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Approved Resolutions | Meeting of the New gTLD Program Committee

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](#)

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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.

Whereas, the NGPC has developed another iteration of the scorecard to respond to certain remaining items of GAC advice in the Beijing Communiqué and the Durban Communiqué, and new advice in the Buenos Aires Communiqué.

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.

As part of the applicant responses, several of the applicants who were subject to GAC Category 1 Safeguard Advice have indicated that they support the NGPC's proposed implementation plan, dated 29 October 2013, and voiced their willingness to comply with the safeguards proposed in the plan. On the other hand, an applicant noted that the NGPC's plan to respond to the GAC's Category 1 Safeguard advice is a "step back from what the GAC has asked for" with regard to certain strings. Others contended that their applied-for string should not be listed among the Category 1 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_Durban_20130718.pdf?version=1&modificationDate=1375787122000&api=v2
[PDF, 238 KB]
- GAC Durban Communiqué:
https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130717.pdf?version=1&modificationDate=1374215119858&api=v2
[PDF, 103 KB]
- GAC Buenos Aires Communiqué:
https://gacweb.icann.org/download/attachments/27132037/FINAL_Buenos_Aires_GAC_Communique_20131120.pdf?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 Aires GAC advice and officially notified applicants of the advice on 11 December 2013. The Durban Communiqué and the Beijing Communiqué were posted on 18 April 2013 and 1 August 2013, respectively. In each case, this triggered the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1.

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 resolution will not impact security, stability or resiliency issues relating to the DNS. The posting of the proposal for public comment is an Organizational Administrative Action not requiring public comment, however follow on consideration of the proposal requires public comment.

c. **Staff Update on Reassignment of Registry Agreements**

Item not considered.

d. **Staff Update on Name Collision Framework**

Item not considered.

Published on 7 February 2014



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Proposed Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections: Framework Principles

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 the framework principles of a potential review mechanism to address the perceived inconsistent String Confusion Objection (SCO) Expert Determinations. The framework principles, outlined below, address the two cases where SCOs were raised by the same objector against different applications for the same string, where the outcomes of the SCOs differ – namely, the SCO Expert Determinations for .CAR/.CARS and .CAM/.COM.

After receiving feedback from the public comment forum, the NGPC will consider whether or not to adopt the proposed review mechanism outlined in the framework principles below.

Principles for Consideration

- 1. THE RECONSIDERATION PROCESS WILL NOT BE MODIFIED AT THIS TIME, FOR THIS PURPOSE**
- 2. PERCEIVED INCONSISTENCIES SHOULD BE ADDRESSED BASED ON A LIMITED STANDARD OF REVIEW**
 - A) DEFINITION OF INCONSISTENT SCO EXPERT DETERMINATIONS
 - B) STANDARD OF REVIEW
 - C) DEFINITION OF REVIEW MECHANISM/CREATION OF NEW PANEL
- 3. APPLICABILITY OF A REVIEW MECHANISM MUST BE LIMITED**
 - A) ICANN AND APPLICANTS HAVE ALREADY ACTED IN RELIANCE ON PRIOR NGPC RESOLUTION ON SINGULAR/PLURALS
 - B) ICANN AND APPLICANTS HAVE ALREADY ACTED IN RELIANCE ON SCO EXPERT DETERMINATIONS

Discussion of Principles

1. The Reconsideration Process Will Not Be Modified at This Time, For This Purpose

- Discussion within the NGPC has made clear that the Reconsideration Process is not the avenue to address the substantive challenges to SCO Expert Determinations.
- While broader discussion on the scope of the Reconsideration Process or some other type of review mechanism may be considered at a later date for a future round of applications, modifying the Reconsideration Process (requiring expert inputs, community review, Bylaws changes, etc.) is not a solution to resolving the issue of the perceived inconsistent SCO Expert Determinations.

2. Perceived Inconsistencies Should Be Addressed Based On A Limited Standard of Review

a) Definition of Inconsistent SCO Expert Determinations

- There is a limited universe of “Inconsistent” SCO Expert Determinations.
- “Inconsistent SCO Expert Determinations” have been defined as objections raised by the same objector against different applications for the same string, where the outcomes of the SCOs differ.
 - This situation is limited to two circumstances:
 - (i) the results of the .COM/.CAM objections, where three SCOs were filed by the same objector against separate applications for the .CAM string, each on the basis of confusion with .COM. In two of the SCOs, the applicant prevailed; in the third, the objector prevailed; and
 - (ii) the results of the .CAR/.CARS objections, where one applicant for the .CAR string, filed SCOs against three applications for the .CARS string. Two of the SCOs were determined in favor of the applicants; the third was in favor of the objector.
 - Diagrams are provided at Appendix A to help illustrate these situations.

b) Standard of Review

- Could the Expert Panel 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 procedural rules?

c) Definition of Review Mechanism/Creation of New Panel

- ICANN would ask the International Centre for Dispute Resolution (ICDR), to constitute a three-member expert “Panel of Last Resort” for which

these two sets of inconsistent rulings (.COM/.CAM and .CAR/.CARS) would each be brought for consolidated consideration.

- Following the standard of review set out above, the Panel of Last Resort would be tasked with reviewing the Expert Determinations across a set to provide additional guidance. ICANN would then accept the Panel of Last Resort's determination.
- There are two potential outcomes to the Panel of Last Resort: either all Expert Determinations are aligned as noted below, or all of the initial Expert Determinations stand as is.
- ICANN would fund the ICDR administrative costs as well as the panel fees throughout the review so as to not impose additional costs on parties subject to these perceived inconsistent Expert Determinations.
- Some anticipated process details include:
 - ICANN would provide notice to all of the parties to objections for each of the two sets that the Expert Determinations will be subject to review by the "Panel of Last Resort."
 - Only the applicant for the application that was objected to in the underlying SCO and lost ("Losing Applicant") would have the option of whether to have the Expert Determination from that SCO reviewed.
 - If the Losing Applicant wishes to not have the Expert Determination reviewed, the Expert Determination in the proceeding described immediately above will stand as is and the Panel of Last Resort will not proceed.
 - If the Losing Applicant wishes to have the review performed, the Panel of Last Resort will evaluate the Expert Determination in the Losing Applicant's SCO, in light of the other Expert Determinations issued in the set, to determine whether or not the Expert Determination in the Losing Applicant's SCO can reasonably stand as is.
- The possible outcomes of the review by the Panel of Last Resort include:
 - The Expert Determination in the Losing Applicant's SCO is supported by the standard of review and reference to the other Expert Determinations, and will stand as is.
 - The Expert Determination in the Losing Applicant's SCO cannot reasonably be supported based on the standard of review and reference to the other Expert Determinations, and will be reversed. The objector will therefore be deemed the non-prevailing party to the SCO.

The Panel of Last Resort is not authorized to reverse or otherwise amend either of the two other Expert Determinations within the set.

3. Applicability of a Review Mechanism Must Be Limited

The use of a strict definition for Inconsistent SCO Expert Determinations conversely means that all other SCO Expert Determinations are *not inconsistent*. As a result, the review mechanism, or Panel of Last Resort, shall not be applicable to those other determinations. Further, there are reasons why the Panel of Last Resort should not be open to all objections. Some of those reasons are as follows:

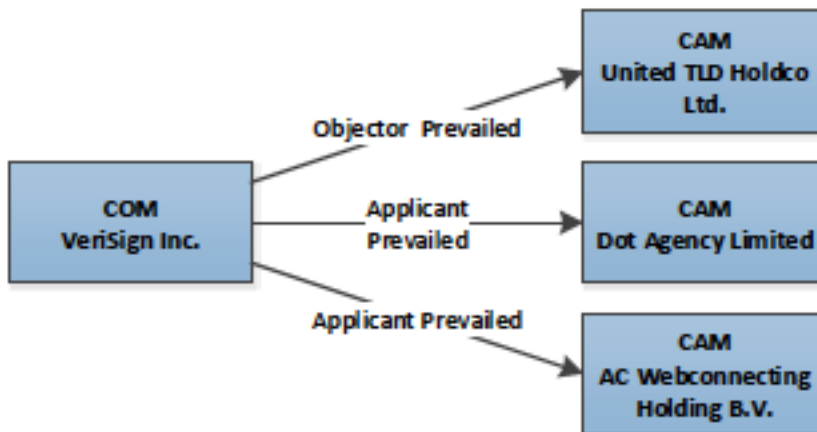
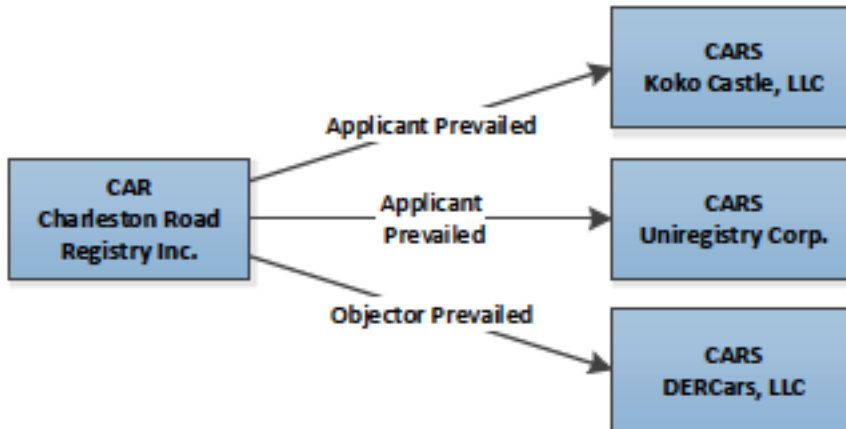
a) ICANN and Applicants have already acted in reliance on prior NGPC resolution on Singular/Plurals

- SCO Expert Determinations regarding singular and plural versions of the same string are not inconsistent Expert Determinations, as they are not Determinations on the same strings with different results.
- The NGPC has already determined that it would not interfere in SCO Expert Determinations regarding singular and plural versions of the same string. See <https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm - 2.d> (“Resolved (2013.06.25.NG07), the NGPC has determined that no changes are 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.”)
- ICANN has already entered Registry Agreements for singular and plural versions of the same string (see, e.g., .CAREER and .CAREERS).
- The NGPC has not modified Resolution 2013.06.25.NG07, which ICANN and Applicants have relied and acted upon.

b) ICANN and Applicants have already acted in reliance on SCO Expert Determinations

- Without limiting the applicability of the review mechanism, or Panel of Last Resort, the opening up of *all* SCO Expert Determinations to further review would be contrary to processes established through the Applicant Guidebook, which is not appropriate at this stage. It is important to recognize that a party’s dissatisfaction with an SCO Expert Determination is, in general, not a sign of an inconsistent determination.
- Applicants have already taken action in reliance on SCO Expert Determinations, such as resolving new contention or withdrawing their application for a refund.
- ICANN and Applicants have already entered into Registry Agreements for strings that were subject to SCO determinations.
- Allowing these actions to be undone now would not only delay the consideration of all applications, but would raise issues of unfairness for those that have already acted in reliance on the Applicant Guidebook.

Appendix A – Diagram of Inconsistent SCO Sets



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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](#)

e. [Any Other Business](#)

The [ICANN](#) Board New gTLD Program Committee meeting on 12 October 2014 was continued to 14 October 2014. The following resolutions were adopted during the meeting:

1. [Consent Agenda:](#)

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a. Approval of Minutes

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)	. [PDF, 73 KB] ¹	Top Level Domain Holdings Limited [PDF, 721 KB](.)

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 affected 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://gnso.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.



You Tube



Twitter



LinkedIn



Flickr



Facebook



RSS Feeds



Community Wiki



ICANN Blog

Who We Are

Get Started
Learning
Participate
Board
President's
Corner
Staff
Careers
Newsletter

Contact Us

Offices
Customer Service
Security Team
PGP Keys
Certificate
Authority
Registry Liaison
AOC Review
Organizational
Reviews
Request a
Speaker
For Journalists

Accountability & Transparency

Accountability
Mechanisms
Independent
Review Process
Request for
Reconsideration
Ombudsman

Governance

Documents
Agreements
AOC Review
Annual Report
Financials
Document
Disclosure
Planning
Dashboard
RFPs
Litigation
Correspondence

Help

Dispute
Resolution
Domain Name
Dispute
Resolution
Name Collision
Registrar
Problems
WHOIS

Reference Material 52.

DETERMINATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 14-1

21 JUNE 2014

The Requester Medistry LLC seeks reconsideration of the Expert Determination, and ICANN's acceptance of that Determination, in favor of the Independent Objector's Community Objection to the Requester's application for .MED.

I. Brief Summary.

The Requester applied for .MED. The Independent Objector ("IO") filed a Community Objection ("Objection") to the Requester's application and won. The Requester contends that the IO and ICANN staff acted contrary to ICANN process that prohibits the IO from filing an objection unless there was a least one public comment opposing the particular application made in the public sphere. In support of its argument, the Requester presented letters from the organizations that had made the public comments upon which the Objection was premised; those letters clarify that the comments were intended to be advisory in nature and not in direct opposition to Requester's application. In addition, the Requester claims that the Expert Panel applied the wrong standards in evaluating the Objection and that ICANN failed to ensure consistent and fair expert determinations.

The BGC¹ concludes that, based on information submitted with this Request, there is substantial and relevant evidence indicating that the Objection was inconsistent with ICANN procedures, despite the diligence and best efforts of the IO and staff. Specifically, the Requester has provided the BGC with uncontroverted information demonstrating that the public comments

¹ Board Governance Committee.

on which the Objection was based were not, in fact, in opposition to the Requester's application. Accordingly, the BGC concludes that ICANN not consider the Expert Determination at issue and that the Requester's Application for .MED is therefore permitted to proceed to the next stage of process in the New gTLD Program.

II. Facts.

A. Background Facts.

Medistry LLC ("Requester"), owned and operated by CC Web Solutions, a wholly owned subsidiary of the Cleveland Clinic and Second Genistry LLC, applied for .MED ("Requester's Application"). (See <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/downloadapplication/216?t:ac=216>.) Three other applicants also applied for .MED.

On 9 August 2012, the National Association of Boards of Pharmacy ("NABP") submitted a public comment relating to the Requester's Application. (<https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/5006>.)

On 26 September 2012, the American Hospital Association ("AHA") submitted public comments relating to the .MED applications submitted by other three applicants. (<https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/10936>; <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/10933>; and <https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/10931>.) AHA did not submit a public comment regarding Requester's Application.²

² The Requester's Application received another comment, on 25 September 2012, by .JOBS Charter Compliance Coalition. That comment was directed at the Requester's ability to comply with ICANN

On 12 March 2013, the IO³ filed the Objection to Requester’s Application asserting that there is “substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.” (Applicant Guidebook (“Guidebook”), § 3.2.1; New gTLD Dispute Resolution Procedure (“Procedure”), Art. 2(e); [http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/med-cty-medistry/.](http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/med-cty-medistry/))

On 30 December 2013, the Expert Panel (“Panel”) rendered an Expert Determination in favor of the Objection. Based on the submissions and evidence, the Panel determined that the IO had standing to object given his role, and that each of the requisite four elements to prevail on an Objection had been satisfied. (Determination, Pg. 12, ¶ 16; Pg. 42, ¶ 134.)

On 2 January 2014, the ICC⁴ notified the Requester of the Panel’s decision.

On 10 January 2014, ICANN published the Expert Determination.

On 10 January 2014, the NABP addressed a letter to the Cleveland Clinic providing “clarification that NABP’s [9 August 2012] comment [on the Requester’s .MED application] was intended to be advisory in nature” and that the “NABP did not oppose [the Requester’s] application to be the Registry Operator for the .MED TLD.” (Attachment 10 to Request: “10 January 2014 Letter from NABP to the Cleveland Clinic.”)

(continued...)

policies given its relationship to Employ Media LLC, the registry operator for .JOBS, and does not appear to be relevant to the issues raised in the Request or the IO’s Objection.

³ The Independent Objector, Professor Alain Pellet, was appointed by ICANN to serve for the entire New gTLD Program and object to “highly objectionable” gTLD applications on Limited Public Interest and Community Grounds. (Applicant Guidebook, § 3.2.5.)

⁴ International Centre for Expertise of the International Chamber of Commerce.

On 14 January 2014, the AHA addressed a letter to the Cleveland Clinic, confirming that AHA did not “express any comment in opposition (or resistance) to [Requester’s] application for .MED.” (Attachment 11: “14 January 2014 Letter from AHA to Cleveland Clinic.”)

On 17 January 2014, the Requester filed Request 14-1. The 10 January 2014 Letter from NABP to the Cleveland Clinic and 14 January 2014 Letter from AHA to Cleveland Clinic were provided to ICANN for the first time as attachments to Request 14-1.

On 22 March 2014, the BGC granted Request 14-1 for the limited purpose of further evaluating whether the Objection and the Panel’s Expert Determination contravened an established ICANN policy or procedure. Specifically, the BGC found that the Request raised questions as to whether the threshold procedural requirement set forth in Section 3.2.5 of the Guidebook, which requires that at least one comment in opposition to the application must have been made in the public sphere before an IO Objection should be filed, was satisfied with respect to Requester’s Application.

On 29 April 2014, the BGC approved a motion asking staff to confer with the IO in an effort to evaluate the basis for the IO’s decision to file the Objection against Requester’s Application for .MED.

On 30 May 2014, the IO responded to questions posed to him regarding his Objection.⁵

B. The Requester’s Claims.

The Requester seeks reconsideration on the following grounds:

First, the Requester claims that the IO and the Panel ignored ICANN procedure that prohibits the IO from filing an objection unless there was at least one public comment opposing

⁵ The IO’s response to the BGC inquiry regarding the nature and basis for the IO’s decision to file the Objection against the Requester’s application is consistent with the grounds stated in his Objection. Specifically, the IO relied upon the public comment made by NABP in the public sphere at the time.

the relevant application. (Request, Section 10, Pg. 9.) The Requester further claims that staff's inaction by allowing an invalid objection to proceed also violated this procedure.

Second, the Requester claims that staff violated ICANN procedure prohibiting the IO from filing an objection unless there was at least one public comment opposing the relevant application, by accepting the Expert Determination. (Request, Section 3, Pg. 3.)

Third, the Requester claims that the Panel did not impose the correct burden of proof for evaluating the Objection. Specifically, the Requester contends that the Panel "did not require the IO to provide any proof on the four relevant standards, but instead sustained the objection on nothing more than the IO's unsubstantiated assertions and speculations." (*Id.* (emphasis in original).)

Fourth, the Requester claims that the Panel failed to apply the four standards established by ICANN in the Guidebook for evaluating community objections and instead "interposed his own, entirely made up, standards." The Requester focuses on and contends that the Panel incorrectly applied the standards for evaluating substantial opposition and the likelihood of material detriment. (Request, Section 10, Pgs. 9-10; *see also* Request, Section 8, Pg. 7 fn. 18.)

Fifth, the Requester claims that the Panel's failure to follow the policies and procedures established by ICANN demonstrates ICANN's own failure to ensure consistent and fair expert determinations. (Request, Section 10, Pg. 10.)

Sixth, the Requester claims that staff failed to ensure that the New gTLD Dispute Resolution Procedure complied with ICANN policies. (Request, Section 3, Pg. 3.)⁶

⁶ Section 3 of the Request identifies seven purported actions or inactions by ICANN, the IO, and/or the Panel that the Requester seeks to have reconsidered. (Request, Section 3, Pgs. 2-3.) These actions/inactions are incorporated in the grounds for reconsideration summarized above. (Request, Section 10, Pgs. 8-24.)

The Requester claims that the above actions/inactions are contrary to ICANN procedures that require fairness, non-discriminatory treatment, and neutral application of documented policies, including, among others, the following:

- Section 3.2.5 of the Guidebook, which requires the IO to act “solely in the best interests of the public who use the global Internet” and prohibits the IO from filing an objection unless there was at least one public comment opposing the relevant application;
- Section 2.4.4 of the Guidebook, which (according to the Requester) requires the dispute resolution process to operate “in the interests of fairness and equivalent treatment for all applicants”⁷;
- Article 1, Section 2.8 of ICANN’s Bylaws, which requires that documented policies be applied neutrally and objectively, with integrity and fairness;
- Article II, Section 3 of ICANN’s Bylaws, which state that ICANN shall not apply its standards, policies, procedures and practices inequitably or by singling out any particular party for disparate treatment unless justified by substantial and reasonable cause; and
- Article 4 of ICANN’s Articles of Incorporation, which requires ICANN to 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.

(Request, Section 10, Pgs. 12-13, 15-16, 19, & 21-22.)

C. Relief Requested.

The Requester asks that ICANN overturn, or otherwise refuse to accept, the Expert Determination, conclude that the Objection did not and cannot meet the required criteria and therefore must be rejected, and allow the Requester’s Application for .MED to proceed.

⁷ It should be noted that Section 2.4.4. of the Guidebook refers to the “Communication Channels” and provides that contacting individual ICANN staff members, Board members, or individuals engaged by ICANN to perform an evaluation role in order to lobby for a particular outcome or to obtain confidential information about applications under review is not appropriate; thus, “[i]n the interests of fairness and equivalent treatment for all applicants, such individual contacts will be referred to the appropriate communication channels.”

Alternatively, the Requester asked that ICANN stay any action on the Requester's Application, and do one of the following:

- Refer the Objection back to the ICC for appointment of a new expert panel for *de novo* review and determination; or
- Refer the Objection to an “accountability mechanism” established by ICANN to deal with incorrect, inconsistent, or otherwise improper determinations by DRSPs; or
- Refer the Objection to the NGPC for further evaluation consistent with, among other things, the evidence, ICANN's policies and procedures (including the Guidebook and the Requester's Public Interest Commitments), and the NGPC's response to the GAC's Beijing Communiqué.

(Request, Section 9, Pg. 8.)

III. Issues.

In view of the claims set forth in Request 14-1, the issues for reconsideration are as follows:

- A. Whether ICANN procedure that prohibits the IO from filing an objection unless there was at least one public comment in the public sphere opposing the relevant application was followed?
- B. Whether staff failed to follow ICANN procedure that prohibits the IO from filing an objection unless there was at least one public comment in the public sphere opposing the relevant application by allowing the Objection to proceed and by accepting the Expert Determination?
- C. Whether the Panel applied the wrong standard in contravention of established policy or process by:
 1. Failing to apply the proper burden of proof;
 2. Failing to apply the proper standard for evaluating substantial opposition; and
 3. Failing to apply the proper standard for evaluating the likelihood of material detriment.
- D. Whether ICANN's purported failure to ensure consistent and fair expert determinations supports reconsideration?

Given the BGC's 22 March 2014 finding that further evaluation was required to determine whether the Objection was consistent with the threshold requirements of Section 3.2.5 of the Guidebook, this BGC Determination addresses the issues identified in Paragraphs A and B above, only.

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.⁸ (Bylaws, Art. IV, § 2.) Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, or if the Board or the NGPC⁹ agrees to the extent that the BGC deems that further consideration is necessary, that the requesting party failed to satisfy the reconsideration criteria set forth in the Bylaws. ICANN has previously determined that the reconsideration process can properly be invoked for challenges to expert determinations rendered by panels formed by third party dispute resolution service providers, such as the ICC, where it can be stated that the Panel failed to follow the established policies or processes in reaching the expert determination, or that staff failed to follow its policies or processes in accepting that determination.¹⁰

In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of expert determinations. Accordingly, the BGC is not

⁸ 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.

⁹ New gTLD Program Committee.

¹⁰ See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>, BGC Recommendation on Reconsideration Request 13-5.

to evaluate the Panel's substantive conclusions. Rather, the BGC's review is limited to whether ICANN policies and procedures were followed with respect to the Objection, the Panel's review of the Objection and staff's acceptance of the Expert Determination.

V. Analysis and Rationale.

A. The Requester Has Demonstrated That The Threshold Requirement Of Section 3.2.5 Of The Guidebook Was Not Satisfied With Respect To The Community Objection.

The Requester contends that the policies and procedures of Section 3.2.5 of the Guidebook, which requires that the IO not object to an application unless there is at least one comment in opposition to the application in the public sphere, was not satisfied because there was no comment in opposition to the Requester's Application existing in the public sphere when the Objection was filed. (Request, Section 10, Pg. 10.) The Requester further contends that ICANN staff failed to ensure that the procedures set forth in Section 3.2.5 were followed by allowing the Objection to proceed and by accepting the Expert Determination. (Request, Section 3, Pg. 3.)

The Requester relies on the following statement from Section 3.2.5 of the Guidebook:

In light of the public interest goal noted above, the IO shall not object to an application unless at least one comment in opposition to the application is made in the public sphere.

(Guidebook, Section 3.2.5.) To support its argument, the Requester proffers the 10 January 2014 Letter from NABP to the Cleveland Clinic and the 14 January 2014 Letter from AHA to Cleveland Clinic explaining that the public comments submitted by these entities regarding .MED, which were the comments that caused the IO to file his Objection, were not made in opposition to Requester's Application. (See 10 January 2014 Letter from NABP to the Cleveland Clinic; 14 January 2014 Letter from AHA to Cleveland Clinic; *see also*, IO's Objection, Pgs. 11-12; ¶¶ 25-28.)

Specifically, the 10 January 2014 Letter from NABP to the Cleveland Clinic states:

We wish to clarify that NABP's comment was intended to be advisory in nature, stressing that health-related gTLDs should account for patient safety and implement protections against fraud and abuse. In submitting this comment, NABP did not oppose Medistry's application to be the Registry Operator for the .MED gTLD, nor take any position as to whether Medistry's .MED application contained appropriate safeguards.

NABP acknowledges that the Public Interest Commitments filed by Medistry in response to the Governmental Advisory Committee's Safeguard Advice may satisfactorily address the issues raised in NABP's Public Comment.

(10 January 2014 Letter from NABP to the Cleveland Clinic.)

The 14 January 2014 Letter from AHA to Cleveland Clinic states:

It has come to the attention of the American Hospital Association [] that Public Comments AHA filed against HEXAP SAS, DocCheck AG, and Charleston Road Registry on September 26, 2012 have been mistakenly used by a Panelist in Case NO. EXP/403/ICANN/20 against an unintended party, Medistry LLC....AHA purposefully did not file a similar Public Comment related to Medistry LLC....Again, so there can be no ambiguity: AHA did not then, and does not now, express any comment in opposition (or resistance) to Medistry's application for .MED.

(14 January 2014 Letter from AHA to Cleveland Clinic.)

Given NABP and AHA's statements that their public comments were not in opposition to Requester's Application, it appears that the threshold requirement of Section 3.2.5 was not satisfied in this particular instance. To the contrary, the 10 January 2014 Letter from NABP to the Cleveland Clinic makes clear that NABP's comments were advisory and were not directed at the Requester's Application, and that Requester's commitments addressed any general concerns raised by NABP. Likewise, the 14 January 2014 Letter from AHA to Cleveland Clinic stresses that AHA purposefully did not oppose Requester's Application for .MED

These two letters from NABP and AHA, providing clarity regarding the context and intent of their public comments, were not available when the IO filed the Objection or when staff accepted the Panel’s Determination.¹¹ But the letters explain and provide clear insight into the public comments made by NABP and AHA and are therefore relevant to the BGC’s analysis of whether the threshold requirements of Section 3.2.5 of the Guidebook were satisfied. The letters are also relevant to the BGC’s analysis of whether staff’s actions (or inactions) in accepting the Determination were consistent with Section 3.2.5. Based on these letters, the BGC concludes that the policies and procedures of Section 3.2.5 were not specifically followed with respect to Requester’s Application.

The BGC’s determination is not a finding that the IO or ICANN staff failed to properly discharge their duties. Rather, the BGC’s determination is based on the Requester’s proffer of substantial evidence relevant to the procedures of Section 3.2.5. The public comments from NABP and AHA that were the basis for the Objection were vague and open to a number of interpretations. Given that there is substantial and uncontroverted evidence from the authors of those public comments, indicating what NABP and AHA intended, the BGC cannot ignore this information in assessing the Request or reaching its determination.

VI. Decision.

As noted above, the BGC previously concluded that the Requester had stated proper grounds for reconsideration and granted the Request for the limited purpose of investigation of Requester’s claims. Upon conclusion of that investigation, the BGC further determines that the

¹¹ It is important to note, however, that in the Objection proceedings the Requester referenced “subsequent conversations between [Requester] and the NABP [that] confirmed the NABP’s intent was ‘not to file an opposition specifically against [Requester].’” (Determination, Pg. 26, ¶ 76.) But the Panel determined that such “unsubstantiated and unproven” allegations were “of no avail. As far as it is known to the Panel, NABP has not retracted its public comments.” (*Id.*)

Objection did not satisfy the procedures of Section 3.2.5 of the Guidebook. Accordingly, the BGC has determined that the Requester's Application for .MED is therefore permitted to proceed to the next stage of process in the New gTLD Program.

In accordance with Article IV, Section 2.15 of the Bylaws, the BGC concludes that this determination is final and that no further consideration by the Board (or the New gTLD Program Committee) is warranted.

In terms of timing of the BGC's Determination, we note that Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a Reconsideration Request within thirty days following receipt of the request, unless impractical. (*See* Article IV, Section 2.16 of the Bylaws.) To satisfy the thirty-day deadline, the BGC would have to have acted by 18 February 2014. But given the issues set forth in Request 14-1, the BGC's 22 March 2014 acceptance of the Request, the BGC's instruction to staff to confer with the IO regarding the Request, the IO's responses to staff's inquiries and consideration thereof, additional time was needed to evaluate Request 14-1. As such, the first practical opportunity for the BGC to reach a conclusion on this Request was on 21 June 2014; it was impractical for the BGC to consider the Request sooner. Upon making that determination, Staff notified the Requester of the BGC's anticipated timing for the review of Request 14-1.

Reference Material 53.

RECOMMENDATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 13-9

10 OCTOBER 2013

On 4 September 2013, Amazon EU S.a.r.l. (“Amazon”) submitted a reconsideration request (“Request”). The Request asked the Board to reconsider the 21 August 2013 Expert Determination from a dispute resolution Panel established by the International Centre for Dispute Resolution (“ICDR”) sustaining Commercial Connect LLC’s (“Commercial Connect”) objection to Amazon’s new gTLD application for the Japanese translation of “online shopping” (“Amazon’s Applied-for String”) as being confusingly similar to Commercial Connect’s application for .SHOP (“Commercial Connect’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).

The Request was received on 4 September 2013, which makes it timely under the Bylaws. Bylaws, Art. IV, § 2.5.

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 (“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 a string confusion objection with the ICDR asserting that an “applied-for string is 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

To initiate a dispute resolution proceeding, an objection must comply with the procedures set out in Articles 5-8 of the Procedure. This includes the requirement that objections be filed with the appropriate DRSP with copies to the gTLD applicant against which the objection is

¹ Where a new gTLD applicant successfully asserts string confusion with another applicant, the two strings are placed in a “contention set” to be resolved per the String Contention Procedures in Module 4 of the Applicant Guidebook. (Guidebook, Section 3.2.2.1.)

being raised. (Procedure, Art. 7 (b).) Before an objection is registered for processing, the DRSP conducts an administrative review to verify compliance with Articles 5-8 of the Procedure and the applicable DRSP Rules, and informs the objector, the applicant and ICANN of the result of its administrative review. (Procedure, Art. 9(a).)

A Panel of appropriately qualified expert(s) appointed by the designated DRSP will 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 considered an expert determination and advice that ICANN will accept within the dispute resolution process. (Guidebook, Section 3.4.6.)

B. Commercial Connect's Objection to Amazon's Applied-for String

Amazon is an applicant for the Japanese translation of "online shopping." Commercial Connect objected to Amazon's Applied-for String, asserting that it was confusingly similar to Commercial Connect's Applied-for String ("Commercial Connect's Objection"); Amazon filed a response. The ICDR's appointed Panelist (the "Panel") rendered an "Expert Determination" on 21 August 2013. The Panel determined that Commercial Connect had standing to object as an applicant for .SHOP, and rejected claims by Amazon that Commercial Connect did not properly serve its objection on Amazon. (Expert Determination, Pg. 3.) Based on the evidence and the parties' submissions, the Panel sustained Commercial Connect's Objection on the grounds that

Commercial Connect's Applied-for String is confusingly similar to Amazon's Applied-for String (Expert Determination, Pgs. 4-5.)

Although Commercial Connect's Objection was 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 Amazon's Request for Reconsideration

Amazon seeks reconsideration of the Panel's decision sustaining Commercial Connect's Objection. More specifically, Amazon requests that ICANN disregard the Panel's Expert Determination, and either instruct a new Panel to review Commercial Connect's string confusion objection with the standards set forth in the Applicant Guidebook or make the necessary accommodations to allow for a "non-discriminatory application of ICANN standards, policies and procedures." (Request, Section 9.)

A. The ICDR and the Panel's Acceptance of Commercial Connect's Objection Does Not Demonstrate A Process Violation

In its Request, Amazon contends that the ICDR and the Panel failed to follow the established process for registering and/or accepting Commercial Connect's Objection. Specifically, Amazon claims that Commercial Connect failed to provide Amazon with a copy of the objection as required by Article 7(b) of the Procedure, and that this failure is a deficiency that cannot be rectified under the Procedure. (Request, Pgs. 8-10; Annex 4 to Request (19 April 2013

Letter from Amazon to the ICDR).) Pursuant to Article 9(d) of the Procedure, which provides for dismissal of objections that do not comply with Articles 5-8 of the Procedure and where deficiencies have not been cured in the specified timeframe, Amazon contends that the ICDR should have dismissed Commercial Connect's Objection and closed the proceedings. (Request, Pg. 10; Annex 4 to Request (19 April 2013 Letter from Amazon to the ICDR); Annex 5 to Request (24 April 2013 Letter from Amazon to the ICDR).)

The Procedure makes clear that the ICDR was required to perform an administrative review of Commercial Connect's Objection, and to inform the objector, applicant, and ICANN of the results of its administrative review. (Procedure, Art. 9(a).) The available record shows that the ICDR complied with its obligations in this regard.

Amazon claims it received an email from the ICDR acknowledging receipt of Commercial Connect's Objection on 18 March 2013 – though, according to Amazon, that email did not specifically identify the string that was the subject of Commercial Connect's Objection. (Request, Pg. 9.) Soon thereafter, on 4 April 2013, Amazon states that it also received an email from the ICDR requesting that Commercial Connect provide “proof or statement” that copies of the objection were sent to Amazon. (Request, Pg. 9.)

Contrary to Amazon's assertions, failure to provide an applicant with a copy of the objection as required by Article 7(b) is a deficiency that can be cured under the Procedure. Article 9(c) provides that if the DRSP finds that the objection does not comply with Articles 5-8 of the Procedure, the DRSP “shall have the discretion to request that any administrative deficiencies in the Objection be corrected within 5 days.” (Procedure, Art. 9(c).) Accordingly, the ICDR's 4 April 2013 email, requesting Commercial Connect to cure the stated deficiency,

was consistent with the process established in the Procedure for the administrative review of objections.

According to the Request, subsequent to the ICDR's 4 April 2013 correspondence to Commercial Connect requesting it to provide proof of service of the objection on Amazon, Amazon claims it received the following documents from Commercial Connect:

- (i) A copy of Commercial Connect's application for .SHOP;
- (ii) A "online filing demand for arbitration/mediation form" that refers to Amazon's Applied-for String;
- (iii) A "dispute resolution objection" with blank unfilled spaces where the string applicant and relevant string would otherwise appear;
- (iv) a copy of Commercial Connect's 11 October 2000 applications for .MALL, .SHOP, and .SVC; and
- (v) A copy of a 5 April 2013 correspondence to the ICDR in which Commercial Connect certifies that copies of the complaint and attachments were sent via email to all respondents and to ICANN.

(Request, Pgs. 9-10.) From the above, although particular entries may have been left blank, it appears that Amazon did in fact receive a copy of the objection. Based on the 5 April 2013 correspondence from Commercial Connect certifying that copies were provided to Amazon, ICDR concluded that Commercial Connect corrected the deficiency within one day of being notified, well within the five-day period allowed under the Procedure.

In its 11 April 2013 correspondence to the parties, the ICDR indicates that Commercial Connect's Objection would be registered for processing. The ICDR states that it conducted a further administrative review and noted that Commercial Connect's Objection, "after rectifying deficiencies previously set forth, now complies with Articles 5-8" of the Procedure. (Request, Pg. 8; Annex 3 to the Request (11 April 2013 Letter from the ICDR).) The ICDR thereafter sent a letter on 17 April 2013 providing Amazon with notification of its thirty-day period to file a

response to Commercial Connect's Objection. (See Annex 5 to Request (24 April 2013 Letter from Amazon to the ICDR.) Based on the above, Amazon lacks support for the claim that it did not receive notification that an objection had been filed against it and that Amazon was required to respond in order to avoid default.

Moreover, notwithstanding Amazon's own acknowledgment that it received a copy of the "dispute resolution objection" (albeit with certain entries left blank), the ICDR invited Amazon to raise the alleged procedural defects in Amazon's response to Commercial Connect's Objection. (Annex 6 to Request (3 May 2013 Email from ICDR to Amazon).) The Panel, having received and considered Amazon's claims of procedural deficiencies, rejected Amazon's claims indicating there was no actual prejudice to Amazon. The Panel noted:

[I]t appears that Applicant received actual notice of the Objection, and has been accorded a full and fair opportunity to be heard on its application. Applicant also has not shown that it was prejudiced by any alleged defects in the filing of the Objection. (Expert Determination, Pg. 3.)

In view of the above, the ICDR's acceptance of Commercial Connect's Objection for decision does not demonstrate a policy or process violation, and Amazon has not demonstrated otherwise.

B. Amazon's Claim That The Panel Applied The Wrong Standard Is Unsupported And Is Not A Basis For Reconsideration.

A separate ground of Amazon's Request is its contention that the Panel applied the wrong standard in evaluating Commercial Connect's Objection. Specifically, Amazon claims that the Panel applied a standard that considered "the use of essentially the same word in two different languages [as] sufficient to cause string confusion among the average, reasonable Internet user," and claims that such a standard would eliminate the need to evaluate translations of words on a case-by-case basis. (Response, Pg. 13.) Amazon further asserts that even if translations of essentially the same word were sufficient to cause string confusion, an English translation of

Amazon’s Applied-for String is not the same as Commercial Connect’s Applied-for String, and they have different meanings. (Request, Pg. 13.) Amazon relies on another ICDR Panel’s determination, finding that Top Level Domain Holdings Limited’s (“TLDH”) application for the Chinese translation of “shop” (“TLDH’s Applied-for String) is not confusingly similar to Commercial Connect’s application for .SHOP,² as evidence that the Panel applied the wrong standard. (Request, Pg. 14; Annex 2 to Request.) Amazon concludes that “in the impossible event” that ICANN accepts the Panel’s determination, the acceptance would “create inequitable and disparate treatment without justified cause” in violation of Article II, Section 3, of ICANN’s Bylaws. (Request, Pg. 7)

In the context of the New gTLD Program, the Reconsideration process does not call for the BGC to perform a substantive review of DRSP Panel decisions; Reconsideration is for the consideration of process- or policy-related complaints. The Reconsideration process will not be used in this instance to evaluate the Panel’s substantive conclusion that Commercial Connect’s Applied-for String and Amazon’s Applied-for String are confusingly similar. Rather, any review will be limited to whether the Panel violated any established policy or process, which Amazon claims was done by the Panel not applying the correct standard in reaching its determination.

The Panel referenced and correctly stated the applicable standard more than once in its evaluation of Commercial Connect’s objection.³ (Expert Determination,

² *Commercial Connect, LLC v. Top Level Domain Holdings Ltd.*, Case No. 50 504 T 00258 13, available at http://images.go.adr.org/Web/AmericanArbitrationAssociation/%7B772b1de3-e337-4643-b310-f87daa172a2e%7D_50_504_T_00258_13_determination.pdf (hereinafter “TLDH Expert Determination”).

³ In what appears to be a typographical error, at one point, the Panel incorrectly cites to Section 3.4.1 of the Applicant Guidebook instead of Section 3.5.1, but the Panel nonetheless correctly quotes from the applicable standard.

Pgs. 2, 4.) The relevant standard for evaluating a string confusion objection is set out in Section 3.5.1 of the Applicant Guidebook:

A DRSP Panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it likely to deceive or cause confusion. For a 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.

The Applicant Guidebook also makes clear that a string confusion objection is not limited to visual similarity, but rather, may be based on any type of similarity, including aural similarity or similarity in meaning. (Guidebook, Section 2.2.1.1.3.)

Based on the parties' contentions, it appears that the Panel concentrated on the meanings of the two strings. The Panel determined that there were three distinct, but related issues that needed to be examined in assessing Commercial Connect's Objection:

- (i) Whether the root of the word in a string should be accorded protection from usage of variations of the root word, including participles (*e.g.*, several variations for the root word "shop" in the English language)?
- (ii) Whether the addition of the word "online" before the word "shopping" makes the two strings distinct as to avoid string confusion?
- (iii) Whether the use of Japanese characters and languages for the same word avoids the possibility of confusion?

(Expert Determination, Pg. 4.)

In evaluating these three issues, the Panel found that the concurrent use of "shopping", the participle of the root word "shop," in a string will result in probable confusion by the average, reasonable Internet user, because the two strings have virtually the same sound, meaning, look

and feel.⁴ (Expert Determination, Pgs. 4-5.) The Panel likewise found that the addition of the word “online” before “shopping” does not add sufficient uniqueness to the string because the meaning of the strings arises from the use of the root word “shop” and not the modifier “online.” (Expert Determination, Pg. 5.) The Panel was also not persuaded that simply using a foreign language or foreign characters avoided the possibility of confusion. The Panel determined that many Internet users speak more than one language, including English, and that the use of essentially the same word in two different languages is sufficient to cause string confusion among the average, reasonable Internet user. (Expert Determination, Pg. 5.)

The Panel’s focus on the meanings of the strings is consistent with the standard for evaluating string confusion objections. A likelihood of confusion can be established with any type of similarity, including similarity of meaning. (Guidebook, Section 2.2.1.1.3.) To challenge this proposition, Amazon relies on the analysis of the public comment to version 2 of the Applicant Guidebook. (Request, Pg. 11.) Amazon asserts that the public comment makes clear that the standard for establishing string confusion is a “high standard, not intended to hobble competition.” (Request, Pg. 11.) In response to these public comments, which included the suggestion that string confusion objections not be allowed for cases of similar meaning, ICANN specifically addressed and clarified the proper scope of objections:

The new gTLD implementation follows the GNSO recommendation that implies that string confusion should be tested in all ways: visual, meaning and aural confusion. After all, if harm to consumers would result due to the introduction of

⁴ Amazon claims that the word “shopping” is not used and does not appear in either of the strings at issue, and therefore, the Panel improperly compared Amazon’s Applied-for String with the “shopping” string. (Request, Pg. 14-15.) Amazon’s argument lacks credibility in that Amazon’s proposed string is the Japanese translation for “online shopping”; thus, “shopping” is contained within the challenged string. Further, the Panel is permitted under the Procedure to “refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable.” (Procedure, Art. 20(b).)

two TLDs into the root zone because they sounded but did not look alike, then both TLDs should not be delegated.

(New gTLD Draft Applicant Guidebook-Version 2: Analysis of Public Comment, Pg. 149 available at <https://archive.icann.org/.../agv2-analysis-public-comments-31may09-en.pdf>.) Any claim by Amazon that the Panel must limit itself to a standard of aural or visual similarity is not supported by available documentation, and does not support a finding that the Panel violated any established policy or procedure.

Moreover, the Panel did not automatically conclude that there was a likelihood of confusion between Commercial Connect's Applied-for String and Amazon's Applied-for String as Amazon contends. To the contrary, it appears that the Panel conducted a detailed and comprehensive analysis of the issues before reaching its determination.

Amazon further relies on another ICDR Panel's determination, finding that TLDH's Applied-for String is not confusingly similar to Commercial Connect's Applied-for String, as evidence that the Panel applied the wrong standard.⁵ (Request, Pg. 14.) The fact that these two ICDR Panels evaluated potentially similar objections yet came to different conclusions does not mean that one Panel applied the wrong standard. 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

⁵ On 5 September 2013, Commercial Connect separately sought reconsideration of ICANN staff's acceptance of the TLDH Expert Determination. (Request 13-10, available at [http://www.icann.org/en/groups/board/governance/reconsideration/request-commercial-connect-.](http://www.icann.org/en/groups/board/governance/reconsideration/request-commercial-connect-)) Request 13-10 is based primarily on a claim that the Panel dismissing Commercial Connect's objection to TLDH's Applied-for String and the Panel sustaining Commercial Connect's objection to Amazon's Applied-for String inconsistently applied the standard for evaluating string confusion objections. For the same reasons as stated herein, Commercial Connect's claims are unsupported and do not support Reconsideration.

presented. While Commercial Connect was the objector in both proceedings cited by Amazon, the objections were rebutted by different applicants. Thus, the Panels reached different determinations at least in part because the materials submitted by each applicant (Amazon and TLDH) in defense of its proposed string were different.

For instance, in dismissing Commercial Connect's objection to TLDH's Applied-for String, the 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 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 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. 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 Panel, dismissing Commercial Connect’s objection to TLDH’s Applied-for String, 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 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 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 Amazon suggests – 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.

Further, the standard guiding the Panels involves some degree of subjectivity. While Amazon may disagree with the Panel’s finding, Reconsideration is not available as a mechanism to re-try the substantive determination of the Panel. Amazon’s claims that the Panel applied the wrong standard are unsupported and therefore, do not support Reconsideration.

IV. Recommendation and Conclusion

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

As there is no indication that either the ICDR or the Panel violated any policy or process in accepting and sustaining Commercial Connect’s Objection, this Request should not proceed. If Amazon thinks that it has somehow been treated unfairly in the process, and the Board (through the NGPC) adopts this Recommendation, Amazon 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.

Reference Material 54.

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case Number: 01-15-0003-3822

VeriSign, Inc., Objector

-and-

United TLD Holdco Ltd., Applicant

REPORT OF THE FINAL REVIEW PANEL

Final Review Panel:

Sandra J. Franklin, Esq.
Mark C. Morril, Esq. (Chair)
L. Donald Prutzman, Esq.

August 26, 2015

Table of Abbreviations

SCO	String Confusion Objection
OEP	Original Expert Panel
OPED	Original Expert Panel Determination
FRP	Final Review Panel
RSCO	Related String Confusion Objection (WebConnect and dot Agency)
EPD	Expert Panel Determination in RSCO Cases
ICDR	International Centre for Dispute Resolution
AGB	Applicant Guidebook
Applicant	United TLD Holdco, Ltd.
Objector	VeriSign, Inc.
gTLD	generic Top Level Domain
NGPC	ICANN New gTLD Program Committee
BGC	ICANN Board Governance Committee
Objection	VeriSign, Inc. v. United TLD Holdco, Ltd., String Confusion Objection to .CAM string, dated 13 March 2013
Response	Response dated 24 May 2013 of United TLD Holdco, Ltd. to the Objection

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I. Introduction

The Final Review Panel (“FRP”) issues this Report pursuant to the International Centre for Dispute Resolution’s (“ICDR”) *Procedures for Final Review of Perceived Inconsistent or Unreasonable String Confusion Objection Expert Determinations* (“Final Review Procedures.”) The Final Review Procedures implement the 2014 decision of the Internet Corporation for Names and Numbers (“ICANN”) to create a new final review mechanism in relation to its New gTLD Program.

At issue before the FRP is a String Confusion Objection (“SCO”) lodged by VeriSign, Inc. (“Objector”), against the application of United TLD Holdco Ltd. (“Applicant”) to register .CAM as a new gTLD. For the reasons stated below, the FRP has determined to reverse the Original Expert Panel’s Determination (“OEPD”), which upheld the SCO. The FRP concurrently is issuing a New Final Determination on the SCO.

II. Background

A. Parties

1. Objector, a Delaware Corporation, is the existing operator of the “.COM” generic Top Level Domain or gTLD.¹ The .COM gTLD was established in 1985 and was one of six original gTLDs. Today, it has over 100 million registered names and is the largest and best known of all gTLDs. Objector operates the .COM gTLD as an “open registry,” i.e., one that is globally available to all registrants.² It is uncontested that Objector has operated the .COM registry with an excellent record of security and stability for more than 20 years.
2. Applicant United TLD Holdco, Ltd. (“Applicant”) is incorporated in the Cayman Islands. It has applied to register .CAM as a gTLD pursuant to ICANN’s New gTLD Program. Applicant has stated its intention to operate .CAM as an open registry.

B. ICANN’s New gTLD Program

1. In 2011, after several years of policy development work, ICANN’s board took action to create a New gTLD Program which would provide an application and evaluation process for the purpose of significantly increasing the number of registered gTLD’s available to

¹ Generic Top Level Domains (“gTLDs”) are the string of letters following the rightmost dot in domain names.

² Restricted gTLDs (versus open gTLD’s) are those that require registrants to meet certain defined criteria to register a domain name within their registry.

the public. The Preamble to ICANN's New gTLD Applicant Guidebook ("AGB"), first issued in 2011, noted that:

"New gTLDs have been in the forefront of ICANN's agenda since its creation. The new gTLD program will open up the top level of the Internet's namespace to foster diversity, encourage competition, and enhance the utility of the [Domain Name System]."

2. ICANN's Board delegated authority to its New gTLD Program Committee ("NGPC") to manage "any and all issues that may arise relating to the New gTLD Program," including the administration of applications to register New gTLDs. The AGB is a detailed handbook, which sets out policies and procedures to guide applicants seeking to register new gTLDs.

C. String Similarity

1. ICANN Initial Evaluation

Applying procedures set out in Module 2, Section 2 of the AGB, ICANN conducts an Initial Evaluation of all applied-for gTLD's for several potential issues. Included in the Initial Evaluation is a review to test "whether the applied-for gTLD string is so similar to other strings that it would create a probability of user confusion." This "String Similarity Review" "involves cross-checking between each applied-for string and the lists of existing gTLD strings and Reserved Names to determine whether two strings are so similar to one another that they create a probability of user confusion." The String Similarity Review is informed in part by application of ICANN's "SWORD" algorithm, which scores applied-for strings against other existing and applied-for TLDs and reserved names. SWORD scores increase with the algorithm's prediction of increasing likelihood of visual confusion between two strings.

2. Standard For String Confusion

The standard of review for String Confusion is set forth in *AGB* 3.5.1:

"String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a 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."

3. The String Confusion Objection (“SCO”) Process

- a. An application that passes the String Similarity Review is still subject to a string confusion objection by an existing gTLD operator or by another gTLD applicant. While the standard to determine string confusion ICANN applies during its Initial Evaluation of new gTLD strings is limited to visual similarity, a string confusion objection lodged by an existing TLD operator or by another gTLD applicant may argue any type of similarity, including visual, aural or similarity of meaning. See *AGB, Module 2, Section 2*.
- b. The Objector bears the burden of proof in each case. *AGB 3.5*. ICANN has elaborated the burden of proof with guidance stating that there is “a presumption generally in favor of granting new gTLDs to applicants who can satisfy the requirements for obtaining a gTLD....” See Comment Summary and Analysis to AGB v3 at 67 (Feb. 15, 2010), <https://www.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf>
- c. The AGB provides for all objections to be referred to a “Panel of Experts,” which issues an Expert Determination resolving the objection. The ICDR administers the SCO resolution process pursuant to its *Supplementary Procedures for ICANN’s New gTLD Program*, effective 8 May 2012. In the case of SCOs, the “Panel of Experts” is comprised of one Expert. *AGB, Attachment to Module 3: New gTLD Dispute Resolution Procedure*.

D. Applications for .CAM as a New gTLD

1. The Applications

ICANN received three applications to register .CAM as a gTLD. Applicant applied to register .CAM as an open gTLD. AC Webconnecting Holding B.V. applied to register .CAM as a restricted registry, limited to camera-related uses. Dot Agency Limited applied to register .CAM to the “niche” market of camera users.³ The Expert Determinations on the AC Webconnecting and Dot Agency gTLD applications are referred to herein and in the Final Review Procedures as the “Related SCO Expert Panel Determinations” or “RSCO EPDs.”

³ The FRP has not had access to the pleadings and evidence filed in the RSCOs and is relying solely on the RSCO EPDs in characterizing the two applications at issue there as providing for a restricted registry or niche marketing.

2. Objections to the Applications for .CAM

The Objector filed objections to all three applications for the .CAM string.⁴ Each Applicant filed a response.⁵ Based on the FRP's review of the Related SCO Expert Determinations, it appears that Objector relied on substantially the same arguments and the same expert evidence in all three objections.

3. The Original Expert Panel Determination

On August 12, 2013, the OEP issued its Expert Determination sustaining the objection. The OEP's reasoning is described in further detail below.

4. The Related SCO Expert Determinations

On August 13, 2013, the Sole Expert Panelist in the RSCO cases on .CAM issued separate Expert Determinations, in both cases dismissing VeriSign's objection. The Sole Expert Panelist's reasoning in the two RSCOs is described below to the extent relevant to this decision.

E. ICANN's Determination to Create a New Review Mechanism

1. In October 2013, ICANN's Board Governance Committee ("BGC") issued a ruling on a reconsideration request in a string confusion objection, unrelated to the SCO at issue here, that also involved two different Expert Panels which had reached different conclusions on "potentially similar objections." The BGC recommended that ICANN's staff provide a report to the NGPC setting out options for dealing with the situation of differing outcomes in similar SCO disputes. *Recommendation of the Board Governance Committee on Reconsideration Request 13-9 (10 October 2013) at <https://www.icann.org/en/system/files/files/recommendation-amazon-10oct13-en.pdf>*
2. In October 2014, the NGPC, having considered the staff report prepared in response to the BGC's recommendation and public comments on a potential review mechanism, took action "to address certain perceived inconsistent or otherwise unreasonable SCO Expert Determinations" which it identified "as not in the best interest of the New gTLD Program and the Internet community." The NGPC directed ICANN's President and CEO to take all steps necessary for the ICDR to provide supplemental rules and create a

⁴ See, e.g., *VeriSign, Inc. v. United TLD Holdco Ltd.*, String Confusion Objection to .CAM String, dated 13 March 2013 ("Objection").

⁵ See, e.g., *Response of United TLD Holdco, Ltd.*, dated 24 May 2013 ("Response").

Review Panel (“the Final Review Panel”) to determine “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”<https://www.icann.org/resources/boardmaterial/resolution-ns-new-gtld-2014-10-12-en#2.b> (“the NGPC Resolution”).

3. The NGPC limited application of the new Final Review Panel procedure to only the .CAR/.CARS and .CAM/.COM disputes.⁶ Significantly, the NGPC did not designate for review each of the Expert Panel Determinations relating to the gTLDs disputes at issue. Rather, in each case, the NGPC specifically identified one of the SCO Expert Determinations in each set as “perceived inconsistent or otherwise unreasonable” and “as not in the best interest of the New gTLD Program and the Internet community.” Only the SCO Expert Determinations so-identified were submitted to the new Final Review Panel procedure.
4. It follows that in ICANN’s organization of the new Final Review Panel procedure, the NGPC identified the Expert Panel Determination at issue here “as not in the best interest of the New gTLD Program and the Internet Community.” Thus, the NGPC implicitly endorsed the determinations in the RSCO .CAM cases, both of which were made by a single Expert Panelist different from the OEP.

F. The Final Review Procedures

1. The NGPC provided the ICDR with detailed standards for the organization and operation of the new Final Review Panel procedure. The NGPC standards were incorporated in the ICDR’s Final Review Procedures.
2. The Standard of Review provided in Article 10 of the Final Review Procedures is the same as that set out in the NGPC Resolution:

“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.”

⁶ The NGPC determined not to extend the Final Review Panel mechanism to any other applications in the initial gTLD round, but stated that it might consider establishing such a mechanism to apply more broadly in future rounds.

3. Article 11 (c) of the Final Review Procedures provides that the possible outcomes of the FRP's Final Determination are:
 - a. Adopt the underlying SCO Expert Determination as the Final Determination; or
 - b. Reverse the underlying SCO Expert Determination and draft a new Final Determination that shall replace and supersede the underlying SCO Expert Determination.
4. Article 9 of the Final Review Procedures defines the matter to be included in the Record for Final Review.
5. Article 6 of the Final Review Procedures provides that the Final Review Panel shall include at least one panel member, and, if possible, other members who have familiarity with ICANN or the Domain Name System.

III. The Record for Final Review

- A. The ICDR initially had posted to the Record for Final Review the pleadings and supporting evidence submitted in the RSCO Expert Determinations ("the Related SCO Records"), but withdrew them upon receipt of an objection from the Applicant who contended that Article 9 (a) of the Final Review Procedures required that only the RSCO EPDs and not the Related SCO Records be included in the Record for Final Review.
- B. On July 4, 2015, the FRP issued an Order pursuant to Article 9 (d) of the Final Review Procedures that the Related SCO Records should be included in the Record. Exclusion of the Related SCO Records foreclosed the FRP from any review based on differences in the record before the three Expert Panels that considered the .CAM/.COM objection. The FRP also believed it would be helpful to have access to the pleadings and the expert reports submitted in the RSCOs. The FRP interpreted Article 9 (a) of the Final Review Procedures as precluding the parties from submitting briefs or other new evidence to the FRP, but not as limiting the FRP's access to materials already in the record of the Related SCO objections.
- C. Subsequent to the July 4 Order, the ICDR advised the FRP of ICANN's position that the Related SCO Records were not to be included in the Record and requested that the July 4 Order be modified to finalize the Record without the Related SCO Records.

- D. After due deliberation, the FRP determined to defer to ICANN’s interpretation of the Final Review Procedures.⁷ Accordingly, on July 23, 2015, the FRP issued a Revised Order Finalizing the Record which modified the July 4 Order finalizing the Record to contain only the following materials:
- The OEPD
 - The pleadings and supporting evidence that were before the OEP
 - The two RSCO EPDs, without supporting evidence

IV. The Original Expert Panel’s Determination

A. The OEP’s Determination

The OEP held that:

“The gTLD[s] “CAM” and “COM” are confusingly similar and the use of “CAM” will likely result in string confusion. Objector has met its burden to prove that “CAM” so nearly resembles “COM” that it is probable that confusion will arise in the mind of the average, reasonable Internet user.”

The OEP based this conclusion on the following:

1. Contemporary Internet Usage

Objector contended that the “relevant class of users here consists of casual Internet users, likely to exercise a low degree of care when exposed to or interacting with TLDs, increasing the likelihood of confusion.” Objection at 7. Applicant countered that “today the average Internet user is sophisticated enough to make determinations about the origin of a website based on its content, rather than its domain name.” Response at 8.

The OEP found that Applicant had an “overly optimistic picture of the general audience of Internet users and their willingness to pay attention to technicalities of sorting out roots of top level domain names” and that Applicant also was “overly optimistic about their focused attention to online tasks.”

2. Expert Linguistic Evidence

- a. Objector provided the Affidavit of Gail Stygall (“Stygall”) to bolster its argument that .CAM is likely to be confused with .COM. Stygall is a Professor at the University of Washington in Seattle and an English language linguist. Stygall presented a

⁷ The FRP nonetheless urges that, to the extent ICANN determines to establish a similar final review mechanism in subsequent rounds of the New gTLD Program, it consider including the full record of related SCOs in the record before future Final Review Panels.

diagram of the mouth to show that the vowel sounds in “CAM” and “COM” are both formed in the lower third of the mouth. Stygall went on to discuss selected dictionary meanings of “CAM” and “COM,” noting “they both can have something to do with computers.” Stygall then concluded that the linguistic similarities between “CAM” and “COM” suggest that “Internet users who encounter domain names with .CAM are likely to be confused.”

- b. Applicant supplied the OEP with the Rebuttal Affidavit of Sandra Ferrari Disner, PhD (“Disner”), an Assistant Professor of Linguistics at the University of Southern California in Los Angeles. In her lengthy rebuttal, Disner gave a detailed analysis of (a) the lack of confusion between the vowels of “CAM” and “COM” in published psycholinguistic studies; (b) the distinctly different acoustic characteristics of these vowels; (c) the distinctly different articulatory characteristics of these vowels; (d) dialectic characteristics that heighten the distinction between these words; (e) the somewhat different initial consonants of “CAM” and “COM”; (f) the greater psycholinguistic prominence of sounds at the beginning of a word than sounds at the end; (g) the regularizing effect of spelling rules on the pronunciation of “CAM” and “COM” syllables, even in foreign borrowings; (h) the meaningfulness of “CAM”; and (i) the semantic differentiation of “CAM” and “COM.”
- c. The OEP concluded that the Disner Affidavit did not overcome the Stygall contention that the “o” and “a” sounds are made in the same part of the mouth. The OEP also found that Applicant had not shown that most people take “CAM” as short for camera. The OEP also criticized one of the Disner references because it pertained primarily to American English.

3. Expert Survey Evidence

- a. Objector submitted a survey designed, supervised, and implemented by Hal L. Poret of ORC International in New York (*Report on Survey to Measure Whether the gTLD .CAM is Confusingly Similar to the gTLD .COM*, March 2013, Objection, Annex 3 (the “Poret Survey”). The *Poret Survey* involved 400 American Internet consumers and an additional 400 consumers in two “control” groups of 200 consumers each. The survey purports to find “a net confusion level of 39% that must be attributed to the similarity of the TLDs .CAM and .COM.” (*Poret Survey* at 1.) Objector also submitted and relied upon the *Poret Survey* in each of the RSCOs.

- b. Applicant submitted a critique of the *Poret Survey (Review of a Survey Conducted by Mr. Hal Poret Concerning the Possible Confusion between Proposed “.CAM” Top Level Domain Name with “.COM” TLD*, Response, Annex 4 (the “*Ostberg Critique*”), and an alternative survey (*Survey to Determine Likelihood of Confusion (if any) between the “.COM” and “.CAM” Top Level Domain Names*, (the “*Ostberg Survey*”), by Henry D. Ostberg of The Admar Group, Inc. in Alpine, New Jersey, Response, Annex 5.
- c. The OEP found the *Poret Survey* result convincing and appears to have relied on it heavily in reaching its conclusion sustaining the objection. (OEPD at 6.) The OEP found that the Ostberg survey was “not persuasive.” The OEP stated:

“Applicant relies on the Ostberg Report to rebut the Poret survey, but the Ostberg Report is deficient on several fronts.”

“Ostberg’s rebuttal may only slightly lower the weight accorded an otherwise good piece of evidence that shows probability of confusion.”

“Dr. Ostberg’s survey of 440 average Internet users that led to the conclusion that there is no likelihood of confusion, seems to compare ‘apples with oranges’ and is less convincing than the Poret survey. It is not a strong rebuttal [to Poret].”

OEPD at 6.

4. Length of the Strings

Objector argued that there was an important “similarity of appearance” between the two strings because each included only three letters, and each begins with “c” and ends with “m.” Objection at 8. Applicant responded that the short length of the strings weighs against a finding of visual similarity, because small differences may frequently lead in short words to a different overall impression. Response at 3.

The OEP relied on the short length of the strings and reached its own conclusion as to their visual similarity:

“While one out of 3 letters is indeed only 33 1/3% of the word, Applicant did not adequately discuss how visually close the letters in question, “o” and “a” are. These letters

do not look entirely different such as e.g., “y” and “F”, or “x” and “T”. While this is true in general, it is especially so to a fast reader. No matter what standards and purpose the ICANN SWORD algorithm includes, it has comparative value. ...Since pairs such as “God” and “dog” (85%) reach similarity scores of 84% and higher, how much more similar would “cxm” and “cxm” be (x being replaced with a vowel)!” *OEPD at 5.*

5. Marketing Channels

- a. Citing trademark law, Objector contended that convergent marketing channels increase the likelihood of confusion and it follows that registration of the .CAM string as an “open, accessible namespace” will “significantly increase the likelihood of confusion.” Objection at 7. Applicant responded that the marketing channels for .CAM and .COM were “irrelevant” because the fact that both parties will appear on the Internet will shed little, if any, light on whether confusion is likely. Applicant also argued that although it intends to operate .CAM as an open gTLD, it will likely appeal to groups interested in “a live feed from a web camera.”
- b. The OEP found that .COM and .CAM would use the same marketing channels, comprised of the entire Internet, since Objector operates the .COM gTLD as an open registry and Applicant proposes to operate .CAM on the same basis. The OEP noted that courts evaluating claims of trademark infringement “find that goods marketed in similar channels of trade are more likely to be confused.” The OEP found confusion more likely here because both parties would use “the same channels appealing to a broad audience” and “this would lead to extensive overlap.” *OEPD at 7.*

B. The Related SCO Expert Panel Determinations

The principal conclusions in the Related SCO Expert Determinations were:

1. The very reputation of the .COM name limits the potential for confusion.
2. While there are “considerable” visual and aural similarities between .COM and .CAM, it does not follow that confusion would result. Objector’s survey evidence does not form a sufficient foundation for a conclusion that the average, reasonable Internet user would be confused by the string .CAM or be inclined to think that there is some association with the .COM string.

3. The evidence of Objector's linguistics expert was not persuasive that the similarity of sound of the two terms would lead to confusion amongst consumers.
4. The RSCO Expert Panel also found that the survey evidence submitted in opposition to the Poret Survey was more persuasive:

“I prefer the survey conducted by Dr. Wright which is more pertinent to the question at hand and belies the danger raised in the report of Mr. Poret in the context of a global Internet. The Wright survey was broader both in terms of respondents and in terms of countries surveyed.” RSCO EPD (AC Webconnecting) at 8.

“The Poret Survey tendered by VeriSign is limited in its reach. It does not form a sufficient foundation for a conclusion that the average Internet user would be confused by the string .CAM or be inclined to think that there is some association with the .COM string.” ... “I accept much of the critique of the Poret Survey as detailed in the rebuttal report of Michael Barone.” RSCO EPD (dot Agency) at 7-8.

V. Analysis

A. Issue To Be Determined

As provided in the NGPC Resolution and the Final Review Procedures, the sole issue before the Final 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.”

B. Scope of Review

The FRP has before it the same record that was available to the OEP. As such, the FRP is in a position to review the OEP's analysis and determination on a plenary basis and to reach an independent conclusion as to whether the applied-for gTLD string is “likely to result in string confusion.”

C. Summary

1. The FRP's Principal Findings

The FRP finds that the OEP erred primarily in its conclusions regarding the knowledge and experience of the average, reasonable Internet user. The FRP also had a different assessment of the expert evidence offered by the parties. We disagree as well with the OEP's conclusion that confusion is likely to arise from any combination of "c" and "m" with a vowel in between. The FRP's disagreement with these cornerstones of the OEP's analysis substantially informs the FRP's conclusion that the OEP could not reasonably have come to the decision reached on the underlying SCO through an appropriate application of the standard of review.

2. The FRP's Finding in Regard to Marketing Channels

The FRP agrees in part with the OEP's analysis regarding overlapping marketing channels. The FRP finds that Applicant's intention to operate the .CAM TLD as an open registry weighs in favor of the objection. The FRP takes note that the RSCOs both involved a limited registry or niche-marketed registry related to cameras. The FRP finds that there is a greater chance for confusion if the ultimate delegation of the new string .CAM is not restricted to camera-related uses, and is allowed to be operated as an open gTLD, as in the .COM gTLD. We find this factor important, but not sufficient, standing alone, to uphold the OEP's determination.

D. Discussion

1. Contemporary Internet Usage

- a. The FRP disagrees with the OEP's view regarding the knowledge and experience level of the average, reasonable Internet user.⁸ The FRP believes that more than four decades after the inception of the Internet, in an era where many Internet users are "digital natives," the average, reasonable Internet user is well-aware of the importance of precision in Internet searches and, in particular, that a difference of one letter in a domain name likely will lead to a destination other than the one intended or an error.

⁸ While acknowledging Applicant and Objector's agreement that confusion is to be measured in reference to the average, reasonable Internet *user*, the OEP nonetheless appears to have given some weight to potential confusion of *registrants* of domain names. OEPD at 7. Moreover, the OEP appears to have erred by reversing the burden of proof, noting that *Applicant* "had failed to disprove" potential registrant confusion. The FRP finds that registrant confusion is unlikely and, in any event, the possibility of registrant confusion is not relevant to the stated standard, which refers to the average, reasonable Internet user.

- b. The average, reasonable Internet user is likely to have experienced the impact of small errors by arriving at a landing page other than the one intended, or through ubiquitous search engine prompts such as “showing results for...” or “did you mean...” The OEP’s conclusion that “Google and other search engines would have to develop a gigantic algorithm to correct psychologically or otherwise induced confusion among its users” is at odds with the actual existence of such prompts and their effectiveness. Applicant submitted evidence that 92% of adult Internet users employ search engines to find information on the Internet.
- c. Based on the average, reasonable Internet user’s experience and the importance of search engines, in the FRP’s view, confusion, if any, between .COM and .CAM is highly likely to be fleeting. While a fleeting association may create some “possibility of confusion” or evoke an “association in the sense that the string brings another string to mind,” both such reactions are insufficient under the ICANN SCO standard to support a finding that confusion is probable.

2. Linguistic Evidence

- a. The FRP found Applicant’s evidence rebutting Stygall convincing, much as the RSCO EP found in the two RSCOs. Specifically, the FRP notes Disner’s use of a well-known experiment by Peterson and Barney to demonstrate that the vowel sounds in “CAM” and “.COM” are confused only .02% of the time. Disner states that even her phone persona Siri recognizes the difference in sound. Disner refers to diagrams showing different tongue positions in the pronunciation of “CAM” and “.COM.”
- b. Disner also effectively rebuts the notion held by Stygall and Walsh (another Objector Affiant) that “CAM” and “COM” are mere sequences of letters, devoid of meaning. Disner offers various meanings of “cam,” concluding that an Internet user is far more likely to associate “CAM” with a camera than a computer, dispelling Stygall’s semantic comparison. Disner specifically references the Corpus of Contemporary American English (“COCA”), in which “CAM” appears 3150 times. She notes that, of those 3150 mentions, 46% of them are related to photography/cameras, with 31% referring to proper names.
- c. The FRP finds Professor Disner’s evidence on the issue of whether .CAM is associated with a particular meaning to be

convincing. Moreover, the OEP appears to have improperly shifted the burden of proof to the Applicant in respect to the meaning of .CAM, finding that Applicant “never showed” that .CAM might be taken to designate camera-related uses. The FRP finds that the letters “CAM” already are associated substantially with camera-related uses, as terms such as nanny-cam, mini-cam and camcorder have entered the lexicon. These associations have the potential to dispel any confusion between .COM and .CAM in the mind of the average, reasonable Internet user. Moreover, the association of the .CAM gTLD string with camera-related usages is likely to grow over time, as the average, reasonable Internet user becomes aware of the New gTLD program in general and potentially encounters camera-related sites that use the .CAM gTLD.

