (Security and Stability Advisory Committee) Membership Committee initiated an annual review of two SSAC (Security and Stability Advisory Committee) members whose terms are ending 31 December 2020 and submitted to the SSAC (Security and Stability Advisory Committee) its recommendations for reappointments in December 2020.

Whereas, on 14 December 2020, the SSAC (Security and Stability Advisory Committee) members approved the reappointments.

Whereas, the SSAC (Security and Stability Advisory Committee) recommends that the Board reappoint the following SSAC (Security and Stability Advisory Committee) members to three-year terms: Tim April and Andrei Kolesnikov.

Whereas, the SSAC (Security and Stability Advisory Committee) Membership Committee,

on behalf of the SSAC (Security and Stability Advisory Committee), recommends that the Board should appoint Matthew Thomas to the SSAC (Security and Stability Advisory Committee) for a three-year term beginning on 01 January 2021 and ending on 31 December 2023.

Resolved (2020.12.17.02), the Board accepts the recommendation of the SSAC (Security and Stability Advisory Committee) and reappoints the following SSAC (Security and Stability Advisory Committee) members to three-year terms beginning 01 January 2021 and ending 31 December 2023: Tim April and Andrei Kolesnikov.

Resolved (2020.12.17.03), the Board accepts the recommendation of the SSAC (Security and Stability Advisory Committee) and appoints Matthew Thomas to the SSAC (Security and Stability Advisory Committee) for a three-year term beginning 01 January 2021 and ending on 31 December 2023.

Rationale for Resolutions **2020.12.17.02 – 2020.12.17.03**

The SSAC (Security and Stability Advisory Committee) is a diverse group of individuals whose expertise in specific subject matters enables the SSAC (Security and Stability Advisory Committee) to fulfill its role and execute its mission. Since its inception, the SSAC (Security and Stability Advisory Committee) has invited to its membership individuals with deep knowledge and experience in technical and security areas that are critical to the security and stability of the Internet's naming and address allocation systems.

The SSAC (Security and Stability Advisory Committee)'s continued operation as a competent body is dependent on the accumulation of talented subject matter experts who have consented to volunteer their time and energies to the execution of the SSAC (Security and Stability Advisory Committee) mission.

This resolution is an organizational administrative function for which no public comment is required. The appointment of SSAC (Security and Stability Advisory Committee) members is in the public interest and in furtherance of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission as it contributes to the commitment of the ICANN (Internet Corporation for Assigned Names and Numbers) to strengthen the security, stability, and resiliency of the DNS (Domain Name System).

c. **Contingency Plans for 2021 Key Signing Key Ceremonies**

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers), through its affiliate PTI, must regularly generate cryptographic signatures that allow the root zone to be properly authenticated using DNSSEC (DNS Security Extensions). This work is currently performed every three months using "key signing ceremonies" involving trusted community representatives from throughout the world, governed by the DNSSEC (DNS Security Extensions) Practice Statement.

Whereas, in April 2020, the Board resolved to authorize contingency plans to hold these ceremonies in a modified format in response to the challenges posted by the COVID-19 pandemic.

Whereas, the COVID-19 pandemic continues to challenge ICANN (Internet Corporation for Assigned Names and Numbers)'s ability to perform the key ceremonies according to policy, due to global travel restrictions and guidance from governments and health authorities to limit gatherings of people.

Resolved (2020.12.17.04), the Board finds the contingency plans continue to be in the best interests of ICANN (Internet Corporation for Assigned Names and Numbers) and in the global public interest, and authorizes the President and CEO, or his designee(s), in consultation with the PTI President, to take all necessary steps to perform the key signing ceremonies as provided in the contingency plans during 2021.

Rationale for Resolution 2020.12.17.04

1. Introduction

The Root Zone (Root Zone) Key Signing Key (Root KSK) is managed using a system that deliberately disperses a number of trusted roles both logically and geographically as a security measure that is designed to reduce risk of collusion between parties to perform unplanned activity. In normal operations, many of these trusted role-players need to converge at one of two ICANN (Internet Corporation for Assigned Names and Numbers)-managed sites (key management facilities, or KMFs) to perform "ceremonies" where each performs their role to perform essential KSK procedures, typically once every three months.

Due to the Coronavirus pandemic, ICANN (Internet Corporation for Assigned Names and Numbers) org staff's mobility has been curtailed and other companies that supply these trusted roles have enacted similar policies. Further, governments have implemented travel restrictions that have a similar effect of reducing mobility. There is a significant risk that these factors continue to impede the ability to hold key signing ceremonies in a normal manner. Without effective contingency plans, the inability to perform successful KSK operations would ultimately mean a widespread catastrophic failure of the DNS (Domain Name System).

2. **Board Remit**

The Board's action on this matter is in-line with decision making it took in April 2020 at the beginning of the pandemic. This resolution seeks to extend the contingency plans beyond the period originally envisaged.

3. **Proposal**

The Board's action today is to authorize the ICANN (Internet Corporation for Assigned Names and Numbers) President and CEO, in consultation with the PTI President, to continue to take all necessary steps to perform the key signing ceremonies as outlined in the following contingency plans. The ceremony management approach in the contingency plans continues to adapt ceremony operations to facilitate maximum safe participation and deciding upon alternatives where

participation is not possible. It also provides for additional operational resiliency by performing signing operations for additional calendar quarters until ceremony operations can safely resume in their normal format.

The associated procedures and policies allow for operations in this format following adjustments adopted by ICANN (Internet Corporation for Assigned Names and Numbers)'s Policy Management Authority on 6 April 2020. In particular, the DNSSEC (DNS Security Extensions) Practice Statement¹ (DPS) formally governs how KSK management is performed, and has been revised to allow for implementation of the presented options following proper authorization by management.

3.1 KSK Ceremony 42 (2021Q1)

Staff has taken lessons learned planning and conducting KSK Ceremony 41, improved details based upon community feedback, and proposes to perform KSK Ceremony 42 in a similar manner which satisfies the broader Internet community and our DPS requirements. The ceremony would be held in the first quarter of 2021, with prospective attendees to be polled on the precise date upon adoption of this resolution.

3.1.1 Graduated set of options for ceremony performance

As with the 41st KSK ceremony held in April 2020, the final configuration of the ceremony will be held based on an assessment of the viability of a graduated set of options. These options provide for alternate mixes of personnel based on the nature of the restrictions around the time the ceremony is due to be held. In all cases, the ceremonies continue to be held in a public and transparent manner, with the ability for community members to participate remotely to assure confidence in how the ceremony is conducted. Compensative controls are effectively implemented to provide assurances regarding the custody of all secure elements used in the ceremony.

3.1.2 Signing for additional calendar quarters

The coronavirus pandemic is expected to continue to significantly impact operations well into 2021. To limit the impact on the ability to hold quarterly key ceremonies, the plan again provides for generating signatures for an extended nine month period. This

relieves the need to hold a subsequent key signing ceremony until the fourth quarter of 2021.

3.2 KSK Ceremony 43 (2021Q4)

A successfully held ceremony in the first quarter of 2021, which generates nine months of signatures, would require the subsequent key ceremony to be held in the fourth quarter of 2021.

Staff will continue to monitor the pandemic and prepare for all possible scenarios for this ceremony in accordance with the graduated approach. Should widespread vaccination programs prove to be successful, and international travel limitations be relaxed, it is conceivable a late-2021 ceremony could be conducted in its normal format with international in-person participation.

4. Stakeholder Consultation

The original contingency plan was developed in early 2020 through wide community engagement, including expected ceremony participants, the third-party auditor, the root zone maintainer, the vendors that support the key ceremony, the trusted community representatives and former ceremony attendees, ICANN (Internet Corporation for Assigned Names and Numbers)'s Root Zone (Root Zone) Evolution Review

Committee, and a number of relevant industry mailing lists. Subsequent to the April 2020 ceremony, the feedback received was universally positive that the modified format met the objectives and retained community trust in KSK management.

Many of these same parties have been apprised of our intention to extend the contingency plan into 2021 and have supported these efforts.

5. **Fiscal Impact**

This proposal is not anticipated to have a material fiscal impact beyond normal operational costs associated with KSK management.

6. **Public Consultation Requirements**

This matter relates to IANA (Internet Assigned Numbers Authority) Naming Functions operations, performed by PTI under contract from ICANN (Internet Corporation for Assigned Names and Numbers). Procedures that are used in KSK operations must be approved by the Policy Management Authority, an internal ICANN (Internet Corporation for Assigned Names and Numbers) Org committee. There is no formal public comment requirement, however, IANA (Internet Assigned Numbers Authority) staff will continue to consult with the trusted community representatives and other stakeholders to implement and adapt these plans.

7. **Public Interest**

The Board's action is within the public

interest and within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission as it will help to continue to ensure the stable and secure operation of the Internet's unique identifier systems. The inability to conduct key signing ceremonies in a timely manner would result in widespread DNS (Domain Name System) resolution failure globally as DNSSEC (DNS Security Extensions) would cease to function. The Board's action will help ensure that DNSSEC (DNS Security Extensions)-enabled devices will be able to resolve any domain names.

8. Key Risks

The following risk considerations were factored into the Board's deliberations on this action.

8.1 Travel of attendees is interrupted

The primary risk that this plan is designed to address is the inability of attendees to safely attend the key ceremony. The suggested mitigation is the graduated approach to different options to hold the ceremony, up to and including holding a ceremony only with staff in the Los Angeles metropolitan area, that will not require air or interstate travel, and with safety precautions for the individual attendees.

8.2 Facility operator suspends

access to facility

The company that provides the facilities in which the KMFs are based may suspend access as part of their response to the pandemic. The suggested mitigation would be to advocate to their senior management, through trusted proxies if necessary, to make an exception given the requirement to hold this ceremony to support critical Internet infrastructure and Internet operation. ICANN (Internet Corporation for Assigned Names and Numbers) has been in discussion with the local and national authorities about issuance of special guidance should it be necessary to retain the access needed to perform the key ceremony.

8.3 Government suspends access to the facility, and/or constrains travel

Governments at different levels may impose restrictions on travel or gatherings that impede the ability to hold the ceremony. ICANN (Internet Corporation for Assigned Names and Numbers) can advocate for exceptions to be made through the appropriate channels, as described in the previous section, noting the requirement to hold this ceremony to support critical Internet infrastructure and Internet

operation. In particular, ICANN (Internet Corporation for Assigned Names and Numbers) has existing relationships with governments that can be used to seek such exemptions.

8.4 Staff become ill or otherwise indisposed

The minimum essential personnel may be incapable of performing the ceremony because they themselves are ill, quarantined or otherwise unavailable. The primary mitigation is PTI staff and other support staff from ICANN (Internet Corporation for Assigned Names and Numbers) Org have been implementing social distancing since the beginning of March 2020 to limit potential transfer of illness. Additionally, there is approximately a three-month window to traverse the options presented, with sufficient slack to allow the exact date within each option to be adjusted to allow for recovery and still be held. There is also depth in staffing such that essential roles can be performed by different personnel if needed.

d. Change to Credit Card Payments Processing Service Agreement

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) has established a need to enter into a new contract for the processing of credit card payments, supported by *[REDACTED-FOR NEGOTIATION]*

PURPOSES].

Whereas, the Board Finance Committee has reviewed the financial implication of contracting with *[REDACTED-FOR NEGOTIATION PURPOSES]*.

Whereas, both the organization and the Board Finance Committee have recommended that the Board authorize the President and CEO, or his designee(s), to take all actions necessary to execute the new contract with *[REDACTED-FOR NEGOTIATION PURPOSES]* and to make all necessary disbursements pursuant to the contract.

Resolved (2020.12.17.05) the Board authorizes the President and CEO, or his designee(s), to take all necessary actions to execute a new contract with *[REDACTED-FOR NEGOTIATION PURPOSES]* and to make all necessary disbursements pursuant to the contract.

Resolved (2020.12.17.06), specific items within this resolution shall remain confidential for negotiation purposes pursuant to Article 3, section 3.5(b) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws until the President and CEO determines that the confidential information may be released.

***Rationale for Resolutions
2020.12.17.05 – 2020.12.17.06***

ICANN (Internet Corporation for Assigned Names and Numbers) org has partnered with *[REDACTED-FOR NEGOTIATION PURPOSES]* for the processing of credit card payments since September 2007. Over the years, the volume of payments that ICANN (Internet Corporation for Assigned Names and Numbers)

receives by credit cards has increased and the tiered rate structure negotiated in 2007 is no longer favorable to ICANN (Internet Corporation for Assigned Names and Numbers). However, ICANN (Internet Corporation for Assigned Names and Numbers) wishes to continue offering this convenient method of payment to its stakeholders through its longtime partner and reputable service provider, *[REDACTED-FOR NEGOTIATION PURPOSES]*.

ICANN (Internet Corporation for Assigned Names and Numbers) determined that under a new rate structure, *[REDACTED-FOR NEGOTIATION PURPOSES]* provided the most cost savings and best product value following a formal Request for Proposal (RFP) to identify potential service providers against 10 nominees and three participants.

[REDACTED-FOR NEGOTIATION PURPOSES] offers minimal transition efforts and a good history of transferring funds between the issuing bank and ICANN (Internet Corporation for Assigned Names and Numbers), without delays or disputes. *[REDACTED-FOR NEGOTIATION PURPOSES]* also meets ICANN (Internet Corporation for Assigned Names and Numbers)'s three primary objectives:

1. Secure services that meet global and local laws and regulations.
2. Reduce ICANN (Internet Corporation for Assigned Names and Numbers)'s cost associated with credit card merchant fees.
3. Migrate to a payment gateway service, increasing efficiency and accuracy for payments received by credit card.

ICANN (Internet Corporation for Assigned Names and Numbers) has also negotiated favorable terms. The initial term of the new contract is three years with an automatic one-year renewal period. The contract can be canceled at any time with 60-days advance notice. The *[REDACTED-FOR NEGOTIATION PURPOSES]* fees are fixed for the contract term and will not increase.

After careful analysis, the Board agrees with the organization that the new contract is a more cost-effective solution for offering payments by credit cards at this time. The Board understands that the organization will continue to review other payment alternatives to further reduce the expense associated with these services and it will implement a process of regularly reviewing the fees billed by the service provider.

Executing the contract on favorable terms is in the public interest as it will lower ICANN (Internet Corporation for Assigned Names and Numbers)'s expenses without any impact to the services ICANN (Internet Corporation for Assigned Names and Numbers) provides to its community and therefore is also consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission.

There is a positive fiscal impact in that the new contract will result in a significant decrease in credit card processing fees. There is no anticipated impact to the security, stability, and resiliency of the domain name system.

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

All members of the Board present voted in favor of Resolutions 2020.12.17.01, 2020.12.17.02, 2020.12.17.03, 2020.12.17.04, 2020.12.17.05, and 2020.12.17.06. One Director was unavailable to vote. The Resolutions carried.

2. Main Agenda:

The Chair introduced the items on the Main Agenda and asked the Board shepherds to lead the discussion for their respective items.

a. 2020 Strategic Outlook Trends Report

Matthew Shears, Chair of the Board Strategic Planning Committee (SPC), provided the Board with an overview of the proposed resolution. The Board previously [adopted \(/resources/board-material/resolutions-2019-06-23-en#2.a\)](#) the [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) Strategic Plan for Fiscal Years 2021 to 2025 and directed that as part of the on-going annual planning cycle with the community, new trends or shifts in existing trends be factored into the annual iteration of [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s plans as appropriate. These efforts are conducted under a process known as the Strategic Outlook trend identification process. Between November 2019 and March 2020, [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) org convened 21 Strategic Outlook trends identification sessions with 398 participants from the community and the organization, resulting in 1,853 data points collected.

Thereafter, the Strategic Planning Board Working Group, as supported by [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) org, conducted a thorough analysis of the trend session data inputs received, including assessing the trends, risks, opportunities, and potential impacts on [ICANN](#)

(Internet Corporation for Assigned Names and Numbers). The SPC, on the basis of the work accomplished by the Strategic Planning Board Working Group, recommends keeping the ICANN (Internet Corporation for Assigned Names and Numbers) Strategic Plan for Fiscal Years 2021 to 2025 unchanged, with no restatement of the Strategic Plan needed at this time.

Following discussion, the Chair called for a vote and the Board took the following action:

Whereas, following community and ICANN (Internet Corporation for Assigned Names and Numbers) organization inputs received between November 2019 and March 2020 on key trends anticipated to impact ICANN (Internet Corporation for Assigned Names and Numbers) in the coming years, the Board conducted an analysis, and concluded that the strategic objectives for ICANN (Internet Corporation for Assigned Names and Numbers), as reflected in the Strategic Plan for Fiscal Years 2021-2025, do not need to change.

Whereas, on 22 October 2020, the Board formed a Strategic Planning Committee to oversee the annual strategic outlook (trends) process to identify relevant trends and events that inform ICANN (Internet Corporation for Assigned Names and Numbers)'s strategic planning and prioritization efforts. Prior to that date, the Board relied upon the use of a Board Working Group on Strategic Planning. This working group, as supported by ICANN (Internet Corporation for Assigned Names and Numbers) organization, played a central role in reviewing and analyzing the results of the trend work and the related opportunities, risks, and impacts on ICANN (Internet Corporation for Assigned Names and Numbers). The working

group articulated this work into a set of proposed priority trends, related impacts, and associated strategic and/or tactical recommendations for full-Board consideration.

Whereas, members of the ICANN (Internet Corporation for Assigned Names and Numbers) Board and ICANN (Internet Corporation for Assigned Names and Numbers) organization held a webinar with the community on 06 October 2020 to present the Strategic Outlook process and methods used to conduct the analysis.

Resolved (2020.12.17.07), the Board affirms that the ICANN (Internet Corporation for Assigned Names and Numbers) Strategic Plan for Fiscal Years 2021 to 2025 shall remain in force and unchanged, with no restatement of the Strategic Plan needed at this time.

Resolved (2020.12.17.08), the Board recognizes that there may be a future need to evolve this Strategic Plan, such as to address funding realities identified through the update of ICANN (Internet Corporation for Assigned Names and Numbers)'s Five-Year Operating and Financial Plan, or mid-course modifications during the life of the Strategic Plan. If such change is needed, the Board will direct the ICANN (Internet Corporation for Assigned Names and Numbers) org on the scope of further actions.

All Board members present voted in favor of Resolutions 2020.12.17.07 and 2020.12.17.08. One Director was unavailable to vote. The Resolutions carried.

Rationale for Resolutions

2020.12.17.07 – 2020.12.17.08

On 23 June 2019, the Board adopted [\(/resources/board-material/resolutions-2019-06-23-en#2.a\)](#) the ICANN (Internet Corporation for Assigned Names and Numbers) Strategic Plan for Fiscal Years 2021 to 2025 and directed that as part of the on-going annual planning cycle with the community, new trends or shifts in existing trends be factored into the annual iteration of ICANN (Internet Corporation for Assigned Names and Numbers)'s plans as appropriate. These efforts are conducted under a process known as the Strategic Outlook trend identification process.

The Strategic Outlook trend identification is an annual process, which ensures ICANN (Internet Corporation for Assigned Names and Numbers) has a consistent way to: identify and track trends; prepare for opportunities; mitigate or avoid challenges; inform strategic and operational planning and prioritization.

It is a joint effort between the ICANN (Internet Corporation for Assigned Names and Numbers) organization, the community, and the ICANN (Internet Corporation for Assigned Names and Numbers) Board to engage on emerging or evolving trends that affect ICANN (Internet Corporation for Assigned Names and Numbers). Trends indicate general directions in which things are developing or changing, that have or could have an impact on ICANN (Internet Corporation for Assigned Names and Numbers), its mission, its operations, or its ecosystem. Trends can be internal or external, organization-specific, community-related, or go beyond ICANN (Internet Corporation for Assigned Names and Numbers)'s ecosystem as ICANN (Internet Corporation for Assigned Names and Numbers) does not operate in a

vacuum.

ICANN (Internet Corporation for Assigned Names and Numbers) org has found the exercise to be beneficial to help surface opportunities and challenges that lay ahead, inform planning, help with prioritization considerations, and risk management.

Between November 2019 and March 2020, ICANN (Internet Corporation for Assigned Names and Numbers) org convened 21 Strategic Outlook trends identification sessions with 398 participants from the community and the organization, resulting in 1,853 data points collected. Community sessions outputs have been published on the Strategic Planning page of the icann.org website.

Between April and September 2020, the Strategic Planning Board Working Group, as supported by ICANN (Internet Corporation for Assigned Names and Numbers) org, conducted a thorough analysis of the trend session data inputs received, including assessing the trends, risks, opportunities, and potential impacts on ICANN (Internet Corporation for Assigned Names and Numbers). The details of this analysis and associated recommendations have been documented in the *2020 Strategic Outlook Trends Report* document attached to this paper for reference.

The Board Strategic Planning Committee, on the basis of the work accomplished by the Strategic Planning Board Working Group in place prior to the [formation \(/resources/board-material/resolutions-2-2020-10-22-en#1.c\)](#) of the committee, recommends keeping the ICANN (Internet Corporation for Assigned Names and Numbers) Strategic Plan for Fiscal Years 2021

to 2025 unchanged, with no restatement of the Strategic Plan needed at this time.

This resolution is not expected to have a fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers), though the changes anticipated to ICANN (Internet Corporation for Assigned Names and Numbers)'s Operating Plan might have impact once approved. This action is expected to have a positive impact on the security, stability and resiliency of the domain name system (DNS (Domain Name System)) as it continues to support ICANN (Internet Corporation for Assigned Names and Numbers)'s strategic work in this area.

This resolution serves ICANN (Internet Corporation for Assigned Names and Numbers)'s mission in ensuring a secure and stable operation of the Internet's unique identifier systems. The ICANN (Internet Corporation for Assigned Names and Numbers) Strategic Plan for Fiscal Years 2021-2025 builds upon ICANN (Internet Corporation for Assigned Names and Numbers)'s mission so that it may continue to effectively fulfil its aims and meet new and continuously evolving challenges and opportunities.

This resolution is in the public interest as the Strategic Plan guides ICANN (Internet Corporation for Assigned Names and Numbers)'s activities and informs ICANN (Internet Corporation for Assigned Names and Numbers)'s operating plans and budgets to fulfil its mission in fiscal years 2021 through 2025. The Strategic Plan serves the public interest by articulating the path towards a new vision to be a champion of the single, open, and globally interoperable Internet. The Strategic

Plan complies with ICANN (Internet Corporation for Assigned Names and Numbers)'s commitments and is guided by ICANN (Internet Corporation for Assigned Names and Numbers)'s core values.

This is an Organizational Administrative Function that has been subject to community consultation as noted above, and is not requiring further public comment.

b. **ICANN (Internet Corporation for Assigned Names and Numbers) Organization Risk Appetite Statement**

Lito Ibarra, Chair of the Board Risk Committee, provided the Board with an overview of the proposed resolution. The Board is being asked to approve the ICANN (Internet Corporation for Assigned Names and Numbers) org Risk Appetite Statement. The Risk Appetite Statement was developed by the organization's Risk Management function in collaboration with representation of every organization function. It articulates the level of risk which ICANN (Internet Corporation for Assigned Names and Numbers) organization is willing to take and retain on a broad level to deliver its mission. The Risk Appetite Statement was reviewed by the organization Executive Team and approved by the ICANN (Internet Corporation for Assigned Names and Numbers) President and CEO for consideration by the Board Risk Committee. The Board Risk Committee reviewed and recommended that the Board approve the ICANN (Internet Corporation for Assigned Names and Numbers) organization Risk Appetite Statement.

Several members of the Board thanked everyone involved, especially ICANN (Internet Corporation for Assigned Names and Numbers) org members, for the work that went into developing the Risk Appetite Statement.

Following discussion, the Chair called for a vote and the Board took the following action:

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Board previously recognized the benefit of and need for a Risk Management Framework to guide the ICANN (Internet Corporation for Assigned Names and Numbers) organization in managing risks it faces.

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Board previously set a target model for the Risk Management Framework including a Risk Appetite Statement.

Whereas, risk management involves the identification of vulnerabilities to the organization and therefore it would not be prudent to publish the Risk Appetite Statement.

Resolved (2020.12.17.09), the Board approves the ICANN (Internet Corporation for Assigned Names and Numbers) Organization Risk Appetite Statement and directs the President and CEO, or his designee(s), to publish a summary of it.

All Board members present voted in favor of Resolution 2020.12.17.09. One Director was unavailable to vote. The Resolution carried.

Rationale for Resolution 2020.12.17.09

This Risk Appetite Statement articulates the level of risk which ICANN (Internet Corporation for Assigned Names and Numbers) organization is willing to take and retain on a

broad level to deliver its mission.

The ICANN (Internet Corporation for Assigned Names and Numbers) Organization Risk Appetite Statement:

- Communicates to personnel that they need to pursue objectives within acceptable risk limits.
- Provides input for prioritization for planning and budgeting.
- Guides the Board and in its decision making and can be considered as part of the rationale that accompanies Board resolutions.
- Informs performance management and incentive measurement, and guides personnel to make decisions that are aligned to the organizational risk appetite.
- Encourages a risk management, not risk aversion, culture so that risk management is a responsibility shared across the organization and for which all personnel are accountable.
- Enhances ICANN (Internet Corporation for Assigned Names and Numbers)'s reputation by demonstrating that the organization is committed to proactively managing risk.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board and the ICANN (Internet Corporation for Assigned Names and Numbers) Executive Team require that a robust Risk Management Framework be developed and implemented for ICANN (Internet Corporation for Assigned Names and Numbers) organization. As part of the Target Operating

Model for Risk Management, a Risk Appetite Statement is part of a mature framework.

The Board of Directors and the ICANN (Internet Corporation for Assigned Names and Numbers) org Executive Team are responsible for making informed decisions to set the level of accepted risk. The Risk Appetite Statement specifies the risks the organization is willing to take and retain, thereby demonstrating the risk appetite of the leadership of ICANN (Internet Corporation for Assigned Names and Numbers) which can then be used to guide the operations of ICANN (Internet Corporation for Assigned Names and Numbers).

Note that by design any Risk Appetite Statement is a high-level articulation of the risks faced by an organization. The intention is to provide a concise overview that is accessible to all personnel and the Board. Further, risks often involve vulnerabilities or threats to the organization, and it would be imprudent for any organization to provide public details of such risks.

The Risk Appetite Statement was developed by the organization's Risk Management function in collaboration with representation of every organization function. The Risk Appetite Statement was reviewed by the organization Executive Team and approved by the ICANN (Internet Corporation for Assigned Names and Numbers) President and CEO for consideration by the Board Risk Committee. The Board Risk Committee reviewed and recommended that the Board approve the ICANN (Internet Corporation for Assigned Names and Numbers) organization Risk Appetite Statement. The Board received a presentation on the Risk Appetite Statement earlier in 2020.

Adopting the Risk Appetite Statement is in the public interest and is also fully consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s mission as it articulates the risk appetite of the leadership of ICANN (Internet Corporation for Assigned Names and Numbers) which can then be used to guide the operations of ICANN (Internet Corporation for Assigned Names and Numbers) organization more efficiently and consistently from a risk management perspective.

Adopting the BRC's recommendation has no financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) that was not otherwise anticipated; and it formalizes the Risk Management Framework of ICANN (Internet Corporation for Assigned Names and Numbers) organization, and strengthens its approach to managing the risks it faces, therefore could have a positive impact on the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function that does not require Public Comment.

c. **Afilias Change of Control Approval Request**

No Resolutions were taken. The Chair stated that the Afilias change of control approval request has been discussed by the Board, and that the ICANN (Internet Corporation for Assigned Names and Numbers) President and CEO, or his designee(s), has the support of the Board to move forward on the request.

d. **AOB**

No Resolutions were taken.

3. Executive Session:

The Board entered a confidential session. The Board undertook the following actions during its confidential session:

a. **President and CEO At-Risk Compensation for First Half of FY21**

Whereas, each Board member has confirmed that he/she does not have a conflict of interest with respect to establishing the amount of payment to the President and CEO for the first half of FY21 at-risk compensation component.

Whereas, the Compensation Committee recommended that the Board approve payment to the President and CEO for the first half of his FY21 at-risk compensation.

Resolved (2020.12.17.10), the Board hereby approves a payment to the President and CEO for his annual at-risk compensation component for the first half of FY21.

Rationale for Resolution 2020.12.17.10

When the President and CEO was hired, he was offered a base salary, plus an at-risk component of his compensation package. This same structure exists today. Consistent with all personnel with the ICANN (Internet Corporation for Assigned Names and Numbers) organization, the President and CEO is to be evaluated against specific goals, which the President and CEO sets in coordination with the Compensation Committee and the Board.

The President and CEO provided to the Compensation Committee his self-assessment of his mid-year achievements towards his FY21 goals. After reviewing, the Compensation Committee discussed and agreed with the President and CEO's self-assessment. Following discussion, the Compensation

Committee recommended that the Board approve payment to the President and CEO for his at-risk compensation for the first half of FY21. The Board agrees with the Compensation Committee's recommendation.

Taking this decision is in furtherance of ICANN (Internet Corporation for Assigned Names and Numbers)'s Mission and is in the public interest in that it helps ensure that President and CEO is sufficiently compensated in line with his performance in furtherance of the Mission, and which reflects that his goals are consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s Strategic and Operating plans.

While the decision to pay the President and CEO his at-risk compensation for the first half of FY21 will have a fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers), it is an impact that was contemplated in the FY21 budget. This decision will not have an impact on the security, stability or resiliency of the domain name system.

The Chair then called the meeting to a close.

A note about our terms of service:

Published on 05 January 2021

We have updated our electronic terms of service to provide greater transparency and align with laws applicable to us. [Learn more \(/privacy\)](#).

¹ <https://www.iana.org/dnssec/dps> (<https://www.iana.org/dnssec/dps>)

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COMPETITION, CONSUMER TRUST, AND CONSUMER CHOICE REVIEW

Final Report

Competition, Consumer Trust, and Consumer Choice Review
Team
8 September 2018



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1 Executive Summary

ICANN's Affirmation of Commitments (AoC) called for a regular review of the degree to which the New Generic Top-Level Domain (gTLD) Program promoted consumer trust, choice and increased competition in the Domain Name System (DNS) market. This review is called the Competition, Consumer Trust, and Consumer Choice Review (CCT).¹ The AoC further called on the CCT reviews to evaluate the effectiveness of the application and evaluation process for new gTLD applicants and the safeguards put in place to mitigate the risks associated with the expansion of generic top-level domains. These reviews are important because they provide ICANN with an assessment of how the new gTLD round performed in these areas and guidance on key issues (including competition, consumer protection, security, malicious abuse, and rights protection issues) as it contemplates further increase in the number of top-level domains (TLDs). The CCT was asked to weigh the advantages and disadvantages of the New gTLD Program in these key areas and assess whether the Program resulted in net benefits to users of the DNS.

The review team endeavored to be as objective as possible and to base its findings on available data. The more objective the findings, the more likely the impact of implemented recommendations can be measured. The idea of using metrics to evaluate the performance of the DNS began six years ago with an ICANN Board resolution² that called on the community to identify quantitative targets to assess the impact of the New gTLD Program on consumer trust, choice, and competition in the DNS marketplace. Although the particular metrics developed at that time aided the review team's analysis, they ultimately did not form the basis for the majority of the review. However, the CCT Review Team did strive to employ quantitative analysis wherever possible.

The CCT Review Team found that while the New gTLD Program is quite new and the data are incomplete, on balance the expansion of the DNS marketplace has demonstrated increased competition and consumer choice and has been somewhat successful in mitigating its impact on consumer trust and rights (particularly trademark) protection. That said, the review team concluded that the New gTLD Program should be regarded only as a "good start," and that a number of policy issues should be addressed before any further expansion of gTLDs.

In particular, the review team found that critical data were in short supply for the analysis of competition, the effectiveness of safeguards, and the promotion of consumer trust and geographic representation of applicants. Even the definition of the DNS market itself is problematic without additional information about whether consumers view new gTLDs as substitutes for other domain names, such as country code top-level domains (ccTLDs). Some gTLDs compete in narrow markets that serve specialized groups of registrants, and alternative online identities such as Facebook and Yelp pages and third-level domains may serve as substitutes for registrations in gTLDs. Consequently, the CCT Review Team recommends that ICANN enhance its capabilities to gather and analyze data, in particular those used by ICANN's Contractual Compliance Department, prior to further increasing the number of gTLDs. We also identify certain policy issues that the community should resolve prior to the

¹ On 30 September 2009, ICANN and the United States Department of Commerce signed the AoC, which—among other things—committed ICANN to periodically organizing Community-led review teams to assess the impact of the New gTLD Program on the domain name marketplace. In January 2017, the AoC expired following the IANA transition in October 2016. However, many of the provisions contained in the AoC—including Community-led reviews of competition, choice, and trust in the domain name marketplace—have been incorporated into ICANN's revised bylaws (see ICANN, "Bylaws for Internet Corporation for Assigned Names and Numbers: Section 4.6: Specific Reviews," amended 1 October 2016, <https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

² ICANN Board Resolution 2010.12.10.30, "Consumer Choice, Competition and Innovation," (2010), accessed 20 January 2017, <https://www.icann.org/resources/board-material/resolutions-2010-12-10-en#6>

further expansion of the gTLD space. Finally, we recommend a number of specific research projects that should be completed prior to a future CCT, and in many cases, even sooner.

Background

Prior to the start of the CCT Review Team's work in January 2016, ICANN, together with the community, had begun preparatory work to identify metrics to inform the forthcoming review. Data collection on these metrics began in 2014 and continued into 2016.³ In addition, ICANN commissioned two major research projects in 2015 in anticipation of the review team's work: a global consumer end-user and registrant survey, and an economic study of the Program's competitive effects.⁴ These surveys were repeated in 2016 to compare against those conducted in 2015 as newer gTLDs came into operation, and took into consideration, where applicable, additional questions and requirements raised by the review team.⁵

In conducting its analysis, the review team was mindful of the fact that the New gTLD Program had only been in place for a short period of time, that new domain names are continuously entering the marketplace, and thus the full effects of the Program may have not yet have been fully realized. The Team used data that had previously been collected—and commissioned new research where it felt important data were missing—to help inform its analysis. The Team divided its work into four subteams:

- ⦿ **Competition and Consumer Choice.** This subteam examined the effects of the entry of new gTLDs on price and non-price competition in the expanded domain name marketplace, as well as whether consumer choice in the marketplace was effectively enhanced with the introduction of new gTLDs.
- ⦿ **Consumer Trust and Safeguards.** This subteam focused on the extent to which the expansion of new gTLDs has promoted consumer trust and the impact of the safeguards adopted to mitigate any problems that might have arisen as a result of the program.
- ⦿ **Application and Evaluation Process.** The review team explored issues related to the effectiveness of the application process to operate a new gTLD, with a particular focus on the applicant experience, the paucity of applications from underserved regions, and the objection processes.

³ This work was carried out by the Implementation Advisory Group for Competition, Consumer Trust, and Consumer Choice (IAG-CCT). See ICANN Board Resolution 2015.02.12.07 – 2015.02.12.09 “Recommendations for the Collection of Metrics for the New gTLD Program to Support the future AoC Review on Competition, Consumer Trust and Consumer Choice,” (12 February 2015), accessed 3 August 2018, <https://www.icann.org/resources/board-material/resolutions-2015-02-12-en#1.e>

⁴ Nielsen, *ICANN Global Consumer Research* (April 2015), accessed 26 April 2017, <https://www.icann.org/news/announcement-2015-05-29-en>; Nielsen, *ICANN Global Registrant Survey* (September 2015), accessed 26 April 2017, <https://www.icann.org/news/announcement-2015-09-25-en>; Analysis Group, *Phase I Assessment of the Competitive Effects Associated with the New gTLD Program* (September 2015), accessed 3 August 2018, <https://www.icann.org/news/announcement-2-2015-09-28-en>

⁵ Nielsen, *ICANN Global Consumer Research: Wave 2* (June 2016), accessed 26 April 2017, <https://www.icann.org/news/announcement-2-2016-06-23-en>; Nielsen, *ICANN Global Registrant Survey: Wave 2* (August 2016), accessed 26 April 2017, <https://www.icann.org/news/announcement-2-2016-09-15-en>; Analysis Group, *Phase II Assessment of the Competitive Effects Associated with the New gTLD Program* (October 2016), accessed 3 August 2018, <https://www.icann.org/news/announcement-2016-10-11-en>

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- ⦿ **International Trademark Association (INTA) Impact Study.** The subteam was limited in time as it was formed to analyze and draw conclusions on the INTA Impact Study results.⁶

Competition and Consumer Choice

Although it is still too early to evaluate fully the competitive effects of the introduction of 741 delegated new gTLDs as of May 2017 (excluding those that are considered “.brands”),⁷ some preliminary findings suggest that the potential for healthy competition exists and some important indicators are consistent with increased competition. Of particular note, as of December 2016, registrations in new gTLDs accounted for about three-fifths of new registrations in all gTLDs, about 45 percent of new registrations in all TLDs (including open ccTLDs) since the new gTLDs were introduced, and about 58 percent of new registrations in gTLDs and “open” ccTLDs. We also found that, in the same month, new gTLDs accounted for about 14 percent of registrations among new and legacy gTLDs (see Table 2 below).

It is also interesting to note that in 92 percent of the cases in which a second-level domain was available in .com, the registrant nonetheless chose a second-level string in a new gTLD. For example, even if bigshotphotography.com was available, registrants often chose bigshots.photography instead, and in many cases were willing to spend more money to do so.⁸

The structure of the domain name industry itself provides a partial explanation of the potential for sustained competition. In particular, the availability of independent back-end service providers and retailers (registrars) decreases barriers to entry because new registries do not need to invest in supplying their own in-house back-end infrastructure or developing their own sales channels. Consequently, smaller niche registries have a higher likelihood of achieving minimum viable scale.

Early indications are that right holders are less inclined to rely on defensive registrations (i.e., registering a domain simply to prevent others from doing so) than in the past. It’s not clear whether this is the result of the new rights protection mechanisms or simply the sheer volume of new gTLDs. Instead rights holders are engaging in increased monitoring and case by case resolution mechanisms. Further analysis of the distribution of defensive costs (including “blocking,” which entails an agreement with a registry not to sell a domain), direct communication (such as cease and desist correspondence and URS) is currently underway, but preliminary indications are that increases in defensive investment by trademark holders were less than anticipated prior to the launch of the Program.

One caveat to this analysis stems from the existence of a large number of “parked” domains (domains that have been registered but are not yet being used) in new gTLDs. Although not dispositive, the fact that the average parking rate for new gTLDs is higher than for legacy gTLDs may suggest that competition from new gTLDs may not be as significant as indicated

⁶ Nielsen, *INTA New gTLD Cost Impact Study* (April 2017) and INTA, *New gTLD Impact Study Status Report II* (August 2017), accessed 3 August 2018,

<https://community.icann.org/display/CCT/Studies%2C+Research%2C+and+Background+Materials>

⁷ gTLDs considered .brands for the purpose of this review are those which include Specification 13 in their Registry Agreements, or are exempt from the Registry Operator Code of Conduct. See

<https://www.icann.org/resources/pages/registries/registries-agreements-en> and

<https://www.icann.org/news/blog/new-gtld-registry-operator-code-of-conduct>

⁸ This reporting is derived from an analysis of two data sets produced by ICANN organization for the Review Team. See “New gTLD Registrations Available in .com,” (2016 and 2018), and “Existing Registrations in .com Against New gTLDs,” (2016 and 2018), accessed 3 August 2018, available at

<https://community.icann.org/display/CCT/Studies%2C+Research%2C+and+Background+Materials>

by the registration data reported above.⁹ We hope that parking data will be part of the analysis in future reviews.

Consumer Trust and Safeguards

An international survey commissioned by the CCT indicates the domain industry is one of the most trusted in the tech sector and that the dramatic expansion of the DNS has done little thus far to undermine that trust.¹⁰ A key component of this trust seems grounded in familiarity, with legacy gTLDs still more trusted than new gTLDs, and strings with recognized terms more trusted than strings with less familiar terms. In addition, there are indications of a desire among end-users for a more semantic Web in which the domain name is an indicator of the type of content contained within a TLD.

Similarly, consumers reported that restrictions on who could purchase certain gTLDs would engender greater trust, particularly if the domain name itself suggests that the registrant might need to possess a certain license or credentials. These tendencies represent both an opportunity and a danger if the connection between names and content proves to be less direct.

Given the difficulty of defining and measuring “trust,” the review team explored the notion of “trustworthiness” as a proxy for consumer trust. For example, the review team fielded a study on DNS Security Abuse to determine if the rates of abuse were higher or lower in new gTLDs.¹¹ These findings were used to analyze whether or not new gTLDs were inherently less trustworthy than legacy gTLDs, as well as to determine the effectiveness of safeguards implemented as part of the New gTLD Program.¹² The results were mixed, indicating that despite new safeguards, some new gTLD registries and registrars may in fact be less trustworthy than those associated with legacy gTLDs, even if new gTLDs as a whole are not.

Other notable findings on the impact of the new gTLD safeguards include the following:

- ⦿ Ninety-nine percent of registries have implemented safeguards regarding the prevention of abusive activities in their gTLDs as required in their registry-registrar agreements; however, the downstream impact is unclear.¹³
- ⦿ ICANN reports that abuse complaint volumes are typically higher for registrars than registries, but it is difficult to determine if safeguards are affecting rates of abuse.¹⁴

⁹ See ntdstats, “Parking in New gTLDs Overview,” accessed 3 August 2018, <https://ntdstats.com/parking/tld>

¹⁰ Nielsen, *Consumer Research Wave 2* (2016), pp. 63-69.

¹¹ SIDN Labs and the Delft University of Technology (August 2017), *Statistical Analysis of DNS Abuse in gTLDs Final Report*, accessed 3 August 2018, <https://www.icann.org/en/system/files/files/sadaq-final-09aug17-en.pdf>.

“DNS Abuse” is a term used by the Review Team that refers to “intentionally deceptive, conniving, or unsolicited activities that actively make use of the DNS and/or the procedures used to register domain names” (see p. 3 of the “New gTLD Program Safeguards Against DNS Abuse: Revised Report” referenced below). “DNS Security Abuse” in the context of this report refers to specific, technical forms of abusive behavior: malware distribution, phishing, pharming, botnet command-and-control, and spam in the DNS. For more on how abuse has been characterized by the ICANN Community, see the *Registration Abuse Policies Working Group’s Final Report* (29 May 2010), accessed 3 August 2018, https://gnso.icann.org/sites/default/files/filefield_12530/rap-wg-final-report-29may10-en.pdf

¹² ICANN Operations and Policy Research, *New gTLD Program Safeguards Against DNS Abuse: Revised Report* (July 2016), accessed 3 August 2018, <https://www.icann.org/news/announcement-2016-07-18-en>

¹³ ICANN (2015), *ICANN Contractual Compliance 2014 Annual Report*, accessed 7 February 2017, <https://www.icann.org/en/system/files/files/annual-2014-13feb15-en.pdf>, p. 13.

¹⁴ ICANN (2016), *ICANN Contractual Compliance 2015 Annual Report*, accessed 7 February 2017, <https://www.icann.org/en/system/files/files/annual-2015-27jan16-en.pdf>

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- ⦿ WHOIS accuracy complaints remain the largest category of complaints to ICANN Contractual Compliance.¹⁵
 - ⦿ ICANN Contractual Compliance has reported that 96 percent of the 264 registries that were reviewed in 2014 are performing the analysis that is required to determine if they are being used to perpetrate security threats.¹⁶
 - ⦿ The review team examined the rates of UDRP and URS case filings and found an overall decrease in the number of cases filed since 2012, although URS cases in new gTLDs have driven an approximately 10 percent increase in disputes since the recent low point in cases filed in 2013. The review team needs more information on costs related to trademark enforcement before it will be able to reach more specific conclusions in this area.¹⁷

The review team also identified several challenges to its assessment of the extent to which safeguards mitigated risks involved in the expansion of the gTLD space. Ultimately, the safeguards put in place as part of the Program were too narrow in scope to prevent some of the malicious abuse issues identified prior to the introduction of the new gTLDs.¹⁸ Instead, as in legacy gTLDs, DNS Security Abuse still remains a significant issue. Although abuse does not universally persist in all new gTLDs, it is endemic to many. More troubling, at present there is little recourse for the community to stop new gTLD registries and registrars associated with high levels of abuse. This in turn creates incentives for network operators to unilaterally block all traffic from specific TLDs or registrars, running counter to community goals for Universal Acceptance of new gTLDs.¹⁹

The failure to prevent the spread of certain abusive activities to new gTLDs previously identified by the community is significant. The CCT Review Team recognizes the infrastructure role played by domain names in enabling abusive activities that impact the security, stability, and resiliency of the DNS, undermine consumer trust, and, ultimately, impact end-users around the globe. Accordingly, this is a high-priority topic that must be addressed before any further expansion of the DNS, and the review team offers several recommendations to remedy the deficiencies of the status quo and improve the security of the DNS.

As previously mentioned, one challenge to evaluating the impact of safeguards on trustworthiness is the lack of granularity in ICANN Contractual Compliance data. It is unclear what the impact of safeguards imposed on sensitive, regulated, and highly-regulated strings has been since complaints to registrants are difficult to track, as is the lack of detail publicly reported by ICANN Contractual Compliance regarding complaints that it receives. Moreover, provisions related to inherent government functions and cyberbullying that were incorporated into the Registry Agreements were difficult to measure as there were no consequences identified for a failure to comply with these provisions. Finally, the Public Interest Commitments

¹⁵ ICANN, “Contractual Compliance Reports,” accessed 8 August 2018,

<https://www.icann.org/resources/pages/compliance-reports-2016-04-15-en>.

¹⁶ ICANN (2015), *ICANN Contractual Compliance 2014 Annual Report*, accessed 10 August 2018,

<https://www.icann.org/en/system/files/files/annual-2014-13feb15-en.pdf>.

¹⁷ ICANN, “CCT Metrics Reporting Page: Rights Protection Mechanisms,” accessed 3 August 2018,

<https://www.icann.org/resources/pages/cct-metrics-rpm-2016-06-27-en>.

¹⁸ ICANN (3 October 2009), *Exploratory Memorandum: Mitigating Malicious Conduct*, accessed 9 November

2016, <https://archive.icann.org/en/topics/new-gtlds/mitigating-malicious-conduct-04oct09-en.pdf>

¹⁹ “Universal Acceptance” refers to an effort to encourage “Internet applications and systems [to] treat all TLDs in a consistent manner, including new gTLDs and internationalized TLDs. Specifically, they must accept, validate, store, process and display all domain names.” See ICANN, “Universal Acceptance,” accessed 3 August 2018,

<https://www.icann.org/resources/pages/universal-acceptance-2012-02-25-en>

(PICs) incorporated into Registry Agreements were particularly challenging to assess because they varied greatly.²⁰ It remains unclear how effective enforcement of the PICs has been.

Application and Evaluation

Here the review team chose to focus less on the complexity and any inefficiencies of the application and evaluation process and more on the potential inequities of the program as implemented. Of particular concern to the review team was the relatively low application rate from entities in the “Global South.”²¹

The CCT Review Team commissioned two focused efforts to explore applicant experiences and barriers to entry for those who did not apply to operate a new gTLD.²² Although more than half of the applicants to the New gTLD Program indicated they would go through the process again (even with no changes), a large majority indicated the Program was overly complex and bureaucratic, and that the assistance of outside consultants was necessary. Therefore, it should come as no surprise that a focus group of potential applicant cohorts (similar entities to those who applied) in the Global South indicated not only a lack of awareness of the Program as a whole, but also concerns over the complexity of the application process and a lack of available assistance in applying. Although not the most frequently expressed concern, nearly every cohort expressed concerns about the return on investment from operating a new gTLD. Programs that were put in place to facilitate and encourage applications from the Global South were thought to be both poorly monitored and largely ineffective. The ICANN community needs to make a decision about the importance of applications from the Global South (and by extension, from other underrepresented regions) and, if appropriate, to take further steps to encourage those applications. It is clear that if the community wants more applications from underrepresented regions, more needs to be done.

Further analysis of the application process revealed that the implementation of policies around issues such as string confusion was inconsistent and unpredictable. More clarity is needed in the Applicant Guidebook (AGB) to reduce this inconsistency going forward.²³

Finally, the CCT Review Team found that Governmental Advisory Committee (GAC) participation in the application and evaluation process was largely beneficial and led directly to modifications of applications and applicants more successfully navigating the process.

Rights Protection Mechanisms

An important aspect of the safeguards available in new gTLDs are the Rights Protection Mechanisms (RPMs) which were specifically developed in connection with the introduction of the New gTLD Program. The RPM’s were meant to stand alongside existing rights protection mechanisms such as the Uniform Dispute Resolution Process (UDRP). The CCT Review

²⁰ See ICANN Wiki, “Public Interest Commitments,” accessed 3 August 2018, https://icannwiki.org/Public_Interest_Commitments.

²¹ “Global South” is a fluid and sometimes contested term used by social scientists to refer broadly to regions in Latin America, Asia, Africa, and Oceania. For an overview of the term’s origins and use, see Nour Dados and Raewyn Connell, “The Global South,” *Contexts: Journal of the American Sociological Association* [11, 1] (2012): <http://journals.sagepub.com/doi/pdf/10.1177/1536504212436479>

²² AMGlobal Consulting, *New gTLDs and the Global South: Understanding Limited Global South Demand in the Most Recent New gTLD Round and Options Going Forward* (October 2016), accessed 3 August 2018, <https://community.icann.org/display/CCT/Studies%2C+Research%2C+and+Background+Materials>

²³ ICANN, *gTLD Applicant Guidebook* (June 2012), accessed 3 August 2018, <https://newgtlds.icann.org/en/applicants/agb>

Team examined whether these RPMs help encourage a safe environment and promote consumer trust in the DNS. The CCT Review Team also sought to measure the cost impact of the New gTLD Program on intellectual property owners. The early indicators are that there is proportionately more trademark infringement in new gTLDs than in legacy TLDs.

The data available indicated that the number of domain name disputes had increased since the introduction of new gTLDs, with disputes rising year-on-year after their introduction. Of course, a rising number of domain name disputes is not in itself surprising, given the expansion of the DNS and increased number of domain name registrations worldwide. Thus, the CCT Review Team sought an answer to the more pertinent question of whether there is proportionately more trademark infringement in new gTLDs than in legacy TLDs. This is a more difficult issue, as there are many factors involved in assessing trademark infringement, and minimal data is available. For example, in addition to the UDRP and URS, trademark owners also use a variety of other means to deal with abusive domain name registrations, such as court actions and demand letters, which are not tracked centrally. Nor are the costs associated with such actions available. It is also not within ICANN's remit to track or attempt to track such data. The International Trademark Association (INTA) conducted a study of its membership to begin to explore the experience of trademark holders that reveals some of the complexities in obtaining such information. The INTA study was directed to the 1,096 corporations, nonprofits and other entities that own trademark portfolios and are considered "regular" members under INTA's membership structure. Outside counsel and other categories of trademark service providers were not the targets of the survey. This decision was made in order to avoid overlap with brand owners whose outside counsel may also be receiving the survey. Ninety-three respondents entered the survey and 33 completed it. Subsequent feedback suggests that the complexity of the questions, the length of the survey, and the survey methodology, generally, discouraged completion.

The CCT Review Team examined the survey results and supplemented these with its own analysis. While the survey received a low number of respondents, the INTA survey offers some interesting findings with respect to the costs of trademark enforcement in the new gTLDs to brand owners. The survey found that "new TLD registrations [by brand owners] primarily duplicate legacy TLD or ccTLD registrations." In particular, only 17% of respondents had registered names in the new gTLDs for the first time versus duplicating existing domains in legacy gTLDs or ccTLDs. This suggests that defensive registrations may remain an issue in the New gTLD Program. While one of the stated purposes of the New gTLD Program was to create greater choice, the primary consideration for domain registration by brand owners who participated in the survey appears to be defensive.

However, the survey also indicates that for the respondents the expansion of the New gTLD Program has made defensive registrations a less efficient means of protection. Accordingly, it appears that trademark holders are shifting their protection spending to alternatives and expanded monitoring. Furthermore, the survey suggests that as many as 75% of domain name dispute cases involve entities that have registered their domain names using privacy and proxy services making it difficult to assess whether this abuse is tied to common actors. These results suggest the need for further research in these systems. Finally, there is an indication that enforcement costs have increased in the new domains, which suggests that at least for respondents, there is greater infringement in those new domains than in legacy gTLDs and ccTLDs. The INTA survey suggests that, at the very least, further research is necessary, perhaps with a simplified methodology to encourage a higher completion rate. Nonetheless, the exercise did provide useful information in terms of indicating trends. It is clear that the brand owners that participated in this survey have experienced some frustration with the New gTLD Program and the rights protection mechanisms that have been put in place.

The CCT Review Team also looked to data collected by ICANN as well as data from the World Intellectual Property Organization ("WIPO"). ICANN's metrics data shows that domain name disputes are rising alongside total domain name registrations but does not show a breakdown of the relative use of UDRPs, i.e. the use of UDRPs in new gTLDs as opposed to legacy TLDs. WIPO data for 2017 however does give a strong indication that there is proportionately more trademark infringement in new gTLDs than in legacy TLDs.

The CCT Review Team could not definitively conclude whether the URS is a valuable RPM given its low usage compared to the UDRP. The fact that the TM-PDDRP and RRDRP have not been invoked to date may on the one hand bring into question their effectiveness but may equally suggest that their mere existence is acting as a successful deterrent. Conclusions from the RPM review currently underway may shed some more light on the issue in the near future.

Recommendations

In light of the studies and analyses carried out for this review, the CCT Review Team has developed recommendations that fall into three main categories:

- ⦿ Requests for more and better data collection
- ⦿ Policy issues to be addressed by the community
- ⦿ Suggested reforms relating to transparency and data collection within ICANN Contractual Compliance

The review team has assigned a priority level to each recommendation, which reflects the timeframe in which each should be implemented and the extent to which any particular recommendation should be a prerequisite to further expansion of the DNS.

Data Gathering

In general, the review team's work was hampered by insufficient data on pricing of domain names, including wholesale, retail, and secondary market prices. In addition, collection of data about a country at a regional level would make it possible to assess competition in narrower geographic areas. Furthermore, the lack of data regarding DNS abuse and lack of more granular information about the subject matter of complaints received by ICANN Contractual Compliance also created obstacles to assessing the effectiveness of the safeguards and the trustworthiness of the new gTLDs. Some of this additional data collection will require changes to registry and registrar contracts, which will take some time, but the review team believes that it is necessary for proper evaluation of reforms to the New gTLD Program. Other data are collected by third parties, and also could be used by ICANN. To the extent possible, relevant data should be made available in an easily accessible and non-confidential form to researchers both within and outside the ICANN community. The CCT Review Team recommends that data gathering become a priority inside ICANN, with an emphasis on data-driven analysis and programmatic success measurement.

ICANN Contractual Compliance

The CCT Review Team found that current data available from ICANN Contractual Compliance are insufficient to measure the enforcement of various contract provisions and the success of safeguards in mitigating downstream consequences to DNS expansion. Part of the problem

is transparency, in part due to the lack of granularity of the data that are being collected. The CCT make several recommendations for practical reform within ICANN Contractual Compliance.²⁴

Conclusion

Initial indications are that the New gTLD Program has led to a dramatic increase in consumer choice, a modest, but important, increase in competition, and has had a minimal impact on consumer trust. However, there are several TLDs with a disproportionate level of DNS security abuse and the review team recommends enhancements to various enforcement mechanisms prior to any further additions to the DNS. The review team believes that there is a substantial need for more and better data on both competition and pricing, and on the impact of safeguards on consumer protection.

²⁴ Since the publication of the CCT Review Team’s draft recommendations for public comment, ICANN Contractual Compliance has considered the review team recommendations in implementing certain changes described in the blogs of October 2017, “Enhancing Transparency in Contractual Compliance Reporting,” <https://www.icann.org/news/blog/enhancing-transparency-in-contractual-compliance-reporting>, and March 2018, “Enhancing Transparency in Contractual Compliance Reporting,” <https://www.icann.org/news/blog/enhancing-transparency-in-contractual-compliance-reporting-en>.

2 CCT Review Team Recommendations

The review team's recommendations are summarized in the table below. The full recommendations, with related findings and rationale, may be found in the cited chapters.

Prerequisite or priority level: Per the ICANN Bylaws, the CCT Review Team indicated whether each recommendation must be implemented prior to the launch of subsequent procedures for new gTLDs.²⁵ The review team agreed that those recommendations that were not categorized as prerequisites would be given a time-bound priority level:

- ⦿ **High priority:** Must be implemented within 18 months of the issuance of a final report
- ⦿ **Medium priority:** Must be implemented with 36 months of the issuance of a final report
- ⦿ **Low priority:** Must be implemented prior to the start of the next CCT Review

²⁵ See ICANN, "Bylaws for Internet Corporation for Assigned Names and Numbers," amended 18 June 2018, <https://www.icann.org/resources/pages/governance/bylaws-en/>, Section 4.6.d.iv: "For each of its recommendations, the CCT Review Team should indicate whether the recommendation, if accepted by the Board, must be implemented before opening subsequent rounds of new generic top-level domain applications periods."

#	Recommendation	To	Prerequisite or priority level	Con sens us
Chapter 5. Data-Driven Analysis: Recommendations for Additional Data Collection and Analysis				
1	Formalize and promote ongoing data collection.	ICANN organization	High	Yes
Chapter 6. Competition				
2	Collect wholesale pricing for legacy gTLDs.	ICANN organization	Low	Yes
3	Collect transactional pricing for the gTLD marketplace.	ICANN organization	Medium	Yes
4	Collect retail pricing for the domain marketplace.	ICANN organization	Low	Yes
5	Collect secondary market data.	ICANN organization	High	Yes
6	Partner with mechanisms and entities involved with the collection of TLD data. As feasible, collect TLD registration number data per TLD and registrar at a country-by-country level in order to perform analysis based on the same methods used in the Latin American and Caribbean DNS Marketplace (LAC) Study. ²⁶	ICANN organization	Low	Yes
7	Collect domain usage data to better understand the implications of parked domains.	ICANN organization	High	Yes
Chapter 7. Consumer Choice				
8	Conduct periodic surveys of registrants that gathers both objective and subjective information with a goal of creating more concrete and actionable information.	ICANN organization	Low	Yes
9	The ICANN community should consider whether the costs related to defensive registration for the small number of brands registering a large number of domains can be reduced.	New gTLD Subsequent Procedures PDP Working Group and/or Rights Protection Mechanisms (RPM) PDP Working Group	Prerequisite	Yes
10	The GNSO should initiate a new Policy Development Process (PDP) to create a consistent privacy baseline across all registries, including to explicitly cover cases of privacy infringements such as sharing or selling personal data without a lawful basis, such as the consent of that person. The GNSO PDP should consider limiting the collection and processing of personal data within rules which are mandatory for all gTLD registries. It should also consider not allowing registries to share personal data with third parties without a lawful basis, such as the consent of that person or under circumstances defined by applicable law (e.g. upon requests of government agencies, IP lawyers, etc.). Also, it is necessary to be aware of emerging, applicable regulations related to the processing of the personal data. For	Generic Names Supporting Organization	Medium	Yes

²⁶ Oxford Information Labs, EURid, InterConnect Communications (22 September 2016), Latin American and Caribbean DNS Marketplace Study (hereafter LAC Study), accessed 6 August 2018, <https://www.icann.org/en/system/files/files/lac-dns-marketplace-study-22sep16-en.pdf>.

#	Recommendation	To	Prerequisite or priority level	Consensus
	clarification, this recommendation does not relate to issues involving WHOIS or registration directory services data.			
Chapter 8. Consumer Trust				
11	Conduct periodic end-user consumer surveys. Future review teams should work with survey experts to conceive more behavioral measures of consumer trust that gather both objective and subjective data with a goal toward generating more concrete and actionable information.	ICANN organization and future CCT Review Teams	Prerequisite	Yes
12	Create incentives and/or eliminate current disincentives that encourage gTLD registries to meet user expectations regarding: (1) the relationship of content of a gTLD to its name; (2) restrictions as to who can register a domain name in certain gTLDs based upon implied messages of trust conveyed by the name of its gTLDs (particularly in sensitive or regulated industries) and (3) the safety and security of users' personal and sensitive information (including health and financial information). These incentives could relate to applicants who choose to make public interest commitments in their applications that relate to these expectations. Ensure that applicants for any subsequent rounds are aware of these public expectations by inserting information about the results of the ICANN surveys in the Applicant Guide Books.	New gTLD Subsequent Procedures PDP Working Group	Prerequisite (incentives could be implemented as part of application process)	Yes
13	ICANN should collect data in conjunction with its related data collection activities on the impact of restrictions on who can buy domains within certain new gTLDs (registration restrictions) to help regularly determine and report: <ol style="list-style-type: none"> Whether consumers and registrants are aware that certain new gTLDs have registration restrictions; Compare consumer trust levels between new gTLDs with varying degrees of registration restrictions; Determine whether the lower abuse rates associated with gTLDs that impose stricter registration policies identified in the Statistical Analysis of DNS Abuse in gTLDs Study continue to be present within new gTLDs that impose registration restrictions as compared with new gTLDs that do not;²⁷ 	ICANN organization	Low	Yes

²⁷ SIDN Labs and the Delft University of Technology, "DNS Abuse in gTLDs".

#	Recommendation	To	Prerequisite or priority level	Con sens us
	<p>4. Assess the costs and benefits of registration restrictions to contracted parties and the public (to include impacts on competition and consumer choice) and;</p> <p>5. Determine whether and how such registration restrictions are enforced or challenged.</p>			
Chapter 9. Safeguards				
14	Consider directing ICANN organization, in its discussions with registries, to negotiate amendments to existing Registry Agreements, or in consideration of new Registry Agreements associated with subsequent rounds of new gTLDs, to include provisions in the agreements to provide incentives, including financial incentives for registries, especially open registries, to adopt proactive anti-abuse measures. ²⁸	The ICANN Board, the Registry Stakeholders Group, the Registrar Stakeholders Group, the Generic Names Supporting Organization, and the Subsequent Procedures PDP WG.	High	Yes
15	ICANN Org should, in its discussions with registrars and registries, negotiate amendments to the Registrar Accreditation Agreement and Registry Agreements to include provisions aimed at preventing systemic use of specific registrars or registries for DNS Security Abuse. With a view to implementing this recommendation as early as possible, and provided this can be done, then this could be brought into effect by a contractual amendment through the bilateral review of the Agreements. In particular, ICANN should establish thresholds of abuse at which compliance inquiries are automatically triggered, with a higher threshold at which registrars and registries are presumed to be in default of their agreements. If the community determines that ICANN org itself is	The ICANN Board, the Registry Stakeholders Group, the Registrar Stakeholders Group, the Generic Names Supporting Organization and the Subsequent Procedures PDP WG	Prerequisite (provisions to address systemic DNS Security Abuse should be included in the baseline contract for any future new gTLDs)	Yes

²⁸ The review team looked for examples of practices that could assist in proactively minimizing abuse. One such example has been proposed by EURid, the operator of the .EU registry, which will soon test a delayed delegation system. See EURid, "EURid Set to Launch First of its Kind Domain Name Abuse Prevention Tool," 2017, accessed 8 August 2018, <https://eurid.eu/en/news/eurid-set-to-launch-first-of-its-kind-domain-name-abuse-prevention-tool/> and Vissers T. et al. (2017), "Exploring the Ecosystem of Malicious Domain Registrations in the .eu TLD" In: Dacier M., Bailey M., Polychronakis M., Antonakakis M. (eds) Research in Attacks, Intrusions, and Defenses. RAID 2017. Lecture Notes in Computer Science, vol 10453. Springer, Cham, accessed 8 August 2018, https://link.springer.com/chapter/10.1007/978-3-319-66332-6_21, https://eurid.eu/media/filer_public/9e/d1/9ed12346-562d-423d-a3a4-bcf89a59f9b4/eutldecosystem.pdf. This process will not prevent registrations, but instead delay activation of a registration if a domain name is identified as being potentially abusive by machine learning algorithms. Future review teams could study this effort to consider its effectiveness and whether it could serve as a potential innovative model to help foster trust and a secure online environment. In addition, the .xyz registry may provide another example of proactive measures to combat abuse. The .xyz registry purports to have a zero-tolerance policy toward abuse-related activities on .xyz or any of their other domain extensions using a sophisticated abuse monitoring tool enabling proactive monitoring and detection in near real-time, suspending domains engaging in any of the abusive activities set out. Future review teams could explore the effectiveness of this approach by examining abuse rates over time and comparing the levels of abuse both before and after this policy.

#	Recommendation	To	Prerequisite or priority level	Con sensus
	ill-suited or unable to enforce such provisions, a DNS Abuse Dispute Resolution Policy (DADRP) should be considered as an additional means to enforce policies and deter against DNS Security Abuse. Furthermore, defining and identifying DNS Security Abuse is inherently complex and would benefit from analysis by the community, and thus we specifically recommend that the ICANN Board prioritize and support community work in this area to enhance safeguards and trust due to the negative impact of DNS Security Abuse on consumers and other users of the Internet.			
16	Further study the relationship between specific registry operators, registrars, and DNS Security Abuse by commissioning ongoing data collection, including but not limited to, ICANN Domain Abuse Activity Reporting (DAAR) initiatives. ²⁹ For transparency purposes, this information should be regularly published, ideally quarterly and no less than annually, in order to be able to identify registries and registrars that need to come under greater scrutiny, investigation, and potential enforcement action by ICANN organization. Upon identifying abuse phenomena, ICANN should put in place an action plan to respond to such studies, remedy problems identified, and define future ongoing data collection.	The ICANN Board, the Registry Stakeholders Group, the Registrar Stakeholders Group, the Generic Names Supporting Organization, and the Subsequent Procedures PDP WG, SSR2 Review Team.	High	Yes
17	ICANN should collect data about and publicize the chain of parties responsible for gTLD domain name registrations.	The ICANN Board, the GNSO Expedited PDP, the Registry Stakeholders Group, the Registrar Stakeholders Group, the Generic Names Supporting Organization, the Subsequent Procedures PDP WG, SSAC	High	Yes
18	In order for the upcoming WHOIS Review Team to determine whether additional steps are needed to improve WHOIS accuracy, and whether to proceed with the identity phase of the Accuracy Reporting System (ARS) project, ICANN should gather data to assess whether a significant percentage of WHOIS-related	ICANN organization to gather required data, and to provide data to relevant review teams to consider the results and, if warranted, to assess feasibility and	Medium	Yes

²⁹ ICANN, "Domain Abuse Activity Reporting (DAAR)," accessed 6 August 2018, <https://www.icann.org/octo-ssr/daar>

#	Recommendation	To	Prerequisite or priority level	Con sen sus
	<p>complaints applicable to new gTLDs relate to the accuracy of the identity of the registrant.³⁰ This should include analysis of WHOIS accuracy complaints received by ICANN Contractual Compliance to identify the subject matter of the complaints (e.g., complaints about syntax, operability, or identity). The volume of these complaints between legacy gTLDs and new gTLDs should also be compared. ICANN should also identify other potential data sources of WHOIS complaints beyond those that are contractually required (including but not limited to complaints received directly by registrars, registries, ISPs, etc.) and attempt to obtain anonymized data from these sources.</p> <p>Future CCT Reviews may then also use these data.</p>	desirability of moving to identity validation phase of WHOIS ARS project.		
19	The next CCT should review the "Framework for Registry Operator to Respond to Security Threats" and assess whether the framework is a sufficiently clear and effective mechanism to mitigate abuse by providing for systemic and specified actions in response to security threats. ³¹	Future CCT Review Teams	Medium	Yes
20	Assess whether mechanisms to report and handle complaints have led to more focused efforts to combat abuse by determining: (1) the volume of reports of illegal conduct in connection with the use of the TLD that registries receive from governmental and quasi-governmental agencies; (2) the volume of inquires that registries receive from the public related to malicious conduct in the TLD; (3) whether more efforts are needed to publicize contact points to report complaints that involve abuse or illegal behavior within a TLD; and (4) what actions registries have taken to respond to complaints of illegal or malicious conduct in connection with the use of the TLD. Such efforts could include surveys, focus groups, or community discussions. If these methods proved ineffective, consideration could be given to amending future standard Registry Agreements to require registries to more prominently disclose their abuse points of contact and provide more granular information	ICANN organization and future CCT Review Teams	Medium	Yes

³⁰ ICANN, "WHOIS Accuracy Reporting System (ARS) Project Information," accessed 6 August 2018, <https://whois.icann.org/en/whoisars>

³¹ ICANN, "Framework for Registry Operator to Respond to Security Threats," accessed 6 August 2018, <https://www.icann.org/resources/pages/framework-registry-operator-respond-security-threats-2017-10-20-en>

#	Recommendation	To	Prerequisite or priority level	Con sen sus
	to ICANN. Once this information is gathered, future review teams should consider recommendations for appropriate follow up measures.			
21 ³²	Include more detailed information on the subject matter of complaints in ICANN publicly available compliance reports. Specifically, more precise data on the subject matter of complaints, particularly: (1) the class/type of abuse; (2) the gTLD that is target of the abuse; (3) the safeguard that is at risk; (4) an indication of whether complaints relate to the protection of sensitive health or financial information; (5) what type of contractual breach is being complained of; and (6) resolution status of the complaints, including action details. These details would assist future review teams in their assessment of these safeguards. ³³	ICANN organization	High	Yes
22	Initiate engagement with relevant stakeholders to determine what best practices are being implemented to offer reasonable and appropriate security measures commensurate with the offering of services that involve the gathering of sensitive health and financial information. Such a discussion could include identifying what falls within the categories of “sensitive health and financial information” and what metrics could be used to measure compliance with this safeguard.	ICANN organization	High	Yes

³² Since the publication of the CCT Review Team’s draft recommendations for public comment, ICANN Contractual Compliance has considered the review team recommendations in implementing certain changes. In October 2017, ICANN Contractual Compliance, began collecting and reporting on the granularity of registrar-related DNS Abuse complaints by identifying the type of abuse including spam, pharming, phishing, malware, botnets, counterfeiting, pharmaceutical, fraudulent and deceptive practices, trademark or copyright infringement, and missing or invalid registrar abuse contact information. This information is reported on ICANN.org in the monthly dashboard at this link <https://features.icann.org/compliance/dashboard/report-list>. The quarterly and annual metrics reports provide information about enforcement reasons, reporter categories, closure reasons and details of the complaints inclusive of DNS Abuse by legacy and new gTLDs as they evolve through the compliance process, from ticket receipt to closure. They also reporting on any complaint type if it concerns a GAC Cat 1 gTLD. They also report on granularity of type of Transfer complaints (choices are Transfer, Unauthorized Transfer, COR, Unauthorized COR and TEAC).

In light of the ICANN community concerns regarding DNS infrastructure abuse, Compliance updated the audit plans with expanded questions and testing to address DNS abuse and also includes concerns about DNS infrastructure abuse when determining which contracted parties to audit. This information will be reported via the Audit Report and published under Reports & Blogs at this link <https://www.icann.org/resources/compliance-reporting-performance>.

³³ Since the publication of the CCT Review Team’s draft recommendations for public comment, ICANN Contractual Compliance has considered the review team recommendations in implementing certain changes described in the blogs of October 2017, “Enhancing Transparency in Contractual Compliance Reporting,” <https://www.icann.org/news/blog/enhancing-transparency-in-contractual-compliance-reporting>, and March 2018, “Enhancing Transparency in Contractual Compliance Reporting,” <https://www.icann.org/news/blog/enhancing-transparency-in-contractual-compliance-reporting-en>.

#	Recommendation	To	Prerequisite or priority level	Con sen sus
23	<p>ICANN should gather data on new gTLDs operating in highly-regulated sectors to include the following elements:³⁴</p> <ul style="list-style-type: none"> ⊙ A survey to determine: 1) the steps registry operators are taking to establish working relationships with relevant government or industry bodies; and 2) the volume of complaints received by registrants from government and regulatory bodies and their standard practices to respond to those complaints. ⊙ A review of a sample of domain websites within the highly-regulated sector category to assess whether contact information to file complaints is sufficiently easy to find. ⊙ An inquiry to ICANN Contractual Compliance and registrars/resellers of highly regulated domains seeking sufficiently detailed information to determine the volume and the subject matter of complaints regarding domains in highly regulated industries. ⊙ An inquiry to registry operators to obtain data to compare rates of abuse between those highly-regulated gTLDs that have voluntarily agreed to verify and validate credentials to those highly-regulated gTLDs that have not. ⊙ An audit to assess whether restrictions regarding possessing necessary credentials are being enforced by auditing registrars and resellers offering the highly-regulated TLDs (i.e., can an individual or entity without the proper credentials buy a highly-regulated domain?). <p>To the extent that current ICANN data collection initiatives and compliance audits could contribute to these efforts, we recommend that ICANN assess the most efficient way to proceed to avoid duplication of effort and leverage current work.</p>	ICANN organization, New gTLD Subsequent Procedures PDP Working Group	High	Yes
24	a. Determine whether ICANN Contractual Compliance should report on a quarterly basis whether it has received complaints for a registry operator's failure to comply with either the	ICANN organization	Low	Yes

³⁴ For materials illustrating the safeguards related to highly-regulated sectors, see ICANN CCT Review Wiki, "Studies, Research, and Background Materials: Safeguards and Public Interest Commitments," accessed 6 August 2018, <https://community.icann.org/display/CCT/Studies%2C+Research%2C+and+Background+Materials>

#	Recommendation	To	Prerequisite or priority level	Con sensus
	<p>safeguard related to gTLDs with inherent governmental functions or the safeguard related to cyberbullying.³⁵</p> <p>b. Survey registries to determine: 1) whether they receive complaints related to cyberbullying and misrepresenting a governmental affiliation; and 2) how they enforce these safeguards.</p>			
25	<p>To the extent voluntary commitments are permitted in future gTLD application processes, all such commitments made by a gTLD applicant must state their intended goal and be submitted during the application process so that there is sufficient opportunity for community review and time to meet the deadlines for community and Limited Public Interest objections.³⁶ Furthermore, such requirements should apply to the extent that voluntary commitments may be made after delegation. Such voluntary commitments, including existing voluntary PICs, should be made accessible in an organized, searchable online database to enhance data-driven policy development, community transparency, ICANN compliance, and the awareness of variables relevant to DNS abuse trends.</p>	<p>ICANN organization, New gTLD Subsequent Procedures PDP Working Group</p>	<p>Prerequisite</p>	<p>Yes</p>
26	<p>A study to ascertain the impact of the New gTLD Program on the costs required to protect trademarks in the expanded DNS space should be repeated at regular intervals to see the evolution over time of those costs. The CCT Review Team recommends that the next study be completed within 18 months after issuance of the CCT Final Report, and that subsequent studies be repeated every 18 to 24 months.</p> <p>The CCT Review Team acknowledges that the Nielsen survey of INTA members in 2017 intended to provide such guidance yielded a lower response rate than anticipated.³⁷ We recommend a more user friendly and perhaps shorter survey to help ensure a higher and more statistically significant response rate.</p>	<p>ICANN organization</p>	<p>High</p>	<p>Yes</p>
27	<p>Since the review team's initial draft recommendation, the PDP "Review of All Rights Protection Mechanisms in All gTLDs (RPM</p>	<p>Generic Names Supporting Organization</p>	<p>Prerequisite</p>	<p>Yes</p>

³⁵ ICANN Governmental Advisory Committee (GAC), *Beijing Communiqué*, accessed 6 August 2018, <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>

³⁶ ICANN, "Objection and Dispute Resolution," accessed 6 August 2018, <https://newgtlds.icann.org/en/program-status/odr>

³⁷ Nielsen, *INTA New gTLD Cost Impact Study* (April 2017) and INTA, *New gTLD Impact Study*, (August 2017).

#	Recommendation	To	Prerequisite or priority level	Con sens us
	<p>WG)” has started reviewing the Uniform Rapid Suspension system in detail and this is currently ongoing.³⁸ Given this ongoing review, the CCT Review Team recommends that the RPM WG continues its review of the URS and also looks into the interoperability of the URS with the Uniform Domain Name Dispute Resolution Policy (UDRP).³⁹ Given the current timeline, it would appear that the appropriate time to do so will be when the UDRP review is carried out by the PDP WG and at this time consideration be given to how it should interoperate with the UDRP.</p> <p>The review team has encountered a lack of data for complete analysis in many respects. The RPM PDP WG appears to also be encountering this issue and this may well prevent it drawing firm conclusions. If modifications are not easily identified, then the review team recommends continued monitoring until more data is collected and made available for a review at a later date.</p>			
28	<p>A cost-benefit analysis and review of the Trademark Clearinghouse (TMCH) and its scope should be carried out to provide quantifiable information on the costs and benefits associated with the present state of the TMCH services and thus to allow for an effective policy review.⁴⁰ Since our initial draft recommendation, the RPM PDP has started reviewing the TMCH in detail and ICANN has appointed Analysis Group to develop and conduct the survey(s) to assess the use and effectiveness of the Sunrise and Trademark Claims RPMs. Provided that the RPM PDP has sufficient data from this survey or other surveys and is able to draw firm conclusions, the CCT Review Team does not consider that an additional review is necessary. However, the CCT Review Team reiterates its recommendation for a cost-benefit analysis to be carried out if such analysis can enable objective conclusions to be drawn. Such cost-benefit analysis should include but not</p>	Generic Names Supporting Organization	Prerequisite	Yes

³⁸ ICANN GNSO, “PDP Review of All Rights Protection Mechanisms in All gTLDs,” accessed 6 August 2018, <https://gns0.icann.org/en/group-activities/active/rpm> and ICANN” and ICANN “Uniform Rapid Suspension (URS),” accessed 6 August 2018, <https://www.icann.org/resources/pages/urs-2014-01-09-en>

³⁹ ICANN, “Uniform Domain Name Dispute Resolution Policy,” accessed 6 August 2018, <https://www.icann.org/resources/pages/help/dndr/udrp-en>

⁴⁰ ICANN, “Trademark Clearinghouse (TMCH),” accessed 6 August 2018, <https://newgtlds.icann.org/en/about/trademark-clearinghouse>

#	Recommendation	To	Prerequisite or priority level	Con sensus
	necessarily be limited to looking at cost to brand owners, cost to registries, and cost to registrars of operating with the TMCH now and going forward and look at the interplay with premium pricing.			
Chapter 10. Application and Evaluation Process of the New gTLD Program				
29	Set objectives/metrics for applications from the Global South.	New gTLD Subsequent Procedures PDP Working Group/Generic Supporting Names Organization	Prerequisite —objectives must be set	Yes
30	Expand and improve outreach into the Global South.	ICANN organization	Prerequisite	Yes
31	The ICANN organization to coordinate the <i>pro bono</i> assistance program.	ICANN organization	Prerequisite	Yes
32	Revisit the Applicant Support Program. ⁴¹	New gTLD Subsequent Procedures Working Group	Prerequisite	Yes
33	As required by the October 2016 Bylaws, Governmental Advisory Committee (GAC) consensus advice to the Board regarding gTLDs should also be clearly enunciated, actionable, and accompanied by a rationale, permitting the Board to determine how to apply that advice. ⁴² ICANN should provide a template to the GAC for advice related to specific TLDs, in order to provide a structure that includes all of these elements. In addition to providing a template, the Applicant Guidebook (AGB) should clarify the process and timelines by which GAC advice is expected for individual TLDs.	New gTLD Subsequent Procedures PDP Working Group, GAC, ICANN organization	Prerequisite	Yes
34	A thorough review of the procedures and objectives for community-based applications should be carried out and improvements made to address and correct the concerns raised before a new gTLD application process is launched. Revisions or adjustments should be clearly reflected in an updated version of the 2012 AGB.	New gTLD Subsequent Procedures PDP Working Group	Prerequisite	Yes
35	The New gTLD Subsequent Procedures PDP should consider adopting new policies to avoid the potential for inconsistent results in string confusion objections. ⁴³ In particular, the PDP should consider the following possibilities:	New gTLD Subsequent Procedures PDP Working Group	Prerequisite	Yes

⁴¹ ICANN, “Applicant Support Program (ASR),” accessed 6 August 2018, <https://newgtlds.icann.org/en/applicants/candidate-support>

⁴² ICANN, “GAC Advice,” accessed 6 August 2018, <https://newgtlds.icann.org/en/applicants/gac-advice>. See also ICANN, “Bylaws,” Section 2.1, Article 3, Section 3.6: <https://www.icann.org/resources/pages/governance/bylaws-en/#article2>

⁴³ ICANN GNSO, “PDP New gTLD Subsequent Procedures,” accessed 6 August 2018, <https://gns0.icann.org/en/group-activities/active/new-gtld-subsequent-procedures>

#	Recommendation	To	Prerequisite or priority level	Consensus
	<ol style="list-style-type: none"> 1. Determining through the initial string similarity review process that singular and plural versions of the same gTLD string should not be delegated.⁴⁴ 2. Avoiding disparities in similar disputes by ensuring that all similar cases of plural versus singular strings are examined by the same expert panelist. 3. Introducing a post-dispute resolution panel review mechanism. 			

⁴⁴ New gTLD Subsequent Procedures Wiki, "String Similarity," accessed 6 August 2018, <https://community.icann.org/display/NGSPP/4.4.2+String+Similarity>

3 Background on the Competition, Consumer Trust, and Consumer Choice Review

The Competition, Consumer Trust and Consumer Choice Review Team (CCT) was convened under the Affirmation of Commitments (AoC) Section 9.3.⁴⁵ The AoC prescribes that “when new gTLDs (whether in ASCII or other language character sets) have been in operation for one year, ICANN will organize a review that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion.”⁴⁶

The CCT was assembled in January 2016 and was comprised of 17 community representatives and volunteer subject matter experts representing a diverse array of global Internet stakeholders.⁴⁷ Since the review team was convened, ICANN has adopted new Bylaws as part of the Internet Assigned Numbers Authority (IANA) stewardship transition that incorporated the AoC provisions into the ICANN Bylaws as “Specific Reviews” under Section 4.6.⁴⁸ Similar to the AoC, the Bylaws describe the scope of this review as:

“The review team for the CCT Review will examine (A) the extent to which the expansion of gTLDs has promoted competition, consumer trust and consumer choice and (B) the effectiveness of the New gTLD Round’s application and evaluation process and safeguards put in place to mitigate issues arising from the New gTLD Round.”

The new Bylaws also specify that, for each of its recommendations, the CCT Review Team should indicate whether the recommendation, if accepted by the Board, should be implemented before opening subsequent rounds of new gTLD application periods. The recommendations contained in this report identify those that should be implemented before the opening of future application periods for new gTLDs.

Producing recommendations that are as data- and fact-driven as possible is a fundamental goal of the review, and the CCT Review Team has endeavored to support its recommendations with data received prior to and throughout the review process. A number of initiatives were undertaken prior to the CCT Review’s launch and during deliberations to inform its work.⁴⁹

⁴⁵ US Department of Commerce and ICANN, *Memorandum of Understanding Between the Department of Commerce and the Internet Corporation for Assigned Names and Numbers*, 31 December 1999, <https://www.icann.org/resources/unthemed-pages/icann-mou-1998-11-25-en>. The Affirmation of Commitments, signed on 30 September 2009 between ICANN and the U.S. Department of Commerce (the “AoC”), calls for periodic review of four key ICANN objectives: (1) ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent; (2) preserve the security, stability and resiliency of the DNS; (3) promote competition, consumer trust, and consumer choice in the DNS marketplace and (4) facilitate international participation in DNS technical coordination.

⁴⁶ ICANN, “Bylaws for Internet Corporation for Assigned Names and Numbers,” (October 2016), accessed 20 January 2017, <https://www.icann.org/resources/pages/governance/bylaws-en>. This aspect has now been incorporated to the new ICANN Bylaws, <https://www.icann.org/en/system/files/files/adopted-bylaws-27may16-en.pdf>.

⁴⁷ The composition of the CCT Review Team can be viewed here: <https://community.icann.org/display/CCT/Composition+of+Review+Team>

⁴⁸ ICANN, “Bylaws,” (2016).

⁴⁹ For details, see [Appendix E: Terms of Reference](#).

In December 2010, the Board requested advice from the At-Large Advisory Committee (ALAC), Governmental Advisory Committee (GAC), Generic Names Supporting Organization (GNSO), and Country Codes Names Supporting Organization (ccNSO) on establishing the definition, measures, and three-year targets for competition, consumer trust and consumer choice in the context of the Domain Name System (DNS). This advice was requested to support ICANN's obligations under the AoC to review the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice.⁵⁰

The ICANN Board formed an Implementation Advisory Group for Competition, Consumer Trust and Consumer Choice (IAG-CCT) in September 2013 to review 70 metrics recommended by a GNSO-ALAC working group in December 2012. The IAG-CCT was tasked to make recommendations to the review team based on an evaluation of the feasibility, utility and cost-effectiveness of each of the proposed metrics. In September 2014, the IAG-CCT submitted its final recommendations⁵¹ to the ICANN Board, which adopted them in February 2015.⁵² The recommendations included 66 metrics related to competition, consumer trust and consumer choice. The ICANN organization has been continuously gathering and publishing data related to most of these metrics on the ICANN website.⁵³

These efforts led the ICANN organization to commission surveys of Internet users and registrants to gauge their sense of trust and choice of gTLDs, and an economic study of gTLD pricing and marketplace competition. Nielsen was retained to perform the registrant⁵⁴ and consumer⁵⁵ studies. The Analysis Group was retained to perform the economic studies.⁵⁶ Each served as important resources for the review team in building its draft recommendations.

The AoC mandates an examination of the effectiveness of the application and evaluation processes used in the 2012 round of gTLD applications, including ICANN organization's implementation of the policy recommendations made for the New gTLD Program. To help inform the CCT, ICANN organization compiled and published the Program Implementation Review,⁵⁷ which incorporated feedback from stakeholders, including applicants, service providers, and other community members, in order to provide the community (and the organization itself) with perspective on the execution of the New gTLD Program. The review team was also interested in understanding why more firms from the developing world did not apply to the program. To inform this aspect of its work, AMGlobal produced a report on its research and interviews conducted with firms, organizations and other institutions that did not apply for new gTLDs, but who may have been considered good candidates for the program because they were similar to entities from the developed world that did apply.⁵⁸

⁵⁰ ICANN Board Resolution 2010.12.10.30, "Consumer Choice, Competition and Innovation," (2010), accessed 20 January 2017, <https://www.icann.org/resources/board-material/resolutions-2010-12-10-en#6>

⁵¹ Implementation Advisory Group for Competition Consumer Trust and Consumer Choice (26 September 2014), *Final Recommendations on Metrics for CCT Review*, accessed 20 January 2017, <https://community.icann.org/display/IAG/IAG-CCT+report>

⁵² ICANN Board Resolution 2015.02.12.07-2015.02.12.09, "Recommendations for the Collection of Metrics for the New gTLD Program to Support the future AoC Review on Competition, Consumer Trust and Consumer Choice," (2012), accessed 20 January 2017, <https://www.icann.org/resources/board-material/resolutions-2015-02-12-en#1.e>

⁵³ ICANN, "Competition, Consumer Trust and Consumer Choice (CCT) Metrics Reporting," (2017), accessed 20 January 2017, <https://www.icann.org/resources/reviews/cct/metrics>

⁵⁴ Nielsen, Registrant Survey (2015) and Nielsen, Registrant Survey Wave 2 (2016).

⁵⁵ Nielsen, Consumer Research (2015) and Nielsen, Consumer Research Wave 2 (2016).

⁵⁶ Analysis Group, *Phase I Assessment* (2015) and Analysis Group, *Phase II Assessment*, (October 2016).

⁵⁷ ICANN, *Program Implementation Review* (January 2016), accessed 13 January 2017,

<https://newgtlds.icann.org/en/reviews/implementation/program-review-29jan16-en.pdf>

⁵⁸ AMGlobal, *New gTLDs and the Global South* (October 2016).

The AoC also mandates that the review assess the effectiveness of safeguards enacted to mitigate abuse of new gTLDs. To inform CCT's work, the ICANN organization worked with the community to create the New gTLD Program Safeguards Against DNS Abuse report,⁵⁹ which explored methods for measuring the effectiveness of safeguards to mitigate DNS abuse that were implemented as part of the New gTLD Program. The ICANN organization also drafted the Rights Protection Mechanisms Review (RPM),⁶⁰ which focused on key rights protection mechanisms such as the Trademark Clearinghouse, the Uniform Rapid Suspension System and Post-Delegation Dispute Resolution Procedures.⁶¹

⁵⁹ ICANN Operations and Policy Research, *New gTLD Program Safeguards* (2016).

⁶⁰ ICANN (11 September 2015), Rights Protection Mechanisms Review, accessed 20 January 2017, <https://newgtlds.icann.org/en/reviews/rpm/rpm-review-11sep15-en.pdf>

⁶¹ For more details, see [Appendix C: Surveys and Studies](#).

4 History of the New gTLD Program⁶²

In the 1990s, management of the Domain Name System (DNS) was revised periodically to encourage more competition in the domain name marketplace. The number of available gTLDs, however, remained fixed and small. Beginning in 2000, ICANN expanded the available set of gTLDs to encourage more competition in the market for domain names.

History of the Expansion of the DNS Prior to 2000

The DNS was developed in the early 1980s as a means of organizing and easing Internet navigation by establishing unique, easier-to-remember addresses for different locations on the Internet. Initially, eight gTLDs were established, within which eligible entities could register second-level domain names. Three of these gTLDs (.com, .org, and .net) were unrestricted, meaning that anyone could register a second-level domain name within them. Five (.edu, .gov, .arpa, .int, and .mil) were in restricted use, meaning that only particular types of users were allowed to register a second-level domain within them. In addition to gTLDs, two-letter country code TLDs (ccTLDs) were introduced over time, beginning with .us in 1985.

Initially, the task of registering second-level domain names in the various gTLDs fell to SRI International, a not-for-profit research institute operating under a contract with the Department of Defense (DOD). In the early 1990s, the responsibility for registering names for .com, .org, .net, .edu and .gov was transferred to a private corporation, Network Solutions Inc. (NSI), under a contract with the National Science Foundation, which had taken over from DOD as the funding source. NSI operated the registry and acted as the sole registrar for .com, .org and .net.

In the early 1990s, .com replaced .edu as the most-used gTLD as the commercial possibilities of the Internet became apparent following the development of the World Wide Web. As the .com registry operator and its sole registrar, NSI had a monopoly on the registration of second-level domain names in .com. In 1995 NSI began charging \$100 to register a .com domain name for a two-year period.

The late 1990s saw a rapid series of steps designed to increase competition in the DNS marketplace. In 1997, the U.S. Government issued a policy directive stating that the management of the DNS should be privatized⁶³. In a policy statement issued in 1998, the U.S. Department of Commerce (“Commerce”) declared its intent to transfer management of the DNS from the U.S. government to a private corporation.⁶⁴ ICANN was established in 1998 as a private, not-for-profit corporation to manage the DNS. A Memorandum of Understanding (MOU) signed by Commerce and ICANN established ICANN’s authority to manage the DNS and reiterated Commerce’s intent that the management of the DNS would be “based on the principles of stability, competition, bottom-up coordination, and representation.”⁶⁵ The MOU also described one of ICANN’s main responsibilities as “oversight of the policy for determining

⁶² Michael L. Katz, Gregory L. Rosston, and Theresa Sullivan (June 2010), *An Economic Framework for the Analysis of the Expansion of Generic Top-Level Domains*, prepared for ICANN, <https://archive.icann.org/en/topics/new-gtlds/economic-analysis-of-new-gtlds-16jun10-en.pdf>

⁶³ President William J. Clinton (1 July 1997), *Memorandum on Electronic Commerce*, <https://www.gpo.gov/fdsys/pkg/WCPD-1997-07-07/pdf/WCPD-1997-07-07-Pg1006-2.pdf>

⁶⁴ National Telecommunications and Information Administration, US Dept of Commerce (5 June 1998), *Statement of Policy on the Management of Internet Names and Addresses*, <https://www.ntia.doc.gov/federal-register-notice/1998/statement-policy-management-internet-names-and-addresses>

⁶⁵ US Department of Commerce and ICANN (31 December 1999), *Memorandum of Understanding between the US Department of Commerce and the Internet Corporation for Assigned Names and Numbers, Section II.A*, accessed 6 August 2018, <https://www.icann.org/resources/unthemed-pages/icann-mou-1998-11-25-en>

the circumstances under which new TLDs are added to the root system,”⁶⁶ including “development of policies for the addition, allocation, and management of gTLDs and the establishment of domain name registries and domain name registrars to host gTLDs.”⁶⁷ Thus, as described in the Applicant Guidebook (AGB), “one of [ICANN’s] key mandates has been to promote competition in the domain name market.”⁶⁸

In late 1998, the National Telecommunications and Information Administration (NTIA), an agency within the U.S. Department of Commerce, required NSI to separate the registry functions from the registrar functions and to facilitate the entry of competitive registrars by establishing a shared registration system that would allow registrars other than NSI to interact with the .com, .org and .net registry databases. This led to the entry of hundreds of registrars, but the set of gTLDs remained fixed at a small number.

Previous gTLD Expansions⁶⁹

Including the most recent in 2012, ICANN has held three rounds of gTLD expansion since its founding. The first began in 2000 as a “proof-of-concept” round.⁷⁰ In that round, ICANN announced that it would create a maximum of seven new gTLDs, for which it received approximately 50 applications. After evaluating the applications, ICANN added four unsponsored gTLDs (.biz, .info, .name and .pro) and three sponsored gTLDs (.aero, .coop and .museum). The second round of gTLD expansion began in 2004. In that round, ICANN accepted applications only for sponsored gTLDs but announced that it would not limit the number of new gTLDs and would approve all qualified applications. ICANN received ten applications for nine different sponsored gTLDs and ultimately approved eight of the applications (.asia, .cat, .jobs, .mobi, .post, .tel, .travel and .xxx). Thus, prior to the 2012 New gTLD Program, there were 23 gTLDs.

Background of the 2012 New gTLD Program⁷¹

In 2005, ICANN’s Generic Names Supporting Organization (GNSO)—the main policy-making body for generic top-level domains—initiated a Policy Development Process (PDP) to consider the introduction of new gTLDs into the DNS based on the results of previous rounds conducted in 2000 and 2004. The two-year PDP included detailed and lengthy consultations with the many constituencies of ICANN’s global Internet community, including governments, civil society, business and intellectual property stakeholders, and technologists. In 2008, the ICANN Board adopted 19 specific GNSO policy recommendations for implementing new gTLDs, which included elements such as allocation criteria and contractual conditions for operating a gTLD.⁷²

After approval of the PDP’s recommendations, ICANN undertook an open, inclusive and transparent implementation process to address stakeholder concerns, such as the protection

⁶⁶ Ibid., Section 2.B.c

⁶⁷ US Government Publishing Office, *Federal Register 31741: Management of Internet Names and Addresses* [Vol. 63, 1], (10 June 1998): <https://www.gpo.gov/fdsys/pkg/FR-1998-06-10/pdf/98-15392.pdf>

⁶⁸ ICANN, *gTLD Applicant Guidebook* (June 2012), p. A-1.

⁶⁹ Katz et. al (2010), *An Economic Framework*

⁷⁰ ICANN, “Registry Proof of Concept Reports,” accessed 19 January 2017, <https://www.icann.org/resources/pages/poc-2012-02-25-en>.

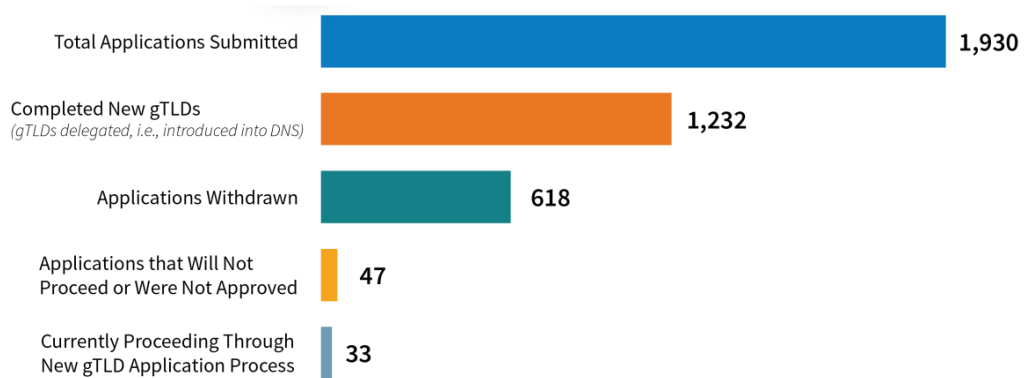
⁷¹ ICANN, “New Generic Top-Level Domains: About the Program,” accessed 19 January 2017, <https://newgtlds.icann.org/en/about/program>.

⁷² ICANN Generic Names Supporting Organization (8 August 2007), *Final Report: Introduction of New Generic Top-Level Domains*, <https://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.html>.

of intellectual property and community interests, consumer protection and DNS stability. This work included public consultations, review and input on multiple draft versions of the Applicant Guidebook. In June 2011, ICANN's Board of Directors approved the Guidebook and authorized the launch of the New gTLD Program. The program's goals included enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII and Internationalized Domain Name (IDN) top-level domains.

The application window opened on 12 January 2012, and ICANN received 1,930 applications for new gTLDs. As reported on ICANN's New gTLD website:

Table 1: New gTLD Applications' Status⁷³



⁷³ Figures current to 6 August 2018. See ICANN, "New Generic Top-Level Domains: Program Statistics," accessed 6 August 2018, <https://newgtlds.icann.org/en/program-status/statistics>.

5 Data-Driven Analysis: Recommendations for Additional Data Collection and Analysis

As called for in its terms of reference, the CCT Review Team endeavored to engage in objective research, to determine its findings and to provide a framework to evaluate the effectiveness of its recommendations.⁷⁴ To this end, the review team assembled data that had been collected as a result of the IAG-CCT recommendations, purchased additional data, and commissioned the collection of more.⁷⁵ The timeframe for the review, beginning while new strings were still being delegated, necessarily limited the conclusions that could be reached. Furthermore, the effort to conceive data-driven evaluation models was hampered by the difficulty in defining abstract concepts such as “Consumer Trust.” However, the primary challenge was insufficient data.

At the core of any competitive analysis is pricing, both in wholesale and retail markets. The data available to analyze both markets were often insufficient for the task. In particular, it would have been useful to have better price data, which would have allowed us to measure the impact of new gTLD entry and to define market(s) in which gTLDs compete more precisely. Anecdotal data suggest that the market in which new gTLDs participate also includes legacy gTLDs, certain “generic” ccTLDs (such as .co), other ccTLDs in their respective countries, and even alternative online identities such as social media accounts and third-level domains. More and better data on pricing, wholesale, retail, and the secondary market, both global and regional, are necessary to fully understand the behavior of participants within these markets. Finally, the role of parking (i.e., domains that have been registered, but are not yet being used as primary identifiers of typical websites. Instead, these domains are forwarded to other domains (including sub-domains), used only for email, monetized via advertising, or simply do not resolve, perhaps held in reserve by speculators or as premium domains by registries. websites) is not fully understood.

When evaluating the effectiveness of Rights Protection Mechanisms (RPMs) and safeguards, far more granular data on individual safeguards, as well as greater transparency on complaints from ICANN’s Contract Compliance Department is necessary.

Additional surveys of end-users would be helpful for competition analysis, to explore substitution behavior, and to evaluate consumer trust. Although user surveys were fielded by the IAG-CCT and the CCT, it is the review team’s view that future analyses would benefit greatly from surveys that take a more refined approach to analyzing registrant behavior. We describe our suggested approach to future surveys in Recommendations 8.

Finally, even the evaluation of the effectiveness of the application and evaluation process would have benefited from additional data. For example, programs put in place to encourage and facilitate applications from the Global South were not sufficiently tracked to allow for comprehensive evaluation.

As the issue of data has come up in the past and will inevitably come up in the future, the CCT would like to make a general recommendation about data collection to ICANN in addition to making suggestions particular to CCT research.

⁷⁴ Competition, Consumer Trust, and Consumer Choice Review Team (2016), *Terms of Reference*, accessed 6 August 2018, <https://community.icann.org/pages/viewpage.action?pageId=58727456>.

⁷⁵ Implementation Advisory Group for Competition Consumer Trust and Consumer Choice (26 September 2014), *Final Recommendations*.

Recommendation

Recommendation 1: Formalize and promote ongoing data collection.

Rationale/related findings: The lack of data has handicapped attempts both internally and externally to evaluate market trends and the success of policy recommendations.

To: ICANN organization

Prerequisite or priority level:⁷⁶ High

Consensus within team: Yes

Details: In an effort to promote more objective policy development inside ICANN, the ICANN organization should establish a formal initiative, perhaps including a dedicated data scientist, to facilitate quantitative analysis of policy initiatives and reviews by staff, contractors, and the community. Specifically, where possible, the ICANN organization should proactively collect data needed to validate or invalidate policy initiatives (whether ICANN organization- or community-driven), identify and collect data necessary to measure program success, both incrementally and in retrospect. On a case-by-case basis, this initiative would help to ascertain the cost/benefit and security requirements for the data in question.

Success measures: The ability for the community to determine, through review process, if policy initiatives had well-defined issue measurement to justify reform and facilitate review.

Below are some of the CCT-specific data requests for future review teams.

Competition and Consumer Choice

At various points in this report, we identify analyses that we were unable to conduct because we lacked the needed information. Some of these shortcomings can be overcome in the future if ICANN obtains these data directly from industry participants or if ICANN enters into contractual relationships with parties that collect the data. Others will require improved analyses of the behavior of industry participants, especially analyses that enhance our understanding of the way in which registrants substitute among TLDs. This section discusses these issues in greater detail. In addition, we believe that ICANN can make better use of publicly available data and that it should develop the capability to analyze both proprietary and public data on an ongoing basis.

The most significant data limitation that we faced was the almost total lack of information about the wholesale prices charged by legacy TLDs. Analysis Group requested wholesale price data directly from both legacy and new gTLD registries as part of its research, with the understanding that the data would never be provided to ICANN or made public. In addition, Analysis Group provided assurances that the data published in its report would be aggregated

⁷⁶ Prerequisite or priority level: Per the ICANN Bylaws, the CCT Review Team indicated whether each recommendation must be implemented prior to the launch of subsequent procedures for new gTLDs. The team agreed that those recommendations which were not categorized as prerequisites would be given a time-bound priority level:

High priority: Must be implemented within 18 months of the issuance of a final report.

Medium priority: Must be implemented with 36 months of the issuance of a final report.

Low priority: Must be implemented prior to the start of the next CCT Review.

and anonymized so as not to compromise confidentiality. Although Analysis Group obtained some data from most of the new gTLD registries from which it requested them, there were extremely few responses from legacy gTLDs and incomplete data from new gTLDs. We believe that ICANN should acquire this information from all registries on a regular basis and provide assurances that the data would be treated on a confidential basis. The data could then be analyzed by the ICANN organization and by others that execute non-disclosure agreements.

Very high parking rates are observed for some gTLDs, raising questions as to the competitive effects of parking. If prospecting rates are different between new and legacy gTLDs, we may be observing something different from competitive behavior and an analysis of registration renewal rates would be helpful in improving our understanding of this phenomenon. Although nTLDstats.com provides this information on an ongoing basis for new gTLDs, ICANN has had to enter into a contract with them to obtain similar information for legacy gTLDs. We report the results of our analysis of these data below. We recommend that ICANN arrange to obtain this information on an ongoing basis in the future.

A third limitation involved our inability to conduct analyses on a regional or country basis. However, during the course of our work, we learned that some of the data required to conduct this analysis had been compiled in connection with the Latin American and Caribbean DNS Marketplace Study.⁷⁷ We subsequently obtained those data, and we report the results of using the data to analyze concentration in a number of Latin American countries below.⁷⁸ We recommend that ICANN collect information on regional market shares between relevant ccTLDs and legacy TLDs, as well as pricing data for all countries on an ongoing basis in the future. In this regard, it is important to note that country-specific analysis would allow assessment of the extent to which gTLDs and ccTLDs compete. Some of these data may already be collected, for example by the Council for European National Top-Level Domain Registries (CENTR), and we recommend that ICANN explore the possibility of obtaining the needed data from these sources.⁷⁹

Fourth, it appears that ICANN does not currently make use of retail price data that can be obtained directly from public sources such as <https://tld-list.com/> and <https://namestat.org>. We recommend that ICANN develop the capability of analyzing these data on an ongoing basis. ICANN may also wish to explore the possibility of obtaining data on prices that prevail in secondary market transactions.

