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

Merck KGaA
Contact Information Redacted

(Claimant)

-v-

Internet Corporation for
Assigned Names and Numbers
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536

(Respondent)

ICDR Case No. 01-14-000-9604

REPLY SUBMISSION
INDEPENDENT REVIEW PROCESS
BY MERCK KGaA

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I. INTRODUCTION

1. Merck KGaA (hereinafter, "Merck") files this Reply as it is necessary to respond to ICANN's mischaracterization of Merck's fundamental grievances in its Request for Independent Review Process ("IRP"), and clarify its legal argument pursuant to the requirements for IRP proceedings.
2. For the benefit of the IRP Panel, Merck will first present in this introduction a concise account of its argument under the IRP, identifying the wrongful actions of the ICANN Board and addressing some of ICANN's most salient mischaracterizations. Merck will thereafter elaborate on each portion of its argument in more detail following a review of relevant rules, principles and facts in this matter.

a. Merck's IRP Argument

3. As a precursor to its claims in this IRP, Merck asserts that its Legal Rights Objection ("LRO") Determinations suffer from palpable mistakes due to the failure of the LRO Panel to apply the appropriate LRO Standards, and the LRO Panel's application of inappropriate elements under the Uniform Domain Name Dispute Resolution Policy (UDRP) in its Determinations. These allegations were the basis of Merck's Request for Reconsideration ("RFR").
4. In making such assertions, Merck is not requesting that the IRP undertake a de novo review of its LRO Determinations or replace the LRO Determinations with their own decision. Rather, Merck's purpose in discussing the errors of the LRO Panel is to provide the basis for its discussion of the violations of the ICANN Board in its evaluation of Merck's RFR and its decisions regarding the implementation and administration of the dispute resolution process in the New gTLD Program.
5. Merck's claims in its RFR regarding the LRO Panel's errors were proper for the ICANN Board Governance Committee ("BGC") to consider, as the RFR challenged whether the LRO Panel followed the appropriate policies and procedures in rendering its determinations. Merck does not challenge the BGC's competence to hear these types of questions.
6. However, Merck's properly-submitted RFR necessarily required the evaluation of interdependent questions of law – namely, whether the LRO Panel applied the LRO Standards in the context of Merck's Objections, and whether the application of the bad faith requirement of the UDRP is inconsistent with the LRO Standards. For explicit reasons detailed in ICANN's policies and

procedures, the BGC itself could not evaluate these questions of law, although it must still evaluate Merck's broader allegations regarding the application of the appropriate policies and procedures in its RFR. Despite these limitations, the BGC improperly engaged in substantive assessment.[1]

7. Further, when the BGC denied Merck's RFR, contrary to ICANN's assertions, it was the ICANN Board itself that was responsible for accepting the LRO Determinations. Regardless of whether acceptance of determinations are typically an ICANN staff action (or otherwise "automatic") in the normal course of the dispute resolution process, when the ICANN Board itself is charged with reviewing the actions of an objection panel for compliance with policy or procedure, the final act of acceptance or rejection of the determination is an ICANN Board action. The ICANN Board's acceptance of the Determinations, made without having accurate facts and assessment of Merck's complaints, were erroneous and improper.[2]
8. Lastly, contrary to ICANN's position, the ICANN Bylaws and Articles of Incorporation do require ICANN to provide certain minimum relief in its dispute resolution processes. ICANN's Articles require that ICANN carry out its activities in conformity with relevant principles of international law. It is a generally accepted international legal norm that a court or other body may review ADR decisions in the event of certain egregious error or actions, including claims that a panel so imperfectly executed its powers such that a final decision on the merits had not been made. Additionally, failure to address such errors in rendered determinations is an affront to fairness and due process. ICANN's decision to implement a dispute resolution mechanism lacking any possible relief for gross error violates international norms and is in contravention of the ICANN Board's obligations in its Articles and Bylaws. Merck's complaints are timely as they were brought within the specified period after the rendering of the BGC's determination of Merck's RFR, at the earliest time that demonstrated that ICANN violated its Bylaws and Articles, leading to material harm.[3]
9. For these reasons, Merck brings this IRP and demands that the Panel render a determination finding that the actions of the ICANN Board were in violation of the ICANN Articles, Bylaws, the New

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[1] ICANN Board Breaches in relation to the ICANN Board's determination on Merck's RFR are discussed at Section III(a), below.
[2] ICANN Board Breaches in relation to the ICANN Board's acceptance of the erroneous LRO Determinations are discussed at Section III(b), below.
[3] ICANN Board Breaches in relation to the ICANN Board's implementation and administration of dispute resolution processes are discussed at Section III(c), below.

gTLD Applicant Guidebook ("AGB"), and relevant policies and procedures. Merck further respectfully requests the IRP to issue a declaration requiring that ICANN instruct a Dispute Resolution Service Provider to appoint a new LRO Panel or Panels to decide upon Merck's LROs, award Merck its costs, and/or provide any such relief as the Panel may find appropriate.

II. LEGAL AND FACTUAL BACKGROUND

a. Standard of Review

10. The IRP Panel must review the actions of the ICANN Board in accordance with an objective and non-deferential standard of review.

11. ICANN erroneously indicates that the ICANN Bylaws require the IRP Panel to apply a "deferential" standard of review.[4] The Bylaws merely reference a "defined" standard, which is found at Article 8 of the ICDR Supplemental Rules[5].

12. In a previous IRP declaration of precedential value[6], the IRP panel determined that it "is charged with 'objectively' determining whether or not the Board's actions are in fact consistent with the Articles, Bylaws and Guidebook, which the Panel understands as requiring that the Board's conduct be appraised independently, and without any presumption of correctness."[7]

b. Legal Rights Objection Procedure

i. Background, Implementation, and ICANN Modification

13. The LRO is a procedure arising out of the ICANN Board's adoption of recommendations of the ICANN Generic Names Supporting Organization (GNSO), including the recommendation that "[s]trings must not infringe the existing legal rights of others".[8] ICANN's Bylaws require that these adopted recommendations be implemented.[9]

14. The Legal Rights Objection procedure was implemented in the final AGB published in June, 2012.[10] The AGB is recognized as "the crystallization of Board-approved consensus policy concerning the

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[4] ICANN erroneously states that ICANN Bylaws, Article IV, Section 3.4 requires that the IRP Panel apply a deferential standard of review. ICANN Response, paragraph 28.
[5] Article 8, ICDR Supplemental Rules. Annex 60(b).
[6] IRP Declarations have precedential value. ICANN Bylaws, Article IV, Section 3.21. Annex 16.
[7] IRP Declaration, Booking.com B.V. v. ICANN, ICDR Case No. 50-20-1400-0247, paragraph 111. Annex 61.
[8] Recommendation 3, Final Report of the ICANN GNSO on the Introduction of New Generic Top-Level Domains. Annex 18.
[9] ICANN Bylaws, Annex A, paragraph 10. Annex 16
[10] See AGB, Module 3 (June 2012). Annex 21.

introduction of new gTLDs."[11] While ICANN indicates that the AGB development process was "a process that was started many years ago and completed over two years ago" and which was adopted "following years of consideration and community involvement," [12] the LRO did not undergo the same development process as the rest of the AGB. The LRO procedure was unveiled in the first draft AGB[13] without input from the community, and remained substantively unchanged despite strong community objection to aspects of the process, which included in particular the availability of an appeals mechanism.[14]

15. While the LRO Procedure was integrated into the AGB, however, the Procedure is subject to modification. "ICANN reserves the right to make reasonable updates and changes to this applicant guidebook and to the application process".[15] In fact, ICANN unilaterally implemented a significant modification to the LRO procedure when it determined that "the Reconsideration process can properly be invoked for challenges of [a] third party's decisions where it can be stated that either the vendor failed to follow its process in reaching the decision, or that ICANN staff failed to follow its process in accepting that decision".[16] ICANN also modified the procedure for particular parties, most notably in the event of "inconsistent string confusion objections", which involved the development of a tailor-made appeal mechanism to resolve inconsistent string confusion determinations regarding identical TLDs.[17]

ii. LRO Requirements

16. Filing an LRO Objection and abiding by standing and procedural requirements entitles an objector to an expert determination.[18]

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[11] IRP Declaration, Booking.com B.V. v. ICANN, paragraph 54. Annex 61.
[12] ICANN Response, paragraph 52.
[13] ICANN maintains draft versions of the AGB and other documents from the New gTLD Program on its website at: http://newgtlds.icann.org/en/about/historical-documentation. The first draft AGB is included at Annex 62; the Legal Rights Objection procedure may be found at Module 3 of the first draft AGB.
[14] Despite early discussions indicating that ICANN would utilize a dispute resolution process modeled on the UDRP (which provides the possibility of court review of UDRP decisions), the LRO procedure did not provide any means for relief from palpable mistakes in decisions. See Draft GNSO Recommendation Summary, Recommendation 2.5.3.2 of September 14, 2006 (Annex 63), and UDRP, paragraph 4(k) (Annex 51). See Annex 56 for selection of Public Comments on Objection Procedures and Appeal Mechanisms.
[15] AGB, Section 6.14. Annex 21.
[16] See BGC Recommendation on Request for Reconsideration 13-5, page 4. Annex 64.
[17] See information on Proposed Mechanism to Address Inconsistent String Confusion Objections. Annexes 55(b) and 70.
[18] AGB, Section 3.2. Annex 21.

17. In two of the four objection procedures, the AGB mandates enhanced expertise requirements for panelists. The LRO is one such procedure, which ICANN regarded as sufficiently sophisticated so as to require "relevant experience in intellectual property rights disputes".[19]

18. The LRO Panel must apply the defined LRO Standards.[20] The LRO Panel may apply other rules and procedures it deems appropriate, but it is clear from the AGB that this ability is limited to the extent that a rule or procedure conflicts with the LRO Standards.[21] The LRO Panel furthermore must give a reasoned decision.[22]

iii. LRO Standard

19. The LRO Standard consists of three elements, based on traditional trademark law concepts. It is noted that "bad faith" is not generally speaking required to find trademark infringement.

