RECOMMENDATION

OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 15-7

20 JUNE 2015

The Requesters, Booking.com B.V. and Travel Reservations SRL (formerly Despegar Online SRL), seek reconsideration of the ICANN Board's approval of Resolutions 2015.4.04.26.14, 2015.4.04.26.15, and 2015.04.26.16 (collectively, the "Resolutions"). By those Resolutions, the Board adopted findings contained in the Final Declaration of the IRP Panel in *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247 ("*Booking.com* Final Declaration") and directed the President and CEO to move forward with processing the .hotels/.hoteis contention set.

I.   Brief Summary.

Requester Booking.com B.V. ("Booking.com") submitted a standard application for .hotels, and Requester Travel Reservations SRL ("TRS") submitted a standard application for .hoteis (collectively, the "Applications"). On 26 February 2013, pursuant to a process called string similarity review ("SSR"), an expert string similarity review panel ("SSR Panel") determined that the .hotels and .hoteis strings were visually confusingly similar. Pursuant to applicable procedure, the Applications were then placed into a contention set.

Requester Booking.com challenged the establishment of the contention set in a prior reconsideration request (Reconsideration Request 13-5), which was denied on 10 September 2013. Booking.com then initiated an Independent Review Process ("IRP") on 18 March 2014, challenging the denial of Reconsideration Request 13-5 and ICANN's adoption of the SSR Panel's determination that the Applications were visually confusingly similar. In its Final

Declaration, the *Booking.com* IRP Panel unanimously rejected Booking.com's claims,

determining that Booking.com's challenge to the decision of an independent evaluator did not

challenge Board action and, moreover, that the ICANN Board had no obligation to review or

otherwise intervene in the conclusions reached by third-party expert evaluators. At its 26 April

2015 meeting, the ICANN Board of Directors ("Board") approved the Resolutions, thereby

adopting findings contained in the *Booking.com* Final Declaration and directing the President

and CEO to move forward with processing the contention set.

On 13 May 2015, the Requesters filed the instant Reconsideration Request ("Request 15-

7"), seeking reconsideration of ICANN's approval of the Resolutions. The Requesters argue that

reconsideration is warranted because, in approving the Resolutions, the Board: (a) contravened

certain of ICANN's "goals" or core values; (b) failed to consider material information; (c) relied

on inaccurate information; and (d) violated unspecified provisions of ICANN's Articles of

Incorporation ("Articles"), Bylaws, and Affirmation of Commitments.

At its core, Request 15-7 comprises nothing other than an attempt to appeal (only) those

portions of the *Booking.com* Final Declaration with which the Requesters disagree. The

Requesters' claims do not support reconsideration because they do not establish that the Board

failed to consider material information, or considered false or inaccurate material information, in

approving the Resolutions. Moreover, the Requester has not demonstrated that it has been

materially adversely affected by the adoption of the Resolutions. Accordingly, the BGC

recommends that Request 15-7 be denied.

II.   Facts

A.   Background Facts.

Requester Booking.com submitted a standard application for .hotels,[1] and Requester TRS submitted a standard application for .hoteis.[2]

On 26 February 2013, pursuant to the SSR process set forth in Section 2.2.1.1 of the Applicant Guidebook ("Guidebook"),[3] an SSR Panel consisting of independent, third-party experts determined that Booking.com's applied-for gTLD .hotels and TRS's applied-for gTLD .hoteis were visually confusingly similar.[4]

Where the string similarity review panel determines that two strings are visually identical or similar to each other, per the Guidebook those applied-for strings **will** be placed in a contention set, which is then resolved pursuant to the contention resolution processes in Module 4 of the Guidebook. If a contention set is created, only one of the strings within that contention set may ultimately be approved for delegation.[5] Following the SSR Panel's determination that .hotels and .hoteis were visually confusingly similar, .hotels and .hoteis were placed in a contention set.[6]

On 28 March 2013, Requester Booking.com filed Reconsideration Request 13-5 (which was revised and re-submitted on 7 July 2013), challenging "ICANN's decision to place [the

