#### INDEPENDENT REVIEW PROCESS

#### INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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## ICANN'S RESPONSE TO CLAIMANT BOOKING.COM'S REQUEST FOR INDEPENDENT REVIEW PROCESS

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#### INTRODUCTION

- 1. The Internet Corporation for Assigned Names and Numbers ("ICANN") hereby submits its Response to the Request for Independent Review Process ("IRP Request") submitted by claimant Booking.com B.V. ("Booking.com") on 18 March 2014.
- 2. These unique proceedings occur pursuant to Article IV, Section 3 of ICANN's Bylaws, which creates a non-binding method of evaluating certain actions of ICANN's Board of Directors. This Independent Review Process Panel ("IRP Panel") is "charged with comparing contested actions of the [ICANN] Board to the [ICANN] Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws." In particular, 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?<sup>3</sup>
- 3. As the Bylaws make clear, the Independent Review Process ("IRP") addresses challenges to conduct undertaken by ICANN's Board of Directors; it is not available as a

<sup>3</sup> *Id*.

<sup>&</sup>lt;sup>1</sup> ICANN's Bylaws, *available at* http://www.icann.org/en/about/governance/bylaws and Cl. Ex. RM-2. Booking.com submitted two sets of numbered exhibits: (1) an "Annex"; and (2) "Reference Materials". Citations to "Cl. Ex. Annex-\_\_" refer to exhibits submitted in Claimant Booking.com's Annex, citations to "Cl. Ex. RM-\_\_" refer to exhibits submitted in Claimant Booking.com's Reference Materials, and citations to "Resp. Ex. " refer to exhibits submitted with Respondent ICANN's Response.

<sup>&</sup>lt;sup>2</sup> Bylaws, Cl. Ex. RM-2, at Art. IV, § 3.4. Booking.com submitted as Cl. Ex. RM-2 ICANN's Bylaws of 11 April 2013. ICANN's Bylaws have been revised since that time, but the provisions relevant to Booking.com's IRP Request and ICANN's response have not changed. For ease of reference, ICANN will refer to the Bylaws as submitted by Booking.com in Cl. Ex. RM-2.

mechanism to challenge the actions or inactions of ICANN staff or third parties that may be involved with ICANN's activities. As discussed below, this distinction is critical.

- 4. These proceedings generally involve ICANN's program to facilitate the creation of hundreds of new "generic Top Level Domains" or "gTLDs" on the Internet to supplement the gTLDs (i.e., .com, .net, .org) that have existed for many years. ICANN is administering this "New gTLD Program" pursuant to an "Applicant Guidebook" (or "Guidebook") that ICANN adopted in June 2011 following years of consideration and public input. The process for applying for new gTLDs, which is open to all interested entities, commenced on 12 January 2012; ICANN received 1,930 new gTLD applications.
- 5. In its IRP Request, Booking.com challenges ICANN's "adoption" of the determination by a panel of independent, third-party experts ("String Similarity Panel") as set forth in Section 2.2.1 of the Guidebook that Booking.com's applied-for gTLD ".hotels" (also called a "string") is visually confusingly similar to another applicant's applied-for string ".hoteis." Per Section 2.2.1 of the Guidebook, all gTLD applications were subjected to this "String Similarity Review" in order to avoid confusion that could occur in the event that two applied-for gTLDs were visually similar. If the String Similarity Panel determined that two strings were so similar as to be confusing, the Guidebook provides that those applied-for strings would enter into a "contention set," meaning that one, but not both, of those strings could proceed. In this instance, the String Similarity Panel determined that the strings .hotels and .hoteis were confusingly similar, such that only one of those strings will be permitted to proceed to delegation (which means that Booking.com's application for .hotels has not been denied, and it could very well be the successful applicant).

<sup>&</sup>lt;sup>4</sup> Booking.com included the New gTLD Applicant Guidebook (version of 4 June 2012) as Cl. Ex. RM-5 ("Guidebook"). The Guidebook is also available at http://newgtlds.icann.org/en/applicants/agb.

- 6. Booking.com further claims that ICANN breached its Bylaws by failing to publish the String Similarity Panel's rationale for its determination and that ICANN's subsequent decision to reject Booking.com's Request for Reconsideration on the same issues was improper.
- 7. In this response, ICANN demonstrates that determinations regarding string similarity were made by the independent String Similarity Panel and were not reviewed by the ICANN Board. Neither the Guidebook, ICANN's Bylaws, nor ICANN's Articles of Incorporation suggests that the ICANN Board would or should conduct a substantive review of or otherwise exercise its own independent judgment concerning the String Similarity Panel's determination that .hotels and .hoteis are visually confusingly similar. Booking.com's IRP Request is therefore misplaced as it challenges an action of independent, third-party expert evaluators selected to perform a String Similarity Review of all applied-for strings, and not an action of the ICANN Board. As the Independent Review Process is strictly limited to challenging actions of ICANN's Board of Directors, Booking.com's IRP Request must be denied.
- 8. ICANN will further demonstrate that the ICANN Board did exactly what it was supposed to do under its Bylaws, its Articles of Incorporation, and the Guidebook.<sup>5</sup> In particular, the record reflects the following:
  - Within the New gTLD Program, every applied-for string has been subjected to the String Similarity Review set out at Section 2.2.1.1 of the Guidebook.
  - As set forth in the Guidebook, "[t]his similarity review will be conducted by an independent String Similarity Panel," not the ICANN Board. ICANN selected

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<sup>&</sup>lt;sup>5</sup> As noted in the Preamble of the Guidebook (Cl. Ex. RM-5), the Guidebook was the product of an extensive evaluation process that involved public comment on multiple drafts.

<sup>&</sup>lt;sup>6</sup> Guidebook, Cl. Ex. RM-5, at § 2.2.1.1.

- (following an open and public request for proposal process) InterConnect Communications ("ICC") to perform the String Similarity Reviews.
- The Guidebook sets forth the process for making and publishing a determination of visual similarity, and the record demonstrates that ICANN followed that process. The Guidebook, which is the product of years of public debate and deliberation, does not require ICANN or the String Similarity Panel to publish the rationale for the independent String Similarity Panel's determinations. While Booking.com may wish for more information regarding the Panel's decision, no such disclosure is called for in the Guidebook, or in ICANN's Bylaws or ICANN's Articles of Incorporation.
- To the extent Booking.com is challenging ICC's failure to publish details regarding its determination, that is a challenge to conduct undertaken by the String Similarity Panel, not the ICANN Board, and is therefore not properly subject to an IRP.
- Finally, ICANN properly denied Booking.com's Request for Reconsideration pursuant to Article IV, Section 2 of the Bylaws.
- 9. 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 .hotels 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 .hotels are confusingly similar was wrong.
- 10. Nonetheless, as established below (Section IV), the String Similarity Panel's determination was well-supported. Of the more than 1900 applications submitted, the String

Similarity Panel created only two non-identical string contentions sets: (1) .hotels/.hoteis; and (2) .unicorn/.unicom, which demonstrates how circumspect the String Similarity Panel was in rendering its determinations. Moreover, there can be no dispute that .hotels and .hoteis are, in fact, visually similar. Indeed, .hotels and .hoteis satisfy each of the factors that the String Similarity Panel found to create confusing similarity:

- .hotels and .hoteis are of similar visual length;
- the strings are within +/- 1 character of each other;
- .hotels and .hoteis are strings where the majority of characters are the same and in the same position in each string;
- .hotels and .hoteis possess letter combinations that visually appear similar to other letters in the same position in each string, namely "l" & "i"; and
- .hotels and .hoteis scored 99% on the publicly available algorithm that assesses visual similarity, more than any other non-exact match applied-for strings.

#### BACKGROUND FACTS AND STANDARD OF REVIEW

- 11. ICANN was formed in 1998. It is a California not-for-profit public benefit corporation. 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 option of the Internet's unique identifier systems."
- 12. ICANN is 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. In broader terms, ICANN includes the Board of Directors, the

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<sup>&</sup>lt;sup>7</sup> Bylaws, Cl. Ex. RM-2, at Art. I, § 1.

Staff, the Ombudsman,<sup>8</sup> an independent Nominating Committee,<sup>9</sup> three Supporting Organizations,<sup>10</sup> four Advisory Committees,<sup>11</sup> a Technical Liaison Group,<sup>12</sup> and a very large, globally distributed group of community members who participate in ICANN's processes. The Supporting Organizations provide policy recommendations and advice on specific topics, and Advisory Committees provide advice to the ICANN Board.

- 13. In its early years, and in accordance with its Core Values set forth in ICANN's Bylaws, ICANN focused on increasing the number of Internet registrars that could sell domain name registrations to consumers. ICANN also focused on expanding, although more slowly, the number of Internet registries that operate generic Top Level Domains (gTLDs). In 2000, ICANN approved a limited number of new gTLDs, including .NAME and .INFO, in a "proof of concept" phase that was designed to confirm that adding additional gTLDs would not adversely affect the stability and security of the Internet. In 2004-05, ICANN approved a few more gTLDs.
- 14. The New gTLD Program, which the ICANN Board approved in June 2011, constitutes by far ICANN's most ambitious expansion of the Internet's naming system. The Program's goals include enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII and internationalized domain name (IDN) gTLDs. In conjunction with this process, ICANN continuously iterated and revised versions of the Guidebook, an extensive document that provides details to gTLD applicants and forms the basis for ICANN's evaluation of new gTLD applications. Booking.com attached the 4 June 2012 version of the Guidebook to its IRP

<sup>&</sup>lt;sup>8</sup> *Id.* at Art. V.

<sup>&</sup>lt;sup>9</sup> *Id.* at Art. VII.

<sup>&</sup>lt;sup>10</sup> *Id.* at Arts. VIII-X.

<sup>&</sup>lt;sup>11</sup> Id. at Art. XI.

<sup>&</sup>lt;sup>12</sup> *Id.* at Art. XI-A. § 2.

Request as Exhibit RM-5. 13 The Guidebook is divided into "Modules," with Module 1 being the "introduction," Module 2 providing "evaluation procedures" (including String Similarity Review), Module 3 containing the "objection procedures," and so forth.

- 15 Within the New gTLD Program, every applied-for string (or gTLD) has been subjected to the String Similarity Review set out in Section 2.2.1.1 of the Guidebook. The String Similarity Review checks each applied-for string against existing TLDs, reserved names, and other applied-for gTLDs for "visual string similarities that would create a probability of user confusion." <sup>14</sup> The objective of this review "is to prevent user confusion and loss of confidence in the [domain name system] resulting from delegation of many similar strings." <sup>15</sup> Early 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. <sup>16</sup> If 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. If a contention set is created, only one of the strings within that contention set may ultimately be approved for delegation.
- 16. As set forth in the Guidebook, "[t]his similarity review will be conducted by an independent String Similarity Panel," not by ICANN. 17 After issuing an open and public request for proposals, ICANN selected InterConnect Communications ("ICC") to perform the String Similarity Review. 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

<sup>&</sup>lt;sup>13</sup> The provisions in the 4 June 2012 version of the Guidebook concerning String Similarity Review govern Booking.com's application for .hotels. <sup>14</sup> Guidebook, Cl. Ex. RM-5, at § 2.2.1.1.1.

<sup>&</sup>lt;sup>15</sup> *Id.* at § 2.2.1.1.

<sup>&</sup>lt;sup>16</sup> Cl. Ex. Annex-16 (Meeting of the New gTLD Program Committee, Minutes, 10 September 2013.)

<sup>&</sup>lt;sup>17</sup> Guidebook, Cl. Ex. RM-5, at § 2.2.1.1.

Guidebook, and was also responsible for the maintenance of its own work papers. <sup>18</sup> The ICANN Board played no role in performing the String Similarity Review.