20. The eight non-exclusive factors accompanying the LRO Standards are "analytical proxies for the more general concepts" described by the LRO Standards to assist the panel in its assessment.[23]

21. The application of the LRO Standards is not a strictly objective process. "[D]epending on the facts and circumstances of each case, some factors may prove more significant than others. Deciding a case under the LRO Procedure is not simply a matter of tallying the factors (e.g., 5-3) and declaring the winner on that basis".[24]

22. By the very nature of the LRO itself as a pre-delegation procedure, the LRO Standards must look to the future (to the "potential use of the applied-for gTLD").

23. The LRO "provides a path for formal objections during evaluation of the applications".[25] It exists, contrary to the suggestions of ICANN[26], and the LRO Panel[27] so that trademark owners do not have to wait until after delegation to protect their rights. The LRO Standards do not ask whether a gTLD

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[19] AGB, Section 3.4.4 (Annex 21); Procedure, Article 13(b)(ii) (Annex 22).
[20] AGB, Section 3.5.2 (Annex 21); Procedure, Article 20(a) (Annex 22).
[21] AGB, Section 3.5 (Annex 21); Procedure, Article 20(b) (Annex 22).
[22] AGB, Section 3.4.6 (Annex 21); Procedure, Article 21(d) (Annex 22).
[23] See Right At Home v. Johnson Shareholdings, Inc., WIPO Case No. LRO2013-0030 at 4. Annex 47.
[24] See id.
[25] AGB, Section 3.2. Annex 21.
[26] "[I]f such alleged violations occur after the delegation of .MERCK, both Merck and MSD are fully capable of attempting to protect their rights". ICANN Response, paragraph 31.
[27] "Of course a rejection of the Objection does not preclude Objector from taking regular legal action should the use of the Disputed gTLD String by Applicant be infringing." Merck KGaA v Merck & Co., Inc., WIPO Case Nos. LRO2013-0009/10/11, page 6. Annex 33.

applicant has a right to apply for a gTLD, but rather whether the future use of a gTLD amounts to an infringement of third parties' trademark rights.

c. Merck's LRO Determinations

24. In contrast to many LRO cases, the Merck LROs featured parties utilizing the same trademark for the same goods and services, with a long history of coexistence and conflict in various jurisdictions and over the Internet. It is the quintessential dispute for which the LRO was designed, which ICANN recognized.[28]

25. Merck demonstrated the clear potential for infringement by Merck & Co. ("MSD") through citation to the parties' coexistence agreement and ongoing litigation. Merck furthermore cited specific provisions of MSD's gTLD applications demonstrating that MSD's intended global use of the TLD would be infringing in more than 100 countries in which Merck holds exclusive rights in the MERCK trademark. To provide contrast, Merck highlighted its own Public Interest Commitment ("PIC") to respect MSD's trademark rights, which MSD itself did not undertake. MSD exacerbated the situation by avoiding any discussion of its intended use of the TLD in its LRO responses.[29]

i. Merck's LRO Determinations – Panel Applied Wrong Facts

26. As demonstrated by the addendums to the LRO Determinations, the LRO Panel misattributed the use of geo-targeting to MSD (relevantly, in its discussion under the specific factor of the eight-factor test dedicated to the intended use of the gTLD[30]), demonstrating that either the LRO Panel made its determination on the basis of wrong facts, or at the very least that the LRO Panel was inattentive to the underlying requirements of the LRO Standard which requires an assessment of the potential for infringement (to which geo-targeting is directly relevant).

ii. Merck's LRO Determinations – Panel Inappropriately Invoked UDRP

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[28] "[T]he dispute resolution panels presiding over these matters will be provided specific criteria that are being developed with intellectual property experts, to consider when determining whether a TLD infringes the rights of others. **One consideration in this analysis, however, is that it is not unusual for more than one entity to have a trademark in the same word or phrase either for different products or services or registered in different jurisdictions. Accordingly, the process is being developed with that understanding.**" New gTLD Program Explanatory Memorandum, Protection of Rights of Others in New gTLDs, October 22, 2008, at page 4. Annex 65.

[29] Section III(f), Merck KGaA IRP Request.

[30] See discussion under LRO Factor viii in Merck LRO Determinations, page 8, and addendums following the decision. Annex 33.

27. The AGB states that LRO panels may apply "rules and procedures it determines to be applicable"[31] – however, the AGB is clear that regardless, the LRO Standards must be applied. Therefore, rules or procedures which are inconsistent with the LRO Standards are not appropriate and cannot be applied.

28. The LRO Panel for Merck's LRO Objections applied the UDRP.[32] The UDRP requires "bad faith",[33] in clear contrast to the requirements of the LRO Standards (and their underlying trademark law concepts) which may be infringed without bad faith. In the Determinations, the LRO Panel reasoned that since MSD had a trademark for MERCK, it had a bona fide basis for applying for the TLD string, and thus (utilizing the UDRP elements) rejected Merck's objection.

29. Merck does not deny that MSD would have a bona fide basis for applying for Merck-formative TLDs, but MSD is nonetheless in violation of the LRO Standards because of its intended infringing global use of the gTLD (as demonstrated through statements in its gTLD applications and through the conscious omission of any statement or commitment to avoid infringing Merck's trademark rights). However, the LRO Panel did not, at any point in the Determinations, move beyond its determination under the UDRP and consider the potential for infringement as required under the LRO Standards.

30. Thus, the LRO Panel wrongly applied the inconsistent and inappropriate UDRP elements, denying Merck's Objections due to the lack of bad faith on the part of MSD, which is inconsistent with the requirements under the LRO Standards.

iii. Merck's LRO Determinations – Panel Failed to Apply LRO Standards

31. In contrast to the LRO Standards which REQUIRE a LRO panel to consider the potential use of the TLD, the LRO Panel explicitly stated that it was "not for this Panel to anticipate all the possible types of use Applicant could make of the Disputed gTLD String" and that "[i]t is also not for this Panel to interpret the existing coexistence agreements and arrangements between the Parties",[34] relying on the mistaken conclusion that as MSD had a bona fide basis for applying for the gTLD and thus that the LRO Objection should fail.

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[31] AGB, Section 3.5 (Annex 21); Procedure, Article 20(b) (Annex 22).
[32] See excerpt of LRO Determination at footnote 51, infra.
[33] See UDRP, paragraph 4(a)(iii). Annex 51.
[34] Merck LRO Determinations, page 6. Annex 33.

32. Despite Merck's several references and citations to MSD's intended infringing global use of the gTLDs and other factors demonstrating the potential for impermissible infringement, and the absence of any mitigating statements from MSD, the LRO Panel did not address these relevant points and simply relied on the inappropriate UDRP elements and the existence of MSD's MERCK trademarks to conclude that Merck's objections would fail.

33. Thus, the LRO Panel failed to apply the appropriate LRO Standards and instead applied the inappropriate and inconsistent UDRP elements to the Objections, and furthermore compounded this error through reliance on incorrect factual basis.

d. Request for Reconsideration

34. ICANN's Bylaws provide for persons or entities who are materially affected by an action of ICANN to have that action reviewed or reconsidered by the ICANN Board.[35]

35. ICANN determined, subsequent to the publishing of the LRO procedure in the AGB, that the RFR can be "invoked for challenges to expert determinations rendered by panels formed by third party dispute resolution service providers, such as WIPO, where it can be stated that the Panel failed to follow the established policies or processes in reaching the expert determination, or that staff failed to follow its policies or processes in accepting that determination."[36]

36. ICANN is bound in the RFR, as it is with any other process, to perform its actions in accordance with established policies and processes, as well as in accordance with its Articles of Incorporation and Bylaws.

37. In particular, the ICANN Board indicated that "the reconsideration process does not call for the BGC to perform a substantive review of expert determinations" and "the BGC does not evaluate the Panel's substantive conclusion that the Requester failed to establish that MSD's applications for .MERCK and .MERCKMSD infringe on Requester's legal rights".[37]

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[35] ICANN Bylaws, Article IV, Section 2.2. Annex 16.
[36] See BGC Recommendation on Request for Reconsideration 14-9, page 6. Annex 45.
[37] See id.

38. Additionally, the BGC must exercise due diligence and care in having a reasonable amount of accurate facts, and exercise independent judgment without conflict of interest, when taking its decisions.[38]

39. The BGC, as a committee of the ICANN Board, also has certain powers to assist it in its duties. This includes the ability to access independent legal advisors to assist in assessment.[39]

40. Lastly, the AGB relevantly indicated that experts reviewing LRO determinations have expertise in intellectual property rights disputes.[40]

e. Merck's Request for Reconsideration

41. Merck's RFR alleged (1) the LRO Panel failed to accurately assess critical facts in Merck's pleadings, (2) the LRO Panel utilized the (inappropriate and inapplicable) UDRP elements instead of applying the LRO Standards when making its determination, and (3) the LRO Panel failed to apply the LRO Standards when making its determination.[41] Merck's allegations were properly brought in the RFR, as they allege that the LRO Panel failed to follow the established LRO policy or procedure[42], which necessarily require the LRO Panel to accurately assess critical facts and apply the appropriate legal standards.

III. ICANN BOARD BREACHES

42. Merck's argument in this IRP arises from the fact that its LRO Determinations suffer from palpable mistakes in the application of the LRO Standards. Merck's IRP is not itself an attempt to appeal the LRO Panel's substantive assessment[43], but rather, is an assertion that the ICANN Board did not correctly apply its own policies and processes when considering Merck's RFR. Furthermore, the ICANN Board wrongly accepted the materially deficient Expert Determinations and lastly failed to follow generally accepted principles in the implementation and administration of its dispute resolution processes.

a. ICANN Board Breaches in Review of Merck's Request for Reconsideration

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[38] ICANN Bylaws, Article IV, Section 3.4. Annex 16.
[39] ICANN Board Governance Guidelines, paragraph 16. Annex 44.
[40] AGB, Section 3.4.4. Annex 21.
[41] Merck KGaA Request for Reconsideration 14-9, pages 6-7. Annex 39.
[42] See also ICANN Response, paragraph 37. "Its focus instead is whether the expert complied with the dispute resolution providers' own and ICANN's policies and procedures."
[43] In contrast to ICANN's assertions otherwise. ICANN Response, paragraph 11.