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[1] Application 1-1016-75482, *available at* https://gtldresult.icann.org/applicationstatus/applicationdetails/1589.
[2] Application 1-1249-87712, *available at* https://gtldresult.icann.org/applicationstatus/applicationdetails/1166.
[3] Within the New gTLD Program, every applied-for string has been subjected to the SSR process set out at Section 2.2.1.1 of the Applicant Guidebook. The SSR Panel checked each applied-for string against existing TLDs, reserved names, and other applied-for TLD strings (among other items) for "visual string similarities that would create a probability of user confusion." Guidebook, Section 2.2.1.1.1. The Guidebook is available at http://newgtlds.icann.org/en/applicants/agb.
[4] New gTLD Program: String Similarity Contention Sets, *available at* https://www.icann.org/news/announcement-2013-02-26-en.
[5] Guidebook, § 2.2.1.1.3.
[6] *See* Contention Set Status, .hotels/hoteis, *available at* https://gtldresult.icann.org/application-result/applicationstatus/stringcontentionstatus.

Applications] in a non-exact match contention set" and arguing that ICANN did "not [] provide a

detailed analysis or a reasoned basis for its decision."[7]

On 1 August 2013, the BGC recommended that the New gTLD Program Committee

("NGPC") deny Reconsideration Request 13-5, explaining:

> 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
> String Similarity Review Panel ("Panel") decision on placing .hotels
> and .hoteis in contention sets. Instead, Booking.com is supplanting what it
> believes the review 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 Panel 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.[8]

On 10 September 2014, the NGPC adopted the BGC's recommendation and denied

Reconsideration Request 13-5.[9]

On 18 March 2014, Requester Booking.com initiated an IRP challenging the ICANN

Board's "adoption" of the SSR Panel's determination that the .hotels and .hoteis strings were

visually confusingly similar. An IRP is conducted pursuant to Article IV, Section 3 of ICANN's

Bylaws, and comprises a unique, non-binding method of evaluating certain actions of ICANN's

Board. The IRP is presided over by a panel "charged with comparing contested actions of the

Board to the [ICANN] Articles of Incorporation and Bylaws, and with declaring whether the

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[7] *See* Recommendation of the Board Governance Committee (BGC), Reconsideration Request 13-5, *available at* https://www.icann.org/en/system/files/files/recommendation-booking-01aug13-en.pdf, at Pg. 5.
[8] *Id.*, Pg. 5.
[9] Approved Resolutions, Meeting of the New gTLD Program Committee, *available at* https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-09-10-en#2.b.

Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws."[10]

On 3 March 2015, the *Booking.com* IRP Panel released its Final Declaration, which unanimously rejected Booking.com's claims. The *Booking.com* IRP Panel declared that Booking.com's IRP Request challenged the decision of the SSR Panel, not any Board action, and thus was not appropriate for independent review under ICANN's Bylaws.[11] Moreover, the *Booking.com* IRP Panel found that the ICANN Board had no obligation to review or otherwise intervene in the conclusions reached by that third-party expert SSR Panel.[12] In short, the *Booking.com* IRP Panel declared that ICANN was the prevailing party because Booking.com's claims did not arise out of any Board action or inaction, let alone action or inaction that comprised a violation of ICANN's Articles of Incorporation or Bylaws.[13]

On 26 April 2015, the ICANN Board considered the *Booking.com* Final Declaration, and approved the Resolutions adopting findings of *Booking.com* IRP Panel. The ICANN Board further directed ICANN's President and CEO or his designees to "move forward with the processing of the hotels/hoteis contention set," and to "take into consideration" for future new gTLD rounds the issues regarding transparency and fairness raised in the *Booking.com* Final Declaration.[14]

On 13 May 2015, the Requesters filed the instant Request (Request 15-7), seeking reconsideration of ICANN's approval of the Resolutions.

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[10] Bylaws, Art. IV, § 3.4.

[11] *Booking.com v. ICANN,* ICDR Case No. 50-20-1400-0247, ("*Booking.com* Final Declaration"), *available at* https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf, at ¶ 138 ("there was no action (or inaction) by the Board here").

[12] *Id.* ¶¶ 129, 138 ("[T]he 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."); *see also id.* ¶ 146.

[13] *See generally id.*

[14] *See* Resolutions, *available at* https://www.icann.org/resources/board-material/resolutions-2015-04-26-en.

