

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
CASE NO. 01-14-0000-6505

VISTAPRINT LIMITED
(Claimant)

And

INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS
(Respondent)

**INDEX TO DOCUMENTS SUBMITTED WITH ICANN'S RESPONSE TO
CLAIMANT'S ADDITIONAL SUBMISSION**

<u>Exhibit</u>	<u>DESCRIPTION</u>
Resp. Ex. 1	<i>Booking.com v. ICANN</i> , ICDR Case No. 50-20-1400-0247, Final Declaration.
Resp. Ex. 2	BGC Recommendation on Reconsideration Request 13-10.
Resp. Ex. 3	NGPC Resolution 2014.02.05.NG02.
Resp. Ex. 4	Excerpt from ICANN Board Rationales for the Approval of the Launch of the New gTLD Program.
Resp. Ex. 5	NGPC Resolutions 2014.10.12.NG02-03

Resp. Ex. 1

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Independent Review Process Panel

In the Matter of an Independent Review Process

Between:

Booking.com B.V.

Applicant

-and-

ICDR Case No: 50-20-1400-0247

**Internet Corporation for Assigned Names
and Numbers (ICANN)**

Respondent

FINAL DECLARATION

The Panel:

Hon. A. Howard Matz

David H. Bernstein, Esq.

Stephen L. Drymer (Chair)

TABLE OF CONTENTS

I. INTRODUCTION 2

II. THE PARTIES 3

 A. The Applicant: Booking.com 3

 B. The Respondent: ICANN..... 3

III. FACTUAL AND PROCEDURAL BACKGROUND – IN BRIEF 3

 A. ICANN’s Adoption of the New gTLD Program and the Applicant Guidebook 3

 B. Booking.com’s Application for .hotels, and the Outcome 5

 C. DIDP Request and Request for Reconsideration 6

 D. The Cooperative Engagement Process 9

 E. The IRP Proceedings 10

 F. The Hearing 11

IV. ICANN ARTICLES, BYLAWS AND POLICIES – KEY ELEMENTS 11

 A. Articles of Association 11

 B. Bylaws 11

 C. The gTLD Applicant Guidebook 16

 (i) *Initial Evaluation* 16

 (ii) *String Review, including String Similarity Review* 16

V. SUMMARY OF THE PARTIES’ POSITIONS 21

 A. Booking.com’s position 21

 (i) *The Panel’s Authority* 21

 (ii) *Booking.com’s Claims* 22

 a. *The string similarity review process* 22

 b. *The case of .hotels* 24

 B. ICANN’s position 26

 (i) *The Panel’s Authority* 26

 (ii) *ICANN’s Response to Booking.com’s Claims* 27

 a. *The string similarity review process* 27

 b. *The case of .hotels* 29

VI. ANALYSIS 29

 A. The Panel’s Authority 29

 B. The String Similarity Review Process 33

 C. The Case of .hotels 37

 D. Conclusion 42

VII. THE PREVAILING PARTY; COSTS 43

DECLARATION

WE, THE UNDERSIGNED PANELISTS, members of the Independent Review Process Panel (“**IRP Panel**” or “**Panel**”), having been designated in accordance with ICANN Bylaws dated 11 April 2013, hereby issue the following Final Declaration (“**Declaration**”):¹

I. INTRODUCTION

1. This Declaration is issued in the context of an Independent Review Process (“**IRP**”) as provided for in Article IV, Section 3 of the Bylaws of the Internet Corporation for Assigned Names and Numbers (“**ICANN**”; “**ICANN Bylaws**” or “**Bylaws**”). In accordance with those Bylaws, the conduct of this IRP is governed by the International Arbitration Rules of the International Centre for Dispute Resolution as amended and in effect June 1, 2009 (“**ICDR**”; “**ICDR Rules**”) as supplemented by the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (“**Supplementary Procedures**”).
2. The subject matter of the dispute here concerns alleged conduct by the ICANN Board in relation to one particular facet of the process by which new generic top-level domains (“**gTLDs**”, also known as gTLD “**strings**”) are applied for, reviewed and delegated into the Internet’s domain name system (“**DNS**”) root zone.
3. As explained in this Declaration, the Applicant, Booking.com, alleges that, in establishing and overseeing the process by which so-called *string similarity reviews* are conducted, and in refusing to reconsider and overturn a decision to place Booking.com’s applied-for gTLD string .hotels in a so-called *string contention set*, the Board acted in a manner inconsistent with applicable policies, procedures and rules as set out in ICANN’s Articles of Incorporation, Bylaws and gTLD Applicant Guidebook (“**Guidebook**”).
4. Reading between the lines of the parties’ submissions, the Panel senses that both sides would welcome the opportunity to contribute to an exchange that might result in enabling disputants in future cases to avoid having to resort to an IRP to resolve issues such as have arisen here. Certainly the Panel considers that the present matter would ideally have been resolved amicably by the parties. This is particularly true given that the matter here concerns two of ICANN’s guiding principles – transparency and fairness – as applied to one of ICANN’s most essential activities – the delegation of new gTLDs² – in circumstances in which various members of the Internet community, including certain members of the ICANN Board’s New gTLD Program Committee, have expressed their own concerns regarding the string similarity review process. That being the case, though, the Panel does not shy away from the duty imposed by the Bylaws to address the questions before it and to render the

¹ As requested by the ICDR, the Declaration was provided to the ICDR in draft form on 26 January 2015 for non-substantive comments on the text (if any). It was returned to the Panel on 2 March 2015.

² As stated in the very first sentence of the Guidebook: “New gTLDs have been in the forefront of ICANN’s agenda since its creation.”

present Declaration, in accordance with, and within the constraints of the Bylaws, the ICDR Rules and the Supplementary Procedures.

II. THE PARTIES

A. The Applicant: Booking.com

5. The Applicant, Booking.com, is a limited liability company established under the law of the Netherlands. Booking.com describes itself as “the number one online hotel reservation service in the world, offering over 435,605 hotels and accommodations.”³ Booking.com’s primary focus is on the U.S. and other English-language markets.
6. Booking.com is represented in this IRP by Mr. Flip Petillion and Mr. Jan Janssen of the law firm *Crowell & Moring* in Brussels, Belgium.

B. The Respondent: ICANN

7. The Respondent, ICANN, is a California not-for-profit public benefit corporation, formed in 1998. As set forth in Article I, Section 1 of its Bylaws, ICANN’s mission is “to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.” ICANN describes itself as “a complex organization that facilitates input from a wide variety of Internet stakeholders. ICANN has a Board of Directors and staff members from around the globe, as well as an Ombudsman. ICANN, however, is much more than just the corporation—it is a community of participants.”⁴
8. ICANN is represented in this IRP by Mr. Jeffrey A. LeVee, Esq. and Ms. Kate Wallace, Esq. of the law firm *Jones Day* in Los Angeles, California, USA.

III. FACTUAL AND PROCEDURAL BACKGROUND – IN BRIEF

9. We recount here certain uncontested elements of the factual and procedural background to the present IRP. Other facts are addressed in subsequent parts of the Declaration, where the parties’ respective claims and the Panel’s analysis are discussed.

A. ICANN’s Adoption of the New gTLD Program and the Applicant Guidebook

10. Even before the introduction of ICANN’s New gTLD Program (“**Program**”), in 2011, ICANN had, over time, gradually expanded the DNS from the original six gTLDs (.com; .edu; .gov; .mil; .net; .org) to 22 gTLDs and over 250 two-letter country-code TLDs.⁵ Indeed, as noted above, the introduction of new gTLDs has been “in the forefront of ICANN’s agenda” for as long as ICANN has existed.

³ Request, ¶ 10.

⁴ Response, ¶ 11-12.

⁵ Request, ¶ 12; see also Guidebook, *Preamble*.

11. The Program has its origins in what the Guidebook refers to as “carefully deliberated policy development work” by the ICANN community.⁶
12. In 2005, ICANN’s Generic Names Supporting Organization (“GNSO”), one of the groups that coordinates global Internet policy at ICANN, commenced a policy development process to consider the introduction of new gTLDs.⁷ As noted in the Guidebook:

Representatives from a wide variety of stakeholder groups – governments, individuals, civil society, business and intellectual property constituencies, and the technology community – were engaged in discussions for more than 18 months on such questions as the demand, benefits and risks of new gTLDs, the selection criteria that should be applied, how gTLDs should be allocated, and the contractual conditions that should be required for new gTLD registries going forward.
13. In October 2007, the GNSO formally completed its policy development work on new gTLDs and approved a set of 19 policy recommendations.
14. In June 2008, the ICANN Board decided to adopt the policies recommended by the GNSO.⁸ As explained in the Guidebook, ICANN’s work next focused on implementation of these recommendations, which it saw as “creating an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval.”⁹
15. This process concluded with the decision by the ICANN Board in June 2011 to implement the New gTLD Program and its foundational instrument, the Guidebook.¹⁰
16. As described by ICANN in these proceedings, the Program “constitutes by far ICANN’s most ambitious expansion of the Internet’s naming system. The Program’s goals include

⁶ Guidebook, *Preamble*

⁷ Request, ¶ 13, Reference Material 7, “Public Comment Forum for Terms of Reference for New gTLDs (6 December 2005), <http://www.icann.org/en/news/announcements/announcement-06dec05-en.htm#TOR>; Reference Material 8, “GNSO Issues Report, Introduction of New Top-Level Domains (5 December 2005) at pp. 3-4. See also Guidebook, *Preamble*. Booking.com refers to the GNSO as “ICANN’s main policy-making body for generic top-level domains”. Article X of ICANN’s Articles of Incorporation provides: “There shall be a policy-development body known as the Generic Names Supporting Organization (GNSO), which shall be responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains” (Section 1); the GNSO shall consist of “a number of Constituencies” and “four Stakeholder Groups” (Section 2).

⁸ Guidebook, *Preamble*. A review of this policy process can be found at <http://gns0.icann.org/issues/new-gtlds> (last accessed on January 15, 2015).

⁹ Guidebook, *Preamble*: “This implementation work is reflected in the drafts of the applicant guidebook that were released for public comment, and in the explanatory papers giving insight into rationale behind some of the conclusions reached on specific topics. Meaningful community input has led to revisions of the draft applicant guidebook.”

¹⁰ RM 10 (ICANN resolution). The Guidebook (in its 30 May 2011 version) is one of seven “elements” of the Program implemented in 2011. The other elements were: a draft communications plan; “operational readiness activities”; a program to ensure support for applicants from developing countries; “a process for handling requests for removal of cross-ownership restrictions on operators of existing gTLDs who want to participate in the [Program]”; budgeted expenditures; and a timetable.

enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs ...”¹¹

17. The Guidebook is “continuously iterated and revised”, and “provides details to gTLD applicants and forms the basis for ICANN’s evaluation of new gTLD applications.”¹² As noted by Booking.com, the Guidebook “is the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs.”¹³

B. Booking.com’s Application for .hotels, and the Outcome

18. In accordance with the process set out in the Guidebook, Booking.com filed an application (Application ID 1-1016-75482) for the gTLD string .hotels.
19. At the same time, Despegar Online SRL (“Despegar”), a corporation established under the law of Uruguay, applied (Application ID 1-1249-87712) for the string .hoteis.
20. “Hoteis” is the Portuguese word for “hotels”.
21. According to Booking.com, Despegar is “a competitor of Booking.com”.¹⁴ Booking.com claims that it intends “to operate .hotels as a secure Internet environment providing hotel reservation services for consumers, hotels, and other stakeholders,”¹⁵ while Despegar similarly intends .hoteis to be dedicated primarily to “individuals that are interested in, and businesses that offer, hotel- and travel-related content.”¹⁶ That being said, a key difference between the two applications, as Booking.com acknowledges, is that Booking.com intends to focus the services it will offer under its proposed gTLD “on the U.S. (with its strongly Anglo-Saxon traditions) and other English-language markets,”¹⁷ whereas Despegar intends to target “Portuguese-speaking” markets.”¹⁸
22. As part of the Initial Evaluation to which all applied-for gTLDs were subject, .hotels and .hoteis were each required to undergo so-called *string review* in accordance with the Guidebook, the first component of which is a process known as *string similarity review*. As provided by the Guidebook, the string similarity review was conducted by an independent

¹¹ Response, ¶ 14.

¹² Response, ¶ 14. The resolution (RM 10) adopting the Guidebook explicitly “authorizes staff to make further updates and changes to the Applicant Guidebook as necessary and appropriate, including as the possible result of new technical standards, reference documents, or policies that might be adopted during the course of the application process, and to prominently publish notice of such changes.”

¹³ Request, ¶ 13. See also Guidebook, Module 1-2: “This Applicant Guidebook is the implementation of Board approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period.”

¹⁴ Request, ¶ 17.

¹⁵ Request, ¶ 5.

¹⁶ Request, ¶ 17. See also Despegar Application for .hoteis (Request, Annex 2), § 18(a).

¹⁷ Request, ¶ 16.

¹⁸ Request, ¶ 17. See also Despegar Application for .hoteis (Request, Annex 2), § 18(a).

String Similarity Panel (“**SSP**”) selected and engaged by ICANN for this purpose. (Extracts of the relevant provisions of the Guidebook can be found below, at Part IV of this Declaration.) ICANN engaged InterConnect Communications Ltd. (“**ICC**”), a company registered under the law of England and Wales, specializing in communications sector strategy, policy and associated regulatory frameworks,¹⁹ in cooperation with University College London, to act as the SSP.

23. On 26 February 2013 ICANN published the results of all of the string similarity reviews for all of the applications for new gTLDs submitted as part of the Program. The announcement revealed, among other things, that two “non-exact match” contention sets had been created: .hotels & .hoteis; and .unicorn & .unicom.²⁰ Booking.com’s applied for string .hotels (as well as the .hoteis, .uncorn and .unicom strings) had thus failed the string similarity review.
24. The results of the string similarity review were notified to Booking.com by ICANN that same day. In its letter of 26 February 2013 ICANN wrote:

After careful consideration and extensive review performed against the criteria in Section 2.2.1.1 of the Applicant Guidebook, the String Similarity Panel has found that the applied-for string (.hotels) is visually similar to another applied-for string (.hoteis), creating a probability of user confusion.

*Due to this finding, the ... two strings have been placed in a contention set.*²¹

25. The impact of being put into a contention set is that the proposed strings in the set will not be delegated in the root zone unless and until the applicants reach agreement on which single string should proceed (with the other proposed string therefore rejected), or until after an auction is conducted, with the highest bidder being given the right to proceed to the next step in the review process.

C. DIDP Request and Request for Reconsideration

26. On 28 March 2013 Booking.com submitted a request for information under ICANN’s Documentary Information Disclosure Policy (“**DIDP Request**”) asking for “all documents directly and indirectly relating to (1) the standard used to determine whether gTLD strings are confusingly similar, and (2) the specific determination that .hotels and .hoteis are confusingly similar.”²²
27. On the same date, Booking.com also filed a formal Request for Reconsideration (“**Request for Reconsideration**”). The “specific action(s)” that Booking.com asked to be reconsidered were: the decision to place .hotels and .hoteis in a contention set; and the decision not to

¹⁹ See <http://www.icc-uk.com/>

²⁰ Request, Annex 3. ICANN published document dated 26 February 2013. As its name suggests, a “non-exact match” connotes a determination that two different (non-identical) strings are visually similar within the meaning of the Guidebook. Another 752 applied-for gTLDs were put into 230 identical contention sets.

²¹ Request, Annex 3, ICANN letter dated 26 February 2013.

²² Request, ¶ 30 and Annex 3.

provide a “detailed analysis or a reasoned basis” for the decision to place .hotels in contention.²³

28. ICANN responded to the DIDP Request on 27 April 2013. Although ICANN provided certain information regarding the review process, in its response to the DIDP Request, ICANN also noted:

*The SSP is responsible for the development of its own process documentation and methodology for performing the string similarity review, and is also responsible for the maintenance of its own work papers. Many of the items that are sought from ICANN within the [DIDP] Request are therefore not in existence within ICANN and cannot be provided in response to the DIDP Request. ICANN will, however, shortly be posting the SSP's String Similarity Process and Workflow on the New gTLD microsite ...*²⁴

29. By letter dated 9 May 2013 Booking.com replied to ICANN, writing that “ICANN’s response fails to provide any additional information or address any of Booking.com’s concerns as conveyed in its DIDP Request or Request for Reconsideration.”²⁵ On 14 May 2013, ICANN answered that it “intends to post the string similarity process documentation on or before ... 17 May 2013.”²⁶ ICANN further informed Booking.com that “ICANN will afford you 30 days from the posting of the process document for the submission of a revised Request for Reconsideration.”²⁷
30. On 7 June 2013, ICANN published the “String Similarity New gTLD Evaluation Panel [i.e., the SSP] – Process Description” (“**SSP Process Description**”).²⁸
31. On 26 June 2013 Booking.com wrote to ICANN regarding both its DIDP Request and its 28 March 2013 Request for Reconsideration. In its letter, Booking.com noted among other things that “the generalized information ICANN thus far has provided does not explain a rationale for or analysis for the decision to put .hotels and .hoteis in a contention set and therefore does not allow Booking.com to appropriately amend its Request for Reconsideration.” The letter concluded by stating: “Considering ICANN’s obligations of transparency and accountability, there cannot be any ‘compelling reason for confidentiality’.

²³ Request, Annex 12, §3. The Request for Reconsideration (which appears to be in the form of a template) expressly states at §2 that it is a “Request for Reconsideration of ... Staff [vs. Board] action/inaction.” The cover letter attaching the Request states that, “[d]espite the fact that the origin of the decisions is unclear, this Reconsideration Request is being submitted as a reconsideration of a ‘Staff action’. In the event that the decisions referenced above are determined to be a ‘Board action’, this request may be amended.” As explained below, the Request for Reconsideration was amended on 7 July 2013. That amendment did not alter the stated nature of the request in §2 or the description of the specific actions that Booking.com sought to have reconsidered (§3). Unless otherwise indicated, all further references in this Declaration to the Request for Reconsideration are understood to be the *amended* Request for Reconsideration.

²⁴ Request, Annex 5.

²⁵ Request, Annex 6.

²⁶ Request, Annex 7.

²⁷ Request, Annex 7.

²⁸ Request, Annex 8.

And ... there are numerous compelling reasons for publication of [the information requested by Booking.com].”²⁹

32. ICANN responded on 25 July 2013, explaining among other things that “the evaluation of the .hotels string by the SSP panel was performed according to the [SSP Process Description] ...” and “[t]he SSP’s work was subjected to quality review, as has been publicly discussed.”³⁰ Approximately six months later, on 9 January 2014, ICANN posted a letter dated 18 December 2013 addressed to ICANN by the SSP Manager at ICC (Mr. Mark McFadden) providing a further “summary of the process, quality control mechanisms and some considerations surrounding the non-exact contention sets for the string similarity evaluation ...” (“**SSP Manager’s Letter**”).³¹ According to that Letter:

When ALL of the following features of a pairwise comparison [of non-exact match strings] are evident the evaluators found the string pair to be confusingly similar:

- *Strings of similar visual length on the page;*
- *Strings within +/- 1 character of each other;*
- *Strings where the majority of characters are the same and in the same position in each string; and*
- *The two strings possess letter combinations that visually appear similar to other letters in the same position in each string*

o For example m~m & l~i

33. Meanwhile, on 7 July 2013 Booking.com had submitted its amended Request for Reconsideration. In its letter attaching the amended Request for Reconsideration, Booking.com stated: “Booking.com reserves the right to further amend its Request for Reconsideration upon receipt of the information it previously requested and urges ICANN to publish the requested information as specified in our letter of 26 June 2013.”³²
34. By virtue of Article IV, Section 3 of the Bylaws, ICANN’s Board Governance Committee (“**BGC**”) is charged with evaluating and making recommendation to the Board with respect to requests for reconsideration. The Board’s New gTLD Program Committee (“**NGPC**”) receives and acts on such recommendations on behalf of the ICANN Board. In accordance with this procedure, Booking.com’s Request for Reconsideration was evaluated by the BGC. In a detailed analysis dated 1 August 2013, the BGC “conclude[d] that Booking.com has not

²⁹ Request, Annex 9.

³⁰ Request, Annex 10.

³¹ Request, Annex 11.

³² Request, Annex 13.

stated proper grounds for reconsideration and we therefor recommend that Booking.com's request be denied" ("**BGC Recommendation**").³³

35. At a telephone meeting held on 10 September 2013 the NGPC, "bestowed with the powers of the Board", considered, discussed and accepted the BGC Recommendation. Booking.com's Request for Reconsideration was denied.³⁴

D. The Cooperative Engagement Process

36. Booking.com thereafter filed a request for a Cooperative Engagement Process ("**CEP**") on 25 September 2013, with a view to attempting to reach an amicable resolution of its dispute with ICANN. In its CEP request, Booking.com wrote:

*Booking.com is of the opinion that Resolution 2013.09.10.NG02 [the Board resolution denying its Request for Reconsideration] violates various provisions of ICANN's Bylaws and Articles of Incorporation. In particular Booking.com considers that ICANN's adoption of [the Resolution] is in violation of Articles I, II(3), II and IV of the ICANN Bylaws as well as Article 4 of ICANN's Articles of Incorporation. In addition, Booking.com considers that ICANN has acted in violation of Articles 3, 5, 7 and 9 of ICANN's Affirmation of Commitment ...*³⁵

37. The CEP ultimately did not result in a resolution, and Booking.com duly commenced the present IRP.
38. One further point should be made, here, prior to describing the commencement and conduct of the present IRP proceedings: The determination by the SSP that .hotels and .hoteis are so visually similar as to give rise to the probability of user confusion, and the resulting placement of those applied-for strings into a contention set, does *not* mean that Booking.com's application for .hotels has been denied or that .hotels will not proceed to delegation to the root zone. Rather, as noted above and explained in the extracts from the Guidebook reproduced below, the Guidebook establishes a process for resolving such contention, under which the applicants for the contending strings in the set – here, Booking.com and Despegar – may resolve the contention by negotiation, failing which the matter will proceed to auction. Ultimately, no matter the outcome of these IRP proceedings, Booking.com may yet be successful and .hotels may yet be delegated into the Internet root zone. However, the fact that .hotels has been put into a contention set does raise the risk that .hotels may never be delegated into the root zone, or that it may be more costly for Booking.com to obtain approval of its proposed string. It also has caused a significant delay in the potential delegation of the string into the root zone (which could prove to be detrimental to the ultimate success of Booking.com's proposed string if other applicants

³³ Request, Annex 14, BGC Recommendation dated 1 August 2013, p.9. See also Request, Annex 15, NGPC Resolution dated 10 September 2013. As noted in footnote 1 to the BGC Recommendation, the Recommendation was ultimately finalized and submitted for posting on 21 August 2013.