Finally, we note that our ability to define relevant markets has been severely handicapped by the lack of information about how registrants make choices among TLDs. [Appendix G: Possible Questions for a Future Consumer Survey](#) contains suggestions for questions that might be included in a future end-user survey.

Consumer Trust/Safeguards

The review team also faced challenges related to its assessment of the extent to which the expansion of gTLDs promoted consumer trust and the effectiveness of safeguards adopted by new TLD operators in mitigating certain risks involved in such expansion.

⁷⁷ Oxford Information Labs, EURid, InterConnect Communications, *LAC Study*.

⁷⁸ ICANN CCT Review Wiki, "Studies, Research, and Background Materials: LAC concentration ratios and HHIs" accessed 6 August 2018,

<https://community.icann.org/display/CCT/Studies%2C+Research%2C+and+Background+Materials>.

⁷⁹ centr.org, accessed 6 August 2018.

Two surveys were made available that contained data regarding the extent to which consumer end-user and registrants trusted new gTLDs.⁸⁰ However, the review team noted that the surveys did not define consumer trust (and other key terms) and contained few questions that explored the objective behavior of the survey respondents that could serve as a proxy for consumer trust. Moreover, certain responses that identified factors relevant to consumer trust—such as reputation and familiarity—were broad concepts that did not lend themselves to providing precise guidance for either future applicants, ICANN, or other community stakeholders. As a result, we recommend that future review teams work with survey experts to conceive more behavioral measures of consumer trust that gather both objective and subjective data, with a goal toward generating more concrete and actionable information, as described in recommendation 8.

The review team also lacked sufficient data on how effective safeguards adopted by new gTLD operators were in mitigating certain risks.⁸¹ For example, although many safeguards for new gTLDs aimed at mitigating DNS Security Abuse, little information was available to the review team that directly addressed this issue. In response, the review team commissioned a study to establish baseline measures of DNS Security Abuse rates in new and legacy gTLDs that will enable further inquiry into the effectiveness of these safeguards.⁸² We hope that future review teams will build on this study and consider how additional studies may shed further light on assessing the effectiveness of new gTLD safeguards.

An important and related issue is information about the costs of implementing these safeguards. At the time this review took place, the review team lacked data regarding the costs to registries and registrars of implementing the safeguards required under the New gTLD Program. Such data would be useful to future review teams who may wish to engage in a cost-benefit analysis.

Another challenge faced by the review team was a lack of transparency in the subject matter of complaints submitted to ICANN Contractual Compliance. Although ICANN makes available information about the general subject matter of the complaints it receives, such as WHOIS accuracy or DNS Security Abuse, ICANN does not disclose more specific information about the subject matter of these complaints. For example, regarding complaints about registrars, ICANN Compliance reports do not disclose what type of WHOIS accuracy is being complained about (i.e. address, email, or identity verification). Similarly, ICANN Compliance reports do not identify what types of DNS Security Abuse are the subjects of complaints, nor the nature of complaints made regarding implementation of UDRP and URS decisions (rather Compliance reports provide just the number of such complaints). Such information would permit review teams to identify more precisely which subject areas generate the most complaints and would enable a better assessment of the effectiveness of current safeguards.⁸³

⁸⁰ Nielsen, Consumer Research (2015); Nielsen, Consumer Research Wave 2 (2016); Nielsen, Registrant Survey (2015); and Nielsen, Registrant Survey Wave 2 (2016).

⁸¹ ICANN, New gTLD Program Safeguards (2016).

⁸² SIDN Labs and the Delft University of Technology (August 2017), “DNS Abuse in gTLDs”.

⁸³ Since the publication of the CCT Review Team’s draft recommendations for public comment, ICANN Contractual Compliance has considered the review team recommendations in implementing certain changes described in the blogs of October 2017, “Enhancing Transparency in Contractual Compliance Reporting,” <https://www.icann.org/news/blog/enhancing-transparency-in-contractual-compliance-reporting>, and March 2018, “Enhancing Transparency in Contractual Compliance Reporting,” <https://www.icann.org/news/blog/enhancing-transparency-in-contractual-compliance-reporting-en>.

6 Competition

In announcing the opening of the latest round of the introduction of new gTLDs, ICANN stated that:

The [New gTLD Program] aims to enhance innovation, competition, and consumer choice...The [Program] has enabled hundreds of new top-level domains in ASCII characters and in different scripts...to enter into the Internet's root zone since the first delegations occurred in October 2013.⁸⁴

This section describes the review team's analysis of the effects of the recent new gTLD round on competition. Before reporting the findings, however, it is important to emphasize that there were significant limitations in conducting the analysis. First, it is still "early innings" and the full effects of the New gTLD Program are unlikely to be felt for some time. TLDs continue to be introduced and many new gTLDs are still in the early stages of their development. Together, these factors make it difficult to reach definitive conclusions about the Program's impact at this time. Therefore, this should be regarded as an interim report and it is possible that the DNS marketplace will look quite different in the future than it does at present.

Second, the review team's analysis has been hampered significantly by the lack of relevant data, including, but not limited to, information about the wholesale prices charged for gTLD registrations. Consequently, among the conclusions reached are recommendations concerning additional information that ICANN should collect on an ongoing basis in order to improve its ability to carry out future analyses.⁸⁵

Finally, although registrants are likely to view different types of TLDs as substitutes for one another—for example, ccTLDs, legacy, and new gTLDs may all offer the same kind of string ending a registrant may value—the review team does not currently have enough information to permit definition of markets definitively for the purpose of analyzing competition. For that reason, the review team has analyzed competition in a number of alternative markets, including all gTLDs, all gTLDs plus "open" ccTLDs,⁸⁶ and all TLDs.⁸⁷ The hope is that future analyses will be better able to define the relevant markets in which gTLDs compete. To that end, a draft of a registrant survey that ICANN could undertake that would improve our understanding of registrant behavior, and thus permit relevant markets to be defined more precisely, is included in Appendix G.

⁸⁴ ICANN, "New Generic Top-Level Domains: About the Program," accessed 6 August 2018, <https://newgtlds.icann.org/en/about/program>

⁸⁵ Katz et. al (2010), *An Economic Framework*. In paragraph 118, the authors make a similar point: "...in order to derive the greatest informational benefits from the next round of gTLD introductions, ICANN should adopt practices that will facilitate the assessment of the net benefits from the initial rollout of additional gTLDs. Specifically, ICANN should require registries, registrars, and domain names registrants to provide information sufficient to allow the estimation of the costs and benefits of new gTLDs."

⁸⁶ Ben Edelman, "Registrations in Open ccTLDs," last modified 22 July 2002, https://cyber.harvard.edu/archived_content/people/edelman/open-cctlds/. Edelman notes: "Seeing the growth of COM, NET, and ORG, certain country-code top-level domains (ccTLDs) have decided to open their name spaces to all interested registrants, regardless of country. These domains are often referred to as 'open ccTLDs' as distinguished from those 'closed' ccTLDs that limit restriction to citizens or firms of their respective countries."

⁸⁷ There is also some indication that alternative online identities, including social media and third level domains, may be substitutes for registrations in TLDs. For example, Nielsen's Wave 2 Registrant Survey, conducted on behalf of ICANN for this report, found that these alternatives are often easier to use and may affect decisions on whether to register a domain name. See Nielsen, *Consumer Research Wave 2* (2016).

Economic Framework for Competition Analysis

In order to analyze the competitive effects of the entry of new gTLDs into the DNS, the review team first attempted to define the relevant markets in which participants in the DNS operate. This required an understanding of, among other factors, the extent to which new TLDs serve as substitutes for the legacy domains, substitutions among new TLDs, and the geographic dimension of the market in which TLDs operate. Because the review team did not have sufficient information to define markets definitively, we conducted our analysis using a number of alternative market definitions. After defining markets, the review team then calculated the market shares of TLD operators, registrars, and back-end providers, and calculated measures of market concentration based on those shares. In order to assess the likely effect of new gTLD entry on competition in the DNS marketplace, these measures were compared in late 2013—just before the introduction of the new gTLDs—to their levels in December 2016, giving the review team an observation window of approximately three years.

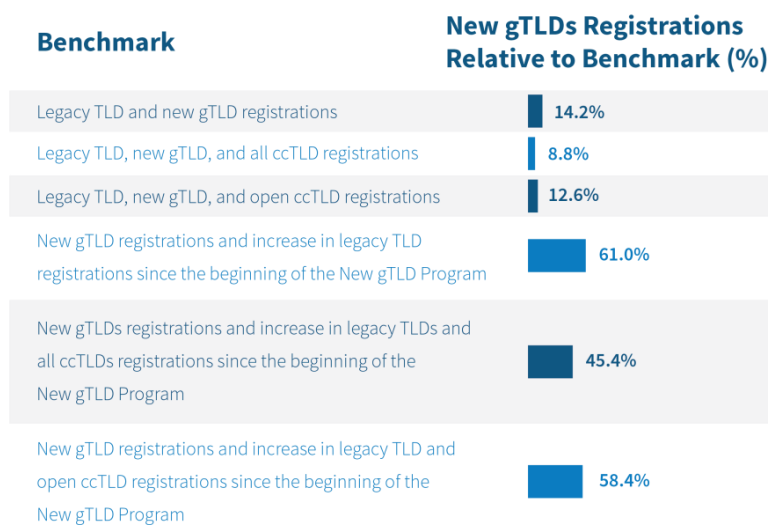
Penetration by New gTLDs in the Domain Name System

The New gTLD Program not only vastly increased the number of registries from which registrants can choose—an increase of more than 60-fold—but it has also vastly increased their variety. This increase in non-price competition among gTLDs is reflected in domains in new languages (e.g., .immobilien), new character sets (e.g., .网址 [xn--ses554g] and コム [xn-tckwe]), new geographic identities (e.g., .london and .tokyo), and new specialized domains (e.g., .racing, .realtor, and .pub). The review team found that, as of December 2016 new gTLDs had acquired approximately 61 percent of the increase in the number of registrations in all gTLDs; approximately 45 percent of the increase in the number of registrations in all TLDs, gTLDs, and ccTLDs; and about 58 percent of the increase in the number of registrations in all gTLDs and all “open” ccTLDs, since the introduction of new gTLDs began in October 2013. The review team also found that, as of December 2016, new gTLDs accounted for about 14 percent of the total number of registrations in all gTLDs, about 9 percent of the total number of registrations in all TLDs, and about 13 percent of the total number of registrants in all gTLDs and “open” ccTLDs.⁸⁸ Table 2 reports these results:⁸⁹

⁸⁸ Google, “International Targeting,” accessed 19 January 2017, <https://support.google.com/webmasters/answer/62399?hl=en> is the source of the list of “open” ccTLDs, which Google refers to as “generic” TLDs.

⁸⁹ Since the review team’s primary focus is on gTLDs that are, or will be, generally available for registration by members of the public, the analysis excludes gTLDs that are subject to Specification 13 of the base registry agreement and/or are exempt from the “Registry Operator Code of Conduct” (ROCC). For this reason, the review team requested that Analysis Group exclude ROCC-exempt as well as “Brand” TLDs subject to Specification 13 from the analysis. For details on Specification 13 and a list of “Brand” TLDs, see ICANN, “Applications to Qualify for Specification 13 of the Registry Agreement,” accessed 20 January 2017, <https://newgtlds.icann.org/en/applicants/agb/base-agreement-contracting/specification-13-applications>. For details on ROCC-exempt TLDs, see ICANN, “Registry Operator Code of Conduct Exemption Requests,” accessed 20 January 2017, <https://newgtlds.icann.org/en/applicants/agb/base-agreement-contracting/ccer>.

Table 2: New gTLD Registrations Relative to Various Benchmarks as of December 2016⁹⁰



A question that naturally arises is how to interpret the observed share of registrations currently captured by new gTLDs. There are at least three reasons why one might expect that share initially to be smaller than the level that it will eventually reach. First, there are costs to registrants for switching from a legacy to a new gTLD that impart inertia to the process. These costs can be fairly mundane, such as the costs of repainting trucks or issuing new business cards. But they can be significant—for example, the costs of assuring that customers and others are made aware of the change—and may well exceed any direct costs related to the registration of a domain name. Second, there are what might be called “network” effects. Here, a potential registrant might be reluctant to register in a new domain because the domain has a small subscriber base and thus users are generally unaware of its existence. Although a “bandwagon effect”—where a new gTLD’s increased popularity may motivate more users to register names after it has reached a given size—is unlikely to occur during the early part of its operations.⁹¹ Third, a registrant might wait for the expiration of its registration term with a legacy gTLD before switching to a new gTLD or, at least for a time, register in a new gTLD

⁹⁰ These and other calculations in this section were performed by Analysis Group at the request of the review team. Registration data for legacy and new gTLDs were derived from monthly transaction reports as of December 2016 and October 2013, which are available at <https://www.icann.org/resources/pages/registry-reports>. Registration data for ccTLDs were based on Zooknic map data. Where Zooknic data were not available, ccTLD registration data were based on Nominet data as of December 2016. Registration data for ccTLDs at the beginning of the New gTLD Program were based on Nominet data as of December 2013. All calculations were based on the total number of registrations as of December 2016 with the exception of the change in legacy TLD and ccTLD registrations since the entry of new gTLDs (October 2013). Brand and ROCC-exempt TLDs were excluded from the analysis. The list of Brand TLDs is available at <https://newgtlds.icann.org/en/applicants/agb/base-agreement-contracting/specification-13-applications>. The list of ROCC-exempt TLDs is available at <https://newgtlds.icann.org/en/applicants/agb/base-agreement-contracting/ccer>

⁹¹ Michael L. Katz and Carl Shapiro, “Systems Competition and Network Effects,” *The Journal of Economic Perspectives* 8(2), (1994): 93-115, http://www.jstor.org/stable/2138538?origin=JSTOR-pdf&seq=1#page_scan_tab_contents. Katz and Shapiro discuss network effects, where the value of a product to a user depends not only on its intrinsic characteristics but also on the number of other users of that product. See also: H. Liebenstein, “Bandwagon, Snob, and Veblen Effects in the Theory of Consumers’ Demand,” *Quarterly Journal of Economics* 64(2), (1950), 183-207, <http://qje.oxfordjournals.org/content/64/2/183.short>. Liebenstein calls this type of behavior a “bandwagon effect,” which reflects “the desire of people to wear, buy, do, consume, and behave like their fellows...” (p. 184).

while maintaining its registration in a legacy domain. Given the low cost of renewal and the high likelihood of remnant links and traffic, there may be very little incentive to drop an old domain registration immediately. Future surveys of gTLD registrants may provide evidence of this type of behavior.

Together, these factors suggest that new gTLDs are unlikely to reach their full potential immediately. In fact, a study performed by KPMG for ICANN found that the new gTLDs that had been introduced after 2001 had, on average, reached 40 percent of their “most recently observed peak registration” at the end of 12 months of operation, 60 percent of the peak at the end of 24 months of operation, and 70 percent of the peak at the end of 36 months of operation.⁹² For these reasons, the share of registrations currently captured by the new gTLDs likely understates the level that it will eventually reach.⁹³

It is important to note that the share of registrations accounted for by new gTLDs depends both on their share of the increase in the number of registrations and on the rate at which the total number of all registrations increased over the period.⁹⁴ For example, given the approximately 61 percent share of the increase in gTLD registrations accounted for by new gTLDs, their share of total gTLD registrations would have been approximately 30 percent if the number of gTLD registrations had doubled between October 2013 and December 2016. In fact, the rate of increase was about 30 percent.⁹⁵ Interestingly, however, this rate of increase is greater than the rates observed before the introduction of the new gTLDs.⁹⁶

It is also possible to use these results to project the share of total registrations that would be captured in the future by the new gTLDs if the rate of increase in the total remains unchanged at about 30 percent every three years and if the new gTLDs continue to capture about 61 percent of the increase. Under these assumptions, the share captured by the new gTLDs would be approximately one-quarter after six years and approximately one-third after nine years.

Substitution Analysis

One question typically asked when evaluating a competitive market is whether a new entrant is a reasonable economic substitute for an existing product. Substitute goods are those goods, to varying degrees that can satisfy the same necessity, they can be used for the same end. Some examples of substitute goods are:

- ⦿ Coca-Cola and Pepsi
- ⦿ Car, motorbike, bike and public transport
- ⦿ Butter and margarine
- ⦿ Tea and coffee
- ⦿ Bananas and Apples

Generally, this “substitutability” is expressed a relationship between price and demand for the substitute good. Basically, if the price of Coke goes up, more people will switch to Pepsi. This

⁹² KPMG, *Benchmarking of Registry Operations* (February 2010), accessed 19 January 2017, <https://www.icann.org/resources/pages/benchmarking-2010-02-15-en>, p. 17.

⁹³ A possible offsetting factor that we discuss below is the fact that a significant percentage of registrations in new gTLDs are currently “parked” and therefore may not be renewed when they expire.

⁹⁴ Note that the increase in the number of registrations equals new registrations minus registrations that are not renewed.

⁹⁵ Over the same period, the rate of increase of registrations in all TLDs was about 24 percent and the rate of increase of registrations in gTLDs and “open” ccTLDs combined was about 28 percent. This suggests that the number of registrations in gTLDs grew faster than that of all ccTLDs and of all “open” ccTLDs.

⁹⁶ Analysis Group, *Phase I Assessment* (2015), p. 33, Fig. 8.

is distinguished from “complementary” products such as hot dogs and mustard. In this case, more sales of hot dogs lead to an increase in sales in mustard, while an increase in the price of hot dogs leads to a decrease in sales of both hot dogs and mustard.

Applied to the gTLD market, assessing whether the new gTLDs represent economic substitutes for legacy gTLDs, one would ask: as the price of legacy gTLDs increases, does demand for the new gTLDs increase? Analysis of this sort in the gTLD marketplace involves three challenges.

First, as noted earlier, the existence of price caps on legacy gTLDs masks what might be the true market price for legacy gTLDs, and any tipping price that would directly increase demand for alternatives. It is possible that these price caps actually suppress competition by keeping prices below market value and discouraging substitution and other competitive effects. As Debra Aron and David Burnstein note:

The regulatory constraints on the market would, in some circumstances, impede the normal functioning of competitive forces, resulting in a market that appears to fail competitive criteria, which in turn leads regulators to perpetuate the regulatory constraints.⁹⁷

Ideally, an evaluation of the pricing in the secondary market is desirable to determine if there are any direct price impacts, but even those will not likely be directly substitutions.

Second, the typical price point of a gTLD is such that “substitution” is not economically mandatory and, in certain cases, counter-indicated. For example, if a registrant has done business at VertigoSoftware.com for a number of years, but eventually buys Vertigo.software, perhaps even at a premium, they are unlikely to immediately drop VertigoSoftware.com because of its presence in bookmarks, emails, blog posts, 3rd party reports, etc. When the price to maintain VertigoSoftware.com is relatively low, the registrant will be inclined to simply keep both registrations, at least for a time. The “substitution” takes place on letterhead, websites, business cards and marketing materials, not directly in the marketplace. Studying the use of a gTLD would be complex but perhaps necessary to fully understand what substitution has taken place.

The third challenge with a substitution analysis is that not every second-level domain of a new gTLD is a substitute for the corresponding domain in a legacy gTLD (see “Previous Studies” in the Consumer Choice section below). With the exception of a few new strings such as .xyz, .online, .site and .space, the new gTLDs are meant to be more semantic and specific than the legacy generic TLDs. So while bridal.photography is a reasonable substitute for bridalphotography.com, plumbing.photography is not a substitute for plumbing.com. Instead, it’s important to take the new gTLDs as a whole and treat the group of them as alternatives for the legacy gTLDs (and ccTLDs). For example, SHOP might be a substitute for online shopping websites, PHOTOGRAPHY might be an alternative for photographers, NEWS might be an alternative for news websites, etc... It’s here that one can see a competitive trend while observing that half of new registrations (or a third if you include ccTLDs) are new gTLDs. While the demand for second-level domains has remained somewhat constant at roughly 5% growth per year, these new registration figures suggest that substitution is taking place in the overall market.

⁹⁷ Debra Aron and David Burnstein, “Regulatory Policy and the Reverse Cellophane Fallacy”, *Journal of Competition Law & Economics* [Volume 6, Issue 4] (December 2010), <https://doi.org/10.1093/joclec/nhp033> pp. 973–994.

As Jonathan Parker and Adrian Majumdar argue:

In some cases, the dynamics of future competition are much better captured by the share of new business won than shares based on total revenues from installed base customers. For example, where a firm has a large installed base of customers locked-in to long term contracts, it may be of greater interest to access its success in relation to business opportunities.⁹⁸

While ongoing study is certainly needed, the trends suggest the initial formation of a competitive marketplace for second-level domains that will only grow with time and eventually reveal more explicit substitution behavior.

The Structure of the TLD Industry

Registrar Services

One factor that has facilitated the entry of new gTLDs is the availability of important “inputs,” specifically registrar and back-end services, that can be acquired through market transactions rather than be “produced” internally.⁹⁹ This has the effect of reducing the minimum viable scale—“the smallest scale of output at which an entrant would expect to cover its complete entry and operating costs at current levels of prices”¹⁰⁰—of gTLDs.

According to ICANN, “An individual or legal entity wishing to register a domain name under a generic top-level domain (“gTLD”) ... may do so by using an ICANN-accredited registrar.... Any entity that wants to offer domain name registration services under gTLDs with a direct access to the gTLD registries is required to obtain an accreditation from ICANN. To that end, the interested entity must apply for accreditation and demonstrate that it meets all the technical, operational and financial criteria necessary to qualify as a registrar business.”¹⁰¹ At the end of August 2016, 2,084 registrars operated under the 2013 Registrar Accreditation Agreement, and 51 operated under the 2009 Registrar Accreditation Agreement.¹⁰² Only registrars that operate under the 2013 Registrar Accreditation Agreement can register domain names in the new gTLDs.

Three hundred thirty-four (334) registrars currently register domain names in new gTLDs and a significant number of new gTLDs are represented by a relatively large number of

⁹⁸ Jonathan Parker and Adrian Majumdar, *UK Merger Control*, (Oxford: Hart Publishing, 2016), p. 432.

⁹⁹ Of course, this does not mean that registries should be prevented from vertically integrating into either back-end or registrar functions, especially as doing so is unlikely to result in foreclosing other registries from obtaining needed services from third parties.

¹⁰⁰ Robert D. Willig, “Merger Analysis, Industrial Organization Theory, and Merger Guidelines,” in *Brookings Papers on Economic Activity (Microeconomics)*, eds. M.N. Bailey and C. Winston, 1991, p. 310. See also US Department of Justice and the Federal Trade Commission (2010), *Horizontal Merger Guidelines*, <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmq.pdf>, section 3.3.

¹⁰¹ ICANN, “Information for Registrars and Registrants,” accessed 20 January 2017,




<https://www.icann.org/resources/pages/registrars-0d-2012-02-25-en>.

¹⁰² ICANN, “2013 Registrar Accreditation Agreement,” accessed 20 January 2017,

<https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en>. ICANN, “2009 Registrar Accreditation Agreement,” accessed 20 January 2017, <https://www.icann.org/resources/pages/ra-agreement-2009-05-21-en>.

registrars.¹⁰³ The following table reports the distribution of new gTLDs as measured by the number of registrars that register names in their domains:

Table 3: Number of Registrars Registering Each New gTLD as of December 2016¹⁰⁴

 Number of Registrars	 Number of New gTLDs	 % of New gTLDs
Fewer than 10	29	7%
11–20	25	6%
21–30	14	3%
31–40	31	7%
41–50	25	5%
51–75	54	11%
More than 75	305	61%

Note that more than three-fifths of new gTLDs have their names offered by more than 75 registrars, about three-quarters have their names offered by more than 50 registrars, and 89 percent have their names offered by more than 20 registrars.¹⁰⁵

Not only is it common for TLDs to be represented by multiple registrars, it is also usually the case that registrars represent multiple TLDs. The following table reports the number of new gTLDs that are represented by each of the top 20 registrars, which collectively have registered almost 87 percent of all domains that have been registered in the new gTLDs. The mean number of new gTLDs that are represented by these registrars is approximately 287; 18 have registered domains in more than 50 new gTLDs and 12 have registered domains in well over 300 new gTLDs.¹⁰⁶

¹⁰³ These registrars report active registrations in new gTLDs or were included in the March 2016 ICANN Monthly Transaction Reports of new gTLDs, despite having zero active registrations in those domains. The list of registrars was obtained from: iana.org, “Registrar IDs,” accessed 20 January 2017, <http://www.iana.org/assignments/registrar-ids/registrar-ids.xhtml> (brand and ROCC-exempt TLDs excluded from the review team analysis).

¹⁰⁴ Calculations performed by Analysis Group at the request of the review team. All calculations were based on the total number of registrars and registrations as of December 2016. Registrar and registration data for legacy gTLDs and new gTLDs were derived from monthly transaction reports provided to ICANN by operating registries as of December 2016, available at <https://www.icann.org/resources/pages/registry-reports>. Only ICANN-accredited registrars and new gTLDs were included in the analysis. ICANN-accredited registrars were identified based on registrars listed at: iana.org, “Registrar IDs,” accessed 20 January 2017, <http://www.iana.org/assignments/registrar-ids/registrar-ids.xhtml>. Brand and ROCC-exempt TLDs were excluded.

¹⁰⁵ As a point of reference, of the five ccTLDs in the Latin American and Caribbean region that do not employ a direct registration model in which “domains are acquired directly from the registry’s platform and/or website,” the number of registrars employed were 17, 19, 80, 92, and 200, respectively. See ICANN (2016), Latin American and Caribbean DNS Marketplace Study, p. 50. Although at least some of these ccTLDs have apparently been able to attract the interest of a significant number of registrars, the report notes that “one of the challenges that many ccTLDs in the region face once they have decided to implement the registry-registrar model is more [sic] how to attract the larger international registrars to their business...” (Ibid. p. 51). This suggests that the availability of registrars to registries may differ across regions, but further research is needed to assess this issue.

¹⁰⁶ The mean is 318 if eName Technology, which represents only four registries, and Knet Registrar, which represents a single registry, are eliminated from the calculation.

Table 4: Number of New gTLDs Represented by Top 20 Registrars by Registration Volume¹⁰⁷

Registrar	Rank	% Of New gTLDs Registrations	# Of New gTLDs Offered
Alibaba Cloud Holding Ltd.	1	25.46	81
NameCheap Inc	2	14.03	373
GoDaddy Group	3	9.70	365
GMO Internet Inc	4	6.67	352
Chengdu West Dimension Digital Tech	5	5.23	162
Tucows	6	3.75	427
West263 International Ltd	7	5.25	64
United Internet AG	8	3.04	428
PublicDomainRegistry Ltd	9	2.91	387
Alpnames Ltd	10	1.46	262
Rightside	11	1.14	409
Uniregistrar Corp	12	1.10	379
eName Technology Co Ltd	13	1.03	7
Web.com	14	0.99	391
Xin Net Technology Corp	15	0.93	107
KeyDrive Group	16	0.92	509
Gandi SAS	17	0.89	472
Knet Registrar Co Ltd	18	0.85	1
Google LLC	19	0.74	208
NameSilo LLC	20	0.73	346
Total		86.82	N/A

Back-End Registry Operators

ICANN defines a back-end registry operator as “an organization contracted by a registry to run one or more of the Critical Functions of a gTLD registry.”¹⁰⁸ The Critical Functions are:

- ⦿ DNS resolution
- ⦿ DNSSEC properly signed zone (if DNSSEC is offered by the registry)
- ⦿ Shared Registration System (SRS), usually by means of the Extensible Provisioning Protocol (EPP)
- ⦿ Registration Data Directory Services (RDDS), e.g., WHOIS provided over both port 43 and through a Web-based service.

- ⦿ Registry Data Escrow

Back-end providers may also offer additional services such as billing, reporting, account management tools, and other technical services related to the TLD’s registration database.

¹⁰⁷ nTLDStats, “Registrar Overview,” accessed 12 July 2018, <https://ntldstats.com/>.

¹⁰⁸ ICANN, “Registry Transition Processes,” accessed 20 January 2017, <https://www.icann.org/resources/pages/transition-processes-2013-04-22-en>.

Although there are far fewer back-end providers than there are registrars, six different back-end providers each provide services to new gTLD registries that collectively have more than one million registrations.

Of the 944 new gTLDs that had begun operation as of 6 May 2016, 495 (52 percent) were using back-end providers that were located in their respective jurisdictions and 627 (66 percent) were using back-end providers located in their respective ICANN regions.¹⁰⁹ Thus, although well over half of all new gTLDs employed back-end providers that were located in relatively close proximity, a significant number did not. This suggests that back-end providers at more distant locations can nonetheless provide service to a registry.

For each of the six largest back-end providers as measured by the number of registrations in the gTLDs that they serve, we also compiled data on the size distribution of the gTLDs that they serve. Table 5 reports the results of this analysis.

Table 5: Back-End Registry Service Providers (RSPs) Servicing the Most New gTLD Registrations as of December 2016¹¹⁰

Back-End RSPs servicing the most New gTLD registrations	Number of TLDs serviced, by number of domain name registrations								
	1 – 2,500	2,501 – 5,000	5,001 – 10,000	10,001 – 50,000	50,001 – 100,000	100,001 – 250,000	250,001 – 500,000	500,001 – 1 Million	> 1 Million
CentralNic	3	10	3	8	4	2	1	2	1
ZDNS	0	3	1	0	0	1	0	0	1
Neustar, Inc.	193	3	3	8	5	4	0	3	1
Rightside Registry	46	57	69	56	9	0	0	0	0
Uniregistrar Inc.	11	2	3	6	2	1	1	0	0
Afilias Limited	164	9	3	14	0	1	2	0	0

There are several observations that can be made about these results. First, about 94 percent of the new gTLDs that obtain back-end services from one of these providers have fewer than 50,000 registrants. Second, three of these back-end providers—Rightside, Neustar, and Afilias—collectively serve about 90 percent of the new gTLDs with fewer than 50,000 registrants. Third, whereas neither Rightside nor Afilias serves any new gTLDs with more than 500,000 registrants and, indeed, none of the new gTLDs that are served by Rightside has more than 100,000 registrants, three of these back-end providers—Neustar, CentralNic, and ZDNS—together serve all of the eight new gTLDs with more than 500,000 registrants.

¹⁰⁹ “ICANN Geographic Regions,” accessed 20 January 2017, <https://meetings.icann.org/en/regions> and Eleeza Agopian to CCT-Review mailing list, “Ry-RSP geographic location comparison,” (19 May 2016), <http://mm.icann.org/pipermail/cct-review/2016-May/000461.html>. In Africa, three gTLDs (out of a total of 10) are using back-end providers in their respective jurisdictions and these three are therefore also using back-end providers in their regions; in Latin America and the Caribbean, five gTLDs (out of a total of 17) are using back-end providers in their respective jurisdictions with one additional gTLD using a back-end provider in the region; in Asia Pacific, 81 gTLDs (out of a total of 163) are using back-end providers in their respective jurisdictions and a total of 102 are using back-end providers in their regions, in North America, 357 gTLDs (out of a total of 441) are using back-end providers in their respective jurisdictions and 409 are using back-end providers in their regions, and in Europe: 49 gTLDs (out of a total of 352) are using back-end providers in their respective jurisdictions and 107 are using back-end providers in in their regions.

¹¹⁰ Registration data derived from ICANN Monthly Transaction Reports, available at <https://www.icann.org/resources/pages/registry-reports>.

It is also important to note that the incremental cost incurred by a back-end operator to serve a registry operator varies with the number of domains served by the registry¹¹¹ and that back-end providers employ a number of pricing models that take these cost differences into account. For example, some charge registries a fixed fee per registered domain. Others charge a per-domain fee that varies with the number of domains in the registry. Still others provide service in return for a share of registry revenues, among other models. As a result, small TLDs tend to pay lower total prices to back-end operators than do large ones.

Size Distribution of gTLDs

Another aspect of the structure of the TLD industry is the wide variation in the sizes of different gTLDs. The table below reports the size distribution of new gTLDs, where size is measured by number of registrations. In reviewing the data in the table, it is important to recognize that some new gTLDs have only recently become available for registrations by the public and others may still not be available.

We find that about three-quarters of the new gTLDs that we have analyzed currently have fewer than 10,000 registrants and more than 90 percent have fewer than 50,000 registrants.¹¹² This raises the question of whether these gTLDs will be viable in the long run. There are, at least, the following five possibilities for “small” gTLDs: (1) they may succeed economically despite their size by serving niche markets, for example small geographic areas or specialized products and services, and may be viable even if they do not serve large numbers of registrants because their registrants are willing to pay relatively high prices;¹¹³ (2) they may lower their prices in the hope that the resulting increase in registrations will more than offset the reduction in price; (3) they may grow over time and eventually achieve economic viability;¹¹⁴ (4) they may change their target markets;¹¹⁵ (5) they may be acquired by larger

¹¹¹ This also varies with the registry’s policies. For example, the incremental cost incurred by a back-end operator to serve a gTLD that does non-standard manual vetting is higher than the incremental cost of serving one that does not.

¹¹² The ICANN (2016), Latin American and Caribbean DNS Marketplace Study, p. 91 refers to “the typical long tail seen in domain names worldwide...”




¹¹³ Uniregistry recently announced price increases of up to 3,000 percent for its new gTLDs. Frank Schilling, CEO of Uniregistry argued that “If you have a space with only 5,000 registrations, you need to have a higher price point to justify its existence...” (See Kevin Murphy, “Schilling, big price increases needed to keep new gTLDs alive,” Domain Incite, March 7, 2017, <http://domainincite.com/21603-schilling-big-price-increases-needed-to-keep-new-gtlds-alive>).

¹¹⁴ Boston Ivy recently announced substantial price decreases for four new gTLDs. See A. Allemann, “A TLD registry just slashed its wholesale prices up to 97%,” Domain Name Wire, March 15, 2017, <http://domainnamewire.com/2017/03/15/tld-registry-just-slashed-wholesale-prices-97/>.

¹¹⁵ For example, .whoswho recently eliminated its requirement that registrants show that their names had appeared in a print Who’s Who book. See Kevin Murphy, “Relaunch and slashed prices for .whoswho after terrible sales,” Domain Incite, 1 September 2017, accessed 20 January 2017, <http://domainincite.com/20930-relaunch-and-slashed-prices-for-whoswho-after-terrible-sales>.

operators that achieve economic viability by owning several TLDs;¹¹⁶ or (6) they may eventually exit the market.¹¹⁷

Table 6: Size Distribution of New gTLDs as of May 2017¹¹⁸

 Number of Registrars	 Number of New gTLDs	 % of New gTLDs
0 – 1,000	300	40.49
1,001 – 10,000	263	35.49
10,001 – 50,000	120	16.19
50,001 – 100,000	29	3.91
100,001 – 250,000	13	1.27
250,001 – 500,000	6	0.47
500,001 – 1,000,000	7	0.50
>1,000,000	3	0.21
Total	741	

Nonetheless, it is important to note that, according to publicly available monthly transaction reports, some small legacy TLDs continue to operate despite a small number of registrations in their domains.

¹¹⁶ For examples of such acquisitions, see: ICANN (2015), Assignment Transfer and Assumption of the top-level domain .promo registry agreement, accessed 20 January 2017, <https://www.icann.org/sites/default/files/tlds/promo/promo-assign-pdf-14dec15-en.pdf>; ICANN (2015), Assignment and Assumption Agreement [of .hiv by Uniregistry Corp], accessed 20 January 2017, <https://www.icann.org/sites/default/files/tlds/hiv/hiv-assign-pdf-20nov15-en.pdf>; ICANN (2015), Assignment and Assumption Agreement [of .reise by Foggy Way LLC (Donuts)]: Dot-REISE Registry Agreement, accessed 20 January 2017, <https://www.icann.org/sites/default/files/tlds/reise/reise-assign-pdf-04may15-en.pdf>. Note, however, that most acquisitions that have occurred to date involved transfers from one holder of a large number of domains to another, for example the transfer of 24 domains from Donuts to Rightside (UnitedTLDHoldco). See Kevin Murphy, “You might be surprised how many new gTLDs have changed hands already,” Domain Incite, 1 July 2015, accessed 20 January 2017, <http://domainincite.com/18849-you-might-be-surprised-how-many-new-gtlds-have-changed-hands-already>. More recently, Donuts and Rightside agreed to merge. See Rightside, “Rightside and Donuts Announce Definitive Merger Agreement,” 14 June 2017, <http://investors.rightside.co/releasedetail.cfm?releaseid=1030175>. Under that agreement, Donuts would acquire 40 top-level domains as well as Rightside’s technical registry (i.e., backend) system. See also A. Allemann, “First take: Donuts to buy Rightside for \$213 million,” 14 June 2017, <http://domainnamewire.com/2017/06/14/first-take-donuts-buy-rightside-213-million/>.

¹¹⁷ See ICANN, “Registry Agreement Termination Information Page,” accessed 6 August 2018, <https://www.icann.org/resources/pages/gtld-registry-agreement-termination-2015-10-09-en#status>

¹¹⁸ Data current to May 2017. Since the review team’s primary focus is on gTLDs that are, or will be, generally available for registration by members of the public, the analysis excludes gTLDs that are subject to Specification 13 of the base registry agreement. For details on Specification 13 and a list of “Brand” TLDs, see ICANN, “Applications to Qualify for Specification 13 of the Registry Agreement,” accessed 20 January 2017, <https://newgtlds.icann.org/en/applicants/agb/base-agreement-contracting/specification-13-applications>. For details on ROCC-exempt TLDs, see ICANN, “Registry Operator Code of Conduct Exemption Requests,” accessed 20 January 2017, <https://newgtlds.icann.org/en/applicants/agb/base-agreement-contracting/ccer>.

Table 7: Small (Under 20,000 Registrations) Legacy gTLDs Still in Operation¹¹⁹

TLD	Number of Domains (March 2018)
.aero	10,900
.coop	8,122
.museum	678
.post	410
.travel	17,700

At the other end of the distribution are the new gTLDs in which the largest numbers of domains have been registered. As the following table shows, about 39 percent of the domains that have been registered in new gTLDs have been registered in the five largest new gTLDs, about 52 percent have been registered in the 10 largest, and about 76 percent have been registered in the 20 largest.¹²⁰ Thus, although a very large number of gTLDs have entered in recent years, a relatively small number account for a very large proportion of the domains that have been registered.

Table 8: Percentage of gTLD Registrations in Top 20 New gTLDs¹²¹

New gTLD	Rank	% of New gTLD Registrations	% of New gTLD Registrations in Top 5, 10, and 20 New gTLDs
.top	1	12.11	
.loan	2	9.27	
.xyz	3	8.49	
.club	4	5.46	
.vip	5	3.70	Top 5 = 39.03%
.online	6	3.48	
.win	7	2.70	
.shop	8	2.62	
.site	9	2.05	
.ltd	10	1.96	Top 10 = 51.84%
.men	11	1.89	
.wang	12	1.48	
.bid	13	1.46	
.work	14	1.45	
.stream	15	1.30	
.app	16	1.18	
.review	17	1.08	
.space	18	1.07	
.xin	19	0.99	
.website	20	0.98	Top 20 = 64.72%

¹¹⁹ ICANN, “Monthly Registry Reports,” accessed 12 July 2018, <https://www.icann.org/resources/pages/registry-reports/#a>. Note that, for contractual reasons, data from these monthly reports are withheld from public view until three months after the end of the month to which the report relates.

¹²⁰ nTLDStats, “New gTLD Overview,” accessed 12 July 2018, <https://ntldstats.com/tld>. According to nTLDStats, 37 new gTLDs currently have more than 100,000 registered domains, 63 have more than 50,000 registered domains, and 198 have more than 10,000 registered domains.

¹²¹ Ibid.

Effect of New gTLD Entry on Industry Concentration

Above, we described our analysis of the extent to which new gTLDs together have captured a share of overall TLD registrations. In this section, we analyze whether, and the extent to which, the entry of new gTLDs has affected concentration among registry operators, registrars, and back-end providers using three standard measures of concentration: the 4-firm concentration ratio (the share of registrants served by the four largest firms), the 8-firm concentration ratio (the share of registrants served by the eight largest firms), and the Herfindahl-Hirschman Index (HHI)—the sum of the squared shares of each firm.¹²² In doing so, we are implicitly defining the markets in which registries, registrars, and back-end providers compete. Market definition, which is a central component of all antitrust analyses, and which has both product and geographic dimensions, is an attempt to identify the suppliers among which competition determines prices and other indicia of market performance.¹²³

The United States antitrust agencies define markets using a “hypothetical monopolist test.”¹²⁴ Under this test, the agencies begin by defining a relatively narrow market and ask whether a hypothetical monopolist in that market could impose “a small but significant and non-transitory increase in price, (‘SSNIP’).” If they conclude that the hypothetical monopolist cannot do so, this means that some significant competitors have been excluded from the market, and the antitrust agencies would expand the market to include more suppliers. This process would continue until the SSNIP test is satisfied (i.e., until it is concluded that a hypothetical monopolist in the defined market could raise prices). The agencies would then calculate the shares held by each of the firms in the defined market. The Horizontal Merger Guidelines state that “the Agencies normally consider measures of market shares and market concentration as part of their evaluation of competitive effects.”¹²⁵

Under many economic theories, higher measures of concentration are associated with lower levels of competition. Moreover, a substantial body of empirical work in, and across, varying industries confirms that high concentration often lead to higher prices and markups.¹²⁶ In particular, the preponderance of evidence is that markets with a small number of firms, or

¹²² The HHI reflects the market shares of all firms, but, because it is calculated by squaring market shares, it gives proportionately greater weight to firms with large shares.

¹²³ As noted above, because we have not been able to reach a definitive conclusion about the appropriate market definition, we have conducted our analysis using a number of alternative definitions.

¹²⁴ United States Department of Justice and Federal Trade Commission (2010), “Merger Guidelines,” Section 4.1.1. A similar approach is employed in other jurisdictions. See, for example, [Article 102](#) of the Treaty on the Functioning of the European Union (TFEU), which prohibits abusive conduct by companies that have a dominant position on a particular market. Defining the relevant market is essential for assessing dominance, because a dominant position can only exist on a particular market.

¹²⁵ *Ibid.*, p. 15.

¹²⁶ For example, Pautler notes: “Several studies of price/concentration relationships indicate that prices are higher where concentration is higher, or the number of sellers is lower.” (Paul A. Pautler, Bureau of Economics, Federal Trade Commission (2003), *Evidence on Mergers and Acquisitions*, accessed 20 January 2017, https://www.ftc.gov/sites/default/files/documents/reports/evidence-mergers-and-acquisitions/wp243_0.pdf, p. 42). Sutton states “...that a fall in concentration will lead to a fall in prices and price-cost margins is well supported both theoretically and empirically” (John Sutton (2006), *Market Structure: Theory and Evidence*, accessed 20 January 2017, http://personal.lse.ac.uk/sutton/market_structure_theory_evidence.pdf, p. 7). Timothy Bresnahan reviews a numbers of studies that “...confirm the existence of a relationship between price and concentration...” (T.F. Bresnahan, “Empirical Studies of Industries with Market Power,” in *Handbook of Industrial Organization*, Vol. II, eds. R. Schmalensee and R.D. Willig, North-Holland, 1989, pp. 1011 - 1057). Coates and Hubbard find that “Empirical studies of auction markets and various industries, such as airlines, railroads, books, and pharmaceuticals, show prices declining as the number of bidders or rivals increases and as concentration of sales in a few firms declines” (John C. Coates IV and Glenn R. Hubbard, “Competition in the Mutual Fund Industry: Evidence and Implications for Policy,” *The Journal of Corporation Law* 33(1) (August 2007), 151-222, p. 164).

markets in which a few firms have very large market shares, tend to have higher prices than markets where concentration is lower.¹²⁷

Our analysis, which, as noted previously, was limited to gTLDs and excluded brand and Registry Operator Code of Conduct (ROCC)-exempt gTLDs, measured the change in each of the concentration measures among registries, registrars, and back-end providers between September 2013, which was before the first new gTLDs entered, and December 2016.¹²⁸ Tables 9 reports the results of our analysis.

¹²⁷ The review team would have preferred to analyze the effects of new gTLD entry on competition directly but, as noted elsewhere in this Report, they were unable to obtain data on changes in the wholesale prices actually charged by legacy gTLDs after new gTLD entry occurred. For examples of this approach see: Phillip M. Parker and Lars-Hendrik Roller, "Collusive Conduct in Duopolies: Multimarket Contact and Cross-ownership in the Mobile Telephone Industry," *The RAND Journal of Economics* 28(2), (1997) https://www.jstor.org/stable/2555807?seq=1#page_scan_tab_contents, pp. 304 - 322. Jerry Hausman, "Mobile Telephone," in *Handbook of Telecommunications Economics: Volume I*, eds. M.E. Cave, S.K. Majumdar, and I. Vogelsang, (Elsevier: 2002), <http://economics.mit.edu/files/1031>, 563 - 604; and Thierry Penard, "Competition and Strategy on the Mobile Telephone Market: A Look at the GSM Business Model in France," *Communications and Strategies* 45, (2002), http://www.comstrat.org/fic/revue_telech/426/CS45_PENARD.pdf, 49 - 79, who examines the effect of mobile carrier entry on the prices charged by incumbent firms.

¹²⁸ Note that measures of concentration among registries would have been substantially lower if the review team had defined the market to include both gTLDs and ccTLDs, and somewhat lower if it had defined the market to include gTLDs and "open" ccTLDs.

Table 9: Comparison of Registry, Registrar, Back End Concentration Ratios and HHIs and Rates of Change from September 2013 to December 2016 in New and Legacy gTLDs ^{129,130}

	4-Firm Conc. Ratio	8-Firm Conc. Ratio	
Registries	Legacy gTLDs (Sept. 2013)	99.3	99.9
	New gTLDs (Dec. 2013)	57.6	72.3
	New and Legacy gTLDs (Dec. 2016)	87.9	93.8
	Total Market Change (New and Legacy Sept. 2013 - Dec. 2016)	-11.4	-6.1
Registrars	Legacy gTLDs (Sept. 2013)	50.3	61.7
	New gTLDs (Dec. 2013)	46.9	68.1
	New and Legacy gTLDs (Dec. 2016)	42.2	54.1
	Total Market Change (New and Legacy Sept. 2013 - Dec. 2016)	-8.1	-7.6
Backend Provider	Legacy gTLDs (Sept. 2013)	95.7	99.5
	New gTLDs (Dec. 2013)	74.2	93.8
	New and Legacy gTLDs (Dec. 2016)	92.5	98.6
	Total Market Change (New and Legacy Sept. 2013 - Dec. 2016)	-3.3	-0.9

Concentration Among Registry Operators

In 2004, Summit Strategies International (SSI) prepared a study for ICANN that analyzed the effect of the introduction of seven new gTLDs on, among other things, concentration in “the domain name market,” a market consisting of both gTLDs and ccTLDs.¹³¹ It found that, as of the first quarter of 2004, .com had about a 45 percent share, .de had about a 12 percent share, .uk had about an 8 percent share, .net had about an 8 percent share, .org had about a 5 percent share, and .info, .nl, .biz, and .it each had about a 2 percent share.¹³² At that time, the

¹²⁹ All calculations were based on the total number of registrations in September 2013 and December 2016. Registration data were derived from monthly transaction reports as of December 2016 and October 2013. Brand and ROCC-exempt TLDs were excluded from the analysis. The list of Brand TLDs is available at <https://newgtlds.icann.org/en/applicants/agb/base-agreement-contracting/specification-13-applications>. The list of ROCC-exempt TLDs is available at <https://newgtlds.icann.org/en/applicants/agb/base-agreement-contracting/ccer>. Backend provider data were supplied by ICANN. Concentration ratios were calculated by summing the market shares of the largest n number of firms. The Herfindahl-Hirschman Index (HHI) was calculated by taking the market share of each firm in the industry, where the share is expressed as a whole number, squaring the respective shares, and summing the result.

¹³⁰ Registries, registrars, and back-end providers are included in the September 2013 analyses if there are registrations associated with that registry, registrar, or back-end provider as of September 2013. Registries, registrars, and back-end providers are included in the December 2016 analyses if there are registrations of legacy TLDs associated with that registry, registrar, or back-end provider as of March December. The 8-firm ratio for back-end providers is not available, as there are only four and five providers in September 2013 and December 2016, respectively.

¹³¹ Summit Strategies International and ICANN (2004), *Evaluation of the New gTLDs: Policy and Legal Issues*, accessed 20 January 2017, <https://archive.icann.org/en/tlds/new-gtld-eval-31aug04.pdf>.

¹³² Ibid. pp. 95-96. .biz was the only new gTLD among this group.

combined share of new gTLDs in this market was only about 4 percent. When it focused on a market that consisted only of gTLDs, SSI found that .com had a share of about 73 percent, .net had a share of about 12 percent, .org had a share of about 8 percent, and the combined share of the seven new gTLDs was less than 7 percent.¹³³ Although SSI noted that the introduction of the new gTLDs had doubled their number, it also remarked on “the relatively small impact that the new gTLDs have had on overall market share.”¹³⁴

In a later study that was also performed for ICANN, Katz, Rosston and Sullivan found that .com’s share was about 75 percent throughout the period from July 2001 through July 2009, about the same as SSI had found for early 2004.¹³⁵ In a later paper, the same authors concluded that “the finding that undifferentiated gTLDs introduced in the past have been unable to provide significant competition for the well-established .com is not surprising; because they are undifferentiated, these gTLDs lack unique features that offer value to users that might (at least partially) offset user familiarity with and perception of .com as the primary gTLD location for commercial (and even non-commercial) websites.”¹³⁶

SSI also found significant concentration among the operators of gTLDs. In particular, it found that gTLDs operated by Verisign had a combined share of 85 percent of the gTLD market, Afiliastore had an 11.5 percent share, and NeuLevel had a 2.7 percent share in 2004.¹³⁷ In their Phase 1 Competition Study using data for November 2014 after the introduction of new gTLDs that began in late 2013, Analysis Group found that Verisign’s share was 85 percent, Public Interest Registry’s share was 6.6 percent, Afiliastore’s share was 4 percent, and the share of Neustar, Inc., which had acquired NeuLevel in 2006, was 1.6 percent.¹³⁸ Thus, although concentration among operators was somewhat lower than in 2004, a market that consisted of operators of gTLDs was still highly concentrated and Verisign’s share was essentially unchanged.

The review team found that, although measured concentration among registry operators remains high, new gTLD entry has reduced overall concentration.¹³⁹ In particular, the share of registrations served by the four largest operators declined by about 11 percentage points, the share of registrations served by the eight largest operators declined by about 6 percentage points, and the HHI declined by almost 1,700 points between September 2013 and December 2016. These differences can be explained largely by the fact that concentration among new gTLD registry operators is substantially lower than that among all gTLD operators. For example, where the HHI for all gTLD operators was 5,728 at the end of 2016, the HHI for new gTLD operators was only 1,116.

¹³³ Ibid. p. 96

¹³⁴ Ibid. p. 96.

¹³⁵ Katz et. al (2010), *An Economic Framework*, pp. 47-48.

¹³⁶ Ibid. p. 7.

¹³⁷ Ibid. p. 96, Table 3.

¹³⁸ Analysis Group, *Phase I Assessment* (2015), p. 15, Table 2.

¹³⁹ In calculating market shares, the shares of registries with the same parent company were combined. For example, Donuts, Inc. was treated as a single firm whose market share was calculated as the aggregation of the shares of all registry LLCs that are owned by Donuts. In characterizing concentration as high or low, we are employing the standards based on HHIs that are described in United States Department of Justice and Federal Trade Commission (2010), “Merger Guidelines,” pp. 18-19. The Guidelines note that “Based on their experience, the Agencies generally classify markets into three types: [1] Unconcentrated Markets: HHI below 1500; [2] Moderately Concentrated Markets: HHI between 1500 and 2500; [3] Highly Concentrated Markets: HHI above 2500” (p. 19). The agencies note: “The purpose of these thresholds is not to provide a rigid screen to separate competitively benign mergers from anticompetitive ones, although high levels of concentration do raise concerns. Rather, they provide one way to identify some mergers unlikely to raise competitive concerns and some others for which it is particularly important to examine whether other competitive factors confirm, reinforce, or counteract the potentially harmful effects of increased concentration. The higher the post-merger HHI and the increase in the HHI, the greater are the Agencies’ potential competitive concerns and the greater is the likelihood that the Agencies will request additional information to conduct their analysis” (p. 19).

Defining the market to include only all gTLDs implicitly assumes that all gTLDs compete at least some degree with one another. An alternative approach might, therefore, be to analyze competition among the members of groups of gTLDs, each of which could be expected to compete for the patronage of a particular group of potential registrants. For example, one would not expect .beer to compete with .photography for registrants.

To consider this possibility, one might calculate concentration within “families” of gTLDs, where the “families” are constructed on the basis of domain names that suggest that they compete for the same registrants. However, doing so raises two issues. First, groupings based on the names of gTLDs may be either under- or over-inclusive because the names may be poor indicators of substitution by registrants. Second, they may result in markets that are too narrowly defined because they fail to account for competition for registrants between the members of the “families” and legacy gTLDs. To pursue the previous example, although .pub, .bar and .beer might be regarded as substitutes by bar owners, defining a market to include only those entities ignores the possibility that bar owners might also consider .com, .biz and .xyz as substitutes. Unfortunately, the review team did not have access to data that would permit it to address these issues, and therefore did not pursue this approach. If ICANN wishes to consider competition in more narrowly defined markets in the future, it will need to obtain additional information about substitution by registrants, perhaps through additional surveys.¹⁴⁰

Recommendations

These results suggest that measures of the impact of the entry of new gTLDs may be sensitive to whether or not they take registration parking into account. As a result, the review Team recommends that ICANN consider undertaking research into whether registration renewal rates are correlated with parking rates and to use the results of that research to improve its analysis of developments in the DNS marketplace. In addition, the review team recommends that ICANN consider using data on upcoming registration deletes, which nTLDstats routinely collects for new gTLDs, for the same purpose.

A Prototype Country-Specific Analysis

The previous analyses implicitly treated the geographic market in which gTLDs compete as worldwide and did not take competition between gTLDs and ccTLDs into account. However, because competition may occur in narrower geographic markets and because the ccTLD in a particular country may compete with gTLDs for registrations in that country, the review team decided to undertake an analysis of market concentration within individual countries. Although the analysis was limited to a small number of countries in a particular region, the review team believes that ICANN can use this analysis as a prototype to carry out similar analyses for other countries and regions.

In order to carry out the analysis, the review team utilized registration data for a number of countries in the Latin America and Caribbean region that had been developed in connection with a previous ICANN-commissioned study (“LAC” Study).¹⁴¹ That study employed gTLD registrant data that were “based on analysis of WHOIS data (based on the country of registrant)”.¹⁴² We supplemented these data using ccTLD registration data that were derived

¹⁴⁰ Such a survey is described in Appendix G.

¹⁴¹ Oxford Information Labs, EURid, InterConnect Communications (2016), *Latin American and Caribbean DNS Marketplace (“LAC”) Study*. We chose these countries because the LAC Study provided country-specific market shares, not because these countries were necessarily representative.

¹⁴² *Ibid.*, p. 82.

from Zooknic.¹⁴³ Those data were not based on WHOIS lookups and thus may include some registrations of users located in other countries. The authors of the LAC Study provided the ccTLD registration data that they employed.¹⁴⁴ We note, however, that those data were also based on self-reporting by ccTLDs and were not based on WHOIS lookups.

The review team carried out two types of analysis. First, it compared the shares of registrations held by ccTLD, legacy gTLD, and new gTLD operators, respectively, in the LAC countries analyzed to the worldwide shares reported by CENTR for March 2016, the same month for which the LAC data had been collected.¹⁴⁵ Second, the review team compared worldwide measures of concentration among gTLD registry operators to the same measures of concentration among all TLD operators in these countries in the same month.

ccTLD, Legacy gTLD, and New gTLD Shares Worldwide and in the LAC Region

CENTR reported that, in the first quarter of 2016, ccTLDs accounted for about 45 percent, legacy gTLDs accounted for about 50 percent, and new gTLDs accounted for about 5 percent of worldwide registrations.¹⁴⁶ The following table reports the same measures for each of the LAC countries that we analyzed.

Table 10: LAC Country-based Market Shares of ccTLDs & gTLDs (Legacy vs. New)

	ccTLD	Legacy gTLDs	New gTLDs	All gTLDs
Argentina	67.75%	29.44%	2.80%	32.25%
Brazil	80.85%	18.41%	0.74%	19.15%
Chile	83.01%	14.04%	2.95%	16.99%
Costa Rica	93.16%	0.14%	6.70%	6.84%
Dominican Republic	30.03%	66.12%	3.85%	69.97%
Peru	31.74%	67.22%	1.04%	68.26%

Two things are notable about these results. First, the share of registrations accounted for by the ccTLD in four of the countries—Argentina, Brazil, Chile, and Costa Rica—is substantially above the share accounted for by ccTLDs worldwide. Indeed, in three of these countries the ccTLD share exceeds 80 percent and it exceeds 67 percent in Argentina, all substantially above the 45 percent ccTLD share worldwide. Second, in all but one of these countries, the share of registrations accounted for by new gTLDs is less than the share accounted for by new gTLDs worldwide.

¹⁴³ ICANN, “Zooknic ccTLD data,” accessed 6 August 2018,

<https://community.icann.org/display/CCT/Studies%2C+Research%2C+and+Background+Materials>

¹⁴⁴ CCT Wiki, “LAC TLD market shares, concentration ratios, and HHIs (March 2017),” accessed 6 August 2018, <https://community.icann.org/display/CCT/Studies%2C+Research%2C+and+Background+Materials>

¹⁴⁵ The authors of the LAC study excluded Panama and the Cayman Islands from much of their analysis because of “the high proportion of proxy registrations” in those countries (LAC Study, p. 82), and we followed that approach. In addition, we excluded Colombia from our analysis because, as its website indicates, “.CO is used all over the world, and recognized by Google as a global domain extension,” <http://www.go.co/about/>, viewed on March 29, 2017.

¹⁴⁶ CENTR (2016), DomainWire Edition 15 – Q1 2016, Global TLD Stat Report, accessed 28 March 2017, <https://www.centri.org/library/library/statistics-report/domainwire-global-tld-report-2016-1.html?filter=Statistics%20report>.

Measures of Concentration Worldwide and in the LAC Region

In March 2016 for all gTLD registry operators worldwide, the 4-firm concentration ratio was 90.9 percent, the 8-firm concentration ratio was 95.7 percent, and the HHI was 6,364.¹⁴⁷ The following table reports the same measures for each of the LAC countries that we analyzed using data for the same month for all TLDs.

Table 11: LAC Country-based Concentration Ratios and HHIs

	4-Firm	8-Firm	HHI
Argentina	99.27%	99.75%	5,460
Brazil	99.45%	99.74%	6,845
Chile	99.15%	99.76%	7,065
Costa Rica	97.30%	98.75%	8,687
Dominican Republic	99.15%	99.76%	7,065
Peru	99.22%	99.73%	5,104

It is notable that the HHI in four of these six countries exceeds the worldwide HHI and that in three of these countries—the exception being the Dominican Republic—the share of registrations accounted for by the ccTLD exceeds 80 percent.

Concentration Among Registrar Owners

Concentration among registrar owners, which was relatively low prior to new gTLD entry, declined somewhat between September 2013 and December 2016.¹⁴⁸ In particular, the 4-firm and 8-firm concentration ratios both declined by about eight percentage points and the HHI declined by about 300 points.¹⁴⁹ These declines are largely the result of the slightly lower concentration among registrar owners for new gTLDs—for example the HHI is 751—as compared to the HHI for registrar owners for all gTLDs, which is 919.

Concentration Among Back-End Providers

Although the supply of back-end services to all gTLDs is highly concentrated, with a 4-firm concentration ratio of 92.5 percent and an HHI of 5,812, the supply of back-end services to new gTLDs is considerably less concentrated, with a 4-firm concentration ratio of 74.2 percent

¹⁴⁷ The Review Team employed March 2016 data here because they are for the same time period as that covered in the LAC report.

¹⁴⁸ As in the case of registry owners, the market shares of registrars with the same parent company were combined in the calculations. Market share and HHI calculations for registrars were based on registrar entities identified by Globally Unique Registrar ID (i.e., IANA ID).

¹⁴⁹ We also found that, although concentration among registrars for a given gTLD was high for some gTLDs, for most it was generally quite low. Moreover, even where concentration was relatively high, there were often a large number of registrars for a gTLD. For example, among legacy gTLDs, the HHI among registrars for .pro was 3,666 but there were 90 registrars and the HHI among registrars for .job was 7,155, but there were 63 registrars. Among new gTLDs, the HHI among registrars for .bar was 5,864, but there were 95 registrars and the HHI for .casa was 5,191, but there were 62 registrars.

and an HHI of only 1,645.¹⁵⁰ This disparity largely reflects the fact that both the largest legacy gTLD, .com, and the second-largest legacy gTLD, .net, both obtain their back-end services from a single supplier¹⁵¹. In fact, measured concentration among back-end providers to new gTLDs is not much greater than it would be if there were eight providers each with an equal share.¹⁵² Although measured concentration among all back-end providers remains high, it has declined significantly since new gTLD entry. In particular, the 4-firm concentration ratio declined by about three percentage points and the HHI declined by about 1,700 points between September 2013 and December 2016.

Price Analysis

The review team was unable to determine whether the prices charged by legacy gTLD to registrars have declined since the introduction of new gTLDs because legacy gTLDs are not required to provide this information under their agreements with ICANN, and only two legacy gTLDs provided this information in response to Analysis Group’s data requests.¹⁵³ Moreover, if, as seems likely, the legacy gTLDs that are subject to price caps, set their wholesale prices at their respective caps during the period under review, we would still not be able to observe any effect.¹⁵⁴ However, in an attempt to determine whether the new gTLDs have provided price competition to the legacy gTLDs, Analysis Group compared simple and weighted averages of the wholesale prices charged by a sample of new gTLDs to simple and weighted averages of the legacy gTLDs price caps, where the weights are the number of registrations served by a TLD, as of March 2016. The following table reports the results of these calculations:

Table 12: Simple and Weighted Average Prices of Legacy and New gTLDs (USD)¹⁵⁵

	Legacy gTLDs	New gTLDs
Simple Average Wholesale Price	\$16.72	\$21.46
Weighted Average Wholesale Price	\$7.92	\$15.38

On average, the wholesale prices charged by new gTLDs are at or above the wholesale prices that legacy gTLDs are permitted to charge under their price caps, although the differences are

¹⁵⁰ As in the cases of registry and registrar owners, the market shares of back-end providers with the same parent company were combined in the calculations.

¹⁵¹ In fact, Verisign, which operates both .com and .net, provides its own back-end services.

¹⁵² In that case, the HHI would be 1,250.

¹⁵³ The only legacy gTLD wholesale price data that were available to Analysis Group came from correspondence between registry operators and ICANN, which contained information on price caps, the maximum prices that legacy gTLDs were permitted to charge, which are not necessarily the same as the price that they actually charged. Although Analysis Group also obtained actual wholesale price information as of April 2016 for 12 legacy gTLDs that responded to a data request, those data were provided on a confidential basis to Analysis Group and thus cannot be publicly reported or analyzed at the individual gTLD level. Below, the Review Team explains why it believes that all gTLDs should be required to provide this information in conjunction with future economic studies in their agreements with ICANN.

¹⁵⁴ Even if we could observe the wholesale prices that registries actually charged, if the wholesale price caps were binding throughout the period, i.e., if prices were always at the caps, we would still be unable to observe the effect of new gTLD entry on the prices that legacy gTLDs *would have wanted to pay* because we would not observe those prices. It is possible that legacy gTLDs reduced their wholesale prices *below* their respective price caps in response to new gTLD entry although we have no evidence that this was the case.

¹⁵⁵ Analysis Group, *Phase II Assessment* (2016), p.45. Table 9 of their assessment shows the full results of these calculations as compared with the results of their *Phase I Assessment* (2015). Section III provides a description of the manner in which the new gTLD sample was constructed.

not statistically significant.¹⁵⁶ Although the new gTLDs have set wholesale prices somewhat above the price caps, their presence might nonetheless have provided a constraint on the ability of legacy gTLDs to increase their prices significantly if the caps were removed, although we cannot be certain that this was the case.

The review team was unable to reach a definitive conclusion on this issue in the absence of adequate data and until more time has passed for the effect of new gTLD entry to be fully felt. The review team views this issue should be addressed in more detail in the future.¹⁵⁷

In 2006, well before the beginning of the recent round that substantially increased the number of gTLDs, a majority of the ICANN Board expressed the view that regulation of the prices charged by TLDs might no longer be needed:

*...we appreciate the community's concerns regarding the price of .COM names. However, we firmly believe that ICANN is not equipped to be a price regulator, and we also believe that the rationale for such provisions in registry agreements is much weaker now than it was at the time the Verisign agreement was originally made in 1998. At that time, Verisign was the only gTLD registry operator, and .COM was, as a practical matter, the only commercially focused gTLD. Today, there are a number of gTLD alternatives to .COM, and several ccTLDs that have become much stronger alternatives than they were in years past. In addition, the incredibly competitive registrar market means that the opportunities for new gTLDs, both in existence and undoubtedly to come in the future, are greater than they have ever been. It may well be that .COM offers to at least some domain name registrants some value that other registries cannot offer, and thus the competitive price for a .COM registration may well be higher than for some alternatives. But price is only one metric in a competitive marketplace, and relative prices will affect consumer choices at the margin, so over time, we expect the registry market to become increasingly competitive. One way to hasten that evolution is to loosen the artificial constraints that have existed on the pricing of .COM and other registries. We began this process with the .NET agreement, and we now continue it with the .COM agreement, and we expect to continue along this path as we renegotiate agreements with other registries.*¹⁵⁸

This view was apparently not universally held, however. The following year, some members of the GNSO Council in a report to the ICANN Board stated that:

When a registry contract is up for renewal, there should be a determination whether that registry is market dominant. That determination should be made by a panel of competition experts including competition lawyers and economists...If the panel determines that there is a situation of market power, then the registry

¹⁵⁶ An important caveat to this finding is that we do not have access to transactional, premium or promotional pricing data for either new or legacy gTLDs. Thus, it is likely that the actual sales prices for many of the domains registered may be significantly different from the reported wholesale prices.

¹⁵⁷ Another possible source of price data are the prices that prevail in secondary market transactions. Although we have been unable to pursue this alternative, ICANN may wish to do so in the future.

¹⁵⁸ ICANN, *Joint Statement from Affirmative Voting Board Members* (28 February 2006), accessed 20 January 2017, <http://archive.icann.org/en/topics/vrsn-settlement/board-statements-section1.html>.

*agreement must include a pricing provision for new registrations, as currently is included in all of the largest gTLD registry agreements...Regardless of whether there is market dominance, consumers should be protected with regard to renewals due to the high switching costs associated with domain names...The price for new registrations and renewals for market dominant registries and for renewals for non-market dominant registries should be set at the time of the renewal of the registry agreement. Such a price should act as a ceiling and should not prohibit or discourage registries from providing promotions or market incentives to sell more names...The pricing provision should include the ability for an increase if there is cost justification for such an increase...non-dominant registries may differentially price for new registrations, but not for renewals. Dominant registries may not differentially price for new registrations or renewals...all registries should provide equitable pricing opportunities for all registrars...*¹⁵⁹

In any event, legacy gTLDs remain subject to price caps, although some have been permitted to increase their prices over time. In principle, the current substantial increase in the number of gTLDs provides an opportunity for ICANN to evaluate the claim of some that legacy gTLDs remain “market dominant” and for ICANN to re-examine its earlier claim that the entry of new gTLDs, in much greater numbers than had occurred earlier, has weakened the rationale for price regulation. However, in the absence of adequate data on the wholesale prices actually charged by both legacy and new gTLDs, the review team has been unable to address this issue. In recommendation 2, the review team suggests that ICANN collect additional data to remedy this shortcoming in the future.

The review team also notes that wholesale prices may vary among gTLDs even if competition among them is intense. For example, if the market for gTLDs is characterized by monopolistic competition, where products are differentiated and consumers choose on the basis both of product characteristics and price but there is free entry of suppliers, prices might vary because of differences in product characteristics.¹⁶⁰ For example, gTLDs with a small number of customers that have an intense demand for them because there are few close substitutes might charge higher prices than ones with many customers for which customers regard other gTLDs as particularly close substitutes. Thus, even if we were to observe that new gTLDs charge, on average, higher prices than do legacy gTLDs, that could reflect differences in the products that they offer and the number of consumers that they serve rather than the absence of competition among them. Of course, we do not have data on the prices charged by most legacy gTLDs and, even if we did, those prices are as likely to reflect the effects of price regulation as of outcomes produced by competitive market forces.

Finally, even if monopolistic competition is a reasonably accurate description of the DNS “market,” it is unlikely to be a complete description because of both inertia and network effects. Some registries may be able to earn excess profits in the long run because consumers incur costs when they switch to new entrants and/or because some consumers prefer to employ large, established domains.

¹⁵⁹ ICANN Board Report (4 October 2007), *Council Report to the Board: Policies for Contractual Conditions, Existing Registries*, PDP Feb 06, <https://gns0.icann.org/en/issues/gtld-policies/council-report-to-board-PDP-feb-06-04oct07.pdf>, pp. 29-30. Other recommendations “received some support from either constituencies of NomCom members.”

¹⁶⁰ JBDON, “Pricing under monopolistic and oligopolistic competition,” accessed 20 January 2017, <http://www.jbdon.com/pricing-under-monopolistic-and-oligopolistic-competition.html>. As defined by economist Joe S. Bain, “Monopolistic competition is found in the industry where there are a large number of sellers, selling differentiated but close substitute products.”

Recommendations

Recommendation 2: Collect wholesale pricing for legacy gTLDs.

Rationale/related findings: The lack of data from legacy gTLDs and transactional data will continue to hinder future CCT Review Teams' efforts to analyze competition between registries in the domain marketplace. In particular, the review team was unable to determine whether wholesale prices charged by legacy gTLDs had declined as a result of increased competition due to the introduction of new gTLDs.

To: ICANN organization

Prerequisite or priority level: Low

Consensus within team: Yes

Details: ICANN could work with an appropriate contractor and registry operators to acquire wholesale price information from both legacy and new gTLD registries on a regular basis, including at least a sample of transactional data. Transactional data is essential to allow analysis of the cost of similar strings across TLDs, and to understand the role of promotional pricing by registries. Due to the sensitive nature of this data, ICANN should provide strong assurances that the data would be treated on a confidential basis, including collecting the data under a nondisclosure agreement. In the event that ICANN is unable to establish a voluntary framework for sharing this information, this may require amendment to the Base Registry Agreement for legacy gTLDs.

Success measures: The ability for a third-party economic study to establish a meaningful understanding of (1) wholesale pricing in legacy gTLDs; (2) the role of promotional pricing in the marketplace; and (3) the value of individual second-level labels across various TLDs.

Recommendation 3: Collect transactional pricing for the gTLD marketplace.

Rationale/related findings: The lack of transactional data will continue to hinder future CCT Review Teams' efforts to analyze competition between registries in the domain marketplace. Although ICANN was able to obtain base wholesale prices from registries, individual domain transactions are often sold at either a significant discount as part of promotional campaigns, or at a significantly higher price than the baseline price for certain premium domains. For some TLDs, the review team believes that a large fraction (even a substantial majority) of domains were sold at discounted prices. Therefore, any pricing analysis based solely on the base wholesale price is unlikely to correctly capture the competitive dynamics in the marketplace.

To: ICANN organization

Prerequisite or priority level: Medium

Consensus within team: Yes

Details: ICANN or an outside contractor should attempt to acquire at least some samples of wholesale price information from registries on a regular basis and provide necessary assurances that the data would be treated on a confidential basis. The data could then be

used for analytic purposes by the ICANN organization and by others that execute non-disclosure agreements.

Success measures: The availability of relevant data for use by the ICANN organization, contractors, and the ICANN community for its work in evaluating competition in the DNS marketplace.

Recommendation 4: Collect retail pricing for the domain marketplace.

Rationale/related findings: The lack of retail data will continue to hinder future CCT Review Teams' efforts to analyze competition between registries and TLDs in the domain marketplace. One of the anticipated benefits of increased competition from the introduction of new gTLDs would be lower prices for registrants of domain names. Prices charged by registrars to registrants are the best indicator of this potential consumer benefit. In addition, retail prices offered to the public will generally be accessible through registrars' public websites and will not require additional disclosures to ICANN by contracted parties. (Note that some registrars, such as those providing corporate/brand protection services, do not publish their prices and therefore would not be represented in a survey of publicly available prices.)

To: ICANN organization

Prerequisite or priority level: Low

Consensus within team: Yes

Details: ICANN does not currently make use of retail price data that can be obtained directly from public sources such as <https://tld-list.com/> and <https://namestat.org>. We recommend that ICANN develop the capability to analyze these data on an ongoing basis. Alternatively, an amendment to the Registrar Accreditation Agreement would ensure the availability of this data with all due diligence to protect competitive information.

Success measures: The availability of relevant data for use by the ICANN organization, contractors, and the ICANN community for its work in evaluating competition in the DNS space.

Recommendation 5: Collect secondary market data.

Rationale/related findings: The presence of price caps in certain TLDs hinders efforts to comprehensively analyze competitive effects. The true market price may very well be above the caps. Accordingly, the secondary market is the best place to see price movement.

To: ICANN organization

Prerequisite or priority level: High

Consensus within team: Yes

Details: ICANN should engage with the secondary market community to better understand pricing trends. Ideally, ICANN would be able to obtain long-term transactional data that would allow it to evaluate whether the price of similar domain names was increase or decreasing over time, and whether there was any relationship to the introduction of new gTLDs. Given that it may be difficult to obtain such data, aggregated data that show per-TLD

trends or overall trends in market pricing that take into consideration the introduction of new gTLDs would still be an improvement over the current limited data on pricing dynamics in legacy gTLDs.

Success measures: The availability of relevant data for use by the ICANN organization, contractors, and the ICANN community for its work in evaluating competition in the DNS space.

Recommendation 6: Partner with mechanisms and entities involved with the collection of TLD data. As feasible, collect TLD registration number data per TLD and registrar at a country-by-country level in order to perform analysis based on the same methods used in the LAC study.¹⁶¹

Rationale/related findings: The lack of country-level data will continue to frustrate future CCT Review Teams' efforts to analyze competition between registries and TLDs in the domain marketplace. In particular, the lack of country-specific data hinders efforts to understand the competition between gTLDs and ccTLDs. ccTLD data, which is useful in understanding the overall TLD marketplace, is particularly hard to come by.

To: ICANN organization

Prerequisite or priority level: Low

Consensus within team: Yes

Details: Some of this data is collected by third parties such as CENTR, so it is possible that ICANN can arrange to acquire the data.

Success measures: The availability of relevant data for use by the ICANN organization, contractors, and the ICANN community for its work in evaluating competition in the DNS space.

Potential Impact of “Parked” Domains on Measures of Competition

Overall, in its discussion of the impact of new gTLDs on competition, the review team treated all domains as equal. However, it is worth noting that the majority of domains in both legacy and new gTLDs are not the primary identifiers of typical websites. Instead, these domains are forwarded to other domains (including sub-domains), used only for email, monetized via advertising, or simply do not resolve, perhaps held in reserve by speculators or as premium domains by registries. For a high-level impact assessment, the review team, for lack of a better term, considered these domains “parked.” The review team attempted to consider if rates of these activities differed between legacy and new gTLDs and, if so, whether the difference suggests the need for further research. The review team's conclusion is that, while further research is ideal, this phenomenon is common across all types of TLDs and a study from outside the narrow lens of the New gTLD Program may be most appropriate. Using an expansive definition of parking, according to data compiled by nTLDstats, about 68 percent of registrations in new gTLDs were parked at the time of this analysis.¹⁶² For comparison, 56

¹⁶¹ ICANN (2016), Latin American and Caribbean DNS Marketplace Study.

¹⁶² “Parking in new gTLDs Overview,” viewed 21 March 2017, <https://ntldstats.com/parking/tld>.

percent of registrations in legacy gTLDs were parked. Halvorsen et al ascribe parking to: (1) speculation in order to sell the domain later at a profit; (2) plans to develop the domain at a later date; or (3) unsuccessful development.¹⁶³

Examples of behaviors that could be considered parking include:

- The domain name does not resolve.
- The domain name resolves, but attempts to connect via HTTP return an error message.
- HTTP connections are successful, but the result is a page that displays advertisements, offers the domain for sale, or both. These pages may also be used as a vector to distribute malware.
- The page that is returned is empty or otherwise indicates that the registrant is not providing any content.
- The page that is returned is a template provided by the registry with no customization offered by the registrant.
- The domain was registered by an affiliate of the registry operator and uses a standard template with no unique content.
- The domain redirects to another domain in a different TLD.

Of course, this represents a broad view of “parking”; the implications for competition as they relate to each of these scenarios are likely different. Future research will require analyzing each of these categories individually to determine their impact on competition.¹⁶⁴

However, because the percentage of “parked” registrations in new gTLDs is so large, the review team sought to understand whether this phenomenon would affect its conclusions regarding the impact of the introduction of new gTLDs on the marketplace and thereby justify further research. Hypotheses could be advanced to suggest counting certain types of parked domains differently when computing market share and concentration. For example, one possible reason for taking parking rates into account is that registration renewal rates may be negatively correlated with rates of certain types of parking. If so, the current market shares of TLDs with relatively high parking rates may overstate their long run competitive significance. For example, some early registrations in a new gTLD are the result of “land rush” behavior by speculators.¹⁶⁵ Furthermore, there was an initial spike in registrations from China in both legacy and new gTLDs, some of which is the result of speculation and some the result of regulations that allow the registration, but not the use of domain names. Finally, a large number of parked domains in a particular gTLD may be related to heavily discounted promotions in that TLD. Significant differences in pricing between initial registration and renewal could have a significant impact on renewals.¹⁶⁶ In such an instance, these new

¹⁶³ T. Halvorsen, M.F. Der, I. Foster, S. Savage, L.K. Saul, and G.M. Voelker, “From .academy to .zone: An Analysis of the New TLD Land Rush,” Proceedings of the 2015 ACM Conference on Internet Measurement, accessed 8 August 2018, <http://conferences2.sigcomm.org/imc/2015/papers/p381.pdf>

¹⁶⁴ The DNS Abuse Study commissioned by the Review Team for this report (SIDN Labs and the Delft University of Technology, “DNS Abuse in gTLDs”) found a small but positive statistically significant relationship between the amount of parked domains and level of abusive behavior in TLDs. In other words, the more parked domains in a TLD, the more likely that TLD is to have higher levels of abuse relative to others. See the “DNS Abuse” section later in this report for more detailed analysis of the study’s findings.

¹⁶⁵ Ibid.

¹⁶⁶ For example, initial pricing for .xyz was free in many instances, but renewal was full price.

domains should be discounted at a rate commensurate to the correlation. In other words, if speculative registrations are isolated and determined to be half as likely to be renewed, their numbers should be discounted 50 percent in any calculation of market share and market concentration.

Of course, one must leave room for the possibility that speculative behavior is fundamentally different between new and legacy gTLDs with established market expectations. Another hypothesis posits that domains used as pointers imply a transition away from an existing domain. In other words, a pointer could be an indication of provisional acceptance of a new gTLD by the market and the old domain is being maintained in the near term purely to smooth a transition. In this case, the domains to which others are pointed should be discounted at some rate. Of course, there are instances when redirects simply represent “over registration” either to capture typos and guesses, or protect brand identity. Future analysis of redirects would require determining which domain is being used to promote the site. Finally, it’s possible that speculation has a pro-competitive effect, not captured directly by market share and concentration calculations, by bridging new entrants to maturity, which can take years. Unfortunately, the review team lacked sufficient data to substantially test any of these hypotheses.

As discussed later in this report, the incidence of parking in new gTLDs may also be a reflection that some registrations in new gTLDs are defensive in nature. Respondents to the INTA Impact Study indicated that in most cases, trademark holders register domains in order to protect their brands and prevent cybersquatting.¹⁶⁷ These domains are generally parked. However, the review team does not believe defensive registrations by trademark holders constitutes a large enough fraction of overall registrations in new gTLDs to significantly alter our approach to measuring effects on competition.

In order to better understand this topic, the review team used existing parking data for new gTLDs that nTLDstats routinely calculates. The review team also requested that ICANN contract with nTLDstats to develop parking data for legacy gTLDs especially for this project.¹⁶⁸ The review team used registration data for December 2016, the same month for which other statistics in this report are based, and the most comprehensive parking measure provided by nTLDstats, the aggregate of the seven separate sources of parking that it identifies.¹⁶⁹

Using this data, the review team made an initial comparison of overall parking rates between legacy and new gTLDs. nTLDstats estimated that the weighted average parking rate for legacy gTLDs in that month was approximately 56 percent and that the weighted average parking rate for new gTLDs in the same month was approximately 68 percent, a rate that is almost 20 percent higher than the parking rate for legacy gTLDs.¹⁷⁰ Again, the review team is not certain of the impact of parked domains on market rivalry, but if (as hypothesized above) TLDs with

¹⁶⁷ Nielsen, *INTA Cost Impact Study* (April 2017) and INTA, *gTLD Impact Study Status Report II* (August 2017).

¹⁶⁸ nTLDstats.com, “Parking Analysis of Legacy gTLDs (3 March 2017),” accessed 6 August 2018, <https://community.icann.org/display/CCT/Studies%2C+Research%2C+and+Background+Materials>. nTLDstats applied its parking analysis method to each legacy gTLD based on the number of names in its zone file. For TLDs with 10,000 names or fewer, nTLDstats analyzed all registered names, for TLDs with 10,001-100,000 names, nTLDstats analyzed 10 percent of registered names, and for TLDs with more than 100,000 names, nTLDstats analyzed 1 percent of registered names. nTLDstats also conducted a manual review of 10 percent of the total sample to check for false positives.

¹⁶⁹ Specifically, the Review Team adjusted the number of registrations for each gTLD to reflect the number of registrations that were not parked, i.e., (1 minus the parking rate) multiplied by the number of registrations for each gTLD.

¹⁷⁰ 20 percent of 55.6 = 11.2 and 55.6 + 11.12 = 66.72 (nearly 68 percent).

large number of parked domains are somehow less vibrant competitors, this is a substantial difference that could affect the computation of our competition-related indicators.¹⁷¹

Taking a cursory stab at understanding the potential significance of parking rates on future market shares, the review team attempted to determine whether there was a relationship between parking and renewal rates. In order to perform this analysis, the review team compared parking rates in each TLD as of December 2016 with a renewal rate computed based on registries' monthly transaction reports¹⁷² for the period of July – December 2016.¹⁷³ Using a Pearson correlation analysis (which measures the correlation between two sets of variables), the review team was unable to find a statistically significant correlation between renewal rates and parking rates in either new or legacy gTLDs.¹⁷⁴ While the identification of a relationship would have been interesting, the results of this test are by no means dispositive of a potential correlation. The review team recommends more robust studies of this topic to better understand whether such a relationship exists. Such studies could include, among other things, a closer examination of the following factors: 1) what parking measures best measure market rivalry; 2) what renewal rates should be used; 3) what factors other than parking are likely to affect renewal rates; 4) a description of the functional form (e.g., linear, logarithmic, etc.) of the relationship between parking and renewals; and 5) the "lag" between parking and non-renewals (i.e., how much time is there between the time that a domain name is parked and the time at which it is not renewed?).

Geographic Differences in Parking Behavior

The review team also sought to determine whether the quantity of parked domains varied based on region. For example, the Latin American and Caribbean DNS Marketplace Study (LAC Study) reports that "across the entire region, 78% of the gTLD domain names are active, and 22% are not in use (either timing out, or no active services)."¹⁷⁵ By comparison, according to nTLDstats, across all new gTLDs approximately 33% of domains had no valid DNS or returned invalid HTTP responses.

Although the review team did not have the ability to directly correlate registrant addresses with parked domains, it did identify six of the top 50 largest new gTLDs, including TLDs operated by registries based in China, showing markedly higher parking rates than the average across all new gTLDs, with parking rates ranging from 85 percent for .wang to 98 percent for .xin. Table 13 below shows the parking rate for each of the six.

¹⁷¹ At one extreme, if parked registrations were excluded from the market share analysis entirely, the Review Team found a "non-parked" market share of new gTLD registrations as a portion of all gTLDs of 10.9 percent, approximately 23 percent lower than the 14.2 percent share when parked domains are included. Making a similar adjustment in market concentration calculations did not make a meaningful difference between including or excluding parked domains.



¹⁷² Registries do not submit a renewal rate calculation to ICANN. Nevertheless, given that second-level domains auto-renew, the Review Team computed a renewal rate for each TLD by dividing the number of renewal transactions by the sum of the deletion transactions (outside of the add grace period) plus renewal transactions.

¹⁷³ Monthly renewal rates can be quite volatile and represent only the portion of domains eligible for renewal that month, whereas parking rates are calculated across all domains in a TLD. Therefore, the Review Team used a six-month period to calculate renewal rates in order to minimize sample errors in the analysis.

¹⁷⁴ CCT Wiki, "Parking, Renewal, and Correlation Analysis: Pearson Linear Correlation Analysis of Parking and Renewal Rates," August 2017, <https://community.icann.org/display/CCT/Studies%2C+Research%2C+and+Background+Materials>.

¹⁷⁵ Oxford Information Labs, LACTLD, EURid and InterConnect Communications, *Latin America and Caribbean DNS Marketplace Study*, p. 107.

Table 13: Parking Rates of Six of the Top 50 Largest New gTLDs

 Number of Registrars	 Parking Rate (%)
All New gTLDs	68.0%
.XIN	97.77%
.WANG	85.08%
.TOP	85.08%
网址 (xn--ses554g)	83.22%
.REN	82.82%

According to data from nTLDstats, there were over 9 million registrations made in new gTLD strings that have their origin in China.¹⁷⁶ One possible reason for the higher levels of parking rates seen in new gTLDs that cater to Chinese registrants may be speculative domain registrations out of China, particularly with regard to short domain names (i.e., names containing five or less letters or numbers). In 2015, Chinese investors purchased a large number of short domain names as these were seen as especially interesting to Chinese investors.¹⁷⁷ Furthermore, it seems that Chinese buyers are also purchasing names with actual end-uses in mind that they think will go up in value. As a result, the increase in awareness of domain investment in China may have contributed to higher parking rates of China-based new gTLDs. This trend may also be indicative of a speculative bubble in the Chinese market as well as expected value of these domains.

These initial analyses of geographically based parking rates are quite cursory and based on limited data, but they do seem to indicate that regional variations in parking rates exist and can be quite significant. Again, these figures represent a gross measurement of parking, and future analysis will require a more granular exploration of behavior across geographic regions.

Relationship Between Parking and DNS Abuse

While the review team was not able to identify a direct relationship between parking rates and either competition or consumer choice, it considered the possibility that parked domains may be linked to consumer trust, and in particular to the possibility that parking is associated with DNS Abuse. Previously, Vissers et al¹⁷⁸ studied over eight million parked domains and found that “users who land on parked websites are exposed to malware, inappropriate content, and elaborate scams.”¹⁷⁹

¹⁷⁶ NTLStats.com, “Parking Analysis of Legacy gTLDs.”

¹⁷⁷ Echo Huang, “China’s newest investment craze is short domain names,” Quartz, 10 January 2016, accessed 30 October 2017, <https://qz.com/581248/chinas-latest-investment-craze-is-short-domain-names/>.

¹⁷⁸ Vissers, Joosen, and Nikiforakis, “Parking Sensors: Analyzing and Detecting Parked Domains,” (paper presented at NDSS, San Diego, USA, 8-11 February 2015). <http://dx.doi.org/10.14722/ndss.2015.23053.p.1>.

¹⁷⁹ It is not entirely clear to the review team whether malware propagation is intentional by the parked sites or parking services, or the result of compromised ad networks. Vissers et al raise this possibility in their paper: “Possibly, these complex chains are the consequence of a process similar to ad arbitration, a widely adopted practice performed by most ad syndicators [p. 33]. During this process, the syndicator bids on available ad slots of other publishers or syndicators, allowing them to resell these slots to the next bidder. Often, ad slots are subjected to multiple iterations of this reselling process. As a consequence, ad slots are no longer under control of the syndicator that the original publisher partnered with. All these interactions and intermediate parties have

In conjunction with this Review, the “Statistical Analysis of DNS Abuse in gTLDs” study conducted for this report found that, in general, in new gTLDs, the total number of registrations associated with malware is lower than in legacy gTLDs,¹⁸⁰ whereas the rate of malware associated domain names per volume in new gTLDs is occasionally higher than that of legacy gTLDs. However, if one examines parking rates in the new gTLDs, the malware propagation that is occurring is marginally more likely to occur in zones with higher parking rates. There may be some correlation between parking and malware, but that is not as strong and indicative as the overall trend of lower malware distribution rates than those of legacy gTLDs. Nonetheless, the malware distribution rate gap between legacy and new gTLDs appears to be shrinking. Therefore, the review team believes the community should further explore the correlation between parking and malware distribution.

Recommendations

While the review team observes that new gTLDs have higher parking (using the broadest possible definition) rates than legacy gTLDs and that there are regional variations in parking rates, it is so far unclear if parking has a meaningful effect on either competition or consumer choice. As a result, the review team recommends that ICANN consider undertaking further research into the potential competitive impact of domain parking and to use the results of that research to improve its analysis of developments in the DNS marketplace. In addition, the review team recommends that ICANN consider using data on upcoming registration renewals for the same purpose.

Recommendation 7: Collect domain usage data to better understand the implications of parked domains.

Rationale/related findings: The high incidence of parked domains suggests an impact on the competitive landscape, but insufficient data hinders efforts to analyze this impact.

To: ICANN organization

Prerequisite or priority level: High

Consensus within team: Yes

Details: The review team uses the term “domain usage” rather than “parking” in the recommendation because the term “parking” is associated with a wide variety of behaviors, and different members of the community may define “parking” differently. It is also likely that different types of “parking” behaviors reflect different intentions by registrants and will have different implications on the competitive dynamics in the marketplace. ICANN should regularly track the proportion of domains in gTLDs that are parked with sufficient granularity to identify trends on a regional and global basis. Ideally, data would allow analysis to occur on a per-domain basis rather than being aggregated on a TLD level. Future reviews should conduct further analyses of whether there is a correlation between parked domains and renewal rates or other factors that may affect competition. Further analysis should be performed on the relationship between parking and DNS abuse. The community may also wish to take this issue up for further study outside of the periodic CCT Review process, as the phenomenon is also

the potential to blur the direct involvement of the parking service in serving malware. In some cases, however, we also see malware being delivered more directly, for example, by the parent company of Parking Service 8.”

¹⁸⁰ SIDN Labs and the Delft University of Technology, “DNS Abuse in gTLDs”.

prevalent within legacy gTLDs, and there does not seem to be significant study of the topic with ICANN.

Success measures: The availability of relevant data for use by the ICANN organization, contractors, and the ICANN community for its work in evaluating competition in the DNS space.

7 Consumer Choice

The review team also considered the question of whether the introduction of new gTLDs increased the choices available to registrants. The expansion of the Program gives registrants new options in terms of new languages, character sets, geographic identities, and new specialized categories. However, the review team sought to establish whether registrations in the new gTLDs represented a positive choice available to registrants or if a significant number felt obliged to register defensively in new gTLDs to protect their brand or identity. In particular, there has been considerable discussion of whether trademark holders would find it necessary to register those trademarks as domain names in new gTLDs in order to prevent others from doing so.

There have been a number of studies (see below) of the extent to which registrants have engaged in such “defensive” registrations. In anticipation of this review, ICANN commissioned Nielsen to perform the Global Registrant Survey to gain insights from registrants. More recently, INTA conducted a study of its membership, which reflects the experience of trademark holders.¹⁸¹ The review team examined each of these studies and supplemented them with its own analysis. The review team initially addressed the general topic of consumer choice and then performed a specific analysis related to trademark holders below.¹⁸²

In evaluating these results, it is important to note that not all instances of duplicate registrations are necessarily “defensive” in nature. For example, a trademark holder might register the same mark in multiple domains in order to increase the probability that it will be found through user searches, a consideration that has become increasingly important as the number of domains has grown.¹⁸³ In fact, a total of 52 percent of registrants interviewed by Nielsen indicated that one of the reasons for registering duplicate domain names was “to help ensure my site gets found in searches.”¹⁸⁴ However, 51 percent of the respondents indicated that they engaged in duplicate registrations “to protect my brand or organization name” and the same percentage did so “to keep someone else from having a similar name.”¹⁸⁵ The INTA Survey found that amongst trademark holders, “new TLD registrations primarily duplicate legacy TLD or ccTLD registrations”¹⁸⁶ and, in particular, that only 17 percent of respondents had registered names in the new gTLDs for the first time versus duplicating existing domains in legacy gTLDs or ccTLDs. Thus, it appears that “defensive” registrations are a real phenomenon, apparently because the costs of challenging registrations by others can be considerably greater than the costs of registering their marks in multiple domains.¹⁸⁷

¹⁸¹ Nielsen, *Consumer Research* (2015); Nielsen, *Consumer Research Wave 2* (2016); Nielsen, *INTA New gTLD Cost Impact Study* (April 2017) and INTA, *New gTLD Impact Study Status Report II* (August 2017),

¹⁸² In this chapter, the term “consumers” is used primarily to refer to domain name registrants and not consumer end-users, whose behavior and beliefs are largely covered in the Consumer Trust chapter.

¹⁸³ Consider users that search for websites by guessing Internet addresses. As the number of TLDs increases, finding the “correct” website by guessing becomes more difficult and, on average, the number of required guesses is substantially increased. Faced with this fact, one would expect that some “guessers” would use search engines more frequently than in the past. However, some registrants may still choose to register in several TLDs in order to reduce the number of guesses that a user must make in order to find them.

¹⁸⁴ Nielsen, *Registrant Survey Wave 2* (2016), p. 13.

¹⁸⁵ *Ibid.* Many registrants chose both responses; a total of 60 percent of registrants of new gTLDs selected one of the two responses.

¹⁸⁶ Nielsen, *INTA New gTLD Cost Impact Study* (April 2017), Slide 19

¹⁸⁷ [Appendix G: Possible Questions for a Future Consumer Survey](#) includes a series of questions that may be included in future surveys of domain name registrants to better understand the choices they make when registering domain names.

Previous Studies

Krueger and Van Couvering surveyed 1,043 brand names of *Fortune* 100 companies and found the following registration percentages in different TLDs: 100 percent in .com, 76 percent in .org, 84 percent in .net, 69 percent in .info, 65 percent in .biz, and 57 percent in .mobi.¹⁸⁸ Zittrain and Edelman found that, six months after open registration in .biz began, 91 percent of a sample of .biz domain names were also registered in .com, 63 percent were also registered in .net, and 49 percent were also registered in .org.¹⁸⁹ Summit Strategies International analyzed the extent of duplicate name registrations and the presence of the same registered name holder between four of the then-new and three legacy TLDs, *finding* that: “The statistics for .info indicate that only 11% of registrants hold the same name in .com, which suggests that .info has created significant new opportunities. With .biz, 42% of duplicate registrations appear to be registered to the same party, thereby suggesting that they are protective in nature.”¹⁹⁰ Katz, Rosston, and Sullivan analyzed the overlap in domain registrations for 200 of the top 500 global brands as ranked by Brand Finance and found “that a very high percentage of them were registered in the different TLDs” that they examined.¹⁹¹ However, they also found “a big range in the share of registered domains with content” and that the percentage of active sites “was quite low”, except for .com. Finally, Halvorson et al, who employ a variety of measures to identify matches of registrants between .com and .biz, found “at least some degree of a match for around 40% of the [biz-com] pairs [they] could assess.”¹⁹² Using what they describe as “stronger indicators” they classified 11.6 percent of biz domains as “defensive.”¹⁹³

CCT Analysis

The Global Registrant Survey, Wave 2, found that 35 percent of all surveyed registrants had registered at least one name in a new gTLD.¹⁹⁴ Of those, 60 percent indicated that they had registered to “protect existing domain(s) and ensure no one else got a domain similar” while 34 percent indicated that they registered to “appeal to new Internet users or new types of customers”, and 6 percent registered because the “name I wanted was not available using older gTLDs.”

The review team also performed an analysis of strings registered as second-level domains in new gTLDs and comparable strings registered in .com, which is currently by far the most popular of the legacy gTLDs. The review team’s analysis focused on two potential patterns. In the first case, the review team looked to see if the identical string registered as a second-level domain in a new gTLD was registered as a second-level domain in .com (e.g., if example.tld

¹⁸⁸ F. Krueger and A. Van Couvering, “An Analysis of Trademark Registration Data in New gTLDs,” *Minds + Machines Working Paper*, (February 2010): 51.

¹⁸⁹ Jonathan Zittrain and Benjamin Edelman, Berkman Center for Internet and Society Harvard Law School, “Survey of Usage of the .biz TLD” (June 2002), accessed 6 August 2017, <https://cyber.law.harvard.edu/tlds/001/>.

¹⁹⁰ Summit Strategies International (July 2004), *Evaluation of the New gTLDs: Policy and Legal Issues*, accessed 6 August 2018, p. 102. The authors note that “The data...is based on an extremely small sample of only 100 names for .biz and .info.” This study was prepared for ICANN.

¹⁹¹ M.L. Katz, G.L. Rosston, and T. Sullivan, *Economic Considerations in the Expansion of Generic Top-Level Domain Names, Phase II Report: Case Studies* (December 2011), accessed 25 January 2017, <https://archive.icann.org/en/topics/new-gtlds/phase-two-economic-considerations-03dec10-en.pdf>. These domains were .com, .net, .org, .biz, .info, .mobi, and .us. This study was prepared for ICANN.

¹⁹² T. Halvorson, J. Szurdi, G. Maier, M. Felegyhazi, C. Kreibich, N. Weaver, K. Levchenko, and V. Paxon, “The BIZ Top-Level Domain: Ten Years Later” in *Passive and Active Measurement*, eds N. Taft and F. Ricciato. (Germany: Springer Berlin Heidelberg, 2012), 221-230, 228. <http://www.icir.org/vern/papers/dot-biz.pam12.pdf>

¹⁹³ See Substitution Analysis section earlier.

¹⁹⁴ Nielsen, *Registrant Survey Wave 2* (2016), p. 164.

was registered, was example.com also registered?).¹⁹⁵ The review team found that 82 percent of registrations in new gTLDs had identical matches in .com. However, there was considerable variation in the percentages of identical matches across gTLDs. For example, among 414 gTLDs with at least 1,000 registrations, 32 had at least 99 percent of their second-level domains as exact matches in .com, including both .wang and .xin, which are the third- and eleventh-largest new gTLDs by registration volume as of November 2016; and nearly two-thirds (271) had at least 95 percent of their second-level domains as exact matches in .com. At the other extreme, 10 gTLDs had fewer than 50 percent of their second-level domains as exact matches in .com. Of these, half were IDNs. In general, IDN gTLDs contained fewer identical matches to .com, with only about 70 percent of registrations in IDN gTLDs being identical matches to domains in .com. Unfortunately, because the analysis did not include WHOIS data, the review team was unable to determine whether the same registrant had registered both domains.

In a second analysis, the review team examined whether the combined string representing both the TLD and the second-level domain was registered as a second-level domain in .com (e.g., if example.tld was registered, was exampletld.com also registered?).¹⁹⁶ If this combined string were available in .com, it meant that the registrant had chosen a new gTLD even though they could have registered a roughly equivalent name in the most popular existing gTLD. In this analysis, the review team found that only 13 percent of registrations in the new gTLDs were also registered in .com in the combined form, meaning that 87 percent of registrants could have registered a very similar string in .com. Of course, in many cases the combined string is nonsense—for example, registrants in the popular .xyz TLD probably did not consider something like examplexyz.com as an alternative. Registrants in these TLDs would likely be looking for the exact match equivalent in other generic TLDs such as .com.

While the review team was unable to systematically differentiate between “generic” (such as .xyz or .com) and “specific” TLDs (such as .photography or .bank), a manual review did reveal a substantial difference in the patterns of availability across these types of TLDs. Unsurprisingly, only .1 percent of the registrations in .xyz were registered in their combined form in .com. On the other hand, many of the combined strings registered in specific TLDs such as .capital (only 30 percent available in .com), .movie (35 percent), .cafe (47 percent), and .properties (49 percent) were also registered in .com, meaning that many of these registrants would have been unable to pick an equivalent string in .com. Overall, approximately 65 new gTLDs representing half a million registrations saw more than 50 percent of their combined strings registered in .com. The vast majority of registrants, including those in popular gTLDs such as .club (95 percent), .review (99 percent), and .shop (89 percent) could have registered the combined form in .com and chose a new gTLD instead.

Overall, the review team concluded that while some registrants are motivated by defensive objectives in the new gTLDs, many registrants choose to register in new gTLDs to broaden the appeal or reach of their offerings even when similar options remain available in legacy gTLDs. As noted in Recommendation 8, the review team suggests that ICANN continue to conduct periodic registrant surveys in order to better understand the value of the increased choice offered by new gTLDs and to observe any changes in their sentiments and motivations over time.

¹⁹⁵ Analysis Group, *Summary of Trademark Strings Registered in Legacy gTLDs Trademark Strings that are also Brand TLDs* (October 2016), accessed 6 August 2018, <https://community.icann.org/download/attachments/56135378/New%20gTLD%20Registrations%20of%20Brand%20TLD%20TM%20Strings%2010-18-16.pdf?version=1&modificationDate=1481305785167&api=v2>.

¹⁹⁶ This reporting was derived from an analysis of two data sets produced by ICANN organization for the Review Team. See “New gTLD Registrations Available in .com,” (2016 and 2018), and “Existing Registrations in .com Against New gTLDs,” (2016 and 2018), accessed 3 August 2018, available at <https://community.icann.org/display/CCT/Studies%2C+Research%2C+and+Background+Materials>.

CCT Analysis: Trademarks and Defensive registrations

The INTA Survey indicated that amongst its respondents of trademark holders, “nearly all of the new domains registered as duplicates to a Legacy or ccTLD were intended primarily to prevent the name from being used by another registrant.”¹⁹⁷ In order to better understand the prevalence of these defensive registrations by trademark holders, the review team, together with Analysis Group, used data from the most recent round of new gTLD expansion to analyze the same issue. Specifically, the review team began by identifying a number of trademarks for which one might expect some degree of “defensive” registrations together with the identity of the registrant. Analysis Group collected a random sample of data from the TMCH database that represented 25% of trademark holders within the database. Identities of registrants were obtained using WHOIS data.¹⁹⁸ The trademark strings analyzed were limited to verified or corrected Latin text strings in the Trademark Clearinghouse. Matches were identified as those involving an exact match in accordance with ICANN’s matching criteria, where the registrant was identified as the trademark holder associated with the registered string based on an approximate text comparison between registrant and trademark holder names.

Using these data, the review team determined: (1) whether each of the trademarks in the data was registered by the trademark holder in at least one legacy gTLD; (2) whether the same string was registered by the trademark holder in at least one new gTLD; and (3) for those strings that were registered by the trademark holder in at least one new gTLD, the number of new gTLDs in which the trademark holder had registered the string. The team found that 54 percent of the strings that were registered in a legacy gTLD were also registered in at least one a new gTLD. The review team also found that, of these strings, three was the median number of registrations in new gTLDs. That is, half of the trademarks that were analyzed were registered in three or fewer new gTLDs.¹⁹⁹ The review team also found that three-quarters of these strings were registered in seven or fewer new gTLDs, and that 90 percent of these strings were registered in 17 or fewer new gTLDs.²⁰⁰ At the same time, a small number of trademarked strings were registered in a large number of TLDs: 4 percent of trademarks were registered in at least 100 new gTLDs, and one was registered in 406 new gTLDs. Extrapolating the sample across all marks, one would expect that trademark holders would have made approximately 80,000 total registrations of their trademarks in new gTLDs as of September 2016, which represents 0.3 percent of all registrations within new gTLDs²⁰¹. The review team concluded from this analysis that, although the direct cost of the New gTLD Program for most trademark holders related to defensive registrations appears to be lower than some had feared prior to the inception of the program,²⁰² a small fraction of trademark holders are likely incurring significant costs associated with defensive registrations.

¹⁹⁷ Nielsen, *INTA New gTLD Cost Impact Study* (April 2017), slide 22.