B.   Relief Requested.

The Requesters ask ICANN to "reverse the decision in which [the Applications] were put in a non-exact match contention set[,]" to "modify the [Resolutions] and to decide that the '.hotels' gTLD […] can co-exist with the '.hoteis' gTLD[,]" or, in the alternative, to "engage in conversations with the Requesters, and that a hearing be organized."[15] The Requesters also seek a "stay [of] the present reconsideration proceedings with a view to allowing the Requesters to further consider how best to exclude all perceived likelihood of visual confusion."[16]

III.   Issues.

In view of the claims set forth in Request 15-7, the issues for reconsideration seem to be:

1.   Whether reconsideration is warranted because:

   a.   The approval of the Resolutions purportedly contravened what the Requesters contend are ICANN's "goals of increasing competition" and "making the domain name system more global and understandable through the use of local languages"[17];

   b.   The Board failed to consider material information in approving the Resolutions;

   c.   The Board relied on false or inaccurate information in approving the Resolutions; or

   d.   The Resolutions violate unspecified provisions of ICANN's Articles of Incorporation, Bylaws, and Affirmation of Commitments; and

2.   Whether the Requesters have demonstrated that they have suffered material adverse harm due to the approval of the Resolutions.

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[15] Request, § 9, Pg. 9.
[16] *Id.*
[17] *Id.*, § 7, Pg. 3.

IV.   The Relevant Standards for Evaluating Reconsideration Requests.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in

accordance with specified criteria.[18] The Requesters are challenging a Board action. A Board

action may be subject to reconsideration where it was undertaken "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, where it was "taken as a result of the Board's reliance on false or inaccurate material

information."[19]

Denial of a request for reconsideration of Board action or inaction is appropriate if the

BGC recommends, and the NGPC agrees, that the requesting party has not satisfied the

reconsideration criteria set forth in the Bylaws.

V.   Analysis and Rationale.

Just as in Booking.com's prior reconsideration request and in its IRP Request, Request

15-7 again challenges the merits of the SSR Panel's determination that the .hotels and .hoteis

strings are visually confusingly similar. However, there is no appeals mechanism to challenge

the substance of an expert SSR Panel determination in ICANN's Articles, Bylaws or the

Guidebook. Reconsideration of a Board action, the process that Requesters have invoked here, is

warranted only where the Board took action without consideration of material information or

with reliance upon false or inaccurate information. Because the Board did not fail to consider

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[18] Article IV, § 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.
[19] Bylaws, Art. IV, § 2.

material information and did not consider false or inaccurate information in approving the

Resolutions, the BGC recommends that Request 15-7 be denied.

A.   Requesters Provide No Evidence That The Board Failed To Consider ICANN's "Goals" Or Core Values In Adopting The Resolutions.

The Requesters argue that the Resolutions are inconsistent with what the Requesters state

to be "ICANN's goals of increasing competition and making the DNS more global and

understandable through the use of local languages."[20] The Requesters' vague allusions to

"ICANN's goals" are without citation, but it appears the Requesters may be referring to Article I,

Section 2 of ICANN's Bylaws, which sets out certain core values that are to guide the decisions

and actions of ICANN. Regardless, even if there is some inconsistency between the Resolutions

and ICANN's "goals" or core values, which there is not, inconsistency itself is not *conduct*

subject to review per ICANN's Reconsideration process. In order to give the Request some

consideration in this regard, however, the inference must be that the Requesters are suggesting

that the Board somehow failed to consider ICANN's core values in adopting the Resolutions.

The Requesters, however, have not presented any facts to support such a suggestion.

Notwithstanding the Requesters' characterization of ICANN's "goals," ICANN's core

values are as follows:

> 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.
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> 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.

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[20] Request, § 7, Pgs. 3-4.

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.[21]

The Requesters present no evidence that the Board failed to consider these core values in considering the *Booking.com* Final Declaration and passing the Resolutions, which adopted the opinions that the *Booking.com* IRP Panel declared. Without evidence that the Board failed to consider material information or considered false or inaccurate information, no ground for reconsideration of a Board action exists.[22] As noted above, a claim that the Resolutions themselves are in conflict with the Requesters' interpretation of ICANN's "goals" is not Board conduct, and is therefore not a proper basis for reconsideration.

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[21] Bylaws, Art. 1, § 2.6.
[22] *Id.*, Art. IV, § 2.2(b)-(c).

