

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

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

CASE NO. 01-14-0002-1065

GULF COOPERATION COUNCIL

v.

INTERNET CORPORATION FOR ASSIGNED

NAMES AND NUMBERS

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# **ANNEX S-1**

**The New York Times** | <http://nyti.ms/1l3ogj5>

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MIDDLE EAST

# Persian (or Arabian) Gulf Is Caught in the Middle of Regional Rivalries

By KAREN ZRAICK JAN. 12, 2016

What's in a name?

History, politics and pride.

Tensions between Iran and Saudi Arabia have been escalating on many fronts — over wars in Syria and Yemen, the Saudis' execution of a dissident Shiite cleric and the Iran nuclear deal. The dispute runs so deep that the regional rivals — one a Shiite theocracy, the other a Sunni monarchy — even clash over the name of the body of water that separates them.

Is it the Persian Gulf? Or the Arabian Gulf?

Iran insists that it be called the Persian Gulf, and has banned publications that fail to use that name. Yet this riles Arab nations, which have succeeded in pushing various parties to use their preferred term — Arabian Gulf.

This may be among the most minor of the disputes, but it speaks to the level of hostility and competition between the two, and is taken quite seriously

by many with an interest in the region — including the United States Navy, which, for fear of alienating its regional allies, uses the term Arabian Gulf.

Why does it matter? In a world where these two adversaries are trying to outmaneuver each other to be the regional superpower, a name can be powerful.

Persian Gulf has been used throughout history, in maps, documents and diplomacy, from the ancient Persians, whose empire dominated the region, to the Greeks and the British.

The push to call it the Arabian Gulf gathered steam during the Pan-Arab nationalist movement of the late 1950s, propelled by President Gamal Abdel Nasser of Egypt, the historian Lawrence G. Potter wrote in the “The Persian Gulf in History.” In the 1960s, Arab countries made Arabian Gulf compulsory, and the Gulf Cooperation Council uses it.

The United Nations uses Persian Gulf. A 2006 paper by a United Nations working group found unanimity in historical documents on the term, which it said was coined by the Persian king Darius in the fifth century B.C.

As far as the United States government is concerned, the body of water is the Persian Gulf, per the Board on Geographic Names. Yet the Navy has used Arabian Gulf for at least 25 years, since the 1991 Persian Gulf War, said Cmdr. Kevin Stephens, a spokesman for the United States Fifth Fleet, whose headquarters are in Bahrain.

“It is commonly understood to be a friendly gesture of solidarity and support for our host nation of Bahrain and our other Gulf Cooperation Council partners in the region to use the term they prefer,” Commander Stephens wrote in an email.

Analysts say the name can be a source of friction even in diplomatic encounters.



“It’s deeply emotional; it’s not simply semantic,” said Frederic Wehrey, an expert on gulf politics at the Carnegie Endowment for International Peace.

Mr. Wehrey recalled meetings that degenerated into shouting matches over the name. At the heart of the matter, he said, was “a geostrategic dispute about ownership of the gulf.”

Kenneth M. Pollack, a fellow at the Brookings Institution who served as the Persian Gulf affairs director at the National Security Council, said that the terms used by American officials had become more nuanced, and that more officials now say Arabian Gulf or simply “the gulf.”

The terminology shifted along with geopolitics, he said. While the close American-Saudi relationship dates to World War II, ties deepened between the United States and other Gulf Arab states after the 1979 Islamic Revolution in Iran, and even more so with the 1991 war in Iraq.

The National Geographic Society found itself in the middle of the argument when it published an atlas adding the term Arabian Gulf in parentheses below the term Persian Gulf in 2004. After protests, National Geographic added an explanatory note to later editions.

Alireza Nader, an analyst at the RAND Corporation, said the body of water’s name resonated deeply with Iranians in the country and abroad.

“It’s almost as if Iranians feel that their history as a civilization is being challenged,” he said. “That’s why it has such an emotional reaction.”

The Associated Press stylebook uses the term Persian Gulf. The New York Times stylebook does not have an entry on it, but the organization generally uses Persian Gulf.

Google Maps shows both terms, with Arabian Gulf in parentheses. But Google will show either Arabian or Persian Gulf to local users, depending on geolocation and language settings.

A version of this article appears in print on January 13, 2016, on page A8 of the New York edition with the headline: Persian (or Arabian) Gulf Is an Object of Regional Rivalries.

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# **ANNEX S-2**

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

Between:	)	
	)	
Vistaprint Limited	)	
	)	
<i>Claimant</i>	)	
	)	
v.	)	<b>ICDR Case No. 01-14-0000-6505</b>
	)	
INTERNET CORPORATION FOR	)	
ASSIGNED NAMES AND NUMBERS	)	
	)	
<i>Respondent</i>	)	
_____	)	

**FINAL DECLARATION OF THE INDEPENDENT REVIEW PANEL**

IRP Panel:

Geert Glas  
Siegfried H. Elsing  
Christopher S. Gibson (Chair)

## I. Introduction

1. This Final Declaration (“Declaration”) is issued in this Independent Review Process (“IRP”) pursuant to Article IV, §3 of the Bylaws of the Internet Corporation for Assigned Names and Numbers (“Bylaws”; “ICANN”). In accordance with the Bylaws, the conduct of this IPR is governed by the International Centre for Dispute Resolution’s (“ICDR”) International Dispute Resolution Procedures, amended and effective June 1, 2014 (“ICDR Rules”), as supplemented by the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers Independent Review Process, dated December 21, 2011 (“Supplementary Procedures”).
2. Claimant, Vistaprint Limited (“Vistaprint”), is a limited company established under the laws of Bermuda. Vistaprint describes itself as “an Intellectual Property holding company of the publicly traded company, Vistaprint NV, a large online supplier of printed and promotional material as well as marketing services to micro businesses and consumers. It offers business and consumer marketing and identity products and services worldwide.”<sup>1</sup>
3. Respondent, ICANN, is a California not-for-profit public benefit corporation. As stated in its Bylaws, ICANN’s mission “is to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.”<sup>2</sup> In its online Glossary, ICANN describes itself as “an internationally organized, non-profit corporation that has responsibility for Internet Protocol (IP) address space allocation, protocol identifier assignment, generic (gTLD) and country code (ccTLD) Top-Level Domain name system management, and root server system management functions.”<sup>3</sup>
4. As part of this mission, ICANN’s responsibilities include introducing new top-level domains (“TLDs”) to promote consumer choice and competition, while maintaining the stability and security of the domain name system (“DNS”).<sup>4</sup> ICANN has gradually expanded the DNS from the original six generic top-level domains (“gTLDs”)<sup>5</sup> to include 22 gTLDs and over 250 country-code TLDs.<sup>6</sup> However, in June 2008, in a significant step ICANN’s Board of Directors (“Board”) adopted recommendations developed by one of its policy development bodies, the Generic Names Supporting Organization (“GNSO”), for

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<sup>1</sup> Request for Independent Review Process by Vistaprint Limited dated June 11, 2014 (“Request”), ¶ 12.

<sup>2</sup> ICANN’s Response to Claimant Vistaprint Limited’s Request for Independent Review Process dated July 21, 2014 (“Response”), ¶ 13; Bylaws, Art. I, § 1.

<sup>3</sup> Glossary of commonly used ICANN Terms, at <https://www.icann.org/resources/pages/glossary-2014-02-03-en#i> (last accessed on Sept. 15, 2015).

<sup>4</sup> Affirmation of Commitments by the United States Department of Commerce and the Internet Corporation for Assigned Names and Numbers (“Affirmation of Commitments”), Article 9.3 (Sept. 30, 2009), available at <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en> (last accessed on Sept. 15, 2015).

<sup>5</sup> The original six gTLDs consisted of .com; .edu; .gov; .mil; net; and .org.

<sup>6</sup> Request, ¶ 14.

introducing additional new gTLDs.<sup>7</sup> Following further work, ICANN's Board in June 2011 approved the "New gTLD Program" and a corresponding set of guidelines for implementing the Program – the gTLD Applicant Guidebook ("Guidebook").<sup>8</sup> ICANN states that "[t]he New gTLD Program constitutes by far ICANN's most ambitious expansion of the Internet's naming system."<sup>9</sup> The Guidebook is a foundational document providing the terms and conditions for new gTLD applicants, as well as step-by-step instructions and setting out the basis for ICANN's evaluation of these gTLD applications.<sup>10</sup> As described below, it also provides dispute resolution processes for objections relating to new gTLD applications, including the String Confusion Objection procedure ("String Confusion Objection" or "SCO").<sup>11</sup> The window for submitting new gTLD applications opened on January 12, 2012 and closed on May 30, 2012, with ICANN receiving 1930 new gTLD applications.<sup>12</sup> The final version of the Guidebook was made available on June 4, 2012.<sup>13</sup>

5. This dispute concerns alleged conduct by ICANN's Board in relation to Vistaprint's two applications for a new gTLD string, ".WEBS", which were submitted to ICANN under the New gTLD Program. Vistaprint contends that ICANN's Board, through its acts or omissions in relation to Vistaprint's applications, acted in a manner inconsistent with applicable policies, procedures and rules as set out in ICANN's Articles of Incorporation ("Articles") and Bylaws, both of which should be interpreted in light of the Affirmation of Commitments between ICANN and the United States Department of Commerce ("Affirmation of Commitments").<sup>14</sup> Vistaprint also states that because ICANN's Bylaws require ICANN to apply established policies neutrally and fairly, the Panel must consider other ICANN policies relevant to the dispute, in particular, the policies in Module 3 of the Guidebook regarding ICANN's SCO procedures, which Vistaprint claims were violated.<sup>15</sup>
6. Vistaprint requests that the IRP Panel provide the following relief:
  - Find that ICANN breached its Articles, Bylaws, and the Guidebook;
  - Require that ICANN reject the determination of the Third Expert in the String

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<sup>7</sup> ICANN Board Resolution 2008.06.26.02, at <http://www.icann.org/en/groups/board/documents/resolutions-26jun08-en.htm> (last accessed on Sept. 11, 2015).

<sup>8</sup> ICANN Board Resolution 2011.06.20.01, at <http://www.icann.org/en/groups/board/documents/resolutions-20jun11-en.htm> (last accessed on Sept. 11, 2015). ICANN states that the "Program's goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs." Response, ¶ 16. The Guidebook is available at <http://newgtlds.icann.org/en/applicants/agb> (last accessed on Sept. 13, 2015).

<sup>9</sup> Response, ¶ 16.

<sup>10</sup> Response, ¶ 16.

<sup>11</sup> The Guidebook is organized into Modules. Module 3 (Objection Procedures) is of primary relevance to this IRP case.

<sup>12</sup> Response, ¶ 5; New gTLD Update (May 30, 2012) on the close of the TLD Application system, at <http://newgtlds.icann.org/en/announcements-and-media/announcement-3-30may12-en> (last accessed on Sept. 11, 2015).

<sup>13</sup> gTLD Applicant Guidebook, Version 2012-06-04.

<sup>14</sup> Affirmation of Commitments.

<sup>15</sup> Request, ¶ 58; Vistaprint's First Additional Submission, ¶ 34.

Confusion Objection proceedings involving Vistaprint (“*Vistaprint SCO*”)<sup>16</sup>, which found that the two proposed gTLD strings – .WEBS and .WEB – are confusingly similar, disregard the resulting “Contention Set”, and allow Vistaprint’s applications for .WEBS to proceed on their own merits;

- In the alternative, require that ICANN reject the *Vistaprint SCO* determination and organize a new independent and impartial SCO procedure, according to which a three-member panel re-evaluates the Expert Determination in the *Vistaprint SCO* taking into account (i) the ICANN Board’s resolutions on singular and plural gTLDs<sup>17</sup>, as well as the Board’s resolutions on the DERCars SCO Determination, the United TLD Determination, and the Onlineshopping SCO Determination<sup>18</sup>, and (ii) ICANN’s decisions to delegate the .CAR and .CARS gTLDs, the .AUTO and .AUTOS gTLDs, the .ACCOUNTANT and ACCOUNTANTS gTLDs, the .FAN and .FANS gTLDs, the .GIFT and .GIFTS gTLDs, the .LOAN and .LOANS gTLDs, the .NEW and .NEWS gTLDs and the .WORK and .WORKS gTLDs;
  - Award Vistaprint its costs in this proceeding; and
  - Award such other relief as the Panel may find appropriate or Vistaprint may request.
7. ICANN, on the other hand, contends that it followed its policies and processes at every turn in regards to Vistaprint’s .WEBS gTLD applications, which is all that it is required to do. ICANN states its conduct with respect to Vistaprint’s applications was fully consistent with ICANN’s Articles and Bylaws, and it also followed the procedures in the Guidebook. ICANN stresses that Vistaprint’s IRP Request should be denied.

## II. Factual and Procedural Background

8. This section summarizes basic factual and procedural background in this case, while leaving additional treatment of the facts, arguments and analysis to be addressed in sections III (ICANN’s Articles, Bylaws, and Affirmation of Commitments), IV (Summary of Parties’ Contentions) and V (Analysis and Findings).

### A. Vistaprint’s Application for .WEBS and the String Confusion Objection

9. Vistaprint’s submitted two applications for the .WEBS gTLD string, one a standard application and the other a community-based application.<sup>19</sup> Vistaprint states that it applied to operate the .WEBS gTLD with a view to reinforcing the reputation of its website

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<sup>16</sup> Request, Annex 24 (Expert Determination in the SCO case *Web.com Group, Inc. v. Vistaprint Limited*, ICDR Consolidated Case Nos. 50 504 T 00221 13 and 50 504 T 00246 13 (Jan. 24, 2014) (“*Vistaprint SCO*”).

<sup>17</sup> ICANN Board Resolution 2013.06.25.NG07.

<sup>18</sup> ICANN Board Resolution 2014.10.12.NG02.

<sup>19</sup> Request, Annex 1 (Application IDs: 1-1033-22687 and 1-1033-73917). A community-based gTLD is a gTLD that is operated for the benefit of a clearly delineated community. An applicant designating its application as community-based must be prepared to substantiate its status as representative of the community it names in the application. A standard application is one that has not been designated as community-based. Response, ¶ 22 n. 22; *see also* Glossary of commonly used terms in the Guidebook, at <http://newgtlds.icann.org/en/applicants/glossary> (last accessed on Sept. 13, 2015).

creation tools and hosting services, known under the identifier “Webs”, and to represent the “Webs” community.<sup>20</sup> The .WEBS gTLD would identify Vistaprint as the Registry Operator, and the products and services under the .WEBS gTLD would be offered by and for the Webs community.<sup>21</sup>

10. Seven other applicants applied for the .WEB gTLD string.<sup>22</sup> Solely from the perspective of spelling, Vistaprint’s proposed .WEBS string differs by the addition of the letter “s” from the .WEB string chosen by these other applicants. On March 13, 2013, one of these applicants, Web.com Group, Inc. (the “Objector”), filed two identical String Confusion Objections as permitted under the Guidebook against Vistaprint’s two applications.<sup>23</sup> The Objector was the only .WEB applicant to file a SCO against Vistaprint’s applications. The Objector argued that the .WEBS and .WEB strings were confusingly similar from a visual, aural and conceptual perspective.<sup>24</sup> Vistaprint claims that the Objector’s “sole motive in filing the objection was to prevent a potential competitor from entering the gTLD market.”<sup>25</sup>

11. As noted above, Module 3 of the Guidebook is relevant to this IRP because it provides the objection procedures for new gTLD applications. Module 3 describes “the purpose of the objection and dispute resolution mechanisms, the grounds for lodging a formal objection to a gTLD application, the general procedures for filing or responding to an objection, and the manner in which dispute resolution proceedings are conducted.”<sup>26</sup> The module also discusses the guiding principles, or standards, that each dispute resolution panel will apply in reaching its expert determination. The Module states that

*“All applicants should be aware of the possibility that a formal objection may be filed against any application, and of the procedures and options available in the event of such an objection.”<sup>27</sup>*

12. Module 3, § 3.2 (Public Objection and Dispute Resolution Process) provides that

*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.*

13. A formal objection may be filed on any one of four grounds, of which the SCO procedure is relevant to this case:

*String Confusion Objection – The applied-for gTLD string is confusingly similar to an existing TLD*

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<sup>20</sup> Request, ¶ 5.

<sup>21</sup> Request, ¶ 17. Vistaprint states that the Webs community is predominantly comprised of non-US clients (54% non-US, 46% US).

<sup>22</sup> Request, ¶ 5.

<sup>23</sup> Request, ¶ 32.

<sup>24</sup> Request, ¶ 32.

<sup>25</sup> Request, ¶ 80.

<sup>26</sup> Guidebook, Module 3, p. 3-2. Module 3 also contains an attachment, the New gTLD Dispute Resolution Procedure (“New gTLD Objections Procedure”), which sets out the procedural rules for String Confusion Objections.

<sup>27</sup> Guidebook, Module 3, p. 3-2.



or to another applied-for gTLD string in the same round of applications.<sup>28</sup>

14. According to the Guidebook, the ICDR agreed to serve as the dispute resolution service provider (“DRSP”) to hear String Confusion Objections.<sup>29</sup> On May 6, 2013, the ICDR consolidated the handling of the two SCOs filed by the Objector against Vistaprint’s two .WEBS applications.<sup>30</sup>
15. Section 3.5 (Dispute Resolution Principles) of the Guidebook provides that the “objector bears the burden of proof in each case”<sup>31</sup> and sets out the relevant evaluation criteria to be applied to SCOs:
  - 3.5.1 String Confusion Objection

*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 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.*
16. On May 23, 2013, Vistaprint filed its responses to the Objector’s String Confusion Objections.
17. On June 28, 2013, the ICDR appointed Steve Y. Koh as the expert to consider the Objections (the “First Expert”). In this IRP Vistaprint objects that this appointment was untimely.<sup>32</sup>
18. On 19 July 2013, the Objector submitted an unsolicited supplemental filing replying to Vistaprint’s response, to which Vistaprint objected.<sup>33</sup> Vistaprint claims that the supplemental submission should not have been accepted by the First Expert as it did not comply the New gTLD Objections Procedure.<sup>34</sup> The First Expert accepted the Objector’s submission and permitted Vistaprint to submit a sur-reply, which Vistaprint claims was subject to unfair conditions imposed by the First Expert.<sup>35</sup> Vistaprint filed its sur-reply on

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<sup>28</sup> Guidebook, § 3.2.1.

<sup>29</sup> Guidebook, § 3.2.3.

<sup>30</sup> Request, ¶ 23, n. 24. The ICDR consolidated the handling of cases nos. 50 504 T 00221 13 and 50 504 T 00246 13. The Guidebook provides in § 3.4.2 that “[o]nce the DRSP receives and processes all objections, at its discretion the DRSP may elect to consolidate certain objections.”

<sup>31</sup> Guidebook, § 3.5. This standard is repeated in Article 20 of the Objection Procedure, which provides that “[t]he Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards.”

<sup>32</sup> Request, ¶ 33.

<sup>33</sup> Response, ¶ 26.

<sup>34</sup> Request, ¶ 42. Article 17 provides that “[t]he Panel may decide whether the parties shall submit any written statements in addition to the Objection and the Response.” Article 18 states that “[i]n order to achieve the goal of resolving disputes over new gTLDs rapidly and at reasonable cost, procedures for the production of documents shall be limited. In exceptional cases, the Panel may require a party to provide additional evidence.”

<sup>35</sup> Vistaprint states that “this surreply was not to exceed 5 pages and was to be submitted within 29 days. This page limit and deadline are in stark contrast with the 58 day period taken by [the Objector] to submit a 6-page (Continued...)”

August 29, 2013.

19. On September 18, 2013 the ICDR informed the parties that the expert determination for the SCO case would be issued on or about October 4, 2013.<sup>36</sup> Vistaprint claims that this extension imposed an unjustified delay beyond the 45-day deadline for rendering a determination.<sup>37</sup>
20. On October 1, 2013, the ICDR removed the First Expert due to a conflict that arose. On October 14, 2013, the ICDR appointed Bruce W. Belding as the new expert (the “Second Expert”).<sup>38</sup> Vistaprint claims that the New gTLD Objections Procedure was violated when the First Expert did not maintain his independence and impartiality and the ICDR failed to react to Vistaprint’s concerns in this regard.<sup>39</sup>
21. On October 24, 2013, the Objector challenged the appointment of the Second Expert, to which Vistaprint responded on October 30, 2013. The challenge was based on the fact that the Second Expert had served as the expert in an unrelated prior string confusion objection, which Vistaprint maintained was not a reason for doubting the impartiality or independence of the Second Expert or accepting the challenge his appointment.<sup>40</sup> On November 4, 2013, the ICDR removed the Second Expert in response to the Objector’s challenge.<sup>41</sup> On November 5, 2013, Vistaprint requested that the ICDR reconsider its decision to accept the challenge to the appointment of the Second Expert. On November 8, 2013, the ICDR denied this request.<sup>42</sup> Vistaprint claims that the unfounded acceptance of the challenge to the Second Expert was a violation of the New gTLD Objections Procedure and the ICDR’s rules. The challenge was either unfounded and the ICDR should have rejected it, or it was founded, which would mean that the ICDR appointed the Second Expert knowing that justifiable doubts existed as to the Expert’s impartiality and independence.<sup>43</sup>
22. On November 20, 2013, the ICDR appointed Professor Ilhyung Lee to serve as the expert (the “Third Expert”) to consider the Objector’s string confusion objection. No party objected to the appointment of Professor Lee.<sup>44</sup>

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reply with no less than 25 additional annexes. Vistaprint considers that the principle of equality of arms was not respected by this decision.” Request, ¶ 42.

<sup>36</sup> Request, Annex 14.

<sup>37</sup> Request, ¶ 33; *see* New Objections Procedure, Art. 21(a).

<sup>38</sup> Response, ¶ 27; Request, Annexes 15 and 16.

<sup>39</sup> Request, ¶¶ 36 and 43. New Objections Procedure, Art. 13(c).

<sup>40</sup> Request, ¶ 37.

<sup>41</sup> Response, ¶ 28; Request, ¶ 39, Annex 19.

<sup>42</sup> Request, ¶ 39, Annex 21.

<sup>43</sup> Request, ¶¶ 37-40. Vistaprint states that the Objector’s challenge was “based solely on the fact that Mr. Belding had served as the Panel in an unrelated string confusion objection” administered by ICDR. Request, ¶ 37. ICDR “was necessarily aware” that Mr. Belding had served as the Panel in the string confusion objection proceedings. “If [ICDR] was of the opinion that the fact that Mr. Belding served as the Panel in previous proceedings could give rise to justifiable doubts as to the impartiality and independence of the Panel, it should never have appointed him in the case between Web.com and Vistaprint.”

<sup>44</sup> Response, ¶ 28; Request, ¶ 39, Annex 22.

23. On 24 January 2014, the Third Expert issued its determination in favor of the Objector, deciding that the String Confusion Objection should be sustained.<sup>45</sup> The Expert concluded that

*“the <.webs> string so nearly resembles <.web> – visually, aurally and in meaning – that it is likely to cause confusion. A contrary conclusion, the Panel is simply unable to reach.”*<sup>46</sup>

24. Moreover, the Expert found that

*“given the similarity of <.webs> and <.web>..., it is probable, and not merely possible, that confusion will arise in the mind of the average, reasonable Internet user. This is not a case of ‘mere association’.”*<sup>47</sup>

25. Vistaprint claims that the Third Expert failed to comply with ICANN’s policies by (i) unjustifiably accepting additional submissions without making an independent assessment, (ii) making an incorrect application of the burden of proof, and (iii) making an incorrect application of the substantive standard set by ICANN for String Confusion Objections.<sup>48</sup> In particular, Vistaprint claims that ICANN has set a high standard for a finding of confusing similarity between two gTLD strings, and the Third Expert’s determination did not apply this standard and was arbitrary and baseless.<sup>49</sup>

26. Vistaprint concludes that “[i]n sum, the cursory nature of the Decision and the arbitrary and selective discussion of the parties’ arguments by the [Third Expert] show a lack of either independence and impartiality or appropriate qualification.”<sup>50</sup> Vistaprint further states that it took 216 days for the Third Expert to render a decision in a procedure that should have taken a maximum of 45 days.<sup>51</sup>

27. The Guidebook § 3.4.6 provides that:

*The findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.*<sup>52</sup>

28. Vistaprint objects that ICANN simply accepted the Third Expert’s ruling on the String Confusion Objection, without performing any analysis as to whether the ICDR and the Third Expert complied with ICANN’s policies and fundamental principles, and without

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<sup>45</sup> Request, ¶ 39, Annex 24 (Expert Determination, *Web.com Group, Inc. v. Vistaprint Limited*, ICDR Case Nos. 50 504 221 13 and 50 504 246 13 (Consolidated) (Jan. 24, 2014)).

<sup>46</sup> Request, Annex 24, p. 10.

<sup>47</sup> Request, Annex 24, p. 11.

<sup>48</sup> Request, ¶¶ 44-49.

<sup>49</sup> Vistaprint’s First Additional Submission, ¶¶ 1-2.

<sup>50</sup> Request, ¶ 49.

<sup>51</sup> Request, ¶ 41; see New gTLD Objections Procedure, Art. 21(a).

<sup>52</sup> Guidebook, § 3.4.6. The New gTLD Objections Procedure further provides in Article 2(d) that:

*The ‘Expert Determination’ is the decision upon the merits of the Objection that is rendered by a Panel in a proceeding conducted under this Procedure and the applicable DRSP Rules that are identified in Article 4(b).*

giving any rationale for doing so.<sup>53</sup>

29. Vistaprint contends that ICANN’s Board remains its ultimate decision-making body and that the Board should have intervened and “cannot blindly accept advice by third parties or expert determinations.”<sup>54</sup> In this respect, Vistaprint highlights the Guidebook, which provides in Module 5 (Transition to Delegation) § 1 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 ... the use of an ICANN accountability mechanism.<sup>55</sup>

*[Underlining added]*

30. As a result of the Third Expert sustaining the Objector’s SCO, Vistaprint’s application was placed in a “Contention Set”. The Guidebook in § 3.2.2.1 explains this result:

*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 application is unsuccessful, the applicants may both move forward in the process without being considered in direct contention with one another.*<sup>56</sup>

## **B. Request for Reconsideration and Cooperative Engagement Process**

31. On February 6, 2014 Vistaprint filed a Request for Reconsideration (“Request for Reconsideration” or “RFR”).<sup>57</sup> According to ICANN’s Bylaws, a RFR is an accountability mechanism which involves a review conducted by the Board Governance Committee (“BGC”), a sub-committee designated by ICANN’s Board to review and consider Reconsideration Requests.<sup>58</sup> A RFR can be submitted by a person or entity that has been “adversely affected” by one or more staff actions or inactions that contradict established ICANN policies.<sup>59</sup>
32. Article IV, §2.15 of ICANN’s Bylaws sets forth the BGC’s authority and powers for handling Reconsideration Requests. The BGC, at its own option, may make a final determination on the RFR or it may make a recommendation to ICANN’s Board for

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<sup>53</sup> Request, ¶ 50.

<sup>54</sup> Vistaprint’s First Additional Submission, ¶¶ 29-30.

<sup>55</sup> Guidebook, § 5.1.

<sup>56</sup> Guidebook, § 3.2.2.1. Module 4 (String Contention Procedures) provides that “*Contention sets are groups of applications containing identical or similar applied-for gTLD strings.*” Guidebook, § 4.1.1. Parties that are identified as being in contention are encouraged to reach settlement among. Guidebook, § 4.1.3. It is expected that most cases of contention will be resolved through voluntary agreement among the involved applicants or by the community priority evaluation mechanism. Conducting an auction is a tie-breaker mechanism of last resort for resolving string contention, if the contention has not been resolved by other means. Guidebook, § 4.3.

<sup>57</sup> Request, Annex 25.

<sup>58</sup> Response, ¶ 29; Bylaws, Art. IV, § 2.

<sup>59</sup> Bylaws, Art. IV, § 2.2.a.

consideration and action:

*For all Reconsideration Requests brought regarding staff action or inaction, the Board Governance Committee shall be delegated the authority by the Board of Directors to make a final determination and recommendation on the matter. Board consideration of the recommendation is not required. As the Board Governance Committee deems necessary, it may make recommendation to the Board for consideration and action. The Board Governance Committee's determination on staff action or inaction shall be posted on the Website. The Board Governance Committee's determination is final and establishes precedential value.*

33. ICANN has determined that the reconsideration process can be invoked for challenges to expert determinations rendered by panels formed by third party dispute resolution service providers, such as the ICDR, 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.<sup>60</sup>
34. In its RFR, Vistaprint asked ICANN to reject the Third Expert's decision and to instruct a new expert panel to issue a new decision "that applies the standards defined by ICANN."<sup>61</sup> Vistaprint sought reconsideration of the "various actions and inactions of ICANN staff related to the Expert Determination," claiming that "the decision fails to follow ICANN process for determining string confusion in many aspects."<sup>62</sup> In particular, Vistaprint asserted that the ICDR and the Third Expert violated the applicable New gTLD Objection Procedures concerning:
  - (i) the timely appointment of an expert panel;
  - (ii) the acceptance of additional written submissions;
  - (iii) the timely issuance of an expert determination;
  - (iv) an expert's duty to remain impartial and independent;
  - (v) challenges to experts;
  - (vi) the Objector's burden of proof; and
  - (vii) the standards governing the evaluation of a String Confusion Objection.
35. Vistaprint also argued that the decision was unfair, and accepting it creates disparate treatment without justified cause.<sup>63</sup>
36. The Bylaws provide in Article IV, § 2.3, that the BGC "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

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<sup>60</sup> See BGC Recommendation on Reconsideration Request 14-5 dated February 27, 2014 ("BGC Determination"), at p. 7, n. 7, Request, Annex 26, and available at <https://www.icann.org/en/system/files/files/determination-vistaprint-27feb14-en.pdf> (last accessed on Sept. 14, 2015).

<sup>61</sup> Request, ¶ 51; Annex 25, p.7.

<sup>62</sup> Request, Annex 25, p.2.

<sup>63</sup> Request, Annex 25, p.6.

*reference to the Board of Directors; and*  
*g. make a recommendation to the Board of Directors on the merits of the request, as necessary.*

37. On February 27, 2014 the BGC issued its detailed Recommendation on Reconsideration Request, in which it denied Vistaprint’s reconsideration request finding “no indication that the ICDR or the [Third Expert] violated any policy or process in reaching the Determination.”<sup>64</sup> The BGC concluded that:

*With respect to each claim asserted by the Requester concerning the ICDR’s alleged violations of applicable ICDR procedures concerning experts, there is no evidence that the ICDR deviated from the standards set forth in the Applicant Guidebook, the New gTLD Dispute Resolution Procedure, or the ICDR’s Supplementary Procedures for String Confusion Objections (Rules). The Requester has likewise failed to demonstrate that the Panel applied the wrong standard in contravention of established policy or procedure. Therefore, the BGC concludes that Request 14-5 be denied.*<sup>65</sup>

38. The BGC explained what it considered to be the scope of its review:

*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 to evaluate the Panel’s substantive conclusion that the Requester’s applications for .WEBS are confusingly similar to the Requester’s application for .WEB. Rather, the BGC’s review is limited to whether the Panel violated any established policy or process in reaching that Determination.*<sup>66</sup>

39. The BGC also stated that its determination on Vistaprint’s RFR was final:

*In accordance with Article IV, Section 2.15 of the Bylaws, the BGC’s determination on Request 14-5 shall be final and does not require Board (or NGPC<sup>67</sup>) consideration. The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that the BGC’s determination on such matters is final. (Bylaws, Art. IV, § 2.15.) As discussed above, Request 14-5 seeks reconsideration of a staff action or inaction. After consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.*<sup>68</sup>

40. On March 17, 2014, Vistaprint filed a request for a Cooperative Engagement Process

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<sup>64</sup> BGC Determination, p. 18, Request, Annex 26.

<sup>65</sup> BGC Determination, p. 2, Request, Annex 26.

<sup>66</sup> BGC Determination, p. 7, Request, Annex 26.

<sup>67</sup> The “NGPC” refers to the New gTLD Program Committee, which is a sub-committee of the Board and “has all the powers of the Board.” See New gTLD Program Committee Charter | As Approved by the ICANN Board of Directors on 10 April 2012, at <https://www.icann.org/resources/pages/charter-2012-04-12-en> (last accessed Sept. 15, 2015).

<sup>68</sup> BGC Determination, p. 19, Request, Annex 26. As noted, the BGC concluded that its determination on Vistaprint’s RFR was final and made no recommendation to ICANN’s Board for consideration and action. Article IV, §2.17 of ICANN’s Bylaws sets out the scope of the Board’s authority for matters in which the BGC decides to make a recommendation to ICANN’s Board:

*The Board shall not be bound to follow the recommendations of the Board Governance Committee. The final decision of the Board shall be made public as part of the preliminary report and minutes of the Board meeting at which action is taken. The Board shall issue its decision on the recommendation of the Board Governance Committee within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible. Any circumstances that delay the Board from acting within this timeframe must be identified and posted on ICANN’s website. The Board’s decision on the recommendation is final.*

(“CEP”) with ICANN.<sup>69</sup> Vistaprint stated in its letter:

*Vistaprint is of the opinion that the Board of Governance Committee’s rejection of Reconsideration Request 14-5 is in violation of various provisions of ICANN’s Bylaws and Articles of Incorporation. In particular, Vistaprint considers this is in violation of Articles I, II(3), III and IV of the ICANN Bylaws as well as Article 4 of ICANN’s Articles of Incorporation. In addition, Vistaprint considers that ICANN has acted in violation of Articles 3, 7 and 9 of ICANN’s Affirmation of Commitment.*<sup>70</sup>

41. The CEP did not lead to a resolution and Vistaprint thereafter commenced this IRP. In this regard, Module 6.6 of the Guidebook provides that an applicant for a new gTLD:

*MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN’S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION.*<sup>71</sup>

### C. Procedures in this Case

42. On June 11, 2014, Vistaprint submitted its Request for Independent Review Process (“Request”) in respect of ICANN’s treatment of Vistaprint’s application for the .WEBS gTLD. On July 21, 2014, ICANN submitted its Response to Vistaprint’s Request (“Response”).
43. On January 13, 2015, the ICDR confirmed that there were no objections to the constitution of the present IRP Panel (“IRP Panel” or “Panel”). The Panel convened a telephonic preliminary hearing with the parties on January 26, 2015 to discuss background and organizational matters in the case. Having heard the parties, the Panel issued Procedural Order No. 1 permitting an additional round of submissions from the parties. The Panel received Vistaprint’s additional submission on March 2, 2015 (Vistaprint’s “First Additional Submission”) and ICANN’s response on April 2, 2015 (ICANN’s “First Additional Response”).
44. The Panel then received further email correspondence from the parties. In particular, Vistaprint requested that the case be suspended pending an upcoming meeting of ICANN’s Board of Directors, which Vistaprint contended would be addressing matters informative for this IRP. Vistaprint also requested that it be permitted to respond to arguments and information submitted by ICANN in ICANN’s First Additional Response. In particular, Vistaprint stated that ICANN had referenced the Final Declaration of March 3, 2015 in the IRP case involving *Booking.com v. ICANN* (the “*Booking.com Final Declaration*”).<sup>72</sup> The *Booking.com Final Declaration* was issued one day after Vistaprint had submitted its First Additional Submission in this case. ICANN objected to Vistaprint’s requests, urging that there was no need for additional briefing and no justification for suspending the case.

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<sup>69</sup> Request, Annex 27.

<sup>70</sup> Request, Annex 27.

<sup>71</sup> Guidebook, § 6.6.

<sup>72</sup> *Booking.com B.V. v. ICANN*, ICDR Case No. 50-2014-000247 (March 3, 2015) (“*Booking.com Final Declaration*”), at <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf> (last accessed on Sept. 15, 2015)

45. On April 19, 2015, the Panel issued Procedural Order No. 2, which denied Vistaprint's request that the case be suspended and permitted Vistaprint and ICANN to submit another round of supplemental submissions. Procedural Order No. 2 also proposed two dates for a telephonic hearing with the parties on the substantive issues and the date of May 13, 2015 was subsequently selected. The Panel received Vistaprint's second additional submission on April 24, 2015 (Vistaprint's "Second Additional Submission") and ICANN's response to that submission on May 1, 2015 (ICANN's "Second Additional Response").
46. The Panel then received a letter from Vistaprint dated April 30, 2015 and ICANN's reply of the same date. In its letter, Vistaprint referred to two new developments that it stated were relevant for this IRP case: (i) the Third Declaration on the IRP Procedure, issued April 20, 2015, in the IRP involving *DotConnectAfrica Trust v. ICANN*<sup>73</sup>, and (ii) the ICANN Board of Director's resolution of April 26, 2015 concerning the *Booking.com Final Declaration*. Vistaprint requested that more time be permitted to consider and respond to these new developments, while ICANN responded that the proceedings should not be delayed.
47. Following further communications with the parties, May 28, 2015 was confirmed as the date for a telephonic hearing to receive the parties' oral submissions on the substantive issues in this case. On that date, counsel for the parties were provided with the opportunity to make extensive oral submissions in connection with all of the facts and issues raised in this case and to answer questions from the Panel.<sup>74</sup>
48. Following the May 28, 2015 hear, the Panel held deliberations to consider the issues in this IRP, with further deliberations taking place on subsequent dates. This Final Declaration was provided to the ICDR in draft form on October 5, 2015 for non-substantive comments on the text; it was returned to the Panel on October 8, 2015.

### **III. ICANN's Articles, Bylaws, and Affirmation of Commitments**

49. Vistaprint states that the applicable law for these IRP proceedings is found in ICANN's Articles of Incorporation and Bylaws. Both Vistaprint and ICANN make numerous references to these instruments. This section sets out a number of the key provisions of

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<sup>73</sup> Third Declaration on the IRP Procedure, *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-2013-001083 (April 20, 2015) ("*DCA Third Declaration on IRP Procedure*"), at <https://www.icann.org/en/system/files/files/irp-procedure-declaration-20apr15-en.pdf> (last accessed on Sept. 15, 2015)

<sup>74</sup> The Panel conducted these IRP proceedings relying on email and telephonic communications, with no objections to this approach from either party and in view of ICANN's Bylaws, Article IV, § 3.12 ("*In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone.*").



the Articles and the Bylaws, as they are relied upon by the parties in this IRP.<sup>75</sup> Vistaprint also references the Affirmation of Commitments – relevant provisions of this document are also provided below.

### **A. Articles of Incorporation**

50. Vistaprint refers to the Articles of Incorporation, highlighting Article IV’s references to “relevant principles of international law” and “open and transparent processes”. Article 4 of the Articles provides in relevant part:

*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.*

*[Underlining added]*

51. Vistaprint states that general principles of international law – and in particular the obligation of good faith – serve as a prism through which the various obligations imposed on ICANN under its Articles of Incorporation and Bylaws must be interpreted.<sup>76</sup> The general principle of good faith is one of the most basic principles governing the creation and performance of legal obligations, and rules involving transparency, fairness and non-discrimination arise from it.<sup>77</sup> Vistaprint also emphasizes that the principle of good faith includes an obligation to ensure procedural fairness by adhering to substantive and procedural rules, avoiding arbitrary action, and recognizing legitimate expectations.<sup>78</sup> 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.<sup>79</sup>

### **B. Bylaws**

#### **a. Directives to ICANN and its Board**

52. The Bylaws contain provisions that address the role, core values and accountability of ICANN and its Board.
53. Article IV, § 3.2 specifies the right of “any person materially affected” to seek independent review (through the IRP) of a Board action alleged to be a violation of the

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<sup>75</sup> ICANN’s Articles are available at <https://www.icann.org/resources/pages/governance/articles-en> (last accessed on Sept. 15, 2015). ICANN’s Bylaws are available at <https://www.icann.org/resources/pages/governance/bylaws-en> (last accessed on Sept. 15, 2015).

<sup>76</sup> Request, ¶ 55. Vistaprint also states that “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.” Request, ¶ 60, n.8.

<sup>77</sup> Request, ¶ 59.

<sup>78</sup> Request, ¶ 60.

<sup>79</sup> Request, ¶ 66.

## Articles or Bylaws:

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

54. Vistaprint has relied on certain of ICANN's core values set forth in Article I, § 2 (Core Values) of the Bylaws. The sub-sections underlined below are invoked by Vistaprint as they relate to principles of promoting competition and innovation (Article I § 2.2, 2.5 and 2.6); openness and transparency (Article I § 2.7); neutrality, fairness, integrity and non-discrimination (Article I § 2.8); and accountability (Article I § 2.10). Article I § 2 provides in full:

### *Section 2. Core Values*

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

*1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.*

*2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.*

*3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.*

*4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.*

*5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.*

*6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.*

*7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.*

*8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*<sup>80</sup>

*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.*

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<sup>80</sup> Vistaprint states that “[t]his 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.’” Request, ¶ 62, n.9.

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.*

*[Underlining added]*

55. Vistaprint refers to Article II, § 3 in support of its arguments that the Board failed to act fairly and without discrimination as it considered Vistaprint's two .WEBS applications and the outcome of the *Vistaprint SCO* case. Article II, § 3 provides:

*Section 3 (Non-Discriminatory Treatment)*

*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.*

*[Underlining added]*

56. Vistaprint refers to Article III (Transparency), § 1 of the Bylaws in reference to the principle of transparency:

*Section 1. PURPOSE*

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

*[Underlining added]*

57. Vistaprint also refers Article IV (Accountability and Review), § 1 as it relates to ICANN's accountability and core values, providing in relevant part:

*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.*

*[Underlining added]*

**b. Directives for the IRP Panel**

58. ICANN's Bylaws also contain provisions that speak directly to the role and authority of the Panel in this IRP case. In particular, Article IV of the Bylaws creates the IRP as an accountability mechanism, along with two other mechanisms: (i) the RFR process, described above and on which Vistaprint relied, and (ii) an unrelated periodic review of

ICANN's structure and procedures.<sup>81</sup>

59. Article IV, § 1 of the Bylaws emphasizes that the IRP is a mechanism designed to ensure ICANN's accountability:

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.

[Underlining added]

60. In this respect, the IRP Panel provides an independent review and accountability mechanism for ICANN and its Board. Vistaprint urges that IRP is the *only* method established by ICANN for holding itself accountable through independent third-party review of its decisions.<sup>82</sup> The Bylaws in Article IV, § 3.1 provides:

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

61. ICANN states in its Response that “[t]he IRP Panel is tasked with determining whether the Board’s actions are consistent with ICANN’s Articles and Bylaws.”<sup>83</sup> ICANN also maintains that while the IRP is intended to address challenges to conduct undertaken by ICANN’s Board, it is not available as a mechanism to challenge the actions or inactions of ICANN staff or third parties that may be involved with ICANN’s activities.<sup>84</sup>

62. In line with ICANN’s statement, the Bylaws provide in Article IV, § 3.4, that:

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.<sup>85</sup>

[Underlining added]

63. The Bylaws also include a standard of review in Article IV, § 3.4, providing that the Panel:

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<sup>81</sup> Note that Article V (Ombudsman) of the Bylaws also establishes the Office of Ombudsman to facilitate the fair, impartial, and timely resolution of problems and complaints for those matters where the procedures of the RFR or the IRP have not been invoked.

<sup>82</sup> Request, ¶ 57.

<sup>83</sup> Response, ¶ 33.

<sup>84</sup> Response, ¶ 4.

<sup>85</sup> Bylaws, Art. IV, § 3.4. The reference to “actions” of ICANN’s Board should be read to refer to both “actions or inactions” of the Board. See Bylaws, Art. IV, § 3.11(c) (“The IRP Panel shall have the authority to:...(c) declare whether an *action or inaction* of the Board was inconsistent with the Articles of Incorporation or Bylaws”); see also Supplementary Procedures, which define “Independent Review” as referring

*“to the procedure that takes place upon the filing of a request to review ICANN Board actions or inactions alleged to be inconsistent with ICANN's Bylaws or Articles of Incorporation.*

“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?<sup>86</sup>

64. The Bylaws in Article IV, § 3.11 set out the IRP Panel’s authority in terms of alternative actions that it may take once it has an IRP case before it:

*The IRP Panel shall have the authority to:*

- a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;
- b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
- c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
- d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;
- e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and
- f. determine the timing for each proceeding.<sup>87</sup>

65. Further, the Bylaws in Article IV, § 3.18 state that

*“[t]he 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.”<sup>88</sup>*

*[Underlining added]*

66. The Bylaws address the steps to be taken after the Panel issues a determination in the IRP. Article IV, § 3.21<sup>89</sup> states that “declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value”:

*Where feasible, the Board shall consider the IRP Panel declaration at the Board’s next meeting. The declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.*

*[Underlining added]*

### **C. Affirmation of Commitments**

67. Vistaprint claims that ICANN violated the ICANN’s Affirmation of Commitments, in particular Articles 3, 7 and 9. This Affirmation of Commitments is instructive, as it explains ICANN’s obligations in light of its role as regulator of the DNS. Article 3, 7 and 9 are set forth below in relevant part:

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<sup>86</sup> Bylaws, Art. IV, § 3.4.

<sup>87</sup> Bylaws, Art. IV, § 3.11.

<sup>88</sup> Bylaws, Art. IV, § 3.18.

<sup>89</sup> This section was added by the amendments to the Bylaws on April 11, 2013.

3. 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.

\* \* \* \*

7. ICANN commits to adhere to transparent and accountable budgeting processes, fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out ICANN's progress against ICANN's bylaws, responsibilities, and strategic and operating plans. In addition, ICANN commits to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which ICANN relied.

9. Recognizing that ICANN will evolve and adapt to fulfill its limited, but important technical mission of coordinating the DNS, ICANN further commits to take the following specific actions together with ongoing commitment reviews specified below:

9.1 Ensuring accountability, transparency and the interests of global Internet users: ICANN commits to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders by: (a) continually assessing and improving ICANN Board of Directors (Board) governance which shall include an ongoing evaluation of Board performance, the Board selection process, the extent to which Board composition meets ICANN's present and future needs, and the consideration of an appeal mechanism for Board decisions; (b) assessing the role and effectiveness of the GAC and its interaction with the Board and making recommendations for improvement to ensure effective consideration by ICANN of GAC input on the public policy aspects of the technical coordination of the DNS; (c) continually assessing and improving the processes by which ICANN receives public input (including adequate explanation of decisions taken and the rationale thereof); (d) continually assessing the extent to which ICANN's decisions are embraced, supported and accepted by the public and the Internet community; and (e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development. ICANN will organize a review of its execution of the above commitments no less frequently than every three years, ..... Each of the foregoing reviews shall consider the extent to which the assessments and actions undertaken by ICANN have been successful in ensuring that ICANN is acting transparently, is accountable for its decision-making, and acts in the public interest. Integral to the foregoing reviews will be assessments of the extent to which the Board and staff have implemented the recommendations arising out of the other commitment reviews enumerated below.

\* \* \* \*

9.3 Promoting competition, consumer trust, and consumer choice: 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. ICANN will organize a further review of its execution of the above commitments two years after the first review, and then no less frequently than every four years.... Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

{Underlining added}

#### IV. Summary of Parties' Contentions

68. This presentation of the parties' contentions is intended to provide a summary to aid in understanding this Final Declaration. It is not an exhaustive recitation of the entirety of the parties' allegations and arguments. Additional references to the parties' assertions are included in sections II (Factual and Procedural Background), III (ICANN's Articles, Bylaws and Affirmation of Commitments) and V (Analysis and Findings).
69. The IRP Panel has organized the parties' contentions into three categories, based on the areas of claim and dispute that have emerged through the exchange of three rounds of submissions between the parties and the Panel. The *first* section relates to the authority of the Panel, while the *second* and *third* sections address the allegations asserted by Vistaprint, which fall into two general areas of claim. In this regard, Vistaprint claims that the ICDR and Third Expert made numerous errors of procedure and substance during the String Confusion Objection proceedings, which resulted in Vistaprint being denied a fair hearing and due process. As a result of the flawed SCO proceedings, Vistaprint alleged that ICANN through its Board (and the BGC), in turn: (i) violated its Articles, Bylaws and the Guidebook (e.g., failed to act in good faith, fairly, non-arbitrarily, with accountability, due diligence, and independent judgment) by accepting the determination in the *Vistaprint SCO* and failing to redress and remedy the numerous alleged process and substantive errors in the SCO proceedings, and (ii) discriminated against Vistaprint, in violation of its Articles and Bylaws, by delaying Vistaprint's .WEBS gTLD applications and putting them into a Contention Set, while allowing other gTLD applications with equally serious string similarity concerns to proceed to delegation, or permitting still other applications that were subject to an adverse SCO determination to go through a separate additional review mechanism.
70. Thus, the three primary areas of contention between the parties are as follows:
- IRP Panel' Authority: The parties have focused on the authority of the IRP Panel, including the *standard of review* to be applied by the Panel, whether the Panel's IRP declaration is *binding* or *non-binding* on ICANN, and, on a very closely related point, whether the Panel has authority to award any *affirmative relief* (as compared to issuing only a declaration as to whether or not ICANN has acted in a manner that is consistent or not with its Articles and Bylaws).
  - SCO Proceedings Claim: Vistaprint claims ICANN's failed to comply with the obligations under its Articles and Bylaws by accepting the Third Expert's SCO determination and failing to provide a remedy or redress in response to numerous alleged errors of process and substance in the *Vistaprint SCO* proceedings. As noted above, Vistaprint claims there were process and substantive violations, which resulted in Vistaprint not being accorded a fair hearing and due process. Vistaprint states that because ICANN's Bylaws require ICANN to apply established policies neutrally and fairly, therefore, the Panel should also consider the policies in Module 3 of the

Guidebook concerning the String Confusion Objection procedures. Vistaprint objects to the policies themselves as well as their implementation through the ICDR and the Third Expert. Vistaprint claims that ICANN’s Board, acting through the BGC or otherwise, should have acted to address these deficiencies and its choice not to intervene violated the Articles and Bylaws.

- Disparate Treatment Claim: Vistaprint claims ICANN discriminated against Vistaprint through ICANN’s (and the BGC’s) acceptance of the Third Expert’s allegedly baseless and arbitrary determination in *Vistaprint SCO*, while allowing other gTLD applications with equally serious string similarity concerns to proceed to delegation, or permitting still other applications that were subject to an adverse SCO determination to go through a separate additional review mechanism.

## A. Vistaprint’s Position

### a. IRP Panel’s Authority

71. Standard of review: Vistaprint emphasizes that ICANN is accountable to the community for operating in a manner that is consistent with the Article and Bylaws, and with due regard for the core values set forth in Article I of the Bylaws. To achieve this required accountability, the IRP Panel is “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.”<sup>90</sup> Vistaprint states that the IRP Panel’s fulfillment of this core obligation is crucial to ICANN’s commitment to accountability. The IRP is the only method established by ICANN for holding itself accountable through third-party review of its decisions.<sup>91</sup>
72. Vistaprint contends that ICANN is wrong in stating (in its Response<sup>92</sup>) that a deferential standard of review applies in this case.<sup>93</sup> No such specification is made in ICANN’s Bylaws or elsewhere, and a restrictive interpretation of the standard of review would be inappropriate. It would fail to ensure accountability on the part of ICANN and would be incompatible with ICANN’s commitment to maintain and improve robust mechanisms for accountability, as required by Article 9.1 of ICANN’s Affirmation of Commitments and ICANN’s core values, which require ICANN to “remain accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness”.<sup>94</sup>
73. Vistaprint states further that the most recent version of ICANN’s Bylaws, amended on

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<sup>90</sup> Request, ¶ 55-56 (citing Bylaws, Art. IV, §§1 & 3.4).

<sup>91</sup> Request, ¶ 57.

<sup>92</sup> Response, ¶ 33.

<sup>93</sup> Vistaprint’s First Additional Submission, ¶ 36.

<sup>94</sup> Vistaprint’s First Additional Submission, ¶¶ 36-37; Request, ¶ 57.



April 11, 2013, require that the IRP Panel focus on whether ICANN's Board was free from conflicts of interest and exercised an appropriate level of due diligence and independent judgment in its decision making.<sup>95</sup> Vistaprint asserts, however, that these issues are mentioned by way of example only. The Bylaws do not restrict the IRP Panel's remit to these issues alone, as the Panel's fundamental task is to determine whether the Board has acted consistently with the Articles and Bylaws<sup>96</sup>

74. IRP declaration binding or non-binding: Vistaprint contends that the outcome of this IRP is binding on ICANN and that any other outcome "would be incompatible with ICANN's obligation to maintain and improve robust mechanisms for accountability."<sup>97</sup>
75. Vistaprint states that since ICANN's amendment of its Bylaws, IRP declarations have precedential value.<sup>98</sup> Vistaprint asserts the precedential value – and binding force – of IRP declarations was confirmed in a recent IRP panel declaration,<sup>99</sup> which itself has precedential value for this case. Vistaprint argues that any other outcome would effectively grant the ICANN Board arbitrary and unfettered discretion, something which was never intended and would be incompatible with ICANN's obligation to maintain and improve robust mechanisms for accountability.<sup>100</sup>
76. Vistaprint contends that the IRP is not a mere "corporate accountability mechanism" aimed at ICANN's internal stakeholders.<sup>101</sup> The IRP is open to any person materially affected by a decision or action of the Board<sup>102</sup> and is specifically available to new gTLD applicants, as stated in the Guidebook, Module 6.4. Vistaprint claims that *internally*, towards its stakeholders, ICANN might be able to argue that its Board retains ultimate decision-making power, subject to its governing principles. *Externally*, however, the ICANN Board's discretionary power is limited, and ICANN and its Board must offer redress when its decisions or actions harm third parties.<sup>103</sup>
77. Vistaprint argues further that the IRP has all the characteristics of an international arbitration.<sup>104</sup> The IRP is conducted pursuant to a set of independently developed

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<sup>95</sup> Bylaws, Article IV, § 3.4.

<sup>96</sup> Vistaprint's First Additional submission, ¶ 35.

<sup>97</sup> Vistaprint's First Additional Submission, ¶ 37.

<sup>98</sup> Vistaprint's First Additional Submission, ¶ 37 (citing Bylaws, Art. IV § 3.21).

<sup>99</sup> See *DCA Third Declaration on IRP Procedure*, ¶ 131 (the panel ruled that "[b]ased on the foregoing and the language and content of the IRP Procedure, the Panel concludes that this Declaration and its future Declaration on the Merits of this case are binding on the Parties").

<sup>100</sup> Vistaprint's First Additional Submission, ¶ 37.

<sup>101</sup> Vistaprint's Second Additional Submission, ¶ 29.

<sup>102</sup> Bylaws, Article IV § 3.2 ("Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action.").

<sup>103</sup> Vistaprint's Second Additional Submission, ¶ 15.

<sup>104</sup> Vistaprint's Second Additional Submission, ¶ 27.

international arbitration rules: the ICDR Rules, as modified by the Supplementary Procedures. The IRP is administered by the ICDR, which is a provider of international arbitration services. The decision-maker is not ICANN, but a panel of neutral individuals selected by the parties in consultation with the ICDR, and appointed pursuant to the ICDR Rules.

78. Vistaprint provides further detailed argument in its Second Additional Submission that the IRP is binding in view of ICANN's Bylaws, the ICDR Rules and the Supplementary Procedures, and that any ambiguity on this issue should weigh against ICANN as the drafter and architect of the IRP:

*31. As mentioned in Vistaprint's Reply, a previous IRP panel ruled that "[v]arious provisions of ICANN's Bylaws and the Supplementary Procedures support the conclusion that the [IRP] Panel's decisions, opinions and declarations are binding" and that "[t]here is certainly nothing in the Supplementary Rules that renders the decisions, opinions and declarations of the [IRP] Panel either advisory or non-binding" (RM 32, para 98).<sup>105</sup>*

*32. Indeed, as per Article IV(3)(8) of the ICANN Bylaws, the ICANN Board has given its approval to the ICDR to establish a set of operating rules and procedures for the conduct of the IRP. The operating rules and procedures established by the ICDR are the ICDR Rules as referred to in the preamble of the Supplementary Procedures (RM 32, para. 101). The Supplementary Procedures supplement the ICDR Rules (Supplementary Procedures, Preamble and Section 2). The preamble of the ICDR Rules provides that "[a] dispute can be submitted to an arbitral tribunal for a final and binding decision". Article 30 of the ICDR Rules specifies that "[a]wards shall be made in writing by the arbitral tribunal and shall be final and binding on the parties". No provision in the Supplementary Procedures deviates from the rule that the Panel's decisions are binding. On the contrary, Section 1 of the Supplementary Procedures defines an IRP Declaration as a decision/opinion of the IRP Panel. Section 10 of the Supplementary Procedures requires that IRP Declarations i) are made in writing, and ii) specifically designate the prevailing party. Where a decision must specifically designate the prevailing party, it is inherently binding. Moreover the binding nature of IRP Declarations is further supported by the language and spirit of Section 6 of the Supplementary Procedures and Article IV(3)(11)(a) of the ICANN Bylaws. Pursuant to these provisions, the IRP Panel has the authority to summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious. Surely, such a decision, opinion or declaration on the part of the IRP Panel would not be considered advisory (RM 32, para. 107).*

*33. Finally, even if ICANN's Bylaws and Supplementary Procedures are ambiguous - quod non - on the question of whether or not an IRP Declaration is binding, this ambiguity would weigh against ICANN. The relationship between ICANN and Vistaprint is clearly an adhesive one. In such a situation, the rule of contra proferentem applies. As the drafter and architect of the IRP Procedure, it was possible for ICANN, and clearly within its power, to adopt a procedure that expressly and clearly announced that the decisions, opinions and declarations of IRP Panels were advisory only. ICANN did not adopt such a procedure (RM 32, paras. 108-109).*

79. Finally, Vistaprint contends that ICANN conceived of the IRP as an alternative to dispute

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<sup>105</sup> Citing *DCA Third Declaration on IRP Procedure*, ¶ 98.

resolution by the courts. To submit a new gTLD application, Vistaprint had to agree to terms and conditions including a waiver of its right to challenge ICANN's decisions on Vistaprint's applications in a court, provided that as an applicant, Vistaprint could use the accountability mechanisms set forth in ICANN's Bylaws. Vistaprint quotes the *DCA Third Declaration on Procedure*, in which the IRP panel stated:

*assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, the ultimate 'accountability' remedy for [Vistaprint] is the IRP.*<sup>106</sup>

80. Authority to award affirmative relief: Vistaprint makes similar arguments in support of its claim that the IRP Panel has authority to grant affirmative relief. Vistaprint quotes the *Interim Declaration on Emergency Request for Interim Measures of Protection in Gulf Cooperation Council v. ICANN* (“GCC Interim IRP Declaration”),<sup>107</sup> where that panel stated that the right to an independent review is

*a significant and meaningful one under the ICANN's Bylaws. This is so particularly in light of the importance of ICANN's global work in overseeing the DNS for the Internet and also the weight attached by ICANN itself to the principles of accountability and review which underpin the IRP process.*

81. Accordingly, Vistaprint argues that the IRP Panel's authority is not limited to declare that ICANN breached its obligations under the Articles, Bylaws and the Guidebook. To offer effective redress to gTLD applicants, the Panel may indicate what action ICANN must take to cease violating these obligations. The point is all the stronger here, as ICANN conceived the IRP to be the sole independent dispute resolution mechanism available to new gTLD applicants.<sup>108</sup>

#### **b. SCO Proceedings Claim**

82. Vistaprint states that this case relates to ICANN's handling of the determination in the *Vistaprint SCO* proceedings following String Confusion Objections to Vistaprint's .WEBS applications, but does not relate to the merits of that SCO determination.<sup>109</sup>
83. Vistaprint's basic claim here is that given the errors of process and substance in those proceedings, Vistaprint was not given a fair opportunity to present its case. Vistaprint was deprived of procedural fairness and the opportunity to be heard by an independent panel applying the appropriate rules. Further, Vistaprint was not given any meaningful opportunity for remedy or redress once the decision was made, and in this way ICANN's Board allegedly violated its Articles and Bylaws.<sup>110</sup>

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<sup>106</sup> *DCA Third Declaration on IRP Procedure*, ¶ 40.

<sup>107</sup> *Interim Declaration on Emergency Request for Interim Measures of Protection in Gulf Cooperation Council v. ICANN*, ICDR Case No. 01-14-0002-1065, ¶ 59 (February 12, 2015) (“GCC Interim IRP Declaration”).

<sup>108</sup> Vistaprint's Second Additional Submission, ¶ 24.

<sup>109</sup> Request, ¶ 4.

<sup>110</sup> Request, ¶ 71.