¹⁹⁸ Analysis Group, *Independent Review of Trademark Clearinghouse (TMCH) Services Draft Report* (July 2016), accessed 7 August 2018, <https://newgtlds.icann.org/en/reviews/tmch/draft-services-review-25jul16-en.pdf>.

¹⁹⁹ The mean number of duplicate registrations was eight, but the statistic is strongly influenced by a small number of trademarks that were registered in a very large number of domains. For example, one trademark was registered in 406 domains.

²⁰⁰ In assessing these findings, it is important to emphasize that the extent of duplicate registrations that we observe may have been influenced, to some degree at least, by the use by trademark holders of the blocking services described above. That is, to the extent that trademark holders obtained protection through blocking, they may have had less need to register their trademarks “defensively.”

²⁰¹ The TMCH review found a total of 19,642 registrations by trademark holders of their mark using a 25 percent sample. Extrapolating this to 100 percent gives us an expected total of 78,568 total registrations. In comparison, as of September 2016, there were a total of 24,814,734 registrations across all new gTLDs.

²⁰² Dan Jaffe of the Association of National Advertisers (ANA) stated in his prepared testimony before the House Subcommittee on Communications and Technology: “This cost [of defensive registrations] alone could be in the hundreds of thousands of dollars per brand name, creating a multi-million dollar liability for major corporations and a multi-billion dollar cost to the industry.” See Testimony of Daniel L. Jaffe (14 December 2011), *Hearing on ICANN’s Top-Level Domain Program*, accessed 7 August 2018, https://www.ana.net/getfile/17073_p.6; 2) The Coalition Against Domain Name Abuse (CADNA) claimed that defensive registrations would cost \$2.4

In addition to defensive registrations, some registries offer a service through which a trademark owner can block others from using its marks without the need to purchase the domain name itself. For example, the Donuts registry offers a “Domain Protected Marks List,” which “protects trademark holders against cybersquatting at a fraction of the cost of defensively and individually registering the terms across all Donuts domains.”²⁰³ Unfortunately, the Review Team was not able to locate any data related to the costs incurred by trademark holders making use of these blocking services, and thus is unable to draw any conclusions as to the efficacy of such services.

Recommendations

Recommendation 8: Conduct periodic surveys of registrants that gathers both objective and subjective information with a goal of creating more concrete and actionable information.

Rationale/related findings: Although Nielsen conducted two surveys of registrants in conjunction with the CCT, the set of questions posed did not allow for a full analysis of consumer motivations or to understand how valuable they found the expanded choice offered by the new gTLDs. At the same time, as the review team observed additional registrations and more familiarity with new gTLDs, it is likely that consumer attitudes will change over time as well. A periodic survey will allow the community to observe those changes.

To: ICANN organization

Prerequisite or priority level: Low

Consensus within team: Yes

Details: Because the survey supports further analysis of both consumer choice and consumer trust, it must pose questions relating to both topics. In both cases, it is important to know which TLDs consumers are familiar with and which they actually visit.

To better understand issues of consumer trust, it is also important to understand why they choose to register in some TLDs but not others, and whether the TLD’s registration policies and perception of trustworthiness influence the choice of whether or not to register.

billion. See Michael Berkens (21 September 2013), “CADNA: Costs of Defensive New gTLD Registrations To Be Double The Total Cost of All .Com Registrations,” accessed 7 August 2018, <https://www.thedomains.com/2013/09/21/cadna-costs-of-defensive-new-gtld-registrations-to-be-double-the-total-cost-of-all-com-registrations/>. As the article points out, that was double the cost of all .COM and .NET registrations combined at the time.

²⁰³ Donuts Registry, “Brand Protection,” accessed 7 August 2018, <http://www.donuts.domains/services/dpml>. According to domainname.com: “Three of the largest new top-level domain registries has [sic] created a new domain name blocking tool. Many clients prefer to avoid defensive registrations but these services offer some economies of scales and are worth considering for key brands. The service is offered by three new gTLD providers; Donuts (covering 172 TLDs) Rightside (covering 36 TLDs) and Minds + Machines (covering 16 TLDs). [NB: Donuts acquired the Rightside registry in 2017]. The blocking tool allows trademark owners to block their marks and related terms, at the second-level, in all supported new gTLDs, for one fee per registry. The service is designed to be an economical way for trademark owners to protect their rights from cybersquatters. With the block it is not necessary for trademark owners to take out defensive registrations in each of the three providers TLDs in order to obtain a block, the term you want to block must be based on a trademark validated by the Trademark Clearinghouse.” In 2016, Donuts announced a new version of its blocking service that will allow brand owners the opportunity to obtain blocking in return for a fee of \$10,000. See Jack Ellis, “Donuts unveils enhanced trademark protection offering; expert urges lower cost options in next gTLD round,” *World Trademark Review*, 29 September 2016, accessed 7 August 2018, <http://www.worldtrademarkreview.com/blog/Detail.aspx?q=fa934d21-cfa7-459c-9b1f-f9aa61287908>

For consumer choice, the survey should allow a relative weighting of the potential contributions to consumer choice with respect to geographic name gTLDs, specific sector gTLDs, and IDN gTLDs. The survey should help determine whether there is a clear preference by registrants for different types of gTLDs and whether there are regional differences or similarities in their preferences. It will be also be important to gather further data on the geographic distribution of gTLD registrants and the services provided to them by registrars, particularly in different regions, including languages offered for service interactions and locations beyond the primary offices.

The survey should be designed to repeat portions of previous surveys while continuously striving to improve the data available on registrant behavior and attitudes. Some potential questions are included in Appendix G: Possible Questions for a Future Consumer Survey. The survey should allow an analysis of: (1) what factors matter most to users in determining which gTLDs to visit; (2) whether perceived trustworthiness of TLDs influences registration behavior; (3) the the perception of new gTLDs with restrictions on registration compared to new gTLDs with few or no restrictions; and (4) whether registrants view the expanded name space as beneficial or confusing.

Success measures: The availability of relevant data for use by the ICANN organization, contractors, and the ICANN community for its work in evaluating competition in the DNS space.

Recommendation 9: The ICANN community should consider whether the costs related to defensive registration for the small number of brands registering a large number of domains can be reduced.

Rationale/related findings: The review team found that while most trademarks were either not registered in new gTLDs or in only a handful of new gTLDs, a small number of trademarks were responsible for a large number of registrations across many new gTLDs and were likely bearing most of the cost of registrations. This bimodal distribution suggests that RPMs tailored to certain of these trademarks may be appropriate.

To: New gTLD Subsequent Procedures PDP Working Group and/or Rights Protection Mechanisms (RPM) PDP Working Group

Prerequisite or priority level: Prerequisite

Consensus within team: Yes

Details: The review team does not suggest a specific mechanism. However, the review team believes the uneven distribution of costs of defensive registrations to a small number of trademark holders may be an unanticipated effect of the current RPM regime and that the relevant PDP(s) should consider whether those costs can be lowered without impacting the benefits of the New gTLD Program, thereby improving the cost-benefit ratio of the overall Program.

Success measures: A reduction in the number of defensive registrations overall and, in particular, a reduction in the number of defensive registrations per trademark by the registrants with the most defensive registrations without causing an increase in the number of UDRP and URS cases.

Benefits vs. Confusion to End-users

The CCT attempted to consider the benefits of the expanded number of gTLDs weighed against the risks that such expansion could create confusion, particularly for consumer end-users navigating to domain names. Although there was some data available about the benefits of the expansion for consumer end-users and registrants, the review team lacked specific data about the risks of confusion. As a result, the analysis on this topic is incomplete.

Using the data available, the review team looked at whether the New gTLD Program benefitted consumer end-users and registrants. In the case of consumer end-users, the review team examined benefits from increased choice and variety. In particular, the review team looked at the benefits consumer end-users would gain in having a broader and more diverse source of domain names to access. For registrants, the review team considered the benefits of having a broader and more diverse source of domain names for registration. This includes geographic TLDs, TLDs using non-Latin scripts and written in languages other than English, and new service models.

Benefits to consumer end-users include greater choice in the number of generic top-level domain names (given the increase from some 22 in 2013 to over 1000 in 2016, which does not include the ccTLDs).²⁰⁴ Another benefit is greater "specificity" of identification regarding the domain names (i.e., a consumer end-user can search within a narrower range of gTLDs depending upon their interests, for example by searching for local florists within .berlin or banks within .bank), as well as increased availability of non-Latin scripts at the top- and second-level (IDNs).²⁰⁵

When comparing the 2013 environment to that of 2016-2017, registrants have benefited from a broader and more diverse source of domain names for registration (e.g., geographic TLDs, new scripts).²⁰⁶ Registrants indicated that having an extension that was relevant to their needs was one of the most important factors in determining which gTLD to purchase compared to the previous situation in which the most important factor was price.²⁰⁷ There has also been a clear increase in the number of jurisdictions governing the registrations, with growth from only 6 jurisdictions having at least one gTLD registry operator in 2013 up to 50 jurisdictions in the second half of 2017.²⁰⁸ The number of registrars has not increased at the same pace, but there were already a large number of registrars prior to the inception of the New gTLD Program. The total number of second-level domain name registrations increased by roughly 59 percent from 2010 to 2017, and, notably, the number of second-level registrations in IDNs has increased by over 3 million percent, from 19 in the second half of 2013 to over 590,000 by the second half of 2017.²⁰⁹

²⁰⁴ When the New gTLD Program was launched, there were 22 gTLDs and over 250 ccTLDs that could be used.

²⁰⁵ Nielsen, *Consumer Research Wave 2* (2016), pp. 7-9, 33, 35. While awareness and visitation of new gTLDs has not increased at the rate of the legacy TLDs, the rise has been greatest in Africa, Asia/Pacific, and Latin America (see pp. 7 – 8). It is also clear that trust in new gTLDs is high for IDNs and that expectations on restrictions on same add to consumer confidence (see p. 9).

²⁰⁶ Nielsen, *Registrant Survey Wave 2* (2016) indicates that awareness of new gTLDs is increasing compared to relative stagnation or decrease in legacy gTLDs. See also ICANN, *gTLD Marketplace Health Index* (July 2016), accessed 25 January 2017, <https://www.icann.org/en/system/files/files/gtld-marketplace-health-index-beta-19jul16-en.pdf>, pp. 5 – 7.

²⁰⁷ Nielsen, *Consumer Research Wave 2* (2016), p. 33 states: "Having a well-known extension and one that seems most relevant are the main factors across the board in determining **which gTLD to purchase**" [emphasis added], which must be a reference to registrants as they are the only ones purchasing gTLD domain names.

²⁰⁸ ICANN, *gTLD Marketplace Health Index* (June 2018), accessed 7 August 2018, <https://www.icann.org/en/system/files/files/gtld-marketplace-health-index-beta-20jun18-en.pdf>, p. 3.

²⁰⁹ ICANN, *gTLD Marketplace Health Index* (December 2017), p. 5.

In addition to understanding these benefits, the review team attempted to see if there was evidence that an increased number and type of gTLDs (geographic, new internationalized scripts) might create confusion for consumers and, if such confusion existed, whether it would reduce the value to registrants of the new type and number of gTLDs. This effort was hampered by a lack of data relevant to this topic. In particular, the Nielsen surveys of consumer end-users did not include specific questions on this issue.

Nevertheless, there is evidence from the Nielsen surveys that over half of end-users search for websites via search engines rather than via specific names of gTLDs.²¹⁰ The use of search engines to find websites might reduce the risk of confusion as to specific searches depending upon the sophistication of the search engines, but more research would need to be conducted to confirm this hypothesis. Also, in order to accurately assess whether the increase in gTLDs increased the risk of confusion for consumer end-users and/or registrants, more research would need to be gathered.

Greater specificity and "sectoralization" of the new gTLDs has permitted consumer end-users to have greater choice in identifying the domains from which they wish to find goods and services. This increased specificity is also reflected in the greater number of geographic gTLDs, potentially permitting narrower searches and search parameters at the second-level. The expansion of availability of IDNs has also increased consumer choice, although the review team did not have sufficient evidence of whether any confusion has arisen as a result.²¹¹ Again, if search engines are a primary source for finding domain names, the use of non-Latin scripts would help to narrow the search and in theory, reduce confusion. But there is no clear insight on this that can be derived from the current surveys.²¹²

Registry Policies

As a part of a new gTLD's attractiveness to consumers as a product, its registration policies and rights protection mechanisms can be used as a point of comparison. The review team analyzed the registry policies of the top 30 new gTLDs that related to protection of privacy, registration rules and rights protection mechanisms (See also section "Background to the RPMs").²¹³ For comparison purposes, the top five ccTLDs (by registration numbers) were included.²¹⁴

²¹⁰ Nielsen, *Registrant Survey Wave 2* (2016), p. 102 shows that 59 percent of respondents (in both 2016 and 2015) indicated that using a search engine is their preferred method for finding a website. Second to search engines was typing the domain name directly into the browser; 22 percent in 2016 of respondents indicated they did this, down very slightly from 23 percent from 2015. Nielsen, *Consumer Research Wave 2* (2016), p. 22 indicates that over 70 percent of consumers use search engines to find information about domain name extensions. This may mean that the specific names themselves are less relevant to consumers (and to a certain extent registrants) when searching for a domain so long as they arrive at the gTLD(s) or the content that they are searching for.

²¹¹ However, there are examples of IDNs being used to purposely confuse victims in furtherance of DNS abuse. See PBS (18 January 2018), "Hackers are flooding the internet with more fake domain names. Here's how you can protect yourself," accessed 7 August 2018, <https://www.pbs.org/newshour/nation/hackers-are-flooding-the-internet-with-more-fake-domain-names-heres-how-you-can-protect-yourself>.

²¹² Nielsen, *Registrant Survey Wave 2* (2016), p. 46.

²¹³ Registries of the top 30 strings by registration number were analysed: .xyz, .top, .wang, .win, .club, .link, .site, .science, .bid, .xin, .red, .ren, .party, .online, .click, .loan, .xn--ses554g (网址), .date, .website, .space, .kim, .work, .tech, .lol, .webcam, .nyc, .realtor, .review, .news, .guru. Listed strings are managed by following companies: .XYZ, Jiangsu Bangning Science & Technology Co., Ltd, Zodiac Leo Limited, First Registry Limited, .Club Domains LLC, Uniregistry, Corp., Radix, Famous Four Media, Elegant Leader Limited, Afiliias, Beijing Qianxiang Wangjing Technology Development Co., Ltd, Hu Yi Global Information Resources (Holding) Company, (Minds + Machines) Top Level Domain Holdings Limited, Neustar + (The City of New York, a municipal corporation under the laws of the State of New York, by and through the New York City Department of Information Technology & Telecommunications), Real Estate Domains LLC, Rightside, Donuts.

²¹⁴ .cn, .de, .uk, .nl and .ru

The vast majority (90 percent) of the top 30 new gTLD registries have a published privacy policy. Two-thirds of these registries would not share personal data with third parties except in cases required by law and in compliance with relevant ICANN contract requirements. Many (30 percent) strictly underline that they will not sell personal data to third parties. Of these registries, 6.6 percent share personal data of its registrants with third parties, and 13.3 percent will ask for registrant consent before sharing the registrant's personal data. With regard to registries with personal data protection policies, many of them—43.3 percent—have strict obligations to take reasonable measures to provide the security of personal data, and 33.3 percent of those registries have information in their policies regarding collecting of cookies.²¹⁵

Of the five compared ccTLDs, all have rules that do not permit sharing personal data with third parties. On the other hand, there are differences among them regarding data that they are publishing through WHOIS (ccTLDs do not have the same WHOIS policies, which accounts for those differences). Three of those ccTLDs have information on collecting cookies. Regarding content, three have no applicable rules. The remaining two have certain rules for dealing with illegal content. Three of the ccTLDs are open to registration by anyone. The remaining two require at least a local address within the jurisdiction of the ccTLD.

For the top 30 new gTLDs considered, there are no requirements to reside within a particular jurisdiction, except for .nyc (only businesses and organizations with an New York City address and individuals with a primary residence in New York City can register a .nyc domain name). Regarding eligibility to register, 20 percent of registries refer to the Trademark Clearinghouse for registration priority. All of these registries have compliance procedures for abusive behavior or other violations of their policies. Registries have provided online forms for filing the complaint or a specific address for this purpose. Also, all registries have the right to act in case of abusive usage of a domain name. None of these registries have policies that regulate parked domain names.

For the analyzed ccTLDs, three have registrations that are open to anyone, and the remaining two require at least a local address. All five of the ccTLDs for which information has been collected have compliance procedures for abusive behavior or other violations of policy. In relation to abusive usage of domain names, all refer to relevant policy or law. Besides that, one has a “blacklist” database: domains on that list are not allowed to be repeatedly registered or utilized. The five ccTLDs do not have any concrete policies regarding parked domains.

Most of the top 30 gTLD registries (73 percent) have different voluntary PICs, such as those that involve security issues, abuse prevention, and additional rights protection mechanisms. Besides voluntary PICs, there are mandatory PICs for all new gTLDs as a part of the Registry Agreement. All new gTLD registry operators are required to work with ICANN-accredited registrars and include GAC safeguards.²¹⁶

With the inclusion of the PICs for new gTLDs, non-price related competition was potentially improved for new gTLDs when compared to legacy gTLDs. To that extent, expectations of consumer end-users for gTLD restrictions are increasing. While both consumer end-users and registrants felt that more restrictions could be protective, registrants were slightly more opposed to restrictions relative to consumers.²¹⁷ Users at a global level generally believe that

²¹⁵ The recent implementation of the European Union's General Data Protection Regulation (GDPR) on 25 May 2018 has had a major impact on how data is collected and processed in all sectors.

²¹⁶ ICANN Board Resolution 2013.07.02.NG07–2013.07.02.NG08, “Category 1 Safeguard Advice from GAC,” (2013), accessed 7 August 2018, <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-07-02-en#1.c>.

²¹⁷ Nielsen, Registrant Survey Wave 2 (2016); Nielsen, Consumer Research Wave 2 (2016).

restrictions increased trust.²¹⁸ Regarding specific restrictions, there are wide differences among regions. For example, registrants in North America are more likely to want local presence restrictions while those in Asia are more likely to want credential validation.²¹⁹ A clear majority of consumer end-users feel that there should be at least some level of restrictions on who can register a domain name, such as those related to credentials, location, and consistent use.²²⁰

On the other hand, there are many similarities among the policies of legacy gTLDs. Most of the legacy gTLD registries were already involved in the domain name industry, so they had developed policies based on their previous experience and background. Besides that, for some issues, rules were already set by ICANN or they were part of accreditation processes. In those cases there was no need or incentive for further developments by registries.

The URS is a rights protection mechanism developed in order to provide protection to trademark holders under the New gTLD Program (see section below on “Background to the RPMs”).²²¹ Compared to the existing UDRP, which was the primary process established by ICANN for the resolution of disputes regarding the registration of domain names that infringe trademark rights, the URS is much faster in taking down websites that are found to infringe on intellectual property rights as well as in fighting cybersquatting. Compared to the UDRP, fees are lower for the URS, ranging from USD \$300 – 500.²²² By comparison, the World Intellectual Property Organization (WIPO), one of the main UDRP arbitration providers, charges USD \$1500 – 2000 for a single panelist and USD \$2000 – 4000 for three panelists.²²³

The URS was designed to be used for obvious cases of infringement.²²⁴ Although the URS is faster and cheaper than the UDRP, the remedy available is limited to a suspension of domain name registrations. Thus, the same domain name could be registered by another potential infringer once it is released following the expiration of the registration (which can be extended by the Complainant). Some rights holders prefer having the remedy of transfer not available under the URS. For such cases, the UDRP is the more appropriate mechanism.

Recommendation

Recommendation 10: The GNSO should initiate a new Policy Development Process (PDP) to create a consistent privacy baseline across all registries, including to explicitly cover cases

²¹⁸ Nielsen, Registrant Survey Wave 2 (2016), p. 31.

²¹⁹ Ibid. p. 30.

²²⁰ Nielsen, Consumer Research Wave 2 (2016), p. 9.

²²¹ ICANN, *Uniform Rapid Suspension System (URS) Rules* (June 2013), accessed 1 December 2016, <https://newgtlds.icann.org/en/applicants/urs/rules-28jun13-en.pdf>.

²²² Currently, there are three providers who arbitrate URS disputes: the Asian Domain Name Dispute Resolution Center (ADNDRC), the National Arbitration Forum (NAF), and the MFSD Intellectual Property Dispute Resolution Center. See ICANN, “Uniform Rapid Suspension (URS),” accessed 7 August 2018,

<https://www.icann.org/resources/pages/urs-2014-01-09-en>. For an example of fees charged, see ADNDRC, “Procedure, Rules, and Supplemental Rules,” accessed 7 August 2018, <https://www.adndrc.org/urs>

²²³ WIPO, “Schedule of Fees under the UDRP,” last modified 1 December 2002,

<http://www.wipo.int/amc/en/domains/fees/>

²²⁴ See D. S. Prah and E. Null, “The New Generic Top-Level Domain Program: A New Era Of Risk For Trademark Owners And The Internet,” *The Law Journal of the International Trademark Association* 101, (2011): 1784.

http://www.inta.org/TMR/Documents/Volume%20101/vol101_no6_a4.pdf: “...the URS is designed to be used for obvious cases of infringement and requires the complainant to prove bad faith and meet the clear and convincing evidentiary standard. In United States jurisprudence, there are generally three standards of proof from least to most onerous: (1) “preponderance of the evidence,” (2) “clear and convincing,” and (3) “beyond a reasonable doubt. Because ICANN requires the clear and convincing standard for a URS, the URS panelist will take a more exacting look at the facts and evidence than is required in a UDRP proceeding, where the preponderance of the evidence standard applies.”

of privacy infringements such as sharing or selling personal data without a lawful basis, such as the consent of that person. The GNSO PDP should consider limiting the collection and processing of personal data within rules which are mandatory for all gTLD registries. It should also consider not allowing registries to share personal data with third parties without a lawful basis, such as the consent of that person or under circumstances defined by applicable law (e.g. upon requests of government agencies, IP lawyers, etc.). Also, it is necessary to be aware of emerging, applicable regulations related to the processing of the personal data. For clarification, this recommendation does not relate to issues involving WHOIS or registration directory services data.

Rationale/related findings: As mentioned above, the policies of the top 30 new gTLDs have rules regarding sharing of personal data of its registrants with third parties. Furthermore, some of those policies have very clear statements that registries have the right to share or sell personal data.

To: Generic Names Supporting Organization

Prerequisite or priority level: Medium

Consensus within team: Yes

Details: Despite the fact that the Base Registry Agreement has references to privacy laws and policies, some of the registries are explicit that they have right to share personal data with third parties without consent of that person or under circumstances defined by applicable law.

Success measures: The development of relevant policy and update of the Base Registry Agreement.

8 Consumer Trust

Background

The review team sought to determine the extent to which the increase in the number of gTLDs has promoted consumer trust.²²⁵ As with the review team's findings about competition and consumer choice issues, the New gTLD Program is still in its early stages and hence the data reflects an early look, rather than a long-term assessment of the Program. To examine the impact of the New gTLD Program on consumer trust, among other issues, ICANN commissioned the Nielsen company to survey global online consumers and global domain name registrants.²²⁶ To avoid confusion between the review team's broad definition of "consumer" and the narrower segment of Internet users surveyed in ICANN's Global Consumer Surveys, the review team refers to the latter group as "consumer end-users." These surveys were conducted approximately one year apart between 2015 and 2016, and were aimed at assessing the current TLD landscape, as well as measuring factors such as consumer awareness, experience, choice, and trust in new TLDs and the Domain Name System in general. Reports on the results of the consumer end-user survey were published in April 2015 and June 2016, and reports on the results of the registrant surveys were published in September 2015 and August 2016. Nielsen directed its "consumer" survey at global Internet users who spent more than five hours per week on the Internet and its "registrant" survey at the primary decision makers that registered a domain name.²²⁷

Based on this data, the review team identified two primary factors relevant to the public's trust of gTLDs: familiarity and security. The concept of "familiarity" includes the awareness and reputation of the gTLD. The concept of "security" includes concerns about DNS abuse and expectations about restrictions concerning who can register a domain name within a particular gTLD.

Typically, awareness is the most basic knowledge of a domain name extension. Familiarity can be considered a higher level of awareness; it entails more experience and understanding about a particular domain name extension. In addition to providing data on aspects of awareness of gTLDs, the global consumer end-user and registrant surveys also asked consumers about the level of their trust in new gTLDs as compared to that of legacy gTLDs, and their comfort levels with providing certain types of sensitive information to new gTLDs as compared to legacy gTLDs. The following discussion sets forth the most pertinent findings from those studies.

Awareness and Visitation

²²⁵ For the purposes of this review, the review team recognized that "consumers" (typically, a natural person, acting primarily for personal, family or household purposes) generally fall into two categories: 1) Internet Users and other market participants who make use of domains through DNS resolution, such as by navigating to a URL or sending an e-mail; and 2) registrants (and potential registrants), which may, depending on the context, include individuals, businesses, and government agencies.

²²⁶ Nielsen, *Consumer Research* (2015); Nielsen, *Consumer Research Wave 2* (2016); Nielsen, *Registrant Survey* (2015); Nielsen, *Registrant Survey Wave 2* (2016). Statistical significance test results in the Nielsen surveys are reported at a 95 percent confidence interval. Although differences in the results of the surveys between 2015 and 2016 reported below are small in many cases and not all are statistically significant, the Review Team nonetheless views the survey data as useful information for its analysis of consumer trust in new gTLDs (results of the significance tests can be found in the respective Nielsen reports). The Review Team recognizes that further study of consumer trust will be required to compare these early measures with the results of future surveys.

²²⁷ Nielsen, *Consumer Research Wave 2* (2016), p.3; Nielsen, *Registrant Survey Wave 2* (2016), p. 4.

In terms of awareness, the logical predecessor to familiarity, the ICANN Global Consumer Survey found that consumer end-user “total awareness” of new gTLDs increased from 46 percent to 52 percent between 2015 and 2016.²²⁸ Total awareness of new gTLDs by registrants was higher than awareness for consumer end-users and remained stable, showing no statistically significant change between 2015 (66 percent) and 2016 (64 percent).²²⁹ Interestingly, consumer end-user and registrant awareness of any new gTLDs specified in the survey was higher in the Asian, African, and South American regions than it was in North America and Europe.²³⁰ As one might expect, total awareness of new gTLDs is lower than that of legacy gTLDs. Legacy gTLDs have total consumer end-user and registrant awareness levels of 98 percent or more in both 2015 and 2016.²³¹

Nielsen also found that consumer end-users do not visit new gTLDs as often as they do legacy gTLDs. Comparing visitation rates between well-known legacy gTLDs (.com, .net, .org) and specified new gTLDs (.email, .photography, .link, .guru, .realtor, .club, .xyz), the data showed that in 2015, 71 percent of consumer end-users indicated a “high” visitation rate for legacy gTLDs versus 15 percent of consumer end-users reporting a “high” visitation rate for specified new gTLDs (.email, .photography, .link, .guru, .realtor, .club).²³² In 2016, an even higher percentage of consumer end-users reported visiting these same legacy gTLDs (81 percent), while the number of consumer end-users visiting the specified new gTLDs was down slightly (12 percent).²³³ When additional new gTLDs were added to the survey questions in 2016 (.news, online, .website, .site, .space, .pics, .top), the reported visitation rate was 15 percent.²³⁴ Generally speaking, the average visitation rates for new gTLDs were closest to the rates reported for legacy gTLDs in the moderately known categories (.info, .biz): 22 percent in 2015 and 27 percent in 2016.²³⁵

Expectations about Relationship of gTLD Name to Websites Using that gTLD

The surveys indicated that the sample population expected a connection between the name of a gTLD and the websites associated with that gTLD. Fifty-five percent of consumer end-users surveyed expected “a very clear relationship” between domain names and websites registered under those domain names.²³⁶ In addition, 79 percent of consumer end-users also expect that the actual use of the domain name to be consistent with the meaning of the gTLD.²³⁷ This issue relates to another question posed in the surveys: “Why do websites have different extensions?” A majority of registrants believed that websites have different

²²⁸ Nielsen, Consumer Research Wave 2 (2016), p. 42 (for “consistent” gTLDs listed in both 2015 and 2016 surveys).

²²⁹ Nielsen, Registrant Survey Wave 2 (2016), p. 12.

²³⁰ Nielsen, Consumer Research Wave 2 (2016), p.42; Nielsen, Registrant Survey Wave 2 (2016), p. 42.

²³¹ Nielsen, Consumer Research Wave 2 (2016), p. 8; Nielsen, Registrant Survey Wave 2 (2016), p. 12.

²³² Nielsen, Consumer Research Wave 2 (2016), p.7.

²³³ Ibid, p.7. Note these are averages of regional responses. Statistical significance of regional results in 2015 and 2016 can be found on p. 15 for legacy gTLD visitation and pp. 46-47 for new gTLD visitation.

²³⁴ Ibid, p.7.

²³⁵ Ibid, p.7.

²³⁶ Nielsen, Consumer Research Wave 2 (2016), pp. 9, 50. The survey asked the following question: “Think about accessing a website with one of the newer domain extensions (the part after the “dot”). If the domain name extension in question is descriptive of a service or item, would you expect that all websites using that domain extension have a direct relationship to it? For example, if you go to .bank, would you expect to see registrations by banks across the globe? If you go to .paris do you expect to see domain names connected to the city of Paris? If you go to .film do you expect to see content related to films?” Id. at appended survey question Q890, p. 20.

²³⁷ Ibid, p.27. In relation to legacy gTLDs, the survey asked respondents to answer “yes” or “no” as to whether they felt that certain restrictions on registration of a gTLD should be enforced. The reported result relates to the following restriction: “[r]equirements for use of the name to be consistent with the meaning of the gTLD (e.g., use of a .net name must be for network operations purposes).” See appended survey question Q767, p. 16.

extensions to “properly identify the purpose or owner or to give an indication of content or function.”²³⁸

Nevertheless, when asked about how much attention consumer end-users pay to a domain extension, the survey reported that 29 percent reported “they don’t pay much attention,” 34 percent only visit sites with “familiar” domains, and 37 percent base their visitation upon search engine results.²³⁹ This finding is consistent with another reported result, that the public’s preferred way of finding a website is with search engines.²⁴⁰ The consumer end-user survey indicated that in 2016, 67 percent of consumer end-users preferred to use a search engine to find a website as compared to 20 percent that indicated that they preferred to type the domain name directly into a browser.²⁴¹ Registrants also reported a preference for using search engines to find websites and also identified search engines as the leading method that they use to find out more information about gTLDs.²⁴²

When asked what makes domain extensions trustworthy, consumer end-users reported that reputation and familiarity played key roles.²⁴³ In the related topic of why consumer end-users visit gTLDs, Nielsen found that consumer end-users choose to visit sites based upon relevance of the gTLD to the information they seek. Consumer end-users also tend to visit sites with which they are already familiar.²⁴⁴ Interestingly, registrants may presume familiarity and trust of certain domains based on the name (such as a reference to a prominent city) regardless of whether the gTLD has actually been delegated.²⁴⁵ Conversely, the public may experience discomfort visiting sites with unfamiliar gTLDs.²⁴⁶ When deciding whether to visit a website with an unfamiliar gTLD, consumer end-users look to usage (their own prior usage or the popularity of the website), site appeal or interest, and reputation (good reviews, recommendations, etc.).²⁴⁷

Public Trusts Legacy gTLDs More Than New gTLDs

The survey data show that both consumer end-users and registrants trust new gTLDs less than they do legacy gTLDs. In both 2015 and 2016, consumer end-users reported trusting specified new gTLDs approximately only half as much as specified legacy gTLDs.²⁴⁸ For example, in 2015, consumer end-users found 90 percent of specified legacy gTLDs to be

²³⁸ Nielsen, *Registrant Survey Wave 2* (2016), pp. 25-26.

²³⁹ Nielsen, *Consumer Research Wave 2* (2016), p.54.

²⁴⁰ *Ibid*, p.77.

²⁴¹ *Ibid*, p.77.

²⁴² Nielsen, *Registrant Survey Wave 2* (2016), pp.102, 32.

²⁴³ Nielsen, *Consumer Research Wave 2* (2016), pp.19-20. See also pp. 56-57. Survey respondents indicated that relevance and appeal of information are significant factors in determining whether an unfamiliar domain extension feels trustworthy. The respondents inserted these results in a text box. See also: NCC Group (2016), *Trust in the Internet Survey*, accessed 7 February 2017, <https://www.nccgroup.trust/uk/about-us/resources/trust-in-the-new-internet-survey-2016-discussion-paper/>, p. 5. More than 50 percent of those surveyed identify the following as a factor that would increase their confidence in new domains: “Brand/company clearly communicates the steps to take to secure your personal information within the website.” The review team notes that it appears this study was commissioned by an entity that has a business interest in marketing both cyber-security products and the .trust domain.

²⁴⁴ Nielsen, *Consumer Research* (2015), pp. 8, 18, 36.

²⁴⁵ Nielsen, *Registrant Survey Wave 2* (2016), p. 39.

²⁴⁶ NCC Group, *Trust in the Internet Survey* (2016), p. 3. In 2016, 52 percent of those surveyed reported feeling “not very or not at all comfortable” visiting websites with new domains.

²⁴⁷ Nielsen, *Consumer Research Wave 2* (2016), pp. 38.

²⁴⁸ Nielsen, *Consumer Research* (2015), pp. 9, 40; Nielsen, *Consumer Research Wave 2* (2016), p. 9. Note the referenced figures are based on averages of regional responses. Statistical significance for changes in trustworthiness from 2015 to 2016 for selected gTLDs can be found on p. 55 of the Wave 2 Study.

“very” or “somewhat” trustworthy, but only 49 percent of specified new gTLDs were found to be “very” or “somewhat” trustworthy.²⁴⁹

Results were similar in 2016, with consumer end-users reporting that 91 percent found specified legacy gTLDs to be “very” or “somewhat” trustworthy, whereas 45 percent found new gTLDs to be “very” or “somewhat” trustworthy. When Nielsen added certain specified new gTLDs to its survey question in Wave 2 of the consumer end-user survey, the percentage of new gTLDs that consumer end-users found to be “very” or “somewhat” trustworthy rose to 52 percent.²⁵⁰ When surveyed about specific new gTLDs, consumer end-user responses varied depending upon the particular gTLD and the consumer’s region.²⁵¹ For example, approximately half the consumer end-users surveyed reported high levels of trust for .news, .photography, .email, and .realtor, with .news seen as the most trustworthy across all regions.²⁵² When asked similar questions about specified legacy gTLDs, over 70 percent of consumer end-users across all regions rated .com, .org, and .net as “very” or “somewhat” trustworthy.²⁵³

Compared to consumer end-users, registrants consistently reported higher levels of trust for specified gTLDs, but still reported lower levels of trust for new gTLDs when compared to legacy gTLDs.²⁵⁴ Registrants associated the term “trustworthy” with legacy gTLDs more than with new gTLDs. For example, in 2015, 83 percent of registrants associated the term “trustworthy” with legacy gTLDs compared to a rate of 58 percent for new gTLDs.²⁵⁵ In 2016, 79 percent of registrants viewed legacy gTLDs as “trustworthy” compared to 60 percent for new gTLDs.²⁵⁶

This increase in the rates of trust for new gTLDs by registrants is also reflected in data regarding individual new gTLDs. For example, for the most trusted new gTLD surveyed over both waves—.email—68 percent of registrants viewed this domain as “very” or “somewhat” trustworthy compared to approximately 62 percent of consumer end-users who viewed it similarly.²⁵⁷

Consumer Behavior That Indicates Trust

In addition to surveying the public about their subjective views on trust, Nielsen also gathered data about behavior that could indicate trust, such as willingness to provide sensitive information to websites associated with new gTLDs. To a certain extent, these results were similar to differences between consumer end-users’ trust of new gTLDs and legacy gTLDs. For example, when asked whether they felt “very” or “somewhat” comfortable providing financial information to websites in the .com legacy gTLDs, 62 percent of consumer end-users responded affirmatively compared to only 36 percent when asked this same question regarding new gTLDs.²⁵⁸

²⁴⁹ Nielsen, Consumer Research (2015), pp. 9, 40. Specified legacy gTLDs: .com, .net, .org; specified new gTLDs: .email, .photography, .link, .guru, .realtor, .club; .xyz.

²⁵⁰ Nielsen, Consumer Research Wave 2 (2016), p. 9. Added new gTLDs (.news, online, .website, .site, .space, .pics, .top).

²⁵¹ Ibid, p. 55.

²⁵² Ibid, p. 55.

²⁵³ Ibid, p. 18.

²⁵⁴ Nielsen, Registrant Survey Wave 2 (2016), p. 64. Compare trustworthiness percentages for legacy gTLDs reported on p. 27 to legacy gTLDs p. 66.

²⁵⁵ Ibid, pp.27 and 66 show trustworthiness percentages.

²⁵⁶ Ibid, pp.27 and 66 show trustworthiness percentages.

²⁵⁷ Nielsen, Registrant Survey Wave 2 (2016), p.64.

²⁵⁸ Nielsen, Consumer Research Wave 2 (2016), p. 90. The survey did not specify which new gTLD and asked “Please think about two websites. One has a .com domain extension and one has one of the new gTLDs like

Results for other types of personal information showed lower comfort levels when consumer end-users were asked about providing sensitive information to new, versus legacy, gTLDs.²⁵⁹ In fact, consumer end-users tended to respond that they were “not very comfortable” with providing sensitive information to new gTLDs.²⁶⁰ Related to these findings, a survey by the NCC Group on “trust in the Internet” reflected the public’s increasing concerns about stolen credit card/financial information, online security, and protection and security of credit card and personal information.²⁶¹

Registration Restrictions Contribute to Trust

The ICANN Global Surveys indicated that the sample population expects certain restrictions about who can purchase domain names and trusts that these restrictions will be enforced.²⁶² The survey results also indicated that the presence of such restrictions contributed to consumer trust.²⁶³ These results applied to all gTLDs and the percentage of the consumer end-users who reported that restrictions contributed to consumer trust increased from 56 percent in 2015 to 70 percent in 2016.²⁶⁴ For example, the consumer end-user surveys indicated that over 70 percent of those surveyed not only trusted entities that offer domain names to take precautions about who gets a domain name, but they also trusted entities that offer domain names to screen individuals or companies who register for certain special domain names.²⁶⁵ In addition, over 80 percent of consumer end-users expected the enforcement of restrictions, such as requiring validation that the person or company registering a website in a given gTLD has valid credentials related to the gTLD.²⁶⁶

Focusing on new gTLDs, an increasing percentage of consumer end-users (73 percent) expected at least some level of restriction on registrations in specified new gTLDs.²⁶⁷ Registrants also favored restrictions, but were generally more opposed to restrictions than consumer end-users.²⁶⁸ However, when put in context of validating certain characteristics that are in keeping with the intended or implied use of the gTLD (such as a contractor’s license for .builder), three out of four registrants approved of such restrictions.²⁶⁹ For context, both consumer end-users and registrants also expected restrictions on registrations in legacy gTLDs.²⁷⁰

Consumer Trust in the Domain Name System Overall Since the Introduction of New gTLDs

Wave 1 of the Global Survey found that about half of consumer end-users trusted the domain name industry just as much as they did other tech industries (e.g., Internet Service Providers,

.club or .bank. How comfortable would you be doing each of these activities on each website?” See appended survey question Q1145, p. 31.

²⁵⁹ Ibid, p. 90.

²⁶⁰ Ibid, p. 90.

²⁶¹ NCC Group, Trust in the Internet Survey (2016), p. 2. The Review Team notes that it appears this study was commissioned by an entity that has a business interest in marketing both cyber-security products and the .trust domain.

²⁶² Nielsen, Consumer Research Wave 2 (2016), pp. 9, 13, 26-27, 65; Nielsen, Registrant Survey Wave 2 (2016), pp. 14, 18, 30, 68.

²⁶³ Nielsen, Consumer Research (2015), pp. 9, 26; Nielsen, Consumer Research Wave 2 (2016), pp. 9, 13, 26.

²⁶⁴ Nielsen, Consumer Research Wave 2 (2016), p. 9.

²⁶⁵ Nielsen, Consumer Research (2015), p. 49.

²⁶⁶ Nielsen, Consumer Research Wave 2 (2016), p. 27.

²⁶⁷ Nielsen, Consumer Research Wave 2 (2016), p. 9. This figure is up from 67 percent in 2015.

²⁶⁸ Nielsen, Registrant Survey Wave 2 (2016), p. 67.

²⁶⁹ Ibid, p. 14.

²⁷⁰ Nielsen, Consumer Research Wave 2 (2016), p. 9; Nielsen, Registrant Survey Wave 2 (2016), p. 29.

software companies, computer/hardware companies, e-commerce, and Web-based marketing companies), and the rest are more inclined to trust it more as opposed to less.²⁷¹ Consumer end-users in Africa, Asia, and South America had higher levels of trust than consumer end-users in other regions.²⁷² Reputation was the factor cited most as the reason some consumer end-users trusted the domain name industry more than they did other tech industries. However, it was also cited as the reason some consumer end-users trusted the domain name industry less than other industries²⁷³. Wave 2 of the survey found that trust levels had at least remained the same since 2015.²⁷⁴ The global total seemed to improve against all of the five reference industries, wave over wave, by an average of just over four percentage points.²⁷⁵ At this point, with only a year between the two reports on a nascent market, it is not possible to conclude with certainty that these levels had in fact improved. Therefore, the review team recommends periodically conducting further registrant surveys as discussed in Recommendation 13 in order to better understand why some TLDs are trusted more than others and how trust in new gTLDs and the domain name industry in general evolves over time.

The survey of registrants found positive results similar to those found in the consumer segment when it comes to trust in the domain name industry relative to other industries.²⁷⁶ General reputation and self-interest drive trust.²⁷⁷ Registrants expected the industry to adhere to practices that protect their own interests and commonly note security protocols, as well as just a general positive reputation, as factors that promote trust.²⁷⁸ Those who trust less cite poor security and regulations, as well as general reputational issues like a lack of transparency regarding business practices.²⁷⁹

Conclusions

The consumer end-user and registrant surveys indicate that the release of hundreds of new gTLDs does not appear to have had a negative impact on overall trust in the DNS. Looking at trust of new gTLDs specifically, the survey found that while consumer end-users do not trust new gTLDs nearly as much as they do legacy gTLDs, the trust levels appear to be stable over both waves of the surveys, with registrants reporting slightly higher trust levels than consumer end-users. Finally, a majority of registrants and consumer end-users expected gTLD registration restrictions, trust that such restrictions would be enforced, and associate such restrictions with an increase in trustworthiness.

Recommendations

Recommendation 11: Conduct periodic end-user consumer surveys. Future review teams should work with survey experts to conceive more behavioral measures of consumer trust that gather both objective and subjective data with a goal toward generating more concrete and actionable information.

²⁷¹ Nielsen, Consumer Research (2015), p. 50.

²⁷² Ibid, p. 50.

²⁷³ Nielsen, Consumer Research Wave 2 (2016), p. 66.

²⁷⁴ Ibid, pp. 63-64.

²⁷⁵ Ibid, pp. 63-64.

²⁷⁶ Nielsen, Registrant Survey (2015), p. 67. In Asia, registrants say they hold comparatively higher trust in the domain name industry compared to other regions.

²⁷⁷ Nielsen, Registrant Survey Wave 2 (2016), pp. 77,79.

²⁷⁸ Ibid, pp. 77,79.

²⁷⁹ Ibid, pp. 77, 81-82.

Rationale/related findings: The New gTLD Program is still in its early days. In order to further analyze consumer choice and trust, surveys of consumer end-users must be continued in order to better understand their behavior and motivations.

To better understand issues of consumer trust, it is also important to understand why consumer end-users choose to visit some TLDs but not others; whether the TLD's registration policies influence the choice of whether or not to visit; and whether consumer end-users' behavior on certain websites indicate varying levels of trust across TLDs.

For consumer choice (discussed above), the survey should allow a relative weighting of the potential contributions to consumer choice with respect to geographic name gTLDs, specific sector gTLDs, brand gTLDs, and IDN gTLDs to help determine whether there is a clear preference among consumer end-users for different types of gTLDs, and whether there are regional differences or similarities in their preferences.

To: ICANN organization and future CCT Review Teams

Prerequisite or priority level: Prerequisite

Consensus Within Team: Yes

Details: Future review teams should work with survey experts to conceive more behavioral measures of consumer trust that gather both objective and subjective data, with a goal toward generating more concrete and actionable information. In addition, the survey should repeat applicable parts of the global surveys for consumer end-users to allow an analysis of (1) which new gTLDs they have visited most; (2) the reasons they give to explain why they visited certain new gTLDs more than others; (3) what factors matter most to them in determining which gTLDs to visit; (4) how their behaviors indicate to what extent they trust new gTLDs; (5) the trustworthiness of new gTLDs with restrictions on registration compared to new gTLDs with few or no restrictions; and (6) whether consumer end-users view the expanded name space as beneficial or confusing.

Success measures: This recommendation would be considered successful if it produces data that enables future review teams and the ICANN organization to see how the levels of trustworthiness correlate with the number of visitations to new gTLDs, and what factors may contribute to the levels of trustworthiness. For example, registration restrictions appear to contribute to higher levels. This information could inform future policy-making on the terms and conditions that should apply for all new gTLD applicants. Another success measure would be information for new gTLD applicants in regard to what factors may lead to increased visitation and trustworthiness for new gTLDs. The last success measure would be data that informs ICANN policy on registration restrictions, especially if the data indicates that certain basic restrictions enhance trustworthiness in the gTLD space, alongside other variables driving gTLD model design and diversity. Those applicants choosing to apply for gTLDs with restrictions would then have a better basis for the decision to do so.

Recommendation 12: Create incentives and/or eliminate current disincentives that encourage gTLD registries to meet user expectations regarding: (1) the relationship of content of a gTLD to its name; (2) restrictions as to who can register a domain name in certain gTLDs based upon implied messages of trust conveyed by the name of its gTLDs (particularly in sensitive or regulated industries) and (3) the safety and security of users' personal and sensitive information (including health and financial information). These incentives could relate to applicants who choose to make Public Interest Commitments in their applications that relate

to these expectations. TLD applicants for any subsequent rounds should be made aware of these public expectations by inserting information about the results of the surveys in an updated Applicant Guidebook.

Rationale/related findings: The Nielsen surveys indicate certain expectations on the part of the public. They indicated the public believes that websites have different extensions to “properly identify the purpose or owner or to give an indication of content or function.”²⁸⁰ The majority of those surveyed expect 1) a connection between the name of a gTLD and the websites associated with that gTLD and 2) a consistency between the meaning of the domain name and its actual use. The Nielsen surveys also indicate that the public expects restrictions on who can purchase domain names, expects that such restrictions will be enforced, and is concerned about the security of their personal and sensitive information. Hence, the Nielsen surveys indicated a positive relationship between registration restrictions and trustworthiness of a domain.

However, in practice, non-brand gTLDs with registration restrictions are extremely rare. Although the review team did not have any specific data sources to explain the general trend away from restricted TLDs, discussions with registries²⁸¹ have indicated that the following factors discourage restricted business models:

- ⦿ ICANN charges each TLD an up-front application fee of \$185,000 and an annual fee of \$25,000 regardless of the number of registrations within the gTLD. These fixed costs mean that smaller TLDs pay a much larger share of total revenue to ICANN than larger TLDs.
- ⦿ The process of verifying compliance with restrictions may qualify as a “Registry Service”, which requires additional approval from ICANN and possibly additional fees to evaluate the service through ICANN’s Registry Service Evaluation Process (RSEP).²⁸²
- ⦿ Registration restrictions reduce the addressable market for the registry operator while increasing costs and adding friction to the registration process. Hence, profit-making registry operators generally tend to shy away from such restrictions. This is mirrored in legacy gTLDs and ccTLDs where many TLDs that initially operated with restrictions have subsequently removed or relaxed them, as with .pro, .travel, .fr and .ie.

Because consumer end-users expect restrictions, and the current market is largely not delivering restricted TLDs, the review team believes that future introductions of new gTLDs should consider examining whether it is possible to reduce existing disincentives to impose restrictions, or even to explicitly incentivize the adoption of restricted models by registry operators.

The fact that so few restricted TLDs exist despite these consumer expectations may also affect consumer trust in new gTLDs. As discussed later in this report in the section on Consumer Trust, consumers are generally less willing to share sensitive information to websites hosted on new gTLDs. Encouraging the protection of user data and/or registration restrictions on

²⁸⁰ Nielsen, Consumer Research Wave 2 (2016), p. 21.

²⁸¹ ICANN CCT Wiki, “Meeting with Registries Stakeholder Group – ICANN 59,” accessed 21 August 2018, <https://community.icann.org/display/CCT/Meeting+with+Registries+Stakeholder+Group+-+ICANN+59> and ICANN CCT Wiki, “Update to Registries Stakeholder Group – ICANN 59,” accessed 21 August 2018, <https://community.icann.org/display/CCT/Update+to+Registries+Stakeholder+Group+-+ICANN+59>

²⁸² ICANN, “Registry Service Evaluation Process,” accessed 7 August 2018, <https://www.icann.org/resources/pages/rsep-2014-02-19-en>.

TLDs related to sensitive data sets (e.g. namespaces related to medical or financial data) may help address the existing gap in consumer trust.

To: New gTLD Subsequent Procedures PDP Working Group

Prerequisite or priority level: Prerequisite (incentives could be implemented as part of application process)

Consensus within team: Yes

Details: In addition to benefits in terms of trust, registration restrictions may also impact competition. Therefore, consideration should be given to both the potential benefits and drawbacks of registration restrictions.

Success measures: Measures of success for these recommendations would include improved public trust and visitation of new gTLDs and reduced fears regarding the misuse of users' personal and sensitive information. They would also include an assessment of whether registration restrictions have had a negative impact on competition.

Further Review

Recommendation 13: ICANN should collect data in conjunction with its related data-collection activities on the impact of restrictions on who can buy domains within certain new gTLDs (registration restrictions) to help regularly determine and report:

- (1). Whether consumers and registrants are aware that certain new gTLDs have registration restrictions;
- (2). Compare consumer trust levels between new gTLDs with varying degrees of registration restrictions;
- (3). Determine whether the lower abuse rates associated with gTLDs that impose stricter registration policies identified in the “Statistical Analysis of DNS Abuse in gTLDs” study continue to be present within new gTLDs that impose registration restrictions as compared with new gTLDs that do not;²⁸³
- (4). Assess the costs and benefits of registration restrictions to contracted parties and the public (to include impacts on competition and consumer choice); and
- (5). Determine whether and how such registration restrictions are enforced or challenged.

Rationale/related findings: The ICANN Consumer Research and Registrant surveys indicate that the public expects certain restrictions about who can purchase domain names and trusts that these restrictions will be enforced. The survey results also indicated that the presence of such restrictions contributed to consumer trust. However, it would be useful for future review teams and those developing future policy to have more data on how aware the public is of registration restrictions and the impact of registration restrictions on consumer trust. In addition, the “Statistical Analysis of DNS Abuse in gTLDs” study indicated that DNS Security Abuse levels correlate with strict registration policies, with bad actors preferring register

²⁸³ SIDN Labs and the Delft University of Technology, “DNS Abuse in gTLDs”, p25.

domains with no registration restrictions.²⁸⁴ It is also important to obtain information on the costs of registration restrictions on the relevant parties so that benefits (in terms of increased trust and decreased DNS abuse) can be weighed against costs (including increased resources needed to implement such restrictions and financial costs) and any restrictions on competition. Future PDPs and review teams can use this data to inform future policy decisions regarding new gTLDs, especially as they relate to the issue of whether restrictions should be encouraged or included within the standard provisions included in ICANN new gTLD contracts.

To: ICANN organization

Prerequisite or priority level: Low

Consensus within team: Yes

Details: ICANN should explore how to incorporate this data collection as part of its existing data collection initiatives, including but not limited to the Domain Abuse Activity Reporting System and the gTLD Marketplace Health Initiative, as well as future ICANN initiatives related to measuring DNS abuse, and the health of the DNS and the DNS marketplace.²⁸⁵ Moreover, ICANN may also explore how to incorporate this data collection through the activities and reporting of ICANN Contractual Compliance, including, but not limited to, its audit functions. Collecting this data would inform future review teams about the impact of registration restrictions and whether and how they can best be utilized for gTLDs, particularly those gTLDs that fall within sensitive or highly-regulated market sectors.

Success measures: This recommendation will be considered successful if it generates data that provides guidance for future review teams and policy development processes on the topic of registration restrictions, particular if the data indicates under what circumstances the benefits of registration restrictions to the public (which may include decreased levels of DNS abuse) outweigh possible costs to contracted parties or possible impacts on competition.

²⁸⁴ Ibid.

²⁸⁵ ICANN, "Domain Abuse Activity Reporting (DAAR)" and "gTLD Marketplace Health Index" (June 2018).

9 Safeguards

DNS Abuse

The widespread availability and relative accessibility of domain names as unique global identifiers have created opportunities for innovative technologies as well as for a multitude of malicious activities. Bad actors have misused these universal identifiers for cybercrime infrastructure and directed users to websites that enable other forms of crime, such as child exploitation, intellectual property infringement, and fraud.²⁸⁶ Each of these activities may constitute a form of DNS abuse. Determinations as to how to characterize these forms of abuse depend largely upon local laws, the roles played by other infrastructure providers, and subjective interpretations. Nonetheless, consensus exists on what constitutes DNS Security Abuse, or DNS Security Abuse of DNS infrastructure, as demonstrated by community findings associated with the development of the New gTLD Program. These forms of abuse include more technical forms of malicious activity, such as malware, phishing, and botnets, as well as spam when used as a delivery method for these forms of abuse.²⁸⁷

Due to the misuse of domain names, the community initially expressed concerns about whether the vast expansion of available gTLDs would result in increased DNS abuse. Consequently, the CCT was tasked with examining issues associated with the expansion of the DNS, including the implementation of safeguards designed to preempt identified risks.²⁸⁸

Prior to the approval of the New gTLD Program, ICANN invited feedback from the cybersecurity community on DNS abuse and the risks posed from the expansion in the DNS name space.²⁸⁹ The identified the following areas of concern:

²⁸⁶ Bursztein et. al., “Framing Dependencies Introduced by Underground Commoditization,” paper presented at the proceedings of the 2015 Workshop on the Economics of Information Security, Delft, Netherlands (22–23 June 2015), accessed 8 August 2018, <https://research.google.com/pubs/pub43798.html>, p. 12.

²⁸⁷ DNS Abuse” is a term used by the Review Team that refers to “intentionally deceptive, conniving, or unsolicited activities that actively make use of the DNS and/or the procedures used to register domain names” (see p. 3 of the “New gTLD Program Safeguards Against DNS Abuse: Revised Report” (2016)). “DNS Security Abuse” in the context of this report refers to specific, technical forms of abusive behavior : spam, phishing, and malware distribution in the DNS. For more on how abuse has been characterized by the ICANN Community, see the *Registration Abuse Policies Working Group’s Final Report* (29 May 2010), accessed 3 August 2018, https://gnso.icann.org/sites/default/files/filefield_12530/rap-wg-final-report-29may10-en.pdf.

²⁸⁸ ICANN’s Affirmation of Commitments (AoC) with the US Department of Commerce specifies that “malicious abuse issues” need to be analyzed prior to expanding the top-level domain space. Furthermore, the AoC requires the CCT Review Team to analyze the “safeguards put in place to mitigate issues involved in the introduction or expansion” of new gTLDs (see ICANN, “Affirmation of Commitments,” accessed 8 August 2018, <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>, Section 9.3). Consequently, the CCT Review Team Terms of Reference define the work of the team to include a review of the “effectiveness of safeguards” and “other efforts to mitigate DNS abuse” (see Appendix E: Terms of Reference). Furthermore, the GAC’s 2015 Buenos Aires Communiqué requested “that the ICANN Community creates a harmonized methodology to assess the number of abusive domain names within the current exercise of assessment of the New gTLD Program” (see GAC (24 June 2015), *Buenos Aires Communiqué*, accessed 8 August 2018, <https://www.icann.org/en/system/files/correspondence/gac-to-board-24jun15-en.pdf>, p. 5). Likewise, the 2015 Dublin Communiqué requested that the ICANN Board “develop and adopt a harmonized methodology for reporting to the ICANN Community the levels and persistence of abusive conduct...that have occurred in the rollout of the New gTLD Program” (see GAC (21 October 2015), *Dublin Communiqué*, accessed 8 August 2018, <https://www.icann.org/en/system/files/correspondence/gac-to-board-21oct15-en.pdf>, p. 7).

²⁸⁹ “ICANN (3 October 2009), *Mitigating Malicious Conduct*, accessed 9 November 2016, <https://archive.icann.org/en/topics/new-gtlds/mitigating-malicious-conduct-04oct09-en.pdf>. Feedback came from groups such as the Anti-Phishing Working Group (APWG), Registry Internet Safety Group (RISG), the Security and Stability Advisory Community (SSAC), Computer Emergency Response Teams (CERTs), the banking/financial and wider Internet security communities.

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- ⊙ How do we ensure that “bad actors” do not run registries?
 - ⊙ How do we ensure integrity and utility of registry information?
 - ⊙ How do we ensure more focused efforts on combating identified abuse?
 - ⊙ How do we provide an enhanced control framework for TLDs with intrinsic potential for malicious conduct?²⁹⁰

Based on the community’s feedback, ICANN identified several recommendations for safeguards aimed at mitigating these risks.²⁹¹ Nine safeguards were identified and recommended:

- ⊙ Vet registry operators
- ⊙ Require Domain Name System Security Extension (DNSSEC) deployment
- ⊙ Prohibit “wildcarding”²⁹²
- ⊙ Encourage removal of “orphaned glue” records²⁹³
- ⊙ Require “Thick” WHOIS records
- ⊙ Centralize Zone File access
- ⊙ Document registry- and registrar-level abuse contacts and policies
- ⊙ Provide an expedited registry security request process
- ⊙ Create a draft framework for a high security zone verification program²⁹⁴

The CCT was tasked with analyzing the effectiveness of these nine recommended safeguards. To the extent possible, the CCT assessed the implementation and effectiveness of each of these safeguards using available implementation and Contractual Compliance data. Additionally, the CCT commissioned a quantitative DNS Security Abuse study to provide insight into the relationship, if any, that may exist between levels of abuse and implemented safeguards in the new gTLD name space.²⁹⁵

The first safeguard, “vet registry operators,” required that all new gTLD applicants provide full descriptions of the technical back-end services that they would use, even where these services were subcontracted, as part of the application process. This was an initial evaluation

²⁹⁰ Ibid.

²⁹¹ Ibid.

²⁹² “Wildcarding” refers to the practice of reserving a special character (commonly an asterisk) within an operating system search operation to mean “return any match in a search.” See Security and Stability Advisory Committee (SSAC), “SAC 015: Why Top Level Domains Should Not Use Wildcard Resource Records,” accessed 8 August 2018, <https://www.icann.org/groups/ssac/documents/sac-015-en>.

²⁹³ The Security Skeptic, “Orphaned Glue Records,” 26 October 2009, accessed 2 February 2017, <http://www.securityskeptic.com/2009/10/orphaned-glue-records.html>. These are records remaining once a domain name has been deleted from a registry.

²⁹⁴ ICANN, “Malicious Conduct.”

²⁹⁵ ICANN (2 August 2016), *Request for Proposal For Study on Rates of DNS Abuse in New and Legacy Top-Level Domains*, accessed 2 February 2017, <https://www.icann.org/en/system/files/files/rfp-dns-abuse-study-02aug16-en.pdf>. The resulting “Statistical Analysis of DNS Abuse in gTLDs” study measured common forms of abuse—such as spam, phishing, and malware distribution—in a large sample of new and legacy gTLDs from 1 January 2014 until December 2016.

to ensure technical competence. These descriptions were evaluated only at the time of application.²⁹⁶ Additionally, all applicants were required to pass Pre-Delegation Testing (PDT).²⁹⁷ PDT included comprehensive technical checks of Extensible Provisioning Protocol (EPP), Name Server setup, Domain Name System Security Extensions (DNSSEC), and other protocols.²⁹⁸ Applicants were required to pass all of these tests before a domain name would be delegated.

Upon delegation, registry operators were required to comply with the technical safeguards through their Registry Agreements with ICANN. The second safeguard mandated that new gTLD registries implement DNSSEC, with active monitoring of compliance and notices sent to non-compliant registries.²⁹⁹ DNSSEC is a set of protocols intended to increase the security of the Internet by adding authentication to DNS resolution to prevent problems such as DNS spoofing³⁰⁰ and DNS cache poisoning.³⁰¹ All new gTLDs are DNSSEC signed at the root level, which is not indicative of second-level domain names in the zone being signed.³⁰²

For the third safeguard, the Registry Agreement for new gTLDs prohibits wildcarding to ensure that domain names only resolve for an exact match and that end-users are not misdirected to another domain name by a synthesized response.³⁰³ Complaints against registry operators for permitting wildcarding may be submitted to ICANN via an online interface.³⁰⁴ A registry's use of wildcarding is easily detectable because every query will receive a response, instead of a "name error," even if the domain name is not valid.³⁰⁵ This means that a user will be redirected to a similar domain name. It appears that all new gTLD operators are in compliance with this safeguard.³⁰⁶

To comply with the fourth safeguard, new gTLD registries are required to remove orphan glue records when presented with evidence that such records have been used in malicious conduct.³⁰⁷ Unmitigated orphan glue records can be used for malicious purposes such as fast-flux hosting botnet attacks.³⁰⁸ This requirement is reactive by design, but registry operators can make it technically impossible for orphan glue records to exist in the first place and some do. Since 2013, there have been no ICANN organization complaints related to orphan glue records.³⁰⁹

²⁹⁶ Technical requirements change over time, which would make continual auditing difficult.

²⁹⁷ ICANN, *Applicant Guidebook* (June 2012), Section 5-4.

²⁹⁸ ICANN, "Pre-Delegation Testing (PDT)," accessed 2 February 2017, <https://newgtlds.icann.org/en/applicants/pdt>.

²⁹⁹ ICANN, "Registry Agreement," accessed 2 February 2017, <https://www.icann.org/resources/pages/registries/registries-agreements-en>, Specification 6, Clause 1.3.

³⁰⁰ SANS Institute (2002), *Global Information Assurance Certification Paper*, accessed 2 February 2017, <https://www.giac.org/paper/gcih/364/dns-spoofing-attack/103863>. DNS spoofing occurs "when a DNS server accepts and uses incorrect information from a host that has no authority giving that information" (p. 16).

³⁰¹ Soeul Son and Vitaly Shmatikov, "The Hitchhiker's Guide to DNS Cache Poisoning" (paper presented at the 6th International ICST Conference on Security and Privacy in Information Networks, Singapore, 7-9 September 2010), https://www.cs.cornell.edu/~shmat/shmat_securecomm10.pdf. DNS cache poisoning occurs when the temporary cached data stored by a DNS resolver is intentionally altered to map DNS resolutions to IP addresses routed to invalid or malicious destinations (p. 1).

³⁰² ICANN, "TLD DNSSEC Report," accessed 26 April 2017, http://stats.research.icann.org/dns/tld_report/. This does not include .aero.

³⁰³ ICANN, "Registry Agreement," Specification 6, Clause 2.2.

³⁰⁴ ICANN, "Wildcard Prohibition (Domain Redirect) Complaint Form," accessed 2 February 2017, <https://forms.icann.org/en/resources/compliance/registries/wildcard-prohibition/form>.

³⁰⁵ SSAC, "SAC 015: Why Top-Level Domains Should Not Use Wildcard Resource Records."

³⁰⁶ As of 1 January 2017, no complaints have been reported via this form. See also "DNSSEC Deployment Report," accessed 1 January 2017, <https://rick.eng.br/dnssecstat/>.

³⁰⁷ ICANN, "Registry Agreement," Specification 6, Clause 4.1.

³⁰⁸ ICANN Security and Stability Advisory Committee (March 2008), *SSAC Advisory on Fast Flux Hosting and DNS*, accessed 2 February 2017, <https://www.icann.org/en/system/files/files/sac-025-en.pdf>.

³⁰⁹ ICANN, "Contractual Compliance Reports," accessed 8 August 2018, <https://www.icann.org/resources/pages/compliance-reports-2016-04-15-en>.

For the fifth safeguard, Registry Agreements require new gTLD operators to create and maintain Thick WHOIS records for domain name registrations. This means that registrant contact information, along with administrative and technical contact information, is collected and displayed in addition to traditional Thin WHOIS data at the registry level.³¹⁰ ICANN Contractual Compliance monitors adherence to the Thick WHOIS requirement on an active basis, for both reachability and format.³¹¹ Syntax and operability accuracy are evaluated by the ICANN WHOIS Accuracy Reporting System (ARS) project.³¹² The “Impact of Safeguards” chapter below further explains the ARS and related compliance issues.

Registry Agreements also require all new gTLD registry operators to post abuse contact details on their websites and to notify ICANN of any changes to contact information.³¹³ ICANN monitors compliance with this requirement and publishes statistics, including remediation measures, in its quarterly reports.³¹⁴ The Registry Agreements require registry operators to respond to well-founded complaints, but do not mandate specific procedures for doing so. Consequently, there is no standard by which the ICANN organization can assess the particular means by which registry operators resolve complaints. There were 55 complaints related to abuse contact data in 2016,³¹⁵ 61 in 2015,³¹⁶ 100 in 2014,³¹⁷ and 386 in 2013.³¹⁸

For the sixth safeguard, new gTLD operators are required via the Registry Agreement to make their zone files available to approved requestors via the Centralized Zone Data Service (CZDS).³¹⁹ Centralizing these data sources enhances the ability of security researchers, IP attorneys, law enforcement agents, and other approved requestors to access the data without the need to enter into a contractual relationship each time. There were 19 complaints related to bulk zone file access in 2016,³²⁰ 27 in 2015,³²¹ and 55 in 2014.³²² No data was available in the ICANN 2013 Contractual Compliance Report.

To enhance the stability of the DNS, ICANN created the Expedited Registry Security Request (ERSR) process, which permits registries “to request a contractual waiver for actions it might take or has taken to mitigate or eliminate” a present or imminent security incident.³²³ As of 5 October 2016, ICANN reports that the ERSR has not been invoked for any new gTLD.³²⁴ In addition to the aforementioned safeguards, ICANN, in response to community input, proposed the creation of the High Security Zone Verification Program whereby gTLD registry operators

³¹⁰ ICANN, “What are thick and thin entries?,” accessed 2 February 2017, <https://whois.icann.org/en/what-are-thick-and-thin-entries>.

³¹¹ ICANN, “Registry Agreement,” Specification 10, Section 4.

³¹² ICANN, “WHOIS Accuracy Reporting System (ARS) Project Information,” accessed 2 February 2017, <https://whois.icann.org/en/whoisars>.

³¹³ ICANN, “Registry Agreement,” Specification 6, Section 4.1.

³¹⁴ ICANN, “Contractual Compliance Reports 2016,” accessed 2 February 2017, <https://www.icann.org/resources/pages/compliance-reports-2016-04-15-en>.

³¹⁵ <https://www.icann.org/en/system/files/files/annual-2016-31jan17-en.pdf>

³¹⁶ ICANN, “Contractual Compliance Reports 2015,” accessed 2 February 2017, <https://www.icann.org/resources/pages/compliance-reports-2015-04-15-en>.

³¹⁷ ICANN, “Contractual Compliance Reports 2014,” accessed 2 February 2017, <https://www.icann.org/resources/pages/compliance-reports-2014-2015-01-30-en>.

³¹⁸ ICANN, “Contractual Compliance Reports 2013,” accessed 2 February 2017, <https://www.icann.org/resources/pages/reports-2013-02-06-en>.

³¹⁹ ICANN, “Registry Agreement,” Specification 4, Section 2.1; ICANN, “Centralized Zone Data Service,” accessed 2 February 2017, <https://czds.icann.org/en>.

³²⁰ ICANN, “Contractual Compliance Reports 2016.”

³²¹ ICANN, “Contractual Compliance Reports 2015.”

³²² ICANN, “Contractual Compliance Reports 2014.”

³²³ ICANN, “Expedited Registry Security Request Process,” accessed 2 February 2017, <https://www.icann.org/resources/pages/ersr-2012-02-25-en>.

³²⁴ ICANN Registry Services, email discussion with Review Team, July 2017.

could voluntarily create high security zones.³²⁵ An advisory group conducted extensive research to determine standards by which registries could create and operate a “high security zone.” However, the proposals never reached the implementation stage due to a lack of consensus.

The technical safeguards, enforced through Contractual Compliance, imposed requirements upon new gTLD registries and registrars that were intended to mitigate risks inherent in the expansion of the DNS. The review team commissioned a DNS abuse study to provide insight as to whether the overall implementation of these safeguards resulted in a decrease in the levels of DNS Security Abuse compared to legacy gTLDs.³²⁶

DNS Abuse Study

In preparation for the CCT’s assessment of the New gTLD Program safeguards discussed above, ICANN issued a report analyzing the history of DNS abuse safeguards tied to the New gTLD Program.³²⁷ The report assessed the various ways to define DNS abuse. Some of the challenges to defining DNS abuse arise because of the various ways that different jurisdictions define and treat DNS abuse. Certain activities are considered to be abusive in some jurisdictions but not others. Some of these activities, such as those solely focused on intellectual property violations, are interpreted differently not only in terms of substance, but also in terms of available remedies depending upon the jurisdiction involved. Another challenge is the lack of data available regarding certain types of abuse. Nonetheless, there are core abusive behaviors for which there is both consensus and significant data available. These include spam, phishing, and malware distribution.

The ICANN report on the history of DNS abuse safeguards acknowledged the absence of a comprehensive comparative study of DNS abuse in new gTLDs versus legacy gTLDs. Nonetheless, some metrics suggest that a high percentage of new gTLDs might suffer from DNS Security Abuse. For example, Spamhaus consistently ranks new gTLDs amongst its list of “The 10 Most Abused Top-Level Domains,” which is based on the ratio of the number of domain names associated with abuse versus the number of domain names seen in a zone.³²⁸ Using a different methodology, previous research from Architelos and the Anti-Phishing Working Group named .com as the TLD with the largest number of domain names associated with abuse.³²⁹ A 2017 report from PhishLabs also concluded that half of all phishing sites are in the .com zone, with new gTLDs comprising 2 percent of all phishing sites.³³⁰ However, the same report concluded that phishing sites in new gTLD zones have increased 1,000 percent

³²⁵ ICANN (18 November 2009), *A Model for a High-Security Zone Verification Program*, accessed 2 February 2017, <https://archive.icann.org/en/topics/new-gtlds/high-security-zone-verification-04oct09-en.pdf>; ICANN, “Public Comment: High Security Zone TLD Final Report,” 11 March 2011, accessed 8 August 2018, <https://www.icann.org/news/announcement-2011-03-11-en>.

³²⁶ SIDN Labs and the Delft University of Technology, “DNS Abuse in gTLDs”. See also ICANN, *Request for Proposal*.

³²⁷ ICANN, *New gTLD Program Safeguards* (2016)

³²⁸ Spamhaus, “The World’s Most Abused TLDs,” accessed 8 August 2018, <https://www.spamhaus.org/statistics/tlds/>

³²⁹ Anti-Phishing Working Group (29 April 2015), *Phishing Activity Trends Report: 4th Quarter 2014*, accessed 8 August 2018, http://docs.apwg.org/reports/apwg_trends_report_q4_2014.pdf; Architelos (June 2015), *The NameSentrySM Abuse Report: New gTLD State of Abuse 2015*, accessed 8 August 2018, <http://domainnamewire.com/wp-content/uploads/Architelos-StateOfAbuseReport2015.pdf>

³³⁰ PhishLabs, *2017 Phishing Trends & Intelligence Report*, accessed 8 August 2018,

<https://pages.phishlabs.com/rs/130-BFB-942/images/2017%20PhishLabs%20Phishing%20and%20Threat%20Intelligence%20Report.pdf>, pp. 23-24. New gTLDs comprised 8 percent of the overall TLD market during this time period when .tk is excluded from the data. See also Kevin Murphy, “Phishing in new gTLDs up 1,000 percent but .com still the worst,” Domain Incite, 20 February 2017, accessed 8 August 2018, <http://domainincite.com/21552-phishing-in-new-gtlds-up-1000-but-com-still-the-worst>

since the previous year, which appears to have coincided with an overall significant increase in phishing attacks during 2016.³³¹ By the end of 2017, new gTLDs exclusively filled the list of Symantec's top 20 "Shady Top-Level Domains."³³²

Domain names are often a key component of cybercrimes and enable cybercriminals to quickly adapt their infrastructure.³³³ For example, spam campaigns often correlate with phishing and other cybercrime.³³⁴ Domain names are also used to assist with malware distribution and botnet command-and-control.³³⁵ Troubling statistics and incidents observed by network operators have led to perceptions that many new gTLDs offer little more than abuse.³³⁶ In fact, some Internet security companies have advised customers to block all network traffic from specific TLDs.³³⁷ Such practices run counter to ICANN's Universal Acceptance efforts.³³⁸ Although ICANN's standard contracts for registries and registrars have mandated consistent use of specified safeguards, efforts to combat domain name abuse vary greatly amongst the contracted parties. Some entities do not act until a complaint is received. In contrast, other registrars take proactive steps, such as checking registrant credentials, blocking domain name strings similar to known phishing targets, and scrutinizing domain name resellers. Domain name resellers are not ICANN-contracted parties and hence not directly subject to ICANN's enforcement authority over standard contract requirements, including the safeguards under discussion in this report.³³⁹

In light of the dynamic DNS environment, snapshots of new gTLD abuse do not account for the full variety of registration rules and safeguards in the 1,000+ new gTLDs that have been delegated since 2013. Accordingly, it is difficult to find definitive distinctions between abuse rates in legacy gTLDs compared to new gTLDs without performing a comprehensive assessment. To the extent possible, the CCT has sought to measure the effectiveness of the technical safeguards developed for the New gTLD Program in mitigating various forms of DNS abuse. As part of this process, the CCT commissioned a comprehensive DNS abuse study to analyze levels of DNS Security Abuse in legacy and new gTLDs, both to inform this review and potentially serve as a baseline for future analysis.³⁴⁰ The ICANN-selected vendor, a joint

³³¹ Lindsey Havens, "APWG & Kaspersky Research Confirms Phishing Trends & Intelligence Report Findings," 2 March 2017, accessed 8 August 2018, <https://info.phishlabs.com/blog/apwg-kaspersky-research-confirms-phishing-trends-investigations-report-findings>; Darya Gudkova, et. al., "Spam and phishing in 2016," 20 February 2017, accessed 8 August 2018, <https://securelist.com/kaspersky-security-bulletin-spam-and-phishing-in-2016/77483/>; Anti-Phishing Working Group (23 February 2017), *Phishing Activity Trends Report: 4th Quarter 2016*, accessed 8 August 2018, http://docs.apwg.org/reports/apwg_trends_report_q4_2016.pdf

³³² Chris Larsen, "The 'Top 20': Shady Top-Level Domains," Symantec, 15 March 2018, <https://www.symantec.com/blogs/feature-stories/top-20-shady-top-level-domains>

³³³ Symantec (April 2015), *Internet Security Threat Report*, accessed 2 February 2017, https://its.ny.gov/sites/default/files/documents/symantec-internet-security-threat-report-volume-20-2015-social_v2.pdf

³³⁴ Richard Clayton, Tyler Moore, and Henry Stern, "Temporal Correlations between Spam and Phishing Websites" (paper presented at the LEET'09 Proceedings of the 2nd USENIX Conference on Large-Scale Exploits and Emergent Threats, Boston, MA, 21 April 2009) <https://www.cl.cam.ac.uk/~rnc1/leet09.pdf>.

³³⁵ CrowdStrike, *Global Threat Intel Report*, (2014, pp.14-15, <https://go.crowdstrike.com/rs/281-OBQ-266/images/ReportGlobalThreatIntelligence.pdf>

³³⁶ Tom Henderson, "The new internet domains are a wasteland," Network World 5 July 2018, accessed 8 August 2018, <http://www.networkworld.com/article/3091754/security/the-new-internet-domains-are-a-wasteland.html>.

³³⁷ In a 2015 report, Blue Coat advised network operators to block all traffic to or from ".work, .gq, .science, .kim and .country". See Blue Coat, "DO NOT ENTER: Blue Coat Research Maps the Web's Shadiest Neighborhoods," September 2015, accessed 8 August 2018, http://dc.bluecoat.com/2015_NAM_Shady_TLD_Reg, p. 7.

³³⁸ ICANN, "Universal Acceptance."

³³⁹ Secure Domain Foundation (June 2015), *The Cost of Doing Nothing: The Business Case for Proactive Anti-Abuse*, https://securedomain.org/Documents/SDF_Report1_June_2015.pdf, p. 8. Registrars must impose flow-down contractual requirements onto resellers with whom they contract. However, the resellers are not ICANN-accredited. See ICANN, "2013 RAA: Section 3.12: Obligations Related to Provision of Registrar Services by Third Parties," accessed 8 August 2018, <https://www.icann.org/resources/pages/approved-with-specs-2013-09-17-en>

³⁴⁰ The study ultimately was able to collect data on phishing, malware hosting, and spam. Initially, the Review Team sought to include botnet hosting and command-and-control domains in the analysis. However, discrete

team comprised of researchers from Delft University of Technology in the Netherlands (TU Delft) and the Foundation for Internet Domain Registration in the Netherlands (SIDN), delivered their final report (hereafter, the “DNS Abuse Study”) to the review team on 9 August 2017.³⁴¹

DNS Abuse Study Methodology

The DNS Abuse Study relied upon zone files, WHOIS records, and 11 distinct domain name blacklist feeds to calculate rates of technical DNS Security Abuse from 1 January 2014 through the end of 31 December 2016.³⁴²

The analysis includes:

1. Absolute counts of abusive domains per gTLD and registrar from 1 January 2014 until 31 December 2016, taking into account sunrise periods and dates of general availability for registration;
2. Abuse rates, based on an “abused domains per 10,000” ratio (as a normalization factor to account for different TLD sizes), per gTLD and registrar from 1 January 2014 until 31 December 2016;
3. Abuse rates associated with privacy and proxy services;
4. Identification of geographic locations associated with abusive activities;
5. Abuse levels distinguished by “maliciously registered” versus “compromised” domains;
6. An inferential statistical analysis on the effects of security indicators and the structural properties of new gTLDs, (i.e., number of DNSSEC-signed domains, parked domains, number of domains in each new gTLD, the level of registration restrictiveness, as well as the number of domains resolving to content).

DNS Abuse Study Findings

The DNS Abuse Study makes many significant findings regarding DNS Security Abuse associated with new gTLDs as compared to legacy gTLDs. Generally, the Study indicates that the introduction of new gTLDs did not increase the total amount of abuse for all gTLDs. Nonetheless, the results demonstrate that the nine aforementioned safeguards alone do not guarantee a lower rate of abuse in each new gTLD compared to legacy gTLDs. Instead, factors such as registration restrictions, price, and registrar-specific practices seem more likely to affect abuse rates.³⁴³

DNS Security Abuse is Migrating to New gTLDs

Legacy gTLDs still account for most domain name registrations and, perhaps consequently, the highest volume of phishing and malware associated domain names.³⁴⁴ Nonetheless, the

historical data on botnets was unavailable for the timeframe of the study. However, botnet-associated domain names were included in the malware blacklists used for the study. See ICANN, *Request for Proposal*.

³⁴¹ SIDN Labs and the Delft University of Technology, “DNS Abuse in gTLDs.”

³⁴² The first new gTLD delegations began in October 2013.

³⁴³ SIDN Labs and the Delft University of Technology, “DNS Abuse in gTLDs,” pp.24-25

³⁴⁴ *Ibid.*, p.24.

overall rates of abuse in legacy and new gTLDs were similar by the end of 2016. Moreover, there are distinct trends with regard to specific types of abuse. For example, by the end of 2016, spam registrations in legacy gTLDs had declined while those in new gTLDs saw a significant increase. In the last quarter of 2016, 56.9 of every 10,000 legacy gTLD domain names were on spam blacklists, whereas the rate for new gTLD domain names was 100 times more: 526.6 domain names per 10,000 registrations.³⁴⁵

Some abuse trends showed overlap. The top five legacy gTLDs with the highest rates of phishing also had the highest rates of domain names tied to malware distribution.³⁴⁶ Phishing and malware abuse rates in legacy gTLDs more often resulted from compromised domain names rather than malicious registrations. There are much higher rates of compromised legacy gTLD domain names than new gTLDs.

Specific to malware distribution, the top 5 new gTLDs with the highest rates of abusive domain names were .top, .wang, .win, .loan, and .xyz.³⁴⁷ Since the end of 2015, the .top TLD has had the highest rate of abusive registrations for all legacy and new gTLDs.³⁴⁸ Each of these TLDs offered low-priced registrations, usually at levels lower than those for a .com registration.

The DNS Abuse Study distinguishes between domain names registered specifically for malicious purposes and domain names registered for legitimate purposes that were subsequently compromised.³⁴⁹ The results of the Study indicate that the introduction of new gTLDs has corresponded with a decrease in the number of spam-associated registrations in legacy gTLDs, and an increase in the number of spam-associated registrations in new gTLDs.³⁵⁰ This, along with the fact that the total number of spam registrations remains stable, suggests that perhaps miscreants are shifting from registering domain names in legacy gTLDs to new gTLDs.³⁵¹ Within this trend, there are specific new gTLDs that serve as primary targets of opportunity for abusive registrations, whether due to lax registration policies and abuse enforcement, or low price. In fact, some registrars are almost entirely associated with abusive, rather than legitimate, registrations.³⁵²

DNS Security Abuse is Not Universal in New gTLDs

Even though abuse is growing in new gTLDs, it is by no means rampant across all of them. Instead, by the end of 2016, this phenomenon was highly concentrated. Five new gTLDs, exhibiting the highest concentration of domain names used in phishing attacks,³⁵³ accounted for 58.7 percent of all blacklisted new gTLD domain names,³⁵⁴ whereas Spamhaus blacklisted at least 10 percent of all domain names registered within 15 new gTLDs.³⁵⁵ However, approximately a third of all new gTLDs did not have a single instance of abuse, as reported on blacklists, in the final quarter of 2016.³⁵⁶

³⁴⁵ Ibid., p.24.

³⁴⁶ Ibid., p.12.

³⁴⁷ Findings based on the “StopBadware” data feed.

³⁴⁸ Ibid., p.13.

³⁴⁹ Compromised domain names include domain names for which the domain name registration or the website may have been hacked.

³⁵⁰ SIDN Labs and the Delft University of Technology, “DNS Abuse in gTLDs,” p. 2.

³⁵¹ Ibid. Figures 24, 36, and 38 illustrate the absolute number of spam domains for different spam feeds.

³⁵² Ibid., p. 22.

³⁵³ Anti-Phishing Working Group, *Phishing Activity Trends Report: 4th Quarter 2016*.

³⁵⁴ SIDN Labs and the Delft University of Technology, “DNS Abuse in gTLDs,” p.11.

³⁵⁵ Ibid., p. 1.

³⁵⁶ Ibid., p. 1.

Two registrars highlighted in the study had overwhelming rates of abuse. Alarming, more than 93 percent of the new gTLD registrations sold by Nanjing Imperiosus Technology, based in China, appeared on SURBL's blacklists.³⁵⁷ For much of 2016, abuse rates associated with this registrar grew at significant rates. ICANN eventually suspended Nanjing in January 2017, citing its failure to pay fees in compliance with the RAA.³⁵⁸ However, ICANN did not rely upon the sustained, unabated, high abuse rates as the reason for its suspension of Nanjing, which in and of itself may not have violated the RAA.

Another registrar, Alpnames Ltd., based in Gibraltar, was associated with a high volume of abuse from the .science and .top domain names. The Study notes that this registrar used price promotions that offered domain name registrations for USD \$1 or sometimes even free.³⁵⁹ Moreover, Alpnames permitted registrants to randomly generate and register 2,000 domain names in 27 new gTLDs in a single registration process. Registering domain names in bulk using domain generation algorithms are commonly associated with cybercrime.³⁶⁰ However, there is currently no contractual prohibition or safeguard against the bulk registration of domains. At the time of this report, Alpnames remained ICANN-accredited.

Many factors can play a role in the volume or rate of abuse in a particular TLD. In terms of absolute size, new gTLDs are no different than legacy gTLDs in that the larger the size of the TLD, the higher the total number of domain names associated with abuse.³⁶¹ However, analyzing attributes of cross-TLD registry operators suggests that many of the operators associated with the highest rates of abuse had low-priced domain registration offerings.

The Study concluded that domain names registered for malicious purposes often contained strings related to trademarked terms.³⁶² Specifically, of the 88 top domain names associated with abuse in the fourth quarter of 2015, 75 of them included exact or misspelled versions of Apple, iCloud, or iPhone, implying that the domain names were used in a phishing campaign against users of Apple, Inc. products and services.³⁶³ These registrations should have raised reasonable suspicion at the time of registration, but were nonetheless delegated and later associated with abuse. Furthermore, registrant data matching registrations associated with abuse can be useful for identifying and preventing repeat abuse. In fact, the Study found 150 abusive .work domain name registrations were registered on the "same day using the same registrant information, the same registrar, and the domain names were composed of similar strings."³⁶⁴ In this instance, correlating matching registrant data in advance could identify suspicious registrations before they are used to harm potential victims.

The Study found a statistically weak but positive correlation between the number of parked domains in a new gTLD zone and the rate of abuse.³⁶⁵ Oddly, there was also a weak positive correlation between the number of DNSSEC-signed domain names and abuse in a new gTLD zone.³⁶⁶ The use of privacy/proxy services to mask registrant WHOIS data is more common

³⁵⁷ Ibid., p. 19.

³⁵⁸ ICANN Contractual Compliance (4 January 2017), "Notice of Termination of Registrar Accreditation Agreement," accessed 8 August 2018, https://www.icann.org/uploads/compliance_notice/attachment/895/serad-to-hansmann-4jan17.pdf

³⁵⁹ SIDN Labs and the Delft University of Technology, "DNS Abuse in gTLDs," p.20.

³⁶⁰ Aditya K. Sood, Sherah Zeadally, "A Taxonomy of Domain-Generation Algorithms," *IEEE Security & Privacy*, vol. 14, no. , pp. 46-53, July-Aug. 2016, <https://ieeexplore.ieee.org/document/7535098/>

³⁶¹ SIDN Labs and the Delft University of Technology, "DNS Abuse in gTLDs," p.15.

³⁶² Ibid., p. 12.

³⁶³ Ibid., p. 12.; Other research has shown similar techniques in which trademarked terms are used in IDNs for homograph-based DNS Security Abuse, see Mike Schiffman, *Touched by an IDN: Farsight Security shines a light on the Internet's oft-ignored and undetected security problem*, Jan. 17, 2018, accessed 5 September 2018, https://www.farsightsecurity.com/2018/01/17/mschiffm-touched_by_an_idn/

³⁶⁴ Ibid., p. 12.

³⁶⁵ Ibid., p. 16.

³⁶⁶ Ibid., p. 16.

in legacy than new gTLDs. Regardless, the Study did not find any statistically significant relationship between the use of such services and domain name abuse.³⁶⁷ Above all, the Study identified a relatively stronger statistically significant correlation between restrictive registration policies and lower rates of abuse. Nonetheless, even new gTLDs with open registration policies varied greatly in abuse rates, suggesting that other key variables, such as price and differences in registry and registrar anti-abuse practices may also influence abuse rates.

DNS Security Abuse is Not Random

Price and registration restrictions appear to affect which registrars and registries cybercriminals will choose for DNS Security abuse, making low-priced domain names with low barriers to registration attractive attack vectors.³⁶⁸ However, these same qualities may be appealing for registrants with legitimate interests and further the overarching goal of a free and open Internet. High prices and/or onerous registration restrictions would not be compatible with many business models focused on open registration and low prices. However, monetary incentives based on fees paid to ICANN may nevertheless provide an impetus for such contracted parties to better prevent systemic DNS Security Abuse by proactively screening registrations and detecting malfeasance.³⁶⁹ For example, there is precedent for ICANN adjusting its fee structure to address behavior harmful to the DNS, such as abolishing the automatic fee refund for “domain tasters.”³⁷⁰ Similarly, the CCT Review Team proposes the development of mandates as well as incentives to reward best practices that curb or prevent technical DNS Security Abuse and strengthen the consequences for culpable or complacent conduits of technical DNS Security Abuse. These recommendations may be applicable to curb other misuse of domain names to the extent the community reaches consensus on other forms of DNS abuse.

The review team is concerned with the high levels of DNS Security Abuse concentrated in a relatively small number of registries and registrars and geographic regions. Of particular concern, DNS Security Abuse appears to have continued without consequence for an extended amount of time in some cases.

Recommendations 14 to 18 are designed to address the reality that the new gTLD safeguards did not, on their own, prevent technical DNS Security Abuse. In addition to means available today to prevent and mitigate DNS Security Abuse, the review team proposes new incentives and tools to combat abuse that will:

- ⦿ Encourage and incentivize proactive abuse measures as per Recommendation 14;
- ⦿ Introduce measures to prevent technical DNS Security Abuse as per Recommendation 15;
- ⦿ Ensure that the data collection is ongoing and acted upon as per Recommendation 16.

³⁶⁷ Ibid., pp. 16-17.

³⁶⁸ Ibid., p. 25.

³⁶⁹ This is a best practice in other parts of the Internet infrastructure ecosystem. For example, the Messaging, Malware, and Mobile Anti-Abuse Working Group (M3AAWG) has encouraged hosting providers to adopt a “vetting process to proactively identify malicious clients before they undertake abusive activities” and to take measures to “prevent abusers from becoming customers.” M3AAWG (March 2015), *Anti-Abuse Best Common Practices for Hosting and Cloud Service Providers*, accessed 8 August 2018, https://www.m3aawg.org/sites/default/files/document/M3AAWG_Hosting_Abuse_BCPs-2015-03.pdf, p. 4.

³⁷⁰ Brian Krebs, “New Policy Aims to Curb Web Site Name Abuse,” *The Washington Post*, 30 January 2008, accessed 8 August 2018, <http://www.washingtonpost.com/wp-dyn/content/article/2008/01/30/AR2008013002178.html>

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- ⊙ Provide an additional mechanism for circumstances where, despite Recommendations 14, 15, and 16, registry operators and/or registrars do not effectively address technical DNS Security Abuse within the domains they offer. A dispute resolution process should be considered to enable injured parties to take action as in Recommendation 15.

Indeed, there should be more consideration by ICANN organization of where further steps are needed to address high levels of DNS Security Abuse. If the level of abuse has not been reduced to acceptable levels, as per the commitment of a registry or registrar, then the failure of the contracted party to implement the plan should constitute a breach of the RAA and/or the RA. If the contracted parties commit to not exceeding a minimum level of DNS Security Abuse, then the proposed dispute resolution process becomes less necessary, and less likely to be used. This translates to positive outcomes for all parties due to decreased levels of DNS Security Abuse.

Recommendation 14: Consider directing ICANN organization, in its discussions with registries, to negotiate amendments to existing Registry Agreements, or in consideration of new Registry Agreements associated with subsequent rounds of new gTLDs, to include provisions in the agreements to provide incentives, including financial incentives for registries, especially open registries, to adopt proactive anti-abuse measures.³⁷¹

Rationale/related findings: ICANN is committed to maintaining “the operational stability, reliability, security, global interoperability, resilience, and openness of the DNS and the Internet.”³⁷² The new gTLD safeguards alone do not prevent DNS Security abuse in the DNS and have consequently failed to meet their intended goal in preventing the abuse phenomenon from spreading to new gTLDs. The review team’s analysis and the DNS Abuse Study indicate that abuse rates are associated with registration restrictions imposed on registrants and registration prices (i.e., abuse rates tend to go down with increased registration restrictions and high domain name prices). Some registries are inherently designed to have strict registration policies and/or high prices. However, a free, open, and accessible Internet will invariably include registries with open registration policies and low prices that must adopt other measures to prevent DNS Security Abuse. Registries that do not impose registration eligibility restrictions can nonetheless reduce technical DNS Security Abuse through proactive means, such as identifying repeat offenders, monitoring suspicious registrations, and actively detecting abuse instead of merely waiting for complaints to be filed. Therefore, ICANN should incentivize and reward operators that adopt and implement proactive anti-abuse measures identified by the community as effective for reducing DNS Security Abuse. Operators that have

³⁷¹ The review team looked for examples of practices that could assist in proactively minimizing abuse. One such example has been proposed by EURid, the operator of the .EU registry, which will soon test a delayed delegation system. See EURid, “EURid Set to Launch First of its Kind Domain Name Abuse Prevention Tool,” 2017, accessed 8 August 2018, <https://eurid.eu/en/news/eurid-set-to-launch-first-of-its-kind-domain-name-abuse-prevention-tool/> and Vissers T. et al. (2017), “Exploring the Ecosystem of Malicious Domain Registrations in the .eu TLD” In: Dacier M., Bailey M., Polychronakis M., Antonakakis M. (eds) Research in Attacks, Intrusions, and Defenses. RAID 2017. Lecture Notes in Computer Science, vol 10453. Springer, Cham, accessed 8 August 2018, https://link.springer.com/chapter/10.1007/978-3-319-66332-6_21. https://eurid.eu/media/filer_public/9e/d1/9ed12346-562d-423d-a3a4-bcf89a59f9b4/eutldecosystem.pdf. This process will not prevent registrations, but instead delay activation of a registration if a domain name is identified as being potentially abusive by machine learning algorithms. Future review teams could study this effort to consider its effectiveness and whether it could serve as a potential innovative model to help foster trust and a secure online environment. In addition, the .xyz registry may provide another example of proactive measures to combat abuse. The .xyz registry purports to have a zero-tolerance policy toward abuse-related activities on .xyz or any of their other domain extensions using a sophisticated abuse monitoring tool enabling proactive monitoring and detection in near real-time, suspending domains engaging in any of the abusive activities set out. Future review teams could explore the effectiveness of this approach by examining abuse rates over time and comparing the levels of abuse both before and after this policy.

³⁷² ICANN, “Bylaws,” Section 1.2(a)(i).

already adopted such measures, prior to the creation of an incentive program, should be rewarded as well.

To: The ICANN Board, the Registry Stakeholders Group, the Registrar Stakeholders Group, the Generic Names Supporting Organization, and the Subsequent Procedures PDP WG.

Prerequisite or priority level: High

Consensus within team: Yes

Details: The ICANN Board should consider urging ICANN organization to negotiate with new and legacy gTLD registries and registrars to include in the registry agreements fee discounts for registry operators with open registration policies and who implement proactive measures to prevent DNS Security Abuse in their zone. ICANN should verify compliance with incentive programs to ensure bad actors are not receiving incentives despite acting in bad faith. The adoption of proactive anti-abuse measures in exchange for incentives should not form the basis for shifting liability for underlying abuse incidents to the registry operator.

Success measures: More registries and registrars, even those with open registration policies, adopting proactive anti-abuse measures that result in measurable decreases in the overall rates of DNS Security Abuse in their zones.

Recommendation 15: ICANN Org should, in its discussions with registrars and registries, negotiate amendments to the Registrar Accreditation Agreement and Registry Agreements to include provisions aimed at preventing systemic use of specific registrars or registries for DNS Security Abuse. With a view to implementing this recommendation as early as possible, and provided this can be done, then this could be brought into effect by a contractual amendment through the bilateral review of the Agreements. In particular, ICANN should establish thresholds of abuse at which compliance inquiries are automatically triggered, with a higher threshold at which registrars and registries are presumed to be in default of their agreements. If the community determines that ICANN org itself is ill-suited or unable to enforce such provisions, a DNS Abuse Dispute Resolution Policy (DADRP) should be considered as an additional means to enforce policies and deter against DNS Security Abuse. Furthermore, defining and identifying DNS Security Abuse is inherently complex and would benefit from analysis by the community, and thus we specifically recommend that the ICANN Board prioritize and support community work in this area to enhance safeguards and trust due to the negative impact of DNS Security Abuse on consumers and other users of the Internet.

Rationale/related findings: Published research, cybersecurity analysis, and DNS Security Abuse monitoring tools highlight concentrated, systemic DNS Security Abuse for which there are no adequate, actionable remedies. The CCT-RT is of the view that the existing powers of ICANN Compliance are too weak in their present form to be as effective as they need to be in abating such DNS Technical Abuse, and ICANN Compliance needs clear authority to address systematic abuse effectively. Whilst abuse can be due, in part, to negligent parties, one of the specific areas of concern identified nearly a decade ago by the community prior to the launch of the New gTLD Program was how to ensure that “bad actors” do not run registries[1]. The anti-abuse safeguards put in place as part of the new gTLD program do not address this problem. Examples from the DNS Abuse Study of new gTLDs registrars with more than 10% of their domain names blacklisted as well as registries, according to Spamhaus for example are .science (51%), .stream (47%), .study (33%), .download (20%), .click (18%), .top (17%), .gdn (16%), .trade (15%), .review (13%), and .accountant (12%). Current policies focus on individual abuse complaints and an ineffective duty to investigate. Such abuse as has been identified by the DNS Abuse Study[2] concentrated in particular in certain registries and registrars and despite such identification it appears that ICANN Compliance are unable to

remedy the situation whereby ICANN may suspend registrars and registry operators found to be associated with unabated, abnormal and extremely high rates of DNS Security Abuse. In this paradigm, certain registrars and registry operators associated with extremely high rates of DNS Security Abuse have continued to operate and face little incentive to prevent such malicious activity. Moreover, there currently exist few enforcement mechanisms to prevent systemic domain name abuse associated with resellers. Systemic use of particular registrars and registries for DNS Security Abuse threatens the security and stability of the DNS, the universal acceptance of TLDs, and consumer trust. Consequently, the imposition of contractual requirements and effective means to enforce them are necessary to remedy this unacceptable phenomenon.

To: The ICANN Board, the Registry Stakeholders Group, the Registrar Stakeholders Group, the Generic Names Supporting Organization and the Subsequent Procedures PDP WG

Prerequisite or priority level: Prerequisite (provisions to address systemic DNS Security Abuse should be included in the baseline contract for any future new gTLDs)

Consensus within team: Yes

Details: The ICANN Board should direct ICANN Org to negotiate amendments to the Registrar Accreditation Agreement and Registry Agreement provisions aimed at preventing DNS Security Abuse. Such language should impose upon registries and registrars, and, through downstream contract requirements their affiliated entities such as resellers, a duty to prevent wide-scale DNS Security Abuse and implement specific measures to reduce malicious conduct whereby ICANN may suspend registrars and registry operators found to be associated with unabated, abnormal and extremely high rates of DNS Security Abuse. It is important for ICANN Org to gather relevant data, conduct analysis, and act on actionable information. Accordingly, ICANN should initiate an investigation into a contracted party's direct or indirect (such as through a reseller) involvement with systemic DNS Security Abuse. ICANN should make use of well-regarded abuse/black lists and establish an initial threshold at which compliance inquiries are automatically generated. We suggest that this initial threshold should be 3% of registrations or 30 total registrations, whichever is higher. Further, ICANN should establish a subsequent threshold at which a contracted party is presumed to be in breach of its agreement. We suggest this subsequent threshold should be 10% of registrations or 100 total registrations, whichever is higher.

Upon making a finding and contacting the contracted party, such findings may be rebutted upon sufficient proof that the findings were materially inaccurate or that the TLD operator is actively mitigating the identified DNS Security Abuse. The following factors may be taken into account when making a determination: whether the registrar or registry operator 1) engages in proactive anti-abuse measures to prevent DNS Security Abuse, 2) was itself a victim in the relevant instance, 3) has since taken necessary and appropriate actions to stop the abuse and prevent future systemic use of its services for DNS Security Abuse.

It is imperative that ICANN Org be empowered to deal with systemic DNS Security Abuse. However, in addition, a specific DADRP should be considered to the extent the community concludes that ICANN Compliance may be unable or ill-suited to deal with certain situations related to such abuse. Where proper, a DADRP could serve as a significant deterrent and help prevent or minimize such high levels of DNS abuse. Analogous to the Trademark PDDRP, this tool would empower the community to address systemic DNS Security Abuse, which plagues the security and stability of Internet infrastructure and undermines safeguards aimed at ensuring consumer trust. Such a procedure would apply if ICANN Compliance were not the right body to resolve a complaint related to DNS Security Abuse, is ill-suited or unable to do so and the registry operators or registrars are identified as having excessive levels of

abuse. It may be useful for Compliance to be able to refer a case to the DADRP. The Community should determine the conditions under which a complainant can invoke a DADRP.

Success measures: 1) Contractual language is adopted which empowers ICANN to investigate and engage in enforcement actions against registries and registrars associated with systemic DNS Security Abuse such that there are no contracted parties serving as enablers of systemic DNS Security Abuse for which ICANN cannot bring an enforcement action. 2) A DADRP is created if there is an area of DNS Security Abuse that ICANN Org is unable to address 3) There exist no gTLD or registrar with systemic high levels of DNS Security Abuse (>3%). 4) The total volume of DNS Security Abuse decreases.

Recommendation 16: Further study the relationship between specific registry operators, registrars, and DNS Security Abuse by commissioning ongoing data collection, including but not limited to, the ICANN Domain Abuse Activity Reporting (DAAR) initiative. For transparency purposes, this information should be regularly published, ideally quarterly and no less than annually, in order to enable identification of registries and registrars that require greater scrutiny, investigation, and potential enforcement action by the ICANN organization. Upon identifying abuse phenomena, ICANN should put in place an action plan to respond to such studies, remedy problems identified, and define future ongoing data collection.

Rationale/related findings: Comprehensive DNS Security Abuse data collection and analysis is necessary for studying the efficacy of safeguards put in place to protect against malicious abuse issues associated with the expansion of the DNS. Furthermore, progress and trends can be identified by repeating studies over time. The DNS Abuse Study commissioned by the CCT Review Team identified extremely high rates of abuse associated with specific registries and registrars as well as registration features, such as bulk registrations, which appear to enable abuse. Moreover, the Study concluded that registration restrictions correlate with abuse, which indicates that there are many factors to consider and analyze in order to extrapolate cross-TLD abuse trends for specific registry operators and registrars. The DNS Abuse Study highlighted certain behaviors that are diametrically opposed to encouraging consumer trust in the DNS. Certain registries and registrars appear to either positively encourage or at the very least willfully ignore DNS Security Abuse. Such behavior needs to be identified and acted upon quickly by the ICANN organization as determined by the facts and evidence presented. The DNS Abuse Study, which provided a benchmark of DNS Security Abuse since the onset of the New gTLD Program, should be followed up with regular studies so that the community is provided current, actionable data on a regular basis to inform policy decisions.

To: The ICANN Board, the Registry Stakeholders Group, the Registrar Stakeholders Group, the Generic Names Supporting Organization, and the Subsequent Procedures PDP WG, SSR2 Review Team.

Prerequisite or priority level: High

Consensus within team: Yes

Details: The additional studies need to be of an ongoing nature, collecting relevant data concerning DNS Security Abuse at both the registrar and registry level. The data should be regularly published, thereby enabling the Community and the ICANN organization in particular to identify registries and registrars that need to come under greater compliance scrutiny and thereby have such behavior eradicated.

Success measures: Comprehensive, up-to-date technical DNS Security Abuse data is readily available to the ICANN Community to promptly identify problems, craft data-driven policy solutions, and measure the efficacy of implemented safeguards and ongoing initiatives. Furthermore, the next CCT Review Team will have a rich dataset on DNS abuse from which to measure safeguard efficacy.

Recommendation 17: ICANN should collect data about and publicize the chain of parties responsible for gTLD domain name registrations.

Rationale/related findings: At present, there is no consistent mechanism for determining all of the ICANN-contracted and non-contracted operators associated with a gTLD domain name registration. WHOIS records often do not distinguish between registrars and resellers. The DNS Abuse Study, for example, was unable to discern resellers from registrars to determine the degree to which DNS Security Abuse rates may be driven by specific-resellers, which in turn affects overall levels of DNS Security abuse. This data should be available to enhance data-driven determinations necessary for recommendations proposed by this and future CCT Review Teams, supplement New gTLD Program safeguards, and improve ICANN Contractual Compliance determinations.