Moreover, in passing the Resolutions the Board acted in a manner that was fully consistent with ICANN's core values, including those relating to the promotion of competition where "[f]easible and appropriate,"[23] and when "beneficial to the public interest."[24] Within the New gTLD Program, procedures such as the string similarity review were designed to ensure that the Program was administered in furtherance of the public interest. Specifically, every applied-for string has been subjected to the SSR process set out in Section 2.2.1.1 of the Guidebook. The SSR process checks each applied-for string against existing TLDs, reserved names, and other applied-for gTLDs for "visual string similarities that would create a probability of user confusion."[25] The objective of this review "is to prevent user confusion and loss of confidence in the [domain name system] resulting from delegation of many similar strings."[26]

Per the SSR process, a panel of independent, third-party experts determined that .hotels and .hoteis were confusingly similar, such that the delegation of both would create a probability of user confusion. In accordance with applicable procedure, .hotels and .hoteis were thereafter placed into a contention set. In this regard, and as affirmed by the *Booking.com* IRP Panel, "the established process was followed in all respects."[27] By approving the Resolutions, the Board upheld the public interest goals inherent in the SSR process, namely the prevention of "user confusion and loss of confidence in the [domain name system] resulting from delegation of many similar strings."[28] The Requesters' claim that the Board somehow violated its core values or "goals" in this regard is both unsubstantiated and inaccurate, and does not support reconsideration.

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[23] Bylaws, Art. 1, § 2.5.
[24] *Id*., Art. 1, § 2.6.
[25] Guidebook, § 2.2.1.1.1.
[26] *See id*.
[27] *Booking.com* Final Declaration, ¶ 132.
[28] *See* Guidebook, § 2.2.1.1.1.

B.   **The SSR Process Itself Is Not A Decision Subject To Reconsideration; Any Challenge To The Process Is Time Barred and Without Merit.**

To the extent that Requesters are seeking reconsideration of "the *decision* to put [the Applications] in a contention set,"[29] any such claim is not a proper basis for reconsideration. Pursuant to the Guidebook, strings found to be confusingly similar through the SSR process must be placed into a contention set.[30] Accordingly, after the SSR Panel determined that the strings were visually confusingly similar, there was no "decision" to be made by any party, much less the ICANN Board, that is subject to reconsideration.

Further, to the extent that the Requesters could be seen as seeking reconsideration of the decision to include the SSR process in the Guidebook, any such claim is time-barred. The Guidebook was published on 4 June 2012 following an extensive review process, including public comment on multiple drafts.[31] As such, any challenge to the SSR process should have been asserted years ago. Moreover, Booking.com has already tried twice (unsuccessfully) to challenge the SSR process laid out in the Guidebook, first in Reconsideration Request 13-5 and then again in its IRP.[32] Now, this third attempt to reiterate the same argument should be deemed no more successful, particularly since it is not the proper basis for reconsideration, as the Requesters do not suggest that the Board failed to consider material information or relied on false or inaccurate material information in adopting the SSR process.

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[29] Request, § 6, Pg. 3 (emphasis added).
[30] Guidebook, 2.2.1.1.3 ("An application for a string that is found too similar to another applied-for gTLD string *will* be placed in a contention set.") (emphasis added).
[31] *See id.*, Preamble.
[32] The determination on Request 13-5 rejected this argument, noting that "Booking.com is supplanting what it believes the review 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." *See* Recommendation of the Board Governance Committee (BGC), Reconsideration Request 13-5, *available at* https://www.icann.org/en/system/files/files/recommendation-booking-01aug13-en.pdf, at Pg. 5. The *Booking.com* IRP Final Declaration quoted this portion of the Request 13-5 determination and noted that Booking.com's IRP Request failed because "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." *Booking.com* Final Declaration, ¶¶ 135, 137.

C. **The Board Did Not Fail To Consider Material Information In Approving The Resolutions.**

The Requesters claim that the Board failed in four ways to consider material information in approving the Resolutions: first, the Requesters argue that the Board disregarded its discretion to improve the current application round in the New gTLD Program; second, the Requesters claim that ICANN ignored their requests to engage in "discussions" about "how the issue can be resolved in the best interests of the community"; third, the Requesters contend that the expert report Booking.com submitted in support of its IRP should have been considered by the Board before it approved the Resolutions; and fourth, the Requesters argue that the Board did not consider the fact that the Board has previously made changes to the New gTLD Program.[33] None of these claims withstand scrutiny.