84. Although Vistaprint challenged the SCO decision through ICANN’s Request for Reconsideration process, ICANN refused to reconsider the substance of the challenged decision, or to take any action to remedy the lack of due process. In doing so, Vistaprint claims ICANN failed to act in a fair and non-arbitrary manner, with good faith, accountability, due diligence and independent judgment, as required by ICANN’s Bylaws and Articles.<sup>111</sup> ICANN’s acceptance of the SCO determination and refusal to reverse this decision was an abdication of responsibility and contrary to the evaluation policies ICANN had established in the Guidebook.<sup>112</sup>
85. A number of Vistaprint’s contentions regarding the alleged violations of process and substance in SCO proceedings are described in part II.A above addressing Vistaprint’s .WEBS applications and the SCO proceedings. Vistaprint’s alleges as follows:
- (i) ICDR’s appointment of the First Expert was untimely, in violation of Article 13(a) of the New gTLD Objections Procedure<sup>113</sup>;
  - (ii) the First Expert (and Third Expert) improperly accepted and considered unsolicited supplemental filings, violating Articles 17 and 18 of the New gTLD Objections Procedure<sup>114</sup>;
  - (iii) ICDR violated Article 21 of the New gTLD Objections Procedure<sup>115</sup> by failing to ensure the timely issuance of an expert determination in the SCO;
  - (iv) the First Expert failed to maintain independence and impartiality, in violation of Article 13(c) of the New gTLD Objections Procedure<sup>116</sup>;
  - (v) ICDR unjustifiably accepted a challenge to the Second Expert (or created the circumstances for such a challenge), in violation of Article 2 of the ICDR’s Supplementary Procedures for String Confusion Objections (Rules);
  - (vi) the Determination of the Third Expert was untimely, in violation of Article 21(a) of the New gTLD Objections Procedure;
  - (vii) the Third Expert incorrectly applied the Objector’s burden of proof, in violation of section 3.5 of the Guidebook and Article 20(c) of the New gTLD Objections Procedure, which place the burden of proof on the Objector; and

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<sup>111</sup> Request, ¶ 71.

<sup>112</sup> Request, ¶ 8.

<sup>113</sup> Article 13(a) of the Procedure provides: “The DRSP shall select and appoint the Panel of Expert(s) within thirty (30) days after receiving the Response.”

<sup>114</sup> Request, ¶ 42. Article 17 provides that “[t]he Panel may decide whether the parties shall submit any written statements in addition to the Objection and the Response.” Article 18 states that “[i]n order to achieve the goal of resolving disputes over new gTLDs rapidly and at reasonable cost, procedures for the production of documents shall be limited. In exceptional cases, the Panel may require a party to provide additional evidence.”

<sup>115</sup> Article 21(a) of the Procedure provides that “[t]he DSRP and the Panel shall make reasonable efforts to ensure that the Expert Determination is rendered within forty-five (45) days of the constitution of the Panel.”

<sup>116</sup> Article 13(c) of the New gTLD Objections Procedure provides that “[a]ll Experts acting under this Procedure shall be impartial and independent of the parties.” Section 3.4.4 of the Guidebook provides that the ICDR will “follow its adopted procedures for requiring such independence, including procedures for challenging and replacing an expert for lack of independence.”

(viii) the Third Expert incorrectly applied ICANN’s substantive standard for evaluation of String Confusion Objections, as set out in Section 3.5.1 of the Guidebook, in particular the standards governing the evaluation of a string confusion objection.

86. Based on these alleged errors in process and substance, Vistaprint concludes in its Request:

*49. In sum, the cursory nature of the Decision and the arbitrary and selective discussion of the parties’ arguments by the Panel show a lack of either independence and impartiality or appropriate qualification on the fact of the Panel. The former is contrary to Article 13 of the Procedure; the latter is contrary to the Applicant Guidebook, Module 3-16, which requires that a panel (ruling on a string confusion or other objection) must consist of “appropriately qualified experts appointed to each proceeding by the designated DRSP”.<sup>117</sup>*

87. Vistaprint states that ICANN’s Board disregarded these accumulated infringements and turned a blind eye to the Third Expert’s lack of independence and impartiality. Vistaprint asserts that ICANN is not entitled to blindly accept expert determinations from SCO cases; it must verify whether or not, by accepting the expert determination and advice, it is acting consistent with its obligations under its Articles, Bylaws and Affirmation of Commitments.<sup>118</sup> Vistaprint further claims ICANN would be in violation of these obligations if it were to accept an expert determination or advice in circumstances where the ICDR and/or the expert had failed to comply with the New gTLD Objections Procedure and/or the ICDR Rules for SCOs, or where a panel – even if it had been correctly appointed – had failed to correctly apply the standard set by ICANN.<sup>119</sup>

88. Vistaprint states that following ICANN’s decision to accept the *Vistaprint SCO* determination, Vistaprint filed its Reconsideration Request detailing how ICANN’s acceptance of the Third Expert’s determination was inconsistent with ICANN’s policy and obligations under its Articles, Bylaws and Affirmation of Commitments. Background on the RFR procedure is provided above in part II.B. Despite this, Vistaprint states that ICANN refused to reverse its decision.

89. The IRP Panel has summarized as follows Vistaprint’s SCO Proceedings Claim concerning ICANN’s alleged breaches of its obligations under the Articles, Bylaws and Affirmation of Commitments:

(1) ICANN failed to comply with its obligation under Article 4 of the Articles and IV § 3.4 of the Bylaws to act in good faith with due diligence and independent judgment by failing to provide due process to Vistaprint’s .WEBS applications.<sup>120</sup> Good faith encompasses the obligation to ensure procedural fairness and due process, including equal and fair treatment of the parties, fair notice, and a fair opportunity to present one’s case. These are more than just formalistic procedural requirements. The opportunity must be meaningful: the party must be given adequate notice of the relevant

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<sup>117</sup> Request, ¶ 49.

<sup>118</sup> Request, ¶ 6.

<sup>119</sup> Request, ¶ 6.

<sup>120</sup> Request, ¶¶ 69-71.

rules and be given a full and fair opportunity to present its case. And the mechanisms for redress must be both timely and effective.

Vistaprint claims that it was not given a fair opportunity to present its case; was deprived of procedural fairness and the opportunity to be heard by an independent panel applying the appropriate rules; and was not given any meaningful opportunity for remedy or redress once the SCO determination was made, even in the RFR procedure. Thus, ICANN's Board failed to act with due diligence and independent judgment, and to act in good faith as required by ICANN's Bylaws and Articles.

- (2) ICANN failed to comply with its obligation under Article I § 2.8 to neutrally, objectively and fairly apply documented policies as established in the Guidebook and Bylaws.<sup>121</sup> Vistaprint argues that there is no probability of user confusion if both .WEBS and .WEB were delegated as gTLD strings. Vistaprint states expert evidence confirms that there is no risk that Internet users will be confused and the Third Expert could not have reasonably found that the average reasonable Internet user is likely to be confused between the two strings. As confirmed by the Objector,<sup>122</sup> the average reasonable Internet user is used to distinguishing between words (and non-words) that are much more similar than the strings, .WEBS and .WEB. Since these strings cannot be perceived confusingly similar by the average reasonable Internet user, the *Vistaprint SCO* determination that they are confusingly similar is contradictory to ICANN's policy as established in the Guidebook.
- (3) ICANN failed to comply with its obligation to act fairly and with due diligence and independent judgment as called for under Article 4 of the Articles of Incorporation, Articles I § 2.8 and IV § 3.4 of the Bylaws by accepting the SCO determination made by the Third Expert, who was allegedly not independent and impartial.<sup>123</sup> Vistaprint claims that the Third Expert was not independent and impartial and/or is not appropriately qualified. However, Vistaprint claims this did not prevent ICANN from accepting the determination by the Third Expert, without even investigating the dependence and partiality of the Expert when serious concerns were raised to the ICANN Board in the RFR. This is a failure of ICANN to act with due diligence and independent judgment, and to act in good faith as required by ICANN's Bylaws and Articles.
- (4) ICANN failed to comply with its obligations under the Article 4 of the Articles, and Article I §§ 2.7 and 2.8 and Article III § 1 of the Bylaws (and Article 9.1 of the Affirmation of Commitments) to act fairly and transparently by failing to disclose/perform any efforts to optimize the service that the ICDR provides in the New gTLD Program.<sup>124</sup> Vistaprint contends that the BGC's determination on Vistaprint's RFR shows that the BGC made no investigation into Vistaprint's fundamental questions about the Panel's arbitrariness, lack of independence, partiality, inappropriate

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<sup>121</sup> Request, ¶ 72.

<sup>122</sup> Request, Annex 10.

<sup>123</sup> Request, ¶ 73.

<sup>124</sup> Request, ¶¶ 52 and 77.

qualification. In addition, rather than identifying the nature of the conflict that forced the First Expert to step down, the BGC focused on developing hypotheses of reasons that could have led to this expert to stepping down. According to Vistaprint, this shows that the BGC did not exercise due diligence in making its determination and was looking for unsubstantiated reasons to reject Vistaprint's Reconsideration Request rather than making a fair determination.

In addition, as it is ICANN's responsibility to ensure that its policies and fundamental principles are respected by its third party vendors, ICANN had agreed with the ICDR that they were going to "communicate regularly with each other and seek to optimize the service that the ICDR provides as a DRSP in the New gTLD Program" and that ICANN was going to support the ICDR "to perform its duties...in a timely and efficient manner".<sup>125</sup> However, ICANN has failed to show that it sought in any way to optimize the ICDR's service vis-à-vis Vistaprint or that it performed any due diligence in addressing the concerns raised by Vistaprint. Instead, the BGC denied Vistaprint's RFR without conducting any investigation.

- (5) ICANN failed to comply with its obligation to remain accountable under Articles I § 2.10 and IV § 1 of the Bylaws (and Articles 3(a) and 9.1 of the Affirmation of Commitments) by failing to provide any remedy for its mistreatment of Vistaprint's gTLD applications.<sup>126</sup> Vistaprint claims that because of ICANN's unique history, role and responsibilities, its constituent documents require that it operate with complete accountability. In contrast to this obligation, throughout its treatment of Vistaprint's applications for .WEBS, ICANN has acted as if it and the ICDR are entitled to act with impunity. ICANN adopted the Third Expert's determination without examining whether it was made in accordance with ICANN's policy and fundamental principles under its Articles and Bylaws. When confronted with process violations, ICANN sought to escape its responsibilities by relying on unrealistic hypotheses rather than on facts that should have been verified. Additionally, ICANN has not created any general process for challenging the substance of SCO expert determinations, while acknowledging the need for such a process by taking steps to develop a review process mechanism for certain individual cases involving SCO objections.
- (6) ICANN failed to promote competition and innovation under Articles I § 2.2 (and Article 3(c) of the Affirmation of Commitments) by accepting the Third Expert's determination.<sup>127</sup> Vistaprint's argues that the Objector's sole motive in filing the SCO against Vistaprint was to prevent a potential competitor from entering the gTLD market. This motive is contrary to the purpose of ICANN's New gTLD Program. The Board's acceptance of the determination in the *Vistaprint SCO*, which was filed with an intent contrary to the interests of both competition and consumers, was contrary to ICANN's Bylaws.

### **c. Disparate Treatment Claim**

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<sup>125</sup> Request, ¶¶ 52.

<sup>126</sup> Request, ¶¶ 78-79.

<sup>127</sup> Request, ¶ 80.

90. Vistaprint claims that ICANN’s Board discriminated against Vistaprint through the Board’s (and the BGC’s) acceptance of the Third Expert’s allegedly baseless and arbitrary determination in the *Vistaprint SCO*, while allowing other gTLD applications with equally serious string similarity concerns to proceed to delegation, or permitting still other applications that were subject to an adverse SCO determination to go through a separate additional review mechanism.
91. Vistaprint states that the “IRP Panel’s mandate includes a review as to whether or not ICANN’s Board discriminates in its interventions on SCO expert determinations,” and contends that “[d]iscriminating between applicants in its interventions on SCO expert determinations is exactly what the Board has done with respect to Vistaprint’s applications.”<sup>128</sup>
92. Vistaprint asserts that in contrast to the handling of other RFRs, the BGC did not give the full ICANN Board the opportunity to consider the *Vistaprint SCO* matter and did not provide detailed minutes of the meeting in which the BGC’s decision was taken.<sup>129</sup> Vistaprint states this is all the more striking as, in other matters related to handling of SCOs with no concerns about the impartiality and independence of the expert or the procedure, the Board considered potential paths forward to address perceived inconsistencies in expert determinations in the SCO process, including implementing a review mechanism. The Board also directed ICANN’s President and CEO, or his designee, to publish this proposed review mechanism for public comment.<sup>130</sup> Vistaprint emphasizes that ICANN’s Board took this decision the day before Vistaprint filed its Reconsideration Request regarding the *Vistaprint SCO*. However, this did not prevent the BGC from rejecting Vistaprint’s RFR without considering whether such a review mechanism might also be appropriate for dealing with the allegedly unfair and erroneous treatment of the SCO related to Vistaprint’s .WEBS applications.<sup>131</sup>
93. The core of Vistaprint’s discrimination and disparate treatment claims is stated in its First Additional Submission:
7. *Other applicants have equally criticized SCO proceedings. In a letter to ICANN’s CEO, United TLD Holdco, Ltd. denounced the process flaws in the SCO proceedings involving the strings .com and .cam. DERCars, LCC filed an RfR, challenging the expert determination in the SCO proceedings relating to the strings .car and .cars. Amazon EU S.a.r.l. filed an RfR, challenging the expert determination in the SCO proceedings relating to the strings .shop and .通販 (which means ‘online shopping’ in Japanese). The ICANN Board took action in each of these matters.*
- *With respect to the Expert Determination finding .cam confusingly similar to .com, the ICANN Board ordered that an appeals process be developed to address the “perceived inconsistent or otherwise unreasonable SCO Expert Determination”.*
  - *With regard to the Expert Determination finding .cars confusingly similar to .car, the ICANN Board ordered its staff to propose a review mechanism. DERCars decided to withdraw its*

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<sup>128</sup> Vistaprint’s Second Additional Submission, ¶ 20-21.

<sup>129</sup> Request, ¶ 52.

<sup>130</sup> Request, ¶ 52 (referencing NGPC Resolution 2014.02.05.NG02).

<sup>131</sup> Request, ¶ 52.



application for .cars before the review mechanism was implemented. As a result, it was no longer necessary for the ICANN Board to further consider the proposed review process.

- With regard to the Expert Determination finding 通販 confusingly similar to .shop, the ICANN Board ordered that an appeals process be developed to address the “perceived inconsistent or otherwise unreasonable SCO Expert Determination”.

8. While the ICANN Board took action in the above-mentioned matters, it did not do so with respect to the .webs / .web determination. However, the .webs / .web determination was equally unreasonable, and at least equally serious substantive and procedural errors were made in these SCO proceedings. There is no reason for ICANN to treat the .webs / .web determination differently.

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12. When there are clear violations of the process and the outcome is highly objectionable (all as listed in detail in the request for IRP), the ICANN Board must intervene, as it has done with regard to other applications. The ICANN Board cannot justify why it intervenes in certain cases (.cars / .car, .cam / .com and 通販 / .shop), but refuses to do so in another case (.webs / .web). This is a clear violation of its Bylaws and Articles of Incorporation. The Panel in the current IRP has authority to order that ICANN must comply with its Bylaws and Articles of Incorporation and must disregard the expert determination in relation to Vistaprint’s .webs applications.<sup>132</sup>

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31. When the ICANN Board individually considers an application, it must make sure that it does not treat applicants inequitably and that it does not discriminate among applicants. Article II, Section 3 of ICANN’s Bylaws provides that “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”. However, with regard to the SCO proceedings, the ICANN Board has done the exact opposite. It created the opportunity for some aggrieved applicants to participate in an appeals process, while denying others.

32. As explained above, there is no justification for this disparate treatment, and the ICANN Board has not given any substantial and reasonable cause that would justify this discrimination.

94. Vistaprint also contends that ICANN cannot justify the disparate treatment:

22. ICANN’s attempt to justify the disparate treatment of Vistaprint’s applications is without merit. ICANN argues that its Board only intervened with respect to specific expert determinations because there had been several expert determinations regarding the same strings that were seemingly inconsistent (fn. omitted). Vistaprint recognizes that the ICANN Board intervened to address “perceived inconsistent or otherwise unreasonable SCO Expert Determinations” (fn. omitted). However, ICANN fails to explain why the SCO Expert Determination on Vistaprint’s .webs applications was not just as unreasonable as the SCO Expert Determinations involving .cars/.car, .cam/.com and 通販 / .shop. Indeed, the determination concerning Vistaprint’s .webs applications expressly relies on the determination concerning .cars/.car, that was considered inconsistent or otherwise unreasonable by the ICANN Board that rejected the reasoning applied in the two other .cars/.car expert determinations (fn. omitted).

23. Therefore, Vistaprint requests the IRP Panel to exercise its control over the ICANN Board and to declare that ICANN discriminated Vistaprint’s applications.

95. Timing: Vistaprint contends that the objections it raises in this IRP concerning the Third Expert’s SCO determination and the Guidebook and its application are timely.<sup>133</sup> While

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<sup>132</sup> Vistaprint’s First Additional Submission, ¶ 12.

<sup>133</sup> Vistaprint’s Second Additional Submission, ¶¶ 8-12.

ICANN argues that the time for Vistaprint to object to the SCO procedures as established in the Guidebook has long passed,<sup>134</sup> Vistaprint responds that the opportunity to challenge the erroneous application of the Guidebook in violation of ICANN's fundamental principles only arose when the flaws in ICANN's implementation of the Guidebook became apparent. At the time of the adoption of the Guidebook, Vistaprint was effectively barred from challenging it by the fact that it could not – at that time – show any harm. Further, to raise an issue at that time would have required Vistaprint to reveal that it was contemplating making an application for a new gTLD string, which might have encouraged opportunistic applications by others seeking to extract monetary value from Vistaprint. Although the IRP panel in the *Booking.com v. ICANN* IRP raised similar timing concerns, it did not draw the distinction between the adoption of the general principles and their subsequent implementation.

## **B. ICANN's Position**

### **a. IRP Panel's Authority**

96. Standard of review: ICANN describes the IRP as a unique mechanism available under ICANN's Bylaws.<sup>135</sup> The IRP Panel is tasked with determining whether the Board's actions are consistent with ICANN's Articles and Bylaws. ICANN states that its Bylaws specifically identify a deferential standard of review that the IRP Panel must apply when evaluating the actions of the ICANN Board, and the rules are clear that the IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.<sup>136</sup> In particular, ICANN cites to Article IV, § 3.4 of the Bylaws indicating the IRP Panel is to 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?
97. Further, ICANN states that the IRP addresses challenges to conduct undertaken by ICANN's Board of Directors; it is not a mechanism to challenge the actions or inactions of ICANN staff or third parties that may be involved with ICANN's activities.<sup>137</sup> The IRP is also not an appropriate forum to challenge the BGC's ruling on a Reconsideration Request in the absence of some violation by the BGC of ICANN's Articles or Bylaws.<sup>138</sup>
98. IRP Declaration binding or non-binding: ICANN states that the IRP “is conducted pursuant to Article IV, section 3 of ICANN's Bylaws, which creates a non-binding method

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<sup>134</sup> ICANN's First Additional Response, ¶¶ 28-29.

<sup>135</sup> Response, ¶ 32.

<sup>136</sup> Response, ¶ 33; ICANN's First Additional Response, ¶ 10.

<sup>137</sup> Response, ¶ 4.

<sup>138</sup> Response, ¶ 12.

of evaluating certain actions of ICANN's Board.<sup>139</sup> The Panel has one responsibility – to “declar[e] whether the Board has acted consistently with the provisions of [ICANN's] Articles of Incorporation and Bylaws.”<sup>140</sup> The IRP is not an arbitration process, but rather a means by which entities that participate in ICANN's processes can seek an independent review of decisions made by ICANN's Board.

99. ICANN states that the language of the IRP provisions set forth in Article IV, section 3 of the Bylaws, as well as the drafting history of the development of the IRP provisions, make clear that IRP panel declarations are not binding on ICANN:<sup>141</sup> ICANN explains as follows in its First Additional Response:

*35. First, the Bylaws charge an IRP panel 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 Board is then obligated to "review[]"<sup>142</sup> and "consider" an IRP panel's declaration at the Board's next meeting "where feasible."<sup>143</sup> The direction to "review" and "consider" an IRP panel's declaration means that the Board has discretion as to whether it should adopt that declaration and whether it should take any action in response to that declaration; if the declaration were binding, there would be nothing to review or consider, only a binding order to implement.*

100. ICANN contends that the IRP Panel's declaration is not binding because the Board is not permitted to outsource its decision-making authority.<sup>144</sup> However, the Board will, of course, give serious consideration to the IRP Panel's declaration and, “where feasible,” shall consider the IRP Panel's declaration at the Board's next meeting.<sup>145</sup>

101. As to the drafting process, ICANN provides the following background in its First Additional Response:

*36. Second, the lengthy drafting history of ICANN's independent review process confirms that IRP panel declarations are not binding. Specifically, the Draft Principles for Independent Review, drafted in 1999, state that "the ICANN Board should retain ultimate authority over ICANN's affairs – after all, it is the Board...that will be chosen by (and is directly accountable to) the membership and supporting organizations (fn. omitted). And when, in 2001, the Committee on ICANN Evolution and Reform (ERC) recommended the creation of an independent review process, it called for the creation of "a process to require non-binding arbitration by an international arbitration body to review any allegation that the Board has acted in conflict with ICANN's Bylaws" (fn. omitted). The individuals who actively participated in the process also agreed that the review process would not be binding. As one participant stated: IRP "decisions will be nonbinding, because the Board will retain final decision-making authority" (fn. omitted).*

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<sup>139</sup> Response, ¶ 2.

<sup>140</sup> Response, ¶ 2 (quoting Bylaws, Art. IV, § 3.4).

<sup>141</sup> ICANN's First Additional Response, ¶ 34.

<sup>142</sup> ICANN's First Additional Response, ¶ 35 (quoting Bylaws, Art. IV, § 3.11.d).

<sup>143</sup> ICANN's First Additional Response, ¶ 35 (quoting Bylaws, Art. IV, § 3.21).

<sup>144</sup> Response, ¶ 35.

<sup>145</sup> Response, ¶ 35 (quoting Bylaws, Art. IV, § 3.21).

37. In February 2010, the first IRP panel to issue a final declaration, the ICM IRP Panel, unanimously rejected the assertion that IRP panel declarations are binding<sup>146</sup> and recognized that an IRP panel's declaration "is not binding, but rather advisory in effect." Nothing has occurred since the issuance of the ICM IRP Panel's declaration that changes the fact that IRP panel declarations are not binding. To the contrary, in April 2013, following the ICM IRP, in order to clarify even further that IRPs are not binding, all references in the Bylaws to the term "arbitration" were removed as part of the Bylaws revisions. ICM had argued in the IRP that the use of the word "arbitration" in the portion of the Bylaws related to Independent Review indicated that IRPs were binding, and while the ICM IRP Panel rejected that argument, to avoid any lingering doubt, ICANN removed the word "arbitration" in conjunction with the amendments to the Bylaws.

38. The amendments to the Bylaws, which occurred following a community process on proposed IRP revisions, added, among other things, a sentence stating that "declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value" (fn. omitted). Vistaprint argues that this new language, which does not actually use the word "binding," nevertheless provides that IRP panel declarations are binding, trumping years of drafting history, the sworn testimony of those who participated in the drafting process, and the plain text of the Bylaws. This argument is meritless.

39. First, relying on the use of the terms "final" and "precedential" is unavailing – a declaration clearly can be both non-binding and also final and precedential:....

40. Second, the language Vistaprint references was added to ICANN's Bylaws to meet recommendations made by ICANN's Accountability Structures Expert Panel (ASEP). The ASEP was comprised of three world-renowned experts on issues of corporate governance, accountability, and international dispute resolution, and was charged with evaluating ICANN's accountability mechanisms, including the Independent Review process. The ASEP recommended, among other things, that an IRP should not be permitted to proceed on the same issues as presented in a prior IRP. The ASEP's recommendations in this regard were raised in light of the second IRP constituted under ICANN's Bylaws, where the claimant presented claims that would have required the IRP Panel to reevaluate the declaration of the IRP Panel in the ICM IRP. To prevent claimants from challenging Board action taken in direct response to a prior IRP panel declaration, the ASEP recommended that "[t]he declarations of the IRP, and ICANN's subsequent actions on those declarations, should have precedential value" (fn. omitted).

41. The ASEP's recommendations in this regard did not convert IRP panel declarations into binding decisions (fn. omitted). One of the important considerations underlying the ASEP's work was the fact that ICANN, while it operates internationally, is a California non-profit public benefit corporation subject to the statutory law of California as determined by United States courts. As Graham McDonald, one of the three ASEP experts, explained, because California law requires that the board "retain responsibility for decision-making," the Board has "final word" on "any recommendation that ... arises out of [an IRP]" (fn. omitted). The ASEP's recommendations were therefore premised on the understanding that the declaration of an IRP panel is not "binding" on the Board.

102. Authority to award affirmative relief: ICANN contends that any request that the IRP Panel grant affirmative relief goes beyond the Panel's authority.<sup>147</sup> The Panel does not have the authority to award affirmative relief or to require ICANN to undertake specific

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<sup>146</sup> Declaration of IRP Panel, ICM Registry, LLC v. ICANN, ICDR Case No. 50 117 T 00224 08, ¶ 133 (Feb. 19, 2010) ("ICM Registry Final Declaration").

<sup>147</sup> Response, ¶ 78.

conduct. The Panel is limited to declaring whether an action or inaction of the Board was inconsistent with the Articles or Bylaws, and recommending that the Board stay any action or decision, or take any interim action, until such time as the Board reviews and acts upon the opinion of the Panel.<sup>148</sup> ICANN adds that the IRP panel in *ICM Registry Declaration* found that

*“[t]he IRP cannot ‘order’ interim measures but do no more than ‘recommend’ them, and this until the Board ‘reviews’ and ‘acts upon the opinion’ of the IRP.”*<sup>149</sup>

#### **b. SCO Proceedings Claim**

103. ICANN states that Vistaprint is using this IRP as a means to challenge the merits of the Third Expert’s determination in the *Vistaprint SCO*.<sup>150</sup> As ICANN states in its Response:

*12. Ultimately, Vistaprint has initiated this IRP because Vistaprint disagrees with the Expert Panel’s Determination and the BGC’s finding on Vistaprint’s Reconsideration Request. ICANN understands Vistaprint’s disappointment, but IRPs are not a vehicle by which an Expert Panel’s determination may be challenged because neither the determination, nor ICANN accepting the determination, constitutes an ICANN Board action. Nor is an IRP the appropriate forum to challenge a BGC ruling on a Reconsideration Request in the absence of some violation by the BGC of ICANN’s Articles or Bylaws. Here, ICANN followed its policies and processes at every turn with respect to Vistaprint, which is all it is required to do.*

104. ICANN states that the IRP Panel has one chief responsibility – to “determine whether the Board has acted consistently with the provisions of [ICANN’s] Articles of Incorporation and Bylaws.”<sup>151</sup> With respect to Vistaprint’s claim that ICANN’s Board violated its Articles and Bylaws by “blindly accepting” the Third Expert’s SCO determination without reviewing its analysis or result, ICANN responds that there is no requirement for the Board to conduct such an analysis. “Accepting” or “reviewing” the Expert’s determination is not something the Board was tasked with doing or not doing. Per the Guidebook, the “findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.”<sup>152</sup> The Guidebook further provides that “[i]n a 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).”<sup>153</sup> This step is a result not of any ICANN Board action, but a straightforward application of Guidebook provisions for SCO determinations.

105. ICANN states the Board thus took no action with respect to the Third Expert’s determination upon its initial issuance, because the Guidebook does not call for the Board to take any action and it is not required by any Article or Bylaw provision. Accordingly, it cannot be a violation of ICANN’s Articles or Bylaws for the Board to not conduct a

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<sup>148</sup> ICANN’s First Additional Response, ¶ 33 (citing Bylaws, Art. IV, §§ 3.4 and 3.11(d)).

<sup>149</sup> *ICM Registry Final Declaration*, ¶ 133.

<sup>150</sup> Response, ¶ 12; ICANN’s First Additional submission, ¶ 4.

<sup>151</sup> Response, ¶ 2 (citing Bylaws, Art. IV, § 3.4).

<sup>152</sup> Response, ¶ 9 (citing Guidebook, § 3.4.6).

<sup>153</sup> Response, ¶ 9 (citing Guidebook, § 3.2.2.1).

substantive review of an expert's SCO determination. And as such, there is no Board action in this regard for the IRP Panel to review.

106. ICANN states that “the sole Board action that Vistaprint has identified in this case is the BGC’s rejection of Vistaprint’s Reconsideration Request. However, ICANN maintains that nothing about the BGC’s handling of the RFR violated ICANN’s Articles or Bylaws.”<sup>154</sup>
107. In this regard, ICANN states that the BGC was not required, as Vistaprint contends, to refer Vistaprint’s Reconsideration Request to the entire ICANN Board.<sup>155</sup> The Bylaws provide that the BGC has the authority to “make a final determination of Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors.”<sup>156</sup> Because Vistaprint’s Reconsideration Request was a challenge to alleged staff action, the BGC was within its authority, and in compliance with the Bylaws, when it denied Vistaprint’s Reconsideration Request without making a referral to the full Board.
108. ICANN states that the BGC did what it was supposed to do in reviewing Vistaprint’s Reconsideration Request – it reviewed the Third Expert’s and ICANN staff’s compliance with policies and procedures, rather than the substance of the Third Expert’s SCO determination, and found no policy or process violations.<sup>157</sup> ICANN urges that Vistaprint seeks to use the IRP to challenge the substantive decision of the Third Expert in the *Vistaprint SCO*. However, this IRP may only be used to challenge ICANN Board actions on the grounds that they do not comply with the Articles or Bylaws, neither of which is present here.
109. ICANN nevertheless responds to Vistaprint’s allegations regarding errors of process and substance in the SCO proceedings, and contends that the BGC properly handled its review of the *Vistaprint SCO*. ICANN’s specific responses on these points are as follows:
  - (i) As to Vistaprint’s claim that the ICDR’s appointment of the First Expert was untimely, missing the deadline by 5 days, ICANN states that the BGC determined that Vistaprint failed to provide any evidence that it contemporaneously challenged the timeliness of the ICDR’s appointment of the First Expert, and that a Reconsideration Request was not the appropriate mechanism to raise the issue for the first time. In addition, the BGC concluded that Vistaprint had failed to show that it was “materially” and “adversely” affected by the brief delay in appointing the First Expert, rendering reconsideration inappropriate.
  - (ii) Regarding Vistaprint’s claim that the First Expert (and Third Expert) improperly accepted and considered unsolicited supplemental filings, violating Articles 17 and 18 of the New gTLD Objections Procedure, ICANN states that Article 17 provides the

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<sup>154</sup> ICANN’s First Additional Submission, ¶ 4.

<sup>155</sup> Response, ¶ 43.

<sup>156</sup> Response, ¶ 44 (citing Bylaws, Art. IV, § 2.3(f)).

<sup>157</sup> Response, ¶ 11.

expert panel with the discretion to accept such a filing:<sup>158</sup> “The Panel *may decide* whether the parties shall submit any written statements in addition to the Objection and the Response, and it shall fix time limits for such submissions.”<sup>159</sup> Thus, as the BGC correctly found, it was not the BGC’s place to second-guess the First (or Third) Expert’s exercise of permitted discretion.

- (iii) As to Vistaprint’s claim that the ICDR violated Article 21 of the New gTLD Objections Procedure by failing to ensure the timely issuance of an expert SCO determination, ICANN contends that the BGC properly determined that Vistaprint’s claims in this regard did not support reconsideration for two reasons. First, on October 1, 2013, before the determination was supposed to be issued by the First Expert, the ICDR removed that expert. The BGC therefore could not evaluate whether the First Expert rendered an untimely determination in violation of the Procedure. Second, the BGC correctly noted that 45-day timeline applies to an expert’s submission of the determination “in draft form to the [ICDR’s] scrutiny as to form before it is signed” and the ICDR and the Expert are merely required to exercise “reasonable efforts” to issue a determination within 45 days of the constitution of the Panel.<sup>160</sup>
- (iv) Regarding Vistaprint’s claim that the First Expert failed to maintain independence and impartiality, in violation of Article 13(c) of the New gTLD Objections Procedure, ICANN argues this claim is unsupported.<sup>161</sup> As the BGC noted, Vistaprint provided no evidence demonstrating that the First Expert failed to follow the applicable ICDR procedures for independence and impartiality. Rather, all indications are that the First Expert and the ICDR complied with these rules as to this “new conflict,” which resulted in a removal of the First Expert. Further, Vistaprint presented no evidence of being materially and adversely affected by the First Expert’s removal, which is another justification for the BGC’s denial of the Reconsideration Request.
- (v) Vistaprint claimed that the ICDR unjustifiably accepted a challenge to the Second Expert (or created the circumstances for such a challenge), in violation of Article 2 of the ICDR’s Supplementary Procedures for String Confusion Objections.<sup>162</sup> ICANN contends that the BGC properly determined that this claim did not support reconsideration. The ICDR Rules for SCOs make clear that the ICDR had the “sole discretion” to review and decide challenges to the appointment of expert panelists. While Vistaprint may disagree with the ICDR’s decision to accept the Objector’s challenge, it is not the BGC’s role to second guess the ICDR’s discretion, and it was

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<sup>158</sup> Response, ¶ 50.

<sup>159</sup> New gTLD Objections Procedure, Art. 17.

<sup>160</sup> Response, ¶ 53, citing New gTLD Objections Procedure, Art. 21(a)-(b).

<sup>161</sup> Response, ¶¶ 54-56.

<sup>162</sup> Article 2, § 3 of the ICDR’s Supplementary Procedures for String Confusion Objections provides that:

*Upon review of the challenge the DRSP in its sole discretion shall make the decision on the challenge and advise the parties of its decision.*  
*[Underlining added]*

not a violation of the Articles or Bylaws for the BGC to deny reconsideration on this ground.

- (vi) Vistaprint claimed that the determination of the Third Expert was untimely, in violation of Article 21(a) of the New gTLD Objections Procedure. ICANN claims that the BGC properly held that this claim did not support reconsideration.<sup>163</sup> On November 20, 2013, the ICDR appointed the Third Expert. Vistaprint claimed in its Reconsideration Request that pursuant to Article 21, the determination therefore “should have been rendered by January 4, 2014,” which was forty-five (45) days after the Panel was constituted. Because “it took this Panel until January 24, 2014 to render the Decision,” Vistaprint contended that the determination was untimely because it was twenty days late. ICANN states that, according to the Procedure, the Expert must exercise “reasonable efforts” to ensure that it submits its determination “in draft form to the DRSP’s scrutiny as to form before it is signed” within forty-five (45) days of the Expert Panel being constituted. As the BGC noted, there is no evidence that the Third Expert failed to comply with this Procedure, and reconsideration was therefore unwarranted on this ground.
- (vii) ICANN responded to Vistaprint’s claim that the Third Expert incorrectly applied the Objector’s burden of proof, in violation of section 3.5 of the Guidebook and Article 20(c) of the New gTLD Objections Procedure (which place the burden on the Objector). Vistaprint claimed that the Third Expert contravened ICANN’s process because the Expert did not give an analysis showing that the Objector had met the burden of proof.<sup>164</sup> ICANN states that the BGC found the Expert extensively detailed support for the conclusion that the .WEBS string so nearly resembles .WEB – visually, aurally and in meaning – that it is likely to cause confusion. The BGC noted that the Expert had adhered to the procedures and standards set forth in the Guidebook relevant to determining string confusion and reconsideration was not warranted on this basis.
- (viii) Finally, as to Vistaprint’s claim that the Third Expert incorrectly applied ICANN’s substantive standard for evaluation of String Confusion Objections (as set out in Section 3.5.1 of the Guidebook), ICANN contends the BGC properly found that reconsideration was not appropriate.<sup>165</sup> Vistaprint contended that the Expert failed to apply the appropriate high standard for assessing likelihood of confusion.<sup>166</sup> ICANN states that Section 3.5.1 of the Guidebook provides that

*“[f]or 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.”*

ICANN claims that disagreement as to whether this standard should have resulted in a finding in favor of Vistaprint does not mean that the Third Expert violated any policy or process in reaching his decision. Vistaprint also claimed that the Third

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<sup>163</sup> Response, ¶¶ 61-62.

<sup>164</sup> Response, ¶¶ 63-64.

<sup>165</sup> Response, ¶¶ 65-68.

<sup>166</sup> Request, ¶ 47.



Expert “failed to apply the burden of proof and the standards imposed by ICANN” because the Expert questioned whether the co-existence between Vistaprint’s domain name, <webs.com>, and the Objector’s domain name, <web.com> for many years without evidence of actual confusion is relevant to his determination. ICANN states that, as the BGC noted, the relevant consideration for the Expert is whether the *applied-for gTLD string* is likely to result in string confusion, not whether there is confusion between second-level domain names. Vistaprint does not cite any provision of the Guidebook, the Procedure, or the Rules that have been contravened in this regard.

110. In sum, ICANN contends that the BGC did its job, which did not include evaluating the merits of Third Expert’s determination, and the BGC followed applicable policies and procedures in considering the RFR.<sup>167</sup>

111. Regarding Vistaprint’s claims of ICANN’s breach of various Articles and Bylaws, ICANN responds as follows in its Response:

*71. First, Vistaprint contends that ICANN failed to comply with the general principle of “good faith.” But the only reason Vistaprint asserts ICANN failed to act in good faith is in “refus[ing] to reconsider the substance” of the Determination or to “act with independent judgment” (fn. omitted). The absence of an appeal mechanism by which Vistaprint might challenge the Determination does not form the basis for an IRP because there is nothing in ICANN’s Bylaws or Articles of Incorporation requiring ICANN to provide one.*

*72. Second, Vistaprint contends that ICANN failed to apply its policies in a neutral manner. Here, Vistaprint complains that other panels let other applications proceed without being placed into a contention set, even though they, in Vistaprint’s opinion, presented “at least equally serious string similarity concerns” as .WEBS/.WEB (fn. omitted). Vistaprint’s claims about ICDR’s treatment of other string similarity disputes cannot be resolved by IRP, as they are even further removed from Board conduct. Different outcomes by different expert panels related to different gTLDs are to be expected. Claiming that other applicants have not suffered adverse determinations does not convert the Expert Panel’s Determination into a “discriminatory ICANN Board act.”*

*73. Third, Vistaprint contends that the ICANN Board violated its obligation to act transparently for not investigating the “impartiality and independence” of the Expert Panel and thereby “did not seek to communicate with [ICDR] to optimize [its] service” (fn. omitted). Aside from the disconnect between the particular Bylaws provision invoked by Vistaprint requiring ICANN’s transparency, and the complaint that the ICDR did not act transparently, Vistaprint fails to identify any procedural deficiency in the ICDR’s actions regarding the removal of the First Expert, as set forth above. Moreover, Vistaprint cites no obligation in the Articles or Bylaws that the ICANN Board affirmatively investigate the impartiality of an Expert Panel, outside of the requirement that the ICDR follow its policies on conflicts, which the ICDR did.*

*74. Fourth, Vistaprint contends that ICANN “has not created any general process for challenging the substance of the so-called expert determination,” and thus has “brashly flouted” its obligation to remain accountable (fn. omitted). But again, Vistaprint does not identify any provision of the Articles or Bylaws that requires ICANN to provide such an appeals process.*

*75. Fifth, Vistaprint “concludes” that the ICANN Board neglected its duty to promote competition and innovation (fn. omitted) when it failed to overturn the Expert Panel’s Determination. Vistaprint claims that the Objector’s “motive in filing the objection was to prevent a potential competitor from entering*

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<sup>167</sup> Response, ¶ 69.

the gTLD market” and therefore ICANN’s “acceptance” of the objection purportedly contravenes ICANN’s core value of promoting competition. But every objection to a gTLD application by an applicant for the same string seeks to hinder a competitor’s application. By Vistaprint’s logic, ICANN’s commitment to promoting competition requires that no objections ever be sustained and every applicant obtains the gTLD it requests. There is no provision in the Articles or Bylaws that require such an unworkable system.

76. All in all, Vistaprint’s attempt to frame its disappointment with the Expert Panel’s decision as the ICANN Board’s dereliction of duties does not withstand scrutiny.

### c. Disparate Treatment Claim

112. ICANN states that Vistaprint objects to the Board’s exercise of its independent judgement in determining not to intervene further (beyond the review of the BGC) with respect to the Third Expert’s determination in the *Vistaprint SCO*, as the Board did with respect to expert determinations on String Confusion Objections regarding the strings (1) .COM/.CAM, (2) .CAR/.CARS, and (3) .SHOP/.通販 (online shopping in Japanese).<sup>168</sup>
113. ICANN states that the Guidebook provides that in “exceptional circumstances,” such as when accountability mechanisms like RFR or IRP are invoked, “the Board might individually consider an application”<sup>169</sup> and that is precisely what occurred in Vistaprint’s case. Because Vistaprint sought reconsideration, the BGC considered Vistaprint’s Reconsideration Request and concluded that the ICDR and Third Expert had not violated any relevant policy or procedure in rendering the Expert’s determination.
114. ICANN states that the ICANN Board only intervened with respect to these other expert determinations because there had been several independent expert determinations regarding the same strings that were seemingly inconsistent with one another. That is not the case with respect to Vistaprint’s applications – no other expert determinations were issued regarding the similarity of .WEB and .WEBS.<sup>170</sup> “Unlike .WEB/.WEBS, the COM/.CAM, .CAR/.CARS, and .SHOP/.通販 strings were all the subject of several, seemingly inconsistent determinations on string confusion objections by different expert panels. So, for example, while one expert upheld a string confusion objection asserting that .CAM was confusingly similar to .COM, another expert overruled a separate string confusion objection asserting precisely the same thing.”<sup>171</sup>
115. Further, ICANN explains that

16. Given what were viewed by some as inconsistent determinations, the BGC requested that ICANN staff draft a report for the ICANN Board’s New gTLD Program Committee (“NGPC”), “setting out

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<sup>168</sup> ICANN’s First Additional Submission, ¶ 14.

<sup>169</sup> ICANN’s First Additional Submission, ¶ 5 (citing Guidebook, § 5.1). ICANN quotes the *Booking.com Final Declaration*, where the IRP Panel stated in relation to § 5.1 “the fact that the ICANN Board enjoys such discretion [to individually consider an application for a New gTLD] and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by *Booking.com*.”

<sup>170</sup> ICANN’s First Additional Submission, ¶ 5.

<sup>171</sup> ICANN’s First Additional Submission, ¶ 15.

options for dealing...[with] differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes...."<sup>172</sup> The NGPC subsequently considered potential approaches to addressing perceived inconsistent determinations on string confusion objections, including possibly implementing a new review mechanism.<sup>173</sup> ICANN staff initiated a public comment period regarding framework principles of a potential such review mechanism.<sup>174</sup> Ultimately, having considered the report drafted by ICANN staff, the public comments received, and the string confusion objection process set forth in the Guidebook, the NGPC determined that the inconsistent expert determinations regarding .COM/.CAM and .SHOP/.通販 were "not[] in the best interest of the New gTLD Program and the Internet community" and directed ICANN staff to establish a process whereby the ICDR would appoint a three-member panel to re-evaluate those expert determinations.<sup>175</sup>

116. ICANN contends that Vistaprint has identified no Articles or Bylaws provision violated by the Board in exercising its independent judgment to intervene with respect to inconsistent determinations in certain SCO cases, but not with respect to the single expert SCO determination regarding .WEBS/.WEB. The Board was justified in exercising its discretion to intervene with respect to the inconsistent expert determinations regarding .COM/.CAM, .CAR/.CARS and .SHOP/.通販 - the Board acted to bring certainty to multiple and differing expert determinations on String Confusion Objections regarding the same strings.<sup>176</sup> That justification was not present with respect to the single *Vistaprint SCO* determination at issue here. Thus, ICANN contends Vistaprint was not treated differently than other similarly-situated gTLD applicants.

117. Timing: Finally, ICANN also states that the time for Vistaprint to challenge the Guidebook and its standards has past. The current version of the Guidebook was published on June 4, 2012 following an extensive review process, including public comment on multiple drafts.<sup>177</sup> Despite having ample opportunity, Vistaprint did not object to the Guidebook at the time it was implemented. If Vistaprint had concerns related to the issues it now raises, it should have pursued them at the time, not years later and only after receiving the determination in the *Vistaprint SCO*. ICANN quotes the *Booking.com Final Declaration*, where the IRP stated,

*"the time has long since passed for Booking.com or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to the establishment of the string similarity review process, including Booking.com's claims that specific elements of the process and the Board decisions to implement those elements are inconsistent with ICANN's Articles and Bylaws. Any such claims, even if they had any merit, are long since time-barred by the 30-day limitation period set out in Article IV, Section 3(3) of the Bylaws."*<sup>178</sup>

118. ICANN states that while the Guidebook process at issue in this case is different for the

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<sup>172</sup> See BGC Determination on Reconsideration Request 13-10, at 11.

<sup>173</sup> See Rationale for NGPC Resolution 2014.02.05.NG02, at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en> (last accessed Sept. 15, 2015).

<sup>174</sup> See <https://www.icann.org/public-comments/sco-rramework-principles-2014-02-11-en> (last accessed Sept. 15, 2015).

<sup>175</sup> ICANN's First Additional Submission, ¶ 16; see NGPC Resolution 2014.1 0.12.NG02, at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-1-0-12-en#2.b> (last accessed Sept. 15, 2015).

<sup>176</sup> ICANN's First Additional Submission, ¶ 18.

<sup>177</sup> ICANN's First Additional Response, ¶ 27.

<sup>178</sup> *Booking.com final Declaration*, ¶ 129.

process at issue in the *Booking.com IRP* – the SCO process rather than the string similarity review process – the Booking.com IRP panel's reasoning applies equally. ICANN argues that because both processes were developed years ago, as part of the development of the Guidebook, challenges to both are time-barred.<sup>179</sup>

## V. Analysis and Findings

### a. IRP Panel's Authority

119. Standard of Review: The IRP Panel has benefited from the parties' submissions on this issue, noting their agreement as to the Panel's primary task: comparing contested actions (or inactions)<sup>180</sup> of ICANN's Board to its Articles and Bylaws and declaring whether the Board has acted consistently with them. Yet when considering this Panel's comparative task, the parties disagree as to the level of deference to be accorded by the Panel in assessing the Board's actions or inactions.

120. Vistaprint has sought independent review through this IRP, claiming that it has been "harmed" (i.e., its .WEBS application has not been allowed to proceed and has been placed in a Contention Set) by the Board's alleged violation of the Articles and Bylaws. In accordance with Article IV, § 3.2 of the Bylaws:

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

121. As noted above, Article IV, § 1 of the Bylaws emphasizes that the IRP is an accountability mechanism:

*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.*

122. The Bylaws in Article IV, § 3.4 detail the IRP Panel's charge and issues to be considered in a defined standard of review:

*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*

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<sup>179</sup> ICANN's First Additional Submission, ¶ 28.

<sup>180</sup> Bylaws, Art. IV, § 3.11(c) ("The IRP Panel shall have the authority to...(c) declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws" (underlining added)).

- c. *did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*<sup>181</sup>

[Underlining added]

123. The Bylaws state the IRP Panel is “*charged*” with “*comparing*” contested actions of the Board to the Articles and Bylaws and “*declaring*” whether the Board has acted consistently with them. The Panel is to focus, in particular, on whether the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, and exercised independent judgment in taking a decision believed to be in the best interests of ICANN. In the IRP Panel’s view this more detailed listing of a defined standard cannot be read to remove from the Panel’s remit the fundamental task of comparing actions or inactions of the Board with the Articles and Bylaws and declaring whether the Board has acted consistently or not. Instead, the defined standard provides a list of questions that can be asked, but not to the exclusion of other potential questions that might arise in a particular case as the Panel goes about its comparative work. For example, the particular circumstances may raise questions whether the Board acted in a transparent or non-discriminatory manner. In this regard, the ICANN Board’s discretion is limited by the Articles and Bylaws, and it is against the provisions of these instruments that the Board’s conduct must be measured.
124. The Panel agrees with ICANN’s statement that the Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board. However, this does not fundamentally alter the lens through which the Panel must view its comparative task. As Vistaprint has urged, the IRP is the only accountability mechanism by which ICANN holds itself accountable through *independent third-party review* of its actions or inactions. Nothing in the Bylaws specifies that the IRP Panel’s review must be founded on a deferential standard, as ICANN has asserted. Such a standard would undermine the Panel’s primary goal of ensuring accountability on the part of ICANN and its Board, and would be incompatible with ICANN’s commitment to maintain and improve robust mechanisms for accountability, as required by ICANN’s Affirmation of Commitments, Bylaws and core values.

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<sup>181</sup> The Supplementary Rules provide similarly in section 1 that the IRP is designed “to review ICANN Board actions or inactions alleged to be inconsistent with ICANN’s Bylaws or Articles of Incorporation” with the standard of review set forth in section 8:

*8. Standard of Review*

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

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

125. The IRP Panel is aware that three other IRP panels have considered this issue of standard of review and degree of deference to be accorded, if any, when assessing the conduct of ICANN’s Board. All of them have reached the same conclusion: the Board’s conduct is to be reviewed and appraised by the IRP Panel using an objective and independent standard, without any presumption of correctness.<sup>182</sup> As the IRP Panel reasoned in the *ICM Registry Final Declaration*:

*ICANN is no ordinary non-profit California corporation. The Government of the United States vested regulatory authority of vast dimension and pervasive global reach in ICANN. In “recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization” – including ICANN – ICANN is charged with “promoting the global public interest in the operational stability of the Internet...” ICANN “shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law...” Thus, while a California corporation, it is governed particularly by the terms of its Articles of Incorporation and Bylaws, as the law of California allows. Those Articles and Bylaws, which require ICANN to carry out its activities in conformity with relevant principles of international law, do not specify or imply that the International Review Process provided for shall (or shall not) accord deference to the decisions of the ICANN Board. The fact that the Board is empowered to exercise its judgment in the application of ICANN’s sometimes competing core values does not necessarily import that that judgment must be treated deferentially by the IRP. In the view of the Panel, the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially. The business judgment rule of the law of California, applicable to directors of California corporations, profit and nonprofit, in the case of ICANN is to be treated as a default rule that might be called upon in the absence of relevant provisions of ICANN’s Articles and Bylaws and of specific representations of ICANN...that bear on the propriety of its conduct. In the instant case, it is those Articles and Bylaws, and those representations, measured against the facts as the Panel finds them, which are determinative.<sup>183</sup>*

126. The IRP Panel here agrees with this analysis. Moreover, Article IV, §3.21 of the Bylaws provides that “declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value” (underlining added). The IRP Panel recognizes that there is unanimity on the issue of degree of deference, as found by the three IRP panels that have previously considered it. The declarations of those panels have precedential value. The Panel considers that the question on this issue is now settled. Therefore, in this IRP the ICANN Board’s conduct is to be reviewed and appraised by this Panel objectively and independently, without any presumption of correctness.

127. On a related point as to the scope of the IRP Panel’s review, the Panel agrees with ICANN’s point of emphasis that, because the Panel’s review is limited to addressing challenges to conduct by ICANN’s Board, the Panel is not tasked with reviewing the

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<sup>182</sup> *ICM Registry Final Declaration*, ¶ 136 (“the judgments of the ICANN Board are to be reviewed and appraised by the Panel objectively, not deferentially”); *Booking.com final Declaration*, ¶ 111 (“the IRP Panel is charged with ‘objectively’ determining whether or not the Board’s actions are in fact consistent with the Articles, Bylaws and Guidebook, which the Panel understands as requiring that the Board’s conduct be appraised independently, and without any presumption of correctness.”); Final Declaration of the IRP Panel in *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-2013-001083, ¶ 76 (July 9, 2015) (“*DCA Final Declaration*”), at <https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf> (last accessed on Sept. 15, 2015) (“The Panel therefore concludes that the “standard of review” in this IRP is a *de novo*, objective and independent one, which does not require any presumption of correctness”).

<sup>183</sup> *ICM Registry Final Declaration*, ¶ 136.

actions or decisions of ICANN staff or other third parties who may be involved in ICANN activities or provide services to ICANN (such as the ICDR or the experts in the *Vistaprint SCO*). With this in mind, and with the focus on the Board, the only *affirmative* action of the Board in relation to Vistaprint's .WEBS gTLD application was through the BGC, which denied Vistaprint's Reconsideration Request.<sup>184</sup> ICANN states that "the sole Board action that Vistaprint has identified in this case is the Board Governance Committee's ('BGC') rejection of Vistaprint's Reconsideration Request, which sought reconsideration of the Expert Determination."<sup>185</sup> It appears that ICANN's focus in this statement is on affirmative action taken by the BGC in rejecting Vistaprint's Reconsideration Request; however, this does not eliminate the IRP Panel's consideration of whether, in the circumstances, inaction (or omission) by the BGC or the full ICANN Board in relation to the issues raised by Vistaprint's application would be considered a potential violation of the Articles or Bylaws.

128. As discussed below, the Panel considers that a significant question in this IRP concerns one of "omission" – the ICANN Board, through the BGC or otherwise, did not provide relief to Vistaprint in the form of an additional review mechanism, as it did to certain other parties who were the subject of an adverse SCO determination.
129. IRP declaration binding or non-binding: As noted above, Vistaprint contends that the outcome of this IRP is binding on ICANN, and that any other result would be incompatible with ICANN's obligation to maintain and improve robust mechanisms for accountability. ICANN, on the other hand, contends that the IRP Panel's declaration is intended to be advisory and non-binding.
130. In analyzing this issue, the IRP Panel has carefully reviewed the three charter instruments that give the Panel its authority to act in this case: the Bylaws, the Supplementary Procedures, and the ICDR Rules. The Panel views that it is important to distinguish between (i) the findings of the Panel on the question of whether the ICANN Board's conduct is consistent (or not) with the Articles and Bylaws, and (ii) any consequent remedial measures to be considered as a result of those findings, at least insofar as those

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<sup>184</sup> The BGC is a committee of the Board established pursuant to Article XII, § 1 of the Bylaws. Article IV, § 2.3 of the Bylaws provide for the delegation of the Board's authority to the BGC to consider Requests for Reconsideration and indicate that the BGC 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.

The BGC has discretion to decide whether to issue a final decision or make a recommendation to ICANN's Board. In this case, the BGC decided to make a final determination on Vistaprint's RFR.

<sup>185</sup> ICANN's First Additional Submission, ¶ 4. By contrast to the IRP Panel's focus on the Board's conduct, the BGC in its decision on Vistaprint's Reconsideration request considered the action or inaction of ICANN staff and third parties providing services to ICANN (i.e., the ICDR and SCO experts).

measures would direct the Board to take or not take any action or decision. The Panel considers that, as to the first point, the findings of the Panel on whether the Board has acted in a manner that is consistent (or not) with the Articles or Bylaws is akin to a finding of breach/liability by a court in a contested legal case. This determination by the Panel is “binding” in the sense that ICANN’s Board cannot overrule the Panel’s declaration on this point or later decide for itself that it disagrees with the Panel and that there was no inconsistency with (or violation of) the Articles and Bylaws. However, when it comes to the question of whether or not the IRP Panel can *require* that ICANN’s Board implement any form of redress based on a finding of violation, here, the Panel believes that it can only raise remedial measures to be considered by the Board in an advisory, non-binding manner. The Panel concludes that this distinction – between a “binding” declaration on the violation question and a “non-binding” declaration when it comes to recommending that the Board stay or take any action – is most consistent with the terms and spirit of the charter instruments upon which the Panel’s jurisdiction is based, and avoids conflating these two aspects of the Panel’s role.

131. The IRP Panel shares some of Vistaprint’s concerns about the efficacy of the IRP as an accountability mechanism if any affirmative relief that might be considered appropriate by the Panel is considered non-binding on ICANN’s Board (see discussion below); nevertheless, the Panel determines on the basis of the charter instruments, as well as the drafting history of those documents, that its declaration is binding only with respect to the finding of compliance or not with the Articles and Bylaws, and non-binding with respect to any measures that the Panel might recommend the Board take or refrain from taking. The Panel’s Declaration will have “precedential value” and will possibly be made publicly available on ICANN’s website.<sup>186</sup> Thus, the declaration of violation (or not), even without the ability to order binding relief vis-à-vis ICANN’s Board, will carry more weight than would be the case if the IRP was a confidential procedure with decisions that carried no precedential value.

132. To the extent that there is ambiguity on the nature of the IRP Panel’s declaration (which perhaps could have been avoided in the first place), it is because there is ambiguity and an apparent contradiction created by some of the key terms of the three charter instruments – the Bylaws, the Supplementary Procedures, and the ICDR Rules. In terms of a potential interpretive hierarchy for these documents – to the extent that such hierarchy is relevant – the Bylaws can be said to have created the IRP and its terms of reference: the IRP is established as an accountability mechanism pursuant to the Bylaws, Article IV, § 3 (Independent Review of Board Actions). Article IV, § 3.8 of the Bylaws, in turn, delegates to the “IRP Provider” the task of establishing rules and procedures that are supposed to be consistent with Article IV, § 3:

*Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures,*

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<sup>186</sup> The Panel observes the final declarations in all previous IRPs that have gone to decision, as well as declarations concerning procedure and interim relief, have been posted on ICANN’s website. In this respect, Supplementary Procedures, Rule 10(c) provides that a “Declaration may be made public only with the consent of all parties or as required by law”. However, ICANN has also agreed in Rule 10(c) that subject to the redaction of confidential information or unforeseen circumstances, “ICANN will consent to publication of a Declaration if the other party so requests.”



which shall implement and be consistent with this Section 3.

[Underlining added]

133. Thus, the Supplementary Procedures and ICDR Rules were established pursuant to Article IV, § 3.8 of the Bylaws; however, the requirement of consistency as between the texts was imperfectly implemented, at least with respect to the ICDR Rules, as discussed below. As between the Supplementary Procedures and the ICDR Rules, the Supplementary Procedures will control, as provided in Supplementary Rule 2:

*In the event there is any inconsistency between these Supplementary Procedures and the Rules, these Supplementary Procedures will govern.*

134. The Bylaws in Article IV, § 3.4 provide that the Panel *shall* be charged with *comparing* contested actions of the Board to the Articles and Bylaws, and with “*declaring*” whether the Board has acted consistently with them. The IRP panel in the *ICM Registry Final Declaration* stressed that the IRP panel’s task is “to ‘declare’, not to ‘decide’ or to ‘determine’.”<sup>187</sup> However, the word “declare”, alone, does not conclusively answer the question of whether the IRP’s declaration (or any part of it) is binding or not. “To declare” means “*to announce or express something clearly and publicly, especially officially.*”<sup>188</sup> Declarations can and do serve as the predicate for binding or non-binding consequences in different contexts. For example, a declaratory relief action – in which a court resolves legal uncertainty by determining the rights of parties under a contract or statute without ordering anything be done or awarding damages – can have a binding result because it may later preclude a lawsuit by one of the parties to the declaratory lawsuit. Further, in a non-legal context, “declaring” a state of emergency in a particular state or country can have binding consequences. Thus, the word “declare,” in itself, does not answer the issue.

135. Moreover, nothing in the Bylaws, Supplementary Procedures or ICDR Rules suggests that the IRP Panel’s declaration is non-binding with respect to the Panel’s core task of deciding whether the Board did, or did not, comply the Articles or Bylaws. There is no provision that states the ICANN Board can reconsider this independent and important declaration. To the contrary, the ICDR Rules, which apply to the IRP proceedings, can be read to suggest that both the Panel’s finding of compliance (or not) by ICANN’s Board, and the Panel’s possible reference to any remedial measures, are binding on ICANN. As Vistaprint indicates, the preamble of the ICDR Rules provide that “[a] *dispute can be submitted to an arbitral tribunal for a final and binding decision,*” and Article 30(1) of those Rules specifies that “[a]wards shall be made in writing by the arbitral tribunal and shall be final and binding on the parties” (*emphasis added*).

136. However, these terms in the ICDR Rules arguably contradict specific provisions of the Bylaws and Supplementary Procedures, at least to the extent that they are read to cover any measures that the IRP Panel would direct the ICANN Board to take or not take. In this way, if there is a contradiction between the texts, the Bylaws and Supplemental rules would govern. However, focusing on the relief that the Panel is authorized to grant

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<sup>187</sup> *ICM Registry Final Declaration*, ¶ 133.