- else) may conduct a substantive review of ICC's results. The only "review" of ICC's results that was ever contemplated is procedural, in the form of a quality assurance review over a random sampling of applications to test whether the process referenced above was followed. <sup>19</sup> This quality assurance procedural review was conducted by another independent, third-party administrator JAS Advisors not by ICANN. <sup>20</sup> Following completion of this procedural safeguard, ICANN was required to post the findings of the String Similarity Panel. <sup>21</sup>
- 18. ICANN received over 1900 applications for new gTLDs. On 26 February 2013, ICANN posted ICC's report, which included only two non-exact match contention sets:

  (1) .hotels/.hoteis which is at issue here; and (2) .unicorn/.unicom. The ICC also determined there to be 230 exact match contention sets.<sup>22</sup>
- 19. As a result of being placed in a contention set, .hotels and .hoteis cannot both proceed to delegation, but this does not mean that Booking.com's application has been terminated. Booking.com may resort to private negotiations with the applicant for .hoteis, or proceed to an auction to resolve the contention issue.<sup>23</sup>

<sup>&</sup>lt;sup>18</sup> Cl. Ex. Annex-5.

<sup>&</sup>lt;sup>19</sup> New gTLD Program Update, 26 October 2011, Dakar, *available at* <a href="http://dakar42.icann.org/node/26953">http://dakar42.icann.org/node/26953</a> and Resp. Ex. 1, at p. 19. <sup>20</sup> *Id* 

<sup>&</sup>lt;sup>21</sup> Guidebook, Cl. Ex. RM-5, at § 2.1.1.1 ("ICANN will notify applicants who are part of a contention set as soon as the String Similarity Review is completed.... These contention sets will also be published on ICANN's website.").

http://www.icann.org/en/news/announcements/announcement-26feb13-en.htm.

<sup>&</sup>lt;sup>23</sup> Guidebook, Cl. Ex. RM-5, § 4.3.

- 20. After ICC's report was posted, Booking.com filed a Request for Reconsideration for consideration by ICANN's Board Governance Committee ("BGC"). 24 Reconsideration is an accountability mechanism available under ICANN's Bylaws and involves a review process administered by the BGC. 25 Booking.com's Reconsideration Request challenged the decision to place .hotels and .hoteis in a non-exact match contention set. Booking.com requested that ICANN provide "detailed analysis and reasoning regarding the decision to place .hotels into a non-exact match contention set" so that Booking.com may "respond" before ICANN makes a "final decision." 26
- 21. The BGC recommended denying Booking.com's Request for Reconsideration (and the Board, through the New gTLD Program Committee, approved the BGC's recommendation) on the grounds that the "Request challenges a substantive decision taken by a panel in the New gTLD Program and not the process by which that decision was taken....

  Reconsideration is not a mechanism for direct, de novo appeal of staff or panel decisions with which the request disagrees, and seeking such relief is, in fact, in contravention of the established processes within ICANN."<sup>27</sup>
- 22. Booking.com, dissatisfied with the denial of its Request for Reconsideration, notified ICANN of its intent to seek independent review of ICANN's actions. <sup>28</sup> Independent

<sup>&</sup>lt;sup>24</sup> See Booking.com's Reconsideration Request (Request 13-5), available at http://www.icann.org/en/groups/board/governance/reconsideration/13-5/request-booking-07jul13-en.pdf and Cl. Ex. Annex-13.

<sup>&</sup>lt;sup>25</sup> See Bylaws, Cl. Ex. RM-2, at Art. IV, § 2.

<sup>&</sup>lt;sup>26</sup> See Booking.com's Reconsideration Request (Request 13-5), available at http://www.icann.org/en/groups/board/governance/reconsideration/13-5/request-booking-07jul13-en.pdf and Cl. Ex. Annex-13, at p. 9.

<sup>&</sup>lt;sup>27</sup> See BGC Recommendation on Reconsideration Request 13-5, available at http://www.icann.org/en/groups/board/governance/reconsideration/13-5/recommendation-booking-01aug13-en.pdf and Cl. Ex. Annex-14.

<sup>&</sup>lt;sup>28</sup> See Booking.com's Notice of Independent Review.

Review is another accountability mechanism available under ICANN's Bylaws and is defined as 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."<sup>29</sup>

- 23. The Independent Review Process ("IRP") is not a form of traditional dispute resolution (*i.e.*, mediation or arbitration), and is a non-binding process in which entities that deal with ICANN can have a further check-and-balance with respect to specific decisions of the ICANN Board, and specifically, whether the Board's actions are consistent with ICANN's Bylaws and Articles of Incorporation.<sup>30</sup> The IRP focuses on the actions of the ICANN Board; it is not available as a mechanism to challenge the conduct of ICANN staff, or third parties such as the third-party evaluators in the context of the New gTLD Program.
- 24. ICANN's Bylaws specify that a deferential standard of review be applied when evaluating the actions of the ICANN Board, and the rules are clear that the appointed IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board. Instead, the IRP Panel is tasked with determining whether the Board's actions were inconsistent with ICANN's Articles of Incorporation or Bylaws.<sup>31</sup>
- 25. In April 2004, ICANN appointed the ICDR as ICANN's IRP Provider. ICANN's Bylaws and the Supplementary Procedures that the ICDR has adopted specially for IRP proceedings, apply here.<sup>32</sup> Unlike a traditional arbitration or mediation through the ICDR, the

Bylaws, Cl. Ex. RM-2, at Art. IV, § 3. Prior to initiating an independent review, parties are urged to enter into a period of cooperative engagement with ICANN for the purpose of resolving or narrowing the issues in dispute. *Id.* at § 3.14. The parties engaged in the cooperative engagement process before commencing the independent review at issue here but were not able to resolve the dispute.

<sup>&</sup>lt;sup>30</sup> See Bylaws, Cl. Ex. RM-2, at Art. IV, §§ 3.2, 3.4.

<sup>31</sup> See id.

Absent a governing provision in ICANN's Bylaws or the ICDR's Supplemental Procedures, the ICDR Rules apply. But in the event of any inconsistency between the Supplementary Procedures and the ICDR's Rules, the Supplementary Procedures shall govern. Bylaws, Cl. Ex. RM-2, at Art. IV, § 3.8; see

Bylaws expressly provide that the IRP should be conducted via "email and otherwise via the Internet to the maximum extent feasible." The IRP Panel may also hold meetings via telephone where necessary, and "[i]n the unlikely event that a telephone 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."<sup>33</sup>

26. Consistent with ICANN's Bylaws, the IRP Panel is supposed to issue a written declaration designating, among other things, the prevailing party.<sup>34</sup> The IRP Panel's declaration is not binding because the Board is not permitted to outsource its decision-making authority. 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>35</sup>

#### **ARGUMENT**

- I. BOOKING.COM'S CLAIM THAT ICANN BREACHED ITS BYLAWS BY "ACCEPTING" THE ICC'S DETERMINATION IS FACTUALLY INCORRECT AND DOES NOT SUPPORT ITS IRP REQUEST.
- 27. Booking.com argues that the ICANN Board has the ability to overturn the decision of the String Similarity Panel finding .hotels and .hoteis visually similar. Specifically, Booking.com claims that "[b]y accepting a third-party determination that is contrary to its

(continued...)

also ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers, Independent Review Process, § 2, available at

 $https://www.adr.org/cs/groups/international/documents/document/z2uy/mde0/\sim edisp/adrstage 2014403.pd \\ f [Hereinafter, ICDR Supplementary Procedures].$ 

Bylaws, Cl. Ex. RM-2, at Art. IV, § 3.12; ICDR Supplementary Procedures, ¶ 10 (Resp. Ex. 2.) The Bylaws provide that requests for independent review shall not exceed 25 pages (double-spaced, 12-point font) of argument (Booking.com's IRP Request was 25 pages), and that ICANN's response shall not exceed that same length. Booking.com states that it is "reserving all rights to rebut ICANN's response in further briefs...." ICANN disagrees that Booking.com has any "rights to rebut," but will reserve discussion on that topic unless and until Booking.com seeks leave to place additional information before the IRP Panel.

<sup>&</sup>lt;sup>34</sup> Bylaws, Cl. Ex. RM-2, at Art. IV, § 3.18.

<sup>&</sup>lt;sup>35</sup> *Id.* at Art. IV, § 3.21.

policies, ICANN has failed to act with due diligence and failed to exercise independent judgment."<sup>36</sup> Booking.com's conclusions in this regard are factually incorrect and do not support an IRP Request under ICANN's Bylaws.

- 28. The Guidebook states that the "string similarity review will be conducted by an independent String Similarity Panel," not ICANN.<sup>37</sup> And "[i]n performing this review, the String Similarity Panel [not ICANN] will create contention sets that may be used in later stages of evaluation."<sup>38</sup> After a request for proposal process, ICANN selected ICC to perform the String Similarity Reviews and create contention sets (if applicable). ICC reviewed all applied-for strings according to the standards and methodology of the visual String Similarity Review set out in the Guidebook.<sup>39</sup> ICANN played no role in performing the String Similarity Review or the creation of the contention sets.
- 29. In the provisions governing the outcome of the String Similarity Panel's evaluation, the Guidebook does not provide ICANN discretion to review or otherwise substantively consider the String Similarity Panel's determination. Instead, the Guidebook provides that following the conclusion of the Panel's evaluation, "[a]n application for a string that is found too similar to another applied-for string will be placed in a contention set." Thus, under the applicable Guidebook provisions, the Panel's determination that .hotels and .hoteis are visually similar mandated that these two strings be put into a contention set.

<sup>36</sup> IRP Request, ¶¶ 9, 59.

<sup>&</sup>lt;sup>37</sup> Guidebook, Cl. Ex. RM-5, at § 2.2.1.1.

<sup>&</sup>lt;sup>38</sup> *Id.* at § 2.2.1.1.1. That the string similarity review would be entirely within the purview of an independent string similarity review panel – and not the ICANN Board – was made clear as early as 31 July 2009, when ICANN issued its Call for Expressions of Interest, and stated that "String Similarity Examiners will review all applied-for strings <u>and decide</u> whether the strings proposed in any pair of applications are so similar to another applied-for string ... that they should be placed into direct string contention as part of a contention set." *See* Cl. Ex. RM-15, at p. 4 (emphasis added).
<sup>39</sup> Cl. Ex. Annex-11.

<sup>&</sup>lt;sup>40</sup> Guidebook, Cl. Ex. RM-5, at § 2.2.1.1.3 (emphasis added).

- 30. The only "review" performed following the String Similarity Panel's evaluation was procedural, in the form of a quality control review over a random sampling of applications to, among other things, test whether the process referenced above was followed. This procedural review was conducted by an independent third-party consultant JAS Advisors not ICANN, and certainly not the ICANN Board. Following completion of this procedural safeguard, ICANN posted the findings of the String Similarity Panel, as the Guidebook requires.
- 31. Therefore, upon notification to the applicants and the posting of the String Similarity Panel report of contention sets, the decision concerning .hotels/.hoteis was already final. Booking.com does not cite and the Guidebook does not provide for any discretion for ICANN to exercise "independent judgment" to "accept" or "reject" the determination of the String Similarity Review Panel.<sup>44</sup>
- 32. ICANN's Bylaws provide that the Independent Review Process is only available to persons "materially affected by a decision or action of the [ICANN] Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws." The IRP is thus limited to challenging ICANN Board conduct, and is not available as a means to challenge the conduct of

<sup>&</sup>lt;sup>41</sup> New gTLD Program Update, Dakar, 26 October 2011, *available at* <a href="http://dakar42.icann.org/node/26953">http://dakar42.icann.org/node/26953</a> and Resp. Ex. 1, at p. 19. *See also* <a href="http://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en">http://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en</a>.