As to the first point, the Requesters concede it is in the Board's discretion whether, when and under what circumstances to "improve" the New gTLD Program, yet argue reconsideration is warranted because the Board failed to consider that discretion in determining not to make any changes to the *current* new gTLD application round based on certain suggestions within the *Booking.com* Final Declaration.[34] Not so. As an initial matter, only a Board failure to consider *material information* can support reconsideration, and any purported Board failure to consider *the existence of its own discretion* does not meet that standard.[35] Moreover, the *Booking.com* Final Declaration did not recommend that any changes be made to the current application round. It simply "acknowledged certain legitimate concerns regarding the string similarity review process" and noted that "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*

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[33] Request, § 8.I, Pgs. 5-6.
[34] *Id.*, § 8.I, Pg. 5.
[35] Bylaws, Art. IV, § 2.2.

Guidebook for round two of the new gTLD program."[36] These statements did not recommend

that the Board "improve" the *current* round of the New gTLD Program at all, and the Requesters

have not shown that the Board failed to consider material information in connection with these

statements when it adopted the Resolutions. Indeed, it is clear that the Board seriously

considered the *Booking.com* IRP Panel's comments regarding transparency and fairness, as the

Resolutions directed ICANN's President and CEO or his designees to "move forward with the

processing of the hotels/hoteis contention set," and to prospectively "take into consideration" the

issues about transparency and fairness raised by the *Booking.com* Final Declaration.[37]

Second, the Requesters claim (without providing any documentation or detail) that they

have expressed their willingness to engage in a "discussion with ICANN, its constituents and the

ICANN Board, as to how [the Requesters' disagreement with the *Booking.com* IRP Final

Declaration and the Resolutions] can be resolved in the best interests of the Internet

community."[38] No reconsideration is warranted on this basis. To start, reconsideration is only

warranted where the Board failed to consider material information or considered false or

inaccurate information.[39] The Requesters do not specify what information they had planned on

sharing during any potential talks with ICANN, and so it cannot be said that the Board failed to

consider any *material* information because those discussions did not take place. In any event,

while the Requesters do not specify when they expressed a willingness to engage in talks with

ICANN, it appears the request post-dated the Board's passing of the Resolutions, and therefore

nothing about the proposed talks could support reconsideration because the Board action the

Requesters challenge would already have occurred. Moreover, the failure to engage in

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[36] *Booking.com* Final Declaration, ¶ 154 (emphasis added).
[37] *See* Resolution, *available at* https://www.icann.org/resources/board-material/resolutions-2015-04-26-en.
[38] Request, § 8.I, Pg. 6.
[39] Bylaws, Art. IV, § 2.2.

unspecified informal talks with the Requesters does not relate to what information the Board

considered in passing the Resolutions. Further, the Board is *not* obligated to engage in any

discussions in the wake of an IRP; the Board is required only to "consider" the final declaration

of the IRP panel,[40] which is exactly what occurred here when the Board approved the

Resolutions. No reconsideration is warranted due to any alleged Board failure to engage in

informal talks with the Requesters prior to or after approving the Resolutions, as no such talks

are required. Therefore, whether or not such talks took place, or were requested, has no bearing

on whether the Board considered all material information in adopting the Resolutions.

Third, no reconsideration is warranted due to any Board failure to consider

Booking.com's expert report dated 10 March 2014 ("Expert Report") regarding the visual

similarity of .hotel and .hoteis, which Booking.com submitted to the IRP Panel.[41] That the

Requesters seek to fault the Board for a failure to consider the evidence Booking.com presented

to the IRP Panel highlights the fact that this Request is, in fact, an attempt to appeal the merits of

the IRP Panel's decision and another of several attempts to appeal the SSR Panel's determination.

The *Booking.com* IRP Panel considered the Expert Report, and found it did not advance

Booking.com's position in the IRP because it bore no relation to Board conduct. In fact, the

Booking.com IRP Panel found that the Board properly did not intervene in the SSR Panel's

conclusion that the .hotels and .hoteis strings were confusingly similar.[42] As such, the Expert

Report was not material information with respect to the adoption of the Resolutions, and the

Board had no obligation to review it.

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[40] *Id.*, § 3.21.
[41] *See* Request, Annex 2; *Booking.com v. ICANN*, Annex 20, Pgs. 2-3, *available at*
https://www.icann.org/en/system/files/files/booking-irp-request-annex-18mar14-en.pdf.
[42] *Booking.com* Final Declaration ¶¶ 79, 142.