<sup>188</sup> Cambridge English Online Dictionary (United States version).

provides a decisive clue as to the question of whether the IRP declaration, or any part of it, is binding or non-binding, and produces a faithful and harmonized reading of all the texts. While the Bylaws and Supplementary Procedures say nothing to limit the binding effect of the IRP Panel’s “liability” declaration, they both contain provisions that expressly indicate the Panel may only “recommend” that the Board stay or take any action or decision. In particular, the Bylaws in Article IV, § 3.11 sets out the IRP Panel’s authority in terms of alternative actions that it may take once it has an IRP case before it:

*The IRP Panel shall have the authority to:*

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

*[Underlining added]<sup>189</sup>*

137. Article IV, § 3.11(a) provides that the Panel may summarily dismiss an IRP request in certain circumstances. A fair reading of this term is that an IRP panel’s dismissal of a case pursuant to § 3.11(a) would be a binding decision, both for the party who brought the IRP request and for ICANN. In other words, ICANN could not require that the IRP panel take-up the case again once it has been dismissed by the panel.<sup>190</sup> Further, the IRP panel can “request additional written submissions” from the parties (including the Board) or certain third parties. Here again, a fair reading of this term is that it is not subject to any review by ICANN Board before it can be implemented and is therefore binding on those who receive such a request.

138. By comparison, any form of relief whereby the IRP Panel *would direct the Board* to take, or refrain from taking, any action or decision, as specified in § 3.11(d), must be “recommend[ed]” to the Board, which then “reviews and acts upon the opinion of the IRP.”<sup>191</sup> The Panel’s authority is thus limited (and in this sense non-binding) when it

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<sup>189</sup> Bylaws, Art. IV, § 3.11.

<sup>190</sup> Supplementary Rule 6 provides similarly that:

*An IRP Panel may summarily dismiss any request for Independent Review where the requestor has not demonstrated that it meets the standing requirements for initiating the Independent Review.*

*Summary dismissal of a request for Independent Review is also appropriate where a prior IRP on the same issue has concluded through Declaration.*

*An IRP Panel may also dismiss a querulous, frivolous or vexatious request for Independent Review.*

<sup>191</sup> Supplementary Rule 7 provides similarly (as regards interim measures of protection) that:

*An IRP Panel may recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the IRP declaration. Where the IRP*

(Continued...)

comes to providing ICANN's Board with potential courses of action or inaction in view of Board's non-compliance with the Articles or Bylaws.<sup>192</sup>

139. Several other provisions of the Bylaws and Supplementary Procedures can be fairly read to relate to decisions of the IRP panel that would be considered binding, even as to ICANN's Board. Article IV, § 3.18 provides “[t]he 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.” There is no mechanism for the Board to overrule the IRP panel's designation as to which party is the prevailing party. Article IV, § 3.20 provides “[t]he IRP Panel may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets.” A fair reading of this provision is that the IRP panel's decision concerning such questions of confidentiality would be binding on all parties (including ICANN) in the IRP procedure. Consolidating IRP requests and determining the timing for each IRP proceeding are also decisions of the panel that are binding and not subject to review. Finally, Supplemental Procedures, Rule 11, directs that “[t]he IRP Panel shall fix costs in its Declaration.” Here too, this decision of the IRP panel can be fairly read to be binding on the parties, including the Board.

140. Thus, the IRP Panel's authority to render binding or non-binding decisions, orders or relief can be considered in relation to four basic areas:

(i) summary dismissals by the IRP Panel (for different reasons as stated in the Bylaws and Supplementary Procedures) are final and binding on the parties. There is no mechanism for appeal of such dismissals and they have precedential value.

(ii) the designation of prevailing party, fixing costs for the IRP, and other orders in support of the IRP proceedings (e.g., timing of proceedings, confidentiality, requests for additional submissions, consolidation of IRP cases) are binding decisions of the IRP Panel, with no review by the Board or any other body.

(iii) the IRP Panel's declaration of whether or not the Board has acted consistently with the provisions of the Articles and Bylaws is final and binding, in the sense that there is no appeal on this point to ICANN's Board or any other body; it is a final determination and has precedential value.

(iv) any form of relief in which the IRP Panel would direct the Board to take, or refrain from taking, any action or decision is only a recommendation to the Board. In this sense,

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*Panel is not yet comprised, the Chair of the standing panel may provide a recommendation on the stay of any action or decision*

<sup>192</sup> The word “recommend” is also not free of ambiguity. For example, Article 47 of the ICSID Convention (concerning investor-State arbitration) provides in relevant part that “the Tribunal may, if it considers that the circumstances so require, *recommend* any provisional measures which should be taken to preserve the respective rights of either party” (emphasis added). The use of the word “recommend” in this context may refer to an order of the Tribunal that is intended to be binding on the parties. Nevertheless, in the context of the IRP, the Panel considers that use of the word “recommend” conveys that the Panel's direction of any action or inaction on the part of the Board is a non-binding reference.

such a recommendation is not binding on the Board. The Bylaws and Supplementary Procedures provide specific and detailed guidance in this key area – i.e., relief that would require the Board to take or refraining from taking any action or decision – where the IRP Panel’s decisions would not be binding on the Board, but would serve only as a recommendation to be reviewed and acted upon by the Board.

141. The other decisions of the IRP panel, as outlined above and including the declaration of whether or not the Board violated the Articles and Bylaws, would be binding, consistent with the Bylaws, Supplementary Procedures and ICDR Rule Article 30(1). This approach provides a reading that harmonizes the terms of the three charter instruments. It also provides interpretive context for Article IV, § 3.21 of the Bylaws, providing that “[w]here feasible, the Board shall consider the IRP Panel declaration at the Board’s next meeting.” The IRP panel in the *ICM Registry Final Declaration* stated that “[t]his relaxed temporal proviso to do no more than ‘consider’ the IRP declaration, and to do so at the next meeting of the Board ‘where feasible’, emphasizes that it is not binding.”<sup>193</sup> However, consistent with the analysis above, the IRP Panel here reads this statement in the *ICM Registry Final Declaration* to relate only to an IRP panel’s decision to “recommend” that the Board take, or refrain from taking, any action or decision. It does not relate to the other decisions or duties of the IRP panel, as explained above.
142. Vistaprint contends that the second sentence in Article IV, § 3.21 – providing “[t]he declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value” – which was added in April 2013 after the issuance of *ICM Registry Final Declaration*, was a change that supports the view that the IRP panel’s outcome, including any references to remedial relief, is binding. However, the Panel agrees with ICANN’s view that “a declaration clearly can be both non-binding and also final and precedential.”<sup>194</sup> Further, the preparatory work and drafting history for the relevant provisions of the Bylaws relating to the IRP procedure indicate the intention for a non-binding procedure with respect to the Panel’s authority to advise the Board to take, or refrain from taking, any action or decision. As summarized in ICANN’s contentions above, ICANN has submitted evidence that those who were initially involved in establishing the IRP considered that it should be an advisory, non-binding procedure *in relation to any policies that the Board might be requested to consider and implement by the IRP panel*.<sup>195</sup>
143. Thus, the Bylaws and the Supplementary Procedures draw a line: when the measures that an IRP panel might consider as a result of its core task require that the Board take or refrain from taking any action or decision, the panel may only “recommend” this course of action. On the other hand, if the IRP panel decides that the Board had violated its Articles or Bylaws, or if the panel decides to dismiss the IRP request, designate a prevailing party,

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<sup>193</sup> *ICM Registry Final Declaration*, ¶ 133.

<sup>194</sup> ICANN’s First Additional Submission, ¶ 39.

<sup>195</sup> ICANN’s First Additional Submission, ¶ 38, n 53 (Vint Cerf, the former Chair of ICANN’s Board, testified in the *ICM IRP* that the independent review panel “is an advisory panel. It makes recommendations to the board but the board has the ultimate responsibility *for deciding policy for ICANN*” (*italics added*)). *ICM v. ICANN*, Hearing Transcript, September 23, 2009, at 592:7-11).

set conditions for confidentiality, consolidate IRP requests, request additional written submissions or fix costs, a fair reading of the Bylaws, Supplementary Procedures and ICDR Rules relevant to these determinations would be that the IRP panel's decisions on these matters are binding on both parties, including ICANN.

144. Finally, in view of Article IV, § 3.21 providing that the declarations of IRP panels are final and *have precedential value*, the IRP Panel here recognizes that, in addition to the *ICM Registry Final Declaration*, two other IRP panels have considered the question of the IRP panel's authority. In the *Booking.com Final Declaration*, the IRP panel focused on the independent and objective standard of review to be applied to the panel's core task of assessing whether the Board's actions were consistent with the Articles, Bylaws and Guidebook.<sup>196</sup> However, the IRP panel in *Booking.com*, as ICANN acknowledges in its Second Additional Response, did not directly address whether an IRP panel may issue a binding declaration (although ICANN contends that the panel implicitly acknowledged that it cannot).<sup>197</sup>
145. In the *DCA Final Declaration*, the IRP panel addressed directly the question of whether or not the panel's declaration was binding. The panel ruled that its declarations, both as to the procedure and the merits of the case, were binding. The IRP panel in that case raised some of the same concerns that Vistaprint has raised here<sup>198</sup>:

*110. ICANN points to the extensive public and expert input that preceded the formulation of the Supplementary Procedures. The Panel would have expected, were a mere advisory decision, opinion or declaration the objective of the IRP, that this intent be clearly articulated somewhere in the Bylaws or the Supplementary Procedures. In the Panel's view, this could have easily been done.*

*111. The force of the foregoing textual and construction considerations as pointing to the binding effect of the Panel's decisions and declarations are reinforced by two factors: 1) the exclusive nature of the IRP whereby the non-binding argument would be clearly in contradiction with such a factor; and, 2) the special, unique, and publicly important function of ICANN. As explained before, ICANN is not an ordinary private non-profit entity deciding for its own sake who it wishes to conduct business with, and who it does not. ICANN rather, is the steward of a highly valuable and important international resource.*

[...]

*115. Moreover, assuming for the sake of argument that it is acceptable for ICANN to adopt a remedial scheme with no teeth, the Panel is of the opinion that, at a minimum, the IRP should forthrightly explain and acknowledge that the process is merely advisory. This would at least let parties know before embarking on a potentially expensive process that a victory before the IRP panel may be ignored by ICANN. And, a straightforward acknowledgment that the IRP process is intended to be merely advisory might lead to a legislative or executive initiative to create a truly independent compulsory process.*

146. The IRP panel in the *DCA Final Declaration* also emphasized that, according to the terms of the Guidebook, applicants for a new gTLD string waive their right to resort to the courts

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<sup>196</sup> *Booking.com Final Declaration*, ¶¶ 104-115.

<sup>197</sup> ICANN's Second Additional Response, ¶ 29.

<sup>198</sup> *DCA Final Declaration*, ¶ 23 (quoting *DCA Declaration on the IRP Procedure* (Aug. 14, 2014)).

and therefore the IRP serves as the ultimate accountability mechanism for them:<sup>199</sup>

*15. The IRP is the only independent third party process that allows review of board actions to ensure their consistency with the Articles of Incorporation or Bylaws. As already explained in this Panel's 14 August 2014 Declaration on the IRP Procedure ("August 2014 Declaration"), the avenues of accountability for applicants that have disputes with ICANN do not include resort to the courts. Applications for gTLD delegations are governed by ICANN's Guidebook, which provides that applicants waive all right to resort to the courts:*

*"Applicant hereby releases ICANN [...] from any and all claims that arise out of, are based upon, or are in any way related to, any action or failure to act by ICANN [...] in connection with ICANN's review of this application, investigation, or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN ON THE BASIS OF ANY OTHER LEGAL CLAIM."*

*Thus, assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, then the only and ultimate "accountability" remedy for an applicant is the IRP.*

147. The IRP Panel in this case considers that the IRP panel in the *DCA Final Declaration*, and Vistaprint, have made several forceful arguments in favor of why the outcome of the IRP should be considered binding, especially to ensure the efficacy of the IRP as an accountability mechanism. Vistaprint has also urged that the IRP, at least with respect to applicants for new gTLD strings, is not merely a corporate accountability mechanism aimed at *internal* stakeholders, but operates to assess ICANN's responsibilities in relation to *external* third parties. And the outcome of the IRP is binding on these third parties, even if it is not binding on ICANN and its Board. In similar circumstances, it would not be uncommon that individuals, companies or even governments, would agree to participate in dispute resolution processes with third parties that are binding, at least *inter partes*.
148. However, as explained above, the IRP Panel concludes that the distinction between a "binding" declaration on the violation/liability question (and certain other matters as discussed above), on the one hand, and a "non-binding" declaration when it comes to recommending that the Board take or refrain from taking any action or decision, on the other hand, is most faithful to the terms and spirit of the charter instruments upon which the Panel's jurisdiction is based. To the extent that there is any disagreement with this approach, it is for ICANN to consider additional steps to address any ambiguities that might remain concerning the authority of the IRP panel and the legal effect of the IRP declaration.
149. Authority to award affirmative relief: The IRP Panel's analysis on this issue is closely related to, and dependent upon, its analysis of the binding vs. non-binding issue

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<sup>199</sup> *DCA Final Declaration*, ¶ 38 (quoting *DCA Third Declaration on IRP Procedure*).

immediately above. To the extent that the IRP Panel renders any form of relief whereby the Panel would direct the Board to take, or refrain from taking, any action or decision, that relief must be “recommend[ed]” to the Board, which then “reviews and acts upon the opinion of the IRP,” as specified in § 3.11(d) of the Bylaws. Relatedly, Supplementary Rule 7 provides that an “IRP Panel may recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the IRP declaration.” Consequently, the IRP Panel finds that it does not have authority to render affirmative relief requiring ICANN’s Board to take, or refrain from taking, any action or decision.

**b. SCO Proceedings Claim**

150. The IRP Panel has carefully reviewed Vistaprint’s arguments concerning ICANN’s alleged violation of its Articles and Bylaws in relation to this *SCO Proceedings Claim*. However, as stated above, the IRP Panel does not review the actions or inactions of ICANN’s staff or any third parties, such as the ICDR or SCO experts, who provided services to ICANN. Instead, the IRP Panel’s focus is on ICANN’s Board and the BGC, which was delegated responsibility from the full Board to consider Vistaprint’s Request for Reconsideration.<sup>200</sup>
151. The core of Vistaprint *SCO Proceedings Claim* is that ICANN’s Board improperly disregarded accumulated errors made by the ICDR and the SCO experts (especially the Third Expert) during the *Vistaprint SCO* proceedings, and in this way ICANN violated Article IV of the Articles of Incorporation and certain provisions of the Bylaws, as well as the Guidebook.
152. Vistaprint contends that ICANN’s Board must verify whether or not, by accepting the SCO expert determination, it is acting consistent with its obligations under its Articles, Bylaws and Affirmation of Commitments,<sup>201</sup> and that ICANN would be in violation of these obligations if it were to blindly accept an expert determination in circumstances where the ICDR and/or the expert had failed to comply with the Guidebook and the New gTLD Objections Procedure and/or the ICDR Rules for SCOs, or where a panel had failed to correctly apply the standard set by ICANN.<sup>202</sup>
153. The IRP Panel disagrees with Vistaprint’s contention on this point. Although the Guidebook provides in § 5.1 that ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program, there is no affirmative duty stated in the Articles, Bylaws or

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<sup>200</sup> Article IV, §2.15 of ICANN’s Bylaws provides that:

*For all Reconsideration Requests brought regarding staff action or inaction, the Board Governance Committee shall be delegated the authority by the Board of Directors to make a final determination and recommendation on the matter. Board consideration of the recommendation is not required. As the Board Governance Committee deems necessary, it may make recommendation to the Board for consideration and action. The Board Governance Committee’s determination on staff action or inaction shall be posted on the Website. The Board Governance Committee’s determination is final and establishes precedential value.*

<sup>201</sup> Request, ¶ 6.

<sup>202</sup> Request, ¶ 6.

Guidebook that the Board must to review the result in each and every SCO case. Instead, the Guidebook § 3.4.6 provides that:

*The findings of the [SCO] panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.*<sup>203</sup>

[Underlining added]

154. In the case of an adverse SCO determination, the applicant for a new gTLD string is not left without any recourse. Module 6.6 of the Guidebook provides that an applicant “*MAY UTILIZE ANY ACCOUNTABILITY MECHANISM SET FORTH IN ICANN’S BYLAWS FOR PURPOSES OF CHALLENGING ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION*” (no emphasis added).<sup>204</sup>

155. The Reconsideration Request is an “accountability mechanism” that can be invoked by a gTLD applicant, as it was used by Vistaprint, to challenge the result in SCO proceedings. Article IV, § 2.2 of the Bylaws provides that:

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

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

156. In line with Article IV, § 2.2 of the Bylaws, Vistaprint submitted its Reconsideration Request to challenge actions of the ICDR and SCO experts, claiming their conduct contradicted ICANN policies. While Guidebook, § 5.1 permits ICANN’s Board to individually consider new gTLD applications, such as through the RFR mechanism, it does not require that the Board do so in each and every case, *sua sponte*. The Guidebook, § 5.1, provides in relevant part 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 ... the use of an ICANN accountability mechanism.*<sup>205</sup>

157. The IRP Panel determines that in the absence of a party’s recourse to an accountability

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<sup>203</sup> Guidebook, § 3.4.6. The New gTLD Objections Procedure further provides in Article 2(d) that:

*The ‘Expert Determination’ is the decision upon the merits of the Objection that is rendered by a Panel in a proceeding conducted under this Procedure and the applicable DRSP Rules that are identified in Article 4(b).*

<sup>204</sup> Guidebook, § 6.6.

<sup>205</sup> Guidebook, § 5.1.



mechanism such as the RFR, the ICANN Board has no affirmative duty to review the result in any particular SCO case.

158. In this case, Vistaprint did submit a Reconsideration Request and the BGC did engage in a detailed review of the alleged errors in process and procedures raised by Vistaprint. The BGC explained what it considered to be the scope of its review, which is consistent with the mandate in Article IV, § 2.2 of the Bylaws for review of “staff actions or inactions that contradict established ICANN policies”:

*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 to evaluate the Panel’s substantive conclusion that the Requester’s applications for .WEBS are confusingly similar to the Requester’s application for .WEB. Rather, the BGC’s review is limited to whether the Panel violated any established policy or process in reaching that Determination.*<sup>206</sup>

159. In contrast to Vistaprint’s claim that the BGC failed to perform its task properly and “turned a blind eye to the appointed Panel’s lack of independence and impartiality”, the IRP Panel finds that the BGC provided in its 19-page decision a detailed analysis of (i) the allegations concerning whether the ICDR violated its processes or procedures governing the SCO proceedings and the appointment of, and challenges to, the experts, and (ii) the questions regarding whether the Third Expert properly applied the burden of proof and the substantive standard for evaluating a String Confusion Objection. On these points, the IRP Panel finds that the BGC’s analysis shows serious consideration of the issues raised by Vistaprint and, to an important degree, reflects the IRP Panel’s own analysis.<sup>207</sup>

160. For example, in relation to Vistaprint’s contention that the First Expert failed to maintain independence and impartiality, in violation of Article 13(c) of the New gTLD Objections Procedure, the BGC reasoned:

*The only evidence the [Vistaprint] cites in support of its argument that Mr. Koh failed to maintain his independence during the proceeding is the ICDR’s statement that it had decided to remove Mr. Koh “due to a new conflict.” (Request, Section 10, Pgs. 9-10.) The ICDR did not provide any further information as to the nature of the conflict. Conflicts can take many forms, such as scheduling or personal conflicts unrelated to the proceedings. There is no evidence that the conflict that inflicted*

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<sup>206</sup> BGC Determination, p. 7, Request, Annex 26.

<sup>207</sup> Vistaprint also asserted that based on the Third Expert’s determination in the *Vistaprint SCO*, the Third Expert lacked impartiality and independence, or alternatively lacked qualification. On a complete review of the entire record in this case, including the SCO proceedings and the Reconsideration Request before the BGC, the IRP Panel has found no foundation for these allegations against the Third Expert, and no violation of ICANN’s Articles or Bylaws in the manner in which the BGC handled these assertions. The BGC found that these assertions were insufficient to merit reconsideration, as stated in its RFR decision, in footnote 10:

*[Vistaprint] concludes with the following claim: “The cursory nature of the Decision and the arbitrary and selective discussion of the parties’ arguments by the Panel show the lack of either the Panel’s independence and impartiality or the Panel’s appropriate qualifications.” (Request, Section 10, Pg. 23.) [Vistaprint’s] assertion is not accompanied by any discussion or further explanation for how ICANN processes were purportedly violated. [Vistaprint’s] summary conclusions are without merit and insufficient to warrant reconsideration. Furthermore, [Vistaprint’s] claim that the Determination was “cursory” and only contained “selective discussion of the parties’ arguments” is unsupported. The Determination was eighteen pages long and contained more than six pages of discussion of the parties’ arguments and evidence.*

*Mr. Koh was related to the instant proceedings or otherwise impacted Mr. Koh's ability to remain impartial and independent.*

*Furthermore, [Vistaprint] neither claims to have been, nor presents any evidence of being, materially and adversely affected by Mr. Koh's removal. Indeed, had [Vistaprint] successfully challenged Mr. Koh for lack of independence at the time he was removed, the remedy under the applicable ICDR procedures would have been the removal of Mr. Koh, which was the result here.<sup>208</sup>*

161. The BGC concluded that Vistaprint provided no evidence of being materially and adversely affected by the First Expert's removal. Moreover, to the extent that there was an impact due to the First Expert stepping down, this conduct was attributable to the First Expert, not to the ICDR. As the BGC states, had there been a concern about the First Expert's lack of independence, the remedy under the applicable ICDR procedures would have been the removal of that expert, which is what actually occurred.

162. Vistaprint also argued that the BGC conducted no investigation as to the nature of the new conflict that confronted the First Expert and instead "developed baseless hypotheses for the other reasons that could have led to this Panel stepping down."<sup>209</sup> In this respect, perhaps the BGC could have sought to develop evidence on this issue by inquiring with the ICDR about the circumstances concerning the First Expert. Article IV, § 2.13 of the Bylaws provides the BGC "may also request information relevant to the request from third parties," but it does not require that the BGC do so. However, it would not have changed the outcome, as noted above. It is also noteworthy that Article IV, § 2.2(b) of the Bylaws provides that a party may submit a Reconsideration Request to the extent that the party has been adversely affected by:

*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.*

163. Here, there was no showing that Vistaprint attempted to develop information concerning how the removal of the First Expert might have had a material and adverse impact on Vistaprint, or information concerning the reasons for the First Expert stepping down.

164. Vistaprint also alleged that the ICDR unjustifiably accepted a challenge to the Second Expert, or created the circumstances for such a challenge. As the BGC noted, the procedure governing challenges to experts is set forth in Article 2 § 3 of the ICDR's New gTLD Objections Procedure, which provides:

*Upon review of the challenge the DRSP in its sole discretion shall make the decision on the challenge and advise the parties of its decision.*

165. The BGC reasoned that while Vistaprint may disagree with the ICDR's decision to accept the challenge to the Second Expert, that decision was in the "sole discretion" of the ICDR and it was not the BGC's role to second guess the ICDR's discretion in this regard.<sup>210</sup> The IRP Panel finds that the BGC violated no Article, Bylaw or the Guidebook by taking this

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<sup>208</sup> BGC Determination, p. 12, Request, Annex 26.

<sup>209</sup> Request, ¶ 77.

<sup>210</sup> BGC Determination, p. 12, Request, Annex 26.

view. However, it does appear that the ICDR might have avoided the challenge situation in the first place by appointing someone other than the Second Expert – who had served as the expert panel in previous SCO case administered by the ICDR – given that the basis for the challenge against him, which the ICDR accepted, was his involvement in the previous case.

166. Vistaprint also claimed that the Third Expert incorrectly applied both the burden of proof and the substantive criteria for evaluating the String Confusion Objection. The BGC rejected these contentions and the IRP Panel agrees. The BGC’s decision looked closely at the standard to be applied in String Confusion Objection proceedings, as well as how the Third Expert extensively detailed the support for his conclusion that the .WEBS string so nearly resembles .WEB – visually, aurally and in meaning – that it is likely to cause confusion.<sup>211</sup> In this respect, the BGC did not violate ICANN’s Articles or Bylaws by determining that the Third Expert properly applied the relevant Guidebook policy for String Confusion Objections. As the BGC noted,

*The Requester’s disagreement as to whether the standards should have resulted in a finding in favor of Requester’s application does not mean that the panel violated any policy or process in reaching the decision.*<sup>212</sup>

167. The Guidebook provides that the following evaluation standard is to be applied in String Confusion Objection proceedings:

*3.5.1 String Confusion Objection*

*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 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.*

168. Vistaprint in its Request emphasized that ICANN has indicated that the SCO test sets a high bar<sup>213</sup>:

22. *At various times, ICANN has indicated that the string confusion test sets a high bar:*

- “[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.[...] 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 [sic] for a first mover.” (fn. omitted)

- “Policy discussions indicate that the most important reason to disallow similar strings as top-level domain names is to protect Internet users from the increased exposure to fraud and other risks that could ensue from confusion of one string for another. This reasoning must be balanced against unreasonable exclusion of top-level labels and denial of applications where considerable investment

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<sup>211</sup> BGC Recommendation, pp. 15-18, Request, Annex 26.

<sup>212</sup> BGC Determination, p. 17, Request, Annex 26.

<sup>213</sup> Request, ¶¶ 22-23.

*has already been made. As the top-level grows in number of registrations, drawing too large a circle of “similarity protection” around each existing string will quickly result in the unnecessary depletion of available names. The unnecessary exclusion of names would also tend to stifle the opportunity of community representation at the top-level and innovation.” (fn. omitted)*

23. ICANN’s high standard for dealing with string confusion objections has been explicitly confirmed by the NGPC, which states that in the Applicant Guidebook ‘similar’ means:

*“strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone. During the policy development and implementation design phases of the New gTLD Program, aural and conceptual string similarities were considered. These types of similarity were discussed at length, yet ultimately not agreed to be used as a basis for the analysis of the string similarity panels’ consideration because on balance, this could have unanticipated results in limiting the expansion of the DNS as well as the reach and utility of the Internet. [...] The NGPC reflected on existing string similarity in the DNS and considered the positive and negative impacts. The NGPC observed that numerous examples of similar strings, including singulars and plurals exist within the DNS at the second level. Many of these are not registered to or operated by the same registrant. There are thousands of examples [...]” (NGPC Resolution 2014.02.056. NG02).*

169. The passages quoted by Vistaprint, referencing ICANN materials and a resolution of the NGPC, arguably provide useful context in applying the test for String Confusion Objections. After citing these passages, however, Vistaprint contends in its Request that

*“[a]s a result, two strings should only be placed in a contention set if they are so similar that they would create a probability of user confusion were both to be delegated into the root zone, and the finding of confusing similarity must be balanced against the risk of unreasonable exclusion of top-level labels and the denial of applications” (no underlining added).<sup>214</sup>*

170. However, the problem with the test as posited by Vistaprint is that it would add a balancing element that is not in the Guidebook’s standard: according to Vistaprint the finding of confusing similarity must be balanced against the risk of unreasonable exclusion of top-level labels and the denial of applications. This part of the standard (as advanced by Vistaprint) is not in the Guidebook, although the concerns it represents were reflected in the other ICANN materials. The Guidebook standard is as follows:

*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.*

171. There is no reference in this standard to balancing the likelihood of confusion against the needs to promote competition and to guard against the unreasonable exclusion of top-level strings. While it might be advisable to consider whether the standard for String Confusion Objections should be revised to incorporate such a balancing test, these elements were not in the policy that was applied by the Third Expert. Nor was there a violation, by the BGC or the ICANN Board, of any Articles or Bylaws in formulating the SCO standard as it was formulated (based on community input), and in determining that the Third Expert properly applied this policy.

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<sup>214</sup> Request, ¶ 24.

172. ICANN has argued that the time for Vistaprint to have objected to the Guidebook and its SCO policy has long since passed. Vistaprint has responded that it contests the *implementation* of the Guidebook and its *policies*, not just the policies themselves. Even assuming that the Guidebook's policies could be challenged at this point, the IRP Panel finds that the relevant policies, such as the standard for evaluating String Confusion Objections, do not violate any of ICANN's Articles or Bylaws reflecting principles such as good faith, fairness, transparency and accountability. However, the Panel does agree with ICANN that the time for challenging the Guidebook's standard for evaluating String Confusion Objections – which was developed in an open process and with extensive input – has passed.
173. Vistaprint has also complained that it was not provided with the opportunity to appeal the Third Expert's decision on the merits, such that the BGC or some other entity would re-evaluate the Expert's string confusion determination. As noted above, the BGC's review focused on whether the ICDR and the Third Expert properly applied the relevant rules and policies, not on whether the BGC, if it had considered the matter *de novo*, would have found string confusion as between the .WEBS and .WEB strings.
174. The IRP Panel finds that the lack of an appeal mechanism to contest the merits of the Third Expert's SCO determination is not, in itself, a violation of ICANN's Articles or Bylaws. ICANN's commitment through its Articles and Bylaws to act in good faith and with accountability and transparency, and to apply documented policies neutrally, objectively and fairly, does not require that it must have designed the SCO mechanism so that the result of a string confusion determination would be subject to a right of appeal. Other significant dispute resolution systems – such as the international legal regime for commercial arbitration regarding awards as final and binding<sup>215</sup> – do not normally provide for a right of appeal on the merits.
175. In respect of Vistaprint's *SCO Proceedings Claim*, the IRP Panel denies each of Vistaprint's claims concerning ICANN's alleged breaches of obligations under the Articles, Bylaws and Affirmation of Commitments, as follows:
- (1) Vistaprint claims that ICANN failed to comply with its obligation under Article 4 of the Articles and IV § 3.4 of the Bylaws to act in good faith with due diligence and independent judgment by failing to provide due process to Vistaprint's .WEBS applications.<sup>216</sup> The IRP Panel denies Vistaprint's claim that Vistaprint was not given a fair opportunity to present its case; was deprived of procedural fairness and the opportunity to be heard by an independent panel applying the appropriate rules; and was not given any meaningful opportunity for remedy or redress once the SCO determination was made, even in the RFR procedure.
  - (2) Vistaprint claims ICANN failed to comply with its obligation under Article I § 2.8 to neutrally, objectively and fairly apply documented policies as established in the

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<sup>215</sup> See *Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*.

<sup>216</sup> Request, ¶¶ 69-71.

Guidebook and Bylaws.<sup>217</sup> As discussed above, the IRP Panel rejects Vistaprint's claim that the *Vistaprint SCO* determination – finding that the .WEBS and .WEB gTLD strings are confusingly similar – is contradictory to ICANN's policy for String Confusion Objections as established in the Guidebook.

- (3) Vistaprint claims ICANN failed to comply with its obligation to act fairly and with due diligence and independent judgment as called for under Article 4 of the Articles of Incorporation, Articles I § 2.8 and IV § 3.4 of the Bylaws by accepting the SCO determination made by the Third Expert, who was allegedly not independent and impartial.<sup>218</sup> As noted above, the IRP Panel finds that there was no failure of the BGC to act with due diligence and independent judgment, and to act in good faith as required by ICANN's Bylaws and Articles, when it determined that Vistaprint's claim – that the Third Expert was not independent and impartial and/or was not appropriately qualified – did not merit reconsideration.
- (4) Vistaprint claims that ICANN failed to comply with its obligations under the Article 4 of the Articles, and Article I §§ 2.7 and 2.8 and Article III § 1 of the Bylaws (and Article 9.1 of the Affirmation of Commitments) to act fairly and transparently by failing to disclose/perform any efforts to optimize the service that the ICDR provides in the New gTLD Program.<sup>219</sup> The IRP Panel rejects Vistaprint's contention that the BGC's Reconsideration determination shows that the BGC made no investigation into Vistaprint's fundamental questions about the Third Expert's arbitrariness, lack of independence, partiality, inappropriate qualification, or that the BGC did not exercise due diligence in making its determination on this issue.
- (5) Vistaprint claims ICANN failed to comply with its obligation to remain accountable under Articles I § 2.10 and IV § 1 of the Bylaws (and Articles 3(a) and 9.1 of the Affirmation of Commitments) by failing to provide any remedy for its mistreatment of Vistaprint's gTLD applications.<sup>220</sup> The IRP Panel disagrees with Vistaprint's claim that ICANN's Board and the BGC adopted the Third Expert's SCO determination without examining whether it was made in accordance with ICANN's policy and fundamental principles under its Articles and Bylaws. In particular, as described above, the IRP Panel rejects Vistaprint's claim that the *Vistaprint SCO* determination is contradictory to ICANN's policy as established in the Guidebook and agrees with the BGC's analysis on this issue. Regarding Vistaprint's contention that ICANN should have created a review mechanism for challenging the substance of SCO expert determinations, as discussed above, the IRP Panel finds that the lack of such a general appeal mechanism creates no inconsistency with ICANN's Articles or Bylaws.
- (6) Vistaprint claims ICANN failed to promote competition and innovation under Articles I § 2.2 (and Article 3(c) of the Affirmation of Commitments) by accepting the Third

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<sup>217</sup> Request, ¶ 72.

<sup>218</sup> Request, ¶ 73.

<sup>219</sup> Request, ¶¶ 52 and 77.

<sup>220</sup> Request, ¶¶ 78-79.

Expert's determination.<sup>221</sup> Finally, the IRP Panel disagrees with Vistaprint's contention that the Board's acceptance of the determination in the *Vistaprint SCO* was contrary to ICANN's Bylaws because it was contrary to the interests of competition and consumers.

### c. Disparate Treatment Claim

176. Vistaprint's final claim is one that raises a close question for this IRP Panel. Vistaprint contends that ICANN's Board discriminated against Vistaprint through the Board's (and the BGC's) acceptance of the Third Expert's determination in the *Vistaprint SCO*, while allowing other gTLD applications with equally serious string similarity concerns to proceed to delegation<sup>222</sup>, or permitting still other applications that were subject to an adverse SCO determination to go through a separate additional review mechanism.

177. The IRP Panel agrees with Vistaprint's statement that the "IRP Panel's mandate includes a review as to whether or not ICANN's Board discriminates in its interventions on SCO expert determinations."<sup>223</sup> As discussed above, in the Guidebook, § 5.1, ICANN has reserved 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:

*....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....*<sup>224</sup>

178. However, as a counterbalance against this reserved power to individually consider new gTLD applications, the ICANN Board must also comply with Article II, § 3 of ICANN's Bylaws, providing for non-discriminatory treatment:

#### *Section 3 (Non-Discriminatory Treatment)*

*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.*

179. As Vistaprint maintains in its First Additional Submission, "[w]hen the ICANN Board individually considers an application, it must make sure that it does not treat applicants inequitably and that it does not discriminate among applicants."<sup>225</sup>

180. As discussed above in relation to standard of review, the IRP Panel considers that the Board's actions or omissions in this area of alleged non-discriminatory treatment bear the scrutiny of independent and objective review, without any presumption of correctness. Moreover, ICANN's Bylaws in Article I, § 2 set out its core values that should guide the

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<sup>221</sup> Request, ¶ 80.

<sup>222</sup> ICANN has permitted the delegation of the .car and .cars gTLDs, the .auto and .autos gTLDs, the .accountant and .accountants gTLDs, the fan and fans gTLDs, the .gift and .gifts gTLDs, the .loan and .loans gTLDs, the .new and news gTLDs and the .work and .works gTLDs.

<sup>223</sup> Vistaprint's Second Additional Submission, ¶ 20.

<sup>224</sup> Guidebook, § 5.1.

<sup>225</sup> Vistaprint's First Additional Submission, ¶ 31.

decisions and actions of ICANN, including the requirement, when balancing among competing core values, to exercise judgment to determine which core values are the most relevant and how they apply to the specific circumstances at hand. Of particular relevance to Vistaprint's disparate treatment claim are the core values set out in §§ 2.8 and 2.9:

*8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*

\* \* \* \*

*10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.*

*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.*

*[Underlining added]*

181. Vistaprint's disparate treatment claim is based on the following allegations:

- On June 25, 2013, the NGPC, a sub-committee of ICANN's Board, determined in Resolution 2013.06.25.NG07 that no changes were needed to the existing mechanisms in the Guidebook to address potential consumer confusion from allowing singular and plural versions of the same gTLD string. The NGPC had addressed this issue in response to advice from the ICANN's Government Advisory Committee ("GAC") that due to potential consumer confusion, the Board should "reconsider its decision to allow singular and plural version of the same strings."
- On February 5, 2014, the day before Vistaprint submitted its Reconsideration Request to the BGC on February 6, 2014, the NGPC approved Resolution 2014.02.05.NG02, which directed ICANN's President to initiate a public comment period on framework principles of a potential review mechanism to address perceived inconsistent String Confusion Objection expert determinations. The NGPC resolution provides in relevant part:

*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.

[Underlining added]

- Vistaprint emphasizes that ICANN's Board (through the NGPC) took this decision the day before Vistaprint filed its Reconsideration Request; however, this did not prevent the BGC from denying Vistaprint's RFR less than one month later without considering whether such a review mechanism might also be appropriate for dealing with the SCO determination involving .WEBS/.WEB.<sup>226</sup>
- Vistaprint's Reconsideration Request and the BGC's decision on that Request rendered on February 27, 2014 contain no reference to the concerns that had been raised both by the BGC (on October 10, 2013 in a prior RFR determination) and the NGPC in its February 5, 2014 resolution concerning inconsistent expert SCO determinations, some of which involved plural and singular versions of the same gTLD string. Neither Vistaprint nor the BGC raised any discussion of disparate treatment at that time. The BGC's determined that its decision on Vistaprint's Reconsideration Request "shall be final and does not require Board (or NGPC) consideration."<sup>227</sup>
- On October 12, 2014, approximately 8 months after the BGC's decision on Vistaprint's Reconsideration Request, and after Vistaprint had filed its Request in this IRP (in June 2014), the NGPC approved Resolution 2014.10.12.NG02, in which it identified certain SCO expert determinations "as not being in the best interest of the New gTLD Program and the Internet community," and directed ICANN's President to establish processes and procedures to re-evaluate certain previous SCO expert determinations. Resolution 2014.10.12.NG02 also stated in its rationale:

*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*

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<sup>226</sup> Request, ¶ 52.

<sup>227</sup> BGC Recommendation, p. 19, Request, Annex 26.

*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.*

*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.*

*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.*

- In view of the NGPC's Resolution 2014.10.12.NG02, Vistaprint describes its disparate treatment claim in its First Additional Submission as follows:

*13 .... Since the filing of Vistaprint's request for IRP, the ICANN Board clarified how the string similarity standard must be applied. In its resolutions of 12 October 2014, the ICANN Board identified certain SCO determinations "as not being in the best interest of the New gTLD Program and the Internet community" and set out the rules for a re-evaluation of these SCO determinations (fn. omitted):*

- *A first SCO determination that needed re-evaluation is the SCO determination in which ICDR's expert accepted Verisign Inc.'s objection to United TLD Holdco Ltd. ('United TLD')'s application for .cam. We refer to this SCO determination as the 'United TLD Determination'. In the United TLD Determination, ICDR's appointed expert found United TLD's application for .cam confusingly similar to Verisign Inc. ('Verisign')'s .com gTLD (RM 23). The ICANN Board decided that (i) the United TLD Determination was not in the best interest of the New gTLD Program and the Internet community and (ii) a new three-member panel must be established to re-evaluate the United TLD Determination (fn. omitted).*

*Verisign had also raised a SCO on the basis of its .com gTLD against the application for .cam by Dot Agency Limited and the application for .cam by AC Webconnecting Holding B.V. In both cases, the appointed experts determined that no confusing similarity existed between the .cam and .com strings (fn. omitted). We refer to these SCO determinations as the 'Related .cam/.com Determinations'. The ICANN Board decided that the Related .cam/.com Determinations need no*

re-evaluation. In addition, the ICANN Board recommended that the three-member panel charged with re-evaluating the United TLD Determination must review the Related .cam/.com Determinations as background (fn. omitted).

- Another SCO determination that needed re-evaluation is the determination in which ICDR's appointed expert accepted Commercial Connect LLC's objection to Amazon EU S.à.r.l. ('Amazon')'s application for .通販 (which means .onlineshopping in Japanese) (fn. omitted). We refer to this SCO determination as the 'Onlineshopping Determination'. ICDR's appointed expert found in the Onlineshopping Determination that Amazon's application for .通販 was confusingly similar to Commercial Connect LLC's application for .shop. Commercial Connect LLC also invoked its application for .shop in a SCO against Top Level Domain Holdings Limited's application .购物 (which means 'shop' in Chinese). ICDR's appointed expert rejected the latter SCO (fn. omitted). We refer to this SCO determination as the 'Related shop/.shop Determination'. The ICANN Board decided that a three-member panel needs to re-evaluate the Onlineshopping Determination and that no re-evaluation is needed for the Related shop/.shop Determination. The ICANN Board decided that the Related shop/.shop Determination must be reviewed as background by the three-member panel that is charged with re-evaluating the Onlineshopping Determination (fn. omitted).

14. The ICANN Board's recommendations to the three-member panels charged with the re-evaluation of the United TLD Determination and the Onlineshopping Determination are clear. Related determinations – involving the same gTLD string(s) and finding that there is no confusing similarity – will not be re-evaluated and must be taken into account in the re-evaluations.

15. Upon instigation of the ICANN Board, ICANN had developed the same process for re-evaluating the SCO determination in which ICDR's appointed expert accepted Charleston Road Registry Inc. ('CRR')'s objection to DERCars, LLC's application for .cars. We refer to this SCO determination as the 'DERCars Determination'. In the DERCars Determination, ICDR's appointed expert found DERCars, LLC's application for .cars confusingly similar to CRR's application for .car. CRR had also objected to the applications for .cars by Uniregistry, Corp. and Koko Castle, LLC, claiming confusing similarity with CRR's application for .car. The latter objections by CRR were not successful. ICANN decided that DERCars, LLC should be given the option of having the DERCars Determination reviewed. ICANN was not allowing a review of the other SCO determinations involving .car and .cars (fn. omitted).

16. The above shows that ICANN and its Board have always decided in favor of co-existence of 'similar' strings. The ICANN Board explicitly allowed singular and plural gTLD strings to co-exist (fn. omitted). To support this view, the ICANN Board referred to the existence of thousands of examples of singular and plurals within the DNS at second level, which are not registered to or operated by the same registrant. The ICANN Board inter alia referred to the co-existing car.com and cars.com (fn. omitted).

17. Why did the ICANN Board intervene in the DERCars determination – involving the strings .car and .cars – but refused to intervene in the SCO Determination involving .web and .webs? In view of the small number of SCO Determinations finding confusing similarity between two strings (fn. omitted), it is a true mystery why the ICANN Board intervened in some matters, but refused to do so in the SCO determinations on Vistaprint's applications for .webs.

18. If anything, the .webs/.web string pair is less similar than the .cars/.car string pair. Cars is commonly used as the plural for car. Web, however, commonly refers to the world wide web, and as such, it is not normally a word where the plural form would be used.

182. Vistaprint contends that ICANN cannot justify the disparate treatment described above. While Vistaprint recognizes that ICANN's Board intervened to address perceived inconsistent or otherwise unreasonable SCO expert determinations, ICANN failed to explain why the SCO determination on Vistaprint's .WEBS applications was not just as unreasonable as the SCO expert determinations involving .cars/.car, .cam/.com, and 通販

/.shop.

183. In response to Vistaprint's disparate treatment claim, ICANN contends that ICANN's Board only intervened with respect to certain SCO expert determinations because there had been several independent expert determinations regarding the same strings that were seemingly inconsistent with one another. ICANN states that is not the case with respect to Vistaprint's applications, as no other expert determinations were issued regarding the similarity of .WEB and .WEBS.<sup>228</sup> ICANN further urges that the Board was justified in exercising its discretion to intervene with respect to the inconsistent SCO expert determinations regarding .COM/.CAM, .CAR/.CARS and .SHOP/.通販, because the Board acted to bring certainty to differing SCO expert determinations regarding the same strings.<sup>229</sup> However, this justification was not present with respect to the single *Vistaprint SCO*.
184. Finally, ICANN stated that "Vistaprint has identified no Articles or Bylaws provision violated by the ICANN Board *in exercising its independent judgment to intervene with respect to certain inconsistent expert determinations on string confusion objections unrelated to this matter, but not with respect to the single Expert Determination regarding .WEB/.WEBS*" (italics added).<sup>230</sup>
185. The IRP Panel has considered carefully the parties' contentions regarding Vistaprint's disparate treatment claim. The Panel finds that, contrary to what ICANN has stated above, ICANN's Board did not have an opportunity to "exercise its independent judgment" – in particular, in view of its decisions to implement an additional review mechanism for certain other inconsistent SCO expert determinations – to consider specifically whether it should intervene with respect to the adverse SCO expert determination involving Vistaprint's .WEBS applications.
186. It is clear that ICANN's Board, through the BGC and the NGPC, was aware of the concerns involving inconsistent decisions in SCO proceedings when it decided Vistaprint's Reconsideration Request in February 2014. The NGPC, on the day (February 5, 2014) before Vistaprint filed its Reconsideration Request and in response to a request from the BGC, initiated a public comment period on framework principles for a potential review mechanism to address perceived inconsistent SCO expert determinations. However, the BGC's decision on the Reconsideration Request rendered on February 27, 2014 made no mention of these issues.<sup>231</sup> By comparison, there is no evidence that

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<sup>228</sup> ICANN's First Additional Submission, ¶ 5.

<sup>229</sup> ICANN's First Additional Submission, ¶ 18.

<sup>230</sup> ICANN's Second Additional submission, ¶ 21.

<sup>231</sup> In this regard, the IRP panel in the *Booking.com final Declaration* (¶ 119) quoted Mr. Sadowsky, a member of the Board's NGPC committee, commenting on the Reconsideration process as follows:

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

Vistaprint was aware of these issues at the time it filed its Reconsideration Request on February 6, 2014. Vistaprint has raised them for the first time in a timely manner during the pendency of this IRP.

187. In accordance with Article 1, § 2 of the Bylaws, the Board *shall* exercise its judgment to determine which competing core values are most relevant and how they apply to arrive at a defensible balance among those values in relation to the case at hand. Given the timing of Vistaprint’s Reconsideration Request, and the timing of ICANN’s consultation process for potential review mechanisms to address inconsistent SCO expert determinations, this exercise of judgment by the Board has not yet occurred in the case of Vistaprint’s .WEBS gTLD applications.
188. Here, ICANN is subject to the requirements of Article II, § 3 of its Bylaws regarding non-discriminatory treatment, providing that it 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.” ICANN has provided additional relief to certain gTLD applicants who were subject to adverse decisions in String Confusion Objection cases. In those cases, the differences in the gTLD strings at issue were not too dissimilar from the .WEBS/.WEB gTLD strings. One of the cases in which ICANN agreed to provide an additional mechanism for review involved a string confusion objection for the .CAR/.CARS strings, which involve the singular vs. plural of the same string. Meanwhile, many other singular and plural variations of the same gTLD strings have been permitted to proceed to delegation, including AUTO and .AUTOS; .ACCOUNTANT and ACCOUNTANTS; .FAN and .FANS; .GIFT and .GIFTS; .LOAN and .LOANS; .NEW and .NEWS; and .WORK and .WORKS.
189. This IRP Panel, among its three members, could not agree – in regards to the specific circumstances of Vistaprint’s gTLD applications – whether the reasons offered by ICANN in its Resolution 2014.10.12.NG02 for refusing the “to expand the scope of the proposed review mechanism to include other [SCO] Expert Determinations” would meet the standard of non-discrimination imposed by Article II, § 3 of the Bylaws, as well as the relevant core values in Article 1, § 2 of the Bylaws (e.g., applying documented policies neutrally and objectively, with integrity and fairness). For instance, one view is that limiting the additional review mechanism to only those SCO cases in which there were inconsistent decisions is a sufficient reason for intervening in these cases, but not in other SCO cases involving similar singular vs. plural gTLD strings where the applicant received an adverse decision. On the other hand, another view is that the real focus should be on the developments involving single vs. plural gTLDs strings, including the inconsistency of decisions and the offering of additional review mechanism in certain cases, and the delegation of so many other single/plural variations of the same gTLD strings, which are, at least in this way, similarly situated to the circumstances of the .WEBS/.WEB strings.<sup>232</sup>

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<sup>232</sup> Regarding inconsistent decisions, Vistaprint quoted the statement dated October 8, 2014, of ICANN’s former Chief Strategy Officer and Senior Vice President of Stakeholders Relations, Kurt Pritz, who had apparently been leading the introduction of the New gTLD Program, concerning ICANN’s objection procedure:

(Continued...)

190. The IRP Panel is mindful that it should not substitute its judgment for that of ICANN's Board. The Board has not yet considered Vistaprint's claim of disparate treatment, and the arguments that ICANN makes through its counsel in this IRP do not serve as a substitute for the exercise of independent judgment by the Board. Without the exercise of judgment by ICANN's Board on this question of whether there is any inequitable or disparate treatment regarding Vistaprint's .WEBS gTLD applications, the Board would risk violating its Bylaws, including its core values. As the Emergency IRP Panel found in the *GCC Interim IRP Declaration*:

*The ICANN Board does not have an unfettered discretion in making decisions. In bringing its judgment to bear on an issue for decision, it must assess the applicability of different potentially conflicting core values and identify those which are most important, most relevant to the question to be decided. The balancing of the competing values must be seen as "defensible", that is it should be justified and supported by a reasoned analysis. The decision or action should be based on a reasoned judgment of the Board, not on an arbitrary exercise of discretion.*

*This obligation of the ICANN Board in its decision making is reinforced by the standard of review for the IRP process under Article IV, Section 3.4 of the Bylaws, quoted at paragraph 42 b. above, when the action of the Board is compared to the requirements under the Articles and Bylaws. The standard of review includes a consideration of whether the Board exercised due diligence and care in having a reasonable amount of facts before them and also whether the Board exercised its own independent judgment.*<sup>233</sup>

191. Here, the IRP Panel finds that due to the timing and scope of Vistaprint's Reconsideration Request (and this IRP proceeding), and the timing of ICANN's consultation process and subsequent NGPC resolution authorizing an additional review mechanism for certain gTLD applications that were the subject of adverse SCO decisions, the ICANN Board has not had the opportunity to exercise its judgment on the question of whether, in view of ICANN's Bylaw concerning non-discriminatory treatment and based on the particular

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*There is no doubt that the New gTLD Program objection results are inconsistent, and not predictable. The fact is most easily demonstrated in the 'string confusion,' objections where challenges to exactly the same strings yielded different results. [...] With globally diverse, multiple panelists invoking untried standards and questions of first impression in an industry with which they were not familiar and had little training, the panelists were bound to deliver inconsistent, unpredictable results. ICANN put no mechanism put [sic] into place to rationalize or normalize the answers. [...] It is my opinion that ICANN, having proven in the initial evaluation context that it could do so, should have implemented measures to create as much consistency as possible on the merits in the objection rulings, requiring DRSPs to educate and train their experts as to the specific (and only) standards to employ, and to review and correct aberrant results. The failure to do so resulted in violation of the overarching policy articulated by the GNSO and adopted by the Board at the outset of the new gTLD Program, as well as policies stated in the Bylaws and Articles of Incorporation concerning on discrimination, application of document policies neutrally, objectively and fairly, promotion of competition, and accountability." (fn. omitted).*

<sup>233</sup> See *GCC Interim IRP Declaration*, ¶¶ 76-77 ("Upon completion of the various procedures for evaluation and for objections under the Guidebook, the question of the approval of the applied for domain still went back to the NGPC, representing the ICANN Board, to make the decision to approve, without being bound by recommendation of the GAC, the Independent Objector or even the Expert Determination. Such a decision would appear to be caught by the requirements of Article 1, Section 2 of the Bylaws requiring the Board or the NGPC to consider and apply the competing values to the facts and to arrive at a defensible balance among those values" ¶ 90 (underlining added).

circumstances and developments noted above, such an additional review mechanism is appropriate following the SCO expert determination involving Vistaprint's .WEBS applications.<sup>234</sup> Accordingly, it follows that in response to Vistaprint's contentions of disparate treatment in this IRP, ICANN's Board – and not this Panel – should exercise its independent judgment on this issue, in light of all of the foregoing considerations.

## VI. Prevailing Party; Costs

192. Article IV, § 3.18 of ICANN's Bylaws requires that the IRP Panel "specifically designate the prevailing party." This designation is relevant to the allocation of costs, given that the same section of the Bylaws provides that the "party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider."

193. Article IV, § 3.18 of the Bylaws also states that "in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses."

194. Similarly, the Supplementary Procedures provide in Rule 11:

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

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

195. Here, Vistaprint engaged in the Cooperative Engagement Process, although the process did not resolve the issues between the parties. The "IRP Provider" is the ICDR, and, in accordance with the ICDR Rules, the costs to be allocated between the parties – what the

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<sup>234</sup> The IRP Panel observes that the NGPC, in its Resolution 2014.10.12.NG02, sought to address the issue of why certain SCO expert determinations should be sent back to the ICDR while others should not. In that resolution, the NGPC determined that to promote the goals of predictability and fairness, establishing a review mechanism more broadly may be appropriate as part of future rounds in the New gTLD Program. The NGPC stated that applicants may have already taken action in reliance on SCO expert determinations, including signing Registry Agreements, transitioning to delegation, withdrawing their applications, and requesting refunds. However, in this case Vistaprint does not fall within the category of applicants who have taken such actions in reliance. Instead, it is still asserting its claims in this IRP proceeding. In accordance with the Bylaws, Vistaprint is entitled to an exercise of the Board's independent judgment to determine, based on the facts of the case at hand and in view of ICANN's Bylaws concerning non-discriminatory treatment and core values, whether Vistaprint should be entitled to the additional review mechanism that was made available to certain other gTLD applicants.

Bylaws call the "costs of the IRP Provider", and the Supplementary Procedures call the "costs of the proceedings" – include the fees and expenses of the IRP Panel members and of the ICDR.

196. ICANN is the prevailing party in this IRP. This designation is confirmed by the Panel's decisions concerning Vistaprint's requests for relief in this IRP:

- Vistaprint requests that the Panel find ICANN breached its Articles, Bylaws, and the Guidebook. The Panel declares that ICANN's Board (including the BGC) did not violate the Articles, Bylaws and Guidebook.
- Vistaprint requests that the Panel require ICANN to reject the Third Expert's determination in the *Vistaprint SCO*, disregard the resulting "Contention Set", and allow Vistaprint's applications for .WEBS to proceed on their merits. The Panel determines that it does not have authority to order the relief requested by Vistaprint. In addition, the Panel declares that the Board (through the BGC) did not violate the Articles, Bylaws and Guidebook in regards to the BGC's handling of Vistaprint's Reconsideration Request.
- Vistaprint requests, in the alternative, that the Panel require ICANN to reject the *Vistaprint SCO* determination and organize a new procedure, in which a three-member panel would re-evaluate the Third Expert's decision taking into account (i) the ICANN Board's resolutions on singular and plural gTLDs, as well as the Board's resolutions on the DERCars SCO Determination, the United TLD Determination, and the Onlineshopping SCO Determination, and (ii) ICANN's decisions to delegate the following gTLDs: .CAR and .CARS; .AUTO and .AUTOS; .ACCOUNTANT and ACCOUNTANTS; .FAN and .FANS; .GIFT and .GIFTS; .LOAN and .LOANS; .NEW and .NEWS; and .WORK and .WORKS. The Panel determines that it does not have authority to order the relief requested by Vistaprint. In addition, the Panel recommends that ICANN's Board exercise its judgment on the question of whether an additional review mechanism is appropriate to re-evaluate the Third Expert's determination in the *Vistaprint SCO*, in view of ICANN's Bylaws concerning core values and non-discriminatory treatment, and based on the particular circumstances and developments noted in this Declaration, including (i) the *Vistaprint SCO* determination involving Vistaprint's .WEBS applications, (ii) the Board's (and NGPC's) resolutions on singular and plural gTLDs, and (iii) the Board's decisions to delegate numerous other singular/plural versions of the same gTLD strings.

197. The IRP Panel also recognizes that Vistaprint, through its Request and submissions, raised certain complex and significant issues and contributed to the "public interest" involving the New gTLD Program and the Independent Review Process. It is therefore appropriate and reasonable to divide the IRP costs over the parties in a 60% (Vistaprint) / 40% (ICANN) proportion.

FOR THE FOREGOING REASONS, the IRP Panel hereby:

- (1) Declares that Vistaprint's IRP Request is denied;
- (2) Designates ICANN as the prevailing party;



(3) Recommends that ICANN's Board exercise its judgment on the question of whether an additional review mechanism is appropriate to re-evaluate the Third Expert's determination in the *Vistaprint SCO*, in view of ICANN's Bylaws concerning core values and non-discriminatory treatment, and based on the particular circumstances and developments noted in this Declaration, including (i) the *Vistaprint SCO* determination involving Vistaprint's .WEBS applications, (ii) the Board's (and NGPC's) resolutions on singular and plural gTLDs, and (iii) the Board's decisions to delegate numerous other singular/plural versions of the same gTLD strings;

(4) In view of the circumstances, Vistaprint shall bear 60% and ICANN shall bear 40% of the costs of the IRP Provider, including the fees and expenses of the IRP Panel members and the fees and expenses of the ICDR. The administrative fees and expenses of the ICDR, totaling US\$4,600.00 as well as the compensation and expenses of the Panelists totaling US\$229,167.70 are to be borne US\$140,260.62 by Vistaprint Limited and US\$93,507.08 by ICANN. Therefore, Vistaprint Limited shall pay to ICANN the amount of US\$21,076.76 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by ICANN upon demonstration that these incurred fees and costs have been paid; and

(5) 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.

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Siegfried H. Elsing  
Date:

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Geert Glas  
Date:



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Christopher Gibson  
Chair of the IRP Panel  
Date: 9 Oct. 2015

(3) Recommends that ICANN's Board exercise its judgment on the question of whether an additional review mechanism is appropriate to re-evaluate the Third Expert's determination in the *Vistaprint SCO*, in view of ICANN's Bylaws concerning core values and non-discriminatory treatment, and based on the particular circumstances and developments noted in this Declaration, including (i) the *Vistaprint SCO* determination involving Vistaprint's .WEBS applications, (ii) the Board's (and NGPC's) resolutions on singular and plural gTLDs, and (iii) the Board's decisions to delegate numerous other singular/plural versions of the same gTLD strings;

(4) In view of the circumstances, Vistaprint shall bear 60% and ICANN shall bear 40% of the costs of the IRP Provider, including the fees and expenses of the IRP Panel members and the fees and expenses of the ICDR. The administrative fees and expenses of the ICDR, totaling US\$4,600.00 as well as the compensation and expenses of the Panelists totaling US\$229,167.70 are to be borne US\$140,260.62 by Vistaprint Limited and US\$93,507.08 by ICANN. Therefore, Vistaprint Limited shall pay to ICANN the amount of US\$21,076.76 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by ICANN upon demonstration that these incurred fees and costs have been paid; and

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Siegfried H. Elsing  
Date: 9 October 2015

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Geert Glas  
Date:

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Christopher Gibson  
Chair of the IRP Panel  
Date:

(3) Recommends that ICANN's Board exercise its judgment on the question of whether an additional review mechanism is appropriate to re-evaluate the Third Expert's determination in the *Vistaprint SCO*, in view of ICANN's Bylaws concerning core values and non-discriminatory treatment, and based on the particular circumstances and developments noted in this Declaration, including (i) the *Vistaprint SCO* determination involving Vistaprint's .WEBS applications, (ii) the Board's (and NGPC's) resolutions on singular and plural gTLDs, and (iii) the Board's decisions to delegate numerous other singular/plural versions of the same gTLD strings;


(4) In view of the circumstances, Vistaprint shall bear 60% and ICANN shall bear 40% of the costs of the IRP Provider, including the fees and expenses of the IRP Panel members and the fees and expenses of the ICDR. The administrative fees and expenses of the ICDR, totaling US\$4,600.00 as well as the compensation and expenses of the Panelists totaling US\$229,167.70 are to be borne US\$140,260.62 by Vistaprint Limited and US\$93,507.08 by ICANN. Therefore, Vistaprint Limited shall pay to ICANN the amount of US\$21,076.76 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by ICANN upon demonstration that these incurred fees and costs have been paid; and

(5) 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.