43. ICANN violated its own processes and procedures in three ways when it reviewed Merck's RFR.

i. The ICANN Board necessarily engaged in an impermissible substantive evaluation when reviewing Merck's Request for Reconsideration

44. ICANN's view of Merck's argument in its RFR is that Merck did not raise any questions requiring substantive assessment, and to the extent that Merck is requesting a substantive evaluation, that request is improper for consideration in a RFR.[44]

45. Merck's position is more complex than ICANN realizes or gives credit – Merck asserts that it correctly requested the BGC to review whether the LRO Panel followed the appropriate policies and procedures when it rendered its Determinations. However, this necessarily required the evaluation of interdependent questions of law requiring a substantive assessment – namely, whether the LRO Panel applied the LRO Standards to the facts and circumstances of Merck's Objections, and whether the application of the bad faith requirement of the UDRP is inconsistent with the LRO Standards.

46. ICANN completely misses the point about the inconsistency of the UDRP elements and the LRO Standards when it asserts that "[t]he BGC determined that no policy or procedure prevented the Expert Panel from 'consider[ing] the UDRP'" because "the Expert Panel may 'refer to and base its finding upon … any rules or principles that it determines to be applicable."[45] Merck's assertion is that, as a matter of law, the LRO Panel may not apply rules or principles which are incompatible with the required LRO Standards. The BGC's assessment failed to distinguish that there are limitations to the rules or principles which can be applied in an LRO proceeding, which may be attributable to its lack of subject matter expertise. Needless to say, the BGC did not assess whether the UDRP and the LRO Standards were incompatible, and thus failed to appropriately answer Merck's complaint in this regard.

47. It is impossible to determine whether the LRO Panel applied the wrong UDRP elements or correctly applied the LRO Standards, or to determine whether the application of UDRP elements is incompatible with the LRO Standards, without itself engaging in substantive analysis. To make things more complicated, the LRO Standards included reference to eight non-exclusive factors – and

[44] See ICANN Response, paragraphs 40-41.
[45] ICANN Response, paragraph 42.

the AGB did not specify how these eight factors are to be applied in conjunction with the three LRO Standards. As stated in an LRO determination, "[d]eciding a case under the LRO Procedure is not simply a matter of tallying the factors (e.g., 5-3) and declaring the winner on that basis".[46] In contrast to ICANN's assertion[47], it is not possible for the BGC to conclude that the LRO Panel did not follow the applicable policy or process by simply confirming that the LRO Standard is referenced in the determination.

48. ICANN itself indicated that "the reconsideration process does not call for the BGC to perform a substantive review of expert determinations".[48] However, as Merck's proper request under the RFR required substantive assessment of certain questions of law relating to the application of legal standards, the BGC must take steps to appropriately assess those questions which the BGC could not itself answer. Despite ICANN's contention that it may not have the ability to, for instance, appoint independent experts,[49] this and other options were at its disposal.[50]

49. Despite these limitations, the BGC performed the improper substantive assessment anyway. The BGC engaged in such substantive assessment, wrongfully and incorrectly, when it concluded that the LRO Panel correctly applied the LRO Standards and when it (selectively and misleadingly[51]) evaluated the LRO Panel's application of the UDRP and LRO Standards in the context of Merck's case and determined that the UDRP was not applied in one instance and that the Panel's reliance on the UDRP did not prejudice Merck in another.

50. In conclusion, Merck's RFR, although requiring a substantive review of questions of law, was proper because it alleged that the LRO Panel failed to follow the appropriate policy or procedure. The BGC

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[46] Right At Home v. Johnson Shareholdings, Inc., WIPO Case No. LRO2013-0030 at 4. Annex 47.
[47] ICANN Response, paragraph 48.
[48] See BGC Recommendation on Request for Reconsideration 14-9, page 6. Annex 45.
[49] See ICANN Response, footnote 60.
[50] See ICANN Governance Guidelines, paragraph 16 (Annex 44), providing the ICANN Board the ability to hire independent legal experts; see Annexes 55(b) and 70demonstrating that the ICANN Board may appoint additional panels to consider legal questions.
[51] The BGC's selected quotation of the LRO Panel determination, if extended, illustrates that the LRO Panel in fact did apply the UDRP to the three LRO Standards (BGC's omitted text, in bold): "there should not be a significant difference between the criteria for the legal rights objection as included in the Guidebook on the one hand and the provisions included in the [UDRP]. **If the applicant for a new gTLD is bona fide, it will not be likely that one of the three criteria will be met. It might be that advantage of the distinctive character or the reputation of the objector's registered trademark is taken, but it is then likely not unfair. It might be that the distinctive character or reputation of the objector's registered trademark is being impaired, but it is likely justified. It might be that a likelihood of confusion between the Disputed gTLD String and the objector's mark is created, but it is not necessarily impermissible.**" Page 6. Annex 33.

had options at its disposal to secure the necessary independent and expert review of Merck's questions. Instead of properly evaluating Merck's arguments, the BGC inappropriately engaged in the substantive review even though it was not permitted to do so and despite lacking requisite expertise, as discussed in the subsequent section.

ii. The ICANN Board did not have requisite expertise to evaluate Merck's allegations in its Request for Reconsideration

51. The ICANN Board could not itself engage in any assessment of Merck's allegations pertaining to the application of the LRO Standards, as the ICANN Board's lack of expertise in intellectual property disputes prevented the ICANN Board from reaching an informed conclusion and basis for its decision.

52. The AGB requires that panels have "relevant experience in intellectual property rights disputes in proceedings involving an existing legal rights objection".[52] The reason for enhanced experiential requirements when reviewing Legal Rights Objections is obvious in light of the novelty and complexity of the LRO Standards, which are an adaptation of traditional trademark law concepts and incorporate an eight-factor balancing test. Proper consideration of the legal standard requires a deep understanding of trademark law to be able to discern the aim of the LRO Standards, and to be able to distinguish the LRO from other ICANN-adopted policies (such as the UDRP). The BGC, in its RFR proceeding "involving an existing legal rights objection" is bound by the AGB expertise requirement, and demonstrably does not meet such requirement.[53]

53. Additionally, the BGC is separately required to exercise due diligence and care in having an accurate and informed assessment of Merck's substantive legal complaints when rendering its determination on Merck's RFR.[54] Noting that ICANN considered the LRO to raise questions of such complexity so as to require enhanced expertise and included such requirement in the AGB, the BGC's failure to obtain independent expert opinion on the matter demonstrates that the BGC's review of Merck's

[52] AGB, Section 3.4.4. Annex 21.
[53] The BGC is composed of individuals with a range of backgrounds. Many are not attorneys, and it is obvious that those members who are attorneys do not have relevant experience in intellectual property disputes. See https://www.icann.org/resources/pages/governance-committee-2014-03-21-en for further information. As the AGB requires all reviewing parties to have relevant expertise, the BGC fails to comply with the relevant requirements. Annex 72.
[54] ICANN Bylaws, Article IV, Section 3.4. Annex 16.

RFR was made without due diligence and care, and without reliable facts as to the validity of Merck's claims. The BGC's decision to deny Merck's RFR thus violated ICANN's Bylaws.

iii. The ICANN Board could not engage in a neutral and independent analysis due to its financial interest in the outcome of its decision

54. The BGC lastly failed to make its decisions "by applying documented policies neutrally and objectively, with integrity and fairness"[55] and without conflict of interest,[56] as the BGC's decision with regard to the RFR directly impacted whether Merck and MSD engaged in the "auction of last resort".[57]

55. The AGB indicated that the LRO procedure was to be administered through an independent process, which stems directly from the implementation guidelines to the GNSO Recommendations adopted by ICANN in the New gTLD Program.[58] The AGB indicated that "the independent dispute resolution process is designed to protect certain interests and rights",[59] with "independence" being synonymous with "having no bias or personal stake in an outcome"[60]. This concept of independence and neutrality is recognized as a core value in ICANN's Bylaws[61] and is a basis for filing an Independent Review action if the ICANN Board fails to exercise independent judgment[62].

56. Given the "nearly century-old battle between two international pharmaceutical companies" which ICANN acknowledges[63], it can hardly be denied that private negotiation between Merck and MSD would most certainly fail and that an auction of last resort concerning <.merck> would result in bid in the tens of millions of dollars. ICANN, as the direct recipient of all proceeds from the auction of last resort, cannot in any manner be considered to be neutral in such circumstances given that it has a significant financial stake in its decision, with a substantial possibility of ICANN receiving a windfall on the order of an entire year of revenue.[64]

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[55] ICANN Bylaws, Article II, Section 2.8. Annex 16.
[56] ICANN Bylaws, Article IV, Section 3.4(a). Annex 16.
[57] Auction of last resort is described in detail at Section 4.3 of the AGB. Annex 21.
[58] Implementation guideline H (note both H and H*), GNSO Final Report on the Introduction of New gTLDs at page 23. Annex 18.
[59] AGB, Section 3.2. Annex 21.
[60] ICANN Bylaws, Article V, Section 3.5. Annex 16.
[61] ICANN Bylaws, Article I, Section 2.8. Annex 16.
[62] ICANN Bylaws, Article IV, Section 3.4(c). Annex 16.
[63] ICANN Response, paragraph 1.
[64] In 2011, the year that the ICANN Board authorized the launch of the New gTLD Program, ICANN had revenue of just over USD 69 million. ICANN Annual Report 2012, page 30 (Annex 66). At the end of April, 2015, ICANN raised approximately

iv. Conclusion

57. ICANN argues that Merck's complaint is that "the Board violated its Bylaws or Articles by not reviewing the provider's decision on the merits".[65] As demonstrated above, this is in fact the opposite case – Merck argues that ICANN did in fact engage in substantive review, and in doing so acted in a manner which is in violation of its Articles and Bylaws, and the ICANN Board's own policy and processes.

