

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

ICDR Case No. 01-14-0001-5004

Dot Registry, LLC,)
)
Claimant,)
)
v.)
)
Internet Corporation for Assigned Names and Numbers,)
)
Respondent.)

**REQUEST FOR EMERGENCY ARBITRATOR AND
INTERIM MEASURES OF PROTECTION**

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November 19, 2014

Glossary

AGB	gTLD Applicant Guidebook
BGC	ICANN Board Governance Committee
CEP	Cooperative Engagement Period
CPEs	Community Priority Evaluations
ccTLD	country code top-level domain
DNS	Domain Name System
EIU	Economist Intelligence Unit
gTLD	Generic top-level domain
GNSO	Generic Names Supporting Organization
GAC	Governmental Advisory Committee
ICDR	International Dispute Resolution Procedures
ICDR Rules	International Arbitration Rules
ICANN	Internet Corporation for Assigned Names and Numbers
IRP	Independent Review Process
NASS	National Association of Secretaries of State
NGPC	ICANN New gTLD Program Committee

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I. INTRODUCTION

1. Dot Registry, LLC (“Dot Registry”) hereby requests the appointment of an emergency arbitrator, pursuant to Articles 6 and 24 of the International Dispute Resolution Procedures (“ICDR”) International Arbitration Rules (the “ICDR Rules”),¹ to hear and decide Dot Registry’s request for interim measures of protection to enjoin the Internet Corporation for Assigned Names and Numbers (“ICANN”) from auctioning or delegating the rights to the generic top-level domains (“gTLDs” or “strings”) .INC, .LLC and .LLP—strings Dot Registry applied to ICANN to operate—to any third-party during the pendency of the Independent Review Process (“IRP”)² Dot Registry invoked against ICANN on September 21, 2014.³

2. Dot Registry requests emergency interim relief because ICANN recently informed Dot Registry that, absent an order enjoining it from doing so, ICANN will proceed with auctioning the rights to these strings on January 21, 2015, ignoring the fact that Dot Registry is participating in an *ICANN-created* accountability mechanism—namely the IRP—in respect of the strings that will be the subject of the auctions. The IRP is the only dispute resolution mechanism that Dot Registry can pursue against ICANN. If Dot Registry is right (which we firmly believe it is) that ICANN breached its Articles of Incorporation,⁴ Bylaws,⁵ and new gTLD

¹ International Dispute Resolution Procedures International Arbitration Rules (1 June 2014) [Ex. C-ER-01].

² Section 3 of Article IV of ICANN’s Bylaws provides for independent third-party review of actions of the ICANN Board of Directors alleged by an affected party to be inconsistent with ICANN’s Articles of Incorporation or Bylaws. ICANN has appointed the ICDR to administer IRPs. Requests for IRP are referred to an IRP Panel, which is charged with comparing the contested actions of the Board to ICANN’s governing documents. ICANN Bylaws (7 Feb. 2014), Art. IV, § 3 [Ex. C-ER-02].

³ Dot Registry invoked the IRP against ICANN by filing a Notice of IRP and Request for IRP with the ICDR, in accordance with Section 3 of Article IV of ICANN’s Bylaws. The ICDR acknowledged receipt of the Notice of IRP and Request for IRP on September 22, 2014. The Request for IRP is incorporated herein by reference and attached as Annex A.

⁴ ICANN Articles of Incorporation, Art. 4 (as revised, 21 Nov. 1998) [Ex. C-ER-03].

Applicant Guidebook (“AGB”)⁶ in its processing of Dot Registry’s applications to serve as the registry operator for .INC, .LLC and .LLP, there will be no need for the auctions. These strings are unique: there can be only one registry for .INC, .LLC and .LLP. Had ICANN’s processes been properly followed, Dot Registry—the *only* applicant for these strings supported by the National Association of Secretaries of State (“NASS”)⁷ and the offices of State Secretaries (the “Secretaries of State”)—would not be in this position: Dot Registry already would have secured the rights to .INC, .LLC and .LLP and would not be required to participate in any auctions.⁸ Without the relief requested, ICANN will cause irreparable harm to Dot Registry, and render the purpose of the IRP moot. The *status quo* must be preserved pending the outcome of the IRP.

3. Accordingly, Dot Registry requests the appointment of an emergency arbitrator pursuant to Articles 6 and 24 of the ICDR Rules and requests an order—

- Enjoining ICANN from taking any further steps toward delegating the strings .INC, .LLC and .LLP until the conclusion of the IRP proceedings commenced by Dot Registry; *and*
- Requiring ICANN to place the contention sets and each active application for .INC, .LLC and .LLP “on hold” and designate them “ineligible for auction,” pending the outcome of the IRP proceedings commenced by Dot Registry.

⁵ See generally ICANN Bylaws [Ex. C-ER-02].

⁶ See generally gTLD Applicant Guidebook (Version 2012-06-04) [Ex. C-ER-04] [hereinafter, “AGB”].

⁷ Founded in 1904, NASS serves as a medium for the exchange of information among states and for the development of public policy. Members of NASS include the secretary of state or lieutenant governor of each of the 50 states, the District of Columbia and the U.S. territories. See National Association of Secretaries of State, www.nass.org. Among NASS’s business services initiatives is an effort to prevent and assist victims of business identity theft. NASS has worked together with the Identity Theft Protection Association to bring together state government officials, business owners, law enforcement, financial industry representatives and other key stakeholders in the fight against business identity theft. See BusinessIDTheft.org, www.businessidtheft.org.

⁸ See Request of Dot Registry, LLC for Independent Review Process, ¶ 58 (Sept. 21, 2014) [hereinafter, “Claimant’s Request for IRP”].

II. BACKGROUND OF THE DISPUTE

4. The purpose of the IRP is to resolve a dispute between Dot Registry and ICANN arising from certain actions, inaction and decisions of the ICANN Board of Directors (the “Board”) in violation of ICANN’s Articles of Incorporation, Bylaws, AGB and principles of international law, relating to the processing of Dot Registry’s applications to ICANN to administer and operate .INC, .LLC and .LLP.⁹ Specifically, Dot Registry has requested review of certain “Community Priority Evaluations” (“CPEs”)¹⁰ of Dot Registry’s applications conducted by an agent of ICANN, review of the Board’s handling and treatment of the results of the CPEs performed by the Economist Intelligence Unit (“EIU”) pursuant to its contract with ICANN and the subsequent decisions of the ICANN Board Governance Committee (“BGC”) and of the ICANN New gTLD Program Committee (“NGPC”) relating to the results of these CPEs.¹¹ In short: (i) the BGC has refused to reconsider the results of the CPEs—despite the failure of the CPE panels to follow the applicable policies and procedures—and (ii) the NGPC, acting under the delegated authority of the Board, is proceeding with plans to hold auctions on January 21, 2015, to sell the rights to these strings before Dot Registry is able to resolve its dispute with ICANN about the rights to these strings.

A. ICANN’s New gTLD Program

5. This dispute concerns rights at issue arising out of ICANN’s program to introduce new TLDs for the Internet. TLDs appear in the domain names as the string of letters—such as “.com”, “.gov”, “.org” and so on—following the rightmost “dot” in domain names. ICANN is a

⁹ See generally Claimant’s Request for IRP [Annex A].

¹⁰ See *infra* ¶¶ 13-15.

¹¹ See Claimant’s Request for IRP [Annex A].

non-profit California public benefit corporation that is responsible for administering certain aspects of the Internet’s domain name system (“DNS”).¹² ICANN delegates responsibility for the operation of each TLD to a registry operator, which contracts with consumers and businesses that wish to register Internet domain names in such TLD.¹³ ICANN is subject to international and local law,¹⁴ and is required to achieve its mission in conformity with the principles expressly espoused in its Articles of Incorporation and Bylaws, including the principles of transparency, fairness, accountability and promotion of competition with respect to the DNS.¹⁵

6. In 2012, ICANN initiated a New gTLD Internet Expansion Program (the “New gTLD Program”) to add new gTLDs to the Internet. This program represents the first time since 2003 that ICANN has allowed Internet stakeholders to apply to administer and operate new gTLDs. The New gTLD Program is the product of several years of planning and considerable dialogue

¹² See ICANN Bylaws, Art. I § 1 (describing ICANN’s “Mission and Core Values”) [Ex. C-ER-02].