To: The ICANN Board, the GNSO Expedited PDP, the Registry Stakeholders Group, the Registrar Stakeholders Group, the Generic Names Supporting Organization, the Subsequent Procedures PDP WG, SSAC

Prerequisite or priority level: High

Consensus within team: Yes

Details: WHOIS information is an important source of data for DNS Security Abuse analysis. Safeguards, such as the Thick WHOIS requirements, do not mandate that resellers be listed in WHOIS records. Consequently, the full chain of parties to a registration transaction is not readily discernible. Without such information, it is difficult to determine the extent to which DNS Security Abuse is correlated to individual resellers rather than registrars. For example, with such data hidden, it would be possible for a reseller associated with extremely high levels of abuse to remain in operation under a registrar with relatively normal levels of DNS Security Abuse. This would, in effect, permit systemic DNS Security Abuse by a non-contracted party. Although the reseller is theoretically bound by flow-down contract requirements, in practice this systemic DNS Security Abuse often remains difficult to attribute and tends to go unabated. Whereas, collecting and publicizing such information would enable end-users to readily determine the registry, registrar, and reseller associated with malicious domain name registrations. This would allow for more granular DNS abuse analysis as well as transparency for Internet users, thereby enhancing Community accountability efforts and Contractual Compliance enforcement.

Success measures: It is possible for anyone to readily determine the reseller associated with any gTLD registration.

Impact of Safeguards

Background on Safeguards

A key distinguishing feature of the New gTLD Program was the advent of additional safeguards aimed at protecting the integrity of the DNS. The Governmental Advisory Committee (GAC) greatly influenced the development and adoption of many of those safeguards. In its Beijing Communiqué, the GAC advised that the safeguards proposed be subject to contractual oversight by ICANN, and many have been implemented via contract provisions in the standard Registry and Registrar Agreements required for all new gTLDs.³⁷³ However, a 2015 review on the effectiveness of GAC advice observed that certain aspects of GAC advice were implemented differently from the way in which they were initially proposed.³⁷⁴

What follows is a discussion of certain key safeguards, focusing on the ability of the safeguards to be enforced via ICANN Contractual Compliance and/or to withstand challenges to potential enforcement.

Safeguards for All New gTLDs

WHOIS verification

The WHOIS verification requirements of the New gTLD Program sought to enhance abuse prevention and mitigation efforts.³⁷⁵ The 2013 Registrar Agreement, which was mandatory for all new gTLD registrars, required adherence to the obligations specified in the WHOIS Accuracy Program Specification.³⁷⁶ Consequently, new gTLD registrars are required to engage in “reasonable and commercially practicable” WHOIS accuracy verification at the time of registration and periodic reverification thereafter.³⁷⁷

Specifically, registrars are required to verify the syntax accuracy of registrant-provided postal addresses, email addresses, and telephone numbers, and verify the validity of the phone number and email address of the registrant. These provisions limit registrants to seven days for correcting or updating such information and a total of 15 days for responding to inquiries by the registrar.³⁷⁸ The consequences imposed by a registrar for a registrant’s failure to comply include the suspension and/or cancellation of the domain name registration.³⁷⁹

ICANN Contractual Compliance reports indicate that WHOIS-related complaints comprise the largest category of complaints that they receive related to registrars.³⁸⁰ For example, of the 41,790 total complaints received in 2014, 29,857 related to WHOIS (most complained about

³⁷³ ICANN, “Registry Agreement”; ICANN, “2013 RAA.”

³⁷⁴ ICANN GAC (2016), *GAC Advice Effectiveness Review*, accessed 8 August 2018, <https://gacweb.icann.org/display/gacweb/GAC+Correspondence?preview=/27492514/41943089/Advice%20Effectiveness%20Review.pdf>, pp. 14-15, regarding review of the advice contained within the Beijing Communiqué. The review noted that “the more the advice seeks to impose restrictions, safeguards, checks, rules, verification, authentication, other minimum behavioral expectations or ‘standard setting’, the less likely it is that ICANN will accept and implement the advice in the precise way that the GAC have requested” (p. 2).

³⁷⁵ ICANN (2009), *Mitigating Malicious Conduct*.

³⁷⁶ The implementation of the European Union’s GDPR on 25 May 2018 has had a major impact on how data is collected and processed in all sectors. As of the date of publication [verify] ICANN has amended the contract specifications that govern WHOIS collection and publication. See <https://www.icann.org/resources/pages/gtld-registration-data-specs-en>. The temporary specification no longer permits public access to many WHOIS data fields and this change will likely affect the number of complaints received by ICANN contractual compliance. Nevertheless, GDPR Principles require personal information to be “accurate, and where necessary, kept up to date.” GDPR, Art. 5(d).

³⁷⁷ ICANN, “2013 RAA,” Section 3.7.8

³⁷⁸ ICANN, “2013 RAA,” Section 3.7.7.1 and 3.7.7.2

³⁷⁹ ICANN, “2013 RAA,” Section 3.7.7.2

³⁸⁰ ICANN, “Contractual Compliance Reports,” accessed 7 February 2017, <https://www.icann.org/resources/pages/compliance-reports-2016-04-15-en>.

lack of accuracy, about 71 percent).³⁸¹ Of the 48,106 total complaints received in 2015, 36,354 related to WHOIS (again, accuracy with about 75 percent).³⁸² In 2016 and 2017, WHOIS-related complaints continued to comprise the largest category of complaints received related to registrars.³⁸³

These figures indicate that the WHOIS safeguards created contractual obligations that were sufficiently specific, that violations were flagged, and generated complaints subject to the ICANN compliance process.³⁸⁴

Coinciding with the new WHOIS verification requirements to improve the quality of contact data in the WHOIS, ICANN also implemented the WHOIS Accuracy Reporting System (ARS).³⁸⁵ The ARS is an effort to identify and report on WHOIS accuracy in a systematic way. The GAC advised that registry operators be required to maintain statistical reports of inaccurate WHOIS records.³⁸⁶ ARS is an ICANN project taken in part to respond to this GAC-advised safeguard requiring documentation of WHOIS inaccuracies. This implementation shifted the responsibility from registry operators to ICANN.³⁸⁷ Originally, the ARS contemplated three phases: syntax accuracy, operability accuracy, and identity validation.³⁸⁸

To date, the ICANN ARS has only dealt with accuracy of syntax and operability (i.e., is the contact information in the correct format and is it an operating email, address, or telephone number?). The ARS Report issued in June 2016 and contains findings on the accuracy of syntax (proper format) and operability (can it be used to communicate) of telephone numbers, postal address, and email address for a sample of both new and legacy gTLDs.³⁸⁹ These findings indicate that new gTLDs have higher syntax accuracy ratings for email and telephone, but lower syntax accuracy for postal address, when compared to legacy gTLDs.³⁹⁰ The latest ARS Report issued in June 2018 shows that new gTLDs have an overall higher syntax accuracy (88.5% compared to 81.3% for legacy gTLDs), with similar syntax accuracy for email, and higher syntax accuracy for telephone and postal address.³⁹¹ In terms of operability accuracy, in June 2018, new gTLDs had higher accuracy for email addresses, lower accuracy for telephone numbers, and about the same accuracy for postal addresses.³⁹²

³⁸¹ ICANN, “Contractual Compliance Reports 2014,” accessed 7 February 2017, <https://www.icann.org/resources/pages/compliance-reports-2014-2015-01-30-en>.

³⁸² ICANN, “Contractual Compliance Reports 2015,” accessed 7 February 2017, <https://www.icann.org/resources/pages/compliance-reports-2015-04-15-en>.

³⁸³ <https://www.icann.org/en/system/files/files/annual-2016-31jan17-en.pdf> and <https://www.icann.org/en/system/files>.

³⁸⁴ ICANN, “Competition, Consumer Trust, and Consumer Choice Metrics Reporting,” accessed 7 February 2017, <https://www.icann.org/resources/reviews/cct/metrics>.

³⁸⁵ ICANN, “WHOIS Accuracy Reporting System (ARS) Project Information,” accessed 7 February 2017, <https://whois.icann.org/en/whoisars>. The project aims to: proactively identify inaccurate gTLD registration data, explore the use of automated tools, forward potentially inaccurate records to registrars for action, and publicly report on the resulting actions to encourage improvement.

³⁸⁶ ICANN GAC (11 April 2013), *Beijing Communiqué*, accessed 7 February 2017, <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>; ICANN GAC, *GAC Advice Effectiveness Review*.

³⁸⁷ ICANN GAC (11 April 2013), *Beijing Communiqué*; ICANN GAC, *GAC Advice Effectiveness Review*.

³⁸⁸ ICANN, “WHOIS Accuracy Reporting System.”

³⁸⁹ ICANN, “WHOIS Accuracy Reporting System.”

³⁹⁰ *Ibid.*

³⁹¹ ICANN (June 2018), WHOIS ARS Cycle 2 Phase 6 Report: Syntax and Operability Accuracy,” accessed 8 August 2018, <https://whois.icann.org/en/file/whois-ars-phase-2-cycle-6-report-syntax-and-operability-accuracy>

³⁹² *Ibid.* *Ibid.*

ICANN has not committed to progressing to the identity validation phase (i.e., is the individual listed responsible for the domain?).³⁹³ Hence, the current documentation effort will only detect syntax and operability issues but will not detect and therefore not document inaccurate identity.³⁹⁴

Ultimately, specific language regarding WHOIS obligations and a detailed WHOIS specification may have promoted more focused efforts on combating abuse by creating clear obligations on registrars to gather specified information, and thus enable the ability to make actionable complaints to ICANN Contractual Compliance.

Recommendations

Recommendation 18³⁹⁵: In order for the upcoming WHOIS Review Team to determine whether additional steps are needed to improve WHOIS accuracy, and whether to proceed with the “identity” phase of the Accuracy Reporting System (ARS) project, ICANN should gather data to assess whether a significant percentage of WHOIS-related complaints applicable to new gTLDs relate to the accuracy of the identity of the registrant. This should include analysis of WHOIS accuracy complaints received by ICANN Contractual Compliance to identify the subject matter of the complaints (e.g., complaints about syntax, operability, or identity). The volume of these complaints between legacy gTLDs and new gTLDs should also be compared. ICANN should also identify other potential data sources of WHOIS complaints beyond those that are contractually required (including, but not limited to, complaints received directly by registrars, registries, ISPs, etc.) and attempt to obtain anonymized data from these sources.

Future CCT Review Teams may then also use these data.

Rationale/related findings: WHOIS-related complaints are the largest category of complaints received by ICANN Contractual Compliance for registrars. However, it is unclear what aspect of WHOIS accuracy forms the basis of these complaints, or if the introduction of new gTLDs has had any effect on the accuracy of WHOIS data. Phase 1 of ICANN’s ARS project analyzes the syntactic accuracy of WHOIS contact information and Phase 2 assesses the operability of the contact data in the WHOIS record. But there is currently no plan to proceed with Phase 3 of the ARS project: identity validation (is the contacted individual responsible for the domain?).

To: ICANN organization to gather required data, and to provide data to relevant review teams to consider the results and, if warranted, to assess feasibility and desirability of moving to identity validation phase of WHOIS ARS project.

Prerequisite or priority level: Medium

Consensus within team: Yes

³⁹³ To carry out this phase of the project, ICANN “requires further consultation with the community as to if and how this phase would be implemented.” See ICANN, “WHOIS ARS Project Information.”

³⁹⁴ Ibid.

³⁹⁵ Since the publication of the CCT Review Team’s draft recommendations for public comment, ICANN Contractual Compliance has considered the review team recommendations in implementing certain changes. Contractual Compliance now codes Whois Inaccuracy tickets by syntax, operability, and identity, and divides complaints based on gTLD type (legacy or new). It also publishes reports with this level of granularity on the performance reporting dashboard. See July data as an example: <https://features.icann.org/compliance/dashboard/0718/report>

The reports also include some data concerning the reporter (complainant), including whether the reporter was anonymous. See quarterly data as an example:

<https://features.icann.org/compliance/dashboard/2018/q2/complaint-count-reporters> (also part of blog).

Success measures: Availability of data that shows the breakdown of WHOIS accuracy complaints by subject matter (syntax, operability or identity). Availability of data that allows comparison between legacy gTLDs and new gTLDs. Availability of data to inform the upcoming WHOIS Review Team on where further work is needed to improve WHOIS accuracy.

Mitigating Abusive Activity

The Base Registry Agreement required new gTLD registry operators to include provisions in their Registry-Registrar Agreements (RRA) that prohibited registrants from “distributing malware, abusively operating botnets, phishing, piracy, trademark or copyright infringement, fraudulent or deceptive practices, counterfeiting or otherwise engaging in activity contrary to applicable law, and providing (consistent with applicable law and any related procedures) consequences for such activities including suspension of the domain name.”³⁹⁶ By its terms, this safeguard is aimed at mitigating abusive activity. This provision was incorporated into the mandatory Public Interest Commitments (PICs) section of the Registry Agreement.

Notably, the plain language of the safeguard does not obligate the registry operator to monitor and enforce this provision beyond requiring the inclusion of the provision in the downstream Registrar-Registrant agreement. ICANN has concluded that 99 percent of new gTLD registry operators had complied with the obligation to include this language in their Registry-Registrar agreements by the end of 2014.³⁹⁷

Complementing the “prohibited use” provisions, new gTLD registrars were bound by the 2013 RAA, which imposed on registrars a duty to promptly “investigate and respond appropriately to any reports of abuse.”³⁹⁸ Subsequently, ICANN received abuse complaints in 2014, 2015, and 2016.³⁹⁹ Abuse complaints are typically higher for registrars than for registries. In 2015, ICANN received 438 abuse complaints related to registrars.⁴⁰⁰ These complaints included both legacy and new gTLDs. ICANN noted that these complaints involved in part, “registrars not taking reasonable and prompt steps to respond to appropriately to reports of abuse, which at a minimum should be to forward valid complaints to the registrants.”⁴⁰¹ ICANN’s 2015 audit of registrars under the 2013 RAA indicated that 74 percent of the registrars audited had deficiencies related to the RAA contract provisions requiring a Registrar Abuse Contact and a duty to investigate complaints of abuse.⁴⁰² ICANN’s 2016 audit of registrars showed a deficiency rate of 60 percent related to this same contract provision.⁴⁰³ These figures indicate that the “mitigating abuse” safeguard is the subject of complaints and the ICANN compliance process.⁴⁰⁴

³⁹⁶ ICANN, “Registry Agreement,” Specification 11, 3(a).

³⁹⁷ ICANN (2015), *ICANN Contractual Compliance 2014 Annual Report*, accessed 7 February 2017, <https://www.icann.org/en/system/files/files/annual-2014-13feb15-en.pdf>, p. 13.

³⁹⁸ ICANN, “2013 RAA,” 3.18.

³⁹⁹ ICANN, “Contractual Compliance Reports 2014” and ICANN, “Contractual Compliance Reports 2015.” Quarterly reports are available as well on their year’s respective pages.

⁴⁰⁰ ICANN (2016), *ICANN Contractual Compliance 2015 Annual Report*, accessed 7 February 2017, <https://www.icann.org/en/system/files/files/annual-2015-27jan16-en.pdf>

⁴⁰¹ *Ibid.*

⁴⁰² ICANN, *Contractual Compliance September 2015 Round Audit Report*, accessed 7 February 2017, <https://www.icann.org/en/system/files/files/compliance-registrar-audit-report-2015-06jul16-en.pdf>

⁴⁰³ ICANN, *Contractual Compliance May 2016 Round Audit Report*, accessed 7 February 2017, <https://www.icann.org/en/system/files/files/compliance-registrar-audit-report-2016-16nov16-en.pdf>

⁴⁰⁴ The effectiveness of this safeguard as well as ICANN Compliance’s enforcement it has been the topic of Congressional Testimony. See Senate Committee on the Judiciary Subcommittee on Oversight, Agency Action, Federal Rights and Federal Courts (“Protecting Internet Freedom: Implications of Ending U.S. Oversight of the

It is not clear whether these safeguards have had an impact on mitigating abuse. It is also not clear what constitutes “reasonable and prompt steps to respond to appropriately to reports of abuse.”

Security Checks

Another mandatory PIC included in the new gTLD Registry Agreement required that registry operators “periodically conduct a technical analysis to assess whether domains in the TLD are being used to perpetrate security threats, such as pharming, phishing, malware, and botnets.”⁴⁰⁵ Furthermore, this safeguard obligated registry operators to maintain statistical reports on such threats and mitigation efforts, and to make them available to ICANN upon request.⁴⁰⁶ This safeguard was intended to enhance efforts to fight DNS abuse.⁴⁰⁷

GAC advice also contained a proposed enforcement mechanism that called for a registry operator to notify a registrar if the detected threats posed an actual risk of harm and provided for suspension of a domain name until a matter is resolved if the registrar failed to act.⁴⁰⁸ However, ICANN reported Community concerns about the timing, cost, and scope of conducting security checks for threats.⁴⁰⁹ Hence, the safeguard implementation provided “general guidelines for what registry operators must do, but omits the specific details from the contractual language to allow for the future development and evolution of the parameters for conducting security checks.”⁴¹⁰ Nevertheless, as implemented by ICANN, the safeguard lacks obligations on either notification to the registrar or how to respond to security threats.

The obligation to engage in security checks can be enforced, as implemented.⁴¹¹ ICANN Contractual Compliance reports engaging in proactive monitoring of this safeguard and determined, for example, that 96 percent of registries were conducting security checks as per the contract.⁴¹² Additionally, a voluntary “Framework for Registry Operator to Respond to Security Threats” has been released during the writing of this report.⁴¹³

Recommendation 19: The next CCT Review Team should review the “Framework for Registry Operator to Respond to Security Threats” and assess whether the framework is a sufficiently clear and effective mechanism to mitigate abuse by providing for systemic and specified actions in response to security threats.

Rationale/related findings: It is not clear whether the intended goal of the “security checks” safeguard to strengthen efforts to fight DNS abuse has been met. The Community will be better positioned to evaluate the effectiveness of this safeguard once the “Framework for

Internet,” written statement of John C. Horton, President and CEO, Legitscript, 14 September 2016), <https://www.judiciary.senate.gov/imo/media/doc/09-14-16%20Horton%20Testimony.pdf>. Mr. Horton argues that ICANN Compliance efforts regarding registrars that allegedly failed to investigate and respond to complaints that domain names were being used to facilitate illegal activity were ineffective and lacked transparency.

⁴⁰⁵ ICANN, “Registry Agreement,” Specification 11, 3(b).

⁴⁰⁶ Ibid.

⁴⁰⁷ ICANN (2009), *Mitigating Malicious Conduct*.

⁴⁰⁸ ICANN GAC (2013), *Beijing Communiqué*.

⁴⁰⁹ ICANN, “Safeguards Applicable to All gTLDs,” accessed 8 August 2018,

<https://features.icann.org/safeguards-applicable-all-new-gtlds>.

⁴¹⁰ Ibid.

⁴¹¹ ICANN GAC, *GAC Advice Effectiveness Review*, pp. 12-13. The Review questioned the effectiveness of this safeguard, noting that “risks may be identified but not necessarily acted on.”

⁴¹² ICANN (2015), *ICANN Contractual Compliance 2014 Annual Report*, p. 1.

⁴¹³ ICANN, “Framework for Registry Operator to Respond to Security Threats,” accessed 8 August 2018,

<https://www.icann.org/resources/pages/framework-registry-operator-respond-security-threats-2017-10-20-en>

Registry Operator to Respond to Security Threats” is in place for a sufficient period of time to provide more specific information.

To: Future CCT Review Teams

Prerequisite or priority level: Medium

Consensus within Team: Yes

Details: It is not clear whether the intended goal of the “security checks” safeguard has been met. With the voluntary framework in place as of October 2017, the Community will be better positioned to evaluate the effectiveness of this safeguard.

Success measures: An evaluation of the “Framework for Registry Operator to Respond to Security Threats.”

Making and Handling Complaints

The Base Registry Agreement for new gTLDs required registry operators to “take reasonable steps to investigate and respond to any reports from law enforcement and governmental and quasi-governmental agencies of illegal conduct in connection with the use of the TLD” with the caveat that they would “not be required to take any action in contravention of applicable law.”⁴¹⁴ Furthermore, new gTLD registry operators were obligated to post abuse contact details on their websites and to notify ICANN of any changes to contact information.⁴¹⁵

These safeguards, like others, were aimed at enabling more focused mitigation of DNS abuse⁴¹⁶ and created a duty for registry operators to investigate and respond to complaints from government agencies, but not the public. GAC advice did not propose such a restriction.⁴¹⁷

Data from Nielsen’s Consumer surveys indicate that many consumers remain unaware of to whom to report abuse. Specifically, 31 percent overall “don’t know” to whom to report site abuse, 31 percent overall would report abuse to a consumer protection agency, 30 percent overall would report abuse to local police, 24 percent overall would report abuse to website owner or operator, and 11 percent overall would report abuse to ICANN.⁴¹⁸

The GAC questioned the specifics of implementation, specifically asking “what constitutes reasonable steps” to investigate and respond to complaints and noting that the effectiveness of this safeguard depends on whether registry operators “have a responsibility to respond to complaints from sources other than governments or law enforcement agencies.”⁴¹⁹ ICANN’s 2014 Contractual Compliance report noted that registry operators “not publishing the email address and primary contact for reports by mail” and registry operators “not responding in a

⁴¹⁴ ICANN, “Registry Agreement,” Section 2.8.

⁴¹⁵ ICANN, “Registry Agreement,” Specification 6, Section 4.1.

⁴¹⁶ ICANN, *Mitigating Malicious Conduct*.

⁴¹⁷ ICANN GAC (11 April 2013), *Beijing Communiqué*; ICANN GAC (11 February 2015), *Singapore Communiqué*, accessed 7 February 2017, <https://www.icann.org/en/system/files/correspondence/gac-to-board-11feb15-en.pdf>. The Singapore Communiqué questions what mechanisms could be used by victims (in addition to law enforcement) to report abuse to registry operators and what constitutes “reasonable steps” to investigate and respond to reports from law enforcement or other governmental bodies.

⁴¹⁸ Nielsen, *Consumer Research Wave 2* (2016), pp. 88, 102.

⁴¹⁹ ICANN GAC (11 February 2015), *Singapore Communiqué*, p. 10 regarding safeguard 5.; ICANN GAC, *GAC Advice Effectiveness Review*, p.13.

timely matter” were a common Contractual Compliance issue regarding publishing abuse contact information.⁴²⁰ Hence, this safeguard can be the subject of complaints and the ICANN compliance process.

The obligation to have mechanisms to respond to complaints likely assists registries to investigate and possibly combat abuse and may help protect the public by providing information about harmful practices. However, questions remain about the scope of registry operators’ response under this safeguard, both as to their duty to investigate and respond to complaints from law enforcement and their responsibility to respond to complaints from the public.

Recommendations

Recommendation 20: Assess whether mechanisms to report and handle complaints have led to more focused efforts to combat abuse by determining: (1) the volume of reports of illegal conduct in connection with the use of the TLD that registries receive from governmental and quasi-governmental agencies; (2) the volume of inquiries that registries receive from the public related to malicious conduct in the TLD; (3) whether more efforts are needed to publicize contact points to report complaints that involve abuse or illegal behavior within a TLD; and (4) what actions registries have taken to respond to complaints of illegal or malicious conduct in connection with the use of the TLD. Such efforts could include surveys, focus groups, or Community discussions. If these methods prove ineffective, consideration could be given to amending future standard Registry Agreements to require registries to more prominently disclose their abuse points of contact and provide more granular information to ICANN. Once this information is gathered, future review teams should consider recommendations for appropriate follow up measures.

Rationale/related findings: The Consumer Research and Registrant surveys conducted by Nielsen have shown significant consumer concern related to abuse, which may undermine confidence and trust in the DNS. The broad strategic response should be to ensure that there are sufficiently effective mechanisms to report complaints that can be measured and assessed, and hence develop the capacity to manage and mitigate the causes of these complaints.

There is concern from the Community that abuse data is not reported consistently to registries. Other concerns relate to ICANN’s own reporting of the complaints it receives. In particular, those concerns focus on the lack of granularity regarding the subject matter of the complaints and lack of information regarding the response to abuse complaints. Generally speaking, detailed information regarding the subject matter of complaints and responses to those complaints is sparingly captured and shared, missing, or unknown.

Although the safeguards regarding making and handling complaints have been implemented, in light of the concerns noted above, it is unclear: (1) whether either law enforcement or the public is sufficiently aware that these complaint mechanisms exist; (2) how frequently these channels are used by the public and law enforcement to notify registries of illegal or abusive behavior; and (3) what impact these safeguards have had on their intended goal of mitigating DNS abuse. Hence, the review team’s recommendations relate to improved data gathering to inform future efforts to combat abuse within gTLDs.

To: ICANN organization and future CCT Review Teams

⁴²⁰ ICANN (2015)., *Contractual Compliance 2014 Annual Report*, accessed 8 August 2018, <https://www.icann.org/en/system/files/files/annual-2014-13feb15-en.pdf>, p. 14.

Prerequisite or priority level: Medium

Consensus within Team: Yes

Success measures:

- ⦿ More information is gathered to assess whether current complaint reporting mechanisms are effective, and that this information informs policy efforts involving amendment of standard Registry agreements.
- ⦿ ICANN Contractual Compliance routinely records and makes available information about complaints by categories filed from registry and registrars, including responses to reports of abuse to original reporters.

Safeguards for Sensitive and Regulated Strings

The GAC identified a non-exhaustive group of nearly 200 strings—which it dubbed “Category 1” strings—that raised consumer protection concerns, contained sensitive strings, or strings in regulated markets and advised that five safeguards should apply to these strings. The GAC explained that strings linked to “regulated or professional sectors should operate in a way that is consistent with applicable laws” and observed that the identified strings were “likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm.”⁴²¹ During implementation, however, ICANN included only a subset of these GAC-identified strings within the Category 1 safeguard protections.⁴²² In addition, during implementation, ICANN included only three of the five GAC-recommended safeguards to its selected subset of Category 1 strings in regulated markets.⁴²³

As implemented, these safeguards took the form of downstream contract requirements contained in the Public Interest Commitments Specification of the Registry Agreement.⁴²⁴ Specifically, the safeguards required registry operators to obligate registrars via the Registry-Registrar Agreement to include certain provisions in their Registration Agreements with registrants.

The requirements for sensitive strings and those in regulated markets included provisions requiring registrants to comply with all applicable laws.⁴²⁵ Another provision emphasized that this obligation includes “those [laws] that relate to privacy, data collection, consumer protection

⁴²¹ ICANN GAC (11 April 2013), *Beijing Communiqué*, p. 8.

⁴²² Ibid. Compare the Beijing Communiqué with ICANN’s implementation framework for GAC Category 1 implementation advice. See ICANN, “GAC Advice: Category 1 Safeguards,” accessed 8 August 2018, <https://newgtlds.icann.org/en/applicants/gac-advice/cat1-safeguards>; and ICANN New gTLD Program Committee (NGPC) (5 February 2014), *GAC Category 1 Safeguards: Annex 2: ICANN NGPC Resolution No. 2014.02.05.NG01*, accessed 8 August 2018, <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-2-05feb14-en.pdf>; Steve Crocker ([former] Chair, ICANN Board of Directors), “NGPC Consideration of GAC Category 1 and Category 2 Safeguard Advice,” letter to GAC Chair, 29 October 2013, <https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-3-29oct13-en.pdf>; Steve Crocker ([former] Chair, ICANN Board of Directors), “Implementation of GAC Safeguard Advice,” letter to GAC Chair, 2 September 2014 <https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-2-02sep14-en.pdf>; Steve Crocker ([former] Chair, ICANN Board of Directors), “GAC Advice re Category 1 Safeguards for New gTLDs,” letter to GAC Chair, 23 June 2015, <https://www.icann.org/en/system/files/correspondence/crocker-to-schneider-23jun15-en.pdf>.

⁴²³ Ibid. See in particular: Crocker, letter to GAC chair, 2 September 2014 and Crocker, letter to GAC Chair, 29 October 2013.

⁴²⁴ ICANN, “Registry Agreement,” Specification 11.

⁴²⁵ ICANN, “Registry Agreement,” Specification 11, 3(f).

(including in relation to misleading and deceptive conduct), fair lending, debt collection, organic farming, disclosure of data, and financial disclosures.”⁴²⁶ Furthermore, specific provisions detailed requirements for registrants handling sensitive information, such as health or financial data, to “implement reasonable and appropriate security measures commensurate with the offering of those services, as defined by applicable law.”⁴²⁷

It is difficult to determine whether these safeguards have been the subject of complaints to ICANN Contractual Compliance because the categories of complaints identified in ICANN’s Compliance reports do not provide this level of detail. That is, the reported ICANN complaint categories for registries and registrars—such as “PIC” (Public Interest Commitments) or “abuse”—do not contain sufficiently specific information to correlate complaints with specific safeguards. However, the ICANN Global Consumer Surveys noted much lower comfort levels when consumer end-users were asked about providing sensitive information (including financial and health information) to new gTLDs as compared to legacy gTLDs.⁴²⁸ Moreover, a separate survey on trust in the internet reflected the public’s increasing concerns regarding stolen credit card and financial information, online security, and protection and security of credit card and personal information.⁴²⁹ ICANN Contractual Compliance does report that it proactively monitored compliance with Specification 11, paragraph 3a, which includes the obligation for downstream contracts to include language requiring compliance with applicable laws, and determined that there was 99 percent compliance with this provision.⁴³⁰

Recommendations

Recommendation 21⁴³¹: Include more detailed information on the subject matter of complaints in ICANN publicly available Contractual Compliance reports. Specifically, more precise data on the subject matter of complaints should be included, particularly: (1) the class/type of abuse; (2) the gTLD that is target of the abuse; (3) the safeguard that is at risk; (4) an indication of whether complaints relate to the protection of sensitive health or financial information; (5) what type of contractual breach is being complained of; and (6) resolution status of the complaints, including action details. These details would assist future review teams in their assessment of these safeguards.⁴³²

⁴²⁶ ICANN, “GAC Advice: Category 1 Safeguards” and ICANN NGPC, *Category 1 Safeguards*.

⁴²⁷ Ibid.

⁴²⁸ Nielsen, *Consumer Research* (2015); Nielsen, *Consumer Research Wave 2* (2016).

⁴²⁹ NCC Group, *Trust in the Internet Survey* (2016), p. 2.

⁴³⁰ ICANN (2015), *ICANN Contractual Compliance 2014 Annual Report*, p.13.

⁴³¹ Since the publication of the CCT Review Team’s draft recommendations for public comment, ICANN Contractual Compliance has considered the review team recommendations in implementing certain changes. In October 2017, ICANN Contractual Compliance, began collecting and reporting on the granularity of registrar-related DNS Abuse complaints by identifying the type of abuse including spam, pharming, phishing, malware, botnets, counterfeiting, pharmaceutical, fraudulent and deceptive practices, trademark or copyright infringement, and missing or invalid registrar abuse contact information. This information is reported on ICANN.org in the monthly dashboard at this link <https://features.icann.org/compliance/dashboard/report-list>. The quarterly and annual metrics reports provide information about enforcement reasons, reporter categories, closure reasons and details of the complaints inclusive of DNS Abuse by legacy and new gTLDs as they evolve through the compliance process, from ticket receipt to closure. They also reporting on any complaint type if it concerns a GAC Cat 1 gTLD. They also report on granularity of type of Transfer complaints (choices are Transfer, Unauthorized Transfer, COR, Unauthorized COR and TEAC).

In light of the ICANN community concerns regarding DNS infrastructure abuse, Compliance updated the audit plans with expanded questions and testing to address DNS abuse and also includes concerns about DNS infrastructure abuse when determining which contracted parties to audit. This information will be reported via the Audit Report and published under Reports & Blogs at this link <https://www.icann.org/resources/compliance-reporting-performance>.

⁴³² Since the publication of the CCT Review Team’s draft recommendations for public comment, ICANN Contractual Compliance has considered the review team recommendations in implementing certain changes described in the blogs of October 2017, “Enhancing Transparency in Contractual Compliance Reporting,” <https://www.icann.org/news/blog/enhancing-transparency-in-contractual-compliance-reporting>, and March 2018,

Rationale/related findings:

(Note: A general recommendation for further transparency regarding the subject matter of complaints received by ICANN Contractual Compliance is set forth in [Chapter 5: Data-Driven Analysis: Recommendations for Additional Data Collection and Analysis](#).)

The lack of publicly available information about whether ICANN Contractual Compliance has received complaints related to the implemented Category 1 safeguards, and lack of a common framework to define sensitive information and identify what constitutes “reasonable and appropriate security measures” make it difficult to assess what impact this safeguard has had on mitigating risks to the public.

The results of the Consumer Research and Registrant Surveys by Nielsen indicate that new gTLDs are not trusted to the same extent as legacy gTLDs, and that the public is concerned about potential misuse of their personal information. Domains catering to interests in highly-regulated sectors such as health and finance are likely to collect more personal and sensitive information. So in that sense, trustworthiness of these domains is even more crucial. There is a further concern that complaints about illegal DNS activities may be under-reported.

Although ICANN has mandated certain safeguards applicable to all new gTLD domains in general and domains for highly-regulated strings in particular, there is scant evidentiary data that the contracted parties have implemented and are complying with these safeguards. The review team lack the evidence to definitively declare whether the defined and implemented safeguards have been effective in mitigating risks associated with domains in the overall new gTLD market, and those in highly-regulated markets in particular. Hence, it is desirable to gather sufficient information to understand whether the existing safeguards mitigate the risks assessed for the new gTLD domains, especially those associated with highly-regulated sectors, and whether there is adequate and effective enforcement. The recommendation therefore proposes that ICANN Contractual Compliance collect and provide reports on the abuse reported to registry and registrars with a granularity that allows identification of origin, type, form, and nature of abuse or alleged illegal use of the DNS.

The ICANN organization acknowledges that data on the several safeguards is not currently being collected in either the detail expected or at all. However, there are ongoing data collection activities and initiatives that may remedy this situation.

To: ICANN organization

Prerequisite or priority level: High

Consensus within team: Yes

Details: This recommendation is tied to the previous one. Together they aim to address whether the New gTLD Program safeguards, the mechanisms developed to implement them, and the outcomes of those implementations allow a reviewer to draw a definitive conclusion on their effectiveness and fitness to purpose.

Success measures: ICANN Contractual Compliance publication of a formatted report on abuse reports received and adjudicated, including, at minimum, all of the specified types and categories noted above.

“Enhancing Transparency in Contractual Compliance Reporting, <https://www.icann.org/news/blog/enhancing-transparency-in-contractual-compliance-reporting-en>.”

Recommendation 22: Initiate engagement with relevant stakeholders to determine what best practices are being implemented to offer reasonable and appropriate security measures commensurate with the offering of services that involve the gathering of sensitive health and financial information. Such a discussion could include identifying what falls within the categories of “sensitive health and financial information,” and what metrics could be used to measure compliance with this safeguard.

Rationale/related findings: The lack of publicly available information about whether ICANN Contractual Compliance has received complaints related to the implemented Category 1 safeguards, and lack of a common framework to define sensitive information, makes it difficult to assess what impact this safeguard has had on mitigating risks to the public. However, protection of sensitive information, particularly sensitive financial and health information, is a high priority for Internet users. As a result, this recommendation aims at improving both complaint data regarding these issues and encouraging communications about best practices on how to protect these sensitive categories of information.

To: ICANN organization

Prerequisite or priority level: High

Consensus within Team: Yes

Success measures: This recommendation would be successful if relevant stakeholders, including new gTLD registries and stakeholder groups representing the public interest, discuss what constitutes sensitive information and best practices regarding how to protect sensitive information. Such discussions could inform future policy in this area with a goal of increasing the public’s trust of new gTLDs.

Safeguards for Highly-Regulated Strings

The GAC advised that strings associated with market sectors that have clear and/or regulated entry requirements in multiple jurisdictions (e.g., financial, gambling, professional services, environmental, health and fitness, corporate identifiers, and charity) should also receive protections in the form of three additional safeguards requiring registry operators to verify and validate a registrant’s licenses or credentials, consult with authorities in case of doubt about the credentials, and conduct periodic post-registration checks to ensure the registrant’s compliance.⁴³³ The GAC explained that these strings may require such additional safeguards to address specific risks and to “bring registry policies in line with arrangements in place offline.”⁴³⁴ As implemented by ICANN, the safeguards applied to about 50 strings, but received fewer protections than GAC had originally advised.⁴³⁵

⁴³³ ICANN GAC (11 April 2013), *Beijing Communiqué*, pp. 8-10.

⁴³⁴ *Ibid.*, p. 10.

⁴³⁵ *Ibid.* Compare to ICANN NGPC, *Category 1 Safeguards*. ICANN indicated its rationale for changes to the GAC safeguard advice in its October 29, 2013 letter to the GAC Chair, expressing concerns that implementation could discriminate against registrants from developing countries that lacked regulatory bodies or databases which the registry operators could work with to verify credentials (Crocker, “NGPC Consideration of GAC Category 1 and Category 2 Safeguard Advice,” letter to GAC Chair). See also ICANN GAC, *GAC Advice Effectiveness Review*, Appendix 1 regarding Beijing Advice. See also “Category 1 Consumer Safeguards,” pp. 14-15, which describes ICANN’s implementation of its Category 1 safeguards 6, 7, 8 as “substantially watered down.” Also see the 23 June 2015 letter from Steve Crocker to the GAC Chair (Crocker, “GAC Advice re Category 1 Safeguards for New gTLDs.”)

As with the other safeguards, many of these safeguards imposed downstream contract requirements upon registry operators to obligate registrars vis-à-vis the Registry-Registrar Agreement to include certain provisions in their Registration Agreements with registrants.

ICANN implemented several additional safeguards that applied to strings in highly-regulated markets related to relationships with regulatory and industry bodies, providing contact information to report complaints, and screening for proper credentials for strings in highly-regulated markets.⁴³⁶

Specifically, registry operators were obligated to establish relationships with relevant regulatory and industry bodies to mitigate risks of illegal activity.⁴³⁷ Moreover, the standard contracts needed to include provisions that would require registrants to have a single point of contact for complaint reporting and contact information for these regulatory bodies.⁴³⁸

Regarding the requirement to establish relationships with relevant regulatory and industry bodies, implementation of this provision appears to be satisfied by the mere issuing of an invitation to have a relationship.⁴³⁹ This implementation may reflect the practical challenges involved with mandating a relationship with a third-party organization. In terms of effectiveness, more information is needed on registry efforts to comply with this safeguard. Regarding the requirement for registrants to provide contact information for complaints and information about relevant regulatory bodies, a key question would be how easy it is for the public to find information on a website regarding contact information for communicating complaints both to those responsible for the domain and applicable government agencies or regulatory bodies.

The final three safeguards related to the credentials that registrants possessed in regard to strings in highly-regulated markets. The GAC had recommended that registry operators (1) verify and validate registrants' credentials "at the time of registration"; (2) consult with authorities in case of doubt about the credentials; and (3) conduct periodic post-registration checks to ensure registrants' validity and compliance.⁴⁴⁰ As implemented by ICANN, registry operators were required to ensure that registrars included in their agreement with registrants a provision requiring a representation that the "registrant possesses any necessary authorizations, charters, licenses and/or other related credentials for participation in the sector associated with the TLD."⁴⁴¹ Registry operators were obligated to investigate the authenticity of a registrant's credentials if they received a complaint casting doubt on them.⁴⁴² Finally, registrars, via the Registry-Registrar Agreement, were obligated to require their registrants to report "any material changes to the validity" of their credentials.⁴⁴³

⁴³⁶ The GAC had advised that certain safeguards apply to all Category 1 strings. ICANN's implementation applied the recommended safeguards regarding establishing relationships with regulatory bodies and providing contact information to report complaints only to specified new gTLDs in the "highly-regulated category". See ICANN GAC (11 April 2013), *Beijing Communiqué*, p. pp. 8-10. Compare to ICANN NGPC, *Category 1 Safeguards*.

⁴³⁷ ICANN NGPC, *Category 1 Safeguards*.

⁴³⁸ *Ibid.*

⁴³⁹ "Registry operators will proactively create a clear pathway for the creation of a working relationship with the relevant regulatory or industry self-regulatory bodies by publicizing a point of contact and inviting such bodies to establish a channel of communication...". See ICANN (5 February 2014), *Annex 2 - ICANN NGPC Resolution NO. 2014.02.05.NG01*, accessed 8 August 2018, <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-2-05feb14-en.pdf>, p. 3 and the Base Registry Agreement for TLDs working in highly-regulated sectors.

⁴⁴⁰ ICANN NGPC, *Category 1 Safeguards*, paras. 6-8.

⁴⁴¹ *Ibid.*, para. 6.

⁴⁴² *Ibid.*, para. 7.

⁴⁴³ *Ibid.*, para. 8.

These provisions were designed to mitigate the higher levels of risks of abuse associated with strings in highly-regulated industries, which are likely to invoke a higher level of trust to consumers.⁴⁴⁴ The Nielsen Consumer and Registrant Surveys indicated that consumers expect some restrictions on who can purchase domains within new gTLDs and that restrictions on who can purchase new gTLDs contribute to consumer trust.⁴⁴⁵ GAC advice originally required registries to screen registrants for proper credentials or licenses at the time of registration to ensure that they are what they purport to be before they may do business with the public using the name of a regulated sector such as a bank or pharmacy. As implemented by ICANN, registrants themselves were to self-report that they possessed the necessary credentials. The GAC indicated that the looser requirement that registrants provide some “representation” that they possess the appropriate credentials (e.g., as a bank, insurer, pharmacy, etc.) poses the risk of consumer fraud and potential harm because bad actors will not hesitate to make false representations about their credentials.⁴⁴⁶

The ICANN Board indicated that its implementation approach resulted from concerns about the practical ability to implement these safeguards as advised because of challenges involved in verifying credentials of entities in multiple jurisdictions.⁴⁴⁷

Recommendations

Recommendation 23: ICANN should gather data on new gTLDs operating in highly-regulated sectors to include the following elements:

- ⦿ A survey to determine 1) the steps registry operators are taking to establish working relationships with relevant government or industry bodies, and 2) the volume of complaints received by registrants from government and regulatory bodies and their standard practices to respond to those complaints;
- ⦿ A review of a sample of domain websites within the highly-regulated sector category to assess whether contact information to file complaints is sufficiently easy to find;
- ⦿ An inquiry to ICANN Contractual Compliance and registrars/resellers of highly-regulated domains seeking sufficiently detailed information to determine the volume and the subject matter of complaints regarding domains in highly-regulated industries.
- ⦿ An inquiry to registry operators to obtain data to compare rates of abuse between those highly-regulated gTLDs that have voluntarily agreed to verify and validate credentials to those highly-regulated gTLDs that have not.
- ⦿ An audit to assess whether restrictions regarding possessing necessary credentials are being enforced by auditing registrars and resellers offering the highly-regulated TLDs (i.e., can an individual or entity without the proper credentials buy a highly-regulated domain?).

⁴⁴⁴ ICANN GAC (11 April 2013), *Beijing Communiqué*, and GAC (25 June 2014), *London Communiqué*, accessed 8 August 2018, <https://www.icann.org/en/system/files/correspondence/gac-to-board-25jun14-en.pdf>.

⁴⁴⁵ Nielsen, *Consumer Research* (2015), pp. 9, 25-26, 44; Nielsen, *Consumer Research Wave 2* (2016), pp. 9, 13, 24-27, 35, 60-63, 65; Nielsen, *Registrant Survey Wave 2* (2016) pp. 14, 18, 29, 67.

⁴⁴⁶ ICANN GAC (25 June 2014), *London Communiqué*, p. 10; ICANN GAC (11 February 2015), *Singapore Communiqué*, pp. 4, 10; GAC (15 October 2014), *Los Angeles Communiqué*, accessed 8 August 2018, <https://www.icann.org/en/system/files/correspondence/gac-to-board-15oct14-en.pdf>, p.5. The Communiqués all question ICANN’s failure to implement the GAC’s advice regarding verification and validation of credentials for strings in highly-regulated markets.

⁴⁴⁷ See, e.g., Board Chair correspondence to GAC Chair, October 29, 2013 and; Sept. 2, 2014.

To the extent that current ICANN data collection initiatives and Contractual Compliance audits could contribute to these efforts, the review team recommends that ICANN assess the most efficient way to proceed to avoid duplication of effort and leverage current work.

Rationale/related findings: Although ICANN has implemented certain safeguards applicable to domains operating in highly-regulated sectors, it is unclear whether and how contracted parties are complying with these safeguards. It is also not clear whether these safeguards have been effective in mitigating risks associated with domains in highly-regulated markets. The Nielsen consumer end-user survey results indicate that new gTLDs are not trusted to the same extent as legacy gTLDs and that the public is concerned about potential misuse of their sensitive information. Domains working in highly-regulated sectors such as health and finance may be more apt to collect this sensitive information, and hence the trustworthiness of these domains is even more crucial. Accordingly, it is important to understand whether the safeguards put into place to mitigate the risks associated with highly-regulated domains are being enforced and whether they are effective.

To: ICANN organization, New gTLD Subsequent Procedures PDP Working Group

Prerequisite or priority level: High

Consensus within Team: Yes

Details: ICANN is embarking on several data gathering initiatives that may shed light on some of these issues, including the Domain Abuse Activity Reporting Project, the gTLD Marketplace Health Index, and the Identifier Technology Health Indicators project.⁴⁴⁸ Moreover, ICANN Contractual Compliance is expanding its audit functions to include additional examination of compliance with certain safeguards. Hence, consideration should be given to assessing whether ICANN's ongoing data collection and Contractual Compliance initiatives could be leveraged to implement parts of this recommendation.

Success measures: This recommendation will be successful if additional data is generated to inform ongoing policy development processes regarding the effectiveness of ICANN contract provisions intended to safeguard the public, particularly as they relate to new gTLDs operating in highly-regulated sectors, and whether the current contractual safeguards sufficiently protect the public against the higher risks associated with these domains. In particular, it is vital to determine whether the current safeguard requiring that registrants possess appropriate credentials for gTLDs operating in highly-regulated sectors is working as intended. Success in this regard would be to generate an assessment of complaints relating to this safeguard, including information on how this safeguard is enforced, among other factors, in order to determine its effectiveness.

Special Safeguards Related to New gTLDs with Inherent Governmental Functions and Cyberbullying

The Base Registry Agreement included provisions for operators of new gTLDs with inherent governmental functions, such as .army, .navy, and .airforce, to mandate that their registrars ensure that their registrants “take reasonable steps to avoid misrepresenting or falsely

⁴⁴⁸ ICANN, “Domain Abuse Activity Reporting (DAAR)”; ICANN (June 2018), “gTLD Marketplace Health Index”; ICANN, “Identifier Technology Health Indicators (ITHI)”, accessed 8 August 2018, <https://www.icann.org/ithi>

implying” that the registrant was associated with a governmental authority when such a relationship did not exist.⁴⁴⁹

Another safeguard was related to cyberbullying and harassment and applied to the .fail, .gripe, .sucks, and .wtf gTLDs. This provision required registry operators to “develop and publish registration policies to minimize the risk of cyber bullying and/or harassment.”⁴⁵⁰

It is not clear whether failure to comply with these safeguards has generated complaints. In addition, as advised and implemented, neither safeguard contains consequences for failure to comply, raising questions about their effectiveness.

Recommendations

Recommendation 24:

1. Determine whether ICANN Contractual Compliance should report on a quarterly basis whether it has received complaints for a registry operator’s failure to comply with either the safeguard related to gTLDs with inherent governmental functions or the safeguard related to cyberbullying.
2. Survey registries to determine 1) whether they receive complaints related to cyberbullying and misrepresenting a governmental affiliation, and 2) how they enforce these safeguards.

Rationale/related findings: The lack of information about whether ICANN Contractual Compliance or registries have received complaints related to these safeguards and lack of consequences for failure to comply with these safeguards make it difficult to assess their effectiveness in mitigating the risks they were intended to address. Gathering this information would assist future policy development processes by identifying whether the current safeguards are meeting their intended goal. (Note: A general recommendation for further transparency regarding the subject matter of complaints received by ICANN Contractual Compliance is set forth in [Chapter 5: Data-Driven Analysis: Recommendations for Additional Data Collection and Analysis](#).)

To: ICANN organization

Prerequisite or priority level: Low

Consensus within Team: Yes

Success measures: These recommendations will be successful if they generate data that indicates the magnitude of complaints regarding cyberbullying and misrepresenting governmental affiliations and provide information regarding how registries enforce these safeguards.

Restricted Registration Policies

ICANN implemented safeguards applicable to restricted registration policies. In its Category 2 safeguard advice on restricted registration policies, the GAC noted that restricted access was “an exception to the general rule that the gTLD domain name space is operated in an open

⁴⁴⁹ ICANN NGPC, *Category 1 Safeguards*.

⁴⁵⁰ Ibid.

manner.”⁴⁵¹ ICANN implemented these recommendations by incorporating provisions into the Base Registry Agreement to (1) mandate that registries operate in “a transparent manner consistent with general principles of openness and nondiscrimination by establishing, publishing and adhering to clear registration policies,”⁴⁵² and (2) prevent “Generic String” registry operators from restricting registration eligibility to a “single person or entity and/or that person’s or entity’s ‘Affiliates’.”⁴⁵³ The GAC had originally advised to ensure that registration restrictions were appropriate for risks associated with particular gTLDs.⁴⁵⁴ Subsequent GAC advice reflects ongoing concerns about whether restricted registration policies could lead to undue preferences.⁴⁵⁵

The ICANN Global surveys indicate that the public expects some restrictions about who can purchase domain names and trusts that restrictions will be enforced.⁴⁵⁶ The survey results also indicate that the presence of such restrictions contribute to consumer trust⁴⁵⁷ (in Recommendation 13, the review team suggests that ICANN perform such surveys on a regular basis). This perception of trust was consistent with the findings of the DNS Abuse Study, which found a negative correlation between the use of registration restrictions in a gTLD and the level of DNS Security Abuse (i.e., the presence of restrictions contributed to lower levels of abuse). Those registering domain names for malicious purposes were more likely to use an open new gTLD that did not impose strict registration criteria. The review team’s recommendations and related rationale are set forth in Recommendation 13, which discusses further data gathering related to registration restrictions.

Public Interest Commitments

Background of Public Interest Commitments

One safeguard mechanism unique to the New gTLD Program was the incorporation of mandatory and voluntary Public Interest Commitments (PICs) into registry applications and, ultimately, registry agreements. The advent of these binding and enforceable contractual obligations stemmed from GAC concerns about how commitments contained in new gTLD applications would be enforced by ICANN. Consequently, in its Toronto Communiqué, the GAC advised that all commitments and objectives set forth in new gTLD applications (or amendments thereto) should be “transformed into binding contract obligation subject to compliance oversight by ICANN.”⁴⁵⁸ In the Communiqué, the GAC also signaled that it had a variety of public policy concerns about the new gTLD applications, including issues involving:

⁴⁵¹ ICANN GAC (11 April 2013), *Beijing Communiqué*, Annex 1, pp. 10-11 (Category 2 Safeguards).

⁴⁵² ICANN NGPC Resolutions 2013.06.25.NG04 - 2013.06.25.NG05 - 2013.06.205.NG06, “Category 2 Safeguard Advice re Restricted and Exclusive Registry Access,” accessed 8 August 2018, <https://features.icann.org/category-2-safeguard-advice-re-restricted-and-exclusive-registry-access> and “Annex I: Proposed PIC Spec Implementation of GAC Category 2 Safeguards,” accessed 8 August 2018, <https://www.icann.org/en/system/files/files/resolutions-new-qtld-annex-i-agenda-2c-25jun13-en.pdf>

⁴⁵³ Ibid.

⁴⁵⁴ ICANN GAC (11 April 2013), *Beijing Communiqué*, Annex 1, pp. 10-11 (Category 2 Safeguards).

⁴⁵⁵ ICANN GAC (11 April 2013), *Beijing Communiqué*; ICANN GAC (25 June 2014), *London Communiqué*; ICANN (GAC) (15 October 2014), *Los Angeles Communiqué*; ICANN Governmental Advisory Committee (GAC) (24 June 2015), *Buenos Aires Communiqué*. These Communiqués address the implementation of the GAC Category 2 safeguard advice: “The NGPC should reconsider its position, particularly since the GAC has clearly advised that it does not believe the current requirements in Specification 11 actually meet either the spirit or the intent of the GAC’s advice” (*London Communiqué*, p.11).

⁴⁵⁶ Nielsen, Consumer Research Wave 2 (2016), pp.9, 13, 26-27, 65; Nielsen, Registrant Survey Wave 2 (2016), pp. 14, 18, 30, 68.

⁴⁵⁷ Nielsen, Consumer Research (2015), pp. .9, 26; Nielsen, Consumer Research Wave 2 (2016), pp. 9, 13, 26.

⁴⁵⁸ ICANN Governmental Advisory Committee (GAC) (17 October 2012), *Toronto Communiqué*, accessed 8 August 2018, <https://gac.icann.org/advice/Communiqués/public/gac-45-toronto-Communiqué.pdf>

consumer protection; strings related to regulated market sectors such as financial, health, and charities; intellectual property issues; and the relationship between new gTLDs and applicable legislation.

On 5 February 2013, ICANN released a revised draft registry agreement that incorporated PICs for new gTLD applicants.⁴⁵⁹ The draft proposed some mandatory requirements, but also allowed for the adoption of voluntary commitments by applicants. The timing of the announcement effectively gave applicants less than 30 days to decide whether to include voluntary PICs in their applications.

Later in 2013, the GAC followed up in Beijing by issuing safeguard advice with mandatory proposals specific to all new gTLDs, regulated gTLDs, and highly-regulated gTLDs.⁴⁶⁰ Other stakeholders, such as the Business Constituency and At-Large Advisory Committee, also weighed in on the proposals.⁴⁶¹ Thereafter, ICANN modified the GAC safeguard advice and elected to implement the modified safeguards in the PICs of the Base Registry Agreement for new gTLDs.⁴⁶²

On 5 February 2014, the New gTLD Program Committee adopted GAC Category 1 Safeguard Advice, mandating that new registry operators include four mandatory PICs in their registry agreements and additional mandatory PICs for regulated and highly-regulated gTLD operators.⁴⁶³ Moreover, the Applicant Guidebook included provisions requiring that Community applicants create enforceable provisions designed to ensure conformity to the stated purpose of the TLD.⁴⁶⁴

Adoption Rate of Voluntary PICs

Out of 1,930 new gTLD applications, 513 included voluntary PICs.⁴⁶⁵ Seventeen of the 29 highly-regulated gTLD applications included voluntary PICs, which were ultimately included in

⁴⁵⁹ ICANN (5 February 2013), Revised New gTLD Registry Agreement Including Additional Public Interest Commitments Specification, accessed 8 August 2018, <https://www.icann.org/resources/pages/base-agreement-2013-02-05-en>.

⁴⁶⁰ ICANN GAC, *Beijing Communiqué*.

⁴⁶¹ For a brief summary of BC and ALAC correspondence, see ICANN (16 October 2014), *At-Large Advisory Committee ALAC Statement on the Public Interest Commitments*, accessed 8 August 2018, <http://atlarge.icann.org/correspondence/correspondence-16oct14-en.htm> and

ICANN (9 December 2014), *Business Constituency Comment on Safeguards for Category 1 gTLDs*, accessed 8 August 2018, <http://www.bizconst.org/assets/docs/positions-statements/bc-comment-on-safeguards-for-category-1-gtlds.pdf>.

⁴⁶² Crocker, "NGPC Consideration of GAC Category 1 and Category 2 Safeguard Advice," letter to GAC Chair.

⁴⁶³ Specifically, all new gTLDs had to incorporate four specific safeguards involving: WHOIS verification and documentation and checks and of same; mitigating abusive activity; security checks; and making and handling complaints. See ICANN (25 June 2013), *Annex I NGPC Proposal for Implementation of GAC Safeguards Applicable to All New gTLDs*, accessed 8 August 2018, <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-i-agenda-2b-25jun13-en.pdf>. In addition, regulated new gTLDs had to also incorporate three safeguards regarding compliance with applicable laws and reasonable/appropriate security measures for collection of sensitive financial/health information. Furthermore, highly-regulated new gTLDs had to also incorporate five safeguards regarding (1) establishing relationship with relevant regulatory/industry bodies to mitigate risks of illegal activity, (2) requiring registrants to have a single point of contact for complaint reporting and contact info for relevant regulatory bodies, and (3) verification and validation of credentials. (see ICANN (5 February 2014), *Annex 2 - ICANN NGPC Resolution NO. 2014.02.05.NG01*).

⁴⁶⁴ See Section 2.18 of the Applicant Handbook. Commitments made under this provision later became part of Specification 12 of the Registry Agreement.

⁴⁶⁵ ICANN, "New gTLD Current Application Status," accessed 3 February 2017, <https://gtldresult.icann.org/application-result/applicationstatus/viewstatus>

their registry agreements.⁴⁶⁶ Seventy of the 116 registry agreements⁴⁶⁷ for regulated gTLDs included voluntary PICs.⁴⁶⁸

Eleven of the regulated new gTLD registry operators, representing 69 regulated registries, incorporated voluntary PICs related to abuse or acceptable use into their registry agreements.⁴⁶⁹ Five of the highly-regulated new gTLD registry operators, representing 17 highly-regulated registries, incorporated voluntary PICs related to abuse into their registry agreements.⁴⁷⁰ Each of the top 30 new gTLDs registries that committed to voluntary PICs incorporated anti-abuse provisions.⁴⁷¹

Implementation of PICs

New gTLD applicants were permitted to incorporate voluntary PICs into Specification 11, Sections 2 and 3 of their applications.⁴⁷² Commitments made in Section 2 were incorporated into Specification 11, Section 2 of the registry agreements, whereas those commitments made in Section 3 became part of Section 4 of the registry agreements. Other voluntary commitments took the form of Specification 12: “Community Registration Policies”, which predated the advent of voluntary PICs. Section 2.18 of the Base Registry Agreement included in the Applicant Guidebook was intended to incorporate by reference portions of new gTLD applications that related to Community-based policies and procedures as proposed by Community applicants. Later, it was decided to incorporate the full text of those policies and procedures into the Registry Agreement as Specification 12 for transparency and clarity.

⁴⁶⁶ Donuts (.surgery, .dentist, .creditcard, .attorney, .lawyer, .doctor, .ltd, .sarl, .gmbh, .bingo, .university, .casino), Minds+Machines (.dds, .abogado), CUNA Performance Resources, LLC (.creditunion), Excellent First Limited (慈善 (xn--30rr7y) – Chinese for “charity”), mySRL GmbH (.srl).

⁴⁶⁷ Based on data provided by ICANN organization on 21 October 2016. These included Donuts (.games, .clinic, .dental, .healthcare, .claims, .finance, .fund, .investments, .loans, .credit, .insure, .tax, .mortgage, .movie, .software, .video, .accountants, .gratis, .legal, .school, .schule, .toys, .care, .fitness, .capital, .cash, .exchange, .financial, .lease, .market, .money, .degree, .mba, .band, .digital, .associates, .fan, .discount, .sale, .media, .news, .pictures, .show, .theater, .tours, .vet, .engineering, .limited, .capital, .town, .city, .reisen), Big Room, Inc. (.eco), Afiliias (.organic), DotHealth (.health), DotHIV gemeinnuetziger e.V. (.hiv), Stable Tone Limited (健康 (xn--nyqy26a) – Chinese for “healthy”), Medistry LLC (.med), Celebrate Broadway, Inc. (.broadway), Famous Four Media (.download, .loan, .accountant), Rightside (.gives, .engineer, .rip, .rehab), Minds+Machines (.law, .fit, .fashion), Foggy Way, LLC (.reise). The National Association of Real Estate Investment Trusts, Inc. (.reit) and European Broadcasting Union (EBU) (.radio) adopted Specification 12 Community Registration Policies.

⁴⁶⁸ The National Association of Boards of Pharmacy (.Pharmacy) adopted Specification 12 Community Registration Policies.

⁴⁶⁹ Based on data provided by ICANN organization on 21 October 2016. These included Donuts (.games, .clinic, .dental, .healthcare, .claims, .finance, .fund, .investments, .loans, .credit, .insure, .tax, .mortgage, .movie, .software, .video, .accountants, .gratis, .legal, .school, .schule, .toys, .care, .fitness, .capital, .cash, .exchange, .financial, .lease, .market, .money, .degree, .mba, .band, .digital, .associates, .fan, .discount, .sale, .media, .news, .pictures, .show, .theater, .tours, .vet, .engineering, .limited, .capital, .town, .city, .reisen), Big Room, Inc. (.eco), Afiliias (.organic), DotHealth (.health), Stable Tone Limited (健康 (xn--nyqy26a) – Chinese for “healthy”), Medistry LLC (.med), Celebrate Broadway, Inc. (.broadway), Famous Four Media (.download, .loan, .accountant), Rightside (.gives, .engineer, .rip, .rehab), Minds+Machines (.law, .fit, .fashion), Foggy Way, LLC (.reise). The National Association of Real Estate Investment Trusts, Inc. (.reit) and European Broadcasting Union (EBU) (.radio) adopted Specification 12 Community Registration Policies.

⁴⁷⁰ Donuts (.surgery, .dentist, .creditcard, .attorney, .lawyer, .doctor, .ltd, .sarl, .gmbh, .bingo, .university, .casino), Minds+Machines (.dds, .abogado), CUNA Performance Resources, LLC (.creditunion), Excellent First Limited (慈善 (xn--30rr7y) – Chinese for “charity”), mySRL GmbH (.srl).

⁴⁷¹ Based on data available to ICANN organization on 12 September 2016, these included: Famous Four (.win, .loan, .date, .racing, .download, .accountant), Minds+Machines (.vip, .bayern, .work), Donuts (.news, .rocks, .guru, .email, .solutions, .photography, .company, .tips, .center, .city, .world, .expert, .media, .today, .live, .life), Rightside (.pub, .ninja), Dot London Domains Limited (.london), Infibeam Incorporation Limited (.ooo), and Over Corner, LLC/Donuts (.ltd). Of these gTLDs, .accountant, .city, .download, .loan, .news, and .media are gTLDs designated as GAC Category 1 strings (Regulated Sectors/Open Entry Requirements in Multiple jurisdictions). One gTLD, .ltd is designated as a Highly Regulated sector/Closed Entry Requirements in Multiple Jurisdictions.

⁴⁷² ICANN, “Specification 11 Public Interest Commitments,” accessed 3 February 2017, <https://newtlds.icann.org/en/applicants/agb/base-agreement-spec-11-pic-19feb13-en.pdf>.

Commitments ultimately adopted into voluntary PICs ranged greatly in topic area and substance. Some of the voluntary PICs used language resembling other obligations,⁴⁷³ such as those found in the applicant guidebook or elsewhere in the registry agreement, while many articulated unique methods for enforcing acceptable use, avoiding ambiguity,⁴⁷⁴ protecting intellectual property rights, or proactively preventing DNS abuse.

For example, of the 30 most popular new gTLDs that ultimately adopted voluntary PICs in their registry agreements, six registry applications included provisions related to pre-existing obligations, such as the Abuse Prevention and Mitigation plan, the Additional Mechanism for Protection of Capital City Names, the Additional Mechanisms to Protect and Reserve IGO Names, the Acceptable Abuse Policy, Rights Protection Mechanisms, and WHOIS Accuracy.⁴⁷⁵ The only wholly new voluntary commitment made in these applications was for the creation of an “Abuse Prevention and Mitigation Seal,” which requires registrants to incorporate an APM Seal onto their webpages for one-click access by visitors to geographically-tailored abuse reporting resources.⁴⁷⁶ These voluntary PICs were ultimately incorporated into Specification 11, Section 4 of the respective registration agreements.⁴⁷⁷

Many voluntary PICs emphasized prohibited uses of domain names, including some also forbade by other obligations, while others created new anti-abuse provisions. For example, some of the voluntary PICs incorporated into registry agreements included attempts to prevent the ability of DNS abusers to rely on privacy and proxy services. One operator focused on registrants by committing to “[l]imit the use of proxy and privacy registration services in cases of malfeasance,”⁴⁷⁸ whereas another targeted service providers by promising to “allow domain name proxy or privacy services to be offered only by select registrars and resellers who have demonstrated a commitment to enforcing the accuracy of registrant data and their willingness to cooperate with members of law enforcement to identify users who are engaging in improper or illegal activity.”⁴⁷⁹ One operator of two highly-regulated domain names included provisions aimed at preventing repeat abuse by voluntarily committing to “block registrants of abusive

⁴⁷³ This may have been due to the fact that the Registry Agreement was not yet finalized when voluntary PICs were submitted, and therefore applicants may not have been aware of pre-existing obligations.

⁴⁷⁴ Voluntary PICs were incorporated into the .ooo Registry Agreement to protect against confusion with Australia’s Triple Zero Emergency Call Service, including the reservation of domain names related to police, fire, and emergency, in order to prohibit domain name registrations that might lead to confusion with these services. See ICANN, “.ooo Registry Agreement,” accessed 2 February 2017, <https://www.icann.org/resources/pages/registries/registries-agreements-en>, Specification 11, Section 4 a-c.

⁴⁷⁵ Famous Four Media for .win, .loan (regulated), .date, .racing, .download (regulated), .accountant (regulated).

⁴⁷⁶ ICANN, “Registry Agreement,” Specification 11 Public Interest Commitments. Registry Agreements for .loan, .win, .date, .racing, .download, and .accountant can be found at the Registry Agreement homepage.

ICANN, “.loan Application Details,” accessed 2 February 2017, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1205>; ICANN, “.win Application Details,” accessed 2 February 2017, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1201>; ICANN, “.date Application Details,” accessed 2 February 2017, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1175>; ICANN, “.racing Application Details,” accessed 2 February 2017, <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/1227>; ICANN, “.download Application Details,” accessed 2 February 2017, <https://gtldresult.icann.org/applicationstatus/applicationdetails/1217>; ICANN, “.accountant Application Details,” accessed 2 February 2017, <https://gtldresult.icann.org/applicationstatus/applicationdetails/1187>.

⁴⁷⁷ See ICANN, “Registry Agreement,” Specification 11, Section 4. Registry Agreements for .loan, .win, .date, .racing, .download, and .accountant. These can be found on the Registry Agreement homepage at <https://www.icann.org/resources/pages/registries/registries-agreements-en>.

⁴⁷⁸ ICANN, “Registry Agreement,” Specification 11, Section 4 (iii). Registry Agreements for .life, .live, .today, .ltd, .news, .rocks, .guru, .email, .solutions, .photography, .company, .tips, .center, .city, .world, .expert, .media can be found at the Registry Agreement homepage.

⁴⁷⁹ ICANN, “Registry Agreement,” Specification 11, Section 4 c(v). Registry Agreements for .life, .live, .today, .ltd, .news, .rocks, .guru, .email, .solutions, .photography, .company, .tips, .center, .city, .world, .expert, .media can be found at the Registry Agreement homepage.

domain names from further registrations” and “suspend or delete all names associated with a registrant.”⁴⁸⁰

Many voluntary PICs included proactive and reactive methods for protecting intellectual property rights claims. Even for generic and open gTLDs, several registry agreements included voluntary PICs to undertake “commercially reasonable efforts” to consult with specific brand owners regarding the use of domain names in relevant commercial applications and to “reserve certain names that likely would interfere with the rights of that entity.”⁴⁸¹ The same operator also committed to creating a “Domains Protected Marks List” that “allows rights holders to reserve registration of exact match trademark terms and terms that contain their trademarks across all gTLDs administered by registry operator under certain terms and conditions.”⁴⁸² Moreover, the operator committed to establishing a “Claims Plus service,” which would alert new registrants if they attempted to register a domain name that matched a trademark.⁴⁸³

Registrant validation methods also appeared in some voluntary PICs. For example, the operator of a highly-regulated new gTLD included in its voluntary PICs a requirement that registrants hold a valid trademark corresponding to the domain name for which they are registering.⁴⁸⁴ Another operator added a commitment to include corporate designation status in the WHOIS records for a highly regulated domain,⁴⁸⁵ committing to “provide appropriate jurisdictional authorities with the capability at their option and at no cost to make designations in the WHOIS record indicating the registrant’s organizational status in the registrant’s jurisdiction.”⁴⁸⁶

Both the registrant and consumer surveys commissioned by the CCT demonstrated a positive correlation between restrictions imposed by TLD operators and trust associated with a given TLD.⁴⁸⁷ In line with this notion, voluntary PICs provided a mechanism by which new gTLD operators imposed and promoted registration and use restrictions as part of their brand identity, making binding commitments to ICANN as well as to registrants, which, in effect, may have assuaged concerns from the GAC and other Community members. However, two factors could be viewed as undermining this goal: first, the applicant could choose whether or not to incorporate these application representations into the final registration agreement and second, even if the applicant chose to incorporate the representations into its registry agreement as PICs, it could also include a provision permitting it and subsequent operators⁴⁸⁸ to withdraw or modify the PICs.⁴⁸⁹

⁴⁸⁰ Minds+Machines (.dds, .abogado)

⁴⁸¹ ICANN, “Registry Agreement,” Specification 11, Section 4. Registry Agreements for .life, .live, .today can be found at the Registry Agreement homepage.

⁴⁸² ICANN, “Registry Agreement,” Specification 11, Section 4 (iii). Registry Agreements for .life, .live, .today, ., .ltd, .news, .rocks, .guru, .email, .solutions, .photography, .company, .tips, .center, .city, .world, .expert, .media can be found at the Registry Agreement homepage.

⁴⁸³ ICANN, “Registry Agreement,” Specification 11, Section 4 (iv). Registry Agreements for .life, .live, .today, ., .ltd, .news, .rocks, .guru, .email, .solutions, .photography, .company, .tips, .center, .city, .world, .expert, .media can be found at the Registry Agreement homepage.

⁴⁸⁴ gTLD Registry Services (.insurance)

⁴⁸⁵ ICANN, “Annex 2 - ICANN NGPC Resolution NO.2014.02.05.NG01.”

⁴⁸⁶ ICANN, “Registry Agreement,” Specification 11, Section 4 (e). The Registry Agreement for .ltd can be found at the Registry Agreement homepage.

⁴⁸⁷ Nielsen, Consumer Research (2015); Nielsen, Consumer Research Wave 2 (2016). Nielsen, Registrant Survey (2015); Nielsen, Registrant Survey Wave 2 (2016).

⁴⁸⁸ .Live was assigned from the original applicant, a Donuts subsidiary, to United LTD.

⁴⁸⁹ One registry operator that made several uniquely robust voluntary PICs reserved the right to discontinue any of its voluntary PICs “in the case of a substantial and compelling business need.” ICANN, “Registry Agreement,” Specification 11, Section 4 (iii). Registry Agreements for .life, .live, .today, ., .ltd, .news, .rocks, .guru, .email, .solutions, .photography, .company, .tips, .center, .city, .world, .expert, .media can be found at the Registry Agreement homepage.

Ultimately, applicants had little time to decide which PICs to adopt voluntarily and did not know what the enforcement mechanism would be for the PICs. The combination of a short timeframe—less than 30 days—and uncertainty about the specifics of enforcement may have deterred certain applicants from submitting PICs or impacted which PICs they elected to submit.⁴⁹⁰

Enforcement of PICs

Mandatory and voluntary PICs are enforced by both ICANN Contractual Compliance via its standard complaint procedures and via the Public Interest Commitment Dispute Resolution Process (PICDRP) established on December 19, 2013.⁴⁹¹ The GAC has expressed concerns that the PICDRP is “complex, lengthy, and ambiguous, raising questions as to its effectiveness in addressing serious threats.”⁴⁹²

To date, only one complaint has been accepted and heard via the PICDRP.⁴⁹³ After an investigation carried out by Contractual Compliance, it was determined that the registry in question had breached its Specification 11 obligations.⁴⁹⁴ Although the complaint alleged that the registry engaged in widespread fraud, ICANN advised the PICDRP Panel to focus its review on the “evaluation of the applicable sections of Specification 11 raised in the Complaint, and on the policies established by the registry operator and its adherence to them.”⁴⁹⁵ The PICDRP analyzes the operator’s adherence to the contractual language and its own policies. Going forward, applicants should be required to state the intentions of their PIC and incorporate these into their Registry Agreements, making them enforceable. At present, there is a gap between the apparent goals of voluntary PICs and the enforceable obligations arising from such PICs. This gap creates a risk that only the letter and not the spirit of a voluntary PIC would be enforceable. In fact, the degree to which voluntary PICs were ultimately effective, implemented, and enforced is also called into question by data from the DNS Abuse Study. Ironically, all six of the top 30 most popular new gTLDs registries that adopted voluntary PICs focused on preventing DNS abuse actually correlated with some of the highest concentrations of DNS Security Abuse of all new gTLDs.⁴⁹⁶

Recommendations

Recommendation 25: To the extent voluntary commitments are permitted in future gTLD application processes, all such commitments made by a gTLD applicant must state their intended goal and be submitted during the application process so that there is sufficient

⁴⁹⁰ ICANN, “Frequently Asked Questions: Specification 11 of the Revised New gTLD Registry Agreement: Public Interest Commitments: What is schedule for the Public Interest Commitments (PIC) Specification Proposal?” accessed 8 August 2018, <https://newgtlds.icann.org/en/applicants/agb/base-agreement-specs-pic-faqs>; ICANN, “Revised New gTLD Registry Agreement Including Additional Public Interest Commitments Specification: Section I: Description, Explanation, and Purpose,” accessed 8 August 2018, <https://www.icann.org/resources/pages/base-agreement-2013-02-05-en>; ICANN, “Posting of Public Interest Commitments (PIC) Specifications Completed,” accessed 8 August 2018, <https://newgtlds.icann.org/en/announcements-and-media/announcement-06mar13-en>.

⁴⁹¹ ICANN, “About Public Interest Commitments Dispute Resolution Procedure (PICDRP),” accessed 8 August 2018, <https://www.icann.org/resources/pages/picdrp-2013-10-31-en>; ICANN, “About gTLD Compliance Program,” accessed 8 August 2018, <https://www.icann.org/resources/pages/gtld-2012-02-25-en>; GAC, *Singapore Communiqué* (see p. 4 regarding the role of Contractual Compliance in enforcing PICs).

⁴⁹² ICANN GAC (2014), “London Communiqué” and ICANN GAC (2015), “Singapore Communiqué.”

⁴⁹³ “Complaint for ICANN Compliance Investigation, Evaluation by PICDRP Standing Panel, and Remedies,” 12 October 2016, accessed 8 August 2018, <http://domainincite.com/docs/FEEDBACK-PICDRP-Complaint.pdf>.

⁴⁹⁴ “Notice of Breach of Registry Agreement,” 16 March 2017, accessed 8 August 2018, https://www.icann.org/uploads/compliance_notice/attachment/911/serad-to-westerdal-16mar17.pdf.

⁴⁹⁵ *Ibid.*, p. 16.

⁴⁹⁶ SIDN Labs and the Delft University of Technology, “DNS Abuse in gTLDs”.

opportunity for Community review and time to meet the deadlines for Community and limited public interest objections. Furthermore, such requirements should apply to the extent that voluntary commitments may be made after delegation. Such voluntary commitments, including existing voluntary PICs, should be made accessible in an organized, searchable online database to enhance data-driven policy development, Community transparency, compliance, and awareness of variables relevant to DNS abuse trends.

Rationale/related findings: The intended purpose of many existing voluntary commitments, through the form of voluntary PICs, is not readily discernible. This ambiguity stifles the Community's ability to evaluate effectiveness. Moreover, upon submission of a gTLD application, there is no mechanism in place for the Community to ensure that such commitments do not negatively impact the public interest and other aspects of the DNS. Consequently, it is important to the multistakeholder process that such voluntary commitment proposals be made available to the Community with adequate time for assessment and potential objections. Furthermore, once adopted, the current process for analyzing voluntary commitments, drawing comparisons amongst TLDs, measuring effectiveness, and building data points for analysis, is too cumbersome because such commitments are only available in individualized contractual documents embedded on the ICANN website and not available in a categorized, searchable form. Unlike many other aspects of registry agreements, voluntary PICs vary greatly from one TLD to another. Therefore, a publicly accessible, categorized, searchable database of these commitments would enhance data-driven policy development, Community transparency, compliance, awareness of variables relevant to DNS abuse trends, and the overall ability of future review teams to measure their effectiveness.

To: ICANN organization, New gTLD Subsequent Procedures PDP Working Group

Prerequisite or priority level: Prerequisite

Consensus within team: Yes

Success measures: The implementation of this recommendation would be successful if the purpose of any voluntary commitment proposed by a registry operator is clearly stated to describe its intended goal, all parties in the multistakeholder community are given ample time to provide input before such a commitment is adopted into a contract, and any adopted measures are available and easily accessible on the ICANN website in an organized way to empower Community awareness and accountability.

Rights Protection Mechanisms

New Rights Protection Mechanisms (RPMs) were specifically developed in connection with the introduction of the New gTLD Program alongside existing rights protection mechanisms. The CCT Review Team examined whether these RPMs help encourage a safe environment and promote consumer trust in the DNS, and also sought to measure the costs impact of the New gTLD Program to intellectual property owners.

The RPMs themselves are firstly described for completeness before moving on to a consideration of these mechanisms and whether they have helped mitigate the issues around the protection of trademark rights and consumers in this expansion of gTLDs. It was clear that the CCT faced difficulties in obtaining reliable data to make this assessment, turning primarily to the data obtained by ICANN under the CCT Metrics Reporting⁴⁹⁷ and the INTA Impact

⁴⁹⁷ ICANN, "Competition, Consumer Trust and Consumer Choice (CCT) Metrics Reporting," accessed 10 October 2017, <https://www.icann.org/resources/reviews/cct/metrics>.

Study,⁴⁹⁸ as well as existing data and commentary from the ICANN Rights Protection Mechanisms Review and the Independent Review of Trademark Clearinghouse (TMCH) Services Revised Report.⁴⁹⁹

The review team also noted the parallel work by the ongoing working groups currently looking into RPMs and sought not to duplicate or undermine that work and thus looks forward to the reports from those groups.⁵⁰⁰

Background to the RPMs

Prior to the 2012 gTLD expansion in the number of gTLDs, aside from action taken by courts, the main rights protection mechanism for the DNS was the Uniform Domain Name Dispute Resolution Policy (UDRP), an alternative dispute resolution procedure (adopted by ICANN on 26 August 1999) that applied to all generic top-level domains. However, the existence of issues concerning trademark protection was identified prior to the 2012 gTLD expansion. In particular, the trademark community had voiced concerns that this mechanism alone would be insufficient to adequately protect trademark rights and consumers in an expanded DNS. The ICANN Board therefore resolved that an internationally diverse group of persons with knowledge, expertise, and experience in the fields of trademarks, consumer protection, competition law, and their relationship to the DNS be convened to propose solutions to the overarching issue of trademark protection in connection with the introduction of new gTLDs.⁵⁰¹ This group was named the Implementation Recommendation Team (IRT).

The IRT proposed a new set of RPMs, namely: Uniform Rapid Suspension System (URS); Post-Delegation Dispute Resolution Procedures (PDDRRPs); the Trademark Post-Delegation Dispute Resolution Procedure (TM-PDDRRP); Registry Restriction Dispute Resolution Procedure (RRDRP); Public Interest Commitments Dispute Resolution Procedure (PICDRP); and the Trademark Clearinghouse (Sunrise and Claims Service).⁵⁰²

Description of the RPMs

Uniform Domain Name Dispute Resolution Policy (UDRP)

The Uniform Domain Name Dispute Resolution Policy (UDRP) is an alternative dispute resolution procedure adopted by ICANN on 26 August 1999 that applies to all generic top-level domains (gTLDs), including legacy gTLDs (such as .com, .net, .info) as well as new gTLDs, and certain country code top-level domains (ccTLDs) that have adopted it. To be successful under the UDRP, a complainant must demonstrate with a preponderance of evidence the following three requirements: (1) the domain name registered by the respondent is identical or confusingly similar to a trademark or service mark in which the complainant has

⁴⁹⁸ Nielsen, *INTA New gTLD Cost Impact Study*.

⁴⁹⁹ ICANN, *Rights Protection Mechanisms Review: Revised Report* (11 September 2015), accessed 9 August 2018, <https://newgtlds.icann.org/en/reviews/cct/rpm>; Analysis Group, *Independent Review of Trademark Clearinghouse*.

⁵⁰⁰ For example, see ICANN GNSO, "PDP Review of All Rights Protection Mechanisms in All gTLDs."

⁵⁰¹ ICANN, "Adopted Board Resolutions: Mexico: Protections for Trademarks in New gTLDs," 6 March 2009, <https://www.icann.org/resources/board-material/resolutions-2009-03-06-en#07>.

⁵⁰² In addition, string contention processes were introduced for applications for the gTLDs themselves, relating to string confusion, limited public interest, community objection, and legal rights objection. These are discussed in more detail in the Application and Evaluation section below.

rights; (2) the respondent has no rights or legitimate interests in respect of the domain name; and (3) the domain name has been registered and is being used in bad faith.

A procedure under the UDRP takes approximately two months, from the filing of a complaint to a decision. Costs for filing a complaint for one to five domain names under the UDRP range between USD \$1,500 (single-member panel) and USD \$4,000 (three-member panel), excluding lawyers' fees. The remedies available under the UDRP are limited to the transfer or cancellation of a domain name. No damages are awarded and there is no appeal mechanism in place. A decision is generally implemented after 10 business days following the notification of the decision, unless court proceedings are initiated in a court of competent jurisdiction.

UDRP complaints are filed electronically with an ICANN-approved dispute resolution provider. To date, the following providers have been approved by ICANN: the Asian Domain Name Dispute Resolution Centre (ADNDRC), the National Arbitration Forum (NAF), World Intellectual Property Organization (WIPO), the Czech Arbitration Court Arbitration Center for Internet Disputes (CAC), and the Arab Center for Domain Name Dispute Resolution (ACDR).

Uniform Rapid Suspension System (URS)

The Uniform Rapid Suspension System (URS) is an alternative dispute resolution procedure launched in 2013 that was originally designed for clear-cut cases of cybersquatting in new generic top-level domains (gTLDs), although it has been voluntarily adopted by a handful of ccTLDs and “sponsored” TLDs (such as .pw, .travel, .pro and .cat). The substantive requirements under the URS are similar to those under the UDRP, although the required burden of proof is heavier (“clear and convincing evidence,” as opposed to “preponderance of the evidence”). A complainant must thus prove the following three requirements:

1. That the domain name is identical or confusingly similar to a wordmark:
 - a. For which the Complainant holds a valid national or regional registration and that is in current use, or
 - b. That has been validated through court proceedings or (c) that is specifically protected by a statute or treaty in effect at the time the URS complaint is filed.⁵⁰³
2. That the registrant has no rights or legitimate interests in the domain name.⁵⁰⁴
3. The domain name was registered and is being used in bad faith.⁵⁰⁵

Complaints are limited to 500 words. The URS is intended for the most clear-cut cases of cybersquatting, so it is generally not appropriate for domain name disputes involving more complex, genuine contestable issues (such as fair use). The only remedy available under the URS is the suspension of the domain name, as opposed to the transfer or cancellation (which are remedies available under the UDRP).

Under the URS, a domain name may be suspended in as quickly as three weeks from the filing of a complaint. In the event of a favorable decision for the complainant, the domain name

⁵⁰³ ICANN, “Uniform Rapid Suspension,” Section 1.2.6.1

⁵⁰⁴ Ibid., Section 1.2.6.2

⁵⁰⁵ Ibid., Section 1.2.6.3

is suspended for the remainder of the registration period (which may be extended for an additional year). The website associated with the domain name in question will display a banner stating “This Site is Suspended,” but the WHOIS record for the domain name will continue to display the information of the original registrant (except for the redirection of the name servers). If the decision in favor of the complainant was a judgment by default, the registrant may seek a *de novo* review by filing a response up to six months after the notice of default (which may be extended by six additional months upon request by the registrant). In the event the decision is denied, the URS provides for an appeal mechanism based on the existing record.

Costs for filing a URS complaint are around USD \$375 (for 1 to 14 domain names).

Only three providers have so far been accredited to provide URS services: the Asian Domain Name Dispute Resolution Centre (ADNDRC), the National Arbitration Forum (NAF) and MSFD Srl.⁵⁰⁶

Post-Delegation Dispute Resolution Procedures (PDDRP)

Post-Delegation Dispute Resolution Procedures are RPMs that have been designed to provide relief against a new gTLD registry operator's alleged conduct (as opposed to a domain name registrant or registrar). There are three types of PDDRP:

- 1. The Trademark Post-Delegation Dispute Resolution Procedure (TM-PDDRP)** allows a trademark holder to file a complaint against the registry operator for its involvement in trademark infringement either at the top- or second-level of a new gTLD.

At the top level, a complainant must demonstrate by “clear and convincing evidence” that “the registry operator’s affirmative conduct in its operation or use of a new gTLD that is identical or confusingly similar to the complainant’s mark, causes or materially contributes to the gTLD doing one of the following: (1) taking unfair advantage of the distinctive character or the reputation of the complainant’s mark; or (2) impairing the distinctive character or the reputation of the complainant’s mark; or (3) creating a likelihood of confusion with the complainant’s mark.”⁵⁰⁷ (paragraph 6.1 of the TM-PDDRP).

At the second-level, complainants are required to demonstrate by “clear and convincing evidence” that “through the registry operator’s affirmative conduct: (a) there is a substantial pattern or practice of specific bad faith intent by the registry operator to profit from the sale of trademark infringing domain names, and (b) the registry operator’s bad faith intent to profit from the systematic registration of domain names within the gTLD that are identical or confusingly similar to the complainant’s mark, which: (i) takes unfair advantage of the distinctive character or the reputation of the complainant’s trade mark, (ii) impairs the distinctive character or the reputation of the complainant’s trade mark, or (iii) creates a likelihood of confusion with the complainant’s trade mark”.

If the registry operator is found liable by the expert panel, a number of remedies may be recommended, including remedial measures to prevent future infringing registrations; suspension of accepting new domain name registrations in the gTLDs at

⁵⁰⁶ ICANN, “Uniform Rapid Suspension System (URS),” accessed 9 August 2018, <https://newgtlds.icann.org/en/applicants/urs>

⁵⁰⁷ ICANN, *Trademark Post-Delegation Dispute Resolution Procedure (Trademark PDDRP)*, 4 June 2012, accessed 9 August 2018, <https://newgtlds.icann.org/en/program-status/pddrp>, Section 6.1.

stake until the violation has ceased or for a set period of time prescribed by the panel; or termination of the Registry Agreement in cases where the registry operator has acted “with malice”.⁵⁰⁸ Ultimately, ICANN has the authority to impose the remedies it deems appropriate, if any.

To date, ICANN has appointed the following dispute resolution providers to resolve disputes under the TM-PPDRP: the Asian Domain Name Dispute Resolution Centre (ADNDRC), the National Arbitration Forum (NAF), and World Intellectual Property Organization (WIPO).⁵⁰⁹

- 2. The Registry Restriction Dispute Resolution Procedure (RRDRP)** allows an established institution to file a complaint against a community-based new gTLD registry operator for failing to meet registration restrictions set out in its Registry Agreement. For a claim to be successful, a complainant must demonstrate by “preponderance of the evidence” that: “(i) the community invoked by the objector is a defined community; (ii) there is a strong association between the community invoked and the gTLD label or string; (iii) the TLD operator violated the terms of the community-based restrictions in its agreement; (iv) there is a measurable harm to the Complainant and the community named by the objector.”⁵¹⁰ The remedies recommended by the expert panel are similar to those prescribed under the TM-PDDRP. Ultimately, ICANN has the authority to decide whether to impose such remedies.
- 3. The Public Interest Commitments Dispute Resolution Procedure (PICDRP)** allows any person or entity (the “reporter”) to file a complaint against a new gTLD registry operator for failure to comply with the Public Interest Commitment(s) in Specification 11 of its Registry Agreement. The Reporter must file a “PIC Report” with ICANN by completing an online form. The PIC Report must (1) identify which PIC(s) form the basis for the report; (2) state the grounds for non-compliance with one or more PICs and provide supporting evidence; and (3) state how the reporter has been harmed by the alleged noncompliance.⁵¹¹ ICANN may undertake a compliance investigation or invoke a “Standing Panel.” If the registry operator is found to be not in compliance with its PIC, it will have 30 days to resolve its noncompliance. If the registry operator fails to resolve the noncompliance issues, ICANN will determine the appropriate remedies.

Trademark Clearinghouse (TMCH)

The Trademark Clearinghouse (TMCH) is a centralized database of verified trademarks from around the world mandated by ICANN to provide protection to trademark holders under the new gTLDs. The TMCH performs several important functions, including authenticating and verifying trademark records, storing such trademark records in a database, and providing this information to new gTLD registries and registrars. The data contained in the TMCH supports RPMs such as Sunrise Services (which provide an opportunity to trademark holders to register domain names corresponding to their trademarks prior to general availability) and the Trademark Claims services (a notification service to domain name registrants and trademark holders of potentially infringing domain name registrations). Registration of a trademark in the TMCH is required to be able to participate not only in the Sunrise Period and Trademark

⁵⁰⁸ Ibid., Section 18.

⁵⁰⁹ ICANN, “Post-Delegation Dispute Resolution Procedures (PDDRP),” accessed 9 August 2018,

<https://newgtlds.icann.org/en/program-status/pddrp>

⁵¹⁰ ICANN, *Registry Restriction Dispute Resolution Procedure (RRDRP)*, 4 June 2012, accessed 9 August 2018, <https://newgtlds.icann.org/en/program-status/pddrp>, Section 6.

⁵¹¹ ICANN, *Public Interest Commitment Dispute Resolution Procedure*, 19 December 2013, accessed 9 August 2018, <https://newgtlds.icann.org/en/program-status/pddrp>

Claims services,⁵¹² but also in other registry-specific RPMs, such as domain name blocking mechanisms (for instance, Donuts' "Domain Protected Marks List"). Registration of a trademark is optional for other RPMs, such as the URS. The TMCH is therefore an important tool to protect trademark rights under the New gTLD Program.

Consideration of these Mechanisms and Whether they have Helped Mitigate the Issues around the Protection of Trademark Rights and Consumers in this Expansion of gTLDs

The review team looked at whether these mechanisms have helped to mitigate the issues around the protection of trademark rights and consumers in this expansion of gTLDs, and have sought to obtain data to help assess the impact of the New gTLD Program on the cost and effort required to protect trademarks in the DNS.

The review team turned primarily to the data obtained by ICANN under the CCT Metrics Reporting page and the INTA Impact Study,⁵¹³ which, it was hoped, would provide additional data on the cost impact of new gTLDs on brand owners as well as existing data and commentary from the ICANN Rights Protection Mechanisms Review.⁵¹⁴ The Team also noted the parallel work by the ongoing GNSO working groups currently looking into RPMs, and sought not to duplicate or undermine their efforts.⁵¹⁵ The Team looks forward to the reports from those groups.

INTA Impact Study

The results of the International Trademark Association (INTA) Impact Study contain important information for the Community to consider regarding the impact of ICANN's New gTLD Program on the cost and effort required to protect trademarks in the DNS. INTA members and intellectual property owners have expressed concern on multiple occasions about the new gTLDs on the basis that such expansion would likely create additional and increased costs in enforcing intellectual property rights. The survey sought to assess what additional costs and efforts have been required to protect trademarks in the DNS.

The INTA is a global organization of 6,600 trademark owners and professionals from over 190 countries. As such, it was well-placed to respond to the Nielsen survey, which was informed by the review team's input. INTA members were asked to estimate all costs associated with protecting their trademarks in the DNS over a two-year period (2015 and 2016). Their cost estimates include:

- ⦿ Both in-house and outside legal fees.
- ⦿ Filing fees.
- ⦿ Investigation costs.
- ⦿ The total costs, including benefits, of personnel responsible for these activities.

⁵¹² ICANN, "TLD Startup Information," accessed 9 August 2018, <https://newgtlds.icann.org/en/program-status/sunrise-claims-periods>

⁵¹³ Nielsen (April 2017), *INTA New gTLD Cost Impact Survey*.

⁵¹⁴ ICANN, *Rights Protection Mechanisms Review: Revised Report*.

⁵¹⁵ ICANN GNSO, "PDP Review of All Rights Protection Mechanisms in All gTLDs."

Respondents who completed the survey reported that compiling the data necessary to properly respond was a significant task. There were 33 respondents in total, including one not-for-profit. The response rate for the survey was actually above the norm for similar surveys,⁵¹⁶ especially considering the level of required effort to complete what respondents indicated was an onerous questionnaire. However, the sample size of completed surveys is small from a statistical standpoint and requires some caution in its interpretation. Nevertheless, the results are indicative of key themes and trends.⁵¹⁷

Key Takeaways from the Impact Study:

1. While one of the goals of the New gTLD Program was to increase choice for brand owners, choice does not seem to be a prime consideration for why some brand owners elect to register in new gTLDs. Rather, the principal reason why the overwhelming majority (90 percent) of trademark owners who responded the survey are registering domain names in new gTLDs is for defensive purposes, i.e. to prevent someone else from registering.
2. Domain names registered by brand owners in new gTLDs are commonly parked and not creating value other than preventing unauthorized use by others.
3. According to the respondents, the New gTLD Program has increased the overall costs of trademark defense, with Internet monitoring and diversion actions being the largest expenditure. These costs have impacted small and big companies alike, with the most relevant cost-driving factor being the number of brands.
4. Respondents reported that the average total enforcement costs related to TLDs generally (both legacy and new) per company is \$150,000 per year. Having said this, the costs varied widely among the survey respondents.⁵¹⁸ This is something that would benefit from further investigation in future surveys.
5. Regarding disputes, more than 75 percent of cases brought now involve privacy and proxy services and close to two-thirds encounter some level of inaccurate or incomplete WHOIS information.
6. While the new gTLDs account for one-sixth of the enforcement costs incurred by the survey respondents, they do not yet represent one-sixth of domain name registrations. In other words, the cost of enforcement actions for the survey respondents in new gTLDs is approximately 18 percent of overall TLD enforcement costs while the total numbers of new gTLD registrations compared to all TLDs is 10 percent at the time the Impact Study was conducted.⁵¹⁹ This data indicates that for the respondents, there is a disproportionate cost associated with new gTLD enforcement actions compared to overall enforcement actions. This provides further indication that there may be proportionately more trademark infringement in new gTLDs than in the legacy gTLDs.⁵²⁰

⁵¹⁶ This statement is based on Nielsen's general experience with samples of customers or members.

⁵¹⁷ According to Nielsen, the total sample is sufficient to give directional information about those trends, but any statistical significance testing would be subject to a high margin of error.

⁵¹⁸ The range of total costs reported ran from zero to \$5.2 million.

⁵¹⁹ Nielsen, *New gTLD Cost Impact Survey*. The average costs for all TLDs for 2 years = \$292,000. The average costs for new gTLDs for 2 years = \$53,690 (approximately 18 percent).

⁵²⁰ Ibid., slides 10 and 27. Nielsen explains that the figures for internet monitoring being one of the main costs should be qualified; these costs are general overall costs and not specific to new gTLDs. An entity will pay for monitoring across all TLDs. There is likely to be some incremental increase in monitoring costs given additional new gTLDs being in scope, and indeed there is anecdotal evidence that more brands have started monitoring

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7. RPMs are generally considered to have been helpful in mitigating the risks anticipated with new gTLDs. In response to the question, “Please tell us why you feel the Rights Protection Mechanisms listed above have or have not mitigated the risks involved with new TLDs,” the responses were varied, but provided a useful insight into the mindset of brand owners.⁵²¹ Two-thirds of the respondents surveyed feel that the UDRP and required Sunrise periods have helped mitigate risks, with 90 percent of respondents registering in new gTLDs during a Sunrise period. Of those who think that RPMs are effective, the ranking is as follows:
- a. Sunrise: 79 percent
 - b. UDRP: 73 percent
 - c. Claims: 66 percent
 - d. URS: 49 percent
 - e. PDDRP/RRDRP/PICDRP: 27 percent

There is nevertheless evidence that brand owners are reluctant purchasers of Sunrise registrations and many see it as a cost that is overly expensive:

“Sunrise Periods have quickly become more a money-making product than a protective tool.”⁵²²

“Sunrise periods have only a minor effect because many registries target brand owners with discriminatory pricing while at the same time many offer the same domain name to non-brands at a much cheaper price.”⁵²³

“The .top registry raised the Sunrise fee by \$30,000 for [company].top. We refused to register.”⁵²⁴

since the introduction of new gTLDs. However, since these costs were not broken down in the questionnaire, monitoring was basically treated as a sunk cost. It would thus be reasonable to assume that these costs have gone up rather than down. Thus, the total costs are likely to be above 18 percent.

⁵²¹ Some examples are summarized here. Respondents indicated that: 1) While the Sunrise Period allows trademark owners to purchase a domain incorporating a key trademark before anyone else can, Sunrise claims often come with a major cost to the brand owner; 2) Claims notices came too late (the name was already registered before the respondent was notified), and they do not prevent squatters from registering domain names despite notice of existing rights, which means that the same problems as exist in the legacy TLDs persist in the new gTLDs after registration has occurred; 3) the URS, although faster than the UDRP, has narrow criteria for action, a high burden of proof compared to the (more expensive) UDRP, requires multiple domains to make a claim, the name cannot be transferred as a result of adjudication, and it’s costly to suspend—as opposed to transfer—the domain in dispute; 4) the Post-Delegation Dispute Resolution Procedure criteria are so narrow that the circumstances to invoke it are extremely unlikely to arise, and the procedure is onerous to carry out (it requires joint action on the part of various trademark holders to be effective); 5) the UDRP has well-defined criteria, has helped to provide a body of helpful case law, provided the ability to transfer a domain if a UDRP dispute was successful on the part of the claimant, but the price of filing a claim was a deterrent for all but the most egregious cases, and most claims were filed against .com, where the most infringing domains are found [according to one respondent]; 6) the Sunrise and trademark claim periods are too short, and companies need to implement additional measures to monitor their portfolio in numerous gTLDs; 7) the PDDRP, RRDRP, and PICDRP can be effective, but are not well understood as available options, leading them to have minor impacts on mitigating risks, and defensive registration is the only cost-effective recourse (although respondents indicated that this could be costly as well, just less so than filing URS or UDRP claims); 8) the TMCH at least provides a mechanism for trademark owners to register domains with their marks before they are registered by cybersquatters, but the claims procedure works only to a minor extent because it only captures filings for a very limited period of time, and a “blocking procedure” for trademarks would greatly mitigate the risks. Respondents in general indicated that the above are good, but incomplete mechanisms. One respondent provided a succinct summary: “The mechanisms [other than the URS, UDRP, and TMCH]... do not seem that effective and require a significant outlay of resources from trademark owners. We’ve not had the opportunity to use. Registrants are willing to risk a small registration fee to use a domain name with a famous trademark in it.” (p. 59).

⁵²² Nielsen, *New gTLD Cost Impact Survey*, p. 52.

⁵²³ *Ibid.* p. 59.

⁵²⁴ *Ibid.* p. 50.

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1. TMCH registrations are used by a majority of the respondents. Looking at the data, the majority of respondents (approximately 9 in 10) registered at least one trademark in the TMCH, with 6 in 10 registering 1-10. With regard to associated costs, these vary considerably across the respondents, ranging from less than USD \$1,000 to USD \$48,000, with the average being approximately USD \$7,700.
 2. The introduction of the URS process has provided an alternative to the UDRP, but it is less used. The most cited reasons for why it is less popular include the inability to transfer the domain name after a successful decision and the higher burden of proof.
 3. With regard to premium pricing, three-quarters of the respondents evaluate premium pricing for domain names on a case-by-case basis, and two-thirds of their domain name registration decisions have been affected by premium pricing, with .sucks being mentioned the most as a TLD that respondents paid premium pricing for. However, 15 percent of respondents refused to pay premium pricing at all.

ICANN Competition, Consumer Trust, and Consumer Choice (CCT) Metrics Reporting

Numbers of Cases Filed (UDRP and URS)

It is clear from the data obtained by ICANN across all domain name dispute resolution providers that the total cases filed (UDRP and URS combined) from 2013-2016 increased considerably since the introduction of new gTLDs.⁵²⁵ Concerning the UDRP, there has been a fairly substantial increase in the number of UDRP complaints filed, while the use of the URS has been more limited and has seen a slight decline in cases filed since its introduction and first use in new gTLDs in 2014.

The first new gTLDs entered the root in 2013,⁵²⁶ but it was not until March 2014 that the first UDRP case was filed involving a new gTLD.⁵²⁷ The first URS decision was filed in April 2014.⁵²⁸ Taking into account the previous year without any new gTLD-related disputes as the baseline, there were a total of 3,371 disputes decided, all of which were UDRPs and all of which concerned only legacy gTLDs.

⁵²⁵ ICANN, "Competition, Consumer Trust and Consumer Choice (CCT) Metrics Reporting: Rights Protection Mechanisms," accessed 10 October 2017, <https://www.icann.org/resources/pages/cct-metrics-rpm-2016-06-27-en#1.12>.

⁵²⁶ ICANN, "First New gTLD Registries Receive Tokens for Root Zone Management System," accessed 10 October 2017, <https://newgtlds.icann.org/en/announcements-and-media/announcement-22oct13-en>.

⁵²⁷ WIPO, "Arbitration and Mediation Center Administrative Panel Decision: Canyon Bicycles GmbH v. Domains By Proxy, LLC / Rob van Eck Case No. D2014-0206," accessed 9 August 2018, <http://www.wipo.int/amc/en/domains/search/text.jsp?case=D2014-0206>.

⁵²⁸ ADR, "National Arbitration Forum URS Appeal Determination: Aeropostale Procurement Company, Inc. v. Michael Kinsey et al. Claim Number: FA1403001550933," accessed 9 August 2018, <http://www.adrforum.com/Domaindecisions/1550933A.htm>.

Table 14: Number of Cases Filed with UDRP and URS Providers through 2017⁵²⁹

	Total Split UDRP and URS	Total Cases Combined
2013	3,371 (UDRP)	3,371
2014	4,056 (UDRP) & 231 (URS)	4,287
2015	4,130 (UDRP) & 213 (URS)	4,343
2016	4,371 (UDRP) & 222 (URS)	4,590
2017	3,095 (UDRP) & 126 (URS)	3,221

In 2014, total cases (UDRP and URS combined) rose to 4,287, representing a 27 percent increase. In 2015, the total cases increased slightly again to 4,343 (1.3 percent higher than 2014), and in 2016, there was a further 5.7 percent increase, taking the total cases to 4,590. In 2017, total cases decreased to 3,221 (almost 30% lower than 2016). Thus, comparing total cases in 2013, the year before the first new gTLD dispute, and in 2016, we have a considerable increase of 36 percent in cases filed across all providers. However, this growing trend changed last year, with significantly fewer cases in 2017.

If only UDRP cases are considered, one sees a 20 percent rise from 2013 to 2014, a further 2 percent rise from 2014 to 2015, a further 5.8 percent rise from 2015 to 2016, and a 29.8 percent decrease from 2016 to 2017. Examining URS cases alone, the first thing to note is that their popularity as an RPM is and remains low, with 231 cases in 2014, 213 cases in 2015, and 222 cases in 2016, and 126 cases in 2017. Thus, around only five percent of the total cases are filed under the URS. In addition, there appears to be no significant rise in the number of complaints filed year on year. There was a decrease in URS cases filed when comparing 2016 to 2015, and even in 2017, the total number of URS cases filed remained lower than in 2014, the first year of operation for new gTLDs. Thus, this leads one to question whether URS is meeting its potential as a useful RPM.

It is important to note that the number of UDRP and URS cases filed reflect only part of the costs incurred by trademark owners in defending their brands. Significant enforcement costs may have been incurred in the form of defensive registrations, blocking, monitoring, cease and desist letters, and court action (although the review team did not have data to evaluate this). The INTA Impact Study, however, does provide some insight.

Complaints to ICANN Concerning Implementation of UDRP and URS Decisions

ICANN's role is to ensure that registrars and registries comply with the UDRP procedures and rules as well as those of the URS.

For example, a UDRP provider may file a UDRP complaint that a registrar did not lock a domain subject to a UDRP or respond to the provider's verification request in a timely manner. The complainant may then submit a complaint to ICANN if the registrar fails to implement a UDRP decision in a timely manner.