³⁴ Request, Annex 15, NGPC Resolution dated 10 September 2013.

³⁵ Request, Annex 17.

whose strings were not put into a contention set are able to establish themselves as pioneer providers of hotel- and travel-related services under a different new gTLD).

E. The IRP Proceedings

39. On 19 March 2014, Booking.com submitted a Notice of Independent Review, dated 18 March 2014, as well as a Request for Independent Review Process (“**Request**”) accompanied by numerous supporting documents and reference materials.
40. In accordance with Article IV, Section 3(9) of the ICANN Bylaws, Booking.com requested that a three-member IRP panel be constituted to consider and determine the Request. As the omnibus standing panel referred to in Article IV, Section 3(6) of the ICANN Bylaws had yet to be established, Booking.com further proposed, in accordance with Article 6 of the ICDR Rules, that each party appoint one panelist, with the third (the Chair of the panel) to be appointed by the two party-appointed panelists.
41. On 25 April 2014, ICANN submitted a Response to ICANN’s Request with supporting documents (“**Response**”).
42. The parties having thereafter agreed on the number of panelists and the method of their appointment, David H. Bernstein, Esq. was duly appointed as panelist by Booking.com on 1 May 2014, and the Hon. A Howard Matz was duly appointed as panelist by ICANN on 30 May 2014.
43. On 17 July 2014, the ICDR notified the parties that Mr. Stephen L. Drymer had been duly nominated by the two party-appointed panelists as Chair of the Panel. Mr. Drymer’s appointment became effective and the Panel was duly constituted as of 1 August 2014.
44. On 21 August 2014, further to consultations among the panelists and between the Panel and the parties, the Panel convened a preparatory conference with the parties (by telephone) for the purpose of discussing organizational matters, including a timetable for any further written statements or oral argument. Both parties requested the opportunity to make supplemental submissions and to present oral argument.
45. On 22 August 2014 the Panel issued Procedural Order No. 1 in which, among other things, it established a Procedural Timetable for the IRP. As specifically requested by the parties, the Procedural Order and Timetable provided for the submission of additional written statements by the parties as well as for a brief oral hearing to take place by telephone, all on dates proposed by and agreed between the parties.³⁶
46. In accordance with the Procedural Timetable, on 6 October 2014 Booking.com submitted its Reply to ICANN’s Response, accompanied by additional documents (“**Reply**”).

³⁶ Paragraph 6 of Procedural Order No. 1 provided that, in its forthcoming Reply to ICANN’s Response, “Booking.com shall only address two issues raised in Respondent’s Response: (1) the nature and scope of the IRP requested; (2) the nature of the relief sought by Claimant.” Paragraph 7 of Procedural Order No. 1 provided that “Respondent’s Sur-Reply ... shall address only the issues raised in the Reply.”

47. In accordance with the Procedural Timetable, ICANN submitted a Sur-Reply on 20 November 2014 (“**Sur-Reply**”).

F. The Hearing

48. As provided by Procedural Order No. 1 and the Procedural Timetable, a hearing was held (by telephone) on 10 December 2011, commencing at 9:00 PST/18:00 CET.
49. In the light of the significance of the issues raised by the parties, and given the many questions prompted by those issues and by the parties’ extensive written submissions and supporting materials, the Panel indicated that it would allow the hearing to continue beyond the approximately one hour originally envisaged. The hearing ultimately lasted two and one-half hours. Counsel for each party made extensive oral submissions, including rebuttal and sur-rebuttal submissions, and responded to the panelists’ questions.
50. Prior to the close of the hearing each party declared that it had no objection concerning the conduct of the proceedings, that it had no further oral submissions that it wished to make, and that it considered that it had had a full opportunity to present its case and to be heard.
51. As agreed and ordered prior to the close of the hearing, the parties were provided the opportunity to file limited additional materials post-hearing, in relation to a certain question asked of them by the Panel. This was done, and, on 13 December 2014, the proceedings were declared closed.

IV. ICANN ARTICLES, BYLAWS AND POLICIES – KEY ELEMENTS

52. We set out here the key elements of ICANN’s Articles of Association, Bylaws and policies on which the parties rely in their submissions and to which the Panel will refer later in this Declaration.

A. Articles of Association

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.

[Underlining added]

B. Bylaws

ARTICLE I: MISSION AND CORE VALUES

Section 1. MISSION

The mission of The Internet Corporation for Assigned Names and Numbers (“ICANN”) is to coordinate, at the overall level, the global Internet’s systems of unique identifiers,

and in particular to ensure the stable and secure operation of the Internet's unique identifier systems.

[...]

Section 2. CORE VALUES

In performing its mission, the following core values should guide the decisions and actions of ICANN:

- 1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.*
- 2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.*
- 3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.*
- 4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.*
- 5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.*
- 6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.*
- 7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.*
- 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*
- 9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.*
- 10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.*
- 11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.*

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN

body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

[...]

ARTICLE III: TRANSPARENCY

Section 1. PURPOSE

ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.

[...]

ARTICLE IV: ACCOUNTABILITY AND REVIEW

Section 1. PURPOSE

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws. The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III and the Board and other selection mechanisms set forth throughout these Bylaws.

Section 2. RECONSIDERATION

1. ICANN shall have in place a process by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.

2. Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:

a. one or more staff actions or inactions that contradict established ICANN policy(ies); or

b. one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act; or

c. one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information.

3. The Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The Board Governance Committee shall have the authority to:

a. evaluate requests for review or reconsideration;

- b. summarily dismiss insufficient requests;
- c. evaluate requests for urgent consideration;
- d. conduct whatever factual investigation is deemed appropriate;
- e. request additional written submissions from the affected party, or from other parties;
- f. make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and
- g. make a recommendation to the Board of Directors on the merits of the request, as necessary.

[...]

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in Section 2 of this Article, ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.

2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation, and not as a result of third parties acting in line with the Board's action.

3. A request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation. Consolidated requests may be appropriate when the causal connection between the circumstances of the requests and the harm is the same for each of the requesting parties.

4. Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?;
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?

[...]

11. The IRP Panel shall have the authority to:

- a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;
- b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
- c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
- d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;
- e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and
- f. determine the timing for each proceeding.

[...]

14. Prior to initiating a request for independent review, the complainant is urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. [...]

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. [...]

16. Cooperative engagement and conciliation are both voluntary. However, if the party requesting the independent review does not participate in good faith in the cooperative engagement and the conciliation processes, if applicable, and ICANN is the prevailing party in the request for independent review, the IRP Panel must award to ICANN all reasonable fees and costs incurred by ICANN in the proceeding, including legal fees.

[...]

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.

[Underlining added]

53. Lest there be any misunderstanding as regards the proper subject matter of IRP proceedings or the role of the Panel, we note that, as was clearly established during the hearing, it is common ground between the parties that the term "action" (or "actions") as used in Article IV, Section 3 of the Bylaws is to be understood as action(s) or inaction(s) by the ICANN Board. The Panel observes that this understanding comports not only with the provisions of Article

IV, Section 2 of the Bylaws concerning “Reconsideration”, which expressly refer to “actions or inactions of the ICANN Board”, but with the clear intent of Section 3 itself, which stipulates at sub-section 11 that “[t]he IRP Panel shall have the authority to: ... (c) declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws.”

C. The gTLD Applicant Guidebook

- 54. As noted above and as understood by all, the Guidebook is (to borrow Booking.com’s phrase) “the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs.”³⁷
- 55. The Guidebook is divided into “Modules”, each of which contains various sections and sub-sections. The three Modules of primary relevance here are Modules 1, 2 and 4. Module 1, titled “Introduction to the gTLD Application Process,” provides an “overview of the process for applying for a new generic top-level domains.”³⁸ Module 2, titled “Evaluation Procedures,” describes the “evaluation procedures and criteria used to determine whether applied-for gTLDs are approved for delegation.”³⁹ Module 4, titled “String Contention Procedures,” concerns “situations in which contention over applied-for gTLD strings occurs, and the methods available to applicants for resolving such contention cases.”

(i) Initial Evaluation

- 56. As explained in Module 1, “[i]mmediately following the close of the application submission period, ICANN will begin checking all applications for completeness.”⁴⁰ Initial Evaluation begins “immediately after the administrative completeness check concludes. All complete applications will be reviewed during Initial Evaluation.”⁴¹
- 57. Initial Evaluation is comprised of two main elements or types of review: *string review*, which concerns the applied-for gTLD string; and *applicant review*, which concerns the entity applying for the gTLD and its proposed registry services. It is the first of these – string review, including more specifically the component known as *string similarity review* – that is particularly relevant.

(ii) String Review, including String Similarity Review

- 58. String review is itself comprised of several components, each of which constitutes a separate assessment or review of the applied-for gTLD string, conducted by a separate reviewing body or panel. As explained in Module 2:

The following assessments are performed in the Initial Evaluation:

³⁷ Request, ¶ 13.

³⁸ Module 1-2. Each Module of the Guidebook is paginated separately. “Module 1-2” refers to Guidebook Module 1, page 2.

³⁹ Module 2-2.

⁴⁰ Guidebook, §1.1.2.2: “Administrative Completeness Check”, Module 1-5.

⁴¹ Guidebook, §1.1.2.5: “Initial Evaluation”, Module 1-8 (underlining added).

- *String Reviews*
 - *String similarity*
 - *Reserved names*
 - *DNS stability*
 - *Geographic names*

[..]

*An application must pass all these reviews to pass the Initial Evaluation. Failure to pass any one of these reviews will result in a failure to pass the Initial Evaluation.*⁴²

59. As indicated, all complete applications are subject to Initial Evaluation, which means that all applied-for gTLD strings are subject to string review. String review is further described in Module 2 as follows:

[String review] focuses on the applied-for gTLD string to test:

- *Whether the applied-for gTLD string is so similar to other strings that it would create a probability of user confusion;*
- *Whether the applied-for gTLD string might adversely affect DNS security or stability; and*
- *Whether evidence of requisite government approval is provided in the case of certain geographic names.*⁴³

60. The various assessments or reviews (i.e., string similarity, reserved names, DNS stability, etc.) that comprise string review are elaborated at Section 2.2.1 of Module 2. As mentioned, the most relevant of these reviews for our purposes is *string similarity review*, which is described in detail at Section 2.2.1.1. Because of the central importance of the string similarity review process in the context of the present dispute, this section of the Guidebook is reproduced here at some length:

2.2.1.1 String Similarity Review

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

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

⁴² Module 2-2. The same is true of applicant review, which is also comprised of various assessments concerning the applicant entity.

⁴³ Guidebook, §2.2: “Initial Evaluation”, Module 2-4 (underlining added). See also Module 1-9: “String reviews include a determination that the applied-for gTLD string is not likely to cause security or stability problems in the DNS ...”

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

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

2.2.1.1.1 Reviews Performed

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

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

[...]

- Applied-for gTLD strings against other applied-for gTLD strings;

[...]

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

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

[...]

2.2.1.1.2 Review Methodology

The String Similarity Panel is informed in part by an algorithmic score for the visual similarity between each applied-for string and each of other existing and applied-for TLDs and reserved names. The score will provide one objective measure for consideration by the panel, as part of the process of identifying strings likely to result in user confusion. In general, applicants should expect that a higher visual similarity score suggests a higher probability that the application will not pass the String Similarity review. However, it should be noted that the score is only indicative and that the final determination of similarity is entirely up to the Panel's judgment.

The algorithm, user guidelines, and additional background information are available to applicants for testing and informational purposes. [footnote in the original: See <http://icann.sword-group.com/algorithm/>] Applicants will have the ability to test their strings and obtain algorithmic results through the application system prior to submission of an application.

[...]

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

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

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

2.2.1.1.3 Outcomes of the String Similarity Review

An application that fails the String Similarity review due to similarity to an existing TLD will not pass the Initial Evaluation, and no further reviews will be available. Where an application does not pass the String Similarity review, the applicant will be notified as soon as the review is completed.

An application for a string that is found too similar to another applied-for gTLD string will be placed in a contention set.⁴⁴

[Underlining added]

61. Module 4 of the Guidebook, as mentioned, concerns “situations in which contention over applied-for gTLD strings occurs, and the methods available to applicants for resolving such contention cases.” As explained in Module 4:

4.1 String Contention

String contention occurs when either:

1. Two or more applicants for an identical gTLD string successfully complete all previous stages of the evaluation and dispute resolution processes; or
2. Two or more applicants for similar gTLD strings successfully complete all previous stages of the evaluation and dispute resolution processes, and the similarity of the strings is identified as creating a probability of user confusion if more than one of the strings is delegated.

ICANN will not approve applications for proposed gTLD strings that are identical or that would result in user confusion, called contending strings. If either situation above occurs, such applications will proceed to contention resolution through either community priority evaluation, in certain cases, or through an auction. Both processes are described in this module. A group of applications for contending strings is referred to as a contention set.

⁴⁴ Module 2-5 to 2-9. As regards the concept of string contention, see also Guidebook, §1.1.2.10: “String Contention”, Module 1-13: “String contention applies only when there is more than one qualified application for the same or similar gTLD strings. String contention refers to the scenario in which there is more than one qualified application for the identical gTLD string or for similar gTLD strings. In this Applicant Guidebook, “similar” means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.”

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

4.1.1 Identification of Contention Sets

Contention sets are groups of applications containing identical or similar applied-for gTLD strings. Contention sets are identified during Initial Evaluation, following review of all applied-for gTLD strings. ICANN will publish preliminary contention sets once the String Similarity review is completed, and will update the contention sets as necessary during the evaluation and dispute resolution stages.

Applications for identical gTLD strings will be automatically assigned to a contention set.

[...]

The String Similarity Panel will also review the entire pool of applied-for strings to determine whether the strings proposed in any two or more applications are so similar that they would create a probability of user confusion if allowed to coexist in the DNS. The panel will make such a determination for each pair of applied-for gTLD strings. The outcome of the String Similarity review described in Module 2 is the identification of contention sets ...

[...]

As described elsewhere in this guidebook, cases of contention might be resolved by community priority evaluation [NB: community priority evaluation applies only to so-called “community” applications; it is not relevant here] or an agreement among the parties. Absent that, the last-resort contention resolution mechanism will be an auction.

[...]

62. As provided in Module 4, the two methods relevant to resolving a contention such as between .hotels and .hoteis are *self-resolution* (i.e., an agreement between the two applicants for the contending strings) and *auction*:

4.1.3 Self-Resolution of String Contention

Applicants that are identified as being in contention are encouraged to reach a settlement or agreement among themselves that resolves the contention. This may occur at any stage of the process, once ICANN publicly posts the applications received and the preliminary contention sets on its website.

Applicants may resolve string contention in a manner whereby one or more applicants withdraw their applications.

[...]

4.3 Auction: Mechanism of Last Resort

It is expected that most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants. Auction is a tie-breaker method for resolving string contention among the applications within a contention set, if the contention has not been resolved by other means.

63. Module 5 of the Guidebook, titled *Transition to Delegation*, describes “the final steps required of an applicant for completion of the process, including execution of a registry agreement with ICANN and preparing for delegation of the new gTLD into the root zone.”⁴⁵ Section 5.1 states:

*ICANN's Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs or of the use of an ICANN accountability mechanism.*⁴⁶

[Underlining added]

V. SUMMARY OF THE PARTIES' POSITIONS

64. The following brief summary of the parties' respective positions is provided with a view solely to assisting the reader to understand the present Declaration. It is *not* intended to recapitulate – and it does not recapitulate – the entirety of the parties' allegations and arguments. Additional references to the parties' positions, including submissions made by them in the course of the proceedings, are contained in the discussion at Part VI below.

A. Booking.com's position

(i) *The Panel's Authority*

65. Booking.com submits that the mandate of the Panel is “to determine whether the contested actions of the ICANN Board are consistent with applicable rules.”⁴⁷ According to Booking.com:

*The set of rules against which the actions of the ICANN Board must be assessed includes: (i) ICANN's Articles of Incorporation and Bylaws – both of which must be interpreted in light of ICANN's Affirmation of Commitments, and both of which require compliance with inter alia International law and generally accepted good governance principles – and (ii) secondary rules created by ICANN, such as the Applicant Guidebook. In setting up, implementing and supervising its policies and processes, the Board must comply with the fundamental principles embodied in these rules. That obligation includes a duty to ensure compliance with its obligations to act in good faith, transparently, fairly, and in a manner that is non-discriminatory and ensures due process.*⁴⁸

⁴⁵ Module 5-2.

⁴⁶ Module 5-4.

⁴⁷ Reply, ¶ 3.

⁴⁸ Reply, ¶ 3.

66. Booking.com submits that IRP panels have broad authority to evaluate actions of the ICANN Board. An overly restrictive interpretation of the standard of review, such as proposed by ICANN in these proceedings, would, says Booking.com, “fail to ensure accountability on the part of ICANN and would be incompatible with ICANN’s commitment to maintain (and improve) robust mechanisms for accountability, as required by Article 9.1 of ICANN’s Affirmation of Commitments and ICANN’s core values.”⁴⁹

(ii) Booking.com’s Claims

67. The purpose of the IRP initiated by Booking.com is, in its own words, “to challenge the ICANN Board’s handling of Booking.com’s application for the new gTLD .hotels.”⁵⁰ This includes the determination of the SSP to place .hotels and .hoteis in contention and the refusal of the Board (and its committees) to revise that determination. Elsewhere in its submissions, Booking.com makes an even broader claim; it asserts that it challenges the conduct of the ICANN Board in relation to what Booking.com refers to as the *setting up, implementation, supervision and review* of the entire of string similarity review process, and the Board’s alleged failure “to ensure due process and to respect its fundamental obligations to ensure good faith, transparency, fairness and non-discrimination” throughout.⁵¹
68. In effect, Booking.com’s specific claims can be divided into two broad categories: claims related to the string similarity review process generally; and claims related to the particular case of .hotels.
69. Booking.com professes that this case “is not about challenging a decision on the merits [i.e., the decision to place .hotels in contention]”; it is about “ICANN’s failure to respect fundamental [procedural] rights and principles in handling New gTLD applications, in particular in the context of String Similarity Review.”⁵²
70. Booking.com also repeatedly emphasizes – and this is crucial – that *it does not challenge the validity or fairness of the process as set out in the Guidebook*. Rather, as indicated, it contests “the way in which that process was established, implemented and supervised by (or under the authority of) the ICANN Board.”⁵³ Equally crucial, as will be seen, is Booking.com’s acknowledgment that *the established process was followed* in the case of the review of .hotels.

a. The string similarity review process

71. According to Booking.com, the problem began when the ICANN Board failed to “provide transparency in the SSP selection process,” in particular by failing “to make clear how

⁴⁹ Reply, ¶ 6.

⁵⁰ Reply, ¶ 7.

⁵¹ Reply, ¶ 15.

⁵² Reply, ¶ 14.

⁵³ Reply, ¶ 17.

[ICANN] would evaluate candidate responses or how it ultimately did so.”⁵⁴ The problem was compounded by the selection of ICC/University College London to perform string similarity reviews as the independent SSP. In Booking.com’s words:

*[T]he identities of the unsuccessful candidates (if any) to perform the String Similarity Review remain unknown. Applicants have never been given any information in relation to the candidate responses that were submitted. ... There is no indication that any other candidate expressed an interest in performing the String Similarity Review. No information has been provided as to the steps (if any) taken by ICANN to reach out to other potential candidates. Numerous questions remain: How did ICANN deal with the situation if there was only one (or only a very few) respondent(s) wishing to perform the String Similarity Review? How did this impact on the discussions with InterConnect Communications? What are the terms of ICANN’s contract with InterConnect Communications?*⁵⁵

72. Booking.com also faults ICANN for “allowing the appointed SSP to develop and perform an unfair and arbitrary review process”, specifically, by allowing the SSP “to perform the String Similarity Review (i) without any (documented) plan or methodology ... (ii) without providing any transparency regarding the evaluators or the evaluation criteria ... and (iii) without informing applicants of its reasoning ...”.⁵⁶
73. Among other things, Booking.com takes ICANN to task for establishing and posting the SSP Process Description and the SSP Manager’s Letter (see Part III.C above) only long after the string similarity review process had ended.⁵⁷
74. It also alleges that the factors identified in the SSP Manager’s Letter are “arbitrary and baseless ... not supported by any methodology capable of producing compelling and defensible conclusions ... [which] has allowed applications with at least equally serious visual string similarity concerns – such as .parts/.paris, .maif/.mail, .srt/.srl, .vote/.voto and .date/.data ... – to proceed while singling out .hotels/.hoteis.”⁵⁸ According to Booking.com: “The failure to take actual human performance into account is at odds with the standard for assessment, *i.e.*, the likelihood of confusion on the part of the average Internet user. Hence, the approach is directly contrary to ICANN’s own policy.”⁵⁹
75. Booking.com further contends that the SSP process is unfair and non-transparent due to the fact that the identity of SSP members has never been publicly disclosed.⁶⁰
76. Further, Booking.com argues that the process is unfair, non-transparent and arbitrary – and thus violates ICANN policy – for failing to provide for a “well-documented rationale” for each

⁵⁴ Reply, ¶ 20.

⁵⁵ Reply, ¶ 20.

⁵⁶ Reply, ¶ 23.

⁵⁷ Reply, ¶ 24.

⁵⁸ Reply, ¶ 25.

⁵⁹ Reply, ¶ 25.

⁶⁰ Reply, ¶ 26-27.