- d. The OEP also criticizes one of the Disner references because it pertains primarily to the American English, and at the same time ignores that fact that the Stygall Affidavit is devoid of any mention of different dialects, or of non-English Internet users.

3. Survey Evidence

- a. In his criticism of the *Poret Survey*, Ostberg focused on the undue length of the second level domain names used for the critical portion of the survey, noting that they “involved three full words” and that the use of such lengthy second level domain names might *overshadow* and might *distract* the focus from the TLDs that came after them.” (*Ostberg Critique* at 8,11, emphasis in original.)
- b. The FRP’s own review of the *Poret Survey*’s methodology finds it unfairly skewed to produce results supportive of Objector’s position. The FRP agrees with Ostberg that the survey’s choice of unnaturally long second level domain names to pair with the gTLDs being tested for confusion is a significant flaw in the survey design. Specifically, the *Poret Survey* showed the subjects, at different times, the following domain names:

www.snapshotphotovideo.com
www.snapshotphotovideo.cam

and after the second viewing asked them to state whether the domain name then shown was the same as, or different from, one of the domain names they had seen earlier. The use of such a long second level domain name (the portion to the left of the dot), combining three separate words, appears highly likely to distort the results in favor of confusion. First, the undue length of the second level domain name, longer than Internet users typically encounter, attracts more than normal attention and focus on the material to the left of the gTLD. Second, the need to parse the three words to determine the similarity of the second level domain name requires more focus on that material. Taken together, these factors appear to have given the survey subject an unnaturally short time to evaluate the similarity of the gTLDs. This likely tended to foster mistakes, guessing and wrong answers and support a misleading survey result of confusion.

- c. The FRP also finds problematic the *Poret Survey*'s initial choice of sample domain names to introduce the subject matter of the survey. At the start of the online survey, the subjects were provided with the following introduction to domain names:

“A domain name is the address of a specific website. The following are examples of five different domain names:

www.movies.com
www.autoinsurance.com
www.autoinsurance.net
www.socialsecurity.gov
www.literature.org”

All of the sample gTLDs chosen have been in use for many years and are quite familiar to all Internet users. This gives the subjects no inkling that new and unfamiliar gTLDs may be encountered later in the survey and increases the chances that the subjects will overlook them when they appear, or assume they are the gTLDs with which they are most familiar. An unbiased survey concerning new gTLDs should have introduced the concept of new gTLDs early on by using some unfamiliar gTLDs in the initial examples and mentioning that new gTLDs are on the way and Internet users will have to get used to encountering them. This would have much better simulated the way users will be encountering the new gTLDs in actual experience. As more and more new gTLDs are rolled out there will undoubtedly be significant publicity and “buzz” about their presence so

that typical Internet users will be cognizant that they may be encountered.

- d. The distortion flowing from the unnaturally long and unnaturally constructed test second level domain names, and the introductory use of familiar gTLDs to the exclusion of new ones, should not have been lost on an experienced survey designer such as Mr. Poret. He has “personally designed, supervised, and implemented over 450 consumer surveys concerning consumer perception, opinion, and behavior.” (*Poret Survey* at 2.)

- e. The FRP also agrees with Ostberg’s criticism of the *Poret Survey*’s failure to explicitly instruct the subjects “not to guess when answering and to feel free to give a “don’t know” response where appropriate.” (*Ostberg Critique* at 8.) Although the *Poret Survey* included a “don’t know” choice for subjects, no effort was made to assure them that “don’t know” was an acceptable choice they should feel free to use and that they should not guess. As Ostberg points out, citing the *Reference Manual on Scientific Evidence*, prepared by the Federal Judicial Center as a guide to judges evaluating the validity of a survey, it is not sufficient merely to give a “don’t know” choice. “Many respondents require assurance that a ‘don’t know’ response answer is acceptable, where appropriate, before they are willing to give such an answer.” (*Ostberg Critique* at 12.) Poret, in fact, has elsewhere stated, “It is well-settled that trademark survey instructions and questions should . . . instruct respondents not to guess and that they are free to answer ‘don’t know’ if they have no opinion. Surveys that do not comply with th[is] criteri[on] have been viewed with less reliability by the courts and TTAB. H. Poret, PLI Course Handbook, *Advanced Seminar on Trademark Law 2009*, Hot Topics in Trademark Surveys, at 8-9, available online at http://www.pli.edu/emktg/all_star/Trademark_Surveys21.DOC. To correct for this issue, the Ostberg Survey explicitly advised subjects, “We don’t want you to guess when giving an answer. If you ‘don’t know’ or ‘don’t recall,’ please indicate this as your answer.” This correction adds to the reliability of the *Ostberg Survey* in the FRP’s view.

- f. Ostberg also criticizes the *Poret Survey* for relying only on visual observation of the domain names being surveyed. He notes that, “Respondents could react hastily, doing so without the thought or the effort involved when someone accesses a website on the internet.” (*Ostberg Critique* at 13.) To simulate the experience an actual Internet user would have, and reflect what occurs in the marketplace, the *Ostberg Survey* asked the subjects to type the .CAM domain name into the computer before responding to the question concerning whether this domain name was included in the group of domain names shown to the subject previously. In the Panel’s view, requiring this typing step does better simulate actual market conditions than the *Poret Survey*’s reliance on visual observation alone. It lends further credence to the *Ostberg Survey* over the *Poret Survey* results.

- g. Because the underlying submissions from Dr. Wright and Prof. Barone in the RSCOs were not part of the record in this proceeding and not available to the FRP, the FRP cannot fully evaluate their criticism of the *Poret Survey*. It has to suffice to say that the RSCO EP found in both its determinations that the rebuttal experts persuasively countered the *Poret Survey*.

- h. The FRP finds the OEP’s determination to credit the *Poret Survey* result and reject the *Ostberg Survey* result to be outside the range of reasonable views of the survey evidence that an expert could reach. The FRP can discern no basis for the OEP’s comment that the Ostberg survey compares “apples with oranges.” The FRP concludes that the *Ostberg Survey* is better designed to test for possible confusion between .COM and .CAM than the *Poret Survey* and its conclusion that confusion is unlikely is entitled to significantly more weight than Poret’s conclusion that confusion is probable.

4. Length of the String and Impact of Second Level Domain Names

- a. The FRP does not concur with the OEP’s conclusion that any three letter string beginning with “c” and ending with “m”, with a vowel in between, is likely to be confusing. *OEPD* at 5. The OEP observes that the ICANN SWORD algorithm score of visual similarity on the pair “God” and “dog” is

85%,” and finds that any combination of “c” and “m” with a vowel in between must be “much more similar.” This ignores that the actual SWORD algorithm score ICANN obtained in its initial evaluation of the proposed .CAM gTLD was 63%. Applicant in the dot Agency RSCO contended that ICANN already has registered more than 790 gTLD’s with higher SWORD scores than .CAM. RSCO EPD (dot Agency) at 6. On that basis, it would appear that strings with relatively high levels of visual similarity, as measured by the SWORD algorithm, can coexist on the Internet without causing unacceptable levels of confusion.

- b. The FRP also finds persuasive the European Union Trade Mark Office guidance that the shorter a name, the more easily the public is able to perceive all its single elements and that small differences in short words may frequently lead to a different overall impression. Response at Annex 1, p. 35. The FRP finds that the short length of a gTLD string, coupled with the average, reasonable Internet user’s general awareness of the importance of precision in web searches, are substantial factors in dispelling possible confusion between .COM and .CAM.
- c. The OEP notes evidence that Internet users focus primarily on the second level domain name, but concludes, “this will increase, not decrease the potential for confusion.” OEPD at 7. The FRP disagrees. The FRP finds that the average, reasonable Internet user almost always will see the gTLD in combination with a second level domain name. The second level domain name, by adding further identifying information, should act to mitigate, not increase, string confusion. To the extent that the second level domain name increases confusion by being confusingly similar to another second level domain name, injured parties will have recourse to ICANN’s accessible, streamlined UDRP process.

5. Marketing Channels

The FRP notes that the RSCOs both would be restricted gTLDs limited to camera-related uses, or niche-marketed to such users. The FRP finds that Applicant’s plan to operate .CAM as an open gTLD, while stating an expectation that .CAM will appeal to a niche audience, is more likely to cause confusion than operation of .CAM as a restricted gTLD would be. Operation of .CAM as an open gTLD also may present opportunities for unscrupulous operators to attempt registration of second level domain names that are similar or identical to existing .COM domains. The FRP finds that the Applicant’s application for .CAM as an open registry,

rather than a restricted (or niche-marketed) registry, weighs in favor of the Objector. Ultimately, however, the FRP finds that this factor, standing alone, is insufficient to support a finding that confusion is probable.

6. Fame of .COM TLD

- a. Objector argued that .COM is analogous to a “famous” trademark and that by analogy to trademark law, “newcomers” should be required to “stay far afield.” *Walsh Aff’t at 6-7*. Applicant disagreed, contending that even if trademark law principles could provide helpful guidance, Objector is not entitled to trademark protection of .COM because it is a generic top level domain, not protected by trademark law. Response at 9. The OEP held that trademark law is “analogous only; it is not controlling.” The FRP finds the “famous mark” doctrine inapplicable in the SCO context where the standard is probability of confusion and not the protection of any vested property right in a gTLD.
- b. The FRP agrees with the RSCO Expert Panelist that the “fame” of the string weighs against the objection. The .COM gTLD is truly a unique identifier. It is used more broadly, and is better known, than any other gTLD. The ubiquity and prominence of the .COM TLD is likely to operate to reduce the likelihood that the average, reasonable Internet user would confuse .COM and .CAM.

7. The NGPC’s Finding In Regard to the Best Interests of the New gTLD Program and the Internet Community

The FRP considered the NGPC’s finding that the OEP Determination was “not in the best interest of the New gTLD Program and the Internet Community” and “outside normal standards of what is perceived to be reasonable and just.” However, the FRP was charged with making, and has made, an independent determination in this matter. The NGPC’s views are noted, but were not given weight in reaching the FRP’s Determination.

E. Conclusion

1. After carefully weighing the evidence in the record and considering the OEP’s analysis, the FRP finds that the OEP could not 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." The FRP's determination to reverse the underlying SCO determination does not require that the FRP disagree with each and every finding in the OEP's analysis.

2. This Report of the Final Review Panel shall constitute the report called for in Article 11 of the Final Review Procedures.
3. Based on the foregoing, the FRP reverses the OEP's Determination and is issuing concurrently a new Final Determination overruling the objection.

Dated: August 26, 2015


Sandra J. Franklin
Date: August 26, 2015

L. Donald Prutzman
Date: August 26, 2015


Mark C. Morril
Chair of the Final Review Panel
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INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case Number: 01-15-0003-3822

VeriSign, Inc., Objector

-and-

United TLD Holdco Ltd., Applicant

FINAL REVIEW PANEL DETERMINATION

Final Review Panel:

Sandra J. Franklin, Esq.
Mark C. Morril, Esq. (Chair)
L. Donald Prutzman, Esq.

August 26, 2015

FOR THE REASONS SET FORTH IN THE FINAL REVIEW PANEL'S REPORT ISSUED CONCURRENTLY HEREWITH, THE FINAL REVIEW PANEL HEREBY DECLARES:

1. It is not probable that the average, reasonable Internet user would confuse the applied-for new gTLD .CAM with the existing gTLD .COM.
2. The underlying String Confusion Objection Expert Panel Determination is reversed and henceforth shall be superseded and replaced by this New Final Determination.
3. The fees and expenses of this Final Review Process shall be borne by ICANN, as provided in Attachment 2 to the *ICDR Procedures for Final Review of Perceived Inconsistent or Unreasonable String Confusion Objection Expert Determinations*, effective 15 March 2015.
4. This New Final Determination may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the New Final Determination in this Final Review Process.

Dated: August 26, 2015



Sandra J. Franklin
Date: August 26, 2015

L. Donald Prutzman
Date: August 26, 2015

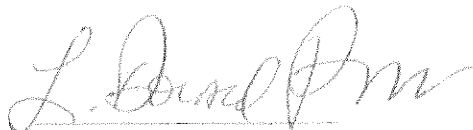
Mark C. Morril
Chair of the Final Review Panel
Date: August 26, 2015

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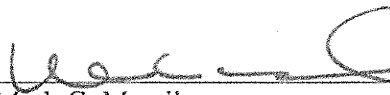
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Reference Material 55.

**International Centre for Dispute Resolution New
gTLD String Confusion Panel**

RE: 0115 0003 3821

Commercial Connect LLC, OBJECTOR

vs

Amazon EU S.à r.l., APPLICANT String:

<.通販>

REPORT OF FINAL REVIEW PANEL

TO: International Centre for Dispute Resolution, Attn: Mr. Thomas Simotas, Supervisor

FROM: Judith Meyer, Esq., Robert O'Brien, Esq. and Stephen S. Strick, Esq. (the "Final Review Panel")

DATE: August 2015

Re: Report of the Final Review Panel Rendered in Accordance with *Procedures for Final Review of Perceived Inconsistent or Unreasonable String Confusion Expert Determinations* ("The Procedures") relating to the Expert Determination Issued on August 21, 2013 and Captioned Above (the "Expert Determination")

WE, the duly appointed undersigned members of the Final Review Panel hereby submit this Report of Final Determination of the Expert Determination.¹

¹ Under paragraphs 3 and 7 of the Procedures, the Final Review Panel was given the authority and tasked to evaluate and render a Final Determination on the Expert Determination pursuant to the NGPC Resolutions as defined in the paragraph 1 of the Procedures.

FINAL DETERMINATION:

The Expert Determination is REVERSED, replaced and superseded by the attached new Final Determination issued by this Final Review Panel.

BASIS AND RATIONALE OF THE FINAL DETERMINATION

The question before this Final Review Panel is whether the Expert Panel² could have reasonably come to the decision reached by it in connection with the underlying String Confusion Objection captioned above, 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.³

After fully reviewing the record in this proceeding,⁴ we find that the Expert Panel could not have reasonably come to the decision it reached. In arriving at our conclusion, we find that the Objector in the underlying String Confusion Objection failed to meet its burden of proving that "通販" (the Japanese symbols for ". online shopping" so nearly resembles ".shop" as to cause probable confusion in the mind of the average, reasonable Internet user. The two strings indisputably have no visual or aural similarity. The two strings are in different languages, written in different scripts that look very different, and have

² The new gTLD program includes a dispute resolution procedure, pursuant to which disputes between a person or entity who applies for a new gTLD and a person or entity who objects to that gTLD are resolved in accordance with this New gTLD Dispute Resolution Procedure." (See, Model 3 of the ICAAN gTLD Applicant Guidebook containing Objection Procedures and the *New gTLD Dispute Resolution Procedure*.)

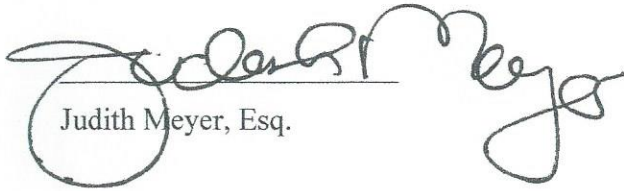
³ The applicable standard for review to be applied by the Expert in the underlying Expert Determination is whether the applied-for gTLD string is likely to result in string confusion. Under the terms of *the New gTLD Dispute Resolution Procedure* String confusion exists where a string so nearly resembles another that it is **likely** to deceive or cause confusion. For a 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.

⁴ Pursuant to paragraph 9(d) of the Procedures, the Final Review Panel reviewed the record in this proceeding and finalized it in our email to the ICDR on July 14, 2015. In that email, we confirmed that the record in this proceeding consists of the Objections, Response and Determination in the Commercial Connect, LLC vs Amazon EU S.a.r.l. matter as well as a consideration the Expert Determination in the Commercial Connect, LLC vs Top Level Domain Holdings Limited matter.

different phonetic spellings and pronunciations.

Although the two strings, .shop and <.通販>, have similar meanings or connotations, we conclude that such similarity is not so great that their co-existence on the Internet would be likely or probable to cause the average Internet user to be deceived or confused.

The Final Review Panel



Judith Meyer, Esq.

Robert O'Brien

Stephen S. Strick, Chair

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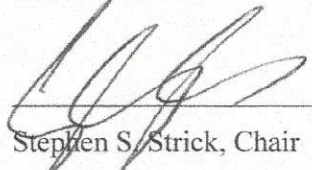
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The Final Review Panel

Judith Meyer, Esq.

Robert O'Brien



Stephen S. Strick, Chair

International Centre for Dispute Resolution
New gTLD String Confusion Final Review Panel

RE: 0115 0003 3821

Commercial Connect LLC, OBJECTOR

vs

Amazon EU S.à r.l., APPLICANT String: <.通販>

FINAL REVIEW PANEL DETERMINATION

The Parties:

The Objector is Commercial Connect LLC, 1418 South 3rd Street, Louisville, Kentucky 40208 USA and is represented by Jeffrey S. Smith.

The Applicant is Amazon EU S.à r.l., 5 Rue Plaetis L-2338 Luxembourg, and is represented by Flip Petillion, Crowell & Moring, rue Joseph Stevens 7, Brussels 1000 Belgium.

The New gTLD String Objected To:

The new gTLD string applied for and objected to is: <.通販> based on alleged confusion with Objector's string ".shop."

Prevailing Party:

On August 21, 2013, the Expert Panel issued its Expert Determination with respect to the String Confusion Objection captioned above. Finding that the Objector had prevailed, the Expert Panel sustained the Objection and concluded that the Objector was the prevailing party.

However, the undersigned Final Review Panel, having been duly appointed,¹ and having reviewed the record and reported its findings to the ICDR in accordance with *Procedures for Final Review of Perceived Inconsistent or Unreasonable String Confusion Expert Determination*, has concluded that the Expert Panel could not have reasonably come to the decision reached by it in connection with the underlying String Confusion Objection captioned above, through an appropriate application of the standard of review as set forth in the Applicant Guidebook and the

¹ See, June 24, 2015 letter from ICDR's Thomas Simotas to parties confirming the panel's appointment.

connection with the underlying String Confusion Objection captioned above, 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.²

Consequently, the Expert Determination is **reversed, replaced and superseded** by the within Final Determination issued by this Final Review Panel.

Background:

Article 1(b) of the Module 3 of the ICANN gTLD Applicant Guidebook ("Guidebook") contains Objection Procedures and the New gTLD Dispute Resolution Procedure ("the Procedure") states that "[t]he new gTLD program includes a dispute resolution procedure, pursuant to which disputes between a person or entity who applies for a new gTLD and a person or entity who objects to that gTLD are resolved in accordance with this New gTLD Dispute Resolution Procedure."

Section 3.1 of the Guidebook provides: "The independent dispute resolution process is designed to protect certain limited interests and rights. The process provides a path for objections during evaluation of the applications. It allows a party with standing to have its objection considered before a panel of qualified experts."

Article 3(a) of the Procedure states that "String Confusion Objections shall be administered by the International Centre for Dispute Resolution."

A formal objection initiates a dispute resolution proceeding. In filing an application for a gTLD, the applicant agrees to accept the applicability of the gTLD dispute resolution process. Similarly, an objector accepts the applicability of the gTLD dispute resolution process by filing its objection.

Article 4(b)(i) of the Procedure provides that the applicable Dispute Resolution Service Provider ("DRSP") Rules are the ICDR Supplementary Procedures for ICANN's New gTLD Program.

A formal objection can be filed on four enumerated grounds, only one of which is relevant here. Specifically, as expressed in the Guidebook, and the Procedure, one of the grounds expressed is "String Confusion." Article 2(e)(i) of the Procedure provides: "(i) 'String Confusion Objection' refers to the objection that the string comprising the potential gTLD is confusingly similar to an existing top-level domain or another string applied for in the same round of applications."

A panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly

² The applicable standard for review to be applied by the Expert in the underlying Expert Determination is whether the applied-for gTLD string is likely to result in string confusion. Under the terms of *the New gTLD Dispute Resolution Procedure* String confusion exists where a string so nearly resembles another that it is **likely** to deceive or cause confusion. For a 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.

resembles another that it is likely to deceive or cause confusion. For a 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. (Guidebook, Section 3.4.1.)

Standing and Other Procedural Matters:

An Objector must satisfy standing requirements to have its objections considered. Standing requirements for objections on the grounds of string confusion require that the Objector be existing TLD operators or TLD applicants in the current round.

An existing TLD operator may file a string confusion objection to assert string confusion between an applied-for gTLD and the TLD that the Objector currently operates.

Any gTLD applicant in the same application round may file a string confusion objection to assert string confusion between an applied-for gTLD and the gTLD for which it has applied, where string confusion between the two applicants has not already been found. That is, an applicant does not have standing to object to another application with which it is already in a contention set.

Here, Objector has applied for the gTLD string <.shop>. Applicant has applied for the gTLD string <.通販(Online Shopping)> aka <.xn--gk3at1e (Online Shopping)>. Accordingly, Objector has standing to file this string confusion objection.

In the case where an existing TLD operator successfully asserts string confusion with an applicant, the application will be rejected.

In the case where a gTLD applicant successfully asserts string confusion with another applicant, the only possible outcome is for both applicants to be placed in a contention set and to be referred to a contention resolution procedure (refer to Module 4, String Contention Procedures). If an objection by one gTLD applicant to another gTLD applicant is unsuccessful, the applicants may both move forward in the process without being considered in contention with one another.

Article 21(d) of the Procedure provides: “The Expert Determination shall be in writing, shall identify the prevailing party and shall state the reasons upon which it is based. The remedies available to an Applicant or an Objector pursuant to any proceeding before a Panel shall be limited to the success or dismissal of an Objection and to the refund by the DRSP to the prevailing party, as determined by the Panel in its Expert Determination, of its advance payment(s) of Costs pursuant to Article 14(e) of this Procedure and any relevant provisions of the applicable DRSP Rules.”

The Parties' Positions:

Applicant asks that the Objection be denied because Objector allegedly did not properly serve the objection on Applicant in accord with applicable rules set out in the Procedure. However, Applicant acknowledges that it previously has been provided with a copy of Objector’s application for the <.shop> gTLD string, the Objector’s Demand for Arbitration and other materials.

Applicant's counsel also has submitted a detailed brief in support of its application, and the panel has reviewed and considered all of Applicant's submissions, arguments and contentions. Thus, it appears that Applicant received actual notice of the Objection, and has been accorded a full and fair opportunity to be heard on its application. Applicant also has not shown that it was prejudiced by any alleged defects in the filing of the Objection. As the procedures for String Confusion Objections were relatively new at the time when the Objection was made, in the absence of a showing of actual prejudice to the Applicant, the panel is of the view that the Objection should be evaluated on the merits. Consequently, Applicant's procedural objections are denied.

Objector asserts that confusing similarity exists because the Applicant's proposed string has a similar meaning to the Objector's string. The Objection further asserts that visual or aural similarity is not required, if the two strings have the same meaning, even if in different languages using different characters.

Applicant responds by contending that the objection should be denied because its application will promote innovation and competition among domain name registries. Applicant asserts that such competition advances the program's goals, to expand consumer choice in the gTLD space.

Applicant also asserts that the string it has applied for will not create confusion. Applicant argues that the strings have a different meaning, because the word "shop" means "commercial establishment" or "store" and is a noun, while "online shopping" refers either to an action of purchasing something online or to order something for delivery via mail.

Lastly, Applicant asserts that the likelihood of confusion is merely possible, not probable, because the two strings are in different languages and the characters used by the two languages for the two strings have no visual similarity.

Jurisdiction:

The Expert was properly appointed pursuant to the Procedure and the ICDR Supplementary Procedures, and had jurisdiction to decide this dispute. The Applicant accepted the applicability of the Procedure and the ICDR Supplementary Procedures by applying for a new gTLD pursuant to Article 1(d) of the Procedure. The Objector has likewise accepted the applicability of the Procedure and the ICDR Supplementary Procedures by filing an objection to a new gTLD pursuant to Article 1(d) of the Procedure.

As noted above, Section 3.5.1 of the Guidebook explains the string confusion standard as follows:

A DRSP panel hearing a string confusion case objection will consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a 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.

Section 2.2.1.1 of the Guidebook refers to visual similarity. However, that provision explains that "[t]he visual similarity check that occurs during the Initial Evaluation is intended to augment the objection and dispute resolution process ... that addresses all types of similarity." Similarly, Section 2.2.1.1.3 of the Guidebook clarifies that a third party string confusion objection "is not limited to visual similarity"; rather, confusion "may be based on any type of similarity (including visual, aural, or similarity of meaning)."

Section 3.5 of the Guidebook states that "[t]he objector has the burden of proof." Section 3.5 further states that the panel "will use appropriate general principles (standards) to evaluate the merits of each objection" and "may also refer to other relevant rules of international law in connection with the standards."

The plain language of Section 3.5.1 makes clear that string confusion is a high standard. In addition to requiring "a likelihood of confusion," Section 3.5.1 emphasizes that "mere association" is insufficient, and that confusion must be "probable, not merely possible."

Section 3.5.1 also refers to "so nearly resembles," indicating that the resemblance between the two strings should be quite close.

Imposing a high standard for string confusion is consistent with the purpose of the new gTLD program. As explained in the Preamble of the Guidebook, "[t]he new gTLD program will open up the top level of the Internet's namespace to foster diversity, encourage competition, and enhance the utility of the DNS" [Domain Name System]. While there are currently 22 gTLDs (as well as over 250 country code top-level domains), "[t]he new gTLD program will create a means for prospective registry operators to apply for new gTLDs, and create new options for consumers in the market." To this end, ICANN did not limit the number of gTLD applications in the current application round, because this would "severely limit the anticipated benefits of the Program: innovation, choice, and competition." New gTLDs Applicant Guidebook April 2011 Discussion Draft Public Comment Summary and Analysis, page 5, <http://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv6-30may11-en.pdf> (hereafter "Draft Summary and Analysis").

The New gTLD Program expressly contemplates the establishment of new Internationalized Domain Names ("IDNs") that are written in a script other than the standard ASCII Roman characters and Arabic numbers. The Preamble of the Guidebook states that "ICANN expects a diverse set of applications for new gTLDs, *including IDNs*, creating significant potential for new uses and benefit to Internet users across the globe" (emphasis added). Consistent with this expectation, Section 1.3 of the Guidebook sets forth special requirements for Internationalized Domain Name applications String Confusion.

Findings On String Confusion Objection:

The Expert found that the Objector had met its burden of proving that Applicant's string (.通販) so nearly resembles ".shop" as to cause probable confusion in the mind of the average, reasonable Internet user. However, as noted, we find to the contrary. The two strings indisputably have no visual or aural similarity, are in different languages, written in different scripts that look very different, and have different phonetic spellings and pronunciations.

The only sense in which ".shop" and (.通販) are similar is their meaning. However, this similarity in meaning is apparent only to individuals who read and understand both Japanese and English. Moreover, a person who can read both languages would understand that ".shop" is directed at English-speaking users, while (.通販) is directed at Japanese-speaking users. While there is some potential overlap between these two markets, they are largely distinct. Therefore, there is little likelihood that a bilingual user would be deceived or confused.

Furthermore, as noted above, the New gTLD Program expressly contemplated the creation of new Internationalized Domain Names written in non-Roman scripts. If similarity in meaning between gTLDs written in two different scripts were deemed sufficient, by itself, to result in confusing similarity, then all Internationalized Domain Name applications with the same meaning would need to be put in the same contention set with each other and with any Roman gTLD applications with the same meaning. This would mean that only one application in any script could be registered, which would conflict with the basic purpose of encouraging "a diverse set of applications for new gTLDs, including IDNs, creating significant potential for new uses and benefit to Internet users across the globe." (Preamble to the Guidebook.)

For the above reasons, this Final Review Panel concludes that (.通販) and ".shop" are not confusingly similar to the average, reasonable Internet user under the standard set forth in the Procedure and the Guidebook. We note, that under Section 2.2.1.1.3 of the Guidebook, a third party string confusion objection "is not limited to visual similarity," but "may be based on any type of similarity (including visual, aural, or similarity of meaning)".

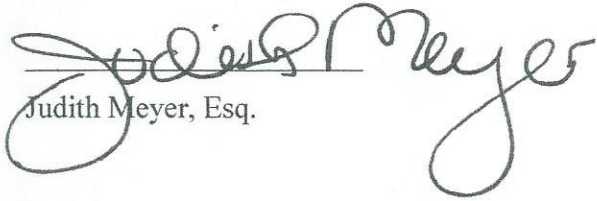
Other Issues:

The Objector has alleged that ICANN agreed to give it preferential treatment as the initial applicant for the ".shop" gTLD. The Objector has not argued, however, that this alleged preference has any bearing on the merits of its Objection. In any event, we find that the Objector's alleged discussions with ICANN are irrelevant to the determination in this case. Whether the Objection has merit depends on whether it meets the criteria set forth in the Procedure and the Guidebook. Moreover, ICANN has stated that "[t]here should be a level playing field for the introduction of new gTLDs, with no privileged treatment for potential applicants." New gTLD Draft Applicant Guidebook Version 4 Public Comment Summary and Analysis, page 90, http://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov_10-en.pdf.

For the forgoing reasons, this Final Review Panel reverses the Expert Determination and finds that the Applicant has prevailed and the Objection is dismissed.

DATE: August 18, 2015

The Final Review Panel



Judith Meyer, Esq.

Robert O'Brien

Stephen S. Strick, Chair

For the forgoing reasons, this Final Review Panel reverses the Expert Determination and finds that the Applicant has prevailed and the Objection is dismissed.

DATE: August 18, 2015

The Final Review Panel

Judith Meyer, Esq.

A handwritten signature in blue and red ink, appearing to read "MCOB" followed by a horizontal line and a period.

Robert O'Brien

Stephen S. Strick, Chair

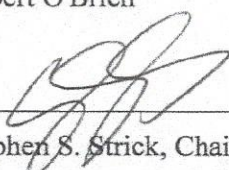
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Reference Material 56.

[English \(/translations\)](#) [العربية \(/ar\)](#) [Español \(/es\)](#)

[Français \(/fr\)](#) [Русский \(/ru\)](#) [_____ \(/zh\)](#)

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[IANA STEWARDSHIP](#)

[& ACCOUNTABILITY \(/STEWARDSHIP-ACCOUNTABILITY\)](#)

Resources

- ▶ [About ICANN \(Internet Corporation for Assigned Names and Numbers\) \(/resources/pages/welcome-2012-02-25-en\)](#)

- ▶ [Board \(/resources/pages/board-of-directors-2014-03-19-en\)](#)

- ▶ [Accountability \(/resources\)](#)

Approved Board Resolutions | Regular Meeting of the [ICANN \(Internet Corporation for Assigned Names and Numbers\) Board](#)

03 Feb 2016

1. [Consent Agenda:](#)

a. [Approval of Board Meeting Minutes](#)

b. [RSSAC \(Root Server System Advisory Committee\) Co-Chair Appointments](#)

[Rationale for Resolution 2016.02.03.03](#)

c. [Redelegation of the .TG domain representing Togo to the Autorite de Reglementation des Secteurs de Postes et de Telecommunications \(ART&P\)](#)

[Rationale for Resolutions 2016.02.03.04 – 2016.02.03.05](#)

/accountability)

- ▶ Governance
(/resources
/pages
/governance-
2012-02-25-en)

- ▶ Groups
(/resources
/pages/groups-
2012-02-06-en)

Business
(/resources
/pages/business)

- ▶ Contractual
Compliance
(/resources
/pages
/compliance-
2012-02-25-en)

- ▶ Registrars
(/resources
/pages
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0d-2012-02-25-en)

- ▶ Registries
(/resources
/pages
/registries-
46-2012-02-25-en)

Operational
Metrics
(/resources
/pages/metrics-
gdd-2015-01-30-en)

- ▶ Identifier

- d. **Delegation of the .eu ("eu") domain representing the European Union in Cyrillic script to EURid vzw/asbl**
Rationale for Resolutions 2016.02.03.06 – 2016.02.03.07

- e. **Delegation of the .澳門 ("Macao") domain representing Macao in Traditional Chinese script to the Bureau of Telecommunications Regulation (DSRT)**
Rationale for Resolutions 2016.02.03.08 – 2016.02.03.09

2. **Main Agenda:**

- a. **Consideration of Independent Review Process Panel's Final Declaration in Merck KGaA v. ICANN (Internet Corporation for Assigned Names and Numbers)**
Rationale for Resolution 2016.02.03.10
- b. **Reconsideration Requests 15-19 (the ICANN (Internet Corporation for Assigned Names and Numbers) Business Constituency & the ICANN (Internet Corporation for Assigned Names and Numbers) Noncommercial Stakeholder Group (NCSG (Non-Commercial Stakeholders Group))) and 15-20 (The Internet Commerce Association)**
Rationale for Resolution 2016.02.03.11
- c. **Consideration of Expert Determination Re: Objection to Application for .HOSPITAL**
Rationale for Resolutions 2016.02.03.12 – 2016.02.03.13
- d. **Ombudsman Report Regarding Complaint by Hu Yi Global Information Resources (applicant for .招聘 ("recruitment" in Chinese))**
Rationale for Resolution 2016.02.03.14
- e. **GAC (Governmental Advisory Committee) Advice: Dublin Communiqué (October 2015)**
Rationale for Resolution 2016.02.03.15
- f. **Board Governance Committee Recommendation Regarding Implementation of Public Interest Commitments for .DOCTOR Registry Agreement**

Systems
Security,
Stability
(Security,
Stability and
Resiliency) and
Resiliency
(IS-SSR)
(/resources
/pages/is-ssr-
2014-11-24-en)

Rationale for Resolution 2016.02.03.16

g. **Establishing a Set of KPIs for Board Performance and Improvement Efforts (ATRT2 Rec. 1, 2 & 3)**

Rationale for Resolutions 2016.02.03.17 – 2016.02.03.18

h. **USG IANA (Internet Assigned Numbers Authority) Stewardship Transition – Additional FY16 Expenses and Funding**

Rationale for Resolution 2016.02.03.19

▶ ccTLDs
(/resources
/pages/cctlds-
21-2012-02-25-en)

3. **Executive Session – CONFIDENTIAL**

a. **President and CEO FY16 SR1 At-Risk Compensation**

Rationale for Resolution 2016.02.03.20

[Published on 5 February 2016]

▶ Internationalized
Domain Names
(/resources
/pages
/idn-2012-02-25-en)

b. **Election of Göran Marby as ICANN (Internet Corporation for Assigned Names and Numbers)'s President and CEO (Published on 11 February 2016)**

▶ Universal
Acceptance
Initiative
(/resources
/pages
/universal-
acceptance-
2012-02-25-en)

1. Consent Agenda:

a. Approval of Board Meeting Minutes

Resolved (2016.02.03.01), the Board approves the minutes of the 21 October, 22 October and 2 December 2015 Meetings of the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

Resolved (2016.02.03.02), the Board approves the minutes of the 18 October New gTLD (generic Top Level Domain) Program Committee (NGPC) Meeting.

▶ Policy
(/resources
/pages/policy-
01-2012-02-25-en)

▶ Public Comment
(/public-
comments)

b. **RSSAC (Root Server System Advisory Committee) Co-Chair Appointments**

▶ Technical
Functions

[\(/resources
/pages/technical-
functions-
2015-10-15-en\)](#)

▶ [Contact
\(/resources
/pages/contact-
2012-02-06-en\)](#)

▶ [Help \(/resources
/pages/help-
2012-02-03-en\)](#)

Whereas, Article XI, Section 2 of the Bylaws governs the [Root Server System Advisory Committee \(Advisory Committee\) \(RSSAC \(Root Server System Advisory Committee\)\)](#).

Whereas, Article XI, Section 2, Subsection 3B of the Bylaws states that the Board of Directors shall appoint the co-chairs and the members of the [RSSAC \(Root Server System Advisory Committee\)](#).

Whereas, on 3 December 2015, the [RSSAC \(Root Server System Advisory Committee\)](#) conducted an election for one co-chair position and elected Brad Verd (Verisign, A/J-Root Server Operator) to a two-year term as co-chair.

Whereas, Tripti Sinha (University of Maryland, D-Root Server Operator) will continue to serve as co-chair for the second year of a two-year term.

Resolved (2016.02.03.03), the Board of Directors accepts the recommendation of the [RSSAC \(Root Server System Advisory Committee\)](#) and appoints Tripti Sinha and Brad Verd as co-chairs of [RSSAC \(Root Server System Advisory Committee\)](#) and extends its best wishes to Tripti and Brad in their important new roles.

Rationale for Resolution 2016.02.03.03

The ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws call for the Board to appoint the [RSSAC \(Root Server System Advisory Committee\)](#) co-chairs as selected by the membership. The appointment of [RSSAC \(Root Server System Advisory Committee\)](#) co-chairs will allow the [RSSAC \(Root Server System Advisory Committee\)](#) to be properly composed to serve its function within [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)'s policy development work as an advisory committee.

The appointment of co-chairs is not anticipated to have any fiscal impact on [ICANN \(Internet Corporation for Assigned](#)

Names and Numbers) that has not already been accounted for in the budgeted resources necessary for ongoing support of the RSSAC (Root Server System Advisory Committee).

This is an Organizational Administrative Function for which no public comment is required.

c. **Redelegation of the .TG domain representing Togo to the Autorite de Reglementation des Secteurs de Postes et de Telecommunications (ART&P)**

Resolved (2016.02.03.04), as part of the exercise of its responsibilities under the IANA (Internet Assigned Numbers Authority) Functions Contract, ICANN (Internet Corporation for Assigned Names and Numbers) has reviewed and evaluated the request to redelegate the .TG country-code top-level domain to Autorite de Reglementation des Secteurs de Postes et de Telecommunications (ART&P). The documentation demonstrates that the proper procedures were followed in evaluating the request.

Resolved (2016.02.03.05), the Board directs that pursuant to Article III, Section 5.2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, that certain portions of the rationale not appropriate for public distribution within the resolutions, preliminary report or minutes at this time due to contractual obligations, shall be withheld until public release is allowed pursuant to those contractual obligations.

Rationale for Resolutions 2016.02.03.04 – 2016.02.03.05

Why the Board is addressing the issue now?

In accordance with the IANA (Internet Assigned Numbers Authority) Functions Contract, the ICANN (Internet Corporation for Assigned Names and Numbers) staff has evaluated a request for ccTLD (Country Code Top Level Domain)

redelegation and is presenting its report to the Board for review. This review by the Board is intended to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) staff has followed the proper procedures.

What is the proposal being considered?

The proposal is to approve a request to IANA (Internet Assigned Numbers Authority) to change the sponsoring organization (also known as the manager or trustee) of the .TG country-code top-level domain to Autorite de Reglementation des Secteurs de Postes et de Telecommunications (ART&P).

Which stakeholders or others were consulted?

In the course of evaluating a delegation application, ICANN (Internet Corporation for Assigned Names and Numbers) staff consults with the applicant and other interested parties. As part of the application process, the applicant needs to describe consultations that were performed within the country concerning the ccTLD (Country Code Top Level Domain), and their applicability to their local Internet community.

What concerns or issues were raised by the community?

Staff are not aware of any significant issues or concerns raised by the community in relation to this request.

What significant materials did the Board review?

[Redacted – Sensitive Delegation Information]

What factors the Board found to be significant?

The Board did not identify any specific factors of concern with this request.

Are there positive or negative community impacts?

The timely approval of country-code domain name managers that meet the various public interest criteria is positive toward ICANN (Internet Corporation for Assigned Names and Numbers)'s overall mission, the local communities to which country- code top-level domains are designated to serve, and responsive to ICANN (Internet Corporation for Assigned Names and Numbers)'s obligations under the IANA (Internet Assigned Numbers Authority) Functions Contract.

Are there financial impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (strategic plan, operating plan, budget); the community; and/or the public?

The administration of country-code delegations in the DNS (Domain Name System) root zone is part of the IANA (Internet Assigned Numbers Authority) functions, and the delegation action should not cause any significant variance on pre-planned expenditure. It is not the role of ICANN (Internet Corporation for Assigned Names and Numbers) to assess the financial impact of the internal operations of country-code top-level domains within a country.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

ICANN (Internet Corporation for Assigned Names and Numbers) does not believe this request poses any notable risks to security, stability or resiliency.

This is an Organizational Administrative Function not requiring public comment.

- d. Delegation of the .eu ("eu") domain representing the European Union in Cyrillic script to EURid vzw/asbl

Resolved (2016.02.03.06), as part of the exercise of its responsibilities under the IANA (Internet Assigned Numbers

Authority) Functions Contract, ICANN (Internet Corporation for Assigned Names and Numbers) has reviewed and evaluated the request to delegate the eu country-code top-level domain to EURid vzw/asbl. The documentation demonstrates that the proper procedures were followed in evaluating the request.

Resolved (2016.02.03.07), the Board directs that pursuant to Article III, Section 5.2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, that certain portions of the rationale not appropriate for public distribution within the resolutions, preliminary report or minutes at this time due to contractual obligations, shall be withheld until public release is allowed pursuant to those contractual obligations.

Rationale for Resolutions 2016.02.03.06 – 2016.02.03.07

Why the Board is addressing the issue now?

In accordance with the IANA (Internet Assigned Numbers Authority) Functions Contract, the ICANN (Internet Corporation for Assigned Names and Numbers) staff has evaluated a request for ccTLD (Country Code Top Level Domain) delegation and is presenting its report to the Board for review. This review by the Board is intended to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) staff has followed the proper procedures.

What is the proposal being considered?

The proposal is to approve a request to IANA (Internet Assigned Numbers Authority) to create the country-code top-level domain and assign the role of sponsoring organization (also known as the manager or trustee) to EURid vzw/asbl.

Which stakeholders or others were consulted?

In the course of evaluating a delegation application, ICANN (Internet Corporation for Assigned Names and Numbers) staff

consults with the applicant and other interested parties. As part of the application process, the applicant needs to describe consultations that were performed within the country concerning the ccTLD (Country Code Top Level Domain), and their applicability to their local Internet community.

What concerns or issues were raised by the community?

Staff are not aware of any significant issues or concerns raised by the community in relation to this request.

What significant materials did the Board review?

[Redacted – Sensitive Delegation Information]

What factors the Board found to be significant?

The Board did not identify any specific factors of concern with this request.

Are there positive or negative community impacts?

The timely approval of country-code domain name managers that meet the various public interest criteria is positive toward ICANN (Internet Corporation for Assigned Names and Numbers)'s overall mission, the local communities to which country- code top-level domains are designated to serve, and responsive to ICANN (Internet Corporation for Assigned Names and Numbers)'s obligations under the IANA (Internet Assigned Numbers Authority) Functions Contract.

Are there financial impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (strategic plan, operating plan, budget); the community; and/or the public?

The administration of country-code delegations in the DNS (Domain Name System) root zone is part of the IANA (Internet Assigned Numbers Authority) functions, and the delegation

action should not cause any significant variance on pre-planned expenditure. It is not the role of ICANN (Internet Corporation for Assigned Names and Numbers) to assess the financial impact of the internal operations of country-code top-level domains within a country.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

ICANN (Internet Corporation for Assigned Names and Numbers) does not believe this request poses any notable risks to security, stability or resiliency.

This is an Organizational Administrative Function not requiring public comment.

- e. Delegation of the .澳門 ("Macao") domain representing Macao in Traditional Chinese script to the Bureau of Telecommunications Regulation (DSRT)

Resolved (2016.02.03.08), as part of the exercise of its responsibilities under the IANA (Internet Assigned Numbers Authority) Functions Contract, ICANN (Internet Corporation for Assigned Names and Numbers) has reviewed and evaluated the request to delegate the .澳門 country-code top-level domain to the Bureau of Telecommunications Regulation (DSRT). The documentation demonstrates that the proper procedures were followed in evaluating the request.

Resolved (2016.02.03.09), the Board directs that pursuant to Article III, Section 5.2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, that certain portions of the rationale not appropriate for public distribution within the resolutions, preliminary report or minutes at this time due to contractual obligations, shall be withheld until public release is allowed pursuant to those contractual obligations.

Rationale for Resolutions 2016.02.03.08 – 2016.02.03.09

Why the Board is addressing the issue now?

In accordance with the [IANA \(Internet Assigned Numbers Authority\) Functions Contract](#), the [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) staff has evaluated a request for [ccTLD \(Country Code Top Level Domain\)](#) delegation and is presenting its report to the Board for review. This review by the Board is intended to ensure that [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) staff has followed the proper procedures.

What is the proposal being considered?

The proposal is to approve a request to [IANA \(Internet Assigned Numbers Authority\)](#) to create the country-code top-level domain and assign the role of sponsoring organization (also known as the manager or trustee) to the Bureau of Telecommunications Regulation (DSRT).

Which stakeholders or others were consulted?

In the course of evaluating a delegation application, [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) staff consults with the applicant and other interested parties. As part of the application process, the applicant needs to describe consultations that were performed within the country concerning the [ccTLD \(Country Code Top Level Domain\)](#), and their applicability to their local Internet community.

What concerns or issues were raised by the community?

Staff are not aware of any significant issues or concerns raised by the community in relation to this request.

What significant materials did the Board review?

[Redacted – Sensitive Delegation Information]

What factors the Board found to be significant?

The Board did not identify any specific factors of concern with this request.

Are there positive or negative community impacts?

The timely approval of country-code domain name managers that meet the various public interest criteria is positive toward ICANN (Internet Corporation for Assigned Names and Numbers)'s overall mission, the local communities to which country- code top-level domains are designated to serve, and responsive to ICANN (Internet Corporation for Assigned Names and Numbers)'s obligations under the IANA (Internet Assigned Numbers Authority) Functions Contract.

Are there financial impacts or ramifications on ICANN (Internet Corporation for Assigned Names and Numbers) (strategic plan, operating plan, budget); the community; and/or the public?

The administration of country-code delegations in the DNS (Domain Name System) root zone is part of the IANA (Internet Assigned Numbers Authority) functions, and the delegation action should not cause any significant variance on pre-planned expenditure. It is not the role of ICANN (Internet Corporation for Assigned Names and Numbers) to assess the financial impact of the internal operations of country-code top-level domains within a country.

Are there any security, stability or resiliency issues relating to the DNS (Domain Name System)?

ICANN (Internet Corporation for Assigned Names and Numbers) does not believe this request poses any notable risks to security, stability or resiliency.

This is an Organizational Administrative Function not requiring public comment.

2. Main Agenda:

a. Consideration of Independent Review Process Panel's Final Declaration in *Merck KGaA v. ICANN (Internet Corporation for Assigned Names and Numbers)*

Whereas, on 11 December 2015, an Independent Review Process (IRP) Panel (Panel) issued its Final Declaration in the IRP filed by Merck KGaA (Merck) against ICANN (Internet Corporation for Assigned Names and Numbers) (Final Declaration).

Whereas, in its IRP, Merck challenged the Board Governance Committee's (BGC) denial of Reconsideration Request 14-9, which in turn challenged the expert determinations overruling Merck's legal rights objections (LROs) to new gTLD (generic Top Level Domain) applications submitted by its former affiliate, U.S.-based Merck Sharp & Dohme Corporation, for strings incorporating the "Merck" mark (Expert Determinations).

Whereas, the Panel denied Merck's IRP Request and, among other things, declared that the Board's actions did not in any way violate ICANN (Internet Corporation for Assigned Names and Numbers)'s Articles of Incorporation (Articles), Bylaws, or the Applicant Guidebook (Guidebook). (See Final Declaration, ¶¶ 41-68, <https://www.icann.org/en/system/files/files/irp-merck-final-declaration-11dec15-en.pdf> (/en/system/files/files/irp-merck-final-declaration-11dec15-en.pdf) [PDF, 1.47 MB].)

Whereas, in accordance with Article IV, section 3.21 of ICAN's Bylaws, the Board has considered the Panel's Final Declaration.

Resolved (2016.02.03.10), the Board accepts the findings of the Panel's Final Declaration: (1) ICANN (Internet Corporation

for Assigned Names and Numbers) is the prevailing party in the Merck KGaA v. ICANN (Internet Corporation for Assigned Names and Numbers) IRP; (2) the Board acted without conflict of interest in taking its decision; (3) the Board exercised due diligence and care in having a reasonable amount of facts in front of them; (4) the Board exercised independent judgment in taking the decision, believed to be in the best interests of the company; (5) the Board (including the Board Governance Committee) did not violate the Articles, Bylaws, or Guidebook; and (6) Merck shall reimburse ICANN (Internet Corporation for Assigned Names and Numbers) costs in the amount of US\$48,588.54.

Rationale for Resolution 2016.02.03.10

Merck KGaA (Merck) filed a request for an Independent Review Process (IRP), which arose out of its legal rights objections (LROs) to new gTLD (generic Top Level Domain) applications submitted by its former affiliate, U.S.-based Merck Sharp & Dohme Corporation, for strings incorporating the "Merck" mark. Merck's LROs were overruled (Expert Determinations). Merck filed Reconsideration Request 14-9 challenging the Expert Determinations. The Board Governance Committee (BGC) denied Reconsideration Request 14-9, finding that Merck had not stated proper grounds for reconsideration and that the Request failed to demonstrate that the expert panel had acted in contravention of established policy or procedure. Merck's IRP Request challenged the denial of Reconsideration Request 14-9 and, among other things, also argued that the Board should have taken further action with respect to the Expert Determinations.

On 11 December 2015, the three-member IRP Panel (Panel) issued its Final Declaration. After consideration and discussion, pursuant to Article IV, Section 3.21 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, the Board adopts the findings of the Panel, which are summarized below, and can be found in full at <https://www.icann.org>

[/en/system/files/files/irp-merck-final-declaration-11dec15-en.pdf](#)
[\(/en/system/files/files/irp-merck-final-declaration-11dec15-en.pdf\)](#) [PDF, 1.47 MB].

Using the applicable standard of review, the Panel found that: (1) ICANN (Internet Corporation for Assigned Names and Numbers) is the prevailing party in the *Merck KGaA v. ICANN (Internet Corporation for Assigned Names and Numbers)* IRP; (2) the Board acted without conflict of interest in taking its decision; (3) the Board exercised due diligence and care in having a reasonable amount of facts in front of them; (4) the Board exercised independent judgment in taking the decision, believed to be in the best interests of the company; and (5) the Board's actions or inactions did not, in any way, violate the Articles of Incorporation (Articles), Bylaws, or Applicant Guidebook (Guidebook). (See Final Declaration, ¶¶ 41-68.)

More specifically, as the Panel found, the standard of review for an IRP is specifically prescribed in Article IV, Section 3.4 of the Bylaws, and "the Panel may not substitute its own view of the merits of the underlying dispute." (*Id.* at ¶¶ 21-22.) The Panel further found that the reconsideration process is "of limited scope" as set forth in Article IV, Section 2.2 of the Bylaws, and "[n]one of th[e] three bases for the Request for Reconsideration process requires or even permits this Panel to provide for a substitute process for exploring a different conclusion on the merits." (*Id.* at ¶ 47.) The Panel also found that: "this Panel does not, because of the precise and limited jurisdiction we have, have the power to second guess [the BGC's determination] that the Sole Panel Expert [in the legal rights objection proceedings] did not apply the wrong standards." (*Id.* at ¶ 49.) The Panel was also clear that "a referral or appeal process for LRO decisions...was not included in the [Guidebook] and it is not open to this Panel to create it." (*Id.* at ¶ 60.) In summary, the Panel explained that "Merck's complaints are, in short, not focused on the applicable test by which this Panel is to review Board action, but rather are focused on the correctness of the conclusion of the Sole Panel

Expert [, which] is not a basis for action by this Panel...." (*Id.* at ¶ 50.)

Merck also claimed that ICANN (Internet Corporation for Assigned Names and Numbers) discriminated against Merck through the Board's (and the BGC's) acceptance of the Expert Determinations because the "*Board has provided the possibility for third-party review of some prima facie erroneous expert determinations while denying the same to other, similarly situated parties, including the Claimant.*" (*Id.* at ¶ 53(emphasis in original).) In response to this claim, the Panel found that:

As to the claim of discrimination, this Panel finds that it was within the discretion of the BGC and Board...to conclude that the Sole Expert had applied the correct legal standard to the correctly found set of facts. Of course, in different cases, the BGC and Board are entitled to pursue different options depending upon the nature of the cases at issue. It is insufficient to ground an argument of discrimination simply to note that on different occasions the Board has pursued different options among those available to it. [¶] In conclusion, Merck was not discriminated against.

(*Id.* at ¶ 61.)

As required, the Board has considered the Final Declaration. As this Board has previously indicated, the Board takes very seriously the results of one of ICANN (Internet Corporation for Assigned Names and Numbers)'s long-standing accountability mechanisms. Accordingly, and for the reasons set forth in this Resolution and Rationale, the Board has accepted the Panel's Final Declaration as indicated above. Adopting the Panel's Final Declaration will have no direct financial impact on the organization and no direct impact on the security, stability or resiliency of the domain name system. This is an Organizational Administrative function that does not require public comment.

b. **Reconsideration Requests 15-19 (the ICANN (Internet Corporation for Assigned Names and Numbers) Business Constituency & the ICANN (Internet Corporation for Assigned Names and Numbers) Noncommercial Stakeholder Group (NCSG (Non-Commercial Stakeholders Group))) and 15-20 (The Internet Commerce Association)**

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Business Constituency and the ICANN (Internet Corporation for Assigned Names and Numbers) Noncommercial Stakeholders (Stakeholders) Group filed Reconsideration Request 15-19, and the Internet Commerce Association filed Reconsideration Request 15-20 (collectively, "Requesters"), both of which seek reconsideration of ICANN (Internet Corporation for Assigned Names and Numbers) Board Resolutions 2015.09.28.04 (renewal of .CAT registry agreement), 2015.09.28.05 (renewal of .TRAVEL registry agreement), and 2015.09.28.06 (renewal of .PRO registry agreement).

Whereas, the Board Governance Committee ("BGC") thoroughly considered the issues raised in Reconsideration Requests 15-19 and 15-20 and all related materials.

Whereas, the BGC recommended that Reconsideration Requests 15-19 and 15-20 be denied because the Requesters have not stated proper grounds for reconsideration, and the Board agrees.

Resolved (2016.02.03.11), the Board adopts the BGC's Recommendation on Reconsideration Requests 15-19 and 15-20, which can be found at <https://www.icann.org/en/system/files/files/reconsideration-request-15-19-bc-ncsg-request-15-20-ica-bgc-recommendation-13jan16-en.pdf> (/en/system/files/files/reconsideration-request-15-19-bc-ncsg-request-15-20-ica-bgc-recommendation-13jan16-en.pdf) [PDF, 146 KB].

Rationale for Resolution 2016.02.03.11

I. Brief Summary

In passing Board Resolutions 2015.09.28.04, 2015.09.28.05, and 2015.09.28.06 (collectively, the "Resolutions"), the ICANN (Internet Corporation for Assigned Names and Numbers) Board approved the renewal of registry agreements for three legacy TLDs—.CAT, .TRAVEL, and .PRO, respectively. The three renewed registry agreements ("Renewed Registry Agreements") are the result of bilateral negotiations between ICANN (Internet Corporation for Assigned Names and Numbers) staff and the respective registry operators. The Renewed Registry Agreements are based on the form of the registry agreement for new gTLDs ("New gTLD (generic Top Level Domain) Registry Agreement") and include new gTLD (generic Top Level Domain) rights protection mechanisms ("RPMs") such as the Trademark Post-Delegation Dispute Resolution Procedure ("Trademark PDDRP") and the Uniform Rapid Suspension system ("URS"), which did not exist under the legacy registry agreements.

In seeking reconsideration of the Resolutions, the Requesters note that the Generic Names Supporting Organization (Supporting Organization) ("GNSO (Generic Names Supporting Organization)") has not yet issued a consensus policy regarding the application of new gTLD (generic Top Level Domain) RPMs to legacy TLDs and suggest that the Renewed Registry Agreements represent an attempt by ICANN (Internet Corporation for Assigned Names and Numbers) staff to preempt that policy development process. The Requesters further assert that, in passing the Resolutions, the Board failed to consider: (1) the details of the relevant contract negotiations, specifically email

communications and other documents reflecting communications between ICANN (Internet Corporation for Assigned Names and Numbers) staff and the relevant registry operators; and (2) a later-published preliminary issue report by ICANN (Internet Corporation for Assigned Names and Numbers) staff regarding gTLD (generic Top Level Domain) RPMs ("Preliminary Issue Report"), which recommends, among other things, that a GNSO (Generic Names Supporting Organization) policy development process be undertaken to address the application of RPMs to legacy TLDs generally.

The Requesters' claims do not support reconsideration. The inclusion of the new gTLD (generic Top Level Domain) RPMs in the Renewed Registry Agreements is part of the package of agreed-upon terms resulting from the bilateral negotiations between ICANN (Internet Corporation for Assigned Names and Numbers) and each registry operator, and not, as Requesters claim, a "unilateral decision by ICANN (Internet Corporation for Assigned Names and Numbers) contractual staff." The Requesters present no evidence to the contrary – i.e., that applying the new gTLD (generic Top Level Domain) RPMs to the Renewed Registry Agreements was based on a unilateral decision by ICANN (Internet Corporation for Assigned Names and Numbers) staff. The Requesters suggest that the Board should have reviewed all of ICANN (Internet Corporation for Assigned Names and Numbers) staff's communications with the .CAT, .TRAVEL, and .PRO registry operators in order to confirm that the negotiations were in fact bilateral. Such contention, however, does not support reconsideration. Staff provided the Board with all material information, including the comments from the public comment forum, for consideration. In approving the Resolutions, the Board considered all material information provided by staff. No policy or procedure requires the Board to review each and every email or

other written exchange between ICANN (Internet Corporation for Assigned Names and Numbers) staff and registry operators during the course of the negotiations and the Requesters do not identify any particular piece of material information that the Board failed to consider. Moreover, as is publicly posted in the respective public comment reports as well as in the Board's rationales for each of the Resolutions, the registry operators specifically "expressed their interest to renew their registry agreement based on the New gTLD (generic Top Level Domain) Registry Agreement." Indeed, not one of these registry operators has indicated that their renewal negotiations were anything but bilateral or sought reconsideration of either staff or Board action as it relates to the Renewed Registry Agreements. Further, the registry agreements each called for presumptive renewal of the agreements at their expiration so long as certain requirements were met – meaning that, if the parties took no action, the registry agreements would have renewed automatically under the same terms as the original registry agreements so as long as the registry operators were in good standing at the time of renewal as provided in the registry agreements.¹ At the time of renewal, these registry operators were in good standing and were therefore subject to the terms of the presumptive renewal. The registry operators, however, elected to enter into negotiations with ICANN (Internet Corporation for Assigned Names and Numbers) based on the existing New gTLD (generic Top Level Domain) Registry Agreement terms.

As the Requesters have not demonstrated that the Board failed to consider any material information in passing the Resolutions, they have not stated a basis for reconsideration of the Resolutions.

II. Facts

The BGC Recommendation on Reconsideration Requests 15-19 and 15-20, which sets forth in detail the facts relevant to this matter, is hereby incorporated by reference and shall be deemed a part of this Rationale. The BGC Recommendation on Reconsideration Requests 15-19 and 15-20 is available at <https://www.icann.org/en/system/files/files/reconsideration-request-15-19-bc-ncsg-request-15-20-ica-bgc-recommendation-13jan16-en.pdf> (/en/system/files/files/reconsideration-request-15-19-bc-ncsg-request-15-20-ica-bgc-recommendation-13jan16-en.pdf) [PDF, 146 KB], and is attached as Exhibit C to the Reference Materials.

III. **Issues**

In view of the claims set forth in Requests 15-19 and 15-20, the issues for reconsideration are whether ICANN (Internet Corporation for Assigned Names and Numbers)'s Board failed to consider material information in passing the Resolutions approving the renewal of the registry agreements for .CAT, .TRAVEL, and .PRO.

IV. **The Relevant Standards for Evaluating Reconsideration Requests**

The BGC Recommendation on Reconsideration Requests 15-19 and 15-20, which sets forth the relevant standards for evaluating reconsideration requests, is hereby incorporated by reference and shall be deemed a part of this Rationale. The BGC Recommendation on Reconsideration Requests 15-19 and 15-20 is available at <https://www.icann.org/en/system/files/files/reconsideration-request-15-19-bc-ncsg-request-15-20-ica-bgc-recommendation-13jan16-en.pdf> (/en/system/files/files/reconsideration-request-15-19-bc-ncsg-request-15-20-ica-bgc-recommendation-13jan16-en.pdf) [PDF, 146 KB], and is attached as Exhibit C to the Reference Materials.

V. Analysis and Rationale

The Requesters claim, without support, that ICANN (Internet Corporation for Assigned Names and Numbers) staff unilaterally imposed the New gTLD (generic Top Level Domain) Registry Agreement as a starting point for the Renewed Registry Agreements and, therefore, "transform[ed] the PDDRP and URS into de facto Consensus (Consensus) Policies without following the procedures laid out in ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws for their creation." Contrary to what the Requesters claim, while the registry operators had a presumptive right of renewal under the terms of their existing legacy registry agreement, they chose to re-negotiate and renew their agreements based upon the New gTLD (generic Top Level Domain) Registry Agreement terms.

The Board's Rationales for the Resolutions as well as the public comment reports make clear that the Renewed Registry Agreements were "based on the bilateral negotiations between ICANN (Internet Corporation for Assigned Names and Numbers) and the [respective] Registry Operator[s], where [the] Registry Operator[s] expressed their interest to renew their registry agreement based on the New gTLD (generic Top Level Domain) Registry Agreements." The Board further stated in the Rationales for the Resolutions that the "inclusion of the URS was developed as part of the proposal in bilateral negotiations," and confirmed that the URS "has not been adopted as a consensus policy and ICANN (Internet Corporation for Assigned Names and Numbers) has no ability to make it mandatory for any TLDs other than new gTLD (generic Top Level Domain) applicants who applied during the first round," and that "the Board's approval of the Renewal Registry Agreements[s] for .CAT, .PRO, and .TRAVEL] is not a

move to make the URS mandatory for any legacy TLDs, and it would be inappropriate to do so." In short, the Requesters' claim that the provisions of the New gTLD (generic Top Level Domain) Registry Agreement were in some way imposed on the registry operators is unsupported.

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. Here, the Requesters do not identify any material information that the Board purportedly failed to consider in passing the Resolutions. More specifically, the Requesters provide no support for their argument that the Board failed to consider "the actual record of exchanges—emails and other correspondence, as well as notes and minutes of meeting and discussions—between ICANN (Internet Corporation for Assigned Names and Numbers) staff and officers and the personnel of these three registries that would support the conclusion that [the parties engaged in] bilateral negotiations..." The Requesters also present no support for their claim that the Board failed to consider the Preliminary Issue Report (because it "did not exist at the time of the Board's decision"). As a result, the BGC concluded and the Board agrees that reconsideration is not appropriate.

First, the Requesters do not identify any material information that the Board purportedly failed to consider. That is, the Requesters do not identify any evidence that the negotiations between ICANN (Internet Corporation for Assigned Names and Numbers) and the registry operators were not bilateral in nature because no such evidence exists. As there is no policy or procedure that requires the Board to review each and every email or other written exchange between ICANN

(Internet Corporation for Assigned Names and Numbers) staff and registry operators during the course of the contract negotiations, the Requesters do not and cannot identify such a policy or procedure. The Requesters' substantive disagreement with the Board's actions does not mean that the Board's actions were taken without consideration of all relevant material information.

Second, the Requesters claim that the Board failed to consider the Preliminary Issue Report, which invited community feedback regarding the inclusion of several topics in a GNSO (Generic Names Supporting Organization) policy development process charter, including "whether any of the new [RPMs] (such as the URS) should, like the UDRP (Uniform Domain-Name Dispute Resolution Policy), be Consensus (Consensus) Policies applicable to all gTLDs." The Requesters claim that, in light of the Preliminary Issue Report, the Renewed Registry Agreements will "interfer[e] with the standard policy development process." However, as the Requesters acknowledge, the Preliminary Issue Report did not exist at the time the Resolutions were approved, and thus could not constitute "material information" the Board failed to consider in approving the Resolutions. As such, no reconsideration is warranted on this basis.

In addition, the Board does not find, as the Requesters suggest, that the Renewed Registry Agreements will "interfere[e] with the standard policy development process." As discussed above, the Board explicitly acknowledged, in the Rationales for the Resolutions, that the URS has not been adopted as consensus policy and that ICANN (Internet Corporation for Assigned Names and Numbers) therefore has no ability to impose the URS (or other new RPMs applicable to new gTLDs) on legacy TLDs. The existence of certain RPMs in the Renewed Registry Agreements, therefore, has no

bearing on the GNSO (Generic Names Supporting Organization) policy development process to determine whether (or not) any of the new RPMs should be consensus policies applicable to all gTLDs. Accordingly, reconsideration is not appropriate.

The full BGC Recommendation on Reconsideration Requests 15-19 and 15-20, which sets forth the analysis and rationale in detail and with which the Board agrees, is hereby incorporated by reference and shall be deemed a part of this Rationale. The BGC Recommendation on Reconsideration Requests 15-19 and 15-20 is available at <https://www.icann.org/en/system/files/files/reconsideration-request-15-19-bc-ncsg-request-15-20-ica-bgc-recommendation-13jan16-en.pdf> ([/en/system/files/files/reconsideration-request-15-19-bc-ncsg-request-15-20-ica-bgc-recommendation-13jan16-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-request-15-19-bc-ncsg-request-15-20-ica-bgc-recommendation-13jan16-en.pdf)) [PDF, 146 KB], and is attached as Exhibit C to the Reference Materials.

VI. **Decision**

The Board had the opportunity to consider all of the materials submitted by or on behalf of the Requesters or that otherwise relate to Reconsideration Requests 15-19 and 15-20. Following consideration of all relevant information provided, the Board reviewed and has adopted the BGC's Recommendation on Reconsideration Requests 15-19 and 15-20 (<https://www.icann.org/en/system/files/files/reconsideration-request-15-19-bc-ncsg-request-15-20-ica-bgc-recommendation-13jan16-en.pdf> ([/en/system/files/files/reconsideration-request-15-19-bc-ncsg-request-15-20-ica-bgc-recommendation-13jan16-en.pdf](https://www.icann.org/en/system/files/files/reconsideration-request-15-19-bc-ncsg-request-15-20-ica-bgc-recommendation-13jan16-en.pdf)) [PDF, 146 KB]), which shall be incorporated by reference here and deemed a part of this Rationale and is attached as Exhibit C to the Reference Materials to the Board Paper on this matter.

Adopting the BGC's recommendation has no direct financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) and will not impact the security, stability and resiliency of the domain name system.

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

c. **Consideration of Expert Determination Re: Objection to Application for .HOSPITAL**

Whereas, on 16 December 2013, an Expert Panel upheld the Independent Objector's (IO) Limited Public Interest (LPI) objection to Ruby Pike, LLC's (Ruby Pike) application for .HOSPITAL (.HOSPITAL Expert Determination).

Whereas, Ruby Pike contends that the .HOSPITAL Expert Determination deviates from the expert determinations for all other health-related LPI objections and that the outlying result is, at a minimum, as inconsistent and unreasonable as the string confusion objection determinations for which ICANN (Internet Corporation for Assigned Names and Numbers) has directed re-evaluation.

Whereas, Ruby Pike initiated a Cooperative Engagement Process (CEP) regarding the .HOSPITAL Expert Determination upholding the IO's LPI objection to Ruby Pike's application for .HOSPITAL.

Whereas, as part of the CEP, the Board has been asked to evaluate this matter and to take action to deal with what Ruby Pike believes to be the inconsistent and unreasonable .HOSPITAL Expert Determination.

Whereas, the Board Governance Committee (BGC): (i) has carefully considered the .HOSPITAL Expert Determination and Ruby Pike's arguments about it; (ii) agrees with Ruby Pike that the Objection proceedings leading to the .HOSPITAL Expert

Determination should be re-evaluated, particularly in comparison to the other eight health-related LPI expert determinations; and (iii) recommends that the Board send the .HOSPITAL Objection back for re-evaluation by a new three-party expert panel.

Whereas, the Board has carefully considered the BGC's recommendation and the information and arguments Ruby Pike has presented, as well the .HOSPITAL Expert Determination in comparison to the other eight health-related LPI expert determinations.

Whereas, after consideration, the Board finds that the .HOSPITAL Expert Determination is seemingly inconsistent with the Expert Determinations resulting from all other health related LPI objections.

Whereas, as set out in the Applicant Guidebook, ICANN (Internet Corporation for Assigned Names and Numbers) has reserved the right to individually consider any application for a new gTLD (generic Top Level Domain) to determine whether approval would be in the best interest of the Internet community.

Resolved (2016.02.03.12), the Board has identified the .HOSPITAL Expert Determination as not being in the best interest of the New gTLD (generic Top Level Domain) Program and the Internet community.

Resolved (2016.02.03.13), the Board directs the President and CEO, or his designee(s), to take all steps necessary to address the perceived inconsistency and unreasonableness of the .HOSPITAL Expert Determination by sending all of the materials for the relevant objection proceeding back to the International Centre of Expertise of the International Chamber of Commerce (ICC (International Chamber of Commerce)), which should in turn establish a new three-member expert panel to re-evaluate those materials in accordance with the criteria for LPI objections as set forth in the Applicant

Guidebook. In doing so, the new three-member expert panel should also review as background the "Related LPI Expert Determinations" referenced in the following chart.