¹³ There are several types of TLDs within the DNS. The most prevalent TLDs are country-code TLDs (“ccTLDs”) and generic TLDs (“gTLDs”). The former, ccTLDs, are two-letter TLDs allocated to countries, usually based upon their two-letter ISO codes. In contrast, gTLDs are privately managed, may include any combination of three or more letters and may be “open” for any use or “closed” and restricted for special use as determined by the registry operator. The original gTLDs were .com, net, .org, .gov, mil, and .edu. The first three are open gTLDs and the last three listed are closed gTLDs. Certain categories of potential gTLDs are protected and cannot be delegated, for example combinations of letters that are similar to any ccTLD and gTLDs on the reserve list included in the new gTLD Guidebook. See AGB Module 2.2.1.2.1 *et sec*, [Ex. C-ER-04]. Under the ICANN New gTLD Program, any “established corporations, organizations or institutions in good standing” may apply for gTLDs. In addition, a new gTLD may be a “community-based gTLD”, which is “a gTLD that is operated for the benefit of a clearly delineated community,” or fall under the category “standard gTLD”, which “can be used for any purpose consistent with the requirements of the application and evaluation criteria, and with the registry agreement.” See *id.* at 1.2.1 (“Eligibility”); *id.* at 1.2.3.1 (“Community-Based Designation - Definitions”). See also, Claimant’s Request for IRP at ¶¶ 13-15 [Annex A] (describing Standard vs. Community applications).

¹⁴ See ICANN Articles of Incorporation, Art. 4 [Ex. C-ER-03]; see also *Declaration of the Independent Review Panel in the matter of an Independent Review Process between ICM Registry, LLC and ICANN*, ICDR Case No. 50 117 T 00224 08, ¶ 152 (19 February 2010) [Ex. C-ER-05] [hereinafter “ICM Declaration”], in which the Panel concluded that “the provision of Article 4 of ICANN’s Articles of Incorporation prescribing that ICANN ‘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,’ requires ICANN to operate in conformity with relevant general principles of law (such as good faith) as well as relevant principles of international law, applicable international conventions, and the law of the State of California.”

¹⁵ ICANN Bylaws, Art. I, § 2, (“Core Values”) [Ex. C-ER-02].

with Internet stakeholders around the world.¹⁶ Extensive input from experts in the Generic Names Supporting Organization (“GNSO”) and four years of public comments and revisions to the AGB created an expectation that the New gTLD Program would be unbiased and predictable, taking its legitimacy from the years of careful development and the participation of stakeholders and the public. The program was expected to be able to run on its own through predictable and approved examination functions laid out in the AGB and executed by evaluation panels, some of which would be comprised of independent experts appointed by ICANN.¹⁷ Because the Internet is a global resource, it is vital that the New gTLD Program be carried out in accordance with the rules and procedures that Internet stakeholders so carefully negotiated with ICANN and that ICANN approved.

B. Applying to Operate a New gTLD

7. Each applicant for a gTLD must submit an application to ICANN containing extensive information about the applicant’s qualifications and capability to operate the gTLD and pay a \$185,000 application fee per string. The New gTLD Program also requires applicants to designate their applications as either community-based (“Community Applications”) or non-community-based (“Standard Applications”).¹⁸ An applicant filing a Community Application must have an “ongoing relationship with a clearly-delineated community,” apply for “a gTLD

¹⁶ According to the website of the new gTLD program, the Generic Names Supporting Organization, a Supporting Organization that provides advice to the ICANN Board, conducted a study from 2005-2007 and produced recommendations to the ICANN Board on implementing a new gTLD program. Based upon the resulting report, ICANN developed the first version of the New gTLD Guidebook in 2008. The Guidebook has gone through several iterations, including at least 5 separate versions, all of which were available for public comment, until the final Applicant Guidebook based on the GNSO recommendations and public comments was produced in June 2012. New Generic Top Level Domains, “About the Program,” at <http://newgtlds.icann.org/en/about/program>, [Ex. C-ER-06].

¹⁷ AGB, Module 4.2.2 [Ex. C-ER-04].

¹⁸ *Id.* at 1.2.3.1. *See also*, Claimant’s Request for IRP at ¶¶ 13-15 [Annex A] (describing Standard vs. Community applications).

string strongly and specifically related to the community,” propose “dedicated registration and use policies” that provide “appropriate security verification procedures,” and demonstrate “written endorsement in support of the application” from “one or more established institutions representing the community.”¹⁹

8. All complete applications, Standard and Community alike, undergo a period of “Initial Evaluation,” in which six separate panels created by ICANN assess each application against criteria relating to the applied-for string and the applicant’s technical, operational and financial capabilities to operate a registry.²⁰ Each application that passes Initial Evaluation for a particular string (or for a confusingly similar string) is grouped together into what ICANN calls a “contention set” to compete for the right to administer and operate the string. The AGB sets forth various methods for resolving the “contention” among the competing applications, with auction being the mechanism of last resort.²¹ ICANN has designated the strings .INC, .LLP and .LLC as “in auction.” When the contention has been resolved, ICANN negotiates and enters into a registry agreement with the prevailing applicant for the gTLD and proceeds with delegating the right to administer and operate the string to that party.

9. Standard Applicants may use their strings for any purpose consistent with ICANN’s standard registry agreement. Community Applicants are contractually bound to operate the gTLD consistent with specific protections and restrictions described in the applicant’s Community Application.²² In large part, because of this distinction, “the ROI [return on

¹⁹ AGB, Module 1.2.3.1 [Ex. C-ER-04].

²⁰ See AGB, Module 1.1.2. [Ex. C-ER-04]. See generally Draft New gTLD Evaluation Program – Evaluation Process [Ex. C-ER-07] (excerpt from AGB, Module 1).

²¹ AGB, Module 4.3 [Ex. C-ER-04].

²² See *id.*, at 1.2.3.2.

investments] on ‘open’ applications is much higher than that of ‘restricted’ applications, giving non-Community Applicants a ‘near-definite’ assurance to win an auction unless a Community Applicant bids higher than their expected ROI.”²³ This means that Community Applicants face a significant—if not fatal—disadvantage when string contention is resolved by an auction. A Community Applicant may not change its application from Community-based to Standard.²⁴

10. In order to correct for this disadvantage, ICANN created the CPE, a process whereby a third-party evaluator evaluates an application designated as a Community Application against specific criteria set forth in the AGB to determine whether it is sufficiently representative of the community on behalf of which it applied that its application should be awarded priority over all Standard Applicants for the gTLD.²⁵ It is an elective process in which Community Applicants are invited to participate at a cost of \$22,000 per application. A Community Applicant that scores at least 14 out of 16 possible points is awarded priority and “wins” the right to operate the gTLD. ICANN refunds prevailing applicants the \$22,000 cost of participating in the CPE and refunds a portion of the \$185,000 application fee paid by each “losing” Standard Applicant.²⁶ If a Community Applicant scores fewer than 14 points in the CPE (and the parties do not otherwise

²³ Constantine Roussos, “How ICANN’s New gTLD Auctions can serve Public Interest and Promote Competition, Innovation and Diversity,” (30 Jan. 2014), available at <http://mytld.com/articles/3023-how-icann-new-gtld-auctions-serve-public-interest-promote-competition-innovation-diversity.html> [Ex. C-ER-08]. Furthermore, if community applicants chose to overpay at auction in order to compete with Standard Applicants, it would likely bankrupt the registry. *See id.* (“If Community Applicants choose to outbid non-community Applicants beyond their expected ROI, the unintended consequence would be the Community Applicant would face a certainty of registry failure since they would have spent all their monies which would otherwise be used for operations and marketing of the gTLD and given the restrictive nature of their gTLD would face an impossible feat in generating profits that would bring a positive ROI after over-bidding in the ICANN Auction.”).

²⁴ *See* AGB, Module 1.2.3.3 [Ex. C-ER-04].

²⁵ *See* AGB, Module 4.2 [Ex. C-ER-04].