58. The BGC (irrespective of whether its determination was made in its own capacity or was assisted by internal or outside counsel) made itself the arbiter of certain substantive questions it was not permitted or capable to answer (rather than, for instance, relying on independent expert assessment). The BGC thereby acted contrary to its own established policies and procedures[66], and its obligations under the ICANN Bylaws to exercise due diligence and care and make decisions on the basis of sufficient and accurate facts without conflict of interest[67]. Its failure furthermore violates the ICANN Bylaws, because it did not make its decisions by applying documented policies neutrally and objectively, with integrity and fairness, and does not allow ICANN to remain accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.[68] Its decision materially harmed Merck by depriving it of an accurate review of its complaints in its IRP, and failing to address the serious errors in its LRO Determinations.

b. ICANN Board Breaches in Acceptance of Erroneous Expert Determinations

59. ICANN argues in its Response that the ICANN Board took no action with respect to evaluating or accepting the Expert Determinations.[69] While the foregoing discussion concerning the BGC's substantive review of the LRO Determinations is prima facie evidence of the ICANN Board's evaluation of the Expert Determinations, it is also the case that by denying Merck's RFR, the ICANN Board accepted the LRO Determinations.

USD 62 million in auctions of last resort, including USD 25 million alone for one gTLD (.app). See "New gTLD Auction Proceeds at: http://newgtlds.icann.org/en/applicants/auctions/proceeds. A copy is provided at Annex 67.

[65] ICANN Response, paragraph 4.

[66] Improper substantive review, as indicated by the BGC in RFR14-9 at page 6 (Annex 45); lack of appropriate expertise in intellectual property disputes, AGB, Section 3.4.4 (Annex 21).

[67] ICANN Bylaws, Article IV, Section 3.4. Annex 16.

[68] ICANN Bylaws, Article I, Sections 2.8 and 2.10. Annex 16.

[69] ICANN Response, paragraph 36.

60. ICANN has been less than clear as to the legal status of expert determinations by objection panels, and how those determinations are integrated into the gTLD application process. The AGB states that "[t]he findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process."[70] Expert determinations are generally binding, and this view is supported by ICANN's statement that it will be accepted within the dispute resolution process.

61. However, by referring to the expert determination as "advice", and given the ICANN Board's actions regarding implementation of expert determinations subject to accountability mechanisms, it is clear that in at least some situations, it is the ICANN Board itself which has the discretion and is responsible for accepting or rejecting expert determinations.

62. It is ICANN's policy to place gTLD applications (and implementation of expert determinations) on hold pending the ICANN Board's review and thereafter act to accept or reject such determination. RFR 14-1 by Medistry LLC demonstrates this fact.[71] In RFR 14-1, a party which lost a community objection (one of the four objection procedures along with the LRO defined at AGB Module 3[72]) filed a RFR on the basis that the objector lacked appropriate standing and that the objection panel failed to follow the appropriate policy or procedure in assessing threshold standing requirements.

63. The BGC ultimately determined that the Objection did not satisfy the appropriate procedures defined in the AGB and "[a]ccordingly, the BGC has determined that the Requester's Application for .MED is therefore permitted to proceed to the next stage of process in the New gTLD Program."[73] Thus, the ICANN Board was responsible for rejecting the expert determination and permitting the gTLD application to continue after consideration of the RFR.

64. The ICANN Board similarly exercised its discretion to consider whether to accept expert determinations when it implemented a limited review procedure for "perceived inconsistent string confusion objections".[74] The ICANN New gTLD Program Committee[75], upon the recommendation

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[70] AGB, Section 3.4.6. Annex 21.
[71] Medistry LLC Request for Reconsideration 14-1 of January 17, 2014. Annex 68.
[72] See AGB, Section 3.5.4.
[73] ICANN BGC Determination on Reconsideration Request 14-1, page 12. Annex 69.
[74] Refer to Annexes 55(b) and 70 for more information about perceived inconsistent string confusion objections.
[75] The ICANN NGPC is a committee of the Board, such as the BGC. See ICANN Bylaws, Article XII, Section 1. Annex 16.

of the BGC, identified several string confusion objection expert determinations as "not being in the best interest of the New gTLD Program and the Internet community".[76] The review mechanism (modifying the objection procedure in the AGB) considers "whether the original Expert Panel could have reasonably come to the decision" and provides the following remedies:

> (1) the original Expert Determination is supported by the standard of review and reference to the identified related Expert Determination, and **will stand as is**; or (2) the original Expert Determination reasonably cannot be supported based on the standard of review and reference to the identified related Expert Determinations, and **will be reversed**."[77]

65. The above-mentioned ICANN Board actions demonstrate that it is the ICANN Board which is responsible for accepting or rejecting expert determinations when called on to review complaints that policies or processes were not followed in objection proceedings.

66. Accordingly, when the BGC considered and rejected Merck's RFR, the ICANN Board itself was responsible for accepting the Expert Determinations. For the reasons explained above, the BGC did not perform its duties appropriately when reviewing Merck's RFR. Thus, the ICANN Board itself did not exercise due diligence and care in having an accurate assessment of the LRO Panel's Expert Determinations when it accepted those Determinations within the dispute resolution process, violating ICANN's duties under its Bylaws to make decisions by applying documented policies neutrally and objectively, with integrity and fairness. Similarly, the BGC's decision does not support ICANN's core value to remain accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.[78] This wrongful and inappropriate decision of the ICANN Board materially harmed Merck, as it deprived Merck of a resolution to its erroneous LRO Determinations.

c. ICANN Board Breaches in Implementation and Administration of Dispute Resolution Processes

67. ICANN contends that its Bylaws and Articles do not require appeal or review mechanism beyond those already provided.[79] While it is true that the Bylaws and Articles do not require that any

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[76] See Annex 70 concerning ICANN NGPC Resolutions 2014.10.12.NG02-NG03 and Rationale regarding Mechanism to Address Inconsistent String Confusion Objections.
[77] See id.
[78] See ICANN Bylaws, Article I, Sections 2.8 and 2.10, and Article IV, Section 3.4. Annex 16.
[79] ICANN Response, Section III.

specific mechanism be provided, ICANN's Bylaws and Articles do require that some minimum safeguards be in place.

68. The ICANN Board, when it adopted GNSO Recommendation 3 and implemented the LRO dispute resolution process in the AGB, committed itself to providing a dispute resolution process that permitted trademark holders the opportunity to object to gTLD applications on the basis of the potential for impermissible infringement. This decision by the ICANN Board, as with all its decisions, must be in accordance with ICANN's Articles of Incorporation and Bylaws. In particular, its decision must be made "in conformity with relevant principles of international law".[80]

69. The availability of remedies for certain egregious errors, including claims that a panel so imperfectly executed its powers such that a final decision on the merits had not been made, is a generally accepted principle or feature of dispute resolution processes in jurisdictions around the world.[81] As demonstrated by ICANN's improper acceptance of Merck's Expert Determinations, the dispute resolution process implemented by ICANN does not permit relief for parties claiming palpable error in the rendering of expert determinations. The ICANN Board's decision to implement and administer a dispute resolution process which lacks internationally-recognized safeguards is in violation of its obligations under its Articles.

70. Furthermore, it is fundamentally unfair and an affront to due process to those participants in the New gTLD Program with palpable mistakes in their determinations to fail to provide relief for those mistakes.

71. ICANN has been neither objective nor neutral in exercising its discretion to review complaints and provide relief. ICANN has entertained substantive review of certain errors for only a subset of all complaining parties, with no discernable basis for its discrimination between similarly-situated complaining parties.[82] It is improper for the ICANN Board to subjectively determine for itself, without independent or expert assessment, which claims for which it will permit substantive review.

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[80] ICANN Articles of Incorporation, paragraph 4. Annex 15.

[81] See in particular 9 USC Section 10(a)(4), recognizing that a court may vacate an arbitral award when it is demonstrated that the arbitrator so imperfectly executed its powers such that a mutual, final, and definite award upon the subject matter submitted was not made. See also 1996 English Arbitration Act, Sections 68-69 (http://www.legislation.gov.uk/ukpga/1996/23/contents); French Code de procédure civile (NCPC), Article 1502 (http://www.legifrance.gouv.fr); Swiss Loi fédérale sur le droit international privé (LDIP), Article 190 (https://www.admin.ch/opc/fr/classified-compilation/19870312/index.html#a190). Annex 71.

[82] See paragraph 75, Merck IRP Request.

ICANN should, in all circumstances, provide for independent and expert assessment of substantive questions when these questions are bound up with proper requests to the ICANN Board in the RFR. Its decision otherwise is not neutral, objective, or fair, and does not allow ICANN to remain accountable to the community through mechanisms that enhance ICANN's effectiveness, in violation of its Bylaws.[83]

72. The ICANN Board's decision to implement a dispute resolution process which lacked any ability to appeal, either to court or other tailored internal mechanism, is all the more outrageous especially since it was directed to utilize the UDRP process[84] (which permits an appeal to court at any time as well as a special provision to halt implementation of decisions under appropriate circumstances) as a procedural guide, and because ICANN put on notice early in the implementation process that novel objection procedures would inevitably result in errors[85].

73. It is furthermore important to note that ICANN's repeated suggestion to simply bring matters of infringement to court once such infringement occurs is inappropriate in the context of the LRO dispute.[86] ICANN is committed to a pre-delegation rights protection mechanism that allows trademark holders the opportunity to prevent the delegation of TLDs in the event of an impermissible potential for future trademark abuse. ICANN has prevented recourse to court or another appeal mechanism for palpable errors in the objection determination. This inability to seek recourse will lead to irrevocable harm which the LRO procedure was designed to prevent.[87] ICANN's suggestion to seek recourse after delegation fails to address the harm which has already been sustained.

74. Because of this, ICANN should have implemented some mechanism to address the inevitable errors in its procedure, in particular for palpable errors in rendered expert determinations. As opposed to ICANN's characterization[88], Merck is not arguing that a particular mechanism MUST have been utilized, but rather, that ICANN had an obligation to provide SOME process for relief in accordance with minimally basic requirements for such dispute resolution processes. ICANN, more than other

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[83] ICANN Bylaws, Article II, Sections 2.8 and 2.10. Annex 16.
[84] Draft GNSO Recommendation Summary, Recommendation 2.5.3.2 of September 14, 2006. Annex 63.
[85] See Annex 56 for a selection of public comments on objection procedures and appeal mechanisms.
[86] ICANN Response, paragraphs 10, 31, 51, 53, 56.
[87] See paragraphs 103-106, Merck IRP Request.
[88] See Section III, ICANN Response.

entities, is under an enhanced obligation to remain accountable to the Internet community through mechanisms that enhance ICANN's effectiveness and to provide due process and act fairly, pursuant to its own Bylaws[89] and its role as a monopolist[90].