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Siegfried H. Elsing

Date:



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Geert Glas

Date: 9 October 2015



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Christopher Gibson  
Chair of the IRP Panel

Date: 9 Oct. 2015

# **ANNEX S-3**

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

**ICDR Case No. 50 117 T 00224 08**

**In the Matter of an Independent Review Process:**

**ICM REGISTRY, LLC,**

**Claimant,**

**v.**

**INTERNET CORPORATION FOR ASSIGNED NAMES  
AND NUMBERS (“ICANN”),**

**Respondent**

**DECLARATION OF THE INDEPENDENT REVIEW PANEL**

**Judge Stephen M. Schwebel, *Presiding***  
**Mr. Jan Paulsson**  
**Judge Dickran Tevrizian**

**February 19, 2010**

## **PART ONE: INTRODUCTION**

**1. From its beginning in 1965, an exchange over a telephone line between a computer at the Massachusetts Institute of Technology and a computer in California, to the communications colossus that the Internet has become, the Internet has constituted a transformative technology. Its protocols and domain name system standards and software were invented, perfected, and for some 25 years before the formation of the Internet Corporation for Assigned Names and Numbers (ICANN), essentially overseen, by a small group of researchers working under contracts financed by agencies of the Government of the United States of America, most notably by the late Professor Jon Postel of the Information Sciences Institute of the University of Southern California and Dr. Vinton Cerf, founder of the Internet Society. Dr. Cerf, later the distinguished leader of ICANN, played a major role in the early development of the Internet and has continued to do so. European research centers also contributed. From the origin of the Internet domain name system in 1980 until the incorporation of ICANN in 1998, a small community of American computer scientists controlled the management of Internet identifiers. However the utility, reach, influence and exponential growth of the Internet quickly became quintessentially international. In 1998, in recognition of that fact, but at the same time determined to keep that management within the private sector rather than to subject it to the ponderous and politicized processes of international governmental control, the U.S. Department of Commerce, which then contracted on behalf of the U.S. Government with the managers of the Internet, transferred operational responsibility over the protocol and domain names system of the Internet to the newly formed Internet Corporation for Assigned Names and Numbers (“ICANN”).**

**2. ICANN, according to Article 3 of its Articles of Incorporation of November 21, 1998, is a nonprofit public benefit corporation organized under the California Nonprofit Public Benefit Corporation Law “In recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization...” ICANN is charged with**

**“promoting the global public interest in the operational stability of the Internet by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol (“IP”) address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system (“DNS”), including the development of**

**policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system...” (Claimant’s Exhibits, hereafter “C”, at C-4.)**

**ICANN was formed as a California corporation apparently because early proposals for it were prepared at the instance of Professor Postel, who lived and worked in Marina del Rey, California, which became the site of ICANN’s headquarters.**

**3. ICANN, Article 4 of its Articles of Incorporation provides,**

**“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.”**

**4. ICANN’s Bylaws, as amended effective May 29, 2008, in Section 1, define the mission of ICANN as that of coordination of the allocation and assignment**

**“of the three sets of unique identifiers for the Internet, ...(a) domain names forming a system referred to as “DNS”, (b) ...Internet protocol (“IP”) addresses and autonomous system (“AS”) numbers and (c) Protocol port and parameter numbers”. ICANN “coordinates the operation and evolution of the DNS root server system” as well as “policy development reasonably and appropriately related to these technical functions.” (C-5.)**

**5. Section 2 of ICANN’s Bylaws provides that, in performing its mission, core values shall apply, among them:**

**“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 interest 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.**

...

**“6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.**

...

**“8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.**

...

**“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.” (C-5.)**

**6. The Bylaws provide in Article II that the powers of ICANN shall be exercised and controlled by its Board, whose international composition, representative of various stakeholders, is otherwise detailed in the Bylaws. Article VI, Section 4.1 of the Bylaws provides that “no official of a national government or a multinational entity established by treaty or other agreement between national governments may serve as a Director”. They specify that “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.” ICANN is to operate in an open and transparent manner “and consistent with procedures designed to ensure fairness” (Article III, Section 1.) In those cases “where the policy action affects public policy concerns,” ICANN shall “request the opinion of the Governmental Advisory Committee and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board’s request” (Article III, Section 6).**



**7. Article IV of the Bylaws, Section 3, provides that: “ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.” Any person materially affected by a decision or action of the Board that he or she asserts “is inconsistent” with those Articles and Bylaws may submit a request for independent review which shall be referred to an Independent Review Panel (“IRP”). That Panel “shall be charged with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws”. “The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators...nominated by that provider.” The IRP shall have the authority to “declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or the Bylaws” and “recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP”. Section 3 further specifies that declarations of the IRP shall be in writing, based solely on the documentation and arguments of the parties, and shall “specifically designate the prevailing party.” The Section concludes by providing that, “Where feasible, the Board shall consider the IRP declaration at the Board’s next meeting.”**

**8. The international arbitration provider appointed by ICANN is the International Centre for Dispute Resolution (“ICDR”) of the American Arbitration Association. It appointed the members of the instant Independent Review Panel in September 2008. Thereafter exchanges of written pleadings and extensive exhibits took place, followed by five days of oral hearings in Washington, D.C. September 21-25, 2009.**

**9. Article XI of ICANN’s Bylaws provides, *inter alia*, for a Governmental Advisory Committee (“GAC”) 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”. It further provides that the Board shall notify the Chair of the GAC in a timely manner of any proposal raising public policy issues. “The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually**

acceptable solution.” If no such solution can be found, the Board will state in its final decision the reasons why the GAC’s advice was not followed.

## **PART TWO: FACTUAL BACKGROUND OF THE DISPUTE**

**10. The Domain Name System (“DNS”), a hierarchical name system, is at the heart of the Internet. At its summit is the so-called “root”, managed by ICANN, although the U.S. Department of Commerce retains the ultimate capacity of implementing decisions of ICANN to insert new top-level domains into the root. The “root zone file” is the list of top-level domains. Top-level domains (“TLDs”), are identified by readable, comprehensible, “user-friendly” addresses, such as “.com”, “.org”, and “.net”. There are “country-code TLDs” (ccTLDs), two letter codes that identify countries, such as .uk (United Kingdom), .jp (Japan), etc. There are generic TLDs (“gTLDs), which are subdivided into sponsored TLDs (“sTLDs”) and unsponsored TLDs (“gTLDs”). An unsponsored TLD operates under policies established by the global Internet community directly through ICANN, 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 is delegated, and carries out, policy-formulation responsibilities over matters concerning the TLD. Thus, under the root, top-level domains are divided into gTLDs such as .com, .net, and .info, and sTLDs such as .aero, .coop, and .museum. And there are ccTLDs, such as .fr (France). Second level domains, under the top-level domains, are legion; e.g., Microsoft.com, dassault.fr. While the global network of computers communicate with one another through a decentralized data routing mechanism, the Internet is centralized in its naming and numbering system. This system matches the unique Internet Protocol address of each computer in the world – a string of numbers – with a recognizable domain name. Computers around the world can communicate with one another through the Internet because their Internet Protocol addresses uniquely and reliably correlate with domain names.**

**11. When ICANN was formed in 1998, there were three generic TLDs: .com, .org, and .net. They were complemented by a few limited-use TLDs, .edu, .gov, .mil, and .int. Since its formation, ICANN has endeavored to introduce new TLDs. In 2000, ICANN opened an application process for the introduction of new gTLDs. This initial round was a preliminary effort to test a “proof of concept” in respect of new gTLDs. ICANN received forty-seven applications for both sponsored and unsponsored TLDs.**

**12. Among them was an application by the Claimant in these proceedings, ICM Registry (then under another ownership), for an unsponsored .XXX TLD,**

which would responsibly present “adult” entertainment (*i.e.*, pornographic entertainment). ICANN staff recommended that the Board not select .XXX during the “proof of concept” round because “it did not appear to meet unmet needs”, there was “controversy” surrounding the application, and the definition of benefits of .XXX was “poor”. It observed 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.” (C-127, p. 230.) In the event, the ICANN Board authorized ICANN’s President and General Counsel to commence contract negotiations with seven applicants including three sponsored TLDs, .museum, .aero and .coop. Agreements were “subject to further Board approval or ratification.” (Minutes of the Second Annual Meeting of the Board, November 16, 2000, ICANN Exhibit G.)

13. In 2003, the ICANN Board passed resolutions for the introduction of new sponsored TLDs in another Round. The Board resolved that “upon the successful completion of the sTLD selection process, an agreement reflecting the commercial and technical terms shall be negotiated.” (C-78.) It posted a “Request for Proposals” (“RFP”), which included an application form setting out the selection criteria that would be used to evaluate proposals. The RFP’s explanatory notes provided that the sponsorship criteria required “the proposed sTLD [to] address the needs and interest of a ‘clearly defined community’...which can benefit from the establishment of a TLD operating in a policy formulation environment in which the community would participate.” Applicants had to show that the Sponsored TLD Community was (a) “Precisely defined, so it can readily be determined which persons or entities make up that community” and (b) “Comprised of persons that have needs and interests in common but which are differentiated from those of the general global Internet community”. (ICANN, New gTLD Program, ICANN Exhibit N.) The sponsorship criteria further required applicants to provide an explanation of the Sponsoring Organization’s policy-formulation procedures. They additionally required the applicant to demonstrate “broad-based support” from the sponsored TLD community. None of the criteria explicitly addressed “morality” issues or the content of websites to be registered in the new sponsored domains.

14. ICANN in 2004 received ten sTLD applications, including that of ICM Registry of March 16, 2004 for a .XXX sTLD. ICM’s application was posted on ICANN’s website. Its application stated that it was to

[REDACTED]

and who are interested in the [REDACTED] (C-Confidential Exh. B.) The International Foundation for Online Responsibility (“IFFOR”), a Canadian organization whose creation by ICM was in process, was proposed to be ICM’s sponsoring organization. The President of ICM Registry, Stuart Lawley, a British entrepreneur, was to explain that the XXX sTLD is a

“significant step towards the goal of protecting children from adult content, and [to] facilitate the efforts of anyone who wishes to identify, filter or avoid adult content. Thus, the presence of “.XXX” in a web address would serve a dual role: both indicating to users that the website contained adult content, thereby allowing users to choose to avoid it, and also indicating to potential adult-entertainment consumers that the websites could be trusted to avoid questionable business practices.” (Lawley Witness Statement, para. 15.)

15. ICANN constituted an independent panel of experts (the “Evaluation Panel”) to review and recommend those sTLD applications that met the selection criteria. That Panel found that two of the ten applicants met all the selection criteria; that three met some of the criteria; and that four had deficiencies that could not be remedied within the applicant’s proposed framework. As for .XXX, the Evaluation Panel found that ICM was among the latter four; it fully met the technical and financial criteria but not some of the sponsorship criteria. The three-member Evaluation Panel, headed by Ms. Elizabeth Williams of Australia, that analyzed sponsorship and community questions did not believe that the .XXX application represented “a clearly defined community”; it found that “the extreme variability of 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 the community”. The Evaluation Panel further found that the lack of cohesion in the community and the planned involvement of child advocates and free expression interest groups would preclude effective formulation of policy for the community; it was unconvinced of sufficient support outside of North America; and “did not agree that the application added new value to the Internet name space”. Its critical evaluation of ICM’s application concluded that it fell into the category of those “whose deficiencies cannot be remedied with the applicant’s proposed framework” (C-110.)

16. Because only two of ten applicants were recommended by the Evaluation Panel, and because the Board remained desirous of expanding the number of sTLDs, the ICANN Board resolved to give the other sTLD applicants further opportunity to address deficiencies found by the

**Evaluation Panel. ICM Registry responded with an application revised as of December 7, 2004. It noted that the independent teams that evaluated the technical merits and business soundness of ICM's application had unreservedly recommended its approval. It submitted, contrary to the analysis of the Evaluation Panel, that ICM and IFFOR also met the sponsorship criteria. "Nonetheless, the Applicants fully understand that the topic of adult entertainment on the Internet is controversial. The Applicants also understand that the Board might be criticized whether it approves or disapproves the Proposal." (C-127, p. 176.) In accordance with ICANN's practice, ICM's application again was publicly posted on ICANN's website.**

**17. Following discussion of its application in the Board, ICM was invited to give a presentation to the Board, which it did in April 2005, in Mar del Plata, Argentina. Child protection and free speech advocates were among the representatives of ICM Registry. The Chairman of the Governmental Advisory Committee, Mohamed Sharil Tarmizi, was in attendance for part of the meeting as well as other meetings of the Board. ICM offered then and at ICANN meetings in Capetown (December 2004) and Luxembourg (July 2005) to discuss its proposal with the GAC or any of its members, a proposal that was not taken up (C-127, p. 231; C-170, p.2). In a letter of April 3, 2005, the GAC Chairman informed the ICANN President and CEO, Paul Twomey, that: "No GAC members have expressed specific reservations or comments, in the GAC, about applications for sTLDs in the current round." (C-158, p.1.) ICM's Mar del Plata presentation to the ICANN Board included the results of a poll conducted by XBiz in February 2005 of "adult" websites that asked: "What do you think of Internet suffixes (.sex, .xxx) to designate adult sites?" 22% of the responders checked, "A Horrible Idea"; 57% checked, "A Good Idea"; 21% checked, "It's No Big Deal Either Way". ICM, while recognizing that its proposal aroused some opposition in the adult entertainment community, maintained throughout that it fully met the RFP requirement of demonstrating that it had "broad-based support from the community to be represented". (C-45.)**

**18. The ICANN Board held a special meeting by teleconference on May 3, 2005, the Chairman of the ICANN Board, Dr. Vinton G. Cerf, presiding. The minutes record, in respect of the .XXX sTLD application, that there was broad discussion of whether ICM's application met the RFP criteria, "particularly relating to whether or not there was a 'sponsored community'". It was agreed to "discuss this issue" at the next Board meeting. (C-134.)**

**19. On June 1, 2005, the Board met by teleconference and after considerable discussion adopted the following resolutions, with a 6-3 vote in favor, 2 abstentions and 4 Board members absent:**

**“Resolved...the Board authorizes 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.”**

**“Resolved...if after entering into negotiations with the .XXX sTLD applicant the President and General Counsel are able to negotiate a set of proposed commercial and technical terms for a contractual arrangement, the President shall present such proposed terms to this board, for approval and authorization to enter into an agreement relating to the delegation of the sTLD.” (C-120.)**

**20. While a few of the other applications that were similarly cleared to enter into negotiations relating to proposed commercial and technical terms, e.g., those of .JOBS, and .MOBI, contained conditions, the foregoing resolutions relating to ICM Registry contained no conditions. The .JOBS resolution, for example, specified that**

**“the board authorizes the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms for the .JOBS sponsored top-level domain (sTLD) with the applicant. During these negotiations, the board requests that special consideration be taken as to how broad-based policy-making would be created for the sponsored community, and how this sTLD would be differentiated in the name space.”**

**In contrast, the .XXX resolutions do not refer to further negotiations concerning sponsorship, nor do the resolutions refer to further consideration by the Board of the matter of sponsorship. Upon the successful conclusion of the negotiation, the terms of an agreement with ICM Registry were to be presented to the Board “for approval and authorization to enter into an agreement relating to the delegation of the sTLD”.**

**21. At the meeting of the Governmental Advisory Committee in Luxembourg July 11-12, 2005, under the chairmanship of Mr. Tarmizi, the foregoing resolutions gave rise to comment. The minutes contain the following summary reports:**

**“The Netherlands, supported by several members, including Brazil, EC and Egypt, raised the point about what appears to be a change in policy as regards the evaluation for the .xxx TLD.**

**“On that issue, the Chair stressed that the Board came to a decision after a very difficult and intense debate which has included the moral aspects. He wondered what the GAC could have done in this context.**

**“Brazil asked clarification about the process to provide GAC advice to the ICANN Board and to consult relevant communities on matter such as the creation of new gTLDs. The general public was likely to assume that GAC had discussed and approved the proposal; otherwise GAC might be perceived as failing to address the matter. This is a public policy issue rather than a moral issue.**

**“Denmark commented on the fact that the issue of the creation of the .xxx extension should have been presented to the GAC as a public policy issue. EC drew attention to the 2000 Evaluation report on .xxx that had concluded negatively.**

**“France asked about the methodology to be followed for the evaluation of new gTLDs in future and if an early warning system could be put in place. Egypt wished to clarify whether the issue was the approval by ICANN or the apparent change in policy.**

**“USA remarked that GAC had several opportunities to raise questions, notably at Working Group level, as the process had been open for several years. In addition there are not currently sufficient resources in the WGI to put sufficient attention to it. We should be working on an adequate methodology for the future. Netherlands commented that the ICANN decision making process was not sufficiently transparent for GAC to know in time when to reach [sic; react] to proposals.**

**“The Chair thanked the GAC for these comments which will be given to the attention of the ICANN Board.” (C-139, p. 3.)**

**22. There followed a meeting of the GAC with the ICANN Board, at which the following statements are recorded in the summary minutes:**

**“Netherlands asked about the new criteria to be retained for new TLDs as it seems there was a shift in policy during the evaluation process.**

**“Mr. Twomey replied that there might be key policy differences due to learning experiences, for example it is now accepted not to put a limit on the number of new TLDs. He also noted that no comments had been received from governments regarding .xxx.**

**“Dr. Cerf added, taking the example of .xxx that there was a variety of proposals for TLDs before, including for this extension, but this time the way to cope with the selection was different. The proposal this time met the three main criteria, financial, technical and sponsorship. They [sic: There] were doubts expressed about the last criteria [sic] which were discussed extensively and the Board reached a positive decision considering that ICANN should not be involved in content matters.**

**“France remarked that there might be cases where the TLD string did infer the content matter. Therefore the GAC could be involved if public policies issues are to be raised.**

**“Dr. Cerf replied that in practice there is no correlation between the TLD string and the content. The TLD system is neutral, although filtering systems could be solutions promoted by governments. However, to the extent the governments do have concerns they relate to the issues across TLDs. Furthermore one could not slip into censorship.**

**“Chile and Denmark asked about the availability of the evaluation Report for .xxx and wondered if the process was in compliance with the ICANN Bylaws.**

**“Brazil asserted that content issues are relevant when ICANN is creating a space linked to pornography. He considered the matter as a public policy issue in the Brazilian context and repeated that the outside world would assume that GAC had been fully cognizant of the decision-making process.**

**“Mr. Twomey referred to the procedure for attention for GAC in the ICANN Bylaws that could be initiated if needed. The bylaws could work both ways: GAC could bring matters to ICANN's attention. Dr. Cerf invited GAC to comment in the context of the ICANN public**



**comments process. Spain suggested that ICANN should formally request GAC advice in such cases.**

**“The Chair [Dr. Cerf] noted in conclusion that it is not always clear what the public policy issues are and that an early warning mechanism is called for.” (C-139, P. 5.)**

**23. When it came to drafting the GAC Communique, the following further exchanges were summarized:**

**“Brazil referred to the decision taken for the creation of .xxx and asked if anything could be done at this stage...**

**“On .xxx, USA thought that it would be very difficult to express some views at this late stage. The process had been public since the beginning, and the matter could have been raised before at Plenary or Working group level...**

**“Italy would be in favour of inserting the process for the creation of new TLDs in the Communique as GAC failed in some way to examine in good time the current set of proposal [sic] for questions of methodology and lack of resources.**

**“Malaysia recalled the difficult situation in which governments are faced with the evolution of the DNS system and the ICANN environment. ICANN and GAC should be more responsive to common issues...**

**“Canada raise [sic] the point of the advisory role of the GAC vis-à-vis ICANN and it would be difficult to go beyond this function for the time being.**

**“Denmark agreed with Canada but considered that the matter could have been raised before within the framework of the GAC; if necessary issues could be raised directly in Plenary.**

**“France though [sic] that the matter should be referred to in the Communique. Since ICANN was apparently limiting its consideration to financial, technical and sponsorship aspects, the content aspects should be treated as a problem for the GAC from the point of view of the general public interest.”**

**“The Chair took note of the comments that had been made. He mentioned that the issues of new gTLDs...would be mentioned in the Communique.” (C-139, p. 7.)**

**24. Finally, in respect of “New Top Level Domains”**

**“...the Chair recalled that members had made comments during the consultation period regarding the .tel and .mobi proposals, but not regarding other sTLD proposals.**

**“The GAC has requested ICANN to provide the Evaluation Report on the basis of which the application for .xxx was approved. GAC considered that some aspects of content related to top level extensions might give rise of [sic] public policies [sic] issues.**

**“The Chair confirmed that, having consulted the ICANN Legal Counsel, GAC could still advise ICANN about the .xxx proposal, should it decide to do so. However, no member has yet raised this as an issue for formal comments to be given to ICANN in the Communique.” (C-139, p. 13.)**

**25. The Luxembourg Communique of the GAC as adopted made no express reference to the application of ICM Registry nor to the June 1, 2005 ICANN Board resolutions adopted in response to it. In respect of “New Top Level Domains”, the Communique stated:**

**“The GAC notes from recent experience that the introduction of new TLDs can give rise to significant public policy issues, including content. Accordingly, the GAC welcomes the initiative of ICANN to hold consultations with respect to the implementation of the new Top Level Domains strategy. The GAC looks forward to providing advice to the process.” (C-159, p. 1.)**

**26. Negotiations on commercial and technical terms for a contract between ICANN’s General Counsel, John Jeffrey, and the counsel of ICM Registry, Ms. J. Beckwith Burr, in pursuance of the ICANN Board’s resolutions of June 1, 2005, progressed smoothly, resulting in the posting in early August 2005 of the First Draft Registry Agreement. It was expected that the Board would vote on the contract at its meeting of August 16, 2005.**

**27. This expectation was overturned by ICANN’s receipt of two letters. On August 11, 2005, Michael D. Gallagher, Assistant Secretary for**

**Communications and Information of the U.S. Department of Commerce, wrote Dr. Cerf, with a copy to Mr. Twomey, as follows:**

**“I understand that the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN) is scheduled to consider approval of an agreement with the ICM Registry to operate the .xxx top level domain (TLD) on August 16, 2005. I am writing to urge the Board to ensure that the concerns of all members of the Internet community on this issue have been adequately heard and resolved before the Board takes action on this application.**

**“Since the ICANN Board voted to negotiate a contract with ICM Registry for the .xxx TLD in June 2005, this issue has garnered widespread public attention and concern outside of the ICANN community. The Department of Commerce has received nearly 6000 letters and emails from individuals expressing concern about the impact of pornography on families and children and opposing the creation of a new top level domain devoted to adult content. We also understand that other countries have significant reservations regarding the creation of a .xxx TLD. I believe that ICANN has also received many of these concerned comments. The volume of correspondence opposed to the creation of a .xxx TLD is unprecedented. Given the extent of the negative reaction, I request that the Board will provide a proper process and adequate additional time for these concerns to be voiced and addressed before any additional action takes place on this issue.**

**“It is of paramount importance that the Board ensure the best interests of the Internet community as a whole are fully considered as it evaluates the addition to this new top level domain...” (C-162, p. 1.)**

**28. On August 12, 2005, Mohamed Sharif Tarmizi, Chairman, GAC, wrote to the ICANN Board of Directors, in his personal capacity and not on behalf of the GAC, with a copy to the GAC, as follows:**

**“As you know, the Board is scheduled to consider approval of a contract for a new top level domain intended to be used for adult content...**

**“You may recall that during the session between the GAC and the Board in Luxembourg that some countries had expressed strong positions to the Board on this issue. In other GAC sessions, a number of other governments also expressed some concern with the potential**

**introduction of this TLD. The views are diverse and wide ranging. Although not necessarily well articulated in Luxembourg, as Chairman, I believe there remains a strong sense of discomfort in the GAC about the TLD, notwithstanding the explanations to date.**

**“I have been approached by some of these governments and I have advised them that apart from the advice given in relation to the creation of new TLDs in the Luxembourg Communiqué that implicitly refers to the proposed TLD, sovereign governments are also free to write directly to ICANN about their specific concerns.**

**“In this regard, I would like to bring to the Board’s attention the possibility that several governments will choose to take this course of action. I would like to request that in any further debate that we may have with regard to this TLD that we keep this background in mind.**

**“Based on the foregoing, I believe that the Board should allow time for additional governmental and public policy concerns to be expressed before reaching a final decision on this TLD.”**

**29. The *volte face* in the position of the United States Government evidenced by the letter of Mr. Gallagher appeared to have been stimulated by a cascade of protests by American domestic organizations such as the Family Research Council and Focus on the Family. Thousands of email messages of identical text poured into the Department of Commerce demanding that .XXX be stopped. Copies of messages obtained by ICM under the Freedom of Information Act show that while officials of the Department of Commerce concerned with Internet questions earlier did not oppose and indeed apparently favored ICANN’s approval of the application of ICM, the Department of Commerce was galvanized into opposition by the generated torrent of negative demands, and by representations by leading figures of the so-called “religious right”, such as Jim Dobson, who had influential access to high level officials of the U.S. Administration. There was even indication in the Department of Commerce that, if ICANN were to approve a top level domain for adult material, it would not be entered into the root if the United States Government did not approve (C-165, C-166.) The intervention of the United States came at a singularly delicate juncture, in the run-up to a United Nations sponsored conference on the Internet, the World Summit on the Information Society, which was anticipated to be the forum for concentration of criticism of the continuing influence of the United States over the Internet. The *Congressional Quarterly Weekly* ran a story entitled, “Web Neutrality vs. Morality” which said: “The flap over .xxx has put ICANN**

**in an almost impossible position. It is facing mounting pressure from within the United States and other countries to reject the domain. But if it goes back on its earlier decision, many countries will see that as evidence of its allegiance to and lack of independence from the U.S. government. ‘The politics of this are amazing,’ said Cerf. ‘We’re damned if we do and damned if we don’t.’ (C-284.)**

**30. Doubt about the desirability of allocating a top-level domain to ICM Registry, or opposition to so doing, was not confined to the U.S. Department of Commerce, as illustrated by the proceedings at Luxembourg quoted above. A number of other governments also expressed reservations or raised questions about ICM’s application on various grounds, including, at a later stage, those of Australia (letter from the Minister for Communications, Information Technology and the Arts of February 28, 2007 expressing Australia’s “strong opposition to the creation of a .XXX sTLD”), Canada (comment expressing concern that ICANN may be drawn into becoming a global Internet content regulator, Exhibit DJ) and the United Kingdom (letter of May 4, 2006 stressing the importance of ICM’s monitoring all .XXX content from “day one”, C-182). The EC expressed the view that consultation with the GAC had been inadequate. The Deputy Director-General of the European Commission on September 16, 2005 wrote Dr. Cerf stating that the June 1, 2005 resolutions were adopted without the benefit of such consultation and added:**

**“Moreover, while the .xxx TLD raises obvious and predictable public policy issues, the fact that a similar application from the same applicants had been rejected in 2000 (following a negative evaluation) had, not surprisingly, led many GAC representatives to expect that a similar decision would have been reached on this occasion...such a change in approach would benefit from an explanation to the GAC.**

**“I would therefore ask ICANN to reconsider the decision to proceed with this application until the GAC have had an opportunity to review the evaluation report.” (C-172, p. 1.)**

**31. The State Secretary for Communications and Regional Policy of the Government of Sweden, Jonas Bjelfvenstam, wrote Dr. Twomey a letter carrying the date of November 23, 2005, as follows:**

**“I have followed recent discussions by the Board of Directors of ...ICANN concerning the proposed top level domain (TLD) .xxx. I appreciate that the Board has deferred further discussions on the**

**subject...taking account of requests from the applicant ICM, as well as the ...GAC Chairman's and the US Department of Commerce's request to allow for additional time for comments by interested parties.**

**"Sweden strongly supports the ICANN mission and the process making ICANN an organization independent of the US Government. We appreciate the achievements of ICANN in the outstanding technical and innovative development of the Internet, an ICANN exercising open, transparent and multilateral procedures.**

**"The Swedish line on pornography is that it is not compatible with gender equality goals. The constant exposure of pornography and degrading pictures in our everyday lives normalizes the exploitation of women and children and the pornography industry profits on the documentation.**

**"A TLD dedicated for pornography might increase the volume of pornography on the Internet at the same time as foreseen advantages with a dedicated TLD might not materialize. These and other comments have been made in the many comments made directly to ICANN through the ICANN web site. There are a considerable number of negative reactions within and outside the Internet community.**

**"I know that all TLD applications are dealt with in procedures open to everyone for comment. However, in a case like this, where public interests clearly are involved, we feel it could have been appropriate for ICANN to request advice from GAC. Admittedly, GAC could have given advice to ICANN anyway at any point in time in the process and to my knowledge, no GAC members have raised the question before the GAC meeting July 9-12 in Luxembourg. However, we all probably rested assure that ICANN's negative opinion on .xxx, expressed in 2000, would stand.**

**"From the ICANN decision on June 1, 2005, there was too little time for GAC to have an informed discussion on the subject at its Luxembourg summer meeting. ..**

**"Therefore we would ask ICANN to postpone conclusive discussions on .xxx until after the upcoming GAC meeting in November 29-30 in Vancouver...In due time before that meeting, it would be helpful if ICANN could present in detail how it means that .xxx fulfils the criteria set in advance..." (C-168, p. 1.)**

**32. At its meeting by teleconference of September 15, 2005, the Board, “after lengthy discussion involving nearly all of the directors regarding the sponsorship criteria, the application, and additional supplemental materials, and the specific terms of the proposed agreement,” adopted a resolution providing that:**

**“ ...**

**“Whereas the ICANN Board has 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)...**

**“Whereas, ICANN has received significant levels of correspondence from the Internet community users over recent weeks, as well as inquiries from a number of governments,**

**“Resolved...that the ICANN President and General Counsel are directed 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.” (C-119, p. 1.)**

**33. At the Vancouver meeting of the Board in December 2005, the GAC requested an explanation of the processes that led to the adoption of the Board’s resolutions of June 1. Dr. Twomey replied with a lengthy and detailed letter of February 11, 2006. The following extracts are of interest:**

**“Where an applicant passed all three sets of criteria and there were no other issues associated with the application, the Board was briefed and the application was allowed to move on to the stage of technical and commercial negotiations designed to establish a new sTLD. One application – POST – was in this category. In other cases – where an evaluation team indicated that a set of criteria was not met, or there were other issues to be examined – each applicant was provided an opportunity to submit clarifying or additional documentation before presenting the evaluation panel’s recommendation to the Board for a decision on whether the applicant could proceed to the next stage. The other nine applications, including .XXX, were in this category.**

**“Because of the more subjective nature of the sponsorship/community value issues being reviewed, it was decided to ask the Board to review these issues directly.**

...

**“It should be noted that, consistent with Article II, Section 1 of the Bylaws, it is the ICANN Board that has the authority to decide, upon the conclusion of technical and commercial negotiations, whether or not to approve the creation of a new sTLD...Responsibility for resolving issues relating to an applicant’s readiness to proceed to technical and commercial negotiations and, subsequently, whether or not to approve delegation of a new sTLD, rests with the Board.**

...

**“Extensive Review of ICM Application**

...

**“On 3 May 2005, the Board held a ‘broad discussion...regarding whether or not there was a ‘sponsored community’ . The Board agreed that it would discuss this issue again at the next Board Meeting.’**

**“Based on the extensive public comments received, the independent evaluation panel’s recommendations, the responses of ICM and the proposed Sponsoring Organization (IFFOR) to those evaluations, ...at its teleconference on June 1, 2005, the Board authorized the President and General Counsel to enter into negotiations relating to proposed commercial and technical terms with ICM. It also requested the President to present any such negotiated agreement to the Board for approval and authorization...” (C-175.)**

**34. Subsequent draft registry agreements of ICM were produced in response to specific requests of ICANN staff for amendments, to which requests ICM responded positively. In particular, a provision was included stating that all requirements for registration would be “in addition to the obligation to comply with all applicable law[s] and regulation[s]”. (Claimant’s Memorial on the Merits, pp. 128-129.)**

**35. Just before the Board met in Wellington, New Zealand in March 2006, the GAC convened and, among other matters, discussed the above letter of the**



**ICANN President of February 11, 2006. Its Communique of March 28 states that the GAC**

**“does not believe that the February 11 letter provides sufficient detail regarding the rationale for the Board determination that the application [of ICM Registry] had overcome the deficiencies noted in the Evaluation Report. The Board would request a written explanation of the Board decision, particularly with regard to the sponsored community and public interest criteria outlined in the sponsored top level domain selection criteria.**

**“...ICM promised a range of public interest benefits as part of its bid to operate the .xxx domain. To the GAC's knowledge, these undertakings have not yet been included as ICM obligations in the proposed .xxx Registry Agreement negotiated with ICANN.”**

**“The public policy aspects identified by members of the GAC include the degree to which the .xxx application would:**

**-Take appropriate measures to restrict access to illegal and offensive content;**

**- Support the development of tools and programs to protect vulnerable members of the community;**

**-Maintain accurate details of registrants and assist law enforcement agencies to identify and contact the owners of particular websites, if need be; and**

**“Without in any way implying an endorsement of the ICM application, the GAC would request confirmation from the Board that any contract currently under negotiation between ICANN and ICM Registry would include enforceable provisions covering all of ICM Registry's commitments, and such information on the proposed contract being made available to member countries through the GAC.**

**“Nevertheless without prejudice to the above, several members of the GAC are emphatically opposed from a public policy perspective to the introduction of a .xxx sTLD.”**

**36. At the Board's meeting in Wellington of March 31, 2006, a resolution was adopted by which it was:**

**“Resolved, the President and General Counsel are directed to analyze all publicly received inputs, to continue negotiations with ICM Registry, and to return to the Board with any recommendations regarding amendments to the proposed sTLD registry agreement, particularly to ensure that the TLD sponsor will have in place adequate mechanisms to address any potential registrant violations of the sponsor’s policies.” (C-184, p. 1.)**

**37. On May 4, 2006, Dr. Twomey sent a further letter to the Chairman and members of the GAC in response to the GAC’s request for information regarding the decision of the ICANN Board to proceed with several sTLD applications, notwithstanding negative reports from one or more evaluation teams. The following extracts are of interest:**

**“It is important to note that the Board decision as to the .XXX application is still pending. The decision by the ICANN Board during its 1 June 2005 Special Board Meeting reviewed the criteria against the materials supplied and the results of the independent evaluations. ...the board voted to authorize staff to enter into contractual negotiations without prejudicing the Board’s right to evaluate the resulting contract and to decide whether it meets all the criteria before the Board including public policy advice such as might be offered by the GAC. The final conclusion on the Board’s decision to accept or reject the .XXX application has not been made and will not be made until such time as the Board either approves or rejects the registry agreement relating to the .XXX application. In fact, it is important to note that the Board has reviewed previous proposed agreements with ICM for the .XXX registry and has expressed concerns regarding the compliance structures established in those drafts.**

**...**

**In some instances, such as with .XXX, while the additional materials provided sufficient clarification to proceed with contractual discussions, the Board still expressed concerns about whether the applicant met all of the criteria, but took the view that such concerns could possibly be addressed by contractual obligations to be stated in a registry agreement.” (C-188, pp. 1, 2.)**

**38. On May 10, 2006, the Board held a telephonic special meeting and addressed ICM’s by now Third Draft Registry Agreement. After a roll call, there were 9 votes against accepting the agreement and 5 in favor. Those**

**who voted against (including Board Chairman Cerf and President Twomey), in brief explanations of vote, indicated that they so voted because the undertakings of ICM could not in their view be fulfilled; because the conditions required by the GAC could not be met; because doubts about sponsorship remained and had magnified as a result of opposition from elements of the adult entertainment community; because the agreement's reference to "all applicable law" raised a wide and variable test of compliance and enforcement; and because guaranty of compliance with obligations of the contract was lacking. Those who voted in favor indicated that changing ICANN's position after an extended process weakens ICANN and encourages the exertions of pressure groups; found that there was sufficient support of the sponsoring community, while invariable support was not required; held it unfair to impose on ICM a complete compliance model before it is allowed to start, a requirement imposed on no other applicant; maintained that ICANN is not in the business and should not be in the business of judging content which rather is the province of each country, that ICANN should not be a "choke-point for content limitations of governments"; and contended that ICANN should avoid applying subjective and arbitrary criteria and should concern itself with the technical merits of applications. (C-189.) The vote of May 10, 2006 was not to approve the agreement as proposed "but it did not reject the application" of ICM (C-197.)**

**39. ICM Registry filed a Request for Reconsideration of Board Action on May 21, 2006, pursuant to Article IV, Section 2 of ICANN's Bylaws providing for reconsideration requests. (C-190.) However, after being informed by ICANN's general counsel that the Board would be prepared to consider still another revised draft agreement, ICM withdrew that request on October 29, 2006. Working as she had throughout in consultation with ICANN's staff, particularly its general counsel, Ms. Burr, on behalf of ICM, engaged in further negotiations with ICANN endeavoring to accommodate its requirements, demonstrate that the concerns raised by the GAC had been met to the extent possible, and provide ICANN with additional support for ICM's commitment to abide by the provisions of the proposed agreement. Among the materials provided, earlier and then, were a list of persons within the child safety community willing to serve on the board of IFFOR, commitments to enter into agreements with rating associations to provide tags for filtering .XXX websites and to monitor compliance with rules for the suppression of child pornography provisions, and data about a "pre-reservation service" for reservations for .XXX from webmasters operating adult sites on other ICANN-recognized top level domains. ICANN claimed to have registered more than 75,000 pre-reservations in the first six months that this service was publicly available. (Claimant's Memorial on the Merits,**

pp. 138-139.) The proposed agreement was revised to include, *inter alia*, provision for imposing certain requirements on registrants; develop mechanisms for compliance with those requirements; create dispute resolution mechanisms; and engage independent monitors. ICM agreed to enter into a contract with the Family Online Safety Institute. The clause regarding registrants' obligations to comply with "all applicable law" was deleted because, in ICM's view, it had given rise to misunderstanding about whether ICANN would become involved in monitoring content. ICM maintains that, in the course of exchanges about making these revisions and preparing its Fourth Draft Registry Agreement, "ICANN never sought to have ICM attempt to re-define the sponsored community or otherwise demonstrate that it met any of the RFP criteria". (*Id.*, p. 141.)

40. On February 2, 2007, the Chairman and Chairman-Elect of the GAC wrote the Chairman of the ICANN Board, speaking for themselves and not necessarily for the GAC, as follows:

"We note that the Wellington Communique...requested clarification from the ICANN Board regarding its decision of 1 June 2005 authorising staff to enter into contractual negotiations with ICM Registry, despite deficiencies identified by the Sponsorship...Panel...we reiterate the GAC's request for a clear explanation of why the ICANN Board is satisfied that the .xxx application has overcome the deficiencies relating to the proposed sponsorship community.

"In Wellington, the GAC also requested confirmation from the ICANN Board that the proposed .xxx agreement would include enforceable provisions covering all of ICM Registry's commitments...

"...GAC members would urge the Board to defer any final decision on this application until the Lisbon meeting." (C-198.)

41. A special meeting of the ICANN Board on February 12, 2007, was held by teleconference. Consideration of the proposed .XXX Registry Agreement was introduced by Mr. Jeffrey, who asked the Board to consider (a) public comment on the proposed agreement (which had been posted by ICANN on its website) (b) advice proffered by the GAC and (c) "how ICM measures up against the RFP criteria" (C-199, p.1). He noted in relation to community input that since the initial ICM application over 200,000 pertinent emails had been sent to ICANN.

42. Rita Rodin, a new Board member, noted that she had not been on the Board at previous discussions of the ICM application, but based on her

review of the papers “she had some concerns about whether the proposal met the criteria set forth in the RFP. For example, she noted that it was not clear to her whether the sponsoring community seeking to run the domain genuinely could be said to represent the adult on-line community. However Rita requested that John Jeffrey and Paul Twomey confirm that this sort of discussion should take place during this meeting. She said that she did not want to reopen issues if they had already been decided by the Board.” (*Id.*, pp. 2-3.)

43. While there was no direct response to the foregoing request of Ms. Rodin, Dr. Cerf noted “that had been the subject of debate by the Board in earlier discussions in 2006...over the last six months, there seem to have been a more negative reaction from members of the online community to the proposal.” Rita Rodin agreed; “there seems to be a ‘splintering of support in the adult on-line community.” She was also concerned “that approval of this domain in these circumstances would cause ICM to become a de facto arbiter of policies for pornography on the Internet...she was not comfortable with ICANN saying to a self-defined group that they could define policy around pornography on the internet. This was not part of ICANN’s technical decision-making remit...” (*Id.*, p. 3) Dr. Twomey said that the Board needed to focus on whether there was a need for further public comment on the new version, the GAC comments, “and whether ICM had demonstrated to the Board’s satisfaction that it had met criteria against the RFP for sTLDs.” Dr. Cerf agreed that “the sponsorship grouping for a new TLD was difficult to define.”

44. Susan Crawford expressed the view that “no group can demonstrate in advance that they will meet the interests and concerns of all members in their community and that this was an unrealistic expectation to place on any applicant....if that test was applied to any sponsor group for a new sTLD, none would ever be approved.”

45. The Acting Chair conducted a “straw poll” of the Board as to whether members held “serious concerns” about the level of support for the creation of the domain from this sponsoring community. A majority indicated that they did, while a minority indicated that “it was an inappropriate burden to place on ICM to ensure that the entire adult online community was supportive of the proposed domain”. (*Id.*) The following resolution was unanimously adopted:

**“Whereas a majority of the Board has serious concerns about whether the proposed .XXX domain has the support of a clearly-defined sponsored community as per the criteria for sponsored TLDs;**

**“Whereas a minority of the Board believed that the self-described community of sponsorship made known by the proponent of the .XXX domain, ICM Registry, was sufficient to meet the criteria for an sTLD.**

**“Resolved that:**

- I. The revised version [now the fifth version of the draft agreement] be exposed to a public comment period of no less than 21 days, and**
- II. ICANN staff consult with ICM and provide further information to the Board prior to its next meeting, so as to inform a decision by the Board about whether sponsorship criteria is [sic] met for the creation of a new .XXX sTLD.” (*Id.*, p. 4.)**

**46. The Governmental Advisory Committee met in Lisbon on March 28, 2007 and issued “formal advice to the Board”. It reaffirmed the Wellington Communique as “a valid and important expression of the GAC’s views on .xxx. The GAC does not consider the information provided by the Board to have answered the GAC concerns as to whether the ICM application meets the sponsorship criteria.” It called attention to an expression of concern by Canada that, with the revised proposed ICANN-ICM Registry agreement, “the Corporation could be moving towards assuming an ongoing management and oversight role regarding Internet content, which would be inconsistent with its technical mandate.” (C-200, pp. 4, 5.) It also adopted “Principles Regarding New TLDs” which contain the following provision in respect of delegation of new gTLDs:**

**“2.5 The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.” (*Id.*, p. 12.)**

**47. The climactic meeting of the ICANN Board took place in Lisbon, Portugal, on March 30, 2007. A resolution was adopted by a vote of nine to five, with one abstention (that of Dr. Twomey), whose operative paragraphs provide that:**

**“...the board has determined that**

**“ICM's application and the revised agreement failed to meet, among other things, the sponsored community criteria of the RFP specification.**

**“Based on the extensive public comment and from the GAC's communiqués, that this agreement raises public policy issues.**

**“Approval of the ICM application and revised agreement is not appropriate, as they do not resolve the issues raised in the GAC communiqués, and ICM's response does not address the GAC's concern for offensive content and similarly avoids the GAC's concern for the protection of vulnerable members of the community. The board does not believe these public policy concerns can be credibly resolved with the mechanisms proposed by the applicant.**

**“The ICM application raises significant law enforcement compliance issues because of countries' varying laws relating to content and practices that define the nature of the application, therefore obligating ICANN to acquire responsibility related to content and conduct.**

**“The board agrees with the reference in the GAC communiqué from Lisbon that under the revised agreement, there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, which is inconsistent with its technical mandate.**

**Accordingly, it is resolved...that the proposed agreement with ICM concerning the .xxx sTLD is rejected and the application request for delegation of the .XXX sTLD is hereby denied.”**

**48. Debate in the Board over adoption of the resolution was intense. Dr. Cerf, who was to vote in favor of the resolution (and hence against the ICM application) observed that he had voted in favor of proceeding to negotiate a contract.**

**“Part of the reason for that was to try to understand more deeply exactly how this proposal would be implemented, and seeing the contractual terms...would put much more meat on the bones of the Initial proposal. I have been concerned about the definition of 'responsible'...there's uncertainty in my mind about what behavioral**

**patterns to expect...over time, the two years that we've considered this, there has been a growing disagreement within the adult content community as to the advisability of this proposal. As I looked at the contract...the mechanisms for assuring the behavior of the registrants in this top-level domain seemed, to me, uncertain. And I was persuaded ... that there were very credible scenarios in which the operation of IFFOR and ICM might still lead to ICANN being propelled into responding to complaints that some content on some of the registered .xxx sites didn't somehow meet the expectations of the general public this would propel ICANN and its staff into making decisions or having to examine content to decide whether or not it met the IFFOR criteria ... I would also point out that the GAC has raised public policy concerns about this particular top level domain.” (C-201, p. 6.)**

**49. Rita Rodin said that she did not believe**

**“that this is an appropriate sponsored community...it's inappropriate to allow an applicant in any sTLD to simply define out ...any people that are not in favor of this TLD..as irresponsible...this will be an enforcement headache...for ICANN..way beyond the technical oversight role of ICANN's mandate...there's porn all over the Internet and...there isn't a mechanism with this TLD to have it all exclusively within one string to actually effect some of the purposes of the TLD...to be responsible with respect to the distribution of pornography, to prevent child pornography on the Internet...” (id., p. 7.)**

**50. Peter Dengate Thrush, who favored acceptance of the ICM contract, voted against the resolution. On the issue of the sponsored community,**

**“there is on the evidence a sufficiently identifiable, distinct community which the TLD could serve. It's the adult content providers wanting to differentiate themselves by voluntary adoption of this labeling system. It's not affected ... by the fact that that's a self-selecting community...or impermanence of that community...This is the first time in any of these sTLD applications that we have had active opposition. And we have no metrics...to establish what level of opposition by members of the potential community might have caused us concern...the resolution I am voting against is particularly weak on this issue. On why the board thinks this community is not sufficiently identified. No fact or real rationale are provided in the resolution, and...given the considerable importance that the board has placed on this...and the cost and effort that the applicant has gone to answer the**



**board's concern demonstrating the existence of a sponsored community...this silence is disrespectful to the applicant and does a disservice to the community...I've also been concerned ... about the scale of the obligations accepted by the applicant...some of those have been forced upon them by the process..in the end I am satisfied that the compliance rules raise no new issues in kind from previous contracts. And I say that if ICANN is going to raise this kind of objection, then it better think seriously of getting out of the business of introducing new TLDs ... I do not think that this contract would make ICANN a content regulator..." (Id., pp. 7-8.)**

**51. Njeri Ronge stated that, in addition to the reasons stated in the resolution, "the ICM proposal will not protect the relevant or interested community from the adult entertainment Web sites by a significant percentage; ... the ICM proposal focuses on content management which is not in ICANN's technical mandate." (Id., p. 8.)**

**52. Susan Crawford dissented from the resolution, which she found "not only weak but unprincipled".**

**"I am troubled by the path the board has followed on this issue...ICANN only creates problems for itself when it acts in an ad hoc fashion in response to political pressures. ICANN...should resist efforts by governments to veto what it does...The most fundamental value of the global Internet community is that people who propose to use the Internet protocols and infrastructures for otherwise lawful purposes, without threatening the operational stability or security of the Internet, should be presumed to be entitled to do so. In a nutshell, everything not prohibited is permitted. This understanding...has led directly to the striking success of the Internet around the world. ICANN's role in gTLD policy development is to seek to assess and articulate the broadly shared values of the Internet community. We have very limited authority. I am personally not aware that any global consensus against the creation of a triple X domain exists. In the absence of such a prohibition, and given our mandate to create TLD competition, we have no authority to block the addition of this TLD to the root. It is very clear that we do not have a global shared set of values about content on line, save for the global norm against child pornography. But the global Internet community clearly does share the core value that no centralized authority should set itself up as the arbiter of what people may do together on line, absent a demonstration that most of those affected by the proposed activity agree that it should be banned...the**

**fact is that ICANN evaluated the strength of the sponsorship of triple X, the relationship between the applicant and the community behind the TLD, and...concluded that this criteria [sic] had been met as of June 2005. ICANN then went on to negotiate specific contractual terms with the applicant. Since then, real and AstroTurf comments – that’s an Americanism meaning filed comments claiming to be grass roots opposition that have actually been generated by organized campaigns – have come into ICANN that reflect opposition to this application. I do not find these recent comments sufficient to warrant revisiting the question of the sponsorship strength of this TLD which I personally believe to be closed. No applicant for any sponsored TLD could ever demonstrate unanimous, cheering approval for its application. We have no metric against which to measure this opposition....We will only get in the way of useful innovation if we take the view that every new TLD must prove itself to us before it can be added to the root...what is meant by sponsorship...is that there is enough interest in a particular TLD that it will be viable. We also have the idea that registrants should participate in and be bound by the creation of policies for a particular string. Both of these requirements have been met by this applicant. There is clearly enough interest, including more than 70,000 preregistrations from a thousand or more unique registrants who are member of the adult industry, and the applicant has undertaken to us that it will require adherence to its self-regulatory policies by all of its registrants...Many of my fellow board members are undoubtedly uncomfortable with the subject of adult entertainment material. Discomfort may have been sparked anew by first the letter from individual GAC members...and second the letter from the Australian Government. But the entire point of ICANN's creation was to avoid the operation of chokepoint control over the domain name system by individual or collective governments. The idea was the U.S. would serve as a good steward for other governmental concerns by staying in the background and...not engaging in content-related control. Australia's letter and concerns expressed...by Brazil and other countries about triple X are explicitly content-based and, thus, inappropriate...If after the creation of a triple X TLD certain governments of the world want to ensure that their citizens do not see triple X content, it is within their prerogative as sovereigns to instruct Internet access providers physically located within their territory to block such content...But content-related censorship should not be ICANN's concern...To the extent there are public policy concerns with this TLD, they can be dealt with through local laws.” (*Id.*, pp. 9-11.)**

**53. Demi Getschko declared that her vote in favor of the resolution was her own decision “without any kind of pressure”. (*Id.*, p. 12.) Alejandro Pisanty denied that “the board has been swayed by political pressure of any kind” and affirmed that, “ICANN has acted carefully and strictly within the rules.” He accepted “that there is no universal set of values regarding adult content other than those related to child pornography...the resolution voted is based precisely on that view, not on any view of content itself.” (*Id.***

### **PART THREE: THE ARGUMENTS OF THE PARTIES**

#### **The Contentions of ICM Registry**

**54. ICM Registry contends that (a) the Independent Review Process is an arbitration; (b) that Process does not afford the ICANN Board a “deferential standard of review”; (c) the law to be applied by that Process comprises the relevant principles of international law and local law, *i.e.*, California law, and that the particularly relevant principle is good faith; (d) in its treatment and rejection of the application of ICM Registry, ICANN did not act consistently with its Articles of Incorporation and Bylaws.**

#### **The Nature of the Independent Review Process**

**55. In respect of the nature of the Independent Review Process, ICM, noting that these proceedings are the first such Process brought under ICANN’s Bylaws, maintains that they are arbitral and not advisory in character. It observes that the current provisions governing the Independent Review Process were added to the Bylaws in December 2002 partly as a result of international and domestic concern about ICANN’s lack of accountability. It recalls that ICANN’s then President, Stuart Lynn, announced in a U.S. Senate hearing in 2002 that ICANN planned to “strengthen ... confidence in the fairness of ICANN decision-making through... creating a workable mechanism for speedy independent review of ICANN Board actions by experienced arbitrators...” (Claimant’s Memorial on the Merits, p. 162). His successor, Dr. Twomey, stated to a committee of the U.S. House of Representatives in 2006 that, “ICANN does have well-established principles and processes for accountability in its decision-making and in its bylaws...there is ability for appeal to...independent arbitration.” (*Id.*, p. 163.) Article IV, Section 3, of ICANN’s Bylaws provides that: “The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators...nominated by that provider.” Pursuant to that provision, ICANN appointed the International Centre for Dispute Resolution (“ICDR”) of the American Arbitration Association as the international arbitration provider**

(which in turn appointed the members of the instant Independent Review Panel). The term “arbitration” imports the binding resolution of a dispute. Courts in the United States – including the Supreme Court of California – have held that the term “arbitration” connotes a binding award. (*Id.*, pp. 168-169.) Article 27(1) of the ICDR Rules provides that “[a]wards...shall be final and binding on the parties. The parties undertake to carry out any such award without delay.” (C-11.) The Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process specify that “the ICDR’s International Arbitration Rules...will govern the Process in combination with these Supplementary Procedures.” They provide that the “Independent Review Panel (IRP) refers to the neutral(s) appointed to decide the issue(s) presented.” “The Declaration shall specifically designate the prevailing party.” (C-12.) In view of all of the foregoing, ICM maintains that the IRP is an arbitral process designed to produce a decision on the issues that is binding on the parties.

**The Standard of Review is Not Deferential**

56. ICM also maintains that, contrary to the position now advanced by counsel for ICANN, ICANN’s assertion that the Panel must afford the ICANN Board “a deferential standard of review” has no support in the instruments governing this proceeding. The term “independent review” connotes a review that is not deferential. Both Federal law and California law treat provision for an independent review as the equivalent of *de novo* review. In California law, when an appellate court employs independent, *de novo* review, it generally gives no special deference to the findings or conclusions of the court from which appeal is taken. (Claimant’s Memorial on the Merits, with citations, pp. 173-174.) ICANN’s reliance on the “business judgment rule” and the related doctrine of “judicial deference” under California law is misplaced, because under California law the business judgment rule is employed to protect directors from personal liability (typically in shareholder suits) when the directors have made good faith business decisions on behalf of the corporation. The IRP is not a court action seeking to impose individual liability on the ICANN board of directors. Rather, this is an Independent Review Process with the specific purpose of declaring “whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws.” As California courts have explicitly stated, “the rule of judicial deference to board decision-making can be limited ... by the association’s governing documents.” The IRP, to quote Dr. Twomey’s testimony before Congress, is a process meant to establish a “final method of accountability.”

**The notion now advanced on behalf of ICANN, that this Panel should afford the Board “a deferential standard of review” and only “question” the Board’s actions upon “a showing of bad faith” is at odds with that purpose as well as with the plain meaning of “independent review”. (*Id.*, pp. 176-177.)**

***The Applicable Law of this Proceeding***

**57. Article 4 of ICANN’s Articles of Incorporation provides that, “The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with the relevant principles of international law and applicable international conventions and local law...” (C-4). The prior version of the draft Articles had provided for ICANN’s “carrying out its activities with due regard for applicable local and international law”. This language was regarded as inadequate, and was revised, as the then Interim Chairman of ICANN explained, “to mak[e] it clear that ICANN will comply with relevant and applicable international and local law”. (*Id.*, p. 180.) As ICANN’s President testified in the U.S. Congress in 2003, the International Review Process was put in place so that disputes could “be referred to an independent review panel operated by an international arbitration provider with an appreciation for and understanding of applicable international laws, as well as California not-for-profit corporation law.” (*Id.*, p. 182.) According to the Expert Report of Professor Jack Goldsmith, on which ICM relies:**

**“...in an attempt to bring accountability and thus legitimacy to its decisions, ICANN (a) assumed in its Articles of Incorporation an obligation to act in conformity with ‘relevant principles of international law’ and (b) in its Bylaws extended to adversely affected third parties a novel right of independent review in this arbitration proceeding for consistency with ICANN’s Articles and Bylaws. The parties have agreed to international arbitration in this forum to determine consistency with the international law standards set forth in Article 4 of the Articles of Incorporation. California law allows a California non-profit corporation to bind itself in this way.” (*Id.*, p. 11.)**

**In ICM’s view, Article 4 of ICANN’s Articles of Incorporation acts as a choice-of-law provision. It notes that Article 28 of the ICDR Arbitration Rules specifically provides that “the Tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to this dispute.” (C-11.) It points out that the choice of a concurrent law clause – as in ICANN’s Articles providing for the application of relevant principles of both**

**international and domestic law – is not unusual, especially in transactions involving a public resource.**

**58. Professor Goldsmith observes that: “... ‘principles of international law and applicable international conventions and local law’ refers to three types of law. Local law means the law of California. Applicable international conventions refers to treaties. “The term ‘principles of international law’ includes general principles of law. Given that the canonical reference to the sources of international law is Article 38 of the Statute of the International Court of Justice, which lists international conventions, customary international law, and “the general principles of law recognized by civilized nations”, the reference to “principles of international law” in ICANN’s Articles must refer to customary international law and to the general principles of law. (Expert Report, p. 12.) Professor Goldsmith notes that the Iran-United States Claims Tribunal has interpreted the “principles of commercial and international law” to include the general principles of law. ICSID tribunals similarly have interpreted “the rules of international law” to include general principles of law.**

**“It is perfectly appropriate to apply general principles in this IRP even though ICANN is technically a non-profit corporation and ICM is a private corporation. ICANN voluntarily subjected itself to these general principles in its Articles of Incorporation, something that both California law permits and that is typical in international arbitrations, especially when public goods are at stake. The ‘international’ nature of this arbitration – ... is evidenced by the global impact of ICANN’s decisions...ICANN is only nominally a private corporation. It exercises extraordinary authority, delegated from the U.S. Government, over one of the globe’s most important resources...its control over the Internet naming and numbering system does make sense of its embrace of the ‘general principles’ standard. While there is no doubt that ICANN can and has bound itself to general principles of law as that phrase is understood in international law... the general principles relevant here complement, amplify and give detail to the requirements of independence, transparency and due process that ICANN has otherwise assumed in its Articles and Bylaws and under California law. General principles thus play their classic supplementary role in this proceeding.” (*Id.*, pp. 15-16.)**

**59. Professor Goldsmith continues: “The general principle of good faith is ‘the foundation of all law and all conventions’” (quoting the seminal work of Bin Cheng, *General Principles of Law as Applied by International Courts and***

***Tribunals*, p. 105). “As the International Court of Justice has noted, ‘the principle of good faith is a well established principle of international law’”. (Case concerning the Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 296, with many citations.) Applications of the principle are “the requirement of good faith in complying with legal restrictions” and “the requirement of good faith in the exercise of discretion, also known as the doctrine of non-abuse of rights...” as well as the requirement of good faith in contractual negotiations. (*Id.*, pp. 17-18.) The principle is “equally applicable to relations between individuals and to relations between nations.” (Cheng, *loc. cit.*).**

**60. Professor Goldsmith maintains that the abuse of right alleged by ICM that is**

**“most obvious is the clearly fictitious basis ICANN gave for denying ICM’s application...the concern about ‘law enforcement compliance issues because of countries’ varying laws relating to content and practices that define the nature of the application’ applies to many top-level domains besides .XXX. The website ‘pornography.com’ would be no less subject to various differing laws around the world than the website ‘pornography.xxx.’ ...a website on the .XXX domain is *easier* for nations to regulate and exclude from computers in their countries because they can block all sites on the .XXX domain with relative ease but have to look at the content, or make guesses based on domain names, to block unwanted pornography on .COM and other top level domains. In short, this reason for ICANN’s denial, if genuine, would extend to many top-level domains and would certainly apply to all generic top-level domains (like .COM, .INFO, .NET and .ORG) where pornographic sites can be found. But ICANN has only applied this reason for denial to the .XXX domain. This strongly suggests that the reasons for the denial are pretextual and thus the denial is an abuse of right...”**

**61. Professor Goldsmith further argues that “similarly pretextual is ICANN’s claim that ‘there are credible scenarios that leads to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content.’” He contends that the scenario is “unlikely”, but, more importantly, “*the same logic applies to generic top level domains* like .COM. The identical scenario could arise if a national court ordered...the registry operator for .COM...to shut down one of the hundreds of thousands of pornography sites on .COM. But ICANN has only expressed concern about ICM...”**

**ICANN Did Not Act Consistently with its Articles of Incorporation and Bylaws**

**62. ICM Registry contends that ICANN failed to act consistently with its Articles of Incorporation and Bylaws in the following respects.**

**63. ICANN, ICM maintains, conducted the 2004 Round of applications for top-level domains as a two-step process, in which it was first determined whether or not each applicant met the RFP criteria. If the criteria were met, “upon the successful completion of the sTLD process” (ICANN Board resolution of October 31, 2003, C-78), the applicant then would proceed to negotiate the commercial and technical terms of a registry agreement. (This Declaration, paras. 13-16, *supra*.) The RFP included detailed description of the criteria to be met to enable the applicant to proceed to contract negotiations, and specified that the selection criteria would be applied “based on principles of objectivity, non-discrimination and transparency”. (C-45.) On June 1, 2005, the ICANN Board concluded that ICM had met all of the RFP criteria - - financial, technical and sponsorship - and authorized ICANN’s President and General Counsel to enter into negotiations over the “commercial and technical terms” of a registry agreement with ICM. “The record evidence in this case demonstrates overwhelmingly that when the Board approved ICM to proceed to contract negotiations on 1 June 2005, the Board concluded that ICM had met all of the RFP criteria - including, specifically, sponsorship.” (Claimant’s Post-Hearing Submission, p. 11.) While ICANN now claims that the sponsorship criterion remained open, and that the Board’s resolution of June 1, 2005, authorized negotiations in which whether ICM met sponsorship requirements could be more fully tested, ICM argues that no credible evidence, in particular, no contemporary documentary evidence, supports these contentions. To the contrary, ICM:**

**- (a) recalls that ICANN’s written announcement of applications received provided: “The applications will be reviewed by independent evaluation teams beginning in May 2004. The criteria for evaluation were posted with the RFP. All applicants that are found to satisfy the posted criteria will be eligible to enter into technical and commercial negotiations with ICANN for agreements for the allocation and sponsorship of the requested TLDs.” (C-82.)**

**- (b) emphasizes that ICANN’s Chairman of the Board, Dr. Cerf, is recorded in the GAC’s Luxembourg minutes as stating, shortly after the adoption of the June 1, 2005, resolution, that the application of .xxx “this time met the three main criteria, financial, technical and sponsorship”. Sponsorship was**



**extensively discussed “and the Board reached a positive decision considering that ICANN should not be involved in content matters.” (C-139; *supra*, para. 22.)**

**- (c) notes that a letter of ICANN's President of February 11, 2006. states that: “...it is the ICANN Board that has the authority to decide, upon the conclusion of technical and commercial negotiations, whether or not to approve the creation of a new sTLD...Responsibility for resolving issues relating to an applicant's readiness to proceed to technical and commercial negotiations...rests with the Board.” (*Supra*, paragraph 33.)**

**- (d) notes that the GAC's Wellington Communique states, in respect of a letter of February 11, 2006 of ICANN's President, that the GAC “does not believe that the February 11 letter provides sufficient detail regarding the rationale for the Board determination” that ICM's application “had overcome the deficiencies noted in the Evaluation Report”. (*Supra*, paragraph 35.)**

**- (e) stresses that the ICANN Vice President in charge of the Round, Kurt Pritz, whom ICANN chose not to call as a witness in the hearing, stated in a public forum meeting in April 2005 that: “If it was determined that an application met those three baseline criteria, technical, commercial and sponsorship community, they, then, were informed that they would enter into a phase of commercial and technical negotiation with ICANN, the culmination of those negotiations is and was intended to result in the designation of the new top-level domain. At the conclusion of that, we would sign agreements that would be forwarded to the Board for their approval.” (C-88.)**

**- (f) recalls that Dr. Pritz stated in Luxembourg that ICM was among the “applicants that have been found to satisfy the baseline criteria and they're presently in negotiation for the designation of registries...” (C-140, p. 28).**

**- (g) observes that the General Counsel of ICANN, Mr. Jeffery, in an exchange with Ms. Burr acting as counsel of ICM, accepted a draft press release in respect of the June 1, 2005 resolution stating that, “ICANN's board of directors today determined that the proposal for a new top level domain submitted by ICM Registry meets the criteria established by ICANN.” (C-221.)**

**- (h) reproduces a Fox News Internet story of June 2, 2005, captioned, “Internet Group OKs New Suffix for Porn Sites,” which cites ICANN spokesman Kieran Baker as saying that adult oriented sites, a \$12 billion industry, “could begin buying .xxx addresses as early as fall or winter depending on ICM's plans.” (C-283.)**

- (i) recalls that a member of the Board when the June 1, 2005 resolution was adopted, Joicho Ito, posted on his blog the next day that “the .XXX proposal, in my opinion, has met the criteria set out in the RFP. Our approval of .XXX is a decision based on whether .XXX met the criteria and does not endorse or condone any particular type of content or moral belief.” (Burr Exhibit 35.)