<sup>&</sup>lt;sup>42</sup> *Id*. Even if JAS Advisors could be considered as acting as ICANN staff, the actions of ICANN staff are not subject to an IRP challenge.

<sup>&</sup>lt;sup>43</sup> Guidebook, Cl. Ex. RM-5, at § 2.2.1.1.1.

<sup>&</sup>lt;sup>44</sup> ICANN has 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 have deviated from this established procedure and perform a substantive review (instead of process testing) over the results of the String Similarity Panel's outcomes prior to the finalization of contention sets. Of course, had ICANN actually deviated from the Guidebook in this respect, as Booking.com suggests, it could then have been accused of acting improperly.

<sup>&</sup>lt;sup>45</sup> Bylaws, Cl. Ex. RM-2, at Art. IV, § 3.2.

third parties, or even conduct of ICANN staff. Because the determination that .hotels and .hotels are visually similar and properly included in a contention set was the decision of the independent String Similarity Panel – and not the ICANN Board – Booking.com has failed to challenge any Board conduct appropriately subject to the Independent Review Process.

# II. BOOKING.COM'S CLAIM THAT IT WAS NOT GIVEN THE REASONS FOR THE STRING SIMILARITY PANEL'S DETERMINATION DOES NOT SUPPORT ITS IRP REQUEST.

has ever published a reasoned report [explaining why .hotels and .hoteis were put into a contention set] ... [and that] no reasons were given for the outcome of the String Similarity Review." This, Booking.com says, constitutes a violation of ICANN's "obligation to act in good faith by failing to provide due process to Booking.com's application." Booking.com also claims that this amounts to a violation of ICANN's obligation to act transparently, insofar as "[t]he principle of transparency arises from, and is generally seen as an element of, the principle of good faith." Booking.com states that "[t]he principle of good faith includes an obligation to ensure procedural fairness by, *inter alia*, adhering to substantive and procedural rules..." and that "ICANN's core values require ICANN to obtain informed input from those entities most affected by ICANN's decision." Booking.com fails to mention that ICANN, in processing the application for .hotels, adhered to substantive and procedural rules that were formed only after obtaining informed input from the ICANN community, including prospective gTLD applicants.

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<sup>&</sup>lt;sup>46</sup> IRP Request, ¶ 26; *see also id.* at ¶ 30 (ICANN "failed to provide any particularized rationale or analysis for putting .hotels and .hoteis in a contention set."); id. at ¶ 55 ("ICANN never provided any information on the standards to be used by the String Similarity Panel, or the manner in which they were applied in this case…").

 $<sup>^{47}</sup>$  *Id.* at 18.

<sup>&</sup>lt;sup>48</sup> *Id*. ¶¶ 50, 67.

<sup>&</sup>lt;sup>49</sup> *Id*. ¶ 44.

- 34. ICANN's decision to proceed with the New gTLD Program followed many years of discussion, debate and deliberation within the Internet community, including participation from end users, civil society, technical experts, business groups, governments and others.

  ICANN's work to implement the Program including the creation of an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation is reflected in the numerous drafts of the Guidebook that were released for public comment, and in the explanatory papers giving insight into the rationale behind some of the conclusions reached on specific topics. Meaningful community input from participants around the globe led to numerous and significant revisions of each draft version of the Guidebook, resulting in the Guidebook that is used in the current application round. In the current application round.
- 35. Section 2.2.1.1 of the Guidebook is clear on the standards to be used in the String Similarity Review process and ICC has confirmed that the standard it used for string similarity evaluation "comes from the AGB [Guidebook]." Nowhere in the Guidebook is there a requirement that the rationale for the determination(s) rendered by the independent third-party evaluators be published.
- 36. Nonetheless, contrary to Booking.com's assertion, ICC <u>did publish</u> documentation setting forth the factors considered by the String Similarity Panel when determining whether applied-for strings are visually confusingly similar under applicable Guidebook provisions. Specifically, ICC's process documentation "provide[d] a summary of the process, quality control mechanisms and some considerations surrounding non-exact

<sup>&</sup>lt;sup>50</sup> See <a href="http://newgtlds.icann.org/en/about/historical-documentation">http://newgtlds.icann.org/en/about/historical-documentation</a>.

<sup>&</sup>lt;sup>51</sup> *Id*.

<sup>&</sup>lt;sup>52</sup> Cl. Ex. Annex-11.

<sup>&</sup>lt;sup>53</sup> Id.

contention sets for the string similarity evaluation as requested by ICANN."<sup>54</sup> And ICANN subsequently published that information on its website.<sup>55</sup> While the published documentation was not specifically tailored to any particular String Similarity Panel determination, there is no requirement that either ICC or ICANN publish any such detailed narrative.

- 37. The fact that ICANN, following years of inclusive policy development and implementation planning, ultimately did not include a requirement that ICANN publish the rationale for the String Similarity Panel's individual determinations does not mean that ICANN acted inconsistent with its Bylaws or Articles of Incorporation. Indeed, there is no established policy or process that requires ICANN to take such action. While parties subject to the String Similarity Review may not always be satisfied with the determinations of the String Similarity Panel, an IRP is not intended to be an avenue to reexamine the Guidebook. Booking.com's belief that the String Similarity Review process should have included certain requirements (such as a requirement to publish the Panel's rationale) does not constitute a Bylaws violation. Booking.com's invocation of the Independent Review Process is not supported.
- 38. The Guidebook sets forth the methodology to be used when evaluating visual similarity of strings. Pursuant to the procedure set forth in the Guidebook, the String Similarity Review was conducted by an independent String Similarity Panel (the ICC). The process documentation provided by the ICC described, in considerable detail, the steps the String Similarity Panel followed in applying the methodology set out in the Guidebook. Another independent third-party JAS Advisors then performed a quality assurance review over a

<sup>&</sup>lt;sup>54</sup> *Id*.

<sup>&</sup>lt;sup>55</sup> http://www.icann.org/en/news/correspondence/mcfadden-to-weinstein-18dec13-en.

<sup>&</sup>lt;sup>56</sup> Guidebook, Cl. Ex. RM-5, at § 2.2.1.1 ("This similarity review will be conducted by an independent String Similarity Panel.").

<sup>&</sup>lt;sup>57</sup> Cl. Ex. Annex-11.

random selection of the Panel's reviews to confirm that the methodology and process were followed, at which point ICANN published the conclusions of the String Similarity Panel.<sup>58</sup> The record demonstrates that ICANN followed the process set forth in the Guidebook. Demonstrated adherence to approved and documented processes cannot provide a basis for an IRP under ICANN's Bylaws.<sup>59</sup>

39. Booking.com also appears to be challenging the ICC's conduct in performing the String Similarity Review, and specifically the ICC's decision not to publish its rationale for finding .hotels and .hotels confusingly similar. But the IRP does not exist to address the propriety of action or inaction by third parties. And even if ICC's conduct could be considered that of ICANN staff, the IRP cannot be used to challenge ICANN staff action or inaction.

Instead, as noted, this IRP Panel's charge is limited to "comparing contested actions of the [ICANN] Board to the [ICANN] Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws." That Booking.com disagrees with the outcome of the Panel's review is not a basis to conclude that the Board acted contrary to its Bylaws or Articles.

## III. ICANN PROPERLY REJECTED BOOKING.COM'S REQUEST FOR RECONSIDERATION.

40. Article IV, Section 2 of ICANN's Bylaws permits an entity that has been materially affected by an ICANN staff or ICANN Board decision to request that the Board

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<sup>&</sup>lt;sup>58</sup> Guidebook, Cl. Ex. RM-5, at § 2.2.1.1.1 ("ICANN will notify applicants who are part of a contention set as soon as the String Similarity review is completed.... These contention sets will also be published on ICANN's website.").

<sup>&</sup>lt;sup>59</sup> *Id.* at § 2.2.1.1.3 ("An application for a string that is found too similar to another applied-for gTLD will be placed in a contention set.") (emphasis added). The only conceivable way ICANN's conduct in following exactly the provisions of the Guidebook could provide a basis for an IRP is if Booking.com is challenging the ICANN Board's adoption of the Guidebook. Booking.com has not asserted – and could not assert – such a claim.

<sup>60</sup> Bylaws, Cl. Ex. RM-2, at Art. IV, § 3.4.

reconsider that decision. After ICANN staff posted the results of the String Similarity Panel on 26 February 2013, Booking.com filed a Request for Reconsideration. The main focus of Booking.com's Reconsideration Request was that .hotels and .hoteis can co-exist on the Internet without concern of confusability, arguing that the String Similarity Panel's decision to put .hotels and .hoteis in a contention set was substantively wrong. Booking.com also claimed that the Panel merely provided "advice to ICANN" and that ICANN improperly "accepted" that advice because .hotels and .hoteis are not, in Booking.com's opinion, confusingly similar.

- 41. ICANN rejected Booking.com's Reconsideration Request because:
  - This Request challenges a substantive decision taken by a panel in the New gTLD Program and not the process by which that decision was taken. ... Reconsideration is not a mechanism for direct, de novo appeal of staff or panel decisions with which requester disagrees, and seeking such relief is, in fact, in contravention of the established processes within ICANN. <sup>63</sup>
- 42. Booking.com now claims that "ICANN's denial to reconsider its decision to put .hotels and .hoteis in a contention set is ... contrary to ICANN's Articles of Incorporation and Bylaws." But Booking.com does not explain how the denial of Booking.com's Reconsideration Request constitutes a violation of ICANN's Bylaws or Articles of Incorporation, except to say that "[i]t is unclear which of ICANN's core values could have possibly led ... to declining Booking.com's Reconsideration Request."
- 43. Booking.com's Reconsideration Request made clear that Booking.com was asking much like it does here for a re-determination of the String Similarity Review between .hotels and .hotels. That is not a proper use of the reconsideration process, as ICANN

<sup>61</sup> See id. at Art. IV, § 2.

<sup>&</sup>lt;sup>62</sup> See Booking.com's Reconsideration Request (Request 13-5) (Cl. Ex. Annex-13).

<sup>&</sup>lt;sup>63</sup> BGC Determination on Reconsideration Request 13-5, at 9 (Cl. Ex. Annex-14).

<sup>&</sup>lt;sup>64</sup> IRP Request, ¶ 36.

has confirmed repeatedly in conjunction with the New gTLD Program.<sup>65</sup> ICANN's role was not to second-guess the substantive decisions of the selected third-party evaluators.

- 44. Booking.com points to statements by a few ICANN Board members that the String Similarity Panel's determination on .hotels/.hoteis was "not fair or correct," but these statements do not demonstrate that any process was violated. Indeed, Booking.com fails to note that these Board members specifically "agreed that the process was followed," that "the BGC has done an appropriate job of applying a limited review standard to the application for reconsideration," and "that the BGC did the right thing" under ICANN's Bylaws governing Reconsideration Requests. Reconsideration Requests.
- 45. Under ICANN's Bylaws, in order to present a proper Reconsideration Request based on staff action or inaction, a requester must provide a detailed explanation of the facts as presented to the staff and the reasons why "one or more staff actions or inactions ... contradict established ICANN policy(ies)." As one ICANN Board member noted at the 11 April 2013 Board meeting, the reconsideration process does not allow for a full-scale review of a new gTLD application. The focus instead in on the process followed in reaching decisions on New gTLD Applications. Because Booking.com did not point to any ICANN staff or Board action that

<sup>&</sup>lt;sup>65</sup> See, e.g., BGC Determination on Reconsideration Request 13-21, at p. 6 ("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. Rather, the BGC's review is limited to whether the Panel violated any established policy or process...."), available at

http://www.icann.org/en/groups/board/governance/reconsideration/13-21/determination-european-lotteries-21jan14-en.pdf; BGC Determination on Reconsideration Request 14-2, at p. 5 (same), available at <a href="http://www.icann.org/en/groups/board/governance/reconsideration/14-2/determination-wgc-05feb14-en.pdf">http://www.icann.org/en/groups/board/governance/reconsideration/13-21/determination-european-lotteries-21jan14-en.pdf</a>; BGC Determination on Reconsideration Request 14-2, at p. 5 (same), available at <a href="http://www.icann.org/en/groups/board/governance/reconsideration/14-2/determination-wgc-05feb14-en.pdf">http://www.icann.org/en/groups/board/governance/reconsideration/14-2/determination-wgc-05feb14-en.pdf</a>.