Fourth, the Requesters argue that in approving the Resolutions the Board did not consider the fact that the Board has previously made changes to the current New gTLD Program. The Requesters claim that the Board's decision not to intervene in this SSR Panel's determination "creates disparate treatment" between the Board's treatment of the Requesters' Applications as compared with others.[43] Specifically, the Requesters appear to argue that the Applications received unfair disparate treatment as compared to other applications because a 12 October 2014 NGPC resolution approved the implementation of a limited review mechanism for expert determinations regarding specifically identified sets of string confusion objections.[44] This argument does not support reconsideration.

The Requesters do not explain how the fact that the Board intervened in a matter not relevant here comprises a failure to consider material information in passing the Resolutions. The ICANN Board is under no obligation to intervene in this or any expert determination. As the *Booking.com* IRP Panel explained, "the fact that the ICANN Board enjoys [the] discretion [to individually consider an application for a New gTLD] and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by [claimant]."[45] Moreover, the circumstances in which the Board did exercise its discretion[46] and intervened with respect to particular third party expert determinations are not the same as the circumstances presented here. There, the Board directed further review of *differing expert determinations* on string confusion objections (a procedure unrelated to the instant matter)

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[43] Request, § 8.I, Pg. 6.

[44] *See* NGPC Resolution 2014.10.12.NG02, *available at* https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#1.a; Request, § 8.III, Pgs. 8-9. The Requesters also note that the Board has approved certain changes to the new gTLD program such as providing applicants with the opportunity to submit specifications of public interest commitments, and permitted "special contractual provisions for .brand TLDs[.]"

[45] *Booking.com* Final Determination ¶ 138.

[46] As it relates to this decision, the Board was acting through the New gTLD Program Committee (NGPC), to which the Board delegated its decision making authority as it relates to New gTLD Program related matters. The NGPC is made up of all Board members who are not generally conflicted with respect to new gTLDs.

regarding the *same strings*.[47] Here, there is a *single* SSR Panel determination at issue

concerning .hotels and .hoteis, that the Requesters simply do not like.

In sum, the Requesters have not demonstrated that the Board failed to consider any

material information when adopting the Resolutions.

D. The Board Did Not Rely On False or Inaccurate Information In Passing The Resolutions.

The Requesters argue that because the *Booking.com* IRP Panel was "wrong" in finding

that Booking.com's challenges to the SSR process as a whole were time-barred, the Board

therefore relied upon false or inaccurate information in approving the Resolutions insofar as they

accepted that finding.[48] The Requesters' claim is nothing more than an attempt to re-argue the

question of whether its IRP claim was time-barred, and does not present any grounds for

reconsideration.

1. A Reconsideration Request May Not Be Used As A Vehicle To Appeal The Results Of An IRP.

In the course of its IRP, Booking.com had ample opportunity to—and did—argue that its

objections to the SSR process were not time-barred. The Panel noted that it "asked during the

hearing about [Booking.com]'s failure to timely object," and that Booking.com offered

arguments that comprised "not a persuasive or meritorious answer."[49] The Board's acceptance

of the *Booking.com* IRP Panel's declaration that certain of Booking.com's claims were time-

barred does not present an opportunity for the Requesters to challenge that IRP Panel's

declaration. Simply put, ICANN's Bylaws provide no mechanism to appeal the outcome of an

IRP. As such, the Requesters' argument that reconsideration is warranted because "the findings

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[47] *See* NGPC Resolution 2014.10.12.NG02, *available at* https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#1.a.
[48] Request, § 8.II, Pgs. 6-8.
[49] *Booking.com* Final Declaration, ¶ 130.

of the IRP Panel, i.e., that Booking.com was time-barred, are flawed"[50] fails at the outset. The

Requesters superficially attempt to resolve the mismatch between this argument and the

reconsideration process by couching it as a concern that the Board relied on "inaccurate material

information" by accepting the *Booking.com* Final Declaration.[51] However, those semantics

cannot conceal the fact that the Requesters merely seek to challenge the substantive findings of

the *Booking.com* Final Declaration, which is not a proper basis for a reconsideration request.