Related LPI Expert Determinations	String
<u>Independent Objector v. DotHealth, LLC (http://newgtlds.icann.org/sites/default/files/drsp/23dec13/determination-2-1-1684-6394-en.pdf)</u> [PDF, 154 KB]	.HEALTH
<u>Independent Objector v. Goose Fest, LLC (http://newgtlds.icann.org/sites/default/files/drsp/23dec13/determination-2-1-1489-82287-en.pdf)</u> [PDF, 153 KB]	.HEALTH
<u>Independent Objector v. Afilias Limited (http://newgtlds.icann.org/sites/default/files/drsp/15nov13/determination-1-1-868-3442-en.pdf)</u> [PDF, 406 KB]	.HEALTH
<u>Independent Objector v. Silver Glen, LLC (http://newgtlds.icann.org/sites/default/files/drsp/06dec13/determination-2-1-1492-32589-en.pdf)</u> [PDF, 437 KB]	.HEALTHCARE
<u>Independent Objector v. HEXAP SAS (http://newgtlds.icann.org/sites/default/files/drsp/10jan14/determination-1-1-1192-28569-en.pdf)</u> [PDF, 474 KB]	.MED
<u>Independent Objector v. Medistry LLC (http://newgtlds.icann.org/sites/default/files/drsp/10jan14/determination-1-1-1192-28569-en.pdf)</u>	.MED

2-1-907-38758-en.pdf [PDF, 396 KB]	
Independent Objector v. Charleston Road Registry Inc. (http://newgtlds.icann.org/sites/default/files/drsp/10jan14/determination-2-1-1139-2965-en.pdf) [PDF, 427 KB]	.MED
Independent Objector v. Steel Hill, LLC (http://newgtlds.icann.org/sites/default/files/drsp/10jan14/determination-2-1-1561-23663-en.pdf) [PDF, 536 KB]	.MEDICAL

Rationale for Resolutions 2016.02.03.12 – 2016.02.03.13

The Board's action today, addressing how to deal with inconsistent and/or unreasonable Expert Determinations from the New gTLD (generic Top Level Domain) Program LPI process, is part of the Board's role to provide general oversight of the New gTLD (generic Top Level Domain) Program. The action being approved today is to direct re-evaluation of the .HOSPITAL LPI objection proceeding which resulted in the .HOSPITAL Expert Determination. Pursuant to the Applicant Guidebook (Guidebook), the Board has the discretion to individually consider an application for a new gTLD (generic Top Level Domain). (Guidebook Module 6.3, <http://newgtlds.icann.org/en/applicants/agb/terms-04jun12-en.pdf> (<http://newgtlds.icann.org/en/applicants/agb/terms-04jun12-en.pdf>) [PDF, 130 KB].) The Board's action arises from Ruby Pike's arguments that the .HOSPITAL Expert Determination deviates from all other health-related LPI expert determinations and that the result is inconsistent and unreasonable such that it warrants further action. (See Letter from J. Genga to A. Stathos, dated 15 April 2015, at 8, attached as Attachment A to the Reference Materials.) As set forth in further detail in the Reference Materials, which are

incorporated herein by reference, Ruby Pike, an affiliate of Donuts, Inc., argues that the Board (via the New gTLD (generic Top Level Domain) Program Committee (NGPC)) has previously taken steps to address other inconsistent and unreasonable results by initiating a re-evaluation of a certain string confusion objection (SCO) expert determinations (SCO Final Review Mechanism) and should do so here as well. (*See id.*)

The Board notes that when it provided for a limited SCO Final Review Mechanism for just a very few expert determinations from string confusion objection proceedings, the NGPC specifically considered, but excluded its application to other forms of objections.

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 (generic Top Level Domain) 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.

(See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b> ([/resources/board-](#)

[material/resolutions-new-gtld-2014-10-12-en#2.b.\)](#)

Here, although not directly on point, the Board is uniquely swayed, as was the BGC, by Ruby Pike's assertions that the .HOSPITAL Expert Determination is inconsistent with the other eight health-related LPI Expert Determinations, thereby rendering it potentially unreasonable, and thereby warranting re-evaluation. As part of its deliberations, the Board took into consideration the following factors, which the BGC had previously evaluated in making its recommendation:

- The .HOSPITAL Expert Determination is inconsistent with the results of the eight other health related LPI objections that resulted in expert determinations, all of which were filed by the IO. The materials submitted by the IO and the Applicant to the Expert Panels in each instance were very similar and, in some instances, nearly identical (i.e., .HOSPITAL, .MEDICAL, and .HEALTHCARE).
- The .HOSPITAL Expert Determination is the only LPI objection, out of the total of ten LPI objections that resulted in expert determinations, where the expert determination was in favor of the objector rather than the applicant.
- The .HOSPITAL Determination is the only LPI expert determination with a split panel decision.
- The .HOSPITAL Determination is the only LPI expert determination where a dissenting opinion was issued.
- Four of the nine health related LPI objections filed by the IO were against applications by subsidiaries of Donuts, Inc. (Steel Hill, LLC (.MEDICAL); Goose Fest, LLC (.HEALTH); Silver Glen, LLC (.HEALTHCARE); and Ruby Pike, LLC (.HOSPITAL). The objections filed by the IO in all four objections are virtually identical. The .HOSPITAL Determination is the only determination in favor of the objector.

- The .HOSPITAL Expert Panel is the only health related LPI expert panel that evaluated the sufficiency of certain protections and safeguards as part of its determination while other expert panels deferred to ICANN (Internet Corporation for Assigned Names and Numbers) to implement and enforce such safeguards as necessary. (See <http://newgtlds.icann.org/sites/default/files/drsp/06dec13/determination-2-1-1492-32589-en.pdf> (<http://newgtlds.icann.org/sites/default/files/drsp/06dec13/determination-2-1-1492-32589-en.pdf>) [PDF, 437 KB]).
- Because there are no other competing applications of the .HOSPITAL TLD (Top Level Domain), this action would not impact other .HOSPITAL applications and therefore would not contradict the NGPC's concern that expanding that re-review would delay consideration of competing applications. (See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b> (</resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b>)).

Given these circumstances, the Board is persuaded, as was the BGC, that, consistent with the manner in which the Board had addressed previous inconsistent or unreasonable expert determinations, a re-evaluation of the objection proceedings against Ruby Pike's application for .HOSPITAL is warranted at this time. The re-evaluation proceeding will be administered in accordance with the ICC (International Chamber of Commerce) Expert Rules for Administration of Expert Proceedings, which include the following:

- The review panel will consist of three members appointed by the ICC (International Chamber of Commerce) (the "Review Panel").
- The only issue subject to review shall be the .HOSPITAL objection proceedings and the resulting Expert Determination.

- The record on review shall be limited to the documentary evidence admitted into evidence during the original proceeding. No additional documents, briefs or other evidence may be submitted for consideration, except that the Review Panel shall also consider the identified "Related LPI Expert Determinations" in the above chart as part of its review of the .HOSPITAL objection proceeding and resulting Expert Determination.
- 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 in the underlying .HOSPITAL LPI objection proceeding through an appropriate application of the standard of review as set forth in the Guidebook.
- ICANN (Internet Corporation for Assigned Names and Numbers) will pay the applicable fees of the Review Panel.
- The possible outcomes of the review are: (1) the original .HOSPITAL Expert Determination is supported by the standard of review and reference to the identified Related LPI Expert Determinations, and will stand as is; or (2) the original .HOSPITAL Expert Determination reasonably cannot be supported based on the standard of review and reference to the identified Related LPI Expert Determinations, and will be reversed. The Review Panel will submit a written determination including an explanation and rationale for its determination.

There will be a fiscal impact associated with the adoption of this resolution, but nothing that will not or cannot be covered by the existing New gTLD (generic Top Level Domain) Program budget. Approval of the resolution will not impact security, stability or resiliency issues relating to the DNS (Domain Name System).

This is an Organizational Administrative Action not requiring

public comment.

d. **Ombudsman Report Regarding Complaint by Hu Yi Global Information Resources (applicant for .招聘 ("recruitment" in Chinese))**

Whereas, a String Confusion Objection was filed against Hu Yi Global Information Resources Company's (Hu Yi's) application for the new gTLD (generic Top Level Domain) .招聘 (meaning "recruitment" in Chinese) (Application) by Employ Media LLC.

Whereas, the International Centre for Dispute Resolution (ICDR) sustained the objection because the ICDR "determined that the Applicant is deemed to be in default as it has failed to file a timely Response to the Objection."

Whereas, Hu Yi filed a complaint with the Ombudsman on 9 June 2015 explaining that Employ Media LLC no longer objected to its Application for .招聘.

Whereas, the Ombudsman issued a report to the ICANN (Internet Corporation for Assigned Names and Numbers) Board regarding Hu Yi's complaint, and set out facts based on his investigation and made specific recommendations in his report.

Whereas, the Board reviewed the Ombudsman Report and thoroughly considered his recommendations.

Resolved (2016.02.03.14), the Board directs the President, Global Domains Division, or his designee(s), to change the status of the Application from "Will Not Proceed" to "Evaluation Complete," and to permit Hu Yi's Application for .招聘 to proceed through the remainder of the new gTLD (generic Top Level Domain) application process.

Rationale for Resolution 2016.02.03.14

The ICANN (Internet Corporation for Assigned Names and Numbers) Ombudsman reports directly to the ICANN (Internet

Corporation for Assigned Names and Numbers) Board. The Ombudsman is an important Accountability Mechanism found in ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws. The purpose of the Ombudsman is to help evaluate whether members of the ICANN (Internet Corporation for Assigned Names and Numbers) community have been treated fairly. The Ombudsman acts as a neutral in attempting to resolve complaints using alternative dispute resolution (ADR (Alternative Dispute Resolution)) techniques. Where, in the course of an investigation of a complaint, the Ombudsman forms an opinion that there has been an issue of administrative fairness, the Ombudsman may notify the Board of the circumstances.

The Ombudsman has issued a report to the Board regarding the closing out of Hu Yi Global Information Resources Company's (Hu Yi's) application for the new gTLD (generic Top Level Domain) .招聘 (meaning "recruitment" in Chinese) (Application) as a result of the default determination issued on the String Confusion Objection. The Ombudsman has recommended that the Board "revive" (or cause to be revived) the Application and permit it to proceed through the remainder of the new gTLD (generic Top Level Domain) application process. Hu Yi is the only applicant for the new gTLD (generic Top Level Domain) .招聘 ("recruitment" in Chinese); and Employ Media LLC is the only entity that filed an objection to the Application. Since its initial filing of the objection, Employ Media has explicitly indicated to ICANN (Internet Corporation for Assigned Names and Numbers) and to the Ombudsman that it no longer objects to the Application. Thus, the Ombudsman determined that permitting the Application to proceed would have no impact on any other applicant and would have no impact on any objector (because there is none). In addition, the Board understands that there are no further evaluation or objection proceedings to which the Application would need to be subjected. The next step in the application process is the contracting phase.

In light of the unique set of circumstances presented here (namely, the fact that the objection was sustained only on procedural grounds, and that the objector later explicitly rescinded the objection and in fact supported the Application), and after a review of the Ombudsman Report, the Board has determined to follow the Ombudsman's recommendation, and direct the President, Global Domains Division or his designee(s) to proceed with processing Hu Yi's Application for the gTLD (generic Top Level Domain) .招聘 through the remainder of the new gTLD (generic Top Level Domain) application process. Taking this action will have a positive impact on ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability to the community, as it is appropriate to review all applicable circumstances and recommendations resulting from one of ICANN (Internet Corporation for Assigned Names and Numbers)'s long-standing Accountability Mechanisms when taking decisions that have significant impact on applicants.

This decision has no direct financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) and will not impact the security, stability and resiliency of the domain name system.

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

e. **GAC (Governmental Advisory Committee)**
Advice: Dublin Communiqué (October 2015)

Whereas, the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) met during the ICANN (Internet Corporation for Assigned Names and Numbers) 55 meeting in Dublin, Ireland and issued a Communiqué (/en/system/files/correspondence/gac-to-board-21oct15-en.pdf) [PDF, 165 KB] on 21 October 2015 ("Dublin Communiqué").

Whereas, the ICANN (Internet Corporation for Assigned

Names and Numbers) Board New gTLD (generic Top Level Domain) Program Committee, which was decommissioned in October 2015, previously adopted a series of scorecards to respond to certain items of the GAC (Governmental Advisory Committee)'s advice concerning the New gTLD (generic Top Level Domain) Program. The Board has developed another iteration of the scorecard to respond to the advice in the Dublin Communiqué.

Resolved (2016.02.03.15), the Board adopts the scorecard titled "GAC (Governmental Advisory Committee) Advice – Dublin Communiqué 21 October 2015: Actions and Updates (3 February 2016) (</en/system/files/files/resolutions-annex-1-03feb16-en.pdf>)" [PDF 136 KB] in response to items of GAC (Governmental Advisory Committee) advice in the Dublin Communiqué.

Rationale for Resolution 2016.02.03.15

Article XI, Section 2.1 (</en/about/governance/bylaws#XI>) of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws permit the GAC (Governmental Advisory Committee) 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 (Governmental Advisory Committee) issued advice to the Board on various matters, including the New gTLD (generic Top Level Domain) Program, in its Dublin Communiqué (21 October 2015). The ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws require the Board to take into account the GAC (Governmental Advisory Committee)'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 (Governmental Advisory Committee) advice, it must inform the GAC (Governmental Advisory Committee) and state the reasons why it decided not to follow the advice. The Board and the GAC (Governmental Advisory Committee) 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 (Governmental Advisory Committee) advice was not followed.

The ICANN (Internet Corporation for Assigned Names and Numbers) Board New gTLD (generic Top Level Domain) Program Committee (NGPC) previously addressed items of the GAC (Governmental Advisory Committee)'s advice concerning new gTLDs issued in Communiqués from Beijing (April 2013), Durban (July 2013), Buenos Aires (November 2013), Singapore (March 2014), London (June 2014), Los Angeles (October 2014), Singapore (February 2015), and Buenos Aires (June 2015). The NGPC was decommissioned in October 2015, and the Board continues to maintain general oversight and governance over the New gTLD (generic Top Level Domain) Program and provide strategic and substantive guidance on New gTLD (generic Top Level Domain)-related topics as the current round of the Program comes to a conclusion. The Board is taking action to address the new advice from the GAC (Governmental Advisory Committee) in the Dublin Communiqué related to the New gTLD (generic Top Level Domain) Program, as well as other advice. The Board's actions are described in scorecard dated 3 February 2016 (/en/system/files/files/resolutions-annex-1-03feb16-en.pdf) [PDF, 136 KB].

In adopting its response to the GAC (Governmental Advisory Committee) advice in the Dublin Communiqué, the Board reviewed various materials, including, but not limited to, the following materials and documents:

- GAC (Governmental Advisory Committee) Beijing Communiqué (https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130718.pdf?version=1&modificationDate=1375787122000&api=v2) [PDF, 238 KB] (April 2013); GAC (Governmental Advisory

Committee) Durban Communiqué

(<https://gacweb.icann.org/download/attachments/27132037>

/Final_GAC_Communique_Durban_20130717.pdf?version=1&modificationDate=1374215119858&api=v2) [PDF, 103

KB] (July 2013); GAC (Governmental Advisory

Committee) Buenos Aires Communiqué

(<https://gacweb.icann.org/download/attachments/27132037>

/FINAL_Buenos_Aires_GAC_Communique_20131120.pdf?version=1&modificationDate=1385055905332&api=v2) [PDF, 97 KB]

(November 2013); GAC (Governmental Advisory

Committee) Singapore Communiqué

(<https://gacweb.icann.org/download/attachments/27132037>

/GAC_Amended_Communique_Singapore_20140327%5B1%5D.pdf?version=1&modificationDate=1397656205000&api=v2) [PDF, 147

KB] (as amended) (March 2014); GAC (Governmental

Advisory Committee) London Communiqué

(<https://gacweb.icann.org/download/attachments/27132037>

/Communique%20London%20final.pdf?version=1&modificationDate=1406852169128&api=v2) [PDF, 138

KB] (June 2014); GAC (Governmental Advisory

Committee) Los Angeles Communiqué (/en/system/files

/correspondence/gac-to-board-15oct14-en.pdf) [PDF, 127

KB] (October 2014); GAC (Governmental Advisory

Committee) Singapore Communiqué (/en/system/files

/correspondence/gac-to-board-11feb15-en.pdf) [PDF, 113

KB] (February 2015); GAC (Governmental Advisory

Committee) Buenos Aires Communiqué

(<https://gacweb.icann.org/download/attachments/27132037>

/GAC%20Buenos%20Aires%2053%20Communique.pdf?version=1&modificationDate=1435188375963&api=v2) [PDF, 106

KB] (June 2015); GAC (Governmental Advisory

Committee) Dublin Communiqué (/en/system/files

/correspondence/gac-to-board-21oct15-en.pdf) [PDF, 165

KB] (October 2015)

- Applicant responses to GAC (Governmental Advisory Committee) advice: <http://newgtlds.icann.org/en/applicants/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> (<http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>) [PDF, 260 KB]
- 9 November 2015 letter (/en/system/files/correspondence/diaz-to-crocker-09nov15-en.pdf) [PDF, 294 KB] from the Registry Stakeholder Group to the ICANN (Internet Corporation for Assigned Names and Numbers) Board regarding the GAC (Governmental Advisory Committee)'s advice in the Dublin Communiqué regarding the use of two-character country codes.

The adoption of the GAC (Governmental Advisory Committee) advice as provided in the scorecard will have a positive impact on the community because it will assist with resolving the advice from the GAC (Governmental Advisory Committee) on the New gTLD (generic Top Level Domain) Program and other matters. There are no foreseen fiscal impacts associated with the adoption of this resolution. Approval of the resolution will not impact security, stability or resiliency issues relating to the DNS (Domain Name System).

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

f. Board Governance Committee Recommendation Regarding Implementation of Public Interest Commitments for .DOCTOR Registry Agreement

Whereas, at its 6 May 2015 meeting, the Board Governance Committee (BGC) recommended that "the NGPC again review the proposed implementation of a public interest commitment

for the .DOCTOR TLD (Top Level Domain), and to re-evaluate the NGPC's 12 February 2015 determination."

Whereas, the ICANN (Internet Corporation for Assigned Names and Numbers) Board New gTLD (generic Top Level Domain) Program Committee (NGPC) was decommissioned on 22 October 2015 and the Board continues to maintain general oversight and governance over the New gTLD (generic Top Level Domain) Program and provide strategic and substantive guidance on New gTLD (generic Top Level Domain)-related topics as the current round of the Program comes to a conclusion.

Resolved (2016.02.03.16), the Board reaffirms the NGPC's acceptance of the Governmental Advisory Committee (Advisory Committee)'s (GAC (Governmental Advisory Committee)) advice (https://gacweb.icann.org/download/attachments/33849634/FINAL_Buenos_Aires_GAC_Communique_20131120.pdf?version=1&modificationDate=1390438464000&api=v2) [PDF, 97 KB] issued in the Buenos Aires Communiqué (20 November 2013) regarding .DOCTOR, and clarifies that the President and CEO, or his designee(s), is directed to implement the GAC (Governmental Advisory Committee)'s advice by including in the .DOCTOR Registry Agreement the eight additional Public Interest Commitments associated with highly-regulated TLDs.

Rationale for Resolution 2016.02.03.16

In response to a recommendation from the Board Governance Committee (BGC), the Board is taking action at this time to clarify the proposed implementation of public interest commitments for the .DOCTOR TLD (Top Level Domain). The .DOCTOR TLD (Top Level Domain) was included as one of the Category 1 strings (<https://gacweb.icann.org/display/GACADV/2013-04-11-Safeguards-Categories-1>) requiring additional safeguards in the Governmental Advisory Committee (Advisory Committee)'s (GAC (Governmental Advisory Committee)) Beijing Communiqué (<https://gacweb.icann.org/download>

[/attachments/27132037](#)

[/Beijing%20Communique%20april2013_Final.pdf?version=1&modificationDate=1365666376000&api=v2](#) [PDF, 156 KB] (11 April 2013). ICANN (Internet Corporation for Assigned Names and Numbers) initiated a public comment period (23 April 2013) to solicit input on how the ICANN (Internet Corporation for Assigned Names and Numbers) Board New gTLD (generic Top Level Domain) Program Committee (NGPC) should address the GAC (Governmental Advisory Committee)'s safeguard advice in the Beijing Communiqué.

On 29 October 2013, the NGPC sent a [letter \(/en/system/files/correspondence/crocker-to-dryden-3-29oct13-en.pdf\)](#) [PDF, 664 KB] to the GAC (Governmental Advisory Committee) about its proposed implementation of the Category 1 Safeguard advice in the Beijing Communiqué. The NGPC proposed to modify the text of the Category 1 Safeguards as appropriate to meet the spirit and intent of the advice in a manner that allowed the requirements to be implemented as Public Interest Commitments (PICs) in Specification 11 of the New gTLD (generic Top Level Domain) Registry Agreement. The NGPC also proposed to distinguish the list of strings between those that the NGPC considered to be associated with market sectors or industries that have highly-regulated entry requirements in multiple jurisdictions, and those that do not. The Category 1 Safeguards in the PIC would apply to the TLDs based on how the TLD (Top Level Domain) string was categorized (i.e. the highly-regulated TLDs would have eight additional PICs, and the others would have three additional PICs). In the NGPC's October 2013 proposal, .DOCTOR was not proposed to be classified as "highly-regulated".

In the GAC (Governmental Advisory Committee)'s [Buenos Aires Communiqué \(https://gacweb.icann.org/download/attachments/33849634/FINAL_Buenos_Aires_GAC_Communique_20131120.pdf?version=1&modificationDate=1390438464000&api=v2\)](#) [PDF, 97 KB] (20 November 2013), the GAC (Governmental Advisory

Committee) [advised \(https://gacweb.icann.org/display/GACADV/2013-11-20-Cat1-Cat2\)](https://gacweb.icann.org/display/GACADV/2013-11-20-Cat1-Cat2) the Board "to re-categorize the string .doctor as falling within Category 1 safeguard advice addressing highly regulated sectors, therefore ascribing these domains exclusively to legitimate medical practitioners. The GAC (Governmental Advisory Committee) notes the strong implications for consumer protection and consumer trust, and the need for proper medical ethical standards, demanded by the medical field online to be fully respected." The NGPC considered the GAC (Governmental Advisory Committee)'s Buenos Aires advice, and in the iteration of the [Scorecard from 5 February 2014 \(https://gacweb.icann.org/download/attachments/33849634/resolutions-new-gtld-annex-1-05feb14-en.pdf?version=1&modificationDate=1392335353000&api=v2\)](https://gacweb.icann.org/download/attachments/33849634/resolutions-new-gtld-annex-1-05feb14-en.pdf?version=1&modificationDate=1392335353000&api=v2) [PDF, 371 KB], the NGPC (1) adopted the proposed [implementation \(/en/system/files/files/resolutions-new-gtld-annex-2-05feb14-en.pdf\)](/en/system/files/files/resolutions-new-gtld-annex-2-05feb14-en.pdf) [PDF, 61 KB] of Category 1 Safeguards that was sent to the GAC (Governmental Advisory Committee) in October 2013; and (2) accepted the GAC (Governmental Advisory Committee)'s Buenos Aires advice to "re-categorize the string .doctor as falling within Category 1 safeguard advice addressing highly regulated sectors and ensure that the domains in the .doctor TLD (Top Level Domain) are ascribed exclusively to legitimate medical practitioners."

One of the contending applicants for the .DOCTOR TLD (Top Level Domain) raised some concerns in [Reconsideration Request 15-3 \(/resources/pages/reconsideration-15-3-brice-trail-llc-2015-03-12-en\)](/resources/pages/reconsideration-15-3-brice-trail-llc-2015-03-12-en) about the proposed implementation of the GAC (Governmental Advisory Committee)'s advice and with respect to what Public Interest Commitments will be required in the .DOCTOR Registry Agreement. At its 6 May 2015 meeting, the Board Governance Committee began discussions about Reconsideration Request 15-3, and postponed making a final determination on the Reconsideration Request. The BGC recommended that "the NGPC again review the proposed implementation of a public interest commitment for the .DOCTOR TLD (Top Level Domain), and to

re-evaluate the NGPC's 12 February 2015 determination." The NGPC has since been decommissioned and the Board continues to maintain general oversight and governance over the New gTLD (generic Top Level Domain) Program and provide strategic and substantive guidance on New gTLD (generic Top Level Domain)-related topics as the current round of the Program comes to a conclusion.

With this action, the Board clarifies that to implement the GAC (Governmental Advisory Committee) advice that the NGPC accepted in February 2014, the following eight Category 1 Safeguards should be included in the .DOCTOR Registry Agreement:

1. Registry Operators will include a provision in their Registry-Registrar Agreements that requires registrars to include in their Registration Agreements a provision requiring registrants to comply with all applicable laws, including those that relate to privacy, data collection, consumer protection (including in relation to misleading and deceptive conduct), fair lending, debt collection, organic farming, disclosure of data, and financial disclosures.
2. Registry Operators will include a provision in their Registry-Registrar Agreements that requires registrars at the time of registration to notify registrants of the requirement to comply with all applicable laws.
3. Registry Operators will include a provision in their Registry-Registrar Agreements that requires registrars to include in their Registration Agreements a provision requiring that registrants who collect and maintain sensitive health and financial data implement reasonable and appropriate security measures commensurate with the offering of those services, as defined by applicable law.
4. Registry Operators will proactively create a clear

pathway for the creation of a working relationship with the relevant regulatory or industry self-regulatory bodies by publicizing a point of contact and inviting such bodies to establish a channel of communication, including for the purpose of facilitating the development of a strategy to mitigate the risks of fraudulent and other illegal activities.

5. Registry Operators will include a provision in their Registry-Registrar Agreements that requires registrars to include in their Registration Agreements a provision requiring registrants to provide administrative contact information, which must be kept up-to-date, for the notification of complaints or reports of registration abuse, as well as the contact details of the relevant regulatory, or industry self-regulatory, bodies in their main place of business.
6. Registry Operators will include a provision in their Registry-Registrar Agreements that requires registrars to include in their Registration Agreements a provision requiring a representation that the registrant possesses any necessary authorizations, charters, licenses and/or other related credentials for participation in the sector associated with the TLD (Top Level Domain).
7. If a Registry Operator receives a complaint expressing doubt with regard to the authenticity of licenses or credentials, Registry Operators should consult with relevant national supervisory authorities, or their equivalents regarding the authenticity.
8. Registry Operators will include a provision in their Registry-Registrar Agreements that requires registrars to include in their Registration Agreements a provision requiring registrants to report any material changes to the validity of the registrants' authorizations, charters, licenses and/or other related credentials for participation in the sector associated with the TLD (Top Level

Domain) in order to ensure they continue to conform to appropriate regulations and licensing requirements and generally conduct their activities in the interests of the consumers they serve.

By clarifying the implementation details of the NGPC's 5 February 2014 action, the Board notes that other potential registrants of .DOCTOR domains – such as professors, doctors of law and those who perform repairs or have "doctor" in their business name (e.g., "Shoe Doctor," "Computer Doctor") would not be limited by the PICs from being able to register names in the TLDs. Additionally, directories, review sites, commentators and services that provide information about medical and other types of doctors could be permitted. In clarifying the implementation details of the NGPC's 5 February 2014 action, the Board notes that it considered a review of a sample of regulatory schemes in multiple jurisdictions to determine whether the term "doctor" is associated with market sectors that have clear and/or regulated entry requirements in multiple jurisdictions, or is strongly associated with a highly-regulated industry in multiple jurisdictions. The review indicates that the term "doctor" is associated with medical practitioners in many countries, and in this context, has highly-regulated entry requirements (e.g. Kenya Medical Practitioners and Dentists Act, the German Approbationsordnung für Ärzte (Regulation of the Licensing of Doctors), and the Medical Board of Australia). The term "doctor" in various jurisdictions around the world also applies to persons who have earned doctoral degrees. In this context, the term "doctor" is also associated with clear and/or regulated entry requirements in multiple jurisdictions for obtaining such degrees (e.g. Doctor of Philosophy (PhD), Doctor of Education (EdD) and Doctor of Psychology (PsyD)). The review also shows that the term "doctor" is used in a general sense to refer to a person having expertise in a particular field without reference to formalized licensing requirements as noted above by the examples "Shoe Doctor," "Computer Doctor".

It should be noted, however, that a registry operator may impose additional registration restrictions that may otherwise limit eligible registrants in the TLD (Top Level Domain). For example, the registry operator may impose registration restrictions that require potential registrants to validate their credentials as licensed medical practitioners in order to register a name in the TLD (Top Level Domain). Imposing such a restriction would be at the discretion of the registry operator.

In adopting its response to the BGC recommendation, the Board reviewed various materials, including, but not limited to, the following materials and documents:

- GAC (Governmental Advisory Committee) Beijing Communiqué (https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130718.pdf?version=1&modificationDate=1375787122000&api=v2) [PDF, 238 KB] (April 2013); GAC (Governmental Advisory Committee) Durban Communiqué (https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130717.pdf?version=1&modificationDate=1374215119858&api=v2) [PDF, 103 KB] (July 2013); GAC (Governmental Advisory Committee) Buenos Aires Communiqué (https://gacweb.icann.org/download/attachments/27132037/FINAL_Buenos_Aires_GAC_Communique_20131120.pdf?version=1&modificationDate=1385055905332&api=v2) [PDF, 97 KB] (November 2013); GAC (Governmental Advisory Committee) Singapore Communiqué (https://gacweb.icann.org/download/attachments/27132037/GAC_Amended_Communique_Singapore_20140327%5B1%5D.pdf?version=1&modificationDate=1397656205000&api=v2) [PDF, 147 KB] (as amended) (March 2014); GAC (Governmental Advisory Committee) London Communiqué

[/27132037/Communique%20London%20final.pdf?version=1&modificationDate=1406852169128&api=v2](https://gacweb.icann.org/download/attachments/27132037/Communique%20London%20final.pdf?version=1&modificationDate=1406852169128&api=v2) [PDF, 138 KB] (June 2014); [GAC \(Governmental Advisory Committee\) Los Angeles Communiqué \(/en/system/files/correspondence/gac-to-board-15oct14-en.pdf\)](#) [PDF, 127 KB] (October 2014); [GAC \(Governmental Advisory Committee\) Singapore Communiqué \(/en/system/files/correspondence/gac-to-board-11feb15-en.pdf\)](#) [PDF, 113 KB] (February 2015); [GAC \(Governmental Advisory Committee\) Buenos Aires Communiqué \(/https://gacweb.icann.org/download/attachments/27132037/GAC%20Buenos%20Aires%2053%20Communique.pdf?version=1&modificationDate=1435188375963&api=v2\)](#) [PDF, 106 KB] (June 2015)

- Applicant responses to [GAC \(Governmental Advisory Committee\) advice: <http://newgtlds.icann.org/en/applicants/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> (<http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>) [PDF, 260 KB]
- [Reconsideration Request 15-3 \(/resources/pages/reconsideration-15-3-brice-trail-llc-2015-03-12-en\)](#)
- Other correspondence related to implementation of the Category 1 Safeguard Advice from the [GAC \(Governmental Advisory Committee\)](#)

The adoption of the Board's resolution will have a positive impact on the community because it will provide greater clarity to the [GAC \(Governmental Advisory Committee\)](#), the applicants and the community about the implementation of the Public Interest Commitments applicable to the [.DOCTOR TLD](#)

(Top Level Domain). This clarification will also allow the contending applicants for the .DOCTOR TLD (Top Level Domain) to move forward with resolving the contention set.

There are no foreseen fiscal impacts associated with the adoption of this resolution. Approval of the resolution will not impact security, stability or resiliency issues relating to the DNS (Domain Name System).

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

g. **Establishing a Set of KPIs for Board Performance and Improvement Efforts (ATRT2 Rec. 1, 2 & 3)**

Whereas, on 26 June 2014, the ICANN (Internet Corporation for Assigned Names and Numbers) Board accepted the recommendations of the Final Report of the Second Accountability and Transparency Review Team (ATRT2) published on 31 December 2013.

Whereas, ATRT2 Recommendation 1 stated "The Board should develop objective measures for determining the quality of ICANN (Internet Corporation for Assigned Names and Numbers) Board members and the success of Board improvement efforts, and analyze those findings over time."

Whereas, ATRT2 Recommendation 2 stated "The Board should develop metrics to measure the effectiveness of the Board's functioning and improvement efforts, and publish the materials used for training to gauge levels of improvement."

Whereas, ATRT2 Recommendation 3 stated "The Board should conduct qualitative/quantitative studies to determine how the qualifications of Board candidate pools change over time and should regularly assess Directors' compensation levels against prevailing standards."

Whereas, the Board Governance Committee (BGC) considered

ATRT2 Recommendations and provided the Board with recommendations on implementation, including among other things the development of Key Performance Indicators (KPIs) to help measure the Board's function and improvement efforts.

Whereas, the Board recognizes the importance of measuring how well the Board functions, including its logistical aspects, and of measuring the Board's improvement efforts.

Whereas, the Board is engaged, through the BGC, in an ongoing process to review the Board's working practices and develop comprehensive and holistic KPIs and other relevant metrics with which the Board can measure its effectiveness and improvement over time.

Whereas, the BGC has recommended that the Board accept a first set of KPIs specifically in response to the ATRT2 recommendations, with the understanding that additional and more comprehensive KPIs will continue being developed and modified over time as part of the BGC and the Board's standard operating procedures and activities.

Resolved (2016.02.03.17), the Board approves the KPIs set forth in Attachment 1 to the Reference Materials, and agrees with the BGC that the Board should continue to develop of more comprehensive, richer set of KPIs and other relevant metrics with which the Board can measure its effectiveness and improvement over time.

Resolved (2016.02.03.18), with respect to the portion of ATRT2 Recommendation 3 recommending that the Board "conduct qualitative/quantitative studies to determine how the qualifications of Board candidate pools change over time", the Board will undertake to commence discussions with the Nominating Committee and electing bodies that are responsible for the selection of Directors and that have access to the qualifications of candidate pools.

Rationale for Resolutions 2016.02.03.17 – 2016.02.03.18

The implementation of [recommendations \(/en/about/aoc-review/atrt/final-recommendations-31dec13-en.pdf\)](/en/about/aoc-review/atrt/final-recommendations-31dec13-en.pdf) [PDF, 3.46 MB] from the Second Accountability and Transparency Review Team (ATRT2) began in June 2014, shortly after the Board accepted the recommendations. The initial Implementation Plan scheduled the completion of Recommendations 1, 2 and 3 in June 2015, which was later revised to February 2016, to allow Board Governance Committee (BGC) to further discuss the overall process, including the development of Key Performance Indicators (KPIs) to help measure the efforts called for in ATRT2 Recommendations 1, 2 and 3.

The BCG is working with the Board to review comprehensively the Board's performance and improvement efforts and to develop relevant and substantive KPIs to measure both. The first set of KPIs (see Attachment A to the Reference Materials) that the Board has approved today was developed directly in response to the ATRT2 recommendations. However, the Board is dedicated to pursuing the development of even more meaningful KPIs as an ongoing effort to help improve the metrics by which the Board measures its performance overtime. Accordingly, the Board now considers this effort as part of its ongoing activities to help enhance its performance, which the BGC is tasked with in Section I.A of its charter (see <https://www.icann.org/resources/pages/charter-06-2012-02-25-en> (/resources/pages/charter-06-2012-02-25-en)).

With respect to ATRT 2 Recommendation 1, the Board has previously stated that it is difficult to determine the quality of individual Board members as this terminology could be interpreted in many different ways. In accepting this recommendation, the Board agreed to measure its improvement efforts (training programs) over time, which is what the first approved KPIs address.

With respect to ATRT 2 Recommendation 2, which is partly redundant to Recommendation 1, the proposed first KPIs measure the Board's current logistical functioning.

With respect to ATRT 2 Recommendation 3, the Board has previously indicated that it does not have access to the information related to the Board candidate pools, and in particular as it relates to the Nominating Committee candidates, that would allow for assessment or measurement by the Board of Board candidate qualifications. Accordingly, the Board will undertake to commence discussions with the Nominating Committee and the electing bodies that are responsible for the selection of Directors and that have access to the qualifications of candidate pools.

Adopting this initial set of KPIs will have no direct fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers) or the community that is not already budgeted, and will not have an impact of the security, stability and resiliency of the domain name system.

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

h. USG IANA (Internet Assigned Numbers Authority) Stewardship Transition – Additional FY16 Expenses and Funding

Whereas, on 25 June 2015, the Board approved the FY16 Operating Plan and Budget, which included an estimated budget envelope of US\$7 million for the USG IANA (Internet Assigned Numbers Authority) Stewardship Transition Project (the Project) to be funded by the Reserve Fund.

Whereas, that budget envelope was fully utilized during the first five months of FY16, including a US\$4 million cost of external legal advice (as referred to at <https://www.icann.org/resources/pages/iana-stewardship-project-costs-2015-10-16-en> ([/resources/pages/iana-stewardship-project-costs-](https://www.icann.org/resources/pages/iana-stewardship-project-costs-2015-10-16-en)

2015-10-16-en) during that five-month period.

Whereas, it is projected that the cost to complete the Cross-Community Working Group on Enhancing ICANN (Internet Corporation for Assigned Names and Numbers) Accountability's (CCWG) Work Stream 1 recommendation development work and, to carry out the implementation work (including bylaws drafting) during the remaining seven months of FY16 to be US\$8 to 9 million, including US\$3.5 million for additional external legal advice.

Whereas, the Board Finance Committee (BFC), the co-chairs of the CCWG and the Cross-Community Working Group to Develop an IANA (Internet Assigned Numbers Authority) Stewardship Transition Proposal on Naming Related Functions (CWG) met on 28 January 2016 to address this escalating cost issue.

Whereas, the BFC recommended the following three actions: (a) the CFO to work with the CCWG and CWG co-chairs to review and confirm the estimates for the remainder of FY16; (b) ICANN (Internet Corporation for Assigned Names and Numbers) to facilitate a discussion on how to establish proper budgetary estimates and cost control mechanisms for the next phase of Cross Community Work in FY16 (Implementation including Bylaws Drafting), to take place between the CCWG and CWG co-chairs and the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Chairs/Chartering Organizations; (c) the ICANN (Internet Corporation for Assigned Names and Numbers) Board should initiate a community discussion on how to replenish the Reserve Fund.

Whereas, the Board Finance Committee met on 2 February 2016 to follow up on the actions agreed during the call on 28 January 2016, and determined as an interim measure to recommend to the Board to approve an expenditure of US\$4.5 million to cover the current estimate of costs of the Project from December 2015 until the end of the ICANN (Internet

Corporation for Assigned Names and Numbers) 55 meeting in Marrakech, and that cost would be funded from the Reserve Fund.

Whereas the Board reiterates on its 25 June 2015 statement that the Board is "committed to supporting the community in obtaining the advice it needs in developing recommendations in support of the transition process, and also notes the importance of making sure that the funds entrusted to ICANN (Internet Corporation for Assigned Names and Numbers) by the community are used in responsible and efficient ways. Assuring the continuation of cost-control measures over the future work of the independent counsel is encouraged." (*See <https://www.icann.org/resources/board-material/resolutions-2015-06-25-en#2.c> (/resources/board-material/resolutions-2015-06-25-en#2.c).*)

Resolved (2016.02.03.19), the Board approves a budget envelope of up to US\$4.5 million, as an interim measure, to cover the costs of the Project incurred from December 2015 to the end of the ICANN55 in Marrakech (in addition to the budgeted envelope of US\$7 million included in the already approved FY16 Operating Plan and Budget) to be funded through a fund release from the Reserve Fund.

Rationale for Resolution 2016.02.03.19

The USG IANA (Internet Assigned Numbers Authority) Stewardship Transition is a major initiative to which the ICANN (Internet Corporation for Assigned Names and Numbers) Community as a whole is dedicating a significant amount of time and resources. ICANN (Internet Corporation for Assigned Names and Numbers)'s support for the community's work towards a successful completion of the Project (including both the USG IANA (Internet Assigned Numbers Authority) Stewardship transition proposal development and the CCWG's work) is critical for ICANN (Internet Corporation for Assigned Names and Numbers).

Considering its exceptional nature and the significant amount of costs anticipated to be incurred, the funding of this Project could not be provided through the Operating Fund. Accordingly, when the Board approved the FY15 and FY16 Operating Plans and Budgets, it included the anticipated funding of the transition initiative costs through a corresponding withdrawal from the Reserve Fund.

ICANN (Internet Corporation for Assigned Names and Numbers) is not able to unilaterally decide to fund these expenses through the New gTLD (generic Top Level Domain) auction proceeds, or potential excess from New gTLD (generic Top Level Domain) application fees, as the Board has committed in the past to organize community consultation on the future use of these funds.

The costs on the USG Stewardship Transition Initiative incurred through the first five months of FY16 totaled US\$7 million, an amount equal to the total envelope budgeted for the entire of FY16. Furthermore, the expenses projected for the remaining seven months of FY16 are estimated at US\$8 to US\$9 million, including US\$3.5 million in external legal advice expenses.

Considering the strategic importance for this initiative to be successfully completed, the Board needs to approve additional expense envelopes for FY16 and identify the funding source.

Based on the extracts from Section 4 of the Charters of the CCWG and CWG, the Board acknowledges that the CCWG and CWG, through their co-chairs, are responsible for defining and requesting staff support, meeting support, experts and facilitators. The CCWG and CWG co-chairs are also responsible for defining and requesting additional advisors or experts and, doing so by providing ICANN (Internet Corporation for Assigned Names and Numbers) with rationale and expected costs.

The CCWG Charter states:

The ICANN (Internet Corporation for Assigned Names and Numbers) Staff assigned to the CCWG-Accountability will fully support the work of the CCWG-Accountability as requested by the co-chairs, including meeting support, document drafting, editing and distribution and other substantive contributions when deemed appropriate by the CCWGAccountability. ICANN (Internet Corporation for Assigned Names and Numbers) will provide access to relevant experts and professional facilitators as requested by the CCWGAccountability Chairs.

The CWG charter contains the same statement as above.

The CCWG Charter continues

[...] the CCWG-Accountability may also identify additional advisors or experts to contribute to its deliberations [...]. Should additional costs be involved in obtaining input from additional advisors or experts, prior approval must be obtained from ICANN (Internet Corporation for Assigned Names and Numbers). Such a request for approval should at a minimum include the rationale for selecting additional advisors or experts as well as expected costs.

The CWG Charter reads:

The chairs of this charter's drafting team, Jonathan Robinson and Byron Holland, will write to ICANN (Internet Corporation for Assigned Names and Numbers) seeking reasonable travel resources for CWG members to participate in face-to-face CWG meetings, but on the understanding that the CWG will make every effort to hold any face-to-face meetings concurrent, or in conjunction with regularly scheduled ICANN (Internet

Corporation for Assigned Names and Numbers)
meetings.

As a result, the BFC recommended to the CCWG and CWG co-chairs the following three actions: (a) the CFO to work with the CCWG and CWG co-chairs to review and confirm the estimates for the remainder of FY16; (b) ICANN (Internet Corporation for Assigned Names and Numbers) to facilitate a discussion on how to establish proper budgetary estimates and cost control mechanisms for the next phase of Cross Community Work in FY16 (Implementation including Bylaws drafting), to take place between the CCWG and CWG co-chairs and the SO (Supporting Organization)/AC (Advisory Committee; or Administrative Contact (of a domain registration)) Chairs/Chartering Organizations; (c) the ICANN (Internet Corporation for Assigned Names and Numbers) Board should initiate a community discussion on how to replenish the Reserve Fund.

The above requests are consistent with previous communication issued by ICANN (Internet Corporation for Assigned Names and Numbers)'s CFO:

- to the CCWG co-chairs on 14 October 2015 through a letter on the ICANN (Internet Corporation for Assigned Names and Numbers) website (*see* <https://community.icann.org/display/acctcrosscomm/Costs+of+independent+legal+advice> (<https://community.icann.org/display/acctcrosscomm/Costs+of+independent+legal+advice>)) requesting the co-chairs to provide estimates for external legal advice.
- to the CWG and CCWG co-chairs, an email dated 30 November 2015, providing actual costs incurred by the four-month period ending 31 October 2015 and requesting to provide the ICANN (Internet Corporation for Assigned Names and Numbers) CFO with cost estimates for the external legal advice expected to be incurred from

31 October 2015 until 30 June 2016.

In addition, as the amount of expenses incurred for this initiative totals an estimated US\$24.7 million for FY15 and FY16, it is expected that the Reserve Fund balance will be approximately reduced to US\$60 million, corresponding to approximately 6 to 7 months of Operating Expenses, well below its current target level of 12 months of Operating Expenses or approximately US\$113 million. As a result, the Board will initiate a process to identify a solution to replenish the Reserve Fund by the estimated amount of US\$24.7 million (or its actual amount once known). The ICANN (Internet Corporation for Assigned Names and Numbers) Board plans to initiate a community discussion on how to replenish the Reserve Fund.

The Board expects that as the community groups continue to incur costs for the initiative, they will perform cost management exercises. Guidelines will be developed on cost management practices.

This action will not have a direct impact on the security, stability and resiliency of the domain name system.

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

3. Executive Session – CONFIDENTIAL

a. President and CEO FY16 SR1 At-Risk Compensation

Whereas, each Board member has confirmed that he/she does not have a conflict of interest with respect to establishing the amount of payment for the President and CEO's FY16 SR1 at-risk compensation payment.

Whereas, the Compensation Committee recommended that the Board approve payment to the President and CEO for his FY16

SR1 at-risk compensation.

Resolved (2016.02.03.20), the Board hereby approves a payment to the President and CEO for his FY16 SR1 at-risk compensation component.

Rationale for Resolution 2016.02.03.20

When the President and CEO was hired, he was offered a base salary, plus an at-risk component of his compensation package. This same structure exists today. Consistent with all ICANN (Internet Corporation for Assigned Names and Numbers) staff members, the President and CEO is to be evaluated against specific goals, which the President and CEO has set in coordination with the Compensation Committee.

Following FY16 SR1, which is a scoring period that ran from 16 May 2015 through 15 November 2015, the President and CEO provided to the Compensation Committee his self-assessment of his achievements towards his goals for FY16 SR1 the measurement period. After seeking input from other Board members, the Compensation Committee reviewed with the President and CEO his FY16 SR1 goals and discussed his achievements against those goals. Following that discussion, the Compensation Committee recommended that the Board approve the President and CEO's at-risk compensation for the first scoring period of FY16 and the Board agrees with that recommendation.

While this will have a fiscal impact on ICANN (Internet Corporation for Assigned Names and Numbers), it is an impact that was contemplated in the FY16 budget. This decision will not have an impact on the security, stability or resiliency of the domain name system.

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

[Published on 5 February 2016]

b. **Election of Göran Marby as ICANN (Internet Corporation for Assigned Names and Numbers)'s President and CEO (Published on 11 February 2016)**

Whereas, Fadi Chehadé will step down as President and Chief Executive Officer (CEO) of ICANN (Internet Corporation for Assigned Names and Numbers) on 15 March 2016.

Whereas, in order to conduct a search for a new President and CEO, the Board established a CEO Search Committee consisting of eight Board members.

Whereas, a description of the position of the ICANN (Internet Corporation for Assigned Names and Numbers) President and CEO was posted on the ICANN (Internet Corporation for Assigned Names and Numbers) website at [http://www.icann.org/en/groups/other/ceo-search \(/en/groups/other/ceo-search\)](http://www.icann.org/en/groups/other/ceo-search (/en/groups/other/ceo-search)).

Whereas, the CEO Search Committee engaged Odgers Berndtson, an international executive search firm, to identify candidates for the President and CEO position.

Whereas, the executive search firm conducted a detailed, thorough, global and international search for a CEO candidate, and identified numerous candidates for the CEO Search Committee to consider.

Whereas, the CEO Search Committee carefully considered the qualifications of all identified candidates and chose a number to interview at length.

Whereas, approximately 115 candidate resumes were received, 16 candidates were chosen for further evaluation by the CEO Search Committee, eight candidates were interviewed in face-to-face meetings by the CEO Search Committee, and four candidates were interviewed in face-to-face meetings by the full Board.

Whereas, after lengthy interviews and deliberations, the Board identified Göran Marby as the leading candidate for the President and CEO position.

Whereas, the Board finds that Göran Marby possesses the leadership, political, technical and management skills necessary to lead ICANN (Internet Corporation for Assigned Names and Numbers) as President and CEO.

Whereas, the CEO Search Committee has recommended that Göran Marby be elected President and CEO and the Compensation Committee has recommended a reasonable compensation package for Göran Marby.

Whereas, Göran Marby will not be able to begin his full time position with ICANN (Internet Corporation for Assigned Names and Numbers) as President and CEO for several weeks following Fadi Chehadé's final date of employment.

Whereas, the Board has determined that Akram Atallah should be appointed President and CEO for the time period of 16 March 2016 and until Göran Marby is able to begin his full time position with ICANN (Internet Corporation for Assigned Names and Numbers) as President and CEO.

Resolved (2016.02.03.21), beginning on 16 March 2016 and until Göran Marby is able to begin his full time position with ICANN (Internet Corporation for Assigned Names and Numbers) as President and CEO, Akram Atallah shall serve as President and CEO at the pleasure of the Board and in accordance with ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, and shall hold this office until his resignation, removal, or other disqualification from service, or until his successor shall be elected and qualified.

Resolved (2016.02.03.22), beginning on the date that Göran Marby is able to begin his full time position with ICANN (Internet Corporation for Assigned Names and Numbers) as President and CEO, and contingent upon the execution of a

formal written Agreement based on terms that have been approved by the Board, Göran Marby is elected as President and CEO, to serve at the pleasure of the Board and in accordance with the ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, and shall hold this office until his resignation, removal, or other disqualification from service, including termination of his Agreement, or until his successor shall be elected and qualified.

Resolved (2016.02.03.23), ICANN (Internet Corporation for Assigned Names and Numbers)'s Board Chair and its General Counsel are authorized to finalize a formal written Agreement with Göran Marby, and ICANN (Internet Corporation for Assigned Names and Numbers)'s Board Chair is authorized to execute that Agreement on behalf of ICANN (Internet Corporation for Assigned Names and Numbers).

Resolved (2016.02.03.24), the Board wishes to thank Odgers Berndtson for its assistance with the CEO search process.

Resolved (2016.02.03.25), this resolution shall remain confidential as an "action relating to personnel or employment matters", pursuant to Article III, section 5.2 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, pending public announcement of the selection of the new President and CEO.

[Published on 11 February 2016]

¹ Article IV, Section 2 of the .CAT, .TRAVEL, and .PRO registry agreements provide that the agreements shall be renewed upon the expiration of the initial term for successive terms, unless the following has occurred:

- i. an arbitrator or court has determined that Registry has been in fundamental and material breach of Registry's obligations set forth in Sections 3.1(a), (b), (d) or (e); Section 5.2 or Section 7.3 despite notice and an opportunity to cure in accordance with Article VI hereof and (ii) following the final decision of such arbitrator or court, Registry

has failed to correct the conduct found to constitute such breach....

.CAT Registry Agreement, *available at* <https://www.icann.org/resources/unthemed-pages/cat-agreement-2005-09-23-en> ([/resources/unthemed-pages/cat-agreement-2005-09-23-en](https://www.icann.org/resources/unthemed-pages/cat-agreement-2005-09-23-en)); .TRAVEL Registry Agreement, *available at* <https://www.icann.org/resources/unthemed-pages/travel-agreement-2006-04-12-en> ([/resources/unthemed-pages/travel-agreement-2006-04-12-en](https://www.icann.org/resources/unthemed-pages/travel-agreement-2006-04-12-en)); .PRO Registry Agreement, *available at* <https://www.icann.org/resources/unthemed-pages/pro-agreement-2010-04-22-en> ([/resources/unthemed-pages/pro-agreement-2010-04-22-en](https://www.icann.org/resources/unthemed-pages/pro-agreement-2010-04-22-en)).



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en.htm)[WHOIS](#)
(http://whois.icann.org/)

Reference Material 57.

.HOTEL AND .HOTELS STRING SIMILARITY OBJECTION

Reconsideration Request

Version of 11 April 2013

ICANN's Board Governance Committee is responsible for receiving requests for reconsideration from any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information. Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit <http://www.icann.org/en/general/bylaws.htm#IV> and <http://www.icann.org/en/committees/board-governance/>.

This form is provided to assist a requester in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12 point font.

Please submit completed form to reconsideration@icann.org.

1. Requester Information

Name: HOTEL TOP-LEVEL-DOMAIN S.a.r.l

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional):

(Note: ICANN will post the Requester's name on the Reconsideration Request page at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>. Requestors address, email and phone number will be removed from the posting.)

2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

(Provide as much detail as available, such as date of Board meeting, reference to Board resolution, etc. You may provide documents. All documentation provided will be made part of the public record.)

The action we are seeking to have reconsidered is the Expert Determination of the New gTLD String Confusion Objection regarding the strings .HOTEL and .HOTELS (HOTEL Top-Level-Domain S.a.r.l, Objector, and BOOKING.COM B.V., Applicant; International Centre for Dispute Resolution, 50 504 T 00237 13, 8 August 2013 (hereinafter the “.HOTEL Determination”). The .HOTEL Determination is attached as Document 1.

4. Date of action/inaction:

(Note: If Board action, this is usually the first date that the Board posted its resolution and rationale for the resolution or for inaction, the date the Board considered an item at a meeting.)

8 August 2013

5. On what date did you become aware of the action or that action would not be taken?

(Provide the date you learned of the action/that action would not be taken. If more than fifteen days has passed from when the action was taken or not taken to when you learned of the action or inaction, please provide discussion of the gap of time.)

8 August 2013

6. Describe how you believe you are materially affected by the action or inaction:

As described in Section 8 below, the failure of the panelist in the present matter to make his determination independently without regard to ICANN's prior action, and the failure of ICANN staff to incorporate suitable quality control provisions into the String Confusion Objection process, unlike other aspects of

the ICANN new gTLD process, constitute material failures of process. Such failures have led to a flawed decision in the instant case and have further led to inherently inconsistent results among similarity situated applicants. These breaches of process have led to the potential co-existence of .HOTEL and .HOTELS strings in the Root Zone, despite other singular/plural strings which have been placed into the same contention set to minimize this harm. This potential co-existence not only creates user confusion and harms in potential users of the Domain Name System but also negatively impacts the commercial viability of Applicant's business plan.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

Internet users and members of the .HOTEL community will be adversely affected by creating an environment in which similar domain names will lead to confusion as to sources of goods and services and other aspects of the hotel industry.

As noted above, there is a growing divergence in the String Confusion Objection decisions being administered by The International Centre for Dispute Resolution (ICDR) (see also cases .COM/.CAM and .PET/.PETS and .CAR/.CARS and .SPORT and .SPORTS). ICANN Staff's failure to include suitable Quality Control provisions and reconsideration mechanisms into this aspect of the New gTLD program, unlike other aspects (e.g. Initial Evaluation and Community Priority Evaluation), has created the potential for similarly situated singular/plural strings to co-exist in the name space, while others of the same kind would be prohibited. This co-existence would lead to potential consumer confusion, increased defensive registrations, and a total lack of predictability for current and future gTLD applicants. The fact that a coexistence of similar singular and plural gTLDs induces and rewards parasitical defensive registrations of registrants with the obviously confusingly string .HOTELS have been stated at Domainincite.com already in June 2013: "Buying two domains instead of one may not be a huge financial burden to individual registrants, but it's going to lead to situations where gTLDs exist in symbiotic – or parasitic – pairs."

8. Detail of Board or Staff Action – Required Information

Staff Action: If your request is in regards to a staff action or inaction, please provide a detailed explanation of the facts as you understand they were provided to staff prior to the action/inaction presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN policy(ies).

Please identify the policy(ies) with which the action/inaction was inconsistent. The policies that are eligible to serve as the basis for a Request for Reconsideration are those that are approved by the ICANN Board (after input from the community) that impact the community in some way. When reviewing staff action, the outcomes of prior Requests for Reconsideration challenging the same or substantially similar action/inaction as inconsistent with established ICANN policy(ies) shall be of precedential value.

Board action: If your request is in regards to a Board action or inaction, please provide a detailed explanation of the material information not considered by the Board. If that information was not presented to the Board, provide the reasons why you did not submit the material information to the Board before it acted or failed to act. “Material information” means facts that are material to the decision.

If your request is in regards to a Board action or inaction that you believe is based upon inaccurate, false, or misleading materials presented to the Board and those materials formed the basis for the Board action or inaction being challenged, provide a detailed explanation as to whether an opportunity existed to correct the material considered by the Board. If there was an opportunity to do so, provide the reasons that you did not provide submit corrections to the Board before it acted or failed to act.

Reconsideration requests are not meant for those who believe that the Board made the wrong decision when considering the information available. There has to be identification of material information that was in existence of the time of the decision and that was not considered by the Board in order to state a reconsideration request. Similarly, new information – information that was not yet in existence at the time of the Board decision – is also not a proper ground for reconsideration. Please keep this guidance in mind when submitting requests.

Provide the Required Detailed Explanation here:

(You may attach additional sheets as necessary.)

Although the subject String Similarity Objection was determined by a third party vendor, ICANN has determined that the Reconsideration process can properly be invoked for challenges of a third party’s decision where either the third-party vendor failed to follow its process in reaching a decision or ICANN staff fails to follow its process in accepting that decision. [Recommendation of the Board Governance Committee (BCG) Reconsideration Request (hereinafter “Reconsideration Request”) 13-5, 1 August 2013, page 4.]

In the present instance of the .HOTEL Determination, it is evident that the panelist deeply failed to follow the appropriate process in evaluating the merits of the Objection, resulting in a fundamentally flawed decision that should be disregarded by ICANN staff and not accepted as advice.

In his decision, the panelist notes, “I find persuasive the degrees of similarity or dissimilarity between the strings by use of the String Similarity Assessment Tool . . . , that ICANN did not put the applications for .HOTEL and .HOTELS in the same contention set . . .” [Hotel Determination, page 4].

The String Confusion Objection was designed to take a second look at and beyond the results of the ICANN string similarity panel. This is apparent from the fact only after having been found not confusingly similar by ICANN does an applicant have standing in the String Confusion Objection process. [“Any gTLD applicant in this application round may file a string confusion objection to assert string confusion between an applied-for gTLD and the gTLD for which it has applied, where string confusion between the two applicants has not already been found in the Initial Evaluation.” Applicant Guidebook, 3.2.2.1, String Confusion Objection.]

The panelist in .HOTEL v. .HOTELS admits that the fact that ICANN did not find the two strings confusingly similar was a material point of persuasion to him in making his decision. However, it was *because* ICANN did not find the two strings confusingly similar that the objection could be brought in the first place. As a point of process, ICANN’s decision on the matter should have had no bearing on the panelist’s decision. The panelist’s consideration of, and reliance in material part upon, the previous action of ICANN marks a serious breach of process within the String Similarity Objection procedure, and should invalidate his determination in this matter.

Further, the failure of ICANN staff to incorporate suitable quality control provisions into the String Confusion Objection process, unlike other aspects of the ICANN new gTLD process, constitutes a material failure of process. Such failure has led to a flawed decision in the instant case and has further led to inherently inconsistent results among similarity situated applicants. This is in contrast to the policy of Quality Assurance that ICANN staff have demonstrated in almost every other part of the New gTLD application process. The reviewing panels in Initial Evaluation were part of a careful testing process before actual evaluations were conducted.

9. What are you asking ICANN to do now?

(Describe the specific steps you are asking ICANN to take. For example, should the action be reversed, cancelled or modified? If modified, how should it be modified?)

We request that the .HOTEL Determination be disregarded by ICANN and not accepted as advice. We further request that a different panelist be appointed to rehear the .HOTEL v. .HOTELS objection on a *de novo* basis. This is the only way to ensure that the inappropriate deference toward ICANN’s decision to

not include the two strings in a contention set that was admitted to by the present panelist is removed from the decision making process.

Further, we request the institution of appropriate Quality Control provisions within the String Similarity Objection process to ensure the consistency of decisions of panelists, similar to those approved by ICANN in connection with Initial Evaluation and Community Priority Evaluation. At a minimum, ICANN should work with ICDR to review all String Confusion Objections to make sure that the Panelists were properly trained and to ensure “consistency of approach,” i.e. CPE Pilot Testing Program.

10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

(Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the requester must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial) that is directly and causally connected to the Board or staff action or inaction that is the basis of the Request for Reconsideration. The requestor must be able to set out the loss or injury and the direct nature of that harm in specific and particular details. The relief requested from the BGC must be capable of reversing the harm alleged by the requester. Injury or harm caused by third parties as a result of acting in line with the Board’s decision is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)

We have invested substantial time, effort, and financial resources to participate in ICANN’s New gTLD program based upon certain commercial representations made by ICANN.

Our participation in the String Similarity Objection process was predicated on our reliance upon the appointment of a panelist that would conduct an impartial, independent and objective assessment of the claims in our objection. The obvious dependence upon, and inappropriate deference to, the prior decision of ICANN with respect to the .HOTEL and .HOTELS strings by the panelist in the instant matter constitutes a material breach of ICANN’s process set forth in the String Similarity Objection process set forth in the New gTLD Guidebook. Objections are entitled to be reviewed precisely because ICANN did not find the strings confusingly similar, not in deference to that decision.

Further, ICANN staff's failure to incorporate suitable Quality Control mechanisms in the objection process has led to inconsistent results among highly analogous fact patterns. Applicant and the community which it represents will be harmed if the .HOTEL and .HOTELS are permitted to co-exist.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

Do you have any documents you want to provide to ICANN?

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

Yes, the Panelist's decision in the .HOTEL Determination is attached as Document 1.

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

Katrin Ohlmer

Signature Ms. Katrin Ohlmer

____23 Aug 2013____

Date

Johannes Lenz-Hawliczek

Signature Mr. Johannes Lenz-Hawliczek

____23 Aug 2013____

Date

Reference Material 58.

“.direct” gTLD application (Application ID: 1-2007- 43424) - Request for Reconsideration of ICANN’s Decision on August 8, 2013

1. Requester Information

Name: DISH DBS Corporation

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number: Contact Information

C/O

Name: Deborah M. Lodge, Patton Boggs LLP

Address: Contact Information Redacted

Email: C
o

Phone Number: Contact Information

2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

- Dish DBS Corporation (hereinafter, “DISH” or “Respondent”) seeks reconsideration of ICANN’s decision to accept the Panel’s determination in LRO2013-0005 (“Decision”) (**Attachment 1**) as an expert determination and advice pursuant to section 3.4.6 of the Applicant Guide Book (“AGB”).
- DISH also seeks reconsideration of ICANN’s inaction in providing clear and well-defined standards to the Dispute Resolution Service Providers (“DRSP”) that have resulted in inconsistent decisions from the DRSP Panels for Legal Rights Objections.

4. Date of action/inaction:

The Decision was published on August 8, 2013. (**Attachment 2**)

5. On what date did you become aware of the action or that action would not be taken?

The Decision was communicated from the World Intellectual Property Organization (“WIPO”) to DISH’s representatives by email on August 8, 2013.

DISH's representatives informed DISH of the Decision on August 8, 2013.

6. Describe how you believe you are materially affected by the action or inaction:

DISH is one of two applicants for the “.direct” generic top level domain (“gTLD”). The Decision will have the following impact on DISH, as the Applicant Guide Book (“AGB”) indicates that the “Applicant Withdraws” if it cannot clear all objections. (**Attachment 3**, AGB at page 3-26).

- DISH will not be allowed to operate the ‘.direct’ gTLD based on its application (Application ID: 1-2007-43424), if that the ‘.direct’ gTLD by Half Trail, LLC (Application ID: 1-1424-94823) is recommended for delegation; and
- If DISH wants to use the .direct gTLD in the manner specified in response to question 18(a) in its application, then it will need to purchase/reserve over 3,000 second level domains for the .direct gTLD from Half Trail, LLC or enter into an agreement with Half Trail, LLC. Both of these options will require significant investments, in addition to DISH's existing investments with the Internet Corporation for Assigned Names and Numbers (ICANN) new gTLD process to secure the .direct gTLD. This is not justified given ICANN's inaction in failing to provide an automatic right of appeal in the existing new gTLD dispute resolution process.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

DISH believes that the Decision also affects the following:

- Other similarly situated applicants/respondents across the various DRSPs, that have suffered inconsistent or erroneous decisions by Panels, including, but not limited to: the applicant for the “.delmonte” gTLD in LRO2013-0001; the applicant for the “.pets” gTLD in ICDR Case No. 50 504 00274 13; and the applicant for “.cam” in ICDR Case No. 50 504 T 229 13. These applicants will not have a uniform or clear forum to challenge these inconsistent and erroneous DRSP panel determinations.
- Over 14 million existing satellite television consumers and internet consumers or new consumers searching for legitimate DISH products and services will have to navigate a number of disjointed second level domains to locate these products and services.

8. Detail of Board or Staff Action – Required Information

Section 3.2 of the Applicant Guide Book (“AGB”) provides:

“a path for formal objections during evaluation of the applications. It allows a party with standing to have its objection considered before a panel of qualified experts... A formal objection initiates a dispute resolution proceeding. In filing an application for a gTLD, the applicant agrees to accept the applicability of this gTLD dispute resolution process. Similarly, an objector accepts the applicability of this gTLD dispute resolution process by filing its objection.”

Section 3.2.1 of the AGB provides that a Legal Rights Objection (“LRO”) may be filed where:

“The applied-for gTLD string infringes the existing legal rights of the objector.”

Section 3.2.3 of the AGB provides that to trigger an LRO, an objection must be filed with:

“The Arbitration and Mediation Center of the World Intellectual Property Organization [, which] has agreed to administer disputes brought pursuant to legal rights objections.”

In the recommendation of the Board Governance Committee (“BGC”) for Reconsideration Request 13-5 dated August 1, 2013, the BGC noted that:

“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.”
(Attachment 4, Page 4).

Based on the above guidance from the BGC, because the WIPO Arbitration and Mediation Center is a third party selected by ICANN, the Request for reconsideration is applicable to WIPO actions by the WIPO Panels.

Section 2.4.3 of the AGB governs the code of third-party panelists appointed by ICANN and provides that:

“Panelists shall conduct themselves as thoughtful, competent, well prepared, and impartial professionals throughout the application process. Panelists are expected to comply with equity and high ethical standards while assuring the Internet community, its constituents, and the public of objectivity, integrity, confidentiality, and credibility.

[...]

Bias -- Panelists shall...

*examine facts as they exist and **not be influenced by past reputation, media accounts**, or unverified statements about the applications being evaluated...”*
(Emphasis Added)

Further, article 20 of the Attachment to Module 3 – New gTLD Procedure (“Procedure), which defines the standards for the Procedure, provides that:

“(a) For each category of Objection identified in Article 2(e), the Panel shall apply the standards that have been defined by ICANN.

(b) In addition, the Panel may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable.

(c) The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards.”

Here, the Panelists, in contravention of section 2.4.3 of the AGB, were improperly influenced by media accounts as the Decision itself candidly admits:

“the Panel notes that as it has been deliberating over this case, Respondent is running a series of television advertisements aimed squarely at Objector and its satellite television offerings.” (Attachment 1, Page 4-5).

No television advertisement of Respondent was submitted in the record of this proceeding. This biased selection of advertisements outside of the record, which appears to have influenced the Panel’s erroneous determination of the Respondent’s bad faith, directly contravenes Article 20(b).

Additionally, section 3.4.6 of the AGB provides that the:

“findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.”

Because ICANN is the final arbiter about whether an applied-for new gTLD application proceeds to delegation, this advice to ICANN clearly indicates that the DRSP panels are only providing a recommendation to ICANN. ICANN makes the ultimate decision with respect to whether an application may proceed to delegation. As a result of the above, a staff action by ICANN is present in this matter.

ICANN’s **automatic** acceptance of the DRSP panelist decisions, even those that are erroneous or inconsistent, is contrary to ICANN’s mandate to act transparently and fairly. Paragraph 7 of the Summary of ICANN Generic Names Supporting Organisation’s (GNSO’s) Final Report on the Introduction of New Generic Top- Level Domains (gTLDs) and Related Activity provides that the

“evaluation and selection process [for the introduction of new top-level domains] should respect the principles of fairness, transparency and non-discrimination. Further, all applicants should be evaluated against transparent

*and **predictable criteria**, fully available before initiation of the process.”*
(Emphasis added) (Attachment 5)

Thus, ICANN’s actions above are also inconsistent with this guidance.

ICANN’s Articles of Incorporation require it to act “through open and transparent processes,” and its Bylaws further provide that ICANN must “operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” (Articles of Incorporation, Art. 4; Bylaws, Art. III. sec. 1) The Bylaws also require that ICANN “mak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness.” (Bylaws, Art. I, Sec. 2.8). ICANN’s Bylaws also prohibit discriminatory treatment: “ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment . . .”. (Bylaws, Art. II, Sec. 3).

ICANN’s failure to provide a mechanism for redress for erroneous and inconsistent DRSP Expert Determinations is contrary to ICANN’s mandate to act with fairness and prevents DISH and other applicants from challenging erroneous and inconsistent DRSP Expert Determinations in a non-arbitrary and non-discriminatory fashion. DRSP panelists are taking “diverse and sometimes opposing views in their decision-making.” (**Attachment 6**). For example, a panelist in *Charleston Road Registry v Koko Castle*, (ICDR Case No. 50 504 00233 13) August 7, 2013, decided that it was inappropriate to consider trademark law in his decision, while the panelist in *VeriSign Switzerland SA v TV Sundram Iyengar & Son Limited* (ICDR Case No. 50 504 00257 13) August 8, 2013, gave trademark law considerable weight. Other examples of this inconsistency are provided in the response to Question 10 below. Fundamental fairness requires that Panels or panelists apply the same standards and principles in their decision-making. These inconsistent positions by the Panels or panelists are hardly consistent with ICANN’s mandate to act with fairness.

Background of Facts related to action/inaction of ICANN Staff or third party vendor

On March 12, 2013, pursuant to the new gTLD Dispute Resolution Procedure, The DirecTV Group Inc. (“Objector”) filed an LRO with the WIPO DRSP.

On March 20, 2013, the WIPO DRSP completed its administrative review of the Objection and determined it completed with the requirements of the Procedure.

WIPO notified DISH’s representatives on April 16, 2013, of the Objection.

DISH timely filed its response on May 16, 2013.

The WIPO DRSP appointed Robert A. Badgley, Mark Partridge, and Maxim Waldbaum as members of the Panel in this matter on June 20, 2013.

On May 22, 2013, Objector requested an opportunity to file a reply brief, which it reiterated on June 20, 2013.

DISH also requested an opportunity to respond to any additional reply briefs filed by the Objector on June 20, 2013.

On June 26, 2013, the Panel issued Procedural Order No. 1 in which it ordered Objector to submit a short Reply Brief by July 1, 2013, and Respondent to submit a short Rejoinder thereto within three business days thereafter. Both parties made timely submissions.

On July 25, 2013, the Panel extended the deadline for the rendering of the Expert Determination in this matter by 14 days.