²⁶ AGB, Modules 4.2.2, 1.5.1 (indicating that following a successful CPE, non-prevailing Standard Applicants will be entitled to a 20% refund or USD 37,000 each) [Ex. C-ER-04]. *See also* Request for IRP at ¶ 26 [Annex A] (describing the investment required in order to undergo CPE).

resolve the contention privately), ICANN holds an auction for the string, where the highest bidder wins the string and ICANN collects all of the proceeds from the auction.²⁷

C. Dot Registry's Applications for New gTLDs

11. Dot Registry is one of the applicants participating in the new gTLD Program. In early 2012, Dot Registry submitted *Community Applications*—with the support of NASS and the Secretaries of State—to ICANN for the new gTLD strings .INC, .LLC and .LLP.²⁸ It is the only Community Applicant for these strings. Dot Registry chose to submit Community Applications for these strings because its founders believed that the protections and restrictions associated with Community Applications were essential safeguards to protect businesses and consumers from misuse of the strings. Accordingly, Dot Registry worked with NASS and the offices of the Secretaries of State, which are responsible for overseeing business filings and formations, and for chartering businesses that wish to operate within the state, to establish registration guidelines. Dot Registry also made a commitment to NASS and the Secretaries of State to combat corporate identity theft and fraud on consumers by making these corporate identifier strings available *exclusively to registered U.S. businesses*, as verified through each registrant's Office of the Secretary of State or other regulatory authority. Furthermore, Dot Registry is prepared to do this: it has developed verification software to work in real-time with the database platforms of

²⁷ AGB, Module 4.2.3 [Ex. C-ER-04]. To date, ICANN has hosted seven public auctions, netting ICANN over \$26 million. See New gTLD Auction Proceeds Page (22 Oct. 2014), <http://newgtlds.icann.org/en/applicants/auctions/proceeds>, [Ex. C-ER-09]. Of the strings auctioned publicly, the most desirable was .TECH, which was sold to Radix Registry for \$6.76 million. See New gTLD Auction Results (22 Oct. 2014) <https://gtdresult.icann.org/application-result/applicationstatus/auctionresults>, [Ex. C-ER-10]. The string most comparable to .INC, .LLC and .LLP in terms of value was .LTD, which was purchased by Donuts Inc. in a private auction for an undisclosed amount. See Kevin Murphy, "Donuts wins .ltd gTLD contest," Domain Incite (15 Aug. 2014) <http://domainincite.com/17169-donuts-wins-ltd-gtld-contest>, [Ex. C-ER-11].

²⁸ See New gTLD Application ID: 1-880-35979 (.INC) [Ex. C-ER-12]; New gTLD Application ID: 1-880-17627 (.LLC) [Ex. C-ER-13]; New gTLD Application ID: 1-880-35508 (.LLP) [Ex. C-ER-14].

each of the offices of Secretaries of State in order to ensure that Dot Registry's registration policies remain current with state statutes.

12. Each of Dot Registry's applications for these strings passed Initial Evaluation and was grouped into contention sets with the applications of Standard Applicants that passed Initial Evaluation. Again, Dot Registry was and remains *the sole Community Applicant* for each of these strings.

13. On February 19, 2014, Dot Registry was invited by ICANN to participate in the CPE process. Dot Registry paid ICANN a total of \$66,000. The EIU, a branch of the Economist Group that specializes in composing country reports and performing industry analyses, economic risk forecasts and providing other research assistance to industry and governmental clients,²⁹ performed CPEs for .INC, .LLC and .LLP, under its contract with ICANN. In an evaluation that deviated drastically from the scoring criteria set forth in the AGB, the EIU denied Dot Registry's applications community priority.³⁰ Key to this result was the determination by the EIU that, although the three corporate identifiers satisfy the elements of "community" required by the AGB, they cannot possibly be representative of "clearly delineated" communities because corporations, limited liability companies and limited liability partnerships categorize themselves according to the industry in which they engage rather than corporate form.³¹

²⁹ See The Economist Intelligence Unit – About us, available at <http://www.eiu.com/home.aspx>, [Ex. C-ER-15] ("Created in 1946, we have nearly 70 years' experience in helping businesses, financial firms and governments to understand how the world is changing and how that creates opportunities to be seized and risks to be managed.").

³⁰ See Claimant's Request for IRP at ¶¶ 26-47 (providing examples of how the EIU's evaluation deviated from the AGB and ICANN's Core Principles).

³¹ See, e.g. New gTLD Program Community Priority Evaluation Report – Application ID 1-880-35979 (.INC), p. 3, 4 (11 June 2013) ("these corporations would typically not associate themselves with being part of the community as defined by the applicant.") [hereinafter "CPE Evaluation for .INC"], [Ex. C-ER-16]. In order to establish "community" for the purposes of the CPE, the AGB requires that each community application define a "clearly delineated, organized and pre-existing community" that is "of considerable size and longevity." AGB, Module 4.2.3 [Ex. C-ER-04]. The EIU evaluators acknowledged with regard to the three U.S. business communities that Dot

14. On June 26, 2014, Dot Registry filed a “Reconsideration Request,” with ICANN’s BGC, requesting that the BGC reconsider both (i) the EIU’s scoring of Dot Registry’s Community Applications, on the basis that the EIU failed to comply with ICANN’s policies and procedures in rendering its decision, and (ii) the acceptance and treatment of the CPE results by ICANN staff.³² The Reconsideration Request is the most basic of ICANN’s accountability mechanisms: “any party materially affected by an action of ICANN may request review or reconsideration of that action by the Board.”³³ Dot Registry argued that the EIU had acted in contravention of ICANN procedures and policies, because it based portions of its evaluations upon letters of opposition that were not verified or not public; its evaluations were based heavily on undisclosed outside “research;” it “double-counted” negative elements by relying on discounted points early in the evaluations to reduce points later in the evaluations; it failed to evaluate the applications

Registry identified (i) “[w]hile broad, the community is clearly defined,” (ii) “responsibility for corporate registrations and the regulations pertaining to corporate formation are vested in each individual US state,” and (iii) “the community as defined in the application is of considerable size.” CPE Evaluation for .INC at pp. 2, 3 [Ex. C-ER-16]. Nonetheless, the EIU found that the communities were not “communities” per the AGB because “firms are typically organized around specific industries, locales and other criteria not related to the entities [sic] structure as an INC.” *Id.* at pp. 2-4.

³² See Claimant’s Request for IRP at ¶¶ 26-47 [Annex A].

³³ Bylaws, Art. IV § 2(1) [Ex. C-ER-02]. Applicants under the New gTLD Program can request reconsideration of either staff action, in which case the BGC makes a “final determination” on the Reconsideration Request, or of Board action, in which case the BGC “recommends” that the Reconsideration Request be granted or denied, and the NGPC makes a final decision to accept or reject the BGC’s recommendation. *Id.* at Art. IV, § 2(3)(f)-(g); see also *id.* at Art. IV, § 2(15) (authorizing the BGC to make a final determination with regard to reconsideration of staff action). The Board also accepts Reconsideration Requests for “challenges to determinations rendered by panels formed by third party service providers...where it can be stated that a Panel failed to follow the established policies or procedures in reaching its determination, or that staff failed to follow its policies and procedures in accepting that determination.” Determination of the BGC – Reconsideration Requests 14-30, 14-32, 14-33, pp. 7-8 (24 July 2014) [hereinafter, “BGC Determination”] [Ex. C-ER-17].

for each string independently; and it did not apply the AGB requirements in order to reach its conclusions.³⁴

15. In a declaration published on July 24, 2014, the BGC denied Dot Registry's Reconsideration Request largely because it found that to the extent the EIU had not followed ICANN policies, Dot Registry had not presented evidence that the EIU's errors *caused* Dot Registry to fail CPE. Considering that many of Dot Registry's complaints related to the EIU's failure to disclose elements of its reasoning, it is unsurprising that Dot Registry was not able to present evidence beyond the EIU's communications with Dot Registry in the context of the evaluations and the EIU's final determinations. The BGC further determined that because Dot Registry remained in contention and could pursue the corporate identifier strings at the auction stage, it had not been materially harmed by the EIU's determination—a conclusion that, at its very core, disregards the very essence of what is represented by a Community Application and an applicant's election to pursue a Community Application.