75. Merck's challenge of ICANN Board actions in relation to the dispute resolution process is timely.[91] To begin, both of ICANN's accountability mechanisms require that the person or entity utilizing such mechanisms be materially affected by the ICANN action.[92] Merck could not reasonably expect to be materially harmed by ICANN's decision regarding the availability of relief mechanisms until such time that it received its materially erroneous LRO Determinations. To have standing at the time the AGB was adopted and the LRO implemented, for instance, Merck would have needed to assume a ridiculous coincidence of facts: (1) that another entity applied for gTLDs which were similar to Merck's trademarks[93], (2) that other entity failed to make sufficient assurances that its use of the gTLD would not be infringing, (3) Merck would need to utilize the LRO procedure, (4) the LRO panel would commit egregious errors in the rendering of its determination. Beyond the far stretch of the imagination that these series of eventualities would in fact take place, Merck would need to assume that ICANN would not perform a review of determinations prior to acceptance within the New gTLD Program[94], or individually consider and rectify any problematic issues upon complaint[95]. Indeed, the first opportunity for Merck to object to the dispute resolution process enacted by the ICANN Board was when it received its materially deficient Determinations.

76. Furthermore, as demonstrated by the ICANN Board's ability to modify the objection procedure at will, the ICANN Board's actual substantive modification of that procedure on at least two separate occasions, and the opportunity for the ICANN Board to further modify that procedure in light of the particular issues raised in Merck's RFR, the ICANN Board's decision to deny Merck's RFR became an appropriate point to challenge the dispute resolution process. This is because the ICANN Board's

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[89] ICANN Bylaws, Article I, Sections 2.8 and 2.10. Annex 16.
[90] See paragraph 74, Merck IRP Request.
[91] ICANN Response, paragraph 52.
[92] See ICANN Bylaws, Article IV, Sections 2.1 and 3.2. Annex 16.
[93] The AGB was adopted on June 6, 2012, before any applied-for gTLD strings were publicly announced on "New gTLD Reveal Day" on June 13, 2012. See http://newgtlds.icann.org/en/announcements-and-media/announcement-13jun12-en.
[94] AGB, Section 3.4.6. Annex 21.
[95] AGB, Section 5.1. Annex 21. "The Board reserves the right to individually consider an application for a new gTLD..."

decision to deny the RFR was in itself a relevant INACTION. By failing to provide adequate relief to Merck's claims, the ICANN Board failed to modify its dispute resolution process which demonstrably failed to provide certain minimum safeguards against charges that the LRO Panel made an egregious error in rendering its Determinations.

77. Accordingly, Merck raised its complaints regarding the ICANN Board's failures in the implementation and administration of the dispute resolution procedure at the earliest time in which material harm had occurred and within the appropriate timelines given ICANN's ongoing ability to modify the procedure at will.

IV. RELIEF REQUESTED

78. Based on the foregoing, Merck respectfully requests that the IRP Panel issue a declaration:

- Finding that the ICANN Board breached its Articles of Incorporation and its Bylaws by accepting expert determinations LRO2013-0009/0010/0011;
- Finding that the BGC and thus the ICANN Board breached its Articles of Incorporation and its Bylaws by rendering its materially incorrect and improper determination in Reconsideration Request 14-9;
- Finding that the ICANN Board breached its Articles of Incorporation and its Bylaws by failing to incorporate appropriate mechanisms for the resolution of palpable mistakes and material errors in expert determination LRO2013-0009/0010/0011;
- Requiring that ICANN instruct a DRSP to appoint a new LRO Panel or Panels to decide upon Merck's Legal Rights Objections with regard to New gTLD Application Nos. 1-1702-28003 (<.merck>), 1-1702-73085 (<.merck>), and 1-1704-28482 (<.merckmsd>), as Merck is entited to under Module 3 of the Applicant Guidebook, and/or provide any such relief as the Panel may find appropriate; and
- Awarding Merck its costs in this proceeding.

Respectfully submitted,

Dr. Torsten Bettinger
Bettinger Scheffelt Kobiako von Gamm
Counsel for Claimant

ANNEXES

60. Relevant ICDR Rules
    a. ICDR Rules, English Version, June 2014
    b. Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process
61. ICANN Independent Review – Booking.com BV v. ICANN, ICDR Case No. 50-20-1400-0247
62. New gTLD Program: Draft Applicant Guidebook (Draft RFP), Version 1, October 24, 2008
63. Draft GNSO Recommendation Summary – New gTLD Program, September 14, 2006
64. ICANN Board Governance Committee Recommendation on Reconsideration Request 13-5, August 1, 2013
65. ICANN New gTLD Program Explanatory Memorandum – Protection of Rights of Others in New gTLDs, October 22, 2008
66. ICANN Annual Report, 2012
67. ICANN New gTLD Auction Proceeds, as of May 1, 2015
68. Medistry LLC Request for Reconsideration 14-1, January 17, 2014
69. ICANN Board Governance Committee Determination on Reconsideration Request 14-1, June 21, 2014
70. ICANN New gTLD Program Committee Resolutions 2014.10.12.NG02-NG03, October 12, 2014.
71. Citation to Selected Laws on Matters of Arbitration Award Appeal and Review
    a. 9 U.S.C. 10
    b. 1996 English Arbitration Act, Section 68
    c. 1996 English Arbitration Act, Section 69
    d. French Code de procédure civile (NCPC), Article 1502
    e. Swiss Loi fédérale sur le droit international privé (LDIP), Article 190
72. ICANN Board Governance Committee Membership and Biographies

Annex 60a

International Dispute Resolution Procedures

(Including Mediation and Arbitration Rules)

Rules Amended and Effective June 1, 2014

Fee Schedule Amended and Effective June 1, 2014

To access the previous versions of the International Dispute Resolution Procedures (Including Mediation and Arbitration Rules) with the Fee Schedules, visit the Archived Rules areas of the site – click here.

Introduction

These Procedures are designed to provide a complete dispute resolution framework for disputing parties, their counsel, arbitrators, and mediators. They provide a balance between the autonomy of the parties to agree to the dispute resolution process they want and the need for process management by mediators and arbitrators.

The International Centre for Dispute Resolution® ("ICDR®") is the international division of the American Arbitration Association® ("AAA®"). The ICDR provides dispute resolution services around the world in locations chosen by the parties. ICDR arbitrations and mediations may be conducted in any language chosen by the parties. The ICDR Procedures reflect best international practices that are designed to deliver efficient, economic, and fair proceedings.

International Mediation

The parties may seek to settle their dispute through mediation. Mediation may be scheduled independently of arbitration or concurrently with the scheduling of the arbitration. In mediation, an impartial and independent mediator assists the parties in reaching a settlement but does not have the authority to make a binding decision or award. The Mediation Rules that follow provide a framework for the mediation.

The following pre-dispute mediation clause may be included in contracts:

In the event of any controversy or claim arising out of or relating to this contract, or a breach thereof, the parties hereto agree first to try and settle the dispute by mediation, administered by the International Centre for Dispute Resolution under its Mediation Rules, before resorting to arbitration, litigation, or some other dispute resolution procedure.

The parties should consider adding:

a. *The place of mediation shall be [city, (province or state), country]*; and

b. *The language(s) of the mediation shall be* _____.

If the parties want to use a mediator to resolve an existing dispute, they may enter into the following submission agreement:

The parties hereby submit the following dispute to mediation administered by the International Centre for Dispute Resolution in accordance with its International Mediation Rules. (The clause may also provide for the qualifications of the mediator(s), the place of mediation, and any other item of concern to the parties.)

International Arbitration

A dispute can be submitted to an arbitral tribunal for a final and binding decision. In ICDR arbitration, each party is given the opportunity to make a case presentation following the process provided by these Rules and the tribunal.

Parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

> *Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.*

The parties should consider adding:

a. *The number of arbitrators shall be (one or three);*

b. *The place of arbitration shall be [city, (province or state), country]; and*

c. The language(s) of the arbitration shall be _____.

For more complete clause-drafting guidance, please refer to the ***ICDR Guide to Drafting International Dispute Resolution Clauses*** on the Clause Drafting page at www.icdr.org. When writing a clause or agreement for dispute resolution, the parties may choose to confer with the ICDR on useful options. Please see the contact information provided in **How to File a Case with the ICDR**.

International Expedited Procedures

The Expedited Procedures provide parties with an expedited and simplified arbitration procedure designed to reduce the time and cost of an arbitration.

The Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds USD $250,000 exclusive of interest and the costs of arbitration. The parties may agree to the application of these Expedited Procedures on matters of any claim size.

Where parties intend that the Expedited Procedures shall apply regardless of the amount in dispute, they may consider the following clause:

> *Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Expedited Procedures.*

The parties should consider adding:

> a. *The place of arbitration shall be (city, [province or state], country); and*
>
> b. *The language(s) of the arbitration shall be* _____.

Features of the International Expedited Procedures:

> · Parties may choose to apply the Expedited Procedures to cases of any size;
>
> · Comprehensive filing requirements;
>
> · Expedited arbitrator appointment process with party input;
>
> · Appointment from an experienced pool of arbitrators ready to serve on an expedited basis;
>
> · Early preparatory conference call with the arbitrator requiring participation of parties and their representatives;
>
> · Presumption that cases up to $100,000 will be decided on documents only;
>
> · Expedited schedule and limited hearing days, if any; and
>
> · An award within 30 calendar days of the close of the hearing or the date established for the receipt of the parties' final statements and proofs.

Whenever a singular term is used in the International Mediation or International Arbitration Rules, such as "party," "claimant," or "arbitrator," that term shall include the plural if there is more than one such entity.

The English-language version of these Rules is the official text for questions of interpretation.

How to File a Case with the ICDR

Parties initiating a case with the International Centre for Dispute Resolution or the American Arbitration Association may file online via AAAWebFile® (File & Manage a Case) at www.icdr.org, by mail, or facsimile (fax). For filing assistance, parties may contact the ICDR directly at any ICDR or AAA office.