On August 8, 2013, the Panel notified the parties and ICANN of its Expert Determination.

9. What are you asking ICANN to do now?

- DISH is asking ICANN to reverse the Decision. This reversal by the BGC will allow the DISH .direct gTLD application, which is part of ICANN String Similarity contention set no. 64, to proceed to string contention and eventual delegation.
- DISH is asking for ICANN to discard the Panel's determination under section 2.4.3.2 of the AGB and for the Decision to be reviewed by a new Panel.
- DISH is also asking ICANN to provide applicants of inconsistent or erroneous DRSP panel determinations with an avenue for redress that is consistent with ICANN's mandate to act with fairness.
- In the event that ICANN will not immediately reverse the Decision, DISH requests that it be provided an opportunity to respond to the BGC, before the BGC makes a final determination.

10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

Pursuant to section 3.5.2 of the AGB, in determining whether an Objector in an LRO may prevail, the Panel must determine whether the potential use of the applied-for gTLD:

(i) takes unfair advantage of the distinctive character or the reputation of the objector's registered or unregistered trademark or service mark ("mark"); or

(ii) unjustifiably impairs the distinctive character or the reputation of the objector's mark; or
(iii) otherwise creates an impermissible likelihood of confusion between the applied-for gTLD and the objector's mark.

a) DISH's application for the .direct gTLD was bona fide.

Section 3.5 of the AGB indicates that the Objector bears the burden of proof; however, ICANN has failed to articulate what the burden of proof is – Preponderance of the Evidence, Clear and Convincing, etc. This has also contributed to different Panels using different standards for the burden of proof.

Here, in its response to Question 18(a) of the .direct application, DISH indicated on the record that it sought the “.direct” gTLD:

as a restricted, exclusively-controlled gTLD for the purpose of expanding Applicant and its affiliated entities' ability to:

- *create a connected digital presence and personalized brand experience for customers and other business partners;*
- *deliver product and service marketing/advertising;*
- *enable marketing campaign activation;*
- *facilitate secure interaction and communication with individuals and entities with whom Applicant has a business relationship;*
- *improve business operations;*
- *simplify Internet user navigation to information about Applicant products and services;*
- *demonstrate market leadership in protecting customer privacy and confidential information online; and*
- *meet future client expectations and competitive market demands.*

Further, an affidavit submitted by DISH's Senior Vice President of Product Management, Vivek Khemka, stated that the application for the “.direct” gTLD was filed in good faith, as part of Respondent's business plan to increase its connectivity and offerings to consumers. (Attachment 1, page 4). Mr. Khemka also noted that the concept of providing "direct" services to its customers has been key to DISH's business and success:

"DISH provides [satellite television] programming and content 'direct' to consumers, direct to their homes, direct to their screens. DISH also will provide telecommunications services 'direct' to consumers. DISH offers consumers direct choice, direct value, and direct service. 'Direct' service has been a key element of DISH's offerings since its founding. That is why DISH selected <.direct> as a gTLD."

Without according Mr. Khemka's declaration sufficient weight, the Panel while deliberating indiscriminately reviewed DISH advertisements outside of the record

as discussed above in the response to Question 9. This indiscriminate review by the Panel appears to have led to their conclusion that the .direct gTLD application was not a *bona fide* application. (**Attachment 1**, Page 4-5).

In Right at Home v. Johnson Shareholdings, Inc., WIPO Case No. LRO2013-0030, Robert Badgley, the presiding panelist in the Decision, indicated that the language of section 3.5.2 of the AGB created a very high burden for trademark-based objections:

*The use of the terms "unfair," "unjustifiably," and "impermissible" as modifiers, respectively, of "advantage," "impairs," and "likelihood of confusion" in Section 3.5.2 suggests that there **must be something more than mere advantage gained, or mere impairment, or mere likelihood of confusion for an Objection to succeed under the Procedure.** It seems, rather, that there must be something untoward- even if not to the level of bad faith - in the conduct or motives of Respondent, or something intolerable in the state of affairs which would obtain if the Respondent were permitted to keep the String in dispute. (emphasis added) (**Attachment 7**).*

This decision was also followed a number LRO panels, including the panels in subsequent LRO decisions: *Canadian Real Estate Association v. Affiliat Limited*, WIPO Case No. LRO2013-0008; *Pinterest, Inc. v. Amazon EU S.a.r.l*, WIPO Case No. LRO2013-0050; and *Defender Security Company v. Lifestyle Domain Holdings, Inc.*, WIPO Case No. LRO2013-0035. *Id.* Based on the record, there is nothing to suggest that there was something untoward about DISH's behavior as DISH has not applied for any competitor brands or trademarks, but rather applied for its brand names and generic terms that were pertinent to its business model. Therefore, the advertisements, which were outside of the record, improperly affected the Panel's decision and rendered it erroneous.

Further, a Respondent's business model does not automatically translate into a finding of bad intent. See *Express, LLC v. Sea Sunset, LLC*, WIPO Case No. LRO2013-0022; and *Limited Stores, LLC v. Big Fest, LLC*, WIPO Case No. LRO2013-0049. Indeed, as the Panel found in the *Express, LLC* case, this risk is an inherent function of the Objector's decision to use a dictionary word as its brand name. The Panel's view of DISH's business model was not only inconsistent with decisions from other panels, but also improperly biased by the DISH advertisements viewed outside of the record.

The "DBS" in DISH DBS Corporation is an acronym for "Direct Broadcast Satellite." "Direct Broadcast Satellite" is a generic term used to describe satellite television broadcasts intended for home reception. (**Attachment 8**). In his declaration Mr. Khemka also confirmed that the provision of satellite television broadcasts to consumers is one of DISH's primary business models, since its founding in 1980. Additionally, DISH has used the acronym for Direct Broadcast Satellite, "DBS", since the formation of DISH DBS Corporation in 1996.

Therefore, there is nothing in the record that would support a finding of “something untoward” or “something intolerable in the state of affairs” in DISH’s *bona fide* application for the .direct gTLD.

DISH respectfully submits that Mr. Khemka’s declaration was not accorded the proper weight. Mr. Khemka’s declaration along with DISH’s response to questions 18(a) and (b) of the application, clearly show on the record that DISH filed a *bona fide* application for the .direct gTLD. Further, a more objective review of other information outside of the record by the Panel would clearly have showed that: (i) DISH has used the phrase “direct” on its website, since as early as 1996 (“**Attachment 9**”); (ii) some of DISH’s over 3,000 exclusive and non-exclusive retailers have used the phrase “direct” in conjunction with the phrase “DISH” and/or DISH products and services since at least **December 1998**. (**Attachment 10**); and (iii) a recent television segment on AZCentral.com (available at <http://www.azcentral.com/video/750995585001>) reviewing the DISH products and services offered in Arizona also refers to the phrase “DISH Direct.” (**Attachment 11**). These examples clearly show DISH’s goals to “[u]nify the full breadth of products and services offered by Applicant and its affiliated entities under one brand umbrella” as stated in its response to Question 18(b) of the application. (**Attachment 1**, page 3). The brand referenced in the phrase “one brand umbrella” is DISH, as confirmed by Mr. Khemka in his declaration.

The above discussions clearly contradict the following assertions by the Panelist and demonstrate that DISH filed a *bona fide* application for the .direct gTLD:

*“there is something untoward in Respondent’s motives here, and that an intolerable state of affairs would obtain if Respondent’s application for the String were allowed to stand;” (**Attachment 1**, Page 5); and*

*“Respondent has never used the term “direct” as a trademark or service mark, and with good reason. If it tried to do so, it would likely be enjoined by a court of law at Objector’s behest. Respondent’s claim that it has applied for the <.direct> string because it provides services (in the generic sense) directly to consumers is viewed by the Panel as a contrivance.” (**Attachment 1**, Page 7).*

- b) DISH has not engaged in a pattern of conduct whereby it applied for or operates TLDs or registrations in TLDs which are identical or confusingly similar to the marks of others.

DISH’s gTLD applications have consisted of generic words, which are related to its businesses or its trademarks. DISH has not applied for any competitor trademarks as gTLD applications. Thus, there is nothing in the record showing that DISH has engaged in a pattern of conduct that may infer any type of bad faith. To the contrary, DISH merely applied for a generic term, which it had used personally and through its affiliates and retailers since at least 1996. LRO panels

such as the panel in *Express, LLC v. Sea Sunset, LLC*, WIPO Case No. LRO2013-0022, regard this as permissible.

c) Internet users will not be confused.

As discussed above, contrary to the incorrect assertion by the Panel, DISH, its affiliates and some of its retailers have used the phrase “direct” in conjunction with DISH’s products and services for at least 17 years. Robert Badgley, the Presiding Panelist in this matter, noted in his dissent in *Del Monte Corporation v. Del Monte Int’l GmbH*, WIPO Case No. LRO2013-0001, “[t]he fact that multiple entities have been using the same mark in the same general area of commerce (food) for many years suggests that the consuming public has not been too troubled or confused by this state of affairs.” Here, as discussed above, both DISH and the Objector have used the phrase “direct” for over 17 years in the satellite services industry and the consuming public does not appear to have been confused. There is nothing in the record that would support a finding of confusion.

d) DISH will be injured if the decision is allowed to stand.

DISH has spent hundreds of thousands of dollars in attempting to secure the .direct gTLD for the purposes articulated in its application. It will likely spend even more in a string content auction with Half Trail, LLC if the BGC reverses the Decision. If the BGC chooses not to uphold the ICANN mandate of fairness by providing the remedy sought in response to Question 9, then the AGB only provides DISH with the ability to obtain a \$37,000 refund, which is patently unfair.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

Do you have any documents you want to provide to ICANN? Yes

Attachment 1 – *The DirecTV Group Inc. v. Dish DBS Corporation*, WIPO Case LRO2013-0005.

Attachment 2 – Legal Rights Objections filed with the WIPO Arbitration and Mediation Center

Attachment 3 - gTLD Application Guidebook Version 2012-06-04

Attachment 4 – Recommendation of the Board Governance Committee (“BGC”) for Reconsideration Request 13-5 dated August 1, 2013

Attachment 5 - Summary of ICANN Generic Names Supporting Organisation’s (GNSO’s) Final Report on the Introduction of New Generic Top- Level Domains (gTLDs) and Related Activity

Attachment 6 - Interview: Atallah on new gTLD objection losers, available at <http://domainincite.com/14208-interview-atallah-on-new-gtld-objection-losers> (last accessed August 23, 2013)

Attachment 7 - ICANN Legal Rights Objections: What's Past Is Prologue I Bloomberg BNA, available at <http://www.bna.com/icann-legal-rights-b17179875369/> (last accessed July 23, 2013)

Attachment 8 – Wikipedia page for “Direct Broadcast Satellite”.

Attachment 9 – Screenshot from 19 DISH website.

Attachment 10 – Screenshots showing the use of the phrase “direct” with DISH products and services.

Attachment 11 –Screenshot from Arizona Midday video on AZ central describing the DISH products and services

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director’s decision on the BGC’s reconsideration recommendation is final and not subject to a reconsideration request.

DISH hereby requests a hearing.

Dzboranyi Ledy

Signature

August 23, 2013
Date

Reference Material 59.

Reconsideration Request Form

Version of 11 April 2013

ICANN's Board Governance Committee is responsible for receiving requests for reconsideration from any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information. Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit <http://www.icann.org/en/general/bylaws.htm#IV> and <http://www.icann.org/en/committees/board-governance/>.

This form is provided to assist a requester in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12 point font.

For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.

Please submit completed form to reconsideration@icann.org.

1. Requester Information

Name: Amazon EU S.à.r.l.

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional):

C/o:

Name: Flip Petillion, Crowell & Moring LLP

Address: 7, rue Joseph Stevens

Email: Contact Information Redacted

Phone Number (optional): Contact Information Redacted

(Note: ICANN will post the Requester's name on the Reconsideration Request page at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>. Requestors address, email and phone number will be removed from the posting.)

2. Request for Reconsideration of (check one only):

Board action/inaction

Staff action/inaction

3. Description of specific action you are seeking to have reconsidered.

(Provide as much detail as available, such as date of Board meeting, reference to Board resolution, etc. You may provide documents. All documentation provided will be made part of the public record.)

Amazon EU S.à.r.l (hereinafter "Requester") seeks reconsideration of ICANN's acceptance of the Expert Determination of the New gTLD String Confusion Objection regarding the strings .SHOP (Application ID 1-1830-1672) and .通販 (Application ID 1-1318-15593) by the International Centre for Dispute Resolution in Case No. 50 504 T 00261 13, dated August 21, 2013 (hereinafter, the 'Decision'). The Decision is attached as **Annex 1**. This decision not only fails to follow ICANN process for instituting an action and for determining string confusion – finding .SHOP and .通販 (Japanese for "online shopping") to be confusingly similar strings – but also places Requester's .通販 application in contention with Requester's own .SHOP application.

4. Date of action/inaction:

(Note: If Board action, this is usually the first date that the Board posted its resolution and rationale for the resolution or for inaction, the date the Board considered an item at a meeting.)

August 21, 2013

5. On what date did you become aware of the action or that action would not be taken?

(Provide the date you learned of the action/that action would not be taken. If more than fifteen days has passed from when the action was taken or not taken to when you learned of the action or inaction, please provide discussion of the gap of time.)

August 21, 2013

6. Describe how you believe you are materially affected by the action or inaction:

The Requester is one of nine applicants for *inter alia* the .SHOP gTLD (Application ID 1-1317-37897) and the only applicant for the .通販 gTLD. The Decision will impact the Requester because ICANN has made it clear in the Applicant Guidebook that it “*will not approve applications for proposed gTLD strings that are identical or that would result in user confusion, called contending strings*” (Applicant Guidebook, Module 4-2). ICANN refers to a group of applications for contending strings as a contention set. The Decision places .SHOP and .通販 in a non-exact match contention set, not only against the objector, Jeffrey S. Smith on behalf of Commercial Connect, LLC (“Commercial Connect”) and other third parties, but against the Requester itself. As a result, ICANN will not approve both the application for .SHOP and the application for .通販.

This directly impacts the Requester as follows:

- The Requester will not be allowed to operate a .SHOP gTLD in the event that the .通販 gTLD is recommended for delegation and *vice versa*;
- If the Requester wants to operate either the .SHOP gTLD or the .通販 gTLD, it will need to either negotiate with other Applicants for .SHOP or participate at an auction with a view to obtaining the delegation of either the .SHOP or the .通販

gTLD. This may require additional investments which are not justified, given the erroneous nature of the Decision and the discrimination resulting from it (*infra*); and

- The Requester must now choose which of its applications it wishes to proceed as Requester is now in contention with its own .SHOP application. The panelist's decision is forcing Requester to withdraw one of its applications, forgoing its significant investment in seeing the application through to date, even though other applications representing strings closer in meaning than Requester's own applications are being allowed through.

7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.

Various third parties are adversely affected by the Decision:

- Other applicants for .SHOP will be put in a contention set with .通販, meaning that Internet users will not be able to benefit from services under a .SHOP if the .通販 gTLD is delegated.
- Internet users will not be able to benefit from services under the .通販 gTLD if the .SHOP gTLD is delegated or they will not be able to benefit from services under the .SHOP gTLD if the .通販 is delegated.

As made clear by ICANN regarding the standard for objections, “[t]here is a presumption generally in favor of granting new gTLDs to applicants who can satisfy the requirements for obtaining a gTLD – and, hence, a corresponding burden upon a party that objects to the gTLD to show why that gTLD should not be granted to the applicant”

(New gTLD Draft Applicant Guidebook Version 3 – Public Comments Summary and Analysis, p. 67, available at <http://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv3-15feb10-en.pdf>). The string similarity process was not intended to “*hobble competition or reserve a broad set of string for a first mover*” [sic]. As a result, the similarity test is a high bar, not to limit legitimate competition. (See New gTLD Draft Applicant Guidebook-Version 2: Analysis of Public Comment, p. 149, available at <http://archive.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf>).

In the case at hand, accepting the Decision would unjustifiably (*infra*) limit choice for Internet users and limit legitimate competition. This is not in the interest of the Internet user.

Internet users are adversely affected as there may be less competition at a TLD level as well as fewer TLDs targeted at non-English speaking communities.

8. Detail of Board or Staff Action – Required Information

Staff Action: If your request is in regards to a staff action or inaction, please provide a detailed explanation of the facts as you understand they were provided to staff prior to the action/inaction presented to the staff and the reasons why the staff’s action or inaction was inconsistent with established ICANN policy(ies). Please identify the policy(ies) with which the action/inaction was inconsistent. The policies that are eligible to serve as the basis for a Request for Reconsideration are those that are approved by the ICANN Board (after input from the community) that impact the community in some way. When reviewing staff action, the outcomes of prior Requests for Reconsideration challenging the same or substantially similar action/inaction as inconsistent with established ICANN policy(ies) shall be of precedential value.

Board action: If your request is in regards to a Board action or inaction, please provide a detailed explanation of the material information not considered by the Board. If that information was not presented to the Board, provide the reasons why you did not submit the material information to the Board before it acted or failed to act. “Material information” means facts that are material to the decision.

If your request is in regards to a Board action or inaction that you believe is based upon inaccurate, false, or misleading materials presented to the Board and those materials formed the basis for the Board action or inaction being challenged, provide a detailed explanation as to whether an opportunity existed to correct the material considered by the Board. If there was an opportunity to do so, provide the reasons that you did not provide submit corrections to the Board before it acted or failed to act.

Reconsideration requests are not meant for those who believe that the Board made the wrong decision when considering the information available. There has to be identification of material information that was in existence of the time of the decision and that was not considered by the Board in order to state a reconsideration request. Similarly, new information – information that was not yet in existence at the time of the Board decision – is also not a proper ground for reconsideration. Please keep this guidance in mind when submitting requests.

Provide the Required Detailed Explanation here:

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 (Recommendation of the Board Governance Committee (BGC) Reconsideration Request 13-5, August 1, 2013, page 4).

The new gTLD program included a dispute resolution procedure pursuant to which disputes between a person or entity who applies for a new gTLD and a person or entity who objects to that gTLD are resolved in accordance with the so-called New gTLD Dispute Resolution Procedure (Article 1(b), New gTLD Dispute Resolution Procedure (hereinafter, the 'Procedure'). Pursuant to Article 1(c) of the Procedure, Dispute resolution proceedings shall be administered by a Dispute Resolution Service Provider (DRSP) in accordance with the Procedure and the applicable DRSP Rules. In accordance with Article 20(a) the Panel appointed by the DRSP had to apply the standards that have been defined by ICANN.

In the present case, both the DRSP and the Panel have derogated from the Procedure and the Panel has failed to apply the standard defined by ICANN in reaching his Decision (*infra*). As a result, the policy for dealing with disputes has not been followed. Accepting the Decision as an expert determination and advice would thus be contrary ICANN's policy, as ICANN would accept an expert determination that was not made in accordance with ICANN's policy.

In any event, ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition (Article II(3), ICANN Bylaws). In the impossible event that ICANN considers that accepting the Decision is not contrary to its policies, accepting the Decision would create inequitable and disparate treatment without justified cause. ICANN could allow for a derogation to its policy, that is in line with the policy. Indeed, the Procedure provides that parties cannot derogate from the Procedure without the express approval of ICANN. *A contrario*, ICANN can (and must) give its express approval to derogate from the Procedure, if this permits ICANN to apply its standards, policies and procedures in a non-discriminatory manner.

9. What are you asking ICANN to do now?

(Describe the specific steps you are asking ICANN to take. For example, should the action be reversed, cancelled or modified? If modified, how should it be modified?)

The Requester asks ICANN to reject the advice set forth in the Decision, and instruct a panel to make an expert determination that applies the standards defined by ICANN. Should ICANN consider that there is a need to derogate from the Procedure in order to

comply with the process defined in the Applicant Guidebook, the Requester asks to make the necessary derogations allowing for a non-discriminatory application of ICANN's standards, policies and procedures.

10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.

(Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the requester must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial) that is a directly and causally connected to the Board or staff action or inaction that is the basis of the Request for Reconsideration. The requestor must be able to set out the loss or injury and the direct nature of that harm in specific and particular details. The relief requested from the BGC must be capable of reversing the harm alleged by the requester. Injury or harm caused by third parties as a result of acting in line with the Board's decision is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)

Both the DRSP and the appointed Panel accepted an objection that was filed incorrectly

On April 11, 2013, the ICDR informed Requester's primary contact for several of its new gTLD applications that it had conducted an administrative review of an objection filed by Commercial Connect (the 'Objection') and that it had noted that "after rectifying deficiencies previously set forth" the Objection "complies with Articles 5-8 of the *New gTLD Dispute Resolution Procedure* and the applicable ICDR (DRSP) Rules" and "shall be registered for processing" (**Annex 3**).

However:

1. The Requester had **not** received any formal objection, nor had it received any

copy of an objection in compliance with Article 7(b) of the *New gTLD Dispute Resolution Procedure*. Not copying the Applicant is a deficiency that cannot be rectified under the New gTLD Dispute Resolution Procedure;

2. In an email of March 18, 2013, the ICDR acknowledged receipt of the Objection by Commercial Connect with reference to Case number 50 504 T 00261 13. There is no reference to the string being objected to in this email. To wit: in its email of April 4, 2013, the ICDR specifically requested Commercial Connect to provide “proof or statement” that copies of the objection were sent to Requester.
3. Subsequently, the Requester has received the following documents from the Objector:
 - a copy of an application for .SHOP by Commercial Connect;
 - an ‘ONLINE FILING DEMAND FOR ARBITRATION/MEDIATION FORM’ that refers to the string ‘xn--gk3at1e Online Shopping’. (No objection against this string was published in either ICANN’s Dispute Announcement, nor in the ICDR’s list of filed objections.);
 - a ‘Dispute Resolution Objection’ with blank unfilled spaces where the string applicant and relevant string would otherwise appear;
 - a TLD Application for .mall, .shop, and .svc submitted by Commercial Connect (October 11, 2000);
 - a copy of a mail of April 5, 2013 to the ICDR in which Mr Smith writes “We

do hereby certify that copies of the complaint and attachments were sent via email to all respondents and to DRDiling@icann.org in particular...”.

On April 19, 2013 the Requester informed the ICDR that it had not received an objection on-time and that it did not know if an objection was filed on-time with the ICDR or not. The Requester also informed the ICDR that it had neither been informed of, nor received any information that allowed it to conclude that any previously set forth deficiencies in the Objection had been rectified timely. The Requester requested the ICDR to disregard and dismiss the Objection (**Annex 4**).

On April 24, 2013, the Requester reiterated this request (**Annex 5**).

On May 3, 2013, the ICDR informed the Requester that the matter would proceed to an Expert for determination and that the issues outlined in the Requester’s letters may be raised as part of the response (**Annex 6**).

Despite the clear violation of the Procedure by Commercial Connect, both the DRSP and the appointed Panel decided to proceed and to issue an expert determination in contravention of the Procedure.

The appointed Panel did not apply the standard, defined by ICANN

- The standard, defined by ICANN

As explained above, according to ICANN’s policy, panels appointed by the DRSP have the obligation to apply the standards that have been defined by ICANN. For a string confusion objection, the standard to be applied by the panel as defined by ICANN is defined in Section 3.5.1 of the Applicant Guidebook:

“A DRSP panel hearing a string confusion case objection will consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another 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.”

ICANN has made it clear that this is a high standard, not intended to hobble competition or reserve a broad set of string for a first mover. Synonyms of TLDs do not automatically cause confusion:

“[T]he standard indicates that confusion must be probable, not merely possible, in order for this sort of harm to arise. Consumers also benefit from competition. For new gTLDs, the similarity test is a high bar, as indicated by the wording of the standard. A TLD string that is a dictionary word will not automatically exclude all synonyms of that word (and most TLD strings today are not dictionary words and have no real synonyms).

Therefore, while the objection and dispute resolution process is intended to address all types of similarity, the process is not intended to hobble competition or reserve a broad set of string for a first mover.” (New gTLD Draft Applicant Guidebook-Version 2: Analysis of Public Comment, p. 149, available at <http://archive.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf>)

In addition, the translation of a word does not automatically generate confusing similarity. In this respect, ICANN stated:

“Leaving aside the issues whether all strings can be translated, whether translations would constitute grounds for findings of confusing similarity can be examined on a case-by-case basis through the objections and dispute resolution procedures that are in place.

[...]

The cases when a party states there might be confusion due to translation are better left for dispute resolution.”

In other words, the translation of a word does not necessarily create confusing similarity with the average Internet user. A case-by-case examination would not be necessary if the opposite were true.

It is indeed the case that no confusion can possibly exist with an average reasonable Internet user who understands different languages and/or scripts when there is no aural or visual similarity. This Internet user will immediately understand the difference between the two strings in the same way that he understands that both languages are different. The Internet user who does not understand both languages will not be able to compare both strings to each other and will not be confused between a string that has a meaning to him and a second string of which he does not understand the meaning.

It is in accordance with this high standard that panels had to rule on confusing similarity

between two strings.

- The application of a different standard in the decision

A different standard than the one defined by ICANN was applied in the Decision putting .SHOP and .通販 in a contention set. It is undisputed that there is no visual or aural link between .SHOP and .通販. The only link that could exist between these two strings is conceptual. Given the fact that a mere translation of a word would be insufficient to create confusing similarity in the mind of the average, reasonable Internet user, there cannot be confusing similarity according to the standard that the panel had to apply.

However, the panel used a different standard, considering that “*the use of essentially the same word in two different languages is sufficient to cause string confusion among the average, reasonable Internet user*” (**Annex 1**). This is in contradiction with ICANN’s standard stating that “*whether translations would constitute grounds for findings of confusing similarity can be examined on a case-by-case basis.*” If a translation was sufficient for a finding of confusing similarity, this would have been taken up in the standard and a case-by-case analysis would not be required. ICANN certainly did not consider that the mere translation of a string was in itself ‘sufficient’ ground for a finding of confusing similarity. Nevertheless, this is the standard that was applied in the Decision in contravention of ICANN’s policy.

In addition ‘通販’ is not even a translation of the word ‘shop’, since ‘通販’ means ‘online shopping’. So, even if ICANN considered that the use of essentially the same word in two different languages is sufficient to cause string confusion among the average, reasonable Internet user, *quod non*, ‘通販’ and ‘shop’ could not be found confusingly

similar, as they have clearly distinct meanings.

The fact that the appointed panel did not use the correct standard is also shown by the Expert Determination in another ICDR objection involving the strings .SHOP and .购物, which is the Chinese word for ‘shop’ (**Annex 2**). In that Expert Determination, the appointed panelist applied the standard, defined by ICANN and came to the conclusion that the strings .SHOP and .购物 are not confusingly similar. It is self-evident that the strings of that case have more in common than the .通販 and .SHOP strings, as the former are identical in meaning, whereas the meaning of the latter strings is clearly different. As a result, it is clear that different standards were applied by both panels. Indeed, if the same standard was applied, it would have been impossible that strings that are more similar to each other are not confusingly similar, while less similar strings are considered confusingly similar (and thus more similar). This constitutes a *contradictio in terminis*, showing that the panel ruling on the string confusion objection between .通販 and .SHOP applied a different standard.

The appointed Panel involved a third string in his determination

Finally, the panel did not limit his examination of string similarity to the similarity between the .通販 and the .SHOP strings, but involved a third string, namely ‘shopping’.

The panel considered:

“The concurrent use of ‘shopping’, the particle of the root word ‘shop’, in a gTLD string will result in probable confusion by the average, reasonable Internet user, because the two strings have virtually the same sound, meaning, look and feel.”

(Annex 1)

However, the word 'shopping' as such is not used and does not appear in either the .通販 or the .SHOP string. By comparing both the .通販 and the .SHOP string with the 'shopping' string, the panel actually made a finding that the .通販 and the .SHOP string are in 'indirect string contention'. This is beyond the scope of the task of the DRSP under ICANN's policy.

Also for this reason, the Decision is contrary to ICANN's policy.

Conclusion

ICANN's established policy was violated in many respects as 1) the DRSP and the appointed Panel proceeded with issuing an expert determination in a case that was not filed in accordance with the Procedure from which parties could not derogate without the express approval of ICANN, 2) the Panel did not apply the standard defined by ICANN, and 3) the Panel involved third strings in his expert determination, beyond the scope of the dispute resolution and interfering with ICANN's policy.

11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)

Yes

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.

Do you have any documents you want to provide to ICANN?

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

1. Expert Determination in the matter before the ICDR with case number 50 504 T 00261 13
2. Expert Determination in the matter before the ICDR with case number 50 504 T 00258 13
3. Communication by the ICDR of April 11, 2013
4. Communication by the Requester of April 19, 2013
5. Communication by the Requester of April 24, 2013
6. Communication by the ICDR of May 3, 2013

Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.



Signature

September 4, 2013

Date

Reference Material 60.

EXPERT DETERMINATION LEGAL RIGHTS OBJECTION

The DirecTV Group Inc. v. Dish DBS Corporation

Case No. LRO2013-0005

1. The Parties

Objector/Complainant (“Objector”) is The DirecTV Group Inc. of El Segundo, California, United States of America represented by Arent Fox LLP, United States.

Applicant/Respondent (“Respondent”) is Dish DBS Corporation of Englewood, Colorado, United States represented by Patton Boggs LLP, United States.

2. The applied-for gTLD string

The applied-for gTLD string (the “String”) is <.direct>.

3. Procedural History

The Legal Rights Objection (“the Objection”) was filed with the WIPO Arbitration and Mediation Center (the “WIPO Center”) on March 12, 2013 pursuant to the New gTLD Dispute Resolution Procedure (the “Procedure”).

In accordance with Article 9 of the Procedure, the WIPO Center has completed the review of the Objection on March 20, 2013 and has determined that the Objection complies with the requirements of the Procedure and the World Intellectual Property Organization Rules for New gTLD Dispute Resolution for Existing Legal Rights Objections (the “WIPO Rules for New gTLD Dispute Resolution”).

In accordance with Article 11(a) of the Procedure, the WIPO Center formally notified Respondent of the Objection, and the proceedings commenced on April 16, 2013. In accordance with Article 11(b) and relevant communication provisions of the Procedure, the Response was timely filed with the WIPO Center on May 16, 2013.

The WIPO Center appointed Robert A. Badgley, Mark Partridge, and Maxim Waldbaum as the Panel in this matter on June 20, 2013. The Panel finds that it was properly constituted. The Panel has submitted the Statement of Acceptance and Declaration of Impartiality and Independence, as required by the WIPO Center to ensure compliance with Article 13(c) of the Procedure and Paragraph 9 of WIPO Rules for New gTLD Dispute Resolution.

On May 22, 2013, Objector requested an opportunity to file a reply brief, which it reiterated on June 20, 2013. On the same day, the Respondent requested an opportunity to respond to any additional reply briefs filed by Objector, if the Panel granted Objector's request. On June 26, 2013, the Panel issued Procedural Order No. 1 in which it ordered Objector to submit a short Reply Brief by July 1, 2013 and Respondent to submit a short Rejoinder thereto within three business days thereafter. Both parties made timely submissions.

4. Factual Background

Objector and its subsidiaries provide digital television entertainment services, and provide television and audio services via satellite to subscribers. Objector provides such services under its DIRECTV mark and other marks containing the term "direct".

Since 1994, Objector has used the mark DIRECTV to identify and distinguish its digital and satellite television services. Objector is a leading satellite television provider in the United States, offering more than 285 digital channels to more than 20 million subscribers in the United States. Objector has another 15 million subscribers in other countries, including a large presence in Latin America.

Objector and its affiliates hold numerous trademark registrations. For example, the word mark DIRECTV was registered on the Principal Register of the United States Patent and Trademark Office ("USPTO") in March 2003 for telecommunications products (which are detailed and include satellite dishes). The word and design service mark DIRECTV was registered with the USPTO in September 2002 for "television programming and production services and distribution of television programs for others." These USPTO registered marks indicate first use in commerce in June 1994.

Other USPTO Principal Register registrations held by Objector or its affiliates include: (1) the word mark DIRECTV PLUS registered in January 2001 for "electronic equipment for receiving direct broadcast satellite signals, namely, receivers, satellite dishes, antennas and remote controllers therefore [*sic*] sold together as a unit" with a first use in commerce in September 1999; (2) the word service mark DIRECTV AIRBORNE registered in January 2004 for "satellite television transmission and broadcasting services" with a first use in commerce in April 1999; (3) the word service mark WORLDDIRECT registered in January 2006 for "television programming and production services and distribution of television programs for others" with a first use in commerce in December 2004; (4) the word service mark WORLDDIRECT registered in October 2007 for "satellite television transmission and broadcasting services" and "pay-per-view television transmission services" with a first use in commerce in December 2004; (5) the word service mark DIRECTVIEW registered in October 2012 for research and analysis of consumer viewing habits with a first use in commerce in April 2010; (6) the word service mark PINOYDIRECT registered in July 2010 for "television programming and production services, programming on a global computer network," and related services with a first use in commerce in September 2008; (7) the word service mark HINDIDIRECT registered in July 2007 for "satellite television broadcasting" and related services with a first use in commerce in October 2004; and (8) the word service mark MANDARINDIRECT registered in August 2007 for "satellite television broadcasting" and related services with a first use in commerce in May 2005.

Outside the United States, Objector holds several trademark registrations, including: (1) DIRECTV CINEMA registered in Argentina in September 2011; (2) DIRECTV NEXUS registered in Chile in July 2012 for telecommunications products and services; (3) DIRECTV registered in Colombia in July 2011 for telecommunications services; (4) DIRECTV registered in the Bolivarian Republic of Venezuela in April 2000 for telecommunications products; (5) ACCESS DIRECTV registered in the European Union in December 2011 for various goods and services, including telecommunication and satellite broadcasting services; and (6) DIRECTVIEW registered in the European Union in July 2011 for various goods and services.

For each year from 2008 through 2012, the DIRECTV brand was ranked among the world's 500 most valuable brands by BrandFinance.

Objector has maintained a website at “www.directv.com” since 1995. In 2012, that website received an average of more than 10 million visits each month. Objector also uses the toll-free telephone number 1-800-DIRECTV to promote its services.

Respondent is a subsidiary of Dish Network Corporation. According to Respondent’s Senior Vice President of Product Management:

“DISH provides satellite television, broadband services, audio programming, and interactive television services to commercial and residential customers in the United States. DISH currently provides satellite television services to 14 million subscribers in the United States. DISH has been a leader and innovator since it was founded in 1980. Since 1996, DISH has provided direct to home satellite based television services.”

In 2011, Dish purchased Blockbuster L.L.C. out of bankruptcy. Through its Blockbuster affiliate, Dish now provides movie and video game rental services to consumers “by DVD-by-mail, streaming and video-on-demand.” Dish also asserts that it intends to expand its presence and activities in the communications field.

Respondent describes itself in marketing materials as “a leader in satellite TV, providing subscribers with the highest-quality programming and technology at the best value.” Objector and Respondent are direct competitors, and both vie for the same customers as satellite dish television subscribers.

There is no evidence in the record that Respondent has ever used DIRECT (or any derivation of that word) as a trademark or service mark.

In section 18(a) of its application for the <.direct> gTLD, Respondent wrote in relevant part:

Applicant seeks the proposed .direct gTLD as a restricted, exclusively-controlled gTLD for the purpose of expanding Applicant and its affiliated entities’ ability to:

- create a connected digital presence and personalized brand experience for customers and other business partners;
- deliver product and service marketing/advertising;
- enable marketing campaign activation;
- facilitate secure interaction and communication with individuals and entities with whom Applicant has a business relationship;
- improve business operations;
- simplify Internet user navigation to information about Applicant products and services;
- demonstrate market leadership in protecting customer privacy and confidential information online; and
- meet future client expectations and competitive market demands.

In section 18(b) of its application, Respondent identified its anticipated “user experience goals” as follows:

- Unify the full breadth of products and services offered by Applicant and its affiliated entities under one brand umbrella;
- Improve and streamline the manner in which customers and other business partners can interact with Applicant and its affiliated entities in the online digital space;
- Foster trust and confidence in online interactions by customers and other business partners with Applicant and its affiliated entities;
- Reduce the risk of Internet users being misled, believing and/or acting on erroneous, information about Applicant and its affiliated entities, its business partners and/or its products and services presented online by unauthorized third parties; and
- Simplify online navigation to products, services and business partner information for Applicant and its affiliated entities.

In an affidavit submitted by Respondent's Vice President, Vivek Khemka, in response to the Objection, Respondent claims that its application for the <.direct> gTLD was filed in good faith, as part of Respondent's business plan to increase its connectivity and offerings to consumers. As Mr. Khemka notes in his affidavit, Respondent intends to continue to provide programming and content "direct" to consumers, using the <.direct> gTLD as a closed, secure network for its eco-system. As Mr. Khemka notes, the concept of providing "direct" services to its customers has been key to Respondent's business and success:

"DISH provides programming and content 'direct' to consumers, direct to their homes, direct to their screens. DISH also will provide telecommunications services 'direct' to consumers. DISH offers consumers direct choice, direct value, and direct service. 'Direct' service has been a key element of DISH's offerings since its founding. That is why DISH selected <.direct> as a gTLD."

5. Parties' Contentions

A. Objector

According to Objector, this is a clear case of underhanded business practices by a competitor. Objector states: "Dish and DIRECTV are direct competitors. Dish acknowledges this in promotional and marketing materials, including at its Web site where it dedicates numerous pages and charts to comparisons between Dish and DIRECTV." Objector also asserts that Respondent has never used the term "direct" to identify or distinguish its goods and services in commerce, but instead has chosen to apply for the <.direct> string in order to confuse consumers who were looking for Objector's goods and services.

Objector emphasizes the following quote from Respondent's application, in which Respondent describes its plan to use the <.direct> string to "[u]nify the full breadth of products and services offered by Applicant [DISH] and its affiliated entities under one brand umbrella." According to Objector, this stated plan is an admission by Respondent that it plans to use <.direct> as a trademark. In this vein, Objector points to several other stated goals of Respondent as reflected in section 18(a) of its application, including:

- creating a connected digital presence and personalized brand experience for customers and other business partners;
- delivering product and service marketing and advertising;
- enabling marketing campaign activation;
- simplifying Internet user navigation to information about Dish's products and services; and
- meeting future client expectations and competitive market demands.

B. Respondent

Respondent denies that it intends to use <.direct> as a trademark, stating that the word "direct" is generic and hence cannot serve as a mark. Respondent also claims that its proposed use of the String is *bona fide* and will not cause confusion with Objector and its goods and services.

6. Discussion and Findings

For the reasons set forth below, the Panel concludes that the Objection should be sustained. Respondent, a purveyor of satellite television services, is seeking to use the word "direct," which is the dominant part of the family of marks owned and used by its chief competitor in the satellite television business, Objector. On the record before it, the Panel therefore unanimously concludes that Respondent likely chose the <.direct> string for the sole purpose of disrupting the business of Objector.

That these two parties are direct competitors can scarcely be doubted. Indeed, the Panel notes that as it has been deliberating over this case, Respondent is running a series of television advertisements aimed

squarely at Objector and its satellite television offerings.

The Panel rejects Respondent's professed *bona fide* motives for applying for the String. Rather, the Panel views Respondent's effort as part of a battle for satellite television market share. Accordingly, under the standards set forth in the Procedure, the Panel concludes that the potential use of the applied-for gTLD by Respondent takes unfair advantage of the distinctive character or the reputation of Objector's registered marks, and unjustifiably impairs the distinctive character or the reputation of Objector's mark, and otherwise creates an impermissible likelihood of confusion between the applied-for gTLD and Objector's mark. gTLD Applicant Guidebook ("Guidebook"), Section 3.5.2. The Panel concludes that there is something untoward in Respondent's motives here, and that an intolerable state of affairs would obtain if Respondent's application for the String were allowed to stand.

The Guidebook sets forth eight non-exclusive factors which should be considered by the Panel when applying the Section 3.5.2 standards to the facts of this case. The Panel will address them below in order.

i. Whether the applied-for gTLD is identical or similar, including in appearance, phonetic sound, or meaning, to Objector's existing mark.

According to Objector, it is "indisputable that the gTLD string '.DIRECT' is nearly identical to DIRECTV's core intellectual property, including its name, and its family of DIRECTV and DIRECT-formative trademarks, and its primary domain name <directv.com>.

According to Respondent:

"The applied-for gTLD <.direct> is not identical or substantially similar to any of Objector's marks. While Objector submitted a roster of many trademark registrations in the U.S. and internationally using the term 'DIRECTV' 'direct+{suffix}', none of these registrations is for 'direct' by itself. That is, Objector has not established that it owns any trademark rights, anywhere in the world, in 'DIRECT' in and by itself. Instead, each of Objector's trademark registrations is for 'direct' in combination with another term, such as 'tv', 'hindi', 'mandarin', 'pinoy', 'world', 'view', etc., as is shown by the registrations set forth in Objector's Attachments B and C. In view of the inherent generic and descriptive nature of the word 'direct,' it is highly unlikely that Objector – or anyone else – could own exclusive trademark rights in 'direct' – especially when used for television or other services offered directly to consumers.

Further, while 'DIRECT' and 'DIRECTV' have some similarities in appearance, a critical aspect of DIRECTV is 'TV,' and as the survey evidence discussed below confirms, that the term 'direct' is not uniquely associated with Objector. Similarly, while 'DIRECT' and 'DIRECTV' have some phonetic similarities, they are significantly different, as the latter requires addition of third and fourth syllables for the 'TV' portion (DIR-ECT-TEE-VEE). That 'TV' portion is critical to Objector's marks and provides meaning, context and association of goods/services with a unique provider thereof. Without the 'TV' segment, the 'DIRECT' portion provides no such association – with Objector or anyone else. By itself, 'DIRECT' is simply a generic term. It is possible that, as stated in paragraph 12.e of Objector's complaint, that its 'DIRECTV' brand was valued at \$8.2 Billion. That is for the full mark, with the critical 'TV' component. It is telling that Objector does not claim that any value was established for 'DIRECT' alone. Objector's failure to establish any use of 'DIRECT' by itself in its advertising and as a free-standing brand compels the conclusion that Objector too has used 'DIRECT' only generically and not as a brand. That is not surprising, as Objector cannot claim any exclusive rights to that generic term."

The Panel concludes that the String is similar to the DIRECTV mark inasmuch as it differs by only one letter, and is similar to the other DIRECT-formative marks of Objector. The Panel is well aware of the fact that Objector's main mark is a contraction of the terms DIRECT and TV, with the T serving a dual role. Even so,

the String and the marks are similar. It bears noting that *confusing* similarity is not required under this factor.

As respects the “survey evidence” alluded to by Respondent under this head, the Panel will address it later in this opinion.

The Panel finds that this factor weighs in favor of Objector.

ii. Whether Objector’s acquisition and use of rights in the mark has been *bona fide*.

There is no serious dispute that Objector’s acquisition and use of rights in its various DIRECT-formative marks is *bona fide*. Accordingly, the Panel finds that this factor favors Objector.

iii. Whether and to what extent there is recognition in the relevant sector of the public of the sign corresponding to the gTLD, as the mark of Objector, of Respondent or of a third party.

According to Respondent:

“Objector failed to show that the public recognizes ‘DIRECT’ as its mark. Indeed, the facts show that ‘Direct’ is not associated with Objector. Dr. Maronick’s survey shows that less than 6% of persons responding to his survey made any connection between .direct and Objector. Maronick Decl., para. 7 (Attachment 2 hereto). As Dr. Maronick states: ‘In this survey, respondents were asked ‘If you were to see a domain name ending with ‘.direct’ would you associate it with any particular company or organization?’ Those who said yes were asked ‘what company or organization?’ Less than 6% of respondents (11 persons out of 216 responding) mentioned DirecTV as that company. Most respondents (159 out of 216) did not name any company at all.’ *Id.* That result is far less than the 15-20% minimum that would be needed to show any association or confusion. See Thomas McCarthy, 6 McCarthy on Trademarks and Unfair Competition § 32:188 (4th ed.).

That result is not surprising. Thousands of trademark registrations use the word ‘direct.’ Most of those use other words or symbols with ‘direct’ – again because no one entity can have exclusive rights to such a generic word. Thus, a search of live trademark applications and registrations at the U.S. Patent and Trademark Office alone revealed over 3,000 results incorporating ‘direct’ in a mark, See Declaration of Paralegal Karen Agee, annexing results of trademark searches (Attachment 3 hereto).”

The Panel is not convinced that the Maronick survey supports Respondent’s case here. First, the context of the survey is not provided. That is to say, the precise circumstances under which the survey was conducted are not laid out by Respondent or its expert, Dr. Maronick. Rather, a bare summary of the methodology and the salient findings is provided. As such, the Panel finds the survey to be of little probative value.

The Panel also questions certain aspects of the methodology, at least as far as it understands it. For instance, it is arguable that survey respondents who do not know the major players in the transmission of entertainment via satellite should not even be counted in the survey.

Further, the Panel notes, assuming the validity of the survey (and the Respondent’s clarifications as to survey responses in its Rejoinder), that nine out of 46 survey respondents who did associate the hypothetical domain name <television.direct> with a particular company identified Objector. This outcome, albeit with a very small sample, confirms that more than 19% of the survey participants who identified some company identified Objector.

Respondent asserted in its Rejoinder that, while not bearing on the main point of the conclusions it makes from its survey, some members of the public associate the <.direct> gTLD with DISH. As respects third-party uses, the Panel accepts that numerous parties have made use of the term “direct” as part of their trademark or service mark. These facts and assertions, however, are of little moment here. In the Panel’s

opinion, the essential fact in this proceeding is that Respondent, a purveyor of satellite television services, is seeking to use the word “direct,” which is the dominant part of the family of marks owned and used by its chief competitor in the satellite television business, Objector.

The Panel finds that this factor weighs in favor of Objector.

iv. Respondent’s intent in applying for the gTLD, including whether Respondent, at the time of application for the gTLD, had knowledge of Objector’s mark, or could not have reasonably been unaware of that mark, and including whether Respondent has engaged in a pattern of conduct whereby it applied for or operates TLDs or registrations in TLDs which are identical or confusingly similar to the marks of others.

This factor, in the Panel’s view, is of paramount importance in this case. There is no doubt that Respondent is well aware of Objector and its DIRECTV and other DIRECT-formative marks. Objector is Respondent’s main competitor, and vice-versa, in the major market of satellite television services in the United States.

Respondent has never used the term “direct” as a trademark or service mark, and with good reason. If it tried to do so, it would likely be enjoined by a court of law at Objector’s behest. Respondent’s claim that it has applied for the <.direct> string because it provides services (in the generic sense) *directly* to consumers is viewed by the Panel as a contrivance.

Rather, the Panel concludes, based on the record before it, that Respondent has applied for the String as part of an ongoing battle for market share, at Objector’s expense.

Respondent essentially admits as much in its application, wherein it states that it applied for the String to “unify the full breadth of products and services offered by Applicant and its affiliated entities under one brand umbrella.” The String, therefore, would serve as the “one brand umbrella” under which the “full breadth” of Respondent’s products and services would be unified. The Panel finds this admission in the application as far more reliable than the statements, quoted above, by Respondent’s vice president, who disavows Respondent’s brand-centered motivation in applying for the String.

In contrast to applying for a gTLD string on the basis of its generic or dictionary meaning, which LRO panels regard as permissible in many circumstances (see *Express, LLC v. Sea Sunset, LLC*, WIPO Case No. LRO2013-0022), this Panel finds that Respondent’s likely intention was to target the trademark of a direct competitor.

The Panel concludes that this factor favors Objector.

v. Whether and to what extent Respondent has used, or has made demonstrable preparations to use, the sign corresponding to the gTLD in connection with a *bona fide* offering of goods or services or a *bona fide* provision of information in a way that does not interfere with the legitimate exercise by Objector of its mark rights.

The discussion under factor 4 applies with equal force here. The Panel concludes that this factor favors Objector.

vi. Whether Respondent has marks or other intellectual property rights in the sign corresponding to the gTLD, and, if so, whether any acquisition of such a right in the sign, and use of the sign, has been *bona fide*, and whether the purported or likely use of the gTLD by Respondent is consistent with such acquisition or use.

Respondent has no marks or other intellectual property rights that correspond to the word “direct.” The Panel finds that this factor favors Objector.

vii. Whether and to what extent Respondent has been commonly known by the sign corresponding to the gTLD, and if so, whether any purported or likely use of the gTLD by Respondent is consistent therewith and *bona fide*.

The Panel finds that Respondent has not been commonly known by the word “direct.” By contrast, Objector has long been associated with the word “direct” (albeit with the term “TV” or a geographical or other descriptive indicator) in the entertainment sector. The Panel finds that this factor favors Objector.

viii. Whether Respondent’s intended use of the gTLD would create a likelihood of confusion with Objector’s mark as to the source, sponsorship, affiliation, or endorsement of the gTLD.

As noted above, Respondent stated in its application that it intended to use the String to “unify the full breadth of products and services offered by Applicant and its affiliated entities under one brand umbrella.” Notwithstanding Respondent’s subsequent, and unconvincing, efforts to disavow this stated motive, the Panel believes that consumer confusion would be likely if this application were allowed to stand. It appears very likely, based on Respondent’s survey alone, that some Internet users seeking Objector’s satellite television services would be confused to land at a website accessible at, for example, the domain name <television.direct>.

The parties are in direct competition for the satellite television market, and the dominant word in Objector’s family of marks is the word “direct.” Under these circumstances, the Panel concludes that consumer confusion would be the likely result if Respondent were allowed to keep and use the <.direct> string.

The Panel concludes that this factor favors Objector.

7. Decision

For the foregoing reasons, the Objection is upheld.

[signed]

Robert A. Badgley
Presiding Panel Expert

[signed]

Mark Partridge
Panel Expert

[signed]

Maxim Waldbaum
Panel Expert
Date: July 29, 2013

Reference Material 61.

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- ▶ [Accountability \(/resources](#)

.direct Registry Agreement

10 Apr 2014

On 10 April 2014, [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) and Half Trail, LLC entered into a Registry Agreement under which Half Trail, LLC operates the .direct top-level domain. The agreement may be viewed by following the links below:

Registry Agreement

- [DOCX \(/sites/default/files/tlds/direct/direct-agmt-docx-10apr14-en.docx\)](#) | [Redline \(/sites/default/files/tlds/direct/direct-agmt-docx-redline-10apr14-en.docx\)](#)
- [PDF \(/sites/default/files/tlds/direct/direct-agmt-pdf-10apr14-en.pdf\)](#) | [Redline \(/sites/default/files/tlds/direct/direct-agmt-pdf-redline-10apr14-en.pdf\)](#)

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► Identifier

- [HTML \(/sites/default/files/tlds/direct/direct-agmt-html-10apr14-en.htm\)](/sites/default/files/tlds/direct/direct-agmt-html-10apr14-en.htm) | [Redline \(/sites/default/files/tlds/direct/direct-agmt-html-redline-10apr14-en.htm\)](/sites/default/files/tlds/direct/direct-agmt-html-redline-10apr14-en.htm)

Authorization(s) for Release of Reserved Names

- [All Digit/Digit, Letter/Digit, and Digit/Letter Two-Character ASCII Labels at the Second Level \(/en/system/files/files/spec5-amend-two-char-01dec14-en.pdf\)](/en/system/files/files/spec5-amend-two-char-01dec14-en.pdf) (01 December 2014)
- [Letter/Letter Two-Character ASCII Labels \(/sites/default/files/tlds/direct/direct-auth-ltr-ltr-01dec14-en.pdf\)](/sites/default/files/tlds/direct/direct-auth-ltr-ltr-01dec14-en.pdf) (01 December 2014)
- [Letter/Letter Two-Character ASCII Labels \(/sites/default/files/tlds/direct/direct-auth-ltr-ltr-08apr15-en.pdf\)](/sites/default/files/tlds/direct/direct-auth-ltr-ltr-08apr15-en.pdf) (08 April 2015)
- [Letter/Letter Two-Character ASCII Labels \(/sites/default/files/tlds/direct/direct-auth-ltr-ltr-14mar16-en.pdf\)](/sites/default/files/tlds/direct/direct-auth-ltr-ltr-14mar16-en.pdf) (14 March 2016)

Updates to General Notices Contact (07 May 2014)

- [PDF \(/sites/default/files/tlds/direct/direct-contacts-07may14-en.pdf\)](/sites/default/files/tlds/direct/direct-contacts-07may14-en.pdf)

Amendment No.1 (09 June 2014)

- [PDF \(/sites/default/files/tlds/direct/direct-amend-1-pdf-09jun14-en.pdf\)](/sites/default/files/tlds/direct/direct-amend-1-pdf-09jun14-en.pdf)

Note: The official version is the Word version above. This HTML version is machine-generated and may not display correctly.

Name Collision Occurrence Management Documents

- [Alternate Path to Delegation Report \(/en/about/agreements/registries/direct/direct-apd-report-12nov13-en.htm\)](/en/about/agreements/registries/direct/direct-apd-report-12nov13-en.htm)
- [List of SLDs to Block \(/sites/default/files/tlds/direct/direct-apd-list-12nov13-en.csv\)](/sites/default/files/tlds/direct/direct-apd-list-12nov13-en.csv)
- [Name Collision Occurrence Assessment \(/resources/pages/registries-](/resources/pages/registries-)

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▶ Technical
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[2012-02-25-en#name-collision-assessment](#))

- [Addendum to Name Collision Occurrence Assessment](#)
(<http://newgtlds.icann.org/sites/default/files/agreements/name-collision-assessment-addendum-14nov14-en.htm>)
-

TLD (Top Level Domain) Startup Information

- [TLD \(Top Level Domain\) Startup Information Page](#)
(<http://newgtlds.icann.org/en/program-status/sunrise-claims-periods/direct>)

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(http://whois.icann.org/)

Reference Material 62.

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

Despegar Online SRL)	
Donuts Inc.)	
Famous Four Media Limited)	
Fegistry LLC)	
Radix FZC)	
)	
Claimants)	
)	
v.)	ICDR Case No. _____
)	
INTERNET CORPORATION FOR)	
ASSIGNED NAMES AND NUMBERS)	
)	
Respondent)	
_____)	

**REQUEST FOR INDEPENDENT REVIEW PROCESS
BY DESPEGAR ONLINE SRL, DONUTS INC., FAMOUS FOUR MEDIA LIMITED,
FEGISTRY LLC, AND RADIX FZC**

Flip Petillion,
Crowell & Moring LLP
7, rue Joseph Stevens
B-1000 Brussels, Belgium
Counsel for Claimants

I. IDENTIFICATION OF THE PARTIES

A. Claimants

1. The Claimants in this dispute are Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, and Radix FZC. Full contact details of Claimants are provided as **Annex 1**.

2. Claimants are represented in these proceedings by:

Flip Petillion
Crowell & Moring LLP
7, rue Joseph Stevens
B-1000 Brussels, Belgium
Tel: +32 2 282 4082
Fax: +32 2 230 6399

B. Respondent

3. The Respondent is the Internet Corporation for Assigned Names and Numbers (ICANN). The Respondent's contact details are as follows: 12025 Waterfront Drive, Suite 300, Los Angeles, CA 90094-2536.

II. EXECUTIVE SUMMARY

4. ICANN organized a new gTLD application round in 2012, allowing interested entities to compete for operating new gTLDs or internet extensions of their choice. Where multiple entities applied for the same string, they were asked to come to an amicable agreement under which one or more applicants withdrew their applications. If no amicable solution was found, applicants in contention for the same string were invited to participate in an auction, the proceeds of which would go to ICANN.

5. ICANN wanted to offer some kind of protection to well-established communities that might otherwise lose out if the free-market competition for gTLD strings was allowed to go unchecked. ICANN therefore introduced a mechanism allowing such communities to apply for a so-called community-based gTLD string that would identify the community. If a

community-based gTLD application met the stringent criteria for obtaining “community priority”, the application was allowed to proceed, and non-community-based applications for the same string were set aside.

6. During ICANN’s recent new gTLD application round, Claimants applied to operate the .hotel gTLD (Annexes 2-6). Another applicant, HOTEL Top-Level-Domain s.a.r.l. (HTLD), also applied for the .hotel gTLD (Annex 7). A panel of third-party evaluators, commissioned by ICANN, decided that HTLD’s application for .hotel met the criteria for obtaining “community priority” (Annex 8). ICANN then adopted the panel’s determination, without any review.

7. The determination was, however, opaque, in violation of ICANN’s very policy on “community priority”, based on non-existent facts, made by a faceless panel, and in violation of ICANN’s fundamental obligations. Claimants have never been given an opportunity to comment, let alone contest, the undisclosed materials considered by the panel or the panel’s insufficient reasoning. As a result of the community priority evaluation (CPE), Claimants’ applications have been excluded without justification. Even if ICANN reconsiders the CPE, Claimants’ applications have been needlessly delayed and subjected to additional procedures (Documentary Information Disclosure Policy (DIDP) Request, Request for Reconsideration (RfR)). ICANN’s CPE was an abdication of responsibility and contrary to the evaluation policies ICANN had established for new gTLD applications, especially in view of the fact that community priority was denied for similarly situated applications. The CPE of HTLD’s application for .hotel is not justified by any legitimate security or stability concerns. It is baseless and arbitrary. Moreover, the CPE fails to comply with ICANN’s obligation to promote consumer choice, innovation and competition.

8. Claimants repeatedly asked ICANN – among others in their DIDP Request and two consecutive RfRs – to comply with its own policy and remedy the improper treatment of the

.hotel applications. ICANN has not only declined, but has attempted to evade all responsibility.

9. ICANN's treatment of Claimants' applications is inconsistent with both the new gTLD policies established in the Guidebook and fundamental ICANN policies and obligations requiring fairness, non-discrimination, transparency, accountability, and good faith. By accepting a third-party determination that is contrary to its policies, ICANN has failed to act with due diligence and failed to exercise independent judgment. Accordingly, Claimants request that ICANN be required to overturn the CPE in relation to .hotel and allow Claimants' applications to proceed on their own merits.

III. SUMMARY OF RELEVANT FACTS

A. The parties

1. Claimants

10. Despegar Online SRL offers online hotel reservation services. All other Claimants offer services in the Internet's domain name system (DNS).

2. ICANN

11. ICANN is a non-profit public benefit corporation that was established under the laws of the State of California on 30 September 1998. ICANN is responsible for administering technical aspects of the Internet's DNS. Core to its mission is increasing competition and fostering choice in the DNS. ICANN's Articles of Incorporation require ICANN to act "*for the benefit of the Internet community as a whole*" and "*in conformity with the relevant principles of international law and local law*" (RM¹ 1, Article 4). ICANN's fundamental principles, which are reiterated numerous times in ICANN's governance documents and other

¹ Reference Material.

policies, require ICANN to ensure fairness, non-discrimination, openness and transparency, accountability, and the promotion of competition, as well as to act in good faith.

B. ICANN established the new gTLD Program

12. ICANN's responsibilities include establishing a process for introducing new top-level domains (TLDs) in order to promote consumer choice and competition (**RM 4**, Article 9.3). Before the introduction of the new gTLD program, ICANN had, over time, expanded the DNS from the original six generic TLDs (gTLDs) to 22 gTLDs and approximately 250 two-letter country-code TLDs (ccTLDs).

13. In 2005, ICANN's Generic Names Supporting Organization (GNSO) began a policy development process to consider the introduction of new gTLDs (**RM 6-7**). The GNSO is the main policy-making body for generic top-level domains, and encourages global participation in the technical management of the Internet (**RM 2**, Article X). In 2008, the ICANN Board adopted 19 specific GNSO policy recommendations for implementing new gTLDs, with allocation criteria and contractual conditions (**RM 8-9**). These allocation criteria were set out in the Applicant Guidebook, which is the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs. In June 2011, ICANN's Board approved the Guidebook and authorized the launch of the New gTLD Program (**RM 10**). The program's goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII and internationalized domain name (IDN) top-level domains (**RM 11**).

14. The GNSO decided that there must be a clear and pre-published application process using objective and measurable criteria (**RM 9**, GNSO Recommendation 9). The Applicant Guidebook was for prospective applicants to make sure they understand what was required of them when applying for a new gTLD and what they could expect at each stage of the evaluation process (**RM 11**, p. 12; **RM 12**). The final version of the Applicant Guidebook

was made available on 4 June 2012 (**RM 5**), *i.e.*, after the application window for new gTLD applicants closed on 30 May 2012 (**RM 13**).

C. Claimants applied for .hotel

15. Claimants have individually filed applications to operate the .hotel gTLD (**Annexes 2-6**). Claimants relied on the objective and measurable criteria of the Applicant Guidebook and were confident that the decision as to which applicant ICANN would delegate the .hotel gTLD—referring to the common dictionary word – would ultimately be dependent upon negotiations between applicants or an auction among applicants (assuming all applicants passed evaluation).

D. HTLD applied for .hotel as a “community-based” gTLD

16. HTLD also filed an application to operate the .hotel gTLD (**Annex 7**). In its application, HTLD claimed, first, to be representing a community and, second, that the gTLD was going to be operated for the benefit of this alleged community. The purpose of HTLD’s application for a so-called community-based gTLD was in fact to avoid competition for the gTLD string, a highly sought after generic word.

E. ICANN established a Policy in relation to CPE

17. The GNSO developed a policy of granting priority to so-called “qualified community-based applications”. What the GNSO “*had in mind and what [it] had at heart*” when developing the CPE policy was “*really to protect communities like the Navaho community [2], the communities that really didn’t have any other kind of protection, and they[3] wanted to protect these communities in a certain way*” (**RM 14**, p. 14). “*The community-based application was nothing more but to protect small communities. That was the intent of the*

² The Navaho or Navajo community refers to the largest federally recognized tribe of indigenous people in the United States of America.

³ The GNSO members.

GNSO” (RM 14, p. 15). The purpose of community-based applications was never to eliminate competition among applicants for a generic word TLD or to pick winners and losers within a diverse commercial industry. Indeed, any such purpose would be contrary to the fundamental principles that form the basis of ICANN.

18. This purpose was clearly translated in the Applicant Guidebook. As a qualified community application eliminates all directly contending standard applications, ICANN considered it fundamental that “*very stringent requirements for qualification of a community-based application*” were applied (RM 5, Module 4-9). To be qualified, an application need to score at least 14 points in the CPE (RM 5, Module 4-10) and the scoring process was specifically developed to prevent “*undue priority [being given] to an application that refers to a ‘community’ construed merely to get a sought-after generic word as a gTLD string*” (RM 5, Module 4-9).

19. ICANN initially considered working with a comparative evaluation panel that would advise which applications should be given priority based on a comparative analysis between applications. However, ICANN rejected this idea and opted for a community priority evaluation panel, as there was an absolute consensus within the ICANN community that evaluations should be made on the basis of objective and predictable criteria (RM 9, GNSO Recommendation 9).

F. ICANN selected a CPE Panel, that made an arbitrary determination on the .hotel CPE

20. On the basis of a largely non-transparent selection process the Economist Intelligence Unit was selected to act as the CPE Panel (*infra*, Section VI.A). Having been selected, this CPE Panel arbitrarily determined that HTLD’s application for .hotel be granted community priority (*infra*, Section VI.B).

G. The ICANN Board failed to assure compliance with ICANN’s Policies, as it accepted the CPE Panel’s arbitrary determination on .hotel

21. The CPE Panel was given the task of preparing a recommendation document for ICANN to consider (RM 15, p. 4: final step). On receipt of this recommendation, ICANN published a report stating that the CPE Panel had determined that HTLD’s application met the requirements specified in the Applicant Guidebook. ICANN accepted that the application prevailed in the CPE. ICANN added that the CPE results (i) “do not necessarily determine the final result of the application”, (ii) “might be subject to change”, and (iii) “do not constitute a waiver or amendment of any provision of the Applicant Guidebook” (Annex 8, p. 6).

22. Although the CPE Panel’s determination of HTLD’s application is discriminatory and completely at odds with the provisions of the Applicant Guidebook (*infra*, Sections VI.B.1 and VI.B.2), ICANN has repeatedly declined to reject or review the CPE Panel’s determination.

H. The ICANN Board improperly refused to grant Claimants the right to defend themselves

1. Claimants’ first Request for Reconsideration

23. ICANN’s Board ultimately has responsibility to ensure that ICANN policies are dutifully followed. In fact, its Bylaws (and this Independent Review Process) require it. As Claimants were confronted with a surprising and erroneous CPE result, Claimants asked the Board to fulfill its obligation to ensure compliance with ICANN’s policies. On 28 June 2014, Claimants filed a first Request for Reconsideration (RfR) seeking reconsideration of ICANN’s decision to accept the CPE Panel’s recommendation that HTLD’s application for .hotel be granted community priority (Annex 9).

2. Claimants requested information

24. Claimants realized that they had scant information as to the underlying process and

reasoning. They were not given any insight into the documentation relied on by ICANN or the unidentified members of the CPE Panel. As the opaque CPE determination set aside all of Claimants' applications to operate the .hotel gTLD, on 4 August 2014 Claimants asked (in a DIDP request) for information as to how and by whom the decision had been reached (**Annex 10**). In the DIDP request, Claimants urged ICANN to comply with its transparency obligation surrounding the CPE decision (**Annex 10**). The purpose of Claimants' DIDP request was to allow them to effectively exercise their right to a defense in the framework of Claimants' first RfR by obtaining equal access to documents and information surrounding the CPE. Without such access, Claimants were severely limited in their ability to defend their own position. They did not have access to the same material as the CPE Panel or ICANN, when challenging ICANN's acceptance of the CPE determination.

3. The ICANN Board denied Claimants' first Request for Reconsideration

25. On 22 August 2014, ICANN's Board Governance Committee (BGC) denied Claimants' first RfR of 28 June 2014 (**Annex 11**). At that point in time, ICANN had not yet responded to Claimants' DIDP request, the purpose of which was, as stated, to enable them to effectively prepare a defense in the framework of this first RfR. Without access to a properly prepared defense, the BGC was not in a position to appraise the full facts of the case.

4. ICANN denied Claimants' DIDP Request

26. On 3 September 2014, ICANN denied the DIDP Request, refusing access to the information relating to the basis on which the Claimants' applications were rejected in favor of HTLD (**Annex 12**).

27. ICANN's rejection of the DIDP request made clear that the ICANN Board would not spontaneously review or reverse the BGC's determination of 22 August 2014 in which Claimants' first RfR was denied.

5. Claimants filed a second Request for Reconsideration

28. As Claimants had still not been given an effective opportunity to defend themselves, Claimants filed a second RfR on 22 September 2014, seeking reconsideration of the decision to deny the DIDP request and urging ICANN to perform a fair and transparent CPE (Annex 13). On 11 October 2014, The BGC issued a determination denying the second RfR (Annexes 14-15). In this determination, the BGC stated only that the ICANN staff had adhered to the DIDP process (1) in finding certain requested documents subject to DIDP nondisclosure conditions, and (2) in determining that the potential harm caused by disclosure outweighed the public interest in disclosure. The BGC refused to examine whether the staff's findings and determinations were correct or compliant with ICANN's obligations to remain transparent and accountable, and to ensure due process (*infra*). Compliance with the DIDP process is a necessary, but not sufficient, requirement in ensuring compliance with ICANN's fundamental obligations. By limiting its review to compliance with a given process, the BGC effectively gave complete discretion to its staff. This constitutes an abdication of responsibility in contravention of Article II(1) of the ICANN Bylaws, and a failure by the ICANN Board to conduct due diligence.

I. Claimants had no choice but to initiate a request for an Independent Review Process

29. In an ultimate attempt to convince ICANN to voluntarily remedy the errors made in the CPE, Claimants initiated a Cooperative Engagement Process (CEP) with ICANN. On 10 December 2014, ICANN asked Claimants to evaluate and advise ICANN within a week on the information that the CPE panel failed to consider. Claimants responded on 17 December 2014. ICANN waited until 21 February 2015 to come back and informed Claimants that it decided to terminate the CEP, giving Claimants 15 days to initiate an IRP. Claimants denounced ICANN's unilateral decision and proposed to mutually agree on the termination of the CEP and the deadline to file an IRP, should ICANN no longer wish to engage itself in the

CEP. However, ICANN denied Claimants' proposal to extend the deadline, while it agreed on an extension in other cases.

30. As a result, Claimants had no choice but to initiate this request for an Independent Review Process. The challenged decisions and actions are attributable to the ICANN Board and materially affect Claimants. If the CPE determination is maintained, Claimants will be unable to compete for the .hotel gTLD, in which all applicants have an equally legitimate interest. It follows that Claimants have standing to file this request.

IV. APPLICABLE LAW

31. In accordance with Article IV(3) of ICANN's Bylaws, an IRP Panel must determine whether the contested actions of the ICANN Board are consistent with applicable rules. 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 law⁴ 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.

32. The IRP Panel has authority to decide whether or not actions or inactions on the part of the ICANN Board are compatible with these principles. The most recent versions of

⁴ In particular, Article IV charges ICANN “with acting consistently with relevant principles of international law, including the general principles of law recognized as a source of international law” (**RM 27**, Declaration of the Independent Review Panel in ICDR Case No. 50 117 T 00224 08, para. 140).

ICANN's Bylaws⁵ – which had not been introduced at the time of Claimants' submissions of its applications⁶ – also require the IRP Panel to focus on whether the ICANN Board was free from conflicts of interest and exercised an appropriate level of due diligence and independent judgment in its decision making.

V. SUMMARY OF ICANN'S OBLIGATIONS

A. Apply policies neutrally, fairly and without discrimination

33. ICANN is subject to a fundamental obligation to act fairly and apply established policies neutrally and without discrimination. Not only does this obligation arise from general principles of international law, it is also laid down repeatedly in ICANN's governing documents. Article 2(3) of ICANN's Bylaws provides that:

“ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any party for disparate treatment unless justified by substantial and reasonable cause . . . ”

34. The above obligation is further elaborated upon in ICANN's Core Values, which require ICANN to make *“decisions by applying documented policies neutrally and objectively, with integrity and fairness.”*(RM 2, Art. I, §2)⁷

B. Remain transparent

35. Article 4 of ICANN's Articles of Incorporation provides that ICANN:

“shall operate for the benefit of the Internet community as a whole, carrying out its activities ... 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.

36. Similarly, Article III of ICANN's Bylaws states that:

⁵ Adopted on 11 April 2013 and subsequently amended on 7 February 2014. Also see ICANN's Bylaws as amended on 16 March 2012, Article IV(3).

⁶ In 2012.

⁷ This requirement is also found in applicable California law, which requires that decisions be made according to procedures that are 'fair and applied uniformly', and not in an 'arbitrary and capricious manner.'