16. On August 28, 2014, Dot Registry invoked ICANN's Cooperative Engagement Process ("CEP"), a process created by ICANN to resolve or narrow the issues that a complainant is contemplating bringing in an IRP, in order to attempt to reach an amicable resolution of the complaints Dot Registry raised in its Reconsideration Request.³⁵ Despite numerous requests that

³⁴ See generally Reconsideration Request for Application No. 1-880-35979 (.INC) (11 Apr. 2013) [Ex. C-ER-18]; Reconsideration Request for Application No. 1-880-17627 (.LLC) (11 Apr. 2013) [Ex. C-ER-19]; Reconsideration Request for Application No. 1-880-35508 (.LLP) (11 Apr. 2013) [Ex. C-ER-20].

³⁵ Although CEP is an elective dispute resolution process for complainants, the CEP guidelines incorporated by reference into ICANN's Bylaws provide that within three business days of ICANN receiving a request for IRP, "ICANN *shall* designate a single executive to serve as the point of contact for the resolution of the issue, and provide notice of the designation to the requestor;" "the requestor and ICANN's representatives *shall* confer by telephone or in person to attempt to resolve the issue and determine if any issues remain for the [IRP];" and, if the initial meeting does not resolve the issue, the requestor and ICANN's representatives "*shall* further meet in person . . . within 7 (seven) calendar days after such initial conference." Cooperative Engagement Process – Requests for Independent Review (11 Apr. 2013) [Ex. C-ER-21]; ICANN Bylaws, Art. IV, § 3(14) [Ex. C-ER-02].

ICANN suspend processing the contention sets for .INC, .LLC and .LLP and engage with Dot Registry in CEP, a process ICANN is bound to participate in by its Bylaws, Dot Registry received no response from ICANN.³⁶ ICANN’s silence left Dot Registry no choice but to file an IRP—the final and only remaining ICANN accountability mechanism it could pursue—in order to preserve its claims against ICANN.³⁷ Only after the ICDR acknowledged receipt of Dot Registry’s Notice of IRP on September 22, 2014, did ICANN respond to Dot Registry’s repeated attempts to utilize ICANN’s CEP.

17. Thereafter, ICANN has gone back and forth between placing the contention sets and Dot Registry’s applications for .INC, .LLC and .LLP “on hold pending accountability mechanism”—meaning that these strings would not proceed to auction or be delegated during the pendency of the accountability mechanism—and placing them into active contention.³⁸ On September 29, 2014, Dot Registry received “Auction Notification Reminders” from ICANN staff, instructing Dot Registry to file certain paperwork if it wished to participate in the auctions

³⁶ See, e.g., Email from Shaul Jolles to John Jeffrey (10 Sept. 2014) [Ex. C-ER-22]; Letter from Arif Ali to John Jeffrey, Appendix B (17 Sept. 2014) [Ex. C-ER-23].

³⁷ The IRP is a mechanism by which “any person materially affected by a decision of 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.” Bylaws, Art. IV § 3 (2) [Ex. C-ER-02]; see generally *id.* at Art. IV § 3. The IRP is the final recourse under ICANN’s Bylaws and the final recourse to any legal remedy for applicants under the New gTLD Program. See AGB, Module 6.6 (waiving, on behalf of New gTLD Program applicants, all recourse to remedy from any court “OR ANY OTHER JUDICIAL FORA” against ICANN or “THE ICANN AFFILIATED PARTIES,” “PROVIDED, THAT APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN’S BYLAWS FOR THE PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION.”) [Ex. C-ER-04].

³⁸ ICANN placed the contention sets for .INC, .LLC and .LLP “on hold” during the pendency of the BGC’s consideration of Dot Registry’s Reconsideration Request and for a period of time thereafter; however, on September 16, 2014, 11 days after Dot Registry submitted its Request for CEP to ICANN, it received a notice through ICANN’s customer portal that contained a link to ICANN’s “New gTLD Contention Set Status” webpage, which indicated that ICANN had changed the status of the contention sets for the strings .INC, .LLC and .LLP from “on-hold,” and ineligible for auction as a result of a pending accountability mechanism, to “active” (and, therefore, eligible for auction) and notified Dot Registry that the auctions had been rescheduled for January 21, 2015 (instead of December 17, 2014). See letter from Arif Ali to John Jeffrey (17 Sept. 2014), Appendixes A, B [Ex. C-ER-23].

for the strings, each of which is currently scheduled for January 21, 2015.³⁹ Dot Registry filed the paperwork under protest and asked ICANN to confirm that the strings would not be auctioned while Dot Registry's IRP involving these strings was underway.⁴⁰ Thereafter, ICANN changed the status of Dot Registry's applications to "on hold."⁴¹

18. On October 29, 2014, however, ICANN's outside counsel contacted Dot Registry to inform it that ICANN would proceed with holding an auction for the strings, absent an injunction from the IRP Panel or an emergency arbitrator. On or about this date, Dot Registry learned that only its applications for each string were listed by ICANN as "on hold," while every other applicant was listed as "in auction."⁴² This simply did not make any sense. According to the AGB and ICANN's "Update on Application Status and Contention Sets Advisory" (the "Advisory"), contention sets cannot proceed to auction unless all remaining strings in the set proceed together.⁴³ ICANN should have placed the *entire contention set* for each of the three strings "on-hold," pending "ICANN accountability mechanisms" on the basis that "pending

³⁹ See, e.g., Letter from Arif Ali to John Jeffrey, Appendix B (17 Sept. 2014) [Ex. C-ER-23].

⁴⁰ Letter from Arif Ali, Weil Gotshal & Manges, LLP, to John Jeffrey, 2 (30 Sept. 2014) [Ex. C-ER-24].

⁴¹ The dates on the bottom left corner of ICANN's New gTLD Contention Set Status pages for the contention sets for .INC, .LLC and .LLP do not necessarily reflect the date ICANN published the information on its public website. See Screen Shot of ICANN New gTLD Contention Set Status for .INC (26 Sept. 2014) [Ex. C-ER-25]; Screen Shot of ICANN New gTLD Contention Set Status for .LLC (26 Sept. 2014) [Ex. C-ER-26]; Screen Shot of ICANN New gTLD Contention Set Status for .LLP (26 Sept. 2014) [Ex. C-ER-27] (each listing Dot Registry's application as "On Hold Pending Accountability Mechanism" and the entire contention set as "On Hold Pending Accountability Mechanism" as of September 26, 2014).

⁴² See Screen Shot of ICANN New gTLD Contention Set Statuses for .INC Applicants (7 Nov. 2014) [Ex. C-ER-28]; Screen Shot of ICANN New gTLD Contention Set Statuses for .LLC Applicants (7 Nov. 2014) [Ex. C-ER-29]; Screen Shot of ICANN New gTLD Contention Set Statuses for .LLP Applicants (7 Nov. 2014) [Ex. C-ER-30] (listing every active applicant in each of the contention sets, except for Dot Registry, as "in auction").

⁴³ AGB, Module 1.1.2.10 (indicating that each applicants in a contention set must complete all steps prior to a string contention resolution mechanism such as auction, before the contention set, as a whole, can proceed); Update on Application Status and Contention Sets Advisory (4 Sept. 2014), <http://newgtlds.icann.org/en/applicants/advisories/application-contention-set-14mar14-en>, [Ex. C-ER-31] ("Applications in the set cannot complete certain Program processes such as Auction" until such status is cleared.).

activities that may impact the processing of the applications in the set” were in process.⁴⁴ In other words, ICANN has itself acknowledged that it is inappropriate to proceed with an auction when an IRP is ongoing, because such activities have the potential to impact the processing of the applications in the contention set.

19. Notwithstanding this, on or about November 14, 2014, ICANN changed the status of each of Dot Registry’s applications for .INC, .LLC and .LLP to “in auction.”⁴⁵ As of the date of this Request for Emergency Relief, the status of each of the contention sets, and each of the active applications therein, for the corporate identifier strings .INC, .LLC and .LLP, is listed by ICANN as “in auction.”⁴⁶

20. In light of ICANN’s blatant disregard of the integrity of its own accountability mechanisms absent an order requiring it to comply with them, and in light of the timeline leading up to the auction of the strings which are the subject of this dispute, Dot Registry is forced to seek the appointment of an emergency arbitrator to issue such an order.