ICM argues that ICANN’s witnesses had no response to the foregoing evidence, other than to say that they could not remember or had not seen it (testimony of Dr. Cerf, Tr. 615:18-21, 660:9-12, 675:3-16; Testimony of Dr. Twomey, 914: 4-11, 915:2-11).

64. Dr. Cerf testified at the hearing that,

“At the point where the question arose whether we should proceed or could proceed to contract negotiation, in the absence of having decided that the sponsorship criteria had been met, the board consulted with counsel [the General Counsel, Mr. Jeffery] and my recollection of this discussion is that we could leave undetermined and undecided the question of sponsorship and could use the discussions with regard to the contract as a means of exposing and understanding more deeply whether the sponsorship criteria had been or could be adequately met...prior to the board vote on the question, should we proceed to contract, this question was raised, and it was my understanding that we were not deciding the question of sponsorship. We were using the contract negotiations as a means of clarifying whether or not...the sponsorship criteria could be or had been met or would be met...” (Tr. 600:6-18, 601: 1-8).

65. ICM however claims that Dr. Cerf’s testimony “is flatly contradicted by the numerous contemporaneous statements of ICANN Board members and officials that ICM had, in fact, met the criteria, including Dr. Cerf’s own contemporaneous statement to the GAC in Luxembourg...” (Claimant’s Post-Hearing Submissions, p. 14.) ICM maintains that there is no contemporary documentary evidence that sustains Dr. Cerf’s recollection. Nor did ICANN present Mr. Jeffery as a witness, despite his presence in the hearing room. No mention of reservations about sponsorship is to be found in the June 1, 2005 resolution; it contains no caveats, unlike the resolutions adopted in respect of the applications for .JOBS and .MOBI adopted by the Board in 2004.

**66. ICANN further argues, ICM observes, that the June 1, 2005, resolution provides that the contract would be entered into “if” the parties were able to negotiate “commercial and technical terms”; therefore ICM should have known that all other issues also remained open. But, responds ICM, “Complete silence on an issue – when other issues are specifically mentioned – does not create ambiguity on the missing issue. It means that the missing issue is no longer an issue.” (*Id.*, pp. 15-16.)**

**67. Shortly after adoption of the June 1, 2005 resolution, contract negotiations commenced. As predicted by Mr. Jeffrey in a June 13, 2005, email to Ms. Burr, the negotiations were “quick” and “straightforward”. (C-150.) Agreement on the terms of a registry contract was reached between them by August 1, 2005. That draft registry agreement was posted on the ICANN website on August 9, 2005. The Board was scheduled to discuss it at a meeting to be held on August 16.**

**68. But then came the intervention of the U.S. Department of Commerce described *supra*, paragraphs 27 and 29. ICM argues that it is remarkable that the U.S. Government responded in the way it did to a lobbying campaign largely generated by the website of the Family Research Council. “What is even more remarkable is the extent to which ICANN altered its course of conduct with respect to ICM in response to the U.S. government’s intervention.” ICM contends that: “The unilateral intervention by the U.S. government was entirely inappropriate and ICANN knew it. But rather than adhere to the principles of its Articles and Bylaws, ICANN quickly bowed to the U.S. intervention, and, at the same time tried to conceal it.” (Claimant’s Post-Hearing Submission, p. 27.) The charge of concealment relates to Dr. Twomey’s having “suggested” to the Chairman of the GAC that he write to ICANN requesting delay in considering the draft contract with ICM (*supra*, paragraph 28). Dr. Twomey acknowledged at the hearing that he so suggested but explained that the letter was nothing more than a confirmation of what Board members had heard weeks before from the GAC in Luxembourg. (Tr. 856:8-19, 859:1-12, 861:10-20, and *supra*, paragraphs 21-25.)**

**69. ICM invokes the witness statement provided by the chair of the Sponsorship Evaluation Team, Dr. Williams, who, as a fellow Australian, had a close working relationship with Dr. Twomey. She wrote that:**

**“The June 2005 vote should have marked the completion of the substantive discussions of the .XXX application, especially in light of the Board resolution that approved the .XXX application with no**

**reservations or caveats. Instead, following the vote, the ICANN Governmental Advisory Committee ‘woke up’ to the .XXX application, and ICANN began to feel pressure from a number of governments, especially from the United States and Australia...An open dispute with the United States would have been very damaging to ICANN’s credibility, and it was therefore very difficult to resist pressure from the United States...Dr. Twomey expressed to me his anxiety about the .XXX registry agreement as a result of this [Gallagher] intervention. This concern went to the heart of ICANN’s legitimacy as a quasi-independent technical regulatory organization with the power to establish the process by which new TLDs could be created and put on the root. If the United States Government disagreed with ICANN’s process or decision at any point and did not enter a TLD accepted by ICANN to the root, it would call into question ICANN’s authority, competence, and entire reason for existence.” (Witness Statement of Elizabeth Williams, pp. 26-28.)**

**70. ICM points out that the Wellington Communique of the GAC (*supra*, paragraph 35) referred to “the Board determination that the [ICM] application had overcome the deficiencies noted in the Evaluation Report.” ICM maintains that, at ICANN’s staff prompting, ICM responded to all of the concerns raised in the GAC’s Wellington Communique. Thus, the Third Draft Registry Agreement of April 18, 2006, included commitments of ICM to establish policies and procedures to label the sites on the domain, to use automated tools to detect and prevent child pornography, to maintain accurate lists of registrants and assist law enforcement agencies to identify and contact the owners of particular sites, and to ensure the intellectual property and trademark rights, personal names, country names, names of historical, cultural and religious significance and names of geographic identifiers, drawing on domain name registry best practices (C-171).**

**71. ICM construes a statement of Dr. Cerf at the hearing as indicating that the reason, or a reason, why ICM ultimately did not obtain a registry agreement was that ICM could not provide adequate solutions “to deal with the problem of pornography on the Net”. It counters that ICM had never undertaken to “deal with” or solve “the problem of pornography on the Net”. “The purpose of .XXX was to create an sTLD where responsible adult content providers would agree, *inter alia*, to submit to technological tools to help tag and filter their sites; allow their sites to be ‘crawled’ for indicia of child pornography (real or virtual); and otherwise adhere to best practices for responsible members of the industry (including practices to prevent credit card fraud, spam, misuse of personal data, the sending of unsolicited**

**promotional email, the ‘capture’ of visitors to their sites, etc.).” (Claimant’s Post-Hearing Submission, p. 42.) However, Dr. Twomey seized on a phrase in the Wellington Communique “in order to impose an impossible burden on ICM.” According to ICM, Dr. Twomey asserted that “the GAC was now insisting that ICM be responsible for ‘enforcing restrictions’ around the world on access to illegal and offensive content.” (*Id.*, pp. 42-43.) But, ICM argues, to the extent that the GAC was requesting ICM to enforce restrictions on illegal and offensive content, ICANN was**

**“not merely acting outside its mission. It was also imposing a requirement on ICM that had never been imposed on any other registrant for any other top level domain, and that, indeed, no registrant could possibly fulfil. .COM, for example, is unquestionably filled with content that is considered ‘illegal and offensive’ in many countries. Some of its content is considered ‘illegal and offensive’ in all countries. Adult content can be found on numerous other TLDs...Dr. Cerf had told the GAC in Luxembourg in July 2005, when he was explaining the Board’s determination that ICM had met the RFP criteria: ‘to the extent that governments do have concerns they relate to the issues across TLDs.’ ICANN has never suggested that the registries for those other TLDs must ‘enforce’ restrictions on access to illegal or offensive content for sites on their TLDs.” (*Id.*, pp. 43-44.)**

**72. ICM adds that if “the GAC was in fact asking ICANN to impose such an absurd requirement on ICM, then ICANN should have told the GAC that it could not do so.” The GAC is no more than an advisory body supposed to provide “advice” on a “timely” basis. “ICANN is by no means under any obligation to do whatever the GAC tells it to do.” Indeed, ICANN’s Bylaws specifically contemplate that the Board may decide not to follow the GAC’s advice. (*Id.*, p. 44.)**

**73. ICM invokes the terms of the Bylaws, Section 2(1)(j), which provide that:**

**“The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution. If no such solution can be found, the ICANN Board will state**

**in its final decision the reasons why the Governmental Advisory Committee's advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to public policy issues falling within their responsibilities.” (C-5, and *supra*, paragraph 9.)**

**74. ICM further argues however that Dr. Twomey's reading of the Wellington Communique was not a reasonable one. The Wellington Communique recalls that “ICM promised a range of public interest benefits as part of its bid to operate the .xxx domain...The public policy aspects identified by members of the GAC include the degree to which .xxx application would: Take appropriate measures to restrict access to illegal and offensive content...” (*Id.* p. 45; C-181). As promised in its application, ICM in fact proposed numerous measures to restrict access to illegal and offensive content. But nowhere did the GAC state that ICM should be responsible for “enforcing” the restrictions of countries on access to illegal and offensive content. ICM argues that the very fact that the GAC wanted ICM to “maintain accurate details of registrants and assist law enforcement agencies to identify and contact the owners of particular websites” (C-181, p. 3) demonstrates that the GAC did *not* expect ICM to enforce various national restrictions on access to illegal and offensive content.**

**75. The numerous measures that ICM set out in its revised draft registry agreement in consultation with the staff of ICANN did not constitute an agreement or “representation to enforce the laws of the world on pornography” (testimony of Ms. Burr, Tr. 1044: 8-9). Actually the activation of an .XXX TLD would make it far easier for governments to restrict access to content that they deemed illegal or offensive. Indeed, as Dr. Cerf told the GAC in Luxembourg in July 2005 in defending ICANN's agreeing to enter into contract negotiations with ICM, “The TLD system is neutral, although filtering systems could be solutions promoted by governments.” (C-139, p. 5.) “In other words,” ICM argues, “the appropriate place for restricting access to content deemed illegal or offensive by any particular country is within that particular country. ICM offered far more tools for countries to effectuate such restrictions than have ever existed before. Thus, ICM provided ‘appropriate measures to restrict access to illegal and offensive content.’” (Claimant's Post-Hearing Submission, p. 47.)**

**76. ICM alleges that, “Nonetheless, on 10 May 2006, the ICANN Board proceeded to reject ICM's registry agreement because, in Dr. Twomey's words, ICM had not demonstrated how it would ‘ensure enforcement of these contractual terms’ as they relate to various countries' individual laws**

**'concerning pornographic content' [citing C-189, p.6]. In other words, ICM's draft registry agreement was rejected on the basis of its inability to comply with a contractual undertaking to which it had never agreed in the first place.' (Id., p. 48.)**

**77. At that same meeting of the Board, Dr. Twomey drew attention to a letter of May 4, 2006 from Martin Boyle, UK Representative to the GAC, which read as follows:**

**"The discussions held by the Governmental Advisory Committee in Wellington in March have highlighted some of the key concerns, and strong opposition by some administrations, to the application for a new top-level domain for pornographic content, dot.xxx. I thought that it would be helpful to follow up those discussions by submitting directly to the ICANN Board the views of the UK Government. In preparing these views, we have consulted a number of stakeholders in the UK, including Internet safety groups...**

**"Having examined the proposal in detail, and recognizing ICANN's authority to grant such domain names, the UK expresses its firm view that if the dot .xxx domain name is to be authorized, it would be important that ICANN ensures that the benefits and safeguards proposed by the registry, ICM, including the monitoring of all dot.xxx content and rating of content on all servers pointed to by .xxx, are genuinely achieved from day one. Furthermore, it will be important to the integrity of ICANN's position as final approving authority for the dot.xxx domain name, to be seen as able to intervene promptly and effectively if for any reason failure on the part of ICM in any of these fundamental safeguards becomes apparent. It would also in our view be essential that ICM liase with the relevant bodies in charge of policing illegal Internet content at national level, such as the Internet Watch Foundation (IWF) in the UK, so as to ensure the effectiveness of the solutions it proposes to avoid the further propagation of illegal content. Specifically, ICM should undertake to monitor all dot.xxx content as it proposed and cooperate closely with IWF and equivalent agencies.**

**"This is an important decision that the ICANN Board has to take and whatever you decide will probably attract criticism from one quarter or another. This makes it all the more important that in making a decslon, you reach a clear view on the extent to which the benefits which ICM claim are likely to be sustainable and reliable." (C-182.)**

**78. Dr. Twomey said this about Mr. Boyle's position:**

**"...the contractual terms put forward by ICM to meet the sorts of public-policy concerns raised by the Governmental Advisory Committee in my view are very difficult to implement, and I retain concerns about their ability to actually be implemented in an international environment where the important phrase, 'all applicable law', would raise a very wide and variable test for enforcement and compliance. And I can't see how that will actually be achieved under the contract. The letter from the UK is an indication of the expectations of the international governmental community to ensure enforcement of these contractual terms as they individually interpret them against their own law concerning pornographic content. This will put ICANN in an untenable position." (C-189, p. 6.)**

**79. ICM contends that "it is impossible to reconcile the points made in Mr. Boyle's letter – *i.e.*, that ICANN should ensure that ICM delivered from "day one" on the 'benefits and safeguards' promised in its contract, and that ICM should liase with the IWF – as a requirement 'to ensure enforcement of the contractual terms as they each individually interpret them against their own law concerning pornographic content'. And even if Mr. Boyle had been making such a demand, it would have been entirely outside ICANN's mandate to impose it on ICM, and would have imposed a requirement on ICM that it has never imposed on any other registry." (Claimant's Post-Hearing Submission, p. 50.)**

**80. ICM however acknowledges that other members of the Board shared Dr. Twomey's analysis. It concludes that:**

**"...the ICANN Board was now imposing a requirement that was outside the mission of ICANN; that had never been imposed on any other registry; and that – had it been included in the RFP – would have kept any applicant from applying for an sTLD dealing with adult content." (*Id.*, p. 51.)**

**81. ICM observes that, following the ICANN Board's rejection of the ICM registry agreement on May 10, 2006, and then its renewed consideration of it after ICM withdrew its request for reconsideration (*supra*, paragraph 39), ICM responded to further requests of ICANN staff. It agreed to conclude a contract with what is now known as the Family Online Safety Institute ("FOSI") specifying that FOSI was "to use an automated tool to scan" the .XXX domain and develop other ways to monitor ICM's compliance with its**



**commitments. ICM notes that, throughout the entire negotiation process, the ICANN staff never asked ICM to change the definition of the sponsored community, which remained the same though each of the five renderings of the draft registry agreement.**

**82. At the Board's meeting of February 12, 2007, the question of the solidity of ICM's sponsorship was re-opened – in ICM's view, inappropriately — as described above (*supra*, paragraphs 41-45 and C-199). ICM argues that the data that it responsively submitted to the ICANN Board in March 2007 demonstrated that its application met the RFP standard of “broad-based support from the community”. 76,723 adult website names had been pre-reserved in .XXX since June 1, 2005; 1,217 adult webmasters from over 70 countries had registered on the ICM Registry website, saying that they supported .XXX. But, ICM observes, none of the Board members voting against acceptance of ICM's application at the dispositive meeting of March 30, 2007, mentioned the extensive evidence provided by ICM in support of sponsorship.**

**83. For the reasons set forth above in paragraphs 63-82, ICM contends that the Board's rejection of its application was not consistent with ICANN's Articles of Incorporation and Bylaws. As regards the five specific reasons for rejection set forth in the Board's resolution of March 30, 2007 (*supra*, paragraph 47), ICM makes the following allegations of inconsistency.**

**84. Reason 1: ICM's application and revised agreement fail to meet the sponsored community criteria of the RFP specification. ICM responds that the Board concluded by its resolution of June 1, 2005, that ICM had met the RFP's sponsorship criteria; and that the Board's abandonment of the two-step process and its reopening of sponsorship at the eleventh hour, and only in respect of ICM's application, violated ICANN's Articles and Bylaws. The manner in which it then “reapplied” the sponsorship criteria to ICM was “incoherent, discriminatory and pretextual”. (Claimant's Post-Hearing Submission, pp. 61-62.) There was no evidence before the Board that ICM's support in the community was eroding. No other applicant was held to a similar standard of demonstrating community support. ICM produced sufficient evidence of what was required by the RFP: “broad-based support from the community”.**

**85. ICANN also complained that ICM's community definition was self-identifying but that was true of numerous sTLDs; as Dr. Twomey acknowledged in a letter of May 6, 2006, “(m)embers of both .TEL and .MOBI communities are self-identified”. Both sTLDs are now in the root.**

**86. ICANN further complained that the sponsored community as defined by ICM was not sufficiently differentiated from other adult entertainment providers. But, besides the fact that ICM had set forth numerous criteria by which members of its community would differentiate themselves from others providers of the adult community, this too could be said to apply to other TLDs. Thus .TRAVEL, much like .XXX, is designed to provide an sTLD for certain members of the industry that wish to follow the rules of a particular charter.**

**87. ICANN further complained that .XXX would merely duplicate content found elsewhere on the Internet. But again, the same was true for virtually all of the other sTLDs.**

**88. In sum “ICANN’s reopening of the sponsorship criteria – which it did *only* for ICM – was unfair, discriminatory and pretextual, and a departure from transparent, fair and well documented policies...not done neutrally and objectively, with integrity and fairness...[it] singled out ICM for disparate treatment, without substantial and reasonable cause.” (*Id.*, p. 65.)**

**89. Reason 2: based on the extensive comment and from the GAC’s Communiques, ICM’s agreement raises public policy issues. ICANN never precisely identified the “public policy” issues raised nor does it explain why they warrant rejection of the application. But, ICM argues, Reasons 2-5 all arise from the same flawed interpretation of the Wellington Communique and other governmental comments, namely, that ICM was to be responsible for enforcing the world’s various and different laws and standards concerning pornography. That interpretation “was sufficiently absurd as to have been made in bad faith”; in any event it holds ICM to an “impossible standard”, and is one never imposed on any other registrant and that no registrant could possibly perform. It led to further flawed conclusions, *viz.*, that if ICM could not meet its responsibility (and no one could) then ICANN would have to take it over, and, if it did so, ICANN would be taking on an oversight role regarding Internet content, which was beyond its technical mandate. ICANN’s imposition of this impossible requirement on ICM alone was discriminatory. It rejected ICM’s application on grounds that were not applied neutrally and objectively, which were suggestive of a “pretextual basis to ‘cover’ the real reason for rejecting .XXX, *i.e.*, that the U.S. government and several other powerful governments objected to its proposed content.” (*Id.*, pp. 66-67.)**

**90. Reason 3: the ICM application and revised agreement do not resolve GAC’s issues, its concern for offensive content and protection of the vulnerable; the Board finds that these public policy concerns cannot be**

**credibly resolved with the mechanisms proposed by the applicant. ICM responds that this is merely an elaboration of Reason 2. ICM's proposed agreement contained detailed provisions to address child pornography issues and detailed mechanisms that would permit the identification and filtration of content deemed to be illegal or offensive.**

**91. Reason 4: the ICM application raises significant law enforcement compliance issues because of countries' varying laws relating to content and practices that define the nature of the application, therefore obligating ICANN to acquire a responsibility related to content and conduct. ICM responds that this builds on the fallacy of Reasons 2 and 3: according to the Board's apparent reasoning, the GAC was requiring ICM to enforce local restrictions on access to illegal and offensive content and if proved unable to do so, ICANN would have to do so. ICM responds that ICANN could not properly require ICM to undertake such enforcement obligations, whether or not the GAC actually so requested. Given that it would have been discriminatory and unfeasible to require ICM to enforce varying national laws regarding adult content, ICANN would not have been obligated to take over that responsibility if ICANN were unable to fulfill it.**

**92. Reason 5: there are credible scenarios in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, inconsistent with its technical mandate. ICM responds that this largely restates Reason 4. ICANN interpreted the GAC's advice to require ICM to be responsible for regulating content on the Internet – a task plainly outside ICANN's mandate. ICANN then criticized ICM for taking on that task and complained that it would have to undertake the task if ICM were unable to fulfill it. But ICANN could not properly require ICM to regulate content on the Internet and ICM did not undertake to do so.**

**93. The above exposition of the contentions of ICM, while long, does not exhaust the full range of its arguments, which were developed at length and in detail in its Memorial and in oral argument. It does not, for example, fully set out its contentions on the effect of international law and the local law on these proceedings. The essence of that argument is that ICANN is bound to act in good faith, an argument that the Panel does not find it necessary to expound since the conclusion is not open to challenge and is not challenged by counsel for ICANN. ICANN does not accept ICM's reliance on principles of international law but it agrees that the principle of good faith is found in the corporate law of California and hence is applicable in the instant dispute.**

**94. The “Relief Requested” by ICM Registry consists, *inter alia*, of requesting that the Panel declare that its Declaration is binding upon ICM and ICANN; and that ICANN acted inconsistently with its Articles of Incorporation and Bylaws by:**

**“i. Failing to conduct negotiations in good faith and to conclude an agreement with ICM to serve as registry operator for the .XXX sTLD;**

**“ii. Rejecting ICM’s proposed agreement to serve as registry operator...**

**“iii. Rejecting ICM’s application on 30 March 2007, after having previously concluded that it met the RFP criteria on 1 June 2005;**

**“iv. Rejecting ICM’s application on 30 March 2007 on the basis of the five grounds set forth...none of which were based on criteria set forth in the RFP criteria...**

**“v. Rejecting ICM’s application after ICANN had approved ICM to proceed to contract negotiations...” (Claimant’s Memorial on the Merits, pp. 265-267.)**

**The Contentions of ICANN**

**95. ICANN maintains that (a) the Independent Review Process is advisory, not arbitral; (b) the judgments of the ICANN Board are to be deferentially appraised; (c) the governing law is that of the State of California, not the principles of international law; and (d) in its treatment and disposition of the application of ICM Registry, ICANN acted consistently with its Articles of Incorporation and Bylaws.**

**The Nature of the Independent Review Process**

**96. ICANN invokes the provisions of the Bylaws that govern the IRP process, entitled, “Independent Review of Board Actions”. Article IV, Section 3, provides that:**

**“1. ...ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.**

**“2. Any person materially affected by a decision or action of the Board that he or she asserts is inconsistent with the Articles of**

**Incorporation or Bylaws may submit a request for independent review of that decision or action.**

**“3. Requests for such independent review shall be referred to an Independent Review Panel (“IRP”) 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 and Bylaws.**

**“4. The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN (“the IRP Provider”) using arbitrators ...nominated by that provider.**

**“5. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with this Section 3.**

...

**“8. The IRP shall have the authority to:**

...

**b. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and**

**c. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.**

...

**“12. Declarations of the IRP shall be in writing. The IRP shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties’ positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.**

**“13. The IRP operating procedures, and all petitions, claims and declarations, shall be posted on the Website when they become available.**

...

**“15. Where feasible, the Board shall consider the IRP declaration at the Board’s next meeting.” (C-5.)**

**97. ICANN contends that the foregoing terms make it clear that the IRP’s declarations are advisory and not binding. The IRP provisions commit the Board to review and consideration of declarations of the Panel. The Bylaws direct the Board to “consider” the declaration. “The direction to ‘consider’ the Panel’s declaration necessarily means that the Board has discretion whether and how to implement it; if the declaration were binding such as with a court judgment or binding arbitration ruling, there would be nothing to consider, only an order to implement.” (ICANN’s Response to Claimant’s Memorial on the Merits, p. 32.) ICANN’s Board is specifically directed to “review” the Panel’s declarations, not to implement them. Moreover, the Board is “not even required to review or consider the declaration immediately, or at any particular time,” but is encouraged to do so at the next Board meeting, where “feasible”, reinforcing the fact that the Board’s review and consideration of the Panel’s declaration does not require its acceptance. The Panel may “recommend”, but not require, interim action. If final Panel declarations were binding, it would make no sense for interim remedies to be merely recommended to the Board. (*Id.*, p. 33.)**

**98. ICANN maintains that the preparatory work of the Bylaws demonstrates that the Independent Review Process was designed to be advisory. The Draft Principles for Independent Review state that the IRP’s authority would be persuasive, “rest[ing] on its independence, on the prestige and professional standing of its members, and on the persuasiveness of its reasoned opinions”. But “the ICANN Board should retain ultimate authority over ICANN’s affairs – after all, it is the Board...that will be chosen by (and is directly accountable to) the membership and supporting organizations”. (*Id.*, p. 34.) The primary pertinent document, “ICANN: A Blueprint for Reform,” calls for the creation of “a process to require non-binding arbitration by an international arbitration body to review any allegation that the Board has acted in conflict with ICANN’s Bylaws”. ICM Registry’s counsel in its negotiations with ICANN for a top-level domain, Ms. Burr, who as a senior official of the U.S. Department of Commerce was the principal official figure immediately involved in the creation and launching of ICANN, in addressing**

**the independent review process, observed that “decisions will be nonbinding, because the Board will retain final decision-making authority”. (*Ibid.*, p. 36.) In accepting recommendations for an independent review process that expressly disclaimed creation of a “Supreme Court” for ICANN, the Board changed the reference to “decisions” of the IRP to “declarations” precisely to avoid any inference that IRP determinations are binding decisions akin to those of a judicial or arbitral tribunal. (*Ibid.*, p. 38.)**

**99. ICANN further points out that, while the IRP Provider selected by it is the American Arbitration Association’s International Centre for Dispute Resolution, and while its Rules apply to IRP proceedings, those Rules in their application to IRP were amended to omit provision for the binding effect of an award.**

***The Standard of Review is Deferential***

**100. ICANN contends that the actions of the ICANN Board are entitled to substantial deference from this Panel. It maintains that that conclusion follows from the terms of Article 1, Section 2 of the Bylaws that set out the core values of ICANN (*supra*, paragraph 5). Article 1, Section 2 of the Bylaws provides that, “In performing its mission, the following core values should guide the decisions and actions of ICANN”; and the core values referred to in paragraph 5 of this Declaration are then spelled out. Section 2 concludes:**

**“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.” (C-5.)**

**101. ICANN argues that since, pursuant to the foregoing provision, the ICANN Board “shall exercise its judgment” in the application of competing core values, and since those core values embrace the neutral, objective and fair decision-making at issue in these proceedings, “the deference expressly**

**accorded to the Board in implementing the core values applies...” ICANN continues:**

**“Thus, by its terms, the Bylaws’ conferral of discretionary authority makes clear that any reasonable decision of the ICANN Board is, *ipso facto*, not inconsistent with the Bylaws and consequently must be upheld. Indeed, the Bylaws even go so far as to provide that outright departure from a core value is permissible in the judgment of the Board, so long as the Board reasonably ‘exercise[s] its judgment’ in determining that other relevant principles outweighed that value in the particular circumstances at hand.”**

**While in the instant case, in ICANN’s view, there was not even an arguable departure from the Articles of Incorporation or Bylaws, “...because such substantial deference is in fact due, there is no basis whatsoever for a declaration in ICM’s favor because the Board’s decisions in this matter were, at a minimum, clearly justified and within the range of reasonable conduct.” (ICANN’s Response to Claimant’s Memorial on the Merits, pp. 45-47.)**

**102. ICANN further argues that the Bylaws governing the independent review process sustain this conclusion. Article 4, Section 3, “strictly limits the scope of independent review proceedings to the narrow question of whether ICANN acted in a manner ‘inconsistent with’ the Articles of Incorporation and the Bylaws. In confining the inquiry into whether ICANN’s conduct was *inconsistent with* its governing documents, the presumption is one of consistency so that inconsistency must be established, rather than the reverse...independent review is not to be used as a mechanism to upset arguable or reasonable actions of the Board.” (*Ibid.*, p. 48.)**

**103. ICANN contends, moreover, that,**

**“Basic principles of corporate law supply an independent basis for the deference due to the reasonable judgments of the ICANN Board in this matter. It is black-letter law that ‘there is a presumption that directors of a corporation have acted in good faith and to the best interest of the corporation’...In California...these principles require deference to actions of a corporate board of directors so long as the board acted ‘upon reasonable investigation, in good faith and with regard for the best interests’ of the corporation and ‘exercised discretion within the scope of its authority’”. This includes the boards of not-for-profit corporations.” (*Ibid.*, pp. 49-50.)**



**The Applicable Law of This Proceeding**

**104. ICANN contests ICM's invocation of principles of international law, in particular the principle of good faith, and allied principles, estoppel, legitimate expectations and abuse of right. It notes that ICM's invocation of international law depends upon a two-step argument: first, ICM interprets Article 4 of the Articles of Incorporation, providing that ICANN will operate for the benefit of the Internet community "in conformity with relevant principles of international law", as a "choice-of-law" provision; second, ICM infers that "any violation of any principles of international law" constitutes a violation of Article 4 (thus allegedly falling within the Panel's jurisdiction to evaluate the consistency of ICANN's actions with its Articles and Bylaws).**

**105. ICANN contends that that two-step argument contravenes the plain language of the governing provisions as well as their drafting history. Article 4 of the Articles does not operate as a "choice-of-law" provision for the IRP processes prescribed in the Bylaws. Rather the provisions of the Bylaws and Articles, as construed in the light of the law of California, govern the claims before the Panel. Nor are the particular principles of international law invoked by ICM relevant to the circumstances at issue in these proceedings.**

**106. Article 4 is quoted in full in paragraph 3 of this Declaration. The specific activities that ICANN must carry out "in conformity with the relevant principles of international law and applicable international conventions and local law" are specified in Article 3 (*supra*, paragraph 2). Thus "relevant" in Article 4 means only principles of international law relevant to the activities specified in Article 3. "ICANN did not adopt principles of international law indiscriminately, but rather to ensure consistency between its policies developed for the world-wide Internet community and well-established substantive international law on matters relevant to various stakeholders in the global Internet community, such as general principles on trademark law and freedom of expression relevant to intellectual property constituencies and governments." (ICANN's Response to Claimant's Memorial on the Merits, pp. 59-60.) The principles of international law relied upon by ICM in this proceeding – the requirement of good faith and related doctrines – are principles of general applicability, and are not specially directed to concerns relating to the Internet, such as freedom of expression or trademark law. Therefore, ICANN argues, they are not "relevant". (*Ibid.*) Article 4 does not operate as a choice-of-law provision requiring ICANN to adapt its conduct to any and all principles of international law. It is not worded as choice-of-law clauses are. As ICANN's expert, Professor David D. Caron notes, it is unlikely that a choice-of-law clause would designate three sources of law on the**

**same level. It is the law of California, the place of ICANN's incorporation, that – by reason of ICANN's incorporation under the law of California – governs how ICANN runs its business and interacts with another U.S. corporation regarding a contract to be performed within the United States. The IRP provisions of the Bylaws, drafted years after the Articles of Incorporation, and their drafting history, do not even mention Article 4 of the Articles.**

**107. Moreover, the specification of “relevant” principles of international law in Article 4 “must mean principles of international law that apply to a private entity such as ICANN” (*id.*, p. 66.) As a private party, ICANN is not subject to law governing sovereigns. International legal principles do not apply to a dispute between private entities located in the same nation because the dispute may have global effects.**

**108. Furthermore, ICM's cited general principles perform no clarifying role in this proceeding. The applicable rules set forth in ICANN's Bylaws and Articles as well as California law render resort to general principles unnecessary. In any event, California law and the Bylaws and Articles themselves provide sufficient guidance for the Panel's analysis.**

**ICANN Acted Consistently with its Articles of Incorporation and Bylaws**

**109. ICANN contends that each of ICM's key factual assertions is wrong. In view of the deference that should be accorded to the judgments of the ICANN Board, the Panel should declare that ICANN's conduct was not inconsistent with its Bylaws and Articles even if ICM's treatment of the facts were largely correct (as it is not). The issues presented to the ICANN Board by ICM's .XXX sTLD application were “difficult”, ICANN's Board addressed them with “great care”, and devoted “an enormous amount of time trying to determine the right course of action”. ICM was fully heard; the Board deliberated openly and transparently. ICANN is unaware of a corporate deliberative process more open and transparent than its own. After this intensive process, the Board twice concluded that ICM's proposal should be rejected, “with no hint whatsoever of the ‘bad faith’ ICM alleges.” (ICANN's Response to Claimant's Memorial on the Merits, pp. 79-80.)**

**110. ICM's claims “begin with the notion that ICANN adopted, and was bound by, an inflexible, two-step procedure for evaluating sTLD applications. First, according to ICM, applications would be reviewed by the Evaluation Panel for the baseline selection criteria. Second, only after applications were finally and irrevocably approved by the ICANN Board would the applications**

**proceed to contract negotiations with ICANN staff with no ability by the Board to address any of the issues that the Board had previously raised in conjunction with the sTLD application.” But the RFP refutes this contention. It does not suggest that the Board’s “allowance for an application to proceed to contract negotiations confirms the close of the evaluation process.” ICANN recalls the public statement of Mr. Pritz in Kuala Lumpur in 2004: “Upon completion of the technical and commercial negotiations, successful applicants will be presented to the ICANN Board with *all* the associated information, so the Board can independently review the findings along with the information and make their own adjustments. *And then* final decisions will be made by the Board, and they’ll authorize staff to complete or execute the agreements with the sponsoring organizations...” (*Ibid.*, pp. 81-82.) It observes that Dr. Cerf affirmed that: “ICANN never intended that this would be a formal, ‘two-step’ process, where proceeding to contract negotiations automatically constituted a *de facto* final and irrevocable approval with respect to the baseline selection criteria, including sponsorship.” (At p. 82, quoting V. Cerf Witness Statement, para. 15.) ICANN maintains that there were “two overlapping phases in the evaluation of the sTLDs” and the Board always retained the right “to vote against a proposed sTLD should the Board find deficiencies in the proposed registry agreement or in the sTLD proposal as a whole”. (P. 83.) There was a two-stage process but the two phases could and often did overlap in time. This is confirmed not only by Dr. Cerf but by Dr. Twomey and the then Vice-Chairman of the Board, Alejandro Pisanty. Each explains that the ICANN Board retained the authority to review and assess the baseline RFP selection criteria even after an applicant was allowed to proceed to contract negotiations. After the June 1, 2005, vote, members supporting ICM’s application did not argue that the Board had already approved the .XXX sTLD. The following exchange with Dr. Cerf took place in the course of the hearing:**

**“Q. Now, ICM’s position in this proceeding is that if the board voted to proceed to contract negotiations, the board was at that time making a finding that a particular applicant had satisfied the technical, financial and sponsorship criteria and that that issue was closed. Is that consistent with your understanding of how the process worked?**

**“A. Not, it’s not. The matter was discussed very explicitly during our consideration of the ICM proposal. We were using the contract negotiations as a means of clarifying whether or not...the sponsorship criteria could be or had been met...this was not a decision that all three of the criteria had been met.” (Tr. 601:4:13.)**

**111. ICM's evidence is not to the contrary. That evidence shows that there were two major steps in the evaluation process. It does not show that those steps could not be overlapping. The relevant question, not answered by ICM, is whether ICANN's Bylaws required these steps to be non-overlapping. "such that contract negotiations could not commence until the satisfaction of the RFP criteria was finally and irrevocably determined..." (*Ibid.*, p. 84.)**

**112. ICM's claims are also based on the argument that, by its terms, the Board's resolutions of June 1, 2005 gave "unconditional" approval of the .XXX sTLD application. (The June 1, 2005 resolutions are set out *supra*, paragraph 19.) But nothing in the resolutions actually says that ICM's application satisfied the RFP criteria, including sponsorship. In fact, nothing in the resolutions expresses approval at all because it provides that "if", after entering negotiations, the applicant is able to negotiate commercial and technical terms for a contractual arrangement, those terms shall be presented to the Board for approval and authorization to enter into an agreement relating to the delegation of the sTLD. "The plain language of the resolutions makes clear that they did not themselves constitute approval of the .XXX sTLD application. The resolutions thus track the RFP, which makes clear that a 'final decision will be made by the Board' only *after* 'completion of the technical and commercial negotiations'". (*Ibid.*, p. 86.)**

**113. ICANN maintains that as of June 2005, there remained numerous unanswered questions and concerns regarding ICM's ability to satisfy the baseline sponsorship criteria set forth in the RFP. An important purpose of the June 1 resolutions was to permit ICM to proceed to contract negotiations in an effort to determine whether ICM's sponsorship shortcomings could be resolved in the contract.**

**114. The ICANN Board also permitted other applicants for sTLDs – .JOBS and .MOBI – to proceed to contract negotiations despite open questions relating to the initial RFP criteria. However, ICM was unique among the field of sTLD applicants due to "the extremely controversial nature of the proposed sTLD, and concerns as to whether ICM had identified a 'community' that existed and actually supported the proposed sTLD...there was a significant negative response to ICM's proposed .XXX sTLD by many adult entertainment providers, the very individuals and entities who logically would be in ICM's proposed community." (*Ibid.*, p. 87.)**

**115. ICM's position is further refuted by continued discussion by the Board of sponsorship criteria at meetings subsequent to June 1, 2005. The fact that most Board members expressed concern about sponsorship**

**shortcomings after the June 1, 2005, resolutions negates any notion that the Board had conclusively determined the sponsorship issue.**

**116. A member of the Board elected after the June 1, 2005, vote, Rita Rodin, expressed “some concerns about whether the [ICM] proposal met the criteria set forth in the RFP...” She said that she did not want to re-open issues if they had already been decided by the Board (*supra*, paragraphs 42-43). In response to her query, no one stated that the sponsorship issue had already been decided by the Board. (ICANN’S Response to Claimant’s Memorial on the Merits, p. 90.)**

**117. ICANN also draws attention to Dr. Twomey’s letter of May 4, 2006 (*supra*, paragraph 37) in which he wrote that the Board’s decision of June 1, 2005, was without prejudice to the Board’s right to decide whether the contract reached with ICM meets all the criteria before the Board.**

**118. ICANN recalls that within days of the posting of the June 1, 2005, resolutions, GAC Chairman Tarmizi wrote Dr. Cerf expressing the GAC’s “diverse and wide-ranging concerns” with the .XXX sTLD. The ICANN Board was required by the ICANN Bylaws to take account of the views of the GAC. Nor could ICANN have ignored concerns expressed by the U.S. Government and other governments. ICANN recalls the concerns expressed thereafter, in the Wellington Communique and otherwise. It observes that “some countries were concerned that, because the .XXX application would not require all pornography to be located within the .XXX domain, a new .XXX sTLD would simply result in the expansion of the number of domain names that involved pornography.” (*Ibid.*, p. 102.)**

**119. ICANN points out that:**

**“In revising its proposed registry agreement to address the GAC’s concerns...ICM took the position that it would install ‘appropriate measures to restrict access to illegal and offensive content,’ including monitoring such content globally. This was immediately controversial among many ICANN Board members because complaints about ICM’s ‘monitoring’ would inevitably be sent to ICANN, which is neither equipped nor authorized to monitor (much less resolve) ‘content-based’ objections to Internet sites.” (*Ibid.*, pp. 103-104.)**

**120. ICANN recalls Board concerns that were canvassed at its meetings of May 10, 2006, (*supra*, paragraph 38) and February 12, 2007, (*supra*, paragraphs 41-45). Board members increasingly were concluding that the results promised by ICM were unachievable. Whether their conclusions were**

or were not incorrect is “irrelevant for purposes of determining whether the Board violated its Bylaws or Articles in rejecting ICM’s application.” (*ibid.*, p. 105.) Board doubts were accentuated by growing opposition to the .XXX sTLD from elements of the online adult entertainment industry (*ibid.*).

121. The Board’s May 10, 2006 vote (*supra*, paragraph 38) rejected ICM’s then current draft, but provided ICM “yet another opportunity to attempt to revise the agreement to conform to the RFP specifications. Notably, the Board’s decision to allow ICM to continue to work the problem is directly at odds with ICM’s position that the Board decided ‘for political reasons’ to reject ICM’s application; if so, it would have been much easier for the Board to reject ICM’s application in its entirety in 2006.” (*ibid.*, p. 106.)

122. At its meeting of February 12, 2007, (*supra*, paragraphs 41-45), concerns in the Board about whether ICM’s application enjoyed the support of the community it purported to represent were amplified.

123. At the meeting of March 30, 2007 at which ICM’s application and agreement were definitively rejected, the majority was, first, concerned by ICM’s definition of its community to include only those members of the industry who supported the creation of .XXX sTLD and its exclusion from the sponsored community of all online adult entertainment industry members who opposed ICM’s application.

“Such self-selection and extreme subjectivity regarding what constituted the content that defined the .XXX community made it nearly impossible to determine which persons or services would be in or out of the community...without a precisely defined Sponsored TLD Community, the Board could not approve ICM’s sTLD application.” (*ibid.*, pp. 108-109.)

124. Second, ICM’s proposed community was not adequately differentiated; ICM failed to demonstrate that excluded providers had separate needs or interests from the community it sought to represent. As contract negotiations progressed, it became increasingly evident that ICM was actually proposing an unsponsored TLD for adult entertainment, “a uTLD, disguised as an sTLD, just as ICM had proposed in 2000.” (*ibid.*, p. 209.)

125. Third, whatever community support ICM may have had at one time, it had “fallen apart by early 2007” (*ibid.*). During the final public comment period in 2007, “a vast majority of the comments posted to the public forum and sent to ICANN staff opposed ICM’s .XXX sTLD...” (p. 110). “Broad-based support” was lacking. (P. 111.) 75,000 pre-registrations for .XXX... “Out of

**the over 4.2 million adult content websites in operation” hardly represents broad-based support. (P. 115.)**

**126. Fourth, ICM could not demonstrate that it was adding new and valuable space to the Internet name space, as required by the RFP. “In fact, the existence of industry opposition to the .XXX sTLD demonstrated that the needs of online adult entertainment industry members were met via existing TLDs without any need for a new TLD.” (P. 112.)**

**127. Fifth and finally, ICM and its supporting organization, IFFOR, proposed to “proactively reach out to governments and international organizations to provide information about IFFOR’s activities and solicit input and participation”. But such measures “diluted the possibility that their policies would be ‘primarily in the interests of the Sponsored TLD Community’ as required by the sponsorship selection criteria.” (Pp. 112-113.)**

**128. ICANN concludes that, “despite the good-faith efforts of both ICANN and ICM over a lengthy period of time, the majority of the Board determined that ICM could not satisfy, among other things, the sponsorship requirements of the RFP.” Reasonable people might disagree – as did a minority of the Board – “but that disagreement does not even approach a violation of a Bylaw or Article of Incorporation.” (P. 113.)**

**129. The treatment of ICM’s application was procedurally fair. It was not the object of discrimination. Applications for .JOBS and .MOBI were also allowed to proceed to contractual negotiations despite open questions relating to selection criteria. ICANN applied documented policies neutrally and objectively, with integrity and fairness. ICM was provided with every opportunity to address the concerns of the Board and the GAC. ICANN did not reject ICM’s application only for reasons of public policy (although they were important). ICM’s application was rejected because of its inability to show how the sTLD would meet sponsorship criteria. The Board ultimately rejected ICM’s application for “many of the same sponsorship concerns noted in the initial recommendation of the Evaluation Panel.” (*Ibid.*, p. 124.) It also rejected the application because ICM’s proposed registry agreement “would have required ICANN to manage the content of the .XXX sTLD” (p. 126). The Board took into account the views of the GAC in arriving at its independent judgment. “Had the ICANN Board taken the view that the GAC’s views must in every case be followed without independent judgment, the Board presumably would have rejected ICM’s application in late 2005 or early 2006, rather than waiting another full year for the parties to try to identify a resolution that would have allowed the sTLD to proceed.” (*Ibid.*)**

**130. As to whether ICM was treated unfairly and was the object of discrimination, ICANN relies on the following statement of Dr. Cerf at the hearing:**

**“...I am surprised at an assertion that ICM was treated unfairly...the board could have simply accepted the recommendations of the evaluation teams and rejected the proposal at the outset...the board went out of its way to try to work with ICM through the staff to achieve a satisfactory agreement. We spent more time on this particular proposal than any other...We repeatedly defended our continued consideration of this proposal...If...ICM believes that it was treated in a singular way, I would agree that we spent more time and effort on this than any other proposal that came to the board with regard to sponsored TLDs.” (Tr. 654:3-655:7.)**

#### **PART FOUR: THE ANALYSIS OF THE INDEPENDENT REVIEW PANEL**

##### **The Nature of the Independent Review Panel Process**

**131. ICM and ICANN differ on the question of whether the Declaration to be issued by the Independent Review Panel is binding upon the parties or advisory. The conflicting considerations advanced by them are summarized above at paragraphs 51 and 91-94. In the light of them, the Panel acknowledges that there is a measure of ambiguity in the pertinent provisions of the Bylaws and in their preparatory work.**

**132. ICANN's officers testified before committees of the U.S. Congress that ICANN had installed provision for appeal to “independent arbitration” (*supra*, paragraph 55). Article IV, Section 3 of ICANN's Bylaws specifies that, “The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators...nominated by that provider”. The provider so chosen is the American Arbitration Association's International Centre for Dispute Resolution (“ICDR”), whose Rules (at C-11) in Article 27 provide for the making of arbitral awards which “shall be final and binding on the parties. The parties undertake to carry out any such award without delay.” The Rules of the ICDR “govern the arbitration” (Article 1). It is unquestioned that the term, “arbitration” imports production of a binding award (in contrast to conciliation and mediation). Federal and California courts have so held. The Supplementary Procedures adopted to supplement the independent review procedures set forth in ICANN's Bylaws provide that the ICDR's “International Arbitration Rules...will govern the process in combination with these Supplementary Procedures”. (C-12.) They specify**



that the Independent Review Panel refers to the neutrals “appointed to decide the issue(s) presented” and further specify that, “DECLARATION refers to the decisions/opinions of the IRP”. “The DECLARATION shall specifically designate the prevailing party.” All of these elements are suggestive of an arbitral process that produces a binding award.

133. But there are other indicia that cut the other way, and more deeply. The authority of the IRP is “to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” – to “declare”, not to “decide” or to “determine”. Section 3(8) of the Bylaws continues that the IRP shall have the authority to “recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP”. The IRP cannot “order” interim measures but do no more than “recommend” them, and this until the Board “reviews” and “acts upon the opinion” of the IRP. A board charged with reviewing an opinion is not charged with implementing a binding decision. Moreover, Section 3(15) provides that, “Where feasible, the Board shall consider the IRP declaration at the Board’s next meeting.” This relaxed temporal proviso to do no more than “consider” the IRP declaration, and to do so at the next meeting of the Board “where feasible”, emphasizes that it is not binding. If the IRP’s Declaration were binding, there would be nothing to consider but rather a determination or decision to implement in a timely manner. The Supplementary Procedures adopted for IRP, in the article on “Form and Effect of an IRP Declaration”, significantly omit the provision of Article 27 of the ICDR Rules specifying that award “shall be final and binding on the parties”. (C-12.) Moreover, the preparatory work of the IRP provisions summarized above in paragraph 93 confirms that the intention of the drafters of the IRP process was to put in place a process that produced declarations that would not be binding and that left ultimate decision-making authority in the hands of the Board.

134. In the light of the foregoing considerations, it is concluded that the Panel’s Declaration is not binding, but rather advisory in effect.

**The Standard of Review Applied by the Independent Review Process**

135. For the reasons summarized above in paragraph 56, ICM maintains that this is a *de novo* review in which the decisions of the ICANN Board do not enjoy a deferential standard of review. For the reasons summarized above in paragraphs 100-103, ICANN maintains that the decisions of the Board are entitled to deference by the IRP.

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

***The Applicable Law of this Proceeding***

**137. The contrasting positions of the parties on the applicable law of this proceeding are summarized above at paragraphs 59-62 and 104-109. Both parties agree that the “local law” referred to in the provision of Article 4 of the Articles of Incorporation – “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” – is the law of California. But they differ on what are “relevant principles of international law” and their applicability to the instant dispute.

**138. In the view of ICM Registry, principles of international law are applicable; that straightforwardly follows from their specification in the foregoing phrase of Article 4 of the Articles, and from the reasons given in introducing that specification. (*Supra*, paragraphs 53-54.) Principles of international law in ICM’s analysis include the general principles of law recognized as a source of international law in Article 38 of the Statute of the International Court of Justice. Those principles are not confined, as ICANN argues, to the few principles that may be relevant to the interests of Internet stakeholders, such as principles relating to trademark law and freedom of expression. Rather they include international legal principles of general applicability, such as the fundamental principle of good faith and allied principles such as estoppel and abuse of right. ICM’s expert, Professor Goldsmith, observes that there is ample precedent in international contracts and in the holdings of international tribunals for the proposition that non-sovereigns may choose to apply principles of international law to the determination of their rights and to the disposition of their disputes.**

**139. ICANN and its expert, Professor David Caron, maintain that international law essentially governs relations among sovereign States; and that to the extent that such principles are “relevant” in this case, it is those few principles that are applicable to a private non-profit corporation that bear on the activities of ICANN described in Article 3 of its Articles of Incorporation (*supra*, paragraph 2). General principles of law, such as that of good faith, are not imported by Article 4 of ICANN’s Articles of Incorporation; still less are principles derived from treaties that protect legitimate expectations. Nor is Article 4 of the Articles a choice-of-law provision; in fact, no governing law has been specified by the disputing parties in this case. If ICANN, by reason of its functions, is to be treated as analogous to public international organizations established by treaty (which it clearly is not), then a relevant principle to be extracted and applied from the jurisprudence of their administrative tribunals is that of deference to the discretionary authority of executive organs and of bodies whose decisions are subject to review.**

**140. 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.**

**That follows from the terms of Article 4 of its Articles of Incorporation and from the intentions that animated their inclusion in the Articles, an intention that the Panel understands to have been to subject ICANN to relevant international legal principles because of its governance of an intrinsically international resource of immense importance to global communications and economies. Those intentions might not be realized were Article 4 interpreted to exclude the applicability of general principles of law.**

**141. That said, the differences between the parties on the place of principles of international law in these proceedings are not of material moment to the conclusions that the Panel will reach. The paramount principle in play is agreed by both parties to be that of good faith, which is found in international law, in the general principles that are a source of international law, and in the corporate law of California.**

***The Consistency of the Action of the ICANN Board with the Articles of Incorporation and Bylaws***

**142. The principal – and difficult – issue that the Panel must resolve is whether the rejection by the ICANN Board of the proposed agreement with ICM Registry and its denial of the application's request for delegation of the .XXX sTLD was or was not consistent with ICANN's Articles of Incorporation and Bylaws. The conflicting contentions of the parties on this central issue have been set forth above (paragraphs 63-93, 109-131).**

**143. The Panel will initially consider the primary questions of whether by adopting the resolutions of June 1, 2005, the ICANN Board determined that the application of ICM Registry met the sponsorship criteria, and, if so, whether that determination was definitive and irrevocable.**

**144. The parties agree that, pursuant to the RFP, applications for sTLDs were to be dealt with in two stages. First, the Evaluation Panel was to review applications and recommend those that met the selection criteria. Second, those applicants that did meet the selection criteria were to proceed to negotiate commercial and technical terms of a contract with ICANN's President and General Counsel. If and when those terms were agreed upon, the resultant draft contract was to be submitted to the Board for approval. As it turned out, the Board was not content with the fact that the Evaluation Panel positively recommended only a few applications. Accordingly the Board itself undertook to consider and decide whether the other applications met the selection criteria.**

**145. In the view of the Panel, which has weighed the diverse evidence with care, the Board did decide by adopting its resolutions of June 1, 2005, that the application of ICM Registry for a sTLD met the selection criteria, in particular the sponsorship criteria. ICM contends that that decision was definitive and irrevocable. ICANN contends that, while negotiating commercial and technical terms of the contract, its Board continued to consider whether or not ICM's application met sponsorship criteria, that it was entitled to do so, and that, in the course of that process, further questions about ICM's application arose that were not limited to matters of sponsorship, which the Board also ultimately determined adversely to ICM's application.**

**146. The considerations that militate in favor of ICM's position are considerable. They are summarized above in paragraphs 63, 65 and 66. ICM argues that these considerations must prevail because they are sustained by contemporary documentary evidence, whereas the contrary arguments of ICANN are not.**

**147. The Panel accepts the force of the foregoing argument of ICM insofar as it establishes that the June 1, 2005, resolutions accepted that ICM's application met the sponsorship criteria. The points summarized in subparagraphs (a) through (i) of paragraph 63 above are in the view of the Panel not adequately refuted by the recollections of ICANN's witnesses, distinguished as they are and candid as they were. Their current recollection, the sincerity of which the Panel does not doubt, is that it was their understanding in adopting the June 1, 2005 resolution that the Board was entitled to continue to examine whether ICM's application met the sponsorship criteria, even if it had by adopting that resolution found those criteria to have been provisionally met (which they challenge). While that understanding is not supported by factors (a) through (i) of paragraph 63, it nevertheless can muster substantial support on the question of whether any determination that sponsorship criteria had been met was subject to reconsideration.**

**148. Support on that aspect of the matter consists of the following:**

- (a) The resolutions of June 1, 2005 (*supra*, paragraph 19) make no reference to the satisfaction of sponsorship criteria or to whether that question is definitively resolved.**
- (b) Those resolutions however expressly provide that the approval and authorization of the Board is required to enter into an agreement relating to**

**the delegation of the sTLD; that being so, the Board viewed itself to be entitled to review all elements of the agreement before approving and authorizing it, including whether sponsorship criteria were met.**

**- (c) At the meeting of the GAC in July, 2005, some six weeks after the adoption by the Board of its resolutions of June 1, in the course of preparing the GAC Communique, the GAC Chair “confirmed that, having consulted the ICANN Legal Counsel, GAC could still advise ICANN about the .xxx proposal, should it decide to do so.” (*Supra*, paragraph 24.) Since on the advice of counsel the GAC could still advise ICANN about the .XXX proposal, and since questions had been raised in the GAC about whether ICM’s application met sponsorship criteria in the light of the appraisal of the Evaluation Panel, it may seem to follow that that advice could embrace the question of whether sponsorship criteria had been met and whether any such determination was subject to reconsideration. In point of fact, after June 1, 2005, a number of members of the GAC challenged or questioned the desirability of approving the ICM application on a variety of grounds, including sponsorship (*supra*, paragraphs 21-25, 40).**

**- (d) At its teleconference of September 15, 2005, there was “lengthy discussion involving nearly all of the directors regarding the sponsorship criteria...” (*supra*, paragraph 32). That imports that the members of the Board did not regard the question of sponsorship criteria to have been closed by the adoption of the resolutions of June 1, 2005.**

**- (e) In a letter of May 4, 2006, the President Twomey wrote the Chairman and Members of the GAC noting**

**“that the Board decision as to the .XXX application is still pending...the Board voted to authorize staff to enter into contractual negotiations without prejudicing the Board’s right to evaluate the resulting contract and to decide whether it meets all of the criteria before the Board including public policy advice such as might be offered by the GAC... Due to the subjective nature of the sponsorship related criteria that were reviewed by the Sponsorship Evaluation Team, additional materials were requested from each applicant to be supplied directly for Board review and consideration...In some instances, such as with .XXX, while the additional materials provided sufficient clarification to proceed with contractual discussions, the Board still expressed concerns about whether the applicant met all of the criteria, but took the view that such concerns could possibly be**

**addressed by contractual obligations to be stated in a registry agreement.” (C-188, and *supra*, paragraph 37.)**

- (f) At a Board teleconference of February 12, 2007, ICANN’s General Counsel asked the Board to consider “how ICM measures up against the RFP criteria,” a request that implies that questions about whether such criteria had been met were not foreclosed. (*Supra*, paragraph 41.)**
- (g) ICM provided data to ICANN staff, in the course of the preparation of its successive draft registry agreements, that bore on sponsorship. It has not placed in evidence contemporaneous statements that in its view such data was not relevant to continued consideration of its application on the ground that it had met sponsorship criteria or that the Board’s June 1, 2005 resolutions foreclosed further consideration of sponsorship criteria. It is understandable that it did not do so, because it was in the process of endeavoring to respond positively to every request of the ICANN Board and staff that it could meet in the hope of promoting final approval of its application; but nevertheless that ICM took part in a continuing dialogue on sponsorship criteria suggests that it too did not regard, or at any rate, treat, that question as definitively resolved by adopted of the June 1, 2005 resolutions.**
- (h) When Rita Rodin, a new member of the Board, raised concerns about ICM’s meeting of sponsorship criteria at the Board’s teleconference of February 12, 2007, she said that she did “not wish to reopen issues if they have already been decided by the Board” and asked the President and General Counsel to confirm that the question was open for discussion. There was no direct reply but the tenor of the subsequent discussion indicates that the Board did not view the question as closed. (During the Board’s debate over adoption of its climactic resolution of March 30, 2007, Susan Crawford said that opposition to ICM’s application was not sufficient “to warrant revisiting the question of the sponsorship strength of this TLD which I personally believe to be closed.”) (*Supra*, paragraph 52.)**

**149. While the Panel has concluded that by adopting its resolutions of June 1, 2005, the Board found that ICM’s application met financial, technical and sponsorship criteria, less clear is whether that determination was subject to reconsideration. The record is inconclusive, for the conflicting reasons set forth above in paragraphs 63, 65 and 66 (on behalf of ICM) and paragraph 149 (on behalf of ICANN). The Panel nevertheless is charged with arriving at a conclusion on the question. In appraising whether ICANN on this issue “applied documented policies, neutrally and objectively, with integrity and**

fairness” (Bylaws, Section 2(8)), the Panel finds instructive the documented policy stated in the Board’s Carthage resolution of October 31, 2003 on “Finalization of New sTLD RFP,” namely, that an agreement “reflecting the commercial and technical terms shall be negotiated upon the successful completion of the sTLD selection process.” (C-78, p. 4.) In the Panel’s view, the sTLD process was “successfully completed”, as that term is used in the Carthage RFP resolution, in the case of ICM Registry with the adoption of the June 1, 2005, resolutions. ICANN should, pursuant to the Carthage documented policy, then have proceeded to conclude an agreement with ICM on commercial and technical terms, without reopening whether ICM’s application met sponsorship criteria. As Dr. Williams, chair of the Evaluation Panel, testified, the RFP process did not contemplate that new criteria could be added after the [original] criteria had been satisfied. (Tr. 374: 1719). It is pertinent to observe that the GAC’s proposals for new TLDs generally exclude consideration of new criteria (*supra*, paragraph 46).