*“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**.”*

37. These provisions are supplemented by the ‘Core Values’ set out in ICANN’s Bylaws. The purpose of the Core Values is to “*guide the decisions and actions of ICANN*” in the performance of its mission (**RM 2**, Art. I, §2). The Core Values include:

*“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.”*(**RM 2**, Art. I, §2(7))

38. The principle of transparency arises from, and is generally seen as an element of, the principle of good faith. Indeed, transparency has itself obtained the position of a fundamental principle in international economic relations, especially in the regulatory and/or standard-setting space that ICANN occupies. The core elements of transparency include clarity of procedures, the publication and notification of guidelines and applicable rules, and the duty to provide reasons for actions taken. The coupling of the terms ‘*open*’ and ‘*transparent*’, and a consideration of the context within which the term has been included, confirms that ICANN intended the term to denote the most developed dimension of transparency, namely openness in decision-making.

C. Remain accountable

39. As already noted, ICANN is required to ensure that it is accountable. Again, one of ICANN’s Core Values is that it must “[*r*]emain[*] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.”* (**RM 2**, Art. I, §2(10) This is reiterated in Art. IV, § 1 of ICANN’s Bylaws, which requires ICANN to “*be accountable to the community for operating in a manner that is consistent with the [...] Bylaws, and with due regard for the core values set forth in Article 1 of the [...] Bylaws.*”

D. Promote competition and innovation

40. In performing its mission, ICANN must depend to the largest possible extent on market mechanisms to promote and sustain a competitive environment. ICANN must be as non-interventionist as possible and its activities are limited to matters requiring, or significantly benefiting from, global coordination. This follows clearly from ICANN's Core Values, which include:

“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. [...]*

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.”(RM 2, Art. I, §2)*

E. Act in good faith

41. Many of the guiding substantive and procedural rules in ICANN's Articles and Bylaws – including the rules involving transparency, fairness, and non-discrimination – are so fundamental that they appear in some form in virtually every legal system in the world. One of the reasons they are so universal is that they arise from the general principle of good faith, which is considered to be the foundation of all law and all conventions. As stated by the ICJ, the principle of good faith is “[o]ne of the basic principles governing the creation and performance of legal obligations.”⁸

42. The principle of good faith includes an obligation to ensure procedural fairness by, *inter alia*, adhering to substantive and procedural rules, avoiding arbitrary action, and

⁸ Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 268 (20 Dec.) (merits) (RM 28); see also Land and Maritime Boundary (Cameroon v. Nig.), 1998 I.C.J. 275, 296 (11 June) (good faith is a “well established principle of international law”) (RM 29).

recognizing legitimate expectations.⁹ ICANN's core values require ICANN to obtain informed input from those entities most affected by ICANN's decisions (**RM 2**, Art. I, §2(9)).

VI. SUMMARY OF ICANN'S BREACHES

A. **The ICANN Board failed to establish, implement and supervise a fair and transparent CPE process in the selection of the CPE Panel**

43. Rather than itself performing the CPE, the ICANN Board decided to rely on the recommendation of third party contractors. As a result, the ICANN Board sought third party providers for "Applicant Evaluation Teams (Technical and Financial Evaluation)", "Geographic Name Evaluation", "String Similarity Examiners" and a "Comparative Evaluation Panel" (which later became a "Community Priority Evaluation Panel") (**RM 16**). The ICANN Board made a number of significant errors in the resulting CPE.

44. In establishing the selection criteria for evaluation panels, and in making selections, the ICANN Board had a duty to ensure compliance with ICANN's fundamental obligations. As expressly stated in ICANN's Call for Expressions of Interest (CfEoI) for CPE Panel, the process for selecting the CPE had *inter alia* to "respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination" (**RM 17-18**, p. 5).

45. However, ICANN did not provide transparency in relation to the CPE selection process. ICANN failed to make clear how it would evaluate candidate responses or how it ultimately did so. The only action taken by ICANN in this regard was to state, in the CfEoI, that responses would be evaluated on the basis of criteria defined in the CfEoI and the Applicant Guidebook (**RM 18**, p. 6). At that time, the Applicant Guidebook was still in an early draft form, and neither the Applicant Guidebook nor the CfEoI in fact contained any

⁹ U.S. and California law, like almost all jurisdictions, recognize obligations to act in good faith and ensure procedural fairness. The requirement of procedural fairness has been an established part of the California common law since before the turn of the 19th century.

information as to how responses would be evaluated. In addition, the identities of the unsuccessful candidates (if any) for the CPE panel's role remain unknown. Applicants have never been given any information in relation to the candidate responses that were submitted. ICANN has revealed only that, overall, there were 12 candidates for all the different evaluation panel roles, and that EIU was selected to perform the String Similarity Review (**RM 19**, p. 1). There is no indication that any other candidate expressed an interest in performing the CPE. 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 CPE? How did this impact on the discussions with the CPE Panel? What are the terms of ICANN's contract with the CPE Panel?

46. It also remains unclear whether the minimum selection criteria were met. ICANN has never demonstrated that any of the following required information was provided by the CPE Panel selected by the ICANN Board:

- a “*plan for ensuring fairness, nondiscrimination and transparency*” (**RM 18**, p. 6);
- a “*plan for ensuring that evaluation teams[...] consist of qualified individuals and that the candidate will make every effort to ensure a consistently diverse and international panel*” (**RM 18**, p. 6);
- a “*Statement of Suitability that includes a detailed description of the candidate's ability to perform the work [...] which demonstrates knowledge, experience and expertise, including but not limited to projects, consulting work, research, publications and other relevant information*” (**RM 18**, p. 6);
- a “*curriculum vitae for each person proposed by the candidate to manage or lead work on th[e] project, the candidate's selection process for persons being proposed to ICANN, and explanation of the role that each named person would play*” (**RM 18**, p. 6);
- an indication of “*the experience and availability of proposed evaluators*” (**RM 18**, p. 6).

47. Furthermore, the many failures in the CPE Panel's performance of the CPE, described below¹⁰, create a strong presumption that appropriate selection criteria were not met.

B. The ICANN Board failed to establish, implement and supervise a fair and transparent CPE process in allowing the appointed CPE Panel to develop and perform an unfair and arbitrary review process

48. The international law standard of good faith encompasses an obligation to ensure procedural fairness and due process. General principles of 'international due process' include equal and fair treatment of the parties, fair notice, and a fair opportunity to present one's case. These requirements are basic principles that inform transnational procedural public policy. They are more than just formalistic procedural requirements. Compliance must be meaningful: parties must be given adequate notice of the relevant rules and a full and fair opportunity to present their case. The mechanisms for redress must be both timely and effective. In view of ICANN's general obligations and the selection criteria for the CPE Panel established by ICANN, new gTLD applicants could reasonably expect that the CPE would, at a minimum, (i) act in accordance with a plan for "*ensuring fairness, nondiscrimination and transparency*", (ii) reach conclusions that were "*compelling and defensible*" and (iii) "*document the way in which [the CPE performed evaluations] in each case*" (**RM 18**, pp. 5 and 6). Instead, the ICANN Board allowed the CPE Panel to perform the CPE (i) arbitrarily and discriminatory (Section VI.B.1), (ii) without (fairly) applying ICANN's policy (Section VI.B.2), (iii) without providing meaningful reasoning (Section VI.B.3), and (iv) without providing any transparency regarding the evaluators (Section II.B.4).

1. The ICANN Board failed to comply with its obligation to provide non-discriminatory treatment by accepting community priority of

¹⁰ *Infra*, Section VI.B.

HTLD’s application, while other applications with identical characteristics were denied community priority

49. HTLD is not the only applicant that sought to game the application process by invoking an alleged community with a view to obtaining community priority for a highly sought-after generic word. Other applicants used the same strategy:

- Starting Dot applied for the .immo gTLD, destined to serve “*a community restricted to businesses, organizations, associations and governmental and non-governmental organisations operating in the real estate industry*” (**RM 20**);
- dotgay llc attempted to invoke community priority for the .gay gTLD aimed at “*individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society*” (**RM 21**);
- Dadotart Inc attempted to invoke community priority for the .art gTLD aimed at the Art community, “*comprised of individuals, groups of individuals and legal entities who identify themselves with the Arts and actively participate in or support Art activities or the organization of Art activities*” (**RM 22**);
- EFLUX.ART, LLC attempted to invoke community priority for the .art gTLD aimed at “*individuals, organizations and companies who are actively involved on a professional and semi-professional level, with an art community that includes architecture, dance, sculpture, music, painting, poetry, film, photography and comics*” (**RM 23**).
- Taxi Pay GmbH attempted to invoke community priority for the .taxi gTLD aimed at “*[t]he global taxi community, including its four main community groups*” consisting of taxi drivers, offices and entrepreneurs, members of the immediate surrounding industry, superordinate organizations and affiliated businesses (**RM 24**).
- .MUSIC LLC attempted to invoke community priority for the .music gTLD aimed at the Global Music Community, “*comprised of an international range of associations and organizations and the millions of individuals these organizations represent, all of whom are involved in the creation, development, publishing, recording, advocacy, promotion, distribution, education, preservation and or nurturing of the art of music*” (**RM 25**);
- Tennis Australia Ltd attempted to invoke community priority for the .tennis gTLD, which was to “*serve the Australian tennis community, which is comprised of the eight Australian state-and territory-based Member Associations*” related to tennis (**RM 26**).

50. None of these applications was granted community priority. No applicant affiliated with an industry sector besides HTLD was granted community priority over other applicants for a string related to that industry sector. The extraordinary outcome for HTLD’s application was only possible due to a completely different and erroneous application of the evaluation criteria in the .hotel CPE. There is no legitimate reason to differentiate between the .hotel

CPE, on the one hand, and the CPEs for .immo, .gay, .art, .taxi, .music and .tennis, on the other.

51. By way of example, in relation to .art, the CPE panels considered that there is a need for a community “*that is represented by at least one entity that encompasses the entire community as defined by the applicant. There should, therefore, be at least one entity that encompasses and organizes” this entire community (**RM 22 and 23**). This requirement is not taken up in the CPE evaluation of .hotel. And, by HTLD’s own admission, there is no single entity that encompasses the ‘community’ defined by HTLD. The members of IH&RA – the association to which the CPE panel and HTLD refer – only represent part of the hotels worldwide (**Annexes 7 and 8**). HTLD also recognizes that IH&RA is not mainly dedicated to the hotel industry, but is equally dedicated to the restaurant sector (**Annex 7**). Hence, HTLD has not therefore established that there is at least one entity that is mainly dedicated to, encompasses and/or organizes the ‘community’ defined by HTLD.*

52. Another example of discrimination without legitimate reason is the disparate treatment in assessing the nexus between the proposed string and the community. In cases where the string did not match or identify the peripheral industries and entities that are included in the definition of the community, the CPE Panel considered that there was a misalignment between the proposed string and the community as defined by the applicant (**RM 20, RM 24**; see also **RM 22**). In such cases, the CPE granted no points for the nexus requirement. In the .hotel CPE, the Panel recognized that HTLD’s defined ‘community’ also includes entities, such as hotel marketing associations, that may not be automatically associated with the gTLD. However, it considered these entities to comprise only a small part of the community. Such reasoning was not applied in the other CPEs. *E.g.*, in the .gay CPE, the inclusion of individuals who are supportive of the gay community, but who are not gay themselves, was a reason to deny the existence of a nexus between the proposed string and

the community (RM 21). Moreover, the CPE Panel in the .hotel evaluation did not take into account that associations representing hotels (1) are not usually referred to using the term ‘hotel’, and (2) often represent other sectors as well. If the CPE Panel used the same standard as, e.g., in the .gay, .immo and .taxi CPEs, it would never have decided that the requirements for nexus were met.

2. **The CPE process was unfair and non-transparent because of the evaluators’ disregard of ICANN’s policy**

53. The abovementioned examples of disparate treatment in the CPE process also show that the CPE process was performed in violation of ICANN’s CPE policy. As outlined in RfR 14-34, the CPE Panel in the .hotel CPE committed several additional policy violations. It did not analyze whether there was a community that meets the definition of “community” under the rules of the Applicant Guidebook, requiring an analysis of the awareness and recognition of the community among the members. The CPE panel did not verify whether such awareness and recognition was present, but simply considered that there is awareness and recognition among the members of the community, “*because the community is defined in terms of its association with the hotel industry and the provision of specific hotel services*” (Annex 8, p. 2). However, the mere definition of a ‘community’ in a particular way can never demonstrate awareness and recognition by community members. Indeed, it is very unlikely that e.g., a tourism association, which is representative of travel services, tour guides, restaurants, lodging facilities, car rental services, etc., but which also happens to represent hoteliers, is aware of the fact that it is a member of the ‘hotel community’ as defined by HTLD. In this regard, the CPE Panel in the .taxi CPE found that there was no awareness or recognition among community members, because “*many affiliated businesses and sectors would have only a tangential relationship with the core taxi community, and therefore would not associate themselves with being part of the community as defined by the applicant*” (RM 24, p. 2).

54. Other examples of policy violations are taken up in Claimants' first RfR (Annex 9).

3. **The CPE process was unfair, non-transparent and arbitrary, because of the lack of meaningful reasoning**

55. The CPE Panel also did not provide meaningful reasoning for its decision. It even went as far as inventing facts. When evaluating HTLD's registration policies as indicated in the application, the CPE Panel must assess whether these policies include specific enforcement measures constituting a coherent set with appropriate appeal mechanisms. HTLD's application does not contain a policy with specific enforcement measures and is silent on any appeal mechanism (Annex 7). Nevertheless, the CPE Panel considered: "*The applicant outlined policies that include specific enforcement measures constituting a coherent set. [...] There is also an appeals mechanism, whereby a registrant has the right to request a review of a decision to revoke its right to hold a domain name. (Comprehensive details are provided in Section 20e of the applicant documentation)*" (Annex 8, p. 5). HTLD did not outline any policy that includes specific enforcement measures. It merely stated that it "*will set-up a process for any questions and challenges that may arise from registrations*" (Annex 7). This intention to set-up a process – whatever that might be – in no way qualifies as "*outlined policies that include specific enforcement measures constituting a coherent set*". The affirmation by the CPE Panel that there is an appeals mechanism is even more bizarre. The word 'appeal' does not appear anywhere in HTLD's application (Annex 7). In other CPEs, the CPE Panel sanctioned the applicant for not having an appeal mechanism (RM 24, p. 5). Even if an appeals process had been mentioned, it would have to have been clearly described or it would score zero on the enforcement requirement (RM 25, p. 7).

56. Additionally, the reasoning the CPE Panel has provided is meaningless, because it is contradictory. In evaluating the community endorsement criterion, the CPE Panel considers that the supporting groups "*constitute the recognized institutions to represent the community*" and that they "*represent a majority of the overall community as defined by the applicant*"

(**Annex 8**, p. 6, emphasis added). The CPE Panel makes a distinction between “the community” and the larger “overall community as defined by the applicant”. It is not clear how the former ‘community’ should be defined. However, the CPE Panel’s reliance on the support of a distinct, yet undefined, community shows that the support for the .hotel gTLD came from a ‘community’ other than the one that was defined by the applicant. The need to introduce a distinct and undefined community goes against the exact purpose of the CPE policy, requiring support of the community targeted by the string. It is at odds with the CPE panel’s findings on organization and nexus between the proposed string and the ‘community’.

4. **The CPE process was unfair, non-transparent and discriminatory due to the use of anonymous evaluators**

57. ICANN’s obligation to safeguard due process rights covers the right to be heard by an independent and impartial adjudicator.¹¹ That right is violated if the adjudicator remains anonymous.¹² The right to know the identity of the adjudicator – with a view to knowing whether there might be grounds for challenging or removing them – is a fundamental requirement.¹³

58. In this case, Claimants had no notice, and absolutely no opportunity to present their case. Claimants were deprived of procedural fairness and the opportunity to be heard through ICANN’s failure to provide advance notice of the applicable standards, failure to allow any opportunity to contest those standards, and failure to provide any means of remedy or redress. Put simply, Claimants were not offered any opportunity to be heard on their own case.

59. Further, Claimants were not given any opportunity for remedy or redress once the decision had been made. Although Claimants challenged the decision through ICANN’s

¹¹ *E.g.*, Article 14 ICCPR (**RM 30**).

¹² IACoMHR, *Lindo et al. v. Peru*, Case 11.182, Report No. 49/00, paras. 115-118 (**RM 31**).

¹³ *See* IACoMHR, *Lindo et al. v. Peru*, Case 11.182, Report No. 49/00, paras. 116 (**RM 31**).

Reconsideration process, ICANN's Board explicitly refused to reconsider the substance of the challenged decision, instead relying on a cursory analysis of procedural requirements.

60. Claimants were never given any meaningful opportunity to be heard on the substance of the CPE determination (by either the CPE Panel itself, or by ICANN upon receiving the Panel's decision), nor any opportunity to seek redress for the erroneous decision. Accordingly, the CPE determination was made without due process, and ICANN's acceptance of the determination, and repeated failure to remedy the wrongful determination through the Reconsideration process or otherwise, is a failure to act with due diligence and independent judgment, and a failure to act in good faith as required by ICANN's Bylaws and Articles of Incorporation.

C. The ICANN Board failed to establish, implement and supervise a fair and transparent CPE process by blindly accepting the advice of the CPE, without providing effective quality control

61. The CPE Panel's description of the CPE process shows that the Panel's final step in that process is the preparation of a "final recommendation document" (**RM 15**). In other words, the CPE Panel does not take a decision, instead it is supposed to give a recommendation to ICANN.

62. There is no indication that any quality review process – other than the CPE Panel's internal quality review process – has been put in place or followed by ICANN. ICANN simply accepted the recommendation and posted it on its website without review.

D. ICANN failed to promote competition and innovation by accepting the CPE

63. ICANN's core mission requires ICANN to be as non-interventionist as possible, and the purpose of community-based applications was never to eliminate competition among applicants for a generic word TLD or pick winners and losers within a diverse commercial industry. Despite this, the ICANN Board's decision to accept the CPE Panel's determination

does exactly that. It picks a winner, HTLD, on the basis of a purely arbitrary decision, and eliminates all possible competition for obtaining the .hotel gTLD.

E. The ICANN Board failed to correct the mistakes in the CPE process and denied Claimants their right to be heard

64. The ICANN Board should have corrected the mistakes in the CPE process on its own motion. Since ICANN's Board has ultimate responsibility for the New gTLD Program, it is required to supervise and assure the compliance of that program (and its implementation) with ICANN's fundamental obligations under its Articles of Incorporation and Bylaws. The Applicant Guidebook explicitly calls on the Board to individually consider an application under an ICANN accountability mechanism (**RM 5**, Module 5-4), such as a Request for Reconsideration (**RM 2 and RM 3**, Article IV(2)).

65. Claimants' RfRs and DIDP request (**Annexes 9, 10 and 13**), and the fact that ICANN discovered affected applicants had no sufficient information regarding the process, should have alerted the ICANN Board to the need to investigate and correct the errors in that process. Instead, the ICANN Board chose, in its own self-interest, to invoke the excuse of confidentiality (**Annexes 12 and 14**) and to refuse to offer any transparency in relation to the CPE process.

66. When Claimants filed their RfRs with the ICANN Board, they informed the Board of the many errors in the CPE process, giving the Board ample opportunity to correct those errors. However, the Board chose, through the BGC, to take no action, not even to investigate the conformity of the CPE process with its fundamental obligations. The BGC contented itself with issuing a statement that the CPE "*Panel's adherence to the Guidebook [that] violates the broadly-phrased fairness principles in ICANN's foundational documents [are not] a proper ground for reconsideration [...]*" (**Annex 11**, p. 10). Otherwise, "*every standard applicant would have the ability to rewrite the Guidebook via a reconsideration request*" (**Annex 11**, p. 10). When dismissing Claimants' second RfR, the BGC contented

itself with issuing a statement that Claimants identified “*no policy or procedure that ICANN staff violated in making its determination*”. In both RfRs, the BGC refused to review compliance of ICANN’s actions with ICANN’s fundamental obligations. The BGC’s blanket refusal to verify this issue was based on the misunderstanding that Claimants wished to rewrite the Applicant Guidebook. Claimants were not, however, seeking to rewrite ICANN’s policy or the Applicant Guidebook. Claimants were merely asking that ICANN comply with its own policies and fundamental obligations in relation to the performance of the CPE process, and to implement the Applicant Guidebook in compliance with these fundamental obligations. Moreover, even if a published policy or process were to explicitly derogate from fundamental due process rights (which is not the case here), ICANN could not implement that policy or process without violating its Articles of Incorporation and Bylaws, regardless of the contents of the Applicant Guidebook. Instead of investigating compliance with those policies and principles (*i.e.*, its governing rules), the ICANN Board – through the BGC – chose to misinterpret and ignore Claimants’ RfRs. As a result, the ICANN Board denied Claimants their right to be heard.

VII. PROCEDURAL MATTERS

67. Pursuant to Article IV, Section 3(9) of the Bylaws, Claimants hereby request that the Panel be composed of three (3) members, each of whom shall be impartial and independent of the parties.

68. It does not appear that ICANN has established the omnibus standing panel described in Art. IV, Section (6) of the Bylaws. As a result, pursuant to Art. 6 of the ICDR Rules, Claimants suggest that the parties agree to the following method for appointing the IRP Panel: each party shall appoint one panelist, after which the two panelists so appointed shall jointly select, in consultation with the parties, the third panelist, who shall serve as the Chairman of the Panel.

69. Claimants propose that both Claimants and ICANN simultaneously make their panelist appointment within twenty (20) days of ICANN's agreement to the Panel appointment procedure set forth herein. The two co-panelists shall select the Chairman of the Panel within twenty (20) days of the confirmation by ICDR of the appointment of the respective panelists. In the event that ICANN fails to make its panelist appointment within the time period indicated, the ICDR shall make the appointment of ICANN's panelist within thirty (30) days of the date on which ICANN should have made its panelist appointment. In the event that the two party-appointed panelists fail to agree on the identity of the third arbitrator, that appointment shall be made by the ICDR, in accordance with its established procedures.

VIII. RELIEF REQUESTED

70. Based on the foregoing, and reserving all rights to rebut ICANN's response in further briefs and during a hearing, Claimants respectfully request that the Panel :

- Declare that ICANN breached its Articles of Incorporation, its Bylaws, and/or the gTLD Applicant Guidebook;
- Declare that ICANN must reject the determination that HTLD's application for .hotel be granted community priority;
- Award Claimants their costs in this proceeding; and
- Award such other relief as the Panel may find appropriate in order to ensure that the ICANN Board follow its Bylaws, Articles of Incorporation, or other policies, or other relief that Claimants may request after further briefing or argument.

Respectfully submitted,



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List of annexes

- Annex 1 - Contact details of Claimants
- Annex 2 - Despegar Online SRL's application to operate the .hotel gTLD (Application ID 1-1249-1940)
- Annex 3 - Spring McCook, LLC (subsidiary of Donuts Inc.)'s application to operate the .hotel gTLD (Application ID 1-1500-16803)
- Annex 4 - dot Hotel Limited / Famous Four Media Limited's application to operate the .hotel gTLD (Application ID 1-1181-77853)
- Annex 5 - Fegistry LLC's application to operate the .hotel gTLD (Application ID 1-1913-57874)
- Annex 6 - DotHotel Inc. / Radix FZC's application to operate the .hotel gTLD (Application ID 1-1059-97519)
- Annex 7 - HOTEL Top-Level-Domain s.a.r.l.'s application to operate the .hotel gTLD (Application ID 1-1032-95136)
- Annex 8 - Community priority evaluation report of HOTEL Top-Level-Domain s.a.r.l.'s application to operate the .hotel gTLD, dated 11 June 2014
- Annex 9 - Claimants' Request for Reconsideration 14-34 of 28 June 2014
- Annex 10 - Claimants' DIDP Request of 4 August 2014
- Annex 11 - Board Governance Committee determination on Request for Reconsideration 14-34 of 22 August 2014
- Annex 12 - ICANN's Response to DIDP Request of 3 September 2014
- Annex 13 - Claimants' Request for Reconsideration 14-39 of 22 September 2014
- Annex 14 - Board Governance Committee determination on Request for Reconsideration 14-39 of 11 October 2014
- Annex 15 - Minutes of the Meeting of the Board Governance Committee on 11 October 2014, published on 23 October 2014

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19. Michael Sarazar, "Preparing Evaluators for the new gTLD Application Process, 22 November 2011
20. Community priority evaluation report of Starting Dot's application to operate the .immo gTLD, dated 17 March 2014
21. Community priority evaluation report of dotgay llc's application to operate the .gay gTLD, dated 6 October 2014
22. Community priority evaluation report of Dadotart Inc's application to operate the .art gTLD, dated 10 September 2014
23. Community priority evaluation report of EFLUX.ART, LLC's application to operate the .art gTLD, dated 10 September 2014
24. Community priority evaluation report of Taxi Pay GmbH's application to operate the .taxi gTLD, dated 17 March 2014

25. Community priority evaluation report of MUSIC LLC's application to operate the .music gTLD, dated 6 October 2014
26. Community priority evaluation report of Tennis Australia ltd's application to operate the .tennis gTLD, dated 17 March 2014
27. Declaration of the Independent Review Panel in ICDR Case No. 50 117 T 00224 08
28. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 268 (20 Dec.) (merits)
29. Land and Maritime Boundary (Cameroon v. Nig.), 1998 I.C.J. 275, 296 (11 June)
30. International Covenant on Civil and Political Rights (ICCPR)
31. IACoMHR, *Lindo et al. v. Peru*, Case 11.182, Report No. 49/00

Reference Material 63.

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

Little Birch, LLC)
Minds + Machines Group Limited)
)
)
)
Claimants)
)
v.)
)
INTERNET CORPORATION FOR)
ASSIGNED NAMES AND NUMBERS)
)
Respondent)
_____)

ICDR Case No. _____

**REQUEST FOR INDEPENDENT REVIEW PROCESS
BY LITTLE BIRCH, LLC AND MINDS + MACHINES GROUP LIMITED**

Flip Petillion,
Crowell & Moring LLP
7, rue Joseph Stevens
B-1000 Brussels, Belgium
Counsel for Claimants

I. IDENTIFICATION OF THE PARTIES

A. Claimants

1. The Claimants in this dispute are Little Birch LLe, a subsidiary of Donuts Inc. and Minds + Machines Group Limited, formerly known as Top Level Domain Holdings Limited. Full contact details of Claimants are provided as **Annex 1**.

2. Claimants are represented in these proceedings by:

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Crowell & Moring LLP
7, rue Joseph Stevens
B-1000 Brussels, Belgium
Tel: +32 2 282 4082
Fax: +32 2 230 6399

B. Respondent

3. The Respondent is the Internet Corporation for Assigned Names and Numbers (ICANN). The Respondent's contact details are as follows: 12025 Waterfront Drive, Suite 300, Los Angeles, CA 90094-2536.

II. EXECUTIVE SUMMARY

4. ICANN organized a new gTLD application round in 2012, allowing interested entities to compete for operating new gTLDs or internet extensions of their choice. Where multiple entities applied for the same string, they were asked to come to an amicable agreement under which one or more applicants withdrew their applications. If no amicable solution was found, applicants in contention for the same string were invited to participate in an auction, the proceeds of which would go to ICANN.

5. ICANN wanted to offer some kind of protection to well-established communities that might otherwise lose out if the free-market competition for gTLD strings was allowed to go unchecked. ICANN therefore introduced a mechanism allowing such communities to apply for a so-called community-based gTLD string that would identify the community. If a community-based gTLD application met the stringent criteria for obtaining "community

priority”, the application was allowed to proceed, and non-community-based applications for the same string were set aside.

6. During ICANN’s recent new gTLD application round, Claimants applied to operate the .eco gTLD (**Annexes 2-3**). Another applicant, Big Room Inc. (Big Room), also applied for the .eco gTLD (**Annex 4**). Big Room claimed that its application was community-based. A panel of third-party evaluators, commissioned by ICANN, decided that Big Room’s application for .eco met the criteria for obtaining “community priority” (**Annex 5**). ICANN then adopted the panel’s determination, without any review.

7. The determination was, however, opaque, in violation of ICANN’s very policy on “community priority”, based on non-existent facts, made by a faceless panel, and in violation of ICANN’s fundamental obligations. Claimants have never been given an opportunity to comment, let alone contest, the undisclosed materials considered by the panel or the panel’s insufficient reasoning. As a result of the community priority evaluation (CPE), Claimants’ applications have been excluded without justification. Even if ICANN reconsiders the CPE, Claimants’ applications have been needlessly delayed and subjected to additional procedures (Documentary Information Disclosure Policy (DIDP) Request, Request for Reconsideration (RfR)). ICANN’s CPE was an abdication of responsibility and contrary to the evaluation policies ICANN had established for new gTLD applications, especially in view of the fact that community priority was denied for similarly situated applications. The CPE of Big Room’s application for .eco is not justified by any legitimate security or stability concerns. It is baseless and arbitrary.

8. Claimants repeatedly asked ICANN – among others in their DIDP Request and two consecutive RfRs – to comply with its own policy and remedy the improper treatment of the .eco applications. ICANN has not only declined, but has attempted to evade all responsibility.

9. ICANN’s treatment of Claimants’ applications is inconsistent with both the new gTLD

policies established in the Guidebook as well as with fundamental ICANN policies and obligations requiring fairness, non-discrimination, transparency, accountability, and good faith. By accepting a third-party determination that is contrary to its policies, ICANN has failed to act with due diligence and failed to exercise independent judgment. Accordingly, Claimants request that ICANN be required to overturn the CPE in relation to .eco and allow Claimants' applications to proceed on their own merits.

III. SUMMARY OF RELEVANT FACTS

A. The parties

1. Claimants

10. Both Claimants offer services in the Internet's domain name system (DNS). Claimants and their affiliated companies have applied for numerous gTLDs with ICANN.

2. ICANN

11. ICANN is a non-profit public benefit corporation that was established under the laws of the State of California on 30 September 1998. ICANN is responsible for administering technical aspects of the Internet's DNS. Core to its mission is increasing competition and fostering choice in the DNS. ICANN's Articles of Incorporation require ICANN to act "*for the benefit of the Internet community as a whole*" and "*in conformity with the relevant principles of international law and local law*" (RM¹ 1, Article 4). ICANN's fundamental principles, which are reiterated numerous times in ICANN's governance documents and other policies, require ICANN to ensure fairness, non-discrimination, openness and transparency, accountability, and the promotion of competition, as well as to act in good faith.

B. ICANN established the new gTLD Program

12. ICANN's responsibilities include establishing a process for introducing new top-level

¹ Reference Material.

domains (TLDs) in order to promote consumer choice and competition (**RM 4**, Article 9.3). Before the introduction of the new gTLD program, ICANN had, over time, expanded the DNS from the original six generic TLDs (gTLDs) to 22 gTLDs and approximately 250 two-letter country-code TLDs (ccTLDs).

13. In 2005, ICANN's Generic Names Supporting Organization (GNSO) began a policy development process to consider the introduction of new gTLDs (**RM 6-7**). The GNSO is the main policy-making body for generic top-level domains, and encourages global participation in the technical management of the Internet (**RM 2**, Article X). In 2008, the ICANN Board adopted 19 specific GNSO policy recommendations for implementing new gTLDs, with allocation criteria and contractual conditions (**RM 8-9**). These allocation criteria were set out in the Applicant Guidebook, which is the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs. In June 2011, ICANN's Board approved the Guidebook and authorized the launch of the New gTLD Program (**RM 10**). The program's goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII and internationalized domain name (IDN) top-level domains (**RM 11**).

14. The GNSO decided that there must be a clear and pre-published application process using objective and measurable criteria (**RM 9**, GNSO Recommendation 9). The Applicant Guidebook was for prospective applicants to make sure they understand what was required of them when applying for a new gTLD and what they could expect at each stage of the evaluation process (**RM 11**, p. 12; **RM 12**). The final version of the Applicant Guidebook was made available on 4 June 2012 (**RM 5**), *i.e.*, after the application window for new gTLD applicants closed on 30 May 2012 (**RM 13**).

C. Claimants applied for .eco

15. Claimants have individually filed applications to operate the .eco gTLD (**Annexes 2-**

3). Claimants relied on the objective and measurable criteria of the Applicant Guidebook and were confident that the decision as to which applicant ICANN would delegate the .eco gTLD – referring to the common dictionary word – would ultimately be dependent upon negotiations between applicants or an auction among applicants (assuming all applicants passed evaluation).

D. Big Room applied for .eco as a “community-based” gTLD

16. Big Room also filed an application to operate the .eco gTLD (**Annex 4**). In its application, Big Room claimed, first, to be representing a community and, second, that the gTLD was going to be operated for the benefit of this alleged community. The purpose of Big Room’s application for a so-called community-based gTLD was in fact to avoid competition for the gTLD string, a highly sought after generic word.

E. ICANN established a Policy in relation to CPE

17. The GNSO developed a policy of granting priority to so-called “qualified community-based applications”. What the GNSO “*had in mind and what [it] had at heart*” when developing the CPE policy was “*really to protect communities like the Navaho community* [²], *the communities that really didn’t have any other kind of protection, and they*[³] *wanted to protect these communities in a certain way*” (**RM 14**, p. 14). “*The community-based application was nothing more but to protect small communities. That was the intent of the GNSO*” (**RM 14**, p. 15). The purpose of community-based applications was never to eliminate competition among applicants for a generic word TLD nor to pick winners and losers within a diverse commercial industry. Indeed, any such purpose would be contrary to the fundamental principles that form the basis of ICANN.

² The Navaho or Navajo community refers to the largest federally recognized tribe of indigenous people in the United States of America.

³ The GNSO members.

18. This purpose was clearly translated in the Applicant Guidebook. As a qualified community application eliminates all directly contending standard applications, ICANN considered it fundamental that “*very stringent requirements for qualification of a community-based application*” were applied (**RM 5**, Module 4-9). To be qualified, an application need to score at least 14 points in the CPE (**RM 5**, Module 4-10) and the scoring process was specifically developed to prevent “*undue priority [being given] to an application that refers to a ‘community’ construed merely to get a sought-after generic word as a gTLD string*” (**RM 5**, Module 4-9).

19. ICANN initially considered working with a comparative evaluation panel that would advise which applications should be given priority based on a comparative analysis between applications. However, ICANN rejected this idea and opted for a community priority evaluation panel, as there was an absolute consensus within the ICANN community that evaluations should be made on the basis of objective and predictable criteria (**RM 9**, GNSO Recommendation 9).

F. ICANN selected a CPE Panel, that made an arbitrary determination on the .hotel CPE

20. On the basis of a largely non-transparent selection process the Economist Intelligence Unit was selected to act as the CPE Panel (*infra*, Section VI.A). Having been selected, this CPE Panel arbitrarily determined that Big Room’s application for .eco be granted community priority (*infra*, Section VI.B).

G. The ICANN Board failed to assure compliance with ICANN’s Policies, as it accepted the CPE Panel’s arbitrary determination on .eco

21. The CPE Panel was given the task of preparing a recommendation document for ICANN to consider (**RM 15**, p. 4: final step). On receipt of this recommendation, ICANN published a report stating that the CPE Panel had determined that Big Room’s application met the requirements specified in the Applicant Guidebook. ICANN accepted that the application

prevailed in the CPE. ICANN added that the CPE results (i) “do not necessarily determine the final result of the application”, (ii) “might be subject to change”, and (iii) “do not constitute a waiver or amendment of any provision of the Applicant Guidebook” (**Annex 5**, p. 9).

22. Although the CPE Panel’s determination of Big Room’s application is discriminatory and completely at odds with the provisions of the Applicant Guidebook (*infra*, Sections VI.B.1 and VI.B.2), ICANN has repeatedly declined to reject or review the CPE Panel’s determination.

H. The ICANN Board improperly refused to grant Claimants the right to seek effective redress

1. Claimants’ Request for Reconsideration

23. ICANN’s Board ultimately has responsibility to ensure that ICANN policies are dutifully followed. In fact, its Bylaws (and this Independent Review Process) require it. As Claimants were confronted with a surprising and erroneous CPE result, Claimants asked the Board to fulfill its obligation to ensure compliance with ICANN’s policies. On 22 October 2014, Claimants filed a Request for Reconsideration (RfR) seeking reconsideration of ICANN’s decision to accept the CPE Panel’s recommendation that Big Room’s application for .eco be granted community priority (**Annex 6**).

2. Claimants requested necessary information

24. Claimants also realized that they had scant information as to the underlying process and reasoning. They were not given any insight into the documentation relied on by ICANN or the unidentified members of the CPE Panel. As the opaque CPE determination set aside all of Claimants’ applications to operate the .eco gTLD, on 22 October 2014 Claimants asked (in a DIDP request) for information as to how and by whom the decision had been reached (**Annex 7**). In the DIDP request, Claimants urged ICANN to comply with its transparency obligation surrounding the CPE decision (**Annex 7**). The purpose of Claimants’ DIDP request was to allow them to effectively exercise their right to seek recourse in the framework of Claimants’

RfR by obtaining equal access to documents and information surrounding the CPE. Without such access, Claimants were severely limited in their ability to defend their own position. They did not have access to the same material as the CPE Panel or ICANN, when challenging ICANN's acceptance of the CPE determination.

3. ICANN denied Claimants' DIDP Request

25. On 31 October 2014, ICANN denied the DIDP Request, refusing access to the information relating to the basis on which the Claimants' applications were rejected in favor of Big Room (**Annex 8**).

4. The ICANN Board denied Claimants' Request for Reconsideration

26. On 18 November 2014, ICANN's Board Governance Committee (BGC) also denied Claimants' RfR of 22 October 2014 (**Annex 9**). ICANN published the BGC's meeting minutes on 20 January 2015 (**Annex 10**).

I. Claimants had no choice but to initiate a request for an Independent Review Process

27. On 3 December 2014, in an ultimate attempt to convince ICANN voluntarily to remedy the errors made in the CPE, Claimants initiated a Cooperative Engagement Process (CEP) with ICANN. On 26 February 2015, ICANN informed Claimants that it had unilaterally decided to terminate the CEP.

28. As a result, Claimants had no choice but to initiate this request for an Independent Review Process. The challenged decisions and actions are attributable to the ICANN Board and materially affect Claimants. If the CPE determination is maintained, Claimants will be unable to compete for the .eco gTLD, in which all applicants have an equally legitimate interest. It follows that Claimants have standing to file this request.

IV. APPLICABLE LAW

29. In accordance with Article IV(3) of ICANN's Bylaws, an IRP Panel must determine

whether the contested actions of the ICANN Board are consistent with applicable rules. 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 law⁴ 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.

30. The IRP Panel has authority to decide whether or not actions or inactions on the part of the ICANN Board are compatible with these principles. The most recent versions of ICANN’s Bylaws⁵ – which had not been introduced at the time of Claimants’ submissions of its applications⁶ – also require the IRP Panel to focus on whether the ICANN Board was free from conflicts of interest and exercised an appropriate level of due diligence and independent judgment in its decision making.

V. SUMMARY OF ICANN’S OBLIGATIONS

A. Apply policies neutrally, fairly and without discrimination

31. ICANN is subject to a fundamental obligation to act fairly and apply established policies neutrally and without discrimination. Not only does this obligation arise from general

⁴ In particular, Article IV charges ICANN “with acting consistently with relevant principles of international law, including the general principles of law recognized as a source of international law” (**RM 27**, Declaration of the Independent Review Panel in ICDR Case No. 50 117 T 00224 08, para. 140).

⁵ Adopted on 11 April 2013 and subsequently amended on 7 February 2014. Also see ICANN’s Bylaws as amended on 16 March 2012, Article IV(3).

⁶ In 2012.

principles of international law, it is also laid down repeatedly in ICANN's governing documents. Article 2(3) of ICANN's Bylaws provides that:

“ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any party for disparate treatment unless justified by substantial and reasonable cause . . . ”

32. The above obligation is further elaborated upon in ICANN's Core Values, which require ICANN to make *“decisions by applying documented policies neutrally and objectively, with integrity and fairness.”*(**RM 2**, Art. I, §2)⁷

B. Remain transparent

33. Article 4 of ICANN's Articles of Incorporation provides that ICANN:

“shall operate for the benefit of the Internet community as a whole, carrying out its activities ... 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.

34. Similarly, Article III of ICANN's Bylaws states that:

“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.”

35. These provisions are supplemented by the 'Core Values' set out in ICANN's Bylaws. The purpose of the Core Values is to *“guide the decisions and actions of ICANN”* in the performance of its mission (**RM 2**, Art. I, §2). The Core Values include:

“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.”(**RM 2**, Art. I, §2(7))

36. The principle of transparency arises from, and is generally seen as an element of, the principle of good faith. Indeed, transparency has itself obtained the position of a fundamental principle in international economic relations, especially in the regulatory and/or standard-

⁷ This requirement is also found in applicable California law, which requires that decisions be made according to procedures that are 'fair and applied uniformly', and not in an 'arbitrary and capricious manner.'

setting space that ICANN occupies. The core elements of transparency include clarity of procedures, the publication and notification of guidelines and applicable rules, and the duty to provide reasons for actions taken. The coupling of the terms ‘open’ and ‘transparent’, and a consideration of the context within which the term has been included, confirms that ICANN intended the term to denote the most developed dimension of transparency, namely openness in decision-making.

C. Remain accountable

37. As already noted, ICANN is required to ensure that it is accountable. Again, one of ICANN’s Core Values is that it must “[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.” (**RM 2**, Art. I, §2(10) This is reiterated in Art. IV, § 1 of ICANN’s Bylaws, which requires ICANN to “be accountable to the community for operating in a manner that is consistent with the [...] Bylaws, and with due regard for the core values set forth in Article 1 of the [...] Bylaws.”

D. Promote competition and innovation

38. In performing its mission, ICANN must depend to the largest possible extent on market mechanisms to promote and sustain a competitive environment. ICANN must be as non-interventionist as possible and its activities are limited to matters requiring, or significantly benefiting from, global coordination. This follows clearly from ICANN’s Core Values, which include:

“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. [...]

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.”(**RM 2**, Art. I, §2)

E. Act in good faith

39. Many of the guiding substantive and procedural rules in ICANN’s Articles and Bylaws

– including the rules involving transparency, fairness, and non-discrimination – are so fundamental that they appear in some form in virtually every legal system in the world. One of the reasons they are so universal is that they arise from the general principle of good faith, which is considered to be the foundation of all law and all conventions. As stated by the ICJ, the principle of good faith is “[o]ne of the basic principles governing the creation and performance of legal obligations.”⁸

40. The principle of good faith includes an obligation to ensure procedural fairness by, *inter alia*, adhering to substantive and procedural rules, avoiding arbitrary action, and recognizing legitimate expectations.⁹ ICANN’s core values require ICANN to obtain informed input from those entities most affected by ICANN’s decisions (**RM 2**, Art. I, §2(9)).

VI. SUMMARY OF ICANN’S BREACHES

A. The ICANN Board failed to establish, implement and supervise a fair and transparent CPE process in the selection of the CPE Panel

41. Rather than itself performing the CPE, the ICANN Board decided to rely on the recommendation of third party contractors. As a result, the ICANN Board sought third party providers for “Applicant Evaluation Teams (Technical and Financial Evaluation)”, “Geographic Name Evaluation”, “String Similarity Examiners” and a “Comparative Evaluation Panel” (which later became a “Community Priority Evaluation Panel”) (**RM 16**). The ICANN Board made a number of significant errors in the resulting CPE.

42. In establishing the selection criteria for evaluation panels, and in making selections, the ICANN Board had a duty to ensure compliance with ICANN’s fundamental obligations. As expressly stated in ICANN’s Call for Expressions of Interest (CfEoI) for CPE Panel, the

⁸ Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 268 (20 Dec.) (merits) (**RM 28**); *see also* Land and Maritime Boundary (Cameroon v. Nig.), 1998 I.C.J. 275, 296 (11 June) (good faith is a “well established principle of international law”) (**RM 29**).

⁹ U.S. and California law, like almost all jurisdictions, recognize obligations to act in good faith and ensure procedural fairness. The requirement of procedural fairness has been an established part of the California common law since before the turn of the 19th century.

process for selecting the CPE had *inter alia* to “*respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination*” (**RM 17-18**, p. 5).

43. However, ICANN did not provide transparency in relation to the CPE selection process. ICANN failed to make clear how it would evaluate candidate responses or how it ultimately did so. The only action taken by ICANN in this regard was to state, in the CfEoI, that responses would be evaluated on the basis of criteria defined in the CfEoI and the Applicant Guidebook (**RM 18**, p. 6). At that time, the Applicant Guidebook was still in an early draft form, and neither the Applicant Guidebook nor the CfEoI in fact contained any information as to how responses would be evaluated. In addition, the identities of the unsuccessful candidates (if any) for the CPE panel’s role remain unknown. Applicants have never been given any information in relation to the candidate responses that were submitted. ICANN has revealed only that, overall, there were 12 candidates for all the different evaluation panel roles, and that EIU was selected to perform the String Similarity Review (**RM 19**, p. 1). There is no indication that any other candidate expressed an interest in performing the CPE. 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 CPE? How did this impact on the discussions with the CPE Panel? What are the terms of ICANN’s contract with the CPE Panel?

44. It also remains unclear whether the minimum selection criteria were met. ICANN has never demonstrated that any of the following required information was provided by the CPE Panel selected by the ICANN Board:

- a “*plan for ensuring fairness, nondiscrimination and transparency*” (**RM 18**, p. 6);
- a “*plan for ensuring that evaluation teams[...] consist of qualified individuals and that the candidate will make every effort to ensure a consistently diverse and international panel*” (**RM 18**, p. 6);

- a “*Statement of Suitability that includes a detailed description of the candidate’s ability to perform the work [...] which demonstrates knowledge, experience and expertise, including but not limited to projects, consulting work, research, publications and other relevant information*” (**RM 18**, p. 6);
- a “*curriculum vitae for each person proposed by the candidate to manage or lead work on th[e] project, the candidate’s selection process for persons being proposed to ICANN, and explanation of the role that each named person would play*” (**RM 18**, p. 6);
- an indication of “*the experience and availability of proposed evaluators*” (**RM 18**, p. 6).

45. Furthermore, the many failures in the CPE Panel’s performance of the CPE, described below¹⁰, create a strong presumption that appropriate selection criteria were not met.

B. The ICANN Board failed to establish, implement and supervise a fair and transparent CPE process in allowing the appointed CPE Panel to develop and perform an unfair and arbitrary review process

46. The international law standard of good faith encompasses an obligation to ensure procedural fairness and due process. General principles of ‘international due process’ include equal and fair treatment of the parties, fair notice, and a fair opportunity to present one’s case. These requirements are basic principles that inform transnational procedural public policy. They are more than just formalistic procedural requirements. Compliance must be meaningful: parties must be given adequate notice of the relevant rules and a full and fair opportunity to present their case. The mechanisms for redress must be both timely and effective. In view of ICANN’s general obligations and the selection criteria for the CPE Panel established by ICANN, new gTLD applicants could reasonably expect that the CPE would, at a minimum, (i) act in accordance with a plan for “*ensuring fairness, nondiscrimination and transparency*”, (ii) reach conclusions that were “*compelling and defensible*” and (iii) “*document the way in which [the CPE performed evaluations] in each case*” (**RM 18**, pp. 5 and 6). Instead, the ICANN Board allowed the CPE Panel to perform the CPE (i) arbitrarily and discriminatory (Section

¹⁰ *Infra*, Section VI.B.

VI.B.1), (ii) without (fairly) applying ICANN’s policy (Section VI.B.2), (iii) without providing meaningful reasoning (Section VI.B.3), and (iv) without providing any transparency regarding the evaluators (Section II.B.4). The ICANN Board did not exercise due diligence and care in accepting the CPE Panel’s advice on .eco, despite clear indications that the advice was erroneous and that its acceptance resulted in inequitable treatment towards similarly situated applicants. In blindly accepting the erroneous advice, the ICANN Board failed to exercise independent judgment in a decision that is clearly not in the best interests of the Internet community, and, by extension, ICANN.

1. **The ICANN Board failed to comply with its obligation to provide non-discriminatory treatment by accepting community priority of Big Room’s application, while other applications with identical characteristics were denied community priority**

47. Big Room is not the only applicant that sought to exploit the application process by invoking an alleged community with a view to obtaining community priority for a highly sought-after generic word. Other applicants used the same strategy:

- Starting Dot applied for the .immo gTLD, destined to serve “*a community restricted to businesses, organizations, associations and governmental and non-governmental organisations operating in the real estate industry*” (**RM 20**);
- dotgay llc attempted to invoke community priority for the .gay gTLD aimed at “*individuals whose gender identities and sexual orientation are outside of the norms defined for heterosexual behavior of the larger society*” (**RM 21**);
- Dadotart Inc attempted to invoke community priority for the .art gTLD aimed at the Art community, “*comprised of individuals, groups of individuals and legal entities who identify themselves with the Arts and actively participate in or support Art activities or the organization of Art activities*” (**RM 22**);
- EFLUX.ART, LLC attempted to invoke community priority for the .art gTLD aimed at “*individuals, organizations and companies who are actively involved on a professional and semi-professional level, with an art community that includes architecture, dance, sculpture, music, painting, poetry, film, photography and comics*” (**RM 23**).
- Taxi Pay GmbH attempted to invoke community priority for the .taxi gTLD aimed at “[t]he global taxi community, including its four main community groups” consisting of taxi drivers, offices and entrepreneurs, members of the immediate surrounding industry, superordinate organizations and affiliated businesses (**RM 24**).
- .MUSIC LLC attempted to invoke community priority for the .music gTLD aimed at the Global Music Community, “*comprised of an international range of associations and organizations and the millions of individuals these organizations represent, all of whom are involved in the creation, development, publishing, recording, advocacy,*

promotion, distribution, education, preservation and or nurturing of the art of music” **(RM 25)**;

- Tennis Australia Ltd attempted to invoke community priority for the .tennis gTLD, which was to “*serve the Australian tennis community, which is comprised of the eight Australian state-and territory-based Member Associations*” related to tennis **(RM 26)**.

48. None of these applications was granted community priority. No applicant affiliated with an industry sector besides Big Room and Hotel Top-Level-Domain Sàrl (HTLD) was granted community priority over other applicants for a string related to that industry sector. The extraordinary outcomes for Big Room’s application for .eco and HTLD’s application for .hotel were only possible due to a completely different and clearly erroneous application of the evaluation criteria in the .eco and .hotel CPE. There is no legitimate reason to differentiate between the .eco CPE, on the one hand, and the CPEs for .immo, .gay, .art, .taxi, .music and .tennis, on the other. The CPE for .hotel is challenged on similar grounds as the CPE for .eco **(RM 32)**.

49. By way of example, in relation to .art, the CPE panel considered that there is a need for a community “*that is represented by at least one entity that encompasses the entire community as defined by the applicant. There should, therefore, be at least one entity that encompasses and organizes*” this entire community **(RM 22 and 23)**. This requirement is not taken up in the CPE evaluation of .eco. And, by Big Room’s own admission, there is no single entity that encompasses the ‘community’ defined by Big Room. Big Room claims, without foundation, that the “*Community has historically structured and organized itself and its work through an international network of organizations*”. Big Room makes no claim that this alleged network of organizations encompasses the entire community as defined by Big Room. Even the organization that was specifically created by Big Room for the purposes of its community-based application does not encompass the entire community. It represents only “*the majority of the Community*” **(Annex 4, p. 18)**. Hence, Big Room has not therefore established that there

is at least one entity that is mainly dedicated to, encompasses and/or organizes the entire ‘community’ defined by Big Room.

50. Another example of discrimination without legitimate reason is the disparate treatment in assessing the nexus between the proposed string and the community. In cases where the string did not match or identify the peripheral industries and entities that are included in the definition of the community, the CPE Panel considered that there was a misalignment between the proposed string and the community as defined by the applicant (**RM 20**, **RM 24**; see also **RM 22**). In such cases, the CPE granted no points for the nexus requirement. If the CPE Panel used the same standard as, *e.g.*, in the .gay, .immo and .taxi CPEs, it would never have decided that the requirements for nexus were met.

2. The CPE process was unfair and non-transparent because of the evaluators’ disregard of ICANN’s policy

51. The abovementioned examples of disparate treatment in the CPE process also show that the CPE process was performed in violation of ICANN’s CPE policy. As outlined in Claimants’ RfR, the CPE Panel in the .eco CPE committed several additional policy violations. It did not analyze whether there was a “community” within the definition of that term under the rules of the Applicant Guidebook, requiring an analysis of the awareness and recognition of the community among the members. The CPE panel did not verify whether such awareness and recognition was present, but simply considered that there is cohesion and awareness among the members of the community, “*because each individual or entity [that is defined as community members in the application] has a clear, public and demonstrable involvement in environmental activities*” (**Annex 5**, pp. 2-3). The CPE panel continued by referencing separate organizations which it considered demonstrated cohesion among their members. However, the CPE panel did not investigate or consider whether any cohesion existed between these separate organizations.

52. The alleged community invoked by the Big Room was explicitly related for the

purposes of the application for .eco, as is demonstrated in the application. The Applicant Guidebook does not permit this approach. To meet the Applicant Guidebook's requirement of community delineation, the applicant needed to prove the existence of a clearly delineated and pre-existing community (**RM 5**, Module 4-10). The Guidebook specified that "*Pre-existing means that a community has been active as such since before the new gTLD policy recommendations were completed in September 2007*" (**RM 5**, Module 4-11). There must be "*some understanding of the community's existence prior to September 2007*" (**RM 5**, Module 4-11). However, Big Room was only founded in November 2007 (**Annex 11**). By its own admission, Big Room only launched a consultation process between a number of environmental organizations in 2009 (**Annex 4**, p. 18). This consultation process took place with the specific aim of aiding Big Room's application for the .eco gTLD. No charter was in place before September 2010. There is no evidence of any understanding of the purported community's existence prior to September 2007. Big Room alleges that the purported community has historically structured and organized itself and its work through an international network of organizations (**Annex 4**, p. 19). However there is no evidence that such a network existed prior to Big Room's initiative to create a network for the purpose of applying for the .eco gTLD.

53. The requirement of a pre-existing community and the suspicious date of incorporation of Big Room have never been examined by the CPE Panel. The CPE Panel contented itself with the statement that many of the organizations that fall within the application's delineation have been active prior to 2007. However, the supposed 'community' Big Room invokes is, in fact, nothing more than an amalgam of different organisations with little or no pre-existing commonality, precluding any reasonable designation of their being a 'community'. The CPE Panel failed to investigate whether there was any recognition of a community across the organizations that were grouped by Big Room.

54. In addition, Big Room claimed that “[m]embers of the Community are delineated from Internet users generally by community-recognized memberships, accreditations, registrations, and certifications that demonstrate active commitment, practice and reporting” (**Annex 4**, p. 18). However, Big Room has never specified any characteristics for these memberships, accreditations, registrations, etc. It is clear from the application that the Organization that was created by Big Room for the purpose of the application has decisive power whether or not to consider an organization, business or individual as part of the ‘community’. The CPE Panel has failed to address the elemental concern: how can there be community awareness prior to 2007, if the organization that establishes the community was yet to be created?

55. Other examples of policy violations are taken up in Claimants’ RfR (**Annex 6**).

3. The CPE process was unfair, non-transparent and arbitrary, because of the lack of meaningful reasoning

56. The CPE Panel also did not provide meaningful reasoning for its decision. It even went as far as neglecting obvious facts. The CPE Panel granted the maximum score (1 point) for the CPE’s uniqueness requirement, considering that the eco string “*does not have any other meaning beyond identifying the community described in the application*” (**Annex 5**, pp. 6-7). However, the eco string has several other meanings beyond identifying the alleged community in Big Room’s application. *E.g.*, Eco is the surname of a famous Italian novelist and semiotician, Umberto Eco; In French the term is used as an abbreviation of the adjective for ‘economic’; Eco is the proposed name for the common currency that the West African Monetary Zone plans to introduce in the framework of Economic Community of West African States; Eco is an abbreviation for *inter alia* Encyclopedia of Chess Openings, the English Chamber Orchestra, Engineering Change Order and equity carve-out; Eco is the ISO code for the synthetic rubber Epichlorohydrin; Eco is the name of a computer simulation game; Eco is the name of a character, played by Jacqueline Duncan, on the Australian television children’s show The Shak; etc. (**RM 33**). In its application for .eco, Big Room acknowledged that eco

was a “*known international acronym*” for the European Communications Office and for the Economic Cooperation Organization, an intergovernmental regional group established by Iran, Pakistan and Turkey to promote economic cooperation in the region (**Annex 4**, p. 27). Big Room also acknowledged that eco is the name of the Association of the German Internet Industry (**Annex 4**, p. 27).

57. Despite the overwhelming weight of evidence that numerous and diverse meanings are associated with the eco string, the CPE Panel considered that eco had no other meaning than identifying the community invoked by Big Room. The CPE Panel did not discuss, nor even reference any of the other meanings associated to the eco string. It did not even refer to the fact that Big Room itself acknowledged the fact that eco had diverse meanings. The CPE Panel refers to a definition in the Oxford English Dictionary (OED) to conclude that the string identifies the invoked community. However, the OED defines “eco” as an informal adjective or a combining form which stands for “*ecology, ecological, etc.*” (**RM 34**). The OED’s definition of “eco” does not refer to any community, but the OED does refer to Umberto Eco (**RM 34**). It is unclear on what basis the CPE panel was able to conclude that “eco” has no significant meaning beyond that of the community invoked.

58. It is a mystery to Claimants why the CPE Panel disregarded the obvious point that the .eco string does not identify a community and that it has numerous other meanings beyond the definitions in the OED. The CPE Panel’s behavior is even more bizarre in view of the fact that Big Room would not have qualified for community priority if the CPE Panel had not granted the maximum score for uniqueness of the string.

59. In addition, the CPE was also incorrect in its evaluation of whether Big Room’s registration policies include specific enforcement measures constituting a coherent set with appropriate appeal mechanisms. In its evaluation, the CPE Panel considered that there was “*an appeal mechanism, whereby a registrant has the right to seek the opinion of an independent*

arbiter approved by the registry” (**Annex 5**, p. 8). However, this is only a partial representation of Big Room’s appeal mechanism. Big Room’s application mentions further that “the Registry [i.e., Big Room] may choose to refer the dispute to the Organization [created under the auspices of Big Room as the representative membership institution for Big Room’s .eco gTLD] for a final decision [...] [, i]f the Registry is dissatisfied with the recommendation of the independent mediator or arbiter” (**Annex 4**, p. 30). In other words, if Big Room is not satisfied with the decision of the independent arbiter, that decision may be overturned by an organization which is directly connected with Big Room. The CPE Panel has never considered the appropriateness of such ‘appeal’ process. In contrast, however, the CPE Panel did investigate the appropriateness of proposed appeal processes in other CPEs, requiring that the appeals processes be clearly described, failing which the application would score zero on the enforcement requirement (**RM 25**, p. 7).

4. **The CPE process was unfair, non-transparent and discriminatory due to the use of anonymous evaluators**

60. ICANN’s obligation to safeguard due process rights covers the right to be heard by an independent and impartial adjudicator.¹¹ That right is violated if the adjudicator remains anonymous.¹² The right to know the identity of the adjudicator – with a view to knowing whether there might be grounds for challenging or removing them – is a fundamental requirement.¹³

61. In this case, Claimants had no notice, and absolutely no opportunity to present their case. Claimants were deprived of procedural fairness and the opportunity to be heard through ICANN's failure to provide advance notice of the applicable standards, failure to allow any

¹¹ E.g., Article 14 ICCPR (**RM 30**).

¹² IAComHR, *Lindo et al. v. Peru*, Case 11.182, Report No. 49/00, paras. 115-118 (**RM 31**).

¹³ See IAComHR, *Lindo et al. v. Peru*, Case 11.182, Report No. 49/00, paras. 116 (**RM 31**).

opportunity to contest those standards, and failure to provide any means of remedy or redress. Put simply, Claimants were not offered any opportunity to be heard on their own case.

62. Further, Claimants were not given any opportunity for remedy or redress once the decision had been made. Although Claimants challenged the decision through ICANN's Reconsideration process, ICANN's Board explicitly refused to reconsider the substance of the challenged decision, instead relying on a cursory analysis of procedural requirements.

63. Claimants were never given any meaningful opportunity to be heard on the substance of the CPE determination (by either the CPE Panel itself, or by ICANN upon receiving the Panel's decision), nor any opportunity to seek redress for the erroneous decision. Accordingly, the CPE determination was made without due process, and ICANN's acceptance of the determination, and repeated failure to remedy the wrongful determination through the Reconsideration process or otherwise, is a failure to act with due diligence and independent judgment, and a failure to act in good faith as required by ICANN's Bylaws and Articles of Incorporation.

C. The ICANN Board failed to establish, implement and supervise a fair and transparent CPE process by blindly accepting the advice of the CPE, without providing effective quality control

64. The CPE Panel's description of the CPE process shows that the Panel's final step in that process is the preparation of a "final recommendation document" (**RM 15**). In other words, the CPE Panel does not take a decision, instead it is supposed to give a recommendation to ICANN.

65. There is no indication that any quality review process – other than the CPE Panel's internal quality review process – has been put in place or followed by ICANN. ICANN simply accepted the recommendation and posted it on its website without review.

D. ICANN failed to promote competition and innovation by accepting the CPE

66. ICANN's core mission requires ICANN to be as non-interventionist as possible, and

the purpose of community-based applications was never to eliminate competition among applicants for a generic word TLD nor to pick winners and losers within a diverse commercial industry. Despite this, the ICANN Board's decision to accept the CPE Panel's determination does exactly that. It picks a winner, Big Room, on the basis of a purely arbitrary decision, and eliminates all possible competition for obtaining the .eco gTLD.

E. The ICANN Board failed to correct the mistakes in the CPE process and denied Claimants their right to be heard

67. The ICANN Board should have corrected the mistakes in the CPE process on its own motion. Since ICANN's Board has ultimate responsibility for the New gTLD Program, it is required to supervise and assure the compliance of that program (and its implementation) with ICANN's fundamental obligations under its Articles of Incorporation and Bylaws. The Applicant Guidebook explicitly calls on the Board to individually consider an application under an ICANN accountability mechanism (**RM 5**, Module 5-4), such as a Request for Reconsideration (**RM 2 and RM 3**, Article IV(2)). ICANN's Bylaws prohibit the Board from exercising (or electing not to exercise) its discretionary power in a manner that discriminates between applicants.

68. Claimants' RfR and DIDP request (**Annexes 6 and 7**), and the fact that ICANN discovered affected applicants had insufficient information regarding the process, should have alerted the ICANN Board to the need to investigate and correct the errors in that process. Instead, the ICANN Board chose, in its own self-interest, to invoke the excuse of confidentiality (**Annexes 8 and 9**) and to refuse to offer any transparency in relation to the CPE process.

69. When Claimants filed their RfR with the ICANN Board, they informed the Board of the many errors in the CPE process, giving the Board ample opportunity to correct those errors. However, the Board chose, through the BGC, to take no action, not even to investigate the conformity of the CPE process with its fundamental obligations. The BGC contented itself

with issuing a statement that Claimants’ “arguments reflect only a substantive disagreement with the CPE Panel’s conclusions” and that “such a substantive disagreement is not a proper basis for reconsideration” (**Annex 9**). The BGC considered that Claimants did “not claim that the CPE Panel violated established policy or procedure, but instead challenge[d] the substantive determinations of the Panel” (**Annex 9**). However, Claimants showed that the CPE Panel manifestly misapplied ICANN’s defined standards in the CPE. It is unclear how else to interpret such a fundamental misapplication other than as an obvious policy violation. In addition, the BGC refused to review compliance of ICANN’s actions with ICANN’s fundamental obligations. Claimants were merely asking that ICANN comply with its own policies and fundamental obligations in relation to the performance of the CPE process, and to implement the Applicant Guidebook in compliance with these fundamental obligations. Moreover, even if a published policy or process were explicitly to derogate from fundamental due process rights (which is not the case here), ICANN could not implement that policy or process without violating its Articles of Incorporation and Bylaws, regardless of the contents of the Applicant Guidebook. Instead of investigating compliance with those policies and principles (*i.e.*, its governing rules), the ICANN Board – through the BGC – chose to misinterpret and ignore Claimants’ RfRs. As a result, the ICANN Board denied Claimants their right to be heard.

VII. PROCEDURAL MATTERS

70. Pursuant to Article IV, Section 3(9) of the Bylaws, Claimants hereby request that the Panel be composed of three (3) members, each of whom shall be impartial and independent of the parties.

71. It does not appear that ICANN has established the omnibus standing panel described in Art. IV, Section (6) of the Bylaws. As a result, pursuant to Art. 6 of the ICDR Rules, Claimants suggest that the parties agree to the following method for appointing the IRP Panel:

each party shall appoint one panelist, after which the two panelists so appointed shall jointly select, in consultation with the parties, the third panelist, who shall serve as the Chairman of the Panel.

72. Claimants propose that both Claimants and ICANN simultaneously make their panelist appointment within twenty (20) days of ICANN's agreement to the Panel appointment procedure set forth herein. The two co-panelists shall select the Chairman of the Panel within twenty (20) days of the confirmation by ICDR of the appointment of the respective panelists. In the event that ICANN fails to make its panelist appointment within the time period indicated, the ICDR shall make the appointment of ICANN's panelist within thirty (30) days of the date on which ICANN should have made its panelist appointment. In the event that the two party-appointed panelists fail to agree on the identity of the third arbitrator, that appointment shall be made by the ICDR, in accordance with its established procedures.

VIII. RELIEF REQUESTED

73. Based on the foregoing, and reserving all rights to rebut ICANN's response in further briefs and during a hearing, Claimants respectfully request that the Panel:

- Declare that ICANN breached its Articles of Incorporation, its Bylaws, and/or the gTLD Applicant Guidebook;
- Declare that ICANN must reject the determination that Big Room's application for .eco be granted community priority;
- Award Claimants their costs in this proceeding; and
- Award such other relief as the Panel may find appropriate in order to ensure that the ICANN Board follow its Bylaws, Articles of Incorporation, or other policies, or other relief that Claimants may request after further briefing or argument.

Respectfully submitted,

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March 13, 2015

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- Annex 3 - Minds + Machines Group Limited (formerly known as Top Level Domain Holdings Limited)'s application to operate the .eco gTLD (Application ID 1-1039-91823)
- Annex 4 - Big Room Inc. 's application to operate the .eco gTLD (Application ID 1-912-59314)
- Annex 5 - Community priority evaluation report of Big Room Inc.'s application to operate the .eco gTLD, dated 6 October 2014
- Annex 6 - Claimants' Request for Reconsideration 14-46 of 22 October 2014
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- Annex 9 - Board Governance Committee determination on Request for Reconsideration 14-46 of 18 November
- Annex 10 - Minutes of the Meeting of the Board Governance Committee on 18 November October 2014, published on 20 January 2015
- Annex 11 - Proof of establishment of Big Room Inc.

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34. Extracts of the Oxford English Dictionary

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INDEPENDENT REVIEW PROCESS (IRP)
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 01-15-0002-8061

Despegar Online SRL

Donuts, Inc.

Famous Four Media Limited

Fegistry, LLC

Radix FZC

-vs-

ICANN

-vs-

Little Birch, LLC

Minds + Machines Group Limited

Final Declaration

IRP Panel

Thomas H. Webster

Dirk P. Tirez

Peter J. Rees QC (Chair)

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A. Introduction and Procedural History

1. This Final Declaration is issued by this Independent Review Process (“IRP”) Panel pursuant to the Bylaws of the Internet Corporation for Assigned Names and Numbers (“ICANN”). This IRP has been administered under the International Centre for Dispute Resolution (“ICDR”) International Dispute Resolution Procedures as amended and in effect as of 1 June 2014 along with ICANN’s Supplementary Procedures.
2. On 4 March 2015, following a failed Cooperative Engagement Process with ICANN, Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC submitted a Request for IRP in relation to ICANN’s treatment of the generic top-level domain (“gTLD”) string .hotel (“the .hotel IRP”).
3. On 17 April 2015, ICANN submitted its Response to this Request.
4. On 15 March 2015, following a failed Cooperative Engagement Process with ICANN, Little Birch, LLC and Minds + Machines Group Limited submitted a Request for IRP in relation to ICANN’s treatment of the gTLD string .eco (“the .eco IRP”).
5. On 27 April 2015, ICANN submitted its Response to this Request.
6. On 12 May 2015, the ICDR confirmed to the parties that the cases regarding .hotel IRP and .eco IRP would be merged and the parties agreed to keep written submissions separate but recognized that the issues presented by the two cases were closely linked and that the parties’ interests in the proceedings were so similar that both should be dealt with during a single hearing.
7. Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, Radix FZC, Little Birch, LLC and Minds + Machines Group Limited are all represented by Flip Petillion and Jan Janssen of Crowell & Moring LLP and ICANN is represented by Jeffrey A. LeVee and Rachel Zernik of Jones Day.
8. The IRP Panel consisting of Thomas H. Webster, Dirk P. Tirez and Peter J. Rees QC (Chair) (“Panel”), having been duly constituted to consider these two Requests, conducted a preparatory conference with the party representatives on 25 August 2015 at which, and following consultation with the party representatives, the procedure was fixed by the Panel for the further conduct of the IRP.

9. On 7 October 2015, the Panel received a letter from Fasken Martineau seeking to make submissions to the Panel on behalf of Big Room Inc. (“Big Room”) whilst acknowledging that Big Room was not a party to the IRP.
10. On 19 October 2015, Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, Radix FZC, and Minds + Machines Group Limited submitted a Reply to ICANN’s Response in the .hotel IRP matter, and Little Birch, LLC and Minds + Machines Group Limited submitted a Reply to ICANN’s Response in the .eco IRP matter.
11. On 10 November 2015, ICANN submitted its Sur-Replies in both the .hotel IRP and the .eco IRP matters.
12. On 20 November 2015, the Panel received an e-mail from HOTREC seeking to make submissions to the Panel whilst acknowledging that HOTREC was not a party to the IRP.
13. On 2 December 2015, in advance of the telephone hearing due to take place on 7 December 2015, the Panel sent an e-mail to the representatives of the parties asking a number of questions.
14. On 4 December 2015, the parties responded in writing to the Panel’s questions.
15. On 7 December 2015, a telephone hearing took place at which the representatives of all the parties made their submissions to the Panel.