21. Dot Registry’s IRP requests, among other relief, that the Panel recommend that ICANN appoint and convene an unbiased third-party CPE Panel, independent of both the EIU and ICANN, to review and score Dot Registry’s community applications for .INC, .LLC and .LLP under the provisions of the AGB. Any such declaration would be moot if ICANN proceeded

⁴⁴ *Id.* [Ex. C-ER-31].

⁴⁵ See Screen Shot of ICANN New gTLD Contention Set Status for .INC (18 Nov. 2014) [Ex. C-ER-32]; Screen Shot of ICANN New gTLD Contention Set Status for .LLC (18 Nov. 2014) [Ex. C-ER-33]; Screen Shot of ICANN New gTLD Contention Set Status for .LLP (18 Nov. 2014) [Ex. C-ER-34] (each no longer listing Dot Registry’s applications as “on hold”).

⁴⁶ See Screen Shot of ICANN New gTLD Contention Set Statuses for the .INC, .LLC and .LLP Applicants (18 Nov. 2014) [Ex. C-ER-35] (listing each active applicant in each contention set as “in auction”).

with or completed the gTLD auction or delegation process for .INC, .LLC and .LLP before Dot Registry can be fully heard in the IRP proceeding.

III. STANDARD FOR INTERIM MEASURES OF PROTECTION UNDER ARTICLE 6

22. The emergency arbitrator has broad authority to “order or award any interim or conservancy measures that the emergency arbitrator deems necessary” and the order or award is “binding on the parties,” pursuant to the Article 6 of the ICDR Rules.⁴⁷ A party seeking emergency relief must describe the relief sought, explain why it is entitled to such relief and demonstrate why the relief is required on an emergency basis.⁴⁸ Little other guidance on the applicable standards is available under the ICDR Rules.

23. It is well settled under international law, however, as reflected across numerous dispute settlement regimes, that interim emergency relief is appropriate where the decision-maker applied to has *prima facie* jurisdiction over the parties and the dispute; the requested interim relief protects an existing right; the interim relief is necessary; and it is urgent.⁴⁹ Finally, some tribunals have undertaken a limited inquiry to assess whether parties requesting interim measures

⁴⁷ ICDR Rules, Art. 6(4) [Ex. C-ER-01] (Interim measures include “injunctive relief and measures for the protection or conservation of property.”); *see also*, ICDR Rules, Art. 24(1) (“At the request of any party, the tribunal may order or award any interim or conservatory measures it deems necessary, including injunctive relief and measures for the protection or conservation of property”). *C.f.*, Convention on the Settlement of Investment Disputes between States and Nationals of Other States [Washington Convention], Art. 47 (“Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party”) [Ex. C-ER-36]; ICSID Arbitration Rules, Chapter V, Rule 39(1) (“At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.”) [Ex. C-ER-37].

⁴⁸ ICDR Rules, Art. 6(1) [Ex. C-ER-01].

⁴⁹ *See, e.g., Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 on Burlington Oriente’s Request for Provisional Measures (29 June 2009) (interpreting the interim relief provisions under the Washington Convention and the ICSID Rules and laying out the four-part test) [Ex. C-ER-38] [hereinafter, “*Burlington Resources*”].

have established a *prima facie* case on the merits.⁵⁰ We address each of these factors in turn below.

A. The Emergency Arbitrator has *Prima Facie* Jurisdiction to Award Interim Relief

24. The emergency arbitrator has the authority to grant interim relief after the arbitration has been commenced, but before the arbitral tribunal has been constituted, pursuant to Article 6 of the ICDR Rules.⁵¹ The relief is binding on the parties unless and until the fully constituted IRP Panel reconsiders, modifies or vacates such interim award or order.⁵² Given that Dot Registry filed its Notice of IRP and Request for IRP on September 21, 2014, the panel of three IRP Panelists has not been appointed as of the date of this request,⁵³ and both parties consented to the application of Article 6 of the ICDR Rules,⁵⁴ the emergency arbitrator has *prima facie* jurisdiction to grant interim relief on an emergency basis, including injunctive relief.⁵⁵

⁵⁰ See generally GARY B. BORN, 2 INTERNATIONAL COMMERCIAL ARBITRATION 2478-2481 (2014) [Ex. C-ER-39].

⁵¹ ICDR Rules, Art. 6(1) (“A party may apply for emergency relief before the constitution of the arbitral tribunal by submitting a written notice to the Administrator and to all other parties setting forth the nature of the relief sought, the reasons why such relief is required on an emergency basis, and the reasons why the party is entitled to such relief.”), [Ex. C-ER-01]. ICANN expressly consented in writing to the application of Article 6 of the ICDR Rules to this IRP proceeding. See Email from Jeffrey LeVee, Jones Day, to Arif Ali, Weil, Gotshal & Manges, LLP (20 Oct. 2014) [Ex. C-ER-40].

⁵² See ICDR Rules, Art. 6(5) [Ex. C-ER-01].

⁵³ On October 31, 2014, Dot Registry timely nominated an arbitrator to serve on the IRP Panel. ICANN has until November 20, 2014, to nominate an arbitrator. Once the two party-appointed arbitrators have been appointed, those two arbitrators will select a chair. See Email from Jeffrey LeVee, Jones Day to Erin Yates, Weil, Gotshal & Manges, LLP (17 Oct. 2014) (containing the parties agreed method for appointing the IRP Panel) [Ex. C-ER-41].

⁵⁴ See Email from Jeffrey LeVee, Jones Day, to Arif Ali, Weil, Gotshal & Manges, LLP (29 Oct., 2014) [Ex. C-ER-40].

⁵⁵ ICDR Rules, Art. 6(4) (“The emergency arbitrator shall have the power to order or award any interim or conservancy measure the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property.”) [Ex. C-ER-01].

B. The Requested Relief is Necessary to Protect the Rights at Issue in the IRP

25. Dot Registry submits that an order enjoining ICANN from auctioning or delegating .INC, .LLC and .LLP is necessary in order to protect Dot Registry's procedural rights in the IRP, to protect the integrity of the IRP process and to preserve the *status quo* at the time Dot Registry filed the IRP.

26. **First**, Dot Registry is entitled to a dispute resolution process that is capable of providing a meaningful remedy. Under general principles of law, which form part of international law,⁵⁶ a party to an international dispute resolution process such as this one has a right to preserve the "effectivity of a possible future award."⁵⁷ When a party enters into a dispute resolution proceeding that is equipped to render a type of relief, that party has a right to protect the object or the ability for that relief to eventually be rendered. At the most basic level, in a dispute over ownership of an asset, a petitioner has a right to ensure that the respondent does not dispose of the asset before the conclusion of the proceeding.⁵⁸ This is particularly true where the asset in dispute is unique.⁵⁹

⁵⁶ See Art. 38 of the Statute of the International Court of Justice (identifying sources of international law) [Ex. C-ER-42]. As noted above, a previous IRP Panel has determined that ICANN is bound by international law, including general principles of law such as good faith.

⁵⁷ See, e.g., *Burlington Resources*, ¶ 71 ("Thus, at least prima facie, a right to . . . the protection of the effectivity of a possible future award" could exist under the circumstances) [Ex. C-ER-38]. The right to an effective remedy is a general principle of international law, Universal Declaration of Human Rights, Art. 8 ("Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law") [Ex. C-ER-43].

⁵⁸ See, e.g., UNCITRAL Arbitration Rules, Art. 26 (2010) ("An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to.... (c) Provide a means of preserving assets out of which a subsequent award may be satisfied") [Ex. C-ER-44].

⁵⁹ See, e.g., *Maffezini v. Kingdom of Spain*, Procedural Order No. 2 in ICSID Case No. ARB/97/7 of 28 Oct. 1999, 16 ICSID Rev.-For. Inv. L.J. 207, ¶14 (2001) ("[a]n example of an existing right would be an interest in a piece of property, the ownership of which is in dispute. A provisional measure could be ordered to require that the property not be sold or alienated before the final award of the arbitral tribunal. Such an order would preserve the *status quo* of the property, thus preserving the rights of the party in the property") [Ex. C-ER-45].