SSP determination. In the absence of reasons for each string similarity determination, says Booking.com, “there is no basis on which decisions can be evaluated and, where appropriate, challenged.”⁶¹

77. Another ground for Booking.com’s challenge is the alleged failure by the ICANN Board to providing “effective supervision or quality control” of the SSP: “If nobody but the evaluator has any insight into how the evaluation was carried out, no effective quality control can be performed.”⁶² Nor, according to Booking.com, does the quality review of the SSP’s work supposedly performed by JAS Advisers (the independent consultant engaged by ICANN for this purpose) overcome the problem of a lack of transparency:

*Booking.com is not aware that any selection process was put in place in relation to the appointment of JAS Advisors to perform the String Similarity Review quality control. No criteria for performing the quality control were published. When ICANN was looking for evaluators, no call for expressions of interest or similar document was issued for the selection of quality controllers.*⁶³

78. In any case, says Booking.com, the “quality control review over a random sampling of applications to, among other things, test whether the process [set out in the Guidebook] was followed,” which ICANN claims was performed on the SSP’s work,⁶⁴ could not provide adequate quality control of the string similarity review process.⁶⁵ Finally, Booking.com argues that the arbitrary and unfair result of the string similarity review concerning .hotels – *i.e.*, the decision to place .hotels and .hoteis in contention – demonstrates that, “whatever quality control review ICANN may have engaged in ... must therefore have been deficient.”⁶⁶

b. The case of .hotels

79. Booking.com argues, in part on the basis of expert evidence which it adduces in this IRP proceeding,⁶⁷ that “[t]here is no probability of user confusion if both .hotels and .hoteis were delegated as gTLD strings into the Internet root zone ... The SSP could not have reasonably found that the average reasonable Internet user is likely to be confused between the two strings.”⁶⁸ It continues:

⁶¹ Reply, ¶ 28-29.

⁶² Reply, ¶ 30.

⁶³ Reply, ¶ 31. Booking.com states that it “doubts” that any quality review was in fact performed, whether by JAS Advisers or any other entity.

⁶⁴ Response, ¶ 30.

⁶⁵ Reply, ¶ 34.

⁶⁶ Reply, ¶ 38.

⁶⁷ Request, Annex 20, Expert Report of Prof. Dr. Piet Desmet of the Faculty of Arts, Department of Linguistics of Leuven University, dated 10 March 2014. Portions of the work underlying Prof. Desmet’s report were performed by Dr. Emmanuel Keuleers, Research Fellow in the Department of Experimental Psychology at Ghent University.

⁶⁸ Request, ¶ 58.

Since .hotels and .hoteis are not confusingly similar, the determination that they are is contradictory to ICANN policy as established in the Applicant Guidebook. Acceptance of the determination, and repeated failure to remedy the wrongful determination, is a failure to act with due diligence and independent judgment, and a failure to neutrally and fairly apply established policies as required by Bylaws and Articles of Incorporation.⁶⁹

80. According to Booking.com, the Board should have acted to overturn the determination of the SSP either in the context of the Request for Reconsideration or under the authority accorded it by Module 5-4 of the Guidebook to “individually consider a gTLD application”.⁷⁰
81. Booking.com claims that its DIDP Request alerted the Board to the need to intervene to “correct the errors in the process” related to .hotels, and that its Request for Reconsideration of the SSP determination further informed the Board of the many errors in the SSP’s review of .hotels, “giving the Board ample opportunity to correct those errors.”⁷¹ Booking.com claims that the Board’s failure, when responding to the DIDP Request, “to offer any insight into the SSP’s reasoning”, its refusal to reconsider and overturn the SSP determination regarding .hotels on the sole ground (says Booking.com) that “the Reconsideration process ‘is not available as a mechanism to re-try the decisions of evaluation panels’”, and its failure to investigate Booking.com’s complaints of a lack of fairness and transparency in the SSP process, constitute violations of ICANN’s governing rules regarding string similarity review.⁷²
82. According to Booking.com, among the most compelling evidence of ICANN’s failure in this regard are the statements made on the record by several members of the NGPC during its 10 September 2013 meeting at which Booking.com’s Request for Reconsideration was denied.⁷³ Given the importance that the Panel attaches to these statements, they are addressed in some detail in the Analysis in Part VI, below.
83. In its written submissions Booking.com asks the Panel to grant the following relief:

Finding that ICANN breached its Articles of Incorporation, its Bylaws, and the gTLD Applicant Guidebook;

Requiring that ICANN reject the determination that .hotels and .hoteis are confusingly similar and disregard the resulting contention set;

Awarding Booking.com its costs in this proceeding; and

⁶⁹ Request, ¶ 59.

⁷⁰ Reply, ¶ 39.

⁷¹ Reply, ¶ 41.

⁷² Reply, ¶ 41. In the passage of Booking.com’s submissions referred to here (as elsewhere), Booking.com speaks of violations of ICANN’s obligations of “due process”, which, it says, comprise concepts such as the right to be heard, the right to receive reasons for decisions, publicity, etc. For reasons explained in Part VI, below, the Panel prefers to use the terms *fairness* and *transparency* to connote the essence of ICANN’s obligations under review in this IRP.

⁷³ See Part II.C, above.

Awarding such other relief as the Panel may find appropriate or Booking.com may request.

84. At the hearing Booking.com *further* requested that the Panel not only require ICANN to disregard the SSP determination regarding .hotels/.hoteis, but also order ICANN to “delegate both .hotels and .hoteis.”

B. ICANN’s position

85. ICANN’s position is best summed up by ICANN itself:

Booking.com’s IRP Request is really about Booking.com’s disagreement with the merits of the String Similarity Panel’s conclusion that .hotels and .hoteis are confusingly similar. But the Panel’s determination does not constitute Board action, and the Independent Review Process is not available as a mechanism to re-try the decisions of an independent evaluation panel. The IRP Panel is tasked only with comparing contested actions of the ICANN Board to ICANN’s Bylaws and Articles of Incorporation; it is not within the IRP Panel’s mandate to evaluate whether the String Similarity Panel’s conclusion that .hotels and .hoteis are confusingly similar was wrong.⁷⁴

86. According to ICANN, the Board “did exactly what it was supposed to do under its Bylaws, its Articles of Incorporation, and the Guidebook.”⁷⁵

(i) *The Panel’s Authority*

87. Throughout its submissions ICANN repeatedly stresses what it says is the very limited authority enjoyed by IRP panels.
88. As provided in Article IV, Section 3(4) of ICANN’s Bylaws, ICANN observes that this Panel (as all IRP panels) is charged only 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.”⁷⁶
89. ICANN notes that, in undertaking this *compare-and-declare* mission, the Panel is further constrained to apply the very specific “standard of review” set out in Bylaw Article IV, Section 3(4), which requires the Panel to focus on three particular questions: “did the Board act without conflict of interest in taking its decision?”; “did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?”; and “did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?”⁷⁷

⁷⁴ Response, ¶ 9.

⁷⁵ Response, ¶ 8. Both parties agree that, as submitted by Booking.com, the “rules” at issue, against which the conduct of the ICANN Board is to be assessed, include the relevant provisions of the Guidebook.

⁷⁶ See for example Response, ¶¶ 2, ¶ 9.

⁷⁷ Response, ¶ 2.

90. ICANN further asserts that the IRP process “is not available as a mechanism to challenge the actions or inactions of ICANN staff or third parties that may be involved in ICANN activities,”⁷⁸ such as the action of the SSP which resulted in .hotels and .hoteis being placed in contention. Nor, says ICANN, may the IRP process be used as an “appeal mechanism” by which to overturn substantive decisions – such as the determination that .hotels and .hoteis are confusingly visually similar – with which an applicant may disagree.⁷⁹
91. In this regard ICANN states that the affirmative relief sought by Booking.com – specifically, a declaration requiring that ICANN “reject the determination that .hotels and .hoteis are confusingly similar and disregard the resulting contention set” and (as requested at the hearing) that ICANN “delegate both .hotels and .hoteis” – exceeds the authority of the Panel.⁸⁰

(ii) ICANN’s Response to Booking.com’s Claims

a. The string similarity review process

92. According to ICANN, “[e]arly on in the iterations of the Guidebook, it was determined that, in the initial evaluation stage, the String Similarity Panel would only examine strings for visual confusion,” and “[i]f applied-for strings are determined to so nearly resemble each other visually that it is likely to deceive or cause confusion, the string will be placed in a contention set, which is then resolved pursuant to the contention set resolution processes in Module 4 of the Guidebook.”⁸¹
93. According to ICANN, it was also determined early on that, as stated in Section 2.2.1.1 of the Guidebook, “[t]his similarity review will be conducted by an independent String Similarity Panel,” not by ICANN itself. ICC was duly selected to perform the string similarity review further to “an open and public request for proposals,” pursuant to which, as the successful bidder, “ICC was responsible for the development of its own process documents and methodology for performing the String Similarity Review consistent with the provisions of the Guidebook.”⁸² ICANN emphasizes that “the Guidebook does not provide for any process by which ICANN (or anyone else) may conduct a substantive review of ICC’s results.”⁸³
94. In ICANN’s submission, the alternative proposed by Booking.com, that “the ICANN Board – and the ICANN Board alone – was obligated to perform the String Similarity Review for the more than 1,900 new gTLD applications submitted,” is “untenable and is not supported by ICANN’s Bylaws or Articles.”⁸⁴ As noted by ICANN, the Guidebook defines six distinct

⁷⁸ Response, ¶ 3.

⁷⁹ Response, ¶ 49.

⁸⁰ Response, ¶ 55.

⁸¹ Response, ¶ 15 (underlining in original).

⁸² Response, ¶ 16.

⁸³ Response, ¶ 17.

⁸⁴ Sur-Reply, ¶ 7.

- review processes that every gTLD application is required to go through, including string similarity review; each of those review processes was conducted by independent experts specifically engaged by ICANN staff for the purpose.
95. ICANN submits that “there simply is no requirement – under ICANN’s governing documents or imposed by law – that would mandate that the ICANN Board inject itself into the day-to-day affairs of the evaluation process in the manner Booking.com proposes.”⁸⁵ It asserts that, consistent with well-settled legal principles, “neither ICANN’s Bylaws, nor the Articles, nor the Guidebook requires the ICANN Board to conduct any analysis of the decisions of third party experts retained to evaluate string similarity.”⁸⁶
96. Moreover, ICANN asserts that “[s]imply because the ICANN Board has the discretion [under Section 5.1 (Module 5-4) of the Guidebook] to consider individual applications does not mean it is required to do so or that it should do so, particularly at an initial evaluation stage.”⁸⁷
97. ICANN claims that that Booking.com’s repeated invocation of the Board’s so-called obligation to ensure “due process” in the administration of the New gTLD Program is misplaced. First, neither applicable California law nor any provision of the Bylaws, Articles of Incorporation or Guidebook “specifically affords any gTLD applicant a right to procedural ‘due process’ similar to that which is afforded in courts of law.”⁸⁸ Second, because ICANN conducts its activities in the public interest it nevertheless provides “more opportunity for parties to be heard and to dispute actions taken”⁸⁹ than most private corporate entities. Third, the “decision to proceed with the New gTLD Program followed many years of discussion, debate and deliberation within the ICANN community, including participation from end users, civil society, technical experts, business groups, governments and others.”⁹⁰ Fourth, and perhaps most importantly, “ICANN adhered to the policies and procedures articulated in its Bylaws, Articles of Incorporation, and the Guidebook, the latter of which was adopted only after being publicly vetted with ICANN’s stakeholders and the broader Internet community.”⁹¹
98. ICANN’s response to Booking.com’s various allegations regarding particular elements of the string similarity review process – including for example the selection of the SSP, the publication of the SSP’s methodology, the anonymity of the individuals SSP members, the supposed lack of quality control – is essentially three-fold: first, the actions challenged by Booking.com are *not Board actions*, but actions of ICANN staff or third parties, which cannot

⁸⁵ Sur-Reply, ¶ 10.

⁸⁶ Sur-Reply, ¶ 10.

⁸⁷ Sur-Reply, ¶ 11. It was established during the hearing that the several references to this discretionary authority in ICANN’s written and oral submissions refer specifically to the authority conferred by Section 5.1 (Module 5-4) of the Guidebook.

⁸⁸ Sur-Reply, ¶ 18.

⁸⁹ Sur-Reply, ¶ 18.

⁹⁰ Sur-Reply, ¶ 18, fn 18.

⁹¹ Sur-Reply, ¶ 18, fn 18.

be challenged by means of IRP proceedings; second, in any case, Booking.com's claims are *factually incorrect*, and there has been no violation of the Bylaws, Articles of Incorporation or Guidebook; third, Booking.com's claims are *time-barred* given that Article IV, Section 3(3) of the Bylaws requires that IRP requests "must be filed within thirty days of the posting of the minutes of the Board meeting ... that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation."⁹²

b. The case of .hotels

99. ICANN's position as regards the determination to place .hotels and .hoteis in contention is similar in many respects to its position regarding the string similarity review process generally. ICANN argues that the Board played no role whatsoever in performing the review of .hotels; that the SSP's determination was in any event well supported and there was no violation of applicable rules; and that the Guidebook does not provide for any process by which ICANN (or any other body, including an IRP panel) may conduct a substantive review of a string similarity determination.
100. In any event, ICANN asserts that .hotels and .hoteis in fact meet every one of the visual similarity criteria applied by the SSP, as set out in the SSP Manager's Letter. Moreover, .hotels and .hoteis scored a stunning 99% for visual similarity under the publicly available SWORD algorithm which, as provided by Section 2.2.1.1.2 (Module 2-7) of the Guidebook, establishes "one objective measure for consideration by the [SSP]". According to ICANN (in response to a question posed by the Panel during the hearing), this was the highest algorithmic score among the comparison of all non-identical pairs within the 1917 new gTLD applications received by ICANN;⁹³ the only other pair of non-exact match strings found to be confusingly visually similar – .unicorn and .unicom – scored only 94%.⁹⁴
101. According to ICANN, "it was not clearly 'wrong,' as Booking.com argues, for the [SSP] to find that .hotels/.hoteis are confusingly similar."⁹⁵
102. In conclusion, ICANN states that its conduct with respect to Booking.com's application for .hotels, including in evaluating Booking.com's Request for Reconsideration, was fully consistent with ICANN's Articles of Incorporation, its Bylaws and the procedures established in the Guidebook; and the fact that Booking.com disagrees with the SSP's determination to put .hotels and .hoteis in a contention set does not give rise to an IRP.
103. ICANN asks the Panel to deny Booking.com's IRP Request.

VI. ANALYSIS

A. The Panel's Authority

⁹² Sur-Reply, ¶ 20-42.

⁹³ A number of these applications were subsequently withdrawn.

⁹⁴ Identical pairs, of course, received a score of 100% for visual similarity under the SWORD algorithm.

⁹⁵ Response, ¶ 53.

104. The jurisdiction and authority of an IRP panel is expressly prescribed – and expressly limited – by the ICANN Bylaws. To recap, Article IV, Section 3 of the Bylaws provides:

4. [The IRP Panel] 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 [ICANN]?*

[...]

11. The IRP Panel shall have the authority to:

[...]

- 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;*

[...]

18. [...] The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties [...]

[Underlining added]

105. Similarly, Article 8 of the Supplementary Procedures reads:

8. Standard of Review

The IRP is subject to the following standard of review: (i) did the ICANN Board act without conflict of interest in taking its decision; (ii) did the ICANN Board exercise due diligence and care in having sufficient facts in front of them; (iii) did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the requestor will have established proper grounds for review.

106. There is no dispute as regards the Panel's duty to compare the actions of the Board to ICANN's Articles of Incorporation and Bylaws (and, in this case, Guidebook) with a view to

declaring whether those actions are inconsistent with applicable policies. Where the parties disagree is with respect to the standard of review to be applied by the Panel in assessing Board conduct.

107. ICANN submits that its Bylaws “specify that a deferential standard of review be applied when evaluating the actions of the ICANN Board ... the rules are clear that the appointed IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.”⁹⁶ Booking.com argues that this “is simply wrong. No such specification is made in ICANN’s Bylaws or elsewhere, and a restrictive interpretation of the standard of review would ... fail to ensure accountability on the part of ICANN and would be incompatible with ICANN’s commitment to maintain (and improve) robust mechanisms for accountability.”⁹⁷
108. In the opinion of the Panel, there can be no question but that the provisions of the ICANN Bylaws establishing the Independent Review Process and defining the role of an IRP panel specify that the ICANN Board enjoys a large degree of discretion in its decisions and actions. So long as the Board acts without conflict of interest and with due care, it is entitled – indeed, required – to exercise its independent judgment in acting in what it believes to be the best interests of ICANN. The only substantive check on the conduct of the ICANN Board is that such conduct may not be inconsistent with the Articles of Incorporation or Bylaws – or, the parties agree, with the Guidebook. In that connection, the Panel notes that Article 1, Section 2 of the Bylaws also clearly states that in exercising its judgment, the Board (indeed “[a]ny ICANN body making a recommendation or decision”) shall itself “determine which core values are most relevant and how they apply to the specific circumstances of the case at hand.”
109. In other words, in making decisions the Board is required to conduct itself reasonably in what it considers to be ICANN’s best interests; where it does so, the only question is whether its actions are or are not consistent with the Articles, Bylaws and, in this case, with the policies and procedures established in the Guidebook.
110. There is also no question but that the authority of an IRP panel to compare contested actions of the Board to the Articles of Incorporation and Bylaws, and to declare whether the Board has acted consistently with the Articles and Bylaws, does not extend to opining on the nature of those instruments. Nor, in this case, does our authority extend to opining on the nature of the policies or procedures established in the Guidebook. In this regard it is recalled that Booking.com itself repeatedly stresses that it does not contest the validity or fairness of the string similarity review process as set out in the Guidebook, but merely whether ICANN’s actions were consistent with various elements of that process. Stated differently, our role in this IRP includes assessing whether the applicable rules – in this case, the rules regarding string similarity review – were followed, not whether such rules are appropriate or advisable.
111. Nevertheless, this does not mean that the IRP Panel may only review ICANN Board actions or inactions under the deferential standard advocated by ICANN in these proceedings. Rather, as explained below, the IRP Panel is charged with “objectively” determining whether

⁹⁶ Response, ¶ 24.

⁹⁷ Reply, ¶ 6.

or not the Board's actions are in fact consistent with the Articles, Bylaws and Guidebook, which the Panel understands as requiring that the Board's conduct be appraised independently, and without any presumption of correctness.

112. In the only other IRP of which the Panel is aware in which such questions were addressed in a published decision, the distinguished members of the IRP panel had this to say about the role of an IRP panel, and the applicable standard of review, in appraising Board action:

The Internet Corporation for Assigned Names and Numbers is a not-for profit corporation established under the law of the State of California. That law embodies the 'business judgment rule'. Section 309 of the California Corporations Code provides that a director must act 'in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders...' and shields from liability directors who follow its provisions. However ICANN is no ordinary non-profit California corporation. The Government of the United States vested regulatory authority of vast dimension and pervasive global reach in ICANN. In 'recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization' – including ICANN -- ICANN is charged with 'promoting the global public interest in the operational stability of the Internet...' 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...' Thus, while a California corporation, it is governed particularly by the terms of its Articles of Incorporation and Bylaws, as the law of California allows. Those Articles and Bylaws, which require ICANN to carry out its activities in conformity with relevant principles of international law, do not specify or imply that the International [sic] Review Process provided for shall (or shall not) accord deference to the decisions of the ICANN Board. The fact that the Board is empowered to exercise its judgment in the application of ICANN's sometimes competing core values does not necessarily import that that judgment must be treated deferentially by the IRP. In the view of the Panel, the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially. The business judgment rule of the law of California, applicable to directors of California corporations, profit and nonprofit, in the case of ICANN is to be treated as a default rule that might be called upon in the absence of relevant provisions of ICANN's Articles and Bylaws and of specific representations of ICANN ... that bear on the propriety of its conduct. In the instant case, it is those Articles and Bylaws, and those representations, measured against the facts as the Panel finds them, which are determinative.⁹⁸

[Underlining added.]

113. While on no way bound by that decision, we agree with its conclusions in this respect.
114. At the end of the day we fail to see any significant difference between the parties' positions in this regard. The process is clear, and both parties acknowledge, that the Panel is tasked with determining whether or not the Board's actions are consistent with ICANN's Articles of Incorporation, Bylaws and the Guidebook. Such a determination calls for what the panel in

⁹⁸ ICDR Case No. 50 117 T 00224 08, *ICM Registry, LLC v. ICANN*, Declaration dated 19 February 2010 ("*ICM Registry*"), ¶ 136.

the *ICM Registry* matter called an “objective” appraisal of Board conduct as measured against the policies and rules set out in those instruments; all agree that it is the Articles, Bylaws and Guidebook which are determinative.

115. That being said, we also agree with ICANN to the extent that, in determining the consistency of Board action with the Articles, Bylaws and Guidebook, an “IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.” In other words, it is not for the Panel to opine on whether the Board could have acted differently than it did; rather, our role is to assess whether the Board’s action was consistent with applicable rules found in the Articles, Bylaws and Guidebook. Nor, as stated, is it for us to purport to appraise the policies and procedures established by ICANN in the Guidebook (since, again, this IRP is not a challenge to those policies and procedures themselves⁹⁹), but merely to apply them to the facts.
116. With the foregoing firmly in mind, the Panel turns now to the issues to be determined in order to resolve the present dispute.

B. The String Similarity Review Process

117. The Panel is not unsympathetic to Booking.com’s complaints regarding the string similarity review process as established by the Guidebook. There is no question but that that process lacks certain elements of transparency and certain practices that are widely associated with requirements of fairness. For example, the Guidebook provides no means for applicants to provide evidence or make submissions to the SSP (or any other ICANN body) and so be fully “heard” on the substantive question of the similarity of their applied-for gTLD strings to others.
118. Indeed, as stated at the outset of this Declaration, these observations and the concerns that they engender were voiced by several members of the ICANN Board’s New gTLD Program Committee which voted to accept the BGC’s Recommendation to deny Booking.com’s Request for Reconsideration. The Panel can do no better than reproduce the statements made by the NGPC members in this respect, as recorded in the minutes of the NGPC’s 10 September 2013 meeting.¹⁰⁰

⁹⁹ As discussed in more detail in the following section (at para. 117 and following) and again at Part IV of this Declaration, the important questions that Booking.com highlights in its pleadings, as to whether the string similarity review process is consistent with ICANN’s guiding principles of transparency and fairness, and regarding the published views of various members of ICANN’s NGPC in this respect, are matters which the ICANN Board, in its discretion, may wish to consider on its own motion in the context of the present case, in accordance with its authority under Section 5.1 (Module 5-4) of the Guidebook, or when it issues the Guidebook for round two of the New gTLD Program. Those questions include a lack of clarity surrounding the way in which the string similarity review is conducted by the SSP, and the absence of any means for applicants to be heard in the string similarity review process where they may have evidence to adduce or arguments to make (such as the evidence and arguments presented by Booking.com to this Panel), which could in fact be relevant to the SSP’s determination.

¹⁰⁰ Request, Annex 16.