<sup>&</sup>lt;sup>66</sup> IRP Request, ¶ 35 (citing Cl. Ex. Annex-16 (Minutes of the Meeting of the New gTLD Program Committee on 10 September 2013)).

<sup>&</sup>lt;sup>67</sup> Cl. Ex. Annex-16 at p. 3.

<sup>&</sup>lt;sup>68</sup> Bylaws, Cl. Ex. RM-2, at Art. IV, §2.2.

<sup>&</sup>lt;sup>69</sup> Preliminary Report of 11 April 2013 meeting, *available at* http://www.icann.org/en/groups/board/documents/prelim-report-11apr13-en.htm and Resp. Ex. 3.

violated any process or policy in the String Similarity Panel's review of .hotels and .hoteis – but instead challenged the substance of the String Similarity Review Panel's decision – Booking.com's Reconsideration Request was properly denied.

## IV. BOOKING.COM'S CLAIM THAT THE STRING SIMILARITY PANEL "GOT IT WRONG" IS IRRELEVANT, BUT IS WITHOUT MERIT IN ALL EVENTS.

- 46. As discussed above, Booking.com's IRP Request is really about Booking.com's disagreement with the String Similarity Panel's conclusion, as evidenced by Booking.com's repeated assertion that "there is no probability of user confusion if both .hotels and .hoteis are delegated as gTLD strings in the Internet root zone." To support this assertion, Booking.com cites to the opinion of an independent expert who was not part of the String Similarity Panel, references certain (largely irrelevant) two-letter country-code ("cc") TLDs that coexist with interchangeable "i"s and "1"s, references gTLDs that coexist with interchangeable "i"s and "t"s, references gTLDs that coexist with interchangeable "i"s and "t"s, references gTLDs that coexist with interchangeable "i"s and "t"s, references gTLDs that coexist with interchangeable "i"s and "t"s, references gTLDs that coexist with interchangeable "i"s and "t"s, references gTLDs that coexist with interchangeable "i"s and "t"s, references gTLDs that coexist with interchangeable "i"s and "t"s, references gTLDs that coexist with interchangeable "i"s and "t"s, references gTLDs that coexist with interchangeable "i"s and "t"s, references gTLDs that coexist with interchangeable "i"s and "t"s, references gTLDs that coexist with interchangeable "i"s and "t"s, references gTLDs that coexist with interchangeable "i"s and "t"s, references gTLDs that coexist with interchangeable "i"s and "t"s, references gTLDs that coexist with interchangeable "i"s and "t"s, references gTLDs that coexist with interchangeable "i"s and "t"s, references gTLDs that coexist with interchangeable "i"s and "t"s, references gTLDs that coexist with interchangeable "i"s and "t"s, references gTLDs that coexist with interchangeable "i"s and "t"s, references gTLDs that coexist with interchangeable "i"s and "t"s, references gTLDs that coexist with interchangeable "i"s and the references gTLDs that coexist with interchangeable "i"s and the references gTLDs that coexist with interchangeable "i"s and the references gTLDs t
- Booking.com is challenging the merits of the Panel's conclusions, and in so doing, Booking.com supplants what it believes the review methodology for assessing visual similarity should have been, as opposed to the methodology set out at Section 2.2.1.1.2 of the Guidebook. In proposing a new review methodology, Booking.com is asking the IRP Panel to substantively evaluate the confusability of the strings and reverse the decision of the independent String Similarity Panel. Under ICANN's Bylaws, however, an IRP Panel does not have the authority to perform a substantive review of the String Similarity Panel's decision (even if the String

<sup>&</sup>lt;sup>70</sup> See, e.g., IRP Request, ¶ 27; *Id.* at ¶ 58 ("There is no probability of user confusion if both .hotels and .hoteis were delegate as gTLDs into the Internet root zone."); *id.* at ¶ 59 (".hotels and .hoteis are not confusingly similar").

<sup>&</sup>lt;sup>71</sup> Cl. Ex. Annex-20.

<sup>&</sup>lt;sup>72</sup> IRP Request, ¶ 66.

<sup>&</sup>lt;sup>73</sup> *Id.* at  $\P\P$  63-65.

Similarity Panel's conduct was deemed to be that of ICANN staff). The IRP Panel is only "charged with comparing contested actions of the [ICANN] Board to the [ICANN] 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 is not tasked with determining whether the String Similarity Panel's decision to include .hotels and .hoteis in a contention set was wrong, and the IRP is not available as a mechanism to re-try the decisions of independent evaluation panels.

- 48. The visual String Similarity Review focused on whether the applied-for string will contribute to instability of the domain name system.<sup>75</sup> It is therefore not practical or desirable to create a process for the Board or an IRP Panel to supplant its own determination as visual string similarity over the guidance of an expert panel formed for that particular purpose.
- 49. Booking.com actually has recognized that the IRP Panel's role is not to review the merits of the String Similarity Panel's determination. Booking.com complains that "ICANN has not created any process for challenging the substance of the SSP's [String Similarity Panel's] determination. But the absence of an appeal mechanism allowing Booking.com to challenge the merits of the independent String Similarity Panel's determination does not give rise to an IRP because there is nothing in ICANN's Bylaws or Articles of Incorporation requiring ICANN to act in the manner preferred by Booking.com.

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<sup>&</sup>lt;sup>74</sup> Bylaws, Cl. Ex. RM-2, at Art. IV, § 3.4.

<sup>&</sup>lt;sup>75</sup> Guidebook, § 2.2.1.1.

<sup>&</sup>lt;sup>76</sup> IRP Request, ¶ 70.

<sup>&</sup>lt;sup>77</sup> *Id.* The Guidebook does not set forth any "appeal" process, only 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." (Guidebook, Cl. Ex. RM-5, at Module 6 (Terms and Conditions).)

50. In all events, the ICC's determination that .hotels and .hoteis are visually confusingly similar was well supported. The Guidebook sets out detail regarding the String Similarity Review, including the review methodology. The independent String Similarity Panel was responsible for the development of its own process documentation and methodology for performing the String Similarity Review, and was also responsible for the maintenance of its own work papers. In that regard, and contrary to Booking.com's claims, ICC did publish details concerning its process, quality control mechanisms, and considerations surrounding non-exact contention sets for string similarity evaluation. Regarding non-exact match contention sets, ICC explained that a string pair was found to be confusingly similar when the following features were present:

- 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 rn~m & l~i<sup>79</sup>
- 51. Importantly, .hotels and .hoteis meet <u>every one</u> of these criteria.
  - hotels and hoteis are "strings of similar visual length on the page";
  - .hotels and .hoteis are "strings within +/- 1 character of each other";

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<sup>&</sup>lt;sup>78</sup> 18 December 2013 ICC Memorandum Re: String Similarity Process, Quality Control and Non-Exact Contention Sets (Cl. Ex. Annex-11 at p. 3).
<sup>79</sup> *Id*.

- hotels and .hoteis are "strings where the majority of characters are the same and in the same position in each string"; and
- .hotels and .hoteis "possess letter combinations that visually appear similar to other letters in the same position in each string", namely "1" & "i".
- 52. Further, the Guidebook provides that the String Similarity Panel would be informed by an algorithmic score for the visual similarity between each applied-for string and each of the other existing and applied-for TLDs and reserved names:<sup>80</sup>

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. 81

53. Booking.com fails to reference this publicly available SWORD algorithm, or the fact that .hotels and .hotels scored a 99% for visual similarity. 82 As the Guidebook makes clear, "a higher visual similarity score suggests a higher probability that the application will not pass the String Similarity review," it was not clearly "wrong," as Booking.com argues, for the ICC to find that .hotels/.hotels are confusingly similar. 83

#### V. RESPONSE TO BOOKING.COM'S REQUESTED RELIEF

54. Booking.com requests that, in addition to various declarations that ICANN's conduct was inconsistent with ICANN's Bylaws and Articles of Incorporation, the Panel issue a

<sup>80</sup> Guidebook, Cl. Ex. Annex-5, at § 2.2.1.1.2 (Review Methodology).

<sup>81</sup> *Id*.

<sup>&</sup>lt;sup>82</sup> See https://icann.sword-group.com/algorithm/.

<sup>83</sup> Guidebook, Cl. Ex. Annex-5, at § 2.2.1.1.2.

declaration "[r]equiring that ICANN reject the determination that .hotels and .hoteis are confusingly similar and disregard the resulting contention set."84

- 55. But any request that the IRP Panel grant affirmative relief goes beyond the IRP Panel's authority. ICANN's Bylaws provide, in pertinent part:
  - 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.<sup>85</sup>
    - 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.
- 56. Thus, the IRP Panel is limited to <u>declaring</u> whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws and <u>recommending</u> 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. Nothing in the Bylaws or Articles of Incorporation

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<sup>&</sup>lt;sup>84</sup> See IRP Request, ¶ 78. Booking.com also requests that "ICANN be required to overturn the string similarity determination in relation to .hotels and .hoteis and allow Booking.com's application to proceed on its own merits without reference to the application for .hoteis." (IRP Request, ¶ 9.)

<sup>85</sup> Bylaws, Cl. Ex. RM-2, at Art. IV, § 3.4.

grants the IRP Panel authority to award affirmative relief or to require ICANN to undertake specific conduct.<sup>86</sup>

#### CONCLUSION

57. ICANN's conduct with respect to Booking.com's application for .hotels was fully consistent with ICANN's Articles of Incorporation and Bylaws. ICANN followed the procedures in the Guidebook and followed the procedures set forth in its Bylaws in evaluating Booking.com's Request for Reconsideration. The fact that Booking.com disagrees with the String Similarity Panel's determination to put .hotels and .hoteis in a contention set does not give rise to an IRP. Booking.com's IRP Request should be denied.

Respectfully submitted,

Dated: April 25, 2014

Jones Day

Counsel for Respondent ICANN

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LAI-3213691v1

<sup>&</sup>lt;sup>86</sup> Indeed, the IRP Panel in the first IRP ever constituted under ICANN's Bylaws 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." *See* Advisory Declaration of IRP Panel, ICM Registry, LLC v. ICANN, ICDR Case No. 50 117 T 00224 08, at ¶ 133, *available at* http://www.icann.org/en/irp/icm-v-icann/irp-panel-declaration-19feb10-en.pdf (last visited 7 April 2014) and Cl. Ex. RM-22.

#### INDEPENDENT REVIEW PROCESS

#### INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Booking.Com B.V. (Claimant)

V.