27. The purpose of this IRP is to allow for independent review of the Board's decisions to, among other things, deny reconsideration of Dot Registry's CPE determination. If the IRP Panel ultimately finds for Dot Registry, orders ICANN to reject the CPE results and declares that Dot Registry's applications should have been awarded community priority status according to the criteria set forth in the AGB (or, in the alternative, new evaluators determine that Dot Registry's applications prevail), then Dot Registry—as the only Community Applicant—would automatically win the rights to operate these strings. If the auction is permitted to continue, in a best-case scenario, Dot Registry will be forced to undertake significant unnecessary expenditures to protect its interest in the strings. Dot Registry should not be forced to participate in a dispute resolution mechanism in which it *never would have needed to participate in the first place*, had the EIU properly applied the CPE scoring criteria or had the Board acted consistently with ICANN's Articles of Incorporation, Bylaws, AGB and principles of international law.

28. Instead, Dot Registry is being required to participate in auctions in which it will have to compete against Standard Applicants funded by major companies like Google, Donuts and Radix. This is patently unfair. If one of Dot Registry's competitors is awarded any of these strings during the pendency of the IRP, there will be no remedy available to Dot Registry in the IRP in any event. Even if the IRP Panel declared that Dot Registry's strings should be re-evaluated and each application passed CPE, the strings would not be available—it would be too late. The requested interim relief will ensure that the strings—the property at issue in this IRP—remain available without prejudice to Dot Registry's rights.

29. **Second**, Dot Registry is entitled to a dispute resolution process that retains its procedural integrity, including a meaningful opportunity to be heard by a panel that is empowered to

evaluate the claims and evidence at issue without one party—the party that created the dispute resolution process and requires participation in it—unilaterally taking actions to render the dispute resolution process moot. ICANN has made the IRP a new gTLD applicant’s *only recourse*. By submitting a new gTLD application to ICANN, an applicant “agrees to . . . without modification” a significant waiver of legal rights, in exchange for the right to challenge a final decision of ICANN through the accountability mechanisms set forth in its Bylaws—the IRP being the final step in an escalating series of accountability mechanisms.⁶⁰ Dot Registry has undertaken extensive preparations to apply for and to operate these strings, and applied to ICANN (at a cost of \$185,000 per string) under these terms and conditions with the understanding that ICANN, the caretaker of an immensely important global resource, would participate in good faith in the very processes and accountability mechanisms it created.

30. Instead, ICANN has refused to stay the auction, unless Dot Registry can produce an order from the IRP Panel or an emergency arbitrator requiring it to do so. Absent such an order, the auction will proceed and in mid-December 2014, Dot Registry will be required to make a significant financial deposit⁶¹ to participate in the auctions. The paperwork that Dot Registry

⁶⁰ AGB, Module 6.6 (“APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FOR A [SIC] ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION. . . . PROVIDED, THAT APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN’S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION.”) [Ex. C-ER-04].

⁶¹ ICANN requires participants in its auctions to make a *minimum* deposit of \$100,000 times the number of applicants in the contention set or \$500,000, whichever is lower. Based on current participation rates for each string (nine applicants for .INC, eight applicants for .LLC and three applicants for .LLP), Dot Registry will be required to deposit a minimum of \$1.3 million with ICANN. A bidder, however, may only bid up to five times the amount of its deposit, unless the bidder deposits with ICANN at least \$2 million per string. Given that many strings have gone for several million dollars at auction, the demand for these strings and the deep-pocketed competing applicants for these strings, it is not unreasonable to think that Dot Registry would need to deposit \$6 million with ICANN in order to ensure that it is able to compete for these strings.

filed on September 30, 2014, out of an abundance of caution to preserve its rights to the strings, will bind Dot Registry to participate in the auctions scheduled for January 21, 2015. Again, Dot Registry would not be required to participate in the auction in the first place had ICANN not violated the very standards and procedures it put in place to evaluate Dot Registry's application as a Community Application.

31. In order for the IRP Panel to rule on Dot Registry's matter, the panel will have to be constituted, hear both parties and produce a declaration before mid-December 2014, or the remedy Dot Registry seeks will be unavailable. This truncated timeline will severely limit the inquiry any IRP Panel would be able to conduct, assuming it could even be constituted by that deadline. Dot Registry is entitled to a proceeding that is not held hostage to ICANN's auction deadlines.

32. ***Third and finally***, Dot Registry is entitled to maintenance of the *status quo* that existed going into the IRP, as well as the non-aggravation of the dispute between Dot Registry and ICANN.⁶² The purpose of the emergency relief requested is not to anticipate the decision on the merits, but to preserve the *status quo* until such time as the IRP Panel can make a determination on the merits. It is a long-recognized principle of international law that parties engaged in a dispute resolution must not proceed outside of the mechanism to alter the *status quo* so as to infringe upon the rights of the other party.⁶³ The *status quo* includes the relationship between the

⁶² See, e.g., *Burlington Resources*, ¶ 60 (indicating that the "general right to the status quo and to the non-aggravation of the dispute" are "self-standing rights," and when they are threatened, a party is entitled to protection of those rights regardless of its rights according to the substantive merits of the dispute) [Ex. C-ER-38]; see also *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011, ¶ 62 [Ex. C-ER-46].

⁶³ *Electricity Company of Sofia and Bulgaria (Belgium v. Bulgaria)*, Judgment of 5 December 1939, PCIJ series A/B, No 79, p.199 (outlining the "principle universally accepted by international tribunals...that the parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not allow any step of any kind to be taken which might aggravate or extend the dispute")

parties and the rights that each party had when the dispute was submitted for resolution.⁶⁴ Interim relief may compel the parties not only to stay any action that would upset the *status quo*, but in some cases, tribunals have ordered a party to reverse actions taken that upset the *status quo*.⁶⁵ In fact, it is in the interest of neither party to “aggravate or exacerbate” the dispute, “thus rendering its solution possibly more difficult.”⁶⁶ By scheduling and persisting with its plans to auction the strings, ICANN has deliberately violated the principle of non-interference with the *status quo*.

C. The Interim Relief is Necessary in Order to Protect Dot Registry’s Procedural Rights and the Security of the United States Business Community

33. The orders requested by Dot Registry are necessary because, without them, Dot Registry will suffer irreparable harm. Necessity under international law generally means that without the requested relief, the complaining party will suffer irreparable harm that cannot be adequately compensated through monetary damages and outweighs the harm that will be suffered by granting the interim relief.⁶⁷ The analysis involves both a question of whether the harm may be

[Ex. C-ER-47]; *see, e.g.*, UNCITRAL Arbitration Rules, Art. 26 (2010) (“An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to: (a) Maintain or restore the status quo pending determination of the dispute”) [Ex. C-ER-44].

⁶⁴ *See Burlington Resources*, ¶¶ 62, 67 (analyzing Electricity Company of Sophia and indicating that the *status quo* protected by the right is the *status quo* that exists at the time the dispute resolution proceeding commences) [Ex. C-ER-38].

⁶⁵ *See, e.g., French Construction Company A v. Iranian Government Organization B*, Partial Award of December 23, 1982, ICC Case No. 3896, 110 *Journal du droit international* (Clunet), pp. 914-918 (compelling the respondent to renounce its call of the claimant’s performance guarantees, which respondent called after the arbitration commenced) [Ex. C-ER-48].

⁶⁶ *Amco Asia Corp. and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Request for Provisional Measures, 24 *I.L.M.* 365, 368 (9 Dec. 1983) [Ex. C-ER-49].

⁶⁷ *See, e.g., UNCITRAL Model Law*, Art. 17A (“Harm not adequately repaired by an award of damages is likely to result if the measure is not ordered and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted”) [Ex. C-ER-50]; *see also, Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Interim Decision on Confidentiality (27

reduced to monetary compensation and whether the harm suffered by the complaining party without the interim relief is proportionally greater than the harm suffered by the responding party if the relief is granted.⁶⁸

34. Absent an order preventing ICANN from taking further steps to delegate .INC, .LLC and .LLP through the auction process, Dot Registry will be unable to obtain a remedy in this IRP. Operation of .INC, .LLC and .LLP is a unique right, and Dot Registry was created expressly for the purpose of securing and managing the registry functions of these three strings. Dot Registry worked diligently with NASS and the Secretaries of State to create registration guidelines that protect registered U.S. businesses, comply with state laws and provide unprecedented transparency for consumers. Moreover, Dot Registry has made a commitment to NASS and the Secretaries of State to assist them in combatting business identity theft and misrepresentation online by creating the first-ever verifiable Internet community for registered U.S. businesses. If Dot Registry is deprived of the opportunity to operate .INC, .LLC and .LLP, Dot Registry will be unable to accomplish its purpose or perform the mandate assigned to it by its community.