⁵²⁹“CCT Metrics: Rights Protection Mechanisms: Metric 1.9.a: UDRP and URS Cases Filed Against Registrants,” accessed 8 August 2018, <https://www.icann.org/resources/pages/cct-metrics-rpm-2016-06-27-en#1.9.a>

With regard to the URS, for example, a registry operator must also lock in a timely manner, and if applicable, suspend the relevant domain name in accordance with the URS determination and the URS procedure and rules. The prevailing complainant in the URS proceeding, and the URS provider, may submit a URS complaint regarding such alleged violations to ICANN via the URS compliance webform.⁵³⁰

Looking at the number of complaints made to ICANN concerning the implementation of UDRP and URS decisions,⁵³¹ the number of complaints concerning the UDRP declined between 2012 and 2014 by some 65 percent and, since then, has remained fairly static at between 250 and 227 complaints annually. URS complaints were relatively high in 2014, the first year in which the URS was available for new gTLDs, but from 2015 through 2017, the number of complaints has roughly halved.

Table 15: Total UDRP/URS Complaints to ICANN⁵³²

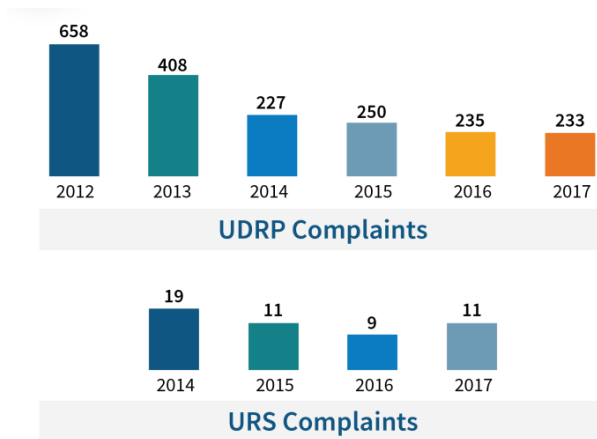
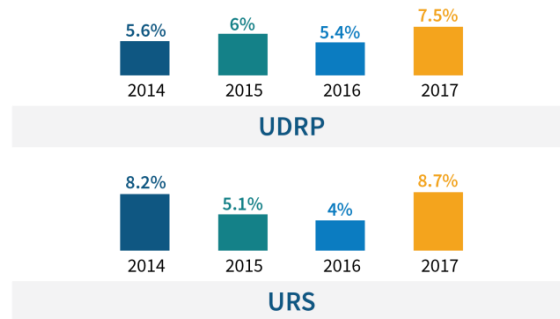


Table 16: Percent of Complaints to ICANN in each RPM Compared to Total Number of Domain Name Decisions in each RPM



⁵³⁰ ICANN, “Uniform Rapid Suspension (URS) Form,” accessed 9 August 2018, <https://forms.icann.org/en/resources/compliance/registries/urs/form>

⁵³¹ It should be noted that complaints regarding the merits of the decision are outside of ICANN's contractual scope.

⁵³² ICANN, “Competition, Consumer Trust and Consumer Choice (CCT) Metrics Reporting: Rights Protection Mechanisms: Metric 1.9.b: Combined UDRP and URS Complaints to ICANN,” accessed 9 August 2018, <https://www.icann.org/resources/pages/cct-metrics-rpm-2016-06-27-en#1.9.b>.

In 2014, the year that the URS was introduced, there was a relatively high number of complaints to ICANN. When compared to the total number of URS complaints that year, the level was at roughly 8 percent. This compares to the complaint level for the UDRP in 2014 of 5.6 percent. The higher level of implementation complaints concerning the URS compared to the UDRP may have been down due to a number of factors including its relative newness, the complexity of the process, and recent adoption by registrars.

Moving through 2015 and 2016, the relative number of complaints for the URS decreases, and in 2016, the relative number of URS related complaints compared to the UDRP was actually less, at 4 percent compared to 5.4 percent for the UDRP. It may be that over time, the complexities of the URS had been understood by registrars, registries, and end-users.

Trademark Clearing House (TMCH)

ICANN commissioned Analysis Group to undertake an independent review of TMCH services based on the Governmental Advisory Committee (“GAC”) recommendation in May 2011 that a comprehensive, post-launch review be performed.⁵³³ The review sought to assess the strengths and weaknesses of the TMCH services in light of that recommendation and was based on an analysis of TMCH and third-party data sources, as well as interviews and surveys of TMCH stakeholders. The 2017 revised report⁵³⁴ incorporated public comments into the draft report published on 25 July 2016.⁵³⁵

According to the report, the data obtained allowed for meaningful observations to be made about the use of the TMCH services studied. The research did not provide quantifiable information on the costs and benefits associated with the present state of the TMCH services. Indeed, the potential costs and benefits of expanding or altering the way the services function needed a concrete cost-benefit analysis, which was outside the scope of the Analysis Group report.

Summary of Findings

The report found that extending the Claims Service period, or expanding the matching criteria used for triggering the Claims Service notifications, may actually be of limited benefit to trademark holders. Indeed, such an extension would potentially be associated with increased costs to other stakeholder groups such as registries, registrars, and non-trademark-holder domain registrants. Data limitations prevented definitive conclusions being drawn.

The report noted that given the fact that a cost-benefit analysis had not been performed, a potential extension of the Claims Service or expansion of the matching criteria should consider the inevitable tradeoffs felt by different stakeholder groups. Indeed, the report stressed that when evaluating whether the Claims Service period should be extended, the number of potential registrations affected by the extension needs to be assessed. The effectiveness of the Claims Service notifications depends on how many registration attempts are being made; if there are few registration attempts, then there are fewer potentially infringing registrations being made.

⁵³³ ICANN GAC, (26 May 2011), *GAC comments on the Applicant Guidebook (April 15th, 2011 version)*, accessed 9 August 2018, <https://archive.icann.org/en/topics/new-gtlds/gac-comments-new-gtlds-26may11-en.pdf>.

⁵³⁴ Analysis Group (2017), *Independent Review of Trademark Clearinghouse (TMCH) Services Revised Report* (2017).

⁵³⁵ Analysis Group (July 2016), *Independent Review of Trademark Clearinghouse (TMCH) Services Draft Report*, accessed 9 August 2018, <https://newgtlds.icann.org/en/reviews/tmch/draft-services-review-25jul16-en.pdf>.

The report found that registration activity declined after the 90-day Claims Service period ends, thus any additional months added to the Claims Service period will likely have diminishing value.

The report also found that according to the data, trademark holders appeared less concerned about variations of trademark strings and thus felt that an expansion of the matching criteria may in fact bring little benefit to trademark holders. On the contrary, the potential harm towards non-trademark holder domain registrants could increase. The latter could find themselves deterred from registering trademark string variations that would not be considered trademark infringement.

Finally, the report considered the Sunrise period and the questionnaire feedback. It seems that while trademark holders felt that there is value in the Sunrise periods, and many do use them, having recorded their marks in the TMCH, many trademark holders in fact do not utilize the Sunrise period. The report concluded that this could be due to the expense of Sunrise domain name registrations or because other protections of the TMCH service, such as the Claims Service, reduce the need for trademark holders to utilize Sunrise registrations. The CCT Review Team feels that it is also likely due to the sheer number of new gTLDs. Defensive registrations, when multiplied across many new gTLDs, become cost prohibitive and few brand owners are willing to engage in the same way with large-scale defensive domain name registrations. The review team questioned whether the extra expense of the TMCH was actually bringing value, and not acting as a deterrent itself as an additional cost for brand owners.

Trademark Post-Delegation Dispute Resolution Procedure (TM-PDDRP)

ICANN Contractual Compliance has received no complaints regarding a registry operator's non-compliance with the TM-PDDRP. However, it should be noted that there is currently a GNSO Working Group conducting a Policy Development Process (PDP) to review all RPMs in all gTLDs.⁵³⁶ The Working Group is exploring possible impediments to implementation of the TM-PDDRP since there are no known PDDRP filings with arbitration providers to date.

Registry Restrictions Dispute Resolutions Procedure (RRDRP) Decisions

The RRDRP is intended to address circumstances in which a community-based new gTLD registry operator deviates from the registration restrictions outlined in its Registry Agreement. As of 17 July 2018, there have been no RRDRP cases.

Share of Sunrise Registrations and Domain Blocks to Total Registrations in Each TLD

As of 17 July 2018, the only available data on the number of Sunrise registrations compared to total registrations in new gTLDs are from ICANN. According to ICANN, there are no consolidated data available regarding commercial blocking services offered by registries.

Conclusion

The data above points to increasing numbers of disputes since the introduction of new gTLDs, with disputes rising year-on-year after their introduction. Indeed, in 2016, the total number

⁵³⁶ ICANN GNSO, "PDP Review of All Rights Protection Mechanisms in All gTLDs."

cases filed (UDRP and URS combined) was 36 percent higher than in 2013, when the first new gTLD entered the root zone (25 percent higher if the average number of cases during 2012 and 2013 is used as the baseline).

However, a rising number of domain name disputes is not in itself surprising, with the increased number of domain name registrations worldwide continuing to increase as new gTLDs are introduced into the root and more registrations occur.

A more pertinent question is whether there is proportionately more trademark infringement in new gTLDs than in legacy TLDs. This is a more difficult issue, as there are many factors involved in assessing trademark infringement, and few data are available. The INTA Impact Study is a good example of the complexities of obtaining such information.

In addition to the UDRP and URS, trademark owners also use a variety of other means to deal with abusive domain name registrations, such as court action and cease and desist letters, which are not tracked centrally, nor are the costs associated with such actions available. It is not within ICANN's remit to track or attempt to track such data either. However, ICANN does collect data on the usage of the dispute resolution mechanisms, the UDRP, and the URS, across all domain name dispute providers. This data shows that domain name disputes are rising. ICANN also provides data on the number of new gTLD registrations compared to total gTLD registrations (including both legacy and new gTLDs). This data also shows that gTLD domain name registrations are rising. However, ICANN's metrics do not show a breakdown of the relative use of UDRPs, i.e. the use of UDRPs in new gTLDs as opposed to legacy TLDs.

Thus, in order to attempt to answer the question of whether there is proportionately more trademark infringement in new gTLDs than in legacy TLDs, publicly available data from WIPO, the major dispute resolution provider, are a useful resource.

The WIPO data for 2017 show that cybersquatting disputes relating to new gTLDs rose to 12 percent of WIPO's 2017 caseload.⁵³⁷ Among these, the new gTLDs .STORE, .SITE and .ONLINE were the most common new gTLDs involved in such disputes.⁵³⁸ In 2017, disputes in the legacy gTLDs .com, .net, .org, and .info accounted for more than 80 percent of WIPO's domain name caseload, and just over 15 percent of it involved new gTLDs.⁵³⁹ ICANN statistics on domain name registrations for March 2018 show 196,450,282 gTLD registrations and 23,348,286 new gTLD registrations.⁵⁴⁰ Thus, new gTLDs account for 12 percent of the registration volume of gTLDs. This data provides a good indication that there is proportionately more trademark infringement presently in new gTLDs than in legacy TLDs.

Based on the analysis above, the review team cannot definitively conclude whether the URS is a valuable RPM given its low usage compared to the UDRP. The fact that the TM-PDDRP and RRDRP have not been invoked to date may on the one hand also bring their existence into question, but may equally underline that their mere existence is acting as a deterrent.

⁵³⁷ WIPO, "WIPO Cybersquatting Cases Reach New Record in 2017," 14 March 2018, accessed 9 August 2018, http://www.wipo.int/pressroom/en/articles/2018/article_0001.html

⁵³⁸ Ibid.

⁵³⁹ WIPO (2018), *Total Number of WIPO Domain Name Cases and Domain Names by Year*, accessed 9 August 2018, http://www.wipo.int/export/sites/www/pressroom/en/documents/pr_2018_815_annexes.pdf#annex1, Annex 2.

⁵⁴⁰ ICANN, "Monthly Transaction Reports," accessed 9 August 2018, <https://www.icann.org/resources/pages/registry-reports>

Recommendations

Recommendation 26: A study to ascertain the impact of the New gTLD Program on the costs required to protect trademarks in the expanded DNS marketplace should be repeated at regular intervals to see the evolution of those costs over time. The CCT Review Team recommends that the next study be completed within 18 months after issuance of the CCT final report, and that subsequent studies be repeated every 18 to 24 months.

The CCT Review Team acknowledges that the Nielsen survey of INTA members in 2017 was intended to provide insight into this topic but yielded a lower response rate than anticipated. The Team recommends a more user-friendly and perhaps shorter survey to help ensure a higher and more statistically representative response rate.

Rationale/related findings: Costs will likely vary considerably over time as new gTLDs are delegated and registration levels evolve. Repeating the Impact Study would enable a comparison over time.

To: ICANN organization

Prerequisite or priority level: High

Consensus within team: Yes

Details: The evolution of costs required to protect trademarks over time will provide a more precise picture of the effectiveness of RPMs generally in the DNS.

Success measures: The results of future impact studies should provide significantly more data to the relevant working groups currently looking into RPMs and the TMCH, as well as to future working groups, thereby benefiting the Community as a whole. Recommendations would then also be able to evolve appropriately in future CCT Review Teams.

Recommendation 27: Since the Review Team's initial draft recommendation, the PDP Review of All RPMs in All gTLDs Working Group started reviewing the URS in detail and, at the time of writing, their review is ongoing. Given this ongoing review, the Review Team recommends that the Working Group continue its review of the URS and also looks into the interoperability of the URS with the UDRP.

The review team encountered a lack of data for complete analysis. The PDP Review of All RPMs appears to also be encountering this issue and this may well prevent it from drawing firm conclusions. If modifications are not easily identified, then the CCT Review Team recommends continued monitoring until more data is collected and made available for review at a later date.

Rationale/related findings: It is important for all gTLDs to have a level playing field, so the applicability of the URS should be considered for all gTLDs.

To: Generic Names Supporting Organization

Prerequisite or priority level: Prerequisite

Consensus within team: Yes

Details: A review of the URS should explore potential modifications, such as: (1) whether there should be a transfer option with the URS rather than only suspension; (2) whether two full systems should continue to operate (namely the UDPR and URS in parallel), considering their relative merits; (3) the potential applicability of the URS to all gTLDs; and (4) whether the availability of different mechanisms applicable in different gTLDs may be a source of confusion to consumers and rights holders.

Success measures: Based on the findings, a clear overview of the suitability of the URS and whether it is functioning effectively in the way originally intended.

Recommendation 28: A cost-benefit analysis and review of the TMCH and its scope should be carried out to provide quantifiable information on the costs and benefits associated with the present state of the TMCH services, and thus to allow for an effective policy review. Since the review team's initial draft recommendation, the PDP Review of All RPMs in All gTLDs Working Group has started reviewing the TMCH in detail and ICANN has appointed Analysis Group to develop and conduct the survey(s) to assess the use and effectiveness of the Sunrise and Trademark Claims RPMs. Provided that the PDP Working Group has sufficient data from this survey or other surveys and is able to draw firm conclusions, the review team does not consider that an additional review is necessary. However, the CCT Review Team reiterates its recommendation for a cost-benefit analysis to be carried out if such analysis can enable objective conclusions to be drawn. Such cost-benefit analysis should include, but not necessarily be limited to, looking at cost-benefits of the TMCH for brand owners, registries, and registrars now and going forward, as well as examine the interplay of the TMCH with premium pricing.

Rationale/related findings: The Independent Review of Trademark Clearinghouse (TMCH) Services Revised Report was unable to provide definitive conclusions on the relative utility of the TMCH due to data limitations. Analysis Group noted in the report that it was unable to perform a cost-benefit analysis of extending the Claims Service or expanding the matching criteria.⁵⁴¹

To: Generic Names Supporting Organization

Prerequisite or priority level: Prerequisite

Consensus within team: Yes

Details: There appears to be considerable discussion⁵⁴² on whether the TMCH should be expanded beyond applying to only identical matches and if it should be extended to include

⁵⁴¹ Analysis Group (2017), *Independent Review of Trademark Clearinghouse (TMCH) Services Revised Report* (2017).

⁵⁴² Trademark Clearinghouse, "Fee Structure Summary 1.1," accessed 5 September 2018, http://trademark-clearinghouse.com/sites/default/files/files/downloads/trademarkclearinghouse_fee_structure_01-04-2015_2.pdf. "Recent developments It was decided on 20 March 2013 that most aspects of ICANN's "Strawman Solution" would be implemented in order to extend protections under the new gTLD program. One approved feature was the Trademark +50 (TM+50) abused variations model, whereby trademark owners are now permitted to attach up to 50 previously abused domain registrations to a TMCH record, which have been connected to a Uniform Domain-Name Dispute-Resolution Policy (UDRP) or court proceeding at the national level. These Labels are not eligible for Sunrise registration periods, but they do qualify for Trademark Claims." See Com Laude, "The Trademark Clearinghouse: Pinning labels on verified trademark records," 29 August 2013, accessed 5 September 2018, <https://comlaude.com/news/trademark-clearinghouse-pinning-labels-verified-trademark-records-0>.

"Expanding Matching Criteria to include non-exact matches may be of limited benefit: The dispute rate of completed registrations that are variations of trademark strings is very low. — "We also find that trademark holders infrequently dispute registrations that are variations of trademark strings. Given the low dispute rates, an

“mark+keyword” or common typographical errors of the mark in question. If an extension is considered valuable, then the basis of such extension needs to be clear.

Success measures: The availability of adequate data to make recommendations and allow an effective policy review of the TMCH.

expansion of the matching criteria may bring little benefit to trademark holders and only harm non trademark-holder domain registrants, who may be deterred from registering trademark string variations that would otherwise not be considered a trademark infringement by trademark holders or authorities who make such determinations.” See Philip S. Corwin, “TMCH Review Recommends Status Quo,” CircleID, 1 August 2016, accessed 5 September 2018, http://www.circleid.com/posts/20160801_tmch_review_recommends_status_quo/.

10 Application and Evaluation Process of the New gTLD Program

In addition to exploring the consumer welfare impact of the New gTLD Program, the CCT Review Team was charged with evaluating the “effectiveness” of the Application and Evaluation process.⁵⁴³ Obviously, this is a potentially overbroad mandate, especially given the concurrent GNSO PDP on new gTLD subsequent procedures.⁵⁴⁴ Therefore, instead of focusing on the possible inefficiencies of the application and evaluation process, the CCT Review Team decided to focus on possible inequities in the process. These include the potential for the process to favor some communities over others, some regions over others, or simply produce inconsistent and unpredictable results.

Applications and the “Global South”

One of the questions that the CCT Review Team addressed was whether the application and evaluation process was effective in serving the needs of previously underserved regions or communities, sometimes referred to as the “developing world.” In particular, the review team endeavored to determine if these communities had special needs that were not met or resource deficiencies that were insufficiently supplemented to create a level playing field among all potential applicants. For purposes of this review, the Global South was defined to include Africa, Latin America, the Caribbean, India, and Southeast Asia, excluding China.⁵⁴⁵

Of course, the only “hard” data on applications from the Global South was their **scarcity**. In total, there were only 303 applications from the Global South and only 200 continued all the way to delegation.⁵⁴⁶ To better understand the challenges faced by those applicants, the CCT Review Team commissioned a survey of applicants, conducted by Nielsen.⁵⁴⁷ Unfortunately, low participation in the survey meant that only two respondents were from the Global South,⁵⁴⁸ but these nonetheless identified some special problems that were faced by applicants from the Global South.

A trickier task was to determine why there were so few applications for new strings from these regions. There were a number of possible explanations: insufficient outreach by ICANN, insufficient funds for applicants, insufficient technical expertise, or possibly insufficient market confidence. Given the low penetration of ccTLD registrations in the Global South,⁵⁴⁹ it might simply have been rational for potential applicants to adopt a “wait-and-see” posture. Moreover, to the extent that promotion of the New gTLD Program by ICANN would be considered part of

⁵⁴³ ICANN, *Affirmation of Commitments* (September 2009).

⁵⁴⁴ ICANN GNSO, “PDP New gTLD Subsequent Procedures.”

⁵⁴⁵ “Global South” is a fluid and sometimes contested term used by social scientists to refer broadly to regions in Latin America, Asia, Africa, and Oceania. For an overview of the term’s origins and use, see Nour Dados and Raewyn Connell, “The Global South,” *Contexts: Journal of the American Sociological Association* [11, 1] (2012): <http://journals.sagepub.com/doi/pdf/10.1177/1536504212436479>

⁵⁴⁶ ICANN, “Competition, Consumer Trust and Consumer Choice (CCT) Metrics Reporting: Registries,” accessed 10 August 2018, <https://www.icann.org/resources/pages/cct-metrics-registries-2016-06-27-en>.

ICANN, “Program Statistics”, accessed 25 January 2017, <https://newgtlds.icann.org/en/program-status/statistics>. The total number of applications received from the Global South excludes 41 applications from China.

⁵⁴⁷ Nielsen (December 2016), *ICANN Application Process Survey*, accessed 10 August 2018, <https://community.icann.org/download/attachments/56135378/2016%20ICANN%20Application%20Process%20Report.pdf?version=1&modificationDate=1482246915000&api=v2>.

⁵⁴⁸ *Ibid.*

⁵⁴⁹ ICANN, “Zooknic ccTLD data,” accessed 10 August 2018, <https://community.icann.org/display/CCT/Studies%2C+Research%2C+and+Background+Materials?preview=/56135378/60492555/Zooknic%20ccTLD%20data.xlsx>.

the “application and evaluation” process, it is certainly useful to understand what kinds of information were available to potential applicants from the Global South.

To that end, the Review Team commissioned a study by AMGlobal, which included evaluating the characteristics of those entities from the Global North that had applied for new strings, identifying similar entities in the Global South that had not applied, and conducting a phone survey of a sample of those entities to better understand their reasons for nonparticipation.⁵⁵⁰ Although it was not feasible to conduct a statistically valid survey of potential applicants, the anecdotal data (largely from Latin America) suggest a number of areas for improvement in outreach and facilitation efforts by ICANN in any future rounds. In particular, the review team wanted to explore the program outreach and applicant support, both financial and non-financial.

Program Outreach

The AMGlobal Study indicated that limited awareness of the New gTLD Program and unfamiliarity with ICANN were key factors limiting participation from the Global South. Fewer than half of the interviewees described having moderate to high levels of awareness of the Program and many said that despite having some information, they felt they did not have needed details. Almost one-third all interviewees said that they had almost no knowledge of the Program or had never heard about it at all. Many interviewees who had heard “something” noted they had no understanding of the Program’s connection to ICANN, and about one-third of all interviewees had no knowledge of ICANN at all. Given the newness of the idea of new gTLDs in many emerging markets, this lack of information was a significant issue.⁵⁵¹

ICANN carried out a promotional campaign for the Program that included online advertising and outreach through its regional centers. These included live presentations, live consultations, and webinars.⁵⁵² It chose to eschew what might be considered “sales” in favor of general information, arguing that it was not in its remit to convince the market to apply for strings, but rather to make it known that applications were being accepted.⁵⁵³ Many in the Community believed that these outreach efforts were insufficient,⁵⁵⁴ and the responses from the AMGlobal Study appear to bear that out.

One barrier to entry, especially in Latin America, was the limited time window between the provision of information to the close of the new round. While many in the ICANN Community have been waiting for the start of a new gTLD round, it was news to many in the Global South. A number of interviewees in the AMGlobal Study admonished ICANN for providing information too late, thus providing inadequate time for decision-making.⁵⁵⁵ This seemed to have especially affected decision-making at large conglomerates and government entities, which suggested that they might need six months or more to fully explore, socialize, and win approval for a new gTLD initiative. As a number of Latin American respondents suggested, it could take time to find the right home or champion within a large organization for an initiative as new as

⁵⁵⁰ AMGlobal, *New gTLDs and the Global South*.

⁵⁵¹ Ibid.

⁵⁵² ICANN, “New gTLD Program Global Consultation and Outreach Events,” accessed 10 August 2018, <https://archive.icann.org/en/topics/new-gtlds/consultation-outreach-en.htm>.

⁵⁵³ Ibid.

⁵⁵⁴ Avri Doria, “The need for a remedial gTLD program for #newgtlds,” accessed 10 August 2018, <http://avri.doria.org/post/74920388723/the-need-for-a-remedial-gtld-program-for-newgtlds>;

Constantine Roussos, “Role of influencers and media in ICANN’s TLD global awareness campaign: How ICANN can create a strong value proposition with new Top-Level Domain extensions to benefit the Internet,” 9 July 2011, accessed 10 August 2018, <http://mytld.com/articles/3018-influencers-media-icann-top-level-domains-tld-benefits-internet.html>.

⁵⁵⁵ AMGlobal, *New gTLDs and the Global South*, p. 10.

a new gTLD.⁵⁵⁶ Time issues were cited by nearly 19 of the 37 respondents, with 11 citing this as their number one constraint to participation. Many interviewees either heard about the Program too late or said they simply did not have enough time to fully explore the idea.⁵⁵⁷

Applicant Informational Support

Many respondents who were aware of the Program cited a lack of complete information and/or clear communication as key constraints to participation.⁵⁵⁸ Communications around the Program were described by interviewees as “complicated” and “dense,” and “more for insiders than for me or the general public.”⁵⁵⁹ Information around Program deadlines, application costs, and longer-term costs were all cited as areas where information was either hard to understand or poorly understood. Inadequate information about the Program was mentioned by 30 of the 37 respondents as a constraint, with 10 of them ranking the lack of information as their number one concern.⁵⁶⁰ The Nielsen survey of applicants revealed a general insufficiency of information from ICANN, with only 49 percent of applicants saying they got enough information from ICANN.⁵⁶¹

Given the high propensity to use some form of consulting services—62 percent of applicants indicated they did so—it stands to reason that such services would be in even higher demand in underserved markets.⁵⁶² It is not clear the sufficient support was available to potential applicants in the Global South.

The Applicant Support Program (ASP) is a program that was conceptualized by the Joint Applicant Support Working Group (JASWG) in order to provide assistance to gTLD applicants in underserved regions and communities to ensure worldwide accessibility and competition within the New gTLD Program.⁵⁶³ Entities interested in the ASP had three options:

- ⦿ Access to *pro bono* services for startup gTLD registries through the Applicant Support Directory: New gTLD applicants, particularly from developing countries, were able to obtain financial and technical information or assistance from members of the ICANN Community who had agreed to provide financial or nonfinancial *pro bono* services.⁵⁶⁴
- ⦿ Financial assistance: reduced evaluation fees were provided to qualified applicants.
- ⦿ The Applicant Support Fund: a \$2,000,000 seed fund was set aside by ICANN to help applicants who demonstrated need.

The non-financial support aspect of the ASP called for Community volunteers to provide *pro bono* services to potential applicants. In total, 20 entities volunteered to provide these services.⁵⁶⁵ Approximately 40 potential applicants expressed interest in *pro bono* support, with

⁵⁵⁶ Ibid., p. 10.

⁵⁵⁷ Ibid., p. 10.

⁵⁵⁸ Ibid., p. 9.

⁵⁵⁹ Ibid., p. 9.

⁵⁶⁰ Ibid., pp. 9-10.

⁵⁶¹ Nielsen, *ICANN Application Process Survey*.

⁵⁶² Ibid.

⁵⁶³ ICANN, “Understanding the Applicant Support Program,” accessed 25 January 2017, <https://newgtlds.icann.org/en/applicants/candidate-support>.

⁵⁶⁴ ICANN, “Applicant Support Directory,” accessed 10 August 2018, <https://newgtlds.icann.org/en/applicants/candidate-support/non-financial-support#organizations-offering-support>

⁵⁶⁵ ICANN, “Applicant Support Directory,” accessed 25 January 2017, <https://newgtlds.icann.org/en/applicants/candidate-support/non-financial-support#organizations-offering-support>

half of these potential applicants from the Global South.⁵⁶⁶ Unfortunately, efforts by the review team to obtain information from either the volunteers or applicants for support about these efforts were unsuccessful. Consequently, the efficacy of this program cannot be evaluated, and better coordination and data collection in subsequent procedures for new gTLDs is called for.

Despite the availability of such services, the AMGlobal research revealed concerns centered around the lack of an obvious business plan for a new gTLD for potential applicants from the Global South. This issue was cited by the vast majority (31 out of 37 of respondents), although others—citing time or information concerns, which were often the first issues raised—ranked it as a somewhat lower priority concern (only nine respondents said this was their primary or secondary driver).⁵⁶⁷

A number of applicants across different regions—and especially in Asia and the Middle East—also cited concerns about customer confusion as a major constraint to submitting an application. They wondered if customers would understand and use a new gTLD and expressed concern about the impact of a new gTLD on search engine optimization (SEO).⁵⁶⁸

New gTLD Application and Program Costs

Another concern for potential applicants in the Global South was cost, both of the application process itself as well as running a new gTLD. Accordingly, the JASWG also specified a discounted application fee of only \$47,000.⁵⁶⁹ However, there were only three applicants for financial support,⁵⁷⁰ so it is difficult to assess the effectiveness of the support program.

Price and longer-term running cost were important issues expressed by many interviewees.⁵⁷¹ Although many of the interviewees said they believed their organizations could probably afford the kind of investment needed, almost none had a clear sense of the real costs involved in applying for or running a new gTLD, and many felt the cost was too high for them or potential applicants like them. Consequently, it is difficult to assess the role of cost in decisions not to apply. It seems as though uncertainty surrounding costs was as big an issue as the costs themselves, especially the application fee.

Still, as the ICANN Program Implementation Review notes, “given the low number of applications submitted, consideration should be given to exploring how the Program can be improved to serve its intended purpose.”⁵⁷²

Recommendations

A number of factors appear to have contributed to the low participation in the New gTLD Program by actors in the Global South. These include insufficient information about the Program, market uncertainty, and financial uncertainty. While the need for more clarity and more substantial outreach may be necessary to increase participation in future rounds, the ICANN Community must determine whether increased participation is the ultimate goal. Given

⁵⁶⁶ Ibid.

⁵⁶⁷ AMGlobal, *New gTLDs and Global South*, p. 10.

⁵⁶⁸ Ibid., p. 11.

⁵⁶⁹ ICANN, “Understanding the Applicant Support Program.”

⁵⁷⁰ ICANN, *Program Implementation Review*.

⁵⁷¹ AMGlobal, *New gTLDs and Global South*, p. 12.

⁵⁷² ICANN, *Program Implementation Review*, p. 159.

the low participation in the DNS itself in the Global South,⁵⁷³ reflected in registrations in existing TLDs, some caution should be exercised in the promotion of subsequent procedures in underserved regions. Some have called for “capacity building” to lay the necessary groundwork for new registries,⁵⁷⁴ but, absent market demand for domains in general, efforts to expand participation in these markets might be better placed elsewhere.

One counterpoint is that several respondents in the AMGlobal survey indicated interest in applying for a string in a future round.⁵⁷⁵ This suggests that the provision of more and better information by ICANN might increase the number of applicants.

Improved Outreach

Beginning the communications process earlier was a common refrain expressed by respondents to the AMGlobal survey.⁵⁷⁶ This would allow information about the applicant process to find its way to less technical decision-makers and perhaps even the public. Of course, a more extensive public outreach program would represent a considerable commitment by ICANN, but the added time might lead to a greater number of applications. In addition, expanded participation in conferences and events where the audience already exists, for example, by targeting conferences of professional associations, might have a similar effect.⁵⁷⁷

Informational Content

Another deficiency reported in the AMGlobal Survey related to outreach efforts concerns the content that was provided. This might have been unavoidable given the newness of the Program, but an emphasis on risk mitigation in outreach efforts seems designed more to put already engaged interests at ease rather than to broadening the appeal of the program.⁵⁷⁸ Instead, content focused on successful case studies and business model templates might embolden more tentative players to explore their options.⁵⁷⁹ Recognizing that this is challenging (given the need for ICANN as an institution to remain neutral in the competitive landscape), the AMGlobal Survey suggests that there may be a real demand for documentation of success cases that can be shared with the potential applicant community. The information needs to be straightforward and aimed at audiences with different levels of technical expertise, with a goal of answering one simple question: if our group, association, or organization decides to go forward, what path(s) can we take and what would we get out of it? This is one of most important issues mentioned across numerous markets, and if at all possible, one ICANN needs to address.

Program Costs

There appear to be efforts already underway to reduce application costs and inefficiencies generally. However, the Applicant Support Program, while well intentioned, appears to have

⁵⁷³ ICANN, “Zooknic ccTLD data.”

⁵⁷⁴ Doria, “The need for a remedial gTLD program for #newgtlds.”

⁵⁷⁵ AMGlobal, *New gTLDs and Global South*, p. 13.

⁵⁷⁶ *Ibid.*, p. 16.

⁵⁷⁷ Reaching out via professional and trade associations about new gTLDs and the application process was the top recommendation regarding outreach from respondents to the AMGlobal Survey. See p. 16.

⁵⁷⁸ Philip Corwin, Internet Commerce Association, “ICANN Road Show Opens on Broadway to Mixed Reviews,” 14 July 2009, accessed 10 August 2018, <http://www.internetcommerce.org/icann-road-show-opens-broadway-mixed-reviews/>.

⁵⁷⁹ AMGlobal, *New gTLDs and Global South*.

missed the mark either in its design or execution. This suggests that greater study on how to subsidize participation from underserved markets is necessary, perhaps, as the ICANN Program Implementation Review suggests, by looking at existing programs from institutions such as the World Bank.⁵⁸⁰

That said, cost was rarely given as the primary rationale for the failure to participate. Instead, cost appears to have been primarily an informational issue. With a clear business model and sufficient assistance in navigating the application process, it is possible that there will be greater participation in future rounds by applicants from the Global South.

Recommendations

Recommendation 29: Set objectives/metrics for applications from the Global South.

Rationale/related findings: Applications were few, but there was no concerted effort to encourage them.

To: New gTLD Subsequent Procedures PDP Working Group/Generic Supporting Names Organization

Prerequisite or priority level: Prerequisite—objectives must be set

Consensus within team: Yes

Details: The New gTLD Subsequent Procedures Working Group needs to establish clear, measurable goals for the Global South, including whether or when applications and even number of delegated strings should be objectives. It is possible that short-term objectives should be around second-level participation.

Success measures: Increased participation by the Global South as demonstrated by increased applications and delegations.

Recommendation 30: Expand and improve outreach into the Global South.

Rationale/related findings: Low understanding of New gTLD Program in the Global South

To: ICANN organization

Prerequisite or priority level: Prerequisite

Consensus within team: Yes

Details: If increased applications from the Global South is determined to be an objective for a future round of applications, outreach to the Global South requires a more comprehensive program of conference participation, thought leader engagement, and traditional media. The work of AMGlobal should be built upon to identify targets, outlets, and venues for better outreach. This outreach should include cost projections, potential business models, and resources for further information. Furthermore, the review team recommends that the outreach program begin significantly earlier to facilitate internal decision-making by potential applicants.

⁵⁸⁰ ICANN, *Program Implementation Review*, p. 159. For example, see The World Bank, “What We Do,” accessed 10 August 2018, <http://www.worldbank.org/en/about/what-we-do>

Success measures: Ideally, success would be measured in appreciable growth in applications from the Global South. In the absence of such growth, ICANN should survey entities in the Global South again to determine the sources of the difficulties that continue to be faced by potential applicants.

Recommendation 31: The ICANN organization to coordinate the *pro bono* assistance program.

Rationale/related findings: Despite the registration of both volunteers and applicants, there is no evidence of interaction.

To: ICANN organization

Prerequisite or priority level: Prerequisite

Consensus within team: Yes

Details: Again, if additional applications from the Global South is determined to be an objective of a future round, the *pro bono* assistance program would be coordinated by the ICANN organization to ensure that communication is successful between volunteers and applicants.

Success measures: Both volunteers and applicants should be surveyed by the ICANN organization on the success of the interaction between them so that future reforms can be based on better information.

Recommendation 32: Revisit the Applicant Financial Support Program.

Rationale/related findings: Only three applicants applied for support.

To: New gTLD Subsequent Procedures Working Group

Prerequisite or priority level: Prerequisite

Consensus within team: Yes

Details: The total cost of getting a new gTLD string far exceeds the USD \$185,000 application fee. Beyond efforts to reduce the application fee for all applicants, efforts should be made to further reduce the overall cost of application, evaluation, and conflict resolution, including additional subsidies and dedicated support for applicants from the Global South.

Success measures: Greater participation in the Applicant Support Program.

Preventing Delegations That Would Be Confusing or Harmful

To ensure that the New gTLD Program would not only contribute to competition, consumer trust, and consumer choice in the DNS marketplace, it was important that the introduction of new gTLDs not be confusing or harmful either to the DNS itself or to potential users. While ICANN's initial assessment of applications for new gTLDs was intended to assess whether

new gTLD strings that had been applied for might adversely affect DNS security or stability, there was also the possibility for the Governmental Advisory Committee (GAC) to provide formal advice to the ICANN Board (following its usual procedures)⁵⁸¹ or via “Early Warnings” to applicants that certain new gTLD applications might be confusing or harmful.⁵⁸² There were no limitations or restrictions on the nature or type of GAC Early Warnings, although the GAC had indicated that strings that could raise sensitivities include those that “purport to represent or that embody a particular group of people or interests based on historical, cultural, or social components of identity, such as nationality, race or ethnicity, religion, belief, culture or particular social origin or group, political opinion, membership of a national minority, disability, age, and/or a language or linguistic group (non-exhaustive)” and “those strings that refer to particular sectors, such as those subject to national regulation (such as .bank, .pharmacy) or those that describe or are targeted to a population or industry that is vulnerable to online fraud or abuse.”⁵⁸³

The idea behind GAC Early Warnings was that advance indications of potential problems would either stop particularly problematic applications at an early stage (thus permitting the applicant to recover the bulk of its application fee) or be adjusted to meet the public policy concerns raised by the Early Warning.⁵⁸⁴

The review team assessed whether GAC Early Warnings influenced or affected the new gTLD applications by ensuring that delegations that might be confusing or harmful were stopped or limited. The Warnings had an influence on a number of new gTLD applications regarding consumer protection or applicable law and were instrumental in withdrawals of some applications involving geographic names.⁵⁸⁵

The review team looked at the number of GAC Early Warnings that were made with respect to withdrawn applications, the reasons for those withdrawals, and whether any Early Warning was directly responsible for applications being put on hold and the reasons why that was the case. Of the 1,930 applications, 575 were withdrawn by the applicants.⁵⁸⁶ Of the 187 applications that received an Early Warning as of December 2016, 89 were delegated and 65 were withdrawn.⁵⁸⁷ Most withdrawn applications related to multiple applications for the same string. Most substantive withdrawals related to conflicts with geographic names, for example, .guangzhou, .roma and .zulu. This is a limited number, and the majority of withdrawals do not appear to be directly related to Early Warnings *per se*, but rather to multiple applications for the same name.

Another issue addressed by the review team was whether GAC Early Warning advice was associated with the addition of Public Interest Commitments (PICs) intended to reduce

⁵⁸¹ ICANN, *gTLD Applicant Guidebook* (2012). The AGB addressed the procedures for GAC Advice on new gTLDs in section 1.1.2.7 and 3.1. See also ICANN, “GAC Early Warning,” accessed 10 August 2018, <https://newgtlds.icann.org/en/applicants/gac-early-warning> and ICANN GAC, “GAC Early Warnings,” accessed 10 August 2018, <https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings>

⁵⁸² *Ibid.*, Section 1.1.2.4. GAC EW had to be submitted during the public comment period, did not require consensus of other GAC members (unlike GAC advice to the Board), had to be submitted via the ICANN Board, and did not constitute a formal objection. GAC EW advice was intended to “address applications...identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities.”

⁵⁸³ ICANN, *gTLD Applicant Guidebook* (2012), p. 1-8.

⁵⁸⁴ *Ibid.*, p. 1-42. The refund available to an applicant within 21 days of a GAC Early Warning was 80 percent of the application fee, or US\$148,000.

⁵⁸⁵ The introduction of Public Interest Commitments, which was the subject of GAC advice to the ICANN Board on the New gTLD Program, is addressed in the “Public Interest Commitments” section of this report.

⁵⁸⁶ It should be noted that these include multiple applications for the same string. The number of withdrawn applications, and applications that received GAC Early Warnings, is calculated as of December 2016. See ICANN, “New gTLD Current Application Status,” accessed 10 August 2018, <https://gtldresult.icann.org/application-result/applicationstatus>. The page contains a search function with a capability to filter applications on the basis of whether they’ve received a GAC Early Warning.

⁵⁸⁷ *Ibid.* See also ICANN, “Program Statistics.”

potential harm to consumers and whether Early Warning advice resulted in any other changes to new gTLD applications. Of the 84 delegated gTLDs that received Early Warnings, 50 added PICs, primarily for sensitive or regulated sectors like .tax, .doctor, and .casino. It is possible that the specific GAC Early Warning advice in these cases encouraged the applicants to add PICs intended to protect consumers.⁵⁸⁸

Two other cases involved .halal and .islam. GAC Early Warning advice, which initially resulted in the delegation being put on hold, are now the subject of Independent Review proceedings.⁵⁸⁹ In a 4 November 2013 letter from the Organization of Islamic Cooperation (OIC) to the GAC Chair, the OIC requested that its letter be considered an “official opposition of the Member States of the OIC towards probable authorization by the GAC allowing the use of [...] .ISLAM and .HALAL by any entity not representing the collective voice of the Muslim people.”⁵⁹⁰ In a 7 February 2014 letter, ICANN noted to the applicant that there seems to be a conflict between the commitments made in the applicant’s letters and the concerns raised in letters to ICANN urging ICANN not to delegate the strings. Given these circumstances, the NGPC stated that it would not address the applications further until the conflicts have been resolved.⁵⁹¹

Overall, GAC Early Warnings appear to have been a useful and timely component of the public comment period, permitting applicants to ensure that public policy or related concerns could be addressed prior to delegation. It also permitted withdrawal of an application and reimbursement of part of the application fee in certain cases.

Recommendation

Recommendation 33: As required by the October 2016 Bylaws, GAC consensus advice to the Board regarding gTLDs should also be clearly enunciated, actionable, and accompanied by a rationale, permitting the Board to determine how to apply that advice.⁵⁹² ICANN should provide a template to the GAC for advice related to specific TLDs in order to provide a structure that includes all of these elements. In addition to providing a template, the Applicant Guidebook should clarify the process and timelines by which GAC advice is expected for individual TLDs.

Rationale/related findings: The GAC Early Warnings helped applicants to improve delegated gTLDs by ensuring that public policy or public interest concerns were addressed and should continue to be an element of any future expansion of the gTLD space. Applicants could

⁵⁸⁸ A further review of the linkages between PICs relating to consumer protection and GAC Advice can be found in the “Public Interest Commitments” section of this report.

⁵⁸⁹ See: ICANN, “Independent Review Process Documents,” accessed 10 August 2018, <https://www.icann.org/resources/pages/accountability/irp-en>; ICANN, “Asia Green IT Systems Bilgisayar San. ve Tic. Ltd. Sti. v. ICANN (.ISLAM/.HALAL),” accessed 10 August 2018, <https://www.icann.org/resources/pages/irp-agit-v-icann-2015-12-23-en>; “GAC Early Warning – Submitted Halal-AE-60793,” accessed 10 August 2018, <https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings?preview=/27131927/27197890/Halal-AE-60793.pdf>; “GAC Early Warning – Submitted Islam-AE-23450,” accessed 10 August 2018, <https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings?preview=/27131927/27197891/Islam-AE-23450.pdf>; “GAC Early Warning – Submitted Islam-IN-23459,” accessed 10 August 2018, <https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings?preview=/27131927/27197989/Islam-IN-23459.pdf>; “GAC Early Warning – Submitted Halal-IN-60793,” accessed 10 August 2018, <https://gacweb.icann.org/display/gacweb/GAC+Early+Warnings?preview=/27131927/27197987/Halal-IN-60793.pdf>.

⁵⁹⁰ Steve Crocker ([former] Chair, ICANN Board of Directors), “RE: Letter from the Secretary General of the Organisation of Islamic Cooperation,” letter to GAC Chair, 11 November 2013, <https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-11nov13-en.pdf>.

⁵⁹¹ “2013-11-20-islam-halal-GAC Register of Advice,” accessed 10 August 2018, <https://gacweb.icann.org/display/GACADV/2013-11-20-islam-halal>.

⁵⁹² ICANN, “Bylaws,” (2016). Section 3.6.

withdraw their applications if they determined that the response or action required to respond to GAC Early Warning advice was either too costly or too complex, and to do so in a timely manner that would permit them to recover 80 percent of the application cost.⁵⁹³

Where general GAC advice was provided by means of communiqués to the ICANN Board, it was sometimes not as easy to apply to the direct cases.⁵⁹⁴ Applying for a gTLD is a complex and time-consuming process, and the initial AGB was amended even after the call for applications had closed. Given the recommendations to attempt to increase representation from applicants from the Global South, it would be appropriate to ensure that the clearest possible information and results from the last round are made available.⁵⁹⁵

To: New gTLD Subsequent Procedures PDP Working Group, GAC, ICANN organization

Prerequisite or priority level: Prerequisite

Consensus within team: Yes

Details: While the details should be left to the Subsequent Procedures PDP Working Group, the CCT Review Team believes there should be a mechanism created to specifically allow objections and means to challenge assertions of fact by individual members of the GAC. Finally, some sort of appeals mechanism is imperative.

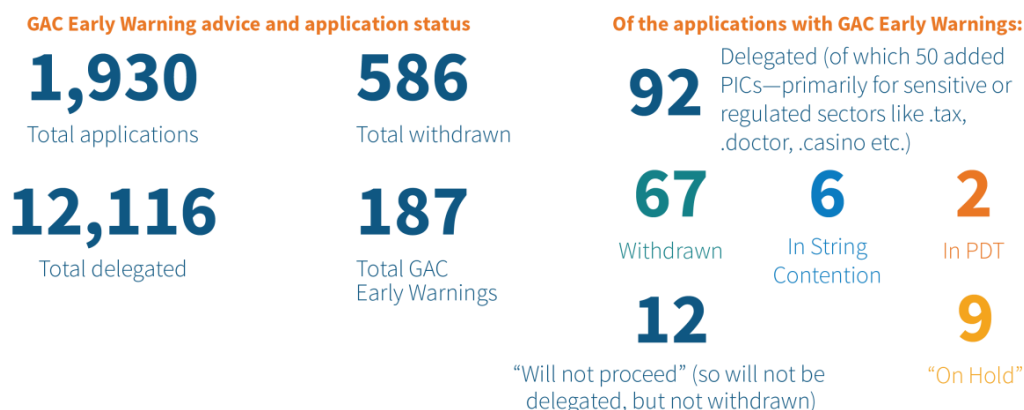
Success measures: This recommendation stems from a more qualitative assessment by the review team and anecdotal feedback from applicants. Consequently, the measures for success will be similarly qualitative as the next CCT Review Team evaluates the process of gTLD application moving forward. That said, the proof will lie in the implementation of the recommendation. With a structured process and template for the submission of GAC advice, and a process for objection and appeal, the most frequently voiced concerns of applicants regarding such advice will be addressed.

⁵⁹³ In 2 of the 187 GAC Early Warning cases, the applications were withdrawn within 21 days of receiving the Warning, which permitted the applicants to receive the 80 percent refund. See ICANN, *Program Implementation Review*, p. 43.

⁵⁹⁴ ICANN's *Program Implementation Review* (p. 96) shows that although 187 applications received GAC Early Warning advice, some 355 applications were subject to GAC advice via communiqués to the ICANN Board only, and did not have the same advantage of GAC Early Warning specificity or predictability.

⁵⁹⁵ See also the discussion on "Application and the Global South" earlier in this chapter.

Table 17: Applications Receiving GAC Early Warning Advice⁵⁹⁶



Allowing Specific Communities to Be Served by a Relevant TLD

The Applicant Guidebook included a special provision for applications for new gTLDs that could be designated as serving a specific community.⁵⁹⁷ Any application wishing to be designated as a community-based gTLD had to show “an ongoing relationship with a clearly delineated community,” that the string applied for was “strongly and specifically related to the named community,” that there were dedicated registration and use policies for registrants including security verification, and show that the application was endorsed by one or more communities representing the community-based gTLD.⁵⁹⁸ All other applications were not presumed to be community-based. However, formal objections on community grounds could be raised against any application, even if it had not been submitted as a community application. Of the 62 community objections raised, the the International Chamber of Commerce (a primary dispute resolution provider) found in favor of the community in 12 gTLDs, the objectors failed for 31 gTLDs, and objections were dropped for 19 gTLDs.⁵⁹⁹

Where a community had applied for a community-based gTLD and a “standard” applicant had applied for the same gTLD, a different evaluation process and criteria applied. The criteria and process for Community Priority Evaluation (CPE) were established to determine whether the community gTLD should be awarded priority in a contention set.⁶⁰⁰

⁵⁹⁶ ICANN, “New gTLD Current Application Status page,” (updated as of 23 February 2017). Note that one application with GAC Early Warning is both on hold and in string contention.

⁵⁹⁷ ICANN, *Applicant Guidebook* (2012), Section 1.2.3.1: “Community-based applications are intended to be a narrow category, for applications where there are unambiguous associations among the applicant, the community served, and the applied-for gTLD string. Evaluation of an applicant’s designation as community-based will occur only in the event of a contention situation that results in a community priority evaluation. However, any applicant designating its application as community-based will, if the application is approved, be bound by the registry agreement to implement the community-based restrictions it has specified in the application. This is true even if there are no contending applicants.”

⁵⁹⁸ Ibid.

⁵⁹⁹ See International Chamber of Commerce, “Pending Cases,” <https://iccwbo.org/dispute-resolution-services/icann-gtld-process/pending-cases/> and “Expert Determinations,” <https://iccwbo.org/dispute-resolution-services/icann-gtld-process/expert-determinations/>, accessed 10 August 2018.

⁶⁰⁰ ICANN, “Community Priority Evaluation,” accessed 10 August 2018, <https://newgtlds.icann.org/en/applicants/cpe>. The community applicant had to score at least 14 points to prevail in a CPE. If those 14 points were not attained, then there was no “priority” for the community that claimed it and the contention was treated in the standard way.

The special priority awarded to successful community-based applications meant that other, even well-qualified or highly-rated, contending applications would be eliminated. For that reason, the AGB indicated that “very stringent requirements for qualification of a community-based application” would apply, although it was underlined that not meeting the scoring threshold was “not necessarily an indication the community itself is in some way inadequate or invalid.”⁶⁰¹

Of the 84 community-based applications, a very large majority (some 75 percent) did not prevail in CPE, in part because of the assessment by the external independent evaluator (the Economist Intelligence Unit) of whether or not the applicant(s) adequately represented the specific community.⁶⁰²

Having noted the disproportionate number of failed applications for the community-based applications, and the queries on the process raised by the GAC and other interested parties, the review team considered the ICANN Ombudsman's “Own Motion Report.”⁶⁰³ That report assessed both the Applicant Guidebook information and the process for assessing applications. While it found that the process outlined in the Guidebook was not unfair to applicants, the processing of applications could have been clearer, and while there had been no inherent unfairness, there is certainly room for improving the process in the future, both to ensure a better rate of success of community applications, to avoid inconsistencies between standard and community applicants, and to ensure that expectations of applicants were not unnecessarily raised. The Ombudsman's report concluded that some problems had arisen in the CPE process, which, while not inherently unfair or warranting rejection of the outcomes, did lead to recommendations for changes in any future round.⁶⁰⁴ These include “better scope of understanding what community-based applications were for and what sort of persons or organizations would benefit from the use of a community-based top-level domain. Some consideration should have been given to the types of community which could use their own top-level domain, whether these were to be charitable, community organizations or perhaps even NGOs or others.”⁶⁰⁵

In addition, the more recent Council of Europe report of November 2016 raises a number of observations and recommendations on the process for evaluating and assessing such applications.⁶⁰⁶

Recommendation

Recommendation 34: A thorough review of the procedures and objectives for community-based applications should be carried out and improvements made to address and correct the concerns raised before a new gTLD application process is launched. Revisions or adjustments should be clearly reflected in an updated version of the 2012 Applicant Guidebook.

⁶⁰¹ ICANN, *Applicant Guidebook*, Section 4.9.

⁶⁰² Applications had to show an ongoing relationship with a clearly delineated community, the string itself had to be specifically related to the named community and had to have dedicated registration and use policies for registrants, and the application had to be endorsed by the named community.

⁶⁰³ ICANN Ombudsman Blog, “EIU Own Motion Report,” 11 October 2015, accessed 10 August 2018, <https://omblog.icann.org/index.html%3Fm=201510.html>.

⁶⁰⁴ *Ibid.*

⁶⁰⁵ *Ibid.*

⁶⁰⁶ Council of Europe (November 2016), *Applications to ICANN for Community-Based New Generic Top-Level Domains (gTLDs): Opportunities and Challenges from a Human Rights Perspective*, accessed 10 August 2018, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806b5a14>.

Rationale/related findings: Given the assessment carried out by the Ombudsman's Own Motion Report, the results of community-based objections, the Council of Europe report on the human rights perspective of those applications, and the interest raised by the ICANN community regarding the relative lack of success of community-based applications (an area where the ICANN community had intended to provide a special entry for communities to gTLDs of particular interest and use for them), it could be expected that there would be a higher rate of success for community-based applications.

To: New gTLD Subsequent Procedures PDP Working Group

Prerequisite or priority: Prerequisite

Consensus within team: Yes

Effectiveness of the Dispute Resolution Process in Cases of Formal String Objection

The application and evaluation process for the New gTLD Program was described in the ICANN gTLD Applicant Guidebook of 4 June 2012: this was based on the policies developed by the Community on the demand, benefits, and risks of new gTLDs, the selection criteria that should be applied, how gTLDs should be allocated, and the contractual conditions that should be required for new gTLD registries.

After the close of the application submission deadline, ICANN began assessing administrative completeness of each application and posted for public comment the public portions of complete applications in order to allow the Community to submit observations to be considered during the Initial Evaluation review (also carried out by ICANN). Evaluation criteria for the Initial Review included “string reviews” to determine whether the security or stability problems might arise, including those that might be caused due to “similarity to existing TLDs or reserved names.”⁶⁰⁷ These comments and the evaluation were distinct from formal objections that could be raised concerning issues going beyond the evaluation criteria.

During the same open comment period, the ICANN Governmental Advisory Committee (GAC) could issue Early Warning notices that an application was potentially sensitive or problematic for government(s). These early warnings were not formal objections, but their substance might be developed into a formal objection if not resolved.⁶⁰⁸

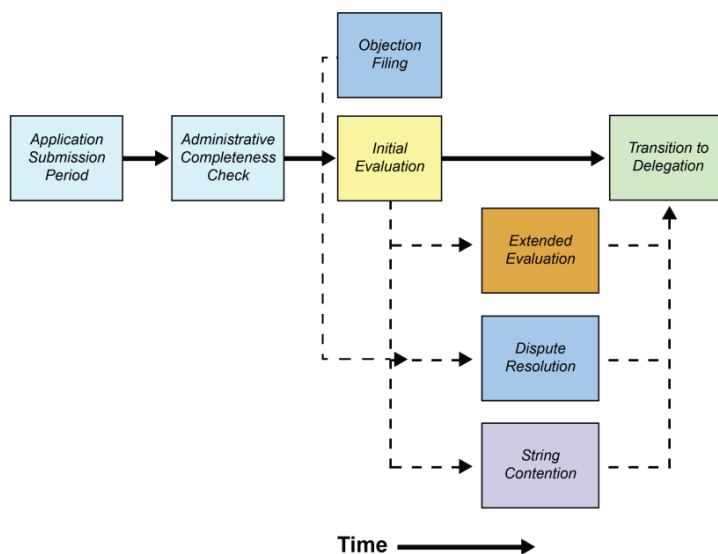
In addition to the public comments, objections could be filed by third parties to protect specific rights and via a dispute resolution mechanism established to resolve cases that went beyond ICANN's initial evaluation of applications.⁶⁰⁹

⁶⁰⁷ ICANN, *Applicant Guidebook*, Section 1.1.2.5. Initial evaluation panels were established to review string similarity, DNS stability and geographic names. The Initial Review also included an assessment of the required technical, operational and financial capability of the applicant. As noted in the section on competition, the use of back-end providers means that technical capability of an applicant could be achieved by using third-party assistance.

⁶⁰⁸ See the “Preventing Delegations that Would Be Confusing or Harmful” section of this report for a review of the GAC Early Warning process.

⁶⁰⁹ ICANN, *Applicant Guidebook*, pp. 1-12, 1-14, Sections 1.1.2.6 and 1.1.2.9.

Table 18: Application Process Stages⁶¹⁰



Once submitted to ICANN, applications will pass through multiple stages of processing.

The grounds for objection were developed to implement the GNSO recommendations relating to string confusion, community objections, limited public interest, or violation of legal rights and were explained in the Applicant Guidebook. Dispute resolution proceedings were carried out by three different service providers selected by a public call for expressions of interest.⁶¹¹

In order to provide a rough assessment of the effectiveness of the process, the review team analyzed both the number and nature of objections that were filed after the initial assessment by the ICANN organization and the outcomes of those objections.⁶¹² In particular, the Team assessed the results of singular/plural string confusion objections and identified some improvements that might be made to the process of application and evaluation in any new launch of gTLDs.

Four types of objections (after initial ICANN assessment) were possible:

- ⦿ **String confusion**, which also involved singular and plural versions of the same word).⁶¹³

⁶¹⁰ ICANN, *gTLD Applicant Guidebook*, pp. 1-4.

⁶¹¹ ICANN, *Program Implementation Review (2016)*, p. 104. The following organizations carried out the proceedings: International Center for Dispute Resolution (ICDR) for string confusion, Arbitration and Mediation Center of the World Intellectual Property Organisation for legal rights objections, and International Center for Expertise of the International Chamber of Commerce for community objections and limited public interest objections.

⁶¹² ICANN, *Applicant Guidebook*, Sections 2-2, 2-4. An initial evaluation was carried out by ICANN, which looked at "String similarity, Reserved names, DNS stability and Geographic names.." and in particular "Whether the applied-for gTLD string is so similar to other strings that it would create a probability of user confusion; Whether the applied-for gTLD string might adversely affect DNS security or stability; and Whether evidence of requisite government approval is provided in the case of certain geographic names."

⁶¹³ The GAC advised that single and plural versions of the same word could create confusion for consumers and should be avoided. See ICANN GAC, *Beijing Communiqué*.

-
- ⊙ **Community objections**, where there was substantial opposition from a significant portion of the community that the string targets.⁶¹⁴
 - ⊙ **Limited Public Interest Objections**, which were objections on the grounds that the gTLD applied for contradicted generally accepted legal norms of morality and public order recognized under principles of international law.
 - ⊙ **Legal rights**, which the objector could claim would be violated if a particular string was delegated.⁶¹⁵

The review team's analysis of the outcome of the dispute resolutions relating to string confusion objections showed that there were 230 exact match sets (i.e., multiple applicants for the same gTLD), and in some cases up to 13 applicants for the same gTLD (for example, .app, .book, and .blog), the majority of which were resolved.⁶¹⁶ However, a few are still on hold at the time of writing, including, for example: gay, .home, .cpa, .llp, .hotel, .llc, .mail, .llc, .inc, and .corp. It should be noted that many applications had objections filed on more than one ground (for example, community plus limited public interest, or confusability plus community).

String confusion objections were brought before the International Centre for Dispute Resolution (ICDR), the international division of the American Arbitration Association (AAA). From the cases reviewed by the review team of the outcome of ICDR panels on objections to new gTLD applications regarding similarity between the singular and plural version of the same gTLD, it would appear there was not a clear, consistent ruling in all cases. In some cases, singular and plural versions were not considered to be confusingly similar (for example .car/.cars), whereas in other cases the plural was considered to be confusingly similar (for example .pet/.pets; .web/.webs; .game/.games).⁶¹⁷

It would appear that inconsistency in outcome on singular/plural cases arose because the dispute resolution process allowed for different expert panelists to examine individual cases, even though they were based on similar situations. Although this was intended to give the panelists latitude to consider the facts of each individual application, it also meant that different expert panelists could come to different conclusions in cases that otherwise might have been considered to have similar characteristics. This could be avoided in future by ensuring that all similar cases of plural versus singular strings were examined by the same expert panelist, or by determining in advance that strings would not be delegated for singular and plurals of the same gTLD. All such similar applications would be resolved either by negotiation between the parties, for example, via a private auction, or by ICANN auction. Whatever the option chosen, it should be made clear in the Applicant Guidebook in advance of any future round of new gTLDs.

Furthermore, there was no appeal mechanism foreseen after the dispute resolution panel had taken its decision. This meant that some unsuccessful objectors then sought to have their cases considered either by the ICANN Board or the ICANN Ombudsman for resolution via ICANN Accountability Mechanisms.⁶¹⁸ In order to avoid different solutions to similar problems and consistency of outcome, and to ensure a fairer process overall in all objection cases,

⁶¹⁴ See the "Allowing Specific Communities to be Served by a Relevant TLD" section of this report for a review of community objections.

⁶¹⁵ ICANN, *Program Implementation Review*, p. 104.

⁶¹⁶ *Ibid.*, p. 64.

⁶¹⁷ International Center for Dispute Resolution, "ICANN New gTLD Program: Listing of String Confusion Objections Filed and Determinations," accessed 10 August 2018, <http://info.adr.org/icanngtld/>

⁶¹⁸ ICANN, "Accountability Mechanisms," accessed 10 August 2018, <https://www.icann.org/resources/pages/mechanisms-2014-03-20-en>

introducing a post-dispute resolution panel review mechanism (as proposed in the ICANN Program Implementation Review) should be considered.⁶¹⁹

Recommendation

From the initial information available, the conclusions are:

Recommendation 35: The Subsequent Procedures PDP should consider adopting new policies to avoid the potential for inconsistent results in string confusion objections. In particular, the PDP should consider the following possibilities:

1. Determining through the initial string similarity review process that singular and plural versions of the same gTLD string should not be delegated.
2. Avoiding disparities in similar disputes by ensuring that all similar cases of plural versus singular strings are examined by the same expert panelist.
3. Introducing a post-dispute resolution panel review mechanism.

Rationale/related findings: From a review of the outcome of singular and plural cases, it would appear that discrepancies in outcomes arose because the dispute resolution process allowed for different expert panelists to examine individual cases, although they were based on similar situations. This meant that different expert panelists could come to different conclusions in cases that otherwise might have been considered to have similar characteristics

The ICANN Program Implementation Review found that there was no recourse after a decision was reached by an expert panel. Given that there appear to be inconsistencies in the outcomes of different dispute resolution panels, it would be useful to establish a review mechanism.

There appear to be inconsistencies in the outcomes of different dispute resolution panels regarding singular and plural versions of the same word, which should be avoided in order to avoid confusing consumers.⁶²⁰

To: New gTLD Subsequent Procedures PDP Working Group

Prerequisite or priority level: Prerequisite

Consensus within team: Yes

Details: While the details should be left to the New gTLD Subsequent Procedures Working Group, the CCT Review Team believes there should be a mechanism created to specifically allow for objections by individual members of the GAC and means to challenge assertions of fact by GAC members. Finally, some sort of appeals mechanism is imperative.

Success measures: No string confusion objections are filed for cases of singular and plural versions of the same string. Or, should singular and plural versions be allowed, objection panels evaluate all such cases with a consistent approach so that all single or plural disputes are resolved in the same manner.

⁶¹⁹ ICANN, *Program Implementation Review*, p. 114.

⁶²⁰ This was also mentioned in the GAC's *Beijing Communiqué*.

Table 19: List of Single/Plural Strings Applied for and Delegated (in Yellow Highlight)⁶²¹

.tour	.tours
.web	.webs
.sport	.sports
.kid	.kids
.gift	.gifts
.game	.games
.deal	.deals
.coupon	.coupons
.car	.cars
.fan	.fans
.home	.homes
.hotel	.hotels
.hotel	.hoteles
.loan	.loans
.market	.markets
.watch	.watches
.pet	.pets
.photo	.photos
.property	.properties
.review	.reviews
.supply	.supplies
.work	.works
.auto	.autos
.cruise	.cruises
.career	.careers
.accountant	.accountants

⁶²¹ See ICANN, “New gTLD Current Application Status,” accessed 10 August 2018, <https://gtldresult.icann.org/application-result/applicationstatus>. The page contains a search function with a capability to filter applications on the basis of whether are part of a contention set.

11 Appendices

Appendix A: Glossary of Terms

Term	Acronym (if applicable)	Definition
Applicant Guidebook	AGB	A document describing the requirements of the new gTLD application and evaluation processes.
American Standard Code for Information Exchange	ASCII	Character encoding based on the English alphabet.
Botnet Command-and-Control	Botnet C2	Using domain names as a way to control and update botnets, which are networks of thousands to millions of infected computers under the common control of a criminal. Botnets can automate and amplify the perpetration of many forms of DNS abuse.
Compromised Domains		Domains in which a malicious actor has broken into the web hosting of a registrant for the express purpose of engaging in DNS abuse.
Country Code Top-Level Domain	ccTLD	A class of top-level domains only assignable to represent countries and territories listed in the ISO 3166-1 standard. See http://www.iana.org/domains/root/db .
DNS Abuse		Intentionally deceptive, conniving or unsolicited activities that actively exploit the DNS and/or the procedures used to register domain names.
DNS Security Abuse		DNS abuse related to cybersecurity, such as malware distribution, phishing, pharming, botnet command-and-control, and high volume spam.
Domain Name System	DNS	The global hierarchical system of domain names.
Governmental Advisory Committee	GAC	An ICANN committee comprising appointed representatives of national governments, multinational governmental organizations and treaty organizations, and distinct economies. Its function is to advise the ICANN Board on matters of concern to governments. The GAC operates as a forum for the discussion of government interests and concerns, including consumer interests. As an Advisory Committee, the GAC has no legal authority to act for ICANN, but will report its findings and recommendations to the ICANN Board.
Generic Names Supporting Organization	GNSO	ICANN's policy development body for generic TLDs and the lead in developing policy recommendations for the introduction of new gTLDs. The GNSO is the body of six constituencies: the Commercial and Business Constituency, the gTLD Registry Constituency, the Internet Service Provider(ISP) Constituency, the Non-Commercial Constituency, the Registrar Constituency, and the Intellectual Property (IP) Constituency.
Generic Top-Level Domain	gTLD	Generic top-level domains (gTLDs) are one of the categories of top-level domains (TLDs) maintained by

		the Internet Assigned Numbers Authority (IANA) for use in the Domain Name System of the Internet. They have three or more characters, and can be used for general purposes.
Internet Assigned Numbers Authority	IANA	IANA is the authority originally responsible for overseeing Internet Protocol (IP) address allocation, coordinating the assignment of protocol parameters for Internet technical standards, managing the DNS (including delegating top-level domains), and overseeing the root name server system. Under ICANN, IANA distributes addresses to Regional Internet Registries, coordinates with the IETF and other technical bodies to assign protocol parameters, and oversees DNS operation.
Internationalized Domain Name	IDN	A domain name consisting, in whole or in part, of characters used in the local representation of languages other than the basic Latin alphabet (a–z), European-Arabic digits (0–9) and the hyphen (-).
Malicious Registrations		Domains registered by malicious actors for the express purpose of engaging in DNS abuse.
Malware		Software intended to damage, disable or otherwise gain access to the computer systems of others in order to engage in various forms of DNS abuse.
Public Interest Commitment	PIC	PICs are safeguards enumerated in Specification 11 of the Registry Agreement, which are intended to hold registry operators to certain standards. PICs are a mechanism to allow registry operators to commit to binding contractual obligations that may be enforced by ICANN Compliance and via the Public Interest Commitments Dispute Resolution Procedure (PICDRP).
Public Interest Commitment Dispute Resolution Procedure	PICDRP	A dispute resolution procedure established to address complaints that a Registry Operator may not be complying with the Public Interest Commitments set forth in Specification 11 of its Registry Agreement.
Phishing		A form of DNS abuse in which a website address or link is sent via email to Internet users to direct them to a website that fraudulently presents itself as a trustworthy site with the purpose of deceiving those users into divulging sensitive information (e.g., online banking credentials or email passwords). The goal of phishing is usually the theft of funds or other valuable assets.
Registry Agreement	RA	The agreement executed between ICANN and successful gTLD applicants.
Registry Services Evaluations Policy/Registry Services Evaluation Process	RSEP	RSEP is ICANN's process for evaluating proposed gTLD registry services or contractual modifications for security, stability or competition issues.
Registry Services Provider	RSP	A company that manages the operations of a TLD on behalf of the TLD owner or licensee. The RSP keeps the master database and generates zone files to allow computers to route Internet traffic using the DNS.
Security and Stability Advisory Committee	SSAC	An advisory committee to the ICANN Board composed of technical experts from industry and academia, as well as operators of Internet root servers, registrars and TLD registries.

Spam		Bulk unsolicited emails sent from domains that are used to advertise websites. Spam is often an avenue for phishing and malware distribution.
Top-Level Domain	TLD	A name at the top of the DNS naming hierarchy. It appears in domain names as the string of letters following the last dot, such as "net" in www.example.net. The TLD administrator controls which second-level names are recognized in that TLD. The administrators of the root domain or root zone control which TLDs are recognized by the DNS.
Trademark Clearinghouse	TMCH	A repository for trademark data supporting rights protection services offered by new gTLD registries.
Uniform Domain Name Dispute Resolution Policy	UDRP	A policy under which challenges to domain name registrations are resolved by a mandatory online arbitration based upon written statements and arguments. All ICANN-accredited registrars follow a uniform dispute resolution policy.
Uniform Rapid Suspension	URS	The URS provides trademark holders with a streamlined and quick mechanism to "take down" clear cases of infringements domain names. A successful proceeding will result in the suspension of the domain name for the balance of its registration term. Compliance with URS decisions is mandatory for all new ICANN-accredited gTLD operators.

Appendix B: Review Process

Founding Documents

The CCT prepared Terms of Reference⁶²² and several iterations of the Work Plan⁶²³, which was regularly updated, to guide its work. The two founding documents were adopted in March 2016. The Terms of Reference set the review team's mandate, includes detailed definitions of key concepts, outlines the expected deliverables, and establishes ground rules pertaining to the process, engagement, and tools used to conduct work. The Work Plan identifies milestones and deliverables in the CCT Review's lifecycle, lists data elements to be considered, and establishes timelines.

The CCT adopted a conflict of interest policy in March 2016.⁶²⁴ All members' declarations were submitted in accordance with the policy and made public on the CCT wiki.⁶²⁵ All CCT calls began with a request to provide updates to statements of interests.⁶²⁶

Modus Operandi

The CCT conducted its work on publicly archived mailing lists.⁶²⁷ Its meetings and conference calls were open to silent observers. Observers were also welcome to subscribe to mailing lists (with viewing rights only). Activities of the review team are documented on a public wiki space.⁶²⁸

The CCT operated in a consensus fashion.

Subteams

Its mandate being threefold, the CCT decided to conduct its work by establishing three subteams: (1) Competition and Consumer Choice; (2) Safeguards and Consumer Trust; and (3) the Application and Evaluation Process of the New gTLD Program.

- ⦿ The **Competition and Consumer Choice** subteam – led by Jordyn Buchanan – was tasked with reviewing the available data on competition and consumer choice, requesting additional data or other resources that may assist in their review, and reporting to the larger CCT Review Team on its findings and recommendations. The group utilized the work of Analysis Group, which conducted an ICANN-commissioned

⁶²² Competition, Consumer Trust and Consumer Choice Review Team (23 March 2016), *Terms of Reference*, accessed 10 August 2018, <https://community.icann.org/download/attachments/58727379/CCTRTToRDRAFTv6.pdf?version=1&modificationDate=1458753064411&api=v2>

⁶²³ Competition, Consumer Trust and Consumer Choice Review Team (23 March 2016), *Work Plan*, accessed 10 August 2018, <https://community.icann.org/download/attachments/58727379/DRAFT%20workplan%20v2.pdf?version=1&modificationDate=1458753104114&api=v2>

⁶²⁴ Competition, Consumer Trust and Consumer Choice Review Team (9 March 2016), *Conflict of Interest Policy*, accessed 10 August 2018, <https://community.icann.org/download/attachments/58732354/ColPolicy-CCTReviewTeam-revised9March2016.pdf?version=1&modificationDate=1459161203000&api=v2>

⁶²⁵ ICANN, "Composition of Review Team," accessed 10 August 2018,

<https://community.icann.org/display/CCT/Composition+of+Review+Team>

⁶²⁶ The statements of interest of the review team members can be found at

<https://community.icann.org/display/CCT/Composition+of+Review+Team>.

⁶²⁷ ICANN, "Email Archives," accessed 10 August 2018, <https://community.icann.org/display/CCT/Email+Archives>

⁶²⁸ ICANN, "Competition, Consumer Trust and Consumer Choice," accessed 10 August 2018,

<https://community.icann.org/display/CCT/Competition%2C+Consumer+Trust+and+Consumer+Choice>

economic study on the competitive effects of the New gTLD Program on the domain name marketplace.⁶²⁹The Competition and Consumer Choice subteam conducted work on a dedicated mailing list⁶³⁰ and calls.⁶³¹

- ⦿ The **Safeguards and Trust** subteam – led by Lauren Kapin and Andrew Bagley – was created to explore two key areas of the review as outlined in section 9.3 of the Affirmation of Commitments: (1) consumer trust; (2) effectiveness of safeguards put in place to mitigate issues involved in the introduction or expansion of new gTLDs. The Safeguards and Consumer Trust subteam conducted work on a dedicated mailing list⁶³² and calls.⁶³³
- ⦿ Although the **Effectiveness of the Application and Evaluation Process of the New gTLD Program** is considered a subteam, it assembles all the members of the full review team. Application and Evaluation Process-related discussions were held on plenary calls. The subteam – led by Jonathan Zuck – focused its activities around three tracks: (1) successful applicants, determining the challenges successful applicants faced, the support they received and an assessment of the impact of the GAC early warnings on the process; (2) unsuccessful applicants, assessing causes of failure and the support received; (3) missing applicants, with an emphasis on the developing world, to better understand why these would-be registries did not submit an application.
- ⦿ An **INTA Impact Study** subteam - led by David Taylor - was limited in time as it was formed to analyze and draw conclusions on the INTA Impact Study results. The subteam held three dedicated calls.⁶³⁴

Template

Building on readings and discussions, the CCT Review Team formulated sets of high-level questions to be addressed and developed a list of discussion papers. To ensure consistency in the subteams' work leading to draft recommendations, the CCT Review Team adopted a template that framed the drafting effort.⁶³⁵ The CCT made its recommendations on fact-based findings.

Consensus

The draft report and recommendations were developed according to a bottom-up, multistakeholder approach. The Draft Report was circulated for review and comment by the CCT from December 2016 to January 2017. The first reading took place during the 7 December 2016 plenary meeting and the final on 16 February 2017. Following the final reading, the draft report was sent to the CCT for a 24-hour period to relay any additional edits. The draft report is the outcome of extensive work by the CCT conducted during the first 12 months of its work, during which it held 81 calls or meetings. It represents a careful consideration of the data received and a diligent attention to the input received.

⁶²⁹ Analysis Group, *Phase I Assessment* (2015) and Analysis Group, *Phase II Assessment* (2016)

⁶³⁰ ICANN, "The cctreview-competition Archives" accessed 10 August 2018,

<http://mm.icann.org/pipermail/cctreview-competition/>

⁶³¹ ICANN, "Competition and Consumer Choice - Calls," accessed 10 August 2018,

<https://community.icann.org/pages/viewpage.action?pageId=58737630>

⁶³² ICANN, "The cctreview-safeguards Archives," accessed 10 August 2018,

<http://mm.icann.org/pipermail/cctreview-safeguards/>

⁶³³ ICANN, "Safeguards and Trust - Calls," accessed 10 August 2018,

<https://community.icann.org/pages/viewpage.action?pageId=58737319>

⁶³⁴ ICANN, "INTA Impact Study - Calls" <https://community.icann.org/x/oGjwAw>

⁶³⁵ Competition, Consumer Trust and Consumer Choice Review Team,, *CCTRT Discussion Paper Worksheet*,"

accessed 10 August 2018,
<https://community.icann.org/download/attachments/58727456/Revised%20template%20%28adopted%29.docx?version=1&modificationDate=1471445497000&api=v2>

Consultations and Outreach Efforts

An outreach plan was designed to ensure that the CCT's work was discussed by the entire ICANN community in a robust and timely fashion.

The CCT sought input from the global multistakeholder community throughout the development of its draft report. Consultation was conducted through (but not limited to) the following channels:

- ⦿ Engagement sessions at ICANN meetings, e.g., the CCT sought input on its interim recommendations at ICANN57⁶³⁶
- ⦿ Updates to Supporting Organizations and Advisory Committees through membership representation

In addition, the CCT posted blogs, communiqués, and videos to document its progress and establish resources for further engagement.

Any community member may contact the CCT to share input or ask questions. Any submission to the list input-to-cctr@icann.org is publicly archived.⁶³⁷

In light of the synergies between the CCT and New gTLD Subsequent Procedures PDP Working Group mandates, regular coordination calls were held between leadership of both groups to ensure no significant overlap occurs and to complement each other's work. The CCT invited the Subsequent Procedures PDP Working Group to provide input on the applicant survey questions prior to its launch and sought input on its interim recommendations.

In addition, the CCT sought input from ICANN's Global Domains Division on the feasibility of implementing its recommendations, to be shared after the publication of the draft report.⁶³⁸

Budget Management

Further to an exchange held with ICANN CFO Xavier Calvez, the CCT appointed Jonathan Zuck – CCT Chair – as the assigned budget manager in an effort to be fiscally responsible and accountable for its budget management. The budget manager works with the ICANN organization to meet the budget restrictions in place.

⁶³⁶ ICANN, "ICANN57 Hyderabad: Input to Competition, Consumer Choice, Consumer Trust Review Team," accessed 10 August 2018, <https://icann572016.sched.com/event/8czO/input-to-competition-consumer-choice-consumer-trust-review-team>

⁶³⁷ ICANN, "The Input-to-CCTR Archives," accessed 10 August 2018, <http://mm.icann.org/pipermail/input-to-cctr/>

⁶³⁸ ICANN (19 May 2017), *ICANN Organization Inputs: Competition, Consumer Trust and Consumer Choice Review Team Draft Report*, accessed 10 August 2018, <https://mm.icann.org/pipermail/comments-cct-rt-draft-report-07mar17/attachments/20170520/06db1b61/ICANNInputsonCCTRRecs-19May2017.pdf> and ICANN (15 January 2018), *ICANN Org Inputs: Competition, Consumer Trust and Consumer Choice Review Team Draft Report*, <https://mm.icann.org/pipermail/comments-cct-recs-27nov17/attachments/20180126/b9ad18cc/CCT-NewRecs-Input-26jan18-0001.pdf>

Appendix C: Surveys and Studies

Several surveys and studies were commissioned prior to the launch of the CCT to inform its work. These are referenced in footnotes throughout the report, and can also be viewed in the bibliography:

- ◉ An Implementation Advisory Group was convened by the ICANN Board in 2013 to examine a series of potential metrics that were proposed by the Generic Names Supporting Organization (GNSO) and the At-Large Advisory Committee (ALAC). This team, referred to as the IAG-CCT, evaluated the feasibility, utility and cost-effectiveness of adopting several recommended metrics produced by these two groups and issued a set of 66 metrics, which the ICANN Board adopted for the CCT to consider.⁶³⁹ ICANN organization has continued to collect data on many of these metrics.⁶⁴⁰ Of the 66 recommended metrics, several included baseline figures that capture a snapshot of behaviors and activity in the domain name marketplace prior to the introduction of new gTLDs. Depending on the metric, the baseline period may span from one year to multiple years prior to the delegation of new gTLDs.
- The IAG-CCT determined that a subset of the metrics was best evaluated using a consumer and registrant survey. Nielsen's Wave 2 Consumer Survey results were released in June 2016.⁶⁴¹ The study measured Internet users' current attitudes about the gTLD landscape and the DNS, as well as changes in these consumers' attitudes from Nielsen's Wave 1 Consumer Survey, which was conducted in 2015.⁶⁴² Internet users were asked about aspects of consumer awareness, consumer choice, experience, and trust. The consumer survey's respondents included a representative sample of Internet users from all five ICANN regions and was conducted in each sampled country's relevant language. Results of the Phase 2 study revealed more than half of respondents (52 percent) were aware of at least one new gTLD, and overall, trust of the domain name industry relative to other technology-related industries has improved.
- Similarly, Nielsen conducted a global domain name registrant survey, which targeted those who have at least one registered domain name. Survey participants were questioned about their awareness of new gTLDs, as well as their perceived sense of choice, experience, and trust related to the current gTLD landscape. Nielsen's Wave 1 Registrant Survey results were issued in September 2015.⁶⁴³ The CCT received the Wave 2 Registrant Survey results on 15 September 2016.⁶⁴⁴ Results revealed that new gTLDs included in both phases of the survey to have similar awareness levels, with higher awareness reported in South America and Asia Pacific, and that trust in the domain name industry generally remains high, particularly in Asia.
- A second subset of IAG-CCT metrics aims to measure competition in the new gTLD marketplace based on an analysis of pricing data and other, non-price-related indicia. ICANN contracted with Analysis Group to conduct an economic study with two primary aims: 1) gauge the pricing practices for domains in new gTLDs against those in the legacy space; and 2) provide a qualitative analysis of other non-price competition indicators, like technical or other business innovations. Analysis Group's Phase 1

⁶³⁹ Implementation Advisory Group for Competition, Consumer Trust, and Consumer Choice (2014), *Final Recommendations*

⁶⁴⁰ ICANN, "Competition, Consumer Trust and Consumer Choice (CCT) Metrics Reporting."

⁶⁴¹ Nielsen, Consumer Research Wave 2 (2016).

⁶⁴² Nielsen, Consumer Research (2015).

⁶⁴³ Nielsen, Registrant Survey (2015).

⁶⁴⁴ Nielsen, Registrant Survey Wave 2 (2016).

Assessment results were delivered in September 2015.⁶⁴⁵ Analysis Group's Phase II Assessment describes how the competition metrics established in the Phase I Assessment have changed (or remained the same) as the New gTLD Program expanded over the course of one year (review team members provided feedback to Analysis Group on its methodology and approach prior to beginning the Phase II analysis).⁶⁴⁶ Results of the Phase II economic study, which were delivered in October 2016, revealed a decline in the share of new gTLD registrations attributable to the four and eight registries with the most registrations. They also revealed volatility in the registration shares held by registry operators.

- ⦿ To help the review team assess the effectiveness of the New gTLD Program's application and evaluation processes, as well as safeguards put in place to mitigate abuse, ICANN organization collaborated with the community to draft the following reports:
 - The *Revised Program Implementation Review*, published in January 2016, examines the effectiveness and efficiency of ICANN's implementation of the New gTLD Program from the ICANN organization perspective.⁶⁴⁷
 - The *New gTLD Program Safeguards Against DNS Abuse: Revised Report* explores methods for measuring the effectiveness of safeguards to mitigate DNS abuse that were implemented as part of the New gTLD Program. It outlines which activities may constitute DNS abuse and provides a preliminary literature review examining rates of abuse in new gTLDs and the DNS as a whole.⁶⁴⁸
 - The *Rights Protection Mechanisms Review: Revised Report* evaluates data on key protection mechanisms such as the Trademark Clearinghouse, the Uniform Rapid Suspension System, and Post-Delegation Dispute Resolution Procedures. The interaction between Rights Protection Mechanisms and other elements of the New gTLD Program are also considered.⁶⁴⁹
- ⦿ To supplement the existing data, the CCT requested additional surveys and studies to further inform its work:
 - The Competition and Consumer Choice subteam requested data on pricing and registration analyses from Analysis Group and ICANN organization to help answer research questions on the effectiveness of the New gTLD Program in promoting price competition among gTLD operators, registrars, and resellers.
 - The Competition and Consumer Choice subteam sought legacy gTLD parking data to complement the new gTLD parking data available on ntlstats.com. The parking data allowed the subteam to see a more accurate picture of registrations in each registry by controlling for registration numbers that do not reflect "active" registrations. The subteam also obtained ccTLD registration data from CENTR and Zooknic.⁶⁵⁰
 - At the request of the review team, ICANN contracted with SIDN Labs to conduct a study analyzing rates of abusive, malicious, and criminal activity in new and legacy gTLDs. The *Statistical Analysis of DNS Abuse in gTLDs: Final Report* compares rates

⁶⁴⁵ Analysis Group, *Phase I Assessment* (2015)

⁶⁴⁶ Analysis Group, *Phase II Assessment* (2016)

⁶⁴⁷ ICANN, *Program Implementation Review* (2016)

⁶⁴⁸ ICANN Operations and Policy Research, *New gTLD Program Safeguards Against DNS Abuse: Revised Report* (July 2016).

⁶⁴⁹ ICANN, *Rights Protection Mechanisms Review* (2015)

⁶⁵⁰ ICANN CCT Wiki, "Studies, Research, and Background Materials."

of these activities between new and legacy gTLDs, as well as employs inferential statistical analysis to measure the effects of DNSSEC, domain parking, and registration restrictions on abuse rates using historical data covering the first three full years of the New gTLD Program (2014 – 2016).⁶⁵¹

- At its third face-to-face meeting in June 2016, the CCT requested that an applicant survey be commissioned. In addition to addressing topics pertaining to competition, consumer choice and trust, the survey was also tasked with reviewing the effectiveness of the application and evaluation process of the New gTLD Program. The CCT sought answers to gain a better understanding of applicants' views on the application process among those who completed the process, are actively in progress, and those who withdrew their applications.
- To help inform its assessment of the application and evaluation process, the CCT requested that AMGlobal Consulting research and conduct interviews with firms, organizations and other institutions in the "Global South" that did not apply for new gTLDs, but who may have been considered good candidates for the program as cohorts of similar entities that did apply.⁶⁵² The purpose of this research was to obtain a deeper understanding of consumer awareness of the New gTLD Program, as well as why more firms from the Global South did not apply to the Program. The report was delivered in November 2016. It included recommendations such as creating outreach tools for non-expert audiences to answer their questions on cost, application process, timing, and about ICANN itself. Another recommendation was to provide the community with a full explanation of the different uses for new gTLDs in order to address business model and use case questions the community might have. Regarding future application rounds, the report proposed to develop additional research on the best ways to reach the general public in the Global South, build dialogue around new gTLDs in the public-private sphere, and, to the greatest extent possible, start preparing the public for the next round as soon as possible.
- In addition, the CCT used the results from a survey commissioned by the International Trademark Association (INTA). The survey, conducted between January and February 2017, received responses from 33 INTA corporate members, non-INTA corporate members, and IP owners who responded to questions on the costs incurred by their clients related to the expansion of the TLD space. The survey, which was sent to 1,096 potential respondents, provided insight into these trademark holders' experiences with the Program.⁶⁵³

⁶⁵¹ SIDN Labs and the Delft University of Technology (August 2017), *Statistical Analysis of DNS Abuse in gTLDs*.

⁶⁵² AMGlobal, *New gTLDs and Global South* (2015).

⁶⁵³ Nielsen (April 2017), *INTA New gTLD Cost Impact Survey*.

Appendix D: Public Comments

With its Initial Report, the review team provided a relatively granular set of recommendations to encourage input via public comment.⁶⁵⁴ The review team received a total of twenty three comments on the first part of its Draft Report, and seventeen comments on the second part of its draft report.⁶⁵⁵ These comments were submitted from sixteen stakeholder groups and constituencies and by five individuals, two governments or governmental agencies, five companies, ten coalitions, and the ICANN Organization and Board. All comments were made available to the entire review team and its relevant subgroups. Each group examined the public comments as they related to each proposed recommendation. ICANN organization assisted in this process by creating a spreadsheet that noted the applicability of each public comment to a specific review team recommendation.⁶⁵⁶ Finally, the review team explored comments not tied to a specific recommendation but instead to the underlying findings of the report.

While there was general support for most of the recommendations, a few themes stood out in the public comments. First, it became clear that the review team needed to be specific about which actors in the community would be called on to implement a recommendation, while leaving room for those actors to determine the best way to implement it. Accordingly, the review team endeavored to identify the most appropriate actors while rewriting several recommendations to allow more flexible implementation. Second, it was clear from the comments on the Initial Report that the review team made recommendations for research with no clear practical value. Several of those recommendations were modified or eliminated.

The review team engaged in a systematic process of reviewing the public comments, summarizing them for the entire review team and assessing what revisions should be made to the proposed recommendations, if any. Any proposed changes were discussed and agreed upon by the both the applicable subteam and the entire review team. Any final recommendations that lacked full consensus would be noted in this Final Report. The comments received comprised varying, and in certain instances, conflicting views. Although the review team considered every comment received, it only revised recommendations when the full Review agreed that revision was necessary to clarify, amend, or further improve the recommendation. The ICANN organization and the review team created two spreadsheets to track the review team's consideration of the public comments.⁶⁵⁷

The review team appreciates the thoughtful public comments it received, which reflected a genuine effort on the part of commenters to provide constructive input and guidance. Although the review team did not accept every comment offered, the review team is grateful for the good faith effort to provide diverse perspectives. The review team believes this Final Report

⁶⁵⁴ ICANN, "Competition, Consumer Trust and Consumer Choice Review Team Draft Report of Recommendations for New gTLDs," accessed 10 August 2018, <https://www.icann.org/public-comments/cct-rt-draft-report-2017-03-07-en>

⁶⁵⁵ Ibid. and ICANN, "Competition, Consumer Trust, and Consumer Choice Review Team – New Sections to Draft Report of Recommendations," accessed 10 August 2018, <https://www.icann.org/public-comments/cct-rt-draft-report-2017-03-07-en>

⁶⁵⁶ ICANN, "Competition, Consumer Trust and Consumer Choice Review Team Draft Report of Recommendations for New gTLDs: Staff Report of Public Comment Proceeding," 10 July 2017, accessed 10 August 2018, Section IV (click "Summary of Comments" hyperlink to download the spreadsheet).

⁶⁵⁷ ICANN CCT Wiki, "Plenary Drafts/Documents" accessed 5 September 2018, <https://community.icann.org/download/attachments/58727456/CCTRT%20Public%20Comment%20-%20Draft%20Report%20-%2010July2017%20Approved.xlsx?version=1&modificationDate=1536147730041&api=v2>, and <https://community.icann.org/download/attachments/58727456/CCTRT%20Public%20Comment%20-%20New%20Sections%20-%2015Feb2018%20Approved.xlsx?version=1&modificationDate=1536142801000&api=v2>.

contains improved recommendations that reflect the constructive feedback it received as part of the public comment process.

Draft Report Public Comment Period

The review team [submitted its Draft Report for public comment](#), which included 50 draft recommendations, from 7 March 2017 to 19 May 2017.⁶⁵⁸ The review team presented its draft recommendations and sought input from the community at ICANN58 and on various occasions, including:

- ⊙ [Two webinars held on 3 April 2017](#)⁶⁵⁹
- ⊙ [A Community engagement session at ICANN58](#)⁶⁶⁰

A summary of the 23 public comments received was published on 10 July 2017, which the review team used as a basis to review and update its draft recommendations.⁶⁶¹

Draft Report With New Sections Public Comment Period

Following the results of the INTA survey and the publication of the DNS Abuse Study, the CCT added new sections to its previous report pertaining to DNS abuse, costs to trademark holders, parking and consumer choice. Ten recommendations were [submitted for public comment](#) from 27 November 2017 to 15 January 2018.⁶⁶²

The review team sought input from the community at ICANN60 during an engagement session, had individual outreach sessions, and also held a webinar to discuss the new sections.⁶⁶³

A summary of the 17 public comments received was published on 15 February 2018, which the review team used as a basis to review and update its draft recommendations.⁶⁶⁴

All outreach and engagement actions from the review team are available on its wiki page.⁶⁶⁵

⁶⁵⁸ ICANN, “Competition, Consumer Trust and Consumer Choice Review Team Draft Report of Recommendations for New gTLDs,”

⁶⁵⁹ ICANN CCT Wiki, “Webinars: CCTRT Draft Recommendations,” 3 April 2017, accessed 10 August 2018, <https://community.icann.org/display/CCT/Webinars%3A+CCTRT+Draft+Recommendations+-+3+April+2017>

⁶⁶⁰ ICANN CCT Wiki, “Community Discussion – ICANN58,” 12 March 2017, accessed 10 August 2018, <https://community.icann.org/display/CCT/Community+Discussion+-+ICANN58>

⁶⁶¹ ICANN, “Competition, Consumer Trust and Consumer Choice Review Team Draft Report of Recommendations for New gTLDs.”

⁶⁶² ICANN, “Competition, Consumer Trust, and Consumer Choice Review Team – New Sections to Draft Report of Recommendations.”

⁶⁶³ ICANN CCT Wiki, “Webinar: CCTRT New Sections of Draft Report,” 18 December 2017, accessed 10 August 2018, <https://community.icann.org/display/CCT/Webinar%3A+CCTRT+New+Sections+of+Draft+Report+-+18+December+2017+@+16%3A00+UTC>

⁶⁶⁴ ICANN, “Competition, Consumer Trust, and Consumer Choice Review Team – New Sections to Draft Report of Recommendations.”

⁶⁶⁵ ICANN CCT Wiki, “Outreach and Engagement,” accessed 10 August 2018, <https://community.icann.org/pages/viewpage.action?pageId=58729463>

Appendix E: Terms of Reference

The Affirmation of Commitments

The Affirmation of Commitments signed on 30 September 2009 between ICANN and the U.S. Department of Commerce (the “AoC”) contain specific provisions for periodic review of four key ICANN objectives, including “promoting competition, consumer trust, and consumer choice.”

Under the AoC, ICANN agreed to ensure that as it contemplated expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) would be adequately addressed prior to implementation. In Section 9.3 of the AoC, ICANN committed to the following:

...when new gTLDs (whether in ASCII or other language character sets) have been in operation for one year, ICANN will organize a review that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (1) the application and evaluation process and (2) safeguards put in place to mitigate issues involved in the introduction or expansion. ICANN will organize a further review of its execution of the above commitments two years after the first review, and then no less frequently than every four years. The reviews will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC, the CEO of ICANN, representatives of the relevant Advisory Committees and Supporting Organizations, and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (in consultation with GAC members) and the CEO of ICANN. Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

This appendix details the terms of reference that the CCT will use to carry out its duties under the AoC.

The goal of the CCT is to assess the impact of the expansion of the DNS marketplace on competition, consumer trust and consumer choice. In addition, this review shall examine the effectiveness of the application and evaluation process used for the 2012 round of gTLD applications, and the effectiveness of the safeguards enacted to mitigate issues involved in the introduction of new gTLDs. The review defines effectiveness as, “to what degree the process (of implementing the New gTLD Program) was successful in producing desired results/achieving objectives.” The CCT will analyze both quantitative and qualitative data to produce recommendations for the ICANN Board to consider and adopt.

This inaugural review will lay the groundwork for recurring reviews, which the AoC requires no less frequently than every three years, subject to potential revision of the ICANN Bylaws. These recurring reviews will play an important role in assessing how ICANN continues to meet

its commitments in the areas of competition, consumer trust, and consumer choice. This first review will examine the initial impact of the New gTLD Program in these three areas.

Background

ICANN has anticipated this review since the AoC was signed with the U.S. Department of Commerce in 2009. Since that time, the ICANN Board has turned to the community for its input on metrics that may be used for data-based recommendations. To that end, the ICANN Board tasked the GNSO and ALAC to propose metrics in December 2010. In June 2011, at the ICANN meeting in Singapore, a working group was formed to come up with recommended metrics for the CCT review. The working group's goal was to provide the ICANN Board with definitions, measures, and targets that could be useful to the CCT Review Team. In December 2012, the group presented the Board with a document detailing 70 recommended metrics, with proposed definitions and three-year targets.

The ICANN Board formed the IAG-CCT in September 2013 to review those recommended metrics and make recommendations to the review team based on an evaluation of the feasibility, utility and cost-effectiveness of each of the proposed 70 metrics. The group first met in November 2013, via conference call, then in person at the ICANN 48 meeting in Buenos Aires. In March 2014, the IAG-CCT made an interim recommendation to commission a survey of Internet users and registrants to gauge their sense of trust and choice, and an economic study on gTLD pricing and marketplace. The ICANN Board adopted those recommendations. In September 2014, the IAG-CCT submitted its final recommendations to the ICANN Board, which adopted those recommendations in February 2015. Those recommendations included the collection of 66 metrics related to competition, consumer trust and consumer choice. The IAG-CCT also revised the original recommendations from the GNSO-ALAC working group.

Framework

ICANN's commitment to promoting competition, consumer trust and consumer choice within the New gTLD Program requires a clear understanding of the program's history and its role in ICANN, followed by a focused examination of its development and implementation. As one of the four key objectives to be evaluated as part of the AoC, the CCT review will also help frame how ICANN may approach future rounds of new gTLDs.

Scope

This review shall assess the New gTLD Program's impact on competition, consumer trust and consumer choice. This includes reviewing the implementation of policy recommendations from the launch of the program through delegation and on to general availability. To conduct the evaluation, review team members may be asked to review data derived from processes related to the program, as well as broader inputs on marketplace indicators and consumer trends and feedback from the community. While these other inputs are not related to this particular review, the findings and information produced from these may be useful to the CCT's work. For those efforts for which this review is critical, to complete their work, the CCT shall endeavor to issue its findings and recommendations in a timely manner such that those efforts may take these into consideration. Efforts under way that will rely on the findings and recommendations from this group may follow its progress on the CCT wiki page: <https://community.icann.org/display/CCT/Competition%2C+Consumer+Trust+and+Consumer+Choice>.

Data and Metrics

With the ICANN Board's February 2015 adoption of the IAG-CCT's 66 recommended metrics for collection, the ICANN organization has been continuously gathering and publishing data related to most of these metrics on the ICANN website: <https://www.icann.org/resources/reviews/cct/metrics>.

The February 2015 Board resolution also noted that the IAG-CCT, in its final report, set aside a group of metrics to be revisited by the CCT, when it began its work, as they required additional contextual analysis, or might require additional resources to capture the data. These metrics are noted in Table 4 of the IAG-CCT final report (<https://community.icann.org/download/attachments/48349551/IAG-CCT%20Final%20report.docx?version=1&modificationDate=1418863127000&api=v2>). The ICANN organization may provide their recommendations on feasibility for internal data collection and resources required for metrics that may require external data gathering.

ICANN Evaluation Reports

The AoC mandates an examination of the effectiveness of the application and evaluation processes used in the 2012 round of gTLD applications, including ICANN's implementation of the policy recommendations made for the New gTLD Program. To help inform the CCT, ICANN organization has compiled and published the Program Implementation Review report to provide staff perspective on the execution of the New gTLD Program, as well as incorporating feedback from stakeholders including applicants, service providers and other community members.

Finally, the review will also consider the effectiveness of safeguards enacted to mitigate abuse. This is understood to include a review of the rights protection mechanisms that were implemented in the program, as well as other efforts to mitigate DNS abuse (such as the various Public Interest Commitments incorporated into Registry Agreements). Reports produced on these topics will provide detailed insight to help the CCT enhance its recommendations and establish a proposed order of priority for implementation, as recommended by Recommendation 9 of the CCWG-Accountability proposal.

Definitions

An assessment of this type requires a common understanding of the terms associated with the review: consumer, competition, consumer trust and consumer choice.

Consumer: The term generally refers to a natural person, acting primarily for personal, family or household purposes and may, depending on the context, include businesses and government agencies as well. For the purposes of this review, consumers generally fall into two categories: (1) Internet users and other market participants who make use of domains through DNS resolution, such as by navigating to a URL or sending an email and (2) registrants (and potential registrants).

Consumer trust: The confidence Consumers have in the function, reliability, safety, security, and authenticity of the Domain Name System. This includes (1) trust in the consistency of name resolution; (2) confidence by Internet users that they can safely navigate to a domain name to find and safely use the site they intend to reach; (3) confidence that a TLD registry operator is fulfilling the registry's stated purpose and (4) confidence by a registrant in a domain's registration process and life cycle.

Consumer choice: The range of meaningful options arising from new entrants and innovations over incumbent offerings available to Consumers for domain names (including in their preferred languages and scripts.)

Competition: The rivalry between two or more parties in the domain name ecosystem (including but not limited to registries, registrars, resellers, registry service providers and registrants) acting independently to secure the business of a third party by offering innovative products and services and or the most favorable terms.

Relevant Market: For the purpose of this review, the CCT shall consider the competitive effects, costs, and benefits of the introduction of new gTLDs on the international domain name marketplace, which also includes legacy gTLDs and ccTLDs. Furthermore, the team may explore the impact of the New gTLD Program on the broader “internet identity” (social media, WIX, etc.) market. However, competitive dynamics in the domain name ecosystem unrelated to the introduction of new gTLDs are not in the scope of this review. The review team may break down the overall market by sector or region for its review and recommendations.

Process

CCT work will be conducted in English via teleconference calls, Adobe Connect web meetings and in person.

Communications and Transparency

1. Teleconferences will be recorded, subject to the right of a member of the CCT to take the discussion “off the record.” Face to face meetings will be streamed, to the extent practicable and subject to the right of a member of the CCT to take the discussion “off the record.” Wherever a meeting is taken “off the record,” however, the record shall reflect this decision, as well as the underlying considerations that motivated such action.
2. The CCT will endeavor to post (a) action items within 24 hours of any telephonic or face to face meeting and (b) streaming video and/or audio recordings as promptly as possible after any such meeting, subject to the limitations and requirements described in subsection (1) above.
3. The CCT will maintain a public website, <https://community.icann.org/display/CCT/Competition%2C+Consumer+Trust+and+Consumer+Choice>, on which it will post: (a) minutes, correspondence, meeting agendas, background materials provided by ICANN, members of the RT, or any third party; (b) audio recordings and/or streaming video; (c) the affirmations and/or disclosures of members of the CCT under the CCT’s conflict of interest policy; (d) input, whether from the general public, from ICANN stakeholders, from the ICANN organization or Board members, governments, supporting organizations and advisory committees, etc. Absent overriding privacy or confidentiality concerns, all such materials should be made publicly available on the CCT website within two business days of receipt.
4. Email communications among members of the CCT shall be publicly archived automatically via the CCT-review email cct-review@icann.org.

ICANN Organization Input

CCT staff will facilitate additional data gathering and coordinate dialogue with additional staff to provide expertise regarding certain elements of the program or its operations, as appropriate. To inform the CCT's work, staff will also solicit outside expertise as requested by CCT members and as budget and resources permit.

The ICANN organization may provide written responses to any questions posed by the CCT, and/or provide input to the CCT in connection with issues that the CCT did not raise but which, in the estimation of staff, are relevant to the work of the CCT.

The ICANN organization will also provide draft review team guidelines and procedures developed with Board oversight, to assist the CCT in its deliberations to cover additional topics beyond those identified in this Terms of Reference.

Community Consultations

Staff will also assist the CCT leadership at their request with materials, meeting arrangements and facilitating outreach with other ICANN supporting organizations and advisory committees and the ICANN Board, as well as individual community members through comment periods, questionnaires and surveys. The CCT will explore other avenues for outreach to the public to engage and collect inputs with respect to this review. This may include community sessions both in person at ICANN meetings or online in Adobe Connect web sessions or any other agreed technology that is convenient to all members, and has the requisite capabilities such as recording of sessions.

Work of Review Team

Decision-Making Within the CCT

Under the AoC, the CCT is to make recommendations regarding how the New gTLD Program impacted competition, consumer trust and consumer choice.

The CCT will seek, but will not require, full consensus with respect to such recommendations. To the extent that the CCT is unable to achieve consensus with respect to any such recommendations, its reports and recommendations will reflect the variety and nature of the CCT views. (See GNSO types of consensus as noted in Section 3.6 of the GNSO Guidelines for examples.)

Any conflicts of interest that may affect the views of a CCT member must be disclosed and addressed in accordance with the conflict of interest policy discussed above. The CCT will ensure that all documents are full consensus documents, i.e., they accurately reflect the discussion held.

Meetings

1. Face to Face Meetings: The CCT intends to hold its meetings concurrent with ICANN meetings and as needed to advance and complete its review. The CCT shall meet in person in Los Angeles on 22–23 February 2016; in Marrakech on 9–10 March 2016; and on additional dates as needed.

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2. Telephonic Meetings: In between face to face meetings, the CCT and/or working groups of the CCT shall conduct regular telephonic meetings. All such meetings shall be publicly noticed on the CCT wiki as far in advance as possible, and agendas for each such meeting will be published no fewer than 2 days in advance.