Nor can the Requesters conceal the fact that they have not identified any false or inaccurate

information upon which the Board purportedly relied related to the time-barred argument.[52]

2.   The Requesters' New Arguments As To Why Their IRP Claims Were Not Untimely Do Not Support Reconsideration.

The Requesters now raise four new arguments as to why their challenge to the SSR

process was timely, in an attempt to show that the *Booking.com* IRP Panel's finding in this

regard is false or inaccurate. Booking.com had ample opportunity to argue the timeliness of its

challenges to the Guidebook procedures during the course of the IRP, and cannot now seek to

appeal the IRP Panel's rejection of those arguments here. Not one of these "new" arguments

supports reconsideration.

First, the Requesters argue that "neither the string similarity review process nor the string

confusion objection procedures had been established and implemented in their entirety at the

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[50] Request, § 8.II, Pg. 7.

[51] *Id*., § 8.II, Pg. 6.

[52] Moreover, the *Booking.com* IRP Panel properly evaluated whether Booking.com's challenges to the SSR process were time-barred. The IRP Panel recognized that the current version of the Guidebook was published on 4 June 2012 following an extensive review process, including public comment on multiple drafts. *Booking.com* Final Declaration, ¶¶ 12-17. The IRP Panel further noted that, despite having ample opportunity to do so, Booking.com did not object to these aspects of the Guidebook when it was implemented. *Id*. ¶ 129. Accordingly, while the Requesters may not like it, there can be no error assigned to the *Booking.com* IRP Panel's finding 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 . . . Any such claims, even if they had any merit, are long since time-barred by the 30-day [IRP] limitation period set out in Article IV, Section 3(3) of the Bylaws." *Booking.com.com* Final Declaration, ¶ 129.

time the Guidebook was adopted.[53] As an initial matter, the string *confusion* objection process is

not at issue in this Request 15-7, so it need not be addressed. As to the SSR process, the

Requesters do not identify any specific SSR procedures that were allegedly adopted after the

release of the Guidebook in June 2012 that would render the IRP Panel's finding false or

inaccurate. As such reconsideration of the Board's adoption of that finding is not warranted.

Second, the Requesters argue that in order to timely object to the string similarity review

process they would have had to "reveal that they were contemplating making an application for a

new gTLD,"[54] and that such revelation might have "encouraged opportunistic applications

seeking to extract monetary value from an application through a private auction."[55] However,

the Requesters fail to explain how this hypothetical concern would render as false or inaccurate

the *Booking.com* IRP Panel's finding that challenges to the SSR process were untimely. As such,

reconsideration of the Board's adoption of this *Booking.com* IRP Panel's finding is not warranted.

Third, the Requesters argue that the *Booking.com* IRP Panel "did not draw a distinction

between the adoption of the general principles and their subsequent implementation[,]" insofar as

it "limited its review to ICANN's compliance to the letter of the Guidebook" as opposed to the

"implementation of the Guidebook."[56] Again, the Requesters fail to demonstrate how, even if

true, the above claim would render the *Booking.com* IRP Panel's finding false or inaccurate, such

that the Board should reconsider its adoption of that finding. To the contrary, the *Booking.com*

IRP Panel in fact did carefully untangle those two concepts: it distinguished between "the

ICANN Board's actions in relation to the string similarity review process generally" and "the

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[53] Request, § 8, Pg. 7.
[54] *Id.*
[55] *Id.*
[56] *Id.*

Board's conduct in relation to the review of .hotels specifically."[57] Just because the Requesters

do not like the distinction the IRP Panel drew, does not make it false or inaccurate information

relied upon by the Board.

Fourth, the Requesters complain that other IRP panels have reached different conclusions

as to when claims arising out of Guidebook procedures are time-barred.[58] Specifically, the

Requesters cite an interim declaration issued by the IRP panel in *Gulf Cooperation Council v.*

ICANN, where that panel determined that actions taken "pursuant to the Guidebook" were

"capable of review."[59] However, the fact that IRP panels may have reached different

conclusions on similar issues under different circumstances does not mean the Board considered

false or inaccurate information in passing the Resolutions.

In sum, as the *Booking.com* Final Declaration confirms, the time for the Requesters to

have objected to the SSR procedures in general has long since passed, and neither the Board's

adoption of the *Booking.com* Final Declaration nor the Requesters' new arguments on the time-

barred issue present any grounds for reconsideration of the Board's approval of the Resolutions.