Mail:

International Centre for Dispute Resolution Case Filing Services

Contact Information Redacted

AAAWebFile: www.icdr.org

Email: Contact Information Redacted

Phone: Contact Information Redacted

Fax: Contact Information Redacted

Toll-free phone in the U.S. and Canada: Contact Information Redacted

Toll- free fax in the U.S. and Canada: Contact Information Redacted

For further information about these Rules, visit the ICDR website at www.icdr.org or

call Contact Information Redacted

International Mediation Rules

1. Agreement of Parties

Whenever parties have agreed in writing to mediate disputes under these International Mediation Rules or have provided for mediation or conciliation of existing or future international disputes under the auspices of the International Centre for Dispute Resolution (ICDR), the international division of the American Arbitration Association (AAA), or the AAA without designating particular Rules, they shall be deemed to have made these Rules, as amended and in effect as of the date of the submission of the dispute, a part of their agreement. The parties by mutual agreement may vary any part of these Rules including, but not limited to, agreeing to conduct the mediation via telephone or other electronic or technical means.

2. Initiation of Mediation

1. Any party or parties to a dispute may initiate mediation under the ICDR's auspices by making a request for mediation to any ICDR or AAA office or case management center via telephone, email, regular mail, or fax. Requests for mediation may also be filed online via AAA WebFile at www.icdr.org.

2. The party initiating the mediation shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the ICDR and the other party or parties as applicable:

a. a copy of the mediation provision of the parties' contract or the parties' stipulation to mediate;

b. the names, regular mail addresses, email addresses, and telephone numbers of all parties to the dispute and representatives, if any, in the mediation;

c. a brief statement of the nature of the dispute and the relief requested;

d. any specific qualifications the mediator should possess.

3. Where there is no preexisting stipulation or contract by which the parties have provided for mediation of existing or future disputes under the auspices of the ICDR, a party may request the ICDR to invite another party to participate in "mediation by voluntary submission." Upon receipt of such a request, the ICDR will contact the other party or parties involved in the dispute and attempt to obtain a submission to mediation.

3. Representation

Subject to any applicable law, any party may be represented by persons of the party's choice. The names and addresses of such persons shall be communicated in writing to all parties and to the ICDR.

4. Appointment of the Mediator

If the parties have not agreed to the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

a. Upon receipt of a request for mediation, the ICDR will send to each party a list of mediators from the ICDR's Panel of Mediators. The parties are encouraged to agree to a mediator from the submitted list and to advise the ICDR of their agreement.

b. If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference, and return the list to the ICDR. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the ICDR shall invite a mediator to serve.

c. If the parties fail to agree on any of the mediators listed, or if acceptable mediators are unable to serve, or if for any other reason the appointment cannot be made from the submitted list, the ICDR shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

5. Mediator's Impartiality and Duty to Disclose

1. ICDR mediators are required to abide by the *Model Standards of Conduct for Mediators* in effect at the time a mediator is appointed to a case. Where there is a conflict between the Model Standards and any provision of these Mediation Rules, these Mediation Rules shall govern. The Standards require mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality.

2. Prior to accepting an appointment, ICDR mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. ICDR mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties' dispute within the time frame desired by the parties. Upon receipt of such disclosures, the ICDR shall immediately communicate the disclosures to the parties for their comments.

3. The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

6. Vacancies

If any mediator shall become unwilling or unable to serve, the ICDR will appoint another mediator, unless the parties agree otherwise, in accordance with Rule 4.

7. Duties and Responsibilities of the Mediator

1. The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, un-coerced decision in which each party makes free and informed choices as to process and outcome.

2. The mediator is authorized to conduct separate or *ex parte* meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person, or otherwise.

3. The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a

party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.

4. The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.

5. In the event that a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation conference(s), the mediator may continue to communicate with the parties for a period of time in an ongoing effort to facilitate a complete settlement.

6. The mediator is not a legal representative of any party and has no fiduciary duty to any party.

8. Responsibilities of the Parties

1. The parties shall ensure that appropriate representatives of each party having authority to consummate a settlement attend the mediation conference.

2. Prior to and during the scheduled mediation conference(s), the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

9. Privacy

Mediation conferences and related mediation communications are private proceedings. The parties and their representatives may attend mediation conferences. Other persons may attend only with the permission of the parties and with the consent of the mediator.

10. Confidentiality

1. Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential.

2. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

3. The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law:

a. views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;

b. admissions made by a party or other participant in the course of the mediation proceedings;

c. proposals made or views expressed by the mediator; or

d. the fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

11. No Stenographic Record

There shall be no stenographic record of the mediation process.

12. Termination of Mediation

The mediation shall be terminated:

a. by the execution of a settlement agreement by the parties; or

b. by a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties' dispute; or

c. by a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated; or

d. when there has been no communication between the mediator and any party or party's representative for 21 days following the conclusion of the mediation conference.

13. Exclusion of Liability

Neither the ICDR nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the ICDR nor any mediator shall be liable to any party for any error, act, or omission in connection with any mediation conducted under these Rules.

14. Interpretation and Application of Rules

The mediator shall interpret and apply these Rules insofar as they relate to the mediator's duties and responsibilities. All other Rules shall be interpreted and applied by the ICDR.

15. Deposits

Unless otherwise directed by the mediator, the ICDR will require the parties to deposit in advance of the mediation conference such sums of money as it, in consultation with the mediator, deems necessary to cover the costs and expenses of the mediation and shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation.

16. Expenses

All expenses of the mediation, including required travel and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

17. Cost of Mediation

There is no filing fee to initiate a mediation or a fee to request the ICDR to invite parties to mediate.

The cost of mediation is based on the hourly mediation rate published on the mediator's ICDR profile. This rate covers both mediator compensation and an allocated portion for the ICDR's services. There is a four-hour minimum charge for a mediation conference. Expenses referenced in Rule 16 may also apply.

If a matter submitted for mediation is withdrawn or cancelled or results in a settlement after the agreement to mediate is filed but prior to the mediation conference, the cost is $250 plus any mediator time and charges incurred.

The parties will be billed equally for all costs unless they agree otherwise.

If you have questions about mediation costs or services, please visit our website at www.icdr.org or contact us at Contact Information Redacted

18. Language of Mediation

If the parties have not agreed otherwise, the language(s) of the mediation shall be that of the documents containing the mediation agreement.

Conference Room Rental

The costs described above do not include the use of ICDR conference rooms. Conference rooms are available on a rental basis. Please contact your local ICDR office for availability and rates.

International Arbitration Rules

Article 1: Scope of These Rules

1. Where parties have agreed to arbitrate disputes under these International Arbitration Rules ("Rules"), or have provided for arbitration of an international dispute by the International Centre for Dispute Resolution (ICDR) or the American Arbitration Association (AAA) without designating particular rules, the arbitration shall take place in accordance with these Rules as in effect at the date of commencement of the arbitration, subject to modifications that the parties may adopt in writing. The ICDR is the Administrator of these Rules.

2. These Rules govern the arbitration, except that, where any such rule is in conflict with any provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

3. When parties agree to arbitrate under these Rules, or when they provide for arbitration of an international dispute by the ICDR or the AAA without designating particular rules, they thereby authorize the ICDR to administer the arbitration. These Rules specify the duties and responsibilities of the ICDR, a division of the AAA, as the Administrator. The Administrator may provide services through any of the ICDR's case management offices or through the facilities of the AAA or arbitral institutions with which the ICDR or the AAA has agreements of cooperation. Arbitrations administered under these Rules shall be administered only by the ICDR or by an individual or organization authorized by the ICDR to do so.

4. Unless the parties agree or the Administrator determines otherwise, the International Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds USD $250,000 exclusive of interest and the costs of arbitration. The parties may also agree to use the International Expedited Procedures in other cases. The International Expedited Procedures shall be applied as described in Articles E-1 through E-10 of these Rules, in addition to any other portion of these Rules that is not in conflict with the Expedited Procedures. Where no party's claim or counterclaim exceeds USD $100,000 exclusive of interest, attorneys' fees, and other arbitration costs, the dispute shall be resolved by written submissions only unless the arbitrator determines that an oral hearing is necessary.

Commencing the Arbitration

Article 2: Notice of Arbitration

1. The party initiating arbitration ("Claimant") shall, in compliance with Article 10, give written Notice of Arbitration to the Administrator and at the same time to the party against whom a claim is being made ("Respondent"). The Claimant may also initiate the arbitration through the Administrator's online filing system located at www.icdr.org.

2. The arbitration shall be deemed to commence on the date on which the Administrator receives the Notice of Arbitration.

3. The Notice of Arbitration shall contain the following information:

a. a demand that the dispute be referred to arbitration;

b. the names, addresses, telephone numbers, fax numbers, and email addresses of the parties and, if known, of their representatives;

c. a copy of the entire arbitration clause or agreement being invoked, and, where claims are made under more than one arbitration agreement, a copy of the arbitration agreement under which each claim is made;

d. a reference to any contract out of or in relation to which the dispute arises;

e. a description of the claim and of the facts supporting it;

f. the relief or remedy sought and any amount claimed; and

g. optionally, proposals, consistent with any prior agreement between or among the parties, as to the means of designating the arbitrators, the number of arbitrators, the place of arbitration, the language(s) of the arbitration, and any interest in mediating the dispute.

4. The Notice of Arbitration shall be accompanied by the appropriate filing fee.

5. Upon receipt of the Notice of Arbitration, the Administrator shall communicate with all parties with respect to the arbitration and shall acknowledge the commencement of the arbitration.

Article 3: Answer and Counterclaim

1. Within 30 days after the commencement of the arbitration, Respondent shall submit to Claimant, to any other parties, and to the Administrator a written Answer to the Notice of Arbitration.

2. At the time Respondent submits its Answer, Respondent may make any counterclaims covered by the agreement to arbitrate or assert any setoffs and Claimant shall within 30 days submit to Respondent, to any other parties, and to the Administrator a written Answer to the counterclaim or setoffs.

3. A counterclaim or setoff shall contain the same information required of a Notice of Arbitration under Article 2(3) and shall be accompanied by the appropriate filing fee.