B. Factual Background - General

16. In 2005, ICANN’s Generic Names Supporting Organization (“GNSO”) began a policy development process to consider the introduction of new gTLDs. As part of this process the New gTLD Applicant Guidebook (“Guidebook”) was developed and was approved by the Board of ICANN in June 2011 and the New gTLD Program was launched.
17. The final version of the Guidebook was published on 4 June 2012. It provides detailed instructions to gTLD applicants and sets out the procedures for evaluating new gTLD applications. The Guidebook provides that new gTLD applicants may designate their applications as either standard or community based, the latter to be “operated for the benefit of a clearly delineated community” (Guidebook § 1.2.3.1).
18. If more than one standard application was made for the same gTLD applicants were asked to try and achieve an amicable agreement under which one or more

of them withdrew their applications. If no amicable solution could be found, applicants in contention for the same gTLD would be invited to participate in an auction for the gTLD.

19. If a community based application was made for a gTLD for which other applicants had made standard applications, the community based applicant was invited to elect to proceed to Community Priority Evaluation (“CPE”) whereby its application would be evaluated by a CPE Panel in order to establish whether the application met the CPE criteria. The CPE Panel could award up to a maximum of 16 points to the application on the basis of the CPE criteria. If an application received 14 or more points the applicant would be considered to have prevailed in CPE (Guidebook § 4.2.2). The four CPE criteria are: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. Each criterion is worth a maximum of 4 points (Guidebook § 4.2.3).
20. If an applicant prevails in CPE, it will proceed to the next stage of evaluation and other standard applications for the same gTLD will not proceed because the community based application will be considered to have achieved priority (Guidebook § 4.2.2).
21. ICANN appointed an external provider, the Economic Intelligence Unit (“EIU”) to constitute the CPE Panel.
22. ICANN has a Documentary Information Disclosure Policy (“DIDP”), which permits requests to be made to ICANN to make public documents “concerning ICANN’s operational activities, and within ICANN’s possession, custody or control”.
23. ICANN also has 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 of ICANN (“Reconsideration Request”) (Art IV.2 of ICANN’s Bylaws).
24. ICANN also has in place a process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws of ICANN (Art IV.3 of ICANN’s Bylaws), namely the IRP Process.
25. Article IV.3.4 of ICANN’s Bylaws provides:

“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?"*

C. Factual Background - Specific

26. Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC each submitted standard applications for .hotel. HOTEL Top-Level-Domain s.a.r.l. ("HTLD") submitted a community based application for .hotel.
27. Little Birch, LLC and Minds + Machines Group Limited each submitted standard applications for .eco. Big Room submitted a community based application for .eco.
28. On 19 February 2014, HTLD was invited to elect to proceed to CPE, which it did, and its application was forwarded to the EIU for evaluation.
29. On 12 March 2014, Big Room was invited to elect to proceed to CPE, which it did, and its application was forwarded to the EIU for evaluation.
30. On 11 June 2014, the CPE Panel from EIU issued its report, which determined that HTLD's application should receive 15 points on the CPE criteria, thereby prevailing in CPE with the consequence that the standard applications for .hotel would not proceed.
31. On 28 June 2014, Despegar Online SRL, DotHotel Inc., dot Hotel Limited, Fegistry LLC, Spring McCook LLC and Top Level Domain Holdings Limited submitted a Reconsideration Request "*to have that decision by the Community Priority Evaluation panel reconsidered*", and, on 4 August 2014, Donuts Inc., Fair Winds Partners, LLC, Famous Four Media Limited, Minds + Machines Group Limited and Radix FZC submitted a request to ICANN pursuant to its DIDP for certain documents related to the decision of the CPE Panel.
32. On 22 August 2014, the Board Governance Committee ("BGC") of ICANN denied the Reconsideration Request to have the CPE Panel decision reconsidered and, on 3 September 2014, ICANN responded to the DIDP request

by referring to certain correspondence that was publicly available, but not providing any other documentation sought in the DIDP request.

33. On 22 September 2014, Despegar Online SRL, Radix FZC, Famous Four Media Limited, Fegistry LLC, Donuts Inc., and Minds + Machines Group Limited submitted a Reconsideration Request to “*seek reconsideration of ICANN staff’s response to the Requesters’ request for documents pursuant to ICANN’s Document Information Disclosure Policy (“DIDP”)*”, and, on 11 October 2014, the BGC of ICANN denied that Reconsideration Request.
34. On 6 October 2014, the CPE Panel from EIU issued its report, which determined that Big Room’s application should receive 14 points on the CPE criteria, thereby prevailing in CPE with the consequence that the standard applications for .eco would not proceed.
35. On 22 October 2014, Little Birch, LLC and Minds + Machines Group Limited submitted a Reconsideration Request seeking “*the reconsideration of ICANN’s Community Priority Evaluation Panel’s determination whereby [Big Room’s application] prevailed in Community Priority Evaluation*”, They also submitted a request to ICANN pursuant to its DIDP for certain documents related to the decision of the CPE Panel.
36. On 31 October 2014, ICANN responded to the DIDP request by referring to certain correspondence that was publicly available, but not providing any other documentation sought in the DIDP request, and, on 18 November 2014, the BGC of ICANN denied the Reconsideration Request to have the CPE Panel decision reconsidered.
37. On 27 February 2015, ICANN staff became aware of a configuration issue with ICANN’s online New gTLD Applicant and Global Domains Division (“GDD”) portals. It appears that, between 17 March 2014 and 27 February 2015, user credentials were used to obtain sensitive and confidential business information concerning several of the .hotel applicants.
38. On 5 June 2015, Crowell & Moring LLP wrote to the ICANN Board and the President of ICANN’s GDD “*on behalf of Travel Reservations SRL (formerly, Despegar Online SRL), Donuts Inc. (and its subsidiary applicant Spring McCook, LLC), Famous Four Media Limited (and its subsidiary applicant dot Hotel limited), Fegistry LLC, Minds + Machines Group Limited (formerly Top Level Domain Holdings Limited), and Radix FZC (and its subsidiary applicant DotHotel Inc.)*”. The letter requested “*full information concerning this data exposure issue and the actions that have been taken by ICANN to limit damages for the affected parties*” and set out a list of information sought.

39. On 5 July 2015, ICANN responded to the letter of 5 June 2015 under the heading “*Response to Documentary Information Disclosure Policy Request*”. ICANN provided further information concerning the issue and referred to certain information that was publicly available, but did not provide any other documentation.
40. Neither the Board of ICANN nor the President of ICANN’s GDD has responded to the letter of 5 June 2015.

D. Relief Requested

41. The relief requested by the Claimants in both the .hotel and .eco Requests for IRP was, essentially, the same, namely:
- Declare that ICANN breached its Articles of Incorporation, its Bylaws, and or the gTLD Guidebook;
 - Declare that ICANN must reject the determination that HTLD’s application for .hotel and Big Room’s application for .eco be granted community priority;
 - Award Claimants their costs in this proceeding; and
 - Award such other relief as the Panel may find appropriate in order to ensure that the ICANN Board follow its Bylaws, Articles of Incorporation, or other policies, or other relief that Claimants may request after further briefing or argument.
42. In the Reply to ICANN’s Response in the .hotel IRP a further request for relief was added, namely:
- Declare that ICANN must reject HTLD’s application for .hotel.
43. In response to the questions raised by the Panel on 2 December 2015, the Claimants’ representative also asked for the following relief:
- i. That the Panel consider declaring that ICANN continues to act inconsistently with its Articles of Incorporation, its Bylaws, and or the Guidebook by:
 - upholding the determination that HTLD’s application for .hotel be granted community priority;
 - upholding HTLD’s application for .hotel; and
 - upholding the determination that Big Room’s application for .eco be granted community priority.
 - ii. That the Panel declare that ICANN has breached and continues to breach its Articles of Incorporation and/or Bylaws by upholding the

provisions of the gTLD Applicant Guidebook or of the new gTLD policy which are in violation of the Articles of Incorporation and/or Bylaws.

- iii. That the Panel examine the consistency with ICANN's Articles of Incorporation and Bylaws of;
 - the contents of the Guidebook
 - the CPE process itself
 - the selection and appointment process of the EIU as the CPE Panel, and
 - the implementation of the CPE process that has led to ICANN accepting community priority for .hotel and .eco.

E. Claimants' Submissions

44. In their submissions, the Claimants, in both the .hotel and .eco IRPs matters, criticise the CPE process as a whole and complain that the ICANN Board failed to establish, implement and supervise a fair and transparent CPE process in the selection of the CPE Panel. They also complain that the CPE process is unfair, non-transparent and discriminatory due to the use of anonymous evaluators, and that no quality review process exists for CPE Panel decisions.
45. In relation to the CPE process as a whole, the Claimants also argue that, as no opportunity is given for applicants to be heard on the substance of a CPE determination (by either the CPE Panel itself, or by ICANN upon receiving the Panel's decision), CPE determinations are made without due process.
46. However, relief in respect of these wider issues was not requested by the Claimants in either the .hotel or .eco Requests, and, although such relief was referred to by the Claimants in their response to the Panel's questions of 2 December 2015, it was confirmed by the Claimants at the hearing on 7 December 2015 that the Claimants were not, in fact, asking the Panel to make a declaration as to the selection process of the CPE Panel by ICANN, nor any declaration as to the CPE process as a whole, nor whether that process breaches ICANN's Articles of Incorporation or Bylaws, nor whether the Guidebook breaches ICANN's Articles of Incorporation or Bylaws.
47. Accordingly, for the purposes of this IRP, it is the submissions made by the Claimants which address the specific relief sought by the Claimants in relation to the granting of CPE in the .hotel and .eco applications that are relevant for the Panel.
48. In the .hotel and .eco Requests and Replies, the Claimants make the following submissions in relation to the CPE Panel's determinations on CPE:

- i. *“By accepting a third-party determination that is contrary to its policies, ICANN has failed to act with due diligence and failed to exercise independent judgment” (.hotel Request § 9, .eco Request § 9)*
- ii. *“The extraordinary outcomes for Big Room’s application for .eco and HTLD’s application for .hotel were only possible due to a completely different and clearly erroneous application of the evaluation criteria in the .eco and .hotel CPE” (.eco Request § 48)*
- iii. *“If the CPE Panel used the same standard as, e.g., in the .gay, .immo and .taxi CPEs, it would never have decided that the requirements for nexus were met” (.hotel Request § 52, .eco Request § 50)*
- iv. *“The abovementioned examples of disparate treatment in the CPE process also show that the CPE process was performed in violation of ICANN’s CPE policy” (.hotel Request § 53, .eco Request § 51)*
- v. *“the CPE Panel in the .hotel CPE committed several additional policy violations. It did not analyze whether there was a ‘community’ within the definition of that term under the rules of the Applicant Guidebook” (.hotel Request § 53)*
- vi. *“the CPE Panel in the .eco CPE committed several additional policy violations. It did not analyze whether there was a ‘community’ within the definition of that term under the rules of the Applicant Guidebook” (.eco Request § 51)*
- vii. *“The requirement of a pre-existing community and the suspicious date of incorporation of Big Room have never been examined by the CPE Panel” (.eco Request § 53)*
- viii. *“The CPE Panel also did not provide meaningful reasoning for its decision. It even went as far as inventing facts” (.hotel Request § 55)*
- ix. *“The CPE Panel also did not provide meaningful reasoning for its decision. It even went as far as neglecting obvious facts” (.eco Request § 56)*
- x. *“However, the CPE Panel’s reliance on the support of a distinct, yet undefined, community shows that the support for the .hotel gTLD came from a ‘community’ other than the one that was defined by the applicant. The need to introduce a distinct and undefined community goes against the exact purpose of the CPE policy, requiring support of the community targeted by the string. It is at odds with the CPE Panel’s findings on organization and nexus between the proposed string and the ‘community.’” (.hotel Request § 56)*
- xi. *“the CPE Panel disregarded the obvious point that the .eco string does not identify a community and that it has numerous other meanings beyond the definitions in the OED.....Big Room would not have qualified for community priority if the CPE Panel had not granted the maximum score for uniqueness of the string.” (.eco Request § 58)*
- xii. *“The CPE Panel has never considered the appropriateness of [Big Room’s] appeal process. In contrast, however, the CPE Panel did investigate the*

- appropriateness of proposed appeal processes in other CPEs requiring that the appeals processes be clearly described, failing which the application would score zero on the enforcement requirement.” (.eco Request § 59)*
- xiii. *“The Applicant Guidebook explicitly calls on the Board to individually consider an application under an ICANN accountability mechanism...such as a Request for Reconsideration” (.hotel Request § 64, .eco Request § 67) NB the Panel notes that this is not actually what the Guidebook says. It says that the “Board reserves the right to individually consider an application for a new gTLD....under exceptional circumstances”*
 - xiv. *“Claimants showed that the CPE Panel manifestly misapplied ICANN’s defined standards in the CPE. It is unclear how else to interpret such a fundamental misapplication other than as an obvious policy violation” (.eco Request § 69)*
 - xv. *“Claimants were merely asking that ICANN comply with its own policies and fundamental obligations in relation to the performance of the CPE process” (.hotel Request § 66, .eco Request § 69)*
 - xvi. *“The IRP Panel’s task is to look at whether ICANN’s unquestioning acceptance of the CPE Panel’s advice and ICANN’s refusal to review the issue raised by Claimants are compatible with ICANN’s fundamental obligations” (.hotel Reply § 4, .eco Reply § 3)*
 - xvii. *“ICANN’s reasoning would logically result in any review of the CPE being denied, no matter how arbitrary the original evaluation may be” (.hotel Reply § 4, .eco Reply § 8)*
 - xviii. *“the ICANN Board decided not to check whether or not the evaluation process had been implemented in compliance with principles of fairness, transparency, avoiding conflicts of interest and non-discrimination.” (.hotel Reply § 34, .eco Reply § 33)*
 - xix. *“One cannot investigate whether a standard was applied fairly and correctly without looking into how the standard was applied.....the ICANN Board deliberately refused to examine whether the standard was applied correctly, fairly, equitably and in a non-discriminatory manner” (.hotel Reply § 39, .eco Reply § 38)*
 - xx. *“As the IRP Panel’s task includes a review as to whether ICANN discriminated in the application of its policies and standards, the IRP Panel is obliged to consider how the standards were applied in different cases” (.hotel Reply § 45, .eco Reply § 44)*

49. In the .hotel Reply, the Claimants also make the following submissions in relation to the declaration they are seeking that ICANN must reject HTLD’s application for .hotel:

- i. *“The IRP Panel is also requested to assess ICANN’s refusal to take appropriate action to offer redress to parties affected by the data exposure issue. In coming to its conclusion, the IRP Panel may examine all the*

- relevant information that was available to ICANN in relation to the question of taking action” (.hotel Reply § 4)*
- ii. *“ICANN never showed any willingness to take appropriate measures” (.hotel Reply § 49)*
 - iii. *“In this case a crime was committed seemingly with the specific purpose of obtaining a better position within the new gTLD program, and the crime was made possible due to misuse of user credentials for which HTLD (or an individual associated to HTLD) was responsible....It would indeed not be in the public interest to allocate a critical Internet resource to an entity that is closely linked with individuals who have misused, or who have permitted the misuse of, their user credentials” (.hotel Reply § 50)*

50. Also in the .hotel Reply the Claimants submit:

“Second Claimant in the .eco case, Minds + Machines Group Limited (Minds + Machines), also applied for the .hotel gTLD. Minds + Machines fully supports the claim initiated by Claimants in this case and joins their request. That Minds + Machines join the proceedings is accepted by all Claimants” (.hotel Reply § 2)

F. ICANN’s Submissions

51. In the .hotel and .eco Responses and Sur-Replies, ICANN makes the following submissions in relation to the CPE Panel’s determinations on CPE:

- i. *“Claimants did not state a proper basis for reconsideration as defined in ICANN’s Bylaws” (.hotel Response § 4, .eco Response § 4)*
- ii. *“ICANN’s Board....has no obligation to review (substantively or otherwise) any such report” (.hotel Response § 9, .eco Response § 9)*
- iii. *“nothing in the Articles or Bylaws requires the Board [to conduct a substantive review” (.hotel Response § 9, .eco Response § 10)*
- iv. *“neither the creation nor the acceptance of the CPE Panel’s Report regarding HTLD’s Application for .HOTEL constitutes Board action” (.hotel Response § 12)*
- v. *“neither the creation nor the acceptance of the CPE Panel’s Report regarding Big Room’s Application for .ECO constitutes Board action” (.eco Response § 13)*
- vi. *“in making those decisions [acceptance of the Guidebook and the decisions by the Board to reject Claimants’ Reconsideration Request], the Board followed ICANN’s Articles and Bylaws” (.hotel Response § 13, .eco Response § 14)*
- vii. *“BGC denied Claimants’ Reconsideration Request finding that Claimants had ‘failed to demonstrate that the CPE Panel acted in contravention of*

- established policy or procedure' in rendering the Report" (.eco Response § 29)*
- viii. *"BGC denied Claimants' Reconsideration Request [in respect of the DIDP Request] finding that the Claimants had 'failed to demonstrate that ICANN staff acted in contravention of established policy or procedure' in responding to the DIDP Request" (.hotel Response § 28)*
 - ix. *"the reconsideration process does not call for the BGC to perform a substantive review of CPE Reports" (.hotel Response § 49, .eco Response § 49)*
 - x. *"Claimants do not identify any ICANN Article or Bylaws provision that the BGC allegedly violated in reviewing their Reconsideration Request" (.hotel Response § 51, .eco Response § 50)*
 - xi. *"It is not the role of the BGC (or, for that matter, this IRP Panel) to second-guess the substantive determinations of independent, third-party evaluators." (.hotel Response § 53, .eco Response § 52)*
 - xii. *"Claimants' only evidence that the CPE Panel in fact erred is the bare allegation that because certain other, completely separate, applications for entirely different strings did not prevail in CPE then .HOTEL TLD's application also should not have prevailed. Claimants' argument is baseless. The outcome of completely unrelated CPEs does not, and should nor, have any bearing on the outcome of the CPE regarding .HOTEL TLD's Application" (.hotel Response § 55)*
 - xiii. *"Claimants' only evidence that the CPE Panel in fact erred is the bare allegation that because certain other, completely separate, applications for entirely different strings did not prevail in CPE, Big Room's application also should not have prevailed. Claimants' argument is baseless. The outcome of completely unrelated CPEs does not, and should nor, have any bearing on the outcome of the CPE regarding Big Room's Application" (.eco Response § 54)*
 - xiv. *"there is not – nor is it desirable to have – a process for the BGC or the Board (through the NGPC) to supplant its own determinationover the guidance of an expert panel formed for that particular purpose" (.hotel Sur-Reply § 11, .eco Sur-Reply § 10)*

52. In the .hotel Sur-Reply, ICANN also makes the following submissions in relation to the declaration the Claimants are seeking that ICANN must reject HTLD's application for .hotel:

- i. *"Claimants argue that the Portal Configuration is relevant to this IRP, but they have not identified any Board action or inaction with respect to this issue that violates ICANN's Articles or Bylaws such that it is subject to independent review, now or ever" (.hotel Sur-Reply § 23)*

- ii. *“The ICANN Board took no action (and was not required to take action under either the ICANN Articles or Bylaws) with respect to Claimant’s letter and DIDP request” (.hotel Sur-Reply § 24)*
- iii. *“Claimants have failed to demonstrate that the Board has a duty to act with respect to Claimants’ belief as to what the Board should do. Again Claimants have also failed to show that the Board’s conduct in this regard has in any way violated ICANN’s Articles or Bylaws” (.hotel Sur-Reply § 25)*

53. Also in the .hotel Sur-Reply ICANN submits:

*“Minds + Machines Limited (“Minds + Machines”) is not a Claimant in this proceeding but, nevertheless signed the Reply and now seeks to join as an additional claimant. Article 7 of the International Center for Dispute Resolution’s International Dispute Resolution Procedures explicitly provides that “[n]o additional party may be joined after the appointment of any [neutral], unless **all parties**, including the additional party, otherwise agree” (ICDR International Dispute Resolution Procedures, Art. VII (emphasis added)). ICANN does not consent to the joinder of Minds + Machines because any claims Minds + Machines may have with respect to the CPE Report or ICANN’s response to that Report are time-barred (Bylaws, Art. IV, § 3.3 (30 day deadline to file IRP request)” (.hotel Sur-Reply § 35)*

G. The Issues

54. As has already been stated, Article IV.3.4 of ICANN’s Bylaws provides:

“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?”*

55. Given that the wider issues of the CPE process as a whole, the appointment of EIU and the provisions of Guidebook are not being pursued, the Panel has concluded that the contested actions of the Board of ICANN in this IRP are:
- i. The denial by the BGC on 22 August 2014, of the Reconsideration Request to have the CPE Panel decision in .hotel reconsidered.
 - ii. The denial by the BGC on 11 October 2014 of the Reconsideration Request to seek reconsideration of ICANN staff's response to the DIDP request in relation to the .hotel CPE decision.
 - iii. The denial by the BGC on 18 November 2014, of the Reconsideration Request to have the CPE Panel decision in .eco reconsidered.
 - iv. The continued upholding of HTLD's application for .hotel in the light of the matters raised in Crowell & Moring's letter of 5 June 2015.
56. In addition, the Panel has the procedural issue to deal with of the attempt by Minds + Machines Group Limited to join the .hotel IRP.

H. Analysis - General

57. Before turning to the specific analysis of each of the issues stated above, there are some general points which the Panel wishes to highlight, which have application to one or more of the issues in question.
58. The analysis, which the Panel is charged with carrying out in this IRP, is one of comparing the actions of the Board with the Articles of Incorporation and Bylaws, and declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The Panel has identified the following relevant provisions of the Articles of Incorporation and Bylaws against which the actions, or inactions, of the Board should be compared.

Articles of Incorporation

Article 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.

Bylaws

Article I.2

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 II.3

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.

Article III.1

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.1

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.

Article IV.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.*

59. In response to the questions posed by the Panel on 2 December 2015, ICANN confirmed its position as follows:

- i. The EIU's determinations are presumptively final. The Board's review on reconsideration is not substantive, but rather is limited to whether the EIU followed established policy or procedure.
- ii. ICANN has an obligation to adhere to all of its obligations under its Articles of Incorporation and its Bylaws.
- iii. The Bylaws, and the BGC's determinations on prior Reconsideration Requests, have established a specific standard for when it is appropriate to reconsider CPE determinations (i.e., when the CPE Panel violated established policy or procedure).
- iv. When considering the Reconsideration Requests in the .eco and .hotel matters, the BGC had before it the EIU's determination and the "facts" that the Claimants had submitted with their Reconsideration Requests. The BGC also considered the Guidebook as well as other published CPE procedures. This was all the information required for the BGC to determine that the EIU had followed established policy and procedure in rendering the CPE determinations.
- v. The Board is not aware (whether through the BGC or otherwise) as to whether EIU makes any comparative analysis of other CPE determinations it has made when considering individual community priority applications.

60. During the hearing on 7 December 2015, ICANN further confirmed its position as follows:

- i. The Claimants (save for Minds + Machines Group Limited in the .hotel IRP) are not time-barred from seeking IRP of:
 - a. The denial by the BGC on 22 August 2014 of the Reconsideration Request to have the CPE Panel decision in .hotel reconsidered.
 - b. The denial by the BGC on 11 October 2014 of the Reconsideration Request to seek reconsideration of ICANN staff's response to the DIDP request in relation to the .hotel CPE decision.
 - c. The denial by the BGC on 18 November 2014 of the Reconsideration Request to have the CPE Panel decision in the .eco matter reconsidered.
- ii. There is no ICANN quality review or control process, which compares the determinations of the EIU on the various CPE applications.

- iii. The core values, which apply to ICANN by virtue of its Bylaws, have not been imposed contractually on the EIU, and the EIU are not, in consequence, subject to them.
- iv. The CPE process operated by the EIU involves 5 core EIU staff and 2 independent evaluators. The independent evaluators separately score each CPE application and submit their separate scores to the EIU core staff. The independent evaluators do not confer on the scoring. The independent evaluators are not the same for each CPE application; sometimes both are different and sometimes one is different.
- v. ICANN considers there is nothing in its Articles of Incorporation or Bylaws, which requires ICANN to comply with due process.
- vi. ICANN does not believe that it is subject to any general international law principle requiring it to comply with due process.
- vii. Upon receipt of a Reconsideration Request, ICANN expects the BGC to carry out a procedural review of the CPE determination, not a substantive review and that this procedural review should look at whether the EIU had followed the correct procedure and had correctly applied ICANN policies.

61. In the light of the relevant provisions of the Articles of Incorporation and Bylaws identified above, and the clarifications provided by ICANN as to its position in relation to CPE applications and Reconsideration Requests made in respect of them, the Panel will now consider each of the contested actions of the Board of ICANN in this IRP. In doing so, the Panel has taken into account, where relevant, all the submissions of the parties, including, without limitation, those specifically set out in sections E. and F. above.

62. Given the confirmation by ICANN, that a time bar is not being raised in relation to the substantive issues in this IRP, the Panel does not have to discuss this question save for when it considers Minds + Machines Group Limited's attempt to join in the .hotel IRP.

I. Analysis – Specific

1. The denial by the BGC, on 22 August 2014, of the Reconsideration Request to have the CPE Panel decision in .hotel reconsidered.

63. In conducting this analysis, the Panel have carefully considered the CPE report dated 11 June 2014, which determined that HTLD's community based application had prevailed, the Reconsideration Request dated 28 June 2014 and the BGC denial of the Reconsideration Request dated 22 August 2014. In doing so, the Panel has considered whether the Board (through the BGC) has acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws.

64. The Panel is clear that, in doing so, it is required by ICANN's Bylaws to apply a defined standard of review focusing on:

- a. whether the BGC acted without conflict of interest in taking its decision?
- b. whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them?; and
- c. whether the BGC exercised independent judgment in taking the decision, believed to be in the best interests of the company?

65. No allegation of conflict of interest has been made by the Claimants and the Panel has no information or documentation upon which it could reach any view as to whether a conflict of interest existed or not. In conclusion, so far as that requirement is concerned, the Panel can make no finding.

66. As to the requirements of due diligence and care, and the exercise of independent judgment, ICANN's position is that the review undertaken by the BGC should be a procedural review of the CPE determination, not a substantive review, and that this procedural review should look at whether the EIU had followed the correct procedure and had correctly applied ICANN policies.

67. That appears to the Panel to be correct, but what is of critical importance is the manner in which the review of whether the EIU has followed the correct procedure and has correctly applied ICANN's policies is conducted.

68. In their Reply in the .hotel IRP at §39 the Claimants submit:

"One cannot investigate whether a standard was applied fairly and correctly without looking into how the standard was applied....The ICANN Board instead limited its review to the question of whether the CPE Panel had made mention of the applicable standard. Such a limited review is not a meaningful one."

69. The Panel agrees that if the BGC is charged with considering whether the EIU correctly applied ICANN policies (which ICANN accepts it is), then it needs to look into how the standard was applied. It is not sufficient to limit the review to the question of whether mention was made of the relevant policy. The BGC needs to have a reasonable degree of assurance that the EIU has correctly applied the policy.

70. This is particularly so given that the EIU is not subject to ICANN's core values, the EIU independent evaluators are not the same for each CPE application, there is no ICANN quality review or control process which compares the

determinations of the EIU on the various CPE applications and ICANN is not aware as to whether EIU makes any comparative analysis of other CPE determinations it has made when considering individual community priority applications.

71. In their Reconsideration Request of 28 June 2014, at page 5, the Claimants say:

“In this case, however, there are 3 instances where the Panel has not followed the [Guidebook] policy and processes for conducting CPE. Further, the Panel, and ICANN staff have breached more general ICANN policies and procedures in the conduct of this CPE.”

72. The three instances of failure to follow the Guidebook policy alleged by the Claimants are:

1. Failure to identify a “Community”;
2. Failure to consider self-awareness and recognition of the community; and
3. Failure to apply the test for Uniqueness.

73. In their Reconsideration Request, the Claimants then go into significant detail as to the ways in which they allege the EIU failed to follow the Guidebook policy. However, in the BGC denial of 22 August 2014, the BGC state:

“...while the Request is couched in terms of the Panel’s purported violations of various procedural requirements, the Requesters do not identify any misapplication of a policy or procedure, but instead challenge the merits of the Panel’s Report, which is not a basis for reconsideration”

74. The BGC’s comment quoted above is plainly wrong as any detailed reading of the Reconsideration Request shows. It is unfortunate that the BGC should have included such comments in its determination as, in the Panel’s view, this has contributed to this IRP and the clear feeling, on the part of the Claimants, that their Reconsideration Request was not treated appropriately by the BGC.

75. In their Reconsideration Request, the Claimants argue that the first question to be asked by the EIU in following the policy and procedure in the Guidebook is whether there is a community that meets the definition of a community under the Guidebook. They say:

“The Panel did not attempt this analysis, in breach of the requirements of the policy and process for CPE.... This is not a disagreement about a finding by the Panel on this topic; the Panel did not consider this definition, nor apply the test for “community” required.... Had it

considered the matter, it would have appreciated that the applicants definition, rather than showing cohesion, depended instead on coercion.”

76. In dealing with this allegation the BGC gave consideration to the definition of community in the Guidebook and stated:

“However, the Requesters point to no obligation to conduct any inquiry as to the definition of community other than those expressed in section 4.2.3 of the Guidebook.....As such, the Requesters fault the Panel for adhering to the Guidebook’s definition of a “community” when evaluating the Application. Given that the Panel must adhere to the standards laid out in the Guidebook, this ground for reconsideration fails.

The Requesters also contend the Applicant’s proposed community, i.e., the “Hotel Community” does not qualify as a community for CPE purposes because “rather than showing cohesion, [it] depend[s] on coercion....But the Panel reached the contrary conclusion... As even the Requesters note, a request for reconsideration cannot challenge the substance of the Panel’s conclusions, but only its adherence to the applicable policies and procedures”

77. In their Reconsideration Request, the Claimants argue that the second question to be asked by the EIU in following the policy and procedure in the Guidebook is whether there was a failure to consider self-awareness and recognition of the community. They say:

“...the Panel has imported the test for determining whether there is a “community” – self-awareness that the group is a community- into the test for “delineation”. With respect, that is an error of process that further invalidates the findings.

Even if it were not, and self-awareness and recognition are considered with Delineation, the actual response given under that enquiry about “self-awareness and recognition” shows that the Panel does not understand the test that is to be applied....

What is required is a showing by evidence that the members of the alleged community regard themselves as members of a defined community, which is recognised as such by the members, and by people outside the community.

It is important to note that the Panel finds that the alleged community is clearly delineated, because there is an ISO definition of “hotel”, and because every hotel is a member of the alleged community....

The Panel then proceeds through the proper requirements of delineation, which it names accurately – organisation and existence before 2007.”

78. In dealing with this allegation, the BGC gave consideration to the definition of delineation in the Guidebook and stated:

“The Panel began its assessment of the test for delineation by noting: “Two conditions must be met to fulfil the requirements for delineation; there must be a clear, straightforward membership definition, and there must be awareness and recognition of a community (as defined by the applicant) among its members” (Report, Pg. 1.) As the Requesters admit, the Panel then “proceeds through the proper requirements of Delineation, which it names accurately....The Requesters thus defeat their own argument, as they squarely concede the Panel assessed the “proper requirements” of the test for delineation.

Again the Requesters dispute the Panel’s allusion to the “awareness and recognition” of the Hotel Community’s members not because that reference constitutes any procedural violation, but because the Requesters simply disagree whether there is any such recognition amongst the Hotel Community’s members.....Disagreement with the Panel’s substantive conclusions, however, is not a proper basis for reconsideration”

79. In their Reconsideration Request, the Claimants argue that the third question to be asked by the EIU in following the policy and procedure in the Guidebook is whether there was a failure properly to apply the test for Uniqueness. They say:

“The Panel has not followed ICANN policy or process in arriving at the conclusion that the string has “no other significant meaning beyond identifying the community” because it has itself cited a significant other meaning and relied on that other meaning (that the word means “an establishment with services and additional facilities where accommodation and in most cases meals are available”) in order to measure and find Delineation.

This is not a disagreement about a conclusion – this is a demonstration of a failure of process by the Panel. It cannot use the significant meaning of “hotel” under an ISO definition for one purpose (a finding under delineation), then deny that meaning and say there is “no other significant meaning” for the purpose of finding Uniqueness....

The word “hotel” means to most of the world what the ISO definition says it means – a place for lodging and meals. To assert that it means to most

people the association of business enterprises that run the hotels is unsubstantiated and absurd.”

80. In dealing with this allegation the BGC gave consideration to the definition of uniqueness in the Guidebook and stated:

“The Requesters have identified no procedural deficiency in the Panel’s determination that the uniqueness requirement was met. The Requesters concede that “HOTEL” has the significant meaning of a place for lodging and meals, and common sense dictates that the Hotel Community consists of those engaged in providing those services. The attempt to distinguish between those who run hotels and hotels themselves is merely a semantic distinction. Again, while the Requesters may disagree with the Panel’s substantive conclusion, that is not a proper basis for reconsideration.

81. As for the alleged breaches of more general ICANN policies and procedures in the conduct of the .hotel CPE, the Claimants refer to Article 7 of ICANN’s Affirmation of Commitments and Articles I.2.8, III.1 and IV.2.20 of ICANN’s Bylaws and say:

“Requestor submits that various aspects of the CPE process breach, or risk breaching, these fundamental provisions...there are a number of features which are prejudicial to standard applicants, including:

(a) Insufficient material was made available to them as to who the Panelist was, and their qualifications....

(b) There is no publication of materials to be examined by the Panel....

(c) Insufficient analysis and reasons were given on how the Panelist reached their CPE report....”

82. In dealing with this allegation the BGC stated:

“None of these concerns represent a policy or procedure violation for the purposes of reconsideration under ICANN’s Bylaws. The Guidebook does not provide for any of the benefits that the Requesters claim they did not receive during CPE of the Application. In essence, the Requesters argue that because the Guidebook’s CPE provisions do not include Requester’s “wish list” of procedural requirements, the Panel’s adherence to the Guidebook violates the broadly-phrased fairness principles embodied in ICANN’s foundational documents. Were this a proper ground for reconsideration, every standard applicant would have the ability to rewrite the Guidebook via a reconsideration request.”

- 83.** In considering the original CPE report of 11 June 2014, the Reconsideration Request dated 28 June 2014 and the BGC denial of the Reconsideration request dated 22 August 2014, the Panel have looked closely at whether the BGC simply undertook an administrative “box ticking” exercise to see whether mention was made of the relevant policy or procedure in denying the Reconsideration Request, or whether, as the Panel considers the BGC is required to do, it looked into how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.
- 84.** Taking, first of all, the three instances of failure to follow the Guidebook policy alleged by the Claimants, it is clear from the BGC determination document of 22 August 2014 as a whole and, particularly, from those extracts quoted above that each one was carefully considered by the BGC in its determination, and that the BGC did properly consider how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.
- 85.** In doing so, the Panel is satisfied that the BGC acted consistently with the provisions of ICANN’s Articles of Incorporation and Bylaws and that the Claimants complaints in this regard are not made out.
- 86.** As for the alleged breaches of more general ICANN policies and procedures in the conduct of the .hotel CPE claimed by the Claimants in the Reconsideration Request, it is clear from the face of these allegations that these are complaints about the CPE process as a whole and are not specific to the .hotel CPE. In consequence of the Claimants’ confirmation at the hearing on 2 December 2015, that relief in respect of the CPE process as a whole is not being pursued, it is not strictly necessary for the Panel to consider this further. However, the Panel wishes to put on record that it considers that the BGC, in denying the Claimants’ Reconsideration Request, acted consistently with the provisions of ICANN’s Articles of Incorporation and Bylaws and that the Claimants’ complaints in this regard are also not made out.

2. The denial by the BGC, on 11 October 2014, of the Reconsideration Request to seek reconsideration of ICANN staff’s response to the DIDP request in relation to the .hotel CPE decision.

- 87.** In conducting this analysis, the Panel has carefully considered the DIDP Request dated 4 August 2014, the Response from ICANN of 3 September 2014, the Reconsideration Request dated 19 September 2014 and the BGC denial of the Reconsideration Request dated 11 October 2014. In doing so, the Panel has

considered whether the Board (through the BGC) has acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws.

- 88.** The Panel knows that, in doing so, it is required by ICANN's Bylaws to apply a defined standard of review focusing on:
- a. whether the BGC acted without conflict of interest in taking its decision?
 - b. whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them?; and
 - c. whether the BGC exercised independent judgment in taking the decision, believed to be in the best interests of the company?
- 89.** As with the previous issue, no allegation of conflict of interest has been made by the Claimants and the Panel has no information or documentation upon which it could reach any view as to whether a conflict of interest existed or not. In conclusion, so far as that requirement is concerned, the Panel can make no finding.
- 90.** In line with the approach taken in the previous issue, the Panel consider that the review undertaken by the BGC should look at whether the ICANN staff, in responding to the DIDP Request, followed the correct procedure and correctly applied ICANN policies, and that, in doing so, the BGC needs to look into how the procedure was followed and how policy was applied so that the BGC has a reasonable degree of assurance that the ICANN staff correctly followed the requisite procedure and correctly applied ICANN policies.
- 91.** In their DIDP Request of 4 August 2014, the Claimants asked for four categories of documents, namely:
- 1) *"All correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication ("Communications") between individual member of ICANN's Board or any member of ICANN Staff and the [EIU] or any other organisation or third party involved in the selection or organisation of the CPE Panel for the Report, relating to the appointment of the Panel that produced the Report, and dated within the 12 month period preceding the date of the Report;*
 - 2) *The curriculum vitae ("CVs") of the members appointed to the CPE Panel;*
 - 3) *All Communications (as defined above) between individual members of the CPE Panel and/or ICANN, directly relating to the creation of the Report; and*
 - 4) *All Communications (as defined above) between the CPE Panel and/or Hotel TLD or any other party prior with a material bearing on the creation of the Report."*

92. In ICANN's Response of 3 September 2014 it was explained that ICANN, whether at Board or staff level, is not involved with the selection to the CPE Panel of the two individual evaluators that perform the scoring in the CPE process and that ICANN is not provided with information about who the evaluators on any individual CPE Panel may be. As this is all done within the EIU, ICANN, it was stated, did neither have the documentation sought in numbered request 1) above, nor did it have the CVs sought in numbered request 2) above. These are clear statements that no such documentation exists.
93. However, the Response goes on to say that to *"the extent that ICANN has documentation with the EIU for the performance of its role as the coordinating firm as it relates to the .HOTEL CPE, those documents are subject to certain of the Defined Conditions of Non-Disclosure set forth in the DIDP."* It then goes on to state the defined Conditions for Nondisclosure upon which ICANN is relying to justify nondisclosure. Five separate Conditions for Nondisclosure are listed.
94. The Response does not give any more detail as to what documents it actually has *"for the performance of its role as the coordinating firm"*, nor which specific Conditions for Nondisclosure apply to which specific documents or category of documents it actually has, and, in consequence, it is not possible to judge whether the policy for nondisclosure has been correctly applied.
95. In dealing with the documentation sought in numbered request 3) above, the Response states *"Because of the EIU's role as the panel firm, ICANN does not have any communications (nor does it maintain any communications) with the evaluators that identify the scoring for any individual CPE. As a result, ICANN does not have documents of this type."* That is a clear and comprehensive statement that such documentation does not exist.
96. However, the Response goes on to say that to *"the extent that ICANN has communications with persons from EIU who are not involved in the scoring of a CPE, but otherwise assist in a particular CPE, (as anticipated in the CPE Panel Process Document), those documents are subject to the following Defined Conditions of Nondisclosure set forth in the DIDP"*. It then goes on to state the defined Conditions for Nondisclosure upon which ICANN is relying to justify nondisclosure. Four separate Conditions for Nondisclosure are listed.
97. The Response does not give any more detail as to what *"communications with persons from EIU who are not involved in the scoring of a CPE"*, nor which specific Conditions for Nondisclosure apply to which specific documents or category of documents it actually has and, in consequence, it is not possible to judge whether the policy for nondisclosure has been correctly applied.

98. In dealing with the documentation sought in numbered request 4) above, the Response states:

“In order to maintain the independence and neutrality of the CPE Panels as coordinated by the EIU, ICANN has limited the ability for requesters or other interested parties to initiate direct contact with the panels – the CPE Panel goes through a validation process regarding letters of support or opposition (as described in the CPE Panel Process document) but that is the extent of direct communications that the CPE Panel is expected to have. For process control purposes, from time to time ICANN is cc’d on the CPE Panel’s verification emails. These emails are not appropriate for disclosure pursuant to the following Defined Conditions of Nondisclosure set forth in the DIDP”.

It then goes on to state the single defined Condition for Nondisclosure upon which ICANN is relying to justify nondisclosure.

99. In this instance, unlike those for numbered requests 1), 2) and 3) above, ICANN has described a single category of documents and the single Condition for Nondisclosure upon which it relies, thus making it possible to judge whether the policy for nondisclosure has been correctly applied.

100. In the Panel’s view, it is unfortunate that the ICANN staff did not adopt the same approach to dealing with documents which ICANN was not prepared to disclose when responding to numbered requests 1), 2) and 3) as was adopted with numbered request 4). Simply to say that “*to the extent*” ICANN has documents which fall within the categories requested in numbered requests 1), 2) and 3) such documents are not disclosable, for a variety of reasons, without making any attempt to link categories of document to particular Conditions for Nondisclosure, gives the impression of a process not properly conducted.

101. Such an approach does not provide the confidence that those requesting disclosure of documents are entitled to have, namely that a collection of potentially responsive documents has taken place and a review has actually been conducted by the ICANN staff as to whether any of the documents identified as responsive to the request are subject to any of the Conditions of Nondisclosure, as is required by ICANN’s published policy for responding to DIDP requests. If the ICANN staff had made this clear in the response it could well have provided the Claimants with the reassurance that both procedure and policy had been followed and applied.

102. In the Reconsideration Request of 19 September 2014, the Claimants say:

“ICANN should not interpose such obstacles to access without providing a factual basis to determine if its claimed privileges have any merit. At

minimum, the BGC should review the asserted protections and independently determine if they have any supportable grounds”.

103. Such a request is understandable in the circumstances. Article 4 of ICANN’s Articles of Incorporation require it to carry out its activities “*through open and transparent processes*”. Its Core Values include:

“Making decisions by applying documented policies neutrally and objectively, with integrity and fairness”, its Bylaws include the requirement to “operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness”.

104. The Panel is, of course, charged with reviewing the action of ICANN’s Board, rather than its staff, but the Panel wishes to make clear that, in carrying out its activities, the Board should seek to ensure that ICANN’s staff comply with the Articles of Incorporation and Bylaws of ICANN, and that a failure of the Board to ensure such compliance is a failure of the Board itself.

105. Although the Reconsideration Request said that “*the BGC should review the asserted protections and independently determine if they have any supportable grounds*”, it is the view of the Panel that this should not have been the starting point for the BGC in looking at the actions of the ICANN staff in dealing with the DIDP Request. As has already been said, the BGC does need to have a reasonable degree of assurance that the ICANN staff has correctly followed the requisite procedure and correctly applied ICANN policies. If the BGC considers it has that assurance, the Panel does not consider the BGC is required to conduct any form of independent determination as to the decisions made by the ICANN staff. The BGC would only need to go that far if it came to the conclusion that the ICANN staff had not followed the requisite procedure and/or had not correctly applied ICANN policies.

106. It is obvious, from the face of the denial of the Reconsideration Request issued by the BGC on 11 October 2014, that such an independent determination did not take place, and it appears that the BGC were satisfied that the ICANN staff had correctly followed procedure and applied policy. In the denial the BGC quite correctly state:

“It is ICANN’s responsibility to determine whether requested documents fall within those Nondisclosure Conditions. Specifically, pursuant to the DIDP process “a review is conducted as to whether the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions]...Here, in finding that certain requested

documents were subject to Nondisclosure Conditions, ICANN adhered to the DIDP process.

- 107.** Whilst the BGC does not explicitly say that a collection process occurred, it is implicit in the BGC denial that the BGC does believe that process was followed. In dealing specifically with numbered requests 1), 2) and 3), the denial says:

“Here, in finding that certain requested documents were subject to Nondisclosure Conditions, ICANN adhered to the DIDP process. Specifically, as to “documentation with the EIU for the performance of its role” and “communications with persons from EIU who are not involved in the scoring of a CPE,” ICANN analysed the Requesters’ requests in view of the DIDP Nondisclosure Conditions, including those covering “information exchanged, prepared for, or derived from the deliberative and decision-making processes” and “confidential business information and/or internal policies and procedures.”

- 108.** The denial quotes from the DIDP response as follows:

“ICANN must independently undertake the analysis of each Condition as it applies to the documentation at issue, and make the final determination as to whether any Nondisclosure Conditions apply”

The denial then goes on to say:

In conformance with the publicly posted DIDP process.... ICANN undertook such analysis, as noted above, and articulated its conclusions in the DIDP Response. While the Requesters may not agree with ICANN’s determination that certain Nondisclosure Conditions apply here, the requesters identify no policy or procedure that ICANN staff violated in making its determination, and the Requesters’ substantive disagreement with that determination is not a basis for reconsideration.”

- 109.** The denial also reaches a similar conclusion as to the adherence by the ICANN staff to the DIDP process in determining that the potential harm caused by disclosure outweighed the public interest in disclosure.

- 110.** Whilst the Panel considers that the ICANN staff could, and should, have been more explicit as to the process they had followed in refusing disclosure, the BGC determination document of 11 October 2014 provides the requisite degree of confirmation that the correct procedure was actually followed, that the BGC did, properly, consider whether the relevant policy or procedure was actually applied by the ICANN staff and whether, in doing so, the BGC could have a reasonable degree of assurance that the ICANN staff had correctly the applied the policy or procedure.

111. In doing so, the Panel is satisfied that the BGC acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws and that the Claimants complaints in this regard are not made out.

3. The denial by the BGC, on 18 November 2014, of the Reconsideration Request to have the CPE Panel decision in .eco reconsidered.

112. In conducting this analysis, the Panel has carefully considered the CPE report dated 6 October 2014, which determined that Big Room's community based application had prevailed, the Reconsideration Request dated 22 October 2014 and the BGC denial of the Reconsideration request dated 18 November 2014. In doing so, the Panel has considered whether the Board (through the BGC) has acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws.

113. The Panel is clear that, in doing so, it is required by ICANN's Bylaws to apply a defined standard of review focusing on:

- a. whether the BGC acted without conflict of interest in taking its decision?
- b. whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them?; and
- c. whether the BGC exercised independent judgment in taking the decision, believed to be in the best interests of the company?

114. As with the previous two issues, no allegation of conflict of interest has been made by the Claimants and the Panel has no information or documentation upon which it could reach any view as to whether a conflict of interest existed or not. In conclusion, so far as that requirement is concerned, the Panel can make no finding.

115. As it did in considering the first issue, and for the reasons stated there, the Panel considers that if the BGC is charged with considering whether the EIU correctly applied ICANN policies (which ICANN accepts it is), then it needs to look into how the standard was applied. It is not sufficient to limit the review to the question of whether mention was made of the relevant policy. The BGC needs to have a reasonable degree of assurance that the EIU has correctly applied the policy.

116. In their Reconsideration Request of 22 October 2014, at page 10, the Claimants say:

“Requester therefore requests ICANN in accordance with its Reconsideration Request process to:

- Reconsider the Determination, and in particular not award a passing score in view of the [CPE] criteria set out in the [Guidebook] for the reasons expressed in this Reconsideration Request and any reasons, arguments and information to be supplemented to this Request or forming part of a new Reconsideration Request in the future;*
- Reconsider ICANN’s decision that the Requester’s application for the .eco gTLD “Will not Proceed” to contracting; and*
- Restore the “Application Status” of the Requester’s application and the Application submitted by the Applicant to “Evaluation Complete”, their respective “Contention Resolution Statuses” to “Active”, and their “Contention Resolution Result” to “In Contention”.*

117. Earlier in the Reconsideration Request (at pages 2 and 3), the Claimants argue that the concept “eco” is much broader than the community definition provided by Big Room in its community based application and say:

“the community definition contained in the Application...- in Requester’s opinion – does not meet the criteria for community-based gTLDs that have been set out in ICANN’s Applicant Guidebook”

118. The Reconsideration Request goes on to give the reasons for this assertion, which can be summarised as:

- there is no clear and unambiguous definition of the community that Big Room’s community based application is intended to serve;
- the string .eco does not closely describe the community or the community members and over-reaches substantially beyond the community referred to in the application;
- the term .eco has various meanings that are completely unrelated to the community determined in Big Room’s application; and
- the CPE Panel failed to detail the letters of opposition received.

119. The BGC’s denial states:

“The Requesters do not identify any misapplication of any policy or procedure by ICANN or the CPE Panel. Rather the Requesters simply disagree with the CPE Panel’s determination and scoring of the Application, and challenge the substantive merits of the CPE Panel’s Report. Specifically, the Requesters contend that the CPE Panel improperly applied the first, second and fourth CPE criteria set forth in the [Guidebook].

Substantive disagreement with the CPE Panel's Report, however, is not a basis for reconsideration. Since the Requesters have failed to demonstrate that the CPE Panel acted in contravention of any established policy or procedure in rendering the Report, the BGC concludes that [the Reconsideration Request] be denied"

120. The BGC denial then goes on to examine whether the EIU properly applied the Guidebook scoring guidelines and CPE Guidelines in respect of each of the items raised by the Claimants and concludes, in respect of each one, that *"the CPE Panel accurately described and applied the Guidebook scoring guidelines and CPE Guidelines"*.
121. In considering the original CPE report of 6 October 2014, the Reconsideration Request dated 22 October 2014 and the BGC denial of the Reconsideration Request dated 18 November 2014, the Panel has looked closely at whether the BGC simply undertook an administrative "box ticking" exercise to see whether mention was made of the relevant policy or procedure in denying the Reconsideration Request, or whether, as the Panel considers the BGC is required to do, it looked into how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.
122. Unlike the Reconsideration Request in respect of the .hotel CPE determination, this Reconsideration Request does not raise questions as to whether the EIU followed ICANN policy and procedure. It is, indeed, correctly categorised by the BGC in its denial as a statement of substantive disagreement with the EIU's determination. Nevertheless, it is clear from the BGC determination document of 18 November 2014 as a whole that the BGC did, properly, consider how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.
123. In doing so, the Panel is satisfied that the BGC acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws and that the Claimants complaints in this regard are not made out.

4. The continued upholding of HTLD's application for .hotel in the light of the matters raised in Crowell & Moring's letter of 5 June 2015.

124. Crowell & Moring's letter of 5 June 2015 is addressed for the attention of the Members of the ICANN Board and to Mr Akram Atallah, the President of ICANN's GDD. It makes a number of serious allegations arising from a portal

configuration issue, which ICANN has admitted occurred, and which can be summarised as follows:

- The user credentials of someone called D. Krischenowski were used to conduct over 60 searches resulting in over 200 unauthorized access incidents across an unknown number of gTLDs;
- these searches resulted in the obtaining of sensitive and confidential business information concerning several of the .hotel applicants;
- D. Krischenowski is associated with HTLD; and
- the user of those credentials was deliberately looking for sensitive and confidential business information concerning competing applicants.

125. The letter then goes on to ask for certain information in relation to the portal configuration issue.

126. The letter is clearly addressed to the Members of the Board of ICANN and its President of GDD and asks, largely, for information and not documentation. It appears that the letter was also submitted through ICANN's DIDP and, in consequence, ICANN appears solely to have treated the letter as a DIDP request. Accordingly, on 5 July 2015, the ICANN staff responded in a document entitled "*Response to Documentary Information Disclosure Policy Request*" and stated:

"ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. Simple requests for non-documentary information are not appropriate DIDP requests".

127. As is clear from the face of the letter itself, it is not simply a DIDP request. The attempt by ICANN to treat it solely as such represents, at best, a basic error on its part and, at worst, an attempt by the Board to avoid dealing with what is clearly a serious and sensitive issue, which goes to the integrity of the application process for the .hotel gTLD.

128. To be fair, the DIDP Response goes on to provide much detail as to what ICANN has done in the way of forensic investigation and what that has revealed. It does not, however, state whether any consideration has been given as to the impact on the integrity of the application process for the .hotel gTLD.

129. In the Reply in the .hotel IRP, the Claimants have argued that, in the circumstances, HTLD's application for .hotel must be denied and have asked the Panel to declare that ICANN must reject HTLD's application.

130. In its Sur-Reply, ICANN argues that the Claimants have failed to identify any Board action or inaction in this regard that violates any of ICANN's Articles of Incorporation or Bylaws. ICANN states in the Sur-Reply that:

“The only Board action (or inaction) that the Claimants vaguely allude to in their Reply is that the Board did not directly respond to a letter addressed to both ICANN Board and staff requesting disclosure of information regarding the Portal Configuration issue. But, it was not the Board's responsibility to do so, and ICANN's Articles and Bylaws do not mandate that the Board reply to every letter it receives”.

131. In the context of the clear problems caused by ICANN's portal configuration problem, and the serious allegations contained in the letter of 5 June 2015, this is, in the view of the Panel, a specious argument.

132. In its Sur-Reply, ICANN goes on to say:

“Although Claimants Argue that [HTLD] “is closely linked with individuals who have misused, or have permitted the misuse of, their user credentials...this argument is unsupported and asserts no conduct by the ICANN Board. Claimants have failed to demonstrate that the Board has a duty to act with respect to Claimants' beliefs as to what the Board should do.”

133. Article III.1 of ICANN's Bylaws provides that *“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.”*

134. The approach taken by the ICANN Board so far in relation to this issue does not, in the view of the Panel, comply with this Bylaw. It is not clear if ICANN has properly investigated the allegation of association between HTLD and D. Krischenowski and, if it has, what conclusions it has reached. Openness and transparency, in the light of such serious allegations, require that it should, and that it should make public the fact of the investigation and the result thereof.

135. The fact that no such investigation has taken place, or if it has the results have not been published, could, in the view of the Panel, amount to Board inaction and fall within the remit of the Panel. However, at the hearing, the Panel was assured by ICANN's representative, that the matter was still under consideration by the Board and that the Panel should not view a failure to act, as at the date of the hearing, as inaction on the part of the Board.

136. In view of the fact that this issue was raised on 5 June 2015 by the Claimants, the Panel is of the view that it cannot remain under consideration by the Board

of ICANN for much longer and that, if no further, appropriate action has been taken by the date of this Declaration, the failure of the Board to act could well amount to inaction on its part.

137. This issue was raised after this IRP process had commenced and has only been the subject of relatively brief argument by the Claimants in their Reply and by ICANN in its Sur-Reply. At the hearing, not only did ICANN's representative inform the Panel that the issue was still under consideration by the Board of ICANN, but he also gave an undertaking on behalf of ICANN that if a subsequent IRP was brought in relation to this issue, ICANN would not seek to argue that it had already been adjudicated upon by this Panel.

138. In all the circumstances, the Panel has concluded it should not make a declaration on this issue in this IRP, but that it should remain open to be considered at a future IRP should one be commenced in respect of this issue.

5. The attempt by Minds + Machines Group Limited to join in the .hotel IRP.

139. As has already been stated, in the Claimants' Reply in the .hotel IRP, Minds + Machines Group Limited stated it wished to join in the proceedings and, in its Sur-Reply, ICANN objected, relying on Article 7 of the ICDR International Dispute Resolution Procedures.

140. Article 7 provides that "[n]o *additional party may be joined after the appointment of any arbitrator, unless all parties, including the additional party, otherwise agree*". There is nothing in the ICANN Supplementary Procedures that is inconsistent with this provision and, accordingly, it governs the procedure of this IRP.

141. Minds + Machines Group Limited applied for the .hotel gTLD and there does not appear to be any reason why, should it have so wished, it could not have joined with the Claimants in bringing the .hotel IRP. It did not do so and no reason has been given for its failure to do so. Accordingly, pursuant to Article IV.3.3 of ICANN's Bylaws, it is now time-barred from doing so.

142. In all the circumstances, the Panel rejects the request of Minds + Machines Group Limited to join this IRP.

J. Conclusion

143. Many general complaints were made by the Claimants as to ICANN's selection process in appointing EIU as the CPE Panel, the process actually followed by

EIU in considering community based applications, and the provisions of the Guidebook. However, the Claimants, sensibly, agreed at the hearing on 7 December 2015 that relief was not being sought in respect of these issues.

144. Nevertheless, a number of the more general issues raised by the Claimants and, indeed, some of the statements made by ICANN at the hearing, give the Panel cause for concern, which it wishes to record here and to which it trusts the ICANN Board will give due consideration.

145. At the hearing, ICANN submitted that it was not subject to a due process obligation neither pursuant to its Articles of Incorporation and Bylaws, nor pursuant to general international legal principles, notwithstanding Article 4 of its Articles of Incorporation. If this was intended as a general statement, the Panel finds this most surprising in the context of the role ICANN fulfils and the language of Article 4 itself. ICANN is a California non-profit corporation but Article 4 of the Articles of Incorporation refers to the principles of international law and local law and to the use of open and transparent processes to enable competition and open entry in Internet markets. The Panel understands the importance of administrative procedures, such as the CPE discussed below. The Panel also understands that the EIU and the BGC themselves are not adjudicatory but administrative bodies. Nevertheless, the Panel invites the Board to affirm that, to the extent possible, and compatible with the circumstances and the objects to be achieved by ICANN, transparency and administrative due process should be applicable.

146. Also, at the hearing, ICANN confirmed that, notwithstanding that different individual evaluators can be used to consider different CPE applications, the EIU has no process for comparing the outcome of one CPE evaluation with another in order to ensure consistency. It further confirmed that ICANN itself has no quality review or control process, which compares the determinations of the EIU on CPE applications. Much was made in this IRP of the inconsistencies, or at least apparent inconsistencies, between the outcomes of different CPE evaluations by the EIU, some of which, on the basis solely of the arguments provided by the Claimants, have some merit.

147. The CPE process for this round of gTLDs is almost at an end, so there is little or nothing that ICANN can do now, but the Panel feels strongly that there needs to be a consistency of approach in making CPE evaluations and if different applications are being evaluated by different individual evaluators, some form of outcome comparison, quality review or quality control procedure needs to be in place to ensure consistency, both of approach and marking, by evaluators. As was seen in the .eco evaluation, where a single mark is the difference between prevailing at CPE and not, there needs to be a system in

place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators.

148. Further, as has already been stated:

- In its letter of 4 December 2015, ICANN confirmed that the EIU's determinations are presumptively final, and the Board's review on reconsideration is not substantive, but rather is limited to whether the EIU followed established policy or procedure.
- At the hearing on 7 December 2015, ICANN confirmed that the core values, which apply to ICANN by virtue of its Bylaws, have not been imposed contractually on the EIU, and the EIU are not, in consequence, subject to them.

149. The combination of these statements gives cause for concern to the Panel. As has already been noted, Article I.2 of the Bylaws states:

“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.”

150. The Panel fails to see why the EIU is not mandated to apply ICANN's core values in making its determinations whilst, obviously, taking into account the limits on direct application of all the core values as reflected in that paragraph of the Bylaws. Accordingly, the Panel suggests that the ICANN Board should ensure that there is a flow through of the application of ICANN's core values to entities such as the EIU.

151. Having expressed the Panel's concern at these general issues, the Panel now turns to the specific issues which, ultimately, it was asked to consider in this IRP. The Panel has found, in relation to each of the specific issues raised in the .hotel and .eco IRPs that it is satisfied that the BGC acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws, and that the Claimants' complaints have not been made out.

152. In consequence, the Panel will not be making any of the declarations sought by the Claimants.

K. The Prevailing Party and Costs

153. Article IV.3.18 of the Bylaws states:

“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 the 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 shall bear its own expenses.”

154. The Panel confirms that it makes its declaration based solely on the documentation, supporting materials and arguments submitted by the parties and that on the basis of that documentation, supporting material and arguments, has concluded that ICANN is the prevailing party, both in respect of the .hotel IRP and the .eco IRP.

155. Although the Claimants have raised some general issues of concern as to the CPE process, the IRP in relation to the .hotel CPE evaluation was always going to fail given the clear and thorough reasoning adopted by the BGC in its denial of the Reconsideration Request and, although the ICANN staff could have responded in a way that made it explicitly clear that they had followed the DIDP Process in rejecting the Claimants’ DIDP request in the .hotel IRP, again the IRP in relation to that rejection was always going to fail given the clarification by the BGC, in its denial of the Reconsideration Request, of the process that was followed.

156. As for the .eco IRP, it is clear that the Reconsideration Request was misconceived and was little more than an attempt to appeal the CPE decision. Again, therefore, the .eco IRP was always going to fail.

157. Finally, although the letter from Crowell & Moring of 5 June 2015 raises some very serious issues, which the Panel considers the ICANN Board needs to address, in the end, the Panel has not had to adjudicate on this issue.

158. In conclusion, therefore, whilst the Panel has declared ICANN to be the prevailing party, the Claimants in this IRP have raised a number of serious issues which give cause for concern and which the Panel considers the Board need to address. In the circumstances, the Panel considers that the Claimants’

contribution to the public interest merits ICANN bearing half of the costs of the IRP Provider, which is the ICDR.

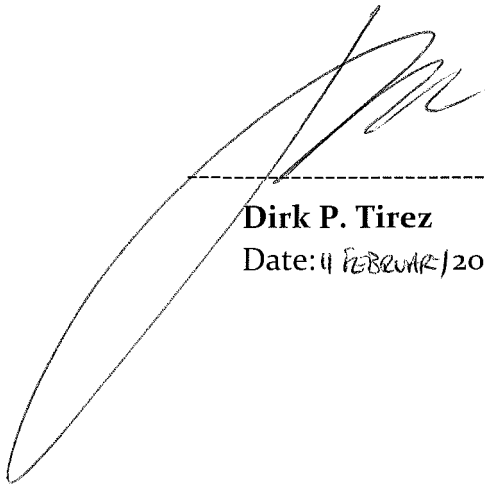
159. Article IV.3.18 provides that “[e]ach party to the IRP shall bear its own expenses”. Rule 11 of ICANN’s Supplementary Procedures provides:

“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”

160. ICANN has not sought to argue that any of the Claimants failed to enter into the Cooperative Engagement Process in good faith, and there is no evidence of this in the materials before the Panel. In consequence, the panel considers that, in accordance with Article IV.3.18 of the Bylaws, each side shall bear their own expenses including legal fees.

FOR THE FORGOING REASONS, the Panel hereby:

- (1) Declares that the IRP Request made in relation to the .hotel gTLD by Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC is denied;
- (2) Designates ICANN as the prevailing party in the .hotel IRP;
- (3) Declares that the IRP Request made in relation to .eco gTLD by Little Birch, LLC and Minds + Machines Group Limited is denied;
- (4) Designates ICANN as the prevailing party in the .eco IRP;
- (5) Declares that the fees and expenses of the IRP Panel members, totalling US\$113,351.52, and the fees and expenses of the ICDR, totalling US\$11,500.00, shall be born as to half by ICANN, and as to the other half collectively by Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, Radix FZC, Little Birch, LLC and Minds +Machines Group Limited (“Applicants”). Therefore, ICANN shall reimburse the Applicants collectively the sum of \$5,750.00 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by the Applicants; and
- (6) 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.



Dirk P. Tirez
Date: 11 FEBRUARY 2016



Thomas H. Webster
Date: 11 FEBRUARY 2016



Peter J. Rees QC
Chair of the IRP Panel
Date: 11 FEBRUARY 2016

Reference Material 65.

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

ICDR Case No. 50 2013 00 1083

DotConnectAfrica Trust,

Claimant,

v.

Internet Corporation for Assigned Names and Numbers,

Respondent.

DCA'S MEMORIAL ON THE MERITS

Weil, Gotshal, Manges, LLP
Contact Information Redacted

Counsel for Claimant

3 November 2014

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GLOSSARY

AU	African Union
AUC	African Union Commission
AGB	Applicant Guidebook
BGC	Board Governance Committee
CQs	clarifying questions
ccTLD	country code top-level domain
DNS	Domain Name System
DCA	DotConnectAfrica Trust
gTLD	Generic top-level domain
GNP	Geographic Names Panel
GAC	Governmental Advisory Committee
ICANN	Internet Corporation for Assigned Names and Numbers
NGPC	New gTLD Program Committee
NTIA	National Telecommunications & Information Administration
RFR	Request for Reconsideration
UNECA	United Nations Economic Commission on Africa
ZACR	ZA Central Registry

I. INTRODUCTION

1. DotConnectAfrica Trust (“DCA”) was formed as a not-for-profit organization for the purpose of applying for the right to operate the generic top-level domain (“gTLD”) .AFRICA. At each stage of the process, DCA has worked diligently to follow the rules and procedures promulgated by the Internet Corporation for Assigned Names and Numbers (“ICANN”). However, although ICANN has put in place rules that ostensibly regulate the delegation of new gTLDs in order to ensure that rights to new gTLDs are awarded transparently and as the result of fair competition among applicants, ICANN not only ignored these rules with respect to DCA’s application, but actively worked to ensure that a different applicant, UniForum SA, now known as ZA Central Registry (“ZACR”),¹ would obtain the rights to .AFRICA. Instead of functioning as a disinterested regulator of a fair and transparent gTLD application process, ICANN used its authority and oversight over that process to assist ZACR and to eliminate its only competitor, DCA, from the process. As a result, ICANN deprived DCA of the right to compete for .AFRICA in accordance with the rules ICANN has established for the new gTLD program, in breach of the AGB and ICANN’s Articles of Incorporation and Bylaws.

2. DCA submits with this memorial the Witness Statement of Sophia Bekele Eshete, founder and executive director of DCA.

II. STATEMENT OF RELEVANT FACTS

A. The New gTLD Program and Geographic Names

3. The purpose of the New gTLD Program, launched in 2011, is to allow private organizations to apply to manage TLDs pursuant to a standard Registry Agreement with ICANN. It is governed by the new gTLD Applicant Guidebook (“AGB”), which establishes a detailed process for evaluating applications for new gTLDs, including specific criteria against which applications should be judged.²

¹ For the sake of consistency, we refer to the applicant as “ZACR” throughout this Memorial.

² See AGB, Module 2 [Ex. C-11].

ICANN must review each application for completeness and post the non-confidential portions of each application to its website for public review and comment. ICANN provides any comments it receives within the 60-day period following the posting of the application to independent evaluators, who perform the initial evaluation of the application.³ In addition, the AGB requires that all applications be reviewed for reference to geographic regions; applications for strings deemed “geographic” demonstrate the support of at least 60% of the governments of the relevant region.⁴

4. All complete applications undergo a period of “Initial Evaluation,” in which six separate panels created by ICANN assess each application against criteria relating to the applied-for string (the “String Review”) and the applicant’s technical, operational and financial capabilities to operate a registry (the “Applicant Review”).⁵ ICANN also performs background checks on each entity applying for a gTLD and the individuals named in the application.⁶ The String Similarity⁷ and Geographic Names reviews are performed by independent, third-party panels designated by ICANN.⁸ Applicants are not permitted to communicate directly with evaluators, though evaluators may request clarifying information from particular applicants by submitting “clarifying questions” (“CQs”) to ICANN, which ICANN then

³ AGB, Module 1.1.2.3 [Ex. C-11].

⁴ Compare AGB Version 1, 2.1.1.4.1 (24 October 2008), [Ex. C-54] (“In the case of an application for a string which represents a continent or UN region, evidence of support, or non-objection, will be required from a substantial number of the relevant governments and/or public authorities associated with the continent or the UN region.”) with AGB, Module 2.1.1.4.1, [Ex. C-11] (“documentation of support will be required from at least 60% of the respective national governments in the region, and there may be no more than one written statement of objection to the application from relevant governments in the region and/or public authorities associated with the continent or the region.”).

⁵ See AGB, Module 1.1.2.5 [Ex. C-11]. See generally Draft New gTLD Evaluation Program – Evaluation Process [Ex. C-55] (excerpt from AGB, Module 1).

⁶ See *id.*

⁷ *I.e.*, review for the probability of user confusion with similar existing strings, applied-for TLDs, or Reserved Names. See *infra* at ¶ 13 for more on the Reserved Names List.

⁸ AGB, Module 2.4, [Ex. C-11] (“A number of independent experts and groups play a part in performing the various reviews in the evaluation process.”); *id.* at 2.4.2 (“ICANN has selected qualified third-party providers to perform the various reviews...”); *id.* at 2.4.3 et. sec. (detailing the Code of Conduct and Conflict of Interest Guidelines for evaluators).

transmits to the applicant.⁹ An application must pass each of these six reviews to pass Initial Evaluation.

B. The GAC's Role In ICANN's Evaluation Process New gTLD Applications

5. During the 60-day public comment period for applications, ICANN's Governmental Advisory Committee ("GAC") also has the opportunity to comment on applications. The GAC's purpose is to "consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues."¹⁰ Membership on the GAC is open to representatives of all national governments and, at the invitation of the GAC through its chair, "[e]conomies as recognized in the international fora, and multinational governmental organizations and treaty organizations."¹¹ Under the New gTLD Program, the GAC may issue an "Early Warning" concerning an application, which is meant to notify an applicant that one or more governments view the application as "potentially sensitive or problematic" from a public policy standpoint.¹²

6. Parties who meet the standing requirements set forth in the AGB may file objections to an application on any one, or combination, of four exclusive grounds for up to two weeks after ICANN has posted the results of its "Initial Evaluation" of the application.¹³ Unlike comments, formal objections filed against an application are reviewed and decided by third-party dispute resolution

⁹ See AGB, Module 2.2.2.3, [Ex. C-11]; see also ICANN, Clarifying Questions, <http://newgtlds.icann.org/en/applicants/clarification-questions>.

¹⁰ Bylaws, Art. XI, § 2.1.a. [Ex. C-10]; see also AGB, Module 3.1 [Ex. C-11]. The limitation of the GAC to an advisory role that does not determine ICANN's policy or decision-making was purposeful, since ICANN was created precisely in order to ensure that Internet infrastructure and governance would be free of governmental control. See Expert Report of Dr. Milton Mueller, §§ 4.1-4.1.2, 5.4, [Ex. C-56], *ICM Registry v. ICANN*, ICDR Case No. 20 117 T 00224 08 (19 Feb. 2010) [Ex. C-12].

¹¹ Bylaws, Art. XI, § 2.1.b [Ex. C-10].