**E.   No Reconsideration Is Warranted On The Basis Of Any Purported Violation
Of The Bylaws, Articles Of Incorporation Or Affirmation Of Commitments.**

Finally, the Requesters argue that the Board's approval of the Resolutions warrants

reconsideration because it violated unspecified provisions of ICANN's Bylaws, Articles of

Incorporation, and Affirmation of Commitments insofar as the Resolutions indicate that the

Board will consider the concerns raised regarding the transparency and fairness of the string

similarity review process only in future rounds of new gTLD applications.[60] The Requesters

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[57] *Booking.com* Final Declaration, ¶ 131.
[58] Request, § 8, Pg. 8.
[59] *See Gulf Cooperation Council v. ICANN*, , ICDR Case No. 01-14-0002-1065, Interim Declaration on Emergency Request ¶ 79, *available at* https://www.icann.org/en/system/files/files/interim-declaration-emergency-protection-redacted-12feb15-en.pdf.
[60] Request, § 8.III, Pgs. 8-9.

appear to confuse reconsideration with the standard of review for an IRP, which evaluates Board

action to assess whether any violation of ICANN's Articles or Bylaws has taken place.[61]

Reconsideration of Board action or inaction is appropriate only if the Board failed to consider

material information or acted upon false or misleading information. An alleged violation of the

Articles, Bylaws, or Affirmation of Commitments is not a basis for reconsideration under

ICANN's Bylaws.[62] Furthermore, the Requesters do not reference any particular provision of

the Articles, Bylaws, or Affirmation of Commitments that were allegedly violated, because none

were, so it is nearly impossible for ICANN to respond substantively to charges that the approval

of the Resolutions violated any provisions of these documents.

In any event, as discussed above, the *Booking.com* Final Declaration did *not* instruct the

Board to make any changes to the current application round. Rather, it specifically noted that

changes were only even potentially warranted as to "round two."[63]

In sum, Requesters' unsubstantiated and inaccurate claim that some unspecified

provisions of ICANN's Articles of Incorporation, Bylaws, and Affirmation of Commitments

have been violated does not present grounds for reconsideration.

F.   The Requesters Have Not Demonstrated That They Have Been Materially Affected By The Approval Of The Resolutions.

Absent evidence that the Requesters have been materially and adversely affected by the

adoption of the Resolutions, reconsideration is not appropriate.[64] Here, the Requesters argue

they were materially affected by the approval of the Resolutions because "it appears that ICANN

is unlikely to approve both [of the Applications]" and so "one of the Requesters . . . would not

have access to its desired gTLD . . . or both Requesters would be obliged to share the same

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[61] *Compare* Bylaws, Art. IV, § 2.2 *with id.* § 2.3.
[62] Bylaws, Art. IV, § 2.2.
[63] *Booking.com* Final Declaration ¶ 154.
[64] Bylaws, Art. IV, §§ 2.1-2.2.

gTLD[.]"[65] However, this harm was not caused by the approval of the Resolutions. As soon as the SSR Panel determined that the .hotels and .hoteis strings were visually confusingly similar, the applicable procedure required that the strings be placed in a contention set. The approval of the Resolutions did not change anything about the constitution of the contention set, or render it more or less likely that one or the other of the Requesters would eventually prevail therein.

The formation of the contention set, not the adoption of the Resolutions, caused the only harm Requesters claim to have suffered here. In addition, the formation of this contention set has already been challenged (unsuccessfully) several times. Booking.com sought to challenge the SSR Panel's decision that led to the contention set being formed in Reconsideration Request 13-5 and was unsuccessful. Booking.com tried again in its IRP and was unsuccessful. Now having banded together with contention-set mate and fellow Requester TRS, Booking.com seeks to use the instant Reconsideration Request to appeal the *Booking.com* Final Declaration. Here too, the effort to undermine the SSR Panel's determination is unsuccessful, not only for the reasons set forth above, but also because the only material adverse harm alleged by either Requester stems from the creation of the contention set, not any Board failure to consider material information or reliance upon false information related to the Resolutions. For this separate and independent reason, reconsideration is not warranted.

VI.   Recommendation.

Based upon the foregoing, the BGC concludes that the Requesters have not stated proper grounds for reconsideration, and therefore recommends that Request 15-7 be denied. If the Requesters believe they have somehow been treated unfairly in the process, the Requesters are free to ask the Ombudsman to review this matter.

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[65] Request, § 3, Pg. 6.