Internet Corporation for Assigned Names and Numbers (Respondent)

## INDEX TO DOCUMENTS SUBMITTED WITH RESPONDENT ICANN'S RESPONSE TO CLAIMANT'S REQUEST FOR INDEPENDENT REVIEW PROCESS

<u>Exhibit</u>	<u>DESCRIPTION</u>
Resp. Ex. 1	New gTLD Program Update, Dakar, 26 October 2011, available at <a href="http://dakar42.icann.org/node/26953">http://dakar42.icann.org/node/26953</a>
Resp. Ex. 2	ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers, Independent Review Process, <i>available at</i> <a href="https://www.adr.org/cs/groups/international/documents/document/z2uy/mde0/~edisp/adrstage2014403.pdf">https://www.adr.org/cs/groups/international/documents/document/z2uy/mde0/~edisp/adrstage2014403.pdf</a>
Resp. Ex. 3	Preliminary Report, Regular Meeting of the ICANN Board, 11 April 2013, available at <a href="http://www.icann.org/en/groups/board/documents/prelim-report-11apr13-en.htm">http://www.icann.org/en/groups/board/documents/prelim-report-11apr13-en.htm</a>

# RESP. Ex. 1

# New gTLD Program Update 26 Oct 2011



# Agenda

- Applicant Guidebook
- Evaluation process
- Operations
- Issues under discussion
- Communications



# **Applicant Guidebook**



## Updates per Singapore Board Resolution

- IOC and Red Cross names
- GAC Early Warning and Advice processes
- URS loser pays threshold



## **Additional Updates**

- Dates for Application Submission period
  - 12 Jan 29 Mar 2012 user registration
  - 12 Jan 12 Apr 2012 application submission
- Resources for Applicant Assistance

http://newgtlds.icann.org/applicants/candidate-support



## **GAC Early Warning**

- WHEN: Concurrent with 60-day Application Comment period
- WHAT: Notice only, not a formal objection
- WHY: Notice to GAC by 1 or more governments that application might be problematic



## **GAC Early Warning Process**

GAC receives notice from government(s)

GAC issues EW to ICANN Board (consensus not required)

Applicant notified of GAC EW

Withdraws application (within 21 days)

Continues
application (may
address issue with
gov't representative)



## Recommendations

- Take GAC Early Warning seriously (likelihood that application could be the subject of GAC Advice)
- Identify potential sensitivities in advance of application submission, and work with relevant parties beforehand to mitigate concerns



#### GAC Advice on New gTLDs

- To address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities
  - GAC intention to develop standard vocabulary and set of rules for use in providing its advice
  - To be submitted by close of Objection Filing Period
- Applicant may submit a response before GAC Advice is considered by Board
- Board must provide reasons if it disagrees

#### **Evaluation Process**



#### When Can I Apply?

# 2012

January							February						
Sun	Mon	Tue	Wed	Thu	Fri	Sat	Sun	Mon	Tue	Wed	Thu	Fri	Sat
1	2	3	4	5	6	7				1	2	3	4
8	9	10	11 (	12	13	14	5	6	7	8	9	10	11
15	16	17	18	19	20	21	12	13	14	15	16	17	18
22	23	24	25	26	27	28	19	20	21	22	23	24	25
29	30	31					26	27	28	29			

March			April

Sun	Mon	Tue	Wed	Thu	Fri	Sat	Sun	Mon	Tue	Wed	Thu	Fri	Sat
				1	2	3	1	2	3	4	5	6	7
4	5	6	7	8	9	10	8	9	10	11 (	12	13	14
11	12	13	14	15	16	17	15	16	17	18	19	20	21
18	19	20	21	22	23	24	22	23	24	25	26	27	28
25	26	27	28	29	30	31	29	30					



#### **Application Process**

Complete Application

Register in TAS

Request Application Slot

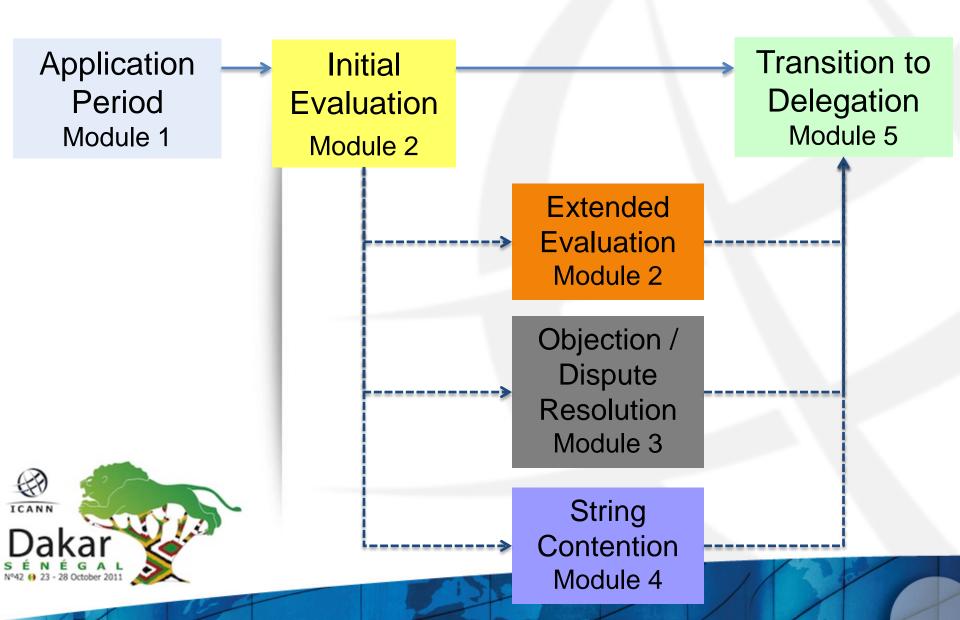
Provide Supporting Documents Evaluation
Phase
Begins

Application <u>not</u> considered complete if:

- Received after deadline (12 April 2012)
- Evaluation fee has not been paid
- Application form is incomplete

Provide Evaluation Fee

#### **Application Process**



#### **Basic Evaluation Path**



- All Mandatory Questions Answered
- RequiredSupportingDocuments inProper Form



#### Initial Evaluation

5 mos

**Background Screening** 

#### **Evaluation Panels**

- String Similarity
- DNS Stability
- Geographical Names
- Technical/Operational Capability
- Financial Capability
- Registry Services

Transition to Delegation

12 Nov

- Contract Execution
- Pre-Delegation Check

2 - 5mos

Delegations may occur as early as Jan 2013

# Key Dates

12 January	Application Window Opens
29 March 12 April	Initial Registration Due Applications Complete / Window Closes
1 May	Strings Posted Opens:  ✓ Application Comment Process  ✓ GAC Early Warning  ✓ GAC Advice Period  ✓ Objection Period
12 June	Initial Evaluation Begins
30 June	Application Comment Process Closes GAC Early Warning Closes
12 November	Initial Evaluation Closes → Results are Posted





Key Dates

2011	<b>5</b>							
2011	29 November	Last day to elect Extended Evaluation						
2012	1 December	Begins:  ✓ Extended Evaluation  ✓ Transition to Delegation (for Clean Applications)  ✓ String Contention (for Applications not in Dispute Resolution or Extended Evaluation)  GAC Advice Period Closes  Last Day to file an Objection						
	30 April	Extended Evaluation Closes Dispute Resolution Closes Results & Summaries Posted						
	15 May	String Contention Opens (for Applications with Variables)						
	30 May	String Contention Closes (for Clean Applications)  → Results Posted						
<b>Daka</b> s é n é G №42 <del>()</del> 23 - 28 Octobe	A L r 2011							

#### Service Providers

Background screening

- -String Similarity
- -DNS Stability
- -Registry Services
- -Geographic
- -Technical/Ops
- -Financial
- -Community Priority

**Quality Control** 



#### **Evaluation Panels**

- Currently negotiating Evaluation Panel services contracts with final candidates
- Working through simulation exercises on evaluation procedures



#### **Evaluation Panels**

Panel	Service Providers
String Similarity	<ul> <li>InterConnect Communications</li> </ul>
DNS Stability	<ul> <li>Interisle Communications</li> </ul>
Registry Services	Interisle Communications
Geographic Names	<ul><li>Economist Intelligence Unit</li><li>InterConnect Communications</li></ul>
Financial / Tech / Ops	<ul><li>Ernst &amp; Young</li><li>JAS Advisors</li><li>KPMG</li></ul>
Community Priority	<ul><li>Economist Intelligence Unit</li><li>InterConnect Communications</li></ul>
Quality Control	<ul> <li>JAS Advisors</li> </ul>

#### **Background Screening**

- RFP issued 30 August 2011
- 11 global firms responded
- Vendor selection currently underway



### **Quality Control Objectives**

- Consistency
- Accountability
- Improvement
- Transparency



#### **Quality Control Components**

- Performing simulation exercises
- Initial sampling
- Blind re-evaluation (~15%)
- Random procedural reviews
- Independent report will be published

#### Program Governance

Oversight and program management to ensure effective program administration





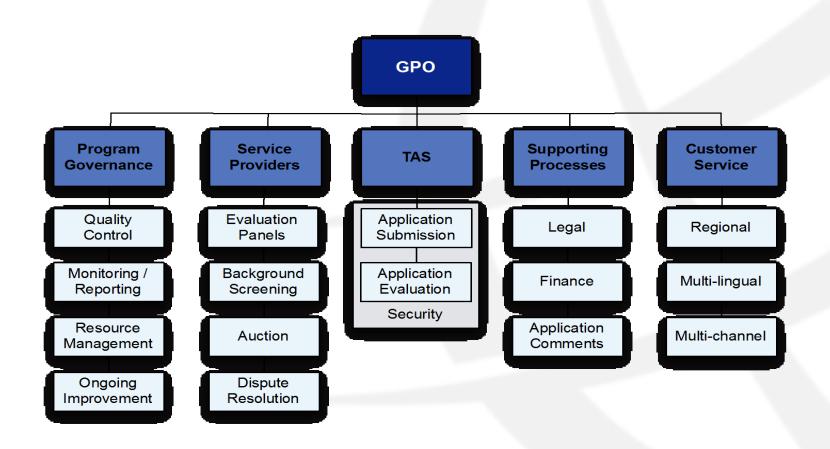
# **Operations**



#### **Operational Readiness**

- Study completed to:
  - identify key functions
  - capture current processes
  - determine the potential impacts
  - enable operational readiness
- Goals:
  - Addressing the effects and risks to operations
  - Anticipating and addressing the impact to existing operating processes
    - gTLD Program Office Legal
    - Finance IANA
    - Registry Liaison
       Registrar Liaison
    - Contractual Compliance

#### **Operational Readiness**



## Procurement for Post-Delegation Activities

Provider	Function	Status
Emergency Back- End Registry Operator (EBERO)	Emergency provider to sustain critical registry functions during temporary failures or transition process	RFI open through 30 November 11
Trademark Clearinghouse	Data repository offering authentication and validation services for trademark data	RFI open through 25 November 11
Independent Objector (IO)	Objector to file and prosecute objections in public interest	RFP expected mid- November – combined with recruiting activity
Uniform Rapid Suspension (URS)	Provider(s) to administer URS complaints re: registered names	RFP expected mid- November

## Issues under discussion



# Registry-Registrar Cross-Ownership (Vertical Integration)

- For new gTLDs, registries will be able to compete as registrars, and registrars will be able to compete as registries
- For existing gTLDs, cross-ownership is deferred pending further discussions including with competition authorities



## Batching: Considerations/Requirements

- Fair and objective for all potential applicants
- Comply with applicable laws
- Should be consistent with AGB
- Delegations must not exceed 1,000 per year
- Address potential abuses
- Makes sense: e.g., keep similar and identical strings in same batch



#### Possible approaches to:

- Reduce need for batching:
  - "Opt In/Opt Out"
  - Lengthen initial evaluation to accommodate more applications in one batch
- Batching:
  - Random selection
  - Secondary time stamp



#### **Applicant Support**

- Applicant Support Program can be found under the Applicants tab on: <a href="http://newgtlds.icann.org">http://newgtlds.icann.org</a>
  - Applicants seeking support and organizations offering support can find each other
- \$USD 2 million allocated as seed funding to assist applicants from developing economies
  - Criteria and process for grant allocation will be posted to the new gTLD site once the information is available

# Communications



#### **Customer Service**

- Mission: Provide support in a transparent and objective manner
- How: FAQs and Knowledge Base
- Accessing customer service:
  - Online self-help tools
  - newgtld@icann.org
  - New gTLD website
  - Applicants get priority



#### Communications Campaign

- Launched the New gTLD website 19
   September <a href="http://newgtlds.icann.org">http://newgtlds.icann.org</a>
- Resources available:
  - Factsheets in the 6 UN languages
  - Educational videos
  - Calendar of upcoming events and event reports



#### **Communications Roadshow**

- Over 35 events in over 20 different countries raising awareness at events
- More outreach events planned: Moscow, Beijing, Jakarta, Mexico, Argentina, Chile
- View upcoming events and reports from previous events: <a href="http://newgtlds.icann.org/program-status/upcoming-events">http://newgtlds.icann.org/program-status/upcoming-events</a>

# Communications - Social & Traditional Media

- Traditional media
  - 5,800+ news articles on new gTLDs since
     18 June 2011
- Twitter
  - 1,300+ followers. Up from ~400 a year ago



# Remaining New gTLD Sessions

Session	Date	Location
Trademark Clearinghouse Work Session	Wed, 26 October 12:00 - 13:30	Chapiteau Tent
Operations Instrument (COI) - Discussion on RySG proposal	Thu, 27 October 09:00 - 10:30	Big Amphitheater
New gTLD Application & Evaluation Process	Thu, 27 October 11:00 - 12:30	Chapiteau Tent



# Thank You



# One World One Internet

# Questions



# RESP. Ex. 2

# Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process

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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.