Reporting

1. Members of the CCT are, as a general matter, free to report back to their constituencies and others with respect to the work of the CCT, unless the information involves confidential information.
2. While the CCT will strive to conduct its business on the record to the maximum extent possible, members must be able to have frank and honest exchanges among themselves, and the CCT must be able to have frank and honest exchanges with stakeholders and stakeholder groups. Moreover, individual members and the CCT as a whole must operate in an environment that supports open and candid exchanges, and that welcomes re-evaluation and repositioning in the face of arguments made by others.
3. Accordingly, the CCT will retain the authority to determine that an interaction will be held under the Chatham House Rule: "When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed."
4. Members of the CCT are volunteers, and each will assume a fair share of the work of the team.
5. Members of the CCT shall execute the investigation according to the plan, based on best practices for fact-based research, analysis and drawing conclusions.
6. Where appropriate, and with the consensus of the CCT, the ICANN organization will be used to provide administrative support services related to travel, meeting logistics, and technology. To preserve the independence and integrity of the CCT, however, the ICANN organization will perform substantive tasks (e.g., report drafting, etc.) with respect to the work of the CCT, as requested. If necessary, the Chair and Vice Chairs of the CCT shall propose an approach to providing appropriate support to the CCT efforts.

Participation

1. Members could be assisted by parties outside the CCT and the ICANN organization when necessary (e.g., for translation purposes), although the emphasis must remain on direct interaction between the named members. CCT Observers should not intervene themselves, nor should they be able to substitute for a member who is unable to participate. This applies to conference calls as well as face-to-face meetings. Remote participation possibilities should be provided in cases where a member is unable to attend a face-to-face meeting. Independent experts are deemed to be full Members of the CCT.

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2. The CCT leadership (Chair and Issue Leads) of the working group will coordinate the work of the CCT, and will serve as full participants in the substantive deliberations of the CCT and in the development of the CCT's deliverables. All members of the CCT will have equivalent voting rights.
 3. External Experts (if applicable). The External Experts are third parties that may be engaged with to support the CCT work. These experts would be those engaged aside from the independent experts, who were chosen to participate in the review. Selection of the experts to support the work of the CCT will follow ICANN procurement processes and be conducted by an open ICANN Request for Proposal (RFP). The RFP will be based upon the criteria and expertise that the CCT has determined.

Tools /Means of Communications

The CCT will endeavor to use online communications capabilities to further its work. In particular, the review team will use Adobe Connect meeting rooms in connection with its telephonic meetings. The materials available in these settings will be made available to the public in keeping with open and transparent processes and the policies contained in this methodology.

Indicators/Metrics

A set of indicators of competition, consumer trust and consumer choice has been adopted by the ICANN Board for consideration in this review.

The CCT may identify a methodology for analyzing these metrics. In addition, the CCT will take into account reports created to support review of Program Implementation, Rights Protection Mechanisms, and safeguards against DNS abuse. In addition, the CCT may identify other sources of data it wishes to help inform in its review.

Finally, the CCT may request additional data or reports be generated to support unanticipated aspects of the review.

Deliverables

INTERIM RECOMMENDATIONS

The CCT might make interim recommendations to the GNSO and/or Board to launch new policy development initiatives, or further implementation work on existing policies, in tandem with the review where there is full consensus among the review team to do so.

FINDINGS

The CCT will present and document its findings on the degree to which the New gTLD Program did or did not enhance overall competition, consumer trust and consumer choice in the gTLD space. Further, the CCT will present and document the successes and challenges experienced by the community in the application process and the attempt to mitigate the adverse consequences of the New gTLD Program.

FINAL RECOMMENDATIONS

7. The CCT will try to post its draft prioritized recommendations in December 2016 in order to solicit public comment. Recommendations should be clear, concise, concrete, prioritized and implementable.

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4. The recommendations will fall into two categories: those which can be implemented directly by staff and those which require further policy development by the community.
 5. These recommendations will be limited to those designed to:
 - a. Enhance competition, consumer trust and consumer choice in the gTLD marketplace
 - b. Improve elements of the application and evaluation processes
 - c. Advance efforts to mitigate abusive activity in the DNS
 6. The team will document the rationale it has employed for any individual recommendation, and where possible, provide a quantitative target or metric for measurement of the recommendations' success.

RECOMMENDATIONS TO NEXT REVIEW PANEL(S)

Based on substantive review of its work, the CCT will provide recommendations regarding the procedures and conduct of future reviews as called for in the AoC. To facilitate the collection of this feedback, a survey will be conducted of all CCT members to gather information on the process, methodology and procedures used (so that the next CCT Review may be conducted using these lessons learned, and so that lessons learnt are available to subsequent CCT Review Teams).

Conflicts of Interest

The CCT has adopted the conflict of interest policy set forth in [Attachment A](#) to this Methodology. All member declarations submitted in accordance with the conflict of interest policy will be made public and posted on the CCT website.

At every meeting the CCT members confirm if declaration has changed.

Timeline

The review team will issue the draft report for public comment in December 2016 and solicit input from the community and stakeholders.

The review team will review the comments received on its draft recommendations and refine the report with the goal of producing the final recommendations by April 2017.

Appendix F: Fact Sheets

The ICANN organization publishes fact and expense sheets on a quarterly basis, as well as participation and milestones updates on a monthly basis. These documents bring transparency and accountability to the community on how review team resources and time are being used.

The Fact Sheet captures attendance of review team members, costs associated with professional services and travel to attend face-to-face meetings, milestones and participation.

Definitions are as follows:

Professional Services: Approved budget for the review team to use for services of independent experts, as noted in Bylaws Section 4.6(a)(iv). Review teams may also solicit and select independent experts to render advice as requested by the review team. ICANN shall pay the reasonable fees and expenses of such experts for each review contemplated by this Section 4.6 to the extent such fees and costs are consistent with the budget assigned for such review. Guidelines on how review teams are to work with and consider independent expert advice are specified in the Operating Standards.

Travel: Amount approved for review team travel for face-to-face meetings. Examples of travel expenditures include, but are not limited to, charges for airfare, hotel, per diem reimbursement, venue meeting costs, audio-visual/tech support, and catering. These expenses include Review Team and the ICANN organization support travel.

ICANN Organization Support: Amount approved in the budget for the ICANN organization to contract outside services to support the work of the review team.

Spent to Date: Amounts include quarterly financials since inception of the work by the review team through the most recent quarter end.

Committed Services:

1. Travel: Estimated expenses for approved face-to-face meetings.
2. Professional Services: Included services from signed contracts to be provided or invoiced. These are typically for non-employee related support services provided by contractors.

Total Spent and Committed to Date: This is the sum of the “Spent to Date” and “Committed Services” amounts through the most recent quarter end. The “Committed Services” amount does not include the “Spent to Date” amounts. **Remaining Budget:** This is the difference between the “Approved Budget” and the “Total Spent and Committed to Date” amounts.

Fact sheet archives may be viewed at: <https://community.icann.org/display/CCT/Fact+Sheet>.

Competition, Consumer Trust and Consumer Choice (CCT) Review

Fact sheet as of: 7-Sep-2018

Overview:
ICANN is committed to ensuring that, as it contemplates expanding the top-level domain space, the various issues that are involved will be adequately addressed prior to implementation.

These include issues such as competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection.

The AOC also requires ICANN to convene a community-driven review to examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as the effectiveness of: The application and evaluation of the application process to place to mitigate issues involved in the introduction or expansion.

Wiki Page:
CCT Wiki Home Page
CCT-FT Email:
IDUUL-CB-CCT@icann.org
Review Questions:
reviews@icann.org

CCT Chair
Jonathan Zuck
Competition and Consumer Choice Stakeem Chair:
Jordyn Buchanan
Safeguards & Trust Subteam Chair:
Laureen Kapin

Review Status (as of 07 Sept 2018)

Start Date: 13-Jan-2016 Review Duration to Date: 32 Months
 Expected Completion: 8-Sep-2018 Total Expected Duration: 32 Months

0% 100% Complete, Based on Duration

0% 100% Budget Spent/Committed

Section I: People (as of 07 Sept 2018)

Review Team members: **15** 64%
 Volunteer Participation Rate: **20%**

ICANN OIG (Inherently Governmental) various times throughout the review process

Face-to-face meetings: **8** Meetings
 Calls (plenary and subteam): **142** Calls
 Volunteer meeting & call time: **3,366** Hours
 Performed support time: **11,653** Hours (estimated hours and non-organizational)

Section II: Financial Resources (as of 07 Sept 2018)

Direct Review Costs ¹⁾	FY19 Approved Budget ²⁾	FY19 Spent to Date ³⁾	Committed FY19 Budget ⁴⁾	Remaining FY19 Budget ⁵⁾	Actual Expenses: Review to Date ⁶⁾	Total Spent and Committed to Date
Professional Services-IPSCCT	\$ -	\$ -	\$ -	\$ -	\$ 210,000	\$ 210,000
Professional Services-CCT	\$ -	\$ -	\$ -	\$ -	\$ 1,540,000	\$ 1,540,000
Travel	\$ -	\$ 5,490	\$ -	\$ (5,490)	\$ 420,000	\$ 420,000
Total	\$ -	\$ 5,490	\$ -	\$ (5,490)	\$ 2,170,000	\$ 2,170,000

¹⁾ Includes incremental department/professional services budget of \$200,000.
²⁾ Professional services includes services from signed contracts to be provided or expeditiously procured. Includes approved budget for the fiscal year.
³⁾ Based on the most recent month and financials (may include preprint expeditiously procured).
⁴⁾ Includes incremental department/professional services budget of \$200,000.
⁵⁾ Includes incremental department/professional services budget of \$200,000.
⁶⁾ Includes incremental department/professional services budget of \$200,000.

Section III: Milestones (as of 07 Sept 2018)

Project Management 20% of total effort

0% 100%

- Adopt terms of reference
- Adopt work plan
- Assemble subteams
- Prepare templates
- Solidify list of projects
- Adopt discussion paper template
- Adopt report shell/framework

Research and Studies 20% of total effort

0% 100%

- Identify data/resources needed for work
- Analyze data from research and studies

Draft Report 25% of total effort

0% 100%

- Assemble initial conclusions
- Populate discussion papers with findings and potential recs.
- Reach agreement on discussions papers
- Discuss/approve/consolidate findings and interim recommendations
- Approve interim recommendations
- Seek ICANN Org and Board Caucus WC input on implementability of interim recommendations
- Circulate interim recommendation to ICANN community
- Socialize interim recommendations with community
- Build and approve Draft Report for public comment
- Incorporate public comment and socialize draft recommendations with community
- Produce summary of public comment received
- GDD to provide input on draft recommendations

New Sections 10% of total effort

0% 100%

- Review studies, input and incorporate as appropriate
- Produce additional recommendations/new sections, as appropriate and edit report
- Approve additional recommendations
- Publish new sections of the report for public comment
- Socialize changes to report with community
- Seek ICANN Org and Board Caucus WC input on implementability of recommendations
- Circulate to new ETLD Subsequent Procedures PIP WG
- Produce summary of public comments

Final Report 25% of total effort

0% 100%

- Review public comment input received and incorporate as appropriate
- Seek Board/ICANN Organization input on implementability of recommendations
- Circulate final recommendations to Subsequent Procedures PIP WG for input
- Finalize Report
- Adapt final recommendations and report
- Send final report to ICANN Board

TOTAL:
 100% 100% Milestones Completed

Appendix G: Participation Summary

Name	Affiliation	Plenary Calls	Face-to-Face Meetings (in days)	Competition and Consumer Choice Subteam Calls	Safeguard and Trust Subteam Calls	Nielsen Subteam Calls	Application and Evaluation Process Subteam Calls	INTA Impact Study Subteam Calls
Total Number of Calls/Meetings		67	16	27	38	4	3	
Drew Bagley	Independent Expert	59	14	2	31			
Stanley Besen ¹	Independent Expert	21	12	13	1	1		
Calvin Browne	GNSO	48	15	2	21			
Jordyn Buchanan	GNSO	63	15	27		3	1	3
Dejan Djukic	ccNSO	44	15	21			1	2
Jamie Hedlund	ICANN President and CEO rep.	49	10	6	22			
Kaili Kan	ALAC	59	15	18				
Laureen Kapin	GAC Chair rep.	59	15		32	2	2	
Gao Mosweu	ccNSO	44	15		28		1	
Carlos Raul Gutierrez	GNSO	39	15	5	16	2		
Megan Richards	GAC	37	12	12				
Carlton Samuels	ALAC	45	15		26			2
N. Ravi Shankar ²	Independent Expert	2	0					
Waldo Siganga	GNSO	55	15	20		2	1	1
Fabro Steibel	Independent Expert	22	10		12	3		
David Taylor	GNSO	41	15	1	24			3
Jonathan Zuck	GNSO	58	15	23	23	3	2	

¹ Resigned from CCTRT on June 25, 2017

² Resigned from CCTRT on October 18, 2017

Appendix H: Possible Questions for a Future Consumer Survey

As referenced in the Data Analysis chapter, the CCT would have found it useful to have answers to the following questions, which the review team recommends incorporating in the next iteration of a survey of domain name registrants:

1. What proportion of the registrants in the new gTLDs were previously registrants in a legacy gTLD but gave up their registrations when they registered in a new gTLD? This will provide some indication of the importance of *switching costs*.
2. What proportion of the registrants in the new gTLDs had not previously been registrants in any gTLD? This will provide some indication of the extent to which the introduction of new gTLDs expanded the number of individual registrants.
3. What proportion of the registrants in the new gTLDs are entities that continued to have registrations in legacy gTLDs? This will provide some indication of whether registrations in legacy and new gTLDs are complements as opposed to substitutes.
4. What proportion of the registrants in the new gTLDs registered primarily: (a) for defensive reasons, i.e., they felt compelled to register in a new gTLD because they existed but obtained no benefits from doing so and what proportion registered primarily or (b) for the benefits that they received, perhaps because doing so permitted them to reach users that would have otherwise been inaccessible? This will provide some indication of whether, on balance, the introduction of new gTLDs resulted in net costs or net benefits to registrants.
5. What are the characteristics of the new gTLDs that attracted registrants primarily because of the benefits that they offered? This will provide some indication of the sources of the benefits that the new gTLDs provided, e.g., new allowable characters, service to a specific community, higher levels of security or customer service, ability to offer domain names to noncompeting entities.

The CCT recommends that ICANN conduct a survey of registrants that would include the following questions:

6. Did you register a new domain name in the last 12 months?
7. For each name that you registered, did you register it in a new gTLD or in a legacy gTLD?
8. For each name that you registered in a new gTLD [Check one]
 - Was the registration a newly registered name?
 - Did the registration replace a registration in a legacy gTLD?
 - Did the registration duplicate a registration in a legacy gTLD?
9. For each name that you registered in a new gTLD, was the closest alternative that you considered another gTLD or a legacy gTLD? What was the identity of that gTLD?
10. For each name that you registered in a legacy gTLD, did you consider registering in a new gTLD as an alternative?

11. For each name that duplicated a registration in a legacy gTLD, was the registration intended primarily to prevent the name from being used by another registrant?

12. For each name that you registered, indicate whether it is currently parked.

Although definitions of parking vary, the general idea is that parked domains are not currently being used as identifiers for Internet resources. Examples of behaviors that could be considered parking include:

- ⦿ The domain name does not resolve.
- ⦿ The domain name resolves, but attempts to connect via HTTP return an error message.
- ⦿ HTTP connections are successful, but the result is a page that displays advertisements, offers the domain for sale, or both. In a small number of cases, these pages may also be used as a vector to distribute malware.
- ⦿ The page that is returned is empty or otherwise indicates that the registrant is not providing any content.
- ⦿ The page that is returned is a template provided by the registry with no customization offered by the registrant.
- ⦿ The domain was registered by an affiliate of the registry operator and uses a standard template with no unique content.
- ⦿ The domain redirects to another domain in a different TLD.

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**An Economic Framework for the Analysis of the
Expansion of Generic Top-Level Domain Names**

prepared for ICANN

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June 2010

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I. INTRODUCTION AND OVERVIEW

1. Following a policy recommendation of the Generic Names Supporting Organization (GNSO), ICANN proposes to introduce new generic top-level domains (gTLDs) and has asked us to conduct an initial economic analysis of the costs and benefits of this proposed expansion.¹

Specifically, ICANN commissioned us to:

- Survey published studies and resources that describe the potential impacts of new gTLD introduction;
- Examine theoretical arguments about the benefits and costs of an increased number of gTLDs; and
- Consider and propose new empirical studies that could help assess costs and benefits of new gTLDs. The studies should be planned and structured to address open questions and to provide information about how best to structure rules for new gTLDs.

This report presents our findings and recommendations with respect to each of these tasks.

2. We begin by providing relevant background on the domain name system (DNS) and the proposed process for approving new gTLDs. With this foundation established, we develop a conceptual framework in which to conduct an economic analysis of the welfare and efficiency effects of introducing additional gTLDs. This economic framework recognizes that the costs and benefits of new gTLDs may not accrue solely to the new gTLD operators, but also to third parties (those outside of the registry application and approval process). The potential for “externalities” (*i.e.*, costs and benefits imposed on third parties) implies that an open-entry delegation process may not lead to the socially-optimal number of new gTLDs. For example,

¹ The GNSO is one of the bodies within ICANN that develops policy recommendations. It comprises representatives of several different constituencies such as gTLD registries, gTLD registrars, Internet service providers, and the business community.

Internet users may suffer costs or gain benefits from the establishment of new gTLDs if the new gTLDs affect the ease of using the Internet. Domain name registrants may also suffer costs or gain benefits if the addition of new gTLDs affects their costs of maintaining an Internet presence or protecting their trademarks. These costs and benefits to third parties create a gap between the net private benefits of new gTLDs to their operators and total net benefits to society. Because new gTLD applicants generally can be expected to make decisions to maximize their own (private) benefits rather than overall social benefits, an open-entry delegation process can lead to private decision-making that is not optimal for society as a whole; a gap between private and social net benefits results in private incentives that could lead to too many or too few new gTLDs.² An estimate of the potential gap between private and social costs and benefits is, therefore, necessary for determining whether an open-entry process for delegating new gTLDs is likely to increase aggregate social benefits. The greater is the gap between private net benefits and social net benefits, the more likely it is that an open-entry process will lead to either too few new gTLDs (if net social benefits exceed net private benefits) or too many new gTLDs (if net private benefits exceed net social benefits).

3. ICANN and others have estimated that prospective registry operators may apply for hundreds of new gTLDs, indicating that private incentives to operate new gTLDs are strong.³ ICANN's task, already underway, will be to consider the effects of new gTLDs on all members of the Internet community and not necessarily to allow private incentives alone determine the number of new gTLDs delegated. Because ICANN can shape the application process and the

² This situation is not particular to gTLDs; in any market where there is a gap between private and social net benefits, private decision-making can lead to sub-optimal outcomes.

³ Based on a study commissioned by ICANN, ICANN expects to receive 400-600 applications in the initial round of new gTLD activity. (ICANN, "Draft: Delegation Rate Scenarios for New gTLDs," available at <http://www.icann.org/en/topics/new-gtlds/anticipated-delegation-rate-model-25feb10-en.pdf>, site visited June 15, 2010.)

rules under which new gTLDs operate, it can take into account any diversion of private and social benefits in defining the process and setting rules. A thorough understanding of the potential sources of the gap between private and social net benefits will provide a basis for determining which application and evaluation processes are most likely to lead to the introduction of gTLDs that promote social welfare and economic efficiency.

4. Understanding a new gTLD's net impact on social welfare requires knowledge of the third-party benefits and costs. We first survey existing studies that shed light on these benefits and costs. These studies are informative, but largely inconclusive. Consequently, we propose a set of empirical studies designed to provide some evidence regarding the relative costs and benefits based on experience from other TLDs and market behavior. No study of past behavior, however, can predict the future costs and benefits for an entirely new set of circumstances. That said, for reasons that we discuss below, the largest sources of potential benefits from the creation of new gTLDs are likely to be:

- additional user benefits that arise from innovative new business models that are very different from those of existing TLDs' registry operators;
- development of gTLDs to serve communities of interest; and
- expansion of gTLDs to include Internationalized Domain Names (IDNs) that use an expanded character set and can thus offer new benefits to specific user communities.

Because business model innovations are difficult to predict, experience with the development of gTLDs that serve specific communities is limited, and the community has no experience with IDNs at the TLD level, it is difficult to describe the expected effects of new gTLDs with precision. Nevertheless, the proposed studies will provide an empirical foundation for understanding the effects of new gTLDs and will provide guidance for procedures and rules governing the delegation and operation of new gTLDs.

II. BACKGROUND

5. This section provides relevant background information regarding the domain name system and the proposed process for approving new gTLDs. In the 1990s, management of the domain name system was revised periodically in attempts to bring more competition to the market for second-level domain names, but the number of available gTLDs, within which all second-level domain names had to be registered, was fixed and small. Beginning in 2000, the set of gTLDs was expanded, and management of the registries evolved in an attempt to foster more competition. Now, at the recommendation of the GNSO, ICANN is overseeing a potentially significant expansion in the number of gTLDs in order to encourage more competition and to serve users better.

A. MANAGEMENT OF THE DNS PRIOR TO 2000

6. The domain name system was developed in the early 1980s as a means of organizing and easing Internet navigation by establishing unique, easier-to-remember addresses for different locations on the Internet. Initially, eight gTLDs were established, within which eligible entities could register second-level domain names. Three of these gTLDs (.com, .org, and .net) were unrestricted, meaning that anyone could register a second-level domain name within them. Five (.edu, .gov, .arpa, .int, and .mil) were restricted-use, meaning that only particular types of users were allowed to register a second-level domain within them. In addition to gTLDs, two-letter country code TLDs (ccTLDs) were introduced over time, beginning with .us in 1985.

7. Initially, the task of registering second-level domain names in the various gTLDs fell to SRI International, a not-for-profit research institute operating under a contract with the Department of Defense (DOD). In the early 1990s, the responsibility for registering names for .com, .org, .net, .edu, and .gov was transferred to a private corporation, Network Solutions Inc.

(“NSI”), under a contract with the National Science Foundation, which had taken over from DOD as the funding source.⁴ NSI operated the registry and acted as the sole registrar for .com, .org, and .net.⁵

8. In the early 1990s the most-used gTLD was .edu, but as the commercial possibilities of the Internet became apparent following the development of the World Wide Web, .com quickly became the dominant gTLD. As the .com registry operator and its sole registrar, NSI had a monopoly on the registration of second-level domain names in the dominant gTLD. In 1995 NSI began charging US\$100 to register a domain name for a two-year period.⁶

9. The next few years saw a rapid series of steps designed to increase competition. In 1997, the U.S. Government issued a policy directive stating that the management of the DNS should be privatized.⁷ In a policy statement issued in 1998, the U.S. Department of Commerce (“Commerce”) declared its intent to transfer management of the DNS from the U.S. government to a private corporation.⁸ In its policy statement, Commerce discussed the different opinions by industry participants on whether new competitive registries (*i.e.*, new gTLDs) should be established. Although it expressed the belief that “competitive systems generally result in greater innovation, consumer choice, and satisfaction in the long run,” and that “the pressure of competition is likely to be the most effective means of discouraging registries from acting

⁴ National Research Council (2005), *Signposts in Cyberspace: The Domain Name System and Internet Navigation*, The National Academies Press, at 75-76.

⁵ *Id.* at 78.

⁶ *Id.* at 76.

⁷ *Id.* at 76-77.

⁸ U.S. Department of Commerce, National Telecommunications and Information Administration, Statement of Policy: Management of Internet Names and Addresses, 63 Fed. Reg. 31741 (1998), available at http://www.ntia.doc.gov/ntiahome/domainname/6_5_98dns.htm, site visited June 15, 2010.

monopolistically,” Commerce left the decision about whether, when, and how new gTLDs would be established to the new corporation that would manage the DNS.⁹

10. The Internet Corporation for Assigned Names and Numbers (“ICANN”) was established in 1998 as a private, not-for-profit corporation to manage the DNS. A Memorandum of Understanding (MOU) signed by Commerce and ICANN established ICANN’s authority to manage the DNS and reiterated Commerce’s intent that the management of the DNS would be “based on the principles of stability, competition, bottom-up coordination, and representation.”¹⁰ The MOU also described one of ICANN’s main responsibilities as “oversight of the policy for determining the circumstances under which new TLDs are added to the root system,” including “development of policies for the addition, allocation, and management of gTLDs and the establishment of domain name registries and domain name registrars to host gTLDs... .”¹¹ Thus, as described in its recent draft guidebook for new gTLD applicants, “one of [ICANN’s] key mandates has been to promote competition in the domain name market.”¹²

11. In late 1998, the National Telecommunications and Information Administration (“NTIA”), an agency within the U.S. Department of Commerce, required NSI to separate the registry functions from the registrar functions and to facilitate the entry of competitive registrars by establishing a shared registration system that would allow registrars other than NSI to interact

⁹ *Id.* at 11.

¹⁰ Memorandum of Understanding between the U.S. Department of Commerce and Internet Corporation for Assigned Names and Numbers, *available at* <http://www.icann.org/en/general/icann-mou-25nov98.htm>, *site visited* June 15, 2010, § II.A.

¹¹ “Management of Internet Names and Addresses,” 63 Fed. Reg. 31741 (1998).

¹² ICANN, “Draft Applicant Guidebook, version 4,” *available at* <http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-28may10-en.pdf>, *site visited* June 15, 2010 (hereinafter *Draft Applicant Guidebook v.4*) at A-1.

with the .com, .org, and .net registry databases.¹³ This led to the entry of hundreds of registrars, but the set of gTLDs remained fixed at a small number.¹⁴

B. PREVIOUS gTLD EXPANSIONS

12. Since its founding, ICANN has held two rounds of gTLD expansion. The first round began in 2000. In that round, ICANN announced that it would create a maximum of seven new gTLDs. It received approximately 50 applications, some from multiple entities proposing jointly to own and operate a registry and some for multiple gTLDs.¹⁵ After evaluating the applications, ICANN added four unsponsored gTLDs (.biz, .info, .name, and .pro) and three sponsored gTLDs (.aero, .coop, and .museum).

13. The second round of gTLD expansion began in 2004. In that round, ICANN accepted applications only for sponsored gTLDs but announced that it would not limit the number of new gTLDs and would approve all qualified applications. ICANN received ten applications for nine different sponsored gTLDs and ultimately approved seven of the applications (.asia, .cat, .jobs, .mobi, .post, .tel, and .travel).¹⁶ Three applications were not approved. Following these two

¹³ By 1998, authority for overseeing the DNS had been transferred from NSF to NTIA. NSI was required to separate registry and registrar functions as a condition of the renewal of its contract with NTIA to operate the registries and several root servers. (*Id.* at 77-78.)

¹⁴ VeriSign, the current .com registry operator, lists more than 800 .com registrars. (VeriSign, “Find a Registrar,” available at <http://www.verisign.com/domain-name-services/find-registrar/index.html>, site visited June 15, 2010.)

¹⁵ For example, NeuStar Inc. applied for six gTLDs (.dot, .info, .site, .spot, .surf, and .web). NeuStar also formed a joint venture with Melbourne IT that applied for other gTLDs (.biz and .per). (See, ICANN, “New TLD Program Application Process Archive,” available at <http://www.icann.org/en/tlds/app-index.htm>, site visited June 15, 2010.)

¹⁶ ICANN, “Status Report on the sTLD Evaluation Process,” December 3, 2005, available at <http://www.icann.org/en/tlds/stld-apps-19mar04/stld-status-report.pdf>, site visited June 15, 2010 (hereinafter *sTLD Status Report*). The registry agreement for .post was signed only recently, in December 2009. (ICANN, “.post Sponsored TLD Agreement,” December 11, 2009, available at <http://www.icann.org/en/tlds/agreements/post/>, site visited June 15, 2010.)

rounds of expansion, there are currently 21 gTLDs, of which seven are unsponsored.¹⁷ The table below provides summary information regarding the current gTLDs.¹⁸

gTLD Restrictions and Registries

gTLD	Introduced	Restrictions, if any	Current Registry Operator (Sponsor)
.arpa	1985	Internet architecture	IANA (Internet Architecture Board)
.com	1985	Unrestricted (but intended for commercial registrants)	VeriSign, Inc.
.edu	1985	United States educational institutions	EDUCAUSE/VeriSign, Inc. (EDUCAUSE)
.gov	1985	United States government	ZoneEdit (US General Services Administration)
.mil	1985	United States military	Defense Information Systems Agency (US DOD Network Information Center)
.net	1985	Unrestricted (but intended for network providers, etc.)	VeriSign, Inc.
.org	1985	Unrestricted (but intended for organizations that do not fit elsewhere)	Public Interest Registry, Afilias
.int	1988	Organizations established by international treaties between governments	ICANN (IANA)
.aero	2001	Air-transport industry	SITA (SITA)
.biz	2001	Businesses	NeuStar
.coop	2001	Cooperatives	DotCooperation, LLC (NCBA)
.info	2001	Unrestricted use	Afilias Limited
.museum	2001	Museums	Museum Domain Management Association (Museum Domain Management Association)
.name	2001	For registration by individuals	VeriSign Information Services, Inc.
.pro	2002	All professionals	RegistryPro (RegistryPro)
.cat	2005	Catalan linguistic & cultural community	Associació puntCAT (Fundació puntCAT)
.jobs	2005	The international human resource management community	Employ Media LLC/Verisign (Society for Human Resource Management)
.mobi	2005	Mobile content providers and users community	dotMobi (Nokia, Vodafone, Microsoft, Afilias)
.travel	2005	Travel and tourism community	Tralliance Registry Management Company, LLC. (The Travel Partnership Corporation)
.tel	2006	For individuals and businesses to store and manage their contact information in the DNS	Telnic Ltd. (Telnic Ltd.)
.asia	2007	From Asia/For Asia	Afilias (dotAsia Organisation)

Sources: ICANN, "Registry Listing," <http://www.icann.org/en/registries/listing.html>.
Various registry websites.

¹⁷ Unsponsored gTLDs operate under ICANN policies rather than the policies of the sponsoring organization but still may have restrictions on who may register domain names. .biz, .name, and .pro are unsponsored gTLDs but are intended for commercial purposes, individuals, and professionals, respectively.

¹⁸ This table excludes .post because it is not yet operational.

C. THE PROPOSAL TO INTRODUCE NEW gTLDs

14. For the past several years, ICANN has been developing a policy and process for delegating additional gTLDs. The GNSO began work on a policy towards issuing new gTLDs in December 2005. Based on its findings that introducing new gTLDs “has the potential to promote competition in the provision of registry services, and to add to consumer choice, market differentiation and geographic and service-provider diversity” and that “[n]o compelling reason has been articulated to not proceed with accepting applications for new top-level domains,” the GNSO recommended in September 2007 that “ICANN must implement a process that allows the introduction of new top-level domains.”¹⁹ The GNSO also approved several principles and policy recommendations with the goal of ensuring a fair and transparent process that, among other things, respects intellectual property rights.²⁰ ICANN’s Board adopted the GNSO’s recommendations in June 2008. ICANN then began devising rules and procedures, drafting materials for applicants, putting those rules, procedures, and materials out for comment, and revising them accordingly.²¹

15. In October 2008, ICANN posted for public comment its proposal to introduce new gTLDs. The Department of Commerce submitted comments on the proposal in December 2008. In those comments, Commerce cited the “core values” expressed in the Commerce-ICANN MOU and the ICANN Board’s 2006 call for an economic study of the domain name market,

¹⁹ GNSO, “Board Report, Introduction of New Generic Top-Level Domains,” September 11, 2007, available at <http://gns0.icann.org/issues/new-gtlds/council-report-to-board-pdp-new-gtlds-11sep07.pdf>, site visited June 15, 2010 at 28 and 19.

²⁰ See, GNSO, “Board Report, Introduction of New Generic Top-Level Domains,” September 11, 2007, available at <http://gns0.icann.org/issues/new-gtlds/council-report-to-board-pdp-new-gtlds-11sep07.pdf>, site visited June 15, 2010 at 16-27.

²¹ The most recent revision of the draft applicant materials was published for comment in June 2010.

which was proposed during the renegotiation of several registry agreements to understand the “changing domain name marketplace.”²² In its call for an economic study, the ICANN Board identified several specific questions as being of potential interest in understanding the domain name marketplace:

1. Is the domain registration market one market, or does each TLD function as a separate market?
2. Are registrations in different TLDs substitutable?
3. How do the switching costs involved in moving from one TLD to another affect consumer and pricing behavior?
4. How does market structure and pricing affect new TLD entrants? Do other markets have similar issues, and, if so, how are they addressed and by who?²³

Commerce found these questions to be relevant to the issue of new gTLDs, stating that “it is unclear that the threshold question of whether the potential consumer benefits [of new gTLDs] outweigh the potential costs has been adequately addressed and determined,”²⁴ and “ICANN needs to complete this economic study and the results should be considered by the community before new gTLDs are introduced.”²⁵

²² ICANN’s Board had adopted a resolution calling on ICANN’s President “to commission an independent study by a reputable economic consulting firm or organization to deliver findings on economic questions relating to the domain registration market... .” (ICANN, Minutes, Special Meeting of the Board, October 18, 2006, available at <http://www.icann.org/en/minutes/minutes-18oct06.htm>, site visited June 15, 2010.) This study was recommended to address questions arising during the renegotiation of the registry agreements for .biz, .info, and .org. Specifically, ICANN wanted to study “the changing domain name marketplace” due to “specific concerns ... regarding potential abuses of ICANN rules as it relates to consumer interests.”

²³ ICANN, Minutes, Special Meeting of the Board, October 18, 2006, available at <http://www.icann.org/en/minutes/minutes-18oct06.htm>, site visited June 15, 2010.

²⁴ Letter from Meredith A. Baker (NTIA) to Peter Dengate Thrush (ICANN), December 18, 2008, available at http://www.ntia.doc.gov/comments/2008/ICANN_081218.pdf, site visited June 15, 2010, at 1.

²⁵ *Id.* at 1.

16. Commerce also asked the Department of Justice (DOJ) for advice on competition issues raised by the new gTLD proposal. The DOJ offered several conclusions. First, the DOJ concluded that some new gTLDs likely would have market power because at least some registrants, *e.g.*, those who needed to protect trademarks or who had invested significantly in their existing domain names, would need to establish domain names in multiple new gTLDs.²⁶ Second, the DOJ concluded that existing gTLDs, especially the .com registry operated by VeriSign, already have market power; with respect to .com, the DOJ noted that domain name registrants considered other gTLDs or ccTLDs to be complements to—rather than substitutes for—.com.²⁷ Third, because of its belief that there were first-mover advantages and network effects, the DOJ concluded that the market power of existing gTLDs, especially Verisign’s.com registry, would not be constrained by new gTLDs.²⁸

17. As with the 2004 round of gTLD introductions, ICANN does not intend to restrict the number of new gTLDs that it may delegate in the current round.²⁹ Under the Board-approved policy, ICANN would accept any new gTLD as long as it met all of the criteria established by ICANN and survived any objections raised by parties with standing to object.

²⁶ Letter from Deborah A. Garza (DOJ) to Meredith A. Baker (NTIA) re: ICANN’s Draft RFP for New gTLDs, December 3, 2008 *available at* http://www.ntia.doc.gov/comments/2008/ICANN_081218.pdf, *site visited* June 15, 2010 at 3.

²⁷ *Id.* at 2.

²⁸ Letter from Deborah A. Garza (DOJ) to Meredith A. Baker (NTIA) re: ICANN’s Draft RFP for New gTLDs, December 3, 2008 *available at* http://www.ntia.doc.gov/comments/2008/ICANN_081218.pdf, *site visited* June 15, 2010 at 4.

²⁹ Depending on the number of applications received, however, ICANN may need to evaluate and delegate new gTLDs in batches. (*See*, ICANN, “Draft: Delegation Rate Scenarios for New gTLDs,” *available at* <http://www.icann.org/en/topics/new-gtlds/anticipated-delegation-rate-model-25feb10-en.pdf>, *site visited* June 15, 2010.)

18. Any established corporation, organization, or institution may apply for a new gTLD.³⁰

The process for application entails: (1) Initial Evaluation; (2) Extended Evaluation (if the application does not pass the Initial Evaluation); (3) Objection and Dispute Resolution; and (4) String Contention Resolution.³¹ Once all submitted applications are deemed complete from an administrative perspective, the applications will be posted for public comment for a given period of time. At the same time, Initial Evaluation will commence.³² If an application does not meet all requirements in the Initial Evaluation, it may be eligible for Extended Evaluation. Relevant public comment will be considered during Initial Evaluation and Extended Evaluation.

Throughout the Initial Evaluation period, parties with standing to object will be able to file objections based on any of four grounds.³³ Formal objections will be resolved using independent dispute resolution services. If more than one qualified applicant seeks the same or similar gTLD strings, the applicants will be encouraged to resolve such string contentions among themselves.

³⁰ See, *Draft Applicant Guidebook v.4*, for details of the application procedure, evaluation criteria and procedures, and dispute resolution process.

³¹ *Draft Applicant Guidebook v.4*, § 1.1.2.

³² The Initial Evaluation is comprised of two types of reviews: the String Review and the Applicant Review. The String Review consists of determining whether the applied-for gTLD string is so similar to others that it would cause user confusion, whether the string might adversely affect DNS security and stability, and whether evidence of government approval is provided in the case of certain geographical names. The Applicant Review focuses on whether the applicant has the requisite technical, operational, and financial capability to operate a registry and whether the registry services offered by the applicant might adversely affect DNS security or stability.

³³ The grounds for objection enumerated by ICANN are (1) String Confusion Objection (the gTLD is confusingly similar to either an existing TLD or another applicant's proposed gTLD); (2) Legal Rights Objection (infringement of another party's legal rights); (3) Morality and Public Order Objection (the gTLD string "is contrary to generally accepted legal norms of morality and public order that are recognized under international principles of law"); (4) Community Objection (a substantial portion of the targeted community objects to the application). (*Draft Applicant Guidebook v.4*, § 3.1.1.)

In the absence of resolution by affected applicants, string contention cases will be resolved through a community priority evaluation or auction.³⁴

19. Applicants will pay a gTLD Evaluation Fee of US\$185,000, plus additional fees in some circumstances.³⁵ If ICANN undertakes an extended review of Registry Services, for example, then the applicant may be assessed an additional fee of US\$50,000. In addition, Dispute Resolution Filing Fees are estimated to be US\$1,000 - US\$5,000 for filing a formal objection or responding to a formal objection. The Dispute Resolution Determination fee is payable to the applicable dispute resolution services provider and panel, and is estimated to range from US\$2,000 - US\$122,000, depending on the size of the panel used to review the case and the complexity of the issues.³⁶

III. THEORETICAL FRAMEWORK

20. This section discusses critical elements of economic theory relevant to analyzing the effects of introducing new gTLDs. Our analysis is structured around identifying the theoretical costs and benefits of new gTLDs.³⁷ Although ICANN's intent is to promote the interests of the Internet community as a whole and not just the private interests of prospective new gTLD applicants, we start with the costs and benefits to the new gTLD registry operators. There is an important distinction, however, between the costs and benefits that accrue to new gTLD registry

³⁴ Fees collected during the new gTLD application and approval process are intended to cover all expenses of the process. Auction proceeds would be paid to ICANN, which is required to use the proceeds to support its Mission and Core Values. (*Draft Applicant Guidebook v.4*, § 4.3, note 2.)

³⁵ Under some conditions, partial refunds of the Evaluation Fee are allowed when an applicant withdraws a gTLD application. The amount of the partial refund (20-70 percent of the Evaluation Fee) depends upon the stage at which the application is withdrawn. (*Draft Applicant Guidebook v.4*, § 1.5.1.)

³⁶ *Draft Applicant Guidebook v.4*, § 1.5.2.

³⁷ We do not address any technical issues regarding the introduction of new gTLDs.

operators and those that accrue to the Internet community or society as a whole. Where there is divergence between the net benefits to registry operators and the net benefits to the community, ICANN cannot rely upon the private incentives of the registry operators to produce a result that is optimal for the community or society as a whole.³⁸

A. PRIVATE VERSUS SOCIAL INCENTIVES TO INTRODUCE NEW gTLDs

21. We expect that an applicant’s decision to apply for a new gTLD will be based on its expected costs and benefits from applying for and potentially running a registry. A prospective registry operator would apply for and launch a new gTLD only if the benefits the registry operator expects to receive exceed the costs the registry operator expects to bear. These are often referred to as the *private* benefits and costs:

$$\begin{array}{rcccl} \textit{net} & & \textit{benefits to} & & \textit{costs to} \\ \textit{private} & = & \textit{registry} & - & \textit{registry} \\ \textit{benefits} & & \textit{operator} & & \textit{operator} \end{array}$$

From ICANN’s perspective, which encompasses the interests of the broader Internet community, determining whether a new gTLD would be beneficial depends on whether the *social* benefits are greater than the *social* costs, where social benefits and costs take into account not only the effects on the registry *operator* but also the benefits and costs to other members of society:

$$\begin{array}{rccclcl} \textit{net} & & \textit{benefits to} & & \textit{costs to} & & \textit{benefits to} & & \textit{costs to} \\ \textit{social} & = & \textit{registry} & - & \textit{registry} & + & \textit{other} & - & \textit{other} \\ \textit{benefits} & & \textit{operator} & & \textit{operator} & & \textit{parties} & & \textit{parties} . \end{array}$$

The effects on other parties, which can be positive or negative, are sometimes called the *external effects*:

³⁸ It is important to note that even if relying on private incentives would not lead to an optimal result, intervention might cause other unintended inefficiencies that lead to an outcome further from the social optimum.

$$\begin{array}{l} \textit{net} \\ \textit{social} \\ \textit{benefits} \end{array} = \begin{array}{l} \textit{net} \\ \textit{private} \\ \textit{benefits} \end{array} + \begin{array}{l} \textit{external} \\ \textit{effects} . \end{array}$$

This situation, whereby net private benefits from an economic activity diverge from net social benefits is well-studied in the economics literature. Common examples in the literature include a manufacturing plant that ignores the cost to others of pollution that the plant generates (a “negative externality,” where net social benefits are less than net private net benefits), and a beekeeper whose bees pollinate crops in the surrounding area (a “positive externality,” where net social benefits are greater than net private benefits). Without intervention to align social and private net benefits, too much of the product with negative externalities and too little of the product with positive externalities will be produced relative to the social optimum.

22. As long as gTLD registry applicants are economically rational, the expected value of the *net private benefits* will be positive for any new gTLD for which an application is filed.³⁹ To understand the implications of this fact from the perspective of the entire community, it is necessary to know if there is a divergence between private and social benefits. With positive external effects, net benefits accrue to parties other than the new gTLD operator; because new gTLD operators do not take those benefits into account in their decisions, some new gTLDs that would be beneficial to society as a whole are not applied for because the private benefits to the new gTLD operator are not large enough to justify the application. In other words, too few new gTLDs will be applied for when there are positive external effects. Similarly, when there are negative external effects, net costs accrue to parties other than the new gTLD operator. In this case, gTLD operators will apply for some new gTLDs that harm society as a whole, even though

³⁹ In other words, economically rational applicants must expect that the private benefits of the registry exceed the private costs or they would not apply.

they provide positive benefits to the operator. Therefore too many new gTLDs will be applied for. In this case, approving all new gTLD applications could result in “too many” new gTLDs. If ICANN’s goal is to maximize social benefits minus social costs, it must be cognizant of potential gaps between social and private net benefits in its application and approval process.

23. In theory, ICANN could address the potential divergence between private and social benefits by adjusting the fees assessed on new gTLDs (*e.g.*, the evaluation fees and post-delegation fees paid to ICANN). By setting fees tailored to individual gTLDs to close the gap between a registry’s net private benefits and net social benefits, ICANN *theoretically* could align the registry operator’s private incentives more closely with social incentives.⁴⁰ For example, if the net social benefits for a particular gTLD are high but the private benefits are low, ICANN could reduce the relevant fees for that gTLD. Note that in some cases this even could imply a negative fee—a subsidy—for operating particular gTLDs. Similarly, if the social costs of a particular new gTLD are especially high relative to the private costs, ICANN could raise the fees charged to that gTLD’s registry owner so that the registry owner effectively would take into account (or internalize) the gTLD’s social costs when deciding whether or not to pursue the gTLD. Those increased fees would discourage organizations from applying for gTLDs that impose significant costs on others.⁴¹ By calibrating fees to internalize a new gTLD’s external effects, ICANN theoretically could equalize net private benefits and net social benefits and

⁴⁰ In principle, such a scheme is similar to a subsidy (or tax) applied by a governmental agency to encourage (or discourage) private activities that have positive (or negative) externalities on society.

⁴¹ In this framework, a decision to ban new gTLDs is equivalent to denying all applications and setting an infinite price for new applications. Because external costs and benefits could vary across gTLDs and business models, a decision to ban all new gTLDs would make sense only if one believed that under the best feasible regime for evaluating new gTLD applications, it still would be the case that, on average, the net social benefits associated with *approved* applications would be negative.

approve any new gTLD for which a private party was willing to pay the price specific to that gTLD. Prospective registry operators would apply for new gTLDs only if net social benefits were positive; prospective registry operators would not apply for new gTLDs if net social benefits were negative.⁴² An individualized pricing system that accounted for externalities thus could effectively use prices to encourage new gTLDs with positive social benefits and discourage those with negative social benefits.⁴³

24. In practice, there are severe obstacles to using fees in this manner. First, setting fees to induce the socially optimal set of new gTLD applications would depend on ICANN's ability to develop accurate quantifications of these social costs and benefits, which is likely to be very difficult. Second, ICANN is committed to using fees only to recover its costs, not as a tax/subsidy system to align private and social incentives.

25. As an alternative to adjusting fees to encourage only gTLDs with positive net social benefits, ICANN could structure its approval process to favor those proposals that offer high expected values of *benefits to other parties* and low expected values of *costs to other parties*.⁴⁴

⁴² To address the potential problem of too few applications, ICANN likewise would have to set subsidies at a level that made it worthwhile for someone to apply for new gTLDs that have positive net social benefits but negative net private benefits.

⁴³ One simple example of using fees to internalize external costs involves external costs imposed on ICANN itself. Processing new gTLD applications and monitoring the operation of approved gTLDs is costly to ICANN. ICANN has the ability, however, to set the fees it charges a registry operator to be equal to the costs that ICANN bears. Through these fees, ICANN can convert what would be a social cost to other parties (namely, itself) into a private cost that is internalized by the registry operator. Thus, by setting application fees and other charges equal to its own costs associated with evaluating applications and any ongoing ICANN costs associated with new gTLDs, ICANN can ensure that the costs borne by ICANN to evaluate the applications and monitor the operation of approved gTLDs are not a source of divergence between the private and social net benefits of a gTLD.

⁴⁴ We do not discuss distributional issues, which ICANN may wish to consider. That is, we weigh costs and benefits to different parties equally, but ICANN may weigh different parties' interests differently.

In addition, ICANN could structure its rules for gTLD operations to increase the expected benefits and decrease the expected costs for third parties.

26. In the remainder of this section, we describe expected benefits and costs of gTLDs in greater detail. In a later section, we describe potential projects to estimate the relative sizes of benefits and costs. With some idea of the magnitude and distribution of the costs and benefits, a more informed choice can be made with respect to which, if any, applications for proposed new gTLDs should be approved.

B. BENEFITS OF NEW gTLDs

27. The Domain Name System maps numeric IP addresses to easier-to-remember website names, often reflecting a brand name, trademark, or descriptive phrase. The potential benefits of new gTLDs to Internet users are that they may provide competition to existing gTLDs, add differentiation and new products that are valuable to consumers, and/or relieve congestion problems caused by having only a few gTLDs.

1. New gTLDs might provide competition to existing gTLDs resulting in lower quality-adjusted prices

28. Generally, additional competition provides benefits to consumers in the form of reduced quality-adjusted prices and increased variety, including completely new products and services. However, at least three facts indicate that the competitive benefits of additional gTLDs may not be large.

- First, past gTLD introductions have not seriously impacted .com's dominance. For commercial applications, .com has remained dominant even as new gTLDs such as .biz and .info have been added. A broad look at the evidence to date suggests that other gTLDs provide little competition for .com as those gTLDs have neither attracted a large

number of domains nor shown any signs of catching up with .com. Thus, it would seem doubtful that additional, generic, unrestricted TLDs using the Latin alphabet and a traditional business model of registering domain names would provide significant additional competition for .com. The situation, however, might be very different if a new gTLD registry offered an innovative service that significantly differentiated that gTLD in terms of the user benefits offered. Such an entrant might provide strong competition to .com, at least from the perspective of some groups of users.

- Second, registrants with well-established domain names are probably unlikely to switch to a new gTLD given the potential customer confusion and the need to change web sites, marketing collateral, stationary, and other materials containing the registrant’s domain name.⁴⁵ In this regard, new and old registrants are likely to be significantly different. If a registry has to treat all domain names equally, then, absent price regulation, registries with large installed bases could be expected to pursue relatively high-price strategies to “milk” their registrant customer base, while registries with relatively few existing registrants can be expected to compete for new registrants.⁴⁶ Competition for new registrants could be expected to be intense because the value of a new registrant is high—once that registrant has been attracted, it is unlikely later to switch.
- Third, existing, open registries are subject to price regulation, which to a degree serves as a substitute for competition. We note, however, that there is a broad consensus among

⁴⁵ One situation in which significant amounts of switching may occur, however, is where IDNs are introduced. For example, as IDN versions of ccTLDs are introduced, there could very well be significant switching from the old, Latin-alphabet ccTLD to the new IDN ccTLD.

⁴⁶ For a survey of the economics of competition in the presence of switching costs, *see* Joseph Farrell and Paul Klemperer (2007), “Coordination and Lock-In: Competition with Switching Costs and Network Effects,” in *Handbook of Industrial Organization, Vol. 3*, M. Armstrong and R. Porter (eds.), Amsterdam: Elsevier.

economists that regulation is an imperfect substitute for competition, particularly with respect to its ability to promote innovation.

2. New gTLDs may support new business models

29. Even if new gTLDs put little direct competitive pressure on existing gTLDs, the new gTLDs could benefit users by offering new or differentiated services.⁴⁷ Innovation and new services are among the most important contributors to economic growth and well-being. The chance that a new gTLD and/or its sponsor could provide an innovative, heretofore unimagined business model is an important reason to consider expanding gTLDs. Such a new business model could put direct competitive pressure on established gTLDs or could expand the market in new directions. One study has identified 106 groups to date that have announced their intent to pursue a gTLD; most are community-based or geographic TLDs, but one major corporation, Canon Inc., has publically announced its intent to launch its own gTLD.⁴⁸

30. For example, a potentially important source of differentiation is in the allowable characters in a gTLD. The current gTLDs are restricted to using the Latin alphabet, Arabic numerals, and hyphens. New gTLDs, however, will be able to use Internationalized Domain Names (IDNs) with characters from other alphabets. IDNs can already be used in some second-level domain names (depending on the rules of the registry), but extending the character set used

⁴⁷ Indeed, it our sense that—from the perspective of evaluating whether the introduction of new gTLDs would benefit Internet users—past discussions have focused too much on the question of whether the introduction of gTLDs would reduce the market power of existing gTLDs. In fact, far greater user benefits could be generated by a new offering that meets needs totally unsatisfied by existing gTLD than would be generated by a new gTLD that largely duplicated existing gTLDs but created competitive pressure by acting as a substitute for existing gTLDs.

⁴⁸ See <http://www.newtlds.tv/newtlds/> for a list of groups announcing their new gTLD plans. Some of the groups have announced their intent to pursue more than one gTLD, and some gTLDs appear more than once in this list because more than one group anticipates submitting an application. For example, two groups on the list intend to apply for .Africa. See <http://www.canon.com/news/2010/mar16e.html> for Canon's announcement that it would seek .canon.

in the top level domains should reduce confusion and difficulty in using the Internet.⁴⁹ To get a sense of the potential scale of benefits that could flow from IDNs, consider the first set of country-specific IDNs delegated by ICANN in May, 2010 for Egypt, Saudi Arabia, United Arab Emirates and the Russian Federation. The total population of these countries is approximately 250 million; using Internet penetration rates estimated by ITU, these countries currently have about 70 million Internet users in total.⁵⁰ As these IDN country TLDs become operational and domain names are registered in them, these 70 million current Internet users will benefit from the ability to navigate the Internet in their own language. Looked at another way, there are currently 2.8 million domain names registered on the non-IDN Russian ccTLD, .ru, and approximately 45 million Internet users in Russia.⁵¹ If the domain names on .ru were located on Russia's new IDN ccTLD and the incremental value to current Russian Internet users was US\$1 per year per user, then the total annual benefits to Russian Internet users would be US\$45 million. A benefit of US\$1 per user per year is less than US\$0.0000004 per user per domain name; thus even very modest per user or per website benefits can result in substantial aggregate benefits. Similar calculations could be done for other IDNs as they are delegated.

31. Another potentially important source of differentiation is in sponsored gTLDs that serve specific communities. The .cat gTLD, for example, is sponsored by Fundació puntCAT for the

⁴⁹ Confusion in using the DNS can arise when an Internet user's native language does not rely on Latin letters (such as Chinese) and/or is read from right to left (such as Arabic). See, ICANN, "IDNs: Internationalized Domain Names," available at <http://www.icann.org/en/topics/idn/factsheet-idn-program-05jun09.pdf>, site visited June 15, 2010.

⁵⁰ International Telecommunications Union, "Telecommunication /ICT Indicators," available at <http://www.itu.int/ITU-D/icteye/Indicators/Indicators.aspx#>, site visited June 15, 2010.

⁵¹ International Telecommunications Union, "Telecommunication /ICT Indicators," available at <http://www.itu.int/ITU-D/icteye/Indicators/Indicators.aspx#>, site visited June 15, 2010; Coordination Center for TLD .RU, "Domain names .RU statistics," available at http://www.cctld.ru/en/domains/domens_ru/stat.php, site visited June 15, 2010.

use and promotion of the Catalan language and culture. In evaluating the .cat application, ICANN evaluators noted that it was “a rather innovative proposal. It ties a domain name to a language and culture, which has not been done before.”⁵² With the new gTLDs, hundreds of such community-based gTLDs may be added, each offering benefits to their unique communities such as geographic, cultural, and interest groups.⁵³

32. In addition to the benefits discussed above, new gTLDs may offer other characteristics such as security or guaranteed levels of customer service that may be attractive to consumers. With many different gTLDs, there may be numerous new business models that benefit consumers.

3. New gTLDs might relieve scarcity in domain names

33. Domain names serve as more than unique identifiers. They are intended to be intuitive and easier to remember than a string of numbers. Because domain names can have meanings, some are more valuable than others—even absent investment by domain name holders in promoting the awareness and reputations of the websites associated with those names. Any given name, *YYY.<gTLD>*, however, can be held by only a single entity, which raises the possibility of congestion.

34. Adding new gTLDs may make it easier for others to have websites with similar names. In some cases, additional gTLDs could make it possible for noncompeting entities that happen to have the same name to create a website based on their names. For example, many companies—especially small ones, such as auto towing companies—have similar business names, but only

⁵² *sTLD Status Report* at 9.

⁵³ The list of potential new gTLD applications include gTLDs focused on geographic areas (*e.g.*, .Africa and .nyc), cultural or community interests (*e.g.*, .irish and .li), specialized interests (*e.g.*, .film and .poker), and commercial ventures (*e.g.*, .shop, .canon). (*See* <http://www.newtlds.tv/newtlds/>.)

one can have `YYY.<gTLD>`. Here, the benefits of a new gTLD will come from making additional useful domain names available, which can be expected to reduce consumer search costs and generate additional traffic for associated web sites.

35. In other cases, new and incumbent domain name holders will compete with one another. For example, some generic websites offer information about the products they sell and hence may have some ability to drive traffic regardless of the underlying quality of the website. For example people may type cars, pants, cameras, or many other product categories into their address bar to find a starting point for their shopping. Adding competitive alternatives such as `.cars`, `.pants`, and `.cameras` could provide alternatives for consumers browsing for products. If the website `cameras.com` had a substantial share of online camera sales, then adding competition to it from `.camera` could reduce the ultimate price of cameras for consumers.⁵⁴

36. As a general matter, this increase in product-market competition—as opposed to competition among registries—can be expected to benefit consumers of the affected products. There may be additional price competition. The presence of new competitors may also drive incumbents to invest in improving their product offerings. For example, if a new gTLD increased competition for “eyeballs” then existing websites may have to improve their offerings in order to retain or increase their shares of user attention.

4. New gTLDs might reduce search costs

37. Improved navigation of the Internet may be among the benefits generated by new gTLDs because Internet users will be able to use these gTLDs as signposts. New gTLDs might reduce search costs by making it especially easy for Internet users to find an organization’s website and

⁵⁴ In assessing the potential benefits of such competition, it should be noted that competitive names can be created either left or right of the dot (that is at the second level or the top level).

by providing more reliable identification of the website as belonging to that particular or organization. For example, Acme Corporation may be able to send a strong signal of its location on the Internet by registering .acme as a new gTLD. Such a signal would be helpful to Internet users whether they located websites by typing in URLs or by choosing among the hits returned by a search engine. In examining a list of search hits, users would probably view .acme as more likely to be Acme's official website than acme.<gTLD>.

C. COSTS OF NEW gTLDs

38. In addition to potential benefits of additional gTLDs, there are both private and social costs.

1. Costs of obtaining and running a gTLD

39. There are two types of costs associated with a new gTLD. First, obtaining the contractual rights to offer a new gTLD is costly. Costs include application and other fees due to ICANN and the costs of preparing the application, adjusted for the risk that the application will be denied.⁵⁵ If approved, the registry will face operating costs, which have to be adjusted for business risk.⁵⁶ A KPMG survey of gTLDs and ccTLDs estimated that operating a registry currently costs one to two million US\$ annually, depending on registry size.⁵⁷

⁵⁵ In some cases, an applicant is eligible for a partial refund of application fees upon withdrawal of the application. (*Draft Applicant Guidebook v.4*, § 1.5.1.)

⁵⁶ ICANN plans a series of rounds of applications for new gTLDs so that risk-averse potential applicants who did not want to invest in the application fees and start-up costs immediately could wait to see whether other applicants successfully launched new registries.

⁵⁷ "New gTLD Program: Benchmarking of Registry Operations," February 2010, *available at* <http://icann.org/en/topics/new-gtlds/benchmarking-report-15feb10-en.pdf>, *site visited* June 15, 2010, at 29. The survey included seven gTLDs and six ccTLDs; the identities of the participating TLDs were not disclosed. KPMG noted that registry costs per domain name decline with the size of the registry. Small registries (those with fewer than 250,000 registrations) have operating costs of US\$1.5 million per 100,000 domain names and large registries (those with more than 250,000 registrations) have operating costs of US\$175,000 per 100,000 domain names. It is possible that

40. The application and operation costs are private costs. An economically rational applicant would not incur these costs unless it had a business model that the applicant believed would allow it to recover its costs plus a reasonable profit.⁵⁸ The remaining costs discussed below are external costs potentially imposed on parties other than the applicant.

2. Costs to competing registries

41. Competitors (existing registries) may suffer losses due to increased competition (from new registries). In this regard, it should be noted that modern competition policy generally does not attempt to protect incumbents from entry even though the incumbents may suffer economic harm from the resulting increase in competition. Instead, there is a strong presumption that the overall social benefits of competition will be positive—that is, that the gains to consumers from increased competition will outweigh any harms suffered by incumbents. For this reason, we will not discuss these costs further.

3. Increased search costs

42. Although the domain name system is intended to make Internet navigation and search easier, it is theoretically possible that some additional gTLDs could have the opposite effect.

(a) Potential consumer confusion or fragmentation of the Internet

43. One concern is that introducing many new gTLDs could lead to confusion and/or make it harder for users to find the content they are looking for. Although it may be difficult to find specific websites in the current gTLDs, consumers that do not use search engines but find websites by typing in URLs will bear even higher costs of finding the website they are looking for (and may be less likely to find it at all) if any given website might be on only one or several

new gTLDs will not have operating costs at these levels depending on their size and ability to outsource to others to take advantage of economies of scale.

⁵⁸ We note that not-for-profit entities might also apply for new gTLDs. They would also need to believe that the benefits would enable them to cover the costs of their new operations.

of many different gTLDs. In 2000, for example, parties applied for the following gTLDs, among others: .commerce, .direct, .market, .shop, .trade, .inc, .biz, .firm, .ebiz, .ecom, .store, .mall. All of these seem like reasonable TLD choices for a company that is selling goods on the Internet. Hence, had all of these TLDs been approved, a consumer looking for the XYZ company might have to look at XYZ.commerce, XYZ.direct, XYZ.market, XYZ.shop, XYZ.trade, XYZ.inc, XYZ.firm, XYZ.ebiz, XYZ.ecom, XYZ.store, and XYZ.mall, in addition to XYZ.com and XYZ.biz. In many countries, especially those where ccTLDs are widely used, users may look for a second-level domain with the top-level domain being the country code, such as amazon.fr instead of amazon.com so that the introduction of new gTLDs may not cause the same increased search costs.

(b) Increased registration costs for companies that feel the need to be in multiple places on the Internet

44. Similarly, the possibility of many gTLDs serving generic uses raises the issue of whether companies that want a presence on the Internet would need to register new domain names just to avoid “holes” if enough consumers don’t search everywhere (and don’t use search engines) and consumers don’t all start their searches in the same place. For example, suppose that there are ten gTLDs in total, .TLD0, .TLD1, .TLD2, ..., .TLD9, and that each consumer always begins his search for a site in the same gTLD, but different consumers begin in different gTLDs, *i.e.*, User A always starts in .TLD0, while User B always starts in .TLD5. If users start in different places but do not search all ten gTLDs, then a second-level domain name registered on less than all of the available gTLDs will be missed by at least some users. If User A searches a maximum of four gTLDs sequentially beginning with .TLD0, then any website owner that hoped to be found by User A would have to register in at least one of the first four gTLDs. More generally, to be assured of reaching everyone, a website owner would have to register in all ten available gTLDs.

It is also possible that if new gTLDs for specific companies become very popular, consumers might refine their searches to look for company websites at the top level rather than at the second level.

45. The extent to which additional gTLDs increase search costs depends on the number of consumers who search for websites only by typing specific words or website names into URL address bars. According to the Pew Internet and American Life Project, in 2008 about 90 percent of Internet users reported using search engines and nearly 50 percent reported using a search engine on the day before the survey.⁵⁹ The 90 percent of Internet users who have used search engines are less likely to be affected by increased search costs from the introduction of new gTLDs (and are also less likely to benefit from the structure that additional gTLDs might bring), but of course that depends on the fraction of time they use search engines when trying to locate new websites. And the 10 percent of users who have not used search engines may overstate the potential for increased search costs if those users use the Internet less intensively than average. If gTLDs proliferate and cause confusion, then the use of search engines may increase in response.

4. Trademark infringement

46. Another set of external costs arise from potential second-level domain name misappropriation. These costs may have decreased over time as improved trademark protections implemented by ICANN and used by new gTLDs (*e.g.*, sunrise registration periods) may have decreased the incidence of misappropriation, at least in new gTLDs.

⁵⁹ Of users who actually used the Internet on the previous day, 70 percent used a search engine. (PEW Internet and American Life Project (2008), “Search Engine Use,” *available at* <http://www.pewinternet.org/Reports/2008/Search-Engine-Use/Questions-and-Data/Spring-Tracking-Survey-2008.aspx?r=1>, *site visited* June 15, 2010.)

(a) Defensive registrations

47. The significant costs of applying for and operating a new gTLD reduce the likelihood of cyber-squatting at the gTLD level. For example, people without a legitimate right to a brand name are unlikely to try to register that brand name or a typo-squatting version of a brand name given the risk of losing the upfront gTLD evaluation fee and subsequent legal fees. The amount of money at risk in attempting to register an infringing gTLD is substantially greater than the US\$10 or so that it costs to register a second-level domain name on the .com gTLD. It is more likely that if cyber-squatting occurs, it will occur at the second level, *i.e.*, within new gTLDs, just as cyber-squatting exists today within .com and other open gTLDs. As discussed below, mechanisms for protection may mitigate this problem.

48. The prospects of cyber-squatting within new gTLDs could force parties to undertake defensive registrations. It is important to be precise about the term “defensive registration.” Consider an owner of a brand, “Widget,” who is faced with a potential new gTLD. If the brand owner (1) prefers that no one be able to register the Widget name in the new gTLD (or equivalently, that the new gTLD didn’t come into existence) but (2) would register the Widget name in the new gTLD if it does come into existence, then we call such a domain name registration “defensive.” Note that, as discussed further below, even defensive registrations can have value to the registrant in addition to their defensive value.

49. Defensive registrations may be undertaken to attempt to deter legitimate competition. Suppose the website widgets.com is devoted to the sale of the generic product widgets. Others in the widget business may seek to register widgets as a second level domain name in any new gTLD that is open and oriented towards commerce, say widgets.store. The owner of widgets.com may want to register widgets.store to head off the competition.

50. Defensive registrations may also be undertaken to protect against trademark infringement or erosion of brand equity. Suppose that widgets are not generic, but instead are a trademarked “Widget” product. In this case, the owner of the trademark “widget” who owns widgets.com may also have to register widgets.store to protect his trademark.⁶⁰

(b) Increased cost to companies to police new gTLD registrations that violate trademarks or copyrights

51. Trademark owners that do not pursue violators can lose the right to defend their trademarks.⁶¹ A proliferation of gTLDs would seem likely to increase the costs of policing, especially where the gTLDs added are open and lack eligibility restrictions on registrants.

5. Adverse investment effects of potential free riding

52. Additional gTLDs could result in increased consumer confusion and the possibility that the holder of one domain name could free ride on the marketing efforts undertaken by another domain name holder. For example, if someone had spent considerable expense developing a strong marketing presence for XYZ.com, another party might benefit from introducing XYZ.store if .store were approved as a gTLD. An enterprise will invest in its web presence to

⁶⁰ The types of injury for which a company can claim harm due to an infringing domain name include not only the diversion of sales (*e.g.*, Princeton Review’s registration of Kaplan.com, where Kaplan was a direct competitor of Princeton Review, or a non-Dell company registering dellcomputers.com to sell computers) but also to “dilution” of a famous mark (*e.g.*, registering barbiesclothing.com to sell hiking gear—there is no chance of consumer confusion (Barbie is not known to hike) but the use of Barbie dilutes a trademark owned by Mattel). Under the Anticybersquatting Consumer Protection Act of 1999 (ACPA) the cybersquatter does not even have to attempt to use the trademark for a commercial purpose in order to be subject to litigation; registering and holding a domain name with an intent to try to sell it for profit is enough to violate the law.

⁶¹ “If a trademark owner does not vigorously monitor and take action against the unauthorized use of its mark, the mark may become legally weak and even generic....When a trademark becomes generic, the trademark owner loses the exclusive right to its use and its investment in developing the mark’s goodwill.” (Elizabeth M. Flanagan (2007), “No Free Parking: Obtaining Relief from Trademark-Infringing Domain Name Parking,” *Minnesota Law Review*, **92**, at 506.)

the extent that the enterprise earns satisfactory returns.⁶² Thus, a potential effect of the increased possibility of free riding would be to make website operators less willing to invest in promoting their brand name and reputation. The reduction in investment incentives could result in harm to consumer welfare. Consumer confusion that resulted in reduced traffic to a given website could similarly reduce incentives to invest. However, this situation already applies today in .com, where slight variants of generic words for websites exist, such as car.com and cars.com. Although these variants may cause some dilution of the value of investment in any particular website, companies controlling these websites still have incentives to invest in their websites and brands.

D. THE DEPARTMENT OF JUSTICE’S FRAMEWORK FOR ANALYZING NEW gTLDs

53. As noted above, in its 2008 analysis, the DOJ was doubtful as to whether ICANN’s new gTLD proposal would benefit consumers.⁶³ Specifically, the DOJ was concerned that: (a) new gTLDs would be unlikely to reduce the market power possessed by existing gTLDs, especially .com, and (b) new gTLDs might themselves possess some market power. Although the DOJ’s predictions might be correct, they do not imply that consumers would be harmed by the introduction of new gTLDs. Indeed, consumers might benefit.

54. Providing competition to .com is not necessary for new gTLDs to yield net benefits to users. The DOJ acknowledged that, even in the absence of .com competition, the new gTLDs “may generate some consumer benefits,” but noted that ICANN had not attempted to quantify

⁶² The types of returns will be different for different types of organizations. Investment by for-profit enterprises will depend on the expected returns in increased profits, but non-profit groups, for example, may use some other metric, such as number of visitors to their website.

⁶³ Letter from Deborah A. Garza (DOJ) to Meredith A. Baker (NTIA) re: ICANN’s Draft RFP for New gTLDs, December 3, 2008 *available at* http://www.ntia.doc.gov/comments/2008/ICANN_081218.pdf, *site visited* June 15, 2010

the consumer benefits that may result. Quantification of consumer benefits is not absolutely necessary to conclude that new gTLDs should be introduced. If external costs are small or absent, or are very likely to be outweighed by external benefits, then new gTLDs should be introduced.

55. New gTLDs may yield positive net social benefits even if they have market power. The introduction of new goods, even when supplied by a monopolist, is generally beneficial because the provision of some goods at a supra-competitive price yields higher consumer welfare than the absence of those goods. In the case of new gTLDs, the potential for market power is a reason to block entry only if net social benefits from a new gTLD would be negative. This could be the case if, as noted by the DOJ, there were strong negative external effects due to, for example, the need for many defensive registrations of additional domain names at a monopoly price. Absent this type of significant external cost imposed on others, the decision of whether to introduce new gTLDs does not hinge on whether the entrants would have market power. Rather, the decision should be made on the basis of whether the net social benefits from their introduction are positive or not. Such a determination can be made on a case-by-case basis, *i.e.*, new gTLDs need not all be approved and they need not all be rejected. Instead, ICANN can evaluate individual applications and judge whether they are likely to result in negative net social benefits because they will spur many defensive registrations or otherwise result in significantly increased costs of defending trademarks.

56. The DOJ stressed, and we concur, that ICANN should craft rules for new gTLDs that are likely to enhance the external benefits and minimize the external costs of new gTLDs. ICANN is already committed to examining applications for potential significant external costs, *e.g.*, new gTLDs must not pose a threat to the stability of the Internet, and has proposed other rules to

reduce the external costs of new gTLDs. For example, ICANN has adopted several of the recommendations of the Implementation Recommendation Team (IRT) to address potential problems associated with trademark protection in new gTLDs, including procedures to prevent infringing domain names from being registered and to eliminate infringing domain names that are discovered after registration.⁶⁴

57. The IRT has recommended, and ICANN has adopted, a Trademark Clearinghouse for use with new gTLDs that will facilitate trademark protection both before and after domain name registration.⁶⁵ The Trademark Clearinghouse will be a central repository for information regarding the existing rights of trademark holders. All new gTLD registries will be required to use the Trademark Clearinghouse to support their pre-launch rights protection mechanisms (RPMs) that must, at a minimum, consist of either a Sunrise Registration Service or Trademark Claims Service. A Sunrise Registration Service will, under certain circumstances, provide for pre-launch registration of a second-level domain name by a holder of a valid trademark that has been entered in the Clearinghouse. A Trademark Claims Service provides notice to a potential registrant that the domain name the registrant is attempting to register is under a trademark in the Clearinghouse. If the registrant proceeds to register the name, the trademark holder will then be notified of that registration.

⁶⁴ See, Implementation Recommendation Team, Final Report on Trademark Protection, May 29, 2010, available at <http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>, site visited June 15, 2010.

⁶⁵ IRT has recommended other preventive measures that ICANN has not yet adopted, such as the creation of a Globally Protected Marks List, against which registries and registrars could check to avoid requesting top level domains or assigning second level domains that are identical to trademarks on the list. Thus, a trademark owner could protect his trademark from infringement at both the top and second levels without being required to establish a gTLD or second level domain using the mark. The mark simply becomes unavailable for registration. (Implementation Recommendation Team, Final Report on Trademark Protection, May 29, 2010, available at <http://www.icann.org/en/topics/new-gtlds/irt-final-report-trademark-protection-29may09-en.pdf>, site visited June 15, 2010.)

58. ICANN’s agreements with registries have evolved over time as ICANN has learned from the experience of past gTLD introductions. Studies of external costs and benefits can help ICANN to craft even better registry rules and procedures in future to increase net social benefits from new gTLDs. Not all IP protection procedures need be mandated by ICANN. Rather, the evaluation of new gTLD applications should include an evaluation of the registry’s proposed IP protection mechanisms, whether mandated by ICANN or voluntarily adopted.

III. SURVEY OF EXISTING STUDIES

59. This section surveys existing studies that shed light on third-party benefits and costs of new gTLDs.

A. BROAD STUDIES OF THE COSTS AND BENEFITS OF NEW gTLDs

60. Summit Strategies International conducted a study for ICANN of new gTLDs that were approved in 2000.⁶⁶ The Summit study addressed several issues that are relevant to the evaluation of costs and benefits of new gTLDs, namely, the effectiveness of each registry’s rules and procedures designed to protect intellectual property and whether the new gTLDs had provided effective competition to existing gTLDs.

61. Regarding intellectual property protection, the Summit study concluded that the start-up registration procedures used by new gTLDs were “generally effective in protecting legitimate trademark owners against cybersquatting.”⁶⁷ The .info registry used a sunrise registration period to allow trademark owners to register their trademarks as .info domain names. Summit reported

⁶⁶ Summit Strategies International, “Evaluation of the New gTLDs: Policy and Legal Issues,” July 10, 2004, available at www.icann.org/en/tlds/new-gtld-eval-31aug04.pdf, site visited June 15, 2010 (hereinafter *Summit Study*).

⁶⁷ *Summit Study* at 79. Summit notes that trademark infringement was not a significant problem in the sponsored gTLDs. We focus here on Summit’s evaluation of two of the two open gTLDs introduced in 2000, .info and .biz.

that, because there was no verification of the applications to ensure that the registrant held the trademark it claimed to hold, 43 percent of the sunrise registrations were eventually cancelled or transferred to rightful trademark owners.⁶⁸ Before opening its registration period, the .biz registry allowed trademark holders to register their trademarks with the registry but, rather than assigning those trademarks to the IP owner as domain names, the .biz registry created a list of “IP Claims” against which all potential registrants’ desired domain names were matched. When a potential registrant requested a domain name on the IP Claims list, the IP owner and potential registrant were notified and the IP owner could contest the registration. The .biz registry did not automatically resolve disputes in favor of the trademark owner. Rather, a potential registrant could defend a claim by an IP owner by showing that it had a legitimate interest in the name.⁶⁹

62. In addition to its start-up registration procedures that likely reduced the incidence of trademark infringement, the .biz registry restricted domain name registrants to those who intended to use the domain name for business or commercial purposes, and prohibited registrations of domain names for the sole purpose of selling the domain name to others. These provisions could reduce the external costs imposed on trademark owners by reducing the need for defensive registrations to protect trademarks. Defensive registrations still exist, however. A

⁶⁸ *Summit Study* at 4.

⁶⁹ *Summit Study* at 4. Buss GmbH & Co. brought a case against Steven Buss, who had registered buss.biz. A WIPO panel found that Mr. Buss, who was an independent consultant who conducted business under his own name, did have legitimate rights in the domain name that he registered, even though he had no trademark rights. (WIPO Arbitration and Mediation Center, Administrative Panel Decision, *BUSS GmbH & Co. KG Fertiggerichte v. Steven Buss*, Case No. DBIZ2001-00034, available at <http://www.wipo.int/amc/en/domains/decisions/html/2001/dbiz2001-00034.html>, site visited June 15, 2010.)

survey of registrants showed that 41 percent of .info respondents and 52 percent of .biz respondents had registered their domain name for “defensive” purposes.⁷⁰

63. On the benefit side, the Summit study concluded that the new gTLDs approved in 2000 had introduced some, albeit very limited, competition.⁷¹ As of 2004, three years after the introduction of new gTLDs, .com still held 73 percent of domain names registered in open gTLDs (which includes .com, .net, .org, .info, .biz, and .name) while the new open gTLDs (.biz, .info, and .name) accounted for a total of 6.3 percent of domain names.⁷² The number of domain names registered in the new open gTLDs was far less than each registry had projected during the application stage. The .info registry had 39 percent of its projected registrations as of the end of 2003, while .biz had 61 percent, and .name had just two percent.⁷³

64. Although the new gTLDs had not attracted a large share of domain names and registrations fell short of projections, domain name renewal rates were comparable to those of .com, which Summit suggested is an indication that the domain names are considered by their owners to be valuable. The 2004 renewal rate was 60 percent for .com, while it was 57 percent for .biz, 56 percent for .info, and 67 percent for .name.⁷⁴

65. Summit’s survey of registrants in new gTLDs shows that the new gTLDs broadened the market by providing a differentiated product that registrants perceived to be valuable. For

⁷⁰ The survey defined a “defensive registration” as one intended to “prevent others from using the name.” (*Summit Study* at 148.)

⁷¹ Summit examined data on renewal rates of domain names, growth rates in the number of domain names in each new registry, and collected information from domain name registrants in the new gTLDs. Summit also interviewed registry operators and registrars to collect information on market conditions.

⁷² *Summit Study* at 96.

⁷³ *Summit Study* at 96 and 99.

⁷⁴ *Summit Study* at 97.

example, one-fifth of survey respondents (who had registered domain names in .biz, .info, or .name) had not previously registered a domain name in any gTLD.⁷⁵ And 55 percent of respondents registered a different name in the new gTLD than they had registered in an existing gTLD. In addition, 11 percent indicated that their first choice for a second-level domain name was not available in another gTLD so that the new gTLDs helped relieve name scarcity for this set of registrants.⁷⁶

66. Summit also examined data on duplicate names registered in more than one open gTLD to determine whether new gTLDs were increasing the options available to registrants. Summit found that a high percentage of domain names registered on .info were also registered on .com (89 percent), .net (81 percent), and .org (75 percent), and a high percentage of domain names registered on .biz were also registered on .com (85 percent).⁷⁷ The existence of the same name on two different gTLDs can indicate either that two different registrants value that name (possibly to compete with one another) or that a single registrant holds both names for some purpose. Summit found that only 11 percent of the overlapping .info and .com names were registered to the same owner. For .biz and .com overlap, the percentage registered to the same owner was higher, 42 percent. Summit used the extent to which a website simply redirects users to another website as an indication of whether domain name registrations are being used defensively. Using data provided by the registries, Summit estimated that about one-third of .info and .biz websites were active websites while another 15 percent redirected to a different

⁷⁵ *Summit Study* at 101. Among .biz registrants who responded to the survey, 16 percent had not previously registered a domain name in another gTLD; 14 percent of .info respondents had not previously registered a domain name in another gTLD; 44 percent of .name respondents had not previously registered a domain name in another gTLD.

⁷⁶ *Summit Study* at 98-100.

⁷⁷ *Summit Study* at 102. This appears to be based on a very small sample of names.

site. About half of the registered domain names were inactive.⁷⁸ Duplication and redirection can, in some circumstances, be indicators of defensive registrations, but they also can be indicators that registrants are affirmatively trying to increase traffic by using a portfolio of names that attract a broader set of users. For example, NPR not only maintains npr.org, but has also registered n.pr, which simply redirects users to the npr.org webpage, and has used n.pr in some of its publicity.

67. Summit concludes that although the new gTLDs have provided registrants with more choices of registries, .com is still the first choice of a majority of registrants, even among new registrants.⁷⁹ Thus the new gTLDs have provided only limited direct competition for .com but nonetheless have provided some value to registrants.

B. STUDIES OF THE INCIDENCE AND COST OF CYBERSQUATTING AND TYPOSQUATTING

68. Numerous authors assert that the costs of combating cyber-squatting are significant, at least in part because potential violators are difficult to identify and must be pursued individually.⁸⁰ These authors, however, do not develop explicit, numerical estimates of the costs. One study purports to calculate the costs of cybersquatting enforcement and predicts that the increased costs of enforcement due to new gTLDs will be small. In that study, Krueger and Van Couvering examined data on trademark infringement cases resolved using ICANN's Universal

⁷⁸ *Summit Study* at 103.

⁷⁹ *Summit Study* at 109.

⁸⁰ *See, e.g.*, Elizabeth M. Flanagan (2007), "No Free Parking: Obtaining Relief from Trademark-Infringing Domain Name Parking," *Minnesota Law Review*, **92**, at 501; Christopher G. Clark (2003), "The Truth in Domain Names Act of 2003 and a Preventive Measure to Combat Typosquatting," *Cornell Law Review*, **89** at 1501;

Dispute Resolution Policy (UDRP) from 2001-2010.⁸¹ Krueger and Van Couvering calculated that .com, .net, and .org accounted for 94 percent of all UDRP cases, and the highest rate of infringement cases resolved using UDRP was in .com, with 41 UDRP cases per million .com domain names registered. Across all of the open gTLDs introduced since 2000, the rate of infringement cases resolved using UDRP was 22.5 cases per million domain names registered. If new gTLDs capture 10 percent of registered domain names (which Krueger and Van Couvering characterize as a very optimistic projection) then there will be 14 million domain names in new gTLDs. Applying the average infringement UDRP case rate of 22.5 cases per million domain names yields 316 new UDRP cases annually. Krueger and Van Couvering estimate that the average cost of a UDRP proceeding is US\$5,000, so the increased enforcement costs would be a total of US\$1.58 million, or US\$0.80 per US trademark.⁸²

69. Although this study suggests that the external costs associated with cyber-squatting in new gTLDs would be low, Krueger and Van Couvering account only for the costs of UDRP proceedings; they do not account for any other enforcement costs associated with domain name watching (*e.g.*, costs of services provided by specialized consultancies to monitor domain name registrations and costs of researching domain name registrants) and they do not account for cases that are resolved through means other than UDRP (*e.g.*, sending cease and desist letters, purchasing an infringing domain name, or litigation in one or more jurisdictions).⁸³ Moreover,

⁸¹ Fred Krueger and Antony Van Couvering, “A Quantitative Analysis of Trademark Infringement and Cost to Trademark Holders in New gTLDs,” Minds + Machines Working Paper 2010-1, February 10, 2010 (hereinafter *Kruger and Van Couvering*). The data include only a few cases in 2010.

⁸² *Kruger and Van Couvering* at 6.

⁸³ In addition, because it focuses only on certain costs borne by trademark owners, the study does not consider the cost of potential harm to consumers who are fooled by cyber-squatting websites. The World Intellectual Property Organization, one of the UDRP arbitrators, notes that the number of cyber-squatting cases it handles has been rising since 2003 and that ten percent of complaints

the study's conclusion that the incremental costs of battling trademark infringement in new gTLDs would be low depends on the experience of new gTLDs replicating that of past gTLD introductions, namely, that new gTLDs will have only limited success in competing with .com and attracting large numbers of registrants. As the study correctly notes, the *rate* of infringement is highest in .com: "because most large brands and high volume websites operate in .com, one would expect a somewhat larger impact of typo-squatting and other infringement, even relative to the installed base."⁸⁴ If a few new gTLDs are introduced and their trademark protections and commercial success match those of gTLDs that were introduced in the past, then incremental UDRP costs associated with cyber-squatting likely would not be excessive. But if new gTLDs fail to have adequate trademark protections or if an innovative new gTLD were introduced that attracted large numbers of registrants either because it competed strongly with .com or because it reached a niche market segment that was previously underserved, then infringement rates and/or cybersquatting costs could rise significantly.⁸⁵

70. Moore and Edelman (2010) studied the phenomenon of "typosquatting," whereby an entity registers a domain name that is close to that of a legitimate website (*e.g.*, it differs from google.com by one letter), and earns advertising revenue when errant typists stumble across the

in 2008 were in the biotechnology and pharmaceutical industries including websites set up to sell counterfeit prescription drugs. (World Intellectual Property Organization, "ICANN's New gTLD Program: Trademark-related Concerns," *available at* <http://www.wipo.int/export/sites/www/amc/en/docs/wipopresentationicann.pdf>, *site visited* June 15, 2010, at 6-8.)

⁸⁴ *Kruger and Van Couvering* at 5.

⁸⁵ Even if rates of infringement are constant, enforcement costs could increase if new gTLDs attract large numbers of domain name registrants. Also, if new gTLDs do not attract large numbers of registrants, enforcement costs could still increase if weak trademark protections lead to an increase in infringement rates.

site.⁸⁶ Typosquatting potentially gives rise to two types of external costs. First, consumers may be confused by the site that they reach inadvertently. In the most extreme cases, they may mistakenly believe that they reached their intended site, which denies both consumers and the owners of the intended sites the benefits of interacting with one another. In addition to confusing the consumer, such outcomes can also harm the reputation of the owner of the intended site. For example, some cybersquatters have placed pornography or other offensive content on sites that incorporated a trademark or brand name to encourage the owner of the mark or brand to purchase the domain name from the squatter.⁸⁷

71. To estimate the prevalence of typosquatting, Moore and Edelman first generated plausible misspellings of over 3,000 popular domain names.^{88, 89} They found 1.9 million registered .com domain names that were plausible misspellings of the 3,000 popular domain names, and estimated that about 900,000 of these are typo domains, *i.e.*, they are deliberate misspellings of the target domain name. Google.com was the most common target, with about 2,500 typo domains, and on average, each popular domain name had 280 typo domains.

⁸⁶ Tyler Moore and Benjamin Edelman (2010), “Measuring the Perpetrators and Funders of Typosquatting,” presented to the 14th International Conference on Financial Cryptography and Data Security.

⁸⁷ National Research Council (2005), *Signposts in Cyberspace: The Domain Name System and Internet Navigation*, The National Academies Press, at 65.

⁸⁸ Moore and Edelman chose the 3,264 domains that contained at least five characters and that were listed in the most popular 6,000 domain names by Alexa.com on June 29, 2009.

⁸⁹ Moore and Edelman used the Damarou-Levenshtein methodology of computing the distance between two different strings of letters to generate all close spellings to each of the popular websites studied. The authors also used their own “fat finger distance” method, which measures distance between two strings based on the number of adjacent keys one would have to hit on a QWERTY keyboard to turn one string into another. For example, google.com is one fat finger away from googlw.com.

72. Moore and Edelman next designed a webcrawler to visit about 1/3 of the typo domains and catalog how the sites were being used.⁹⁰ About 80 percent of the sites contained pay-per-click ads for which the domain name owner would be paid advertising revenue if errant visitors clicked on the advertisement. The other 20 percent of typo domains redirect or link to other domains. Of these, 20 percent redirect to the intended site and therefore represent defensive registrations; about 55 percent redirect to the intended site but perhaps through an affiliate marketing agreement where the redirector receives payment if the user makes a purchase; and about 25 percent redirect or link to a site that competes with the target site.

73. Moore and Edelman conclude that although more than 45,000 complaints were filed against cybersquatters and typosquatters under ICANN's UDRP over a ten-year period and still other complaints were filed in U.S. courts under ACPA, even those companies that are most aggressive in filing complaints against individual squatters are still heavily targeted by squatters.

74. There is relatively little information on the costs firms incur to police typosquatting. At a cost of around US\$10 a year, purchasing an additional unclaimed domain is relatively inexpensive, but as Moore and Edelman indicate, users make a large variety of spelling mistakes. Purchasing a troublesome domain from a typosquatter may be much more costly than the US\$10 original registration fee. Firms thus may engage not just in preemptive purchases of similar domain names, but may also use resources to monitor domain registrations to ensure that they are not losing traffic to typosquatters.

⁹⁰ Of the sites the webcrawler tried to visit, it was blocked from a large number, presumably because the host recognized it as a crawler and prevented it from retrieving information or examining links. Ultimately, the crawler was able to retrieve information on about 95,000 typo domains.

75. ICANN obtained information from industry sources estimating that monitoring of domain names currently costs a company between US\$6,000 and US\$15,000 annually per term, such as a brand name or a trademarked slogan, that is being protected.⁹¹ These costs cover activities such as monitoring new domain name registrations, gathering information on the website, if any, associated with possibly infringing domain names, and gathering of information on the registrants of possibly infringing domain names. Because information on registrants and new names registered must be gathered from each TLD registry, the addition of new gTLDs will increase monitoring costs.

76. Costs to organizations of protection against cybersquatter or typosquatters can go beyond simply monitoring domain name registrations. If the organization cares enough to monitor, then presumably it will take some kind of enforcement action if it believes another entity is infringing upon its intellectual property. According to industry sources obtained by ICANN, researching the registrants of a suspicious domain name can cost between US\$200 and US\$500 per instance, and sending a cease and desist order to a registrant costs between US\$200 and US\$650. Should this approach fail, official dispute mechanisms can be costly. ICANN indicates that filing a UDRP complaint costs US\$2,000-4,000 plus an additional US\$1,500-3,300 in related fees. These costs may be dwarfed by fees involved in going to court should it be necessary. The least expensive course of action may be to purchase the name, although trademark owners are reluctant to reward infringing behavior in this manner.

C. SURVEYS OF DEFENSIVE REGISTRATIONS

77. Some evidence suggests that many organizations are not concerned about registering domains in all possible gTLDs but do register in more than one gTLD. Stahura (2009) found

⁹¹ Interview with Nick Wood, Com Laude.

that only about 200,000 second-level domain names were registered in all seven of the most popular gTLDs: .com, .net, .org, .info, .biz, .us, and .mobi.⁹² Of these 200,000 second-level domain names registered in all seven gTLDs studies, Stahura estimated that three percent were registered by the same party.⁹³ Krueger and Van Couvering (2010) surveyed 1,043 brand names of Fortune 100 companies. The authors found that all of those brand names were registered in .com, 76 percent were registered in.org, 84 percent were registered in .net, 69 percent were registered in .info, 65 percent in .biz, and 57 percent in .mobi.⁹⁴ The percentages for other gTLDs were much lower.⁹⁵ This evidence suggests that many of the largest firms are concerned with “filling holes” in their web presence or are engaging in defensive registration.⁹⁶ It tells us little about how smaller firms—who are less likely to have as much brand recognition—behave with respect to such registrations.

78. Zittrain and Edelman (2002) examined usage of the .biz TLD by new registrants.⁹⁷ After a three-month period in which trademark owners could register their trademarks in the IP Claims database, open registration on a first-come, first-served basis began in November 2001. Zittrain

⁹² Paul Stahura (2009) “Analysis of Domain Names Registered Across Multiple Existing gTLDs and Implication for new gTLDs,” *CircleID*, available at http://www.circleid.com/posts/20090202_analysis_domain_names_registered_new_gtlds/, site visited June 15, 2010.

⁹³ Registrant identification is difficult because many registrants protect their identities in the Whois database that catalogs registrant information for each registered domain name.

⁹⁴ Fred Krueger and Antony Van Couvering, “An Analysis of Trademark Registration Data in New gTLDs,” *Minds + Machines Working Paper 2010-02*, available at <http://www.mindsandmachines.com/2010/02/survey-shows-brands-dont-register-defensively-in-new-gtlds/>, site visited June 15, 2010, at 42.

⁹⁵ *Id.*

⁹⁶ We observe in passing that the Krueger and Van Couvering study drew the opposite conclusion from these figures (*i.e.*, that firms were not strongly concerned with filling holes or engaging in defensive registrations). Stahura also concluded that registration across multiple gTLDs was uncommon, but we note that he was examining registration in a very large number of gTLDs.

⁹⁷ Jonathan Zittrain and Benjamin Edelman (2002), “Survey of Usage of the .biz TLD,” mimeo, available at <http://cyber.law.harvard.edu/tlds/001/>, site visited June 15, 2010.

and Edelman surveyed .biz registrants six months after open registration began. Using a ten-percent random sample of domain names registered in .biz, they found that 91 percent of those domain names were also registered in .com, 63 percent were also registered in .net, and 49 percent were also registered in .org. Forty-four percent of the registered .biz names were registered in .com, .net, *and* .org, and just 9 percent were not registered in .com, .net, *or* .org. Because the same name could be registered by different parties in different gTLDs, domain names that are duplicated across different gTLDs don't necessarily indicate that a company is attempting to fill in holes or engage in defensive registration. Based on a small sample of 823 names that were registered in both .biz and .com, Zittrain and Edelman estimated that 20-30 percent were registered to the same person or company and were potentially defensive.⁹⁸

79. Zittrain and Edelman also examined the content of sites registered on .biz and estimated that, at most, 26 percent of the registered domain names led to sites with “actual substantive web content,”⁹⁹ including sites that redirected or contained information that was identical to other sites. The other 74 percent of the registered domain names either were “under construction,” for sale, returned an error, or did not return a website at all. Thus, at least in the early stages of .biz, the great majority of registered domain names were not being used to provide content to users, again indicating that the registrations may have been defensive.

⁹⁸ Zittrain and Edelman attempted to match .com and .biz registrants using postal codes, the domain name's nameserver designation, and the registrant's administrative email address as recorded in WHOIS data for the sample of 823 domain names duplicated on .com and .biz. Because of the difficulty in determining a registrant's identity from Whois data, Zittrain and Edelman's estimate should be thought of as a lower bound on the share of duplicate domain names that are held by a single party.

⁹⁹ Jonathan Zittrain and Benjamin Edelman (2002), “Survey of Usage of the .biz TLD,” mimeo, available at <http://cyber.law.harvard.edu/tlds/001/>, site visited June 15, 2010, at 4.

IV. POTENTIAL PROJECTS

80. In this section, we describe several projects that might provide useful insights into the costs and benefits of introducing new gTLDs. These projects generally would attempt to quantify, at least roughly, the external costs and benefits that create a gap between private and social costs and benefits. The proposed projects include the analysis of market data, surveys, and detailed case studies. As described below, there is a high likelihood that some of the projects would be very likely to confirm results suggested by preliminary analysis, while other projects might be difficult to complete given currently available data. We recommend that ICANN place a low priority on these projects. We also recommend that ICANN address data issues by creating mechanisms for collecting data regarding the experiences of any new gTLDs delegated in the future. The data collected through this process could then be used to inform later decisions regarding additional gTLDs.

A. PROJECTED BENEFITS OF NEW GTLDS

81. We begin by describing several potential studies to project the benefits of new gTLDs. As discussed above, in principle new gTLDs might generate benefits by: providing competition to existing gTLDs resulting in lower quality-adjusted prices; facilitating new business models; relieving scarcity in domain names; and reducing search costs. As also discussed above, the greatest expected benefits would likely come from new business models. However, it is inherently difficult for an economic study of existing registries and business models to anticipate the benefits that could be generated by new business models that rely on unique characteristics of new gTLDs not yet introduced.¹⁰⁰ Therefore, we first focus on benefits to registrants that stem either from increased competition to .com or from the relief of name scarcity.

¹⁰⁰ We propose several case studies in Part C of this section that can shed some light on this issue.

1. Analysis of domain name registration volumes

82. New gTLDs would benefit domain name registrants and/or Internet users if these gTLDs provided competition for existing gTLDs or relieved scarcity by allowing the registration in new gTLDs of second-level domain names that already exist in current gTLDs.¹⁰¹ Data regarding the effects of past gTLD introductions on the number of aggregate second-level domain names registered can provide some insight into the effects of new gTLDs on scarcity. Less obviously, quantity data on domain name registrations can, in some circumstances, provide information about the competitive effects of past gTLD introductions. Ideally, one would assess whether past introductions of new gTLDs provided competition to existing gTLDs by directly examining the effects on the prices or qualities of existing TLDs. Because the .com registry operates under price regulation, and there are data issues associated with quality levels and secondary-market prices, it can also be useful to examine aggregate registration volume data to find indirect evidence of competition.

83. We focus on .com because it has been the dominant existing TLD. Certain ccTLDs are marketed to compete with .com, including .me, .tv, .nu, and .co, but we focus here on .info and .biz, both introduced about eight years ago and designed explicitly to compete with .com. If .info or .biz were good substitutes for, and put competitive pressure on, .com, then one might expect to see the number of domain names registered on .com fall (or not increase as rapidly as it otherwise would have) as the number of domain names registered on .info and .biz increased. In this case, the introduction of .info and .biz would be unambiguously beneficial because they

¹⁰¹ We implicitly assume that these registrations of existing second-level domain names in new gTLDs are undertaken by new registrants. If they were undertaken by the same registrants that controlled the name in .com, then these would potentially be examples of defensive registrations rather than relief of name scarcity.

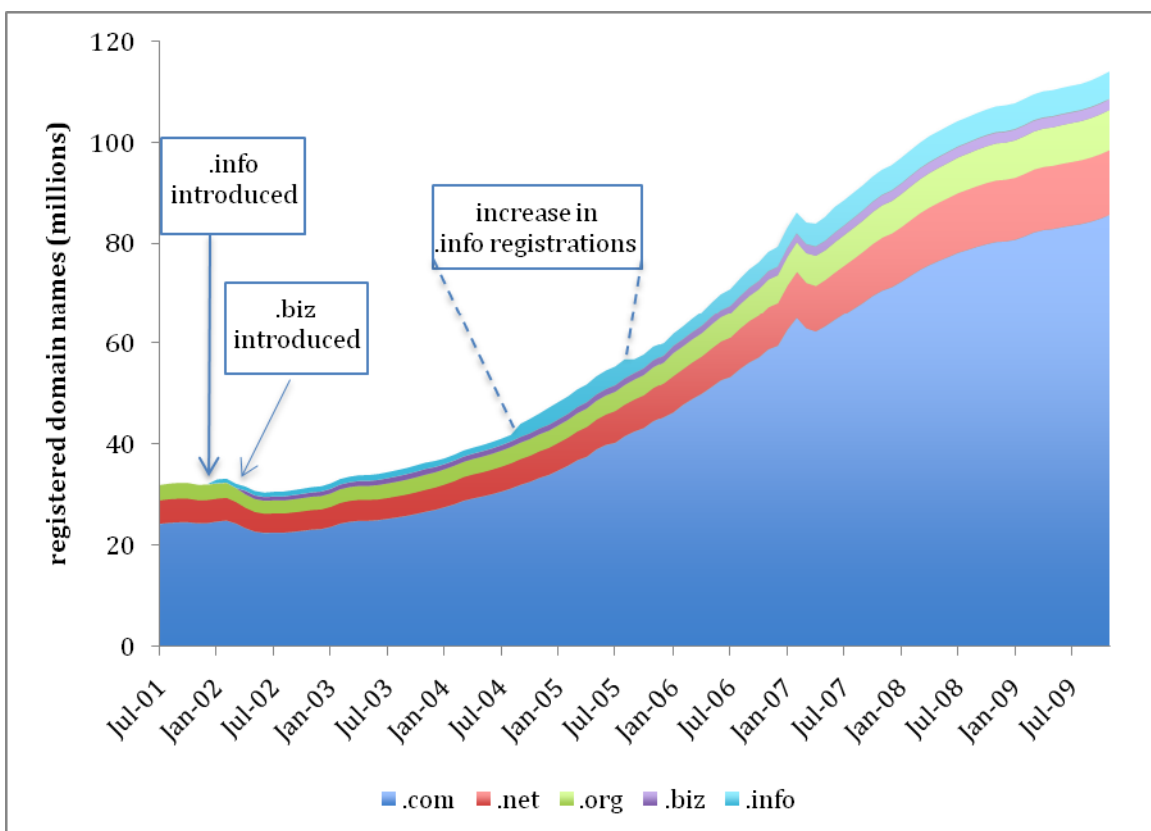
offered registrants sufficient additional benefits to attract registrants away from .com.¹⁰² Other patterns of domain name registration trends are not as informative. For example, suppose one observed that registrations on .com did not fall as the number of registrations on .info and .biz rose. This pattern would be consistent with several different explanations. First, .com might have maintained its registration volume by improving quality in response to the entry of .info and .biz. In this case, registrants would benefit from the increased competition. Second, registrations on .info and .biz might have been purely defensive in the sense that registrants on .com registered the same domain names on .info and .biz simply in order to prevent other entities from doing so. In this case, registrants would not have benefited from the entry of .info and .biz. Third, if the introduction of .info and .biz relieved name scarcity, then registrants and Internet users would have benefited. One cannot tell from an examination of the aggregate domain name volume data which of these explanations is most plausible.

84. A cursory examination of domain names registered does not show a dramatic effect of new gTLD introductions on .com domain name volumes. Figure 1 shows the number of domain names registered in .com, .org, .net, .info, and .biz over time. Although .com dominates, with about 75 percent of all domain names throughout the time period, the figure reveals at least two potentially significant events. First, the number of registered .com domains decreased slightly at the time .biz was introduced, which occurred just after .info was introduced. The number of domains registered under .org and .net also decreased during this time period. The decrease in .com, .org, and .net registrations when .info and .biz were introduced is consistent with the new gTLDs' having created additional competition for incumbent gTLDs. However, it should be noted that the total number of registered domains, even including the new gTLDs, decreased

¹⁰² The registrants attracted away from .com would include both existing .com registrants who switch and new registrants who considered .com, but chose to register on .info or .biz instead.

during this time period, which suggests that factors other than competition from .info and .biz may have driven some or all of the decline in registrations on .com. Second, the number of domains registered under .info increased substantially in 2004 and 2005, coincident with a promotional price on .info domain names beginning in Fall 2004, before falling back to levels more consistent with its previous trend growth rate. There is no obvious effect on .com registrations during this time period.

Figure 1: Number of Domain Names Registered



85. Because factors other than new gTLD competition may affect domain name registrations on .com, a careful economic study would have to attempt to disentangle the competitive effects of new gTLD introductions from these other factors. For example, one could use regression analysis to explain the number of .com registrations as a function of various economic factors

and the existence of the .biz and .info registries. By controlling for factors (other than .biz and .info) that influence the number of .com registrations, one potentially could isolate the effect of the introduction of .biz and .info. Identifying and quantifying all of the relevant factors affecting .com registrations, however, is not likely to be easy and may not be feasible. Because of the econometric difficulties in conducting such a study, the fact that the results are likely to be inconclusive, and our judgment that a resolution of the issue of whether past gTLDs have provided meaningful competition to .com is not central to a decision whether to proceed with new gTLDs, we think this project should be assigned a low priority.

2. Analysis of domain name resale prices

86. Rather than look for indirect evidence of competition on the number of domain name registrations in .com, one could look at pricing of .com for direct evidence of competition. The .com registry operates under a price cap regime, however, meaning that prices to register unclaimed domains may not be directly affected by the entry of new gTLDs.¹⁰³ Instead, the relevant prices to examine are those in the secondary market for second-level domain names. If .info and .biz were good substitutes for .com, then we would expect to see declines in the prices of .com domain names on the secondary market following the introduction of those new gTLDs, controlling for other factors.¹⁰⁴ An analysis of secondary-market prices is difficult, however,

¹⁰³ If the price cap is binding, that is, if the registry always charges the maximum amount allowed, then no price effect would be visible in the data.

¹⁰⁴ The disparity in secondary market prices across different gTLDs may diminish with the introduction of additional new gTLDs. Many browsers today allow auto-completion of partial URLs by adding ".com." Such auto-completion is sensible when .com accounts for such a large percentage of second-level domains, but it also reinforces the dominance of .com, thus explaining, in part, the systematically higher resale prices for .com domains. With more gTLDs available, and assuming that at least some of them are successful in attracting significant numbers of second-level domain names pointing to websites that compete with the same domain names on .com, this auto-completion feature becomes less useful. To the extent that consumers stop using auto-completion or browsers stop featuring it, the value of generic words in .com would be reduced.

because the quality of the domain names sold in each time period may vary greatly and it is not obvious how one could control for this variation in quality. If, independently of the introduction of .info and .biz, the average quality of .com domain names offered for sale trends up or down over time, one risks attributing the effect of these changes in quality to the introduction of .info and .biz. On the other hand, if the average quality of .com domain names offered for sale does not trend in any direction but varies substantially from year to year, then one will be unable to estimate the relationship between prices and the introduction of .info and .biz with precision.

87. As an alternative to examining secondary-market pricing data over time, one could get an idea of whether .biz and .info are substitutes for .com by examining cross-sectional patterns of secondary-market transaction prices. The tables below show average and median sales prices by gTLD for domain names sold through Sedo, a company that handles secondary-market domain name transactions. These preliminary data show that, in any given year (cross-section), mean sales prices differ by gTLD, with .com sites commanding significantly higher prices than other gTLDs.

***Mean Sales Prices of Second-level Domains
on the Secondary Market, by gTLD***

	Average Sales Price (US\$)		
	2007	2008	2009
.com	\$5,016	\$2,512	\$1,829
.net	\$2,033	\$1,670	\$1,367
.org	\$1,942	\$1,244	\$1,338
.biz	\$1,126	\$790	\$1,373
.info	\$1,091	\$841	\$624

Source: Sedo's Domain Market Study,
2009 Overview with Q4 Highlights.