4. Respondent shall within 30 days after the commencement of the arbitration submit to Claimant, to any other parties, and to the Administrator a response to any proposals by Claimant not previously agreed upon, or submit its own proposals, consistent with any prior agreement between or among the parties, as to the means of designating the arbitrators, the number of arbitrators, the place of the arbitration, the language(s) of the arbitration, and any interest in mediating the dispute.

5. The arbitral tribunal, or the Administrator if the tribunal has not yet been constituted, may extend any of the time limits established in this Article if it considers such an extension justified.

6. Failure of Respondent to submit an Answer shall not preclude the arbitration from proceeding.

7. In arbitrations with multiple parties, Respondent may make claims or assert setoffs against another Respondent and Claimant may make claims or assert setoffs against another Claimant in accordance with the provisions of this Article 3.

Article 4: Administrative Conference

The Administrator may conduct an administrative conference before the arbitral tribunal is constituted to facilitate party discussion and agreement on issues such as arbitrator selection, mediating the dispute, process efficiencies, and any other administrative matters.

Article 5: Mediation

Following the time for submission of an Answer, the Administrator may invite the parties to mediate in accordance with the ICDR's International Mediation Rules. At any stage of the proceedings, the parties may agree to mediate in accordance with the ICDR's International Mediation Rules. Unless the parties agree otherwise, the mediation shall proceed concurrently with arbitration and the mediator shall not be an arbitrator appointed to the case.

Article 6: Emergency Measures of Protection

1. A party may apply for emergency relief before the constitution of the arbitral tribunal by submitting a written notice to the Administrator and to all other parties setting forth the nature of the relief sought, the reasons why such relief is required on an emergency basis, and the reasons why the party is entitled to such relief. The notice shall be submitted concurrent with or following the submission of a Notice of Arbitration. Such notice may be given by email, or as otherwise permitted by Article 10, and must include a statement certifying that all parties have been notified or an explanation of the steps taken in good faith to notify all parties.

2. Within one business day of receipt of the notice as provided in Article 6(1), the Administrator shall appoint a single emergency arbitrator. Prior to accepting appointment, a prospective emergency arbitrator shall, in accordance with Article 13, disclose to the Administrator any circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the Administrator to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.

3. The emergency arbitrator shall as soon as possible, and in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such schedule shall provide a reasonable opportunity to all parties to be heard and may provide for proceedings by telephone, video, written submissions, or other suitable means, as alternatives to an in-person hearing. The emergency arbitrator shall have the authority vested in the arbitral tribunal under Article 19, including the authority to rule on her/his own jurisdiction, and shall resolve any disputes over the applicability of this Article.

4. The emergency arbitrator shall have the power to order or award any interim or conservancy measures that the emergency arbitrator deems necessary, including injunctive relief and measures for the protection or conservation of property. Any such measures may take the form of an interim award or of an order. The emergency arbitrator shall give reasons in either case. The emergency arbitrator may modify or vacate the interim award or order. Any interim award or order shall have the same effect as an interim measure made pursuant to Article 24 and shall be binding on the parties when rendered. The parties shall undertake to comply with such an interim award or order without delay.

5. The emergency arbitrator shall have no further power to act after the arbitral tribunal is constituted. Once the tribunal has been constituted, the tribunal may reconsider, modify, or vacate the interim award or order of emergency relief issued by the emergency arbitrator. The emergency arbitrator may not serve as a member of the tribunal unless the parties agree otherwise.

6. Any interim award or order of emergency relief may be conditioned on provision of appropriate security by the party seeking such relief.

7. A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this Article 6 or with the agreement to arbitrate or a waiver of the right to arbitrate.

8. The costs associated with applications for emergency relief shall be addressed by the emergency arbitrator, subject to the power of the arbitral tribunal to determine finally the allocation of such costs.

Article 7: Joinder

1. A party wishing to join an additional party to the arbitration shall submit to the Administrator a Notice of Arbitration against the additional party. No additional party may be joined after the appointment of any arbitrator, unless all parties, including the additional party, otherwise agree. The party wishing to join the additional party shall, at that same time, submit the Notice of Arbitration to the additional party and all other parties. The date on which such Notice of Arbitration is received by the Administrator shall be deemed to be the date of the commencement of arbitration against the additional party. Any joinder shall be subject to the provisions of Articles 12 and 19.

2. The request for joinder shall contain the same information required of a Notice of Arbitration under Article 2(3) and shall be accompanied by the appropriate filing fee.

3. The additional party shall submit an Answer in accordance with the provisions of Article 3.

4. The additional party may make claims, counterclaims, or assert setoffs against any other party in accordance with the provisions of Article 3.

Article 8: Consolidation

1. At the request of a party, the Administrator may appoint a consolidation arbitrator, who will have the power to consolidate two or more arbitrations pending under these Rules, or these and other arbitration rules administered by the AAA or ICDR, into a single arbitration where:

a. the parties have expressly agreed to consolidation; or

b. all of the claims and counterclaims in the arbitrations are made under the same arbitration agreement; or

c. the claims, counterclaims, or setoffs in the arbitrations are made under more than one arbitration agreement; the arbitrations involve the same parties; the disputes in the arbitrations arise in connection with the same legal relationship; and the consolidation arbitrator finds the arbitration agreements to be compatible.

2. A consolidation arbitrator shall be appointed as follows:

a. The Administrator shall notify the parties in writing of its intention to appoint a consolidation arbitrator and invite the parties to agree upon a procedure for the appointment of a consolidation arbitrator.

b. If the parties have not within 15 days of such notice agreed upon a procedure for appointment of a consolidation arbitrator, the Administrator shall appoint the consolidation arbitrator.

c. Absent the agreement of all parties, the consolidation arbitrator shall not be an arbitrator who is appointed to any pending arbitration subject to potential consolidation under this Article.

d. The provisions of Articles 13-15 of these Rules shall apply to the appointment of the consolidation arbitrator.

3. In deciding whether to consolidate, the consolidation arbitrator shall consult the parties and may consult the arbitral tribunal(s) and may take into account all relevant circumstances, including:

a. applicable law;

b. whether one or more arbitrators have been appointed in more than one of the arbitrations and, if so, whether the same or different persons have been appointed;

c. the progress already made in the arbitrations;

d. whether the arbitrations raise common issues of law and/or facts; and

e. whether the consolidation of the arbitrations would serve the interests of justice and efficiency.

4. The consolidation arbitrator may order that any or all arbitrations subject to potential consolidation be stayed pending a ruling on a request for consolidation.

5. When arbitrations are consolidated, they shall be consolidated into the arbitration that commenced first, unless otherwise agreed by all parties or the consolidation arbitrator finds otherwise.

6. Where the consolidation arbitrator decides to consolidate an arbitration with one or more other arbitrations, each party in those arbitrations shall be deemed to have waived its right to appoint an arbitrator. The consolidation arbitrator may revoke the appointment of any arbitrators and may select one of the previously-appointed tribunals to serve in the consolidated proceeding. The Administrator shall, as necessary, complete the appointment of the tribunal in the consolidated proceeding. Absent the agreement of all parties, the consolidation arbitrator shall not be appointed in the consolidated proceeding.

7. The decision as to consolidation, which need not include a statement of reasons, shall be rendered within 15 days of the date for final submissions on consolidation.

Article 9: Amendment or Supplement of Claim, Counterclaim, or Defense

Any party may amend or supplement its claim, counterclaim, setoff, or defense unless the arbitral tribunal considers it inappropriate to allow such amendment or supplement because of the party's delay in making it, prejudice to the other parties, or any other circumstances. A party may not amend or supplement a claim or counterclaim if the amendment or supplement would fall outside the scope of the agreement to arbitrate. The tribunal may permit an amendment or supplement subject to an award of costs and/or the payment of filing fees as determined by the Administrator.

Article 10: Notices

1. Unless otherwise agreed by the parties or ordered by the arbitral tribunal, all notices and written communications may be transmitted by any means of communication that allows for a record of its transmission including mail, courier, fax, or other written forms of electronic communication addressed to the party or its representative at its last- known address, or by personal service.

2. For the purpose of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice is made. If the last day of such period is an official holiday at the place received, the period is extended until the first business day that follows. Official holidays occurring during the running of the period of time are included in calculating the period.

The Tribunal

Article 11: Number of Arbitrators

If the parties have not agreed on the number of arbitrators, one arbitrator shall be appointed unless the Administrator determines in its discretion that three arbitrators are appropriate because of the size, complexity, or other circumstances of the case.

Article 12: Appointment of Arbitrators

1. The parties may agree upon any procedure for appointing arbitrators and shall inform the Administrator as to such procedure. In the absence of party agreement as to the method of appointment, the Administrator may use the ICDR list method as provided in Article 12(6).

2. The parties may agree to select arbitrators, with or without the assistance of the Administrator. When such selections are made, the parties shall take into account the arbitrators' availability to serve and shall notify the Administrator so that a Notice of Appointment can be communicated to the arbitrators, together with a copy of these Rules.

3. If within 45 days after the commencement of the arbitration, all parties have not agreed on a procedure for appointing the arbitrator(s) or have not agreed on the selection of the arbitrator(s), the Administrator shall, at the written request of any party, appoint the arbitrator(s). Where the parties have agreed upon a procedure for selecting the arbitrator(s), but all appointments have not been made within the time limits provided by that procedure, the Administrator shall, at the written request of any

party, perform all functions provided for in that procedure that remain to be performed.

4. In making appointments, the Administrator shall, after inviting consultation with the parties, endeavor to appoint suitable arbitrators, taking into account their availability to serve. At the request of any party or on its own initiative, the Administrator may appoint nationals of a country other than that of any of the parties.

5. If there are more than two parties to the arbitration, the Administrator may appoint all arbitrators unless the parties have agreed otherwise no later than 45 days after the commencement of the arbitration.

6. If the parties have not selected an arbitrator(s) and have not agreed upon any other method of appointment, the Administrator, at its discretion, may appoint the arbitrator(s) in the following manner using the ICDR list method. The Administrator shall send simultaneously to each party an identical list of names of persons for consideration as arbitrator(s). The parties are encouraged to agree to an arbitrator(s) from the submitted list and shall advise the Administrator of their agreement. If, after receipt of the list, the parties are unable to agree upon an arbitrator(s), each party shall have 15 days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the Administrator. The parties are not required to exchange selection lists. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on the parties' lists, and in accordance with the designated order of mutual preference, the Administrator shall invite an arbitrator(s) to serve. If the parties fail to agree on any of the persons listed, or if acceptable arbitrators are unable or unavailable to act, or if for any other reason the appointment cannot be made from the submitted lists, the Administrator shall have the power to make the appointment without the submission of additional lists. The Administrator shall, if necessary, designate the presiding arbitrator in consultation with the tribunal.