¹² AGB, Module 1.1.2.4 [Ex. C-11].

¹³ The four grounds are: (i) "string confusion" (the applied for string is confusingly similar to another string), (ii) "legal rights" (the applied for string infringes on the rights of the objector), (iii) "limited public interest" (the applied for string is contrary to generally accepted legal norms of morality and public order) or (iv) "community objection" (there is substantial opposition to an application from a significant portion of a clearly delineated community). AGB, Module 3.2.1 [Ex. C-11].

providers appointed by ICANN. The initial review is not suspended as a result of ICANN's receipt of comments, GAC Early Warning Advice or formal objections relating to an application.¹⁴

7. During the formal objection period, the GAC also may provide "public policy advice" directly to the Board on any application that may be considered by the Board during the evaluation process.¹⁵

The AGB provides that GAC advice "is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities."¹⁶

According to the AGB, the Board's 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)."¹⁷

8. Following the close of the objection period, any formal objections are ruled upon by independent experts, and any GAC advice relating to a particular application is considered by the Board. If neither applies, then the applicant either proceeds towards negotiating a registry agreement with ICANN to operate the applied for string or, if multiple applicants passed Initial Evaluation, enters into a process called "contention" to identify the prevailing applicant.¹⁸

9. As explained below, with respect to applications for .AFRICA, ICANN allowed the GAC to be used as a vehicle for the issuance of advice against DCA's application by DCA's only competitor for .AFRICA, the African Union ("AU"), ensuring that rights to .AFRICA would be delegated to the chosen proxy of the African Union Commission (the "AUC"), ZACR.

¹⁴ *Id.* at Module 1.1.2, 1.1.2.4, 1.1.2.6 [Ex. C-11].

¹⁵ *Id.* at Module 1.1.2.7 [Ex. C-11].

¹⁶ *Id.* at Module 3.1 [Ex. C-11].

¹⁷ *See id.*

¹⁸ *See generally* AGB, Module 4 [Ex. C-11].

C. DCA’s Early Campaign for Africa

10. When DCA’s founder and executive director, Sophia Bekele, began to solicit interest in the .AFRICA TLD in 2006, ICANN had not yet settled on the final AGB requirements, including what would be required of applicants for geographic gTLDs. Ms. Bekele began by targeting regional organizations for endorsements, reasoning that the regional organizations’ endorsements would either count toward 100% of the geographic support requirement or would provide backing to solicit endorsements from individual governments.

11. From 2006 to 2008, Ms. Bekele engaged with numerous African multinational organizations responsible for prompting development in Africa, including the AU, the United Nations Economic Commission on Africa (“UNECA”), and the African Development Bank.¹⁹ Ms. Bekele obtained endorsements for her “DotConnectAfrica Initiative” to apply to ICANN for the right to operate .AFRICA from the Executive Secretary of UNECA in 2008 and from the Chairman of the AUC in 2009.²⁰ DCA officially launched the .AFRICA campaign in 2010.²¹

D. ICANN’s Advice To The AUC On Reserving .AFRICA For Its Own Use

12. Prior to the opening of the new gTLD application period, ICANN received a request from the AUC—despite having endorsed DCA’s campaign for .AFRICA—to reserve the exclusive rights to .AFRICA and its French and Arabic equivalents for itself as an international organization made up of government representatives.²² Strings on ICANN’s Reserved Names List, however, can *never* be

¹⁹ See Witness Statement of S. Bekele at ¶¶ 27- 34 for a description of this engagement.

²⁰ See UNECA Endorsement Letter to Ms. Bekele (8 August 2008), [Ex. C-15]; AUC Endorsement Letter to Ms. Bekele (27 August 2009), [Ex. C-16]. During Ms. Bekele’s meetings with the AUC Chairman Jean Ping regarding .AFRICA, Dr. Ping asked Ms. Bekele her opinion on which Department within the AUC ought to coordinate with her on the .AFRICA project. Ms. Bekele suggested that the Department of Infrastructure and Energy had the requisite authority, based upon an analysis performed by the UN Working Group on Internet Governance, and Chairman Ping put Ms. Bekele in touch with Commissioner Elham Ibrahim to work out the details of the African Union endorsement under his name. See Witness Statement of Sophia Bekele, at ¶¶ 30, 33-34; REDACTED [Ex. C-57]. See also Oxfam International Liaison Office with the African Union, 2 “African Union Compendium,” 104-05 (2014), [Ex. C-58] (explaining the role of the AUC Department of Infrastructure and Energy).

²¹ See Amended Notice of IRP at ¶ 18.

²² African ICT Ministerial Round-Table on 42nd Meeting of ICANN (21 October 2011), [Ex. C-22].

delegated: they are reserved for special use.²³ In making this request, the AUC was asking ICANN to treat it like a national government, which has exclusive rights to its two-letter country code TLD (“ccTLD”) (e.g., “.za” for South Africa), seeking to have .AFRICA treated as a continental ccTLD, treatment not contemplated in either the gTLD program or the ccTLD system.²⁴ If ICANN granted the AUC’s request and allowed only the AUC to choose the registry operator(s) for each string, the AUC would gain exclusive control over the operation of .AFRICA without going through the new gTLD application process at all.

13. ICANN rejected the AUC’s request to reserve .AFRICA in March 2012.²⁵ However, in the same letter ICANN also instructed the AUC on how to use the GAC to achieve the desired result by other means—advice the AUC proceeded to follow in order to eliminate DCA’s application from competition for .AFRICA.²⁶ In a letter dated 8 March 2012, ICANN Board Chairman Stephen Crocker explained to the AUC that although ICANN could not reserve .AFRICA for the AU’s use because the Reserved Names list was already closed, the AUC could “play a prominent role in determining the outcome of any application” for .AFRICA: first, as a “public authorit[y] associated with the continent,” the AUC could block a competing application by filing “one written statement of objection;” second, the AUC could file a Community Objection (a type of formal objection recognized by ICANN and decided by an independent evaluator); or finally, the AUC could utilize the GAC to combat a competing application for .AFRICA.²⁷

²³ The full list of Reserved Names is available at <https://www.icann.org/sites/default/files/packages/reserved-names/ReservedNames.xml>.

²⁴ ICANN did not respond to the AUC’s request until 8 March 2012, just one month before the gTLD application deadline was due to close, meaning that for the bulk of the application cycle, African governments remained under the impression that .AFRICA and related names might be reserved for the AUC’s use.

²⁵ See Witness Statement of S. Bekele at ¶¶ 61-63.

²⁶ See Letter from Stephen Crocker to Elham M.A. Ibrahim, p. 2 (8 March 2012), [Ex. C-24].

²⁷ Letter from Stephen Crocker to Elham M.A. Ibrahim, p. 2 (8 March 2012), [Ex. C-24].

14. Shortly after receiving ICANN’s advice to use the GAC to obtain .AFRICA, the AUC joined the GAC,²⁸ and the GAC requested an extension to file early warnings against new gTLD applications.²⁹ In November 2012, the AUC and GAC representatives from 16 other countries filed substantially identical Early Warnings, complaining that DCA’s application was problematic because it was in competition with the ZACR application, for which the AUC was a co-applicant.³⁰ DCA filed a response pointing out that the Early Warning did not touch upon any permissible reason for objecting to DCA’s application.³¹

15. Meanwhile, having been chosen by the AUC to apply for .AFRICA on its behalf, ZACR submitted an application for the .AFRICA gTLD to ICANN with the AUC listed as a co-applicant.³² The application indicated that the AUC—and not ZACR—would retain the right to reassign the gTLD registry operations.³³ ZACR, however, did not have letters of support from REDACTED . Instead, it filed letters REDACTED , along with declarations made by the AUC regarding its intention to reserve .AFRICA for its own use REDACTED

²⁸ GAC Communiqué – Prague, Czech Republic, p. 1 (28 June 2012), [Ex. C-59].

²⁹ Letter from Heather Dryden to Stephen Crocker, p. 2 (17 June 2012), [Ex. C-60]. The AGB required the GAC to submit early warnings by the close of the public comment period on August 1, 2012, *see* AGB, Module 1.1.2.4. The AGB also required that the GAC file Advice against any application no later than the close of the Objection Filing Period on 13 March 2013, *see* AGB, Module 3.1; 1.1.2.6. *See generally* Chronology of ICANN’s Actions During the New gTLD Process [hereinafter “Chronology”], [Ex. C-61].

³⁰ *See* Amended Notice of IRP at ¶¶ 26-27. *See also* GAC Early Warnings, [Exs. C-33, C-34]. Shortly after the applications were published, ICANN also created an African Strategy Working Group (“ASWG”) to increase ICANN’s engagement with African internet users and almost exclusively appointed individuals connected to the ZACR application to manage the group and dictate ICANN’s engagement with Africa. *See* Witness Statement of Sophia Bekele at ¶¶ 48-50, 54-56, 68-74; African Internet Community, [Ex. C-62].

³¹ *See* DCA Response to GAC Early Warning, 4-5 (5 December 2012), [Ex. C-35].

³² *See* New gTLD Application Submitted to ICANN by: UniForum SA (NPC) trading as Registry.Africa (13 June 2012), q. 18 (a), [Ex. C-28] (“The African Union Commission (AUC) has, on behalf of its member states, officially appointed UniForum SA to apply for and launch the dotAfrica TLD.”); *id.* at q. 22, 29 (3) (describing various rights reserved to the AUC and aspects of TLD operations that the AUC will administer).

³³ *See id.* at q. 22 (7) (“It should be noted that the AUC shall retain all rights relating to the dotAfrica TLD, including in particular, intellectual property and other rights to the registry databases required to ensure the implementation of the agreement between the AUC and the ZACR, and the right to re-designate the registry function.”) [Ex. C-28].

REDACTED as evidence of such support.³⁴

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³⁵ In other words, the ZACR application was, for all intents and purposes, the AUC’s application, and the purpose of it was to reserve .AFRICA for the AUC’s use.

E. ICANN Staff Inappropriately Coordinated With The Geographic Names Panel Concerning Applications For .AFRICA

16. ICANN not only advised the AUC on how to control the delegation of .ARICA, but it also

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in order to

ensure that ZACR’s application would pass review.

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InterConnect Communications (“InterConnect”), the organization that ICANN contracted to perform the string similarity and geographic review during the Initial Evaluation.³⁶

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³⁴ REDACTED [Ex. C-63]. See Oliver Tambo Declaration (5 November 2009),[Ex. C-64]; Abuja Declaration (7 August 2010),[Ex. C-65] .

³⁵ REDACTED [Ex. C-66] REDACTED

³⁶ REDACTED [Ex. C-67].

³⁷ [Ex. C-67]. See also AGB, Module 2.2.1.4.2.

³⁸ REDACTED

REDACTED [Ex. C-68] REDACTED

³⁹ REDACTED [Ex. C-69]. REDACTED

REDACTED [Ex. C-70].

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F. GAC Objection Advice On .AFRICA

18. Meanwhile, having used its new position as a GAC member to coordinate a GAC Early Warning, the AUC began preparing GAC advice against DCA’s application.

19. Prior to the ICANN meeting in Beijing in April 2013, REDACTED

Kenya’s GAC advisor, Sammy Buruchara, was unable to attend the

⁴⁰ REDACTED [Ex. C-71] REDACTED

DCA had endorsements from the AUC and UNECA, Compare REDACTED [Ex. C-72] with REDACTED [Ex. C-73] REDACTED

⁴¹ REDACTED [Ex. C-68], see also REDACTED [Ex. C-74]; REDACTED [Ex. C-75] REDACTED

⁴² REDACTED [Ex. C-72]; REDACTED [Ex. C-73].

⁴³ REDACTED [Ex. C-70].

⁴⁴ REDACTED [Ex. C-74]; REDACTED [Ex. C-76]; REDACTED [Ex. C-77].

GAC meeting in person, but was informed that at a meeting of the GAC and ICANN Board on 9 April 2013, Alice Munyua, Kenya’s former GAC advisor and a member of the ZACR Steering Committee as well as a GAC representative for the AUC, made a statement purportedly on behalf of Kenya denouncing DCA’s application for .AFRICA.⁴⁵ Mr. Buruchara wrote to the GAC Chairperson Heather Dryden later that evening to inform her that Ms. Munyua no longer represented Kenya and that Kenya did not share her viewpoints on .AFRICA.⁴⁶

20. REDACTED

Mr. Buruchara, who explained that Kenya supported the AUC’s application for .AFRICA but did not think it was appropriate for the AUC to utilize the GAC to eliminate competition.⁴⁷

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⁴⁵ See Transcript of Beijing GAC-ICANN Board meeting, p. 19-23 (9 April 2013), [Ex. C-78] (recording Ms. Munyua’s comments on behalf of Kenya, followed by comments from an AUC Representative thanking Ms. Munyua for her comments and indicating that Ms. Munyua attended the Beijing meeting as “one of the AUC [GAC] representatives”).

⁴⁶ REDACTED [Ex. C-79]. The email apparently bounced back from Ms. Dryden’s inbox REDACTED Kenya’s GAC Representative Michael Katundu forwarded the email to Ms. Dryden’s personal address, as well as copying the GAC distribution list. See REDACTED [Ex. C-80]. REDACTED See REDACTED [Ex. C-81].

⁴⁷ REDACTED [Ex. C-82] REDACTED

⁴⁸ Compare REDACTED [Ex. C-83] REDACTED [Ex. C-84] with REDACTED REDACTED See also REDACTED REDACTED [Ex. C-85] REDACTED REDACTED ; REDACTED [Ex. C-86] REDACTED

therefore incorrect in asserting that Mr. Buruchara ultimately endorsed the advice against .AFRICA; he did not.⁵⁰ Nonetheless, the GAC Communiqué of 11 April 2013 purported to offer *consensus advice* that DCA’s application should not proceed (the “GAC Objection Advice”).⁵¹

22. DCA responded to the GAC Advice on 8 May 2013, indicating that it would be inappropriate for ICANN to allow the AUC to utilize the GAC to eliminate DCA, the AUC’s only competitor for .AFRICA. DCA submitted a list of nine points for the ICANN Board to consider in evaluating the GAC Objection Advice, explaining that (i) it was anticompetitive, contravening both the ICANN Bylaws and the GAC Operating Principles; (ii) the GAC is a policy body and is not empowered to perform the GNP evaluation, as it purported to do; (iii) ZACR also failed to satisfy the 60% geographic requirement, and it would be inappropriate to treat the applications differently; (iv) the GAC Objection Advice was not consensus advice, because Kenya objected to it; and (v) the GAC Objection Advice was untimely under the AGB.⁵²

23. On 4 June 2013, the NGPC held a meeting to “consider accepting the GAC Advice.”⁵³ The meeting minutes show no evidence that the NGPC considered any of DCA’s nine points before

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[Ex. C-87]

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⁵⁰ See ICANN’s Response to Claimant’s Amended Notice, ¶ 38 (“representatives of several other African countries criticized Mr. Buruchara’s statements and strongly encouraged Mr. Buruchara to change his position stated in these two emails, which he did.”) [hereinafter, “ICANN Response”].

⁵¹ GAC Communiqué – Beijing, China (11 April 2013), [Ex. C-43] (“The GAC has reached consensus on GAC Objection Advice according to Module 3.1 part I of the [AGB] on the following applications: 1. The application for .africa (Application number 1--1165--42560)”). GAC advice may take three forms: (i) consensus advice that a particular application should not proceed, which creates a “strong presumption for the ICANN Board that the application should not be approved,” (ii) non-consensus advice that the GAC has concerns about a particular application, about which the Board “is expected to enter into a dialogue with the GAC to understand the scope of the concerns” and “is also expected to provide a rationale for its decision,” and (iii) non-consensus advice that an application should not proceed unless remediated, which raises a strong presumption that a particular application should be disqualified unless the applicant implements a remediation method set forth in the AGB. AGB, Module 3.1.I.-III [Ex. C-11].

⁵² See generally GAC Advice Response Form for Applicants (8 May 2013), [Ex. C-41].

⁵³ Despite ICANN’s claims that the NGPC met “multiple times” to discuss the advice on DCA, see ICANN Response at ¶ 20, the 4 June meeting of the NGPC was the only meeting which took place after DCA had an opportunity to respond to

accepting the GAC Advice.⁵⁴ Both Mike Silber and Chris Disspain, whom DCA had previously complained had conflicts of interest with respect to .AFRICA, were present and voted to accept the GAC Objection Advice against DCA.⁵⁵

24. At the time the NGPC accepted the GAC advice on DCA’s application, ICANN REDACTED . DCA would never receive CQs from InterConnect because REDACTED

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G. DCA’s Request For Reconsideration By The NGPC

25. DCA filed a Request for Reconsideration (“RFR”)⁵⁷ on 19 June 2013, requesting that the NGPC reconsider its acceptance of the GAC Advice. Specifically, DCA argued that, because the GAC Advice was structured as an objection, the NGPC should have exercised its discretionary power to consult an independent expert of the kind designated to hear objections under the Dispute Resolution framework.⁵⁸ The AGB provides this option to the ICANN Board; moreover, DCA argued that a

the Advice. *See* Minutes of NGPC Meeting (8 May 2013), [Ex. C-88] (indicating that the Board discussed the GAC Advice on .AFRICA, but also noting that the applicant response window closed on 10 May 2013, so the Board could not take any action with regard to individual applications until after the window closed). To the extent that the NGPC did, as ICANN claims, discuss the advice on DCA’s application “multiple times,” it did so without investigating any of DCA’s concerns. Furthermore, in contrast to the detailed discussions the NGPC had on other matters at the 4 June meeting, the discussion of the Advice on DCA is summarized in all of three sentences. *See* Minutes of NGPC Meeting (4 June 2013), [Ex. R-4]

⁵⁴ *See* Minutes of NGPC Meeting, p. 2 (4 June 2013), [Ex. R-4] (“The Committee *discussed accepting* the GAC (Governmental Advisory Committee) advice regarding application number 1-1165-42560 for .AFRICA and application number 1-1936-2101 for .GCC.”) (emphasis added).

⁵⁵ *See* Amended Notice of IRP, at ¶¶ 24-25 for details on the conflicts of interest and the Ombudsman’s investigation, which found on 12 December 2012 that, utilizing a definition of conflicts of interest as relates to judges and arbitrators rather than board members, Mike Silber and Chris Disspain were not conflicted with regard to .AFRICA, because *the board had yet to take any decisions with regard to .AFRICA*. Nonetheless, Mr. Silber and Mr. Disspain both updated their conflicts of interest statements on 18 December 2012 to include the conflicts that DCA identified. Witness Statement of Sophia Bekele at ¶¶ 104-124.

⁵⁶ REDACTED [Ex. C-89]. *See also* Chronology, [Ex. C-61]

⁵⁷ ICANN’s Bylaws provide the Reconsideration Request as a mechanism “by which any person or entity materially affected by an action of ICANN may request review or reconsideration of that action by the Board.” The RFR includes reconsideration of Board or Staff action, but must be filed within 15 days of the posting of the minutes of the action on ICANN’s website. For RFRs relating to Board actions, the BGC reviews the RFR and provides a recommendation, and the NGPC thereafter determines whether to adopt the BGC recommendation. *See generally* Bylaws, Art. IV § 2, [Ex. C-9].

⁵⁸ DCA Trust Reconsideration Request Form (19 June 2013), p. 4-5, [Ex. C-46].

summary decision was not appropriate given the huge investment made by DCA and the extremely political nature of the contention between DCA and the AUC.

26. The BGC considered DCA's RFR at two Board meetings. On 14 July 2013, the BGC considered a draft recommendation that was apparently drafted before the BGC deliberated the RFR. Mr. Silber abstained from the discussion; Mr. Disspain did not.⁵⁹

27. On 1 August 2013, the BGC met again to finalize its recommendation,⁶⁰ indicating that DCA had not identified material that the NGPC did not consider during its discussion of the GAC Advice, and if DCA wanted the NGPC to consult an independent expert, DCA should have raised that in its Response to the GAC Advice. Furthermore, the BGC argued that the independent expert was a discretionary measure. According to the BGC, the AGB merely required the Board to (i) post the GAC Advice publicly, (ii) allow 21 days for DCA to respond, and (iii) consider the Advice and the Response as soon as possible.⁶¹ Finally, the BGC found that DCA did not show that the outcome would have been different if an independent expert had been consulted; so the BGC recommended that the NGPC deny DCA's RFR.

28. On 13 August 2013, the NGPC met and decided to accept the BGC's recommendation that it *approve its own* 4 June 2013 decision to accept the GAC Advice.⁶²

⁵⁹ See Minutes of BGC Meeting (14 July 2013), [Ex. C-117]. Three days later, the NGPC met again and apparently determined *sua sponte* that it was necessary to clarify that no one who voted to accept the GAC Advice on .AFRICA at the prior meeting was conflicted. Consequently, the NGPC asked itself if any member who voted previously had felt conflicted, and all members confirmed that they did not believe they were conflicted. See Minutes of NGPC Meeting (17 July 2013), p. 9 [Ex. R-5].

⁶⁰ See Minutes of BGC Meeting (1 August 2013), [Ex. C-90].

⁶¹ BGC Recommendation, p. 9 (1 August 2013), [Ex. C-47]. See generally Chronology [Ex. C-61].

⁶² See Minutes of NGPC Meeting (13 August 2013), [Ex. C-91]. Mr. Silber abstained from the vote; whereas Mr. Disspain did not. The only other attorney on ICANN's Board, Ms. Olga Madruga-Forti, also apparently left the NGPC meeting before the vote. Ms. Madruga-Forti resigned from the ICANN Board in October 2014. See Kieren McCarthy, "Another ICANN Board member resigns," The Register (16 October 2014), available at <http://www.theregister.co.uk/2014/10/16/second-icann-board-member-quits/>.

H. ICANN Staff's Efforts To Help ZACR Pass The Geographic Names Review

29. After removing DCA from competition for .AFRICA, ICANN decided that REDACTED

The

same ICANN staffers then

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⁶³ REDACTED

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⁶⁵ Part of the rush seems to have been acting to move ZACR's application forward before DCA could react to the quashing of its own application: REDACTED

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⁶³ REDACTED [Ex. C-92]; REDACTED [Ex. C-92]

⁶⁴ Compare REDACTED [Ex. C-92] to REDACTED [Ex. C-93]; See also REDACTED, [Ex. C-94].

⁶⁵ See REDACTED See also REDACTED [Ex. C-95]; REDACTED [Ex. C-96]; REDACTED [Ex. C-97]; REDACTED

REDACTED [Ex. C-89].

⁶⁶ REDACTED [Ex. C-96]. ICANN acted with the same blatantly obstructive alacrity earlier this year, when it signed a contract with ZACR two days ahead of schedule in order to make it impossible for DCA to obtain provisional relief preventing it from doing so, as DCA had warned it was about to do. See generally Request for Emergency Arbitrator and Interim Measures of Protection ¶¶ 3-4.

entered into the contracting phase with ICANN.⁶⁷

III. LAW APPLICABLE TO THESE PROCEEDINGS

30. The version of ICANN’s Articles of Incorporation and its Bylaws in effect at the time DCA filed its Request for IRP applies to these proceedings.⁶⁸ ICANN’s agreement with the U.S. Department of Commerce, National Telecommunications & Information Administration (“NTIA”), the “Affirmation of Commitments,” is also instructive, as it explains ICANN’s obligations in light of its role as regulator of the Domain Name System (“DNS”).⁶⁹ The standard of review is a *de novo* “independent review” of whether the actions of the Board violated the Bylaws, with focus on whether the Board acted without conflict of interest, with due diligence and care, and exercised independent judgment in the best interests of ICANN and its many stakeholders.⁷⁰

31. All of the obligations enumerated in these documents are to be carried out *first* in conformity with “relevant principles of international law” and *second* in conformity with local law.⁷¹ As explained by Dr. Jack Goldsmith in his Expert Report submitted in *ICM v. ICANN*, the reference to

⁶⁷ See REDACTED [Ex. C-98] REDACTED ; New gTLD Program Initial Evaluation Report, Application ID 1-1243-89583 (12 July 2013), [Ex. C-99] (recording ZACR’s passing the initial evaluation). See generally Chronology [Ex. C-61].

⁶⁸ Articles of Incorporation of Internet Corporation for Assigned Names and Numbers (21 November 1998) [hereinafter, the “Articles of Incorporation”] [Ex. C-9]; Bylaws of the Internet Corporation for Assigned Names and Numbers (11 April 2013) [hereinafter, the “Bylaws”] [Ex. C-10].

⁶⁹ Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers (30 September 2009) [hereinafter, the “Affirmation of Commitments”] [Ex. C-100]. The Articles of Incorporation, Bylaws, and Affirmation of Commitments shall together be referenced as the “Governing Documents.”

⁷⁰ Bylaws, Art. IV § 3 (4), [Ex. C-10]. See also, *ICM v. ICANN*, ¶¶ 136, 152 (19 Feb. 2010), [Ex. C-12] (“the actions and decisions of the ICANN Board are not entitled to deference whether by application of the “business judgment” rule or otherwise; they are to be appraised not deferentially but objectively.”).

⁷¹ See *ICM v. ICANN*, ¶ 140 (19 Feb. 2010) [Ex. C-12] (“In the view of the Panel, ICANN, in carrying out its activities ‘in conformity with the relevant principles of international law,’ is charged with acting consistently with relevant principles of international law, including the general principles of law recognized as a source of international law.”); see also, *id.* at ¶ 141 (“The paramount principle in play is agreed by both parties to be that of good faith...”).

“principles of international law” in ICANN’s Articles of Incorporation should be understood to include both customary international law and general principles of law.⁷²

IV. ARGUMENT: ICANN BREACHED ITS BYLAWS AND ARTICLES OF INCORPORATION

32. By preventing DCA’s application from proceeding through the new gTLD review process and by coordinating with the AUC and others to ensure that the AUC obtained the rights to .AFRICA, ICANN breached its obligations of independence, transparency and due process contained in its Articles of Incorporation and Bylaws, including its obligation to conduct itself consistent with its duty of good faith under relevant principles of international law.⁷³

A. ICANN Breached Its Articles Of Incorporation And Bylaws By Discriminating Against DCA And Failing To Permit Competition For The .AFRICA gTLD

33. ICANN’s Bylaws and Articles of Incorporation prohibit it from discriminating against any party and require it to apply its “standards, policies, procedures or practices” equitably, unless for a “substantial or reasonable” cause—such as the promotion of effective competition.⁷⁴ ICANN is similarly committed to make decisions in a neutral and fair manner, without favoring any one party over another,⁷⁵ and ICANN is required to implement its policies neutrally and objectively.⁷⁶ Finally, ICANN has an obligation, enumerated in its governing documents and in the Affirmation of Commitments to actively promote and encourage competition in the DNS.⁷⁷ Principles of

⁷² Expert Report of Jack Goldsmith, ¶¶ 23-25, *ICM v. ICANN*, [Ex. C-12].

⁷³ See generally Articles of Incorporation, ¶ 4, [Ex. C-9]; Bylaws, Art. I, Section 2, “Core (Council of Registrars) Values,” [Ex. C-10].

⁷⁴ Bylaws, Art. II § 3, [Ex. C-10].

⁷⁵ *Id.* at Art. I § 2(8) (“Making decisions by applying documented policies neutrally and objectively, with integrity and fairness”).

⁷⁶ *Id.* at Art. III § 1 (“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”).

⁷⁷ Affirmation of Commitments, Cl. 3, [Ex. C-100] (“This document affirms key commitments by DOC and ICANN, including commitments to: (a) ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent; (b) preserve the security, stability and resiliency of the DNS; (c) promote competition, consumer trust, and consumer choice in the DNS marketplace; and (d) facilitate international participation in DNS technical coordination”); *id.* at Cl. 9.3 (“Promoting competition, consumer trust, and consumer choice:

international law, including the principle of good faith and the customary international law minimum standard of treatment of aliens, include prohibition on discrimination.⁷⁸ Discrimination occurs when similarly placed parties are treated differently without justification.⁷⁹ The general principle of good faith, which includes the prohibition on abuse of rights, also requires ICANN not to abuse its authority in carrying out its activities.⁸⁰ The Board itself undertook to promote the AUC's attempts to secure .AFRICA; and despite repeated notifications submitted by DCA, the Board turned a blind eye to the actions its staff took to ensure that the AUC would prevail in acquiring .AFRICA.

ICANN will ensure that as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed prior to implementation. If and when new gTLDs (whether in ASCII or other language character sets) have been in operation for one year, ICANN will organize a review that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion.”).

⁷⁸ See, e.g., Nicolas F. Diebold, “Standards of Non-Discrimination in International Economic Law,” 60 Int’l & Comp. L.Q. 831, 831 (2011), [Ex. C-101] (“The principle of non-discrimination...has become a central pillar of modern international economic law.”); Edwin Borchard, “The ‘Minimum Standard’ of the Treatment of Aliens,” 38 Mich. L. Rev. 445 (1940), [Ex. C-102] (describing minimum standard of treatment to include equality before law and non-discriminatory treatment).

⁷⁹ *ADC Affiliate Ltd. v. Republic of Hungary*, ICSID Case No. ARB/03/16 (Award of 2 October 2006) ¶ 442, [Ex. C-103]. The principle of non-discrimination is found throughout numerous legal systems. For example, it is treated under the rubric of equality of treatment by the European Court of Justice. The ECJ has held that the principle of equality of treatment is a fundamental principle of European Community law. The principle of equal treatment means that comparable situations may not be treated differently unless the difference in treatment is objectively justified. See *Joint Cases 117/76 and 16/77 Ruckdeschel* 1977 E.C.R. 1753, [Ex. C-104]; see also *Case 810/79 Uberschar v. Bundesversicherungsanstalt für Angestellte* 1980 E.C.R. 2747, ¶ 16, [Ex. C-105]. The EC, like the United States and most other jurisdictions with developed procurement systems, has particularly emphasized the importance of non-discrimination in the awarding of public contracts. See, e.g., Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedures for the Award of Public Work Contracts, Public Supply Contracts and Public Service Contracts, OJ 2004 L 134 at 114, [Ex. C-106]. The principle of non-discrimination also features prominently in jurisprudence concerning allegations that states have treated foreign investments discriminatorily in breach of treaty obligations and/or the international minimum standard. See, e.g., *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5, Decision on Liability (14 December 2012) ¶ 402, [Ex. C-107] (confirming that discriminatory measure is “illegal” “under general international law”); *Joseph C. Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (21 Jan. 2010), ¶ 221, [Ex. C-108] (defining discrimination and citing cases).

⁸⁰ See Expert Report of Jack Goldsmith, ¶¶ 35-37 [Ex. C-109] (stating that “core meaning [of the prohibition on abuse of rights] is that the exercise of legal discretion or legal rights must be made in good faith” and outlining the scope of the prohibition in international law).

1. ICANN Discriminated Against DCA And Abused Its Regulatory Authority In Its Differential Treatment Of The ZACR And DCA Applications

34. ICANN discriminated against DCA and abused its regulatory authority over new gTLDs by treating it differently from other new gTLD applicants without justification or any rational basis—particularly relative to DCA’s competitor ZACR—and by applying ICANN’s policies in an unpredictable and inconsistent manner so as to favor DCA’s competitor for .AFRICA. ICANN staff repeatedly disparaged DCA and portrayed it as an illegitimate bidder for .AFRICA, and the Board failed to stop the discriminatory treatment despite protests from DCA.⁸¹

35. Moreover, ICANN staff REDACTED to ensure that ZACR, but not DCA, would be able to pass the GNP evaluation, even going so far as to REDACTED

While ICANN staff purported to hold DCA to the strict geographic support requirement set forth in the AGB, once DCA was removed from contention for .AFRICA, ICANN staff REDACTED

After DCA’s application was pulled from processing on 7 June 2013, ICANN staff REDACTED

.⁸² This was a complete change of policy for ICANN, which had insisted (until DCA’s application was no longer being considered) that the AUC endorsement was not material to the geographic requirement.⁸³

36. However, REDACTED
ICANN staff then took the remarkable step of REDACTED

⁸¹ See *supra* at ¶¶ 13, 16-17, 23, 29; Witness Statement of S. Bekele at 48-50.

⁸² ICANN Response at ¶ 41; AGB, Module 2.2.1.4.2(4), [Ex. C-11].

⁸³ See *supra* at ¶¶ 16-17, 29; REDACTED [Ex. C-110]. See also REDACTED
REDACTED [Ex. C-67]; REDACTED
[Ex. C-76]; REDACTED [Ex. C-74]; REDACTED [Ex. C-111]; REDACTED

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REDACTED

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37. In its Response to the GAC Advice rendered against its application, DCA raised concerns that the two .AFRICA applications had been treated differently, though at the time it had no idea of just how far ICANN was going or would go to push ZACR’s application through the process.⁸⁷ Apparently the NGPC failed to make any inquiry into those allegations. .AFRICA was discussed at one meeting only, and there is no rationale listed for the NGPC’s decision in the “Approved Resolutions” for the 4 June 2013 meeting.⁸⁸ An adequate inquiry into ICANN staff’s treatment of DCA’s and ZACR’s application—even simply asking the Director of gTLD Operations whether there was any merit to DCA’s concerns—would have revealed a pattern of discriminatory behavior against DCA and special treatment by both ICANN staff and the ICANN Board in favor of ZACR’s application.⁸⁹

⁸⁴ It is particularly ironic that ICANN has defended itself in this IRP by arguing that DCA’s claims are “not a basis to change the rules. ICANN argues that if it ignored the geographic names requirements at DCA’s request, it would be violating the Guidebook.” ICANN Response at ¶ 41; *see also id.* at ¶ 12. Despite the fact that the AGB actually contains a sample government support letter,

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See id., Attachment to Module 2.

⁸⁵ *See supra* at ¶ 29;

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[Ex. C-92]; REDACTED

[Ex. C-92].

⁸⁶ Thereafter, ICANN staff represented that they had actually followed the AGB requirements in ZACR’s Initial Evaluation report. *See* New gTLD Program Initial Evaluation Report, Application ID 1-1243-89583 (12 July 2013), [Ex. C-99] (informing ZACR that “your application falls within the criteria for a geographic name contained in the Applicant AGB Module 2.2.1.4”). *See also*, Section 2.2.1.4.2 [Ex. C-11] (requiring applications for strings listed as a UNESCO region or continent to provide “documentation of 60% of the respective *national governments* in the region”). *Cf.* Version 1 of the AGB, 2.2.1.4.2 [Ex. C-54] (including the support of public authorities as a requirement).

⁸⁷ *See supra* at ¶ 22; *see generally* Response of DCA to the GAC Advice (8 May 2013), Ex. C-[41].

⁸⁸ *See* Approved Resolution – Meeting of the New gTLD Program Committee (4 June 2013), Ex. R-4 (containing no mention of the advice on .AFRICA at all). The NGPC Scorecard merely quotes the AGB language indicating that consensus advice creates a “strong presumption for the ICANN Board that the application should not be approved.” *See* NGPC Scorecard, 2 (6 June 2013), [Ex. C-45].

⁸⁹ *See, e.g., supra* at ¶¶ 13, 16-17, 23, 29 (demonstrating the pattern of discrimination).

38. In all of these acts and omissions, ICANN breached the AGB and its own Articles of Incorporation and Bylaws, which require it to act in good faith, avoid discriminating against any one party, and ensure open, accurate and unbiased application of its policies.⁹⁰ Furthermore, ICANN breached principles of international law by failing to exercise its authority over the application process in good faith and committing an abuse of right by REDACTED

for ZACR to pass. Finally, the Board’s failure to inquire into the actions of its staff, even when on notice of the myriad of discriminatory actions, violates its obligation to comply with its Bylaws with appropriate care and diligence.⁹¹

2. ICANN Abused Its Authority And Discriminated Against DCA By Colluding With The AUC To Ensure That The AUC Would Obtain Control Over .AFRICA, In Contravention Of The Rules For The New gTLD Program

39. ICANN also abused its authority and discriminated against DCA by cooperating with the AUC in order to ensure that the AUC would effectively reserve .AFRICA for its own use, even as ICANN was accepting applications for .AFRICA. As outlined above, ICANN instructed the AUC—which was not a member of the GAC at the time—on how to use ICANN’s objection procedures and GAC advice mechanism to “play a prominent role in determining the outcome of any application” for .AFRICA.⁹² ICANN expressly informed the AUC that it could use the GAC “to raise concerns that an applicant is seen as potentially sensitive or problematic, or provide direct advice to the Board.”⁹³ Not surprisingly, the AUC promptly became a member of the GAC and a few months later, issued the “Early Warning”

⁹⁰ See Articles of Incorporation, ¶ 4 [Ex. C-9]; Bylaws Arts. I § 2(7), I § 2(8), II § 3, III § 1 [Ex. C-10].

⁹¹ See Bylaws Art. IV § 3 (4) [Ex. C-10].

⁹² Letter from Dr. Stephen Crocker, chairman of the Board, ICANN, to Elham M.A. Ibrahim, Commissioner, Infrastructure and Energy Commission, AUC (8 Mar. 2012) [Ex. C-24].

⁹³ *Id.* at p. 2.

against DCA's application that culminated in the GAC Objection Advice which halted DCA's progress.

40. ICANN's instructions to the AUC as to how to bypass ICANN's own rules for reserving names for special use breached the AGB by facilitating the AUC's avoidance of the AGB evaluation procedure and by treating the gTLD .AFRICA as a ccTLD, enabling the AUC to benefit from special treatment.⁹⁴ In addition, ICANN's instructions violated ICANN's Articles of Incorporation and Bylaws by effecting an inequitable and inaccurate application of ICANN's AGB policies.⁹⁵ The AUC made clear to ICANN that it wanted to reserve .AFRICA for its own use and prevent any other actor from operating the domain name. In effect, it wished to remove .AFRICA availability under the new gTLD process. This was not possible under the applicable rules, and placing .AFRICA on the Reserved Name list at that point would have attracted scrutiny. Instead, ICANN instructed the AUC on how to achieve the same result, using the GAC's advice mechanism.⁹⁶ Such instruction was a breach of ICANN's obligation to carry out its activities in good faith and was a cynical abuse of ICANN's position as the alleged regulator of the New gTLD Program in order to allow the AUC to game the system and gain control of .AFRICA on the sly.

41. ICANN's willingness to assist the AUC in achieving its goals is all the more irregular given that the AU is not a government, and the GAC is only meant to communicate advice concerning ***government policy interests*** to the Board. Although the AU is composed of government

⁹⁴ See AGB, Module 1 [Ex. C-11] (indicating that the AGB details "the process for applying for a new generic top level domain"; the AGB does not contemplate any other process); *id.* at Module 2 (indicating that "all applicants will undergo an Initial Evaluation and those that do not pass all elements may request Extended Evaluation"). The AGB does not provide a process for ccTLD applications, and a gTLD application specifically cannot be eliminated by a government's ccTLD application for the same string. See *id.* at 2.2.1.1.1 ("A gTLD application that has successfully completed all relevant evaluation stages, including dispute resolution and string contention, if applicable, and is eligible for entry into a registry agreement will be considered complete, and therefore would not be disqualified by a newly-filed IDN ccTLD request").

⁹⁵ See Articles of Incorporation, ¶ 4 [Ex. C-9]; Bylaws Arts. I § 2(8), II § 3, III § 1 [Ex. C-10].

⁹⁶ By joining the GAC, the AUC also avoided actually having to demonstrate to an independent third-party dispute resolution provider that it could meet the standing requirements for bringing a community objection and satisfy its burden of proof. See generally AGB, Module 3.2.2.4 [Ex. C-11] (detailing the standing requirements and burden of proof to sustain a community objection).

representatives, the AUC has no governmental powers, nor was it evident prior to the AUC's joining the GAC that it could participate as a voting member. The only other non-government with voting powers on the GAC at the time was the European Union Commission (which, unlike the AUC, has regulatory authority over its member states).⁹⁷ But the AUC is fundamentally different from the EUC: the EU is a supra-national governmental and regulatory body with the power to regulate the activities of its Member States. By contrast, the AU is simply an international organization with no power to regulate its members.⁹⁸ None of the other African public authorities similarly situated to the AU, including UNECA and the New Partnership for Africa's Development, are on the GAC as members, but as non-voting GAC observers. Likewise, comparable regional public authorities such as the Organization of Islamic Cooperation and the Organization of American States are non-voting GAC observers, not voting GAC members.⁹⁹ In fact, other GAC members have protested the special treatment accorded to the AUC as an international organization (as opposed to a national government, like other GAC members).¹⁰⁰

42. Furthermore, ICANN's Bylaws provide that membership on the GAC is only open to "multinational governmental organizations and treaty organizations" at the "invitation" of the GAC

⁹⁷ See List of GAC Representatives, [Ex. C-112].

⁹⁸ Unlike the EU, the AU has no power to legislate, and its mandatory power is extremely limited. The AU can impose sanctions on its members for violating the principles in the AU's Constitutive Act, for unconstitutional changes of government and for failure to pay membership dues. *See* Oxfam International Liaison Office with the African Union, 2 "African Union Compendium," 132-133 (2014), [Ex. C-58]. Furthermore, although the AU Assembly of Heads of State and Government votes on decisions that are theoretically binding on Member States, "there is no consistent mechanism to track the implementation of the AU decisions by Member States at national levels." *Id.* at 131.

⁹⁹ Letter from Dr. Stephen Crocker, chairman of the Board, ICANN, to Elham M.A. Ibrahim, Commissioner, Infrastructure and Energy Commission, AUC (8 Mar. 2012) [Ex. C-24].

¹⁰⁰ The only other international organization that is a member rather than an observer of the GAC is the European Union Commission; *see* List of GAC Representatives, [Ex. C-112]. *See also*, GAC Communique Overview at 14:30:00 (15 October 2014), available at <http://la51.icann.org/en/schedule/wed-gac-communique-overview> (comments of the United States GAC Representative during an hour-long discussion at ICANN 51 in Los Angeles, CA, concerning the voting rights of multinational organizations in the GAC and considering amendments to the GAC Operating Principles); *id.* at 18:20:00 (comments of the Australian representative to the GAC).

through its chair (at the time, Heather Dryden).¹⁰¹ Dr. Crocker’s letter to the AUC thus provided it not only with a strategy for accomplishing its goal of reserving .AFRICA for itself, but implicit assurance that there would be a spot for the AUC on the GAC—even though the GAC is comprised entirely of governments or supra-governmental organizations like the EU, and not international organizations such as the AU.¹⁰² ICANN’s advice that the AUC should use the GAC to achieve its goals concerning .AFRICA was therefore abusive even if one were to assume that ICANN should cater to government interests—which it should not. On the contrary, while ICANN has a duty to take into account advice from governments as communicated through the GAC, it is obligated to investigate and evaluate such advice before exercising its own judgment as to the appropriate action to take.¹⁰³ This duty is even more important when the proffered advice is not consensus advice—which ICANN knew,

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and, after the Beijing GAC meeting, DCA itself.¹⁰⁴

¹⁰¹ Bylaws Art. XI § 2(1)(b), [Ex. C-10] (“Membership [on the GAC] shall also be open to Distinct Economies as recognized in international fora and multinational governmental organizations and treaty organizations, on the invitation of the Governmental Advisory Committee through its Chair.”). DCA has been unable to obtain details on exactly how the AUC became a voting member of the GAC, and to what extent ICANN – whose Board Member Heather Dryden was at that time Chair of the GAC – may have facilitated its accession to GAC membership. However, prior to the ICANN Board sending its response to the AUC, REDACTED [Ex. C-113].

¹⁰² The AUC has no mandate to legislate for and bind its members; rather, the AUC serves an administrative role for the AU. By way of example, the AUC “represents the Union and defends its interests, elaborates draft common positions of the Union, prepares strategic plans and studies for the consideration of the Executive Council, elaborates, promotes, coordinates and harmonises the programs and policies of the Union with those of the [Regional Economic Communities], ensures the mainstreaming of gender in all programmes and activities of the Union...”. Oxfam International Liaison Office with the African Union, 2 “African Union Compendium,” 75, 76-78 (2014), [Ex. C-58].

¹⁰³ Bylaws Art. XI § 2(1)(j) - (k), [Ex. C-10] (“The advice of the [GAC] on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the [GAC] advice, it shall so inform the [GAC] and state the reasons why it decided not to follow the advice.”); AGB, Module 3.1, [Ex. C-11] (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 raise in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.”). *See also, ICM v. ICANN* at ¶ 150 [Ex. C-12] (opining that the Board must duly take GAC advice into account but may not give undue deference such that the Board violates ICANN’s neutral, fair and objective policies).

¹⁰⁴ *See supra* at ¶¶ 19, 21-22. AGB, Module 3.1 (II), [Ex. C-11] (“The GAC advises ICANN that there are concerns about a particular application “dot-example.” The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.”).

43. These breaches by ICANN were fatal to DCA’s application. It was as a direct result of these breaches that DCA’s application was wrongfully removed from competition and ZACR’s application was rushed through the evaluation process, which it passed only because ICANN REDACTED to which ICANN then REDACTED .

B. The NGPC Breached ICANN’s Articles Of Incorporation And Bylaws By Failing To Apply ICANN’s Procedures In A Neutral And Objective Manner, With Procedural Fairness, When It Accepted The GAC Objection Advice Against DCA

44. The decision of the NGPC, acting pursuant to the delegated authority of the ICANN Board, to accept the purported “consensus” GAC Objection Advice, violated ICANN’s Articles of Incorporation and Article III § 1 of its Bylaws, requiring transparency, consistency and fairness.¹⁰⁵ ICANN ignored the serious issues raised by DCA and others with respect to the rendering and consideration of the GAC Objection Advice, breaching its obligation to operate “to the maximum extent possible in an open and transparent manner and consistent with procedures designed to ensure fairness.”¹⁰⁶ It also breaches ICANN’s obligation under Article 4 of its Articles of Incorporation to abide by principles of international law, including good faith application of rules and regulations and the prohibition on the abuse of rights.¹⁰⁷

45. The NGPC gave undue deference to the GAC and failed to investigate the serious procedural irregularities and conflicts of interest raised by DCA and others relating to the GAC’s Objection Advice on .AFRICA. ICANN had a duty under principles of international law to exercise good faith

¹⁰⁵ Articles of Incorporation ¶ 4, [Ex. C-9]; Bylaws, Art. III, § 1 [Ex. C-10] (“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.”).

¹⁰⁶ Bylaws, Art. III, § 1 [Ex. C-10] (“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.”).

¹⁰⁷ See *supra* n. 80 (indicating that the core of the prohibition on abuse of rights is the obligation to act in good faith when exercising legal discretion or legal rights). See also, BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 107, 119 (“Where the right confers upon its owner a discretionary power, this must be exercised honestly, sincerely, reasonably, in conformity with the spirit of the law and with due regard to the interests of others. . . . They must not be exercised fictitiously so as to evade such obligations or rules of law, or maliciously so as to injure others. Violations of these requirements of the principle of good faith constitute abuses of right”) (quoted in Expert Report of Jack Goldsmith, ¶¶ 37 [Ex. C-114].

and due diligence in evaluating the GAC advice rather than accepting it wholesale and without question, despite having notice of the irregular manner in which the advice was rendered. Importantly, ICANN was well aware that the AUC was using the GAC to effectively reserve .AFRICA for itself, pursuant to ICANN’s own advice that it should use the GAC for that purpose and contrary to the New gTLD Program objective of enhancing competition for TLDs. The AUC’s very presence on the GAC as a member rather than an observer demonstrates the extraordinary lengths ICANN took to ensure that the AUC was able to reserve .AFRICA for its own use notwithstanding the new gTLD application process then underway.

1. The NGPC Should Have Investigated Questions About The GAC Objection Advice Being Obtained Through Consensus

46. The ICANN Board and staff members had actual knowledge of information calling into question the notion that there was a consensus among the GAC members to issue the advice against DCA’s application, prohibiting the application of the rule in the AGB concerning consensus advice (which creates a “strong presumption” for the Board that a particular application “should not proceed” in the gTLD evaluation process).¹⁰⁸ The irregularities leading to the advice against DCA’s application included proposals offered by Alice Munyua, who no longer represented Kenya as a GAC advisor at the time, and the fact that the REDACTED¹⁰⁹

The GAC emails referenced in Ms. Dryden’s witness statement clearly show that Kenya accepted the text only insofar as it supported the AUC’s endeavor and not insofar as it objected to DCA’s application.¹¹⁰ Finally, the ICANN Board knew very well that the AUC might attempt to use the GAC

¹⁰⁸ AGB, Module 3.1.I [Ex. C-11]

¹⁰⁹ See *supra* at ¶¶ 19-21. See also Transcript of Beijing GAC-ICANN Board meeting, 19-23 (9 April 2013), [Ex. C-78].

¹¹⁰ The Operating Principles of the GAC and its practice of taking no roll call, keeping no record of the discussions at its meetings, and excluding the input on *internet policy* of countries whose representatives clearly express their viewpoints utilizing the *internet forum* provided for that purpose, but cannot on all occasions attend the in-person meetings, is not at issue in this IRP. However, particularly in light of frequent complaints by GAC representatives that they cannot even obtain visas to enter the countries where ICANN schedules its meetings—and therefore the GAC meetings,—the propriety of this method of operation is truly questionable. See ICANN Response ¶ 39, n. 56-57 for a description of how the GAC operates. See also Declaration of H. Dryden at ¶¶ 11-12.

in an anticompetitive manner, since it was ICANN itself that informed the AUC it could use the GAC to achieve that very goal.¹¹¹

47. At a bare minimum, this information put ICANN Board and staff members on notice that further investigation into the rationale and support for the GAC's decision was necessary. During the very meeting wherein the NGPC accepted the Objection Advice, the NGPC acknowledged that due diligence required a conversation with the GAC, even where the advice *was* consensus advice.¹¹² The evidence shows that ICANN simply decided to push through the AUC's appointed applicant in order to allow the AUC to control .AFRICA, as it had previously requested.

2. The NGPC Should Have Consulted With An Independent Expert About The GAC Advice Given That The AUC Used The GAC To Circumvent the AGB's Community Objection Procedures

48. Even if the GAC's Objection Advice could be characterized as "consensus" advice, the NGPC's failure to consult with an independent expert about the GAC's Objection Advice was a breach of ICANN's duty to act to the "maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."¹¹³ The AGB specifically provides that when the Board is considering any form of GAC advice, it "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."¹¹⁴

¹¹¹ See *supra* at ¶¶ 12-14; see also Letter from Dr. Stephen Crocker, chairman of the Board, ICANN, to Elham M.A. Ibrahim, Commissioner, Infrastructure and Energy Commission, AUC (8 March 2012), [Ex. C-24] (recommending that the AUC utilize the GAC to have an impact on the outcome of .AFRICA).

¹¹² Bylaws, Art. III, § 1. [Ex. C-10]; see also Minutes of NGPC Meeting (4 June 2013), Ex. C-[114]. Although with regard to other gTLDs raised by the GAC, the NGPC confirmed that "the committee is expected to enter into a dialogue with the GAC, regardless of whether the advice is consensus or not," and the NGPC did consult the GAC on other strings discussed at the same meeting, the NGPC did not similarly consult with the GAC on .AFRICA.

¹¹³ Bylaws, Art. III, § 1 [Ex. C-10] ("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.").

¹¹⁴ AGB, Module 3.1 [Ex. C-11].

49. Given the unique circumstances surrounding the applications for .AFRICA—namely that one applicant was the designee of the AUC, which wanted to control .AFRICA without competition—ICANN should not have simply accepted GAC Objection Advice, proposed and pushed through by the AUC. If it was in doubt as to how to handle GAC advice sponsored by DCA’s only competitor for .AFRICA, it could have and should have consulted a third-party expert in order to obtain appropriate guidance. Its failure to do so was, at a minimum, a breach of ICANN’s duty of good faith and the prohibition on abuse of rights under international law.¹¹⁵ In addition, in light of the multiple warning signs identified by DCA in its Response to the GAC Objection Advice and its multiple complaints to the Board, failure to consult an independent expert was certainly a breach of the Board’s duty to ensure its fair and transparent application of its policies and its duty to promote and protect competition.¹¹⁶

C. The NGPC Breached ICANN’s Articles Of Incorporation And Bylaws By Failing To Apply Its Procedures In A Neutral And Objective Manner, With Procedural Fairness, When It Approved The BGC’s Recommendation Not To Reconsider The NGPC’s Acceptance Of The GAC Objection Advice against DCA

50. Not only did the NGPC breach ICANN’s Articles of Incorporation and its Bylaws by accepting the GAC’s Objection Advice, but the NGPC also breached ICANN’s Articles of Incorporation and its Bylaws by approving the BGC’s recommendation not to reconsider the NGPC’s earlier decision to accept the GAC Objection Advice. Not surprisingly, the NGPC concluded that its earlier decision should not be reconsidered.

1. The NGPC Reviewed Its Own Decision

51. First, the NGPC’s decision not to review its own acceptance of the GAC Objection Advice lacks procedural fairness, because the NGPC literally reviewed its own decision to accept the Objection Advice. It is a well-established general principle of international law that a party cannot be

¹¹⁵ See Articles of Incorporation, Cl. 4, [Ex. C-9].

¹¹⁶ Bylaws Arts. I § 2(6), I § 2(7), I § 2(8), II § 3, III § 1, [Ex. C-10]; Affirmation of Commitments Cls. 3 (c), 9.3 [Ex. C-100].

the judge of its own cause.¹¹⁷ No independent viewpoint entered into the process. In addition, although Mr. Silber recused himself from the vote on .AFRICA, he remained present for the entire discussion of .AFRICA, and Mr. Disspain apparently concluded that he did not feel conflicted, so both participated in the discussion and Mr. Disspain voted on DCA's RFR.

52. Second, the participation of the BGC did not provide an independent intervention into the NGPC's decision-making process, because the BGC is primarily a subset of members of the NGPC. At the time the BGC made its recommendation, the majority of BGC members were also members of the NGPC.¹¹⁸

2. The NGPC Did Not Exercise Due Diligence And Care In Accepting The BGC's Recommendation

53. Finally, the Board did not exercise due diligence and care in accepting the BGC's recommendation, because the BGC recommendation essentially proffered the NGPC's inadequate diligence in accepting the GAC Objection Advice in the first place, in order to absolve the NGPC of the responsibility to look into any of DCA's grievances in the context of the Request for Review. The basis for the BGC's recommendation to deny was that DCA did not state proper grounds for reconsideration, because failure to follow correct procedure is not a ground for reconsideration, and DCA did not identify the actual information an independent expert would have provided, had the NGPC consulted one.¹¹⁹ Thus, the BGC essentially found that the NGPC did not fail to take account of material information, because the NGPC did not have before it the material information that would have been provided by an independent expert's viewpoint. The BGC even claimed that if DCA had wanted the NGPC to exercise due diligence and consult an independent expert, DCA should have

¹¹⁷ BIN CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 279-289 [Ex. C-116].

¹¹⁸ See Overlaps of the ICANN BGC and ICANN NGPC, [Ex. C-115]

¹¹⁹ Recommendation of the BGC – Reconsideration Request 13-4, p. 6-7 (1 August 2013), [Ex. C-47].

made such a suggestion in its Response to the GAC Objection Advice.¹²⁰ Applicants should not have to remind the Board to comply with its Bylaws in order for the Board to exercise due diligence and care.

54. ICANN's acts and omissions with respect to the BGC's recommendation constitute further breaches of ICANN's Bylaws and Articles of Incorporation, including its duty to carry out its activities in good faith and to refrain from abusing its position as the regulator of the DNS to favor certain applicants over others.

V. CONCLUSION

55. DCA believes that, as a result of the Board's breaches of ICANN's Articles of Incorporation, Bylaws and general principles of international law, ICANN must halt the process of delegating .AFRICA to ZACR and ZACR should not be permitted to retain the rights to .AFRICA it has procured as a result of the Board's violations. Because ICANN's handling of the new gTLD application process for .AFRICA was so flawed and so deeply influenced by ICANN's relationships with various individuals and organizations purporting to represent "the African community," DCA believes that any chance it may have had to compete for .AFRICA has been irremediably lost and that DCA's application could not receive a fair evaluation even if the process were to be re-set from the beginning. Under the circumstances, DCA submits that ICANN should remove ZACR's application from the process altogether and allow DCA's application to proceed under the rules of the New gTLD Program, allowing DCA up to 18 months to negotiate with African governments to obtain the necessary endorsements so as to enable the delegation and management of the .AFRICA string.

¹²⁰ *Id.* at 9-10.

56. For these reasons, DCA respectfully requests that the Panel declare that—

- The Board violated ICANN’s Articles of Incorporation, Bylaws and general principles of international law by—
 - Discriminating against DCA and wrongfully assisting the AUC and ZACR to obtain rights to the .AFRICA gTLD;
 - Failing to apply ICANN’s procedures in a neutral and objective manner, with procedural fairness when it accepted the GAC Objection Advice against DCA; and
 - Failing to apply its procedures in a neutral and objective manner, with procedural fairness when it approved the BGC’s recommendation not to reconsider the NGPC’s acceptance of the GAC Objection Advice against DCA;
- As a result of each of these violations, ICANN must—
 - Cease all preparations to delegate the .AFRICA gTLD to ZACR and rescind its contract with ZACR;
 - Permit DCA’s application to proceed through the remainder of the new gTLD application process; and
 - Compensate DCA for the costs it has incurred in applying for .AFRICA, including the \$185,000 DCA paid in order to apply (and which ICANN has retained), as well as other costs DCA incurred in preparing its application;
- DCA is the prevailing party in this IRP and, consequently, shall be entitled to its costs in this proceeding; and
- DCA is entitled to such other relief as the Panel may find appropriate under the circumstances described herein.

Respectfully submitted,



Arif H. Ali
Counsel for Claimant

Reference Material 66.



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ICANN finally publishes THAT .africa letter, makes me look like an idiot

Kevin Murphy, September 1, 2015, 10:31:21 (UTC), Domain Policy

ICANN has finally published the letter it controversially drafted for the African Union Commission in order to help it express support for ZA Central Registry's .africa bid.

Having now read the draft letter for the first time, on balance I'd have to say my previous opinions on its contents were more wrong than right.

The letter was central to claims by rival .africa applicant DotConnectAfrica that ICANN treated ZACR preferentially during the evaluation of both applications.

It was drafted by ICANN staffer Trang Nguyen around June 25, 2013, and sent to ZACR.

It was then edited by ZACR and the AUC, signed by the AUC, and returned to ICANN, whereupon it was forwarded to the new gTLD's program's Geographic Names Panel at InterConnect Communications.

The GNP took the letter as an official endorsement of ZACR's bid, enabling it to pass the Geographic Names Review and proceed to the next stage of the program.

Having seen (and published) the signed AUC letter, I opined here in July that it looked like it had been mostly been written by ZACR and/or the AUC.

I no longer believe that.

It's now proven that the AUC redraft goes far beyond the "minor edits" that have been claimed by DCA and others — for starters, it's 40% longer — but a lot of the text that I believed to be ZACR's work turns out in fact to have come from ICANN.

I've put the two letters into a single document (pdf), so you can do a side-by-side comparison if you wish.

There's still no question that ZACR had African government support for its bid and DCA did not. The dispute centers entirely on whether InterConnect had received expressions of support in the correct format.

An Independent Review Process panel declined to issue an opinion on whether ICANN did anything wrong by drafting the letter, though it is mentioned in its final declaration.

ICANN itself says that it did nothing wrong by drafting the letter, and had DCA had any governmental support it would have done exactly the same thing for it.

The draft letter was among hundreds of pages of documents published last night by ICANN following a Documentary Information Disclosure Process request filed by DI a little over a month ago.

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CANN re uses to play ed Cruz s game

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Over 20 companies ighting or contract

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Small registrar suspended by CANN

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CANN receives irst sexual harassment complaint

Governments still split on CANN accountability plan, but will not block it

CANN China "con lict denied as Cruz looks or dirt

CANN ups new g LD revenue orecast

US judge reezes a rica g LD

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Activist investor slams Rightside over "garbage

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COMMENTS (4)

Rubens Kuhl

September 1, 2015 at 12 01 pm

he CANN letter looks like a composite o AUC website and text rom a rica application, and it wouldn't (MHO) score on this issue ZACR and AUC edits went to the point o establishing why AUC could represent A rican countries in this regard, so it seems CANN letter writing support wasn't that much o a service to this specic application

[Reply](#)

Martin

September 1, 2015 at 4 10 pm

Murphy now that you are wrong and rom your article, that CANN did something wrong, why don't you then apologize to DCA, a ter all the DCA bashing and downplaying the signi icance o the issue

[Reply](#)

Kevin Murphy

September 1, 2015 at 5 14 pm

Nothing to apologize or stand by everything have written about DCA

[Reply](#)

Steve DelBianco

September 4, 2015 at 4 05 pm

hanks or the ollow-up, Kevin t's help ul or those o us who ve quoted your earlier posts

[Reply](#)

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Rubens Kuhl

here were only two ways to win a a rica delegation either direct support rom a signi icant number o countries, or s [read more](#)

@PotentialNames

t eels as i ZACR has lined the pockets o the CANN committee, because the pro it-making overseer o the internet dom [read more](#)

Martin O

" t's possible there are smoking guns contained within these censored documents that were more in luential on the ruling [read more](#)

Nigel Roberts

CANN's wasting its time redacting stu All court papers are available at WWW PACER GOV at a cost o a mere ten ce [read more](#)

ony

Another correct decision or the lie o me cannot understand how so many can possibly think generics are communities [read more](#)

Joseph Peterson

@Domain Kong, Daniel Negari would never say or do anything merely to move the needle with publicity [read more](#)

Antony Van Couvering

With all respect to Dr Crocker, to say that "no-one can reasonably in er" that companies like Cisco support China's pol [read more](#)

Domain Kong

grow and rom 3000 to 10,000 or 20,000? big deal this sounds more like a publicity stunt don't think you'd e [read more](#)

Krishna

"Negari thinks he would be able to grow army, dance, dentist, and vet " Who will buy this shit? Negari, how long [read more](#)

Greg Shatan

the caterer provides bread, cold cuts, sliced cheeses, lettuce, tomato and condiments, that will not violate the sand [read more](#)

new gTLDs, looking for
blood

Registrars object to
"unreasonable" .bank
demands

First new gTLD deleted from
the net

Krueger sues M+M over five
million "missing" shares

Cruz says Chehade is in
China's pocket

Van Couvering ousted from
M+M, replaced by PR guy
with channel focus

dotgay has a third crack at
.gay appeal

Rape ban results in just one
.uk takedown, but piracy
suspensions soar

DCA fails .africa evaluation
.cloud passes 20,000 names
on day one

.top adds a quarter million
names in a day

\$33 million .org contract up
for grabs

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ICANN DRAFT LETTER

This letter is to confirm that the African Union Commission fully supports the application for .Africa submitted to ICANN by UniForum SA (NPC) trading as Registry.Africa in the New gTLD Program. As the Commissioner I confirm that I have the authority of the African Union Commission to be writing to you on this matter. The African Union Commission is the Secretariat of the Union entrusted with executive functions. The structure represents the Union and protects its interest under the auspices of the Assembly of Heads of State and Government as well as the Executive Committee. The African Union Commission is made up of Portfolios. They are: Peace and Security; Political Affairs; Trade and Industry; Infrastructure and Energy; Social Affairs; Rural Economy and Agriculture; Human Resource, Science and Technology; and Economic Affairs.

The primary objective of the gTLD is summarised as follows: "To establish a world class domain name registry operation for the .Africa Top Level Domain (TLD) by engaging and utilising African technology, know-how and funding; for the benefit and pride of Africans; in partnership with African governments and other ICT stakeholder groups".

Our mission is to establish the .Africa TLD as a proud identifier of Africa's online identity, fairly reflecting the continent's rich cultural, social and economic diversity and potential. In essence we will strive to develop and position the .Africa TLD as the preferred option for individuals and businesses either based in Africa or with strong associations with the continent and its people.

The .Africa TLD represents a unique opportunity for Africa to develop and enhance its domain name and Internet eco-systems and communities by collaborating with each other to:

- identify, engage and develop African-based specialist skills and resources;

AUC LETTER

This letter serves to confirm that the African Union Commission (AUC) fully supports and endorses the application for the .Africa (dotAfrica) TLD string (Application ID 1-1243-89583) submitted to ICANN by UniForum SA (NPC) trading as Registry .Africa in the New gTLD Program. Furthermore as the relevant government authority for the purpose of the above application, the AUC hereby confirms that it represents the interests and support of 54 African governments.

As you may be aware, the AUC is comprised of various Portfolios, namely Peace and Security; Political Affairs; Infrastructure and Energy; Social Affairs; Trade and Industry; Rural Economy and Agriculture; Human Resources, Science and Technology; and Economic Affairs.

As the Commissioner, I confirm that I have the authority of the African Union Commission and African member states to be writing to you on this matter. The African Union Commission is the Secretariat of the African Union entrusted with executive functions. The AUC represents the African Union and protects its interest under the auspices of the Assembly of the Heads of States and Government.

In terms of the .Africa (dotAfrica) TLD, the AUC operates under a specific mandate from African Member States as outlined in the Abuja Declaration (Third Conference of African Ministers in Charge of Communications and Information Technologies, held in Abuja, Nigeria in August 2010).

In terms of the above ministerial declaration the AUC has been requested to "set up the structure and modalities for the Implementation of the dotAfrica project". This has in turn commenced an extensive and on-going governmental engagement process by the AUC concerning the .Africa (dotAfrica) TLD, as is evidenced by, amongst others:

- share knowledge and develop DNS thought-leadership; and
- implement world class registry standard and contribute towards their continued development.

The African Union Commission has worked closely with the applicant in the development of this proposal.

The African Union Commission supports this application, and in doing so, understands that in the event that the application is successful, UniForum SA (NPC) trading as Registry.Africa will be required to enter into a Registry Agreement with ICANN. In doing so, they will be required to pay fees to ICANN and comply with consensus policies developed through the ICANN multi-stakeholder policy processes.

The African Union Commission further understands that, in the event of a dispute between the African Union Commission and the applicant, ICANN will comply with a legally binding order from a court in the jurisdiction of the African Union Commission.

The African Union Commission understands that the Geographic Names Panel engaged by ICANN, will, among other things, conduct due diligence on the authenticity of this documentation. I would request that if additional information is required during this process, to contact my office in the first instance.

Thank you for the opportunity to support this application.

[475 words]

- The individual government letters of support and endorsement for the AUC initiated application process; and
- The overwhelming government support and participation in the GAC (Government Advisory Committee) processes concerning Early Warnings and Advice.

The primary objective of the .Africa (dotAfrica) gTLD string is: "to establish a world class domain name registry operation for the .Africa Top Level Domain (TLD) by engaging and utilising African technology, know-how and funding; for the benefit and pride of Africans; in partnership with African governments and other ICT stakeholder groups."

Our collective mission is to establish the .Africa (dotAfrica) TLD as a proud identifier of Africa's online identity fairly reflecting the continent's rich cultural, social and economic diversity and potential. In essence we will strive to develop and position the .Africa (dotAfrica) TLD as the preferred option for individuals and business either based in Africa or with strong associations with the continent and its people.

The .Africa (dotAfrica) TLD represents a unique opportunity for Africa to develop and enhance its domain name and Internet eco-systems and communities by collaborating with each other to:

- Identify, engage and develop African-based specialist skills and resources
- Share knowledge and develop DNS thought-leadership; and
- Implement world class registry standards and contribute towards their continued development.

The AUC has worked closely with the applicant, UniForum SA *t/a* Registry.Africa), concerning the preparation and lodgment of the TLD application and will continue to do so throughout the launch and regular administration of the .Africa (dotAfrica) TLD.

The AUC supports this application, and in doing so, understands that in the event that the application is successful, UniForum SA (NPC) trading as Registry .Africa will be required to enter into a Registry Agreement with ICANN. In doing so, they will be required to pay fees to ICANN and comply with consensus policies developed through the ICANN multi-stakeholder policy processes.

The AUC further understands that, in the event of a dispute between the African Union Commission and applicant, ICANN will comply with a legally binding order from a court in the jurisdiction of the AUC.

The AUC understands that the Geographic Names Panel (GNP) engaged by ICANN, will, among others, conduct a due diligence on the authenticity of this documentation. I would request that if any additional information is required during this process, the GNP to contact my office in the first instance.

Thank you for the opportunity to support this application.

[669 words]

Reference Material 67.

RECOMMENDATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 13-5

1 AUGUST 2013¹

On 7 July 2013, Booking.com B.V. (“Booking.com”), through its counsel, Crowell & Moring, submitted a reconsideration request (“Request”). The Request was revised from Booking.com’s 28 March 2013 submission of a similar reconsideration request, which was put on hold pending the completion of a request pursuant to ICANN’s Documentary Information Disclosure Policy (“DIDP”).

The Request asked the Board to reconsider the ICANN staff action of 26 February 2013, when the results of the String Similarity Panel were posted for the New gTLD Program. Specifically, the Request seeks reconsideration of the placement of the applications for .hotels and .hoteis into a string similarity contention set.

I. Relevant Bylaws

As the Request is deemed filed as of the original 28 March 2013 submission, this Request was submitted and should be evaluated under the Bylaws that were in effect from 20 December 2012 through 10 April 2013. Article IV, Section 2.2 of that version 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:

¹ At its 1 August 2013 meeting, the Board Governance Committee deliberated and reached a decision regarding this Recommendation. During the discussion, however, the BGC noted revisions that were required to the draft Recommendation in order to align with the BGC’s decision. After revision and allowing for the BGC member review, the BGC Recommendation on Request 13-5 was finalized and submitted for posting on 21 August 2013.

(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.

A third criteria was added to the Bylaws effective 11 April 2013, following the Board's adoption of expert recommendations for revisions to the Reconsideration process. That third basis for reconsideration, focusing on Board rather than staff conduct, is "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." (See <http://www.icann.org/en/about/governance/bylaws#IV>.)

When challenging a staff action or inaction, a request must contain, among other things, a detailed explanation of the facts as presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN policy(ies). See Article IV §2.6(g) of the 20 December 2012 version of Bylaws (<http://www.icann.org/en/about/governance/bylaws/bylaws-20dec12-en.htm#IV>) and the current Reconsideration form effective as of 11 April 2013 (<http://www.icann.org/en/groups/board/governance/reconsideration/request-form-11apr13-en.doc>).

Dismissal of a request for reconsideration is appropriate if the Board Governance Committee ("BGC") finds 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, but that it is limited to situations where the staff acted in contravention of established policies.