- Mr. George Sadowski stated his intention to abstain from the vote because, although “he understood that the BGC did the right thing, [he] thought the end result that was contrary to ICANN’s ... and the user’s best interests.”
 - Ms. Olga Madruga-Forti also stated her intention to abstain from voting on the BGC recommendation “because there was not sufficient rationale provided for why the string similarity review panel made its determination.”
 - In response to a comment by the Chair that the Request for Reconsideration deserved to be denied “[b]ecause the process was followed,” Mr. Ray Plzak “agreed that the process was followed, but noted that the process needs to be reviewed to potentially add a mechanism that would allow persons who don’t agree with the outcome to make an objection, other than using a Reconsideration Request.”
 - Mr. Plzak “recommended the Committee send a strong signal to the BGC, or adopt a resolution recommending that the BGC consider development of a different mechanism to provide an avenue for the community to appeal the outcome of a decision based on the merits.”
 - Ms. Madruga-Forti agreed and “recommended that in the future, a remand or appeals mechanism may help alleviate the concerns noted.”
 - Mr. Bill Graham also agreed with Mr. Plzak’s suggestion, and noted that “generally, there is a considerable level of discomfort and dissatisfaction with the process as expressed by Committee members.”
 - The Chair “agreed with [Mr. Graham’s] sentiment.”
 - The General Counsel and Secretary noted that ICANN ... “has tried to encourage more use of the ombudsman, or other accountability mechanisms for these types of concerns.”
119. Ultimately, five members of the NGPC voted in favour of the resolution accepting the BGC’s Recommendation; two members were unavailable to vote; and four members abstained. The abstaining members offered the following voting statements:
- Mr. Plzak stated that he abstained from voting “because he is disappointed in what is being done to remedy the situation. [He] would like to see more resolve to fix the process.”
 - Ms. Madruga-Forti stated that:

[T]he BGC has done an appropriate job of applying a limited review standard to the application for reconsideration, but unfortunately, in this circumstance, to apply that limited review accompanied by a lack of information regarding the rationale of the string similarity review panel is not possible in a logical and fair manner. The public interest would not be served by applying the limited review standard without proper information on the basis and reasoning for the decision of the panel. In my opinion, the public interest would be better served by abstaining and continuing to explore ways to

establish a better record of the rationale of the string similarity review panel in circumstances such as this.

- Mr. Kuo-Wei Wu agreed with Ms. Madruga-Forti's and Mr. Plzak's voting statements.
- Mr. Sadowsky provided the following detailed statement:

I have a strong concern regarding the ratification of the BGC recommendation to deny the reconsideration request regarding string contention between .hoteis and .hotels, and I therefore have therefore abstained when the vote on this issue was taken.

The reconsideration process is a very narrowly focused instrument, relying solely upon investigating deviations from established and agreed upon process. As such, it can be useful, but it is limited in scope. In particular, it does not address situations where process has in fact been followed, but the results of such process have been regarded, sometimes quite widely, as being contrary to what might be best for significant or all segments of the ... community and/or Internet users in general.

The rationale underlying the rejection of the reconsideration claim is essentially that the string similarity process found that there was likely to be substantial confusion between the two, and that therefore they belonged in a contention set. Furthermore, no process has been identified as having been violated and therefore there is nothing to reconsider. As a Board member who is aware of ICANN's ... Bylaws, I cannot vote against the motion to deny reconsideration. The motion appears to be correct based upon the criteria in the Bylaws that define the reconsideration process and the facts in this particular case. However, I am increasingly disturbed by the growing sequence of decisions that are based upon a criterion for user confusion that, in my opinion, is not only both incomplete and flawed, but appears to work directly against the concept that users should not be confused. I am persuaded by the argument made by the proponents of reconsideration in this case that users will in fact not be confused by .hoteis and .hotels, since if they enter the wrong name, they are very likely to be immediately confronted by information in a language that they did not anticipate.

Confusion is a perceptual issue. String similarity is only one consideration in thinking about perceptual confusion and in fact it is not always an issue. In my opinion, much more perceptual confusion will arise between .hotel and .hotels than between .hotels and .hoteis. Yet if we adhere strictly to the Guidebook and whatever instructions have or have not been given to string similarity experts, it is my position that we work against implementing decisions that assist in avoiding user confusion, and we work in favor of decisions that are based upon an incorrect, incomplete and flawed ex ante analysis of the ICANN Network real issues with respect to user confusion.

The goal of the string similarity process is the minimization of user confusion and ensuring user trust in using the DNS ... The string similarity exercise is one of the means in the new gTLD ... process to minimize such confusion and to strengthen user trust. In placing our emphasis, and in fact our decisions, on string similarity only, we are unwittingly substituting the means for the goal, and making decisions regarding the goal on the basis of a means test. This is a disservice to the Internet user community.

I cannot and will not vote in favor of a motion that reflects, directly or indirectly, an unwillingness to depart from what I see as such a flawed position and which does not reflect in my opinion an understanding of the current reality of the situation.

120. These statements reflect to an important degree the Panel's own analysis.
121. The elements of the string similarity review process were established and widely published several years ago, after extensive consultation and debate among ICANN stakeholders and the Internet community. Booking.com correctly describes the process established (or "crystallized") in the Guidebook as a component of "a consensus policy" concerning the introduction of new gTLDs.¹⁰¹
122. The Guidebook makes clear that, as part of the initial evaluation to which all applied-for gTLDs are subject, each string would be reviewed for a number of factors, one of which is "string similarity", which involves a determination of "whether the applied-for gTLD string is so similar to other strings that it would create a probability of user confusion"¹⁰². The term "user" is elaborated elsewhere in the Guidebook, which speaks of confusion arising "in the mind of the average, reasonable Internet user."¹⁰³
123. The Guidebook explains that string similarity review comprises merely a "visual similarity check",¹⁰⁴ with a view to identifying only "visual string similarities that would create a probability of user confusion."¹⁰⁵
124. The Guidebook makes clear that string similarity reviews would be conducted by an independent third party – the SSP – that would have wide (though not complete) discretion both in formulating its methodology and in determining string similarity on the basis of that methodology.
125. Section 2.2.1.1.2 of the Guidebook, titled "Review Methodology", provides that the SSP "is informed in part by an algorithmic score for ... visual similarity," which "will provide one objective measure for consideration by the [SSP]." Section 2.2.1.1.2 further states that, in addition to "examin[ing] all the algorithm data," the SSP will "perform its own review of similarities between strings and whether they rise to the level of string confusion." It is noted that the objective algorithmic score is to be treated as "only indicative". Crucially, "the final determination of similarity is entirely up to the [SSP's] judgment." (Underlining added)
126. In sum, the Guidebook calls for the SSP to determine whether two strings are so "visually similar" as to create a "probability of confusion" in the mind of an "average, reasonable Internet user." In making this determination, the SSP is informed by an "algorithmic score", to ensure that the process comprises at least one "objective measure". However, the algorithmic score is not determinative. The SSP also develops and performs "its own review". At the end of the day, the determination is entirely a matter of "the [SSP's] judgment."

¹⁰¹ Request, ¶ 13.

¹⁰² Guidebook, §2.2 (Module 2-4).

¹⁰³ Guidebook, §2.2.1.1.2. (Underlining added)

¹⁰⁴ Guidebook, §2.2.1.1. (Underlining added)

¹⁰⁵ Guidebook, §2.2.1.1.1. (Underlining added)

127. By its very nature this process is highly discretionary. It is also, to an important degree, subjective. The Guidebook provides no definition of “visual similarity”, nor any indication of how such similarity is to be objectively measured other than by means of the SWORD algorithm. The Guidebook provides no definition of “confusion,” nor any definition or description of an “average, reasonable Internet user.” As Mr. Sadowski of the NGPC put it: “Confusion is a perceptual issue.” (Mr. Sadowski further noted: “String similarity is only one consideration in thinking about perceptual confusion, and in fact it is not always an issue.) The Guidebook mandates the SSP to develop and apply “its own review” of visual similarity and “whether similarities rise to the level of user confusion”, in addition to SWORD algorithm, which is intended to be merely “indicative”, yet provides no substantive guidelines in this respect.
128. Nor does the process as it exists provide for gTLD applicants to benefit from the sort of procedural mechanisms – for example, to inform the SSP’s review, to receive reasoned determinations from the SSP, or to appeal the merits of those determinations – which Booking.com claims are required under the applicable rules. Clearly, certain ICANN NGPC members themselves consider that such input would be desirable and that changes to the process are required in order for the string similarity review process to attain its true goal, which Mr. Sadowski referred to as “the minimization of user confusion and ensuring user trust in using the DNS”. However, as even the abstaining members of the NGPC conceded, the fact is that the sort of mechanisms that Booking.com asserts are required (and which those NGPC members believe should be required) are simply not part of the string similarity review process as currently established. As to whether they *should* be, it is not our place to express an opinion, though we note that such additional mechanisms surely would be consistent with the principles of transparency and fairness.
129. We add that we agree with ICANN that the time has long since passed for Booking.com or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to the establishment of the string similarity review process, including Booking.com’s claims that specific elements of the process and the Board decisions to implement those elements are inconsistent with ICANN’s Articles and Bylaws. Any such claims, even if they had any merit, are long since time-barred by the 30-day limitation period set out in Article IV, Section 3(3) of the Bylaws. As ICANN expressed during the hearing, if Booking.com believed that there were problems with the Guidebook, it should have objected at the time the Guidebook was first implemented.
130. When asked during the hearing about its failure to object timely, Booking.com argued that it could not have known how the Board’s actions – that is, how the process established in the Guidebook – would affect it prior to the submission of its application for .hotels. However, that is not a persuasive or meritorious answer. As did all stakeholders, Booking.com had the opportunity to challenge the Board’s adoption of the Guidebook, at the time, if it considered any of its elements to be inconsistent with ICANN’s Articles of Incorporation or Bylaws.

C. The Case of .hotels

131. In the light of the preceding analysis of Booking.com’s challenge concerning the ICANN Board’s actions in relation to the string similarity review process generally, the Panel is not

persuaded by its challenge concerning the Board's conduct in relation to the review of .hotels specifically.

132. There are two principal elements to this part of Booking.com's case: a challenge in relation to the process followed by the SSP; and a challenge in relation to the Board's handling of Booking.com's Request for Reconsideration of the SSP's determination. However, the fundamental obstacle to Booking.com's case is that *the established process was followed in all respects*.
133. Booking.com itself acknowledges that "the process was followed" by the SSP, which determined that .hotels and .hoteis were so visually similar as to warrant being placed in a contention set. So too did all of the NGPC members who commented on the matter recognize that "the process was followed" – for all their stated misgivings concerning the outcome of the process.
134. The same is true of the Request for Reconsideration. The Panel is struck by the extent and thoughtfulness not only of the NGPC's consideration of the issue, certain aspects of which are discussed above, but of the BGC's detailed analysis and its Recommendation to the NGPC, on the basis of which Booking.com's Request for Reconsideration was denied. Contrary to Booking.com's allegations, in neither instance was this merely a blind acceptance of a decision of a subordinate body. In fact, the reconsideration process itself, however limited and perhaps imperfect it may be, is inconsistent with Booking.com's claims of lack of "due process".
135. Although not addressed in great detail by the parties, the Panel considers several observations made by the BGC in its 1 August 2013 Recommendation to be particularly apposite:

- *These standing requirements [for Requests for Reconsideration] are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge an action with which someone disagrees, but that it is limited to situations where the staff [or the Board] acted in contravention of established policies.*¹⁰⁶

- *Although the String Similarity Review was performed by a third party, ICANN has determined that the Reconsideration process can properly be invoked for challenges of the third party's decisions where it can be stated that either the vendor failed to follow its process in reaching the decision, or that ICANN staff failed to follow its process in accepting that decision.*¹⁰⁷

- *Booking.com does not suggest that the process for String Similarity Review set out in the Applicant Guidebook was not followed, or that ICANN staff violated any established ICANN policy in accepting the [SSP] decision on placing .hotels and .hoteis in contention sets. Instead, Booking.com is supplanting what it believes the review*

¹⁰⁶ BGC Recommendation, p. 2.

¹⁰⁷ BGC Recommendation, p. 4. The BGC explains that "Because the basis for the Request is not Board conduct, regardless of whether the 20 December 2012 version, or the 11 April 2013 version, of the Reconsideration Bylaws is operative, the BGC's analysis and recommendation below would not change."

methodology for assessing visual similarity should have been, as opposed to the methodology set out at Section 2.2.1.1.2 of the Applicant Guidebook. In asserting a new review methodology, Booking.com is asking the BGC (and the Board through the New gTLD Program Committee (NGPC)) to make a substantive evaluation of the confusability of the strings and to reverse the decision. In the context of the New gTLD Program, the Reconsideration process is not however intended for the Board to perform a substantive review of [SSP] decisions. While Booking.com may have multiple reasons as to why it believes that its application for .hotels should not be in contention set with .hoteis, Reconsideration is not available as a mechanism to re-try the decisions of the evaluation panels.¹⁰⁸

▪ *Booking.com also claims that its assertions regarding the non-confusability of the .hotels and .hoteis strings demonstrate that “it is contrary to ICANN policy to put them in a contention set.” (Request, pages 6-7.) This is just a differently worded attempt to reverse the decision of the [SSP]. No actual policy or process is cited by Booking.com, only the suggestion that – according to Booking.com – the standards within the Applicant Guidebook on visual similarity should have resulted in a different outcome for the .hotels string. This is not enough for Reconsideration.¹⁰⁹*

▪ *Booking.com argues that the contention set decision was taken without material information, including Booking.com’s linguistic expert’s opinion, or other “information that would refute the mistaken contention that there is likely to be consumer confusion between ‘.hotels’ and ‘.hoteis.’” (Request, page 7.) However, there is no process point in the String Similarity Review for applicants to submit additional information. This is in stark contrast to the reviews set out in Section 2.2.2 of the Applicant Guidebook, including the Technical/Operational review and the Financial Review, which allow for the evaluators to seek clarification or additional information through the issuance of clarifying questions. (AGB, Section 2.2.2.3 (Evaluation Methodology).)¹¹⁰*

▪ *Just as the process does not call for additional applicant inputs into the visual similarity review, Booking.com’s call for further information on the decision to place .hotels and .hoteis in a contention set ... is similarly not rooted in any established ICANN process at issue.[...] While applicants may avail themselves of accountability mechanism to challenge decisions, the use of an accountability mechanism when there is no proper ground to bring a request for review under the selected mechanism does not then provide opportunity for additional substantive review of decisions already taken.¹¹¹*

▪ *[W]hile we understand the impact that Booking.com faces by being put in a contention set, and that it wishes for more narrative information regarding the [SSP’s] decision, no such narrative is called for in the process.¹¹²*

▪ *The Applicant Guidebook sets out the methodology used when evaluating visual similarity of strings. The process documentation provided by the String Similarity Review Panel describes the steps followed by the [SSP] in applying the methodology*

¹⁰⁸ BGC Recommendation, p. 5.

¹⁰⁹ BGC Recommendation, p. 6.

¹¹⁰ BGC Recommendation, p. 6.

¹¹¹ BGC Recommendation, pp. 6-7.

¹¹² BGC Recommendation, p. 7.

set out in the Applicant Guidebook. ICANN then coordinates a quality assurance review over a random selection of [SSP's] reviews to gain confidence that the methodology and process were followed. That is the process used for a making and assessing a determination of visual similarity. Booking.com's disagreement as to whether the methodology should have resulted in a finding of visual similarity does not mean that ICANN (including the third party vendors performing String Similarity Review) violated any policy in reaching the decision (nor does it support a conclusion that the decision was actually wrong).¹¹³

▪ The [SSP] reviewed all applied for strings according to the standards and methodology of the visual string similarity review set out in the Applicant Guidebook. The Guidebook clarifies that once contention sets are formed by the [SSP], ICANN will notify the applicants and will publish results on its website. (AGB, Section 2.2.1.1.1.) That the [SSP] considered its output as "advice" to ICANN (as stated in its process documentation) is not the end of the story. Whether the results are transmitted as "advice" or "outcomes" or "reports", the important query is what ICANN was expected to do with that advice once it was received. ICANN had always made clear that it would rely on the advice of its evaluators in the initial evaluation stage of the New gTLD Program, subject to quality assurance measures. Therefore, Booking.com is actually proposing a new and different process when it suggests that ICANN should perform substantive review (instead of process testing) over the results of the String Similarity Review Panel's outcomes prior to the finalization of contention sets.¹¹⁴

▪ As there is no indication that either the [SSP] or ICANN staff violated any established ICANN policy in reaching or accepting the decision on the placement of .hotels and .hoteis in a non-exact contention set, this Request should not proceed.¹¹⁵

136. These excerpts of the BGC Recommendation not only illustrate the seriousness with which Booking.com's Request for Reconsideration was heard, they mirror considerations to which we fully subscribe and which we find apply as well, with equal force and effect, in the context of Booking.com's IRP Request.
137. It simply cannot be said – indeed, it is not even alleged by Booking.com – that the established process was not followed by the ICANN Board or any third party either in the initial string similarity review of .hotels or in the reconsideration process.
138. Booking.com was asked at the hearing to identify *with particularity* the ICANN Board's actions (including inactions) in this case that it claims are inconsistent with ICANN's Articles of Incorporation, Bylaws or the Guidebook and regarding which it asks the Panel to render a declaration. It identified four:
- The Board's adoption of certain provisions of the Guidebook, including the allegedly ill-defined, unfair and non-transparent procedures for selecting the SSP and supervising the SSP's performance of the string similarity review process. As discussed, any claims in this regard are time-barred.

¹¹³ BGC Recommendation, p. 7.

¹¹⁴ BGC Recommendation, p. 8.

¹¹⁵ BGC Recommendation, p. 10.

- The Board's acceptance of the SSP determination. As ICANN argues, there was no action (or inaction) by the Board here, no decision made (or not made) by the Board or any other body to accept the SSP's determination. The Guidebook provides that applied-for strings "will be placed in contention set" where the SSP determines the existence of visual similarity likely to give rise to user confusion. Simply put, under the Guidebook the Board is neither required nor entitled to intervene at this stage to accept or not accept the SSP's determination. Booking.com is correct that the Board could nevertheless have stepped in and reversed the SSP determination under Section 5.1 (Module 5-4) of the Guidebook, but did not do so; that inaction is addressed below.
 - The Board's denial of Booking.com's Request for Reconsideration. As discussed above, there is nothing in the evidence that even remotely suggests that ICANN's conduct in this regard was inconsistent with its Articles, Bylaws or the Guidebook. On the contrary, we have already stated that the detailed analysis performed by the BGC and the extensive consideration of the BGC Recommendation by the NGCP undermine any claim that ICANN failed to exercise due care and independent judgment, or that its handling of the Request for Reconsideration was inconsistent with applicable rules or policy. As discussed above, just as in the present IRP, the question in the reconsideration process is whether the established process was followed. This was the question that the BGC and NGPC asked themselves in considering Booking.com's Request for Reconsideration, and which they properly answered in the affirmative in denying Booking.com's request.
 - The Board's refusal to "step in" and exercise its authority under Section 5.1 (Module 5-4) of the Guidebook to "individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community." As pointed out by ICANN during the hearing, **the fact that the ICANN Board enjoys such discretion and may choose to exercise it any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by Booking.com. In any case, the Panel does not believe that the Board's inaction in this respect was inconsistent with ICANN's Articles of Incorporation or Bylaws or indeed with ICANN's guiding principles of transparency and fairness, given** (1) Booking.com's concession that the string similarity review process was followed; (2) the indisputable conclusion that any challenge to the adoption of the SSP process itself is time-barred; (3) the manifestly thoughtful consideration given to Booking.com's Request for Reconsideration by the BGC; and (4), the fact that, notwithstanding its protestations to the contrary, Booking.com's real dispute seems to be with the process itself rather than how the process was applied in this case (given that, as noted, Booking.com concedes that the process was indeed followed).
139. The Panel further considers that these – in addition to any and all other potential (and allegedly reviewable) actions identified by Booking.com during the course of these proceedings – fail on the basis of Booking.com's dual acknowledgement that it does not challenge the validity or fairness of the string similarity review process, and that that process was duly followed in this case.

140. Finally, the panel notes that Booking.com's claim – largely muted during the hearing – regarding alleged “discrimination” as regards the treatment of its application for .hotels also founders on the same ground. Booking.com acknowledges that the established string similarity review process was followed; and there is absolutely no evidence whatsoever that .hotels was treated any differently than any other applied-for gTLD string in this respect. The mere fact that the *result* of the string similarity review of .hotels differed from the results of the reviews of the vast majority of other applied-for strings does not suggest discriminatory treatment. In any event, the Panel cannot but note the obvious, which is that .hotels is not alone in having been placed in contention by the SSP. So too was .hoteis; and so too were .unicom and .unicorn. Moreover, and once again, it is recalled that Booking.com does not claim to challenge the merits of the string similarity review, that is, the determination that .hotels and .hoteis are so visually similar as to warrant placement in a contention set.

D. Conclusion

141. In launching this IRP, Booking.com no doubt realized that it faced an uphill battle. The very limited nature of IRP proceedings is such that any IRP applicant will face significant obstacles in establishing that the ICANN Board acted inconsistently with ICANN's Articles of Incorporation or Bylaws. In fact, Booking.com acknowledges those obstacles, albeit inconsistently and at times indirectly.
142. Booking.com purports to challenge “the way in which the [string similarity review] process was established, implemented and supervised by (or under the authority of) the ICANN Board”; yet it also claims that it *does not challenge the validity or fairness of the string similarity review process as set out in the Guidebook*. It asks the Panel to overturn the SSP's determination in this case and to substitute an alternate result, in part on the basis of its own “expert evidence” regarding similarity and the probability of user confusion as between .hotels and .hoteis; yet it claims that it *does not challenge the merits of the SSP determination and it acknowledges that the process set out in the Guidebook was duly followed* in the case of its application for .hotels.
143. In sum, Booking.com has failed to overcome the very obstacles that it recognizes exist.
144. The Panel finds that Booking.com has failed to identify any instance of Board action or inaction, including any action or inaction of ICANN staff or a third party (such as ICC, acting as the SSP), that could be considered to be inconsistent with ICANN's Articles of Incorporation or Bylaws or with the policies and procedures established in the Guidebook. This includes the challenged actions of the Board (or any staff or third party) in relation to what Booking.com calls the implementation and supervision of the string similarity review process generally, as well as the challenged actions of the Board (or any staff or third party) in relation to the string similarity review of .hotels in particular.
145. More particularly, the Panel finds that the string similarity review performed in the case of .hotels was not inconsistent with the Articles or Bylaws or with what Booking.com refers to as the “applicable rules” as set out in the Guidebook.
146. To the extent that the Board's adoption and implementation of specific elements of the new gTLD Program and Guidebook, including the string similarity review process, could

potentially be said to be inconsistent with the principles of transparency or fairness that underlie ICANN's Articles and Incorporation and Bylaws (which the Panel does not say is the case), the time to challenge such action has long since passed.