#### 1. Definitions

In these Supplementary Procedures:

DECLARATION refers to the decisions/opinions of the IRP PANEL.

ICANN refers to the Internet Corporation for Assigned Names and Numbers.

ICDR refers to the International Centre for Dispute Resolution, which has been designated and approved by ICANN's Board of Directors as the Independent Review Panel Provider (IRPP) under Article IV, Section 3 of ICANN's Bylaws.

INDEPENDENT REVIEW or IRP refers 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

INTERNATIONAL DISPUTE RESOLUTION PROCEDURES OR RULES refer to the ICDR's International Arbitration Rules that will govern the process in combination with these Supplementary Procedures.

IRP PANEL refers to the neutral(s) appointed to decide the issue(s) presented. The IRP will be comprised of members of a standing panel identified in coordination with the ICDR. Certain decisions of the IRP are subject to review or input of the Chair of the standing panel. In the event that an omnibus standing panel: (i) is not in place when an IRP PANEL must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the ICDR; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the ICDR shall identify and appoint one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding.

#### 2. Scope

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. In the event there is any inconsistency between these Supplementary Procedures and the RULES, these Supplementary Procedures will govern. These Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is received by the ICDR.

#### 3. Number of Independent Review Panelists

Either party may elect that the request for INDEPENDENT REVIEW be considered by a three-member panel: the parties' election will be

taken into consideration by the Chair of the standing panel convened for the IRP, who will make a final determination whether the matter is better suited for a one- or three-member panel.

#### 4. Conduct of the Independent Review

The IRP Panel should conduct its proceedings by electronic means to the extent feasible. Where necessary, the IRP Panel may conduct telephone conferences. In the extraordinary event that an in-person hearing is deemed necessary by the panel presiding over the IRP proceeding (in coordination with the Chair of the standing panel convened for the IRP, or the ICDR in the event the standing panel is not yet convened), the in-person hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance. Telephonic hearings are subject to the same limitation.

The IRP PANEL retains responsibility for determining the timetable for the IRP proceeding. Any violation of the IRP PANEL's timetable may result in the assessment of costs pursuant to Section 10 of these Procedures.

#### 5. Written Statements

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. All necessary evidence to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission. Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. The IRP PANEL may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.

#### 6. Summary Dismissal

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.

## 7. Interim Measures of Protection

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

## 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.

## 9. Declarations

Where there is a three-member IRP PANEL, any DECLARATION of the IRP PANEL shall by made by a majority of the IRP PANEL members. If any IRP PANEL member fails to sign the DECLARATION, it shall be accompanied by a statement of the reason for the absence of such signature.

## 10. Form and Effect of an IRP Declaration

- a. DECLARATIONS shall be made in writing, promptly by the IRP PANEL, based on the documentation, supporting materials and arguments submitted by the parties.
- b. The DECLARATION shall specifically designate the prevailing

party.

- c. A DECLARATION may be made public only with the consent of all parties or as required by law. Subject to the redaction of Confidential information, or unforeseen circumstances, ICANN will consent to publication of a DECLARATION if the other party so request.
- d. Copies of the DECLARATION shall be communicated to the parties by the ICDR.

## 11. Costs

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 IRPPANEL must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.

## 12. Emergency Measures of Protection

Article 37 of the RULES will not apply.

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RESP. Ex. 3

## Preliminary Report | Regular Meeting of the ICANN **Board**

🎎 icann.org /en/groups/board/documents/prelim-report-11apr13-en.htm

11 April 2013

[Formal Minutes are still to be approved by the ICANN Board]

Note: This has not been approved by the Board and does not constitute minutes but does provide a preliminary attempt setting forth the unapproved reporting of the resolutions from that meeting. Details on voting and abstentions will be provided in the Board's Minutes, when approved by the Board at a future meeting.

NOTE ON ADDITIONAL INFORMATION INCLUDED WITHIN PRELIMINARY REPORT - ON RATIONALES -- Where available, a draft Rationale for each of the Board's actions is presented under the associated Resolution. A draft Rationale is not final until approved with the minutes of the Board meeting.

A Regular Meeting of the ICANN Board of Directors was held on 11 April 2013 at 6:15 pm local time in Beijing, China.

Steve Crocker, Chair, promptly called the meeting to order.

In addition to the Vice Chair the following Directors participated in all or part of the meeting: Sébastien Bachollet, Fadi Chehadé (President and CEO), Bertrand de La Chapelle, Chris Disspain, Bill Graham, Olga Madruga-Forti, Erika Mann, Gonzalo Navarro, Ray Plzak, George Sadowsky, Mike Silber, Bruce Tonkin (Vice Chair), Judith Vazquez and Kuo-Wei Wu

The following Board Liaisons participated in all or part of the meeting: Francisco da Silva (TLG Liaison), Heather Dryden (GAC Liaison), Ram Mohan (SSAC Liaison); Thomas Narten (IETF Liaison); and Suzanne Woolf (RSSAC Liaison).

This is a preliminary report of the approved resolutions resulting from the Special Meeting of the ICANN Board of Directors, which took place on 11 April 2013.

## 1. Consent Agenda:

The items on the Board consent agenda were summarized for the community. The Board then took the following action:

Resolved, the following resolutions in this Consent Agenda are approved:

## 1. Approval of Board Meeting Minutes

Resolved (2013.04.11.01), the Board approves the minutes of the 28 February 2013 Special Meeting of the ICANN Board.

## 2. RSSAC Bylaws Amendments

Whereas, in Resolution 2011.01.25.10, the Board approved the Root Server System Advisory Committee (RSSAC) review final report implementation steps and instructed the Structural Improvements Committee (SIC), in coordination with staff, to provide the Board with a final implementation plan to address the RSSAC review final recommendations and conclusions.

Whereas, in July and August 2012, a working group of RSSAC and SIC members was formed to draft a revised RSSAC charter in order to meet the requirements of the final RSSAC review recommendations. The RSSAC Charter is set forth within the ICANN Bylaws at Article XI, Section 2.3.

Whereas, on 4 December 2012, the SIC reviewed the proposed Bylaws revisions and recommended that the suggested changes to Article XI, Section 2.3 be posted for public comment. The Board approved the public comment posting on 20 December 2012, and the comment period was opened on 3 January 2013. No comments were received.

Whereas, on 28 March 2013, the SIC recommended that the Board adopt the changes to Article IX, Section 2.3 of the Bylaws.

Resolved (2013.04.11.02), the Board adopts the proposed changes to Article XI, Section 2.3 of the ICANN Bylaws that are necessary to modify the charter for the RSSAC in line with the recommendations arising out of the organizational review of the RSSAC.

#### Rationale for Resolution 2013.04.11.02

These ICANN Bylaws amendments will clarify the continuing purpose of the Root Server Advisory Committee (RSSAC). They were recommended by the joint RSSAC-SIC Working Group formed to conclude the implementation of the RSSAC review WG final report: implementation steps [PDF, 448 KB], approved by the Board on 25 January 2011. The proposed Bylaws changes were posted for public comment, and no comments were received in response. The absence of public comment indicates that such amendments are desirable for the RSSAC to improve its effectiveness in the current environment. The Bylaws revisions are drafted to allow the RSSAC sufficient time to coordinate the new RSSAC member terms that are required under the Bylaws, with the first full term under the new Bylaws provision beginning on 1 July 2013.

The approval of these Bylaws revisions is an Organizational Administrative Function for which public comment was sought. While the approval of the Bylaws amendments has no budget implications per se, it is expected that the Bylaws revisions will induce RSSAC expenditures. Empowered by the revised Bylaws amendment, the RSSAC will contribute to strengthening the security, stability and resiliency of the DNS.

This is an Organizational Administrative Function for which public comment was received.

## 3. Hub office in Istanbul, Turkey

Resolved (2013.04.11.03), the President and CEO is authorized to implement either the resolutions relating to a liaison office or the resolutions relating to the branch office,

which ever is deemed by the President and CEO to be more appropriate, and to open any bank accounts necessary to support the office in Turkey.

(i) Whereas, the Internet Corporation for Assigned Names and Numbers, a legal entity duly incorporated and existing under the laws of the State of California and the United States of America, having its principal place of business at 12025 E. Waterfront Drive, Suite 300, Los Angeles, California USA 90094 ("ICANN"), has decided to establish a branch office in Istanbul, Turkey ("Branch Office").

Resolved (2013.04.11.04), David Olive, holding a United States passport numbered [REDACTED], is appointed as the representative of the Branch Office with each and every authority to act individually on behalf of the Branch Office before, including but not limited to, any and all courts, private and public institutions.

(ii) Whereas, the Internet Corporation for Assigned Names and Numbers, a legal entity duly incorporated and existing under the laws of the State of California and the United States of America, having its principal place of business at 12025 E. Waterfront Drive, Suite 300, Los Angeles, California USA 90094 ("ICANN"), has decided to establish a liaison office in Istanbul, Turkey ("Liaison Office").

Resolved (2013.04.11.05), David Olive, [personal identification information REDACTED], is appointed as the representative of the Liaison Office with each and every authority to act individually on behalf of the Liaison Office before, including but not limited to, any and all courts, private and public institutions.

#### Rationale for Resolutions 2013.04.11.03 – 2013.04.11.05

ICANN is committed to continuing to expand its global reach and presence in all time zones throughout the globe. One of the key aspects of ICANN's internationalization is to establish offices in Turkey and Singapore. Another key aspect of ICANN's internationalization is to ensure that not all members of ICANN's senior management are located in the Los Angeles office. To that end, one of ICANN's officers, David Olive, has agreed to relocate to Istanbul and to be the designated branch representative.

In order to formally establish an office in Istanbul, ICANN must register to do business in Turkey. The registration to do business in Turkey requires a specific Board resolution establishing the branch and designating the branch representative, which is why the Board has passed this resolution.

Establishing hub office around the globe will be a positive step for the ICANN community as it will provide a broader global reach to all members of the community. There will be a fiscal impact on ICANN, which has been considered in the FY13 budget and will be taken into account when approving the FY14 budget and beyond. This resolution is not intended to have any impact on the security, stability and resiliency of the DNS except that it might provide additional coverage around the globe that could

help more quickly address any security, stability or resiliency issues.