150. In so concluding, the Panel does not question the integrity of the ICANN Board’s disposition of the ICM Registry application, still less that of any of the Board’s members. It does find that reconsideration of sponsorship criteria, once the Board had found them to have been met, was not in accord with documented policy. If, by way of analogy, there was a construction contract at issue, the party contracting with the builder could not be heard to argue that specifications and criteria defined in invitations to tender can be freely modified once past the qualification stage; the conditions of any such modifications are carefully circumscribed. Admittedly in the instant case the Board was not operating in a context of established business practice. That fact is extenuating, as are other considerations set out above. The majority of the Board appears to have believed that was acting appropriately in reconsidering the question of sponsorship (although a substantial minority vigorously differed). The Board was pressed to do so by the Government of the United States and by quite a number of other influential governments, and ICANN was bound to “duly take into account” the views of those governments. It is not at fault because it did so. It is not possible to estimate just how influential expressions of governmental positions were. They were undoubtedly very influential but it is not clear that they were decisive. If the Board simply had yielded to governmental pressure, it would have disposed of the ICM application much earlier. The Panel does not conclude that the Board, absent the expression of those governmental positions, would necessarily have arrived at a conclusion favorable to ICM. It accepts the affirmation of members of the Board that they did not vote against acceptance of ICM’s application because of governmental pressure. Certainly there are those, including Board members,



**who understandably react negatively to pornography, and, in some cases, their reactions may be more visceral than rational. But they may also have had doubts, as did the Board, that ICM would be able successfully to achieve what it claimed .XXX would achieve.**

**151. The Board's resolution of March 30, 2007, rejecting ICM's proposed agreement and denying its request for delegation of the .XXX sTLD lists four grounds for so holding in addition to failure to meet sponsored community criteria (*supra*, paragraph 47). The essence of these grounds appears to be the Board's understanding that the ICM application "raises significant law enforcement compliance issues ... therefore obligating ICANN to acquire responsibility related to content and conduct ... there are credible scenarios that lead to circumstances in which ICANN would be forced to assume an ongoing management and oversight role regarding Internet content, which is inconsistent with its technical mandate." ICM interprets these grounds, and statements of Dr. Twomey and Dr. Cerf, as seeking to impose on ICM responsibility for "enforcing restrictions around the world on access to illegal and offensive content" (*supra*, paragraph 66-67). ICM avers that it never undertook "to enforce the laws of the world on pornography", an undertaking that it could never discharge. It did undertake, in the event of the approval and activation of .XXX, to install tools that would make it far easier for governments to restrict access to content that they deemed illegal and offensive. ICM argues that its application was rejected in part because of its inability to comply with a contractual undertaking to which it never had agreed in the first place (*supra*, paragraphs 66-71). To the extent that this is so – and the facts and the conclusions drawn from the facts by the ICANN Board in its resolution of March 30, 2007, in this regard are not fully coherent – the Panel finds ground for questioning the neutral and objective performance of the Board, and the consistency of its so doing with its obligation not to single out ICM Registry for disparate treatment.**

#### **PART FIVE: CONCLUSIONS OF THE INDEPENDENT REVIEW PANEL**

**152. The Panel concludes, for the reasons stated above, that:**

**First, the holdings of the Independent Review Panel are advisory in nature; they do not constitute a binding arbitral award.**

**Second, 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.**

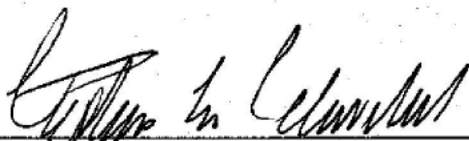
**Third, the provision of Article 4 of ICANN's Articles of Incorporation prescribing that ICANN "shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law," requires ICANN to operate in conformity with relevant general principles of law (such as good faith) as well as relevant principles of international law, applicable international conventions, and the law of the State of California.**

**Fourth, the Board of ICANN in adopting its resolutions of June 1, 2005, found that the application of ICM Registry for the .XXX sTLD met the required sponsorship criteria.**

**Fifth, the Board's reconsideration of that finding was not consistent with the application of neutral, objective and fair documented policy.**

**Sixth, in respect of the first foregoing holding, ICANN prevails; in respect of the second foregoing holding, ICM Registry prevails; in respect of the third foregoing holding, ICM Registry prevails; in respect of the fourth foregoing holding, ICM Registry prevails; and in respect of the fifth foregoing holding, ICM Registry prevails. Accordingly, the prevailing party is ICM Registry. It follows that, in pursuance of Article IV, Section 3(12) of the Bylaws, ICANN shall be responsible for bearing all costs of the IRP Provider. Each party shall bear its own attorneys' fees. Therefore, the administrative fees and expenses of the International Centre for Dispute Resolution, totaling \$4,500.00, shall be borne entirely by ICANN, and the compensation and expenses of the Independent Review Panel, totaling \$473,744.91, shall be borne entirely by ICANN. ICANN shall accordingly reimburse ICM Registry with the sum of \$241,372.46, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by ICM Registry.**

**Judge Tevrizian is in agreement with the first foregoing conclusion but not the subsequent conclusions. His opinion follows.**



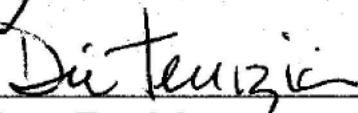
**Stephen M. Schwebel**

Date: February 19, 2010



**Jan Paulsson**

Date: 16 February 2010



**Dickran Tevrizian**

Date: February 18, 2010

## **CONCURRING AND DISSENTING OPINION**

**I concur and expressly join in the Panel's conclusion that the holdings of the Independent Review Panel are advisory in nature and do not constitute a binding arbitral award. I adopt the rationale and the reasons stated by the Panel on this issue only.**

**However, I must respectfully dissent from my learned colleagues as to the remainder of their findings. I am afraid that the majority opinion will undermine the governance of the internet community by permitting any disgruntled person, organization or governmental entity to second guess the administration of one of the world's most important technological resources.**

### **I**

#### **INTRODUCTION**

**The Internet Corporation for Assigned Names and Numbers (hereinafter "ICANN") is a uniquely created institution: a global, private, not-for-profit organization incorporated under the laws of the State of California (Calif. Corp. Code 5100, et seq.) exercising plenary control over one of the world's most important technological resources: the Internet Domain Name System or "DNS." The DNS is the gateway to the nearly infinite universe of names and numbers that allow the Internet to function.**

**ICANN is a public benefit, non-profit corporation that was established under the law of the State of California on September 30, 1998. ICANN's Articles of Incorporation were finalized and adopted on November 21, 1998, and its By-Laws were finalized and adopted on the same day as its Articles of Incorporation.**

**Article 4 of ICANN's Articles of Incorporation sets forth the standard of conduct under which ICANN is required to carry out its activities and mission to protect the stability, integrity and utility of the Internet Domain Name System on behalf of the global Internet community pursuant to a series of agreements with the United States Department of Commerce. ICANN is headquartered in Marina del Rey, California, U.S.A.**

**Article 4 of ICANN's Articles of Incorporation specifically provide:**

**"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."**

**ICANN serves the function as the DNS root zone administrator to ensure and is required by its Articles of Incorporation to be a neutral and open facilitator of Internet coordination. ICANN's function and purpose was never meant to be content driven in any respect.**

**The Articles of Incorporation provide that ICANN is managed by a Board of Directors ("Board"). The Board consists of 15 voting directors and 6 non-voting liaisons from around the world, "who in the aggregate [are to] display diversity in geography, culture, skills, experience and perspective." (Article VI, § 2). The voting directors are composed of: (1) six representatives of ICANN's Supporting Organizations, which are sub-groups dealing with specific sections of the policies under ICANN's purview; (2) eight independent representatives of the general public interest, currently selected through ICANN's Nominating Committee, in which all the constituencies of ICANN are represented; and (3) the President and CEO, who is appointed by the rest of the Board. Consistent with ICANN's mandate to provide private sector technical leadership in the management of the DNS, "no official of a national government" may serve as a director. (Article VI, § 4). In carrying out its functions, it is obvious that ICANN is expected to solicit and will receive input from a wide variety of Internet stakeholders and participants.**

**ICANN operates through its Board of Directors, a Staff, An Ombudsman, a Nominating Committee for Directors, three Supporting Organizations, four Advisory Committees and numerous other stakeholders that participate in the unique ICANN process. (By-Laws Articles V through XI).**

**As was stated earlier, ICANN was formed under the laws of the State of California as a public benefit, non-profit corporation. As such, it would appear that California Corporations Code Section 5100, et seq., together with ICANN's Articles of Incorporation and By-Laws, control its governance and accountability.**

**In general, a non-profit director's fiduciary duties include the duty of care, which includes an obligation of due inquiry and the duty of loyalty among others. The term "fiduciary" refers to anyone who holds a position requiring trust, confidence and scrupulous exercise of good faith and candor. It includes anyone who has a duty, created by a particular undertaking, to act primarily for the benefit of others in matters connected with the undertaking. A fiduciary relationship is one in which one person reposes trust and confidence in another person, who "must exercise a corresponding degree of fairness and good faith." (Black's Law Dictionary). The type of persons who are commonly referred to as fiduciaries include corporate directors. The California Corporation's Code makes no distinction between**

**directors chosen by election and directors chosen by selection or designation in the application of fiduciary duties.**

**Directors of non-profit corporations in California owe a fiduciary duty to the corporation they serve and to its members, if any. See Raven's Cove Townhomes, Inc. v. Knuppe Dev. Co., (1981) 114 CA3d 783, 799; Burt v. Irvine Co., (1965) 237 CA2d 828, 852. See also, Harvey v. Landing Homeowners Assn., (2008) 162 CA4th 809, 821-822.**

**The “business judgment rule” is the standard the California courts apply in deciding whether a director, acting without a financial interest in the decision, satisfied the requirements of careful conduct imposed by the California Corporations Code. See Gaillard v. Natomas Co., (1989) 208 CA3d 1250, 1264. The rule remains a creature of common law. Some California courts define it as a standard of reasonable conduct. See Burt v. Irvine Co., (1965) 237 CA2d 828, while others speak of actions taken in good faith. See Marble v. Latchford Glass Co., (1962) 205 CA2d 171. While, still others examine whether the director “rationally believes that the business judgment is in the best interests of the corporation.” See Lee v. Interinsurance Exch., (1996) 50 CA4th 694.**

**The business judgment rule is codified in Section 309 of the California Corporations Code, which provides that a director must act “in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances.” Cal. Corp. Code § 309(a); see also Lee v. Interinsurance Exch., (1996) 50 CA4th 694, 714. Section 309 shields from liability directors who follow its provisions: “A person who performs the duties of a director in accordance with subdivisions (a) and (b) shall have no liability based upon any alleged failure to discharge the person’s obligations as a director.” Cal. Corp. Code § 309 (c).**

## **II**

### **THE ACTIONS OF THE ICANN BOARD OF DIRECTORS ARE ENTITLED TO SUBSTANTIAL DEFERENCE FROM THE INDEPENDENT REVIEW PANEL**

**ICANN's By-Laws, specifically Article I, § 2, sets forth 11 core values and concludes as follows:**

**“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.”**

**The By-Laws make it clear that the core values must not be construed in a “narrowly prescriptive” manner. To the contrary, Article I, § 2, provides that the ICANN Board is vested with board discretion in implementing its responsibility such as is mentioned in the business judgment rule.**

### **III**

#### **PRINCIPLES OF INTERNATIONAL LAW DO NOT APPLY**

**Article 4 of the ICANN Articles of Incorporation does not preempt the California Corporations Code as a “choice-of-law provision” importing international law into the independent review process. Rather, the substantive provisions of the By-Laws and Articles of Incorporation, as construed in light of the law of California, where ICANN is incorporated as a non-profit entity, should govern the claims before the Independent Review Panel (hereinafter “IRP”).**

**Professor Caron opined that principles of international law do not apply because, as a private entity, ICANN is not subject to that body of law governing sovereigns. To adopt a more expansive view is tantamount to judicial legislation or mischief.**

### **IV**

#### **THE ICANN BOARD OF DIRECTORS DID NOT ACT INCONSISTENTLY WITH ICANN’S ARTICLES OF INCORPORATION AND BY-LAWS IN CONSIDERING AND ULTIMATELY DENYING ICM REGISTRY, LLC’S APPLICATION FOR A SPONSORED TOP LEVEL DOMAIN NAME**

**On March 30, 2007, the ICANN Board of Directors approved a resolution rejecting the proposed registry agreement and denying the application submitted by ICM Registry, LLC for a sponsored top level domain name. The findings of the Board was that the application was deficient in that the applicant, ICM Registry, LLC, (hereinafter “ICM”), failed to satisfy the**

**Request For Proposal (“hereinafter “RFP”) posted June 24, 2003, in the following manner:**

- “1. ICM’s definition of its sponsored TLD community was not capable of precise or clear definition;**
- 2. ICM’s policies were not primarily in the interests of the sponsored TLD community;**
- 3. ICM’s proposed community did not have needs and interests which are differentiated from those of the general global Internet community;**
- 4. ICM could not demonstrate that it had the requisite community support; and,**
- 5. ICM was not adding new and valuable space to the Internet name space.”**

**On December 15, 2003, ICANN posted a final RFP for a new round of sponsored Top Level Domain Names (hereinafter “STLD”). On March 16, 2004, ICM submitted its application for the .XXX STLD name. From the inception, ICM knew that its .XXX application would be controversial. From the time that ICM submitted its applications until the application was finally denied on March 30, 2007, ICM never was able to clearly define what the interests of the .XXX community would be or that ICM had adequate support from the community it sought to represent.**

**ICM has claimed during these proceedings that the RFP posted by ICANN established a non-overlapping two-step procedure for approving new STLDs, under which applications would first be tested for baseline criteria, and only after the applications were finally and irrevocably approved by the ICANN Board could the applications proceed to technical and commercial contract negotiations with ICANN staff. ICM forcefully argues that on June 1, 2005, the ICANN Board irrevocably approved the ICM .XXX STLD application so as to be granted vested rights to enter into registry agreement negotiations dealing with economic issues only. The evidence introduced at the independent review procedure refutes this contention. Nothing contained in the ICANN RFP permits this interpretation.**

**Before the ICANN Board could approve a STLD application, applicants had to satisfy the baseline selection criteria set forth in the RFP, including the technical, business, financial and sponsorship criteria, and also negotiate an acceptable registry contract with ICANN staff. A review of the relevant documents and testimony admitted into evidence established that the two phases could overlap in time.**

**The fact that most ICANN Board members expressed significant concerns about ICM’s sponsorship shortcomings after the June 1, 2005,**



**resolutions negates any notion that the June 1, 2005, resolutions (which do not say that the Board is approving anything and, to the contrary, state clearly that the ICANN Board is not doing so) conclusively determined the sponsorship issue.**

**The sponsorship issues and shortcomings in ICM's application were also raised by ICANN Board members who joined the ICANN Board after the June 1, 2005, resolutions. Between the June 2005 and February 2007 ICANN Board meetings, there were a total of six new voting Board members (out of a total of fifteen) considering ICM's application.**

**Both Dr. Cerf and Dr. Pisanty testified during the evidentiary hearing that the ICANN Board's vote on June 1, 2005, made clear that the Board's vote was intended only to permit ICM to proceed with contract negotiations. Under no circumstances was ICANN bound by the vote to award the .XXX STLD to ICM because the resolution that the ICANN Board adopted was not a finding that ICM had satisfied the sponsorship criteria set forth in the Request for Proposal.**

**By August 9, 2005, ICM's first draft of the proposed .XXX STLD registry agreement was posted on ICANN's website and submitted to the ICANN Board for approval. ICANN's next Board meeting was scheduled for August 16, 2005, at which time the ICANN Board had planned on discussing the proposed agreement.**

**Within days of ICANN posting the proposed registry agreement, the Government Advisory Committee (hereinafter "GAC") Chairman wrote Dr. Cerf a letter expressing the GAC's diverse and wide ranging" concerns with the .XXX STLD and requesting that the ICANN Board provide additional time for governments to express their public policy concerns before the ICANN Board reached a final decision on the proposed registry agreement.**

**The GAC's input was significant and proper because the ICANN By-Laws require the ICANN Board to take into account advice from the GAC on public policy matters, both in formulation and adoption of policies. ICANN By-Laws Article XI, § 2.1 (j), provides: "The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies." Where the ICANN Board seeks to take actions that are inconsistent with the GAC's advice, the Board must tell the GAC why. Thus, it was perfectly acceptable, appropriate and fully consistent with the ICANN Articles of Incorporation and By-Laws for the ICANN Board to consider and to address the GAC's concerns.**

**Further, throughout 2005 and up to the ICANN Board's denial of the ICM .XXX STLD on March 30, 2007, a number of additional continuing concerns and issues appeared beyond those originally voiced by the evaluation panel at the beginning of the review process. Despite the best efforts of many and**

numerous opportunities, ICM could not satisfy these additional concerns and, most importantly, could not cure the continuing sponsorship defects.

In all respects, ICANN operated in a fair, transparent and reasoned manner in accordance with its Articles of Incorporation and By-Laws.

## V

### CONCLUSION

For the reasons stated above, I would give substantial deference to the actions of the ICANN Board of Directors taken on March 30, 2007, in approving a resolution rejecting the proposed registry agreement and denying the application submitted by ICM Registry, LLC for a sponsored top level domain name. I specifically reject any notion that there was any sinister motive by any ICANN Director, governmental entity or religious organization to undermine ICM Registry, LLC's application. In my opinion, the application was rejected on the merits in an open and transparent forum. On the basis of that, ICM Registry, LLC never satisfied the sponsorship requirements and criteria for a top level domain name.

The rejection of the business judgment rule will open the floodgates to increased collateral attacks on the decisions of the ICANN Board of Directors and undermine its authority to provide a reliable point of reference to exercise plenary control over the Internet Domain Name System. In addition, it will leave the ICANN Board in a very vulnerable position for politicization of its activities.

The business judgment rule establishes a presumption that the directors' and officers' decisions are based on sound business judgment, and it prohibits courts from interfering in business decisions made by the management in good faith and in the absence of a conflict of interest. *Katz v. Chevron Corp.*, 22 Cal.App.4th 1352. In most cases, "the presumption created by the business judgment rule can be rebutted only by affirmative allegations of facts which, if proven, would establish fraud, bad faith, overreaching or an unreasonable failure to investigate material facts." The record in this case does not support such findings. In addition, interference with the discretion of the directors is not warranted in doubtful cases such as is present here. *Lee v. Interinsurance Exch.*, 50 Cal.App.4th 694.

In *Marble v. Latchford Glass Co.*, 205 Cal.App.2nd 171, the court stated that it would "not substitute its judgment for the business judgment of the board of directors made in good faith." Similarly, in *Eldridge v. Tymshare, Inc.*, 186 Cal.App.3rd 767, the court stated that the business judgment rule "sets up a presumption that directors' decisions are based on sound business judgment. This presumption can be rebutted only by a factual showing of fraud, bad faith or gross overreaching." ICM Registry, LLC has not met the standard articulated by established law.

**In the present case, regardless of how ICM Registry, LLC stylizes its allegations, the business judgment rule poses a substantial hurdle for ICM's effort which I submit was never met by the evidence presented. The evidence presented at the hearing held in this matter disclosed that at every step the decisions made by the ICANN Board were made in good faith, and for the benefit of the continued operation of ICANN in its role as exercising plenary control over one of the world's most important technological resources: the Internet Domain Name System.**

**Simply stated, as long as ICANN is incorporated and domiciled within the State of California, U.S.A., it is the undersigned's opinion that the standard of review to be used by the Independent Review Panel in judging the conduct of the ICANN board, is the abuse of discretion standard, based upon the business judgment rule, and not a de novo review of the evidence.**

**JUDGE DICKRAN TEVRIZIAN (Retired)**

*Dickran Tevrian*  
*February 18, 2010*

# **ANNEX S-4**

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

**Independent Review Process Panel**

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**In the Matter of an Independent Review Process**

Between:

**Booking.com B.V.**

*Applicant*

-and-

**ICDR Case No: 50-20-1400-0247**

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

*Respondent*

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**FINAL DECLARATION**

The Panel:

Hon. A. Howard Matz

David H. Bernstein, Esq.

Stephen L. Drymer (Chair)

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## DECLARATION

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

### I. INTRODUCTION

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

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

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



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

## II. THE PARTIES

### A. The Applicant: Booking.com

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

### B. The Respondent: ICANN

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

## III. FACTUAL AND PROCEDURAL BACKGROUND – IN BRIEF

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

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

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

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<sup>3</sup> Request, ¶ 10.

<sup>4</sup> Response, ¶ 11-12.

<sup>5</sup> Request, ¶ 12; see also Guidebook, *Preamble*.



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

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

<sup>6</sup> Guidebook, *Preamble*

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

<sup>8</sup> Guidebook, *Preamble*. A review of this policy process can be found at <http://qns0.icann.org/issues/new-gtlds> (last accessed on January 15, 2015).

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

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

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

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

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

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

<sup>11</sup> Response, ¶ 14.

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

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

<sup>14</sup> Request, ¶ 17.

<sup>15</sup> Request, ¶ 5.

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

<sup>17</sup> Request, ¶ 16.

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

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

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

24. The results of the string similarity review were notified to Booking.com by ICANN that same day. In its letter of 26 February 2013 ICANN wrote:

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

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

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

### **C. DIDP Request and Request for Reconsideration**

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

<sup>19</sup> See <http://www.icc-uk.com/>

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

<sup>21</sup> Request, Annex 3, ICANN letter dated 26 February 2013.

<sup>22</sup> Request, ¶ 30 and Annex 3.



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

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

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

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

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

<sup>24</sup> Request, Annex 5.

<sup>25</sup> Request, Annex 6.

<sup>26</sup> Request, Annex 7.

<sup>27</sup> Request, Annex 7.

<sup>28</sup> Request, Annex 8.

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

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

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

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

*o For example m~m & l~i*

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

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<sup>29</sup> Request, Annex 9.

<sup>30</sup> Request, Annex 10.

<sup>31</sup> Request, Annex 11.

<sup>32</sup> Request, Annex 13.

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

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

#### **D. The Cooperative Engagement Process**

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

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

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

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

<sup>34</sup> Request, Annex 15, NGPC Resolution dated 10 September 2013.

<sup>35</sup> Request, Annex 17.



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

#### **E. The IRP Proceedings**

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

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

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

#### **F. The Hearing**

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

### **IV. ICANN ARTICLES, BYLAWS AND POLICIES – KEY ELEMENTS**

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

#### **A. Articles of Association**

*4. The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.*

*[Underlining added]*

#### **B. Bylaws**

##### **ARTICLE I: MISSION AND CORE VALUES**

###### **Section 1. MISSION**

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



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

*[...]*

## *Section 2. CORE VALUES*

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

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

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

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

[...]

### **ARTICLE III: TRANSPARENCY**

#### Section 1. PURPOSE

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

[...]

### **ARTICLE IV: ACCOUNTABILITY AND REVIEW**

#### Section 1. PURPOSE

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

#### Section 2. RECONSIDERATION

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

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

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

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

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

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

a. evaluate requests for review or reconsideration;

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

[...]

### Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

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

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

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

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

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

[...]

11. The IRP Panel shall have the authority to:



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

[...]

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

15. *Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. [...]*

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

[...]

18. *The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.*

[Underlining added]

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

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

**C. The gTLD Applicant Guidebook**

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

**(i) Initial Evaluation**

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

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

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

*The following assessments are performed in the Initial Evaluation:*

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<sup>37</sup> Request, ¶ 13.

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

<sup>39</sup> Module 2-2.

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

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

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

[...]

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

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

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

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

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

#### **2.2.1.1 String Similarity Review**

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

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

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

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



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

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

#### **2.2.1.1.1 Reviews Performed**

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

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

[...]

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

[...]

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

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

[...]

#### **2.2.1.1.2 Review Methodology**

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

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

[...]

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

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

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

#### **2.2.1.1.3 Outcomes of the String Similarity Review**

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

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

[Underlining added]

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

#### **4.1 String Contention**

String contention occurs when either:

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

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

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



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

#### **4.1.1 Identification of Contention Sets**

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

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

*[...]*

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

*[...]*

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

*[...]*

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

#### **4.1.3 Self-Resolution of String Contention**

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

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

*[...]*

#### **4.3 Auction: Mechanism of Last Resort**

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

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

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

[Underlining added]

## V. SUMMARY OF THE PARTIES' POSITIONS

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

### A. Booking.com's position

#### (i) *The Panel's Authority*

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

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

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<sup>45</sup> Module 5-2.

<sup>46</sup> Module 5-4.

<sup>47</sup> Reply, ¶ 3.

<sup>48</sup> Reply, ¶ 3.

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

**(ii) Booking.com’s Claims**

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

**a. The string similarity review process**

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

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<sup>49</sup> Reply, ¶ 6.

<sup>50</sup> Reply, ¶ 7.

<sup>51</sup> Reply, ¶ 15.

<sup>52</sup> Reply, ¶ 14.

<sup>53</sup> Reply, ¶ 17.



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

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

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

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<sup>54</sup> Reply, ¶ 20.

<sup>55</sup> Reply, ¶ 20.

<sup>56</sup> Reply, ¶ 23.

<sup>57</sup> Reply, ¶ 24.

<sup>58</sup> Reply, ¶ 25.

<sup>59</sup> Reply, ¶ 25.

<sup>60</sup> Reply, ¶ 26-27.

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

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

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

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

*b. The case of .hotels*

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

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<sup>61</sup> Reply, ¶ 28-29.

<sup>62</sup> Reply, ¶ 30.

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

<sup>64</sup> Response, ¶ 30.

<sup>65</sup> Reply, ¶ 34.

<sup>66</sup> Reply, ¶ 38.

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

<sup>68</sup> Request, ¶ 58.

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

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

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

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

*Awarding Booking.com its costs in this proceeding; and*

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<sup>69</sup> Request, ¶ 59.

<sup>70</sup> Reply, ¶ 39.

<sup>71</sup> Reply, ¶ 41.

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

<sup>73</sup> See Part II.C, above.



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

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

#### **B. ICANN’s position**

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

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

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

##### ***(i) The Panel’s Authority***

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

<sup>74</sup> Response, ¶ 9.

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

<sup>76</sup> See for example Response, ¶¶ 2, ¶ 9.

<sup>77</sup> Response, ¶ 2.

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

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

***a. The string similarity review process***

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

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<sup>78</sup> Response, ¶ 3.

<sup>79</sup> Response, ¶ 49.

<sup>80</sup> Response, ¶ 55.

<sup>81</sup> Response, ¶ 15 (underlining in original).

<sup>82</sup> Response, ¶ 16.

<sup>83</sup> Response, ¶ 17.

<sup>84</sup> Sur-Reply, ¶ 7.



review processes that every gTLD application is required to go through, including string similarity review; each of those review processes was conducted by independent experts specifically engaged by ICANN staff for the purpose.

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

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<sup>85</sup> Sur-Reply, ¶ 10.

<sup>86</sup> Sur-Reply, ¶ 10.

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

<sup>88</sup> Sur-Reply, ¶ 18.

<sup>89</sup> Sur-Reply, ¶ 18.

<sup>90</sup> Sur-Reply, ¶ 18, fn 18.

<sup>91</sup> Sur-Reply, ¶ 18, fn 18.

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

*b. The case of .hotels*

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

## VI. ANALYSIS

### A. The Panel's Authority

<sup>92</sup> Sur-Reply, ¶ 20-42.

<sup>93</sup> A number of these applications were subsequently withdrawn.

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

<sup>95</sup> Response, ¶ 53.

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

*4. [The IRP Panel] shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:*

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

[...]

- 11. The IRP Panel shall have the authority to:*

[...]

*c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and*

*d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;*

[...]

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

[Underlining added]

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

**8. Standard of Review**

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

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

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



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

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

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<sup>96</sup> Response, ¶ 24.

<sup>97</sup> Reply, ¶ 6.

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

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

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

[Underlining added.]

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

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

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

115. That being said, we also agree with ICANN to the extent that, in determining the consistency of Board action with the Articles, Bylaws and Guidebook, an “IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.” In other words, it is not for the Panel to opine on whether the Board could have acted differently than it did; rather, our role is to assess whether the Board’s action was consistent with applicable rules found in the Articles, Bylaws and Guidebook. Nor, as stated, is it for us to purport to appraise the policies and procedures established by ICANN in the Guidebook (since, again, this IRP is not a challenge to those policies and procedures themselves<sup>99</sup>), but merely to apply them to the facts.
116. With the foregoing firmly in mind, the Panel turns now to the issues to be determined in order to resolve the present dispute.

#### **B. The String Similarity Review Process**

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

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

<sup>100</sup> Request, Annex 16.



- Mr. George Sadowski stated his intention to abstain from the vote because, although “he understood that the BGC did the right thing, [he] thought the end result that was contrary to ICANN’s ... and the user’s best interests.”
  - Ms. Olga Madruga-Forti also stated her intention to abstain from voting on the BGC recommendation “because there was not sufficient rationale provided for why the string similarity review panel made its determination.”
  - In response to a comment by the Chair that the Request for Reconsideration deserved to be denied “[b]ecause the process was followed,” Mr. Ray Plzak “agreed that the process was followed, but noted that the process needs to be reviewed to potentially add a mechanism that would allow persons who don’t agree with the outcome to make an objection, other than using a Reconsideration Request.”
  - Mr. Plzak “recommended the Committee send a strong signal to the BGC, or adopt a resolution recommending that the BGC consider development of a different mechanism to provide an avenue for the community to appeal the outcome of a decision based on the merits.”
  - Ms. Madruga-Forti agreed and “recommended that in the future, a remand or appeals mechanism may help alleviate the concerns noted.”
  - Mr. Bill Graham also agreed with Mr. Plzak’s suggestion, and noted that “generally, there is a considerable level of discomfort and dissatisfaction with the process as expressed by Committee members.”
  - The Chair “agreed with [Mr. Graham’s] sentiment.”
  - The General Counsel and Secretary noted that ICANN ... “has tried to encourage more use of the ombudsman, or other accountability mechanisms for these types of concerns.”
119. Ultimately, five members of the NGPC voted in favour of the resolution accepting the BGC’s Recommendation; two members were unavailable to vote; and four members abstained. The abstaining members offered the following voting statements:
- Mr. Plzak stated that he abstained from voting “because he is disappointed in what is being done to remedy the situation. [He] would like to see more resolve to fix the process.”
  - Ms. Madruga-Forti stated that:  
  
*[T]he BGC has done an appropriate job of applying a limited review standard to the application for reconsideration, but unfortunately, in this circumstance, to apply that limited review accompanied by a lack of information regarding the rationale of the string similarity review panel is not possible in a logical and fair manner. The public interest would not be served by applying the limited review standard without proper information on the basis and reasoning for the decision of the panel. In my opinion, the public interest would be better served by abstaining and continuing to explore ways to*

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

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

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

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

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

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

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

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



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

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<sup>101</sup> Request, ¶ 13.

<sup>102</sup> Guidebook, §2.2 (Module 2-4).

<sup>103</sup> Guidebook, §2.2.1.1.2. (Underlining added)

<sup>104</sup> Guidebook, §2.2.1.1. (Underlining added)

<sup>105</sup> Guidebook, §2.2.1.1.1. (Underlining added)

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

### **C. The Case of .hotels**

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

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

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

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

- *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.<sup>107</sup>*

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

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<sup>106</sup> BGC Recommendation, p. 2.

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



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

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

▪ 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).)<sup>110</sup>

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

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

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

<sup>108</sup> BGC Recommendation, p. 5.

<sup>109</sup> BGC Recommendation, p. 6.

<sup>110</sup> BGC Recommendation, p. 6.

<sup>111</sup> BGC Recommendation, pp. 6-7.

<sup>112</sup> BGC Recommendation, p. 7.

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

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

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

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

<sup>113</sup> BGC Recommendation, p. 7.

<sup>114</sup> BGC Recommendation, p. 8.

<sup>115</sup> BGC Recommendation, p. 10.

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



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

#### **D. Conclusion**

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

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

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

## VII. THE PREVAILING PARTY; COSTS

148. Article IV, Section 3(18) of the Bylaws requires that the Panel "specifically designate the prevailing party." This designation is germane to the allocation of costs, given that Article IV, Section 3(18) provides that the "party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider."
149. The same provision of the Bylaws also states that "in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses."
150. Similarly, the Supplementary Procedures state, at Article 11:

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

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

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

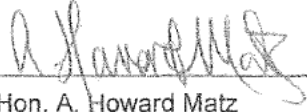


or are not inconsistent with ICANN's Articles of Incorporation and Bylaws. We have found that the actions in question are not inconsistent with those instruments. The process established by ICANN under its Articles of Incorporation and Bylaws and set out in the Guidebook was followed, and the time to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

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

FOR THE FOREGOING REASONS, the Panel hereby declares:

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

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

\_\_\_\_\_  
 David H. Bernstein  
 Date:

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

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

March 2, 2015  
Date

  
Hon. A. Howard Matz

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Date

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David H, Bernstein

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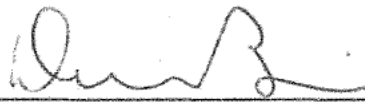
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 Date:

  
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 David H. Bernstein  
 Date: March 2, 2015

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 Chair of the IRP Panel  
 Date:

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Date

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Hon. A. Howard Matz

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March 2, 2015  
Date

  
\_\_\_\_\_  
David H. Bernstein

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\_\_\_\_\_  
Date

\_\_\_\_\_  
Stephen L. Drymer

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FOR THE FOREGOING REASONS, the Panel hereby declares:

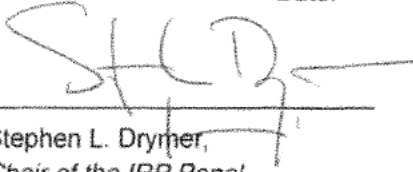
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\_\_\_\_\_  
Hon. A. Howard Matz

Date:

\_\_\_\_\_  
David H. Bernstein

Date:

  
\_\_\_\_\_  
Stephen L. Drymer,  
Chair of the IRP Panel

Date: 3 March 2015



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

\_\_\_\_\_  
Date

\_\_\_\_\_  
Hon. A. Howard Matz

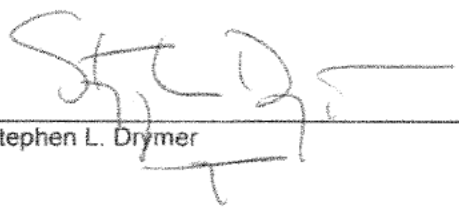
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\_\_\_\_\_  
Date

\_\_\_\_\_  
David H. Bernstein

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

3 March 2015  
Date

  
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Stephen L. Drymer

# **ANNEX S-5**

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION  
Independent Review Panel**

**CASE #50 2013 001083**

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**FINAL DECLARATION**

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**In the matter of an Independent Review Process (IRP) pursuant to the Internet Corporation For Assigned Names and Number's (ICANN's) Bylaws, the *International Dispute Resolution Procedures* (ICDR Rules) and the *Supplementary Procedures for ICANN Independent Review Process* of the International Centre for Dispute Resolution (ICDR),**

**Between: DotConnectAfrica Trust;**  
("Claimant" or "DCA Trust")

Represented by Mr. Arif H. Ali, Ms. Meredith Craven, Ms. Erin Yates and Mr. Ricardo Ampudia of Weil, Gotshal & Manges, LLP located at 1300 Eye Street, NW, Suite 900, Washington, DC 20005, U.S.A.

**And**

**Internet Corporation for Assigned Names and Numbers (ICANN);**  
("Respondent" or "ICANN")

Represented by Mr. Jeffrey A. LeVee and Ms. Rachel Zernik of Jones Day, LLP located at 555 South Flower Street, Fiftieth Floor, Los Angeles, CA 90071, U.S.A.

Claimant and Respondent will together be referred to as "Parties".

**IRP Panel**

**Prof. Catherine Kessedjian  
Hon. William J. Cahill (Ret.)  
Babak Barin, *President***



## **I. BACKGROUND**

1. DCA Trust is non-profit organization established under the laws of the Republic of Mauritius on 15 July 2010 with its registry operation – DCA Registry Services (Kenya) Limited – as its principal place of business in Nairobi, Kenya.
2. DCA Trust was formed with the charitable purpose of, among other things, advancing information technology education in Africa and providing a continental Internet domain name to provide access to internet services for the people of Africa and not for the public good.
3. In March 2012, DCA Trust applied to ICANN for the delegation of the .AFRICA top-level domain name in its 2012 General Top-Level Domains (“gTLD”) Internet Expansion Program (the “New gTLD Program”), an internet resource available for delegation under that program.
4. ICANN is a non-profit corporation established on 30 September 1998 under the laws of the State of California, and headquartered in Marina del Rey, California, U.S.A. According to its Articles of Incorporation, ICANN was established for the benefit of the Internet community as a whole and is tasked with carrying out its activities in conformity with relevant principles of international law, international conventions and local law.
5. On 4 June 2013, the ICANN Board New gTLD Program Committee (“NGPC”) posted a notice that it had decided not to accept DCA Trust’s application.
6. On 19 June 2013, DCA Trust filed a request for reconsideration by the ICANN Board Governance Committee (“BGC”), which denied the request on 1 August 2013.
7. On 19 August 2013, DCA Trust informed ICANN of its intention to seek relief before an Independent Review Panel under ICANN’s Bylaws. Between August and October 2013, DCA Trust and ICANN participated in a Cooperative Engagement Process (“CEP”) to try and resolve the issues relating to DCA Trust’s application. Despite several meetings, no resolution was reached.
8. On 24 October 2013, DCA Trust filed a Notice of Independent Review Process with the ICDR in accordance with Article IV, Section 3 of ICANN’s Bylaws.

9. In an effort to safeguard its rights pending the ongoing constitution of the IRP Panel, on 22 January 2014, DCA Trust wrote to ICANN requesting that it immediately cease any further processing of all applications for the delegation of the .AFRICA gTLD, failing which DCA Trust would seek emergency relief under Article 37 of the ICDR Rules.
10. DCA Trust also indicated that it believed it had the right to seek such relief because there was no standing panel as anticipated in the Supplementary Procedures for ICANN Independent Review Process (“Supplementary Procedures”), which could otherwise hear requests for emergency relief.
11. In response, on 5 February 2014, ICANN wrote:

Although ICANN typically is refraining from further processing activities in conjunction with pending gTLD applications where a competing applicant has a pending reconsideration request, ICANN does not intend to refrain from further processing of applications that relate in some way to pending independent review proceedings. In this particular instance, ICANN believes that the grounds for DCA’s IRP are exceedingly weak, and that the decision to refrain from the further processing of other applications on the basis of the pending IRP would be unfair to others.

12. In its Request for Emergency Arbitrator and Interim Measures of Protection subsequently submitted on 28 March 2014, DCA Trust pleaded, *inter alia*, that, in an effort to preserve its rights, in January 2014, DCA requested that ICANN suspend its processing of applications for .AFRICA during the pendency of this proceeding. ICANN, however, summarily refused to do so.
13. DCA Trust also submitted that “on 23 March 2014, DCA became aware that ICANN intended to sign an agreement with DCA’s competitor (a South African company called ZACR) on 26 March 2014 in Beijing [...] Immediately upon receiving this information, DCA contacted ICANN and asked it to refrain from signing the agreement with ZACR in light of the fact that this proceeding was still pending. Instead, according to ICANN’s website, ICANN *signed its agreement with ZACR the very next day, two days ahead of plan, on 24 March instead of 26 March.*”
14. According to DCA Trust, that same day, “ICANN then responded to DCA’s request by presenting the execution of the contract as a *fait accompli*, arguing that DCA should have sought to stop ICANN from proceeding with ZACR’s application, as ICANN had already informed DCA of its intention [to] ignore its obligations to participate in this proceeding in good faith.”

15. DCA Trust also submitted that on 25 March 2014, as per ICANN's email to the ICDR, "ICANN for the first time informed DCA that it would accept the application of Article 37 of the ICDR Rules to this proceeding contrary to the express provisions of the Supplementary Procedures of ICANN has put in place for the IRP Process."
16. In its Request, DCA Trust argued that it "is entitled to an accountability proceeding with legitimacy and integrity, with the capacity to provide a meaningful remedy. [...] DCA has requested the opportunity to compete for rights to .AFRICA pursuant to the rules that ICANN put into place. Allowing ICANN to delegate .AFRICA to DCA's only competitor – which took actions that were instrumental in the process leading to ICANN's decision to reject DCA's application – would eviscerate the very purpose of this proceeding and deprive DCA of its rights under ICANN's own constitutive instruments and international law."
17. Finally, among other things, DCA Trust requested the following interim relief:
  - a. An order compelling *ICANN to refrain from any further steps toward delegation of the .AFRICA gTLD*, including but not limited to execution or assessment of pre-delegation testing, negotiations or discussions relating to delegation with the entity ZACR or any of its officers or agents; [...]
18. On 24 April and 12 May 2014, the Panel issued Procedural Order No. 1, a Decision on Interim Measures of Protection, and a list of questions for the Parties to answer.
19. In its 12 May 2014 Decision on Interim Measures of Protection, the Panel required ICANN to "immediately refrain from any further processing of any application for .AFRICA until [the Panel] heard the merits of DCA Trust's Notice of Independent Review Process and issued its conclusions regarding the same".
20. In the Panel's unanimous view, among other reasons, it would have been "unfair and unjust to deny DCA Trust's request for interim relief when the need for such a relief...[arose] out of ICANN's failure to follow its own Bylaws and procedures." The Panel also reserved its decision on the issue of costs relating to that stage of the proceeding until the hearing of the merits.
21. On 27 May and 4 June 2015, the Panel issued Procedural Order No. 2 and a Decision on ICANN's request for Partial Reconsideration of certain portions of its Decision on Interim Measures of Protection.

22. In its 4 June 2014 Decision on ICANN's request for Partial Reconsideration, the Panel unanimously concluded that ICANN's request must be denied. In that Decision, the Panel observed:

9. After careful consideration of the Parties' respective submissions, the Panel is of the unanimous view that ICANN's Request must be denied for two reasons.

10. First, there is nothing in ICANN's Bylaws, the International Dispute Resolution Procedures of the ICDR effective as at 1 June 2009 or the Supplementary Procedures for ICANN Independent Review Process that in any way address the Panel's ability to address ICANN's Request. The Panel has not been able to find any relevant guidance in this regard in any of the above instruments and ICANN has not pointed to any relevant provision or rule that would support its argument that the Panel has the authority to reconsider its Decision of 12 May 2014.

11. Moreover, ICANN has not pointed to any clerical, typographical or computation error or shortcoming in the Panel's Decision and it has not requested an interpretation of the Panel's Decision based on any ambiguity or vagueness. To the contrary, ICANN has asked the Panel to reconsider its prior findings with respect to certain references in its Decision that ICANN disagrees with, on the basis that those references are in ICANN's view, inaccurate.

12. Second, even if the Panel were to reconsider based on any provision or rule available, its findings with respect to those passages complained of by ICANN as being inaccurate in its Decision – namely paragraphs 29 to 33 – after deliberation, the Panel would still conclude that ICANN has failed to follow its own Bylaws as more specifically explained in the above paragraphs, in the context of addressing which of the Parties should be viewed as responsible for the delays associated with DCA Trust's Request for Interim Measures of Protection. It is not reasonable to construe the By-law proviso for consideration by a provider-appointed *ad hoc* panel when a standing panel is not in place as relieving ICANN indefinitely of forming the required standing panel. Instead, the provider appointed panel is properly viewed as an interim procedure to be used before ICANN has a chance to form a standing panel. Here, more than a year has elapsed, and ICANN has offered no explanation why the standing panel has not been formed, nor indeed any indication that formation of that panel is in process, or has begun, or indeed even is planned to begin at some point.

The Panel also reserved its decision on the issue of costs relating to that stage of the proceeding until the hearing of the merits.

23. On 14 August 2014, the Panel issued a Declaration on the IRP Procedure ("2014 Declaration") pursuant to which it (1) ordered a reasonable documentary exchange, (2) permitted the Parties to benefit from additional filings and supplementary briefing, (3) allowed a video hearing, and (4) permitted both Parties at the hearing to

challenge and test the veracity of any written statements made by witnesses.

The Panel also concluded that its Declaration on the IRP and its future Declaration on the Merits of the case were binding on the Parties. In particular, the Panel decided:

98. Various provisions of ICANN's Bylaws and the Supplementary Procedures support the conclusion that the Panel's decisions, opinions and declarations are binding. There is certainly nothing in the Supplementary Rules that renders the decisions, opinions and declarations of the Panel either advisory or non-binding.

[...]

100. Section 10 of the Supplementary Procedures resembles Article 27 of the ICDR Rules. Whereas Article 27 refers to "Awards", section 10 refers to "Declarations". Section 10 of the Supplementary Procedures, however, is silent on whether Declarations made by the IRP Panel are "final and binding" on the parties.

101. As explained earlier, as per Article IV, Section 3, paragraph 8 of the Bylaws, the Board of Directors of ICANN has given its approval to the ICDR to establish a set of operating rules and procedures for the conduct of the IRP set out in section 3. The operating rules and procedures established by the ICDR are the ICDR Rules as referred to in the preamble of the Supplementary Procedures. These Rules have been supplemented with the Supplementary Procedures.

102. This is clear from two different parts of the Supplementary Procedures. First, in the preamble, where the Supplementary Procedures state that: "These procedures supplement the International Centre for Dispute Resolution's International Arbitration Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws".

103. And second, under section 2 entitled (Scope), that states that the "ICDR will apply these Supplementary Procedures, in addition to the INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, in all cases submitted to the ICDR in connection with the Article IV, Section 3(4) of the ICANN Bylaws". It is therefore clear that ICANN intended the operating rules and procedures for the independent review to be an international set of arbitration rules supplemented by a particular set of additional rules.

104. There is also nothing inconsistent between section 10 of the Supplementary Procedures and Article 27 of the ICDR Rules.

105. One of the hallmarks of international arbitration is the binding and final nature of the decisions made by the adjudicators. Binding arbitration is the essence of what the ICDR Rules, the ICDR itself and its parent, the American Arbitration Association, offer. The selection of the ICDR Rules as the baseline set of procedures for IRP's, therefore, points to a binding adjudicative process.

106. Furthermore, the process adopted in the Supplementary Procedures is an adversarial one where counsel for the parties present competing evidence and arguments, and a panel decides who prevails, when and in what circumstances. The panellists who adjudicate the parties' claims are also selected from among experienced arbitrators, whose usual charter is to make binding decisions.

107. The above is further supported by the language and spirit of section 11 of ICANN's Bylaws. Pursuant to that section, the IRP Panel has the authority to summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious. Surely, such a decision, opinion or declaration on the part of the Panel would not be considered advisory.

[...]

110. ICANN points to the extensive public and expert input that preceded the formulation of the Supplementary Procedures. The Panel would have expected, were a mere advisory decision, opinion or declaration the objective of the IRP, that this intent be clearly articulated somewhere in the Bylaws or the Supplementary Procedures. In the Panel's view, this could have easily been done.

111. The force of the foregoing textual and construction considerations as pointing to the binding effect of the Panel's decisions and declarations are reinforced by two factors: 1) the exclusive nature of the IRP whereby the non-binding argument would be clearly in contradiction with such a factor; and, 2) the special, unique, and publicly important function of ICANN. As explained before, ICANN is not an ordinary private non-profit entity deciding for its own sake who it wishes to conduct business with, and who it does not. ICANN rather, is the steward of a highly valuable and important international resource.

[...]

115. Moreover, assuming for the sake of argument that it is acceptable for ICANN to adopt a remedial scheme with no teeth, the Panel is of the opinion that, at a minimum, the IRP should forthrightly explain and acknowledge that the process is merely advisory. This would at least let parties know before embarking on a potentially expensive process that a victory before the IRP panel may be ignored by ICANN. And, a straightforward acknowledgment that the IRP process is intended to be merely advisory might lead to a legislative or executive initiative to create a truly independent compulsory process. The Panel seriously doubts that the Senators questioning former ICANN President Stuart Lynn in 2002 would have been satisfied had they understood that a) ICANN had imposed on all applicants a waiver of all judicial remedies, *and* b) the IRP process touted by ICANN as the "ultimate guarantor" of ICANN accountability was only an advisory process, the benefit of which accrued only to ICANN. [Underlining is from the original decision.]

The Panel also reserved its decision on the issue of costs relating to that stage of the proceeding until the hearing of the merits.

24. On 5 September and 25 September 2014, the Panel issued Procedural Orders No. 3 and No. 4. In Procedural Order No. 3, the Panel notably required the Parties to complete their respective filing of briefs in accordance with the IRP Procedure Guidelines by 3 November 2014 for DCA Trust and 3 December 2014 for ICANN.
25. In Procedural Order No. 4 dated 25 September 2014, the Panel reached a decision regarding document production issues.
26. On 3 November 2014 and 3 December 2014, the Parties filed their Memorial and Response Memorial on the Merits in accordance with the timetable set out in Procedural Order No. 3.
27. On 26 February 2015, following the passing away of the Hon. Richard C. Neal (Ret.) and confirmation by the ICDR of his replacement arbitrator, the Hon. William J. Cahill (Ret.), ICANN requested that this Panel consider revisiting the part of this IRP relating to the issue of hearing witnesses addressed in the Panel's 2014 Declaration.
28. In particular, ICANN submitted that given the replacement of Justice Neal, Article 15.2 of the ICDR Rules together with the Supplementary Procedures permitted this IRP to in its sole discretion, determine "whether all or part" of this IRP should be repeated.
29. According to ICANN, while it was not necessary to repeat all of this IRP, since the Panel here had exceeded its authority under the Supplementary Procedures when it held in its 2014 Declaration that it could order live testimony of witnesses, the Panel should then at a minimum consider revisiting that issue.
30. According to ICANN, panelists derived "their powers and authority from the relevant applicable rules, the parties' requests, and the contractual provisions agreed to by the Parties (in this instance, ICANN's Bylaws, which establish the process of independent review). The authority of panelists is limited by such rules, submissions and agreements."
31. ICANN emphasized that "compliance with the Supplementary Procedures [was] critical to ensure predictability for ICANN, applicants for and objectors to gTLD applications, and the entire ICANN community...", and while "ICANN [was] committed to fairness and accessibility...ICANN [was] also committed to predictability and the like treatment of all applicants. For this Panel to change the rules

for this single applicant [did] not encourage any of these commitments.”

32. ICANN also pleaded that, DCA specifically agreed to be bound by the Supplementary Procedures when it initially submitted its application, the Supplementary Procedures apply to both ICANN and DCA alike, ICANN is now in the same position when it comes to testing witness declarations and finally, in alternative dispute resolution proceedings where cross examination of witnesses is allowed, parties often waive cross-examination.

33. Finally, ICANN advanced that:

[T]he Independent Review process is an alternative dispute resolution procedure adapted to the specific issues to be addressed pursuant to ICANN’s Bylaws. The process cannot be transformed into a full-fledged trial without amending ICANN’s Bylaws and the Supplementary Procedures, which specifically provide for a hearing that includes counsel argument only. Accordingly, ICANN strongly urges the Panel to follow the rules for this proceeding and to declare that the hearing in May will be limited to argument of counsel.

34. On 24 March 2015, the Panel issued its Declaration on ICANN’s Request for Revisiting of the 14 August Declaration on the IRP Procedure following the Replacement of Panel Member. In that Declaration, the newly constituted Panel unanimously concluded that it was not necessary for it to reconsider or revisit its 2014 Declaration.

35. In passing and not at all as a result of any intended or inadvertent reconsideration or revisiting of its 2014 Declaration, the Panel referred to Articles III and IV of ICANN’s Bylaws and concluded:

Under the general heading, Transparency, and title “Purpose”, Section 1 of Article III states: “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.” Under the general heading, Accountability and Review, and title “Purpose”, Section 1 of Article IV reads: “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.” In light of the above, and again in passing only, it is the Panel’s unanimous view, that the filing of fact witness statements (as ICANN has done in this IRP) and limiting telephonic or in-person hearings to argument only is inconsistent with the objectives setout in Articles III and IV setout above.

The Panel again reserved its decision on the issue of costs relating to that stage of the proceeding until the hearing of the merits.



36. On 24 March and 1 April 2015, the Panel rendered Procedural Orders No. 5 and 6, in which, among other things, the Panel recorded the Parties' "agreement that there will no cross-examination of any of the witnesses" at the hearing of the merits.
37. On 20 April 2015, the Panel rendered its Third Declaration on the IRP Procedure. In that Declaration, the Panel decided that the hearing of this IRP should be an in-person one in Washington, D.C. and required all three witnesses who had filed witness statements to be present at the hearing.
38. The Panel in particular noted that:

13. [...] Article IV, Section 3, and Paragraph 4 of ICANN's Bylaws (reproduced above) – the Independent Review Process – was designed and set up to offer the Internet community, an accountability process that would ensure that ICANN acted in a manner consistent with ICANN's Articles of Incorporation and Bylaws.

14. Both ICANN's Bylaws and the Supplementary Rules require an IRP Panel to *examine* and *decide* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws. As ICANN's Bylaws explicitly put it, an IRP Panel is "*charged with* comparing contested actions of the Board [...], and with *declaring* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws.

15. The IRP is the only independent third party process that allows review of board actions to ensure their consistency with the Articles of Incorporation or Bylaws. As already explained in this Panel's 14 August 2014 Declaration on the IRP Procedure ("August 2014 Declaration"), the avenues of accountability for applicants that have disputes with ICANN do *not* include resort to the courts. Applications for gTLD delegations are governed by ICANN's Guidebook, which provides that applicants waive all right to resort to the courts:

"Applicant hereby releases ICANN [...] from any and all claims that arise out of, are based upon, or are in any way related to, any action or failure to act by ICANN [...] in connection with ICANN's review of this application, investigation, or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN ON THE BASIS OF ANY OTHER LEGAL CLAIM."

Thus, assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, then the only and ultimate "accountability" remedy for an applicant is the IRP.

16. Accountability requires an organization to explain or give reasons for its activities, accept responsibility for them and to disclose the results in a transparent manner.

[...]

21. In order to keep the costs and burdens of independent review as low as possible, ICANN's Bylaws, in Article IV, Section 3 and Paragraph 12, suggests that the IRP Panel conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible, and where necessary the IRP Panel may hold meetings by telephone. Use of the words "should" and "may" versus "shall" are demonstrative of this point. In the same paragraph, however, ICANN's Bylaws state that, "in the unlikely event that a telephonic or in-person hearing is convened, the hearing *shall* be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance."

22. The Panel finds that this last sentence in Paragraph 12 of ICANN's Bylaws, unduly and improperly restricts the Panel's ability to conduct the "independent review" it has been explicitly mandated to carryout in Paragraph 4 of Section 3 in the manner it considers appropriate.

23. How can a Panel compare contested actions of the Board and declare whether or not they are consistent with the provisions of the Articles of Incorporation and Bylaws, without the ability to fact find and make enquiries concerning those actions in the manner it considers appropriate?

24. How can the Panel for example, determine, if the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, or exercised independent judgment in taking decisions, if the Panel cannot ask the questions it needs to, in the manner it needs to or considers fair, just and appropriate in the circumstances?

25. How can the Panel ensure that the parties to this IRP are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case with respect to the mandate the Panel has been given, if as ICANN submits, "ICANN's Bylaws do not permit any examination of witnesses by the parties or the Panel during the hearing"?

26. The Panel is unanimously of the view that it cannot. The Panel is also of the view that any attempt by ICANN in this case to prevent it from carrying out its independent review of ICANN Board's actions in the manner that the Panel considers appropriate under the circumstances deprives the accountability and review process set out in the Bylaws of any meaning.

27. ICANN has filed two 'Declarations' in this IRP, one signed by Ms. Heather Dryden, a Senior Policy Advisor at the International Telecommunications Policy and Coordination Directorate at Industry Canada, and Chair of ICANN Government Advisory Committee from 2010 to 2013, and the other by Mr. Cherine Chalaby, a member of the Board of Directors of ICANN since 2010. Mr. Chalaby is also, since its inception, one of three members of the Subcommittee on Ethics and Conflicts of ICANN's Board of Governance Committee.

28. In their respective statements, both individuals have confirmed that they "have personal knowledge of the matters set forth in [their] declaration and [are] competent to testify to these matters *if called as a witness*."

[...]

29. In his Declaration, Mr. Chalaby states that “all members of the NGPC were asked to and did specifically affirm that they did not have a conflict of interest related to DCA’s application for .AFRICA when they voted on the GAC advice. In addition, the NGPC asked the BGC to look into the issue further, and the BGC referred the matter to the Subcommittee. After investigating the matter, the Subcommittee concluded that Chris Disspain and Mike Silber did not have conflicts of interest with respect to DCA’s application for .AFRICA.”

30. The Panel considers it important and useful for ICANN’s witnesses, and in particular, Mr. Chalaby as well as for Ms. Sophia Bekele Eshete to be present at the hearing of this IRP.

31. While the Panel takes note of ICANN’s position depicted on page 2 of its 8 April 2015 letter, the Panel nonetheless invites ICANN to reconsider its position.

32. The Panel also takes note of ICANN’s offer in that same letter to address written questions to its witnesses before the hearing, and if the Panel needs more information after the hearing to clarify the evidence presented during the hearing. The Panel, however, is unanimously of the view that this approach is fundamentally inconsistent with the requirements in ICANN’s Bylaws for it to act openly, transparently, fairly and with integrity.

33. As already indicated in this Panel’s August 2014 Declaration, analysis of the propriety of ICANN’s decisions in this case will depend at least in part on evidence about the intentions and conduct of ICANN’s top personnel. Even though the Parties have explicitly agreed that neither will have an opportunity to cross-examine the witnesses of the other in this IRP, the Panel is of the view that ICANN should not be allowed to rely on written statements of its top officers attesting to the propriety of their actions and decisions without an opportunity for the Panel and thereafter DCA Trust’s counsel to ask any follow-up questions arising out of the Panel’s questions of ICANN’s witnesses. The same opportunity of course will be given to ICANN to ask questions of Ms. Bekele Eshete, after the Panel has directed its questions to her.

34. The Parties having agreed that there will be no cross-examination of witnesses in this IRP, the procedure for asking witnesses questions at the hearing shall be as follows:

- a) The Panel shall first have an opportunity to ask any witness any questions it deems necessary or appropriate;
- b) Each Party thereafter, shall have an opportunity to ask any follow-up questions the Panel permits them to ask of any witness.

The Panel again reserved its decision on the issue of costs relating to that stage of the proceeding until the hearing of the merits.

39. On 27 April and 4 May 2015, the Panel issued its Procedural Order No. 7 and 8, and on that last date, it held a prehearing conference call with the Parties as required by the ICDR Rules. In Procedural

Order No. 8, the Panel set out the order of witness and party presentations agreed upon by the Parties.