35. In addition, the relief is necessary because without it, Dot Registry's designated communities and the general public likely will suffer serious harm if ICANN is permitted to auction the three strings to the highest bidder before the IRP can determine whether

Oct. 1997), ¶ 8 (“the measures are urgently required in order to protect its rights from an injury that cannot be made good by the subsequent payment of damages.”) (applying the reasoning of the Washington Convention Art.47 to NAFTA 1134 in order to rule on interim measures) [Ex. C-ER-51].

⁶⁸ See, e.g. *Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 Feb. 2010), ¶¶ 156, 158 (“The Tribunal considers that an irreparable harm is a harm that cannot be repaired by an award of damages. . . . However, Claimants have accurately pointed out that the necessity requirement requires the Tribunal to consider the proportionality of the requested provisional measures. The Tribunal must thus balance the harm caused to Claimants by the criminal proceedings [which would be stayed by an award of provisional measures] and the harm that would be caused to Respondent if the proceedings were stayed or terminated.”) [Ex. C-ER-52].

Dot Registry’s CPEs should be reconsidered and whether Dot Registry should have been awarded community priority had the EIU adhered to the scoring criteria set forth in the AGB. If ICANN awards the strings to a non-Community Applicant, representatives of Dot Registry’s community and ICANN’s own Governmental Advisory Committee⁶⁹ have already notified ICANN of the harm that the U.S. business community would suffer. The strings .INC, .LLC and .LLP reference highly regulated business identifiers in the United States, and their delegation to an applicant that not only is not committed to regulating the strings on the DNS but *has no connection whatsoever to the regulators of the affected community*—simply because that applicant has the deepest pockets—would likely result in rampant fraud and abuse of .INC, .LLC and .LLP, and result in harm to business and consumers worldwide.⁷⁰

36. By contrast, ICANN will suffer no similar harm if the emergency arbitrator orders the relief that Dot Registry requests. Regardless of the outcome in this IRP, ICANN will be able to delegate .INC, .LLC and .LLP in the future.⁷¹ That fact that ICANN stands to gain millions of

⁶⁹ The GAC’s serves to “consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues.” Bylaws, Art. XI, § 2.1.a [Ex. C-ER-02].

⁷⁰ See, e.g., GAC Communiqué – Beijing, People’s Republic of China, pp. 4, 8 (11 Apr. 2013) (“Strings that are linked to regulated or professional sectors should operate in a way that is consistent with applicable laws. These strings are likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm.”) (suggesting five safeguards that should apply to such regulated strings) [Ex. C-ER-53]; AGB, Module 1.1.2.4, n.1 (“the GAC has indicated that strings that could raise sensitivities include... “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.”) [Ex. C-ER-04]; GAC indicative scorecard on new gTLD outstanding issues listed in the GAC Cartagena Communiqué p. 3-4 (1 Mar. 2011) (“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, should also be considered “community-based” strings”) [Ex. C-ER-54]; *id.* at 11-12 (“The GAC proposes that gTLD strings which relate to any generally regulated industry (e.g., .bank, .dentist, .law) should be subject to more intensive vetting than other non-geographical gTLDs”).

⁷¹ Similarly, if the Panel determines that ICANN and its affiliated parties, including the EIU, correctly failed Dot Registry during CPE, the strings may be auctioned at a later date with no harm to any party in contention for them.

dollars from the contemplated auctions is not a valid reason for denying this request. Auctions do not represent anticipated sources of revenue for ICANN.⁷² They are not a required step in every gTLD contention set, nor do they procure for ICANN earmarked funds that would be required to fund operations. Rather, auctions are a mechanism of “last resort” for allocating gTLD strings. Consequently, postponing the auction until the IRP panel can determine whether these three strings should have reached the auction stage at all cannot be considered detrimental to ICANN.

37. A slight delay in delegation is hardly an undue burden compared to the issues at stake for Dot Registry. Primary among those issues are the integrity of the IRP process that ICANN has put in place to ensure its accountability and transparency to the global community of Internet stakeholders, and the irreparable harm that would be inflicted on Dot Registry and the general public if it loses the chance to operate .INC, .LLC and .LLP in a competitive auction, without an opportunity to be heard before the IRP Panel. Dot Registry has a right to be heard in a meaningful way in the only proceeding available to review the decisions of the ICANN Board.

38. Furthermore, ICANN has placed other contention sets on hold pending the outcome of accountability mechanisms involving strings in the set.⁷³ Dot Registry simply asks that ICANN do the same—or be ordered to do the same—in this matter.

⁷² See Constantine Roussos, “How ICANN’s New gTLD Auctions can serve Public Interest and Promote Competition, Innovation and Diversity,” (30 Jan. 2014), available at <http://mytld.com/articles/3023-how-icann-new-gtld-auctions-serve-public-interest-promote-competition-innovation-diversity.html> (discussing ICANN’s financial statements and budget) (“Furthermore, ICANN’s adopted operating plan and budget for 2014 (<http://www.icann.org/en/about/financials/adopted-opplan-budget-fy14-22aug13-en.pdf>) completely ignores proceeds from auctions”) [Ex. C-ER-08].

⁷³ For example, all contention sets for the strings listed in Donuts Inc.’s IRP have been placed on hold. See Screen Shot: Contention Set: RUGBY (8 Aug. 2014) [Ex. C-ER-55]; Screen Shot: Contention Set: SKI (8 Aug. 2014) [Ex. C-ER-56]; Screen Shot: Contention Set: SPORT (22 Aug. 2014) [Ex. C-ER-57]. ICANN also lists the contention sets for .MERCK and .WEB/.WEBS on hold during the IRPs filed by Merck KGaA and Vistaprint, Ltd. See Screen Shot: Contention Set: MERCK (30 May 2014) [Ex. C-ER-58]; Screen Shot: Contention Set: WEB/WEBS (7 Nov. 2014) [Ex. C-ER-59]. Finally, ICANN was ordered to put .AFRICA on hold, pending the conclusion of the IRP

D. The Interim Relief is Needed Urgently, on an Emergency Basis

39. Finally, the orders Dot Registry requests are needed urgently, on an emergency basis, because ICANN is proceeding with the auctions for .INC, .LLC and .LLP scheduled for January 21, 2015. By mid-December, applicants for these strings will be required to make significant financial deposits and bind themselves to participate in the auctions. Without a binding order compelling ICANN to stay the auctions for, or delegation of, .INC, .LLC and .LLP, Dot Registry will suffer irreparable harm before the IRP process can be concluded and, indeed, perhaps before the IRP Panel is constituted. Without the requested relief, ICANN is positioned to jeopardize the very purpose of the IRP.

40. A request for interim measures of protection is considered urgent if, absent the requested measure, an action that is prejudicial to the rights of either party is likely to be taken before a final determination is made on the merits.⁷⁴ This standard is sometimes termed “imminent harm.”⁷⁵ Where the integrity of the dispute resolution process itself is at issue, measures requested to protect that process are “urgent by definition.”⁷⁶ There is no doubt here that the

filed by DotConnectAfrica Trust. *See* Decision on Interim Measures of Protection, DotConectAfrica Trust v. ICANN, ICDR Case No. 50-117-T-1083-13 (12 May 2014), *available at* <https://www.icann.org/en/system/files/files/decision-interim-measures-of-protection-12may14-en.pdf>, [Ex. C-ER-60].

⁷⁴ *Burlington Resources*, ¶ 73 (“The Arbitral Tribunal agrees that the criterion of urgency is satisfied when...a question cannot await the outcome of the award on the merits.”) (internal quotations removed) [Ex. C-ER-38].

⁷⁵ *See, e.g., UNCITRAL Arbitration Rules*, Art. 26 (2010) (“An interim measure is any temporary measure by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party, for example and without limitation, to... (b) Take action that would prevent, or refrain from taking action that is likely to cause, (i) current or imminent harm”) [Ex. C-ER-44].