This is an Organizational Administrative Function not requiring public comment.

## 4. Accountability Structures Bylaws Effective Date

Whereas, the Accountability and Transparency Review Team's Recommendations 23 and 25 recommended that ICANN retain independent experts to review ICANN's accountability structures and the historical work performed on those structures.

Whereas, ICANN convened the Accountability Structures Expert Panel (ASEP), comprised of three international experts on issues of corporate governance, accountability and international dispute resolution, which after research and review of ICANN's Reconsideration and Independent Review processes and multiple opportunities for public input, produced a report in October 2012.

Whereas, the ASEP report was posted for public comment, along with proposed Bylaws revisions to address the recommendations within the report.

Whereas, after ASEP and Board review and consideration of the public comment received, on 20 December 2012 the Board approved Bylaws revision to give effect to the ASEP's recommendations, and directed additional implementation work to be followed by a staff recommendation for the effective date if the revised Bylaws.

Whereas, as contemplated within the Board resolution, and as reflected in public comment, further minor revisions are needed to the Bylaws to provide flexibility in the composition of a standing panel for the Independent Review process (IRP).

Resolved (2013.04.11.06), the Bylaws revisions to Article IV, Section 2 (Reconsideration) and Article IV, Section 3 (Independent Review) as approved by the Board and subject to a minor amendment to address public comments regarding the composition of a standing panel for the IRP, shall be effective on 11 April 2013.

#### Rationale for Resolution 2013.04.11.06

The Board's action in accepting the report of the Accountability Structures Expert Panel (ASEP) and approving the attendant Bylaws revisions is in furtherance of the Board's commitment to act on the recommendations of the Accountability and Transparency Review Team (ATRT). The ASEP's work was called for in ATRT Recommendations 23 and 25, and the work performed, including a review of the recommendations from the President's Strategy Committee's work on Improving Institutional Confidence, is directly aligned with the ATRT requested review.

The adoption of the ASEP's work represents a great stride in ICANN's commitment to accountability to its community. The revised mechanisms adopted today will bring easier access to the Reconsideration and Independent Review processes through the implementation of forms, the institution of defined terms to eliminate vagueness, and the ability to bring collective requests. A new ground for Reconsideration is being added, which will enhance the ability for the community to seek to hold the Board accountable for its decisions. The revisions are geared towards instituting more predictability into the processes, and certainty in ICANN's decision making, while at the same time making

it clearer when a decision is capable of being reviewed. The Bylaws as further revised also address a potential area of concern raised by the community during the public comments on this issue, regarding the ability for ICANN to maintain a standing panel for the Independent Review proceedings. If a standing panel cannot be comprised, or cannot remain comprised, the Bylaws now allow for Independent Review proceedings to go forward with individually selected panelists.

The adoption of these recommendations will have a fiscal impact on ICANN, in that there are anticipated costs associated with maintaining a Chair of the standing panel for the Independent Review process and potential costs to retain other members of the panel. However, the recommendations are expected to result in less costly and time-consuming proceedings, which will be positive for ICANN, the community, and those seeking review under these accountability structures. The outcomes of this work are expected to have positive impacts on ICANN and the community in enhanced availability of accountability mechanisms. This decision is not expected to have any impact on the security, stability or resiliency of the DNS.

This is an Organizational Administrative Function of the Board for which the Board received public comment.

## 5. .CAT Cross-Ownership Removal Request

Whereas, in December 2012, the Fundació puntCAT requested the removal of the cross-ownership restrictions reflected on the 23 September 2005 Registry Agreement signed between ICANN and Fundació puntCAT.

Whereas, the request followed the "Process for Handling Requests for Removal of Cross-Ownership Restrictions on Operators of Existing gTLDs" adopted by the Board on 18 October 2012.

Whereas, ICANN conducted a competition review in accordance to the Board-approved process and has determined that the request does not raise significant competition issues.

Whereas, a public comment period took place between 22 December 2012 and 11 February 2013 and only one comment was received, which was in support of Fundació puntCAT's request.

Resolved (2013.04.11.07), an amendment to remove the cross-ownership restriction in the Fundació puntCAT 23 September 2005 Registry Agreement is approved, and the President and CEO and the General Counsel are authorized to take such actions as appropriate to implement the amendment.

#### Rationale for Resolution 2013.04.11.07

#### Why the Board is addressing the issue?

The cross-ownership removal for existing registries has been subject to extensive discussions by the board and the community. This is the first time an existing registry has made the request according the Board-approved process adopted 18 October 2012. However, the Board is likely to see additional requests in the further. Under the Board

process adopted in October 2012, to lift cross-ownership restrictions existing gTLD registry operators could either request an amendment to their existing Registry Agreement or request transition to the new form of Registry Agreement for new gTLDs. Although Fundació puntCAT requested an amendment to its Registry Agreement, it still will be offered the opportunity to transition to the new form of Registry Agreement for the new gTLDs. Removal of the cross-ownership restrictions for .BIZ, .INFO and .ORG are being considered as part of their overall renewal negotiations. ICANN is also in preliminary discussions with .MOBI and .PRO on removal of the cross-ownership restrictions.

#### What is the proposal being considered?

An amendment to the 23 September 2005 Registry Agreement signed between ICANN and Fundació puntCAT.

#### Which stakeholders or others were consulted?

A public comment period took place between 22 December 2012 and 11 February 2013.

#### What concerns or issues were raised by the community?

Only one comment was received during the public comment period. The comment was in favor of the Fundació puntCAT request.

#### What factors did the Board find to be significant?

ICANN conducted a competition review in accordance to with the Board-approved process for handling requests of removal of cross-ownership restrictions in Registry Agreements. ICANN has determined that the request does not raise significant competition issues.

Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?

There is no fiscal impact to ICANN.

#### Are there any security, stability or resiliency issues relating to the DNS?

There are no security, stability and resiliency issues identified.

Is this either a defined policy process within ICANN's Supporting Organizations or ICANN's Organizational Administrative Function decision requiring public comment or not requiring public comment?

This request followed the "Process for Handling Requests for Removal of Cross-Ownership Restrictions on Operators of Existing gTLDs" adopted by the Board on 18 October 2012.

This is an Organizational Administrative Function for which public comment was received.

# 6. Confirm Process Followed Regarding Redelegation of the .GA domain representing Gabon

Resolved (2013.04.11.08), ICANN has reviewed and evaluated the request, and the documentation demonstrates the process was followed and the redelegation is in the interests of the local and global Internet communities.

#### Rationale for Resolution 2013.04.11.08

As part of the IANA Functions, ICANN receives request to delegate and redelegate country-code top-level domains. ICANN Staff has reviewed and evaluated a redelegation request for this domain and has provided a report to the ICANN Board that proper procedures were followed in that evaluation. The Board's oversight of the process helps ensure ICANN is properly executing its responsibilities relating to the stable and secure operation of critical unique identifier systems on the Internet and pursuant to the IANA Functions Contract.

Ensuring that the process is followed adds to the accountability of ICANN. This action will have no fiscal impact on ICANN or the community, and will have a positive impact on the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function not requiring public comment.

## 7. Change to Public Participation Committee Name

Whereas, Article XII of the Bylaws provides that the "Board may establish one or more committees of the Board, which shall continue to exist until otherwise determined by the Board".

Whereas, on 7 November 2008, the Board established a committee named the Public Participation Committee pursuant to its authority under Article XII of the Bylaws.

Whereas, the Public Participation Committee now desires to change its name to the "Public and Stakeholder Engagement Committee," which will be consistent with the new Stakeholder Engagement focus that ICANN has adopted.

Whereas, the Board Governance Committee has recommended that the Board approve this committee name change.

Resolved (2013.04.11.09), the Board approves the name change of the Public Participation Committee to the Public and Stakeholder Engagement Committee.

#### Rationale for Resolution 2013.04.11.09

The proposed name change is consistent with the manner in which ICANN is now focusing on Stakeholder Engagement on a global basis.

This resolution seeks only a name change of the Committee, and not a change in the structure or scope of the Committee. As the Board Governance Committee ("BGC") intends to conduct a full review of the structure and scope of all committees later this year the current resolution seeks only a name change for the PPC.

Taking this action will positively impact the ICANN community by ensuring that the committee's name adequately reflects the global outreach and engagement with under

which ICANN is operating and the committee is overseeing. This resolution will not have any fiscal impact on ICANN or the community. This action will not have any impact on the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function not requiring public comment.

## 8. SO/AC Fast-Track Budget Request

Whereas, a working group on budget improvements, which include ICANN staff and Community members identified the need for an earlier decision on the funding of specific requests from the ICANN Community which required funding at the beginning of the fiscal year.

Whereas, an SO/AC Additional Budget Requests Fast-Track Process was developed in response to the working groups suggestion; the process was meant to facilitate the collection, review and submission of budget requests to the Board Finance Committee and the Board for consideration.

Whereas, timely requests were submitted by the ICANN Community, and were reviewed by a panel of staff members representing the Policy, Stakeholder Engagement and Finance personnel.

Whereas, the review panel recommended 12 fast track budget requests representing \$279,000 requests for approval.

Whereas the Board Finance Committee met on 5 April 2013, reviewed the process followed and the staff's recommendations, and has recommend that the Board approve the staff's recommendation.

Resolved (2013.04.11.10), the Board approves the inclusion in ICANN's Fiscal Year 2014 budget an amount for funds relating to 12 requests identified by the Community as part of the SO/AC Additional Budget Requests Fast-Track Process.

#### Rationale for Resolution 2013.04.11.10

The SO/AC Additional Budget Requests Fast-Track Process leading to budget approval earlier than usual is a reasonable accommodation for activities that begin near the beginning of FY14. This slight augmentation to ICANN's established budget approval process and timeline helps facilitate the work of the ICANN Community and of the ICANN Staff, and does not create additional expenses. The amount of the committed expenses resulting from this resolution is considered sufficiently small so as not to require resources to be specifically identified and separately approved.

There is no anticipated impact from this decision on the security, stability and resiliency of the domain name system as a result of this decision.

This is an Organizational Administrative Function for which ICANN received community input.

## 9. Thank You Resolutions – Departing Community Members

Whereas, ICANN wishes to acknowledge the considerable energy and skills that members of the stakeholder community bring to the ICANN process.

Whereas, in recognition of these contributions, ICANN wishes to acknowledge and thank members of the community when their terms of service on Supporting Organizations and Advisory Committees end.

Whereas, the following member of the Commercial and Business Users Constituency (BC) of the Generic Names Supporting Organization (GNSO) is leaving her position when her term ends:

Marilyn Cade

Resolved (2013.04.11.11), Marilyn Cade has earned the deep appreciation of the Board for her term of service, and the Board wishes her well in future endeavors.

Whereas, the following members of the Country Code Names Supporting Organization (ccNSO) Council are leaving their positions when their terms end:

Fernando Espana, .us Paulos Nyirenda, .mw Rolando Toledo, .pe

Resolved (2013.04.11.12), Fernando Espana, Paulos Nyirenda and Rolando Toledo have earned the deep appreciation of the Board for their terms of service, and the Board wishes them well in their future endeavors.

## 10. Thank You to Sponsors of ICANN 46 Meeting

The Board wishes to thank the following sponsors:

Verisign, Inc., Afilias Limited, .ORG, The Public Interest Registry, HiChina Zchicheng Technology Limited, .PW Registry, Community.Asia, Iron Mountain, Zodiac Holding Limited, Minds + Machines, Neustar Inc., KNET Co., Ltd., Deloitte Bedrijfsrevisoren BV ovve CVBA, JSC Regional Network Information Center (RU-CENTER), UniForum SAT/A ZA Central Registry, CORE Internet Council of Registrars, Symantec, APNIC Pty Ltd, NCC Group, APTLD (Asia Pacific Top Level Domain Association), Freedom Registry B.V., Uniregistry Corp., Afnic, ICANN WIKI and our local sponsors CNNIC, CONAC and Internet Society of China.