40. On 18 May 2015, and in response to ZA Central Registry's (ZACR) request to have two of its representatives along with a representative from the African Union Commission (AUC) attend at the IRP hearing scheduled for 22 and 23 May 2015 in Washington, D.C., the Panel issued its Procedural Order No. 9, denying the requests made by ZACR and AUC to be at the merits hearing of this matter in Washington, D.C.
41. In a letter dated 11 May 2015, ZACR and AUC's legal representative had submitted that both entities had an interest in this matter and it would be mutually beneficial for the IRP to permit them to attend at the hearing in Washington, D.C.
42. ZACR's legal representative had also argued that "allowing for interests of a materially affected party such as ZACR, the successful applicant for the dotAfrica gTLD, as well as broader public interests, to be present enhances the legitimacy of the proceedings and therefore the accountability and transparency of ICANN and its dispute resolution procedures."
43. For the Panel, Article 20 of the ICDR Rules, which applied in this matter, stated that the hearing of this IRP was "private unless the parties agree otherwise". The Parties in this IRP did not consent to the presence of ZACR and AUC. While ICANN indicated that it had no objection to the presence of ZACR and AUC, DCA Trust was not of the same view. Therefore, ZACR and AUC were not permitted to attend.
44. The in-person hearing of the merits of this IRP took place on 22 and 23 May 2015 at the offices of Jones Day LLP in Washington, D.C. All three individuals who had filed witness statements in this IRP, namely Ms. Sophia Bekele Eshete, representative for DCA Trust, Ms. Heather Dryden and Mr. Cherine Chalaby, representatives for ICANN, attended in person and answered questions put to them by the Panel and subsequently by the legal representatives of both Parties. In attendance at the hearing was also Ms. Amy Stathos, Deputy General Counsel of ICANN.
45. The proceedings of the hearing were reported by Ms. Cindy L. Sebo of TransPerfect Legal Solutions, who is a Registered Merit Real-Time Court Reporter.

46. On the last day of the hearing, DCA Trust was asked by the Panel to clearly and explicitly articulate its prayers for relief. In a document entitled Claimant's Final Request for Relief which was signed by the Executive Director of DCA Trust, Ms. Sophia Bekele and marked at the hearing as Hearing Exhibit 4, DCA Trust asked the Panel to:

Declare that the Board violated ICANN's Articles of Incorporation, Bylaws and the Applicant Guidebook (AGB) 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;

And to declare that:

- 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.

Recommend, as a result of each of these violations, that:

- ICANN cease all preparations to delegate the .AFRICA gTLD to ZACR;
- ICANN permit DCA's application to proceed through the remainder of the new gTLD application process and be granted a period of no less than 18 months to obtain Government support as set out in the AGB and interpreted by the Geographic Names Panel, or accept that the requirement is satisfied as a result of the endorsement of DCA Trust's application by UNECA; and
- ICANN compensate DCA for the costs it has incurred as a result of ICANN's violations of its Articles of Incorporation, Bylaws and AGB.

47. In its response to DCA Trust's Final Request for Relief, ICANN submitted that, "the Panel should find that no action (or inaction) of the ICANN Board was inconsistent with the Articles of Incorporation or Bylaws, and accordingly none of DCA's requested relief is appropriate."

48. ICANN also submitted that:

DCA urges that the Panel issue a declaration in its favor...and also asks that the Panel declare that DCA is the prevailing party and entitled to its costs. Although ICANN believes that the evidence does not support the

declarations that DCA seeks, ICANN does not object to the form of DCA's requests.

At the bottom of DCA's Final Request for Relief, DCA asks that the Panel recommend that ICANN cease all preparations to delegate the .AFRICA gTLD to ZACR, and that ICANN permit DCA's application to proceed and give DCA no less than 18 additional months from the date of the Panel's declaration to attempt to obtain the requisite support of the countries in Africa. ICANN objects to that appropriateness of these requested recommendations because they are well outside the Panel's authority as set forth in the Bylaws.

[...]

Because the Panel's authority is limited to declaring whether the Board's conduct was inconsistent with the Articles or the Bylaws, the Panel should limit its declaration to that question and refrain from recommending how the Board should then proceed in light of the Panel's declaration. Pursuant to Paragraph 12 of that same section of the Bylaws, the Board will consider the Panel's declaration at its next meeting, and if the Panel has declared that the Board's conduct was inconsistent with the Articles or the Bylaws, the Board will have to determine how to act upon the opinion of the Panel.

By way of example only, if the Panel somehow found that the unanimous NGPC vote on 4 June 2013 was not properly taken, the Board might determine that the vote from that meeting should be set aside and that the NGPC should consider the issue anew. Likewise, if the Panel were to determine that the NGPC did not adequately consider the GAC advice at [the] 4 June 2013 meeting, the Board might require that the NGPC reconsider the GAC advice.

In all events, the Bylaws mandate that the Board has the responsibility of fashioning the appropriate remedy once the Panel has declared whether or not it thinks the Board's conduct was inconsistent with ICANN's Articles of Incorporation and Bylaws. The Bylaws do not provide the Panel with the authority to make any recommendations or declarations in this respect.

49. In response to ICANN's submissions above, on 15 June 2015, DCA Trust advanced that the Panel had already ruled that its declaration on the merits will be binding on the Parties and that nothing in ICANN's Bylaws, the Supplementary Procedures or the ICDR Rules applicable in these proceedings prohibits the Panel from making a recommendation to the ICANN Board of Directors regarding an appropriate remedy. DCA Trust also submitted that:

According to ICANN's Bylaws, the Independent Review Process is designed to provide a remedy for "any" person materially affected by a decision or action by the Board. Further, "in order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation. Indeed, the ICANN New gTLD Program Committee, operating under the delegated authority of the ICANN Board, itself suggested that DCA could seek relief through ICANN's accountability

mechanisms or, in other words, the Reconsideration process and the Independent Review Process. If the IRP mechanism – the mechanism of last resort for gTLD applicants – is intended to provide a remedy for a claimant materially injured or harmed by Board action or inaction, and it serves as the only alternative to litigation, then naturally the IRP Panel may recommend how the ICANN Board might fashion a remedy to redress such injury or harm.

50. On 25 June 2015, the Panel issued its Procedural Order No. 10, directing the Parties to by 1 July 2015 simultaneously file their detailed submissions on costs and their allocation in these proceedings.
51. The additional factual background and reasons in the above decisions, procedural orders and declarations rendered by the Panel are hereby adopted and incorporated by reference in this Final Declaration.
52. On 1 and 2 July 2015, the Parties filed their respective positions and submissions on costs.

## **II. BRIEF SUMMARY OF THE PARTIES' POSITIONS ON THE MERITS & REQUEST FOR RELIEF**

53. According to DCA Trust and as elaborated on in its Memorial on Merits dated 3 November 2014, the central dispute between it and ICANN in this IRP may be summarized as follows:

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.

54. According to DCA Trust, among other things, "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."
55. DCA Trust also advanced that, "as a result, ICANN deprived DCA of the right to compete for .AFRICA in accordance with the rules ICANN established for the new gTLD program, in breach of the Applicant Guidebook ("AGB") and ICANN's Articles of Incorporation and Bylaws."

56. In its 3 December 2014 Response to DCA’s Memorial on the Merits, among other things, ICANN submitted that, “ICANN’s conduct with respect to DCA’s application for .AFRICA was fully consistent with ICANN’s Bylaws, its Articles of Incorporation and the Applicant Guidebook. ICANN also pleaded that it acted through open and transparent processes, evaluated DCA’s application for .AFRICA in accordance with the procedures set forth in the Guidebook, and followed the procedures set forth in its Bylaws in evaluating DCA’s Request for Reconsideration.”
57. ICANN advanced that, “DCA is using this IRP as a mean to challenge the right of African countries to support a specific (and competing) application for .AFRICA, and to rewrite the Guidebook.”
58. ICANN also added that, “ICANN provided assistance to those who requested, cooperated with governmental authorities, and respected the consensus advice issued by the GAC, which speaks on behalf of the governments of the world.”
59. In its Final Request for Relief filed on 23 May 2015, DCA Trust asked this Panel to:
1. Declare that the Board violated ICANN’s Articles of Incorporation, Bylaws and the Applicant Guidebook (AGB);
  2. Declare that DCA Trust is the prevailing party in this IRP and, consequently entitled to its costs in this proceeding; and
  3. Recommend as a result of the Board violations a course of action for the Board to follow going forward.
60. In its response letter of 1 June 2015, ICANN confirmed that it did not object to the form of DCA Trust’s requests above, even though it believes that the evidence does not support the declarations that DCA Trust seeks. ICANN did, however, object to the appropriateness of the request for recommendations on the ground that they are outside of the Panel’s authority as set forth in the Bylaws.

### **III. THE ISSUES RAISED AND THE PANEL’S DECISION**

61. After carefully considering the Parties’ written and oral submissions, perusing the three witness statements filed and hearing *viva voce* the testimonies of the witnesses at the in-person hearing of this IRP in Washington, D.C., the Panel answers the following four questions put to it as follows:



1. Did the Board act or fail to act in a manner inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook?

Answer: Yes.

2. Can the IRP Panel recommend a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act in a manner inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook (AGB)?

Answer: Yes.

3. Who is the prevailing party in this IRP?

Answer: DCA Trust

4. Who is responsible for bearing the costs of this IRP and the cost of the IRP Provider?

Answer: ICANN, in full.

### **Summary of Panel's Decision**

For reasons explained in more detail below, and pursuant to Article IV, Section 3, paragraph 11 (c) of ICANN's Bylaws, the Panel declares that both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN.

Furthermore, pursuant to Article IV, Section 3, paragraph 11 (d) of ICANN's Bylaws, the Panel recommends that ICANN continue to refrain from delegating the .AFRICA gTLD and permit DCA Trust's application to proceed through the remainder of the new gTLD application process.

Finally, DCA Trust is the prevailing party in this IRP and ICANN is responsible for bearing, pursuant to Article IV, Section 3, paragraph 18 of the Bylaws, Article 11 of Supplementary Procedures and Article 31 of the ICDR Rules, the totality of the costs of this IRP and the totality of the costs of the IRP Provider.

As per the last sentence of Article IV, Section 3, paragraph 18 of the Bylaws, DCA Trust and ICANN shall each bear their own expenses. The Parties shall also each bear their own legal representation fees.

#### IV. ANALYSIS OF THE ISSUES AND REASONS FOR THE PANEL'S DECISION

##### 1) Did the Board act or fail to act in a manner inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook?

62. Before answering this question, the Panel considers it necessary to quickly examine and address the issue of "standard of review" as referred to by ICANN in its 3 December 2014 Response to DCA's Memorial on the Merits or the "law applicable to these proceedings" as pleaded by DCA Trust in its 3 November 2014 Memorial on the Merits.

63. According to DCA Trust:

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. [Articles of Incorporation of Internet Corporation for Assigned Names and Numbers (21 November 1998) and Bylaws of the Internet Corporation for Assigned Names and Numbers (11 April 2013)]. 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"). 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. (Underlining added).

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. As explained by Dr. Jack Goldsmith in his Expert Report submitted in *ICM v. ICANN*, the reference to "principles of international law" in ICANN's Articles of Incorporation should be understood to include both customary international law and general principles of law.

64. In response, ICANN submits that:

11. The IRP is a unique process available under ICANN's Bylaws for persons or entities that claim to have been materially and adversely affected by a decision or action of the ICANN Board, but only to the extent that Board action was inconsistent with ICANN's Bylaws or Articles. This IRP Panel is tasked with providing its opinion as to whether the challenged Board actions violated ICANN's Bylaws or Articles. ICANN's Bylaws specifically identify the deferential standard of review that the IRP Panel must apply when evaluating the actions of the ICANN Board, 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?

12. DCA disregards the plain language of ICANN's Bylaws and relies instead on the IRP Panel's declaration in a prior Independent Review proceeding, *ICM v. ICANN*. However, *ICM* was decided in 2010 under a previous version of ICANN's Bylaws. In its declaration, the *ICM* Panel explicitly noted that ICANN's then-current Bylaws "d[id] not specify or imply that the [IRP] process provided for s[hould] (or s[hould] not) accord deference to the decisions of the ICANN Board." As DCA acknowledges, the version of ICANN's Bylaws that apply to this proceeding are the version as amended in April 2013. The current Bylaws provide for the deferential standard of review set forth above. [Underlining is added]

- 65. For the following reasons, the Panel is of the view that the standard of review is a *de novo*, objective and independent one examining whether the Board acted or failed to act in a manner inconsistent with ICANN's Articles of Incorporation and Bylaws.
- 66. ICANN is not an ordinary California nonprofit organization. Rather it has a large international purpose and responsibility to coordinate and ensure the stable and secure operation of the Internet's unique identifier systems.
- 67. Indeed, Article 4 of ICANN's Articles of Incorporation require 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 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." ICANN's Bylaws also impose duties on it to act in an open, transparent and fair manner with integrity.
- 68. ICANN's Bylaws (as amended on 11 April 2013) which both Parties explicitly agree that applies to this IRP, reads in relevant parts as follows:

**ARTICLE IV: ACCOUNTABILITY AND REVIEW**

**Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS**

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

[...]

4. Requests for such independent review shall be referred to an Independent Review Process Panel [...], which shall be charged with comparing contested actions of the Board to 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?

69. Section 8 of the Supplementary Procedures similarly subject the IRP to the standard of review set out in subparagraphs a., b., and c., above, and add:

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

70. In the Panel's view, Article IV, Section 3, and Paragraph 4 of ICANN's Bylaws (reproduced above) – the Independent Review Process – was designed and set up to offer the Internet community, a *de novo, objective and independent* accountability process that would ensure that ICANN acted in a manner consistent with ICANN's Articles of Incorporation and Bylaws.
71. Both ICANN's Bylaws and the Supplementary Rules require an IRP Panel to *examine* and *decide* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws. As ICANN's Bylaws explicitly put it, an IRP Panel is "*charged with* comparing contested actions of the Board [...], and with *declaring* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws.

72. The IRP is the only independent third party process that allows review of board actions to ensure their consistency with the Articles of Incorporation or Bylaws. As already explained in this Panel's 14 August 2014 Declaration on the IRP Procedure ("August 2014 Declaration"), the avenues of accountability for applicants that have disputes with ICANN do *not* include resort to the courts. Applications for gTLD delegations are governed by ICANN's Guidebook, which provides that applicants waive all right to resort to the courts:

Applicant hereby releases ICANN [...] from any and all claims that arise out of, are based upon, or are in any way related to, any action or failure to act by ICANN [...] in connection with ICANN's review of this application, investigation, or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN ON THE BASIS OF ANY OTHER LEGAL CLAIM.

73. Thus, assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, then the only and ultimate "accountability" remedy for an applicant is the IRP.

74. As previously decided by this Panel, such accountability requires an organization to explain or give reasons for its activities, accept responsibility for them and to disclose the results in a transparent manner.

75. Such accountability also requires, to use the words of the IRP Panel in the *Booking.com B.V. v. ICANN* (ICDR Case Number: 50-20-1400-0247), this IRP Panel to "objectively" determine whether or not the Board's actions are in fact consistent with the Articles of Incorporation, Bylaws and Guidebook, which this Panel, like the one in *Booking.com* "understands as requiring that the Board's conduct be appraised independently, and without any presumption of correctness."

76. The Panel therefore concludes that the "standard of review" in this IRP is a *de novo, objective and independent* one, which does not require any presumption of correctness.

77. With the above in mind, the Panel now turns its mind to whether or not the Board in this IRP acted or failed to act in a manner inconsistent

with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook.

### **DCA Trust's Position**

78. In its 3 November 2014 Memorial on the Merits, DCA Trust criticizes ICANN for variety of shortcomings and breaches relating to the Articles of Incorporation, Bylaws and Applicant Guidebook. DCA Trust submits:

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.

79. DCA Trust also pleads that ICANN breached its Articles of Incorporation and Bylaws by discriminating against DCA Trust and failing to permit competition for the .AFRICA gTLD, ICANN abused its Regulatory authority in its differential treatment of the ZACR and DCA Trust applications, and in contravention of the rules for the New gTLD Program, ICANN colluded with AUC to ensure that the AUC would obtain control over .AFRICA.

80. According to DCA Trust:

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.

35. Moreover, ICANN staff worked with InterConnect to ensure that ZACR, but not DCA, would be able to pass the GNP evaluation, even going so far as to draft a letter supporting ZACR for the AUC to submit back to ICANN. 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 immediately bypassed these very same rules in order to allow ZACR's application to pass the GNP evaluation. After DCA's application was pulled from processing on 7 June 2013, ICANN staff directed InterConnect to equate the AUC's support for ZACR's application as support from 100% of African governments. 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.

36. However, none of the AUC statements ZACR submitted were adequate endorsements under the AGB, either. ICANN staff then took the remarkable step of drafting the AUC endorsement letter in order to enable ZACR to pass review. The Director of gTLD Operations, Trang Nguyen, personally composed an endorsement letter corresponding to all the AGB requirements for Commissioner Ibrahim's signature. Once Commissioner Ibrahim responded with a signed, stamped copy of the letter incorporating minor additions, ICANN staff rushed to pass ZACR's application just over one week later.

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. 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. 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.

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. 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 ghost-writing an endorsement letter for ZACR and the AUC, and then decreeing that the letter was all that would be needed 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.

81. DCA Trust submits that 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 Trust, the NGPC should have investigated questions about the GAC Objection Advice being obtained through consensus, and 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.

82. According to DCA Trust:

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. 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.” 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.

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 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.

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). 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 genuine Kenya GAC advisor expressly refused to endorse the advice. Redacted - GAC Designated

Confidential Information

Finally, the ICANN Board knew very well that the AUC might attempt to use the GAC in an anticompetitive manner, since it was ICANN itself that informed the AUC it could use the GAC to achieve that very goal.

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. 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.

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.” 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.”

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. 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.

83. DCA Trust also submits that 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.

84. According to DCA Trust:

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.

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 the judge of its own cause. 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.

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. 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 made such a suggestion in its Response to the GAC Objection Advice. 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.

85. Finally, DCA Trust pleads 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.

### **ICANN's Position**

86. In its Response to DCA's Memorial on the Merits filed on 3 December 2014 ("ICANN Final Memorial"), ICANN submits that:

2. [...] Pursuant to ICANN's New gTLD Applicant Guidebook ("Guidebook"), applications for strings that represent geographic regions—such as "Africa"—require the support of at least 60% of the respective national governments in the relevant region. As DCA has acknowledged on

multiple occasions, including in its Memorial, DCA does not have the requisite governmental support; indeed, DCA now asks that ICANN be required to provide it with eighteen more months to try to gather the support that it was supposed to have on the day it submitted its application in 2012.

3. DCA is using this IRP as a means to challenge the right of African countries to support a specific (and competing) application for .AFRICA, and to rewrite the Guidebook. The Guidebook provides that countries may endorse multiple applications for the same geographic string. However, in this instance, the countries of Africa chose to endorse only the application submitted by ZA Central Registry (“ZACR”) because ZACR prevailed in the Request for Proposal (“RFP”) process coordinated by the African Union Commission (“AUC”), a process that DCA chose to boycott. There was nothing untoward about the AUC’s decision to conduct an RFP process and select ZACR, nor was there anything inappropriate about the African countries’ decision to endorse only ZACR’s application.

4. Subsequently, as they had every right to do, GAC representatives from Africa urged the GAC to issue advice to the ICANN Board that DCA’s application for .AFRICA not proceed (the “GAC Advice”). One or more countries from Africa—or, for that matter, from any continent—present at the relevant GAC meeting could have opposed the issuance of this GAC Advice, yet not a single country stated that it did not want the GAC to issue advice to the ICANN Board that DCA’s application should not proceed. As a result, under the GAC’s rules, the GAC Advice was “consensus” advice.

5. GAC consensus advice against an application for a new gTLD creates a “strong presumption” for ICANN’s Board that the application should not proceed. In accordance with the Guidebook’s procedures, the Board’s New gTLD Program Committee (the “NGPC”) considered the GAC Advice, considered DCA’s response to the GAC Advice, and properly decided to accept the GAC Advice that DCA’s application should not proceed. As ZACR’s application for .AFRICA subsequently passed all evaluation steps, ICANN and ZACR entered into a registry agreement for the operation of .AFRICA. Following this Panel’s emergency declaration, ICANN has thus far elected not to proceed with the delegation of the .AFRICA TLD into the Internet root zone.

6. DCA’s papers contain much mudslinging and many accusations, which frankly do not belong in these proceedings. According to DCA, the entire ICANN community conspired to prevent DCA from being the successful applicant for .AFRICA. However, the actions that DCA views as nefarious were, in fact, fully consistent with the Guidebook. They also were not actions taken by the Board or the NGPC that in any way violated ICANN’s Bylaws or Articles, the only issue that this IRP Panel is tasked with assessing.

87. ICANN submits that the Board properly advised the African Union’s member states of the Guidebook Rules regarding geographic strings, the NGPC did not violate the Bylaws or Articles of Incorporation by accepting the GAC Advice, the AUC and the African GAC members properly supported the .AFRICA applicant chosen through the RFP

process, the GAC issued consensus advice opposing DCA's application and the NGPC properly accepted the consensus GAC Advice.

88. According to ICANN:

13. DCA's first purported basis for Independent Review is that ICANN improperly responded to a 21 October 2011 communiqué issued by African ministers in charge of Communication and Information Technologies for their respective countries ("Dakar Communiqué"). In the Dakar Communiqué, the ministers, acting pursuant to the Constitutive Act of the African Union, committed to continued and enhanced participation in ICANN and the GAC, and requested that ICANN's Board take numerous steps aimed at increasing Africa's representation in the ICANN community, including that ICANN "include ['Africa'] and its representation in any other language on the Reserved Names List in order [for those strings] to enjoy [] special legislative protection, so [they could be] managed and operated by the structure that is selected and identified by the African Union."

14. As DCA acknowledges, in response to the request in the Dakar Communiqué that .AFRICA (and related strings) be reserved for a operator of the African ministers' own choosing, ICANN advised that .AFRICA and its related strings could not be placed on the Reserved Names List because ICANN was "not able to take actions that would go outside of the community-established and documented guidelines of the program." Instead, ICANN explained that, pursuant to the Guidebook, "protections exist that w[ould] allow the African Union and its member states to play a prominent role in determining the outcome of any application for these top-level domain name strings."

15. It was completely appropriate for ICANN to point the AU member states to the publicly-stated Guidebook protections for geographic names that were put in place to address precisely the circumstance at issue here—where an application for a string referencing a geographic designation did not appear to have the support of the countries represented by the string. DCA argues that ICANN was giving "instructions . . . as to how to bypass ICANN's own rules," but all ICANN was doing was responding to the Dakar Communiqué by explaining the publicly-available rules that ICANN already had in place. This conduct certainly did not violate ICANN's Bylaws or Articles.

16. In particular, ICANN explained that, pursuant to the Guidebook, "Africa" constitutes a geographic name, and therefore any application for .AFRICA would need: (i) documented support from at least 60% of the national governments in the region; and (ii) no more than one written statement of objection . . . from "relevant governments in the region and/or from public authorities associated with the continent and region." Next, ICANN explained that the Guidebook provides an opportunity for the GAC, whose members include the AU member states, to provide "Early Warnings" to ICANN regarding specific gTLD applications. Finally, ICANN explained that there are four formal objection processes that can be initiated by the public, including the Community Objection process, which may be filed where 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. Each of these explanations was factually accurate and based on publicly available information. Notably, ICANN did not mention the possibility of GAC consensus advice against a particular application (and, of course, such advice could not have occurred if even a single country had voiced its disagreement with that advice during the GAC meeting when DCA's application was discussed).

17. DCA's objection to ICANN's response to the Dakar Communiqué reflects nothing more than DCA's dissatisfaction with the fact that African countries, coordinating themselves through the AUC, opposed DCA's application. However, the African countries had every right to voice that opposition, and ICANN's Board acted properly in informing those countries of the avenues the Guidebook provided them to express that opposition.

18. In another attempt to imply that ICANN improperly coordinated with the AUC, DCA insinuates that the AUC joined the GAC at ICANN's suggestion. ICANN's response to the Dakar Communiqué does not even mention this possibility. Further, in response to DCA's document requests, ICANN searched for communications between ICANN and the AUC relating to the AUC becoming a voting member of the GAC, and the search revealed no such communications. This is not surprising given that ICANN has no involvement in, much less control over, whether the GAC grants to any party voting membership status, including the AUC; that decision is within the sole discretion of the GAC. ICANN's Bylaws provide that membership in the GAC shall be open to "multinational governmental organizations and treaty organizations, on the invitation of the [GAC] through its Chair." In any event, whether the AUC was a voting member of the GAC is irrelevant to DCA's claims. As is explained further below, the AUC alone would not have been able to orchestrate consensus GAC Advice opposing DCA's application.

19. DCA's next alleged basis for Independent Review is that ICANN's NGPC improperly accepted advice from the GAC that DCA's application should not proceed. However, nearly all of DCA's Memorial relates to conduct of the AUC, the countries of the African continent, and the GAC. None of these concerns is properly the subject of an Independent Review proceeding because they do not implicate the conduct of the ICANN Board or the NGPC. The only actual decision that the NGPC made was to accept the GAC Advice that DCA's application for .AFRICA should not proceed, and that decision was undoubtedly correct, as explained below.

20. Although the purpose of this proceeding is to test whether ICANN's Board (or, in this instance, the NGPC) acted in conformance with its Bylaws and Articles, ICANN addresses the conduct of third parties in the next few sections because that additional context demonstrates that the NGPC's decision to accept the GAC Advice—the only decision reviewable here—was appropriate in all aspects.

21. After DCA's application was posted for public comment (as are all new gTLD applications), sixteen African countries—Benin, Burkina Faso, Comoros, Cameroon, Democratic Republic of Congo, Egypt, Gabon, Ghana, Kenya, Mali, Morocco, Nigeria, Senegal, South Africa, Tanzania and Uganda—submitted GAC Early Warnings regarding DCA's application.

Early Warnings are intended to “provid[e] [] applicant[s] with an indication that the[ir] application is seen as potentially sensitive or problematic by one or more governments.” These African countries used the Early Warnings to notify DCA that they had requested the AUC to conduct an RFP for .AFRICA, that ZACR had been selected via that RFP, and that they objected to DCA’s application for .AFRICA. They further notified DCA that they did not believe that DCA had the requisite support of 60% of the countries on the African continent.

22. DCA minimizes the import of these Early Warnings by arguing that they did not involve a “permissible reason” for objecting to DCA’s application. But DCA does not explain how any of these reasons was impermissible, and the Guidebook explicitly states that Early Warnings “may be issued for any reason.” DCA demonstrated the same dismissive attitude towards the legitimate concerns of the sixteen governments that issued Early Warnings by arguing to the ICANN Board and the GAC that the objecting governments had been “teleguided (or manipulated).”

23. In response to these Early Warnings, DCA conceded that it did not have the necessary level of support from African governments and asked the Board to “waive th[e] requirement [that applications for geographic names have the support of the relevant countries] because of the confusing role that was played by the African Union.” DCA did not explain how the AUC’s role was “confusing,” and DCA ignored the fact that, pursuant to the Guidebook, the AUC had every right to promote one applicant over another. The AUC’s decision to promote an applicant other than DCA did not convert the AUC’s role from proper to improper or from clear to confusing.

24. Notably, long before the AUC opposed DCA’s application, DCA itself recognized the AUC’s important role in coordinating continent-wide technology initiatives. In 2009, DCA approached the AUC for its endorsement prior to seeking the support of individual African governments. DCA obtained the AUC’s support at that time, including the AUC’s commitment to “assist[] in the coordination of [the] initiative with African Ministers and Governments.”

25. The AUC, however, then had a change of heart (which it was entitled to do, particularly given that the application window for gTLD applications had not yet opened and would not open for almost two more years). On 7 August 2010, African ministers in charge of Communication and Information Technologies for their respective countries signed the Abuja Declaration. In that declaration, the ministers requested that the AUC coordinate various projects aimed at promoting Information and Communication Technologies projects on the African continent. Among those projects was “set[ting] up the structure and modalities for the [i]mplementation of the DotAfrica Project.”

26. Pursuant to that mandate, the AUC launched an open RFP process, seeking applications from private organizations (including DCA) interested in operating the .AFRICA gTLD. The AUC notified DCA that “following consultations with relevant stakeholders . . . [it] no longer endorse[d] individual initiatives [for .AFRICA].” Instead, “in coordination with the Member States . . . the [AUC] w[ould] go through [an] open [selection]

process”—hardly an inappropriate decision (and not a decision of ICANN or its Board). DCA then refused to participate in the RFP process, thereby setting up an inevitable clash with whatever entity the AUC selected. When DCA submitted its gTLD application in 2012 and attached its 2009 endorsement letter from the AUC, DCA knew full well (but did not disclose) that the AUC had retracted its support.

27. In sum, the objecting governments' concerns were the result of DCA's own decision to boycott the AUC's selection process, resulting in the selection of a different applicant, ZACR, for .AFRICA. Instead of addressing those governments' concerns, and instead of obtaining the necessary support of 60% of the countries on the African continent, DCA asked ICANN to re-write the Guidebook in DCA's favor by eliminating the most important feature of any gTLD application related to a geographic region—the support of the countries in that region. ICANN, in accordance with its Bylaws, Articles and Guidebook, properly ignored DCA's request to change the rules for DCA's benefit.

28. At its 10 April 2013 meeting in Beijing, the GAC advised ICANN that DCA's application for .AFRICA should not proceed.<sup>40</sup> As noted earlier, the GAC operates on the basis of consensus: if a single GAC member at the 10 April 2013 meeting (from any continent, not just from Africa) had opposed the advice, the advice would not have been considered “consensus.”<sup>41</sup> As such, the fact that the GAC issued consensus GAC Advice against DCA's application shows that not a single country opposed that advice. Most importantly, this included Kenya: Michael Katundu, the GAC Representative for Kenya, and Kenya's only official GAC representative, was present at the 10 April 2013 Beijing meeting and did not oppose the issuance of the consensus GAC Advice.

29. DCA attempts to argue that the GAC Advice was not consensus advice and relies solely on the purported email objection of Sammy Buruchara, Kenya's GAC advisor (as opposed to GAC representative). As a preliminary matter (and as DCA now appears to acknowledge), the GAC's Operating Principles require that votes on GAC advice be made in person. Operating Principle 19 provides that:

If a Member's accredited representative, or alternate representative, is not present at a meeting, then it shall be taken that the Member government or organisation is not represented at that meeting. Any decision made by the GAC without the participation of a Member's accredited representative shall stand and nonetheless be valid.

Similarly, Operating Principle 40 provides:

One third of the representatives of the Current Membership with voting rights shall constitute a quorum at any meeting. A quorum shall only be necessary for any meeting at which a decision or decisions must be made. The GAC may conduct its general business face-to-face or online.

25. DCA argues that Mr. Buruchara objected to the GAC Advice via email, but even if objections could be made via email (which they cannot), Mr. Katundu, Kenya's GAC representative who was in Beijing at the GAC

meeting, not Mr. Buruchara, Kenya's GAC advisor, was authorized to speak on Kenya's behalf. Accordingly, under the GAC rules, Mr. Buruchara's email exchanges could not have constituted opposition to the GAC Advice.

26. Redacted - GAC Designated Confidential Information

And, tellingly, DCA did not to submit a declaration from Mr. Buruchara, which might have provided context or support for DCA's argument.

27. Redacted - GAC Designated Confidential Information

28. Notably, immediately prior to becoming Kenya's GAC advisor, Mr. Buruchara had served as the chairman of DCA's Strategic Advisory Board. But despite Mr. Buruchara's close ties with DCA and with Ms. Bekele, the Kenyan government had: (i) endorsed the Abuja Declaration; (ii) supported the AUC's processes for selecting the proposed registry operator; and (iii) issued an Early Warning objecting to DCA's application.

In other words, the Kenyan government was officially on record as supporting ZACR's application and opposing DCA's application, regardless of what Mr. Buruchara was writing in emails.

29. Furthermore, correspondence produced by DCA in this proceeding (but not referenced in either of DCA's briefs) shows that, despite Ms. Bekele's and Mr. Buruchara's efforts to obtain the support (or at least non-opposition) of the Kenyan government, the Kenyan government had rescinded its earlier support of DCA in favor of ZACR. For example, in February 2013, Ms. Bekele emailed a Kenyan government official asking that Kenya issue an Early Warning regarding ZACR's application. The official responded that he would have to escalate the matter to the Foreign Ministry because the Kenyan president "was part of the leaders of the AU who endorsed AU to be the custodian of dot Africa." On 10 April 2013, Ms. Bekele emailed Mr. Buruchara, asking him to make further points objecting to the proposed GAC advice. Mr. Buruchara responded that he was unable to do so because the Kenyan government had been informed (erroneously informed, according to Mr. Buruchara), that Mr. Buruchara was "contradict[ing] the Heads of State agreement in Abuja." On 8 July 2013,



Mr. Buruchara explained to Ms. Bekele that he “stuck [his] neck out for DCA inspite [*sic*] of lack of Govt support.”

30. Because DCA did not submit a declaration from Mr. Buruchara (and because Ms. Bekele’s declaration is, of course, limited to her own interpretation of email correspondence drafted by others), the Panel is left with a record demonstrating that: (i) Mr.

Buruchara was not authorized by the Kenyan government to oppose the GAC Advice; Redacted - GAC Designated Confidential Information and (iii) the actual GAC representative from Kenya (Mr. Katundu) attended the 10 April 2013 meeting in Beijing and did not oppose the issuance of the consensus GAC Advice that DCA’s application for .AFRICA should not proceed.

31. In short, DCA’s primary argument in support of this Independent Review proceeding—that the GAC should not have issued consensus advice against DCA’s application—is not supported by any evidence and is, instead, fully contradicted by the evidence. And, of course, Independent Review proceedings do not test whether the GAC’s conduct was appropriate (even though in this instance there is no doubt that the GAC appropriately issued consensus advice).

32. As noted above, pursuant to the Guidebook, GAC consensus advice that a particular application should not proceed creates a “strong presumption for the ICANN Board that the application should not be approved.” The ICANN Board would have been required to develop a reasoned and well-supported rationale for not accepting the consensus GAC Advice; no such reason existed at the time the NGPC resolved to accept that GAC Advice (5 June 2013), and no such reason has since been revealed. The consensus GAC Advice against DCA’s application was issued in the ordinary course, it reflected the sentiment of numerous countries on the African continent, and it was never rescinded.

33. DCA’s objection to the Board’s acceptance of the GAC Advice is twofold. First, DCA argues that the NGPC failed to investigate DCA’s allegation that the GAC advice was not consensus advice. Second, DCA argues that the NGPC should have consulted an independent expert prior to accepting the advice. DCA also argued in its IRP Notice that two NGPC members had conflicts of interest when they voted to accept the GAC Advice, but DCA does not pursue that argument in its Memorial (and the facts again demonstrate that DCA’s argument is incorrect).

34. As to the first argument, the Guidebook provides that, when the Board receives GAC advice regarding a particular application, it publishes that advice and notifies the applicant. The applicant is given 21 days from the date of the publication of the advice to submit a response to the Board. Those procedures were followed here. Upon receipt of the GAC Advice, ICANN posted the advice and provided DCA with an opportunity to respond. DCA submitted a lengthy response explaining “[w]hy DCA Trust disagree[d]” with the GAC Advice. A primary theme was that its application had been unfairly blocked by the very countries whose support the Guidebook required DCA to obtain, and that the AUC should not have been allowed to endorse an applicant for .AFRICA. DCA argued that it had been

unfairly “victimized” and “muzzled into insignificance” by the “collective power of the governments represented at ICANN,” and that “the issue of government support [should] be made irrelevant in the process so that both contending applications for .Africa would be allowed to move forward . . . .” In other words, DCA was arguing that the AUC’s input was inappropriate, and DCA was requesting that ICANN change the Guidebook requirement regarding governmental support for geographic names in order to accommodate DCA. ICANN’s NGPC reviewed and appropriately rejected DCA’s arguments.

35. One of DCA’s three “supplementary arguments,” beginning on page 10 of its response to the GAC Advice, was that there had been no consensus GAC advice, in part allegedly evidenced by Mr. Buruchara’s (incomplete) email addressed above. DCA, however, chose not to address the fact that: (i) DCA lacked the requisite support of the African governments; (ii) Mr. Buruchara was not the Kenyan GAC representative; (iii) Mr. Buruchara was not at the Beijing meeting; (iv) the government of Kenya had withdrawn any support it may have previously had for DCA’s application; and (iv) the actual Kenyan GAC representative (Mr. Katundu) was at the ICANN meeting in Beijing and did not oppose the issuance of the GAC Advice against DCA’s application for .AFRICA. All of these facts were well known to DCA at the time of its response to the GAC Advice.

36. The NGPC’s resolution accepting the GAC Advice states that the NGPC considered DCA’s response prior to accepting the GAC Advice, and DCA presents no evidence to the contrary. DCA’s disagreement with the NGPC’s decision does not, of course, demonstrate that the NGPC failed to exercise due diligence in determining to accept the consensus GAC Advice.

37. As to DCA’s suggestion that the NGPC should have consulted an independent expert, the Guidebook provides that it is within the Board’s discretion to decide whether to consult with an independent expert:

ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.

The NGPC clearly did not violate its Bylaws, Articles or Guidebook in deciding that it did not need to consult any independent expert regarding the GAC Advice. Because DCA’s challenge to the GAC Advice was whether one or more countries actually had opposed the advice, there was no reason for the NGPC to retain an “expert” on that subject, and DCA has never stated what useful information an independent expert possibly could have provided.

89. ICANN also submits that the NGPC properly denied DCA’s request for reconsideration, ICANN’s actions following the acceptance of the GAC Advice are not relevant to the IRP, and in any event they were not improper, the ICANN staff directed the ICC to treat the two

African applications consistently, and ICANN staff did not violate any policy in drafting a template letter at the AUC request.

90. According to ICANN:

38. DCA argues that the NGPC improperly denied DCA's Reconsideration Request, which sought reconsideration of the NGPC's acceptance of the GAC Advice. Reconsideration is an accountability mechanism available under ICANN's Bylaws and administered by ICANN's Board Governance Committee ("BGC"). DCA's Reconsideration Request asked that the NGPC's acceptance of the GAC Advice be rescinded and that DCA's application be reinstated. Pursuant to the Bylaws, reconsideration of a Board (or in this case NGPC) action is appropriate only where the NGPC took an action "without consideration of material information" or in "reliance on false or inaccurate material information."

39. In its Reconsideration Request, DCA argued (as it does here) that the NGPC failed to consider material information by failing to consult with an independent expert prior to accepting the GAC Advice. The BGC noted that DCA had not identified any material information that the NGPC had not considered, and that DCA had not identified what advice an independent expert could have provided to the NGPC or how such advice might have altered the NGPC's decision to accept the GAC Advice. The BGC further noted that, as discussed above, the Guidebook is clear that the decision to consult an independent expert is at the discretion of the NGPC.

40. DCA does not identify any Bylaws or Articles provision that the NGPC violated in denying the Reconsideration Request. Instead, DCA simply disagrees with the NGPC's determination that DCA had not identified any material information on which the NGPC failed to rely. That disagreement is not a proper basis for a Reconsideration Request or an IRP. DCA also argues (again without citing to the Bylaws or Articles) that, because the NGPC accepted the GAC Advice, the NGPC could not properly consider DCA's Reconsideration Request. In fact, the DCA's Reconsideration Request was handled exactly in the manner prescribed by ICANN's Bylaws: the BGC—a separate Board committee charged with considering Reconsideration Requests—reviewed the material and provided a recommendation to the NGPC. The NGPC then reviewed the BGC's recommendation and voted to accept it. In short, the various Board committees conducted themselves exactly as ICANN's Bylaws require.

41. The NGPC accepted the GAC Advice on 4 June 2013. As a result, DCA's application for .AFRICA did not proceed. In its Memorial, DCA attempts to cast aspersions on ICANN's evaluation of ZACR's application, but that evaluation has no bearing on whether the NGPC acted consistently with its Bylaws and Articles in handling the GAC advice related to DCA's application. Indeed, the evaluation of ZACR's application did not involve any action by ICANN's Board (or NGPC), and is therefore not a proper basis for Independent Review. Although the actions of ICANN's staff are not relevant to this proceeding, ICANN addresses DCA's allegations for the sake of thoroughness and because the record demonstrates that ZACR's application was evaluated fully in conformance with the Guidebook requirements.

42. DCA alleges that “ICANN staff worked with [the ICC] to ensure that ZACR, but not DCA, would be able to pass the GNP evaluation.” DCA’s argument is based on false and unsupported characterizations of the ICC’s evaluation of the two .AFRICA applications.

43. First, DCA claims (without relevant citation) that ICANN determined that the AUC’s endorsement would count as an endorsement from each of the AU’s member states only after ICANN had stopped processing DCA’s application. In fact, the record indicates that ICANN accepted the ICC’s recommendation that the AUC’s endorsement would qualify as an endorsement from each of the AU’s member states while DCA’s application was still in contention, at a time when the recommendation had the potential to benefit both applicants for .AFRICA (had DCA also in fact received the AUC’s support).

44. The Guidebook provides that the Geographic Names Panel is responsible for “verifying the relevance and authenticity of supporting documentation.” Accordingly, it was the ICC’s responsibility to evaluate how the AUC’s endorsement should be treated. The ICC recommended that the AUC’s endorsement should count as an endorsement from each of the AU’s member states. The ICC’s analysis was based on the Abuja Declaration, which the ICC interpreted as “instruct[ing] the [AUC] to pursue the DotAfrica project, and in [the ICC’s] independent opinion, provide[d] suitable evidence of support from relevant governments or public authorities.” The evidence shows that ICANN accepted the ICC’s recommendation before the NGPC accepted the GAC Advice regarding DCA’s application— in a 26 April 2013 email discussing the preparation of clarifying questions regarding the AUC’s letters of support, ICANN explained to the ICC that “if the applicant(s) is/are unable to obtain a revised letter of support from the AU [], they may be able to fulfill the requirements by approaching the individual governments.”

45. DCA also claims that ICANN determined that endorsements from the UNECA would not be taken into account for geographic evaluations. This simply is not true. Pursuant to the ICC’s advice, the UNECA’s endorsement was taken into account. Like the AUC, the UNECA had signed letters of support for both DCA and ZACR. The ICC advised that because the UNECA was specifically named in the Abuja Declaration, it too should be treated as a relevant public authority. ICANN accepted the ICC’s advice.

46. DCA argues that, after ICANN had stopped processing DCA’s application, ICANN staff improperly assisted the AUC in drafting a support letter for ZACR. As is reflected in the clarifying questions the ICC drafted regarding the endorsement letters submitted on behalf of each of the two .AFRICA applications, the Guidebook contains specific requirements for letters of support from governments and public authorities. In addition to “clearly express[ing] the government’s or public authority’s support for or non- objection to the applicant’s application,” letters must “demonstrate the government’s or public authority’s understanding of the string being requested and its intended use” and that “the string is being sought through the gTLD application process and that the applicant is willing to accept the conditions under which the string will be available, i.e., entry into a registry agreement with ICANN . . .”. In light of these specific requirements, the Guidebook even includes a sample letter of support.

47. The first letter of support that the AUC submitted for ZACR's application did not follow the correct format and resulted in a clarifying question from the ICC. As a result, the AUC requested ICANN staff's assistance in drafting a letter that conformed to the Guidebook's requirements. ICANN staff drafted a template based on the sample letter of support in the Guidebook, and the AUC then made significant edits to that template. DCA paints this cooperation as nefarious, but there was absolutely nothing wrong with ICANN staff assisting the AUC, assistance that DCA would certainly have welcomed, and which ICANN would have provided, had the AUC been supporting DCA instead of ZACR.

## 91. Finally, ICANN submits:

50. ICANN's conduct with respect to DCA's application for .AFRICA was fully consistent with ICANN's Bylaws, its Articles of Incorporation and the Applicant Guidebook. ICANN acted through open and transparent processes, evaluated DCA's application for .AFRICA in accordance with the procedures set forth in the Guidebook, and followed the procedures set forth in its Bylaws in evaluating DCA's Request for Reconsideration. ICANN provided assistance to those who requested, cooperated with governmental authorities, and respected the consensus advice issued by the GAC, which speaks on behalf of the governments of the world.

51. DCA knew, as did all applicants for new gTLDs, that some of the applications would be rejected. There can only be one registry operator for each gTLD string, and in the case of strings that relate to geographic regions, no application can succeed without the significant support of the countries in that region. There is no justification whatsoever for DCA's repeated urging that the support (or lack thereof) of the countries on the African continent be made irrelevant to the process.

52. Ultimately, the majority of the countries in Africa chose to support another application for the .AFRICA gTLD, and decided to oppose DCA's application. At a critical time, no country stood up to defend DCA's application. These countries—and the AUC— had every right to take a stand and to support the applicant of their choice. In this instance, that choice resulted in the GAC issuing consensus advice, which the GAC had every right to do. Nothing in ICANN's Bylaws or Articles, or in the Guidebook, required ICANN to challenge that decision, to ignore that decision, or to change the rules so that the input of the AUC, much less the GAC, would become irrelevant. To the contrary, the AUC's role with respect to the African community is critical, and it was DCA's decision to pursue a path at odds with the AUC that placed its application in jeopardy, not anything that ICANN (or ICANN's Board or the NGPC) did. The NGPC did exactly what it was supposed to do in this circumstance, and ICANN urges this IRP Panel to find as such. Such a finding would allow the countries of Africa to soon provide their citizens with what all parties involved believe to be a very important step for Africa – access to .AFRICA on the internet.

## The Panel's Decision

92. The Panel in this IRP, has been asked to determine whether, in the case of the application of DCA Trust for the delegation of the .AFRICA top-level domain name in its 2012 General Top-Level Domains (“gTLD”) Internet Expansion Program (the “New gTLD Program”), the Board acted or failed to act in a manner inconsistent with ICANN’s Articles of Incorporation, Bylaws or the Applicant Guidebook?
93. After reviewing the documentation filed in this IRP, reading the Parties’ respective written submissions, reading the written statements and listening to the testimony of the three witnesses brought forward, listening to the oral presentations of the Parties’ legal representatives at the hearing in Washington, D.C., reading the transcript of the hearing, and deliberating, the Panel is of the unanimous view that certain actions and inactions of the ICANN Board (as described below) with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN.
94. ICANN is bound by its own Articles of Incorporation to act fairly, neutrally, non-discriminatorily and to enable competition. Article 4 of ICANN’s Articles of Incorporation sets this out explicitly:
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.
95. ICANN is also bound by its own Bylaws to act and make decisions “neutrally and objectively, with integrity and fairness.”
96. These obligations and others are explicitly set out in a number of provisions in ICANN’s Bylaws:

### **ARTICLE I: MISSION AND CORE (Council of Registrars) VALUES**

#### **Section 2. CORE (Council of Registrars) VALUES**

In performing its mission, the following core values should guide the decisions and actions of ICANN (Internet Corporation for Assigned Names and Numbers):

1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.

[...]

7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.

8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.

10. Remaining accountable to the Internet community through mechanisms that enhance ICANN (Internet Corporation for Assigned Names and Numbers)'s effectiveness.

11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN (Internet Corporation for Assigned Names and Numbers) body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

## **ARTICLE II: POWERS**

### **Section 1. GENERAL POWERS**

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN (Internet Corporation for Assigned Names and Numbers) shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board.

### **Section 3. NON-DISCRIMINATORY TREATMENT**

ICANN (Internet Corporation for Assigned Names and Numbers) shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by

substantial and reasonable cause, such as the promotion of effective competition.

### **ARTICLE III: TRANSPARENCY**

#### **Section 1. PURPOSE**

ICANN (Internet Corporation for Assigned Names and Numbers) and **its constituent bodies** shall operate to the maximum extent feasible in an open and transparent manner and consistent **with procedures designed to ensure fairness.** [Underlining and bold is that of the Panel]

97. As set out in Article IV (Accountability and Review) of ICANN's Bylaws, in carrying out its mission as set out in its 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 the Bylaws.
98. As set out in Section 3 (Independent Review of Board Actions) of Article IV, "any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and casually connected to the Board's alleged violation of the Bylaws or Articles of Incorporation, and not as a result of third parties acting in line with the Board's action."
99. In this IRP, among the allegations advanced by DCA Trust against ICANN, is that the ICANN Board, and its constituent body, the GAC, breached their obligation to act transparently and in conformity with procedures that ensured fairness. In particular, DCA Trust criticizes the ICANN Board here, for allowing itself to be guided by the GAC, a body "with apparently no distinct rules, limited public records, fluid definitions of membership and quorums" and unfair procedures in dealing with the issues before it.
100. According to DCA Trust, ICANN itself asserts that the GAC is a "constituent body." The exchange between the Panel and counsel for ICANN at the in-person hearing in Washington, D.C. is a living proof of that point.

#### **HONORABLE JUDGE CAHILL:**

Are you saying we should only look at what the Board does? The reason I'm asking is that your -- the Bylaws say that ICANN and its constituent bodies shall operate, to the maximum extent feasible, in an open and transparent manner. Does the constituent bodies include, I don't know,



GAC or anything? What is "constituent bodies"?

**MR. LEVEE:**

Yeah. What I'll talk to you about tomorrow in closing when I lay out what an IRP Panel is supposed to address, the Bylaws are very clear. Independent Review Proceedings are for the purpose of testing conduct or inaction of the ICANN Board. They don't apply to the GAC. They don't apply to supporting organizations. They don't apply to Staff.

**HONORABLE JUDGE CAHILL:**

So you think that the situation is a -- we shouldn't be looking at what the constituent -- whatever the constituent bodies are, even though that's part of your Bylaws?

**MR. LEVEE:**

Well, when I say not -- when you say not looking, part of DCA's claims that the GAC did something wrong and that ICANN knew that.

**HONORABLE JUDGE CAHILL:**

So is GAC a constituent body?

**MR. LEVEE:**

It is a constituent body, to be clear --

**HONORABLE JUDGE CAHILL:**

Yeah.

**MR. LEVEE:**

-- whether -- I don't think an IRP Panel -- if the only thing that happened here was that the GAC did something wrong --

**HONORABLE JUDGE CAHILL:**

Right.

**MR. LEVEE:**

-- an IRP Panel would not be -- an Independent Review Proceeding is not supposed to address that, whether the GAC did something wrong.

Now, if ICANN knew -- the Board knew that the GAC did something wrong, and that's how they link it, they say, Look, the GAC did something wrong, and ICANN knew it, the Board -- if the Board actually knew it, then we're dealing with Board conduct.

The Board knew that the GAC did not, in fact, issue consensus advice. That's the allegation. So it's fair to look at the GAC's conduct.

101. The Panel is unanimously of the view that the GAC is a constituent body of ICANN. This is not only clear from the above exchange between the Panel and counsel for ICANN, but also from Article XI (Advisory Committees) of ICANN's Bylaws and the Operating Principles of the GAC. Section 1 (General) of Article XI of ICANN's Bylaws states:

The Board may create one or more Advisory Committees in addition to those set forth in this Article. Advisory Committee membership may consist of Directors only, Directors and non-directors, or non-directors only, and may also include non-voting or alternate members. Advisory Committees shall have no legal authority to act for ICANN (Internet Corporation for Assigned Names and Numbers), but shall report their findings and recommendations to the Board.

Section 2, under the heading, Specific Advisory Committees states:

There shall be at least the following Advisory Committees:

1. Governmental Advisory Committee

a. The Governmental Advisory Committee should consider and provide advice on the activities of ICANN (Internet Corporation for Assigned Names and Numbers) as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN (Internet Corporation for Assigned Names and Numbers)'s policies and various laws and international agreements or where they may affect public policy issues. [Underlining is that of the Panel]

Section 6 of the preamble of GAC's Operating Principles is also relevant. That Section reads as follows:

The GAC commits itself to implement efficient procedures in support of ICANN and to provide thorough and timely advice and analysis on relevant matters of concern with regard to government and public interests.

102. According to DCA Trust, based on the above, and in particular, Article III (Transparency), Section 1 of ICANN's Bylaws, therefore, the GAC was bound to the transparency and fairness obligations of that provision to "operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness", but as ICANN's own witness, Ms. Heather Dryden acknowledged during the hearing, the GAC did not act with transparency or in a manner designed to insure fairness.

**Mr. ALI:**

Q. But what was the purpose of the discussion at the Prague meeting with respect to AUC? If there really is no difference or distinction between voting/nonvoting, observer or whatever might be the opposite of observer,

or the proper terminology, what was -- what was the point?

**THE WITNESS:**

A. I didn't say there was no difference. The issue is that there isn't GAC agreement about what are the -- the rights, if you will, of -- of entities like the AUC. And there might be in some limited circumstances, but it's also an extremely sensitive issue. And so not all countries have a shared view about what those -- those entities, like the AUC, should be able to do.

Q. So not all countries share the same view as to what entities, such as the AUC, should be able to do. Is that what you said? I'm sorry. I didn't --

A. Right, because that would only get clarified if there is a circumstance where that link is forced. In our business, we talk about creative ambiguity. We leave things unclear so we don't have conflict.

103. As explained by ICANN in its Closing Presentation at the hearing, ICANN's witness, Ms. Heather Dryden also asserted that the GAC Advice was meaningless until the Board acted upon it. This last point is also clear from examining Article 1, Principle 2 and 5 of ICANN GAC's Operating Principles. Principle 2 states that "the GAC is not a decision making body" and Principle 5 states that "the GAC shall have no legal authority to act for ICANN".

**MR. ALI:**

Q. I would like to know what it is that you, as the GAC Chair, understand to be the consequences of the actions that the GAC will take --

**HONORABLE JUDGE CAHILL:**

The GAC will take?

**MR. ALI:**

Q. -- the GAC will take -- the consequences of the actions taken by the GAC, such as consensus advice?

**HONORABLE JUDGE CAHILL:**

There you go.

**THE WITNESS:**

That isn't my concern as the Chair. It's really for the Board to interpret the outputs coming from the GAC.

104. Ms. Dryden also stated that the GAC made its decision without providing any rationale and primarily based on politics and not on potential violations of national laws and sensitivities.

**ARBITRATOR KESSEDJIAN:**

So, basically, you're telling us that the GAC takes a decision to object to an applicant, and no reasons, no rationale, no discussion of the concepts that are in the rules?

**THE WITNESS:**

I'm telling you the GAC did not provide a rationale. And that was not a requirement for issuing a GAC --

**HONORABLE JUDGE CAHILL:**

But you also want to check to see if the countries are following the right -- following the rules, if there are reasons for rejecting this or it falls within the three things that my colleague's talking about.

**THE WITNESS:**

The practice among governments is that governments can express their view, whatever it may be. And so there's a deference to that.

That's certainly the case here as well.

105. ICANN was bound by its Bylaws to conduct adequate diligence to ensure that it was applying its procedures fairly. Section 1 of Article III of ICANN's Bylaws, require it and its constituent bodies to "operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. The Board must also as per Article IV, Section 3, Paragraph 4 exercise due diligence and care in having a reasonable amount of facts in front of it.
106. In this case, on 4 June 2013, the NGPC accepted the GAC Objection Advice to stop processing DCA Trust's application. On 1 August 2013, the BGC recommended to the NGPC that it deny DCA Trust's Request for Reconsideration of the NGPC's 4 June 2013 decision, and on 13 August 2013, the NGPC accepted the BGC's recommendation (i.e., the NGPC declined to reconsider its own decision) without any further consideration.
107. In this case, ICANN through the BGC was bound to conduct a meaningful review of the NGPC's decision. According to ICANN's Bylaws, Article IV, Section 2, the Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The [BGC] shall have the authority to, among other things, conduct whatever factual investigation is deemed appropriate, and request additional written submissions from the affected party, or from others.

108. Finally, the NGPC was not bound by – nor was it required to give deference to – the decision of the BGC.

109. The above, combined with the fact that DCA Trust was never given any notice or an opportunity in Beijing or elsewhere to make its position known or defend its own interests before the GAC reached consensus on the GAC Objection Advice, and that the Board of ICANN did not take any steps to address this issue, leads this Panel to conclude that both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were not procedures designed to insure the fairness required by Article III, Sec. 1 above, and are therefore inconsistent with the Articles of Incorporation and Bylaws of ICANN.

110. The following excerpt of exchanges between the Panel and one of ICANN's witnesses, Ms. Heather Dryden, the then Chair of the GAC, provides a useful background for the decisions reached in this IRP:

**PRESIDENT BARIN:**

But be specific in this case. Is that what happened in the .AFRICA case?

**THE WITNESS:**

The decision was very quick, and --

**PRESIDENT BARIN:**

But what about the consultations prior? In other words, were -- were you privy to --

**THE WITNESS:**

No. If -- if colleagues are talking among themselves, then that's not something that the GAC, as a whole, is -- is tracking or -- or involved in. It's really those interested countries that are.

**PRESIDENT BARIN:**

Understood. But I assume -- I also heard you say, as the Chair, you never want to be surprised with something that comes up. So you are aware of -- or you were aware of exactly what was happening?

**THE WITNESS:**

No. No. You do want to have a good sense of where the problems are, what's going to come unresolved back to the full GAC meeting, but that's -- that's the extent of it.

And that's the nature of -- of the political process.

Redacted - GAC Designated Confidential Information

**HONORABLE JUDGE CAHILL:**

Okay.

**THE WITNESS:**

-- that question was addressed via having that meeting.

**PRESIDENT BARIN:**

And what's your understanding of what -- what the consequence of that decision is or was when you took it? So what happens from that moment on?

**THE WITNESS:**

It's conveyed to the Board, so all the results, the agreed language coming out of GAC is conveyed to the Board, as was the case with the communiqué from the Beijing meeting.

**PRESIDENT BARIN:**

And how is that conveyed to the Board?

**THE WITNESS:**

Well, it's a written document, and usually Support Staff are forwarding it to Board Staff.

**ARBITRATOR KESSEDJIAN:**

Could you speak a little bit louder? I don't know whether I am tired, but I --

**THE WITNESS:**

Okay. So as I was saying, the document is conveyed to the Board once it's concluded.

**PRESIDENT BARIN:**

When you say "the document", are you referring to the communiqué?

**THE WITNESS:**

Yes.

**PRESIDENT BARIN:**

Okay. And there are no other documents?

**THE WITNESS:**

The communiqué --

**PRESIDENT BARIN:**

In relation to .AFRICA. I'm not interested in any other.

**THE WITNESS:**

Yes, it's the communiqué.

**PRESIDENT BARIN:**

And it's prepared by your staff? You look at it?

**THE WITNESS:**

Right --

**PRESIDENT BARIN:**

And then it's sent over to --

**THE WITNESS:**

-- right, it's agreed by the GAC in full, the contents.

**PRESIDENT BARIN:**

And then sent over to the Board?

**THE WITNESS:**

And then sent, yes.

**PRESIDENT BARIN:**

And what happens to that communiqué? Does the Board receive that and say, Ms. Dryden, we have some questions for you on this, or --

**THE WITNESS:**

Not really. If they have questions for clarification, they can certainly ask that in a meeting. But it is for them to receive that and then interpret it and -- and prepare the Board for discussion or decision.

**PRESIDENT BARIN:**

Okay. And in this case, you weren't asked any questions or anything?

**THE WITNESS:**

I don't believe so. I don't recall.

**PRESIDENT BARIN:**

Any follow-ups, right?

**THE WITNESS:**

Right.

**PRESIDENT BARIN:**

And in the subsequent meeting, I guess the issue was tabled. The Board meeting that it was tabled, were you there?

**THE WITNESS:**

Yes. I don't particularly recall the meeting, but yes.

[...]

**ARBITRATOR KESSEDJIAN:**

Can I turn your attention to Paragraph 5 of your declaration?

Here, you basically repeat what is in the ICANN Guidebook literature, whatever. These are the exact words, actually, that you use in your declaration in terms of why there could be an objection to an applicant -- to a specific applicant. And you use three criteria: problematic, potentially violating national law, and raise sensitivities.

Now, I'd like you to, for us -- for our benefit, to explain precisely, as concrete as you can be, what those three concepts -- how those three concepts translate in the DCA case. Because this must have been discussed in order to get this very quick decision that you are mentioning. So I'd like to understand, you know, because these are the criteria -- these are the three criteria; is that correct?



**THE WITNESS:**

That is what the witness statement says, but the link to the GAC and the role that I played in terms of the GAC discussion did not involve me interpreting those three things. In fact, the GAC did not provide rationale for the consensus objection.

**ARBITRATOR KESSEDJIAN:**

No.