88. Median sales prices may be more informative than mean prices because medians are not skewed by extreme outliers (*i.e.*, sales at very high or very low prices). In years prior to 2009,

median sales prices generally showed the same patterns as mean sales prices, with .com domains commanding higher prices than domains in other gTLDs. But in 2009, the median .net sales price exceeded that of .com, and .com and .org had comparable medians; median prices for .biz and .info continued to lag behind. Additional analysis is needed to understand what is driving this pattern of prices. For example, there may be strong selection effects at work (e.g., enterprises may seek .net or .org domain names only in those cases in which the name is particularly valuable and, thus, worth purchasing even though it is not a .com domain).

***Median Sales Prices of Second-level Domains
on the Secondary Market, by gTLD***

gTLD	Median Sales Price		
	Q2 2009	Q3 2009	Q4 2009
.com	\$410	\$490	\$437
.net	\$520	\$501	\$498
.org	\$377	\$496	\$436
.biz	\$272	\$301	\$333
.info	\$219	\$291	\$253

Source: SEDO Domain Market Study,
2009 Overview with Q4 Highlights.

Still, as with the time series analysis, the results of this cross-sectional analysis will be highly dependent on the actual domain names that are offered for sale in any particular time period; in the absence of the ability to control for the quality of the underlying domain names, it will be difficult or impossible to design an accurate study based on aggregated secondary-market prices.

89. A more direct approach would examine sale prices in different gTLDs of a matched sample of second-level domain names. Examination of the same second-level domain name in each gTLD should control for many factors that influence the value of a domain name and isolate

the value of the gTLD itself. Thus the study would shed light on the substitutability or relative value of domain names on different gTLDs and on the extent of competition between gTLDs.¹⁰⁵

90. To determine the feasibility of such a study, we examined information provided by ICANN for a sample of matched domain names sold over the past three years. Those data show that the average .com domain name sold for 10 times more than the same name in another TLD. Those data also show that, when the domain name is generic (not a trademark), the .com version sold for an average of 15 times more than the version in another gTLD.¹⁰⁶ Although we do not know how many examples of matched domain names exist, about 25 percent of the gTLD domains sold in 2009 through Sedo, a major reseller/auctioneer of domain names and websites, were not registered on the .com gTLD; this is roughly equal to the share of non-.com domain names registered.¹⁰⁷ Thus, there is a significant amount of resale activity in gTLDs other than .com, and it is possible that one could find a good-sized sample of matched domain name transactions across gTLDs.

91. In addition to looking at matched transactions, the study could also examine the prices of auctioned .com domain names where the same name was available as a new registration on .biz or .info at the time of the auction. Conceptually this is similar to the comparison proposed for matched domain name transactions, but the offering price on the non-.com domain name is

¹⁰⁵ Because gTLDs are a differentiated product, different gTLDs might compete with each other even though prices differ across gTLDs. Nevertheless, the magnitude of price differences yields some sense of the relative values registrants place on different gTLDs.

¹⁰⁶ Some sold at even higher multiples; for example, FTN.com sold for US\$15,100, while FTN.info sold for US\$162; and Thanksgivingdinner.com sold for US\$3,600, while Thanksgivingdinner.net sold for US\$80. It is unclear whether these sales in different gTLDs were of domain names or developed websites. All else equal, the latter would be expected to command a higher price.

¹⁰⁷ SEDO, "SEDO's Domain Market Study: 2009 Overview with Q4 Highlights," *available at* http://sedo.com/fileadmin/documents/pressdownload/2009_Market_Study.pdf, *site visited* June 15, 2010.

simply the price of registering it with an alternative gTLD rather than purchasing it from a registrant. If a domain name is available on .biz or .info, but is sold at a high price on .com, this suggests that domain names on gTLDs other than .com are not close substitutes for addresses on .com.¹⁰⁸ An analysis of auction prices would be complicated by the fact that .com domain names may have higher value because the original owner of the name had invested in promoting the brand or market presence of that domain name or had developed a website which is being sold along with the rights to the domain name. To isolate the effect of the gTLD itself, we would have to examine carefully the matched domain names being sold in order to make certain they are comparable.

92. Assuming that a large enough sample of secondary-market transactions could be obtained, a study of prices of a matched sample of domain names or prices of domain names on .com when the same name is available on other gTLDs would be feasible. Such a study, however, would be likely to confirm the conventional wisdom that .com domain names are more valuable than domain names in other gTLDs. Moreover, even if the conventional wisdom held true for gTLDs introduced in the past that attempted to compete head on with .com, such a finding would not establish that future new gTLDs would be unable to compete with .com or generate significant new benefits by adopting different business models.¹⁰⁹ Therefore, we think this should be a low-priority project.

¹⁰⁸ Again, competition between different gTLDs does not imply that domain name prices will be equal across the gTLDs. *See* note 105.

¹⁰⁹ Looking at the history of .info and .biz could be helpful, but any empirical results are conditional on the particular business models and rules used by .info and .biz. Future new gTLDs may use significantly different business models and rules, which would render a simple data analysis of .info and .biz much less informative.

3. Switching costs and behavior

93. If .info and .biz provide competition to .com, then one might observe individual domain name registrants switching their registrations from .com to .info and .biz. A concern expressed by some parties, however, is that the introduction of new gTLDs would provide little competition for incumbent gTLDs because users are locked-in to their current domain names as the result of high switching costs (*e.g.*, the costs a company would bear to change its marketing collateral and the loss of equity in the domain name). An assessment of those switching costs or measurement of switching behavior might help in assessing the likelihood that new gTLDs would provide competition to .com.

94. One approach to assessing the extent to which competition is affected by switching costs would be to conduct a survey designed to elicit organizations' estimated costs and benefits from changing their domain names.¹¹⁰ Such an approach would likely obtain a wide range of answers, depending in part on the scale of the business and how it uses the web as a tool for reaching customers.

95. Because surveys are subject to potential biases, an alternative approach would be to examine actual switching behavior. By revealed preference, in those cases where a user has switched, the perceived benefits of switching were greater than the perceived costs. Registration costs on new gTLDs are one of the costs of switching, so that a study could examine the extent

¹¹⁰ To ascertain switching costs, the survey could ask about changing of any part of the domain name; it need not specifically ask about changing the gTLD on which a domain name is registered, although it would have to be recognized that there could be additional costs of such a change stemming from customer confusion and loss of traffic.

of switching when prices of new gTLDs have changed, for example, at the introduction of .info and .biz¹¹¹ and at the time of any special .info and .biz price promotions.

96. Because of the difficulty in determining who has registered particular domain names due to cases in which proxy services are used, it is not clear that sufficient data will be available to determine the extent of switching.¹¹² Furthermore, the benefits of new gTLDs do not depend only upon registrants' switching from other gTLDs. First, domain name registrants may benefit from the introduction of new gTLDs that are purely complementary to .com and other existing gTLDs because the new gTLDs allow registrants to reach new users. Second, new registrants are not locked in to .com or any existing gTLD and may derive benefits from the introduction of new gTLDs. For these reasons, a study of switching may be unnecessary, and it should be assigned a low priority.

B. PROJECTED EXTERNAL COSTS OF NEW GTLDS

97. The projects discussed in this part focus on enumerating and quantifying the external costs of a gTLD, *i.e.*, the costs that are imposed on parties other than the gTLD owner. We do not consider here the costs imposed on ICANN because ICANN can adjust fees charged to registries in order to force the registry to internalize ICANN's costs. We also do not consider costs imposed on other registries due to increased competition because competition policy generally does not protect incumbents from competitive entry.

¹¹¹ In economic terms, the introduction of a new good or service, in this case a new gTLD, is identical to a price reduction from infinity to a finite level.

¹¹² It is also important to observe that registrants might derive large competitive benefits even if few of them switch gTLDs. First, new registrants might benefit from competition. Second, even existing registrants could benefit if their current registries improve their services in order to retain customers and the registries cannot price discriminate.

1. Costs of increased registration, monitoring, and enforcement of trademarks across multiple gTLDs

98. A potentially significant external cost of new gTLDs stems from the need to protect trademarks or brands through the use of defensive registrations. This project would involve estimating the share of organizations or brand names that engage in defensive registrations, as well as the costs incurred by organizations in monitoring domain name registrations and engaging in legal proceedings to protect their brand names and trademarks. The project would evaluate these costs over time, paying particular attention to how those costs have changed with the introduction and changes in the popularity of new domain names, including country codes.

99. The analysis is complicated by the fact that even registrations that are “defensive” may yield benefits to the registrant. One can think of there being two factors that influence whether a potential registrant decides to register a domain name. The potential registrant considers the affirmative value of the domain name to it, *e.g.*, the value of increased sales of a product or increased advertising revenue due to traffic on the domain. The potential registrant also considers the defensive “benefits” from denying the domain name to others, *e.g.*, reduced cost of pursuing litigation for trademark infringement. The sum of these two values is the potential registrant’s willingness to pay for the domain name. We define a purely defensive registration as one that the registrant undertakes solely to prevent others from undertaking it.

100. When willingness to pay exceeds price, the potential registrant will register the name. Suppose, for example, that the affirmative benefit is US\$10 and the defensive benefit is US\$2. If the price is US\$11, then the potential registrant will register the domain name; although the affirmative benefits are less than the price, the ability to deny the name to others yields defensive benefits to the registrant and the total value to the registrant exceeds the price. This type of registration is mixed, with both affirmative and defensive elements. Although the registrant

would not register the name in the absence of the defensive value (or if rules prevented the assignment of the domain name to someone else), the registrant still derives benefits from the domain name. Hence, even though the registrant would prefer that the domain name not exist, the net burden imposed on the registrant is \$1 (the affirmative benefit minus the price), rather than \$11 (the price). This example illustrates the general need to exercise care to avoid overestimating the costs of registrations motivated, at least in part, by defensive considerations.

101. One must also be careful not to miss costs. In particular, a trademark owner may determine that it suffers harm when it does not register a given domain name but that the harm is less than its cost of registering the domain name. In this case, the trademark owner suffers a loss, but there is no defensive registration.

102. These considerations can be expressed more formally. Define a_i and d_i as the affirmative and defensive benefits, respectively, associated with registration i by a legitimate trademark owner on a new gTLD. Let p denote the associated price of registration. Assuming that the trademark owner is not preempted by another registrant, the registration will be made if and only if $a_i + d_i \geq p$. The introduction of the new gTLD can generate the following losses. First, when $a_i + d_i < p$, the organization will not undertake registration, but will suffer the loss of d_i from not registering the domain. Observe that this case will arise only if $d_i \leq p$. Second, when $a_i + d_i \geq p$, the organization will undertake the registration but may suffer a welfare loss of up to $p - a_i \leq p$. Observe that this case will arise only if $p - a_i \leq d_i$. Taking the sum over all possible registrations on the new gTLD, $\sum_i \min\{p, d_i\}$ provides an upper bound on the social costs imposed on trademark owners by the new gTLD. In thinking about this sum, it is

important to recognize that, in most cases, $d_i = 0$. It is also important to recognize that there may be large affirmative benefits that offset these costs.

103. Although price is observable, the affirmative and defensive benefits are not. Using the fact that $\sum_i \min\{p, d_i\} \leq \sum_i p$, one can use $N \times p$ as an upper bound on the losses imposed on trademark owners by the new gTLD, where N is the number of second-level domain names for which $d_i > 0$. N is not observable either, but it may be possible to approximate N by making assumptions about a joint distribution function for a_i and d_i . This distribution function can be used with a measure of the number of almost-purely defensive registrations to estimate the upper bound on trademark owners' losses.

104. To determine the number of almost-purely defensive registrations, the project would begin by examining the extent to which registrants register the same domain names in different gTLDs. This determination would likely have to be made by relying on a sample of registrants.¹¹³ The project would then estimate the number of duplicate registrations that are empty or redirect to another website, as opposed to offering original content. The registrar for .info, Afilias, estimates that in June, 2009, 36 percent of .info domain names redirected to a domain name on another gTLD and another 14 percent were "referral" sites that referred the user to other websites. Only 19 percent of the .info domain names corresponded to "live, dedicated Web sites with apparent unique content."¹¹⁴ However, even if a domain name simply redirects to another website, the domain name could provide benefits to the registrant if it funnels traffic to the main website that would otherwise be lost.

¹¹³ Krueger and Van Couvering, for example, examined brands registered by Fortune 100 companies on different gTLDs.

¹¹⁴ Afilias, Annual Report 2009, at 10. These estimates are based on work done by the consulting firm, Pegasus Consulting.

105. A survey of registrants would likely be needed to disentangle the extent to which duplicate registrations are either purely defensive (and constitute external costs) or generate benefits to the registrants. A survey of trademark owners could provide information on the reasons for registration of domain names in multiple gTLDs, such as how registrants use the additional gTLDs (*e.g.*, to provide new content or purely to redirect to another site) and whether the registrants expect to reach a new audience with the new gTLD.¹¹⁵ The survey could also ask whether the registrant would have registered the name if it instead could have been taken out of circulation. The survey could also examine the likelihood that trademark owners would change their use of defensive registrations (potentially decreasing these external costs) given the introduction of new intellectual property protections in new gTLDs.

106. Lastly, differences in the rules of various gTLDs may generate useful information about the costs of defensive registration and the extent to which rules can help to mitigate such costs. The final part of this project would examine how different rules used by existing gTLDs to protect trademark owners have influenced the number and cost of disputes over domain names. For example, this part of the project would examine whether .biz and .info, which used different registration rules when those gTLDs were introduced, experienced material differences in the number, type, or cost of domain name disputes over time.

2. Costs to consumers from increased confusion or fragmentation of the Internet

107. New gTLDs could impose costs on consumers if the new gTLDs increased the time it takes Internet users to find their desired websites or increased the likelihood that users would go

¹¹⁵ Returning to an example described earlier, National Public Radio has registered the domain name n.pr and uses it to redirect users to npr.org. n.pr may be, or may become, an important source of traffic if consumers find the shorter address easier to remember or more convenient to enter into their Internet access devices.

to websites other than the ones they intended to visit. These costs could include lost time as a user tried to locate the correct site, damage inflicted on the user's computer when he or she inadvertently visited a website that downloaded malware onto his or her computer, or the purchasing of counterfeit goods from websites that appear to be legitimate.

108. The extent to which users incur these costs depends in large part on how frequently users find websites via search engines as opposed to typing domain names into the browser's address bar. As discussed earlier, according to the Pew Internet and American Life Project, in 2008 90 percent of all Internet users had used search engines, and 49 percent used one "yesterday," making search engines the second most popular online application, after email. Thus, the number of people subject to this type of increased confusion due to new gTLDs is probably relatively small, though these numbers may overstate or understate the implied costs. We note, however, that even when a search engine is used, the consumer usually must choose between multiple hits returned by the search engine. If proliferation of new gTLDs leads to many search hits that are confusing to the user, then even those relying upon search engines rather than typing in URLs might be harmed.

109. At this point in time, we are unaware of a study methodology that would allow us to measure or predict the amount of consumer confusion that may occur in future from the introduction of new gTLDs. Companies sometimes use focus groups, individual user testing, or other means to observe how users react to different websites and how they navigate the Internet. But the introduction of a large number of new gTLDs has the potential to change Internet navigation and use in a way that would be impossible to model for a focus group or in a controlled user experiment, and confusion that may show up in a short focus group session or user experiment may overstate the likely effect if it is only a transitory state and users adapt to

the new TLD structure. Indeed the very likelihood that new gTLDs will introduce unanticipated innovative business models and services makes it unlikely that a proper focus group or user experiment could be designed. Therefore, although we view user confusion as a potentially important issue, no definitive project could be defined at this point in time. We recommend that ICANN consider the potential for consumer confusion in deciding how quickly to proceed with the introduction of gTLDs, possibly incorporating some methodology to measure consumer confusion as new gTLDs are rolled out over time.

C. CASE STUDIES TO HELP PROJECT EXPECTED NET BENEFITS FROM NEW gTLDs

110. New gTLDs are expected to adopt a variety of business models, either to compete directly with existing gTLDs or to broaden the market and serve a particular unmet need. Economic theory suggests that many new gTLDs will attempt to differentiate themselves rather than try to compete directly with established gTLDs like .com.¹¹⁶ Based on the initial indications of interest, there may be a wide variety of new business plans: although some commercial gTLDs may be established to compete with .com (e.g., .sell or .shop), others may try to differentiate themselves by establishing cultural (e.g., .eus or .irish); geographic (e.g., .london or .nyc); specialized interest (e.g., .music or .rugby); country-specific (e.g., .pr or .fr); or new IDN (e.g., .ﻻﺩﻭﻋﺴﺎﺍ (Saudi Arabia) or .ﭘﻔ (Russian Federation)) gTLDs.

111. Because of the uncertainty surrounding the introduction of innovative new products and business models, it is difficult to analyze or predict the costs and benefits of any particular new gTLD, but one can analyze generally the expected costs and benefits of various types of new gTLDs. This potential project would use case studies to examine the likely costs and benefits in

¹¹⁶ For a discussion of the theory, see, e.g., Damien Neven (1985), "Two Stage (Perfect) Equilibrium in Hotelling's Model," *Journal of Industrial Economics*, 317-326.

broad categories of new gTLDs. Such studies would lead to recommendations on how ICANN could craft its application process and ongoing rules to lessen the likelihood of delegating gTLDs that will have negative net social benefits and to enhance the net social benefits from gTLDs that are designated.¹¹⁷

112. Experience with past introductions of gTLDs may provide insight into how different business models might affect competition and the benefits flowing from new gTLDs. One proposed case study would examine a new gTLD that was designed to compete with .com, such as .biz or .info. The study would look at the outcomes from these introductions along such dimensions as the number of domain names sold, traffic generated, and how registrants use the domain names (*e.g.*, to house original content, to re-direct to another site, or to duplicate content found on other websites). The study would examine the rules of registration, costs to register, and value-added services as possible impediments to, or stimulants of, demand. Finally the study would examine the effectiveness of rules to protect intellectual property, *e.g.*, sunrise registration rules.

113. Similar case studies could be undertaken with respect to gTLDs that were not designed to compete with .com and, instead, were intended to serve an underserved or specific community, *e.g.*, sponsored gTLDs such as .cat or .museum. These case studies would analyze the business models used, how the registry restricts domain name registrants and serves its community of interest, how domain name registrants and users benefit from the gTLD, and the effectiveness of—or need for—intellectual property protection.

¹¹⁷ Business models, rules, and regulations also affect the level of external costs, which we discussed in the section on cost studies.

114. Finally, case studies of ccTLDs that have been marketed as generic TLDs could be performed. Examples include .tv (Tuvalu), .me (Montenegro), and .co (Colombia).

115. In all of these case studies, it would be valuable to pay particular attention to the rules and regulations governing the gTLDs. The rules and procedures used by registries potentially raise a host of questions, but we focus here on the possible interactions between the rules and procedures and the introduction of new gTLDs. Different rules for trademark protection could substantially change the costs and benefits that a new gTLD imposes on third parties. For example, rules that make it very difficult for anyone but a trademark owner to register a second-level domain would reduce the costs to trademark owners while at the same time potentially decreasing the benefits to other third parties. The goal of examining experiences with various rules and regulations is to facilitate the design of future institutions that reduce the chances that new gTLDs with negative net social benefits will be approved and increase the net social benefits of those gTLDs that are delegated by proposing rules that will minimize the negative externalities while allowing socially beneficial innovation.

D. USING THE INTRODUCTION OF NEW gTLDs TO GENERATE ADDITIONAL INFORMATION

116. As discussed above, looking to past experience to shed light on the likely costs and benefits of new gTLDs is problematic for two reasons. First, the introduction of large numbers of new gTLDs—many of them brand- or company-specific and many others designed to promote geographic areas or serve cultural communities or other communities of interest—has the potential to change the way website owners communicate and do business with Internet users, and the way Internet users gather information and communicate with each other. There is no historical experiment—or set of historical experiments—from which one can extrapolate the future costs and benefits of such an advance. Second, piecing together bits of information as we

propose above in various studies, although it may be informative in limited areas, is in many cases seriously hampered by the paucity of relevant data. These facts lead to two conclusions.

117. First, it may be wise to continue ICANN's practice of introducing new gTLDs in discrete, limited rounds. It is impossible to predict the costs and benefits of new gTLDs accurately. By proceeding with multiple rounds, the biggest likely costs—consumer confusion and trademark protection—can be evaluated in the earlier rounds to make more accurate predictions about later rounds.

118. Second, in order to derive the greatest informational benefits from the next round of gTLD introductions, ICANN should adopt practices that will facilitate the assessment of the net benefits from the initial rollout of additional gTLDs. Specifically, ICANN should require registries, registrars, and domain names registrants to provide information sufficient to allow the estimation of the costs and benefits of new gTLDs. For example, there might be mandatory reporting of trademark disputes.

Petillon

RM 74

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

Note: this page is an archive of an old version of the bylaws. The current ICANN (Internet Corporation for Assigned Names and Numbers) bylaws are always available at:

<https://www.icann.org/resources/pages/governance/bylaws-en>
([/resources/pages/governance/bylaws-en](https://www.icann.org/resources/pages/governance/bylaws-en)).

As amended 11 February 2016

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ARTICLE I: MISSION AND CORE VALUES

Section 1. MISSION

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

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

Section 2. CORE VALUES

In performing its mission, the following core values should guide the

decisions and actions of ICANN (Internet Corporation for Assigned Names and Numbers):

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

mechanisms that enhance ICANN (Internet Corporation for Assigned Names and Numbers)'s effectiveness.

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

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

ARTICLE II: POWERS

Section 1. GENERAL POWERS

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

Section 2. RESTRICTIONS

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

Section 3. NON-DISCRIMINATORY TREATMENT

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

ARTICLE III: TRANSPARENCY

Section 1. PURPOSE

ICANN (Internet Corporation for Assigned Names and Numbers) and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.

Section 2. WEBSITE

ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain a publicly-accessible Internet World Wide Web site (the "Website"), which may include, among other things, (i) a calendar of scheduled meetings of the Board, Supporting Organizations (Supporting Organizations), and Advisory Committees (Advisory Committees); (ii) a docket of all pending policy development matters, including their schedule and current status; (iii) specific meeting notices and agendas as described below; (iv) information on ICANN (Internet Corporation for Assigned Names and Numbers)'s budget, annual audit, financial contributors

and the amount of their contributions, and related matters; (v) information about the availability of accountability mechanisms, including reconsideration, independent review, and Ombudsman activities, as well as information about the outcome of specific requests and complaints invoking these mechanisms; (vi) announcements about ICANN (Internet Corporation for Assigned Names and Numbers) activities of interest to significant segments of the ICANN (Internet Corporation for Assigned Names and Numbers) community; (vii) comments received from the community on policies being developed and other matters; (viii) information about ICANN (Internet Corporation for Assigned Names and Numbers)'s physical meetings and public forums; and (ix) other information of interest to the ICANN (Internet Corporation for Assigned Names and Numbers) community.

Section 3. MANAGER OF PUBLIC PARTICIPATION

There shall be a staff position designated as Manager of Public Participation, or such other title as shall be determined by the President, that shall be responsible, under the direction of the President, for coordinating the various aspects of public participation in ICANN (Internet Corporation for Assigned Names and Numbers), including the Website and various other means of communicating with and receiving input from the general community of Internet users.

Section 4. MEETING NOTICES AND AGENDAS

At least seven days in advance of each Board meeting (or if not practicable, as far in advance as is practicable), a notice of such meeting and, to the extent known, an agenda for the meeting shall be posted.

Section 5. MINUTES AND PRELIMINARY REPORTS

1. All minutes of meetings of the Board and Supporting Organizations (Supporting Organizations) (and any councils thereof) shall be approved promptly by the originating body and provided to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary for posting on the Website.

2. No later than 11:59 p.m. on the second business days after the conclusion of each meeting (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office), any resolutions passed by the Board of Directors at that meeting shall be made publicly available on the Website; provided, however, that any actions relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN (Internet Corporation for Assigned Names and Numbers)), matters that ICANN (Internet Corporation for Assigned Names and Numbers) is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the preliminary report made publicly available. The Secretary shall send notice to the Board of Directors and the Chairs of the Supporting Organizations (Supporting Organizations) (as set forth in Articles VIII - X of these Bylaws) and Advisory Committees (Advisory Committees) (as set forth in Article XI of these Bylaws) informing them that the resolutions have been posted.
3. No later than 11:59 p.m. on the seventh business days after the conclusion of each meeting (as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office), any actions taken by the Board shall be made publicly available in a preliminary report on the Website, subject to the limitations on disclosure set forth in Section 5.2 above. For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant preliminary report the reason for such nondisclosure.
4. No later than the day after the date on which they are formally approved by the Board (or, if such day is not a business day, as calculated by local time at the location of ICANN (Internet Corporation for Assigned Names and Numbers)'s principal office, then the next immediately following business day), the minutes shall be made publicly available on the Website; provided, however, that any

minutes relating to personnel or employment matters, legal matters (to the extent the Board determines it is necessary or appropriate to protect the interests of ICANN (Internet Corporation for Assigned Names and Numbers)), matters that ICANN (Internet Corporation for Assigned Names and Numbers) is prohibited by law or contract from disclosing publicly, and other matters that the Board determines, by a three-quarters (3/4) vote of Directors present at the meeting and voting, are not appropriate for public distribution, shall not be included in the minutes made publicly available. For any matters that the Board determines not to disclose, the Board shall describe in general terms in the relevant minutes the reason for such nondisclosure.

Section 6. NOTICE AND COMMENT ON POLICY ACTIONS

1. With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges, ICANN (Internet Corporation for Assigned Names and Numbers) shall:
 - a. provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;
 - b. provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments, prior to any action by the Board; and
 - c. in those cases where the policy action affects public policy concerns, to request the opinion of the Governmental Advisory Committee (Advisory Committee) and take duly into account any advice timely presented by the Governmental Advisory Committee (Advisory Committee) on its own initiative or at the Board's request.
2. Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed

policies as described in **Section 6(1)(b) of this Article**, prior to any final Board action.

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

Section 7. TRANSLATION OF DOCUMENTS

As appropriate and to the extent provided in the ICANN (Internet Corporation for Assigned Names and Numbers) budget, ICANN (Internet Corporation for Assigned Names and Numbers) shall facilitate the translation of final published documents into various appropriate languages.

ARTICLE IV: ACCOUNTABILITY AND REVIEW

Section 1. PURPOSE

In carrying out its mission as set out in these Bylaws, ICANN (Internet Corporation for Assigned Names and Numbers) should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in **Article I of these Bylaws**. The provisions of this Article, creating processes for reconsideration and independent review of ICANN (Internet Corporation for Assigned Names and Numbers) actions and periodic review of ICANN (Internet Corporation for Assigned Names and Numbers)'s structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of **Article III** and the Board and other selection mechanisms set forth throughout these Bylaws.

Section 2. RECONSIDERATION

1. ICANN (Internet Corporation for Assigned Names and Numbers) shall have in place a process by which any person or entity materially affected by an action of ICANN (Internet Corporation for Assigned Names and Numbers) may request review or reconsideration of that action by the Board.

2. Any person or entity may submit a request for reconsideration or review of an ICANN (Internet Corporation for Assigned Names and Numbers) action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:
 - a. one or more staff actions or inactions that contradict established ICANN (Internet Corporation for Assigned Names and Numbers) policy(ies); or
 - b. one or more actions or inactions of the ICANN (Internet Corporation for Assigned Names and Numbers) Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or
 - c. one or more actions or inactions of the ICANN (Internet Corporation for Assigned Names and Numbers) Board that are taken as a result of the Board's reliance on false or inaccurate material information.
3. The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:
 - a. evaluate requests for review or reconsideration;
 - b. summarily dismiss insufficient requests;
 - c. evaluate requests for urgent consideration;
 - d. conduct whatever factual investigation is deemed appropriate;
 - e. request additional written submissions from the affected party, or from other parties;
 - f. make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and

conditions set forth in the form when filing.

7. Requestors shall not provide more than 25 pages (double-spaced, 12-point font) of argument in support of a Reconsideration Request. Requestors may submit all documentary evidence necessary to demonstrate why the action or inaction should be reconsidered, without limitation.
8. The Board Governance Committee shall have authority to consider Reconsideration Requests from different parties in the same proceeding so long as: (i) the requests involve the same general action or inaction; and (ii) the parties submitting Reconsideration Requests are similarly affected by such action or inaction. In addition, consolidated filings may be appropriate if the alleged causal connection and the resulting harm is the same for all of the requestors. Every requestor must be able to demonstrate that it has been materially harmed and adversely impacted by the action or inaction giving rise to the request.
9. The Board Governance Committee shall review each Reconsideration Request upon its receipt to determine if it is sufficiently stated. The Board Governance Committee may summarily dismiss a Reconsideration Request if: (i) the requestor fails to meet the requirements for bringing a Reconsideration Request; (ii) it is frivolous, querulous or vexatious; or (iii) the requestor had notice and opportunity to, but did not, participate in the public comment period relating to the contested action, if applicable. The Board Governance Committee's summary dismissal of a Reconsideration Request shall be posted on the Website.
10. For all Reconsideration Requests that are not summarily dismissed, the Board Governance Committee shall promptly proceed to review and consideration.
11. The Board Governance Committee may ask the ICANN (Internet Corporation for Assigned Names and Numbers) staff for its views on the matter, which comments shall be made publicly available on the Website.
12. The Board Governance Committee may request additional information or clarifications from the requestor, and may elect

to conduct a meeting with the requestor by telephone, email or, if acceptable to the party requesting reconsideration, in person. A requestor may ask for an opportunity to be heard; the Board Governance Committee's decision on any such request is final. To the extent any information gathered in such a meeting is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation.

13. The Board Governance Committee may also request information relevant to the request from third parties. To the extent any information gathered is relevant to any recommendation by the Board Governance Committee, it shall so state in its recommendation. Any information collected from third parties shall be provided to the requestor.
14. The Board Governance Committee shall act on a Reconsideration Request on the basis of the public written record, including information submitted by the party seeking reconsideration or review, by the ICANN (Internet Corporation for Assigned Names and Numbers) staff, and by any third party.
15. For all Reconsideration Requests brought regarding staff action or inaction, the Board Governance Committee shall be delegated the authority by the Board of Directors to make a final determination and recommendation on the matter. Board consideration of the recommendation is not required. As the Board Governance Committee deems necessary, it may make recommendation to the Board for consideration and action. The Board Governance Committee's determination on staff action or inaction shall be posted on the Website. The Board Governance Committee's determination is final and establishes precedential value.
16. The Board Governance Committee shall make a final determination or a recommendation to the Board with respect to a Reconsideration Request within thirty days following its receipt of the request, unless impractical, in which case it shall report to the Board the circumstances that prevented it from making a final recommendation and its best estimate of

the time required to produce such a final determination or recommendation. The final recommendation shall be posted on ICANN (Internet Corporation for Assigned Names and Numbers)'s website.

17. The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Governance Committee within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on ICANN (Internet Corporation for Assigned Names and Numbers)'s website. The Board's decision on the recommendation is final.
18. If the requestor believes that the Board action or inaction posed for Reconsideration is so urgent that the timing requirements of the Reconsideration process are too long, the requestor may apply to the Board Governance Committee for urgent consideration. Any request for urgent consideration must be made within two business days (calculated at ICANN (Internet Corporation for Assigned Names and Numbers)'s headquarters in Los Angeles, California) of the posting of the resolution at issue. A request for urgent consideration must include a discussion of why the matter is urgent for reconsideration and must demonstrate a likelihood of success with the Reconsideration Request.
19. The Board Governance Committee shall respond to the request for urgent consideration within two business days after receipt of such request. If the Board Governance Committee agrees to consider the matter with urgency, it will cause notice to be provided to the requestor, who will have two business days after notification to complete the Reconsideration Request. The Board Governance Committee shall issue a recommendation on the urgent Reconsideration Request within seven days of the completion of the filing of the Request, or as soon thereafter as feasible. If the Board Governance Committee does not agree to consider the

matter with urgency, the requestor may still file a Reconsideration Request within the regular time frame set forth within these Bylaws.

20. The Board Governance Committee shall submit a report to the Board on an annual basis containing at least the following information for the preceding calendar year:
 - a. the number and general nature of Reconsideration Requests received, including an identification if the requests were acted upon, summarily dismissed, or remain pending;
 - b. for any Reconsideration Requests that remained pending at the end of the calendar year, the average length of time for which such Reconsideration Requests have been pending, and a description of the reasons for any request pending for more than ninety (90) days;
 - c. an explanation of any other mechanisms available to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) is accountable to persons materially affected by its decisions; and
 - d. whether or not, in the Board Governance Committee's view, the criteria for which reconsideration may be requested should be revised, or another process should be adopted or modified, to ensure that all persons materially affected by ICANN (Internet Corporation for Assigned Names and Numbers) decisions have meaningful access to a review process that ensures fairness while limiting frivolous claims.

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in Section 2 of this Article, ICANN (Internet Corporation for Assigned Names and Numbers) shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.

2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.
3. A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN (Internet Corporation for Assigned Names and Numbers) violated its Bylaws or Articles of Incorporation. Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.
4. Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:
 - a. did the Board act without conflict of interest in taking its decision?;
 - b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
 - c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?
5. Requests for independent review shall not exceed 25 pages (double-spaced, 12-point font) of argument. ICANN (Internet Corporation for Assigned Names and Numbers)'s response shall not exceed that same length. Parties may submit

documentary evidence supporting their positions without limitation. In the event that parties submit expert evidence, such evidence must be provided in writing and there will be a right of reply to the expert evidence.

6. There shall be an omnibus standing panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and work from which each specific IRP Panel shall be selected. The panelists shall serve for terms that are staggered to allow for continued review of the size of the panel and the range of expertise. A Chair of the standing panel shall be appointed for a term not to exceed three years. Individuals holding an official position or office within the ICANN (Internet Corporation for Assigned Names and Numbers) structure are not eligible to serve on the standing panel. In the event that an omnibus standing panel: (i) is not in place when an IRP Panel must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the IRP Provider; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the IRP Provider shall identify one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding.
7. All IRP proceedings shall be administered by an international dispute resolution provider appointed from time to time by ICANN (Internet Corporation for Assigned Names and Numbers) ("the IRP Provider"). The membership of the standing panel shall be coordinated by the IRP Provider subject to approval by ICANN (Internet Corporation for Assigned Names and Numbers).
8. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with this **Section 3**.
9. Either party may request that the IRP be considered by a one- or three-member panel; the Chair of the standing panel

shall make the final determination of the size of each IRP panel, taking into account the wishes of the parties and the complexity of the issues presented.

10. The IRP Provider shall determine a procedure for assigning members from the standing panel to individual IRP panels.
11. The IRP Panel shall have the authority to:
 - a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;
 - b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations (Supporting Organizations), or from other parties;
 - c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
 - d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;
 - e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and
 - f. determine the timing for each proceeding.
12. In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone. In the unlikely event that a telephonic or in-person hearing is convened, the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.
13. All panel members shall adhere to conflicts-of-interest policy stated in the IRP Provider's operating rules and procedures, as approved by the Board.
14. Prior to initiating a request for independent review, the

complainant is urged to enter into a period of cooperative engagement with ICANN (Internet Corporation for Assigned Names and Numbers) for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. The cooperative engagement process is published on ICANN (Internet Corporation for Assigned Names and Numbers).org and is incorporated into this Section 3 of the Bylaws.

15. Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. The conciliator shall not be eligible to serve as one of the panelists presiding over that particular IRP. The Chair of the standing panel may deem conciliation unnecessary if cooperative engagement sufficiently narrowed the issues remaining in the independent review.
16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN (Internet Corporation for Assigned Names and Numbers) is the prevailing party in the request for independent review, the IRP Panel must award to ICANN (Internet Corporation for Assigned Names and Numbers) all reasonable fees and costs incurred by ICANN (Internet Corporation for Assigned Names and Numbers) in the proceeding, including legal fees.
17. All matters discussed during the cooperative engagement and conciliation phases are to remain confidential and not subject to discovery or as evidence for any purpose within the IRP, and are without prejudice to either party.
18. The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its

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

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

Section 4. PERIODIC REVIEW OF ICANN (Internet Corporation for Assigned Names and Numbers) STRUCTURE AND OPERATIONS

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

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

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

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

ARTICLE V: OMBUDSMAN

Section 1. OFFICE OF OMBUDSMAN

1. There shall be an Office of Ombudsman, to be managed by an Ombudsman and to include such staff support as the Board determines is appropriate and feasible. The Ombudsman shall be a full-time position, with salary and benefits appropriate to the function, as determined by the Board.
2. The Ombudsman shall be appointed by the Board for an initial term of two years, subject to renewal by the Board.
3. The Ombudsman shall be subject to dismissal by the Board only upon a three-fourths (3/4) vote of the entire Board.
4. The annual budget for the Office of Ombudsman shall be established by the Board as part of the annual ICANN (Internet Corporation for Assigned Names and Numbers) budget process. The Ombudsman shall submit a proposed budget to the President, and the President shall include that budget submission in its entirety and without change in the general ICANN (Internet Corporation for Assigned Names

and Numbers) budget recommended by the ICANN (Internet Corporation for Assigned Names and Numbers) President to the Board. Nothing in this Article shall prevent the President from offering separate views on the substance, size, or other features of the Ombudsman's proposed budget to the Board.

Section 2. CHARTER

The charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Reconsideration Policy set forth in **Section 2 of Article IV** or the Independent Review Policy set forth in **Section 3 of Article IV** have not been invoked. The principal function of the Ombudsman shall be to provide an independent internal evaluation of complaints by members of the ICANN (Internet Corporation for Assigned Names and Numbers) community who believe that the ICANN (Internet Corporation for Assigned Names and Numbers) staff, Board or an ICANN (Internet Corporation for Assigned Names and Numbers) constituent body has treated them unfairly. The Ombudsman shall serve as an objective advocate for fairness, and shall seek to evaluate and where possible resolve complaints about unfair or inappropriate treatment by ICANN (Internet Corporation for Assigned Names and Numbers) staff, the Board, or ICANN (Internet Corporation for Assigned Names and Numbers) constituent bodies, clarifying the issues and using conflict resolution tools such as negotiation, facilitation, and "shuttle diplomacy" to achieve these results.

Section 3. OPERATIONS

The Office of Ombudsman shall:

1. facilitate the fair, impartial, and timely resolution of problems and complaints that affected members of the ICANN (Internet Corporation for Assigned Names and Numbers) community (excluding employees and vendors/suppliers of ICANN (Internet Corporation for Assigned Names and Numbers)) may have with specific actions or failures to act by the Board or ICANN (Internet Corporation for Assigned Names and Numbers) staff which have not otherwise become the subject of either the Reconsideration or Independent Review Policies;

2. exercise discretion to accept or decline to act on a complaint or question, including by the development of procedures to dispose of complaints that are insufficiently concrete, substantive, or related to ICANN (Internet Corporation for Assigned Names and Numbers)'s interactions with the community so as to be inappropriate subject matters for the Ombudsman to act on. In addition, and without limiting the foregoing, the Ombudsman shall have no authority to act in any way with respect to internal administrative matters, personnel matters, issues relating to membership on the Board, or issues related to vendor/supplier relations;
3. have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN (Internet Corporation for Assigned Names and Numbers) staff and constituent bodies to enable an informed evaluation of the complaint and to assist in dispute resolution where feasible (subject only to such confidentiality obligations as are imposed by the complainant or any generally applicable confidentiality policies adopted by ICANN (Internet Corporation for Assigned Names and Numbers));
4. heighten awareness of the Ombudsman program and functions through routine interaction with the ICANN (Internet Corporation for Assigned Names and Numbers) community and online availability;
5. maintain neutrality and independence, and have no bias or personal stake in an outcome; and
6. comply with all ICANN (Internet Corporation for Assigned Names and Numbers) conflicts-of-interest and confidentiality policies.

Section 4. INTERACTION WITH ICANN (Internet Corporation for Assigned Names and Numbers) AND OUTSIDE ENTITIES

1. No ICANN (Internet Corporation for Assigned Names and Numbers) employee, Board member, or other participant in Supporting Organizations (Supporting Organizations) or Advisory Committees (Advisory Committees) shall prevent or impede the Ombudsman's contact with the ICANN (Internet

Corporation for Assigned Names and Numbers) community (including employees of ICANN (Internet Corporation for Assigned Names and Numbers)). ICANN (Internet Corporation for Assigned Names and Numbers) employees and Board members shall direct members of the ICANN (Internet Corporation for Assigned Names and Numbers) community who voice problems, concerns, or complaints about ICANN (Internet Corporation for Assigned Names and Numbers) to the Ombudsman, who shall advise complainants about the various options available for review of such problems, concerns, or complaints.

2. ICANN (Internet Corporation for Assigned Names and Numbers) staff and other ICANN (Internet Corporation for Assigned Names and Numbers) participants shall observe and respect determinations made by the Office of Ombudsman concerning confidentiality of any complaints received by that Office.
3. Contact with the Ombudsman shall not constitute notice to ICANN (Internet Corporation for Assigned Names and Numbers) of any particular action or cause of action.
4. The Ombudsman shall be specifically authorized to make such reports to the Board as he or she deems appropriate with respect to any particular matter and its resolution or the inability to resolve it. Absent a determination by the Ombudsman, in his or her sole discretion, that it would be inappropriate, such reports shall be posted on the Website.
5. The Ombudsman shall not take any actions not authorized in these Bylaws, and in particular shall not institute, join, or support in any way any legal actions challenging ICANN (Internet Corporation for Assigned Names and Numbers) structure, procedures, processes, or any conduct by the ICANN (Internet Corporation for Assigned Names and Numbers) Board, staff, or constituent bodies.

Section 5. ANNUAL REPORT

The Office of Ombudsman shall publish on an annual basis a consolidated analysis of the year's complaints and resolutions, appropriately dealing with confidentiality obligations and concerns.

Such annual report should include a description of any trends or common elements of complaints received during the period in question, as well as recommendations for steps that could be taken to minimize future complaints. The annual report shall be posted on the Website.

ARTICLE VI: BOARD OF DIRECTORS

Section 1. COMPOSITION OF THE BOARD

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

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

1. The Directors shall consist of:
 - a. Eight voting members selected by the Nominating Committee established by **Article VII of these Bylaws**. These seats on the Board of Directors are referred to in these Bylaws as Seats 1 through 8.
 - b. Two voting members selected by the Address Supporting Organization (Supporting Organization) according to the provisions of **Article VIII of these Bylaws**. These seats on the Board of Directors are referred to in these Bylaws as Seat 9 and Seat 10.
 - c. Two voting members selected by the Country-Code Names Supporting Organization (Supporting Organization) according to the provisions of **Article IX of these Bylaws**. These seats on the Board of Directors are referred to in these Bylaws as Seat 11 and Seat 12.
 - d. Two voting members selected by the Generic Names

Supporting Organization (Supporting Organization) according to the provisions of **Article X of these Bylaws**. These seats on the Board of Directors are referred to in these Bylaws as Seat 13 and Seat 14.

- e. One voting member selected by the At-Large Community according to the provisions of Article XI of these Bylaws. This seat on the Board of Directors is referred to in these Bylaws as Seat 15.
- f. The President ex officio, who shall be a voting member.

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

For purposes of this sub-section 2 of Article VI, Section 2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, if any candidate for director maintains citizenship of more than one country, or has been domiciled for more than five years in a country of which the candidate does not maintain citizenship ("Domicile"), that candidate may be deemed to be from either country and must select in his/her Statement of Interest the country of citizenship or Domicile that he/she wants the Nominating Committee to use for Diversity Calculation purposes. For purposes of this sub-section 2 of Article VI, Section 2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, a

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

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

For purposes of this sub-section 3 of Article VI, Section 2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, if any candidate for director maintains citizenship of more than one country, or has been domiciled for more than five years in a country of which the candidate does not maintain citizenship ("Domicile"), that candidate may be deemed to be from either country and must select in his/her Statement of Interest the country of citizenship or Domicile that he/she wants the Supporting Organization (Supporting Organization) or the At-Large Community to use for selection purposes. For purposes of this sub-section 3 of Article VI, Section 2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, a person can only have one "Domicile," which shall be determined by where the candidate has a permanent residence and place of habitation.

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

Section 3. CRITERIA FOR SELECTION OF DIRECTORS

ICANN (Internet Corporation for Assigned Names and Numbers) Directors shall be:

1. Accomplished persons of integrity, objectivity, and intelligence, with reputations for sound judgment and open minds, and a demonstrated capacity for thoughtful group decision-making;
2. Persons with an understanding of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and the potential impact of ICANN (Internet Corporation for Assigned Names and Numbers) decisions on the global Internet community, and committed to the success of ICANN (Internet Corporation for Assigned Names and Numbers);
3. Persons who will produce the broadest cultural and geographic diversity on the Board consistent with meeting the other criteria set forth in this Section;
4. Persons who, in the aggregate, have personal familiarity with the operation of gTLD (generic Top Level Domain) registries and registrars; with ccTLD (Country Code Top Level Domain) registries; with IP (Internet Protocol or Intellectual Property) address registries; with Internet technical standards and protocols; with policy-development procedures, legal traditions, and the public interest; and with the broad range of business, individual, academic, and non-commercial users of the Internet; and
5. Persons who are able to work and communicate in written and spoken English.

Section 4. ADDITIONAL QUALIFICATIONS

1. Notwithstanding anything herein to the contrary, no official of a national government or a multinational entity established by treaty or other agreement between national governments may serve as a Director. As used herein, the term "official" means a person (i) who holds an elective governmental office or (ii) who is employed by such government or multinational entity and whose primary function with such government or entity is to develop or influence governmental or public policies.
2. No person who serves in any capacity (including as a liaison) on any Supporting Organization (Supporting Organization)

Council shall simultaneously serve as a Director or liaison to the Board. If such a person accepts a nomination to be considered for selection by the Supporting Organization (Supporting Organization) Council or the At-Large Community to be a Director, the person shall not, following such nomination, participate in any discussion of, or vote by, the Supporting Organization (Supporting Organization) Council or the committee designated by the At-Large Community relating to the selection of Directors by the Council or Community, until the Council or committee(s) designated by the At-Large Community has selected the full complement of Directors it is responsible for selecting. In the event that a person serving in any capacity on a Supporting Organization (Supporting Organization) Council accepts a nomination to be considered for selection as a Director, the constituency group or other group or entity that selected the person may select a replacement for purposes of the Council's selection process. In the event that a person serving in any capacity on the At-Large Advisory Committee (Advisory Committee) accepts a nomination to be considered for selection by the At-Large Community as a Director, the Regional At-Large Organization or other group or entity that selected the person may select a replacement for purposes of the Community's selection process.

3. Persons serving in any capacity on the Nominating Committee shall be ineligible for selection to positions on the Board as provided by Article VII, Section 8.

Section 5. INTERNATIONAL REPRESENTATION

In order to ensure broad international representation on the Board, the selection of Directors by the Nominating Committee, each Supporting Organization (Supporting Organization) and the At-Large Community shall comply with all applicable diversity provisions of these Bylaws or of any Memorandum of Understanding referred to in these Bylaws concerning the Supporting Organization (Supporting Organization). One intent of these diversity provisions is to ensure that at all times each Geographic Region shall have at least one Director, and at all times no region shall have more than five Directors on the Board (not including the President). As used in these Bylaws, each of the following is considered to be a

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

Section 6. DIRECTORS' CONFLICTS OF INTEREST

The Board, through the Board Governance Committee, shall require a statement from each Director not less frequently than once a year setting forth all business and other affiliations that relate in any way to the business and other affiliations of ICANN (Internet Corporation for Assigned Names and Numbers). Each Director shall be responsible for disclosing to ICANN (Internet Corporation for Assigned Names and Numbers) any matter that could reasonably be considered to make such Director an "interested director" within the meaning of Section 5233 of the California Nonprofit Public Benefit Corporation Law ("CNPBCL"). In addition, each Director shall disclose to ICANN (Internet Corporation for Assigned Names and Numbers) any relationship or other factor that could reasonably be considered to cause the Director to be considered to be an "interested person" within the meaning of Section 5227 of the CNPBCL. The Board shall adopt policies specifically addressing Director, Officer, and Supporting Organization (Supporting Organization) conflicts of interest. No Director shall vote on any matter in which he or she has a material and direct financial interest that would be affected by the outcome of the vote.

Section 7. DUTIES OF DIRECTORS

Directors shall serve as individuals who have the duty to act in what they reasonably believe are the best interests of ICANN (Internet Corporation for Assigned Names and Numbers) and not as representatives of the entity that selected them, their employers, or any other organizations or constituencies.

Section 8. TERMS OF DIRECTORS

1. The regular term of office of Director Seats 1 through 15 shall begin as follows:

- a. The regular terms of Seats 1 through 3 shall begin at the conclusion of ICANN (Internet Corporation for Assigned Names and Numbers)'s annual meeting in 2003 and each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2003;
- b. The regular terms of Seats 4 through 6 shall begin at the conclusion of ICANN (Internet Corporation for Assigned Names and Numbers)'s annual meeting in 2004 and each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2004;
- c. The regular terms of Seats 7 and 8 shall begin at the conclusion of ICANN (Internet Corporation for Assigned Names and Numbers)'s annual meeting in 2005 and each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2005;
- d. The terms of Seats 9 and 12 shall continue until the conclusion of ICANN (Internet Corporation for Assigned Names and Numbers)'s ICANN (Internet Corporation for Assigned Names and Numbers)'s annual meeting in 2015. The next terms of Seats 9 and 12 shall begin at the conclusion of ICANN (Internet Corporation for Assigned Names and Numbers)'s annual meeting in 2015 and each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2015;
- e. The terms of Seats 10 and 13 shall continue until the conclusion of ICANN (Internet Corporation for Assigned Names and Numbers)'s annual meeting in 2013. The next terms of Seats 10 and 13 shall begin at the conclusion of ICANN (Internet Corporation for Assigned Names and Numbers)'s annual meeting in 2013 and each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2013; and
- f. The terms of Seats 11, 14 and 15 shall continue until

the conclusion of ICANN (Internet Corporation for Assigned Names and Numbers)'s annual meeting in 2014. The next terms of Seats 11, 14 and 15 shall begin at the conclusion of ICANN (Internet Corporation for Assigned Names and Numbers)'s annual meeting in 2014 and each ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting every third year after 2014.

2. Each Director holding any of Seats 1 through 15, including a Director selected to fill a vacancy, shall hold office for a term that lasts until the next term for that Seat commences and until a successor has been selected and qualified or until that Director resigns or is removed in accordance with these Bylaws.
3. At least two months before the commencement of each annual meeting, the Nominating Committee shall give the Secretary of ICANN (Internet Corporation for Assigned Names and Numbers) written notice of its selection of Directors for seats with terms beginning at the conclusion of the annual meeting.
4. At least six months before the date specified for the commencement of the term as specified in paragraphs 1.d-f above, any Supporting Organization (Supporting Organization) or the At-Large community entitled to select a Director for a Seat with a term beginning that year shall give the Secretary of ICANN (Internet Corporation for Assigned Names and Numbers) written notice of its selection.
5. Subject to the provisions of the Transition Article of these Bylaws, no Director may serve more than three consecutive terms. For these purposes, a person selected to fill a vacancy in a term shall not be deemed to have served that term. (Note: In the period prior to the beginning of the first regular term of Seat 15 in 2010, Seat 15 was deemed vacant for the purposes of calculation of terms of service.)
6. The term as Director of the person holding the office of President shall be for as long as, and only for as long as, such person holds the office of President.

Section 9. NON-VOTING LIAISONS

1. The non-voting liaisons shall include:
 - a. One appointed by the Governmental Advisory Committee (Advisory Committee);
 - b. One appointed by the Root Server System Advisory Committee (Advisory Committee) established by Article XI of these Bylaws;
 - c. One appointed by the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) established by Article XI of these Bylaws;
 - d. One appointed by the Internet Engineering Task Force.
2. The non-voting liaisons shall serve terms that begin at the conclusion of each annual meeting. At least one month before the commencement of each annual meeting, each body entitled to appoint a non-voting liaison shall give the Secretary of ICANN (Internet Corporation for Assigned Names and Numbers) written notice of its appointment.
3. Each non-voting liaison may be reappointed, and shall remain in that position until a successor has been appointed or until the liaison resigns or is removed in accordance with these Bylaws.
4. The non-voting liaisons shall be entitled to attend Board meetings, participate in Board discussions and deliberations, and have access (under conditions established by the Board) to materials provided to Directors for use in Board discussions, deliberations and meetings, but shall otherwise not have any of the rights and privileges of Directors. Non-voting liaisons shall be entitled (under conditions established by the Board) to use any materials provided to them pursuant to this Section for the purpose of consulting with their respective committee or organization.

Section 10. RESIGNATION OF A DIRECTOR OR NON-VOTING

LIAISON

Subject to Section 5226 of the CNPBCL, any Director or non-voting liaison may resign at any time, either by oral tender of resignation at any meeting of the Board (followed by prompt written notice to the Secretary of ICANN (Internet Corporation for Assigned Names and Numbers)) or by giving written notice thereof to the President or the Secretary of ICANN (Internet Corporation for Assigned Names and Numbers). Such resignation shall take effect at the time specified, and, unless otherwise specified, the acceptance of such resignation shall not be necessary to make it effective. The successor shall be selected pursuant to Section 12 of this Article.

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

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

by that Committee if the Board, by a three-fourths (3/4) majority vote of all Directors, determines that such an action is appropriate.

Section 12. VACANCIES

1. A vacancy or vacancies in the Board of Directors shall be deemed to exist in the case of the death, resignation, or removal of any Director; if the authorized number of Directors is increased; or if a Director has been declared of unsound mind by a final order of court or convicted of a felony or incarcerated for more than 90 days as a result of a criminal conviction or has been found by final order or judgment of any court to have breached a duty under Sections 5230 et seq. of the CNPBCL. Any vacancy occurring on the Board of Directors shall be filled by the Nominating Committee, unless (a) that Director was selected by a Supporting Organization (Supporting Organization), in which case that vacancy shall be filled by that Supporting Organization (Supporting Organization), or (b) that Director was the President, in which case the vacancy shall be filled in accordance with the provisions of **Article XIII of these Bylaws**. The selecting body shall give written notice to the Secretary of ICANN (Internet Corporation for Assigned Names and Numbers) of their appointments to fill vacancies. A Director selected to fill a vacancy on the Board shall serve for the unexpired term of his or her predecessor in office and until a successor has been selected and qualified. No reduction of the authorized number of Directors shall have the effect of removing a Director prior to the expiration of the Director's term of office.
2. The organizations selecting the non-voting liaisons identified in **Section 9 of this Article** are responsible for determining the existence of, and filling, any vacancies in those positions. They shall give the Secretary of ICANN (Internet Corporation for Assigned Names and Numbers) written notice of their appointments to fill vacancies.

Section 13. ANNUAL MEETINGS

Annual meetings of ICANN (Internet Corporation for Assigned Names and Numbers) shall be held for the purpose of electing

Officers and for the transaction of such other business as may come before the meeting. Each annual meeting for ICANN (Internet Corporation for Assigned Names and Numbers) shall be held at the principal office of ICANN (Internet Corporation for Assigned Names and Numbers), or any other appropriate place of the Board's time and choosing, provided such annual meeting is held within 14 months of the immediately preceding annual meeting. If the Board determines that it is practical, the annual meeting should be distributed in real-time and archived video and audio formats on the Internet.

Section 14. REGULAR MEETINGS

Regular meetings of the Board shall be held on dates to be determined by the Board. In the absence of other designation, regular meetings shall be held at the principal office of ICANN (Internet Corporation for Assigned Names and Numbers).

Section 15. SPECIAL MEETINGS

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

Section 16. NOTICE OF MEETINGS

Notice of time and place of all meetings shall be delivered personally or by telephone or by electronic mail to each Director and non-voting liaison, or sent by first-class mail (air mail for addresses outside the United States) or facsimile, charges prepaid, addressed to each Director and non-voting liaison at the Director's or non-voting liaison's address as it is shown on the records of ICANN (Internet Corporation for Assigned Names and Numbers). In case the notice is mailed, it shall be deposited in the United States mail at least fourteen (14) days before the time of the holding of the meeting. In case the notice is delivered personally or by telephone or facsimile or electronic mail it shall be delivered personally or by telephone or facsimile or electronic mail at least forty-eight (48)

hours before the time of the holding of the meeting. Notwithstanding anything in this Section to the contrary, notice of a meeting need not be given to any Director who signed a waiver of notice or a written consent to holding the meeting or an approval of the minutes thereof, whether before or after the meeting, or who attends the meeting without protesting, prior thereto or at its commencement, the lack of notice to such Director. All such waivers, consents and approvals shall be filed with the corporate records or made a part of the minutes of the meetings.

Section 17. QUORUM

At all annual, regular, and special meetings of the Board, a majority of the total number of Directors then in office shall constitute a quorum for the transaction of business, and the act of a majority of the Directors present at any meeting at which there is a quorum shall be the act of the Board, unless otherwise provided herein or by law. If a quorum shall not be present at any meeting of the Board, the Directors present thereat may adjourn the meeting from time to time to another place, time, or date. If the meeting is adjourned for more than twenty-four (24) hours, notice shall be given to those Directors not at the meeting at the time of the adjournment.

Section 18. ACTION BY TELEPHONE MEETING OR BY OTHER COMMUNICATIONS EQUIPMENT

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

constitutes presence in person at such meeting. ICANN (Internet Corporation for Assigned Names and Numbers) shall make available at the place of any meeting of the Board the telecommunications equipment necessary to permit members of the Board to participate by telephone.

Section 19. ACTION WITHOUT MEETING

Any action required or permitted to be taken by the Board or a Committee of the Board may be taken without a meeting if all of the Directors entitled to vote thereat shall individually or collectively consent in writing to such action. Such written consent shall have the same force and effect as the unanimous vote of such Directors. Such written consent or consents shall be filed with the minutes of the proceedings of the Board.

Section 20. ELECTRONIC MAIL

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

Section 21. RIGHTS OF INSPECTION

Every Director shall have the right at any reasonable time to inspect and copy all books, records and documents of every kind, and to inspect the physical properties of ICANN (Internet Corporation for Assigned Names and Numbers). ICANN (Internet Corporation for Assigned Names and Numbers) shall establish reasonable procedures to protect against the inappropriate disclosure of confidential information.

Section 22. COMPENSATION

1. Except for the President of ICANN (Internet Corporation for Assigned Names and Numbers), who serves ex officio as a voting member of the Board, each of the Directors shall be entitled to receive compensation for his/her services as a Director. The President shall receive only his/her

compensation for service as President and shall not receive additional compensation for service as a Director.

2. If the Board determines to offer a compensation arrangement to one or more Directors other than the President of ICANN (Internet Corporation for Assigned Names and Numbers) for services to ICANN (Internet Corporation for Assigned Names and Numbers) as Directors, the Board shall follow a process that is calculated to pay an amount for service as a Director that is in its entirety Reasonable Compensation for such service under the standards set forth in §53.4958-4(b) of the Treasury Regulations.
3. As part of the process, the Board shall retain an Independent Valuation Expert to consult with and to advise the Board regarding Director compensation arrangements and to issue to the Board a Reasoned Written Opinion from such expert regarding the ranges of Reasonable Compensation for any such services by a Director. The expert's opinion shall address all relevant factors affecting the level of compensation to be paid a Director, including offices held on the Board, attendance at Board and Committee meetings, the nature of service on the Board and on Board Committees, and appropriate data as to comparability regarding director compensation arrangements for U.S.-based, nonprofit, tax-exempt organizations possessing a global employee base.
4. After having reviewed the expert's written opinion, the Board shall meet with the expert to discuss the expert's opinion and to ask questions of the expert regarding the expert's opinion, the comparability data obtained and relied upon, and the conclusions reached by the expert.
5. The Board shall adequately document the basis for any determination the Board makes regarding a Director compensation arrangement concurrently with making that determination.
6. In addition to authorizing payment of compensation for services as Directors as set forth in this Section 22, the Board may also authorize the reimbursement of actual and necessary reasonable expenses incurred by any Director and by non-voting liaisons performing their duties as

Directors or non-voting liaisons.

7. As used in this Section 22, the following terms shall have the following meanings:
 - a. An "Independent Valuation Expert" means a person retained by ICANN (Internet Corporation for Assigned Names and Numbers) to value compensation arrangements that: (i) holds itself out to the public as a compensation consultant; (ii) performs valuations regarding compensation arrangements on a regular basis, with a majority of its compensation consulting services performed for persons other than ICANN (Internet Corporation for Assigned Names and Numbers); (iii) is qualified to make valuations of the type of services involved in any engagement by and for ICANN (Internet Corporation for Assigned Names and Numbers); (iv) issues to ICANN (Internet Corporation for Assigned Names and Numbers) a Reasoned Written Opinion regarding a particular compensation arrangement; and (v) includes in its Reasoned Written Opinion a certification that it meets the requirements set forth in (i) through (iv) of this definition.
 - b. A "Reasoned Written Opinion" means a written opinion of a valuation expert who meets the requirements of subparagraph 7(a) (i) through (iv) of this Section. To be reasoned, the opinion must be based upon a full disclosure by ICANN (Internet Corporation for Assigned Names and Numbers) to the valuation expert of the factual situation regarding the compensation arrangement that is the subject of the opinion, the opinion must articulate the applicable valuation standards relevant in valuing such compensation arrangement, and the opinion must apply those standards to such compensation arrangement, and the opinion must arrive at a conclusion regarding the whether the compensation arrangement is within the range of Reasonable Compensation for the services covered by the arrangement. A written opinion is reasoned even though it reaches a conclusion that is subsequently

determined to be incorrect so long as the opinion addresses itself to the facts and the applicable standards. However, a written opinion is not reasoned if it does nothing more than recite the facts and express a conclusion.

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

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

Section 23. PRESUMPTION OF ASSENT

A Director present at a Board meeting at which action on any corporate matter is taken shall be presumed to have assented to the action taken unless his or her dissent or abstention is entered in the minutes of the meeting, or unless such Director files a written dissent or abstention to such action with the person acting as the secretary of the meeting before the adjournment thereof, or forwards such dissent or abstention by registered mail to the Secretary of ICANN (Internet Corporation for Assigned Names and Numbers) immediately after the adjournment of the meeting. Such right to dissent or abstain shall not apply to a Director who voted in favor of such action.

ARTICLE VII: NOMINATING COMMITTEE

Section 1. DESCRIPTION

There shall be a Nominating Committee of ICANN (Internet Corporation for Assigned Names and Numbers), responsible for the selection of all ICANN (Internet Corporation for Assigned Names and Numbers) Directors except the President and those Directors selected by ICANN (Internet Corporation for Assigned Names and Numbers)'s Supporting Organizations (Supporting Organizations),

and for such other selections as are set forth in these Bylaws.

Section 2. COMPOSITION

The Nominating Committee shall be composed of the following persons:

1. A non-voting Chair, appointed by the ICANN (Internet Corporation for Assigned Names and Numbers) Board;
2. A non-voting Chair-Elect, appointed by the ICANN (Internet Corporation for Assigned Names and Numbers) Board as a non-voting advisor;
3. A non-voting liaison appointed by the ICANN (Internet Corporation for Assigned Names and Numbers) Root Server System Advisory Committee (Advisory Committee) established by **Article XI of these Bylaws**;
4. A non-voting liaison appointed by the ICANN (Internet Corporation for Assigned Names and Numbers) Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) established by **Article XI of these Bylaws**;
5. A non-voting liaison appointed by the **Governmental Advisory Committee (Advisory Committee)**;
6. Subject to the provisions of the Transition Article of these Bylaws, five voting delegates selected by the At-Large Advisory Committee (Advisory Committee) established by **Article XI of these Bylaws**;
7. Voting delegates to the Nominating Committee shall be selected from the Generic Names Supporting Organization (Supporting Organization), established by **Article X of these Bylaws**, as follows:
 - a. One delegate from the Registries Stakeholder Group;
 - b. One delegate from the Registrars Stakeholder Group;
 - c. Two delegates from the Business Constituency, one representing small business users and one

- representing large business users;
- d. One delegate from the Internet Service Providers Constituency;
 - e. One delegate from the Intellectual Property Constituency; and
 - f. One delegate from consumer and civil society groups, selected by the Non-Commercial Users Constituency.
8. One voting delegate each selected by the following entities:
- a. The Council of the Country Code Names Supporting Organization (Supporting Organization) established by **Article IX of these Bylaws**;
 - b. The Council of the Address Supporting Organization (Supporting Organization) established by **Article VIII of these Bylaws**; and
 - c. The Internet Engineering Task Force.
9. A non-voting Associate Chair, who may be appointed by the Chair, at his or her sole discretion, to serve during all or part of the term of the Chair. The Associate Chair may not be a person who is otherwise a member of the same Nominating Committee. The Associate Chair shall assist the Chair in carrying out the duties of the Chair, but shall not serve, temporarily or otherwise, in the place of the Chair.

Section 3. TERMS

Subject to the provisions of the **Transition Article of these Bylaws**:

1. Each voting delegate shall serve a one-year term. A delegate may serve at most two successive one-year terms, after which at least two years must elapse before the individual is eligible to serve another term.
2. The regular term of each voting delegate shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting and shall end at the conclusion of the immediately following ICANN (Internet Corporation for Assigned Names and Numbers) annual

meeting.

3. Non-voting liaisons shall serve during the term designated by the entity that appoints them. The Chair, the Chair-Elect, and any Associate Chair shall serve as such until the conclusion of the next ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting.
4. It is anticipated that upon the conclusion of the term of the Chair-Elect, the Chair-Elect will be appointed by the Board to the position of Chair. However, the Board retains the discretion to appoint any other person to the position of Chair. At the time of appointing a Chair-Elect, if the Board determines that the person identified to serve as Chair shall be appointed as Chair for a successive term, the Chair-Elect position shall remain vacant for the term designated by the Board.
5. Vacancies in the positions of delegate, non-voting liaison, Chair or Chair-Elect shall be filled by the entity entitled to select the delegate, non-voting liaison, Chair or Chair-Elect involved. For any term that the Chair-Elect position is vacant pursuant to paragraph 4 of this Article, or until any other vacancy in the position of Chair-Elect can be filled, a non-voting advisor to the Chair may be appointed by the Board from among persons with prior service on the Board or a Nominating Committee, including the immediately previous Chair of the Nominating Committee. A vacancy in the position of Associate Chair may be filled by the Chair in accordance with the criteria established by Section 2(9) of this Article.
6. The existence of any vacancies shall not affect the obligation of the Nominating Committee to carry out the responsibilities assigned to it in these Bylaws.

Section 4. CRITERIA FOR SELECTION OF NOMINATING COMMITTEE DELEGATES

Delegates to the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee shall be:

1. Accomplished persons of integrity, objectivity, and intelligence, with reputations for sound judgment and open

minds, and with experience and competence with collegial large group decision-making;

2. Persons with wide contacts, broad experience in the Internet community, and a commitment to the success of ICANN (Internet Corporation for Assigned Names and Numbers);
3. Persons whom the selecting body is confident will consult widely and accept input in carrying out their responsibilities;
4. Persons who are neutral and objective, without any fixed personal commitments to particular individuals, organizations, or commercial objectives in carrying out their Nominating Committee responsibilities;
5. Persons with an understanding of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission and the potential impact of ICANN (Internet Corporation for Assigned Names and Numbers)'s activities on the broader Internet community who are willing to serve as volunteers, without compensation other than the reimbursement of certain expenses; and
6. Persons who are able to work and communicate in written and spoken English.

Section 5. DIVERSITY

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

Section 6. ADMINISTRATIVE AND OPERATIONAL SUPPORT

ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the Nominating Committee to carry out its responsibilities.

Section 7. PROCEDURES

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

Section 8. INELIGIBILITY FOR SELECTION BY NOMINATING COMMITTEE

No person who serves on the Nominating Committee in any capacity shall be eligible for selection by any means to any position on the Board or any other ICANN (Internet Corporation for Assigned Names and Numbers) body having one or more membership positions that the Nominating Committee is responsible for filling, until the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting that coincides with, or is after, the conclusion of that person's service on the Nominating Committee.

Section 9. INELIGIBILITY FOR SERVICE ON NOMINATING COMMITTEE

No person who is an employee of or paid consultant to ICANN (Internet Corporation for Assigned Names and Numbers) (including the Ombudsman) shall simultaneously serve in any of the Nominating Committee positions described in Section 2 of this Article.

ARTICLE VIII: ADDRESS SUPPORTING ORGANIZATION

Section 1. DESCRIPTION

1. The Address Supporting Organization (Supporting Organization) (ASO (Address Supporting Organization)) shall advise the Board with respect to policy issues relating to the operation, assignment, and management of Internet addresses.

2. The ASO (Address Supporting Organization) shall be the entity established by the Memorandum of Understanding entered on 21 October 2004 between ICANN (Internet Corporation for Assigned Names and Numbers) and the Number Resource Organization (NRO (Number Resource Organization)), an organization of the existing regional Internet registries (RIRs).

Section 2. ADDRESS COUNCIL

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

ARTICLE IX: COUNTRY-CODE NAMES SUPPORTING ORGANIZATION

Section 1. DESCRIPTION

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

1. developing and recommending to the Board global policies relating to country-code top-level domains;
2. Nurturing consensus across the ccNSO (Country Code Names Supporting Organization)'s community, including the name-related activities of ccTLDs; and
3. Coordinating with other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations), committees, and constituencies under ICANN (Internet Corporation for Assigned Names and Numbers).

Policies that apply to ccNSO (Country Code Names Supporting Organization) members by virtue of their membership are only those

policies developed according to section 4.10 and 4.11 of this Article. However, the ccNSO (Country Code Names Supporting Organization) may also engage in other activities authorized by its members. Adherence to the results of these activities will be voluntary and such activities may include: seeking to develop voluntary best practices for ccTLD (Country Code Top Level Domain) managers, assisting in skills building within the global community of ccTLD (Country Code Top Level Domain) managers, and enhancing operational and technical cooperation among ccTLD (Country Code Top Level Domain) managers.

Section 2. ORGANIZATION

The ccNSO (Country Code Names Supporting Organization) shall consist of (i) ccTLD (Country Code Top Level Domain) managers that have agreed in writing to be members of the ccNSO (Country Code Names Supporting Organization) (see **Section 4(2) of this Article**) and (ii) a ccNSO (Country Code Names Supporting Organization) Council responsible for managing the policy-development process of the ccNSO (Country Code Names Supporting Organization).

Section 3. ccNSO (Country Code Names Supporting Organization) COUNCIL

1. The ccNSO (Country Code Names Supporting Organization) Council shall consist of (a) three ccNSO (Country Code Names Supporting Organization) Council members selected by the ccNSO (Country Code Names Supporting Organization) members within each of **ICANN (Internet Corporation for Assigned Names and Numbers)'s Geographic Regions** in the manner described in **Section 4(7) through (9) of this Article**; (b) three ccNSO (Country Code Names Supporting Organization) Council members selected by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee; (c) liaisons as described in **paragraph 2 of this Section**; and (iv) observers as described in **paragraph 3 of this Section**.
2. There shall also be one liaison to the ccNSO (Country Code Names Supporting Organization) Council from each of the following organizations, to the extent they choose to appoint

such a liaison: (a) the Governmental Advisory Committee (Advisory Committee); (b) the At-Large Advisory Committee (Advisory Committee); and (c) each of the Regional Organizations described in **Section 5 of this Article**. These liaisons shall not be members of or entitled to vote on the ccNSO (Country Code Names Supporting Organization) Council, but otherwise shall be entitled to participate on equal footing with members of the ccNSO (Country Code Names Supporting Organization) Council. Appointments of liaisons shall be made by providing written notice to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair, and shall be for the term designated by the appointing organization as stated in the written notice. The appointing organization may recall from office or replace its liaison at any time by providing written notice of the recall or replacement to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair.

3. The ccNSO (Country Code Names Supporting Organization) Council may agree with the Council of any other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organization (Supporting Organization) to exchange observers. Such observers shall not be members of or entitled to vote on the ccNSO (Country Code Names Supporting Organization) Council, but otherwise shall be entitled to participate on equal footing with members of the ccNSO (Country Code Names Supporting Organization) Council. The appointing Council may designate its observer (or revoke or change the designation of its observer) on the ccNSO (Country Code Names Supporting Organization) Council at any time by providing written notice to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair.
4. Subject to the provisions of the **Transition Article of these Bylaws**: (a) the regular term of each ccNSO (Country Code Names Supporting Organization) Council member shall

begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting and shall end at the conclusion of the third ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting thereafter; (b) the regular terms of the three ccNSO (Country Code Names Supporting Organization) Council members selected by the ccNSO (Country Code Names Supporting Organization) members within each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region shall be staggered so that one member's term begins in a year divisible by three, a second member's term begins in the first year following a year divisible by three, and the third member's term begins in the second year following a year divisible by three; and (c) the regular terms of the three ccNSO (Country Code Names Supporting Organization) Council members selected by the Nominating Committee shall be staggered in the same manner. Each ccNSO (Country Code Names Supporting Organization) Council member shall hold office during his or her regular term and until a successor has been selected and qualified or until that member resigns or is removed in accordance with these Bylaws.

5. A ccNSO (Country Code Names Supporting Organization) Council member may resign at any time by giving written notice to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair.
6. ccNSO (Country Code Names Supporting Organization) Council members may be removed for not attending three consecutive meetings of the ccNSO (Country Code Names Supporting Organization) Council without sufficient cause or for grossly inappropriate behavior, both as determined by at least a 66% vote of all of the members of the ccNSO (Country Code Names Supporting Organization) Council.
7. A vacancy on the ccNSO (Country Code Names Supporting Organization) Council shall be deemed to exist in the case of the death, resignation, or removal of any ccNSO (Country Code Names Supporting Organization) Council member.

Vacancies in the positions of the three members selected by the Nominating Committee shall be filled for the unexpired term involved by the Nominating Committee giving the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary written notice of its selection, with a notification copy to the ccNSO (Country Code Names Supporting Organization) Council Chair. Vacancies in the positions of the ccNSO (Country Code Names Supporting Organization) Council members selected by ccNSO (Country Code Names Supporting Organization) members shall be filled for the unexpired term by the procedure described in **Section 4(7) through (9) of this Article**.

8. The role of the ccNSO (Country Code Names Supporting Organization) Council is to administer and coordinate the affairs of the ccNSO (Country Code Names Supporting Organization) (including coordinating meetings, including an annual meeting, of ccNSO (Country Code Names Supporting Organization) members as described in **Section 4(6) of this Article**) and to manage the development of policy recommendations in accordance with Section 6 of this Article. The ccNSO (Country Code Names Supporting Organization) Council shall also undertake such other roles as the members of the ccNSO (Country Code Names Supporting Organization) shall decide from time to time.
9. The ccNSO (Country Code Names Supporting Organization) Council shall make selections to fill Seats 11 and 12 on the Board by written ballot or by action at a meeting; any such selection must have affirmative votes of a majority of all the members of the ccNSO (Country Code Names Supporting Organization) Council then in office. Notification of the ccNSO (Country Code Names Supporting Organization) Council's selections shall be given by the ccNSO (Country Code Names Supporting Organization) Council Chair in writing to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, consistent with Article VI, **Sections 8(4)** and **12(1)**.
10. The ccNSO (Country Code Names Supporting Organization) Council shall select from among its members the ccNSO (Country Code Names Supporting Organization) Council

Chair and such Vice Chair(s) as it deems appropriate. Selections of the ccNSO (Country Code Names Supporting Organization) Council Chair and Vice Chair(s) shall be by written ballot or by action at a meeting; any such selection must have affirmative votes of a majority of all the members of the ccNSO (Country Code Names Supporting Organization) Council then in office. The term of office of the ccNSO (Country Code Names Supporting Organization) Council Chair and any Vice Chair(s) shall be as specified by the ccNSO (Country Code Names Supporting Organization) Council at or before the time the selection is made. The ccNSO (Country Code Names Supporting Organization) Council Chair or any Vice Chair(s) may be recalled from office by the same procedure as used for selection.

11. The ccNSO (Country Code Names Supporting Organization) Council, subject to direction by the ccNSO (Country Code Names Supporting Organization) members, shall adopt such rules and procedures for the ccNSO (Country Code Names Supporting Organization) as it deems necessary, provided they are consistent with these Bylaws. Rules for ccNSO (Country Code Names Supporting Organization) membership and operating procedures adopted by the ccNSO (Country Code Names Supporting Organization) Council shall be published on the Website.
12. Except as provided by **paragraphs 9 and 10 of this Section**, the ccNSO (Country Code Names Supporting Organization) Council shall act at meetings. The ccNSO (Country Code Names Supporting Organization) Council shall meet regularly on a schedule it determines, but not fewer than four times each calendar year. At the discretion of the ccNSO (Country Code Names Supporting Organization) Council, meetings may be held in person or by other means, provided that all ccNSO (Country Code Names Supporting Organization) Council members are permitted to participate by at least one means described in **paragraph 14 of this Section**. Except where determined by a majority vote of the members of the ccNSO (Country Code Names Supporting Organization) Council present that a closed session is appropriate, physical meetings shall be open to attendance by all interested persons. To the extent practicable, ccNSO

(Country Code Names Supporting Organization) Council meetings should be held in conjunction with meetings of the Board, or of one or more of ICANN (Internet Corporation for Assigned Names and Numbers)'s other Supporting Organizations (Supporting Organizations).

13. Notice of time and place (and information about means of participation other than personal attendance) of all meetings of the ccNSO (Country Code Names Supporting Organization) Council shall be provided to each ccNSO (Country Code Names Supporting Organization) Council member, liaison, and observer by e-mail, telephone, facsimile, or a paper notice delivered personally or by postal mail. In case the notice is sent by postal mail, it shall be sent at least 21 days before the day of the meeting. In case the notice is delivered personally or by telephone, facsimile, or e-mail it shall be provided at least seven days before the day of the meeting. At least seven days in advance of each ccNSO (Country Code Names Supporting Organization) Council meeting (or if not practicable, as far in advance as is practicable), a notice of such meeting and, to the extent known, an agenda for the meeting shall be posted.
14. Members of the ccNSO (Country Code Names Supporting Organization) Council may participate in a meeting of the ccNSO (Country Code Names Supporting Organization) Council through personal attendance or use of electronic communication (such as telephone or video conference), provided that (a) all ccNSO (Country Code Names Supporting Organization) Council members participating in the meeting can speak to and hear one another, (b) all ccNSO (Country Code Names Supporting Organization) Council members participating in the meeting are provided the means of fully participating in all matters before the ccNSO (Country Code Names Supporting Organization) Council, and (c) there is a reasonable means of verifying the identity of ccNSO (Country Code Names Supporting Organization) Council members participating in the meeting and their votes. A majority of the ccNSO (Country Code Names Supporting Organization) Council members (i.e. those entitled to vote) then in office shall constitute a quorum for the transaction of business, and actions by a majority vote

of the ccNSO (Country Code Names Supporting Organization) Council members present at any meeting at which there is a quorum shall be actions of the ccNSO (Country Code Names Supporting Organization) Council, unless otherwise provided in these Bylaws. The ccNSO (Country Code Names Supporting Organization) Council shall transmit minutes of its meetings to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, who shall cause those minutes to be posted to the Website as soon as practicable following the meeting, and no later than 21 days following the meeting.

Section 4. MEMBERSHIP

1. The ccNSO (Country Code Names Supporting Organization) shall have a membership consisting of ccTLD (Country Code Top Level Domain) managers. Any ccTLD (Country Code Top Level Domain) manager that meets the membership qualifications stated in **paragraph 2 of this Section** shall be entitled to be members of the ccNSO (Country Code Names Supporting Organization). For purposes of this Article, a ccTLD (Country Code Top Level Domain) manager is the organization or entity responsible for managing an ISO (International Organization for Standardization) 3166 country-code top-level domain and referred to in the IANA (Internet Assigned Numbers Authority) database under the current heading of "Sponsoring Organization", or under any later variant, for that country-code top-level domain.
2. Any ccTLD (Country Code Top Level Domain) manager may become a ccNSO (Country Code Names Supporting Organization) member by submitting an application to a person designated by the ccNSO (Country Code Names Supporting Organization) Council to receive applications. Subject to the provisions of the Transition Article of these Bylaws, the application shall be in writing in a form designated by the ccNSO (Country Code Names Supporting Organization) Council. The application shall include the ccTLD (Country Code Top Level Domain) manager's recognition of the role of the ccNSO (Country Code Names Supporting Organization) within the ICANN (Internet Corporation for Assigned Names and Numbers) structure as

well as the ccTLD (Country Code Top Level Domain) manager's agreement, for the duration of its membership in the ccNSO (Country Code Names Supporting Organization), (a) to adhere to rules of the ccNSO (Country Code Names Supporting Organization), including membership rules, (b) to abide by policies developed and recommended by the ccNSO (Country Code Names Supporting Organization) and adopted by the Board in the manner described by paragraphs 10 and 11 of this Section, and (c) to pay ccNSO (Country Code Names Supporting Organization) membership fees established by the ccNSO (Country Code Names Supporting Organization) Council under **Section 7(3) of this Article**. A ccNSO (Country Code Names Supporting Organization) member may resign from membership at any time by giving written notice to a person designated by the ccNSO (Country Code Names Supporting Organization) Council to receive notices of resignation. Upon resignation the ccTLD (Country Code Top Level Domain) manager ceases to agree to (a) adhere to rules of the ccNSO (Country Code Names Supporting Organization), including membership rules, (b) to abide by policies developed and recommended by the ccNSO (Country Code Names Supporting Organization) and adopted by the Board in the manner described by paragraphs 10 and 11 of this Section, and (c) to pay ccNSO (Country Code Names Supporting Organization) membership fees established by the ccNSO (Country Code Names Supporting Organization) Council under **Section 7(3) of this Article**. In the absence of designation by the ccNSO (Country Code Names Supporting Organization) Council of a person to receive applications and notices of resignation, they shall be sent to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, who shall notify the ccNSO (Country Code Names Supporting Organization) Council of receipt of any such applications and notices.

3. Neither membership in the ccNSO (Country Code Names Supporting Organization) nor membership in any Regional Organization described in **Section 5 of this Article** shall be a condition for access to or registration in the IANA (Internet Assigned Numbers Authority) database. Any individual relationship a ccTLD (Country Code Top Level Domain)

manager has with ICANN (Internet Corporation for Assigned Names and Numbers) or the ccTLD (Country Code Top Level Domain) manager's receipt of IANA (Internet Assigned Numbers Authority) services is not in any way contingent upon membership in the ccNSO (Country Code Names Supporting Organization).

4. The Geographic Regions of ccTLDs shall be as described in **Article VI, Section 5 of these Bylaws**. For purposes of this Article, managers of ccTLDs within a Geographic Region that are members of the ccNSO (Country Code Names Supporting Organization) are referred to as ccNSO (Country Code Names Supporting Organization) members "within" the Geographic Region, regardless of the physical location of the ccTLD (Country Code Top Level Domain) manager. In cases where the Geographic Region of a ccNSO (Country Code Names Supporting Organization) member is unclear, the ccTLD (Country Code Top Level Domain) member should self-select according to procedures adopted by the ccNSO (Country Code Names Supporting Organization) Council.
5. Each ccTLD (Country Code Top Level Domain) manager may designate in writing a person, organization, or entity to represent the ccTLD (Country Code Top Level Domain) manager. In the absence of such a designation, the ccTLD (Country Code Top Level Domain) manager shall be represented by the person, organization, or entity listed as the administrative contact in the IANA (Internet Assigned Numbers Authority) database.
6. There shall be an annual meeting of ccNSO (Country Code Names Supporting Organization) members, which shall be coordinated by the ccNSO (Country Code Names Supporting Organization) Council. Annual meetings should be open for all to attend, and a reasonable opportunity shall be provided for ccTLD (Country Code Top Level Domain) managers that are not members of the ccNSO (Country Code Names Supporting Organization) as well as other non-members of the ccNSO (Country Code Names Supporting Organization) to address the meeting. To the extent practicable, annual meetings of the ccNSO (Country Code Names Supporting Organization) members shall be held in person and should

be held in conjunction with meetings of the Board, or of one or more of ICANN (Internet Corporation for Assigned Names and Numbers)'s other Supporting Organizations (Supporting Organizations).

7. The ccNSO (Country Code Names Supporting Organization) Council members selected by the ccNSO (Country Code Names Supporting Organization) members from each Geographic Region (see **Section 3(1)(a) of this Article**) shall be selected through nomination, and if necessary election, by the ccNSO (Country Code Names Supporting Organization) members within that Geographic Region. At least 90 days before the end of the regular term of any ccNSO (Country Code Names Supporting Organization)-member-selected member of the ccNSO (Country Code Names Supporting Organization) Council, or upon the occurrence of a vacancy in the seat of such a ccNSO (Country Code Names Supporting Organization) Council member, the ccNSO (Country Code Names Supporting Organization) Council shall establish a nomination and election schedule, which shall be sent to all ccNSO (Country Code Names Supporting Organization) members within the Geographic Region and posted on the Website.
8. Any ccNSO (Country Code Names Supporting Organization) member may nominate an individual to serve as a ccNSO (Country Code Names Supporting Organization) Council member representing the ccNSO (Country Code Names Supporting Organization) member's Geographic Region. Nominations must be seconded by another ccNSO (Country Code Names Supporting Organization) member from the same Geographic Region. By accepting their nomination, individuals nominated to the ccNSO (Country Code Names Supporting Organization) Council agree to support the policies committed to by ccNSO (Country Code Names Supporting Organization) members.
9. If at the close of nominations there are no more candidates nominated (with seconds and acceptances) in a particular Geographic Region than there are seats on the ccNSO (Country Code Names Supporting Organization) Council available for that Geographic Region, then the nominated

candidates shall be selected to serve on the ccNSO (Country Code Names Supporting Organization) Council. Otherwise, an election by written ballot (which may be by e-mail) shall be held to select the ccNSO (Country Code Names Supporting Organization) Council members from among those nominated (with seconds and acceptances), with ccNSO (Country Code Names Supporting Organization) members from the Geographic Region being entitled to vote in the election through their designated representatives. In such an election, a majority of all ccNSO (Country Code Names Supporting Organization) members in the Geographic Region entitled to vote shall constitute a quorum, and the selected candidate must receive the votes of a majority of those cast by ccNSO (Country Code Names Supporting Organization) members within the Geographic Region. The ccNSO (Country Code Names Supporting Organization) Council Chair shall provide the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary prompt written notice of the selection of ccNSO (Country Code Names Supporting Organization) Council members under this paragraph.

10. Subject to clause 4(11), ICANN (Internet Corporation for Assigned Names and Numbers) policies shall apply to ccNSO (Country Code Names Supporting Organization) members by virtue of their membership to the extent, and only to the extent, that the policies (a) only address issues that are within scope of the ccNSO (Country Code Names Supporting Organization) according to Article IX, Section 6 and Annex C; (b) have been developed through the ccPDP as described in **Section 6 of this Article**, and (c) have been recommended as such by the ccNSO (Country Code Names Supporting Organization) to the Board, and (d) are adopted by the Board as policies, provided that such policies do not conflict with the law applicable to the ccTLD (Country Code Top Level Domain) manager which shall, at all times, remain paramount. In addition, such policies shall apply to ICANN (Internet Corporation for Assigned Names and Numbers) in its activities concerning ccTLDs.
11. A ccNSO (Country Code Names Supporting Organization) member shall not be bound if it provides a declaration to the

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

Section 5. REGIONAL ORGANIZATIONS

The ccNSO (Country Code Names Supporting Organization) Council may designate a Regional Organization for each ICANN (Internet Corporation for Assigned Names and Numbers) Geographic Region, provided that the Regional Organization is open to full membership by all ccNSO (Country Code Names Supporting Organization) members within the Geographic Region. Decisions to designate or de-designate a Regional Organization shall require a 66% vote of all of the members of the ccNSO (Country Code Names Supporting Organization) Council and shall be subject to review according to procedures established by the Board.

Section 6. ccNSO (Country Code Names Supporting Organization) POLICY-DEVELOPMENT PROCESS AND SCOPE

1. The scope of the ccNSO (Country Code Names Supporting Organization)'s policy-development role shall be as stated in **Annex C to these Bylaws**; any modifications to the scope shall be recommended to the Board by the ccNSO (Country Code Names Supporting Organization) by use of the procedures of the ccPDP, and shall be subject to approval by the Board.
2. In developing global policies within the scope of the ccNSO (Country Code Names Supporting Organization) and recommending them to the Board, the ccNSO (Country Code Names Supporting Organization) shall follow the ccNSO (Country Code Names Supporting Organization) Policy-Development Process (ccPDP). The ccPDP shall be as stated in **Annex B to these Bylaws**; modifications shall be recommended to the Board by the ccNSO (Country Code Names Supporting Organization) by use of the procedures of the ccPDP, and shall be subject to approval by the Board.

Section 7. STAFF SUPPORT AND FUNDING

1. Upon request of the ccNSO (Country Code Names Supporting Organization) Council, a member of the ICANN (Internet Corporation for Assigned Names and Numbers) staff may be assigned to support the ccNSO (Country Code Names Supporting Organization) and shall be designated as the ccNSO (Country Code Names Supporting Organization)

Staff Manager. Alternatively, the ccNSO (Country Code Names Supporting Organization) Council may designate, at ccNSO (Country Code Names Supporting Organization) expense, another person to serve as ccNSO (Country Code Names Supporting Organization) Staff Manager. The work of the ccNSO (Country Code Names Supporting Organization) Staff Manager on substantive matters shall be assigned by the Chair of the ccNSO (Country Code Names Supporting Organization) Council, and may include the duties of ccPDP Issue Manager.

2. Upon request of the ccNSO (Country Code Names Supporting Organization) Council, ICANN (Internet Corporation for Assigned Names and Numbers) shall provide administrative and operational support necessary for the ccNSO (Country Code Names Supporting Organization) to carry out its responsibilities. Such support shall not include an obligation for ICANN (Internet Corporation for Assigned Names and Numbers) to fund travel expenses incurred by ccNSO (Country Code Names Supporting Organization) participants for travel to any meeting of the ccNSO (Country Code Names Supporting Organization) or for any other purpose. The ccNSO (Country Code Names Supporting Organization) Council may make provision, at ccNSO (Country Code Names Supporting Organization) expense, for administrative and operational support in addition or as an alternative to support provided by ICANN (Internet Corporation for Assigned Names and Numbers).
3. The ccNSO (Country Code Names Supporting Organization) Council shall establish fees to be paid by ccNSO (Country Code Names Supporting Organization) members to defray ccNSO (Country Code Names Supporting Organization) expenses as described in **paragraphs 1 and 2 of this Section**, as approved by the ccNSO (Country Code Names Supporting Organization) members.
4. Written notices given to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary under this Article shall be permanently retained, and shall be made available for review by the ccNSO (Country Code Names Supporting Organization) Council on request. The ICANN (Internet

Corporation for Assigned Names and Numbers) Secretary shall also maintain the roll of members of the ccNSO (Country Code Names Supporting Organization), which shall include the name of each ccTLD (Country Code Top Level Domain) manager's designated representative, and which shall be posted on the Website.

ARTICLE X: GENERIC NAMES SUPPORTING ORGANIZATION

Section 1. DESCRIPTION

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

Section 2. ORGANIZATION

The GNSO (Generic Names Supporting Organization) shall consist of:

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

Except as otherwise defined in these Bylaws, the four Stakeholder Groups and the Constituencies will be responsible for defining their own charters with the approval of their members and of the ICANN

(Internet Corporation for Assigned Names and Numbers) Board of Directors.

Section 3. GNSO (Generic Names Supporting Organization) COUNCIL

1. Subject to the provisions of Transition Article XX, Section 5 of these Bylaws and as described in Section 5 of Article X, the GNSO (Generic Names Supporting Organization) Council shall consist of:
 - a. three representatives selected from the Registries Stakeholder Group;
 - b. three representatives selected from the Registrars Stakeholder Group;
 - c. six representatives selected from the Commercial Stakeholder Group;
 - d. six representatives selected from the Non-Commercial Stakeholder Group; and
 - e. three representatives selected by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee, one of which shall be non-voting, but otherwise entitled to participate on equal footing with other members of the GNSO (Generic Names Supporting Organization) Council including, e.g. the making and seconding of motions and of serving as Chair if elected. One Nominating Committee Appointee voting representative shall be assigned to each House (as described in Section 3(8) of this Article) by the Nominating Committee.

No individual representative may hold more than one seat on the GNSO (Generic Names Supporting Organization) Council at the same time.

Stakeholder Groups should, in their charters, ensure their representation on the GNSO (Generic Names Supporting Organization) Council is as diverse as possible and practicable, including considerations of geography, GNSO

(Generic Names Supporting Organization) Constituency, sector, ability and gender.

There may also be liaisons to the GNSO (Generic Names Supporting Organization) Council from other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations) and/or Advisory Committees (Advisory Committees), from time to time. The appointing organization shall designate, revoke, or change its liaison on the GNSO (Generic Names Supporting Organization) Council by providing written notice to the Chair of the GNSO (Generic Names Supporting Organization) Council and to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary. Liaisons shall not be members of or entitled to vote, to make or second motions, or to serve as an officer on the GNSO (Generic Names Supporting Organization) Council, but otherwise liaisons shall be entitled to participate on equal footing with members of the GNSO (Generic Names Supporting Organization) Council.

2. Subject to the provisions of the **Transition Article XX, and Section 5 of these Bylaws**, the regular term of each GNSO (Generic Names Supporting Organization) Council member shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting and shall end at the conclusion of the second ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting thereafter. The regular term of two representatives selected from Stakeholder Groups with three Council seats shall begin in even-numbered years and the regular term of the other representative selected from that Stakeholder Group shall begin in odd-numbered years. The regular term of three representatives selected from Stakeholder Groups with six Council seats shall begin in even-numbered years and the regular term of the other three representatives selected from that Stakeholder Group shall begin in odd-numbered years. The regular term of one of the three members selected by the Nominating Committee shall begin in even-numbered years and the regular term of the other two of the three members selected by the Nominating

Committee shall begin in odd-numbered years. Each GNSO (Generic Names Supporting Organization) Council member shall hold office during his or her regular term and until a successor has been selected and qualified or until that member resigns or is removed in accordance with these Bylaws.

Except in a "special circumstance," such as, but not limited to, meeting geographic or other diversity requirements defined in the Stakeholder Group charters, where no alternative representative is available to serve, no Council member may be selected to serve more than two consecutive terms, in such a special circumstance a Council member may serve one additional term. For these purposes, a person selected to fill a vacancy in a term shall not be deemed to have served that term. A former Council member who has served two consecutive terms must remain out of office for one full term prior to serving any subsequent term as Council member. A "special circumstance" is defined in the GNSO (Generic Names Supporting Organization) Operating Procedures.

3. A vacancy on the GNSO (Generic Names Supporting Organization) Council shall be deemed to exist in the case of the death, resignation, or removal of any member. Vacancies shall be filled for the unexpired term by the appropriate Nominating Committee or Stakeholder Group that selected the member holding the position before the vacancy occurred by giving the GNSO (Generic Names Supporting Organization) Secretariat written notice of its selection. Procedures for handling Stakeholder Group-appointed GNSO (Generic Names Supporting Organization) Council member vacancies, resignations, and removals are prescribed in the applicable Stakeholder Group Charter.

A GNSO (Generic Names Supporting Organization) Council member selected by the Nominating Committee may be removed for cause: i) stated by a three-fourths (3/4) vote of all members of the applicable House to which the Nominating Committee appointee is assigned; or ii) stated by a three-fourths (3/4) vote of all members of each House in the

case of the non-voting Nominating Committee appointee (see **Section 3(8) of this Article**). Such removal shall be subject to reversal by the ICANN (Internet Corporation for Assigned Names and Numbers) Board on appeal by the affected GNSO (Generic Names Supporting Organization) Council member.

4. The GNSO (Generic Names Supporting Organization) Council is responsible for managing the policy development process of the GNSO (Generic Names Supporting Organization). It shall adopt such procedures (the "GNSO (Generic Names Supporting Organization) Operating Procedures") as it sees fit to carry out that responsibility, provided that such procedures are approved by a majority vote of each House. The GNSO (Generic Names Supporting Organization) Operating Procedures shall be effective upon the expiration of a twenty-one (21) day public comment period, and shall be subject to Board oversight and review. Until any modifications are recommended by the GNSO (Generic Names Supporting Organization) Council, the applicable procedures shall be as set forth in **Section 6 of this Article**.
5. No more than one officer, director or employee of any particular corporation or other organization (including its subsidiaries and affiliates) shall serve on the GNSO (Generic Names Supporting Organization) Council at any given time.
6. The GNSO (Generic Names Supporting Organization) shall make selections to fill Seats 13 and 14 on the ICANN (Internet Corporation for Assigned Names and Numbers) Board by written ballot or by action at a meeting. Each of the two voting Houses of the GNSO (Generic Names Supporting Organization), as described in **Section 3(8) of this Article**, shall make a selection to fill one of two ICANN (Internet Corporation for Assigned Names and Numbers) Board seats, as outlined below; any such selection must have affirmative votes comprising sixty percent (60%) of all the respective voting House members:
 - a. the Contracted Party House shall select a representative to fill Seat 13; and

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

Election procedures are defined in the GNSO (Generic Names Supporting Organization) Operating Procedures.

Notification of the Board seat selections shall be given by the GNSO (Generic Names Supporting Organization) Chair in writing to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, consistent with Article VI, Sections 8(4) and 12(1).

7. The GNSO (Generic Names Supporting Organization) Council shall select the GNSO (Generic Names Supporting Organization) Chair for a term the GNSO (Generic Names Supporting Organization) Council specifies, but not longer than one year. Each House (as described in **Section 3.8 of this Article**) shall select a Vice-Chair, who will be a Vice-Chair of the whole of the GNSO (Generic Names Supporting Organization) Council, for a term the GNSO (Generic Names Supporting Organization) Council specifies, but not longer than one year. The procedures for selecting the Chair and any other officers are contained in the GNSO (Generic Names Supporting Organization) Operating Procedures. In the event that the GNSO (Generic Names Supporting Organization) Council has not elected a GNSO (Generic Names Supporting Organization) Chair by the end of the previous Chair's term, the Vice-Chairs will serve as Interim GNSO (Generic Names Supporting Organization) Co-Chairs until a successful election can be held.
8. Except as otherwise required in these Bylaws, for voting purposes, the GNSO (Generic Names Supporting Organization) Council (see **Section 3(1) of this Article**) shall be organized into a bicameral House structure as described below:
 - a. the Contracted Parties House includes the Registries Stakeholder Group (three members), the Registrars Stakeholder Group (three members), and one voting member appointed by the ICANN (Internet Corporation for Assigned Names and Numbers)

Nominating Committee for a total of seven voting members; and

- b. the Non Contracted Parties House includes the Commercial Stakeholder Group (six members), the Non-Commercial Stakeholder Group (six members), and one voting member appointed by the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee to that House for a total of thirteen voting members.

Except as otherwise specified in these Bylaws, each member of a voting House is entitled to cast one vote in each separate matter before the GNSO (Generic Names Supporting Organization) Council.

9. Except as otherwise specified in these Bylaws, Annex A, Annex A-1 and Annex A-2 hereto, or the GNSO (Generic Names Supporting Organization) Operating Procedures, the default threshold to pass a GNSO (Generic Names Supporting Organization) Council motion or other voting action requires a simple majority vote of each House. The voting thresholds described below shall apply to the following GNSO (Generic Names Supporting Organization) actions:
 - a. Create an Issues Report: requires an affirmative vote of more than one-fourth (1/4) vote of each House or majority of one House.
 - b. Initiate a Policy Development Process ("PDP (Policy Development Process)") Within Scope (as described in Annex A): requires an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.
 - c. Initiate a PDP (Policy Development Process) Not Within Scope: requires an affirmative vote of GNSO (Generic Names Supporting Organization) Supermajority.
 - d. Approve a PDP (Policy Development Process) Team Charter for a PDP (Policy Development Process)

Within Scope: requires an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.

- e. Approve a PDP (Policy Development Process) Team Charter for a PDP (Policy Development Process) Not Within Scope: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.
- f. Changes to an Approved PDP (Policy Development Process) Team Charter: For any PDP (Policy Development Process) Team Charter approved under d. or e. above, the GNSO (Generic Names Supporting Organization) Council may approve an amendment to the Charter through a simple majority vote of each House.
- g. Terminate a PDP (Policy Development Process): Once initiated, and prior to the publication of a Final Report, the GNSO (Generic Names Supporting Organization) Council may terminate a PDP (Policy Development Process) only for significant cause, upon a motion that passes with a GNSO (Generic Names Supporting Organization) Supermajority Vote in favor of termination.
- h. Approve a PDP (Policy Development Process) Recommendation Without a GNSO (Generic Names Supporting Organization) Supermajority: requires an affirmative vote of a majority of each House and further requires that one GNSO (Generic Names Supporting Organization) Council member representative of at least 3 of the 4 Stakeholder Groups supports the Recommendation.
- i. Approve a PDP (Policy Development Process) Recommendation With a GNSO (Generic Names Supporting Organization) Supermajority: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority,
- j. Approve a PDP (Policy Development Process)

Recommendation Imposing New Obligations on Certain Contracting Parties: where an ICANN (Internet Corporation for Assigned Names and Numbers) contract provision specifies that "a two-thirds vote of the council" demonstrates the presence of a consensus, the GNSO (Generic Names Supporting Organization) Supermajority vote threshold will have to be met or exceeded.

- k. Modification of Approved PDP (Policy Development Process) Recommendation: Prior to Final Approval by the ICANN (Internet Corporation for Assigned Names and Numbers) Board, an Approved PDP (Policy Development Process) Recommendation may be modified or amended by the GNSO (Generic Names Supporting Organization) Council with a GNSO (Generic Names Supporting Organization) Supermajority vote.
- l. Initiation of an Expedited Policy Development Process (EPDP): requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.
- m. Approve an EPDP Team Charter: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.
- n. Approval of EPDP recommendations: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.
- o. Approve an EPDP Recommendation Imposing New Obligations on Certain Contracting Parties: where an ICANN (Internet Corporation for Assigned Names and Numbers) contract provision specifies that "a two-thirds vote of the council" demonstrates the presence of a consensus, the GNSO (Generic Names Supporting Organization) Supermajority vote threshold will have to be met or exceeded.
- p. Initiation of a GNSO (Generic Names Supporting Organization) Guidance Process (GGP): requires an

affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.

- q. Rejection of initiation of a GGP requested by the ICANN (Internet Corporation for Assigned Names and Numbers) Board: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.
- r. Approval of GGP recommendations: requires an affirmative vote of a GNSO (Generic Names Supporting Organization) Supermajority.
- s. A "GNSO (Generic Names Supporting Organization) Supermajority" shall mean: (a) two-thirds (2/3) of the Council members of each House, or (b) three-fourths (3/4) of one House and a majority of the other House."

Section 4. STAFF SUPPORT AND FUNDING

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

to time.

Section 5. STAKEHOLDER GROUPS

1. The following Stakeholder Groups are hereby recognized as representative of a specific group of one or more Constituencies or interest groups and subject to the provisions of the **Transition Article XX, Section 5 of these Bylaws**:
 - a. Registries Stakeholder Group representing all gTLD (generic Top Level Domain) registries under contract to ICANN (Internet Corporation for Assigned Names and Numbers);
 - b. Registrars Stakeholder Group representing all registrars accredited by and under contract to ICANN (Internet Corporation for Assigned Names and Numbers);
 - c. Commercial Stakeholder Group representing the full range of large and small commercial entities of the Internet; and
 - d. Non-Commercial Stakeholder Group representing the full range of non-commercial entities of the Internet.
2. Each Stakeholder Group is assigned a specific number of Council seats in accordance with **Section 3(1) of this Article**.
3. Each Stakeholder Group identified in **paragraph 1 of this Section** and each of its associated Constituencies, where applicable, shall maintain recognition with the ICANN (Internet Corporation for Assigned Names and Numbers) Board. Recognition is granted by the Board based upon the extent to which, in fact, the entity represents the global interests of the stakeholder communities it purports to represent and operates to the maximum extent feasible in an open and transparent manner consistent with procedures designed to ensure fairness. Stakeholder Group and Constituency Charters may be reviewed periodically as prescribed by the Board.