The Request was originally received on 28 March 2013, which makes it timely under the then effective Bylaws.² Bylaws, Art. IV, § 2.5.

II. Background

Within the New gTLD Program, every applied-for string has been subjected to the String Similarity Review set out at Section 2.2.1.1 of the Applicant Guidebook. The String Similarity Review checks 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.” (Applicant Guidebook, Section 2.2.1.1.1.) If applied-for strings are determined to be visually identical or similar to each other, the strings will be placed in a contention set, which is then resolved pursuant to the contention resolution processes in Module 4 of the Applicant Guidebook. If a contention set is created, only one of the strings within that contention set may ultimately be approved for delegation.

After issuing a request for proposals, ICANN selected InterConnect Communications (“ICC”) to perform the string similarity review called for in the Applicant Guidebook. On 26 February 2013, ICANN posted ICC’s report, which included two non-exact match contention sets (.hotels/.hoteis and .unicorn/.unicom) as well as 230 exact match contention sets. <http://www.icann.org/en/news/announcements/announcement-26feb13-en.htm>. The String Similarity Review was performed in accordance with process documentation posted at <http://newgtlds.icann.org/en/program-status/evaluation-panels/geo-names-similarity-process-07jun13-en.pdf>. As part of ICANN’s acceptance of the ICC’s results, a quality assurance review

² ICANN staff and the requester communicated regarding the holds placed on the Request pending the DIDP Response, and the requester met all agreed-upon deadlines, thereby maintaining the timely status of this Request.

was performed over a random sampling of applications to, among other things, test whether the process referenced above was followed.

Booking.com is an applicant for the .hotels string. As a result of being placed in a contention set, .hotels and .hoteis cannot both proceed to delegation. Booking.com will have to resort to private negotiations with the applicant for .hoteis, or proceed to an auction to resolve the contention issue. Request, page 4.

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. 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.

III. Analysis of Booking.com's Request for Reconsideration

Booking.com seeks reconsideration and reversal of the decision to place .hotels and .hoteis in a non-exact match contention set. Alternatively, Booking.com requests that an outcome of the Reconsideration process could be to provide "detailed analysis and reasoning regarding the decision to place .hotels into a non-exact match contention set" so that Booking.com may "respond" before ICANN takes a "final decision." (Request, Page 9.)

A. Booking.com's Arguments of Non-Confusability Do Not Demonstrate Process Violations

The main focus of Booking.com's Request is that .hotels and .hoteis can co-exist in the root zone without concern of confusability. (Request, pages 10 – 12.) To support this assertion, Booking.com cites to the opinion of an independent expert that was not part of the string

similarity review panel (Request, pages 10-11), references the intended uses of the .hotels and .hoteis strings (Request, page 11) and the difference in language populations that is expected to be using .hotels and .hoteis (Request, page 11), references ccTLDs that coexist with interchangeable “i”s and “l”s (Request, page 11), notes the keyboard location of “i”s and “l”s (Request, page 12), and contends that potential users who get to the wrong page would understand the error they made to get there (Request, page 12).

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.³

³ Notably, Booking.com fails to reference one of the key components of the documented String Similarity Review, the use of the SWORD Algorithm, which is part of what informs the Panel in assessing the visual similarity of strings. .hotels and .hoteis score a 99% on the publicly available SWORD algorithm for visual similarity. See <https://icann.sword-group.com/algorithm/>.

Booking.com also claims that its assertions regarding the non-confusability of the .hotels and .hoteis strings demonstrate that “it is contrary to ICANN policy⁴ to put them in a contention set.” (Request, pages 6-7.) This is just a differently worded attempt to reverse the decision of the Panel. 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.

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).) As ICANN has explained to Booking.com in response to its DIDP requests for documentation regarding the String Similarity Review, the Review was based upon the methodology in the Applicant Guidebook, supplemented by the Panel’s process documentation; the process does not allow for additional inputs.

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

⁴ It is clear that when referring to “policy”, Booking.com is referring to the process followed by the String Similarity Review.

a contention set “to give the Requester the opportunity to respond to this, before taking a final decision” is similarly not rooted in any established ICANN process at issue. (Request, page 9.) First, upon notification to the applicants and the posting of the String Similarity Review Panel report of contention sets, the decision was already final. 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.

Second, while 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 Panel’s decision, no such narrative is called for in the process. 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 Panel in applying the methodology set out in the Applicant Guidebook. ICANN then coordinates a quality assurance review over a random selection of Panel’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).⁵

⁵ In trying to bring forward this Request, Booking.com submitted requests to ICANN under the Documentary Information Disclosure Policy (DIDP). As of 25 July 2013, all requests had been responded to, including the release of the Panel process documentation as requested. See Request 20130238-1 at <http://www.icann.org/en/about/transparency>. Booking.com describes the information it sought through the DIDP at Pages 8 – 9 of its Request. The discussion of those requests, however, has no bearing on the outcome of this Reconsideration.

B. Booking.com’s Suggestion of the “Advisory Status” of the String Similarity Panel Decision Does Not Support Reconsideration

In its Request, Booking.com suggests that the Board has the ability to overturn the Panel’s decision on .hotels/.hoteis because the Panel merely provided “advice to ICANN” and ICANN made the ultimate decision to accept that advice. Booking.com then suggests that the NGPC’s acceptance of GAC advice relating to consideration of allowing singular and plural versions of strings in the New gTLD Program, as well as the NGPC’s later determination that no changes were needed to the Applicant Guidebook regarding the singular/plural issue, shows the ability of the NGPC to override the Panel determinations. (Request, pages 5-6.) Booking.com’s conclusions in these respects are not accurate and do not support Reconsideration.

The Panel 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 Panel, ICANN will notify the applicants and will publish results on its website. (AGB, Section 2.2.1.1.1.) That the Panel 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.

The subsequent receipt and consideration of GAC advice on singular and plural strings does not change the established process for the development of contention sets based on visual

similarity. The ICANN Bylaws require the ICANN Board to consider GAC advice on issues of public policy (ICANN Bylaws, Art. XI, Sec. 2.1.j); therefore the Board, through the NGPC, was obligated to respond to the GAC advice on singular and plural strings. Ultimately, the NGPC determined that no changes were needed to the Guidebook on this issue. (Resolution 2013.06.25.NG07, at <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm#2.d>.) Notably, neither the GAC advice nor the NGPC resolution focused on the issue of visual similarity (which the String Similarity Review Panel was evaluating), but instead the issue was potential consumer confusion from having singular and plural versions of the same word in the root zone. It is unclear how the NGPC's decision on a separate topic – and a decision that did not in any way alter or amend the work of an evaluation panel – supports reconsideration of the development of the .hotels/.hoteis contention set.

VIII. Recommendation And Conclusion

Based on the foregoing, the BGC concludes that Booking.com has not stated proper grounds for reconsideration and we therefore recommend that Booking.com's request be denied without further consideration. This Request challenges a substantive decision taken by a panel in the New gTLD Program and not the process by which that decision was taken. As stated in our Recommendation on Request 13-2, Reconsideration is not a mechanism for direct, de novo appeal of staff or panel decisions with which the requester disagrees, and seeking such relief is, in fact, in contravention of the established processes within ICANN. See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-nameshop-01may13-en.pdf>.

The BGC appreciates the impact to an applicant when placed in a contention set and does not take this recommendation lightly. It is important to recall that the applicant still has the

opportunity to proceed through the New gTLD Program subject to the processes set out in the Applicant Guidebook on contention. We further appreciate that applicants, with so much invested and so much at stake within the evaluation process, are interested in seeking any avenue that will allow their applications to proceed easily through evaluation. However, particularly on an issue such as visual similarity, which is related to the security and stability of the domain name system, there is not – nor is it desirable to have – a process for the BGC or the Board (through the NGPC) to supplant its own determination as to the visual similarity of strings over the guidance of an expert panel formed for that particular purpose. As there is no indication that either the Panel 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.

If Booking.com thinks that it has been treated *unfairly* in the new gTLD evaluation process, and the NGPC adopts this Recommendation, Booking.com is free to ask the Ombudsman to review this matter. (See ICANN Bylaws the Ombudsman shall “have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN staff and constituent bodies to enable an informed evaluation of the complaint and to assist in dispute resolution where feasible (subject only to such confidentiality obligations as are imposed by the complainant or any generally applicable confidentiality policies adopted by ICANN)”.)

Reference Material 68.

Status Report on the sTLD Evaluation Process

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I. Overview

Background

There are several types of TLDs within the DNS, including TLDs with three or more characters referred to as “generic” TLDs, or “gTLDs.” They can be subdivided into two types, “sponsored” TLDs (sTLDs) and “unsponsored” TLDs, as described in more detail below.

Generally speaking, an unsponsored TLD operates under policies established by the global Internet community directly through the ICANN process, while a sponsored TLD is a specialized TLD that has a sponsor representing the narrower community that is most affected by the TLD. The sponsor thus carries out delegated policy-formulation responsibilities over many matters concerning the TLD.

A Sponsor is an organization to which is delegated some defined ongoing policy-formulation authority regarding the manner in which a particular sponsored TLD is operated. The sponsored TLD has a Charter, which defines the purpose for which the sponsored TLD has been created and will be operated. The Sponsor is responsible for developing policies on the delegated topics so that the TLD is operated for the benefit of a defined group of stakeholders, known as the Sponsored TLD Community, which are most directly interested in the operation of the TLD. The Sponsor is usually also responsible for selecting the registry operator and, to varying degrees, establishing the

roles played by registrars and their relationship with the registry operator. The Sponsor must exercise its delegated authority according to fairness standards and in a manner that is representative of the Sponsored TLD Community.

The extent to which policy-formulation responsibilities are appropriately delegated to a Sponsor depends upon the characteristics of the organization that may make such delegation appropriate. These characteristics may include the mechanisms the organization uses to formulate policies, its mission, its guarantees of independence from the registry operator and registrars, who will be permitted to participate in the Sponsor's policy-development efforts and in what way, and the Sponsor's degree and type of accountability to the Sponsored TLD Community.

The first round of expansion of the DNS namespace took place in November 2000, when ICANN's Board of Directors selected seven proposals for new gTLDs. Those selected were: AERO, BIZ, COOP, INFO, MUSEUM, NAME, and PRO. This was the first effort to expand the domain name system (DNS) since the 1980s, other than by adding "country code top-level domains" that correspond to particular countries or territories. At the time, ICANN received over 40 applications for new gTLDs, but it had determined that, as a "proof-of-concept," it would select far fewer. The TLDs for which applications were submitted in both 2000 and 2004 include MOBI¹ (by Nokia Corporation), POST² (by the Universal Postal Union), TEL-Pulver³ (by

¹ Evaluation of the MOBI application submitted in 2000 indicated that "the application was not complete and did not demonstrate soundness and feasibility from technical and business-process perspectives. Although Nokia and its registry operator, Sonera, have impressive capabilities in the communications field, the application by itself does not adequately describe the architecture of the proposed system and did not address all the topics required by the ICANN call for proposals. Instead, it sketched out general requirements for hardware and software systems without providing a detailed solution to the requirements. The business/financial aspects of Nokia's proposal were also sketchy: the application included a weak marketing plan and a weak assessment of estimated demand and the resources to meet demand." (See <http://www.icann.org/tlds/report/report-appb-09nov00.htm>).

² The business/financial evaluation of the POST application submitted in 2000 indicated that "while the technical resources to run the .post registry were likely to be sufficient, the Universal Postal Union's application did not include a well-thought-out plan on how the proposed TLD would be used. This imprecision made it impossible to determine if the uses of the TLD anticipated by the Universal Postal Union are feasible, and did not suggest a level of specific technical familiarity that commends inclusion in this initial "proof-of-concept" stage. As one example, the Universal Postal Union proposal states that non-postal organizations with .post domain names will not be allowed to create web sites, but does not specify how it will enforce this restriction." (See <http://www.icann.org/tlds/report/report-iiib2-09nov00.htm>.)

³ Evaluation of the TEL-Pulver application submitted in 2000 indicated that "none of the four proposals in the telephony-related group should be selected at this time. Each of the four proposals appears not to have adequately addressed requirements for stable, authoritative coordination with the PSTN numbering system, particularly when dynamic-routing considerations are taken into account. (Of the four, Group One, Number.tel, and Pulver/Peek/Marschel are of particular concern in this area.) In addition, the Group One Registry, Number.tel and Pulver/Peek/Marschel proposals would do little to address unmet needs. Moreover, if a TLD were established in which the service available at URLs was defined by the TLD rather than the prefix, this would likely increase confusion regarding URL naming conventions. Finally, the concerns raised and caution urged by the ITU counsel against establishing a telephony-related TLD until further study and consensus-building within the Internet and telephony technical communities." (See <http://www.icann.org/tlds/report/report-iiib3-09nov00.htm>.)

Pulver/Peek/Marschel), TEL-Telnic⁴ (by Telnic), TRAVEL⁵ (submitted by the International Air Transport Association (IATA), and XXX⁶ (submitted by ICM Registry), see <http://www.icann.org/tlds/report/report-appb-09nov00.htm>. The selection criteria used in 2004 took into account the criteria used in 2000, but were not identical, in part because a goal of the latter round was to select sponsored TLDs.

sTLD Application Process

On 26 June 2003, at the ICANN Board meeting in Montreal, the Board directed ICANN

⁴ As noted in the previous footnote, evaluation of the TEL-Telnic application submitted in 2000 indicated that “none of the four proposals in the telephony-related group should be selected at this time. Each of the four proposals appears not to have adequately addressed requirements for stable, authoritative coordination with the PSTN numbering system, particularly when dynamic-routing considerations are taken into account . . . Moreover, if a TLD were established in which the service available at URLs was defined by the TLD rather than the prefix, this would likely increase confusion regarding URL naming conventions. Finally, the concerns raised and caution urged by the ITU counsel against establishing a telephony-related TLD until further study and consensus-building within the Internet and telephony technical communities.” (See <http://www.icann.org/tlds/report/report-iiib3-09nov00.htm>.)

⁵ Evaluation of the TEL-Pulver application submitted in 2000 indicated that the “International Air Transport Association (IATA) . . . asserts that it is representative of an estimated 675,000 to 759,000 potential registrants. A number of public comments to the ICANN Public Comment Forum from members of the travel industry, however, object to IATA’s application on grounds of representativeness. In answer to a question from ICANN, IATA asserts that since the date of its application it has been in communication with the travel industry to discuss its proposal for sponsorship of the .travel TLD and to seek consensus within the industry in support of its application. IATA states in its response that it has gained the support of the American Society of Travel Agents (ASTA), representing 26,000 travel agents primarily in the United States, and of the Universal Federation of Travel Agents’ Associations (UFTAA), representing 48,000 travel agent members in 97 countries. IATA also cites other travel industry comments to the ICANN Public Comment Forum in support of its application. IATA represents that in its discussions with ASTA and UFTAA it has agreed to changes in its governance procedures to satisfy them that the procedures will result in representativeness to the broader travel industry. However, even after IATA’s response was received, ICANN has continued to receive objections from travel agents and others.” The team went on to state that during “the period since the IATA’s application was submitted it appears to have made progress toward gaining support of the some of the affected segments of the relevant communities, particularly from the two large associations representing travel agents. However, on the basis of the information provided, the evaluation team cannot conclude, at this juncture, that IATA has demonstrated that it is or would be broadly representative of the diverse global travel industry.”

⁶ Evaluation of the XXX application submitted in 2000 indicated that “ICM Registry’s application for an .xxx TLD does not appear to meet unmet needs. Adult content is readily available on the Internet. To the extent that some believe that an .xxx TLD would segregate adult content, no mechanism (technical or non-technical) exists to require adult content to migrate from existing TLDs to an .xxx TLD . . . The [U.S.] COPA Commission articulated some of the more common reservations about a content-specific TLD for sex-related speech, even when its content-designation is purely voluntary: ‘Privacy and First Amendment concerns may be raised by the clear identification of a ‘red light district’ and the stigma involved in being found there, and the concern about a ‘slippery slope’ toward mandatory location in the gTLD’ (footnote omitted). Though these concerns are certainly not universally shared outside (or even within) the United States, they indicate the degree of controversy that surrounds .xxx.” The team went on to state that “at this early ‘proof of concept’ stage with a limited number of new TLDs contemplated, other proposed TLDs without the controversy of an adult TLD would better serve the goals of this initial introduction of new TLDs. If an adult TLD is to be introduced, moreover, it would be beneficial to have a diversity of proposals, with a diversity of possible approaches to the various problems, from which to choose. In addition, because of the controversy surrounding, and poor definition of the hoped-for benefits of, .xxx, we also recommend against its selection at this time.” (See <http://www.icann.org/tlds/report/report-iiib1c-09nov00.htm>.)

staff to invite public comment on a draft request for proposals for sTLDs posted on 24 June 2003, and in particular on the question of whether the RFP should be limited to applicants that had proposed sponsored TLDs in November 2000. The public comments are available on ICANN's website at <http://forum.icann.org/mtg-cmts/stld-rfpcomments/general/index.html>.

In parallel with the public comments, the ICANN Board discussed at length the topic of how, and within what timeframe, ICANN should proceed with the creation of new gTLDs, including sTLDs. On 29 October 2003, the GNSO called upon the Board to proceed with the process for an interim round of sTLDs.

Following various community discussions, including input by experts and interested parties through the GNSO, and from users both directly and through the ALAC on 31 October 2003, at its meeting in Carthage, Tunisia, the ICANN Board directed the ICANN President to finalize and post no later than 15 December 2003 an open RFP, not restricted to prior applicants, for a limited number of new sTLDs. The final RFP was to be based on the points of agreement indicated above and the comments received concerning the posted draft.

In response to this direction, on 15 December 2003, ICANN announced and released the RFP for sTLDs. The RFP was divided into six parts, see <http://www.icann.org/tlds/new-stld-rfp/new-stld-application-part-15dec03.htm>. The first part provided applicants with explanatory notes on the process as well as an indication of the type of information requested by ICANN. The remaining parts constituted the application itself.

The RFP's explanatory notes described the selection criteria, which are included in Appendix A of this Report. In brief:

- The technical standards included “evidence of ability to ensure stable registry operation,” “evidence of ability to ensure that the registry conforms with best practice technical standards for registry operations,” “evidence of a full range of registry services,” and “assurance of continuity of registry operation in the event of business failure of the proposed registry.”
- The business plan had to “demonstrate the applicant's methodology for introducing a new sTLD and the ability of the organization to implement a robust and appropriately resourced organization.” The financial model had to “outline the financial, technical and operational capabilities of the organization.”
- The sponsorship information had to include a “definition of sponsored TLD community,” “evidence of support from the Sponsoring Organization,” “appropriateness of the Sponsoring Organization and the policy formulation environment,” and “level of support from the Community.” In addition, the criteria of “community value” had to be demonstrated by the “addition of new

value to the Internet name space,” protections for “the rights of others,” “assurance of charter-compliant registrations and avoidance of abusive registration practices,” “assurance of adequate dispute-resolution mechanisms,” and “provision of ICANN-policy compliant WHOIS service.”

ICANN received 10 applications for new sTLDs before close of the application period on 16 March 2004. Applications were received for the following 9 sTLD strings: ASIA, CAT, JOBS, MAIL, MOBI, POST, TEL, TRAVEL, and XXX. (Two different applicants submitted applications for TEL.) The public parts of the ten applications were posted on the ICANN website at <http://www.icann.org/tlds/stld-apps-19mar04/stld-publiccomments.htm> for public comment. Dozens of public comments were received and posted.

ICANN performed an initial review of the applications for completeness. Subsequently, ICANN sought the assistance of an outside Project Manager, Summit Strategies International, LLC, to coordinate the evaluation and limit direct contact between ICANN staff and the evaluators, and between the evaluators and the applicants.

An independent panel of experts with substantial knowledge of relevant technical, business/financial and policy areas was convened to review and evaluate the applications. The evaluation panel was divided into three internationally diverse teams, with each one focused on technical, business/financial or policy areas. The technical team was chaired by Ólafur Guðmundsson and included Patrik Fältström and Nii Quaynor. The business/financial team was chaired by Maureen Cubberley and included Fernando Silveira Galban and Jeffrey Lissack. The sponsorship/community value team was chaired by Liz Williams and included Pierre Ouédraogo and Daniel Weitzner. (Biographical data about the evaluators may be found at the conclusion of each report, in Appendix D.) The identities of the evaluators were kept confidential until conclusion of the evaluation phases of the process, in order to prevent applicants from influencing deliberations. Several applicants, which were not initially recommended by an evaluation team, took advantage of an offer from ICANN to allow them to seek to remedy deficiencies identified by the evaluators. In some cases, as described in detail in the next section, the technical and the business/financial teams were convened again in order to review an applicant’s supplementary materials. This additional work took place between October 2004 and June 2005.

The three teams began their work in May 2004 and completed their recommendations, as requested, to ICANN in July 2004. During that period, each team met formally six to eight times by teleconference. Between formal meetings, the teams worked diligently and thoroughly to discuss the selection criteria, analyze the applications, review public comments and assess the extent to which each proposal satisfied the different parts of the RFP. Additionally, the teams posed a series of questions to each applicant in an effort to amplify points that were unclear and to seek other clarifications (see Appendix B).

At every step, the applications were evaluated on their own merits, in an objective and fair manner. The independent review procedures ensured that all communications

involving the evaluations were made through the Project Manager and as such, the review was blind between the teams and ICANN staff and between the teams and the applicants.

Each team provided a separate report to ICANN through the Project Manager, which assessed the information in the applications against the established RFP criteria – technical, business/financial and sponsorship/community value – that it had been asked to evaluate. These reports were transmitted to ICANN on 12 July 2004 and are included in Appendix D. In cases where an evaluation team indicated that a set of criteria was not met, ICANN decided to give each applicant an opportunity to submit clarifying or additional documentation.

The extent to which clarification or other information was requested depended on the nature of each proposal and the feedback from the evaluators, and whether any evaluation team needed to reconvene. For this reason, ICANN decided to allow each proposal to progress on its own timetable, a process which began in August 2004 and is nearly concluded. ICANN informed all applicants that the evaluation reports would be released publicly as soon as all applicants had concluded the evaluation process, in order to enhance transparency and understanding of the sTLD selection process.

All ten applicants have completed the independent review process. Accordingly, ICANN is providing this Status Report on the sTLD Application Process.

II. Status of Applications

ASIA

The applicant, proposed registry operator and proposed Sponsoring Organization (SO) for ASIA is DotAsia Organisation Limited, a not-for-profit organization based in the Hong Kong Special Administrative Region (“DotAsia”). DotAsia selected Afilias Limited (“Afilias”) to provide registry services.

Each of the three evaluation teams described above reviewed the ASIA application. The technical evaluation team found that ASIA met the technical selection criteria set forth in the RFP, and accordingly recommended that it be approved on technical grounds. The business/financial evaluation team found that the respective selection criteria set forth in the RFP had been met, and recommended that, from a business/financial perspective, the application be approved.

The sponsorship/community value evaluation team found that the proposal did “not define a sponsored TLD community clearly enough,” that there was “inadequate evidence of widespread support for the application across the broadly identified region,” and that there were remaining “questions about how a .asia sTLD would have broad recognition across such a wide region that includes both the Middle East and the South Pacific.” The team’s comments included, inter alia, questions about the “policy formulation environment.” The team “thought that the application might be a useful starting point for

the consideration of a sTLD which reflects specific geographic regions, but that the application had failed to demonstrate how it would be implemented and managed in this instance.” The team suggested that the applicant might “consider participating in a broader round of generic top level domains at a later date.”

On 31 July 2004, ICANN notified DotAsia of the evaluators’ recommendations (see Appendix E). ICANN also reminded the applicant that “the Governmental Advisory Committee (GAC) had asked it to “avoid, in the creation of new generic TLDs, well known and famous country, territory or place names; well known and famous country, territory or regional language or people descriptions; or ISO 639 Codes for representation of languages *unless in agreement with the relevant governments or public authorities*” (see section 8.3 of the “Principles for the Delegation and Administration of Country Code Top Level Domains, at <http://www.icann.org/committees/gac/gac-cctldprinciples-23feb00.htm>)(emphasis added). Accordingly, ICANN invited the applicant to submit any information indicating agreement for such a new sTLD from the appropriate Ministers or Heads of Agencies of the Governments of the countries in the region constituting the community to be represented.

On 15 September 2004, DotAsia responded with "Clarifications and Response on: Principles for Delegation and Administration of ccTLD Principles Presented by GAC," in which it stated that it does not represent, nor intend to, a country, territory, place, language or people) see Appendix E. On the same date, DotAsia also provided its “Response & Clarifications on Sponsorship and Other Issues.” In that document, the applicant stated that its proposed community was precisely defined, that “Asia” was a unifying term and concept, and that the support of ccTLDs in the region (then 16), in addition to the support of many others, provided sufficient evidence on both points. The applicant also described the adequacy of its proposed policy formulation process.

On 26 October 2004, DotAsia provided supplemental information for the ICANN Board. These documents included an Executive Summary, “Clarifications and Response on: Principles for Delegation and Administration of ccTLDs Presented by GAC,” and “Further Discussions on Appropriateness and Representativeness of the DotAsia Framework.” These documents described DotAsia as a “membership-based notfor-profit initiative” with a mission, among other things, to establish “an Internet namespace with global recognition and regional significance, dedicated to the needs of the Pan-Asia and Asia Pacific Internet community” and reinvest surpluses in regional initiatives. The ASIA sTLD would “embrace a community-based bottom-up governance structure.” The documents also suggested that the GAC Principles “have not been formally adopted as an ICANN policy” and, in any case, do “not apply to the context of the DotAsia proposal.” DotAsia indicated that the principles were drafted for a different purpose, and that nothing in its proposal would “challenge the sovereignty of any nation, country, economy or jurisdiction.”

On 10 December 2004, DotAsia provided additional information to the ICANN Board on “Mitigating Concerns Regarding GAC ccTLD Principles.” This letter informed the Board that two additional ccTLDs had joined DotAsia. While disagreeing that the GAC

Principles applied to its proposal, it offered to address any Board concerns by establishing a “Waiting Period to allow governments [within the region] to register their objections, if any, via the GAC.”

On 24 January 2005, DotAsia provided additional Letters of Intent from ccTLDs and other Support Letters for its organization.

On 24 January 2005, DotAsia provided an Update Letter to the ICANN Board outlining the extent of support for ASIA.

On 18 February 2005, ICANN’s Board of Directors discussed extensively the ASIA application, and “in particular whether the applicant had demonstrated the sponsored community requirements” (see <http://www.icann.org/minutes/minutes-18feb05.htm>). A motion to deny the application was put to a vote and did not pass.

On 8 March 2005, DotAsia provided ICANN with a short summary of its proposal, which highlighted that the “boundaries of the DotAsia community are clearly defined” and that the Asia Pacific Internet community has seen “many successful bottom up community based collaborative initiatives.”

On 19 April 2005, DotAsia provided a clarifying letter that emphasized (1) it was a member-based, not-for-profit organization, and not a “joint venture;” and (2) it was “open to eligible organisations within the community on an inclusive and voluntary basis.”

On 3 May 2005, the ICANN Board of Directors discussed the ASIA application further (see <http://www.icann.org/minutes/minutes-03may05.htm>). The Board decided to request ICANN Staff to obtain from DotAsia “additional detailed information regarding the applicant's compliance with Section 8.3 of the ‘Principles for Delegation and Administration of ccTLDs Presented by Governmental Advisory Committee’ or otherwise report back to the board within 90 days.”

On 6 June 2005, DotAsia wrote to GAC Members to invite their “thoughts and participation” in the initiative. The letter noted that DotAsia had begun an informal dialogue with GAC Members from the region, with the assistance of the GAC Chair, the previous April at the Mar del Plata ICANN Meeting, and sought to include all GAC Members from the region.

On 2 August 2005, Howard C. Dickson, the GAC Representative for the Hong Kong SAR, sent a letter to Che-Hoo Cheng, the Interim CEO of DotAsia. Mr. Dickson’s letter stated that (1) we “think that ICANN and DotAsia should address the issues and considerations before governments could take a definitive view on the support or otherwise for the proposal” and (2) we have “reservation for a private company to oversee and administer a regional TLD in general.” The letter continues that “[h]aving said that, we do not have sufficient grounds to respond to the format as DotAsia proposed, that is support, have no objection, or object to, the Proposal.”

On 5 August 2005, DotAsia provided an update report for the Board in response to its May resolution. The report indicated that a second informal meeting had taken place during the July Luxembourg ICANN Meeting, where “there was a consensus around the room that it is an appropriate channel for [DotAsia] to communicate with governments through GAC representatives in the region and that it is a suitable forum to continue to hold these communication meetings” The report also indicated that the resolution and information about DotAsia had been sent to GAC members encouraging them to register their objections “should there be strong concerns from any government.” It noted that no “objection from any GAC member had been received.

On 11 August 2005, Mr. Cheng responded to Mr. Dickson’s letter of 2 August that DotAsia “believes in continuing this constructive discussion with yourself and other government representatives around the region” Mr. Cheng also described the membership structure and not-for-profit status of the organization, which would not include shareholders. Mr. Cheng also indicated that “it is good for us to understand that you are neutral to the initiative” and that ongoing contact would “allow you to feel comfortable that your concerns from the HKSAR Government perspective are being addressed appropriately.”

DotAsia’s application to operate an ASIA sTLD will be considered again by the Board. Any decision taken by the Board will be published on the ICANN website.

CAT

The applicant, registry operator and Sponsoring Organization (SO) for the CAT sTLD is Fundació puntCAT, Fundació Privada, a Catalonia private foundation (“puntCAT”). The registry operator selected CORE Internet Council of Registrars (CORE) to provide registry services.

Each of the three evaluation teams described above reviewed the CAT application and found that it met the respective selection criteria set forth in the RFP. The technical evaluation team noted that the application “was a rather innovative proposal. It ties a domain name to a language and culture, which has not been done before. The proposal is clear that this is an experiment. As such, it lays out a clear exit plan if the experiment fails, including provisions for the return of the TLD to ICANN. The proposal sets preconditions before registrations can go live, and monitors registrants for compliance with TLD policies.”

The business/financial team noted that the “business plan is clearly defined and demonstrates an in-depth knowledge of the registrant market to be addressed. The methodology is solid and well structured. The financial plan is credible and solid. Contingency plans are appropriate to keep the domain operational in case of failure. The budget seems realistic and appropriately scaled to the tasks outlined in the business plan. The model shows good judgment in building low initial overhead until the revenue base is secured.”

The sponsorship/community value team found that CAT met the selection criteria set forth in the RFP. It noted that the “community was well defined and the policy formulation environment was properly articulated. The application showed that there is a clearly defined set of needs around the provision of Internet services that are culturally and/or linguistically associated with the Catalan language or region.”

On 31 July 2004, ICANN notified puntCAT of the evaluators’ recommendations (see Appendix E). ICANN also reminded the applicant that the GAC had asked it to “avoid, in the creation of new generic TLDs, well known and famous country, territory or place names; well known and famous country, territory or regional language or people descriptions; or ISO 639 Codes for representation of languages *unless in agreement with the relevant governments or public authorities*” (see section 8.3 of the “Principles for the Delegation and Administration of Country Code Top Level Domains, at <http://www.icann.org/committees/gac/gac-cctldprinciples-23feb00.htm>)(emphasis added). ICANN noted its understanding from the application that Catalan is spoken predominantly in Spain, and that it is also the sole official language of Andorra. Accordingly, ICANN requested that puntCAT obtain letters from the Government of Spain and the Government of Andorra indicating whether they agree with the designation of an sTLD for the “Catalan Linguistic and Cultural Community.”

On 5 October 2004, ICANN wrote to the Government of Spain to explain the sTLD application process (see Appendix E for this and subsequent documents). The letter indicated that the CAT application “was found to have successfully met the baseline criteria,” and that ICANN took the “guidance of the GAC seriously.” As a result, the letter indicated that “a formal letter stating from your government that there is not opposition or reservations regarding the creation of the new TLD .cat is important.” We would request that you provide your position, in agreement or in objection, opposition, or concern”

On 22 October 2004, ICANN sent a similar letter to the Government of Andorra.

On 15 November 2004, Sr. Daniel Bastida, Director del Department de la Societat de la Informació, Projectes Estrategics, Govern d'Andorra, replied that the Government did “not have any objection to grant the TLD .cat domain to use it for the Catalan linguistic and cultural community.”

On 24 November 2004, Excmo. Sr. D. Francisco Ros Peran, Secretary of State, Telecommunications with the Information Society, Communications Center replied indicating a lack of objection on the part of the Government of Spain to the creation of a CAT TLD.

On 18 February 2005, the ICANN Board of Directors reviewed the CAT application materials, the evaluator's recommendations and the applicant's supplemental materials. After extensive board discussion regarding the application, the Board authorized the beginning of negotiations relating to proposed commercial and technical terms for the

CAT sTLD, “in conjunction with consultation with the appropriate governmental authorities” (see <http://www.icann.org/minutes/minutes-18feb05.htm>).

On 9 August 2005, the proposed CAT sTLD registry agreement was posted on the ICANN website (at <http://www.icann.org/tlds/agreements/cat/proposed-cat-agmt-09aug05.pdf>) and submitted to the ICANN Board for approval.

On 16 August 2005, the ICANN Board discussed and then deferred consideration of the CAT sTLD request until its 15 September 2005 meeting in order to “allow for further clarification of the terms of the agreement (see <http://www.icann.org/minutes/resolutions-16aug05.htm>).

On 15 September 2005, the Board approved the CAT Sponsored Top-Level Domain Registry Agreement (see <http://www.icann.org/minutes/resolutions-15sep05.htm>).

On 9 October 2005, ICANN and puntCAT signed the Registry Agreement. The CAT sTLD is currently awaiting submission of its IANA report.

JOBS

The applicant and registry operator for the JOBS sTLD is Employ Media LLC, a Delaware limited liability company (“Employ Media”). The Sponsoring Organization (SO) for the application is The Society for Human Resource Management (SHRM), a human resource management association. The registry operator selected VeriSign Naming and Directory Services to provide registry services.

Each of the three evaluation teams described above reviewed the JOBS application. The technical evaluation team found that the application met the criteria of demonstrating an ability to ensure stable registry operation, consistent with best practice technical standards for registry operations. With respect to evidence of a full range of registry services, the team was “concerned about the validation criteria for registrants from outside North America, and whether the applicant understood the complexities of creating a reserved list for job categories that span many languages.” The team concluded that JOBS did not at that time meet the technical selection criteria set forth in the RFP.

The business/financial evaluation team reviewed the JOBS applicant’s business and financial plans. It concluded that the relevant selection criteria had been met.

The sponsorship/community value evaluation team found that “employment is a very broad category that has substantial overlap with other existing classes of content and services . . . the global jobs and careers market was well served by existing search capabilities and that the application as presented would not add significant new value to the name space.” It questioned “how appropriate the [Sponsoring Organization (SO)] is to the proposed policy formulation environment,” and whether “there was sufficient evidence for support from the SO to meet the selection criteria.” It concluded that the

JOBS application “did not, on balance, meet the selection criteria.”

On 31 July 2004, ICANN notified Employ Media of the evaluators’ recommendations (see Appendix E).

On 22 September 2004, JOBS responded to the reports of the technical and sponsorship evaluation teams (see Appendix E for this and subsequent documents). In response to the technical team’s concerns, JOBS explained in greater detail its system for validating whether an employer was bona fide. In response to the sponsorship/community value team’s concerns, it provided more information about the JOBS “community” and the international presence of the SO, among other issues.

On 14 October 2004, JOBS, the technical team and ICANN held a teleconference to discuss the concerns raised about validation and other technical issues. The minutes of this teleconference are included in Appendix D. The applicant agreed to specify in writing how it will address the question of validation of employers on a global basis, including, for example, small and medium enterprises from the developing world. It also agreed to clarify in writing precisely how it will communicate with applicants, and specify the level of security for all such channels, and the “hard timers” that it will use to deter abuse of the validation system. It also agreed to provide more information about how it would reach out to the global community to determine how best to develop a list of reserved names to propose to ICANN.

On 10 November 2004, the applicant provided the follow-up information requested by the technical team.

On 26 November 2004, the technical team indicated its view that the JOBS application was now complete and sufficient from a technical standpoint (see Appendix E). It recommended that the remaining technical issue –requiring the external validator to use bi-directional EPP to communicate with the registry – could be handled during contract negotiations. VeriSign is currently implementing bi-directional EPP.

On 13 December 2004, after review of the above-mentioned information and materials, ICANN’s Board of Directors authorized the entry of commercial and technical negotiations with the JOBS applicant (<http://www.icann.org/minutes/resolutions-13dec04.htm>).

On 24 March 2005, ICANN announced the completion of those negotiations and posted the proposed JOBS Sponsored TLD Registry Agreement (<http://www.icann.org/announcements/announcement-24mar05.htm>) prior to Board consideration. The agreement was discussed briefly at the ICANN Public Forum in Mar del Plata, Argentina, on 7 April 2005. ICANN did not receive other comments on the agreement.

The agreement was then submitted to the ICANN Board for review at its meeting in Mar del Plata on 8 April 2005. The Board noted that the “applicant has provided satisfactory

details as to the broad-based mechanism for policy-making for the sponsored community, and how this sTLD would be differentiated in the name space,” and that “delegation of a .JOBS sponsored top-level domain to Employ Media would be beneficial for ICANN and the Internet community.” The Board approved the agreement, subject to the taking of appropriate steps to address the registration of “names of countries and distinct economies,” and directed the President of ICANN to implement its decision (<http://www.icann.org/minutes/minutes-08apr05.htm>).

On 5 May 2005, ICANN and Employ Media signed the Registry Agreement.

On 10 June 2005, Employ Media submitted a delegation template to IANA, which lists itself as the requested Sponsoring Organization. Mr. Ray Fassett is listed as the designated Administrative Contact and VeriSign Global Registry Services is listed as the designated Technical Contact. Completion of the template was deferred while VeriSign and Employ Media worked out several technical issues associated with launch.

IANA approved the proposed delegation on 7 September 2005. On 9 September 2005, JOBS was added to the root.

MAIL

The registry operator and Sponsoring Organization (SO) for the MAIL sTLD is The Anti-Spam Community Registry, founded by the Spamhaus Project, an international non-profit organization based in the United Kingdom. The registry operator selected VeriSign to provide registry services and eNom, Inc. to provide “extra services” (XO), including authority over all DNS records for delegations.

Each of the three evaluation teams described above reviewed the MAIL application. The evaluators concluded that the MAIL application did not satisfy the business/financial or sponsorship/community value criteria of the RFP, and that additional review would be necessary before it could be determined whether the proposal meets the technical criteria. More specifically, the technical evaluation team found the proposal “innovative by trying to create a more trusted TLD that would reserve a namespace for non-spamming email application.” It concluded that given “the complexity and unsettled nature of the behavior in the area this proposal is attempting to address, it is hard to evaluate it. Approving this TLD offers high risk and possible high benefit. Accordingly, the Team does not take a position on .mail, but recommends a review by the ICANN Security & Stability Advisory Committee.”

The business/financial team found the proposal’s goal of “adding another feature to the Spamhaus war on spam . . . interesting, and even laudable, yet the methodology as presented in the business plan appears inadequate to give the Team confidence that it will achieve this objective.” It recommended that the application not be approved because of major weaknesses it identified, including (1) “insufficient evidence and documentation to support the revenue projections;” (2) “insufficient capital to support ongoing operations if

revenues are short of projections;” and (3) little evidence of “support (and therefore of market demand) from the affected community, which the applicant describes as large senders or recipients of e-mail.” The team summarized its review by stating that there “is little in the business plan, or in the responses to our supplementary questions, to provide confidence that the applicant will have sufficient staying power to see this TLD through start up and early growth stages. There is even less to instill confidence if it encounters any setbacks; this application lacks sufficient resources to have the necessary staying power for the delays and problems inherent in a start-up business.”

The sponsorship/community value team found the sponsored community to be “a very amorphous category of users – essentially anyone who does not want to receive spam.” It did not believe that MAIL met the RFP selection criteria. It noted that this decision “does not imply that we consider spam either a solved or unimportant problem. To the contrary, we believe that it is a vital issue to address but that it requires broad-based Internet community involvement. We recommend that the applicant work closely with the existing gTLD and ccTLD registries to implement their spam management ideas.”

On 31 July 2004, ICANN notified Spamhaus of the evaluators’ recommendations (see Appendix E).

On 16 December 2004, Spamhaus responded to the evaluators’ reports, indicating that (1) “the zones are no more complex than others in other TLDs” and, in any case, will be run by the Sponsoring Organization through eNom and VeriSign; (2) “the price per domain, and the funding and resources provided by eNom and VeriSign, are more than enough to keep the SO funded at even the lowest levels of domain uptake. We have also been able to obtain further insurances from eNom and VeriSign that the funding concerns expressed will not be an issue;” (3) should the SO fail, board members, eNom and VeriSign have said they will be able to keep the .mail system going for the “current set of validated users;” (4) the proposed sTLD “gives a large value added service to the user;” and (5) the “ability of the system to change one of the largest concerns of internet users; deliverability of their email, will almost enable .mail to market itself” (see Appendix E for this and subsequent documents).”

In January 2005, the Project Manager and ICANN notified ICANN's Security and Stability Advisory Committee (SSAC) that there could be a need for further review of technical issues associated with the application.

The business/financial evaluation team re-convened to review the response and additional information provided by Spamhaus. On 28 February 2005, the team posed several supplementary questions to the applicant about the information (see Appendix E) about capital to sustain the operation; management commitment and capabilities; demand for the domain; and pricing and revenue projections.

On 19 March 2005, Spamhaus provided answers to the questions posed by the business/financial team (see Appendix E).

On 22 April 2005, the business/financial team completed its review of the supplementary information, in conjunction with previous submissions. It found that while “the new information reflects a strong desire by the applicant to launch a .mail sTLD, there is still insufficient indication that, from a business and financial perspective, this applicant is fully capable of operating a new sTLD. Many of our questions were only partially answered and many of the responses lack clarity or were deemed insufficient to address the underlying concern.” The team had significant outstanding concerns in three areas: (1) financials: capital to sustain the operation and pricing and revenue projections; (2) management commitment and capabilities; and (3) demand. It found that the proposal “for a .mail TLD is not financially viable and that the business plans are not sound.” The team therefore indicated that the “application does not meet the selection criteria set forth in the RFP.”

On 31 July 2005, ICANN informed the applicant of this conclusion. Because the business/financial team had found that the applicant did not satisfy the relevant criteria, there was no need for further review of technical issues by SSAC.

MOBI

The registry operator and Sponsoring Organization (SO) for the MOBI sTLD is DotMobi, Ltd, an Irish limited liability company (“DotMobi”). The MOBI application for the TLD was submitted by Nokia Corporation, Vodafone Group Services Limited and Microsoft. The registry operator selected Afilias Limited (“Afilias”) to provide registry services.

Each of the three evaluation teams described above reviewed the MOBI application. The technical evaluation team found that the application did not meet all relevant criteria. It noted concerns about (1) “the disruptive behavior of servers and clients that just assume the use of .mobi TLD for small device content, rather than use content delivery protocol negotiation mechanisms”; (2) “namespace fragmentation if mobile devices use search strings that try <domain-name>.mobi before <domain-name>” because “such a practice would force content providers to register in .mobi to defend their interests in other TLDs”; and (3) users getting “locked-into services that become available only in .mobi by connection providers.” It also noted concern about “registrations . . . being open to abuse, as there is no explicit verification mechanism whether, for example, websites actually follow some specific requirement for either small devices or devices connected over slow bandwidth.”

The business/financial evaluation team reviewed the MOBI applicant’s business and financial plans and concluded that the relevant selection criteria had been met. The sponsorship/community value evaluation team found that the application did not meet all relevant criteria. The team indicated that it “is not clear that it is possible, especially over time, to establish the membership of this community. It also did not “believe that the application articulated the most appropriate policy formulation environment for a highly commercial and exclusive organisation,” noting “concerns

about bias on behalf of the financial backers of the JV [Joint Venture partners].” The team was “not persuaded that the joint venture partners could implement a cohesive policy formulation environment that aligned with ICANN policy setting priorities” because the “perception of bias would discourage the broader community from participating and cast doubt on the fairness of the resulting decisions.” In addition, the team indicated it was “not clear whether the Policy Advisory Group (PAG) and the Membership Advisory Group (MAG) were self-selecting on the basis of financial capability which would be an excluding element in their organisation. It was thought that whilst the policymaking process takes input from a variety of advisory organizations, decisions are made by the board of directors, chosen from amongst those that invest in the venture. This may not be the best scenario for the board to take the larger community input into account.”

On 31 July 2004, ICANN notified DotMobi of the evaluators’ recommendations (see Appendix E).

On 3 September 2004, MOBI responded to the report of the technical evaluation team (see Appendix E for this and subsequent documents). In response to that team’s concerns, MOBI suggested that they were not relevant to the question of whether the four technical criteria of the RFP had been satisfied, which it believed had occurred. MOBI indicated that (1) it would “utilize existing Internet standards, such as content negotiation, and will promote their use within the .mobi style guide and other publications”; (2) the diversity of participants in the “policy making structure will discourage unilateral and non-user friendly imposition of “mobi-only” Internet browsing on mobile devices or policies posing restrictions for .mobi users to access the Internet”; and (3) “its management and agenda will not be “driven by any mobile manufacturer, operator or content providers with an intent to lock-in users to the .mobi domain.” MOBI also suggested that concerns about defensive registrations were not grounds for disapproval.

On 13 September 2004, MOBI responded to the report of the sponsorship/community value evaluation team. In response to that team’s concerns, MOBI explained that (1) “policy requirements, which cannot reasonably be met in existing TLDs at the second level or in new generic TLDs, can be enforced by way of a charter with ICANN for the benefit of consumers,” notwithstanding the size of the anticipated sponsored community, or changes in the community; (2) there is a need for a “clearly recognizable designation for enhanced services [for mobile devices] that can be implemented today and easily understood” by customers, particularly in the developing world; (3) the policy mechanism “permits total flexibility”; and (4) although the policy boards are advisory, the MOBI Board will be “accountable to the MAG and PAB, to ICANN itself, and to competition authorities around the world.”

On 4 and 15 October 2004, ICANN, the technical team and MOBI held teleconferences to discuss the concerns raised about validation, content negotiation and mobile device restrictions. The applicant (1) agreed to specify in writing the validation and enforcement procedures that it would use; (2) explained why it believed protocol negotiation protocols now in effect to be insufficient; and (3) stated that MOBI TLDs would be available to any

device, and that anyone on a mobile device can get to any TLD (i.e., it would be up to the user, and not the device, i.e., there would be no “lock-in” or exclusion). It agreed, in particular, to provide “a detailed technical description of the validation and enforcement process it will use, including means of communication between parties, process for bringing registrants into compliance with the style guide, rights of registrants, and other specific steps, as well as confirm whether the processes are supported by the current business plan.”

On 21, 28 and 29 October 2004, the applicant provided follow-up information requested by the technical team, including answers to specific questions and a description of the “.mobi Style Verification Process.”

On 26 November 2004, the technical team indicated its view that MOBI “has not been able to convince us of the technical merit of its application beyond the criteria specified in the RFP” because of “significant concerns about deployment of a TLD for content negotiation reasons.” The team found there was an absence of technical arguments to support MOBI’s belief that “currently mobile devices are not well served by standard content sites,” and that “the best way to address this issue is to create a new TLD.” The team felt it was “unclear what happens if the content negotiation in the protocol is violating the style guide regarding mobile content and the domain name used is in the .MOBI TLD, and that in any case it would not be possible to guarantee that “the style guide would not override the protocol negotiations.” The technical team noted that MOBI did amend its application to satisfy concerns about validation with two additions: (1) “a registrant must sign an agreement to comply with the .MOBI style guide. . . and understand that [it] will be revoked” for non-adherence; and (2) there would be a “compliance checking process” put in place, including how a registrant will be contacted when not in compliance.

On 10 December 2004, MOBI responded to the technical team’s Comments (see Appendix E). The response emphasized that the technical team had concluded that the application met the “technical requirements of the RFP,” and suggested that MOBI did not have to prove that the proposed TLD was required for technical reasons. MOBI indicated that concerns about fragmentation of the Internet were unfounded, and that the style guides and content negotiation are “complementary rather than in conflict.”

On 13 December 2004, after review of the above-mentioned information and materials, ICANN’s Board of Directors authorized the entry of commercial and technical negotiations with the MOBI applicant (<http://www.icann.org/minutes/resolutions-13dec04.htm>). The Board requested that, in the process of negotiations, “special consideration be taken as to confirm the sTLD applicant’s proposed community of content providers for mobile phones users, and confirmation that the sTLD applicant’s approach will not conflict with the current telephone numbering systems.”

On 3 June 2005, ICANN announced the completion of those negotiations and posted the proposed MOBI Sponsored TLD Registry Agreement prior to Board consideration (<http://www.icann.org/announcements/announcement-03jun05.htm>).

On 28 June 2005, the agreement was then submitted to the ICANN Board for review (<http://icann.org/minutes/resolutions-28jun05.htm>). The Board noted that “the applicant has provided satisfactory details as to the proposed community of content providers for mobile phones users, and confirmation that the applicant's approach will not conflict with the current telephone numbering systems.” It found that “delegation of a .MOBI sponsored top-level domain to DotMobi, Ltd. would be beneficial for ICANN and the Internet community.” The Board approved the agreement and directed the President of ICANN to implement its decision.

On 11 July 2005, ICANN and DotMobi signed the Registry Agreement.

On 9 September 2005, DotMobi submitted a delegation template to IANA, which lists mTLD, Limited as the requested Sponsoring Organization. The designated Administrative Contact and Technical Contact roles will be shared by mTLD Limited and Afilias.

IANA approved the proposed delegation on 17 October 2005. On 20 October 2005, MOBI was added to the root.

POST

The applicant, registry operator and Sponsoring Organization (SO) for the POST sTLD is the Universal Postal Union (UPU), an international organization headquartered in Berne, Switzerland. The registry operator selected the Swiss Academic and Research Council (SWITCH) to perform all technical registry functions under its supervision. Each of the three evaluation teams described above reviewed the POST application. They found that the POST application satisfied all criteria -- technical, business/financial and sponsorship/community value -- specified in the RFP.

On 31 July 2004, ICANN informed the applicant that, as a result of the evaluations, it was ready to begin technical and commercial negotiations with the intention of designating POST as a new sTLD. ICANN indicated that after the successful conclusion of such negotiations, its Board of Directors would be requested to authorize the ICANN President and General Counsel to conclude and implement the Registry Agreement that had been negotiated.

TEL (PULVER)

The applicant and registry operator for this TEL sTLD application is NetNumber, Inc, a company doing business in Massachusetts (“Netnumber”). The Sponsoring Organization (SO) is Pulver.com, a company doing business in New York (“Pulver”). For purposes of this report, both entities shall be referred to as “Pulver.”

Each of the three evaluation teams described above reviewed this TEL application, and none recommended approval. The technical evaluation team expressed concern that an effort to “create a public ENUM-like service that is only open for registration by ‘VoIP providers’” would “cause major problems for global ENUM deployment.” It was “also concerned that this proposal is focused entirely on North America.” The team also noted that “this is a new operator of an EPP registry that has not demonstrated an ability to operate it, even though the description in the application suggests that it has the chance of being a success. Nonetheless, there is a high risk of technical problems when the registry starts up, even though the registry is also (the only) registrar.”

The business/financial team found that the “methodology is not clear. The key players are experienced, well resourced financially and qualified, and NetNumber’s existing operation appears to be solid, but there are few details actually provided in the application to substantiate this. Nor is there a detailed methodology that describes how that experience and current operational success will be used to ensure the success of this TLD.”

The sponsorship/community value team found a “lack of representative reach of the Sponsoring Organization, poor coordination with ENUM developments in the larger Internet community, and questions about whether the application defined a community which can add value to the Internet name space.”

On 31 July 2004, ICANN notified Pulver of the evaluators’ recommendations (see Appendix E). Pulver did not respond to ICANN’s invitation to remedy, or attempt to remedy, deficiencies in its application.

On 30 November 2004, ICANN informed Pulver that those applicants seeking to remedy identified deficiencies had done so, and that the sTLD application process would therefore draw to a close.

TEL (TELNIC)

The applicant and registry operator for this TEL sTLD application is Telnic Limited, a company in the United Kingdom (“Telnic”). The Sponsoring Organization (SO) it plans to form is Telname Limited. The registry operator selected CORE Internet Council of Registrars (CORE) to provide registry services.

Each of the three evaluation teams described above reviewed this TEL application, and none recommended approval. The technical evaluation team did not recommend the TEL application for approval because (1) “the description of how the domain operates describes functionality which is not coherent” with the rest of the application, and could contribute to “an increase in operational instability when the registry starts up;” (2) it is unclear “if there will be a connection between what names are used in this domain, versus other TLDs. I.e. should the holder of example.com get example.tel, or examplecom.tel?;” and (3) TEL’s proposal to allow any registration but “only register non

delegation records for each name . . . may cause problems for registrars as they need to make major changes to their systems . . .” In addition, Telnic’s decision initially not to identify the provider of registry services led the team to decide that there was “no way to judge their suitability or capabilities.”

The business/financial team did not recommend approval because it found that (1) neither “the business plan nor the responses to supplementary questions provides satisfactory evidence of the applicant’s ability to reach the projected number of domain registrations. Projections are based on an unconvincing argument that the number of dot-tel domains registered will be proportional to number of users of mobile terminal devices;” (2) the “marketing plan suggests that the applicants will spend a significant amount of money quickly without any real focus to their efforts.” It does “not indicate where the market focus is, for example which conferences are the most potentially beneficial and why. This lack of focus, lack of meaningful specificity and lack of relevant partners on board to date do not generate confidence in the applicant’s ability to execute successfully;” and (3) the “lack of evidence of initial discussions/agreements with an RO does not establish confidence in the applicant’s ability to garner the necessary technical resources in a timely fashion and within the planned budget.”

The sponsorship/community value team also did not recommend approval. Its concerns included that (1) the “application defines an enormously broad community of users,” namely “anyone who has a phone or seeks to disseminate telecommunications routing information about how to reach them;” and (2) despite “laudably transparent operating procedures, the policy making and operational authority is exclusively vested in the original financial investors of this venture with no mechanisms to grow toward broader community support,” with “no obligation to include representation from any portion of the community to be served by the sTLD.”

On 31 July 2004, ICANN notified Telnic that it had not been recommended by any of the evaluation teams (see Appendix E).

On 25 August 2004, Telnic responded to the evaluation reports. It indicated that (1) the proposed TLD was “configured as a standard ‘delegation only’ system (i.e., Registry holds only NS records);” (2) it would issue an RFP for back-end services but had not in an effort to promote a competitive process; (3) it had presented a sound business and financial plan; (4) there was sufficient market demand; and (5) providing domains that are “tied exclusively tied to a person’s or company’s name and used to hold contact data for Registrant, not their machines” is appropriately an sTLD (see Appendix E for this and subsequent documents).

On 20 September 2004, Telnic notified ICANN that it had signed a Letter of Intent with CORE to provide registry services.

On 28 October 2004, the technical team issued a statement on “Consideration of Supplemental Information,” which took into account selection of CORE. The technical team noted that, with respect to the nature of the delegation system, Telnic’s affirmative

answer that the proposed sTLD was to be “delegation only” was not consistent with other information it had provided. For example, Telnic’s June 21, 2004, response to questions from the Technical Team states both that (i) “SRV records and MX records will be acceptable. However, the target for these records will have to be in a zone in another TLD,” and (ii) that the sTLD will be “delegation only.” With respect to registration restrictions, the team noted that the SO “should have a technical plan for enforcing restrictions that ensures, for example, the registry will operate reliably” and suggested the applicant provide “a more detailed technical description of the proposed enforcement mechanism.” With respect to the identification of CORE, the team noted that “CORE has demonstrated sound technical abilities to operate registries of sizes that are smaller than Telnic proposes for .tel,” which Telnic estimates would be 5 million by the end of year 5. On the same day, CORE, on behalf of Telnic, provided an initial response to the technical team’s questions that described CORE’s capacity and ability to scale up or down.

On 29 October 2004, Telnic, the technical team and ICANN held a teleconference to discuss technical issues. With respect to delegation, the team sought clarification of a system that was not described consistently. Telnic clarified that it would “use a standard delegation only system.” On enforcement, Telnic described how robots would “randomly and selectively query registered domains for evidence of usage violations,” and agreed to describe the process in more detail. Telnic also confirmed that CORE could scale up to the estimated size of the TEL registry. After the teleconference, the Evaluators conferred, as agreed, and posed follow-up questions about treatment of the address records, the proximity of data centers and what domain name strings would be prohibited.

On 2 November 2004, the applicant provided answers to the technical team’s follow-up questions.

On 10 November 2004, the business/financial team completed its review of Telnic’s response to the evaluation, and posed 22 supplemental questions to the applicant. The questions were organized into five broad issues and included: (1) facilitating the sale of .tel registrations, including eligibility and market research; (2) determining the importance of value-added features; and (3) clarifying the relationship between an increase in consumers’ purchase and use of dual-function (both Internet and Telephony capable) devices and the financial success of TEL.

On 15 November 2004, Telnic responded to the technical team’s supplemental questions (which updated an earlier response on 2 November). Telnic described the TEL registry delegation model, and confirmed that it would act as a “delegation only” TLD. It also described its acceptable usage, policing and enforcement model in detail. It clarified that solely numeric domain labels will be excluded from TEL.

On 27 November 2004, the Technical Team provided its final comments and found that the application was now “complete and sufficient from a technical standpoint,” and did meet the technical criteria of the RFP. It indicated that (1) “information provided by CORE showed evidence that their operation can scale to a size larger than .TEL expects

to reach in 3-5 years;” and (2) greater geographical distance between the data sites would be optimal.

On 4 December 2004, the applicant provided responses to the business/financial team’s question, including market surveys and analyses.

On 12 January 2005, the business/financial team concluded that its concerns had been addressed, and that from a business/financial perspective Telnic’s application now meets the selection criteria set forth in the RFP. It noted that Telnic’s new “information presents a high level of specificity, and has provided the answers, details and clarifications we were looking for. It has moved this plan for a .tel TLD from the early stage work that characterized the original application to a more fully considered endeavour with a comprehensive business plan. Telnic’s ability to implement its business plan is now evident and the methodology appears to be sound. The additional details that have been provided regarding operational capacity, marketing, fee structure and registrar arrangements reinforce our evaluation that Telnic is likely to be able to implement its plan.”

On 17 March 2005, the applicant provided ICANN with additional thoughts on why it believed it met the sponsorship/community value criteria, for the Board’s consideration. Telnic indicated that the sTLD allows people to find people, and that TEL will restrict the “use” of the domain; “members of this community will use the DNS to organize, store and publish their personal contact information.” It also stated that the needs of this specific community are unique in terms of technical issues, infrastructure, restrictions, educational needs, enforcement and privacy. It pledged that the SO would enable broad, direct community involvement.

On 21 March 2005, the ICANN Board discussed the TEL application and directed “the President to provide the Board with more information from the technical evaluators and applicants regarding the technical aspects of the .TEL sTLD application” (see <http://www.icann.org/minutes/minutes-21mar05.htm>). The Board had questions about the scaling potential of the TLD; the operation, name conflicts, and special applications; and registrar-registry protocols and interactions.

On 3 June 2005, the technical team responded to the Board’s inquiries. The team stated that (1) with respect to scaling, the “proposed TLD is no different than .COM . . . [because] growth is typically linear”; (2) a “first-come, first-served approach to registration does not seem appropriate to a TLD of this potential size,” but that issue was within the purview of the sponsorship team; (3) there “is no known technical mechanism whereby different users in different locations can get different responses from DNS;” (4) it did not foresee a problem with the DNS’s caching environment, for DNS traffic is relatively small; (5) “the TLD will ultimately succeed or fail based on the availability of applications;” (6) it had already “expressed the view that a prefix would raise fewer issues than a suffix,” but that “proposals for prefixes were not the ones presented to us for evaluation;” (7) it had already noted that “there is a high risk of problems for registrars if there is no preliminary detailed analysis of the registry-registrar relationship, including

consideration of the different technical abilities of different registrars;” and (8) despite “initial confusion, Telnic clarified in fall 2004 that the .TEL sTLD would be ‘delegation-only,’” which moots the question of patches in a post-SiteFinder environment.

On 28 June 2005, the Board discussed the TEL application, specifically the issues of compliance with the technical requirements of the sTLD RFP. The Board voted to authorize the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the TEL sTLD (see <http://www.icann.org/minutes/minutes-28jun05.htm>).

TRAVEL

The applicant and registry operator for the TRAVEL sTLD is Tralliance, a New York corporation (“Tralliance”). The Sponsoring Organization (SO) is The Travel Partnership Corporation (“TPPC”). The registry operator selected NeuLevel, Inc., to provide registry services.

Each of the three evaluation teams described above reviewed the TRAVEL application. The technical evaluation team found that the application met the technical selection criteria set forth in the RFP, and so recommended that it be approved on technical grounds with two conditions: (1) ICANN and TRAVEL specify some time limits within which (for example) a registration must be validated, or it is rejected; and (2) TRAVEL should be required to document - after 6 months - any problems it experiences with validation of requests, in order to assist future TLDs with similar outreach using diverse verification agencies, including the experience of registrants “fishing” for a validation agency to approve their application.

The business/financial team found that the selection criteria concerning the business and financial plans were met, and recommended approval.

The sponsorship/community value team found that while “the applicant does a very thorough job of defining a community,” it did not “believe that the community is consistent in breath with the name string .travel. Rather, the community defined is limited to the commercial providers of travel services. Also, the ET believes that the needs of the very diverse travel community are well met by the existing gTLDs and that this proposal could be integrated as a second level domain name into, for example, .com, .biz or .info, quite easily.”

On 31 July 2004, ICANN notified Tralliance of the evaluators’ recommendations (see Appendix E).

On 18 August 2004, TRAVEL responded to the sponsorship/community value evaluation (see Appendix E for this and subsequent documents).

On 18 October 2004, the ICANN Board reviewed, commented and actively discussed the

sponsorship criteria and the TRAVEL sTLD application, the report of the independent review panel on the sponsorship application, the response by the applicant to the independent review panel's report (<http://www.icann.org/minutes/minutes-18oct04.htm>). The Board voted to authorize the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the TRAVEL sponsored top-level domain (sTLD) with the applicant.

On 24 March 2005, ICANN announced the completion of negotiations with the applicant for TRAVEL and posted the proposed Sponsored TLD Registry Agreement (<http://www.icann.org/announcements/announcement-24mar05.htm>). The agreement was then submitted to the ICANN Board for approval. It was discussed at the ICANN Public Forum and Board meeting in Mar del Plata, Argentina, 4-8 April 2005.

On 8 April 2005, the ICANN Board of Directors authorized the President of ICANN to complete the TRAVEL delegation process (<http://www.icann.org/minutes/minutes-08apr05.htm>). It noted that "ICANN's Governmental Advisory Committee (GAC) "has concluded that "the issue of geographical and geopolitical names is very complex, and the subject of ongoing international discussion," and the Board has determined that it is appropriate to take temporary steps to prevent the registration of such names in new TLDs in order to allow it and the community the time to consider carefully this issue and determine what, if any, policy should be adopted with respect to it." As a result, the Board directed the President and the General Counsel "to take appropriate steps to preserve the Board's ability to take action with respect to the registration in this generic top-level domain of names of countries and distinct economies." It agreed that, subject to amendment on this point, the proposed agreement with Tralliance concerning TRAVEL was approved.

On 17 June 2005, a delegation template was submitted to IANA which lists Tralliance Corporation as the requested SO, and Mr. Ronald Andruff as the designated Administrative Contact. The technical contact has been designated as a role account.

IANA approved the proposed delegation on 14 July 2005. On 21 July 2005, TRAVEL was added to the root.

XXX

The applicant and registry operator for the XXX sTLD is ICM Registry LLC, a Delaware limited liability corporation ("ICM"). The Sponsoring Organization (SO) for the application is The International Foundation for Online Responsibility (IFFOR). The registry operator selected Afilias Limited to provide registry services. Each of the three evaluation teams described above reviewed the XXX application. The technical and the business/financial evaluation teams found that the relevant selection criteria had been met.

The sponsorship/community value team found that the relevant selection criteria had not

been met. Its reasoning included that (1) the “proposed sTLD is proposed to serve a community of registrants defined based on the type of content they provide, described by the applicant as ‘adult-oriented information’ . . . The RFP defines a “clearly defined community” as one that is “precisely defined, so it can readily be determined which persons or entities make up that community.” The extreme variability in definitions of what constitutes the content which defines this community makes it difficult to establish which content and associated persons or services would be in or out of that community;” (2) a “successful policy formulation environment requires effective coordination of a community that has some common interests and the promise of working together in a cohesive, even if confrontational, style. It is unclear what the interests of this community are. The applicant hypothesizes a set of interests on behalf of a community (whose definitional coherence is in doubt) but little testimony from that community has been provided in support of either its common interests or cohesiveness;” and (3) there “was considerable support from North American representatives of the adult industry. However, virtual no support was available from the rest of the world, or from users or other members of this community.”

On 31 July 2004, ICANN notified ICM of the evaluators’ recommendations (see Appendix E).

On 9 October 2004, the applicant responded to the sponsorship/community value report. It indicated its belief that there is an online community of material that is sexually explicit and whose providers are committed to working together – with public interest and civil liberty groups – to identify and implement best industry practices (see Appendix E for this and subsequent documents).

On 7 December 2004, the applicant submitted a sponsorship memorandum to the Board elaborating on these points.

On 24 January 2005, the ICANN Board held extensive discussions regarding the application, in particular focused on “whether a sponsored community criteria of the RFP was appropriately met” (see <http://www.icann.org/minutes/minutes-24jan05.htm>). It was suggested by various Board Members “that it might be useful for the applicants to give a presentation to the board on these issues” at a later meeting.

On 3 April 2005, ICM gave a presentation to the ICANN Board. It also prepared a summary of why it believed that the proposed TLD was a sponsored community.

On 3 May 2005, the ICANN Board held a “broad discussion of this matter regarding whether or not the [XXX] application met the criteria within the RFP particularly relating to whether or not there was a “sponsored community” (<http://www.icann.org/minutes/minutes-03may05.htm>). The Board “agreed that it would discuss this issue again at the next Board Meeting.”

On 1 June 2005, the ICANN Board decided to authorize “the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms

for the .XXX sponsored top-level domain (sTLD) with the applicant”
(<http://www.icann.org/minutes/minutes-01jun05.htm>).

On 16 August 2005, the ICANN Board discussed and then decided to defer consideration of the .XXX sTLD request until its 15 September 2005 Meeting (<http://www.icann.org/minutes/resolutions-16aug05.htm>). The XXX application “was deferred in response to requests from the applicant ICM, as well as the ICANN Government Advisory Committee Chairman and various Governments, to allow for additional time for comments by interested parties.”

On 15 September 2005, the ICANN Board reviewed the XXX application (<http://www.icann.org/minutes/resolutions-15sep05.htm>). The Board noted that it had “expressed concerns regarding issues relating to the compliance with the proposed .XXX Registry Agreement (including possible proposals for codes of conduct and ongoing obligations regarding potential changes in ownership) and has noted the importance of private registry agreements, in creating contractual means of affecting registries and other actors of the Internet community for the public interest.” It also noted that “ICANN has received significant levels of correspondence from the Internet community users over recent weeks, as well as inquiries from a number of governments.” It therefore voted to authorize the President and General Counsel “to discuss possible additional contractual provisions or modifications for inclusion in the .XXX Registry Agreement, to ensure that there are effective provisions requiring development and implementation of policies consistent with the principles in the ICM application. Following such additional discussions, the President and General Counsel are requested to return to the board for additional approval, disapproval or advice.”

Any decision taken by the Board will be published on the ICANN website.

III. Conclusion

Three independent teams of experts reviewed ten sTLD applications against the selection criteria set forth in the RFP. They worked diligently and thoroughly between 28 May and 7 July 2004 to discuss the selection criteria, analyze the applications, review public comments and assess the extent to which each proposal satisfied the different parts of the RFP. Additionally, the teams posed a series of questions to each applicant in an effort to amplify points that were unclear and to seek other clarifications. At every step, the applications were evaluated on their own merits, in an objective and fair manner. The teams concluded the following:

- Technical: (i) five proposals met the technical criteria of the RFP: ASIA, CAT, POST, TRAVEL (with conditions) and XXX; (ii) the issues raised by MAIL would benefit from review by ICANN’s Security & Stability Advisory Committee; and (iii) four proposals did not meet the selection criteria: JOBS, MOBI, TEL-Pulver and TEL-Telnic, although concerns with JOBS might be resolvable.

- Business/Financial: (i) seven proposals met the business/financial selection criteria of the RFP: .ASIA, CAT, JOBS, MOBI, POST, TRAVEL and XXX; and (ii) three proposals did not meet the selection criteria: MAIL, TEL-Telnic and TEL-Pulver.
- Sponsorship/Community Value: (i) two proposals met the sponsorship and community value selection criteria of the RFP: CAT and POST; (ii) three proposals did not presently meet the selection criteria but merit further discussions with ICANN: ASIA, JOBS and TRAVEL; and (iii) the five other proposals did not meet the selection criteria.

After completing the independent review process, ICANN decided to offer all applicants an opportunity to seek to remedy deficiencies identified by the evaluators. Nine out of ten applicants chose to try to remedy such deficiencies. In some cases, as described above, the technical and the business/financial evaluation teams convened again in order to review applicants' supplementary materials.

The overall results can be summarized as follows: Of the ten applications submitted for consideration –

- Three sTLDs have been added to the root (TRAVEL, JOBS, MOBI);
- Another sTLD has signed a Registry Agreement and is awaiting submission of an IANA report (CAT);
- Another three sTLDs are engaged in negotiations with ICANN concerning a Registry Agreement (POST, TEL-Telnic, XXX);
- Another sTLDs is pending Board consideration (ASIA) on the issue of whether it should proceed to negotiation; and
- Two sTLDs were not accepted (MAIL and TEL-Pulver).

In concluding the process and issuing this Report, it is important to recognize the hard work, creativity and dedication shown by all of the applicants. Overall, their responses to the RFP reflected enormous thought and commitment. It is equally important to recognize the hard work and dedication of the three teams of evaluators, which conducted diligent and thorough reviews.