⁷⁶ *See, e.g., Quiborax S.A., Non Metallic Minerals S.A. and Allan Fosk Kaplún v. Plurinational State of Bolivia*, ICSID Case No. ARB/06/2, Decision on Provisional Measures (26 Feb. 2010), ¶ 153 (“if measures are intended to protect the procedural integrity of the arbitration...they are urgent by definition”) [Ex. C-ER-52].

harm is imminent and the integrity of the IRP process is at stake. Without the requested relief, ICANN will proceed with auctioning and delegating the rights to .INC, .LLC and .LLP before the IRP Panel has had the opportunity to make a decision on the merits; this would be highly prejudicial to Dot Registry.

41. Furthermore, Dot Registry enjoys, according to ICANN's Bylaws, the right to have the decisions of the Board (including the BGC and NGPC) reviewed by an independent panel, a right that will essentially become irrelevant if interim relief is not granted in this case. A decision rendered by the IRP Panel *after* the strings have been awarded or delegated to other applicants that the Board has violated its governing documents would be meaningless and permit the applicants competing with Dot Registry for these strings to benefit from the Board's wrongdoing. For these reasons, the relief requested is needed on an urgent basis to protect Dot Registry's procedural rights to a remedy, to allow Dot Registry a meaningful opportunity to be heard and to preserve the *status quo* during the pendency of the IRP.

E. Dot Registry Has Established a *Prima Facie* Case on the Merits

42. Finally, some tribunals look to see whether a party requesting interim relief has established a *prima facie* case on the merits.⁷⁷ Making “[a]n assessment of the existence of a *prima facie* case does not prejudice the merits of the case: it is a purely provisional assessment based upon incomplete submissions and evidence, without preclusive effects.”⁷⁸ Although the

⁷⁷ “[A]ll authorities that permit consideration of the merits of the parties’ claims in connection with a request for provisional measures emphasize that this is a very limited and *prima facie* inquiry. ‘[I]t is at the merits that one sees “whether there really has been a breach,” and not at the stage of a request for provisional measures. Indeed, only in rare cases, where a claimant has failed to advance any plausible basis for its claims will tribunals deny provisional relief based on a *prima facie* view of the merits.’” Gary B. Born, 2 INTERNATIONAL COMMERCIAL ARBITRATION 2481 (2014) (quoting *Oil Platforms (Iran v. U.S.A.)*, Judgment of 12 Dec. 1996, [1996] I.C.J. Rep. 803, 856-57 (Higgins, J.) (citing *Mavrommatis Palestine Concessions*, PCIJ Series A, No. 2 (P.C.I.J. 1924)) [Ex. C-ER-39].

⁷⁸ *Id.* at 2479.

ICDR Rules do not expressly require a party requesting emergency relief to make any particular showing with respect to the merits of the party's case, to the extent the emergency arbitrator deems that he or she must assess whether Dot Registry has established a *prima facie* case on the merits, Dot Registry submits that it has done so. Dot Registry has properly invoked the IRP against ICANN and submits that it has pled sufficient facts in its Request for IRP to substantiate its claims that the actions, inaction and decisions of the Board relating to the processing of Dot Registry's applications for .INC, .LLC and .LLP violate ICANN's Articles of Incorporation, Bylaws, AGB and principles of international law.⁷⁹ ICANN's primary defense to Dot Registry's claims is the assertion that ICANN is not responsible for the acts of its agents and employees. This defense fails under the Bylaws,⁸⁰ international law⁸¹ and California law.⁸² Moreover, it also fails under the express terms of the AGB litigation waiver, which makes the IRP a substitute for

⁷⁹ See Claimant's Request for IRP at ¶¶ 60-64 [Annex A].

⁸⁰ Bylaws, Art. XIV (indicating that ICANN is ultimately responsible for the actions of its employees and agents of the corporation, acting within the scope of their responsibility). Bylaws, Art. XV § 1 (explaining that all authority to contract on behalf of ICANN must be delegated to agents and employees expressly by the ICANN Board) [Ex. C-ER-02]

⁸¹ See, e.g., United Nations General Assembly, "Responsibility of States for Internationally Wrongful Acts," YEARBOOK OF THE INTERNATIONAL LAW COMMISSION, vol. II (Part Two) (2001), A/56/49(Vol. I)/Corr.4, Art. 4(1) ("The conduct of any State organ shall be considered an act of that State under international law..."); *id.* at Art. 5 ("The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law"); *id.* at Art. 10 ("The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct"); see also, *id.* at Art. 7 ("The conduct of an organ of a State or of a person or entity empowered to exercise elements of the governmental authority shall be considered an act of the State under international law if the organ, person or entity acts in that capacity, even if it exceeds its authority or contravenes instructions") [Ex. C-ER-61].

⁸² Cal. Corp. Code §§ 5141(a)-(b), 5210 ("The board may delegate the management of the activities of the corporation to any person or persons, management company, or committee however composed, provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the *ultimate direction of the board.*") (emphasis added) [Ex. C-ER-62].

all legal remedies that applicants may raise against ICANN *or any agent or employee of ICANN*.⁸³

43. ICANN is responsible for appointing the EIU, an organization with an apparent conflict of interest in the outcome of the CPEs, which was not qualified to perform the task required of it in conducting CPEs.⁸⁴ In addition, ICANN is responsible for the actions of the EIU, as an agent appointed by ICANN to perform the CPEs. Thus, ICANN is responsible for the errors that the EIU made in applying the criteria and policies set forth in the AGB. In exchange for requiring every new gTLD applicant to acknowledge that “ANY ICANN AFFILIATED PARTY IS AN EXPRESS THIRD PARTY BENEFICIARY” of the litigation waiver and that ICANN may enforce the waiver against any applicant, ICANN provides applicants the right to “UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN’S BYLAWS FOR THE PURPOSES OF CHALLENGING *ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION*.”⁸⁵ This means ICANN intended to make itself accountable, and is, in fact, accountable for the actions of its employees and agents. To find otherwise, would mean ICANN, its employees and its agents effectively would be judgment-proof.

⁸³ See AGB, Module 6.6 (waiving, on behalf of New gTLD Program applicants, all recourse to remedy from any court “OR ANY OTHER JUDICIAL FORA” against ICANN or “THE ICANN AFFILIATED PARTIES,” “PROVIDED, THAT APPLICANT MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN’S BYLAWS FOR THE PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION. *APPLICANT ACKNOWLEDGES THAT ANY ICANN AFFILIATED PARTY IS AN EXPRESS THIRD PARTY BENEFICIARY OF THIS SECTION 6 AND MAY ENFORCE EACH PROVISION OF THIS SECTION 6 AGAINST APPLICANT.*”) (emphasis added) [Ex. C-ER-04].

⁸⁴ See Claimant’s Request for IRP at ¶¶ 31-47 [Annex A].

⁸⁵ AGB, Module 6.6 (emphasis added) [Ex. C-ER-04].

44. Finally, ICANN and its Board failed on a number of occasions to exercise appropriate due diligence and care in considering the issues raised by Dot Registry regarding the EIU's conflicts, qualifications and process; failed to operate in a transparent and accountable manner; and failed to act to protect the security and stability of the Internet and consumer confidence, in breach of ICANN's Articles of Incorporation, Bylaws, AGB and principles of international law.⁸⁶ Additional details are set out in Dot Registry's Request for IRP, which is incorporated by reference herein.

IV. RELIEF REQUESTED

45. In light of the foregoing, Dot Registry respectfully requests that the ICDR appoint an emergency arbitrator, pursuant to Articles 6 and 24 of the ICDR Rules, to hear this request for relief and issue an order—

- Enjoining ICANN from taking any further steps toward delegating the strings .INC, .LLC and .LLP until the conclusion of the IRP proceedings commenced by Dot Registry; *and*
- Requiring ICANN to place the contention sets and each active application for .INC, .LLC and .LLP “on hold” and designate them “ineligible for auction,” pending the outcome of the IRP proceedings commenced by Dot Registry.

Respectfully submitted,



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⁸⁶ See Claimant's Request for IRP at ¶¶ 48-54, 60-64 [Annex A].