147. Booking.com's IRP Request must be denied.

VII. THE PREVAILING PARTY; COSTS

148. Article IV, Section 3(18) of the Bylaws requires that the Panel "specifically designate the prevailing party." This designation is germane to the allocation of costs, given that Article IV, Section 3(18) provides that the "party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider."
149. The same provision of the Bylaws also states that "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."
150. Similarly, the Supplementary Procedures state, at Article 11:

The IRP PANEL shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.

In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the requestor is not successful in the Independent Review, the IRP PANEL must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.

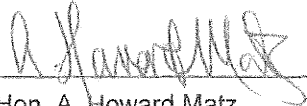
151. The "IRP Provider" is the ICDR, and, in accordance with the ICDR Rules, the costs to be allocated between the parties – what the Bylaws call the "costs of the IRP Provider", and the Supplementary Procedures call the "costs of the proceedings" – include the fees and expenses of the Panel members and of the ICDR (we refer to all of these costs as "IRP costs").
152. ICANN is undoubtedly the prevailing party in this case. That being said, the Panel considers that the nature and significance of the issues raised by Booking.com, and the contribution to the "public interest" of its submissions, are such that it is appropriate and reasonable that the IRP costs be shared equally by the parties. We consider that the extraordinary circumstances of case – in which some members of ICANN's New gTLD Program Committee have publicly declared that, in their view, the rules on the basis of which Booking.com's claims fail should be reconsidered by ICANN – warrants such a holding.
153. The Panel cannot grant Booking.com the relief that it seeks. A panel such as ours can only declare whether, on the facts as we find them, the challenged actions of ICANN are

or are not inconsistent with ICANN's Articles of Incorporation and Bylaws. We have found that the actions in question are not inconsistent with those instruments. The process established by ICANN under its Articles of Incorporation and Bylaws and set out in the Guidebook was followed, and the time to challenge that process (which Booking.com asserts is not its intention in these proceedings in any event) has long passed.

154. However, we can – and we do – acknowledge certain legitimate concerns regarding the string similarity review process raised by Booking.com, discussed above, which are evidently shared by a number of prominent and experienced ICANN NGPC members. And we can, and do, encourage ICANN to consider whether it wishes to address these issues in an appropriate manner and forum, for example, when drafting the Guidebook for round two of the New gTLD Program or, more immediately, in the exercise of its authority under Section 5.1 (Module 5-4) of the Guidebook (which it may choose to exercise at any time, in its discretion) to consider whether, notwithstanding the result of the string similarity review of .hotels and .hoteis, approval of both of Booking.com's and Despegar's proposed strings would be in the best interest of the Internet community.

FOR THE FOREGOING REASONS, the Panel hereby declares:

- (1) Booking.com's IRP Request is denied;
- (2) ICANN is the prevailing party;
- (3) In view of the circumstances, each party shall bear one-half of the costs of the IRP Provider, including the fees and expenses of the Panel members and the fees and expenses of the ICDR. As a result, the administrative fees and expenses of the ICDR, totaling US\$4,600.00, as well as the compensation and expenses of the Panelists totaling US\$163,010.05 are to be borne equally. Therefore, ICANN shall pay to Booking.com the amount of US\$2,300.00 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Booking.com
- (4) This Final 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 Final Declaration of this IRP Panel.



Hon. A. Howard Matz
Date: March 2, 2015

David H. Bernstein
Date:

Stephen L. Drymer,
Chair of the IRP Panel
Date:

I, Hon. A. Howard Matz, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Declaration of the IRP Panel.

March 2, 2015
Date


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March 2, 2015
Date



David H. Bernstein

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Date

Stephen L. Drymer

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- (4) This Final 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 Final Declaration of this IRP Panel.

Hon. A. Howard Matz

Date:

David H. Bernstein

Date:



Stephen L. Drymer,
Chair of the IRP Panel

Date: 3 March 2015

I, Hon. A. Howard Matz, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Declaration of the IRP Panel.

Date

Hon. A. Howard Matz

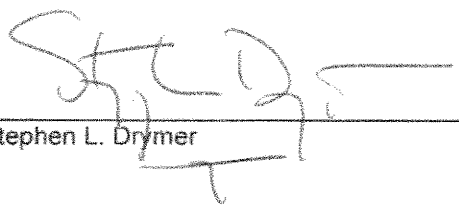
I, David H. Bernstein, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Declaration of the IRP Panel.

Date

David H. Bernstein

I, Stephen L. Drymer, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Declaration of the IRP Panel.

3 March 2015
Date



Stephen L. Drymer

Resp. Ex. 2

RECOMMENDATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)**RECONSIDERATION REQUEST 13-10****10 OCTOBER 2013**

On 5 September 2013, Commercial Connect, LLC (“Commercial Connect”) submitted a reconsideration request (“Request”). The Request asked the Board to reconsider ICANN staff’s acceptance of what Commercial Connect argues to be two inconsistent expert determinations from dispute resolution panels appointed by the International Centre for Dispute Resolution (“ICDR”). Specifically, the Request challenges the staff’s acceptance of the 8 August 2013 Expert Determination dismissing Commercial Connect LLC’s objection to Top Level Domain Holdings Limited’s (“TLDH”) new gTLD application for the Chinese translation of “shop” (“TLDH’s Applied-for String”) in light of the 21 August 2013 Expert Determination sustaining Commercial Connect’s objection to Amazon EU S.a.r.l.’s (“Amazon”) new gTLD application for the Japanese translation of “online shopping” (“Amazon’s Applied-for String”).

I. Relevant Bylaws

Article IV, Section 2.2 of ICANN’s Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

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

Dismissal of a request for reconsideration is appropriate if the Board Governance Committee (“BGC”) recommends, and in this case the New gTLD Program Committee (“NGPC”) agrees, that the requesting party does not have standing because the party failed to satisfy the criteria set forth in the Bylaws. These standing requirements are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge an action with which someone disagrees. The reconsideration process is for situations where the staff acted in contravention of established policies (when the Request is based on staff action or inaction).

For reconsideration requests that challenge staff actions, requests must be submitted to the BGC within fifteen days after the date on which the party submitting the request became aware of, or reasonably should have become aware of, the challenged staff action. Bylaws, Art. IV, § 2.5.

The Request was received on 5 September 2013. Commercial Connect asserts that it did not become aware of the challenged staff action (the staff’s acceptance of two seemingly inconsistent expert determinations) until after the second expert determination was rendered on 21 August 2013. Because the Request was received within fifteen days of the second expert determination, Commercial Connect’s Request is deemed timely under the Bylaws.

II. Background

A. The New gTLD Objection Procedure

The New gTLD Program includes an objection procedure pursuant to which objections to applications for new gTLDs are submitted to an independent dispute resolution service provider (“DRSP”). The objection procedures are set out in Module 3 of the Applicant Guidebook (<http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>) and the New gTLD Dispute Resolution Procedure (the “Procedure”) attached thereto.

As detailed in the Request, Commercial Connect filed two string confusion objections with the ICDR asserting that two applied-for strings are “confusingly similar to an existing TLD or to another applied-for gTLD string in the same round of applications.” (Guidebook, Section 3.3.2.1; Procedure, Art. 2(e).)¹

A panel of appropriately qualified expert(s) appointed by the ICDR is required to consider an objection that has been registered for processing and for which a response has been submitted. (Guidebook, Section 3.4.4.) Each panel will determine whether the objector has standing to object and will use appropriate general principles/standards to evaluate the merits of each objection. The panel must apply the standards that have been defined in Section 3.5 of the Applicant Guidebook for each type of objection. (Guidebook, Section 3.5; Procedure, Art. 20.)

The panel’s final determination will include a summary of the dispute and findings, identify the prevailing party, and provide the reasoning upon which the expert determination is based. (Guidebook, Section 3.4.6.; Procedure, Art. 21.) The findings of the panel will be

¹ With string confusion objections, where a new gTLD applicant successfully asserts string confusion with another applicant, the two applied-for strings will be placed in a “contention set” and be referred to the String Contention Procedures in Module 4 of the Applicant Guidebook. (Guidebook, Section 3.2.2.1.)

considered an expert determination and advice that ICANN will accept within the dispute resolution process. (Guidebook, Section 3.4.6.)

B. Commercial Connect's Objections to TLDH's Applied-for String and Amazon's Applied-for String

Commercial Connect is an applicant for the .SHOP string ("Commercial Connect's Applied-for String"). Commercial Connect objected to both TLDH's Applied-for String and Amazon's Applied-for String, asserting that both strings were confusingly similar to Commercial Connect's Applied-for String; TLDH and Amazon each filed responses in separate proceedings.

For Commercial Connect's objection to TLDH's Applied-for String, the ICDR's appointed panelist rendered an expert determination on 8 August 2013 ("TLDH Expert Determination"). Based on the evidence and the parties' submissions, the TLDH Panel dismissed Commercial Connect's objection on the grounds that the two-applied for strings are not confusingly similar to the average, reasonable Internet user under the standard set forth in the Procedure and the Applicant Guidebook. (TLDH Expert Determination, Pg. 7.)

Separately, for Commercial Connect's objection to Amazon's Applied-for String, a different panelist appointed by the ICDR rendered an expert determination on 21 August 2013 ("Amazon Expert Determination"). That Panelist ("Amazon Panel") determined that Commercial Connect had standing to object as an applicant for the .SHOP string. (Amazon Expert Determination, Pg. 3.) Based on the evidence and the parties' submissions, the Amazon Panel sustained Commercial Connect's objection on the grounds that the two-applied for strings are confusingly similar. (Amazon Expert Determination, Pgs. 4-5.)

Although Commercial Connect's objections were determined by a third-party DRSP, ICANN has determined that the Reconsideration process can properly be invoked for challenges of the third-party DRSP's decisions where it can be stated that either the DRSP failed to follow

the established policies or processes in reaching the decision, or that ICANN staff failed to follow its policies or processes in accepting that decision. See BGC Recommendation on Reconsideration Request 13-5 at

<http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>.

III. Analysis of Commercial Connect’s Request for Reconsideration

Commercial Connect seeks reconsideration of the staff’s acceptance of the purportedly inconsistent TLDH Expert Determination and the Amazon Expert Determination. More specifically, Commercial Connect requests that ICANN “issue clear and well-defined guidance” to the expert panels and “ensure that the Panels comply with the guidelines” (especially for string similarity objections involving Internationalized Domain Names with foreign characters). Once ICANN establishes “well-defined guidance,” Commercial Connect requests that staff return to the expert panels any determinations that do not comply with the guidance, and Commercial Connect contends that the TLDH Expert Determination should be returned because it is inconsistent with the standards set forth in the Applicant Guidebook and the Amazon Expert Determination. (Request, Section 9.)

A. The Purported Inconsistencies Between Expert Determinations Do Not Demonstrate A Process Violation

Commercial Connect’s Request is based primarily on a claim that the TLDH Panel and the Amazon Panel inconsistently applied the standard for evaluating string confusion objections.²

² On 4 September 2013, Amazon separately sought reconsideration of the Amazon Expert Determination. (Request 13-9, available at <http://www.icann.org/en/groups/board/governance/reconsideration/request-commercial-connect-05sep13-en.pdf>.) Amazon’s reconsideration request is based in part on Amazon’s contention that the Amazon Panel applied the wrong standard in evaluating Commercial Connect’s objection. Amazon relies on the TLDH Expert Determination as evidence that the Amazon

To support this assertion, Commercial Connect relies on Section 2.2.1.1.3 of the Applicant Guidebook, which states that a string confusion objection may be based on any type of similarity, including visual, aural or similarity of meaning. (Request, Pg. 4.) Although both panels concentrated on the meanings of the applied-for strings (determining there was no visual or aural similarities between the objected-to strings and Commercial Connect’s application for .SHOP), Commercial Connect concludes that the two panels, applying the same standard, rendered inconsistent determinations “as to whether a Roman root and a gTLD string of foreign characters having the same meaning should be placed in the same contention set.” (Request, Pg. 5.) To support this conclusion, Commercial Connect contends that the TLDH Panel determined that “the guidelines do not permit confusion to be based on meaning alone” when evaluating an application for Internationalized Domain Names with foreign characters, while the Amazon Panel determined the “use of essentially the same word in two different languages is sufficient to cause string confusion.” (Request, Pg. 5.)

The fact that these two panels, evaluating similar objections, came to different conclusions does not mean that the panels inconsistently applied the standard for evaluating string confusion objections, nor does it establish a policy or process violation to support Reconsideration. On a procedural level, each expert panel generally rests its determination on the materials presented to it by the parties to that particular objection, and the objector bears the burden of proof. Two panels confronting nearly identical issues could rightfully reach different determinations, based on the strength of the materials presented. While Commercial Connect

(continued...)

Panel applied the wrong standard. For the same reasons as stated herein, Amazon’s claims are unsupported and do not support Reconsideration.

was the objector in each of these determinations, each objection was rebutted by a different applicant. Thus, the panels reached different decisions at least in part because the materials submitted by each applicant (TLDH and Amazon) in defense of its proposed string were different, and not because one panel violated any established policy or process in reaching its determination.

For instance, in dismissing Commercial Connect's objection, the TLDH Panel determined that Commercial Connect failed to meet its burden of proof that the two strings (Commercial Connect's Applied-for String and TLDH's Applied-for String) would cause probable confusion in the mind of the average, reasonable Internet user. (TLDH Expert Determination, Pg. 7.) The Amazon Panel, on the other hand, in sustaining Commercial Connect's objection, found that Amazon's arguments:

[d]o not appear to be consistent with the applicable standard of review, the apparent purpose or goal of implementing gTLDs, or the purpose or goal in allowing a string confusion objection.

(Amazon Expert Determination, Pg. 5.) Overall, the Amazon Panel found that Amazon's arguments were "not persuasive." (Expert Determination, Pg. 5.)

Moreover, according to the TLDH Expert Determination, TLDH asserted that Commercial Connect's Applied-for String and TLDH's Applied-for String are aimed at distinct markets, as evidenced by the descriptions in the two applications. TLDH claimed that Commercial Connect's Applied-for String will be marketed to "the global ecosystem of e-commerce" with a "strict verification process where Commercial Connect researches the identity of that applicant and [the] business." (TLDH Expert Determination, Pg. 5.) In contrast, TLDH's Applied-for String is directed to "Chinese-language vendors" and requires no such pre-verification. TLDH noted that these markets may overlap to some extent, but one is "global and

restricted,” while the other is “language-specific and open.” (TLDH Expert Determination, Pg. 5.)

The TLDH Panel found that the similarity in meaning between the two strings is apparent only to individuals who read and understand both Chinese and English. Relying on the intended markets for the strings, the TLDH Panel determined:

While there is some potential for overlap between these two markets, they are largely distinct. Therefore, there is little likelihood that a bilingual user would be deceived or confused.

(TLDH Expert Determination, Pg. 7.) The TLDH Panel therefore dismissed Commercial Connect’s objection not because it concluded that translations of essentially the same word are insufficient to cause string confusion – as Commercial Connect contends – but because TLDH presented convincing evidence that there was little likelihood of confusion between Commercial Connect’s Applied-for String and TLDH’s Applied-for String.

Ultimately, Commercial Connect has not been able to establish an actual policy or process that either panel failed to follow. The Request instead challenges the substantive determinations of the panels rather than the processes by which the panels reached their determinations. While Commercial Connect may disagree with the TLDH Panel’s findings, Reconsideration is not available as a mechanism to re-try the substantive determination of the TLDH Panel. Commercial Connect’s claims that the panels inconsistently applied the standards set out in the Applicant Guidebook are unsupported and do not support Reconsideration.

B. ICANN’s Alleged Failure To Provide Guidance To The Panels Does Not Support Reconsideration

In its Request, Commercial Connect contends that its participation in the dispute resolution process was predicated on its reliance that DRSP-appointed panels would comply with the clear and well-defined guidance provided by ICANN and that ICANN would only accept

determinations that complied with ICANN's guidance. Commercial Connect claims that ICANN's "failure to provide and ensure compliance with clear and well defined guidance has resulted in inconsistent results in identical fact patterns." (Request, Pg. 6.)

Commercial Connect does not contend that the dispute resolution procedures set out in Module 3 of the Applicant Guidebook, or the attached Procedures, were not followed. Instead, it appears that Commercial Connect is challenging an alleged inaction – *i.e.*, ICANN's purported failure to act to provide "clear and well-defined guidance" to dispute resolution panels and failure to "ensure compliance" with that guidance. (Request, Pg. 6.) But Commercial Connect does not identify any established policy or process that required ICANN to take action above the action it has already taken in implementing the New gTLD Program.

ICANN's decision to proceed with the New gTLD Program followed many years of discussion, debate and deliberation with the Internet community, including end users, business groups and governments. ICANN's work to implement the New gTLD Program – including the creation of an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation – is reflected in the drafts of the applicant guidebook that were released for public comment, and in the explanatory papers giving insight into the rationale behind some of the conclusions reached on specific topics. Meaningful community input from participants around the globe has led to numerous and significant revisions of each the draft version of the applicant guidebook, resulting in the Applicant Guidebook that is used in the current application round.

The current Applicant Guidebook is publicly posted on an ICANN website dedicated to the New gTLD Program. See <http://newgtlds.icann.org/en/applicants/agb>. The standards for evaluating the merits of a string confusion objection are provided in the Applicant Guidebook,

and by filing an application for a new gTLD, each applicant agrees to accept the applicability of the gTLD dispute resolution process. (Guidebook, Section 3.5.1 & Section 3.3.2; Procedure, Art. 1(d).) Applicants are evaluated against transparent and predictable criteria, and the procedures are designed to ensure fairness.

Commercial Connect's disagreement as to whether the standards should have resulted in the TLDH Panel dismissing Commercial Connect's objection does not mean that ICANN violated any policy or process in accepting the decision (nor does it support a conclusion that either panel's decision was wrong). The Applicant Guidebook sets out the standards used to evaluate and resolve objections. The TLDH Expert Determination and the Amazon Expert Determination reflect that the panels followed the evaluation standards. As explained above, Commercial Connect has not been able to establish any policy or process that either panel failed to follow. ICANN's acceptance of the determinations as advice to ICANN is also in accordance with the established process. (Guidebook, Section 3.4.6.) Commercial Connect's attempt to claim here that the procedures set forth in the Applicant Guidebook for evaluating string confusion objections, which followed years of inclusive policy development and implementation planning, are somehow deficient because of allegedly inconsistent expert determinations is therefore not supported and should be rejected.

IV. Recommendation and Conclusion

Based on the foregoing, the BGC concludes that Commercial Connect has not stated proper grounds for reconsideration, and we therefore recommend that Commercial Connect's Request be denied without further consideration.

As there is no indication that the TLDH Panel violated any policy or process in dismissing Commercial Connect's objection, and there is similarly no indication that ICANN acted inconsistent with any established policy or procedure, this Request should not proceed. If

Commercial Connect thinks that it has somehow been treated unfairly in the process, and the Board (through the New gTLD Program Committee) adopts this Recommendation, Commercial Connect is free to ask the Ombudsman to review this matter.

Though there are no grounds for reconsideration presented in this matter, following additional discussion of the matter the BGC recommended that staff provide a report to the NGPC, for delivery in 30 days, setting out options for dealing with the situation raised within this Request, namely the differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes involving Amazon's Applied-for String and TLDH's Applied-for String. In addition, the BGC suggested that the strings not proceed to contracting prior to staff's report being produced and considered by the NGPC.

Resp. Ex. 3

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Approved Resolutions | Meeting of the New gTLD Program Committee

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05 Feb 2014

1. [Main Agenda](#)

- a. [Remaining Items from Beijing, Durban and Buenos Aires GAC Advice: Updates and Actions](#)
[Rationale for Resolution 2014.02.05.NG01](#)
- b. [Discussion of Report on String Confusion Expert Determinations](#)
[Rationale for Resolution 2014.02.05.NG02](#)
- c. [Staff Update on Reassignment of Registry Agreements](#)
- d. [Staff Update on Name Collision Framework](#)

1. Main Agenda:

a. Remaining Items from Beijing, Durban and Buenos Aires [GAC Advice: Updates and Actions](#)

Whereas, the [GAC](#) met during the [ICANN 46](#) meeting in Beijing and issued a Communiqué on 11 April 2013 ("Beijing Communiqué").

Whereas, the [GAC](#) met during the [ICANN 47](#) meeting in Durban and issued a Communiqué on 18 July 2013 ("Durban Communiqué").

Whereas, the [GAC](#) met during the [ICANN 48](#) meeting in Buenos Aires and issued a Communiqué on 20 November 2013 ("Buenos Aires Communiqué").

Whereas, the NGPC adopted scorecards to respond to certain items of the [GAC's](#) advice in the Beijing Communiqué and the Durban Communiqué, which were adopted on 4 June 2013, 10 September 2013, and 28 September 2013.

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Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the Board on 10 April 2012, to exercise the ICANN Board's authority for any and all issues that may arise relating to the New gTLD Program.

Resolved (2014.02.05.NG01), the NGPC adopts the "GAC Advice (Beijing, Durban, Buenos Aires): Actions and Updates" (5 February 2014), attached as [Annex 1](#) [PDF, 371 KB] to this Resolution, in response to open items of Beijing, Durban and Buenos Aires GAC advice as presented in the scorecard.

Rationale for Resolution 2014.02.05.NG01

Article XI, Section 2.1 of the [ICANN Bylaws](#)

<http://www.icann.org/en/about/governance/bylaws#XI> permit the GAC to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies." The GAC issued advice to the Board on the New gTLD Program through its Beijing Communiqué dated 11 April 2013, its Durban Communiqué dated 18 July 2013, and its Buenos Aires Communiqué dated 20 November 2013. The ICANN Bylaws require the Board to take into account the GAC's advice on public policy matters in the formulation and adoption of the policies. If the Board decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. The Board and the GAC will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC advice was not followed.