But, I mean, look, the GAC is taking a decision which -- very quickly -- I'm using your words, "very quickly" -- erases years and years and years of work, a lot of effort that have been put by a single applicant. And the way I understand the rules is that the -- the GAC advice -- consensus advice against that applicant are -- is based on those three criteria. Am I wrong in that analysis?

**THE WITNESS:**

I'm saying that the GAC did not identify a rationale for those governments that put forward a string or an application for consensus objection. They might have identified their reasons, but there was not GAC agreement about those reasons or -- or -- or -- or rationale for that. We had some discussion earlier about Early Warnings. So Early Warnings were issued by individual countries, and they indicated their rationale. But, again, that's not a GAC view.

**ARBITRATOR KESSEDJIAN:**

So, basically, you're telling us that the GAC takes a decision to object to an applicant, and no reasons, no rationale, no discussion of the concepts that are in the rules?

**THE WITNESS:**

I'm telling you the GAC did not provide a rationale. And that was not a requirement for issuing a GAC --

**HONORABLE JUDGE CAHILL:**

But you also want to check to see if the countries are following the right -- following the rules, if there are reasons for rejecting this or it falls within the three things that my colleague's talking about.

**THE WITNESS:**

The practice among governments is that governments can express their view, whatever it may be. And so there's [...] deference to that. That's certainly the case here as well. The -- if a country tells -- tells the GAC or says it has a concern, that's not really something that -- that's evaluated, in the sense you mean, by the other governments. That's not the way governments work with each other.

**HONORABLE JUDGE CAHILL:**

So you don't go into the reasons at all with them?

**THE WITNESS:**

To issue a consensus objection, no.

**HONORABLE JUDGE CAHILL:**

Okay. ---

[...]

**PRESIDENT BARIN:**

I have one question for you. We spent, now, a bit of time or a considerable amount of time talking to you about the process, or the procedure leading to the consensus decision.

Can you tell me what your understanding is of why the GAC consensus objection was made finally?

[...]

But in terms of the .AFRICA, the decision -- the issue came up, the agenda -- the issue came up, and you made a decision, correct?

**THE WITNESS:**

The GAC made a decision.

**PRESIDENT BARIN:**

Right. When I say "you", I mean the GAC.

Do you know -- are you able to express to us what your understanding of the substance behind that decision was? I mean, in other words, we've spent a bit of time dealing with the process.

Can you tell us why the decision happened?

**THE WITNESS:**

The sum of the GAC's advice is reflected in its written advice in the communiqué. That is the view to GAC. That's -- that's --

[...]

**ARBITRATOR KESSEDJIAN:**

I just want to come back to the point that I was making earlier. To your Paragraph 5, you said -- you answered to me saying that is my declaration, but it was not exactly what's going on. Now, we are here to --

at least the way I understand the Panel's mandate, to make sure that the rules have been obeyed by, basically. I'm synthesizing. So I don't understand how, as the Chair of the GAC, you can tell us that, basically, the rules do not matter -- again, I'm rephrasing what you said, but I'd like to give you another opportunity to explain to us why you are mentioning those criteria in your written declaration, but, now, you're telling us this doesn't matter.

If you want to read again what you wrote, or supposedly wrote, it's Paragraph 5.

**THE WITNESS:**

I don't need to read again my declaration. Thank you. The header for the GAC's discussions throughout was to refer to strings or applications that were controversial or sensitive. That's very broad. And –

**ARBITRATOR KESSEDJIAN:**

I'm sorry. You say the rules say problematic, potentially violate national law, raise sensitivities. These are precise concepts.

**THE WITNESS:**

Problematic, violate national law -- there are a lot of laws -- and sensitivities does strike me as being quite broad.

[...]

**ARBITRATOR KESSEDJIAN:**

Okay. So we are left with what? No rules?

**THE WITNESS:**

No rationale with the consensus objections.

That's the -- the effect.

**ARBITRATOR KESSEDJIAN:**

I'm done.

**HONORABLE JUDGE CAHILL:**

I'm done.

**PRESIDENT BARIN:**

So am I.

111. The Panel understands that the GAC provides advice to the ICANN Board on matters of public policy, especially in cases where ICANN activities and policies may interact with national laws or international agreements. The Panel also understands that GAC advice is developed through consensus among member nations. Finally, the Panel understands that although the ICANN Board is required to consider GAC advice and recommendations, it is not obligated to follow those recommendations.

112. Paragraph IV of ICANN's Beijing, People's Republic of China 11 April 2013 Communiqué [Exhibit C-43] under the heading "GAC Advice to the ICANN Board" states:

**IV. GAC Advice to the ICANN Board**

**1. New gTLDs**

**a. GAC Objections to the Specific Applications**

**i. The GAC Advises the ICANN Board that:**

i. The GAC has reached consensus on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook on the following applications:

1. The application for .africa (Application number 1-1165-42560)

[...]

Footnote 3 to Paragraph IV.1. (a)(i)(i) above in the original text adds, "Module 3.1: The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved." A similar statement in this regard can be found in paragraph 5 of Ms. Dryden's 7 February 2014 witness statement.

113. In light of the clear "Transparency" obligation provisions found in ICANN's Bylaws, the Panel would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting DCA Trust's application.

114. The Panel would have had a similar expectation with respect to the NGPC Response to the GAC Advice regarding .AFRICA which was expressed in ANNEX 1 to NGPC Resolution No. 2013.06.04.NG01 [Exhibit C-45]. In that document, in response to DCA Trust's application, the NGPC stipulated:

The NGPC accepts this advice. The AGB provides that “if GAC advised ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved. The NGPC directs staff that pursuant to the GAC advice and Section 3.1 of the Applicant Guidebook, Application number 1-1165-42560 for .africa will not be approved. In accordance with the AGB the applicant may withdraw [...] or seek relief according to ICANN's accountability mechanisms (see ICANN's Bylaws, Articles IV and V) subject to the appropriate standing and procedural requirements.

115. Based on the foregoing, after having carefully reviewed the Parties' written submissions, listened to the testimony of the three witnesses, listened to the oral submissions of the Parties in various telephone conference calls and at the in-person hearing of this IRP in Washington, D.C. on 22 and 23 May 2015, and finally after much deliberation, pursuant to Article IV, Section 3, paragraph 11 (c) of ICANN's Bylaws, the Panel declares that both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN.

116. As indicated above, there are perhaps a number of other instances, including certain decisions made by ICANN, that did not proceed in the manner and spirit in which they should have under the Articles of Incorporation and Bylaws of ICANN.

117. DCA Trust has criticized ICANN for its various actions and decisions throughout this IRP and ICANN has responded to each of these criticisms in detail. However, the Panel, having carefully considered these criticisms and decided that the above is dispositive of this IRP, it does not find it necessary to determine who was right, to what extent and for what reasons in respect to the other criticisms and other alleged shortcomings of the ICANN Board identified by DCA Trust.

**2) Can the IRP Panel recommend a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act in a manner inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook?**

118. In the conclusion of its Memorial on the Merits filed with the Panel on 3 November 2014, DCA Trust submitted 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.

119. In its Final Request for Relief filed with the Panel on 23 May 2015, DCA Trust requested that this Panel recommend to the ICANN Board that it cease all preparations to delegate the .AFRICA gTLD to ZACR and recommend that ICANN permit DCA's application to proceed through the remainder of the new gTLD application process and be granted a period of no less than 18 months to obtain Government support as set out in the AGB and interpreted by the Geographic Names Panel, or accept that the requirement is satisfied as a result of the endorsement of DCA Trust's application by UNECA.

120. DCA Trust also requested that this Panel recommend to ICANN that it compensate DCA Trust for the costs it has incurred as a result of ICANN's violations of its Articles of Incorporation, Bylaws and AGB.

121. In its response to DCA Trust's request for the recommendations set out in DCA Trust's Memorial on the Merits, ICANN submitted that this Panel does not have the authority to grant the affirmative relief that DCA Trust had requested.

122. According to ICANN:

48. DCA's request should be denied in its entirety, including its request for relief. DCA requests that this IRP Panel issue a declaration requiring ICANN to "rescind its contract with ZACR" and to "permit DCA's application to proceed through the remainder of the application process." Acknowledging that it currently lacks the requisite governmental support for its application, DCA also requests that it receive "18 months to negotiate with African governments to obtain the necessary endorsements." In sum, DCA requests not only that this Panel remove DCA's rival for .AFRICA from contention (requiring ICANN to repudiate its contract with ZACR), but also that it rewrite the Guidebook's rules in DCA's favor.

49. IRP Panels do not have authority to award affirmative relief. Rather, an IRP Panel is limited to stating its opinion as to "whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws" and recommending (as this IRP Panel has done previously) that the Board stay any action or decision, or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP Panel. The Board will, of course, give extremely serious consideration to the Panel's recommendations.

123. In its response to DCA Trust's amended request for recommendations filed on 23 May 2015, ICANN argued that because the Panel's authority is limited to declaring whether the Board's conduct was inconsistent with the Articles or the Bylaws, the Panel should limit its declaration to that question and refrain from

recommending how the Board should then proceed in light of the Panel's declaration.

124. In response, DCA Trust submitted that according to ICANN's Bylaws, the Independent Review Process is designed to provide a remedy for "any" person materially affected by a decision or action by the Board. Further, "in order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation.

125. According to ICANN, "indeed, the ICANN New gTLD Program Committee, operating under the delegated authority of the ICANN Board, itself [suggests] that DCA could seek relief through ICANN's accountability mechanisms or, in other words, the Reconsideration process and the Independent Review Process." Furthermore:

If the IRP mechanism – the mechanism of last resort for gTLD applicants – is intended to provide a remedy for a claimant materially injured or harmed by Board action or inaction, and it serves as the only alternative to litigation, then naturally the IRP Panel may recommend how the ICANN Board might fashion a remedy to redress such injury or harm.

126. After considering the Parties' respective submissions in this regard, the Panel is of the view that it does have the power to recommend a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act in a manner inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook.

127. Article IV, Section 3, paragraph 11 (d) of ICANN's Bylaws states:

**ARTICLE IV: ACCOUNTABILITY AND REVIEW**  
**Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS**

11. The IRP Panel shall have the authority to:

d. recommend that the Board stay any action or decision or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.

128. The Panel finds that both the language and spirit of the above section gives it authority to recommend how the ICANN Board might fashion a remedy to redress injury or harm that is directly related and causally connected to the Board's violation of the Bylaws or the Articles of Incorporation.

129. As DCA Trust correctly points out, with which statement the Panel agrees, "if the IRP mechanism – the mechanism of last resort for

gTLD applicants – is intended to provide a remedy for a claimant materially injured or harmed by Board action or inaction, and it serves as the only alternative to litigation, then naturally the IRP Panel may recommend how the ICANN Board might fashion a remedy to redress such injury or harm.”

130. Use of the imperative language in Article IV, Section 3, paragraph 11 (d) of ICANN’s Bylaws, is clearly supportive of this point. That provision clearly states that the IRP Panel has the authority to recommend a course of action until such time as the Board considers the opinion of the IRP and acts upon it.
131. Furthermore, use of the word “opinion”, which means the formal statement by a judicial authority, court, arbitrator or “Panel” of the reasoning and the principles of law used in reaching a decision of a case, is demonstrative of the point that the Panel has the authority to recommend affirmative relief. Otherwise, like in section 7 of the Supplementary Procedures, the last sentence in paragraph 11 would have simply referred to the “declaration of the IRP”. Section 7 under the heading “Interim Measures of Protection” says in part, that an “IRP PANEL may recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the IRP declaration.”
132. The scope of Article IV, Section 3, paragraph 11 (d) of ICANN’s Bylaws is clearly broader than Section 7 of the Supplementary Procedures.
133. Pursuant to Article IV, Section 3, paragraph 11 (d) of ICANN’s Bylaws, therefore, the Panel recommends that ICANN continue to refrain from delegating the .AFRICA gTLD and permit DCA Trust’s application to proceed through the remainder of the new gTLD application process.

### **3) Who is the prevailing party in this IRP?**

134. In its letter of 1 July 2015, ICANN submits that, “ICANN believes that the Panel should and will determine that ICANN is the prevailing party. Even so, ICANN does not seek in this instance the putative effect that would result if DCA were required to reimburse ICANN for all of the costs that ICANN incurred. This IRP was much longer [than] anticipated (in part due to the passing of one of the panelists last summer), and the Panelists’ fees were far greater than an ordinary IRP, particularly because the Panel elected to conduct a live hearing.”



135.DCA Trust on the other hand, submits that, “should it prevail in this IRP, ICANN should be responsible for all of the costs of this IRP, including the interim measures proceeding.” In particular, DCA Trust writes:

On March 23, 2014, DCA learned via email from a supporter of ZA Central Registry (“ZACR”), DCA’s competitor for .AFRICA, that ZACR would sign a registry agreement with ICANN in three days’ time (March 26) to be the registry operator for .AFRICA. The very same day, we sent a letter on behalf of DCA to ICANN’s counsel asking ICANN to refrain from executing the registry agreement with ZACR in light of the pending IRP proceedings. See DCA’s Request for Emergency Arbitrator and Interim Measures of Protection, Annex I (28 Mar. 2014). Instead, ICANN entered into the registry agreement with ZACR the very next day—two days ahead of schedule. [...] Later that same day, ICANN responded to DCA’s request by treating the execution of the contract as a *fait accompli* and, for the first time, informed DCA that it would accept the application of Rule 37 of the 2010 [ICDR Rules], which provides for emergency measures of protection, even though ICANN’s Supplementary Procedures for ICANN Independent Review Process expressly provide that Rule 37 does not apply to IRPs. A few days later, on March 28, 2014, DCA filed a Request for Emergency Arbitrator and Interim Measures of Protection with the ICDR. ICANN responded to DCA’s request on April 4, 2014. An emergency arbitrator was appointed by the ICDR; however, the following week, the original panel was fully constituted and the parties’ respective submissions were submitted to the Panel for its review on April 13, 2014. After a teleconference with the parties on April 22 and a telephonic hearing on May 5, the Panel ruled that “ICANN must immediately refrain from any further processing of any application for .AFRICA” during the pendency of the IRP. Decision on Interim Measures of Protection, ¶ 51 (12 May 2014).

136.A review of the various procedural orders, decisions, and declarations in this IRP clearly indicates that DCA Trust prevailed in many of the questions and issues raised.

137.In its letter of 1 July 2015, DCA Trust refers to several instances in which ICANN was not successful in its position before this Panel. According to DCA Trust, the following are some examples, “ICANN’s Request for Partial Reconsideration, ICANN’s request for the Panel to rehear the proceedings, and the evidentiary treatment of ICANN’s written witness testimony in the event it refused to make its witnesses available for questioning during the merits hearing.”

138.The Panel has no doubt, as ICANN writes in its letter of 1 July 2015, that the Parties’ respective positions in this IRP “were asserted in good faith.” According to ICANN, “although those positions were in many instances diametrically opposed, ICANN does not doubt that DCA believed in the credibility of the positions that it took, and

[ICANN believes] that DCA feels the same about the positions ICANN took.”

139. The above said, after reading the Parties’ written submissions concerning the issue of costs and deliberation, the Panel is unanimously of the view that DCA Trust is the prevailing party in this IRP.

#### **4) Who is responsible for bearing the costs of this IRP and the cost of the IRP Provider?**

140. DCA Trust submits that ICANN should be responsible for *all* costs of this IRP, including the interim measures proceeding. Among other arguments, DCA Trust submits:

This is consistent with ICANN’s Bylaws and Supplementary Procedures, which together provide that in ordinary circumstances, the party not prevailing shall be responsible for all costs of the proceeding. Although ICANN’s Supplementary Procedures do not explain what is meant by “all costs of the proceeding,” the ICDR Rules that apply to this IRP provide that “costs” include the following:

- (a) the fees and expenses of the arbitrators;
- (b) the costs of assistance required by the tribunal, including its experts;
- (c) the fees and expenses of the administrator;
- (d) the reasonable costs for legal representation of a successful party; and
- (e) any such costs incurred in connection with an application for interim or emergency relief pursuant to Article 21.

Specifically, these costs include all of the fees and expenses paid and owed to the [ICDR], including the filing fees DCA paid to the ICDR (totaling \$4,750), all panelist fees and expenses, including for the emergency arbitrator, incurred between the inception of this IRP and its final resolution, legal costs incurred in the course of the IRP, and all expenses related to conducting the merits hearing (e.g., renting the audiovisual equipment for the hearing, printing hearing materials, shipping hard copies of the exhibits to the members of the Panel).

Although in “extraordinary” circumstances, the Panel may allocate up to half of the costs to the prevailing party, DCA submits that the circumstances of this IRP do not warrant allocating costs to DCA should it prevail. The reasonableness of DCA’s positions, as well as the meaningful contribution this IRP has made to the public dialogue about both ICANN’s accountability mechanisms and the appropriate deference owed by ICANN to its Governmental Advisory Committee, support a full award of costs to

DCA.

[...]

To the best of DCA's knowledge, this IRP was the first to be commenced against ICANN under the new rules, and as a result there was little guidance as to how these proceedings should be conducted. Indeed, at the very outset there was controversy about the applicable version of the Supplemental Rules as well as the form to be filed to initiate a proceeding. From the very outset, ICANN adopted positions on a variety of procedural issues that have increased the costs of these proceedings. In DCA's respectful submission, ICANN's positions throughout these proceedings are inconsistent with ICANN's obligations of transparency and the overall objectives of the IRP process, which is the only independent accountability mechanism available to parties such as DCA.

141. DCA Trust also submits that ICANN's conduct in this IRP increased the duration and expense of this IRP. For example, ICANN failed to appoint a standing panel, it entered into a registry agreement with DCA's competitor for .AFRICA during the pendency of this IRP, thereby forcing DCA Trust to request for interim measures of protection in order to preserve its right to a meaningful remedy, ICANN attempted to appeal declarations of the Panel on procedural matters where no appeal mechanism was provided for under the applicable procedures and rules, and finally, ICANN refused only a couple of months prior to the merits hearing, to make its witnesses available for viva voce questioning at the hearing.

142. ICANN in response submits that, "both the Bylaws and the Supplementary Procedures provide that, in the ordinary course, costs shall be allocated to the prevailing party. These costs include the Panel's fees and the ICDR's fees, [they] would also include the costs of the transcript."

143. ICANN explains on the other hand that this case was extraordinary and this Panel should exercise its discretion to have each side bear its own costs as this IRP "was in many senses a first of its kind." According to ICANN, among other things:

This IRP was the first associated with the Board's acceptance of GAC advice that resulted in the blocking of an application for a new gTLD under the new gTLD Program;

This was the first IRP associated with a claim that one or more ICANN Board members had a conflict of interest with a Board vote; and

This was the first (and still only) IRP related to the New gTLD Program that involved a live hearing, with a considerable amount of debate associated with whether to have a hearing.

144. After reading the Parties' written submissions concerning the issue of costs and their allocation, and deliberation, the Panel is unanimous in deciding that DCA Trust is the prevailing party in this IRP and ICANN shall bear, pursuant to Article IV, Section 3, paragraph 18 of the Bylaws, Article 11 of Supplementary Procedures and Article 31 of the ICDR Rules, the totality of the costs of this IRP and the totality of the costs of the IRP Provider.

145. As per the last sentence of Article IV, Section 3, paragraph 18 of the Bylaws, however, DCA Trust and ICANN shall each bear their own expenses, and they shall also each bear their own legal representation fees.

146. For the avoidance of any doubt therefore, the Panel concludes that ICANN shall be responsible for paying the following costs and expenses:

- a) the fees and expenses of the panelists;
- b) the fees and expenses of the administrator, the ICDR;
- c) the fees and expenses of the emergency panelist incurred in connection with the application for interim emergency relief sought pursuant to the Supplementary Procedures and the ICDR Rules; and
- d) the fees and expenses of the reporter associated with the hearing on 22 and 23 May 2015 in Washington, D.C.

147. The above amounts are easily quantifiable and the Parties are invited to cooperate with one another and the ICDR to deal with this part of this Final Declaration.

## **V. DECLARATION OF THE PANEL**

148. Based on the foregoing, after having carefully reviewed the Parties' written submissions, listened to the testimony of the three witness, listened to the oral submissions of the Parties in various telephone conference calls and at the in-person hearing of this IRP in Washington, D.C. on 22 and 23 May 2015, and finally after much deliberation, pursuant to Article IV, Section 3, paragraph 11 (c) of ICANN's Bylaws, the Panel declares that both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN.

149. Furthermore, pursuant to Article IV, Section 3, paragraph 11 (d) of ICANN's Bylaws, the Panel recommends that ICANN continue to

refrain from delegating the .AFRICA gTLD and permit DCA Trust's application to proceed through the remainder of the new gTLD application process.

150. The Panel declares DCA Trust to be the prevailing party in this IRP and further declares that ICANN is to bear, pursuant to Article IV, Section 3, paragraph 18 of the Bylaws, Article 11 of Supplementary Procedures and Article 31 of the ICDR Rules, the totality of the costs of this IRP and the totality of the costs of the IRP Provider as follows:

- a) the fees and expenses of the panelists;
- b) the fees and expenses of the administrator, the ICDR;
- c) the fees and expenses of the emergency panelist incurred in connection with the application for interim emergency relief sought pursuant to the Supplementary Procedures and the ICDR Rules; and
- d) the fees and expenses of the reporter associated with the hearing on 22 and 23 May 2015 in Washington, D.C.
- e) As a result of the above, the administrative fees of the ICDR totaling US\$4,600 and the Panelists' compensation and expenses totaling US\$403,467.08 shall be born entirely by ICANN, therefore, ICANN shall reimburse DCA Trust the sum of US\$198,046.04

151. As per the last sentence of Article IV, Section 3, paragraph 18 of the Bylaws, DCA Trust and ICANN shall each bear their own expenses. The Parties shall also each bear their own legal representation fees.

The Panel finally would like to take this opportunity to fondly remember its collaboration with the Hon. Richard C. Neal (Ret. and now Deceased) and to congratulate both Parties' legal teams for their hard work, civility and responsiveness during the entire proceedings. The Panel was extremely impressed with the quality of the written work presented to it and oral advocacy skills of the Parties' legal representatives.

**This Final Declaration has sixty-three (63) pages.**

**Date: Thursday, 9 July 2015.**

**Place of the IRP, Los Angeles, California.**



Professor Catherine Kessedjian



Hon. William J. Cahill (Ret.)



Babak Barin, President

# **ANNEX S-6**

# JONES DAY

Contact Information Redacted

Contact Information Redacted

Contact Information Redacted

October 12, 2015

VIA EMAIL AND FEDEX

Scott Donahey

Contact Information Redacted

Hon. Charles N. Brower

Contact Information Redacted

Mark Kantor

Contact Information Redacted

Re: Dot Registry and ICANN—ICDR Case No. 01-14-0001-5004

Dear Chairman Donahey and Members of the Panel:

On behalf of ICANN, we provide this response to the questions that the Panel posed in Procedural Order No. 8. The numbering corresponds to the Procedural Order. ICANN also takes this opportunity to attach the Final Declaration of the IRP panel in *Vistaprint Ltd. v. ICANN*, issued on 9 October 2015.

(a) ICANN is a California nonprofit public benefit corporation. As such, the local law to which ICANN is subject is California law. This includes Cal. Corp. Code §§ 5110-6910, which are the California statutes that specifically govern nonprofit public benefit corporations, and which, among other things, impose certain regulatory requirements on nonprofit public benefit corporations.<sup>1</sup> In addition, by virtue of its Articles of Incorporation (“Articles”), ICANN has committed to “carrying out its activities in conformity with relevant principles of international law and applicable international conventions.”<sup>2</sup> ICANN has interpreted this statement previously as requiring ICANN generally to conform its conduct to relevant principles of international law and international conventions, but certainly not as dictating that ICANN is subject to all international laws and conventions in a literal sense.

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<sup>1</sup> See, e.g., Cal. Corp. Code § 5913 (imposing certain regulatory requirements on the sale of a nonprofit public benefit corporation’s assets).

<sup>2</sup> Articles of Incorporation (“Articles”), ¶ 4 (Ex. C-6).



Members of the Panel  
 October 12, 2015  
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We are not aware of any principles of California or international law that are directly relevant to the determination of the sole issues within the scope of this IRP—whether ICANN’s Board acted in conformance with ICANN’s Articles and Bylaws in determining not to intervene in decisions made as part of the normal course of the administration of the New gTLD Program and, specifically: (1) declining to reconsider the CPE Panels’ Reports regarding Dot Registry’s Applications; and (2) declining to take other action with respect to those Reports.<sup>3</sup>

As for the Panel’s question regarding “due process,” ICANN is a nonprofit corporation, not a government entity or actor, and neither California nor relevant international law imposes any sort of “due process” requirement on ICANN with respect to its determinations regarding the delegation of specific new gTLDs.<sup>4</sup> In any event, inasmuch as the Bylaws and Articles do not create “due process” rights on behalf of gTLD applicants, it is not within the scope of this IRP to determine whether Dot Registry was accorded “due process” in the processing of its applications.

That said, the design of the New gTLD Program was intended to ensure, insofar as possible, fair and equal treatment of new gTLD applicants. In accordance with ICANN’s Articles and Bylaws, and with considerable community input, ICANN’s Board approved the New gTLD Applicant Guidebook (“Guidebook”), which set forth publicly-available, universally-applicable rules for the evaluation of new gTLD applications. New gTLD applicants specifically affirmed<sup>5</sup> when they submitted their applications that they understood that they would be subject to the Guidebook’s rules (including the rules for community priority evaluation), and that there was no guarantee that they would ultimately be awarded their applied-for new gTLD (much less be awarded community priority over other applicants for the same new gTLD).

Finally, the Panel also asked whether the language in ICANN’s Articles regarding “relevant principles of international law”<sup>6</sup> means that “relevant principles of international arbitration” apply to IRPs. The substantive and procedural rules governing IRPs are laid out in ICANN’s Bylaws and the Supplementary Procedures for ICANN Independent Review Process (“Supplementary Procedures”). The Supplementary Procedures provide that IRPs will be governed by the Supplementary Procedures and also the ICDR’s International Arbitration Rules (“ICDR Procedures”). As such, general principles of international dispute resolution apply to IRPs only insofar as those principles are incorporated into the ICDR Procedures. However, to the extent that there is any inconsistency between the (i) ICDR Procedures (and any relevant

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<sup>3</sup> See, e.g., Cal. Corp. Code § 5210 (“The board may delegate the management of the activities of the corporation to any person or persons, management company, or committee however composed, provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.”).

<sup>4</sup> See, e.g., *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) (the Constitution’s due process protections are limited to “state action”).

<sup>5</sup> Guidebook § 1.2.6 (Ex. C-5); *id.* Module 6.

<sup>6</sup> Articles ¶ 4 (Ex. C-6).



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 Page 3

principles of international dispute resolution they may incorporate) and (ii) the Supplementary Procedures, the Supplementary Procedures govern.<sup>7</sup>

(b) Article IV, Section 3.4 of the Bylaws establish a defined standard of review for IRP panels to apply in determining whether ICANN’s Board acted in conformance with ICANN’s Articles and Bylaws.<sup>8</sup> That standard of review requires IRP panels to focus on three factors:

- 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?<sup>9</sup>

The plain language of this standard restricts the IRP panel’s assessment of the Board’s “due diligence and care” to an assessment of whether the Board’s action was taken in reliance on a “reasonable amount of facts.”<sup>10</sup> Neither California nor international law is relevant to either that specific definition or the standard of review more generally.

ICANN was not required to establish any internal corporate accountability mechanism, but it chose to do so voluntarily. California non-profit public benefit corporations, such as ICANN, are expressly authorized to establish internal accountability mechanisms and to define the scope and form of those mechanisms.<sup>11</sup> Pursuant to this explicit authority, ICANN established the Independent Review process, as well as the procedures and standard of review, that would govern that process.

This prescribed standard of review is not inconsistent with other provisions of ICANN’s Bylaws, including those provisions requiring ICANN to operate “to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.”<sup>12</sup> ICANN has previously quoted to this Panel the holding of the IRP panel in *Booking.com*, which expressed the same view:

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<sup>7</sup> Supplementary Procedures ¶ 2 (“In the event there is any inconsistency between these Supplementary Procedures and the [ICDR Rules], these Supplementary Procedures will govern.”) (Ex. C-3).

<sup>8</sup> Bylaws Art. IV, § 3.4 (Ex. C-1).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation’s bylaws).

<sup>12</sup> Bylaws Art. III, § 1 (Ex. C-1).



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[T]here can be no question that the provisions of the ICANN Bylaws establishing the Independent Review Process and defining the role of an IRP panel specify that the ICANN Board enjoys a large degree of discretion in its decisions and actions. So long as the Board acts without conflict of interest and with due care it is entitled—indeed required—to exercise its independent judgment in acting in what it believes to be the best interest of ICANN. The only substantive check on the conduct of the ICANN Board is that such conduct may not be inconsistent with the Articles of Incorporation or Bylaws—or, the parties agree, with the Guidebook.<sup>13</sup>

This defined standard review reflects the fact that IRP panels are not intended to substitute their judgment for the independent judgment of ICANN’s Board in determining whether ICANN’s Board acted in conformity with ICANN’s Articles and Bylaws.

The Panel asks whether any relevant legal principles would prevent ICANN’s Board from delegating certain authority to ICANN staff or to third-party experts such as the EIU. As an initial matter, ICANN notes that any challenges to the Board’s delegation of authority via the Guidebook are long since time-barred because the Guidebook was published in 2012, and IRP challenges to Board decisions must be filed within 30 days of the posting of the minutes of the Board meeting reflecting the challenged Board action or inaction.<sup>14</sup> In any event, there are no relevant legal principles preventing such delegation. To the contrary, California law expressly provides for corporate boards to delegate managerial functions.<sup>15</sup> Here, ICANN’s Board properly exercised its independent judgment in determining that the day-to-day management of the New gTLD Program should be delegated to ICANN staff (which amounts to nearly 340 staff members), and that the thousands of expert evaluations required as part of the New gTLD Program should be delegated to third parties with the requisite expertise and resources to properly conduct those evaluations, expertise that the Board knew it did not have.

<sup>13</sup> *Booking.com* Final Declaration ¶ 108 (Ex. R-5); *see also Vistaprint* Final Declaration (“[T]he Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.”) (Ex. R-8).

<sup>14</sup> Bylaws, Art. IV, § 3.3; *Booking.com* Final Declaration (“[T]he time has long since passed for Booking.com or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to the establishment of [a Guidebook procedure] . . . [I]f Booking.com believed that there were problems with the Guidebook, it should have objected at the time the Guidebook was first implemented.”) (Ex. R-5); *Vistaprint* Final Declaration ¶ 172 (“[T]he Panel does agree with ICANN that the time for challenging the Guidebook’s [procedures]—which w[ere] developed in an open process and with extensive input—has passed.”) (Ex. R-8).

<sup>15</sup> Cal. Corp. Code § 5210 (“The board may delegate the management of the activities of the corporation to any person or persons, management company, or committee however composed, provided that the activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.”)



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For example, one of the evaluations performed on each of the 1,930 New gTLD Applications was a string similarity review, which used an algorithm, among many other things, to test whether applied-for new gTLDs were visually similar to either existing TLDs or other applied-for new gTLDs.<sup>16</sup> It was plainly reasonable for ICANN's Board to determine that this extremely technical task was properly delegated to a third-party with expertise to conduct such tasks. The same, equally justifiable, determination was made with respect to a number of other application review processes, including, among others, financial reviews and community priority evaluations.

(c) California law does not discuss the legal effect of a "declaration" as the term is used in ICANN's Bylaws; indeed, we are not aware of any other corporation in the United States (or elsewhere) that has adopted such a unique process. Instead, the term is defined by the context of the Bylaws, which make clear that ICANN's Board is required to "review[]" and "consider" the declaration, thereby exercising its discretion as to whether and in what manner to adopt and implement that declaration.<sup>17</sup> This is precisely what happened in the only three IRPs that have gone to a final declaration prior to *Vistaprint*: in the *ICM*, *Booking.com*, and *DotConnectAfrica* IRPs, the Board promptly reviewed and ultimately determined to adopt the relevant portions of the panels' declarations.<sup>18</sup> The IRP Panel's declaration in *Vistaprint* was issued last Friday. ICANN's Board will promptly review and consider that declaration.

ICANN recognizes that the IRP panel in the *DotConnectAfrica* matter issued a finding that its declaration would be legally binding, in contrast to the finding made by the panel in the *Vistaprint* and *ICM* matters that their declarations were not legally binding.<sup>19</sup> As ICANN has emphasized repeatedly to all IRP panels, the ICANN Board has announced that it will take (and is required by the Bylaws to take) any declarations of IRP panels seriously and to date has adopted the recommendations of all IRP declarations. Accordingly, we believe that further discussion of this issue would not be particularly useful.

<sup>16</sup> Guidebook § 2.2.1.1 (Ex. C-5).

<sup>17</sup> Bylaws Art. IV, § 3.11.d (Ex. C-1).

<sup>18</sup> NGPC Resolutions 2015.04.26.14-2015.04.26.16, available at <https://www.icann.org/resources/board-material/resolutions-2015-04-26-en#2.b> (*Booking.com*); NGPC Resolutions 2015.07.16.01 – 2015.07.16.05, available at <https://www.icann.org/resources/board-material/resolutions-2015-07-16-en> (*DotConnectAfrica*); Board Resolutions 2010.03.12.39-41 (*ICM*).

<sup>19</sup> *DotConnect Africa Trust v. ICANN*, Declaration of the IRP Procedure ¶¶ 98-115 (Ex. CLA-9D); *Vistaprint* Final Declaration ¶ 149 (An IRP panel's declaration is a "'non-binding declaration' when it comes to recommending that the Board take or refrain from taking any action or decision . . . .") (Ex. R-8); *ICM v. ICANN*, Declaration of the Independent Review Panel ¶¶ 131-134 (Ex. CLA-1). There was an extensive amount of briefing to both panels on the subject, which we could provide to this Panel if you believed it would be helpful, although it is quite voluminous and involved interpretations of two different sets of Bylaws. The *Booking.com* Panel did not address the issue of whether its declaration was binding.



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(d) ICANN agrees with the statements in Paragraph 53 of the *Booking.com* IRP Panel's Declaration that: (1) the term "action" as used in Article IV, Section 3 of ICANN's Bylaws encompasses inactions by the ICANN Board, and (2) the "rules" at issue when assessing the Board's conduct with respect to the New gTLD Program include relevant provisions of the Guidebook. However, the notion of Board "inaction" leading to a decision that is reviewable by an IRP Panel must involve a situation where the Board was required to, but did not, act.

For example, ICANN receives complaints from various types of Internet stakeholders regarding a myriad of issues, ranging from spam to cybersquatting, and so forth. These matters are almost never brought to the attention of the ICANN Board, meaning that the Board's "inaction" in addressing such matters would not warrant independent review. By contrast, if the Board were specifically presented with a decision—i.e., to decide to adopt a new policy recommended by one of ICANN's supporting organizations—but the Board elected not to consider that policy, that type of "inaction" could support independent review.

Here, as explained in ICANN's briefs, ICANN's Board acted in full accordance with ICANN's Articles, Bylaws, and the relevant provisions of the Guidebook in: (i) not independently evaluating the CPE Reports regarding Dot Registry's Applications; and (ii) not taking further action with respect to those Reports. The Board had no obligation to consider either of these matters, which is why ICANN has argued that independent review of those Board "inactions" is not appropriate under the terms of the Bylaws.

(e) ICANN's Bylaws and the Supplementary Procedures governing this IRP do not prohibit the holding of an in-person hearing. However, the Bylaws do strongly encourage IRP panels to "conduct [] proceedings by electronic means to the extent feasible" and contemplate that "in-person hearings" will be necessary only in "extraordinary" circumstances.<sup>20</sup>

As to live witness testimony, Paragraph 4 of the Supplementary Procedures and Article IV, Section 3.12 of the Bylaws are dispositive and expressly prohibit live witness testimony: "the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance."<sup>21</sup> IRP panels do not have the discretion to modify or ignore such express provisions of the Supplementary Procedures, and that it would be contrary to both the Bylaws and the Supplementary Procedures for an IRP Panel to order that any of the potential witnesses be subjected to live examination.<sup>22</sup>

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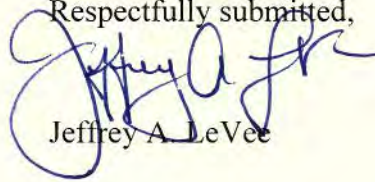
<sup>20</sup> Bylaws Art. IV, § 3.12 (Ex. C-1), Supplementary Procedures ¶ 4 (Ex. C-3).

<sup>21</sup> *Id.*

<sup>22</sup> ICANN anticipates that Dot Registry will note that the Panel in the *DCA* matter insisted on live testimony, over ICANN's vehement objection and in contravention of the express language of ICANN's Bylaws, and ICANN wound up bringing its declarants to the hearing. ICANN did not submit any declarations on the merits

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Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Jeffrey A. LeVee". The signature is stylized and cursive.

Jeffrey A. LeVee

cc: Counsel for Dot Registry

Enclosure

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(continued...)

in conjunction with this matter and does not believe it would be necessary or useful to be able to cross-examine Dot Registry's declarants.

# **ANNEX S-7**

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

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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 \(/resources/accountability\)](#)

- ▶ [Governance \(/resources/pages/governance-2012-02-25-en\)](#)

- ▶ [Groups \(/resources/pages/groups-2012-02-06-en\)](#)

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# AFFIRMATION OF COMMITMENTS BY THE UNITED STATES DEPARTMENT OF COMMERCE AND THE INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

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1 This document constitutes an Affirmation of Commitments (Affirmation) by the United



<p>Compliance (/resources/pages/compliance-2012-02-25-en)</p>	<p>States Department of Commerce ("DOC (Department of Commerce (USA))") and the Internet Corporation for Assigned Names and Numbers ("ICANN (Internet Corporation for Assigned Names and Numbers)"), a not-for-profit corporation. In recognition of the conclusion of the Joint Project Agreement and to institutionalize and memorialize the technical coordination of the Internet's domain name and addressing system (DNS (Domain Name System))<sup>1</sup>, globally by a private sector led organization, the parties agree as follows:</p>
<p>▶ Registrars (/resources/pages/registrars-0d-2012-02-25-en)</p>	
<p>▶ Registries (/resources/pages/registries-46-2012-02-25-en)</p>	<p>2. The Internet is a transformative technology that will continue to empower people around the globe, spur innovation, facilitate trade and commerce, and enable the free and unfettered flow of information. One of the elements of the Internet's success is a highly decentralized network that enables and encourages decision-making at a local level. Notwithstanding this decentralization, global technical coordination of the Internet's underlying infrastructure - the DNS (Domain Name System) - is required to ensure interoperability.</p>
<p>Operational Metrics (/resources/pages/metrics-gdd-2015-01-30-en)</p>	
<p>▶ Identifier Systems Security, Stability and Resiliency (Security, Stability and Resiliency) and Resiliency (IS-SSR) (/resources/pages/is-ssr-2014-11-24-en)</p>	<p>3. This document affirms key commitments by DOC (Department of Commerce (USA)) and ICANN (Internet Corporation for Assigned Names and Numbers), including commitments to: (a) ensure that decisions made related to the global technical coordination of the DNS (Domain Name System) are made in the public interest and are accountable and transparent; (b) preserve the security, stability and resiliency of the DNS (Domain Name System); (c) promote competition, consumer trust, and consumer choice in the DNS (Domain Name System) marketplace; and (d) facilitate international participation in DNS (Domain Name System) technical coordination.</p>
<p>▶ ccTLDs (/resources/pages/cctlds-21-2012-02-25-en)</p>	
<p>▶ Internationalized Domain Names (/resources/pages/idn-2012-02-25-en)</p>	<p>4. DOC (Department of Commerce (USA)) affirms its commitment to a multi-stakeholder, private sector led, bottom-up policy development model for DNS (Domain Name System) technical coordination that acts for the benefit of global Internet users. A private coordinating process, the outcomes of which reflect the public interest, is best able to flexibly meet the changing needs of the Internet and of Internet users. ICANN (Internet Corporation for Assigned Names and Numbers) and DOC (Department of Commerce (USA)) recognize that there is a group of participants that engage in ICANN (Internet Corporation for Assigned Names and Numbers)'s processes to a greater extent than Internet users generally. To ensure that its decisions are in the public interest, and not just the interests of a particular set of stakeholders, ICANN (Internet Corporation for Assigned Names and Numbers) commits to perform and publish analyses of the positive and negative effects of its decisions on the public, including any financial impact on the public, and the positive or negative impact (if any) on the systemic security, stability and resiliency of the DNS (Domain Name System).</p>
<p>▶ Universal Acceptance Initiative (/resources/pages/universal-acceptance-2012-02-25-en)</p>	
<p>▶ Policy (/resources/pages/policy-01-2012-02-25-en)</p>	
<p>▶ Public Comment (/public-comments)</p>	
<p>▶ Technical Functions (/resources/pages/technical-functions-2015-10-15-en)</p>	<p>5. DOC (Department of Commerce (USA)) recognizes the importance of global Internet users being able to use the Internet in their local languages and character sets, and endorses the rapid introduction of internationalized country code top level domain names (ccTLDs), provided related security, stability and resiliency issues are first addressed. Nothing in this document is an expression of support by DOC (Department</p>
<p>▶ Contact</p>	<p>of Commerce (USA)) of any specific plan or proposal for the implementation of new generic top level domain names (gTLDs) or is an expression by DOC (Department of</p>

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

► [Help](#)

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

generic top level domain names (gTLDs) or is an expression by [DOC \(Department of Commerce \(USA\)\)](#) of a view that the potential consumer benefits of new gTLDs outweigh the potential costs.

6. [DOC \(Department of Commerce \(USA\)\)](#) also affirms the United States Government's commitment to ongoing participation in [ICANN \(Internet Corporation for Assigned Names and Numbers\)'s Governmental Advisory Committee \(Advisory Committee\) \(GAC \(Governmental Advisory Committee\)\)](#). [DOC \(Department of Commerce \(USA\)\)](#) recognizes the important role of the [GAC \(Governmental Advisory Committee\)](#) with respect to [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) decision-making and execution of tasks and of the effective consideration by [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) of [GAC \(Governmental Advisory Committee\)](#) input on the public policy aspects of the technical coordination of the [Internet DNS \(Domain Name System\)](#).

7. [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) commits to adhere to transparent and accountable budgeting processes, fact-based policy development, cross-community deliberations, and responsive consultation procedures that provide detailed explanations of the basis for decisions, including how comments have influenced the development of policy consideration, and to publish each year an annual report that sets out [ICANN \(Internet Corporation for Assigned Names and Numbers\)'s](#) progress against [ICANN \(Internet Corporation for Assigned Names and Numbers\)'s](#) bylaws, responsibilities, and strategic and operating plans. In addition, [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) commits to provide a thorough and reasoned explanation of decisions taken, the rationale thereof and the sources of data and information on which [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) relied.

8. [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) affirms its commitments to: (a) maintain the capacity and ability to coordinate the [Internet DNS \(Domain Name System\)](#) at the overall level and to work for the maintenance of a single, interoperable Internet; (b) remain a not for profit corporation, headquartered in the United States of America with offices around the world to meet the needs of a global community; and (c) to operate as a multi-stakeholder, private sector led organization with input from the public, for whose benefit [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) shall in all events act. [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) is a private organization and nothing in this Affirmation should be construed as control by any one entity.

9. Recognizing that [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) will evolve and adapt to fulfill its limited, but important technical mission of coordinating the [DNS \(Domain Name System\)](#), [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) further commits to take the following specific actions together with ongoing commitment reviews specified below:

**9.1 Ensuring accountability, transparency and the interests of global Internet users:** [ICANN \(Internet Corporation for Assigned Names and Numbers\)](#) commits

to maintain and improve robust mechanisms for public input, accountability, and transparency so as to ensure that the outcomes of its decision-making will reflect the public interest and be accountable to all stakeholders by: (a) continually assessing and improving ICANN (Internet Corporation for Assigned Names and Numbers) Board of Directors (Board) governance which shall include an ongoing evaluation of Board performance, the Board selection process, the extent to which Board composition meets ICANN (Internet Corporation for Assigned Names and Numbers)'s present and future needs, and the consideration of an appeal mechanism for Board decisions; (b) assessing the role and effectiveness of the GAC (Governmental Advisory Committee) and its interaction with the Board and making recommendations for improvement to ensure effective consideration by ICANN (Internet Corporation for Assigned Names and Numbers) of GAC (Governmental Advisory Committee) input on the public policy aspects of the technical coordination of the DNS (Domain Name System); (c) continually assessing and improving the processes by which ICANN (Internet Corporation for Assigned Names and Numbers) receives public input (including adequate explanation of decisions taken and the rationale thereof); (d) continually assessing the extent to which ICANN (Internet Corporation for Assigned Names and Numbers)'s decisions are embraced, supported and accepted by the public and the Internet community; and (e) assessing the policy development process to facilitate enhanced cross community deliberations, and effective and timely policy development. ICANN (Internet Corporation for Assigned Names and Numbers) will organize a review of its execution of the above commitments no less frequently than every three years, with the first such review concluding no later than December 31, 2010. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC (Governmental Advisory Committee), the Chair of the Board of ICANN (Internet Corporation for Assigned Names and Numbers), the Assistant Secretary for Communications and Information of the DOC (Department of Commerce (USA)), representatives of the relevant ICANN (Internet Corporation for Assigned Names and Numbers) Advisory Committees (Advisory Committees) and Supporting Organizations (Supporting Organizations) and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (Governmental Advisory Committee) (in consultation with GAC (Governmental Advisory Committee) members) and the Chair of the Board of ICANN (Internet Corporation for Assigned Names and Numbers). Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations. Each of the foregoing reviews shall consider the extent to which the assessments and actions undertaken by ICANN (Internet Corporation for Assigned Names and Numbers) have been successful in ensuring that ICANN (Internet Corporation for Assigned Names and Numbers) is acting transparently, is accountable for its decision-making, and acts in the public interest. Integral to the foregoing reviews will be assessments of the extent to which the Board and staff have implemented the recommendations arising out of the other commitment reviews enumerated

below.

9.2 Preserving security, stability and resiliency: ICANN (Internet Corporation for Assigned Names and Numbers) has developed a plan to enhance the operational stability, reliability, resiliency, security, and global interoperability of the DNS (Domain Name System), which will be regularly updated by ICANN (Internet Corporation for Assigned Names and Numbers) to reflect emerging threats to the DNS (Domain Name System). ICANN (Internet Corporation for Assigned Names and Numbers) will organize a review of its execution of the above commitments no less frequently than every three years. The first such review shall commence one year from the effective date of this Affirmation. Particular attention will be paid to: (a) security, stability and resiliency matters, both physical and network, relating to the secure and stable coordination of the Internet DNS (Domain Name System); (b) ensuring appropriate contingency planning; and (c) maintaining clear processes. Each of the reviews conducted under this section will assess the extent to which ICANN (Internet Corporation for Assigned Names and Numbers) has successfully implemented the security plan, the effectiveness of the plan to deal with actual and potential challenges and threats, and the extent to which the security plan is sufficiently robust to meet future challenges and threats to the security, stability and resiliency of the Internet DNS (Domain Name System), consistent with ICANN (Internet Corporation for Assigned Names and Numbers)'s limited technical mission. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC (Governmental Advisory Committee), the CEO of ICANN (Internet Corporation for Assigned Names and Numbers), representatives of the relevant Advisory Committees (Advisory Committees) and Supporting Organizations (Supporting Organizations), and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (Governmental Advisory Committee) (in consultation with GAC (Governmental Advisory Committee) members) and the CEO of ICANN (Internet Corporation for Assigned Names and Numbers). Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

9.3 Promoting competition, consumer trust, and consumer choice: ICANN (Internet Corporation for Assigned Names and Numbers) 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 (Internet Corporation for Assigned Names and Numbers) 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

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. ICANN (Internet Corporation for Assigned Names and Numbers) will organize a further review of its execution of the above commitments two years after the first review, and then no less frequently than every four years. The reviews will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC (Governmental Advisory Committee), the CEO of ICANN (Internet Corporation for Assigned Names and Numbers), representatives of the relevant Advisory Committees (Advisory Committees) and Supporting Organizations (Supporting Organizations), and independent experts. Composition of the review team will be agreed jointly by the Chair of the GAC (Governmental Advisory Committee) (in consultation with GAC (Governmental Advisory Committee) members) and the CEO of ICANN (Internet Corporation for Assigned Names and Numbers). Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

9.3.1 ICANN (Internet Corporation for Assigned Names and Numbers) additionally commits to enforcing its existing policy relating to WHOIS (WHOIS (pronounced "who is"; not an acronym)), subject to applicable laws. Such existing policy requires that ICANN (Internet Corporation for Assigned Names and Numbers) implement measures to maintain timely, unrestricted and public access to accurate and complete WHOIS (WHOIS (pronounced "who is"; not an acronym)) information, including registrant, technical, billing, and administrative contact information. One year from the effective date of this document and then no less frequently than every three years thereafter, ICANN (Internet Corporation for Assigned Names and Numbers) will organize a review of WHOIS (WHOIS (pronounced "who is"; not an acronym)) policy and its implementation to assess the extent to which WHOIS (WHOIS (pronounced "who is"; not an acronym)) policy is effective and its implementation meets the legitimate needs of law enforcement and promotes consumer trust. The review will be performed by volunteer community members and the review team will be constituted and published for public comment, and will include the following (or their designated nominees): the Chair of the GAC (Governmental Advisory Committee), the CEO of ICANN (Internet Corporation for Assigned Names and Numbers), representatives of the relevant Advisory Committees (Advisory Committees) and Supporting Organizations (Supporting Organizations), as well as experts, and representatives of the global law enforcement community, and global privacy experts. Composition of the review team will be agreed jointly by the Chair of the GAC (Governmental Advisory Committee) (in consultation with GAC (Governmental Advisory Committee) members) and the CEO of ICANN (Internet Corporation for Assigned Names and Numbers). Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

10. To facilitate transparency and openness in ICANN (Internet Corporation for Assigned Names and Numbers)'s deliberations and operations, the terms and output of each of the reviews will be published for public comment. Each review team will consider such public comment and amend the review as it deems appropriate before it issues its final report to the Board.

11. The DOC (Department of Commerce (USA)) enters into this Affirmation of Commitments pursuant to its authority under 15 U.S.C. 1512 and 47 U.S.C. 902. ICANN (Internet Corporation for Assigned Names and Numbers) commits to this Affirmation according to its Articles of Incorporation and its Bylaws. This agreement will become effective October 1, 2009. The agreement is intended to be long-standing, but may be amended at any time by mutual consent of the parties. Any party may terminate this Affirmation of Commitments by providing 120 days written notice to the other party. This Affirmation contemplates no transfer of funds between the parties. In the event this Affirmation of Commitments is terminated, each party shall be solely responsible for the payment of any expenses it has incurred. All obligations of the DOC (Department of Commerce (USA)) under this Affirmation of Commitments are subject to the availability of funds.

FOR THE NATIONAL  
TELECOMMUNICATIONS  
INFORMATION ADMINISTRATION:

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Name: Lawrence E. Strickling  
Title: Assistant Secretary for  
Communications and Information

Date: September 30, 2009

FOR THE INTERNET CORPORATION  
AND FOR ASSIGNED NAMES AND  
NUMBERS:

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Name: Rod Beckstrom  
Title: President and CEO

Date: September 30, 2009

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<sup>1</sup>For the purposes of this Affirmation the Internet's domain name and addressing system (DNS (Domain Name System)) is defined as: domain names; Internet protocol addresses and autonomous system numbers; protocol port and parameter numbers. ICANN (Internet Corporation for Assigned Names and Numbers) coordinates these identifiers at the overall level, consistent with its mission.



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			<a href="#">Correspondence (/en/news/correspondence)</a>	



# **ANNEX S-8**

## Salour, Kamran

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**From:** Eric P. Enson Contact Information Redacted  
**Sent:** Tuesday, December 09, 2014 9:30 AM  
**To:** Eric P. Enson; Salour, Kamran  
**Cc:** Contact Information Redacted; Jeffrey LeVee; Kohne, Natasha; Pierre Heitzmann; Rachel Zernik  
**Subject:** Re: Gulf Cooperation Council V. ICANN - Case 01-14-0002-1065

All,  
My message did not go through to Mr. Salour. I have copied him again on this message. Thank you.  
Eric

Eric P. Enson  
[JONES DAY® - One Firm Worldwide](#)  
555 S. Flower St., 50th Floor  
Los Angeles, CA. 90071  
Contact Information Redacted

From: Eric P. Enson/JonesDay  
To: Contact Information Redacted  
CC: Contact Information Redacted, Jeffrey LeVee/JonesDay@JonesDay, Pierre Heitzmann/JonesDay@JonesDay, Rachel Zernik/JonesDay@JONESDAY  
Date: 12/09/2014 09:27 AM  
Subject: Re: Gulf Cooperation Council V. ICANN - Case 01-14-0002-1065

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Dear Carolina,

I am writing in response to your December 8, 2014 letter regarding the request of Gulf Corporation Council ("GCC") for emergency proceedings. Because the standing panel contemplated in the Supplementary Procedures for ICANN's Independent Review Process ("Supplementary Procedures") is not in place yet and pending the constitution of the Independent Review Process ("IRP") Panel in this matter, ICANN hereby consents to the appointment of a single emergency IRP panelist to address GCC's request for emergency relief, assuming the emergency panelist acts in accordance with the Rules contained in Article 6 of the 2014 ICDR Rules *as supplemented* by the Supplementary Procedures. Specifically and as provided in the Supplementary Procedures, in the event there is any inconsistency between the Supplementary Procedures and Article 6 of the 2014 ICDR Rules, the Supplementary Procedures will govern. For instance, an emergency IRP panelist, rather than an arbitrator, will be appointed by the ICDR to issue a Declaration, as provided under Articles 1, 6, 7, 9, 10 and 11 of the Supplementary Procedures, and not an Order or Award, as provided in section 6.4 of the 2014 ICDR Rules. Similarly, the rules related to the conduct of the proceedings and the administration of the evidence contained in the Supplementary Procedures shall govern these emergency IRP proceedings.

The foregoing clarifications are essential to ICANN's consent to the appointment of an emergency IRP panelist. In addition, ICANN's consent to selection of an emergency IRP panelist is in no way any concession or admission that emergency relief of any kind is appropriate in this action or that GCC has satisfied the conditions for emergency relief. ICANN would like GCC to confirm its agreement to the terms set forth above before the ICDR selects an emergency IRP panelist or initiates emergency IRP proceedings. I have copied GCC's counsel on this email.

Given the upcoming holidays and ICANN's holiday schedule, ICANN may seek from GCC or the emergency IRP

panelist an extension in the emergency IRP proceedings. In addition, ICANN cannot attend the Administrative Conference on December 15 at 2:30 Eastern. Is it possible to reschedule the Conference for December 15 at 11:30 Eastern? Thank you.

Eric

Eric P. Enson  
[JONES DAY® - One Firm Worldwide](#)  
555 S. Flower St., 50th Floor  
Los Angeles, CA. 90071  
Contact Information Redacted

From: Contact Information Redacted  
To: Contact Information Redacted  
Date: 12/08/2014 08:47 AM  
Subject: Gulf Cooperation Council V. ICANN - Case 01-14-0002-1065

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Attached please find correspondence related to the captioned matter.  
Thank you.

Carolina Cardenas-Venino, LL.M.  
International Senior Case Counsel  
American Arbitration Association  
International Centre for Dispute Resolution  
120 Broadway, 21st Floor  
New York, NY 10271  
<http://www.icdr.org>  
Contact Information Redacted

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[attachment "INT034.pdf" deleted by Eric P. Enson/JonesDay] [attachment "Independent Review information worksheet.pdf" deleted by Eric P. Enson/JonesDay] [attachment "21065 14 Checklist for Conflicts.pdf" deleted by Eric P. Enson/JonesDay]

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# **ANNEX S-9**

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

**Gulf Cooperation Council (GCC)**

Gulf Cooperation Council Building  
King Khaled Road,  
Diplomatic Area 7153, Saudi Arabia

**Claimant,**

v.

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

12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536

**Respondent.**

**ICDR Case No. 01-14-0002-1065**

**SUPPLEMENTAL WITNESS STATEMENT OF ABDULRAHMAN AL MARZOUQI IN  
SUPPORT OF CLAIMANT THE GULF COOPERATION COUNCIL'S  
SUPPLEMENTARY REQUEST FOR INDEPENDENT REVIEW PROCESS**

Akin Gump Strauss Hauer & Feld LLP

Counsel for Claimant GCC

**SUPPLEMENTAL WITNESS STATEMENT OF ABDULRAHMAN AL MARZOUQI**

1. My name is Abdulrahman Al Marzouqi. I am the Manager of Internet Advancements in the Policy Programs Department for the Telecommunications Regulatory Authority (TRA) in the United Arab Emirates (UAE). In this capacity, my responsibilities include, among other things, representing the UAE government in its dealings with ICANN and representing the Gulf Cooperation Council (GCC) in matters relating to the .PERSIANGULF gTLD application, including the GCC's Independent Review Process (IRP). Additionally, I have led the GCC's efforts to resolve the .PERSIANGULF gTLD dispute with ICANN and Asia Green, both before and after the GCC filed its IRP on December 5, 2014. I provide this statement in support of the GCC's Supplementary Request for Independent Review. I have personal knowledge of the facts set forth below and, if called as a witness, could and would competently testify to them.

2. Based on my dealings with ICANN as the GCC's representative, I know that ICANN allows for and encourages parties to participate in a conciliation period after a party files an IRP.

3. In December 2014, soon after the GCC filed its IRP, I instructed my counsel to participate with ICANN in a period of conciliation. Under this period of conciliation, my counsel would engage directly in conciliation talks with ICANN's attorneys.

4. Beginning in January 2015, I coordinated with my GCC colleagues to discuss and obtain an agreement on a conciliation proposal that my counsel could then present to ICANN's attorneys. In March 2015, after deliberating with my GCC colleagues, I presented to my counsel the GCC's first conciliation proposal.

5. In May 2015, I asked my counsel about the status of conciliation talks with ICANN's attorneys. Because conciliation talks with ICANN's attorneys had not led to a





resolution, I instructed my counsel to inquire whether Asia Green would be amenable to participating in the conciliation process. I had talks with Asia Green representatives in the past about resolving the dispute over the .PERSIANGULF gTLD, but those talks were unsuccessful. I believed that if Asia Green now participated in the conciliation process, it would help facilitate a mutually acceptable resolution for Asia Green, ICANN, and the GCC.

6. I instructed my counsel to draft an email (that ICANN's attorneys would send to Asia Green) asking Asia Green to participate in conciliation talks. I instructed my counsel further that ICANN must still be involved in conciliation talks even if Asia Green agreed to participate.

7. On or about August 10, 2015, Mr. Christopher Mondini, an ICANN representative, sent me an email inquiring about my availability to participate in a conference call with representatives ICANN and Asia Green.

8. On September 2, 2015, I participated in a conference call with representatives from ICANN and Asia Green, including attorneys for each. The purpose of the call was to include Asia Green in the ongoing conciliation talks to solve the ongoing dispute over the .PERSIANGULF gTLD.

9. During the conference call, I made the GCC's first conciliation proposal to Asia Green. In response to the first conciliation proposal, Asia Green requested specific, additional information to help it determine whether, and if so, how it could execute the GCC's conciliation proposal.

10. Following the conference call, I coordinated with my GCC colleagues to gather, organize, and obtain an agreement on the information that the GCC would provide in response to Asia Green's request for additional information.





11. In November 2015, I instructed my counsel to provide Asia Green's attorney with the additional information Asia Green requested.

12. In December 2015, my counsel forwarded me an email from Asia Green's attorney rejecting the GCC's first conciliation proposal. The email indicated further that Asia Green would no longer participate in conciliation talks.


13. In response to Asia Green's December 2015 email, I instructed my counsel to contact again Asia Green's attorney and request that Asia Green re-open conciliation talks.

14. While awaiting Asia Green's response, I coordinated again with my GCC colleagues to discuss and obtain an agreement on a second conciliation proposal for my counsel to present to Asia Green's attorney.

15. In January 2016, my counsel forwarded me an email from Asia Green's attorney indicating that Asia Green agreed to re-open conciliation talks. I instructed my counsel to make the second conciliation proposal to Asia Green.

16. To date, Asia Green has not responded to the GCC's second conciliation proposal.

Being in full agreement with the contents of this witness statement, I hereby sign and acknowledge its contents on 11<sup>th</sup> day of February 2016.

  
Abdulrahman Al Marzouqi