4. Any group of individuals or entities may petition the Board for recognition as a new or separate Constituency in the Non-Contracted Parties House. Any such petition shall contain:
 - a. A detailed explanation of why the addition of such a Constituency will improve the ability of the GNSO (Generic Names Supporting Organization) to carry out its policy-development responsibilities;
 - b. A detailed explanation of why the proposed new Constituency adequately represents, on a global basis, the stakeholders it seeks to represent;
 - c. A recommendation for organizational placement within a particular Stakeholder Group; and
 - d. A proposed charter that adheres to the principles and procedures contained in these Bylaws.

Any petition for the recognition of a new Constituency and the associated charter shall be posted for public comment.

5. The Board may create new Constituencies as described in **Section 5(3)** in response to such a petition, or on its own motion, if the Board determines that such action would serve the purposes of ICANN (Internet Corporation for Assigned Names and Numbers). In the event the Board is considering acting on its own motion it shall post a detailed explanation of why such action is necessary or desirable, set a reasonable time for public comment, and not make a final decision on whether to create such new Constituency until after reviewing all comments received. Whenever the Board posts a petition or recommendation for a new Constituency for public comment, the Board shall notify the GNSO (Generic Names Supporting Organization) Council and the appropriate Stakeholder Group affected and shall consider any response to that notification prior to taking action.

Section 6. POLICY DEVELOPMENT PROCESS

The policy-development procedures to be followed by the GNSO (Generic Names Supporting Organization) shall be as stated in **Annex A** to these Bylaws. These procedures may be supplemented

or revised in the manner stated in Section 3(4) of this Article.

ARTICLE XI: ADVISORY COMMITTEES

Section 1. GENERAL

The Board may create one or more Advisory Committees (Advisory Committees) in addition to those set forth in this Article. Advisory Committee (Advisory Committee) membership may consist of Directors only, Directors and non-directors, or non-directors only, and may also include non-voting or alternate members. Advisory Committees (Advisory Committees) shall have no legal authority to act for ICANN (Internet Corporation for Assigned Names and Numbers), but shall report their findings and recommendations to the Board.

Section 2. SPECIFIC ADVISORY COMMITTEES

There shall be at least the following Advisory Committees (Advisory Committees):

1. Governmental Advisory Committee (Advisory Committee)
 - a. The Governmental Advisory Committee (Advisory Committee) should consider and provide advice on the activities of ICANN (Internet Corporation for Assigned Names and Numbers) as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN (Internet Corporation for Assigned Names and Numbers)'s policies and various laws and international agreements or where they may affect public policy issues.
 - b. Membership in the Governmental Advisory Committee (Advisory Committee) shall be open to all national governments. Membership shall also be open to Distinct Economies as recognized in international fora, and multinational governmental organizations and treaty organizations, on the invitation of the Governmental Advisory Committee (Advisory Committee) through its Chair.

- c. The Governmental Advisory Committee (Advisory Committee) may adopt its own charter and internal operating principles or procedures to guide its operations, to be published on the Website.
- d. The chair of the Governmental Advisory Committee (Advisory Committee) shall be elected by the members of the Governmental Advisory Committee (Advisory Committee) pursuant to procedures adopted by such members.
- e. Each member of the Governmental Advisory Committee (Advisory Committee) shall appoint one accredited representative to the Committee. The accredited representative of a member must hold a formal official position with the member's public administration. The term "official" includes a holder of an elected governmental office, or a person who is employed by such government, public authority, or multinational governmental or treaty organization and whose primary function with such government, public authority, or organization is to develop or influence governmental or public policies.
- f. The Governmental Advisory Committee (Advisory Committee) shall annually appoint one non-voting liaison to the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors, without limitation on reappointment, and shall annually appoint one non-voting liaison to the ICANN (Internet Corporation for Assigned Names and Numbers) Nominating Committee.
- g. The Governmental Advisory Committee (Advisory Committee) may designate a non-voting liaison to each of the Supporting Organization (Supporting Organization) Councils and Advisory Committees (Advisory Committees), to the extent the Governmental Advisory Committee (Advisory Committee) deems it appropriate and useful to do so.
- h. The Board shall notify the Chair of the Governmental Advisory Committee (Advisory Committee) in a timely

manner of any proposal raising public policy issues on which it or any of ICANN (Internet Corporation for Assigned Names and Numbers)'s supporting organizations or advisory committees seeks public comment, and shall take duly into account any timely response to that notification prior to taking action.

- i. The Governmental Advisory Committee (Advisory Committee) may put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies.
- j. The advice of the Governmental Advisory Committee (Advisory Committee) on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN (Internet Corporation for Assigned Names and Numbers) Board determines to take an action that is not consistent with the Governmental Advisory Committee (Advisory Committee) advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee (Advisory Committee) and the ICANN (Internet Corporation for Assigned Names and Numbers) Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.
- k. If no such solution can be found, the ICANN (Internet Corporation for Assigned Names and Numbers) Board will state in its final decision the reasons why the Governmental Advisory Committee (Advisory Committee) advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee (Advisory Committee) members with regard to public policy issues falling within their responsibilities.

2. Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee)

- a. The role of the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) ("SSAC (Security and Stability Advisory Committee)") is to advise the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board on matters relating to the security and integrity of the Internet's naming and address allocation systems. It shall have the following responsibilities:
1. To communicate on security matters with the Internet technical community and the operators and managers of critical DNS (Domain Name System) infrastructure services, to include the root name server operator community, the top-level domain registries and registrars, the operators of the reverse delegation trees such as in-addr.arpa and ip6.arpa, and others as events and developments dictate. The Committee shall gather and articulate requirements to offer to those engaged in technical revision of the protocols related to DNS (Domain Name System) and address allocation and those engaged in operations planning.
 2. To engage in ongoing threat assessment and risk analysis of the Internet naming and address allocation services to assess where the principal threats to stability and security lie, and to advise the ICANN (Internet Corporation for Assigned Names and Numbers) community accordingly. The Committee shall recommend any necessary audit activity to assess the current status of DNS (Domain Name System) and address allocation security in relation to identified risks and threats.
 3. To communicate with those who have direct responsibility for Internet naming and address allocation security matters (IETF (Internet Engineering Task Force), RSSAC (Root Server

System Advisory Committee), RIRs, name registries, etc.), to ensure that its advice on security risks, issues, and priorities is properly synchronized with existing standardization, deployment, operational, and coordination activities. The Committee shall monitor these activities and inform the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board on their progress, as appropriate.

4. To report periodically to the Board on its activities.
 5. To make policy recommendations to the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board.
- b. The SSAC (Security and Stability Advisory Committee)'s chair and members shall be appointed by the Board. SSAC (Security and Stability Advisory Committee) membership appointment shall be for a three-year term, commencing on 1 January and ending the second year thereafter on 31 December. The chair and members may be re-appointed, and there are no limits to the number of terms the chair or members may serve. The SSAC (Security and Stability Advisory Committee) chair may provide recommendations to the Board regarding appointments to the SSAC (Security and Stability Advisory Committee). The SSAC (Security and Stability Advisory Committee) chair shall stagger appointment recommendations so that approximately one-third (1/3) of the membership of the SSAC (Security and Stability Advisory Committee) is considered for appointment or re-appointment each year. The Board shall also have to power to remove SSAC (Security and Stability Advisory Committee) appointees as recommended by or in consultation with the SSAC (Security and Stability Advisory Committee). (Note: The first full term under this paragraph shall commence on 1 January 2011 and

end on 31 December 2013. Prior to 1 January 2011, the SSAC (Security and Stability Advisory Committee) shall be comprised as stated in the Bylaws as amended 25 June 2010, and the SSAC (Security and Stability Advisory Committee) chair shall recommend the re-appointment of all current SSAC (Security and Stability Advisory Committee) members to full or partial terms as appropriate to implement the provisions of this paragraph.)

- c. The SSAC (Security and Stability Advisory Committee) shall annually appoint a non-voting liaison to the ICANN (Internet Corporation for Assigned Names and Numbers) Board according to **Section 9 of Article VI.**

3. Root Server System Advisory Committee (Advisory Committee)

- a. The role of the Root Server System Advisory Committee (Advisory Committee) ("RSSAC (Root Server System Advisory Committee)") is to advise the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board on matters relating to the operation, administration, security, and integrity of the Internet's Root Server System. It shall have the following responsibilities:
 1. Communicate on matters relating to the operation of the Root Servers (Root Servers) and their multiple instances with the Internet technical community and the ICANN (Internet Corporation for Assigned Names and Numbers) community. The Committee shall gather and articulate requirements to offer to those engaged in technical revision of the protocols and best common practices related to the operation of DNS (Domain Name System) servers.
 2. Communicate on matters relating to the administration of the Root Zone (Root Zone) with those who have direct responsibility for that administration. These matters include the

- processes and procedures for the production of the Root Zone (Root Zone) File.
3. Engage in ongoing threat assessment and risk analysis of the Root Server System and recommend any necessary audit activity to assess the current status of root servers and the root zone.
 4. Respond to requests for information or opinions from the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors.
 5. Report periodically to the Board on its activities.
 6. Make policy recommendations to the ICANN (Internet Corporation for Assigned Names and Numbers) community and Board.
- b. The RSSAC (Root Server System Advisory Committee) shall be led by two co-chairs. The RSSAC (Root Server System Advisory Committee)'s chairs and members shall be appointed by the Board.
1. RSSAC (Root Server System Advisory Committee) membership appointment shall be for a three-year term, commencing on 1 January and ending the second year thereafter on 31 December. Members may be re-appointed, and there are no limits to the number of terms the members may serve. The RSSAC (Root Server System Advisory Committee) chairs shall provide recommendations to the Board regarding appointments to the RSSAC (Root Server System Advisory Committee). If the board declines to appoint a person nominated by the RSSAC (Root Server System Advisory Committee) then it will provide the rationale for its decision. The RSSAC (Root Server System Advisory Committee) chairs shall stagger appointment recommendations so that

approximately one-third (1/3) of the membership of the RSSAC (Root Server System Advisory Committee) is considered for appointment or re-appointment each year. The Board shall also have to power to remove RSSAC (Root Server System Advisory Committee) appointees as recommended by or in consultation with the RSSAC (Root Server System Advisory Committee). (Note: The first term under this paragraph shall commence on 1 July 2013 and end on 31 December 2015, and shall be considered a full term for all purposes. All other full terms under this paragraph shall begin on 1 January of the corresponding year. Prior to 1 July 2013, the RSSAC (Root Server System Advisory Committee) shall be comprised as stated in the Bylaws as amended 16 March 2012, and the RSSAC (Root Server System Advisory Committee) chairs shall recommend the re-appointment of all current RSSAC (Root Server System Advisory Committee) members to full or partial terms as appropriate to implement the provisions of this paragraph.)

2. The RSSAC (Root Server System Advisory Committee) shall recommend the appointment of the chairs to the board following a nomination process that it devises and documents.

c. The RSSAC (Root Server System Advisory Committee) shall annually appoint a non-voting liaison to the ICANN (Internet Corporation for Assigned Names and Numbers) Board according to Section 9 of Article VI.

4. At-Large Advisory Committee (Advisory Committee)

a. The At-Large Advisory Committee (Advisory Committee) (ALAC (At-Large Advisory Committee)) is the primary organizational home within ICANN (Internet Corporation for Assigned Names and

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

- b. The ALAC (At-Large Advisory Committee) shall consist of (i) two members selected by each of the Regional At-Large Organizations ("RALOs") established according to paragraph **4(g) of this Section**, and (ii) five members selected by the Nominating Committee. The five members selected by the Nominating Committee shall include one citizen of a country within each of the five Geographic Regions established according to **Section 5 of Article VI**.
- c. Subject to the provisions of the **Transition Article of these Bylaws**, the regular terms of members of the ALAC (At-Large Advisory Committee) shall be as follows:
 1. The term of one member selected by each RALO shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting in an even-numbered year.
 2. The term of the other member selected by each RALO shall begin at the conclusion of an ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting in an

odd-numbered year.

3. The terms of three of the members selected by the Nominating Committee shall begin at the conclusion of an annual meeting in an odd-numbered year and the terms of the other two members selected by the Nominating Committee shall begin at the conclusion of an annual meeting in an even-numbered year.
 4. The regular term of each member shall end at the conclusion of the second ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting after the term began.
- d. The Chair of the ALAC (At-Large Advisory Committee) shall be elected by the members of the ALAC (At-Large Advisory Committee) pursuant to procedures adopted by the Committee.
 - e. The ALAC (At-Large Advisory Committee) shall, after consultation with each RALO, annually appoint five voting delegates (no two of whom shall be citizens of countries in the same Geographic Region, as defined according to **Section 5 of Article VI**) to the Nominating Committee.
 - f. Subject to the provisions of the **Transition Article of these Bylaws**, the At-Large Advisory Committee (Advisory Committee) may designate non-voting liaisons to each of the ccNSO (Country Code Names Supporting Organization) Council and the GNSO (Generic Names Supporting Organization) Council.
 - g. There shall be one RALO for each Geographic Region established according to **Section 5 of Article VI**. Each RALO shall serve as the main forum and coordination point for public input to ICANN (Internet Corporation for Assigned Names and Numbers) in its Geographic Region and shall be a non-profit organization certified by ICANN (Internet Corporation for Assigned Names and Numbers) according to criteria and standards

established by the Board based on recommendations of the At-Large Advisory Committee (Advisory Committee). An organization shall become the recognized RALO for its Geographic Region upon entering a Memorandum of Understanding with ICANN (Internet Corporation for Assigned Names and Numbers) addressing the respective roles and responsibilities of ICANN (Internet Corporation for Assigned Names and Numbers) and the RALO regarding the process for selecting ALAC (At-Large Advisory Committee) members and requirements of openness, participatory opportunities, transparency, accountability, and diversity in the RALO's structure and procedures, as well as criteria and standards for the RALO's constituent At-Large Structures.

- h. Each RALO shall be comprised of self-supporting At-Large Structures within its Geographic Region that have been certified to meet the requirements of the RALO's Memorandum of Understanding with ICANN (Internet Corporation for Assigned Names and Numbers) according to **paragraph 4(i) of this Section**. If so provided by its Memorandum of Understanding with ICANN (Internet Corporation for Assigned Names and Numbers), a RALO may also include individual Internet users who are citizens or residents of countries within the RALO's Geographic Region.
- i. Membership in the At-Large Community
 1. The criteria and standards for the certification of At-Large Structures within each Geographic Region shall be established by the Board based on recommendations from the ALAC (At-Large Advisory Committee) and shall be stated in the Memorandum of Understanding between ICANN (Internet Corporation for Assigned Names and Numbers) and the RALO for each Geographic Region.
 2. The criteria and standards for the certification of At-Large Structures shall be established in such a way that participation by individual

Internet users who are citizens or residents of countries within the Geographic Region (as defined in Section 5 of Article VI) of the RALO will predominate in the operation of each At-Large Structure within the RALO, while not necessarily excluding additional participation, compatible with the interests of the individual Internet users within the region, by others.

3. Each RALO's Memorandum of Understanding shall also include provisions designed to allow, to the greatest extent possible, every individual Internet user who is a citizen of a country within the RALO's Geographic Region to participate in at least one of the RALO's At-Large Structures.
4. To the extent compatible with these objectives, the criteria and standards should also afford to each RALO the type of structure that best fits the customs and character of its Geographic Region.
5. Once the criteria and standards have been established as provided in this Clause i, the ALAC (At-Large Advisory Committee), with the advice and participation of the RALO where the applicant is based, shall be responsible for certifying organizations as meeting the criteria and standards for At-Large Structure accreditation.
6. Decisions to certify or decertify an At-Large Structure shall be made as decided by the ALAC (At-Large Advisory Committee) in its Rules of Procedure, save always that any changes made to the Rules of Procedure in respect of ALS (At-Large Structure) applications shall be subject to review by the RALOs and by the ICANN (Internet Corporation for Assigned Names and Numbers) Board.
7. Decisions as to whether to accredit, not to

accredit, or disaccredit an At-Large Structure shall be subject to review according to procedures established by the Board.

8. On an ongoing basis, the ALAC (At-Large Advisory Committee) may also give advice as to whether a prospective At-Large Structure meets the applicable criteria and standards.
- j. The ALAC (At-Large Advisory Committee) is also responsible, working in conjunction with the RALOs, for coordinating the following activities:
1. Making a selection by the At-Large Community to fill Seat 15 on the Board. Notification of the At-Large Community's selection shall be given by the ALAC (At-Large Advisory Committee) Chair in writing to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary, consistent with Article VI, Sections 8(4) and 12(1).
 2. Keeping the community of individual Internet users informed about the significant news from ICANN (Internet Corporation for Assigned Names and Numbers);
 3. Distributing (through posting or otherwise) an updated agenda, news about ICANN (Internet Corporation for Assigned Names and Numbers), and information about items in the ICANN (Internet Corporation for Assigned Names and Numbers) policy-development process;
 4. Promoting outreach activities in the community of individual Internet users;
 5. Developing and maintaining on-going information and education programs, regarding ICANN (Internet Corporation for Assigned Names and Numbers) and its work;
 6. Establishing an outreach strategy about ICANN

(Internet Corporation for Assigned Names and Numbers) issues in each RALO's Region;

7. Participating in the ICANN (Internet Corporation for Assigned Names and Numbers) policy development processes and providing input and advice that accurately reflects the views of individual Internet users;
8. Making public, and analyzing, ICANN (Internet Corporation for Assigned Names and Numbers)'s proposed policies and its decisions and their (potential) regional impact and (potential) effect on individuals in the region;
9. Offering Internet-based mechanisms that enable discussions among members of At-Large structures; and
10. Establishing mechanisms and processes that enable two-way communication between members of At-Large Structures and those involved in ICANN (Internet Corporation for Assigned Names and Numbers) decision-making, so interested individuals can share their views on pending ICANN (Internet Corporation for Assigned Names and Numbers) issues.

Section 3. PROCEDURES

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

Section 4. TERM OF OFFICE

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

Section 5. VACANCIES

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

Section 6. COMPENSATION

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

ARTICLE XI-A: OTHER ADVISORY MECHANISMS

Section 1. EXTERNAL EXPERT ADVICE

1. Purpose. The purpose of seeking external expert advice is to allow the policy-development process within ICANN (Internet Corporation for Assigned Names and Numbers) to take advantage of existing expertise that resides in the public or private sector but outside of ICANN (Internet Corporation for Assigned Names and Numbers). In those cases where there are relevant public bodies with expertise, or where access to private expertise could be helpful, the Board and constituent bodies should be encouraged to seek advice from such expert bodies or individuals.
2. Types of Expert Advisory Panels.
 - a. On its own initiative or at the suggestion of any ICANN (Internet Corporation for Assigned Names and Numbers) body, the Board may appoint, or authorize the President to appoint, Expert Advisory Panels consisting of public or private sector individuals or entities. If the advice sought from such Panels concerns issues of public policy, the provisions of **Section 1(3)(b) of this Article** shall apply.
 - b. In addition, in accordance with **Section 1(3) of this Article**, the Board may refer issues of public policy pertinent to matters within ICANN (Internet Corporation for Assigned Names and Numbers)'s mission to a multinational governmental or treaty organization.

3. Process for Seeking Advice-Public Policy Matters.
 - a. The Governmental Advisory Committee (Advisory Committee) may at any time recommend that the Board seek advice concerning one or more issues of public policy from an external source, as set out above.
 - b. In the event that the Board determines, upon such a recommendation or otherwise, that external advice should be sought concerning one or more issues of public policy, the Board shall, as appropriate, consult with the Governmental Advisory Committee (Advisory Committee) regarding the appropriate source from which to seek the advice and the arrangements, including definition of scope and process, for requesting and obtaining that advice.
 - c. The Board shall, as appropriate, transmit any request for advice from a multinational governmental or treaty organization, including specific terms of reference, to the Governmental Advisory Committee (Advisory Committee), with the suggestion that the request be transmitted by the Governmental Advisory Committee (Advisory Committee) to the multinational governmental or treaty organization.
4. Process for Seeking and Advice-Other Matters. Any reference of issues not concerning public policy to an Expert Advisory Panel by the Board or President in accordance with **Section 1(2)(a) of this Article** shall be made pursuant to terms of reference describing the issues on which input and advice is sought and the procedures and schedule to be followed.
5. Receipt of Expert Advice and its Effect. External advice pursuant to this Section shall be provided in written form. Such advice is advisory and not binding, and is intended to augment the information available to the Board or other ICANN (Internet Corporation for Assigned Names and Numbers) body in carrying out its responsibilities.
6. Opportunity to Comment. The Governmental Advisory Committee (Advisory Committee), in addition to the Supporting Organizations (Supporting Organizations) and

other Advisory Committees (Advisory Committees), shall have an opportunity to comment upon any external advice received prior to any decision by the Board.

Section 2. TECHNICAL LIAISON GROUP

1. Purpose. The quality of ICANN (Internet Corporation for Assigned Names and Numbers)'s work depends on access to complete and authoritative information concerning the technical standards that underlie ICANN (Internet Corporation for Assigned Names and Numbers)'s activities. ICANN (Internet Corporation for Assigned Names and Numbers)'s relationship to the organizations that produce these standards is therefore particularly important. The Technical Liaison Group (TLG) shall connect the Board with appropriate sources of technical advice on specific matters pertinent to ICANN (Internet Corporation for Assigned Names and Numbers)'s activities.
2. TLG Organizations. The TLG shall consist of four organizations: the European Telecommunications Standards Institute (ETSI (European Telecommunications Standards Institute)), the International Telecommunications Union's Telecommunication Standardization Sector (ITU (International Telecommunication Union)-T), the World Wide Web Consortium (W3C (World Wide Web Consortium)), and the Internet Architecture Board (IAB (Internet Architecture Board)).
3. Role. The role of the TLG organizations shall be to channel technical information and guidance to the Board and to other ICANN (Internet Corporation for Assigned Names and Numbers) entities. This role has both a responsive component and an active "watchdog" component, which involve the following responsibilities:
 - a. In response to a request for information, to connect the Board or other ICANN (Internet Corporation for Assigned Names and Numbers) body with appropriate sources of technical expertise. This component of the TLG role covers circumstances in which ICANN (Internet Corporation for Assigned Names and Numbers) seeks an authoritative answer

to a specific technical question. Where information is requested regarding a particular technical standard for which a TLG organization is responsible, that request shall be directed to that TLG organization.

- b. As an ongoing "watchdog" activity, to advise the Board of the relevance and progress of technical developments in the areas covered by each organization's scope that could affect Board decisions or other ICANN (Internet Corporation for Assigned Names and Numbers) actions, and to draw attention to global technical standards issues that affect policy development within the scope of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission. This component of the TLG role covers circumstances in which ICANN (Internet Corporation for Assigned Names and Numbers) is unaware of a new development, and would therefore otherwise not realize that a question should be asked.

4. TLG Procedures. The TLG shall not have officers or hold meetings, nor shall it provide policy advice to the Board as a committee (although TLG organizations may individually be asked by the Board to do so as the need arises in areas relevant to their individual charters). Neither shall the TLG debate or otherwise coordinate technical issues across the TLG organizations; establish or attempt to establish unified positions; or create or attempt to create additional layers or structures within the TLG for the development of technical standards or for any other purpose.

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

6. Individual Technical Experts. Each TLG organization shall designate two individual technical experts who are familiar with the technical standards issues that are relevant to ICANN (Internet Corporation for Assigned Names and Numbers)'s activities. These 8 experts shall be available as necessary to determine, through an exchange of e-mail messages, where to direct a technical question from ICANN (Internet Corporation for Assigned Names and Numbers) when ICANN (Internet Corporation for Assigned Names and Numbers) does not ask a specific TLG organization directly.

ARTICLE XII: BOARD AND TEMPORARY COMMITTEES

Section 1. BOARD COMMITTEES

The Board may establish one or more committees of the Board, which shall continue to exist until otherwise determined by the Board. Only Directors may be appointed to a Committee of the Board. If a person appointed to a Committee of the Board ceases to be a Director, such person shall also cease to be a member of any Committee of the Board. Each Committee of the Board shall consist of two or more Directors. The Board may designate one or more Directors as alternate members of any such committee, who may replace any absent member at any meeting of the committee. Committee members may be removed from a committee at any time by a two-thirds (2/3) majority vote of all members of the Board; provided, however, that any Director or Directors which are the subject of the removal action shall not be entitled to vote on such an action or be counted as a member of the Board when calculating the required two-thirds (2/3) vote; and, provided further, however, that in no event shall a Director be removed from a committee unless such removal is approved by not less than a majority of all members of the Board.

Section 2. POWERS OF BOARD COMMITTEES

1. The Board may delegate to Committees of the Board all legal authority of the Board except with respect to:
 - a. The filling of vacancies on the Board or on any committee;

- b. The amendment or repeal of Bylaws or the Articles of Incorporation or the adoption of new Bylaws or Articles of Incorporation;
 - c. The amendment or repeal of any resolution of the Board which by its express terms is not so amendable or repealable;
 - d. The appointment of committees of the Board or the members thereof;
 - e. The approval of any self-dealing transaction, as such transactions are defined in Section 5233(a) of the CNPBCL;
 - f. The approval of the annual budget required by Article XVI; or
 - g. The compensation of any officer described in Article XIII.
2. The Board shall have the power to prescribe the manner in which proceedings of any Committee of the Board shall be conducted. In the absence of any such prescription, such committee shall have the power to prescribe the manner in which its proceedings shall be conducted. Unless these Bylaws, the Board or such committee shall otherwise provide, the regular and special meetings shall be governed by the provisions of Article VI applicable to meetings and actions of the Board. Each committee shall keep regular minutes of its proceedings and shall report the same to the Board from time to time, as the Board may require.

Section 3. TEMPORARY COMMITTEES

The Board may establish such temporary committees as it sees fit, with membership, duties, and responsibilities as set forth in the resolutions or charters adopted by the Board in establishing such committees.

ARTICLE XIII: OFFICERS

Section 1. OFFICERS

The officers of ICANN (Internet Corporation for Assigned Names and Numbers) shall be a President (who shall serve as Chief Executive Officer), a Secretary, and a Chief Financial Officer. ICANN (Internet Corporation for Assigned Names and Numbers) may also have, at the discretion of the Board, any additional officers that it deems appropriate. Any person, other than the President, may hold more than one office, except that no member of the Board (other than the President) shall simultaneously serve as an officer of ICANN (Internet Corporation for Assigned Names and Numbers).

Section 2. ELECTION OF OFFICERS

The officers of ICANN (Internet Corporation for Assigned Names and Numbers) shall be elected annually by the Board, pursuant to the recommendation of the President or, in the case of the President, of the Chairman of the ICANN (Internet Corporation for Assigned Names and Numbers) Board. Each such officer shall hold his or her office until he or she resigns, is removed, is otherwise disqualified to serve, or his or her successor is elected.

Section 3. REMOVAL OF OFFICERS

Any Officer may be removed, either with or without cause, by a two-thirds (2/3) majority vote of all the members of the Board. Should any vacancy occur in any office as a result of death, resignation, removal, disqualification, or any other cause, the Board may delegate the powers and duties of such office to any Officer or to any Director until such time as a successor for the office has been elected.

Section 4. PRESIDENT

The President shall be the Chief Executive Officer (CEO) of ICANN (Internet Corporation for Assigned Names and Numbers) in charge of all of its activities and business. All other officers and staff shall report to the President or his or her delegate, unless stated otherwise in these Bylaws. The President shall serve as an ex officio member of the Board, and shall have all the same rights and privileges of any Board member. The President shall be empowered to call special meetings of the Board as set forth herein, and shall discharge all other duties as may be required by these Bylaws and from time to time may be assigned by the Board.

Section 5. SECRETARY

The Secretary shall keep or cause to be kept the minutes of the Board in one or more books provided for that purpose, shall see that all notices are duly given in accordance with the provisions of these Bylaws or as required by law, and in general shall perform all duties as from time to time may be prescribed by the President or the Board.

Section 6. CHIEF FINANCIAL OFFICER

The Chief Financial Officer ("CFO") shall be the chief financial officer of ICANN (Internet Corporation for Assigned Names and Numbers). If required by the Board, the CFO shall give a bond for the faithful discharge of his or her duties in such form and with such surety or sureties as the Board shall determine. The CFO shall have charge and custody of all the funds of ICANN (Internet Corporation for Assigned Names and Numbers) and shall keep or cause to be kept, in books belonging to ICANN (Internet Corporation for Assigned Names and Numbers), full and accurate amounts of all receipts and disbursements, and shall deposit all money and other valuable effects in the name of ICANN (Internet Corporation for Assigned Names and Numbers) in such depositories as may be designated for that purpose by the Board. The CFO shall disburse the funds of ICANN (Internet Corporation for Assigned Names and Numbers) as may be ordered by the Board or the President and, whenever requested by them, shall deliver to the Board and the President an account of all his or her transactions as CFO and of the financial condition of ICANN (Internet Corporation for Assigned Names and Numbers). The CFO shall be responsible for ICANN (Internet Corporation for Assigned Names and Numbers)'s financial planning and forecasting and shall assist the President in the preparation of ICANN (Internet Corporation for Assigned Names and Numbers)'s annual budget. The CFO shall coordinate and oversee ICANN (Internet Corporation for Assigned Names and Numbers)'s funding, including any audits or other reviews of ICANN (Internet Corporation for Assigned Names and Numbers) or its Supporting Organizations (Supporting Organizations). The CFO shall be responsible for all other matters relating to the financial operation of ICANN (Internet Corporation for Assigned Names and Numbers).

Section 7. ADDITIONAL OFFICERS

In addition to the officers described above, any additional or assistant officers who are elected or appointed by the Board shall perform such duties as may be assigned to them by the President or the Board.

Section 8. COMPENSATION AND EXPENSES

The compensation of any Officer of ICANN (Internet Corporation for Assigned Names and Numbers) shall be approved by the Board. Expenses incurred in connection with performance of their officer duties may be reimbursed to Officers upon approval of the President (in the case of Officers other than the President), by another Officer designated by the Board (in the case of the President), or the Board.

Section 9. CONFLICTS OF INTEREST

The Board, through the Board Governance Committee, shall establish a policy requiring a statement from each Officer not less frequently than once a year setting forth all business and other affiliations that relate in any way to the business and other affiliations of ICANN (Internet Corporation for Assigned Names and Numbers).

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

ICANN (Internet Corporation for Assigned Names and Numbers) shall, to maximum extent permitted by the CNPBCL, indemnify each of its agents against expenses, judgments, fines, settlements, and other amounts actually and reasonably incurred in connection with any proceeding arising by reason of the fact that any such person is or was an agent of ICANN (Internet Corporation for Assigned Names and Numbers), provided that the indemnified person's acts were done in good faith and in a manner that the indemnified person reasonably believed to be in ICANN (Internet Corporation for Assigned Names and Numbers)'s best interests and not criminal. For purposes of this Article, an "agent" of ICANN (Internet Corporation for Assigned Names and Numbers) includes any person who is or was a Director, Officer, employee, or any other agent of ICANN (Internet Corporation for Assigned Names and Numbers) (including a member of any Supporting Organization

(Supporting Organization), any Advisory Committee (Advisory Committee), the Nominating Committee, any other ICANN (Internet Corporation for Assigned Names and Numbers) committee, or the Technical Liaison Group) acting within the scope of his or her responsibility; or is or was serving at the request of ICANN (Internet Corporation for Assigned Names and Numbers) as a Director, Officer, employee, or agent of another corporation, partnership, joint venture, trust, or other enterprise. The Board may adopt a resolution authorizing the purchase and maintenance of insurance on behalf of any agent of ICANN (Internet Corporation for Assigned Names and Numbers) against any liability asserted against or incurred by the agent in such capacity or arising out of the agent's status as such, whether or not ICANN (Internet Corporation for Assigned Names and Numbers) would have the power to indemnify the agent against that liability under the provisions of this Article.

ARTICLE XV: GENERAL PROVISIONS

Section 1. CONTRACTS

The Board may authorize any Officer or Officers, agent or agents, to enter into any contract or execute or deliver any instrument in the name of and on behalf of ICANN (Internet Corporation for Assigned Names and Numbers), and such authority may be general or confined to specific instances. In the absence of a contrary Board authorization, contracts and instruments may only be executed by the following Officers: President, any Vice President, or the CFO. Unless authorized or ratified by the Board, no other Officer, agent, or employee shall have any power or authority to bind ICANN (Internet Corporation for Assigned Names and Numbers) or to render it liable for any debts or obligations.

Section 2. DEPOSITS

All funds of ICANN (Internet Corporation for Assigned Names and Numbers) not otherwise employed shall be deposited from time to time to the credit of ICANN (Internet Corporation for Assigned Names and Numbers) in such banks, trust companies, or other depositories as the Board, or the President under its delegation, may select.

Section 3. CHECKS

All checks, drafts, or other orders for the payment of money, notes, or other evidences of indebtedness issued in the name of ICANN (Internet Corporation for Assigned Names and Numbers) shall be signed by such Officer or Officers, agent or agents, of ICANN (Internet Corporation for Assigned Names and Numbers) and in such a manner as shall from time to time be determined by resolution of the Board.

Section 4. LOANS

No loans shall be made by or to ICANN (Internet Corporation for Assigned Names and Numbers) and no evidences of indebtedness shall be issued in its name unless authorized by a resolution of the Board. Such authority may be general or confined to specific instances; provided, however, that no loans shall be made by ICANN (Internet Corporation for Assigned Names and Numbers) to its Directors or Officers.

ARTICLE XVI: FISCAL MATTERS

Section 1. ACCOUNTING

The fiscal year end of ICANN (Internet Corporation for Assigned Names and Numbers) shall be determined by the Board.

Section 2. AUDIT

At the end of the fiscal year, the books of ICANN (Internet Corporation for Assigned Names and Numbers) shall be closed and audited by certified public accountants. The appointment of the fiscal auditors shall be the responsibility of the Board.

Section 3. ANNUAL REPORT AND ANNUAL STATEMENT

The Board shall publish, at least annually, a report describing its activities, including an audited financial statement and a description of any payments made by ICANN (Internet Corporation for Assigned Names and Numbers) to Directors (including reimbursements of expenses). ICANN (Internet Corporation for Assigned Names and Numbers) shall cause the annual report and the annual statement of certain transactions as required by the CNPBCL to be prepared and sent to each member of the Board and to such other persons as the

Board may designate, no later than one hundred twenty (120) days after the close of ICANN (Internet Corporation for Assigned Names and Numbers)'s fiscal year.

Section 4. ANNUAL BUDGET

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

Section 5. FEES AND CHARGES

The Board may set fees and charges for the services and benefits provided by ICANN (Internet Corporation for Assigned Names and Numbers), with the goal of fully recovering the reasonable costs of the operation of ICANN (Internet Corporation for Assigned Names and Numbers) and establishing reasonable reserves for future expenses and contingencies reasonably related to the legitimate activities of ICANN (Internet Corporation for Assigned Names and Numbers). Such fees and charges shall be fair and equitable, shall be published for public comment prior to adoption, and once adopted shall be published on the Website in a sufficiently detailed manner so as to be readily accessible.

ARTICLE XVII: MEMBERS

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

ARTICLE XVIII: OFFICES AND SEAL

Section 1. OFFICES

The principal office for the transaction of the business of ICANN (Internet Corporation for Assigned Names and Numbers) shall be in the County of Los Angeles, State of California, United States of America. ICANN (Internet Corporation for Assigned Names and Numbers) may also have an additional office or offices within or outside the United States of America as it may from time to time establish.

Section 2. SEAL

The Board may adopt a corporate seal and use the same by causing it or a facsimile thereof to be impressed or affixed or reproduced or otherwise.

ARTICLE XIX: AMENDMENTS

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

ARTICLE XX: TRANSITION ARTICLE

Section 1. PURPOSE

This Transition Article sets forth the provisions for the transition from the processes and structures defined by the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, as amended and restated on 29 October 1999 and amended through 12 February 2002 (the "Old Bylaws (/en/general/archive-bylaws/bylaws-12feb02.htm)"), to the processes and structures defined by the Bylaws of which this Article is a part (the "New Bylaws (/resources/pages/governance/bylaws-en)"). [Explanatory Note (dated 10 December 2009): For Section 5(3) of this Article, reference to the Old Bylaws refers to the Bylaws as amended and restated through to 20 March 2009.]

Section 2. BOARD OF DIRECTORS

1. For the period beginning on the adoption of this Transition Article and ending on the Effective Date and Time of the New Board, as defined in **paragraph 5 of this Section 2**, the Board of Directors of the Corporation ("Transition Board") shall consist of the members of the Board who would have been Directors under the Old Bylaws immediately after the conclusion of the annual meeting in 2002, except that those At-Large members of the Board under the Old Bylaws who elect to do so by notifying the Secretary of the Board on 15 December 2002 or in writing or by e-mail no later than 23 December 2002 shall also serve as members of the Transition Board. Notwithstanding the provisions of **Article VI, Section 12 of the New Bylaws**, vacancies on the Transition Board shall not be filled. The Transition Board shall not have liaisons as provided by **Article VI, Section 9 of the New Bylaws**. The Board Committees existing on the date of adoption of this Transition Article shall continue in existence, subject to any change in Board Committees or their membership that the Transition Board may adopt by resolution.
2. The Transition Board shall elect a Chair and Vice-Chair to serve until the Effective Date and Time of the New Board.
3. The "New Board" is that Board described in **Article VI, Section 2(1) of the New Bylaws**.
4. Promptly after the adoption of this Transition Article, a Nominating Committee shall be formed including, to the extent feasible, the delegates and liaisons described in **Article VII, Section 2 of the New Bylaws**, with terms to end at the conclusion of the ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting in 2003. The Nominating Committee shall proceed without delay to select Directors to fill Seats 1 through 8 on the New Board, with terms to conclude upon the commencement of the first regular terms specified for those Seats in **Article VI, Section 8(1)(a)-(c) of the New Bylaws**, and shall give the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary written notice of that selection.
5. The Effective Date and Time of the New Board shall be a

time, as designated by the Transition Board, during the first regular meeting of ICANN (Internet Corporation for Assigned Names and Numbers) in 2003 that begins not less than seven calendar days after the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary has received written notice of the selection of Directors to fill at least ten of Seats 1 through 14 on the New Board. As of the Effective Date and Time of the New Board, it shall assume from the Transition Board all the rights, duties, and obligations of the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors. Subject to Section 4 of this Article, the Directors (**Article VI, Section 2(1)(a)-(d)**) and non-voting liaisons (**Article VI, Section 9**) as to which the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary has received notice of selection shall, along with the President (**Article VI, Section 2(1)(e)**), be seated upon the Effective Date and Time of the New Board, and thereafter any additional Directors and non-voting liaisons shall be seated upon the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary's receipt of notice of their selection.

6. The New Board shall elect a Chairman and Vice-Chairman as its first order of business. The terms of those Board offices shall expire at the end of the annual meeting in 2003.
7. Committees of the Board in existence as of the Effective Date and Time of the New Board shall continue in existence according to their existing charters, but the terms of all members of those committees shall conclude at the Effective Date and Time of the New Board. Temporary committees in existence as of the Effective Date and Time of the New Board shall continue in existence with their existing charters and membership, subject to any change the New Board may adopt by resolution.
8. In applying the term-limitation provision of **Section 8(5) of Article VI**, a Director's service on the Board before the Effective Date and Time of the New Board shall count as one term.

Section 3. ADDRESS SUPPORTING ORGANIZATION

The Address Supporting Organization (Supporting Organization) shall continue in operation according to the provisions of the **Memorandum of Understanding originally entered on 18 October 1999 (/aso/aso-mou-26aug99.htm)** between ICANN (Internet Corporation for Assigned Names and Numbers) and a group of regional Internet registries (RIRs), and **amended in October 2000 (/aso/aso-mou-amend1-25sep00.htm)**, until a replacement Memorandum of Understanding becomes effective. Promptly after the adoption of this Transition Article, the Address Supporting Organization (Supporting Organization) shall make selections, and give the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary written notice of those selections, of:

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

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

Section 4. COUNTRY-CODE NAMES SUPPORTING ORGANIZATION

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

Names Supporting Organization) Council, the Nominating Committee shall designate one to serve a term that ends upon the conclusion of the first ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting after the ccNSO (Country Code Names Supporting Organization) Council is constituted, a second member to serve a term that ends upon the conclusion of the second ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting after the ccNSO (Country Code Names Supporting Organization) Council is constituted, and the third member to serve a term that ends upon the conclusion of the third ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting after the ccNSO (Country Code Names Supporting Organization) Council is constituted. The three members of the ccNSO (Country Code Names Supporting Organization) Council selected by the Nominating Committee shall not take their seats before the ccNSO (Country Code Names Supporting Organization) Council is constituted.

3. Upon the ccNSO (Country Code Names Supporting Organization) Council being constituted, the At-Large Advisory Committee (Advisory Committee) and the Governmental Advisory Committee (Advisory Committee) may designate one liaison each to the ccNSO (Country Code Names Supporting Organization) Council, as provided by **Article IX, Section 3(2)(a) and (b)**.
4. Upon the ccNSO (Country Code Names Supporting Organization) Council being constituted, the Council may designate Regional Organizations as provided in **Article IX, Section 5**. Upon its designation, a Regional Organization may appoint a liaison to the ccNSO (Country Code Names Supporting Organization) Council.
5. Until the ccNSO (Country Code Names Supporting Organization) Council is constituted, Seats 11 and 12 on the New Board shall remain vacant. Promptly after the ccNSO (Country Code Names Supporting Organization) Council is constituted, the ccNSO (Country Code Names Supporting Organization) shall, through the ccNSO (Country Code Names Supporting Organization) Council, make selections of

Directors to fill Seats 11 and 12 on the New Board, with terms to conclude upon the commencement of the next regular term specified for each of those Seats in Article VI, Section 8(1)(d) and (f) of the New Bylaws, and shall give the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary written notice of its selections.

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

Section 5. GENERIC NAMES SUPPORTING ORGANIZATION

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

- a. The gTLD (generic Top Level Domain) Registries Constituency shall be assigned to the Registries Stakeholder Group;
 - b. The Registrars Constituency shall be assigned to the Registrars Stakeholder Group;
 - c. The Business Constituency shall be assigned to the Commercial Stakeholder Group;
 - d. The Intellectual Property Constituency shall be assigned to the Commercial Stakeholder Group;
 - e. The Internet Services Providers Constituency shall be assigned to the Commercial Stakeholder Group; and
 - f. The Non-Commercial Users Constituency shall be assigned to the Non-Commercial Stakeholder Group.
2. Each GNSO (Generic Names Supporting Organization) Constituency described in paragraph 1 of this subsection shall continue operating substantially as before and no Constituency official, working group, or other activity shall be changed until further action of the Constituency, provided that each GNSO (Generic Names Supporting Organization) Constituency described in paragraph 1 (c-f) shall submit to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary a new or revised Charter inclusive of its operating procedures, adopted according to the Constituency's processes and consistent with these Bylaws Amendments, no later than the ICANN (Internet Corporation for Assigned Names and Numbers) meeting in October 2009, or another date as the Board may designate by resolution.
3. Prior to the commencement of the ICANN (Internet Corporation for Assigned Names and Numbers) meeting in October 2009, or another date the Board may designate by resolution, the GNSO (Generic Names Supporting Organization) Council shall consist of its current Constituency structure and officers as described in **Article X, Section 3(1) of the Bylaws (/en/general/archive-bylaws/bylaws-20mar09.htm#X-3.1)** (as amended and restated on 29

October 1999 and amended through 20 March 2009 (the "Old Bylaws")). Thereafter, the composition of the GNSO (Generic Names Supporting Organization) Council shall be as provided in these Bylaws, as they may be amended from time to time. All committees, task forces, working groups, drafting committees, and similar groups established by the GNSO (Generic Names Supporting Organization) Council and in existence immediately before the adoption of this Transition Article shall continue in existence with the same charters, membership, and activities, subject to any change by action of the GNSO (Generic Names Supporting Organization) Council or ICANN (Internet Corporation for Assigned Names and Numbers) Board.

4. Beginning with the commencement of the ICANN (Internet Corporation for Assigned Names and Numbers) Meeting in October 2009, or another date the Board may designate by resolution (the "Effective Date of the Transition"), the GNSO (Generic Names Supporting Organization) Council seats shall be assigned as follows:
 - a. The three seats currently assigned to the Registry Constituency shall be reassigned as three seats of the Registries Stakeholder Group;
 - b. The three seats currently assigned to the Registrar Constituency shall be reassigned as three seats of the Registrars Stakeholder Group;
 - c. The three seats currently assigned to each of the Business Constituency, the Intellectual Property Constituency, and the Internet Services Provider Constituency (nine total) shall be decreased to be six seats of the Commercial Stakeholder Group;
 - d. The three seats currently assigned to the Non-Commercial Users Constituency shall be increased to be six seats of the Non-Commercial Stakeholder Group;
 - e. The three seats currently selected by the Nominating Committee shall be assigned by the Nominating Committee as follows: one voting member to the Contracted Party House, one voting member to the

Non-Contracted Party House, and one non-voting member assigned to the GNSO (Generic Names Supporting Organization) Council at large.

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

5. The GNSO (Generic Names Supporting Organization) Council, as part of its Restructure Implementation Plan, will document: (a) how vacancies, if any, will be handled during the transition period; (b) for each Stakeholder Group, how each assigned Council seat to take effect at the 2009 ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting will be filled, whether through a continuation of an existing term or a new election or appointment; (c) how it plans to address staggered terms such that the new GNSO (Generic Names Supporting Organization) Council preserves as much continuity as reasonably possible; and (d) the effect of Bylaws term limits on each Council member.
6. As soon as practical after the commencement of the ICANN (Internet Corporation for Assigned Names and Numbers) meeting in October 2009, or another date the Board may designate by resolution, the GNSO (Generic Names Supporting Organization) Council shall, in accordance with Article X, Section 3(7) and its GNSO (Generic Names Supporting Organization) Operating Procedures, elect officers and give the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary written notice of its selections.

Section 6. PROTOCOL SUPPORTING ORGANIZATION

The Protocol (Protocol) Supporting Organization (Supporting Organization) referred to in the Old Bylaws (</en/general/archive-bylaws/bylaws-12feb02.htm#VI-C>) is discontinued.

Section 7. ADVISORY COMMITTEES AND TECHNICAL LIAISON GROUP

1. Upon the adoption of the New Bylaws, the Governmental Advisory Committee (Advisory Committee) shall continue in operation according to its existing operating principles and practices, until further action of the committee. The Governmental Advisory Committee (Advisory Committee) may designate liaisons to serve with other ICANN (Internet Corporation for Assigned Names and Numbers) bodies as contemplated by the New Bylaws by providing written notice to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary. Promptly upon the adoption of this Transition Article, the Governmental Advisory Committee (Advisory Committee) shall notify the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary of the person selected as its delegate to the Nominating Committee, as set forth in Article VII, Section 2 of the New Bylaws.
2. The organizations designated as members of the Technical Liaison Group under Article XI-A, Section 2(2) of the New Bylaws shall each designate the two individual technical experts described in Article XI-A, Section 2(6) of the New Bylaws, by providing written notice to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary. As soon as feasible, the delegate from the Technical Liaison Group to the Nominating Committee shall be selected according to Article XI-A, Section 2(7) of the New Bylaws.
3. Upon the adoption of the New Bylaws, the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) shall continue in operation according to its existing operating principles and practices, until further action of the committee. Promptly upon the adoption of this Transition Article, the Security (Security – Security, Stability and Resiliency (SSR)) and Stability (Security, Stability and Resiliency) Advisory Committee (Advisory Committee) shall notify the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary of the person selected as its delegate to the Nominating Committee, as set forth in Article

VII, Section 2(4) of the New Bylaws.

4. Upon the adoption of the New Bylaws, the Root Server System Advisory Committee (Advisory Committee) shall continue in operation according to its existing operating principles and practices, until further action of the committee. Promptly upon the adoption of this Transition Article, the Root Server Advisory Committee (Advisory Committee) shall notify the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary of the person selected as its delegate to the Nominating Committee, as set forth in Article VII, Section 2(3) of the New Bylaws.
5. At-Large Advisory Committee (Advisory Committee)
 - a. There shall exist an Interim At-Large Advisory Committee (Advisory Committee) until such time as ICANN (Internet Corporation for Assigned Names and Numbers) recognizes, through the entry of a Memorandum of Understanding, all of the Regional At-Large Organizations (RALOs) identified in Article XI, Section 2(4) of the New Bylaws. The Interim At-Large Advisory Committee (Advisory Committee) shall be composed of (i) ten individuals (two from each ICANN (Internet Corporation for Assigned Names and Numbers) region) selected by the ICANN (Internet Corporation for Assigned Names and Numbers) Board following nominations by the At-Large Organizing Committee and (ii) five additional individuals (one from each ICANN (Internet Corporation for Assigned Names and Numbers) region) selected by the initial Nominating Committee as soon as feasible in accordance with the principles established in Article VII, Section 5 of the New Bylaws. The initial Nominating Committee shall designate two of these individuals to serve terms until the conclusion of the ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting in 2004 and three of these individuals to serve terms until the conclusion of the ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting in 2005.

- b. Upon the entry of each RALO into such a Memorandum of Understanding, that entity shall be entitled to select two persons who are citizens and residents of that Region to be members of the At-Large Advisory Committee (Advisory Committee) established by **Article XI, Section 2(4) of the New Bylaws**. Upon the entity's written notification to the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary of such selections, those persons shall immediately assume the seats held until that notification by the Interim At-Large Advisory Committee (Advisory Committee) members previously selected by the Board from the RALO's region.
- c. Upon the seating of persons selected by all five RALOs, the Interim At-Large Advisory Committee (Advisory Committee) shall become the At-Large Advisory Committee (Advisory Committee), as established by **Article XI, Section 2(4) of the New Bylaws**. The five individuals selected to the Interim At-Large Advisory Committee (Advisory Committee) by the Nominating Committee shall become members of the At-Large Advisory Committee (Advisory Committee) for the remainder of the terms for which they were selected.
- d. Promptly upon its creation, the Interim At-Large Advisory Committee (Advisory Committee) shall notify the ICANN (Internet Corporation for Assigned Names and Numbers) Secretary of the persons selected as its delegates to the Nominating Committee, as set forth in **Article VII, Section 2(6) of the New Bylaws**.

Section 8. OFFICERS

ICANN (Internet Corporation for Assigned Names and Numbers) officers (as defined in **Article XIII of the New Bylaws**) shall be elected by the then-existing Board of ICANN (Internet Corporation for Assigned Names and Numbers) at the annual meeting in 2002 to serve until the annual meeting in 2003.

Section 9. GROUPS APPOINTED BY THE PRESIDENT

Notwithstanding the adoption or effectiveness of the New Bylaws, task forces and other groups appointed by the ICANN (Internet Corporation for Assigned Names and Numbers) President shall continue unchanged in membership, scope, and operation until changes are made by the President.

Section 10. CONTRACTS WITH ICANN (Internet Corporation for Assigned Names and Numbers)

Notwithstanding the adoption or effectiveness of the New Bylaws, all agreements, including employment and consulting agreements, entered by ICANN (Internet Corporation for Assigned Names and Numbers) shall continue in effect according to their terms.

Annex A: GNSO (Generic Names Supporting Organization) Policy Development Process

The following process shall govern the GNSO (Generic Names Supporting Organization) policy development process ("PDP (Policy Development Process)") until such time as modifications are recommended to and approved by the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors ("Board").

The role of the GNSO (Generic Names Supporting Organization) is outlined in Article X of these Bylaws. If the GNSO (Generic Names Supporting Organization) is conducting activities that are not intended to result in a Consensus (Consensus) Policy, the Council may act through other processes.

Section 1. Required Elements of a Policy Development Process

The following elements are required at a minimum to form Consensus (Consensus) Policies as defined within ICANN (Internet Corporation for Assigned Names and Numbers) contracts, and any other policies for which the GNSO (Generic Names Supporting Organization) Council requests application of this Annex A:

- a. Final Issue Report requested by the Board, the GNSO (Generic Names Supporting Organization) Council ("Council") or Advisory Committee (Advisory Committee), which should include at a minimum a) the proposed issue raised for consideration, b) the identity of the party submitting the

- issue, and c) how that party is affected by the issue;
- b. Formal initiation of the Policy Development Process by the Council;
 - c. Formation of a Working Group or other designated work method;
 - d. Initial Report produced by a Working Group or other designated work method;
 - e. Final Report produced by a Working Group, or other designated work method, and forwarded to the Council for deliberation;
 - f. Council approval of PDP (Policy Development Process) Recommendations contained in the Final Report, by the required thresholds;
 - g. PDP (Policy Development Process) Recommendations and Final Report shall be forwarded to the Board through a Recommendations Report approved by the Council]; and
 - h. Board approval of PDP (Policy Development Process) Recommendations.

Section 2. **Policy Development Process Manual**

The GNSO (Generic Names Supporting Organization) shall maintain a Policy Development Process Manual (PDP (Policy Development Process) Manual) within the operating procedures of the GNSO (Generic Names Supporting Organization) maintained by the GNSO (Generic Names Supporting Organization) Council. The PDP (Policy Development Process) Manual shall contain specific additional guidance on completion of all elements of a PDP (Policy Development Process), including those elements that are not otherwise defined in these Bylaws. The PDP (Policy Development Process) Manual and any amendments thereto are subject to a twenty-one (21) day public comment period at minimum, as well as Board oversight and review, as specified at Article X, Section 3.6.

Section 3. **Requesting an Issue Report**

Board Request. The Board may request an Issue Report by

instructing the GNSO (Generic Names Supporting Organization) Council ("Council") to begin the process outlined the PDP (Policy Development Process) Manual. In the event the Board makes a request for an Issue Report, the Board should provide a mechanism by which the GNSO (Generic Names Supporting Organization) Council can consult with the Board to provide information on the scope, timing, and priority of the request for an Issue Report.

Council Request. The GNSO (Generic Names Supporting Organization) Council may request an Issue Report by a vote of at least one-fourth (1/4) of the members of the Council of each House or a majority of one House.

Advisory Committee (Advisory Committee) Request. An Advisory Committee (Advisory Committee) may raise an issue for policy development by action of such committee to request an Issue Report, and transmission of that request to the Staff Manager and GNSO (Generic Names Supporting Organization) Council.

Section 4. **Creation of an Issue Report**

Within forty-five (45) calendar days after receipt of either (i) an instruction from the Board; (ii) a properly supported motion from the GNSO (Generic Names Supporting Organization) Council; or (iii) a properly supported motion from an Advisory Committee (Advisory Committee), the Staff Manager will create a report (a "Preliminary Issue Report"). In the event the Staff Manager determines that more time is necessary to create the Preliminary Issue Report, the Staff Manager may request an extension of time for completion of the Preliminary Issue Report.

The following elements should be considered in the Issue Report:

- a. The proposed issue raised for consideration;
- b. The identity of the party submitting the request for the Issue Report;
- c. How that party is affected by the issue, if known;
- d. Support for the issue to initiate the PDP (Policy Development Process), if known;

- e. The opinion of the ICANN (Internet Corporation for Assigned Names and Numbers) General Counsel regarding whether the issue proposed for consideration within the Policy Development Process is properly within the scope of the ICANN (Internet Corporation for Assigned Names and Numbers)'s mission, policy process and more specifically the role of the GNSO (Generic Names Supporting Organization) as set forth in the Bylaws.
- f. The opinion of ICANN (Internet Corporation for Assigned Names and Numbers) Staff as to whether the Council should initiate the PDP (Policy Development Process) on the issue

Upon completion of the Preliminary Issue Report, the Preliminary Issue Report shall be posted on the ICANN (Internet Corporation for Assigned Names and Numbers) website for a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers).

The Staff Manager is responsible for drafting a summary and analysis of the public comments received on the Preliminary Issue Report and producing a Final Issue Report based upon the comments received. The Staff Manager should forward the Final Issue Report, along with any summary and analysis of the public comments received, to the Chair of the GNSO (Generic Names Supporting Organization) Council for consideration for initiation of a PDP (Policy Development Process).

Section 5. **Initiation of the PDP (Policy Development Process)**

The Council may initiate the PDP (Policy Development Process) as follows:

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

GNSO (Generic Names Supporting Organization) Council or Advisory Committee (Advisory Committee) Requests: The Council may only initiate the PDP (Policy Development Process) by a vote of

the Council. Initiation of a PDP (Policy Development Process) requires a vote as set forth in Article X, Section 3, paragraph 9(b) and (c) in favor of initiating the PDP (Policy Development Process).

Section 6. **Reports**

An Initial Report should be delivered to the GNSO (Generic Names Supporting Organization) Council and posted for a public comment period that complies with the designated practice for public comment periods within ICANN (Internet Corporation for Assigned Names and Numbers), which time may be extended in accordance with the PDP (Policy Development Process) Manual. Following the review of the comments received and, if required, additional deliberations, a Final Report shall be produced for transmission to the Council.

Section 7. **Council Deliberation**

Upon receipt of a Final Report, whether as the result of a working group or otherwise, the Council chair will (i) distribute the Final Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the PDP (Policy Development Process) Manual.

The Council approval process is set forth in Article X, Section 3, paragraph 9(d) through (g), as supplemented by the PDP (Policy Development Process) Manual.

Section 8. **Preparation of the Board Report**

If the PDP (Policy Development Process) recommendations contained in the Final Report are approved by the GNSO (Generic Names Supporting Organization) Council, a Recommendations Report shall be approved by the GNSO (Generic Names Supporting Organization) Council for delivery to the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

Section 9. **Board Approval Processes**

The Board will meet to discuss the GNSO (Generic Names Supporting Organization) Council recommendation as soon as feasible, but preferably not later than the second meeting after

receipt of the Board Report from the Staff Manager. Board deliberation on the PDP (Policy Development Process) Recommendations contained within the Recommendations Report shall proceed as follows:

- a. Any PDP (Policy Development Process) Recommendations approved by a GNSO (Generic Names Supporting Organization) Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers). If the GNSO (Generic Names Supporting Organization) Council recommendation was approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board will be sufficient to determine that such policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).
- b. In the event that the Board determines, in accordance with paragraph a above, that the policy recommended by a GNSO (Generic Names Supporting Organization) Supermajority Vote or less than a GNSO (Generic Names Supporting Organization) Supermajority vote is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers) (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.
- c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.

- d. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO (Generic Names Supporting Organization) Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such policy is not in the interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers). For any Supplemental Recommendation approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board shall be sufficient to determine that the policy in the Supplemental Recommendation is not in the best interest of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

Section 10. **Implementation of Approved Policies**

Upon a final decision of the Board adopting the policy, the Board shall, as appropriate, give authorization or direction to ICANN (Internet Corporation for Assigned Names and Numbers) staff to work with the GNSO (Generic Names Supporting Organization) Council to create an implementation plan based upon the implementation recommendations identified in the Final Report, and to implement the policy. The GNSO (Generic Names Supporting Organization) Council may, but is not required to, direct the creation of an implementation review team to assist in implementation of the policy.

Section 11. **Maintenance of Records**

Throughout the PDP (Policy Development Process), from policy suggestion to a final decision by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) will maintain on the Website, a status web page detailing the progress of each PDP (Policy Development Process) issue. Such status page will outline the completed and upcoming steps in the PDP (Policy Development

Process) process, and contain links to key resources (e.g. Reports, Comments Fora, WG (Working Group) Discussions, etc.).

Section 12. **Additional Definitions**

"Comment Site", "Comment Forum", "Comments For a" and "Website" refer to one or more websites designated by ICANN (Internet Corporation for Assigned Names and Numbers) on which notifications and comments regarding the PDP (Policy Development Process) will be posted.

"Supermajority Vote" means a vote of more than sixty-six (66) percent of the members present at a meeting of the applicable body, with the exception of the GNSO (Generic Names Supporting Organization) Council.

"Staff Manager" means an ICANN (Internet Corporation for Assigned Names and Numbers) staff person(s) who manages the PDP (Policy Development Process).

"GNSO (Generic Names Supporting Organization) Supermajority Vote" shall have the meaning set forth in the Bylaws.

Section 13. **Applicability**

The procedures of this Annex A shall be applicable to all requests for Issue Reports and PDPs initiated after 8 December 2011. For all ongoing PDPs initiated prior to 8 December 2011, the Council shall determine the feasibility of transitioning to the procedures set forth in this Annex A for all remaining steps within the PDP (Policy Development Process). If the Council determines that any ongoing PDP (Policy Development Process) cannot be feasibly transitioned to these updated procedures, the PDP (Policy Development Process) shall be concluded according to the procedures set forth in Annex A in force on 7 December 2011.

Annex A-1: GNSO (Generic Names Supporting Organization) Expedited Policy Development Process

The following process shall govern the specific instances where the

GNSO (Generic Names Supporting Organization) Council invokes the GNSO (Generic Names Supporting Organization) Expedited Policy Development Process ("EPDP"). The GNSO (Generic Names Supporting Organization) Council may invoke the EPDP in the following limited circumstances: (1) to address a narrowly defined policy issue that was identified and scoped after either the adoption of a GNSO (Generic Names Supporting Organization) policy recommendation by the ICANN (Internet Corporation for Assigned Names and Numbers) Board or the implementation of such an adopted recommendation; or (2) to create new or additional recommendations for a specific policy issue that had been substantially scoped previously such that extensive, pertinent background information already exists, e.g. (a) in an Issue Report for a possible PDP (Policy Development Process) that was not initiated; (b) as part of a previous PDP (Policy Development Process) that was not completed; or (c) through other projects such as a GGP. The following process shall be in place until such time as modifications are recommended to and approved by the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors. Where a conflict arises in relation to an EPDP between the PDP (Policy Development Process) Manual (see Annex 2 of the GNSO (Generic Names Supporting Organization) Operating Procedures) and the procedures described in this Annex A-1, the provisions of this Annex A-1 shall prevail.

The role of the GNSO (Generic Names Supporting Organization) is outlined in Article X of these Bylaws. Provided the Council believes and documents via Council vote that the above-listed criteria are met, an EPDP may be initiated to recommend an amendment to an existing Consensus (Consensus) Policy; however, in all cases where the GNSO (Generic Names Supporting Organization) is conducting policy-making activities that do not meet the above criteria as documented in a Council vote, the Council should act through a Policy Development Process (see Annex A).

Section 1. Required Elements of a GNSO (Generic Names Supporting Organization) Expedited Policy Development Process

The following elements are required at a minimum to develop expedited GNSO (Generic Names Supporting Organization) policy

recommendations, including recommendations that could result in amendments to an existing Consensus (Consensus) Policy, as part of a GNSO (Generic Names Supporting Organization) Expedited Policy Development Process:

- a. Formal initiation of the GNSO (Generic Names Supporting Organization) Expedited Policy Development Process by the GNSO (Generic Names Supporting Organization) Council, including an EPDP scoping document;
- b. Formation of an EPDP Team or other designated work method;
- c. Initial Report produced by an EPDP Team or other designated work method;
- d. Final EPDP Policy Recommendation(s) Report produced by an EPDP Team, or other designated work method, and forwarded to the Council for deliberation;
- e. GNSO (Generic Names Supporting Organization) Council approval of EPDP Policy Recommendations contained in the Final EPDP Policy Recommendation(s) Report, by the required thresholds;
- f. EPDP Recommendations and Final EPDP Recommendation(s) Report forwarded to the Board through a Recommendations Report approved by the Council; and
- g. Board approval of EPDP Recommendation(s).

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

The GNSO (Generic Names Supporting Organization) shall include a specific section(s) on the EPDP process as part of its maintenance of the GNSO (Generic Names Supporting Organization) Policy Development Process Manual (PDP (Policy Development Process) Manual), described in Annex 5 of the GNSO (Generic Names Supporting Organization) Operating Procedures. The EPDP Manual shall contain specific additional guidance on completion of all elements of an EPDP, including those elements that are not otherwise defined in these Bylaws. The EPDP Manual and any amendments thereto are subject to a twenty-one (21) day public

comment period at minimum, as well as Board oversight and review, as specified at Article X, Section 3.4.

Section 3. **Initiation of the EPDP**

The Council may initiate an EPDP as follows:

The Council may only initiate the EPDP by a vote of the Council. Initiation of an EPDP requires an affirmative Supermajority vote of the Council (as defined in these Bylaws) in favor of initiating the EPDP.

The request to initiate an EPDP must be accompanied by an EPDP scoping document, which is expected to include at a minimum the following information:

1. Name of Council Member / SG (Stakeholder Group) / C;
2. Origin of issue (e.g. previously completed PDP (Policy Development Process));
3. Scope of the effort (detailed description of the issue or question that the EPDP is expected to address);
4. Description of how this issue meets the criteria for an EPDP, i.e. how the EPDP will address either: (1) a narrowly defined policy issue that was identified and scoped after either the adoption of a GNSO (Generic Names Supporting Organization) policy recommendation by the ICANN (Internet Corporation for Assigned Names and Numbers) Board or the implementation of such an adopted recommendation, or (2) new or additional policy recommendations on a specific GNSO (Generic Names Supporting Organization) policy issue that had been scoped previously as part of a PDP (Policy Development Process) that was not completed or other similar effort, including relevant supporting information in either case;
5. If not provided as part of item 4, the opinion of the ICANN (Internet Corporation for Assigned Names and Numbers) General Counsel as to whether the issue proposed for consideration is properly within the scope of the ICANN (Internet Corporation for Assigned Names and Numbers)'s

mission, policy process and more specifically the role of the GNSO (Generic Names Supporting Organization);

6. Proposed EPDP mechanism (e.g. WG (Working Group), DT (Drafting Team), individual volunteers);
7. Method of operation, if different from GNSO (Generic Names Supporting Organization) Working Group Guidelines;
8. Decision-making methodology for EPDP mechanism, if different from GNSO (Generic Names Supporting Organization) Working Group Guidelines;
9. Target completion date.

Section 4. **Council Deliberation**

Upon receipt of an EPDP Final Recommendation(s) Report, whether as the result of an EPDP Team or otherwise, the Council chair will (i) distribute the Final EPDP Recommendation(s) Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the PDP (Policy Development Process) Manual.

Approval of EPDP Recommendation(s) requires an affirmative vote of the Council meeting the thresholds set forth in in Article X, Section 3, paragraphs 9 n-o, as supplemented by the PDP (Policy Development Process) Manual.

Section 5. **Preparation of the Board Report**

If the EPDP Recommendation(s) contained in the Final EPDP Recommendation(s) Report are approved by the GNSO (Generic Names Supporting Organization) Council, a Recommendation(s) Report shall be approved by the GNSO (Generic Names Supporting Organization) Council for delivery to the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

Section 6. **Board Approval Processes**

The Board will meet to discuss the EPDP recommendation(s) as soon as feasible, but preferably not later than the second meeting after receipt of the Recommendations Report from the Staff Manager. Board deliberation on the EPDP Recommendations

contained within the Recommendations Report shall proceed as follows:

- a. Any EPDP Recommendations approved by a GNSO (Generic Names Supporting Organization) Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers). If the GNSO (Generic Names Supporting Organization) Council recommendation was approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board will be sufficient to determine that such policy is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).
- b. In the event that the Board determines, in accordance with paragraph a above, that the proposed EPDP Recommendations are not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers) (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.
- c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.
- d. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO (Generic Names Supporting

Organization) Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such guidance is not in the interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers). For any Supplemental Recommendation approved by less than a GNSO (Generic Names Supporting Organization) Supermajority Vote, a majority vote of the Board shall be sufficient to determine that the guidance in the Supplemental Recommendation is not in the best interest of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

Section 7. **Implementation of Approved Policies**

Upon a final decision of the Board adopting the EPDP recommendations, the Board shall, as appropriate, give authorization or direction to ICANN (Internet Corporation for Assigned Names and Numbers) staff to implement the EPDP Recommendations. If deemed necessary, the Board shall direct ICANN (Internet Corporation for Assigned Names and Numbers) staff to work with the GNSO (Generic Names Supporting Organization) Council to create a guidance implementation plan, based upon the guidance recommendations identified in the Final EPDP Recommendation(s) Report.

Section 8. **Maintenance of Records**

Throughout the EPDP, from initiation to a final decision by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) will maintain on the Website, a status web page detailing the progress of each EPDP issue. Such status page will outline the completed and upcoming steps in the EPDP process, and contain links to key resources (e.g. Reports, Comments Fora, EPDP Discussions, etc.).

Section 9. **Applicability**

The procedures of this Annex A-1 shall be applicable from 28 September 2015 onwards.

Annex A-2: GNSO (Generic Names Supporting Organization) Guidance Process

The following process shall govern the GNSO (Generic Names Supporting Organization) guidance process ("GGP") until such time as modifications are recommended to and approved by the ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors ("Board"). The role of the GNSO (Generic Names Supporting Organization) is outlined in Article X of these Bylaws. If the GNSO (Generic Names Supporting Organization) is conducting activities that are intended to result in a Consensus (Consensus) Policy, the Council should act through a Policy Development Process (see Annex A).

Section 1. Required Elements of a GNSO (Generic Names Supporting Organization) Guidance Process

The following elements are required at a minimum to develop GNSO (Generic Names Supporting Organization) guidance:

1. Formal initiation of the GNSO (Generic Names Supporting Organization) Guidance Process by the Council, including a GGP scoping document;
2. Identification of the types of expertise needed on the GGP Team;
3. Recruiting and formation of a GGP Team or other designated work method;
4. Proposed GNSO (Generic Names Supporting Organization) Guidance Recommendation(s) Report produced by a GGP Team or other designated work method;
5. Final GNSO (Generic Names Supporting Organization) Guidance Recommendation(s) Report produced by a GGP Team, or other designated work method, and forwarded to the Council for deliberation;
6. Council approval of GGP Recommendations contained in the Final Recommendation(s) Report, by the required thresholds;
7. GGP Recommendations and Final Recommendation(s)

Report shall be forwarded to the Board through a Recommendations Report approved by the Council; and

8. Board approval of GGP Recommendation(s).

Section 2. **GNSO (Generic Names Supporting Organization) Guidance Process Manual**

The GNSO (Generic Names Supporting Organization) shall maintain a GNSO (Generic Names Supporting Organization) Guidance Process (GGP Manual) within the operating procedures of the GNSO (Generic Names Supporting Organization) maintained by the GNSO (Generic Names Supporting Organization) Council. The GGP Manual shall contain specific additional guidance on completion of all elements of a GGP, including those elements that are not otherwise defined in these Bylaws. The GGP Manual and any amendments thereto are subject to a twenty-one (21) day public comment period at minimum, as well as Board oversight and review, as specified at Article X, Section 3.4.

Section 3. **Initiation of the GGP**

The Council may initiate a GGP as follows:

The Council may only initiate the GGP by a vote of the Council or at the formal request of the ICANN (Internet Corporation for Assigned Names and Numbers) Board. Initiation of a GGP requires a vote as set forth in Article X, Section 3, paragraph 9.p in favor of initiating the GGP. In the case of a GGP requested by the ICANN (Internet Corporation for Assigned Names and Numbers) Board, a GGP will automatically be initiated unless the GNSO (Generic Names Supporting Organization) Council votes against the initiation of a GGP as set forth in Article X, Section 3, paragraph 9 q¹.

The request to initiate a GGP must be accompanied by a GGP scoping document, which is expected to include at a minimum the following information:

1. Name of Council Member / SG (Stakeholder Group) / C
2. Origin of issue (e.g., board request)
3. Scope of the effort (detailed description of the issue or

question that the GGP is expected to address)

4. Proposed GGP mechanism (e.g. WG (Working Group), DT (Drafting Team), individual volunteers)
5. Method of operation, if different from GNSO (Generic Names Supporting Organization) Working Group Guidelines
6. Decision-making methodology for GGP mechanism, if different from GNSO (Generic Names Supporting Organization) Working Group Guidelines
7. Desired completion date and rationale

In the event the Board makes a request for a GGP, the Board should provide a mechanism by which the GNSO (Generic Names Supporting Organization) Council can consult with the Board to provide information on the scope, timing, and priority of the request for a GGP.

Section 4. **Council Deliberation**

Upon receipt of a Final Recommendation(s) Report, whether as the result of a GGP Team or otherwise, the Council chair will (i) distribute the Final Recommendation(s) Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the GGP Manual.

The Council approval process is set forth in Article X, Section 3, paragraph 9. r² as supplemented by the GGP Manual.

Section 5. **Preparation of the Board Report**

If the GGP recommendations contained in the Final Recommendation(s) Report are approved by the GNSO (Generic Names Supporting Organization) Council, a Recommendations Report shall be approved by the GNSO (Generic Names Supporting Organization) Council for delivery to the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

Section 6. **Board Approval Processes**

The Board will meet to discuss the GNSO (Generic Names

Supporting Organization) Guidance recommendation(s) as soon as feasible, but preferably not later than the second meeting after receipt of the Board Report from the Staff Manager. Board deliberation on the GGP Recommendations contained within the Recommendations Report shall proceed as follows:

- a. Any GGP Recommendations approved by a GNSO (Generic Names Supporting Organization) Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such guidance is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).
- b. In the event that the Board determines, in accordance with paragraph a above, that the proposed GNSO (Generic Names Supporting Organization) Guidance recommendation(s) adopted by a GNSO (Generic Names Supporting Organization) Supermajority Vote is not in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers) (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.
- c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.
- d. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO (Generic Names Supporting Organization) Supermajority Vote on the Supplemental

Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such guidance is not in the interests of the ICANN (Internet Corporation for Assigned Names and Numbers) community or ICANN (Internet Corporation for Assigned Names and Numbers).

Section 7. **Implementation of Approved GNSO (Generic Names Supporting Organization) Guidance**

Upon a final decision of the Board adopting the guidance, the Board shall, as appropriate, give authorization or direction to ICANN (Internet Corporation for Assigned Names and Numbers) staff to implement the GNSO (Generic Names Supporting Organization) Guidance. If deemed necessary, the Board may direct ICANN (Internet Corporation for Assigned Names and Numbers) Staff to work with the GNSO (Generic Names Supporting Organization) Council to create a guidance implementation plan, if deemed necessary, based upon the guidance recommendations identified in the Final Recommendation(s) Report.

Section 8. **Maintenance of Records**

Throughout the GGP, from initiation to a final decision by the Board, ICANN (Internet Corporation for Assigned Names and Numbers) will maintain on the Website, a status web page detailing the progress of each GGP issue. Such status page will outline the completed and upcoming steps in the GGP process, and contain links to key resources (e.g. Reports, Comments Fora, GGP Discussions, etc.).

Section 9. **Additional Definitions**

"Comment Site", "Comment Forum", "Comments Fora" and "Website" refer to one or more websites designated by ICANN (Internet Corporation for Assigned Names and Numbers) on which notifications and comments regarding the GGP will be posted.

"GGP Staff Manager" means an ICANN (Internet Corporation for Assigned Names and Numbers) staff person(s) who manages the GGP.

Annex B: ccNSO (Country Code Names Supporting Organization) Policy-Development Process (ccPDP)

The following process shall govern the ccNSO (Country Code Names Supporting Organization) policy-development process ("PDP (Policy Development Process)").

1. Request for an Issue Report

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

- a. *Council.* The ccNSO (Country Code Names Supporting Organization) Council (in this Annex B, the "Council") may call for the creation of an Issue Report by an affirmative vote of at least seven of the members of the Council present at any meeting or voting by e-mail.
- b. *Board.* The ICANN (Internet Corporation for Assigned Names and Numbers) Board may call for the creation of an Issue Report by requesting the Council to begin the policy-development process.
- c. *Regional Organization.* One or more of the Regional Organizations representing ccTLDs in the ICANN (Internet Corporation for Assigned Names and Numbers) recognized Regions may call for creation of an Issue Report by requesting the Council to begin the policy-development process.
- d. *ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organization (Supporting Organization) or Advisory Committee (Advisory Committee).* An ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organization (Supporting Organization) or an ICANN (Internet Corporation for Assigned Names and Numbers) Advisory Committee (Advisory Committee) may call for creation of an Issue Report by requesting the Council to begin the policy-development process.
- e. *Members of the ccNSO (Country Code Names Supporting Organization).* The members of the ccNSO

(Country Code Names Supporting Organization) may call for the creation of an Issue Report by an affirmative vote of at least ten members of the ccNSO (Country Code Names Supporting Organization) present at any meeting or voting by e-mail.

Any request for an Issue Report must be in writing and must set out the issue upon which an Issue Report is requested in sufficient detail to enable the Issue Report to be prepared. It shall be open to the Council to request further information or undertake further research or investigation for the purpose of determining whether or not the requested Issue Report should be created.

2. **Creation of the Issue Report and Initiation Threshold**

Within seven days after an affirmative vote as outlined in Item 1(a) above or the receipt of a request as outlined in Items 1 (b), (c), or (d) above the Council shall appoint an Issue Manager. The Issue Manager may be a staff member of ICANN (Internet Corporation for Assigned Names and Numbers) (in which case the costs of the Issue Manager shall be borne by ICANN (Internet Corporation for Assigned Names and Numbers)) or such other person or persons selected by the Council (in which case the ccNSO (Country Code Names Supporting Organization) shall be responsible for the costs of the Issue Manager).

Within fifteen (15) calendar days after appointment (or such other time as the Council shall, in consultation with the Issue Manager, deem to be appropriate), the Issue Manager shall create an Issue Report. Each Issue Report shall contain at least the following:

- a. The proposed issue raised for consideration;
- b. The identity of the party submitting the issue;
- c. How that party is affected by the issue;
- d. Support for the issue to initiate the PDP (Policy Development Process);

e. A recommendation from the Issue Manager as to whether the Council should move to initiate the PDP (Policy Development Process) for this issue (the "Manager Recommendation"). Each Manager Recommendation shall include, and be supported by, an opinion of the ICANN (Internet Corporation for Assigned Names and Numbers) General Counsel regarding whether the issue is properly within the scope of the ICANN (Internet Corporation for Assigned Names and Numbers) policy process and within the scope of the ccNSO (Country Code Names Supporting Organization). In coming to his or her opinion, the General Counsel shall examine whether:

1. The issue is within the scope of ICANN (Internet Corporation for Assigned Names and Numbers)'s mission statement;
2. Analysis of the relevant factors according to **Article IX, Section 6(2)** and **Annex C** affirmatively demonstrates that the issue is within the scope of the ccNSO (Country Code Names Supporting Organization);

In the event that the General Counsel reaches an opinion in the affirmative with respect to points 1 and 2 above then the General Counsel shall also consider whether the issue:

3. Implicates or affects an existing ICANN (Internet Corporation for Assigned Names and Numbers) policy;
4. Is likely to have lasting value or applicability, albeit with the need for occasional updates, and to establish a guide or framework for future decision-making.

In all events, consideration of revisions to the ccPDP (this **Annex B**) or to the scope of the ccNSO (Country Code Names Supporting Organization) (**Annex C**) shall be within the scope of ICANN (Internet Corporation for Assigned Names and Numbers) and the ccNSO

(Country Code Names Supporting Organization).

In the event that General Counsel is of the opinion the issue is not properly within the scope of the ccNSO (Country Code Names Supporting Organization) Scope, the Issue Manager shall inform the Council of this opinion. If after an analysis of the relevant factors according to Article IX, Section 6 and Annex C a majority of 10 or more Council members is of the opinion the issue is within scope the Chair of the ccNSO (Country Code Names Supporting Organization) shall inform the Issue Manager accordingly. General Counsel and the ccNSO (Country Code Names Supporting Organization) Council shall engage in a dialogue according to agreed rules and procedures to resolve the matter. In the event no agreement is reached between General Counsel and the Council as to whether the issue is within or outside Scope of the ccNSO (Country Code Names Supporting Organization) then by a vote of 15 or more members the Council may decide the issue is within scope. The Chair of the ccNSO (Country Code Names Supporting Organization) shall inform General Counsel and the Issue Manager accordingly. The Issue Manager shall then proceed with a recommendation whether or not the Council should move to initiate the PDP (Policy Development Process) including both the opinion and analysis of General Counsel and Council in the Issues Report.

- f. In the event that the Manager Recommendation is in favor of initiating the PDP (Policy Development Process), a proposed time line for conducting each of the stages of PDP (Policy Development Process) outlined herein (PDP (Policy Development Process) Time Line).
- g. If possible, the issue report shall indicate whether the resulting output is likely to result in a policy to be approved by the ICANN (Internet Corporation for Assigned Names and Numbers) Board. In some circumstances, it will not be possible to do this until substantive discussions on the issue have taken

place. In these cases, the issue report should indicate this uncertainty. Upon completion of the Issue Report, the Issue Manager shall distribute it to the full Council for a vote on whether to initiate the PDP (Policy Development Process).

3. **Initiation of PDP (Policy Development Process)**

The Council shall decide whether to initiate the PDP (Policy Development Process) as follows:

- a. Within 21 days after receipt of an Issue Report from the Issue Manager, the Council shall vote on whether to initiate the PDP (Policy Development Process). Such vote should be taken at a meeting held in any manner deemed appropriate by the Council, including in person or by conference call, but if a meeting is not feasible the vote may occur by e-mail.
- b. A vote of ten or more Council members in favor of initiating the PDP (Policy Development Process) shall be required to initiate the PDP (Policy Development Process) provided that the Issue Report states that the issue is properly within the scope of the ICANN (Internet Corporation for Assigned Names and Numbers) mission statement and the ccNSO (Country Code Names Supporting Organization) Scope.

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

At the meeting of the Council where the PDP (Policy Development Process) has been initiated (or, where the Council employs a vote by e-mail, in that vote) pursuant to Item 3 above, the Council shall decide, by a majority vote of members present at the meeting (or voting by e-mail), whether or not to appoint a task force to address the issue. If the Council votes:

- a. In favor of convening a task force, it shall do so in accordance with Item 7 below.

- b. Against convening a task force, then it shall collect information on the policy issue in accordance with Item 8 below.

The Council shall also, by a majority vote of members present at the meeting or voting by e-mail, approve or amend and approve the PDP (Policy Development Process) Time Lineset out in the Issue Report.

5. **Composition and Selection of Task Forces**

- a. Upon voting to appoint a task force, the Council shall invite each of the Regional Organizations (see **Article IX, Section 6**) to appoint two individuals to participate in the task force (the "Representatives"). Additionally, the Council may appoint up to three advisors (the "Advisors") from outside the ccNSO (Country Code Names Supporting Organization) and, following formal request for GAC (Governmental Advisory Committee) participation in the Task Force, accept up to two Representatives from the Governmental Advisory Committee (Advisory Committee) to sit on the task force. The Council may increase the number of Representatives that may sit on a task force in its discretion in circumstances that it deems necessary or appropriate.
- b. Any Regional Organization wishing to appoint Representatives to the task force must provide the names of the Representatives to the Issue Manager within ten (10) calendar days after such request so that they are included on the task force. Such Representatives need not be members of the Council, but each must be an individual who has an interest, and ideally knowledge and expertise, in the subject matter, coupled with the ability to devote a substantial amount of time to the task force's activities.
- c. The Council may also pursue other actions that it deems appropriate to assist in the PDP (Policy Development Process), including appointing a particular individual or organization to gather

information on the issue or scheduling meetings for deliberation or briefing. All such information shall be submitted to the Issue Manager in accordance with the PDP (Policy Development Process) Time Line.

6. **Public Notification of Initiation of the PDP (Policy Development Process) and Comment Period**

After initiation of the PDP (Policy Development Process), ICANN (Internet Corporation for Assigned Names and Numbers) shall post a notification of such action to the Website and to the other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees). A comment period (in accordance with the PDP (Policy Development Process) Time Line, and ordinarily at least 21 days long) shall be commenced for the issue. Comments shall be accepted from ccTLD (Country Code Top Level Domain) managers, other Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and from the public. The Issue Manager, or some other designated Council representative shall review the comments and incorporate them into a report (the "Comment Report") to be included in either the Preliminary Task Force Report or the Initial Report, as applicable.

7. **Task Forces**

- a. *Role of Task Force.* If a task force is created, its role shall be responsible for (i) gathering information documenting the positions of the ccNSO (Country Code Names Supporting Organization) members within the Geographic Regions and other parties and groups; and (ii) otherwise obtaining relevant information that shall enable the Task Force Report to be as complete and informative as possible to facilitate the Council's meaningful and informed deliberation.

The task force shall not have any formal decision-making authority. Rather, the role of the task force shall

be to gather information that shall document the positions of various parties or groups as specifically and comprehensively as possible, thereby enabling the Council to have a meaningful and informed deliberation on the issue.

b. *Task Force Charter or Terms of Reference.* The Council, with the assistance of the Issue Manager, shall develop a charter or terms of reference for the task force (the "Charter") within the time designated in the PDP (Policy Development Process) Time Line. Such Charter shall include:

1. The issue to be addressed by the task force, as such issue was articulated for the vote before the Council that initiated the PDP (Policy Development Process);
2. The specific time line that the task force must adhere to, as set forth below, unless the Council determines that there is a compelling reason to extend the timeline; and
3. Any specific instructions from the Council for the task force, including whether or not the task force should solicit the advice of outside advisors on the issue.

The task force shall prepare its report and otherwise conduct its activities in accordance with the Charter. Any request to deviate from the Charter must be formally presented to the Council and may only be undertaken by the task force upon a vote of a majority of the Council members present at a meeting or voting by e-mail. The quorum requirements of **Article IX, Section 3(14)** shall apply to Council actions under this Item 7(b).

c. *Appointment of Task Force Chair.* The Issue Manager shall convene the first meeting of the task force within the time designated in the PDP (Policy Development Process) Time Line. At the initial meeting, the task

force members shall, among other things, vote to appoint a task force chair. The chair shall be responsible for organizing the activities of the task force, including compiling the Task Force Report. The chair of a task force need not be a member of the Council.

d. *Collection of Information.*

1. *Regional Organization Statements.* The Representatives shall each be responsible for soliciting the position of the Regional Organization for their Geographic Region, at a minimum, and may solicit other comments, as each Representative deems appropriate, including the comments of the ccNSO (Country Code Names Supporting Organization) members in that region that are not members of the Regional Organization, regarding the issue under consideration. The position of the Regional Organization and any other comments gathered by the Representatives should be submitted in a formal statement to the task force chair (each, a "Regional Statement") within the time designated in the PDP (Policy Development Process) Time Line. Every Regional Statement shall include at least the following:

- i. If a Supermajority Vote (as defined by the Regional Organization) was reached, a clear statement of the Regional Organization's position on the issue;
- ii. If a Supermajority Vote was not reached, a clear statement of all positions espoused by the members of the Regional Organization;
- iii. A clear statement of how the Regional Organization arrived at its position(s).

Specifically, the statement should detail specific meetings, teleconferences, or other means of deliberating an issue, and a list of all members who participated or otherwise submitted their views;

- iv. A statement of the position on the issue of any ccNSO (Country Code Names Supporting Organization) members that are not members of the Regional Organization;
- v. An analysis of how the issue would affect the Region, including any financial impact on the Region; and
- vi. An analysis of the period of time that would likely be necessary to implement the policy.

2. *Outside Advisors.* The task force may, in its discretion, solicit the opinions of outside advisors, experts, or other members of the public. Such opinions should be set forth in a report prepared by such outside advisors, and (i) clearly labeled as coming from outside advisors; (ii) accompanied by a detailed statement of the advisors' (a) qualifications and relevant experience and (b) potential conflicts of interest. These reports should be submitted in a formal statement to the task force chair within the time designated in the PDP (Policy Development Process) Time Line.

e. *Task Force Report.* The chair of the task force, working with the Issue Manager, shall compile the Regional Statements, the Comment Report, and other information or reports, as applicable, into a single document ("Preliminary Task Force Report") and distribute the Preliminary Task Force Report to the full task force within the time designated in the PDP

(Policy Development Process) Time Line. The task force shall have a final task force meeting to consider the issues and try and reach a Supermajority Vote. After the final task force meeting, the chair of the task force and the Issue Manager shall create the final task force report (the "Task Force Report") and post it on the Website and to the other ICANN (Internet Corporation for Assigned Names and Numbers) Supporting Organizations (Supporting Organizations) and Advisory Committees (Advisory Committees). Each Task Force Report must include:

1. A clear statement of any Supermajority Vote (being 66% of the task force) position of the task force on the issue;
2. If a Supermajority Vote was not reached, a clear statement of all positions espoused by task force members submitted within the time line for submission of constituency reports. Each statement should clearly indicate (i) the reasons underlying the position and (ii) the Regional Organizations that held the position;
3. An analysis of how the issue would affect each Region, including any financial impact on the Region;
4. An analysis of the period of time that would likely be necessary to implement the policy; and
5. The advice of any outside advisors appointed to the task force by the Council, accompanied by a detailed statement of the advisors' (i) qualifications and relevant experience and (ii) potential conflicts of interest.

8. Procedure if No Task Force is Formed

- a. If the Council decides not to convene a task force, each Regional Organization shall, within the time designated in the PDP (Policy Development Process)

Time Line, appoint a representative to solicit the Region's views on the issue. Each such representative shall be asked to submit a Regional Statement to the Issue Manager within the time designated in the PDP (Policy Development Process) Time Line.

- b. The Council may, in its discretion, take other steps to assist in the PDP (Policy Development Process), including, for example, appointing a particular individual or organization, to gather information on the issue or scheduling meetings for deliberation or briefing. All such information shall be submitted to the Issue Manager within the time designated in the PDP (Policy Development Process) Time Line.
- c. The Council shall formally request the Chair of the GAC (Governmental Advisory Committee) to offer opinion or advice.
- d. The Issue Manager shall take all Regional Statements, the Comment Report, and other information and compile (and post on the Website) an Initial Report within the time designated in the PDP (Policy Development Process) Time Line. Thereafter, the Issue Manager shall, in accordance with Item 9 below, create a Final Report.

9. **Comments to the Task Force Report or Initial Report**

- a. A comment period (in accordance with the PDP (Policy Development Process) Time Line, and ordinarily at least 21 days long) shall be opened for comments on the Task Force Report or Initial Report. Comments shall be accepted from ccTLD (Country Code Top Level Domain) managers, other Supporting Organizations (Supporting Organizations), Advisory Committees (Advisory Committees), and from the public. All comments shall include the author's name, relevant experience, and interest in the issue.
- b. At the end of the comment period, the Issue Manager shall review the comments received and may, in the Issue Manager's reasonable discretion, add

appropriate comments to the Task Force Report or Initial Report, to prepare the "Final Report". The Issue Manager shall not be obligated to include all comments made during the comment period, nor shall the Issue Manager be obligated to include all comments submitted by any one individual or organization.

- c. The Issue Manager shall prepare the Final Report and submit it to the Council chair within the time designated in the PDP (Policy Development Process) Time Line.

10. **Council Deliberation**

- a. Upon receipt of a Final Report, whether as the result of a task force or otherwise, the Council chair shall (i) distribute the Final Report to all Council members; (ii) call for a Council meeting within the time designated in the PDP (Policy Development Process) Time Line wherein the Council shall work towards achieving a recommendation to present to the Board; and (iii) formally send to the GAC (Governmental Advisory Committee) Chair an invitation to the GAC (Governmental Advisory Committee) to offer opinion or advice. Such meeting may be held in any manner deemed appropriate by the Council, including in person or by conference call. The Issue Manager shall be present at the meeting.
- b. The Council may commence its deliberation on the issue prior to the formal meeting, including via in-person meetings, conference calls, e-mail discussions, or any other means the Council may choose.
- c. The Council may, if it so chooses, solicit the opinions of outside advisors at its final meeting. The opinions of these advisors, if relied upon by the Council, shall be (i) embodied in the Council's report to the Board, (ii) specifically identified as coming from an outside advisor; and (iii) accompanied by a detailed

statement of the advisor's (a) qualifications and relevant experience and (b) potential conflicts of interest.

11. **Recommendation of the Council**

In considering whether to make a recommendation on the issue (a "Council Recommendation"), the Council shall seek to act by consensus. If a minority opposes a consensus position, that minority shall prepare and circulate to the Council a statement explaining its reasons for opposition. If the Council's discussion of the statement does not result in consensus, then a recommendation supported by 14 or more of the Council members shall be deemed to reflect the view of the Council, and shall be conveyed to the Members as the Council's Recommendation. Notwithstanding the foregoing, as outlined below, all viewpoints expressed by Council members during the PDP (Policy Development Process) must be included in the Members Report.

12. **Council Report to the Members**

In the event that a Council Recommendation is adopted pursuant to Item 11 then the Issue Manager shall, within seven days after the Council meeting, incorporate the Council's Recommendation together with any other viewpoints of the Council members into a Members Report to be approved by the Council and then to be submitted to the Members (the "Members Report"). The Members Report must contain at least the following:

- a. A clear statement of the Council's recommendation;
- b. The Final Report submitted to the Council; and
- c. A copy of the minutes of the Council's deliberation on the policy issue (see Item 10), including all the opinions expressed during such deliberation, accompanied by a description of who expressed such opinions.

13. **Members Vote**

Following the submission of the Members Report and within the time designated by the PDP (Policy Development Process) Time Line, the ccNSO (Country Code Names Supporting Organization) members shall be given an opportunity to vote on the Council Recommendation. The vote of members shall be electronic and members' votes shall be lodged over such a period of time as designated in the PDP (Policy Development Process) Time Line (at least 21 days long).

In the event that at least 50% of the ccNSO (Country Code Names Supporting Organization) members lodge votes within the voting period, the resulting vote will be employed without further process. In the event that fewer than 50% of the ccNSO (Country Code Names Supporting Organization) members lodge votes in the first round of voting, the first round will not be employed and the results of a final, second round of voting, conducted after at least thirty days notice to the ccNSO (Country Code Names Supporting Organization) members, will be employed if at least 50% of the ccNSO (Country Code Names Supporting Organization) members lodge votes. In the event that more than 66% of the votes received at the end of the voting period shall be in favor of the Council Recommendation, then the recommendation shall be conveyed to the Board in accordance with Item 14 below as the ccNSO (Country Code Names Supporting Organization) Recommendation.

14. **Board Report**

The Issue Manager shall within seven days after a ccNSO (Country Code Names Supporting Organization) Recommendation being made in accordance with Item 13 incorporate the ccNSO (Country Code Names Supporting Organization) Recommendation into a report to be approved by the Council and then to be submitted to the Board (the "Board Report"). The Board Report must contain at least the following:

- a. A clear statement of the ccNSO (Country Code Names Supporting Organization) recommendation;

- b. The Final Report submitted to the Council; and
- c. the Members' Report.

15. **Board Vote**

- a. The Board shall meet to discuss the ccNSO (Country Code Names Supporting Organization) Recommendation as soon as feasible after receipt of the Board Report from the Issue Manager, taking into account procedures for Board consideration.
- b. The Board shall adopt the ccNSO (Country Code Names Supporting Organization) Recommendation unless by a vote of more than 66% the Board determines that such policy is not in the best interest of the ICANN (Internet Corporation for Assigned Names and Numbers) community or of ICANN (Internet Corporation for Assigned Names and Numbers).
 - 1. In the event that the Board determines not to act in accordance with the ccNSO (Country Code Names Supporting Organization) Recommendation, the Board shall (i) state its reasons for its determination not to act in accordance with the ccNSO (Country Code Names Supporting Organization) Recommendation in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.
 - 2. The Council shall discuss the Board Statement with the Board within thirty days after the Board Statement is submitted to the Council. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board shall discuss the Board Statement. The discussions shall be held in good faith and in a timely and efficient manner, to find a mutually acceptable solution.
 - 3. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or

modify its Council Recommendation. A recommendation supported by 14 or more of the Council members shall be deemed to reflect the view of the Council (the Council's "Supplemental Recommendation"). That Supplemental Recommendation shall be conveyed to the Members in a Supplemental Members Report, including an explanation for the Supplemental Recommendation. Members shall be given an opportunity to vote on the Supplemental Recommendation under the same conditions outlined in Item 13. In the event that more than 66% of the votes cast by ccNSO (Country Code Names Supporting Organization) Members during the voting period are in favor of the Supplemental Recommendation then that recommendation shall be conveyed to Board as the ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation and the Board shall adopt the recommendation unless by a vote of more than 66% of the Board determines that acceptance of such policy would constitute a breach of the fiduciary duties of the Board to the Company.

4. In the event that the Board does not accept the ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation, it shall state its reasons for doing so in its final decision ("Supplemental Board Statement").
5. In the event the Board determines not to accept a ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation, then the Board shall not be entitled to set policy on the issue addressed by the recommendation and the status quo shall be preserved until such time as the ccNSO (Country Code Names Supporting Organization) shall, under the ccPDP, make a recommendation on the issue that is deemed

acceptable by the Board.

16. **Implementation of the Policy**

Upon adoption by the Board of a ccNSO (Country Code Names Supporting Organization) Recommendation or ccNSO (Country Code Names Supporting Organization) Supplemental Recommendation, the Board shall, as appropriate, direct or authorize ICANN (Internet Corporation for Assigned Names and Numbers) staff to implement the policy.

17. **Maintenance of Records**

With respect to each ccPDP for which an Issue Report is requested (see Item 1), ICANN (Internet Corporation for Assigned Names and Numbers) shall maintain on the Website a status web page detailing the progress of each ccPDP, which shall provide a list of relevant dates for the ccPDP and shall also link to the following documents, to the extent they have been prepared pursuant to the ccPDP:

- a. Issue Report;
- b. PDP (Policy Development Process) Time Line;
- c. Comment Report;
- d. Regional Statement(s);
- e. Preliminary Task Force Report;
- f. Task Force Report;
- g. Initial Report;
- h. Final Report;
- i. Members' Report;
- j. Board Report;
- k. Board Statement;
- l. Supplemental Members' Report; and

m. Supplemental Board Statement.

In addition, ICANN (Internet Corporation for Assigned Names and Numbers) shall post on the Website comments received in electronic written form specifically suggesting that a ccPDP be initiated.

Annex C: The Scope of the ccNSO (Country Code Names Supporting Organization)

This annex describes the scope and the principles and method of analysis to be used in any further development of the scope of the ccNSO (Country Code Names Supporting Organization)'s policy-development role. As provided in **Article IX, Section 6(2)** of the Bylaws, that scope shall be defined according to the procedures of the ccPDP.

The scope of the ccNSO (Country Code Names Supporting Organization)'s authority and responsibilities must recognize the complex relation between ICANN (Internet Corporation for Assigned Names and Numbers) and ccTLD (Country Code Top Level Domain) managers/registries with regard to policy issues. This annex shall assist the ccNSO (Country Code Names Supporting Organization), the ccNSO (Country Code Names Supporting Organization) Council, and the ICANN (Internet Corporation for Assigned Names and Numbers) Board and staff in delineating relevant global policy issues.

Policy areas

The ccNSO (Country Code Names Supporting Organization)'s policy role should be based on an analysis of the following functional model of the DNS (Domain Name System):

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

Within a TLD (Top Level Domain) two functions have to be performed (these are addressed in greater detail below):

1. Entering data into a database (Data Entry Function) and
2. Maintaining and ensuring upkeep of name-servers for the TLD (Top Level Domain) (Name Server Function).

These two core functions must be performed at the ccTLD (Country Code Top Level Domain) registry level as well as at a higher level (IANA (Internet Assigned Numbers Authority) function and root servers) and at lower levels of the DNS (Domain Name System) hierarchy. This mechanism, as RFC (Request for Comments) 1591 points out, is recursive:

There are no requirements on sub domains of top-level domains beyond the requirements on higher-level domains themselves. That is, the requirements in this memo are applied recursively. In particular, all sub domains shall be allowed to operate their own domain name servers, providing in them whatever information the sub domain manager sees fit (as long as it is true and correct).

The Core Functions

1. Data Entry Function (DEF):

Looking at a more detailed level, the first function (entering and maintaining data in a database) should be fully defined by a naming policy. This naming policy must specify the rules and conditions:

- a. under which data will be collected and entered into a database or data changed (at the TLD (Top Level Domain) level among others, data to reflect a transfer from registrant to registrant or changing registrar) in the database.
- b. for making certain data generally and publicly available (be it, for example, through Whois or nameservers).

2. The Name-Server Function (NSF (National Science Foundation (USA)))

The name-server function involves essential interoperability and stability issues at the heart of the domain name system.

The importance of this function extends to nameservers at the ccTLD (Country Code Top Level Domain) level, but also to the root servers (and root-server system) and nameservers at lower levels.

On its own merit and because of interoperability and stability considerations, properly functioning nameservers are of utmost importance to the individual, as well as to the local and the global Internet communities.

With regard to the nameserver function, therefore, policies need to be defined and established. Most parties involved, including the majority of ccTLD (Country Code Top Level Domain) registries, have accepted the need for common policies in this area by adhering to the relevant RFCs, among others RFC (Request for Comments) 1591.

Respective Roles with Regard to Policy, Responsibilities, and Accountabilities

It is in the interest of ICANN (Internet Corporation for Assigned Names and Numbers) and ccTLD (Country Code Top Level Domain) managers to ensure the stable and proper functioning of the domain name system. ICANN (Internet Corporation for Assigned Names and Numbers) and the ccTLD (Country Code Top Level Domain) registries each have a distinctive role to play in this regard that can be defined by the relevant policies. The scope of the ccNSO (Country Code Names Supporting Organization) cannot be established without reaching a common understanding of the allocation of authority between ICANN (Internet Corporation for Assigned Names and Numbers) and ccTLD (Country Code Top Level Domain) registries.

Three roles can be distinguished as to which responsibility must be assigned on any given issue:

- Policy role: i.e. the ability and power to define a policy;
- Executive role: i.e. the ability and power to act upon and implement the policy; and
- Accountability role: i.e. the ability and power to hold the

responsible entity accountable for exercising its power.

Firstly, responsibility presupposes a policy and this delineates the policy role. Depending on the issue that needs to be addressed those who are involved in defining and setting the policy need to be determined and defined. Secondly, this presupposes an executive role defining the power to implement and act within the boundaries of a policy. Finally, as a counter-balance to the executive role, the accountability role needs to be defined and determined.

The information below offers an aid to:

1. delineate and identify specific policy areas;
2. define and determine roles with regard to these specific policy areas.

This annex defines the scope of the ccNSO (Country Code Names Supporting Organization) with regard to developing policies. The scope is limited to the policy role of the ccNSO (Country Code Names Supporting Organization) policy-development process for functions and levels explicitly stated below. It is anticipated that the accuracy of the assignments of policy, executive, and accountability roles shown below will be considered during a scope-definition ccPDP process.

Name Server Function (as to ccTLDs)

Level 1: Root Name Servers

Policy role: IETF (Internet Engineering Task Force), RSSAC (Root Server System Advisory Committee) (ICANN (Internet Corporation for Assigned Names and Numbers))

Executive role: Root Server System Operators

Accountability role: RSSAC (Root Server System Advisory Committee) (ICANN (Internet Corporation for Assigned Names and Numbers)), (US DoC-ICANN (Internet Corporation for Assigned Names and Numbers) MoU (Memorandum of Understanding))

Level 2: ccTLD (Country Code Top Level Domain) Registry Name Servers in respect to interoperability

Policy role: ccNSO (Country Code Names Supporting Organization)

Policy Development Process (ICANN (Internet Corporation for

Assigned Names and Numbers)), for best practices a ccNSO (Country Code Names Supporting Organization) process can be organized

Executive role: ccTLD (Country Code Top Level Domain) Manager

Accountability role: part ICANN (Internet Corporation for Assigned Names and Numbers) (IANA (Internet Assigned Numbers Authority)), part Local Internet Community, including local government

Level 3: User's Name Servers

Policy role: ccTLD (Country Code Top Level Domain) Manager, IETF (Internet Engineering Task Force) (RFC (Request for Comments))

Executive role: Registrant (Registrant)

Accountability role: ccTLD (Country Code Top Level Domain) Manager

Data Entry Function (as to ccTLDs)

Level 1: Root Level Registry

Policy role: ccNSO (Country Code Names Supporting Organization)

Policy Development Process (ICANN (Internet Corporation for Assigned Names and Numbers))

Executive role: ICANN (Internet Corporation for Assigned Names and Numbers) (IANA (Internet Assigned Numbers Authority))

Accountability role: ICANN (Internet Corporation for Assigned Names and Numbers) community, ccTLD (Country Code Top Level Domain) Managers, US DoC, (national authorities in some cases)

Level 2: ccTLD (Country Code Top Level Domain) Registry

Policy role: Local Internet Community, including local government, and/or ccTLD (Country Code Top Level Domain) Manager according to local structure

Executive role: ccTLD (Country Code Top Level Domain) Manager

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

Level 3: Second and Lower Levels

Policy role: Registrant (Registrant)

Executive role: Registrant (Registrant)

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

¹A GNSO (Generic Names Supporting Organization) Supermajority Vote will be required to not initiate a GGP following a formal request from the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

²Approval of GGP recommendations requires a GNSO (Generic Names Supporting Organization) Supermajority Vote.