The NGPC has previously addressed items of the GAC's Beijing and Durban advice, but there are some items that the NGPC continues to work through. Additionally, the GAC issued new advice in its Buenos Aires Communiqué that relates to the New gTLD Program. The NGPC is being asked to consider accepting some of the remaining open items of the Beijing and Durban GAC advice, and new items of Buenos Aires advice as described in the attached scorecard dated 28 January 2014.

As part of its consideration of the GAC advice, ICANN posted the GAC advice and officially notified applicants of the advice, triggering the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1. The Beijing GAC advice was posted on 18 April 2013 <http://newgtlds.icann.org/en/announcements-and-media/announcement-18apr13-en>, the Durban GAC advice was posted on 1 August 2013 <http://newgtlds.icann.org/en/announcements-and-media/announcement-01aug13-en>, and the Buenos Aires GAC advice was posted on 11 December 2013. The complete set of applicant responses are provided at: <http://newgtlds.icann.org/en/applicants/gac-advice/>.

In addition, on 23 April 2013, ICANN initiated a public comment forum to solicit input on how the NGPC should address Beijing GAC advice regarding safeguards applicable to broad categories of new gTLD strings <http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm>. The NGPC has considered the applicant responses in addition to the community feedback on how ICANN could implement the GAC's safeguard advice in the Beijing Communiqué in formulating its response to the remaining items of GAC advice.

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Safeguard strings. Some of the applicants for the .doctor string noted that the NGPC should not accept the new GAC advice on .doctor because the term "doctor" is not used exclusively in connection with medical services and to re-categorize the string as relating to a highly regulated sector is unfair and unjust.

With respect to the Category 2 Safeguards, some applicants urged ICANN to ensure that any Public Interest Commitments or application changes based on safeguards for applications in contention sets are "bindingly implemented and monitored after being approved as a Change Request." Additionally, some applicants indicated their support for the GAC advice protections for inter-governmental organization acronyms, protection of Red Cross/Red Crescent names, and special launch programs for geographic and community TLDs.

As part of its deliberations, the NGPC reviewed the following materials and documents:

- GAC Beijing Communiqué:
https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_version=1&modificationDate=1375787122000&api=v2 [PDF, 238 KB]
- GAC Durban Communiqué:
https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_version=1&modificationDate=1374215119858&api=v2 [PDF, 103 KB]
- GAC Buenos Aires Communiqué:
https://gacweb.icann.org/download/attachments/27132037/FINAL_Buenos_Aires_Communique_version=1&modificationDate=1385055905332&api=v2 [PDF, 97 KB]
- Letter from H. Dryden to S. Crocker dated 11 September 2013 re: .vin and .wine: <http://www.icann.org/en/news/correspondence/dryden-to-crocker-09sep13-en.pdf> [PDF, 66 KB]
- Applicant responses to GAC advice: <http://newgtlds.icann.org/en/applicants/gac-advice/>
- Applicant Guidebook, Module 3:
<http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf> [PDF, 261 KB]

In adopting its response to remaining items of Beijing and Durban GAC advice, and the new Buenos Aires advice, the NGPC considered the applicant comments submitted, the GAC's advice transmitted in the Communiqués, and the procedures established in the AGB and the ICANN Bylaws. The adoption of the GAC advice as provided in the attached scorecard will assist with resolving the GAC advice in manner that permits the greatest number of new gTLD applications to continue to move forward as soon as possible.

There are no foreseen fiscal impacts associated with the adoption of this resolution, but fiscal impacts of the possible solutions discussed will be further analysed if adopted. Approval of the resolution will not impact security, stability or resiliency issues relating to the DNS.

As part of ICANN's organizational administrative function, ICANN posted the Buenos

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b. Discussion of Report on String Confusion Expert Determinations

Whereas, on 10 October 2013 the Board Governance Committee (BGC) requested staff to draft a report for the NGPC on String Confusion Objections "setting out options for dealing with the situation raised within this Request, namely the differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes involving Amazon 's Applied – for String and TLDH's Applied-for String."

Whereas, the NGPC is considering potential paths forward to address the perceived inconsistent Expert Determinations from the New gTLD Program String Confusion Objections process, including implementing a review mechanism. The review will be limited to the String Confusion Objection Expert Determinations for .CAR/.CARS and .CAM/.COM.

Whereas, the proposed review mechanism, if implemented, would constitute a change to the current String Confusion Objection process in the New gTLD Applicant Guidebook.

Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the Board on 10 April 2012, to exercise the ICANN Board's authority for any and all issues that may arise relating to the New gTLD Program.

Resolved (2014.02.05.NG02), the NGPC directs the President and CEO, or his designee, to publish for public comment the proposed review mechanism for addressing perceived inconsistent Expert Determinations from the New gTLD Program String Confusion Objections process.

Rationale for Resolution 2014.02.05.NG02

The NGPC's action today, addressing how to deal with perceived inconsistent Expert Determinations from the New gTLD Program String Confusion Objections process, is part of the NGPC's role to provide general oversight of the New gTLD Program. One core of that work is "resolving issues relating to the approval of applications and the delegation of gTLDs pursuant to the New gTLD Program for the current round of the Program." (See NGPC Charter, Section II.D).

The action being approved today is to first direct the ICANN President and CEO, or his designee, to initiate a public comment period on the framework principles of a potential review mechanism to address the perceived inconsistent String Confusion Objection Expert Determinations.

The effect of this proposal, and the issue that is likely to be before the NGPC after the close of the public comments, is to consider implementing a new review mechanism in the String Confusion Objection cases where objections were raised by the same objector against different applications for the same string, where the outcomes of the String Confusion Objections differ. If the proposal is eventually adopted after public comment and further consideration by the NGPC, ICANN would work with the International Centre for Dispute Resolution (ICDR) to implement the new review mechanism outlined in the proposal.

There are no foreseen fiscal impacts associated with the adoption of this resolution, which would initiate the opening of public comments, but the fiscal impacts of the proposed new review mechanism will be further analyzed if adopted. Approval of the

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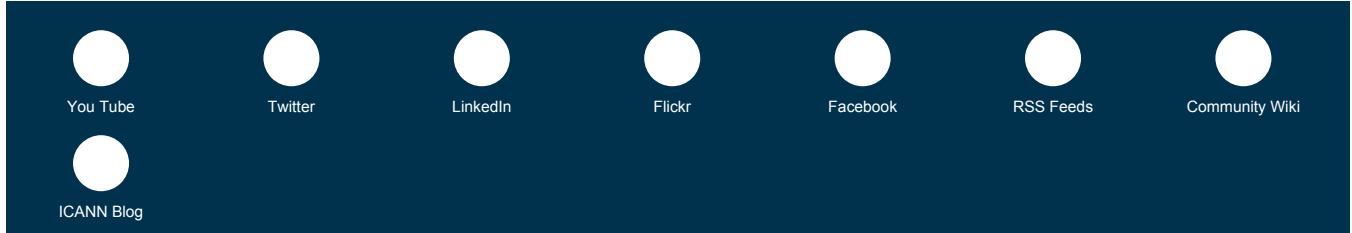
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Item not considered.

d. Staff Update on Name Collision Framework

Item not considered.

Published on 7 February 2014



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Accountability & Transparency

- Accountability Mechanisms
- Independent Review Process
- Request for Reconsideration
- Ombudsman

Governance

- Documents
- Agreements
- AOC Review
- Annual Report
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Approved Resolutions | Meeting of the New gTLD Program Committee

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12 Oct 2014

12 – 14 October 2014

1. **Consent Agenda:**
 - a. [Approval of Minutes](#)

2. **Main Agenda:**
 - a. [GAC Advice in Beijing Communiqué regarding Category 2 Safeguards – Exclusive Registry Access](#)

 - b. [Perceived Inconsistent String Confusion Objection Expert Determinations Rationale for Resolutions 2014.10.12.NG02 – 2014.10.12.NG03](#)

 - c. [Reconsideration Request 14-37, I-Registry Ltd Rationale for Resolution 2014.10.12.NG04](#)

 - d. [GAC Advice regarding Protections for the Red Cross and Red Crescent – Singapore Communiqué Rationale for Resolution 2014.10.12.NG05](#)

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Resolved (2014.10.12.NG01), the Board New gTLD Program Committee (NGPC) approves the minutes of its 8 September 2014 meeting.

2. Main Agenda:

- a. GAC Advice in Beijing Communiqué regarding Category 2 Safeguards – Exclusive Registry Access

No resolution taken.

- b. Perceived Inconsistent String Confusion Objection Expert Determinations

Whereas, on 10 October 2013 the Board Governance Committee (BGC) requested that staff draft a report for the NGPC on String Confusion Objections (SCOs) "setting out options for dealing with the situation raised within this [Reconsideration] Request, namely the differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes involving Amazon's Applied – for String and TLDH's Applied-for String."

Whereas, the NGPC considered potential paths forward to address perceived inconsistent Expert Determinations from the New gTLD Program SCO process, including possibly implementing a new review mechanism.

Whereas, on 5 February 2014, the ICANN Board New gTLD Program Committee (NGPC) directed the ICANN President and CEO, or his designee, to initiate a public comment period on framework principles of a potential review mechanism to address perceived inconsistent String Confusion Objection Expert Determinations (the "proposed review mechanism"). The proposed review mechanism, if adopted, would have been limited to the String Confusion Objection Expert Determinations for .CAR/.CARS and .CAM/.COM, and would have constituted a change to the Objection process set forth in the New gTLD Applicant Guidebook.

Whereas, the NGPC has carefully considered the report that the BGC asked staff to draft in response to Reconsideration Request 13-9, the received public comments to the proposed review mechanism, other comments provided to the NGPC for consideration, as well as the processes set out in the Applicant Guidebook.

Whereas, as set out in the Applicant Guidebook, ICANN has reserved the right to individually consider any application for a new gTLD to determine whether approval would be in the best interest of the Internet community.

Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the Board on 10 April 2012, to exercise the ICANN Board's authority for any and all issues that may arise relating to the New gTLD Program.

Resolved (2014.10.12.NG02), the NGPC has identified the following String Confusion Objection Expert Determinations as not being in the best interest of the New gTLD Program and the Internet community:

SCO Expert Determinations for Review	String	Related SCO Expert Determinations

VeriSign Inc. (Objector) v. United TLD Holdco Ltd. (Applicant)	.CAM [PDF, 5.96 MB]	<ul style="list-style-type: none"> ▪ Dot Agency Limited [PDF, 248 KB](.CAM) ▪ AC Webconnecting Holding B.V. [PDF, 264 KB] (.CAM)
Commercial Connect LLC (Objector) v. Amazon EU S.à r.l. (Applicant)	.通販 [PDF, 73 KB] ¹	Top Level Domain Holdings Limited [PDF, 721 KB](.购物)

Resolved (2014.10.12.NG03), the NGPC directs the President and CEO, or his designee(s), take all steps necessary to establish processes and procedures, in accordance with this resolution and related rationale, pursuant to which the International Centre for Dispute Resolution (ICDR) shall establish a three-member panel to re-evaluate the materials presented, and the Expert Determinations, in the two objection proceedings set out in the chart above under the "SCO Expert Determinations for Review" column and render a Final Expert Determination on these two proceedings. In doing so, the NGPC recommends that the three-member panel also review as background the "Related SCO Expert Determinations" referenced in the above chart.

Rationale for Resolutions 2014.10.12.NG02 – 2014.10.12.NG03

Today, the NGPC is taking action to address perceived inconsistent and unreasonable Expert Determinations resulting from the New gTLD Program String Confusion Objections process. The NGPC's action today is part of its role to provide general oversight of the New gTLD Program. One component of the NGPC's responsibilities is "resolving issues relating to the approval of applications and the delegation of gTLDs pursuant to the New gTLD Program for the current round of the Program." (See [NGPC Charter](#), Section II.D).

The New gTLD Applicant Guidebook (AGB or Guidebook) identifies four grounds upon which a formal objection may be filed against an applied-for string. One such objection is a String Confusion Objection or SCO, which may be filed by an objector (meeting the standing requirements) if the objector believes that an applied-for gTLD string is confusingly similar to an existing TLD or to another applied-for gTLD string in the same round of applications. If successful, an SCO could change the configuration of the preliminary contention sets in that the two applied-for gTLD strings at issue in the objection proceedings will be considered in direct contention with one another (see AGB Module 4, String Contention Procedures). All SCO proceedings were administered by the International Centre for Dispute Resolution (ICDR), and Expert Determinations in all such proceedings have been issued.

Some stakeholders have raised concerns about the perceived inconsistencies with or unreasonableness of certain SCO Expert Determinations. The NGPC has monitored these concerns over the past year, and discussed the issue at several of its meetings. On 10 October 2013, the Board Governance Committee (BGC) asked staff to draft a report for the NGPC on String Confusion Objections "setting out options for dealing with the situation raised within this Request, namely the differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes involving Amazon 's Applied – for String and TLDH's Applied-for String." (See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-amazon-10oct13-en.pdf> [PDF, 131 KB]).

In light of the BGC request following its consideration of Reconsideration Requests 13-9 and 13-10, and community-raised concerns about perceived inconsistent SCO Expert Determinations, the NGPC considered its options, including possibly implementing a review mechanism not contemplated in the Applicant Guidebook that would be available in limited circumstances.

On 5 February 2014, the NGPC directed the ICANN President and CEO to initiate a public comment period on framework principles of a potential review mechanism to address the perceived inconsistent String Confusion Objection Expert Determinations. The proposed review mechanism, as drafted and posted for public comment, would be limited to the SCO Expert Determinations for .CAR/.CARS and .CAM/.COM. The public comment period on the proposed review mechanism closed on 3 April 2014, and a [summary of the comments](#) [PDF, 165 KB] has been publicly posted.

At this time, the NGPC is taking action to address certain perceived inconsistent or otherwise unreasonable SCO Expert Determinations by sending back to the ICDR for a three-member panel evaluation of certain Expert Determinations. The NGPC has identified these Expert Determinations as not in the best interest of the New gTLD Program and the Internet community. The ICDR will be provided supplemental rules to guide the review of the identified Expert Determinations, which include the following:

- The review panel will consist of three members appointed by the ICDR (the "Review Panel").
- The only issue subject to review by the Review Panel shall be the SCO Expert Determinations identified in these resolutions.
- The record on review shall be limited to the transcript of the proceeding giving rise to the original Expert Determination, if any, expert reports, documentary evidence admitted into evidence during the original proceeding, or other evidence relevant to the review that was presented at the original proceeding. No additional documents, briefs or other evidence may be submitted for consideration, except that it is recommended that the Review Panel consider the identified "Related SCO Expert Determinations" in the above chart as part of its review.
- The standard of review to be applied by the Review Panel is: whether the original Expert Panel could have reasonably come to the decision reached on the underlying SCO through an appropriate application of the standard of review as set forth in the Applicant Guidebook and the ICDR Supplementary Procedures for ICANN's New gTLD Program.

- ICANN will pay the applicable fees to conduct the review by the Review Panel.
- The possible outcomes of the review are: (1) the original Expert Determination is supported by the standard of review and reference to the identified related Expert Determinations, and will stand as is; or (2) the original Expert Determination reasonably cannot be supported based on the standard of review and reference to the identified related Expert Determinations, and will be reversed. The Review Panel will submit a written determination including an explanation and rationale for its determination.

As part of its months-long deliberations on this issue, the following are among the factors the NGPC found to be significant:

1. The NGPC notes that the Guidebook was developed by the community in a multi-stakeholder process over several years. The NGPC considered whether it was appropriate to change the Guidebook at this time to implement a review mechanism to address certain perceived inconsistent Expert Determinations. On 18 April 2013, ICANN posted a proposed review mechanism for public comment. The NGPC carefully considered the public comments received. The NGPC notes that comments submitted during the public comment period generally fell into the following categories and themes, each of which is discussed more fully in the summary of public comments:
 - a. Do not adopt the proposed review mechanism.
 - b. Adopt the proposed review mechanism.
 - c. Adopt a review mechanism with an expanded scope.
 - d. Do not adopt the proposed review mechanism or expand the scope.
 - e. Adopt some form of review, but not necessarily the one posted for public comment.
 - f. Recommended modifications to the framework principles of the proposed review mechanism, if any review mechanism is adopted.

The comments presented by various stakeholders highlight the difficulty of the issue and the tension that exists between balancing concerns about perceived inconsistent Expert Determinations, and the processes set forth in the Guidebook that were the subject of multiple rounds of public comment over several years.

As highlighted in many of the public comments, adopting a review mechanism this far along in the process could potentially be unfair because applicants agreed to the processes included in the Guidebook, which did not include this review mechanism, and applicants relied on these processes. The NGPC acknowledges that, while on balance, a review mechanism is not appropriate for the current round of the New gTLD Program, it is recommended that the development of rules and processes for future rounds of the New gTLD Program (to be developed through the multi-stakeholder process) should explore whether there is a need for a formal review process with respect to Expert Determinations.

2. The NGPC considered its role and purpose to provide general oversight of the New

gTLD Program. One component of the NGPC's responsibilities in providing general oversight of the New gTLD Program is "[r]esolving issues relating to the approval of applications and the delegation of gTLDs pursuant to the New gTLD Program for the current round of the Program." (See [NGPC Charter](#), Section II.D). Additionally, the Applicant Guidebook (Section 5.1) provides that:

ICANN's Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs or of the use of an ICANN accountability mechanism.

Addressing the perceived inconsistent and unreasonable String Confusion Objection Expert Determinations is part of the discretionary authority granted to the NGPC in its Charter regarding "approval of applications" and "delegation of gTLDs", in addition to the authority reserved to the Board in the Guidebook to consider individual gTLD applications under exceptional circumstances. The NGPC considers that the identified SCO Expert Determinations present exceptional circumstances warranting action by the NGPC because each of the Expert Determinations falls outside normal standards of what is perceived to be reasonable and just. While some community members may identify other Expert Determinations as inconsistent or unreasonable, the SCO Expert Determinations identified are the only ones that the NGPC has deemed appropriate for further review. The NGPC notes, however, that it also identified the String Confusion Objection Expert Determinations for .CAR/.CARS as not in the best interest of the New gTLD Program and the Internet community. Nonetheless, because the parties in the .CAR/.CARS contention set recently have resolved their contending applications, the NGPC is *not* taking action to send these SCO Expert Determinations back to the ICDR for re-evaluation to render a Final Expert Determination.

3. The NGPC also considered whether there was a reasonable basis for certain perceived inconsistent Expert Determinations to exist, and particularly why the identified Expert Determinations should be sent back to the ICDR while other Expert Determinations should not. The NGPC notes that while on their face some of the Expert Determinations may appear inconsistent, including other SCO Expert Determinations, and Expert Determinations of the Limited Public Interest and Community Objection processes, there are reasonable explanations for these seeming discrepancies, both procedurally and substantively.

First, on a procedural level, each expert panel generally rests its Expert Determination on materials presented to it by the parties to that particular objection, and the objector bears the burden of proof. Two panels confronting identical issues could – and if appropriate should – reach different determinations, based on the strength of the materials presented.

Second, on a substantive level, certain Expert Determinations highlighted by the community that purportedly resulted in "inconsistent" or "unreasonable" results, presented nuanced distinctions relevant to the particular objection. These nuances should not be ignored simply because a party to the dispute disagrees with the end

result. Further, the standard guiding the expert panels involves some degree of subjectivity, and thus independent expert panels would not be expected to reach the same conclusions on every occasion. However, for the identified Expert Determinations, a reasonable explanation for the seeming discrepancies is not as apparent, even taking into account all of the previous explanations about why reasonably "discrepancies" may exist. To allow these Expert Determinations to stand would not be in the best interests of the Internet community.

4. The NGPC considered whether it was appropriate, as suggested by some commenters, to expand the scope of the proposed review mechanism to include other Expert Determinations, such as some resulting from Community and Limited Public Objections, as well as other String Confusion Objection Expert Determinations, and possibly singular and plural versions of the same string. The NGPC determined that to promote the goals of predictability and fairness, establishing a review mechanism more broadly may be more appropriate as part of future community discussions about subsequent rounds of the New gTLD Program. Applicants have already taken action in reliance on many of the Expert Determinations, including signing Registry Agreements, transitioning to delegation, withdrawing their applications, and requesting refunds. Allowing these actions to be undone now would not only delay consideration of all applications, but would raise issues of unfairness for those that have already acted in reliance on the Applicant Guidebook.

It should also be noted that in response to advice from the Governmental Advisory Committee (GAC), the NGPC previously considered the question of whether consumer confusion may result from allowing singular and plural versions of the same strings. On 25 June 2013, the NGPC adopted a resolution resolving "that no changes [were] needed to the existing mechanisms in the Applicant Guidebook to address potential consumer confusion resulting from allowing singular and plural versions of the same string"

<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm#2.d>. The NGPC again notes that the topic of singular and plural versions of the same string also may be the subject of further community discussion as it relates to future rounds of the New gTLD Program.

5. The NGPC considered community correspondence on this issue in addition to comments from the community expressed at the ICANN meetings. The concerns raised in the ICANN meetings and in correspondence have been factored into the deliberations on this matter.

The NGPC previously delayed its consideration of BGC Recommendations on Reconsideration Requests 13-9 and 13-10 pending the completion of the NGPC's review of the issues discussed above. Now that the NGPC has taken action as noted above, it will resume its consideration of the BGC Recommendations on Reconsideration Requests 13-9 and 13-10 as soon as feasible.

There will be direct fiscal impacts on ICANN associated with the adoption of this resolution since certain proceedings will be sent back to the ICDR for re-review by a three-member expert panel. Approval of the resolution will not impact security, stability or resiliency issues relating to the domain name system.

Taking this action is an Organizational Administrative Action that was the subject of public

comment. The summary of public comments is available for review here: (<https://www.icann.org/en/system/files/files/report-comments-sco-framework-principles-24apr14-en.pdf> [PDF, 165 KB]).

c. Reconsideration Request 14-37, I-Registry Ltd.

Whereas, iRegistry Ltd. ("Requester") filed Reconsideration Request 14-37 asking the New gTLD Program Committee ("NGPC") to reverse Resolutions 2014.07.30.NG01 – 2014.07.30.NG04 (the "Resolution") "or at least amend[]" the Resolution, and to then put the decision as to how to address name collisions "on hold" until the issues the Requester raises have "been solved."

Whereas, the BGC considered the issues raised in Reconsideration Request 14-37.