# 11. Thank You to Scribes, Interpreters, Staff, Event and Hotel Teams of ICANN 46 Meeting

The Board expresses its appreciation to the scribes, interpreters, technical teams, and the entire ICANN staff for their efforts in facilitating the smooth operation of the meeting. Board would also like to thank the management and staff of the Beijing International Hotel for the wonderful facility to hold this event. Special thanks are given to Li Yun, Senior Sales Manager, Beijing International Hotel and Nick Yang, Manager of Convention Services, Beijing International Hotel.

## 12. Thank You to Local Hosts of ICANN 46 Meeting

The Board wishes to extend its thanks to the local host organizer, Mr. Bing SHANG,

Minister of Ministry of Industry and Information Technology; Ms. Xia HAN, Director of the Telecommunications Regulation Bureau of MIIT; Mr. Er-Wei SHI, Vice President of Chinese Academy of Sciences; Mr. Tieniu TAN, Vice Secretary General of Chinese Academy of Sciences; Mr. Xiangyang HUANG, Director of CNNIC; Mr. Xiaodong Lee, Chief Executive Officer of CNNIC; Mr. Feng WANG, Vice Minister of State Commission Office for Public Sector Reform; Mr. Ning, FU Chairman of CONAC Board; Mr. Ran ZUO, Vice Chairman of CONAC Board; Mr. Qing SONG, CEO of CONAC; Ms. Qiheng HU, President of Internet Society of China; Mr. Xinmin GAO, Vice President of Internet Society of China; Mr. Wei LU, Secretary General of Internet Society of China.

All members of the Board voted in favor of Resolutions 2013.04.11.01, 2013.04.11.02, 2013.04.11.03, 2013.04.11.04, 2013.04.11.05, 2013.04.11.06, 2013.04.11.07, 2013.04.11.08, 2013.04.11.09, 2013.04.11.10, 2013.04.11.11 and 2013.04.11.12. The Resolutions carried.

## 2. Main Agenda:

# 1. IDN Variant TLD Root LGR Procedure and User Experience Study Recommendations

After Ram Mohan presented the resolution, he provided a brief discussion noting the complexity of this issue and the analysis that still remains to be done.

Whereas, IDNs have been a Board priority for several years to enable Internet users to access domain names in their own language, and the Board recognizes that IDN variants are an important component for some IDN TLD strings;

Whereas, the Board previously resolved that IDN variant gTLDs and IDN variant ccTLDs will not be delegated until relevant work is completed;

Whereas, since December 2010 ICANN has been working to find solutions to ensure a secure and stable delegation of IDN variant TLDs, and the IDN Variant TLD Program benefited from significant community participation in developing the Procedure to Develop and Maintain the Label Generation Rules for the Root Zone in Respect of IDNA Labels and the Report on User Experience Implications of Active Variant TLDs.

Resolved (2013.04.11.13), the Board directs staff to implement the Procedure to Develop and Maintain the Label Generation Rules for the Root Zone in Respect of IDNA Labels [PDF, 772 KB] including updating the gTLD Applicant Guidebook and IDN ccTLD Process to incorporate the Label Generation Rules for the Root Zone in Respect of IDNA Labels in the respective evaluation processes.

Resolved (2013.04.11.14), the Board requests that, by 1 July 2013, interested Supporting Organizations and Advisory Committees provide staff with any input and guidance they may have to be factored into implementation of the Recommendations from the Report on User Experience Implications of Active Variant TLDs [PDF, 1.38 MB].

## All members of the Board voted in favor of Resolutions 2013.04.11.13 and 2013.04.11.14. The Resolutions carried.

## Rationale for Resolutions 2013.04.11.13 - 2013.04.11.14

## Why the Board is addressing the issue now?

IDN variant TLDs have been a subject of interest for several years to a number of IDN users. The IDN Variant TLD Program has been working with subject matter experts in the community to develop solutions to enable a secure and stable delegation of IDN variant TLDs. The Program has concluded the work on two key components of the solution: the Procedure to Develop and Maintain the Label Generation Rules for the Root Zone in Respect of IDNA Labels and the Report on User Experience Implications of Active Variant TLDs, hereinafter referred to as the Procedure. The Procedure is now ready for consideration for adoption as the mechanism, between other things, to evaluate potential IDN TLD strings and to identify their variants (if any). The recommendations from Report on User Experience Implications of Active Variant TLDs are now ready to be implemented with any input and guidance that interested Supporting Organizations and Advisory Committees may have.

## What is the proposal being considered?

The Procedure describes how to populate and maintain the Label Generation Rules for the Root Zone in Respect of IDNA Labels, which is expected to become a key component in processing IDN TLD applications. The Procedure requires participation from the relevant communities as a central component. The Procedure includes safeguards to ensure maximum community participation of a given linguistic community and avoid dominance of a single interested party, and requires technical experts involvement to ensure technical and linguistic accuracy on the contents of the Rules. The Report on User Experience Implications of Active Variant TLDs includes a series of recommendations to enable a good user experience with IDN variant TLDs.

#### What Stakeholders or others were consulted?

The development of the Procedure and the Report included full participation of several members from the community. Both documents also went through two public comment processes and a number of public presentations where feedback was gathered.

#### What concerns or issues were raised by the community?

There were concerns raised about the idea that variants in general are inappropriate in the root zone, though, allowing that some specific case might be acceptable. There were also concerns about conflict resolution and governance of the Procedure. However, by having a requirement of consensus within and between panels the conflict resolution issue would seem to be mitigated. In regard to the governance of the Procedure, it is

foreseen that having the integration panel under contract with ICANN will allow removing a panelist that could be behaving in a non-constructive manner.

Concerns were also raised that the issues raised in the Report may frighten readers away from supporting variants and the Report does not highlight the risks (problems and security issues) if variants are not supported or activated. However, in order to ensure a secure, stable and acceptable experience, these issues need to be called out for the respective parties to work on. The need for variants is well articulated by the individual issues reports, so that issue outside the scope of the current study.

## What significant materials did Board review?

A Board paper and Reference Materials detailing the proposal, the Procedure to Develop and Maintain the Label Generation Rules for the Root Zone in Respect of IDNA Labels, and the Report on User Experience Implications of Active Variant TLDs.

## What factors the Board found to be significant?

The Board found that the Label Generation Rules for the Root Zone in Respect of IDNA Labels will improve the current process to evaluate IDN strings by using a pre-approved, deterministic process to define which code points are allowed in the root. The Board also found significant that the rules are a key component to consistently identify the variants of applied-for IDN strings. The Procedure has the participation of the relevant communities as a core feature. In addition, the Recommendations aim to enable a good user experience in regards to IDN variant TLDs.

## Are there Positive or Negative Community Impacts?

Adopting the Procedure and consequently the Label Generation Rules for the Root Zone in Respect of IDNA Labels will benefit future TLD applicants by enabling future applicants to check whether the string they are intending to apply for is allowed. The Rules will also allow the deterministic identification of IDN variants for the applied-for strings. Implementing the Recommendations will enable a good user experience with IDN variant TLDs.

Are there fiscal impacts/ramifications on ICANN (Strategic Plan, Operating Plan, Budget); the community; and/or the public?

No fiscal impacts/ramifications on ICANN are foreseen by adopting this resolution.

## Are there any Security, Stability or Resiliency issues relating to the DNS?

The adoption of the Rules and the implementation of the Recommendations is expected to have a positive impact on the Security of the DNS by having a technically sound process with multiple checkpoints, including public review, of the code points and their variants (if any) that will be allowed in the root

zone and the deployment of measures avoid user confusion regarding IDN variant TLDs.

Is this either a defined policy process within ICANN's Supporting Organizations or ICANN's Organizational Administrative Function decision requiring public comment or not requiring public comment?

This is an Organizational Administrative Function not requiring public comment.

## 2. PIA-CC Application to Form New Constituency

After Ray Plzak presented the resolution, he presented a bit of background on the process that has been developed for the Board to recognize new constituencies in the GNSO. The Board discussed that it is in a role of affirmation of process.

The Board then took the following action:

Whereas, the ICANN Board wants to encourage participation by a broad spectrum of existing and potential community groupings in ICANN processes and activities.

Whereas, the ICANN Board has established a Process for the Recognition of New GNSO Constituencies that includes objective eligibility criteria, encourages collaboration and puts the decisions regarding applications, in the first instance, in the hands of the communities to be directly impacted by the potential new Constituency.

Whereas, the Cybercafé Association of India (CCAOI), submitted an application for formal recognition of a new GNSO Constituency called the "Public Internet Access/Cybercafé Ecosystem (PIA/CC)" within the GNSO's Non-Commercial Stakeholder Group (NCSG).

Whereas, ICANN staff managed a 68-day Public Comment Forum for community review and reaction to the PIA/CC proposal.

Whereas, the NCSG Leadership and ICANN staff engaged in collaborative consultation and dialogue with the PIA/CC proponents.

Whereas the NCSG Leadership and ICANN staff have followed the process and the NCSG has advised the Structural Improvements Committee of the Board of its determination to deny the application because the application does not meet the criteria established by the Board.

Resolved (2013.04.11.15) the decision of the NCSG to deny the PIA/CC application is ratified with the understanding that the decision is without prejudice and the Constituency proponents have the right to re-submit a new application.

Resolved (2013.04.11.16) the President and CEO is directed to continue collaborative discussions with the PIA/CC proponents to further investigate

and consider other options for community engagement within the ICANN community and its processes.

All members of the Board voted in favor of Resolutions 2013.04.11.15 and 2013.04.11.16. The Resolutions carried.

#### Rationale for Resolutions 2013.04.11.15 – 2013.04.11.16

The process for the recognition of new GNSO Constituencies was designed to provide specific and objective application criteria and to place decisions on the recognition of new GNSO Constituencies, in the first instance, in the hands of the community groups in the best position to evaluate those applications. In the present case, the process was followed and the NCSG has made its determination.

It is important to note that Board ratification of the NCSG decision to reject the PIA/CC application is without prejudice to the right of the proponents to resubmit a new application. The Board hopes that further discussions with the PIA/CC proponents can result in a course of action that will allow PIA/CC interests to be effectively incorporated into ICANN's activities and processes.

This action will have no immediate or substantial impact on ICANN's resources. This action is not expected to have any impact on the security, stability or resiliency of the DNS.

This action is an Organizational Administrative Function for which public comment was received.

## 3. Any Other Business

Bertrand de La Chapelle raised the issue of the working methods of the organization, as highlighted in the recent comment period on "closed" generic/exclusive use TLDs, and noted the good collection of perspectives that have been raised.

Bruce Tonkin raised the issue of ICANN's accountability mechanisms to clarify that the reconsideration process does not actually allow for a full-scale review of a new gTLD application. The Independent Review Process is for areas where there are alleged breaches by the Board of ICANN's Articles of Incorporation or Bylaws. The ICANN Ombudsman has a broader remit, to provide an evaluation of complaints that the ICANN Board, staff or a constituent body has treated the complainant unfairly. Bruce encouraged the community to use the Ombudsman where they have complaints of potential unfairness.

The Chair noted the privilege that it is to serve as the Chair of the Board, and noted the amount of work the Board does, through committees and working groups, which is in addition to all of the broader community participation in the ICANN structure that feed into ICANN's work. The Chair thanked the community for the hard work at the meeting and called the meeting to a close.

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