Whereas, the BGC recommended that the Request be denied because the Requester has not stated proper grounds for reconsideration and the NGPC agrees.

Resolved (2014.10.12.NG04), the NGPC adopts the BGC Recommendation on Reconsideration Request 14-37, which can be found at <https://www.icann.org/en/system/files/files/recommendation-i-registry-04sep14-en.pdf> [PDF, 150 KB].

Rationale for Resolution 2014.10.12.NG04

I. Brief Summary

iRegistry Ltd. ("Requester") is a domain name registry that disputes the NGPC's adoption of the Name Collision Occurrence Management Framework (the "Framework").

After conducting several independent studies regarding the name collision issue, ICANN implemented a public comment period from 26 February 2014 through 21 April 2014 where the community provided feedback on possible solutions to the name collision issue, including the issue of implementing a framework to manage and mitigate name collisions. ICANN received 28 comments, none of which were from the Requester.²

After considering the public comments received, the detailed studies analyzing the issue, and advice from the relevant ICANN advisory committee, the NGPC approved Resolutions 2014.07.30.NG01 – 2014.07.30.NG04 (the "Resolution")³ on 30 July 2014, adopting the Framework. The Framework sets forth procedures that registries must follow to prevent name collisions from compromising the security or stability of the Internet.

The Requester filed the instant Request (Request 14-37), arguing that the NGPC failed to sufficiently involve the public in its decision to adopt the Framework and contending that the Framework will lead to confusion amongst registrants, a lower volume of registrations, and thus adversely impact the Requester financially. The Board Governance Committee (BGC) considered Request 14-37 and concluded that: (i) there is no evidence that the NGPC's actions in adopting the Resolution support reconsideration; (ii) the Requester has not demonstrated that the NGPC

failed to consider any material information in passing the Resolution or that the NGPC relied on false or inaccurate material information in passing the Resolution; and (iii) the Requester has not demonstrated that it has been materially and adversely affected by the Resolution. Therefore, the BGC recommended that Reconsideration Request 14-37 be denied (and the entirety of the BGC Recommendation is incorporated by reference as though fully set forth in this rationale). The NGPC agrees.

II. Summary of Relevant Background Facts

In furtherance of ICANN's core values aimed at "[p]reserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet" (Bylaws, Art. 1, § 2.1), ICANN's Security and Stability Advisory Committee ("SSAC") published SAC057: SSAC Advisory on Internal Name Certificates on 15 March 2013.⁴ The report identified a Certificate Authority ("CA") practice that, if widely exploited, could pose risks to the privacy and integrity of secure Internet communications (name collisions). The SSAC advised ICANN to take immediate steps to mitigate the risks. The issues identified in SAC057 are part of the more general category of name collision issues. Accordingly, on 18 May 2013, the ICANN Board approved a resolution commissioning a study in response to the SSAC's advice in SAC057.⁵

On 5 August 2013, ICANN released the study, prepared by Interisle Consulting Group, of the likelihood and potential consequences of collision between new public gTLD labels and existing private uses of the same strings.⁶

On 7 October 2013, ICANN introduced the New gTLD Collision Occurrence Management Plan (the "Plan"), which permitted the use of an alternate path to delegation.⁷ As part of the Resolution adopting the Plan, the NGPC recommended that the ICANN Board "direct the ICANN President and CEO to develop a long term plan to manage name collision risks related to the delegation of new TLDs, and to work with the community to develop a long-term plan to retain and measure root-server data."⁸

In November 2013, ICANN engaged JAS Global Advisors LLC ("JAS") to lead the development of the Framework, in cooperation with the community.⁹

From 26 February 2014 through 21 April 2014, ICANN implemented a public comment period where the community provided feedback on possible solutions to the name collision issue, including the issue of implementing a framework to manage and mitigate name collisions; ICANN received 28 comments, none of which were from the Requester¹⁰ The Requester did not participate in the public comment forum. After collection of the public comments, JAS released the final version of its Phase One Report on Mitigating the Risk of DNS Namespace Collisions.¹¹

On 6 June 2014, SSAC published SAC066: SSAC Comment Concerning JAS Phase One Report on Mitigating the Risk of DNS Namespace Collisions, in which it offered advice and recommendations to the Board on the framework presented in the JAS Study and Name Collision Framework.¹²

On 27 July 2014, the Requester sent a letter to ICANN: (i) asking ICANN to "thoroughly evaluate" a proposal for addressing the problem of name collisions; and

(ii) providing five specific proposals as to the how the issue should be addressed. (Request, Ex. D.) ICANN acknowledged receipt of the Requester's letter on 29 July 2014. (Request, Ex. E.)

On 30 July 2014, the NGPC approved Resolutions 2014.07.30.NG01 – 2014.07.30.NG04 (the "Resolution"), which adopted the Framework. The Framework sets forth procedures that registries must follow to prevent name collisions from compromising the security or stability of the Internet and directs the "President and CEO, or his designee(s), to take the necessary actions to implement" the Framework.¹³

On 4 August 2014, ICANN's Global Domains Division issued each new gTLD registry operator a Name Collision Occurrence Assessment ("Assessment"), which identified which measures registries must take to avoid name collision issues, in accordance with the Framework.¹⁴ On that same date, the Requester received the Assessment via email. (Request, Ex. A.)

On 12 August 2014, ICANN presented a webinar providing an overview of the Framework specifically geared towards registry operators.¹⁵

On 13 August 2014, the Requester filed the instant Request, seeking reconsideration of the NGPC's Resolution.

While how to treat one category of names affected by the name collision issue is not yet part of the Framework, ICANN is in the process of gathering public input on this topic. Specifically, ICANN has opened a public comment forum on this particular issue, which will run from 25 August 2014 through 7 October 2014.¹⁶

On 4 September 2014, the Board Governance Committee ("BGC") issued its Recommendation regarding Reconsideration Request 14-37.¹⁷ On 11 September 2014, the Requester filed a Clarification to Reconsideration Request 14-37,¹⁸ containing further alleged details regarding how the Requester has been materially affected by the Resolution and the adoption of the Framework.

III. Issues

The issues for reconsideration are whether the NGPC:

1. Failed to consider material input from the community in approving the Resolution (Request, § 8, Pg. 11); and
2. Improperly underestimated the Resolution's potential negative consequences. (*Id.*, § 8, Pgs. 7-8.).

IV. The Relevant Standards for Evaluating Reconsideration Requests

ICANN's Bylaws call for the BGC to evaluate and, for challenged Board (or NGPC) action, make recommendations to the Board (or NGPC) with respect to Reconsideration Requests. See Article IV, Section 2 of the Bylaws. The NGPC, bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC Recommendation on Request 14-37 and finds the analysis sound.¹⁹

V. Analysis and Rationale

The Requester has not demonstrated that the Board failed to consider material information or relied on false or inaccurate material information in passing the Resolutions; therefore, reconsideration is not appropriate.

A. The Request Warrants Summary Dismissal.

The BGC concluded, and the NGPC agrees, that the Requester does not have standing because the Requester "had notice and opportunity to, but did not, participate in the public comment period relating to the contested action[.]" (Bylaws, Art. IV, § 2.9.). Specifically, ICANN's Bylaws permit the BGC to summarily dismiss a request for reconsideration if "the requestor had notice and opportunity to, but did not, participate in the public comment period relating to the contested action[.]" (Bylaws, Art. IV, § 2.9.)

From 26 February 2014 through 21 April 2014, ICANN implemented a public comment period, which was announced on ICANN's website, and where the community provided feedback on possible solutions, including a framework, to name collision issues²⁰ The forum generated 28 comments, but the Requester did not participate in the public comment forum, and has offered no justification, excuse or explanation for its decision to refrain from doing so. The only communication it claims to have had with ICANN regarding name collisions is a letter dated 27 July 2014, which was well after the public comment period had closed.²¹ Given that the public comment period here is indisputably related to the Resolution, summary dismissal is warranted on the basis of the Requester's non-participation. However, in the interest of completeness, the NGPC will nonetheless address the merits of the Request.

B. The NGPC Considered All Material Information.

The BGC concluded, and the NGPC agrees, that the Requester has not demonstrated that the NGPC failed to consider material relevant information.

In order to state a basis for reconsideration of a Board action, the Requester must demonstrate that the Board (or in this case the NGPC) failed to consider material information or considered false or inaccurate material information in adopting the Resolution. (Bylaws, Art. IV, § 2.2.) The Requester does not argue that the NGPC considered false or inaccurate material information, but it does claim that the NGPC failed to consider material information in two ways. First, the Requester claims that the NGPC did not sufficiently consult with the public prior to adopting the Resolution. Second, the Requester claims that the NGPC failed to consider how the Resolution will have material adverse effects on registries and internet users. Neither argument withstands scrutiny, and neither is grounds for reconsideration.

1. The NGPC Considered Public Comments Solicited During A Lengthy Public Comment Period.

The Requester claims that the NGPC "failed to take material input

from the community into account." (Request, § 8, Pg. 11.) Contrary to the Requester's claims, the NGPC did consider feedback received in "the public comment forum"²² that was open from 26 February 2014 through 21 April 2014. The Requester does not explain why it failed to participate in that forum. Had it participated, its views would have been included along with the 28 detailed comments considered that were submitted by various stakeholders and members of the public, including other registries.²³ Notably, the public comment period for this matter was actually longer than required. Typically, public comment periods are open 21 days, and if comments are received during that time, there is a 21-day reply period.²⁴ Here, the public comment period was open for 33 days, with a 21-day reply period. In addition, ICANN facilitated an entire public session about the name collision issue at the London ICANN meeting on 23 June 2014 that provided yet another opportunity for public commentary and participation; the Requester again chose not to participate.²⁵ As such, the Requester cannot reasonably claim that the NGPC did not consider public input before adopting the Resolution.

In sum, the Requester does not persuasively argue that the NGPC failed to consider material information in the form of public comments in adopting the Resolution, and therefore has not stated proper grounds for reconsideration on that basis. (Bylaws, Art. IV, § 2.2.)

2. The NGPC Considered All Material Information Relevant To The Resolution.

The Requester seeks reconsideration of the Resolution because it claims the NGPC "did not properly assess the implications of the decision." (Request, § 8, Pg. 12.) The Requester's main basis for this assertion is that the issues raised in its own 27 July 2014 letter were not expressly addressed in the "Rationale" section of the Resolution. This argument fails to provide a basis for reconsideration for two reasons.

First, the Resolution *does* take into account the substance of the information provided in the Requester's 27 July 2014 letter. The 27 July 2014 letter made five requests, all related to either the "RPM rules" or the Requester's view that one common set of rules should apply to all gTLDs. (Request, § 8, Pg. 10 & Ex. D.) Despite Requester's claims to the contrary, the same issues raised in the 27 July 2014 letter were all presented to the NGPC during the public comment period by other stakeholders and were addressed by the NGPC. The Resolution acknowledges that the NGPC considered the public comments that: (i) expressed concern regarding the "interaction between the name collision block lists and intellectual property rights protection mechanisms"²⁶; (ii) referenced how the "name collision issue is creating an uneven competitive landscape"; and (iii) discussed the pros and cons of treating new gTLD operators differently from legacy operators.²⁷ Furthermore, ICANN has already determined that the RPM issue requires further public comment

before a decision can be made as to how to handle the issue. In fact, ICANN is currently soliciting comments, between 25 August 2014 and 7 October 2014, on the approach that should be taken "regarding the appropriate Rights Protection Mechanisms for release of SLD Block List names."²⁸ In other words, the NGPC was not lacking any material information on the applicable issues, regardless of whether it specifically considered the Requester's 27 July 2014 letter.

Second, the Requester's disagreement with the substance of the Framework does not form the proper basis for reconsideration. The NGPC considered independent, detailed studies discussing the name collision issue, including one prepared by JAS and one prepared by Interisle Consulting Group.²⁹ Further, the NGPC took into account advice from the SSAC before adopting the Resolution. The SSAC's role is to "advise the ICANN community and Board on matters relating to the security and integrity of the Internet's naming and address allocation systems." (Bylaws, Art. XI, § 2.a.) In sum, the NGPC considered public comments, independent analytical reports, and advice from the relevant ICANN advisory committee. While the Requester complains that the NGPC "did not mention the letter" (that the Requester sent months after the public comment period had closed) and as such "did not properly address the implications of the decision" to approve the Framework, those allegations do not amount to a claim that the NGPC failed to consider any material information. As such, no reconsideration is warranted.

As a final note, the Requester also claims reconsideration is warranted because "[t]here is no indication that the GAC³⁰ has been given the opportunity to provide feedback" to the JAS reports or the SSAC advice. (Request, § 7, Pg. 7) The GAC provides "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.) That the GAC did not issue any formal advice related to how ICANN should address name collisions does not mean the NGPC failed to consider any material information. Had the GAC issued such advice, the ICANN Board would have considered it, as is required under ICANN's Bylaws. (Bylaws, Art. XI, §§ 2.1.i, 2.1.j.) Further, in July 2013, the GAC Durban Communiqué did advise that the Board "[a]s a matter of urgency consider the recommendations contained in the SSAC Report on Dotless Domains (SAC053) and Internal Name Certificates (SAC057)," and the latter involved name collision issues.³¹ The Board did consider the SSAC's advice, and in turn, adopted the Framework.

Again, as the Requester does not show that the NGPC failed to consider material information in adopting the Resolution, reconsideration is not appropriate. (Bylaws, Art. IV, § 2.2.)

C. Alleged Confusion is not a Basis for Reconsideration.

The BGC concluded, and the NGPC agrees, that the Requester has not demonstrated that the NGPC failed to consider material relevant information concerning the importance of educating the public about the Framework.

The Requester complains that the NGPC failed to consider the supposed fact that the "overall majority" of registrants are not aware of the name collision problem and will therefore be "confus[ed] about the availability of domain names in general." (Request, § 7, Pg. 6.) However, it is evident that the NGPC did consider information concerning the importance of educating the public about the Framework. The Resolution dedicates an entire provision (section B.6) to "Informational Materials" and requires ICANN to "produce informational materials as needed . . . [and] work to make this information available to parties potentially affected by name collision."³² Even though the Framework was just recently adopted, ICANN has already posted and provided a wide variety of informational materials, including webinars geared towards registry operators, handbooks and videos for IT professionals, and a "Frequently Asked Questions" page regarding the Framework.³³ Moreover, ICANN has dedicated resources towards ensuring questions about the Assessment or the Framework will be answered promptly and accurately. In other words, far from failing to consider the potential for confusion regarding the Resolution, ICANN has taken proactive and significant steps to ensure that affected parties comprehend the Framework and the steps it requires.³⁴ No reconsideration is warranted on the grounds that the NGPC did not consider information regarding public outreach, as it is clear that the NGPC did consider such information and acted on it by way of the aforementioned educational resources.

D. The Requester Has Not Demonstrated It Has Been Materially Affected By The Resolution.

The BGC concluded, and the NGPC agrees, that the Requester has not demonstrated that it has been materially and adversely affect by the Resolution.

Absent evidence that the Requester has been materially and adversely affected by the Resolution, reconsideration is not appropriate. (Bylaws, Art. IV, §§ 2.1-2.2.) Here, the Requester argues it is materially affected by the Resolution for two reasons. (Request, § 6, Pgs. 4-5.) First, it contends that the Framework does not provide clear guidance as to how to prevent harms related to name collisions. (*Id.*, Pg. 5.) Second, the Requester contends that it will suffer "lower registration rates" due to the confusion the Framework will purportedly cause, because the Requester predicts that registrars will "not offer domain name registrations from the Name Collision lists." (*Id.*) Neither of these concerns has yet come to fruition, however, and both are merely speculative at this point.³⁵ Again, only those persons who "*have been* adversely affected by" an ICANN action may file a request for reconsideration. (Bylaws, Art. IV, § 2.2) (emphasis added). Because the only harm the Requester identifies is, at this point, merely speculative and hypothetical, the request for reconsideration is premature.³⁶

As such, the Requester has failed to demonstrate it *has been* materially affected by the Resolution and, on that independent basis, reconsideration of

the adoption of the Resolution is not warranted.

VI. Decision

The NGPC had the opportunity to consider all of the materials submitted by or on behalf of the Requester or that otherwise relate to Request 14-37. Following consideration of all relevant information provided, the NGPC reviewed and has adopted the BGC's Recommendation on Request 14-37 <https://www.icann.org/en/system/files/files/recommendation-i-registry-04sep14-en.pdf> [PDF, 150 KB], which shall be deemed a part of this Rationale and is attached to the Reference Materials to the NGPC Submission on this matter.

Adopting the BGC's recommendation has no direct financial impact on ICANN and will not negatively impact the systemic security, stability and resiliency of the domain name system.

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

d. GAC Advice regarding Protections for the Red Cross and Red Crescent – Singapore Communiqué

Whereas, the GAC met during the ICANN 49 meeting in Singapore and issued a [Communiqué](#) [PDF., 449 KB] on 27 March 2014 ("Singapore Communiqué").

Whereas, in the Singapore Communiqué the GAC clarified its previous advice to the ICANN Board to permanently protect from unauthorized use the terms associated with the International Red Cross and Red Crescent Movement, and advised that the protections should also include "the 189 National Red Cross and Red Crescent Societies, in English and the official languages of their respective states of origin," and the "full names of the International Committee of the Red Cross and International Federation of the Red Cross and Red Crescent Societies in the six (6) United Nations Languages." The GAC Advice is identified in the GAC Register of Advice as [2014-03-27-RCRC](#).

Whereas, the GNSO has developed policy recommendations to the Board concerning the Red Cross and Red Crescent names that are the subject of the GAC's Singapore Communiqué. The scope of protections in the GNSO policy recommendations differ from the GAC's advice, and the GAC, GNSO, Board, and ICANN community continue to actively work on resolving the differences.

Whereas, the NGPC is responsible for considering the GAC advice pursuant to the authority granted to it by the Board on 10 April 2012, to exercise the ICANN Board's authority for any and all issues that may arise relating to the New gTLD Program.

Resolved (2014.10.12.NG05), the President and CEO, or his designee(s), is directed to provide temporary protections for the names of the International Committee of the Red Cross and International Federation of the Red Cross and Red Crescent Societies, and the 189 National Red Cross and Red Crescent Societies, as identified in the GAC Register of Advice as [2014-03-27-RCRC](#) while the GAC, GNSO, Board, and ICANN community continue to actively work on resolving the differences in the advice from the GAC and the GNSO policy recommendations on the scope of protections for the RCRC names.

Rationale for Resolution 2014.10.12.NG05

The NGPC is taking action to provide temporary protections for Red Cross/Red Crescent (RCRC) names identified in the GAC's advice in the Singapore Communiqué, while being mindful of the outstanding discussions among the GAC, GNSO, Board, and ICANN community to actively work on resolving the differences in the GAC advice and the GNSO policy recommendations on the scope of protections for the RCRC names.

[Article XI, Section 2.1](#) of the ICANN Bylaws permits the GAC to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies." The GAC issued advice to the Board on the New gTLD Program through its Singapore Communiqué dated 27 March 2014 ("Singapore Communiqué"). The ICANN Bylaws require the Board to take into account the GAC's advice on public policy matters in the formulation and adoption of the policies. If the Board decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. The Board and the GAC will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC advice was not followed.

In the Singapore Communiqué, the GAC clarified its previous advice to the ICANN Board to permanently protect from unauthorized use the terms associated with the International Red Cross and Red Crescent Movement, and advised that the protections should also include "the 189 National Red Cross and Red Crescent Societies, in English and the official languages of their respective states of origin," and the "full names of the International Committee of the Red Cross and International Federation of the Red Cross and Red Crescent Societies in the six (6) United Nations Languages".

The GNSO has also provided policy recommendations to the ICANN Board on the same RCRC names that are the subject of the GAC's advice in the Singapore Communiqué. Unlike the GAC's advice, the GNSO policy recommendations do not call for permanent protections for the set of RCRC names. Instead, the GNSO policy recommends that these names be protected by entering them into the TMCH for 90-days claims notification.

On 30 April 2014, the ICANN Board [adopted](#) the GNSO Council's policy recommendations on IGO-INGO protections that were not inconsistent with the GAC's advice, and requested additional time to consider the remaining policy recommendations that are inconsistent with the GAC's advice on the same topic. The Board committed to facilitate discussions among the relevant parties to reconcile any remaining differences between the policy recommendations and the GAC advice on the topic, and previously tasked the NGPC to help with this process. The NGPC action today is to provide temporary protections for the RCRC names identified in the GAC's advice in the Singapore Communiqué, while being mindful of the outstanding discussions among the GAC, GNSO, Board, and ICANN community to actively work on resolving the differences in the advice from the GAC and the GNSO policy recommendations on the scope of protections for the RCRC names.

The NGPC's action will have a positive impact on the community as it will allow for temporary protections for RCRC names, while allowing for discussions to continue. As part of its deliberations, the NGPC reviewed the following significant materials and documents:

- GAC Singapore Communiqué:

<https://www.icann.org/en/system/files/correspondence/gac-to-board-27mar14-en.pdf>
[PDF, 449 KB]

- GNSO PDP Working Group Final Report on Protection of IGO and INGO Identifiers in all gTLDs: <http://gns0.icann.org/en/issues/igo-ingo-final-10nov13-en.pdf> [PDF, 645 KB]

There are no foreseen fiscal impacts associated with the adoption of this resolution. Approval of the proposed resolution will not impact security, stability or resiliency issues relating to the DNS. This action is not a defined policy process within ICANN's Supporting Organizations or ICANN's Organizational Administrative Function decision requiring public comment or not requiring public comment. Subsequent actions related to protections for RCRC names may be subject to public comment.

e. Any Other Business

No resolution taken.

Published on 14 October 2014

¹ Japanese translation of "online shopping"

² See Report of Public Comments, *available at* <https://www.icann.org/en/system/files/files/report-comments-name-collision-10jun14-en.pdf> [PDF, 229 KB].

³ See Resolution, *available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-07-30-en>.

⁴ See <https://www.icann.org/en/system/files/files/sac-057-en.pdf> [PDF, 1.13 MB].

⁵ See <https://features.icann.org/ssac-advisory-internal-name-certificates>.

⁶ See Addressing the Consequences of Name Collisions, *available at* <https://www.icann.org/news/announcement-3-2013-08-05-en>.

⁷ See New gTLD Collision Occurrence Management Plan Frequently Asked Questions, *available at* <https://www.icann.org/news/announcement-2013-12-03-en>.

⁸ See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-10-07-en#1.a>.

⁹ See <https://www.icann.org/resources/pages/name-collision-2013-12-06-en>.

¹⁰ See Report of Public Comments, *available at* <https://www.icann.org/en/system/files/files/report-comments-name-collision-10jun14-en.pdf> [PDF, 229 KB].

¹¹ See JAS Report, *available at* <https://www.icann.org/en/system/files/files/name-collision-mitigation-study-06jun14-en.pdf> [PDF, 391 KB].

¹² See <https://www.icann.org/en/system/files/files/sac-066-en.pdf> [PDF, 305 KB].

¹³ See Resolution, *available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-07-30-en>.

¹⁴ See Name Collision Occurrence Assessment, *available at* <http://newgtlds.icann.org/sites/default/files/agreements/name-collision-assessment-04aug14-en.pdf> [PDF, 91 KB].

¹⁵ See <https://www.icann.org/resources/pages/name-collision-2013-12-06-en>.

¹⁶ See Implementing Rights Protection Mechanisms in the Name Collision Mitigation Framework, *available at* <https://www.icann.org/public-comments/name-collision-rpm-2014-08-25-en>.

¹⁷ <https://www.icann.org/en/system/files/files/recommendation-i-registry-04sep14-en.pdf> [PDF, 150 KB]

¹⁸ <https://www.icann.org/en/system/files/files/clarification-i-registry-11sep14-en.pdf> [PDF, 59 KB]

¹⁹ Having a reconsideration process whereby the BGC reviews and, if it chooses, makes a recommendation to the Board/NGPC for approval, positively affects ICANN's transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, Bylaws, and Articles of Incorporation.

²⁰ See Report of Public Comments, *available at* <https://www.icann.org/en/system/files/files/report-comments-name-collision-10jun14-en.pdf> [PDF, 229 KB].

²¹ The Requester states that it sent a letter to the NGPC "well in advance" of the NGPC meeting, but that statement is wrong given the mere three days between the date of the letter and the 30 July 2014 NGPC meeting. (See Request, § 8, Pg. 9.)

²² See Resolution, *available at* <https://www.icann.org/en/system/files/files/name-collision-framework-30jul14-en.pdf> [PDF, 634 KB].

²³ See Report of Public Comments, *available at* <https://www.icann.org/en/system/files/files/report-comments-name-collision-10jun14-en.pdf> [PDF, 229 KB].

²⁴ See <https://www.icann.org/resources/pages/how-2014-03-17-en>

²⁵ See Name Collision Presentation, London: ICANN 50, *available at* <https://london50.icann.org/en/schedule/mon-name-collision/presentation-name-collision-23jun14-en>.

²⁶ See Resolution, *available at* <https://www.icann.org/en/system/files/files/name-collision-framework-30jul14-en.pdf> [PDF, 634 KB].

²⁷ See Report of Public Comments, at Pg. 11, *available at* <https://www.icann.org/en/system/files/files/report-comments-name-collision-10jun14-en.pdf> [PDF, 229 KB].

²⁸ See Implementing Rights Protection Mechanisms in the Name Collision Mitigation Framework, *available at* <https://www.icann.org/public-comments/name-collision-rpm-2014-08-25-en>

²⁹ See Resolution, *available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-07-30-en>.

³⁰ Governmental Advisory Committee.

³¹ See GAC Communiqué Issued at ICANN 47, *available at* <https://www.icann.org/news/announcement-2013-07-18-en>; SAC057, *available at* <https://www.icann.org/en/system/files/files/sac-057-en.pdf> [PDF,

1.13 KB].

³² See Resolution, available at <https://www.icann.org/en/system/files/files/name-collision-framework-30jul14-en.pdf> [PDF, 634 KB].

³³ See Name Collision Resources & Information, available at <https://www.icann.org/resources/pages/name-collision-2013-12-06-en>.

³⁴ ICANN has also engaged in significant outreach activities on LinkedIn and via various media outlets, as well as launching a Google Adwords promotion.

³⁵ In fact, the Framework will permit names to be activated in the DNS now that were previously not allowed to be activated. As such, the Framework may well lead to an increase in registrations.

³⁶ On 11 September 2014, after the BGC issued its Recommendation, the Requester filed a Clarification to Reconsideration Request 14-37, purportedly providing additional details regarding ways in which the Requester has been materially and adversely affected by the Resolution. Despite its claims to the contrary, the Requester's continued allegations of potential harm are still speculative and hypothetical.

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Resp. Ex. 5

ICANN Board Rationales for the Approval of the Launch of the New gTLD Program

*Note: The Rationales are not final until approved with the minutes of the Board meeting.

Table of Contents

ICANN Board Rationales

1. Program Launch.....	4
2. Evaluation Process.....	8
3. Fees.....	16
4. Geographic Names.....	30
5. Mitigating Malicious Conduct.....	46
6. Objection Process.....	64
7. Root Zone Scaling.....	79
8. String Similarity and String Contention.....	93
9. Trademark Protection.....	107

6. ICANN Board Rationale on Objection Process Associated with the New gTLD Program

6. ICANN Board Rationale on Objection Process Associated with the New gTLD Program

I. Introduction

Recommendation 12 of the Generic Names Supporting Organization (GNSO) Final Report on the Introduction of New gTLDs (<http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>), and approved by the Board in June 2008 (http://www.icann.org/en/minutes/resolutions-26jun08.htm#_Toc76113171) states that, “[D]ispute resolution and challenge processes must be established prior to the start of the process.” Further, Implementation Guideline H, also set forth by the GNSO, states “External dispute providers will give decisions on objections.”

Based on the GNSO Policy and implementation planning, it was determined that four of the GNSO recommendations should serve as a basis for an objection process managed by external providers. Those include the following:

- (i) Recommendation 2 “Strings must not be confusingly similar to an existing top-level domain or a Reserved Name” (String Confusion Objection);
- (ii) Recommendation 3 “Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law” (Legal Rights Objection);
- (iii) Recommendation 6 “Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law” (Limited Public Interest Objection); and
- (iv) Recommendation 20 “An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted” (Community Objection).

Thus, a process allowing third parties to object to applications for new gTLDs on each the four grounds stated above was developed.²

Subsequent to the development and refinement of the original Objection Procedures based on the GNSO recommendations and set out in Module 3 of the Applicant Guidebook (see <http://www.icann.org/en/topics/new-gtlds/objection-procedures-clean-30may11-en.pdf>) a separate process has been established for the GAC. That process is also set out in Module 3 of the Applicant Guidebook. In short, there is now a formal process for the GAC to provide advice in relation to the approval of an application.

II. History of the Development of the Objection Processes and Procedures Associated with the New gTLD Program

This section sets forth a history of significant actions taken on the subject of the objection process associated with the new gTLD program.

- In December 2005, the GNSO commenced a rigorous policy development process to determine whether (and the circumstances under which) new gTLDs would be added. A broad consensus was achieved that new gTLDs should be added to the root in order to further stimulate competition and for numerous other reasons.
- In August 2007, the GNSO issued its final report regarding the introduction of new gTLDs. Recommendation 12 of the report (“Recommendation 12”) states that “[d]ispute resolution and challenge processes . . . must be established prior to the start of the process” and Implementation Guideline H states that “External dispute providers will give decisions on objections.” <http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>
- In December 2007, ICANN posted a call for expressions of Interest from potential Dispute Resolution Service Providers (DSRP) for the new gTLD Program. <http://www.icann.org/en/announcements/announcement-21dec07.htm>

² The International Centre for Dispute Resolution (ICDR) has agreed to administer disputes brought pursuant to String Confusion Objections. The Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO) has agreed to administer disputes brought pursuant to Legal Rights Objections. The International Center of Expertise of the International Chamber of Commerce (ICC) has agreed to administer disputes brought pursuant to Limited Public Interest and Community Objections.

- Throughout 2008, external dispute resolution service providers were evaluated and selected. As noted above in footnote 1, the ICDR will administer disputes brought pursuant to String Confusion Objections, WIPO will administer disputes brought pursuant to Legal Rights Objections and the ICC will administer disputes brought pursuant to Limited Public Interest and Community Objections.
- Also throughout 2008, ICANN conducted public consultations, as well as thorough and global research to help define the standing requirements and standards to be used by dispute resolution panels to resolve the disputes on the various Objection grounds.
- In October 2008, ICANN published draft version 1 of the Applicant Guidebook, including Module 3, which laid out the Dispute Resolution Procedures. At that same time, ICANN posted a paper for community discussion entitled “Morality and Public Order Objection Considerations in New gTLDs,” which summarized the implementation work that had been accomplished in response to Recommendation 6 (now called Limited Public Interest Objection).
<http://www.icann.org/en/topics/new-gtlds/morality-public-order-draft-29oct08-en.pdf>
- In February 2009, the Board discussed who would have standing to object to an applied-for string on the basis of morality and public order. There was a sense that an objection-based dispute resolution process was the appropriate method for addressing possible disputes. There was also a sense that any injured party would have standing to object. Limiting standing to governments or other official bodies might not address the potential harm.
<http://www.icann.org/en/minutes/minutes-12feb09.htm>
- Also in February 2009, with the second draft version of the Applicant Guidebook, ICANN posted the separate “New gTLD Dispute Resolution Procedure”. <http://www.icann.org/en/topics/new-gtlds/draft-dispute-resolution-procedure-18feb09-en.pdf>
- Also in February 2009, ICANN posted a paper for community discussion entitled “Description of Independent Objector for the New gTLD Dispute Resolution Process,” which explored the potential benefits of

allowing an “Independent Objector” to object within the dispute resolution process.

<http://www.icann.org/en/topics/new-gtlds/independent-objector-18feb09-en.pdf>

- In May 2009, along with revised excerpts of the Applicant Guidebook, ICANN posted a paper for community discussion entitled “Standards for Morality and Public Order Research,” which summarized the research relating to the development of standards for morality and public order (now Limited Public Interest) objections.
<http://www.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf>
- In May 2010, ICANN posted a paper entitled “‘Quick Look’ Procedure for Morality and Public Order Objections,” which summarized a procedure requested by community members by which morality and public order objections could be dismissed if they are determined to be “manifestly unfounded and/or an abuse of the right to object.”
<http://www.icann.org/en/topics/new-gtlds/morality-public-order-quick-look-28may10-en.pdf>
- In August 2010, Heather Dryden, Chair of the GAC, delivered a letter to Peter Dengate Thrush, Chairman of the Board, requesting that the proposed procedure for morality and public order objections be replaced with an alternative mechanism.
<http://www.icann.org/en/correspondence/gac-to-dengate-thrush-04aug10-en.pdf>
- Also in August 2010, the Board considered Submission No. 2010-08-05-15, which discussed the feedback received by the GAC with regard to the proposed procedure for morality and public order objections.
<http://www.icann.org/en/minutes/board-briefing-materials-2-05aug10-en.pdf>
- In September 2010, the cross-stakeholder group known as the New gTLD Recommendation 6 Cross-Community Working Group (“Rec6 CWG”) published a report on the Implementation of the Recommendation (the “Rec6 CWG report”). The report provided guidance to the Board with regard to procedures for addressing culturally objectionable and/or sensitive strings, while protecting internationally recognized freedom of expression rights. This report

was posted for public comment. [See link at http://www.icann.org/en/announcements/announcement-2-22sep10-en.htm](http://www.icann.org/en/announcements/announcement-2-22sep10-en.htm)

- Also in September 2010, the Board met in Trondheim, Norway and stated that they would “accept the [Rec6 CWG] recommendations that are not inconsistent with the existing process, as this can be achieved before the opening of the first gTLD application round, and [would] work to resolve any inconsistencies.” At the same meeting, the Board agreed that it had “ultimate responsibility for the new gTLD program ... however, [that it wished] to rely on the determination of experts on these issues.”
<http://www.icann.org/en/minutes/resolutions-25sep10-en.htm>
- In October 2010, the Board again discussed the Rec6 CWG report, indicating that several of the working group recommendations could be included in the Guidebook for public discussion and that the working group recommendations should be discussed publicly at ICANN’s upcoming meeting in Cartagena.
<http://www.icann.org/en/minutes/resolutions-28oct10-en.htm>
- In November 2010, ICANN posted the proposed final version of the Applicant Guidebook (the “Proposed Final Guidebook”), which adopted several of the recommendations set forth in the Rec6 CWG report.
<http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-12nov10-en.pdf>
- Also in November 2010, ICANN posted an explanatory memorandum entitled “Limited Public Interest Objection,” which described the recommendations set forth in the Rec6 CWG report, ICANN’s responses to those recommendations and ICANN’s rationale for its responses.
<http://www.icann.org/en/topics/new-gtlds/explanatory-memorality-public-order-12nov10-en.pdf>
- In December 2010 in Cartagena, Columbia, the Board had two separate sessions with the Rec6 CWG to help achieve further understanding of the working group’s positions.
- On 23 February the GAC issued the “GAC indicative scorecard on new gTLD issues listed in the GAC Cartagena Communique” (“Scorecard”)

identifying the Objection Process as one of twelve areas for discussion. <http://www.icann.org/en/topics/new-gtlds/gac-scorecard-23feb11-en.pdf>

- On 28 February and 1 March 2011, the Board and the GAC had a two-day consultation in Brussels, Belgium to discuss the issues raised in the Scorecard, including the suggestion that the GAC should not be subject to the Objection Procedures for Limited Public Interest Objections. Instead, a process was discussed by which the GAC could provide public policy advice on individual gTLD applications directly to the Board
- On 12 April 2011, the GAC issued “GAC comments on the ICANN’s Board’s response to the GAC Scorecard” that also addressed the Objection Procedures. <http://www.icann.org/en/topics/new-gtlds/gac-comments-board-response-gac-scorecard-12apr11-en.pdf>
- On April 15 2011, ICANN posted the April 2011 Discussion Draft of the Applicant Guidebook, containing a new “GAC Advice” section detailing the procedure by which the GAC could provide advice to the Board concerning gTLD applications. <http://www.icann.org/en/topics/new-gtlds/draft-dispute-resolution-procedures-redline-15apr11-en.pdf>
- Also on 15 April 2011, ICANN posted an Explanatory Memorandum entitled ‘GAC and Government Objections; Handling of Sensitive Strings; Early Warning’ to describe details of the new procedures. <http://www.icann.org/en/topics/new-gtlds/gac-objections-sensitive-strings-15apr11-en.pdf>
- [Also on 15 April 2011, ICANN posted](http://www.icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-clean-15apr11-en.pdf) “Revised ICANN Notes on: the GAC New gTLDs Scorecard, and GAC Comments to Board Response” discussing its response to the GAC’s concerns on the Objection Process. <http://www.icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-clean-15apr11-en.pdf>
- [On 20 May the Board and GAC had further consultations that included discussion on the Objection Process.](http://www.icann.org/en/topics/new-gtlds/transcript-board-gac-20may11-en.pdf) <http://www.icann.org/en/topics/new-gtlds/transcript-board-gac-20may11-en.pdf>

- [On 30 May, ICANN posted the current version of the Applicant Guidebook with additional refinements to the Objection Process as it relates to the GAC. http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm](http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm)
- [On 19 June 2011, the Board and the GAC had additional consultations.](#)

III. The Board’s Analysis of the Objection Process Associated with the New gTLD Program

A. Brief Introduction to the Objection Process

1. Brief Overview of the Objection Process for all except the GAC.

- The new gTLD process is an objection-based process, in which parties with standing may file with an identified independent dispute resolution provider a formal objection to an application on certain enumerated grounds (see footnote 1 for list of providers). The grounds for filing a formal objection to an application are:
 - the gTLD string is confusingly similar to an existing TLD or another applied-for gTLD string in the same round of applications (“String Confusion Objection”)
 - the gTLD string infringes the existing legal rights of the objector (“Legal Rights Objection”)
 - the gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under international principles of law (“Limited Public Interest Objection”)
 - there is substantial opposition to the application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted (“Community Objection”).

<http://www.icann.org/en/topics/new-gtlds/draft-rfp-redline-15apr11-en.pdf>

- If the objectors have standing, their objections will be considered by a panel of qualified experts, that will issue a Determination.

- Specific standards under which each of the four types of objections will be evaluated are set forth in detail in Module 3 of the current Applicant Guidebook.
- There will be objection fees (fixed for String Confusion and Community Objections and hourly for Limited Public Interest and Community Objections) that will be refundable to the prevailing party.

2. Brief Overview of the GAC Advice Process.

- The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities.
- For the Board to be able to consider the GAC advice during the evaluation process, the GAC advice would have to be submitted by the close of the Objection Filing Period
- Where GAC Advice on New gTLDs is received by the Board concerning an application, ICANN will publish the Advice and endeavor to notify the relevant applicant(s) promptly. The applicant will have a period of 21 calendar days from the publication date in which to submit a response to the ICANN Board.
- ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.
- The receipt of GAC advice will not toll the processing of any application (i.e., an application will not be suspended but will continue through the stages of the application process).

B. Why the Board Addressed the Objection Process as it has

- The GNSO Policy Recommendations called for the creation of a dispute resolution or objection process in the new gTLD program.

- The GNSO also provided implementation guidelines suggesting that external dispute resolution providers should be utilized.
- A fully established objection process, with uniform standing requirements and standards available to the dispute resolution service providers, ensures that a reasonably objective process is in place. It further ensures that experts in dispute resolution make any determinations on the disputes after considering all of the evidence.
- A fully established dispute resolution process provides parties with a cost-effective alternative to initiating action in court, if there is a valid objection.
- The GAC advised the Board that it was not amendable to utilizing the standard Objection Process established for the new gTLD program. Accordingly, the Board worked closely with the GAC to develop a mutually acceptable “objection” mechanism, in the form of GAC Advice.

C. Who the Board Consulted

- Legal Counsel
- International arbitration experts
- Judges from various international tribunals such as the International Court of Justice
- Attorneys who practice in front of international tribunals such as the International Court of Justice
- The GNSO
- The GAC
- The ALAC
- The ccNSO
- The SSAC
- All other Stakeholders and Community Members

D. Significant Non-Privileged Materials the Board Reviewed

- GAC Principles Regarding New gTLDs.
http://gac.icann.org/system/files/gTLD_principles_0.pdf
- GNSO “Final Report – Introduction of new generic top-level domains.” <http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>
- Report on Implementation of GNSO New GTLD Recommendation #6. See link to Report from <http://www.icann.org/en/announcements/announcement-2-22sep10-en.htm>
- All materials related to the Board/GAC consultation. See <http://www.icann.org/en/topics/new-gtlds/related-en.htm>
- All relevant GAC letters and Communiqués. See <http://www.icann.org/en/correspondence/> and <http://gac.icann.org/communiqués>.
- Applicant Guidebook, related explanatory memoranda, other related documents and related comment summaries and analyses:
 - Each version of the Applicant Guidebook, including all ICANN created explanatory memoranda and the specific proposals for trademark protections, along with numerous pages of public comment summaries and analysis related to the Objection Procedures. See (i) <http://www.icann.org/en/topics/new-gtlds/comments-en.htm>; (ii) <http://www.icann.org/en/topics/new-gtlds/comments-2-en.htm#expmem>; (iii) <http://www.icann.org/en/topics/new-gtlds/comments-e-en.htm>; (iv) <http://www.icann.org/en/topics/new-gtlds/comments-3-en.htm>; (v) <http://www.icann.org/en/topics/new-gtlds/gns0-consultations-reports-en.htm>; (vi) <http://www.icann.org/en/announcements/announcement-4-15feb10-en.htm>; (vii) <http://www.icann.org/en/topics/new-gtlds/summaries-4-en.htm>; (viii) <http://www.icann.org/en/topics/new-gtlds/comments-5-en.htm>; (ix)

<http://www.icann.org/en/topics/new-gtlds/comments-analysis-en.htm>; (x) <http://www.icann.org/en/topics/new-gtlds/dag-en.htm>; (xi) <http://www.icann.org/en/topics/new-gtlds/comments-6-en.htm>; and (xii) <http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm>

E. Significant Concerns the Community Raised

- What will be done if there is an application for a highly objectionable name, but there are no objectors within the process?
- There is a need for clarification on what type of string would be considered to be “contrary to generally accepted legal norms relating to morality and public order . . . recognized under international principles of law.”
- Are the standards set out for each objection appropriate?
- How will fees be determined?
- Will ICANN fund certain stakeholders’ objections?
- Should it be a dispute process rather than a mere objection process?
- Are the independent dispute resolution providers the rights ones to handle the specific objections?
- Neither Governments nor the GAC should be required to utilize the Objection Procedures.

F. Factors the Board Found to Be Significant

- The Dispute Resolution Process is designed to protect certain interests and rights, those interests identified by the GNSO in their policy recommendations that were approved by the ICANN Board.
- The Dispute Resolution Process will be more cost effective and efficient than judicial proceedings. Fees will be paid directly to the dispute resolution providers.

- The Dispute Resolution Process should be independent as possible so that the applicants, the community and ICANN have the benefit of neutral expert opinion.
- It is critical to address risk to the established processes and to ICANN by providing a path for considering controversial applications that might otherwise result in litigation or attacks to the process or to the ICANN model.
- Governments have a particular interest in having an unencumbered process to provide advice to the Board without having to utilize the formal independent objection process.

G. The Board's Reasons for Supporting the Two-pronged Objection Process Established for the New gTLD Program

- The Dispute Resolution Process complies with the policy guidance provided by the GNSO.
- The Dispute Resolution Process provides a clear, predictable path for objections and objectors.
- The Dispute Resolution Process provides clear standards that will lead to predictable, consistent results.
- The Dispute Resolution Process provides for an independent analysis of a dispute.
- The Dispute Resolution Process provides a bright line between public comment and a formal objection process so parties understand the manner in which a challenge to a particular application should be brought (a lesson learned from previous rounds).
- The Dispute Resolution Process appropriately limits the role for the Board.
- The Dispute Resolution Process limits involvement to those who truly have a valid objection.
- The Dispute Resolution Process provides for a more efficient and cost effective approach to dispute resolution than judicial proceedings.

- The Dispute Resolution Process, which provide for an “Independent Objector” to object is an important step to achieving the goal of independence and ensuring the objectionable strings are challenged.
- The GAC Advice process provides an avenue for the GAC to provide public policy advice to the Board on individual applications in a relatively timely fashion and consistent manner.
- The GAC Advice process was developed after close consultations with the GAC and provides a prescribed manner and time frame in which the Board will be able to consider GAC advice with respect to a particular string or applicant.