7. The appointment of an arbitrator is effective upon receipt by the Administrator of the Administrator's Notice of Appointment completed and signed by the arbitrator.

Article 13: Impartiality and Independence of Arbitrator

1. Arbitrators acting under these Rules shall be impartial and independent and shall act in accordance with the terms of the Notice of Appointment provided by the Administrator.

2. Upon accepting appointment, an arbitrator shall sign the Notice of Appointment provided by the Administrator affirming that the arbitrator is available to serve and is independent and impartial. The arbitrator shall disclose any circumstances that may give rise to justifiable doubts as to the arbitrator's impartiality or independence and any other relevant facts the arbitrator wishes to bring to the attention of the parties.

3. If, at any stage during the arbitration, circumstances arise that may give rise to such doubts, an arbitrator or party shall promptly disclose such information to all parties and to the Administrator. Upon receipt of such information from an arbitrator or a party, the Administrator shall communicate it to all parties and to the tribunal.

4. Disclosure by an arbitrator or party does not necessarily indicate belief by the arbitrator or party that the disclosed information gives rise to justifiable doubts as to the arbitrator's impartiality or independence.

5. Failure of a party to disclose any circumstances that may give rise to justifiable doubts as to an arbitrator's impartiality or independence within a reasonable period after the party becomes aware of such information constitutes a waiver of the right to challenge an arbitrator based on those circumstances.

6. No party or anyone acting on its behalf shall have any *ex parte* communication relating to the case with any arbitrator, or with any candidate for party-appointed arbitrator, except to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or impartiality and independence in relation to the parties, or to discuss the suitability of candidates for selection as a presiding arbitrator where the parties or party-appointed arbitrators are to participate in that selection. No party or anyone acting on its behalf shall have any *ex parte* communication relating to the case with any candidate for presiding arbitrator.

Article 14: Challenge of an Arbitrator

1. A party may challenge an arbitrator whenever circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence. A party shall send a written notice of the challenge to the Administrator within 15 days after being notified of the appointment of the arbitrator or within 15 days after the circumstances giving rise to the challenge become known to that party. The challenge shall state in writing the reasons for the challenge. The party shall not send this notice to any member of the arbitral tribunal.

2. Upon receipt of such a challenge, the Administrator shall notify the other party of the challenge and give such party an opportunity to respond. The Administrator shall not send the notice of challenge to any member of the tribunal but shall notify the tribunal that a challenge has been received, without identifying the party challenging. The Administrator may advise the challenged arbitrator of the challenge and request information from the challenged arbitrator relating to the challenge. When an arbitrator has been challenged by a party, the other party may agree to the acceptance of the challenge and, if there is agreement, the arbitrator shall withdraw. The challenged arbitrator, after consultation with the Administrator, also may withdraw in the absence of such agreement. In neither case does withdrawal imply acceptance of the validity of the grounds for the challenge.

3. If the other party does not agree to the challenge or the challenged arbitrator does not withdraw, the Administrator in its sole discretion shall make the decision on the challenge.

4. The Administrator, on its own initiative, may remove an arbitrator for failing to perform his or her duties.

Article 15: Replacement of an Arbitrator

1. If an arbitrator resigns, is incapable of performing the duties of an arbitrator, or is removed for any reason and the office becomes vacant, a substitute arbitrator shall be appointed pursuant to the provisions of Article 12, unless the parties otherwise agree.

2. If a substitute arbitrator is appointed under this Article, unless the parties otherwise agree the arbitral tribunal shall determine at its sole discretion whether all or part of the case shall be repeated.

3. If an arbitrator on a three-person arbitral tribunal fails to participate in the arbitration for reasons other than those identified in Article 15(1), the two other arbitrators shall have the power in their sole discretion to continue the arbitration and to make any decision, ruling, order, or award, notwithstanding the failure of the third arbitrator to participate. In determining whether to continue the arbitration or to render any decision, ruling, order, or award without the participation of an arbitrator, the two other arbitrators shall take into account the stage of the arbitration, the reason, if any, expressed by the third arbitrator for such non-participation and such other matters as they consider appropriate in the circumstances of the case. In the event that the two other arbitrators determine not to continue the arbitration without the participation of the third arbitrator, the Administrator on proof satisfactory to it shall declare the office vacant, and a substitute arbitrator shall be appointed pursuant to the provisions of Article 12, unless the parties otherwise agree.

General Conditions

Article 16: Party Representation

Any party may be represented in the arbitration. The names, addresses, telephone numbers, fax numbers, and email addresses of representatives shall be communicated in writing to the other party and to the Administrator. Unless instructed otherwise by the Administrator, once the arbitral tribunal has been established, the parties or their representatives may communicate in writing directly with the tribunal with simultaneous copies to the other party and, unless otherwise instructed by the Administrator, to the Administrator. The conduct of party representatives shall be in accordance with such guidelines as the ICDR may issue on the subject.

Article 17: Place of Arbitration

1. If the parties do not agree on the place of arbitration by a date established by the Administrator, the Administrator may initially determine the place of arbitration, subject to the power of the arbitral tribunal to determine finally the place of arbitration within 45 days after its constitution.

2. The tribunal may meet at any place it deems appropriate for any purpose, including to conduct hearings, hold conferences, hear witnesses, inspect property or documents, or deliberate, and, if done elsewhere than the place of arbitration, the arbitration shall be deemed conducted at the place of arbitration and any award shall be deemed made at the place of arbitration.

Article 18: Language of Arbitration

If the parties have not agreed otherwise, the language(s) of the arbitration shall be the language(s) of the documents containing the arbitration agreement, subject to the power of the arbitral tribunal to determine otherwise. The tribunal may order that any documents delivered in another language shall be accompanied by a translation into the language(s) of the arbitration.

Article 19: Arbitral Jurisdiction

1. The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement(s), or with respect to whether all of the claims, counterclaims, and setoffs made in the arbitration may be determined in a single arbitration.

2. The tribunal shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an agreement independent of the other terms of the contract. A decision by the tribunal that the contract is null and void shall not for that reason alone render invalid the arbitration clause.

3. A party must object to the jurisdiction of the tribunal or to arbitral jurisdiction respecting the admissibility of a claim, counterclaim, or setoff no later than the filing of the Answer, as provided in Article 3, to the claim, counterclaim, or setoff that gives rise to the objection. The tribunal may extend such time limit and may rule on any objection under this Article as a preliminary matter or as part of the final award.

4. Issues regarding arbitral jurisdiction raised prior to the constitution of the tribunal shall not preclude the Administrator from proceeding with administration and shall be referred to the tribunal for determination once constituted.

Article 20: Conduct of Proceedings

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.

2. The tribunal shall conduct the proceedings with a view to expediting the resolution of the dispute. The tribunal may, promptly after being constituted, conduct a preparatory conference with the parties for the purpose of organizing, scheduling, and agreeing to procedures, including the setting of deadlines for any submissions by the parties. In establishing procedures for the case, the tribunal and the parties may consider how technology, including electronic communications, could be used to increase the efficiency and economy of the proceedings.

3. The tribunal may decide preliminary issues, bifurcate proceedings, direct the order of proof, exclude cumulative or irrelevant testimony or other evidence, and direct the parties to focus their presentations on issues whose resolution could dispose of all or part of the case.

4. At any time during the proceedings, the tribunal may order the parties to produce documents, exhibits, or other evidence it deems necessary or appropriate. Unless the parties agree otherwise in writing, the tribunal shall apply Article 21.

5. Documents or information submitted to the tribunal by one party shall at the same time be transmitted by that party to all parties and, unless instructed otherwise by the Administrator, to the Administrator.

6. The tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence.

7. The parties shall make every effort to avoid unnecessary delay and expense in the arbitration. The arbitral tribunal may allocate costs, draw adverse inferences, and take such additional steps as are necessary to protect the efficiency and integrity of the arbitration.

Article 21: Exchange of Information

1. The arbitral tribunal shall manage the exchange of information between the parties with a view to maintaining efficiency and economy. The tribunal and the parties should endeavor to avoid unnecessary delay and expense while at the same time avoiding surprise, assuring equality of treatment, and safeguarding each party's opportunity to present its claims and defenses fairly.

2. The parties may provide the tribunal with their views on the appropriate level of information exchange for each case, but the tribunal retains final authority. To the extent that the parties wish to depart from this Article, they may do so only by written agreement and in consultation with the tribunal.

3. The parties shall exchange all documents upon which each intends to rely on a schedule set by the tribunal.

4. The tribunal may, upon application, require a party to make available to another party documents in that party's possession not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case. Requests for documents shall contain a description of specific documents or classes of documents, along with an explanation of their relevance and materiality to the outcome of the case.

5. The tribunal may condition any exchange of information subject to claims of commercial or technical confidentiality on appropriate measures to protect such confidentiality.

6. When documents to be exchanged are maintained in electronic form, the party in possession of such documents may make them available in the form (which may be paper copies) most convenient and economical for it, unless the tribunal determines, on application, that there is a compelling need for access to the documents in a different form. Requests for documents maintained in electronic form should be narrowly focused and structured to make searching for them as economical as possible. The tribunal may direct testing or other means of focusing and limiting any search.

7. The tribunal may, on application, require a party to permit inspection on reasonable notice of relevant premises or objects.

8. In resolving any dispute about pre-hearing exchanges of information, the tribunal shall require a requesting party to justify the time and expense that its request may involve and may condition granting such a request on the payment of part or all of the cost by the party seeking the information. The tribunal may also allocate the costs of providing information among the parties, either in an interim order or in an award.

9. In the event a party fails to comply with an order for information exchange, the tribunal may draw adverse inferences and may take such failure into account in allocating costs.

10. Depositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information in an arbitration under these Rules.

Article 22: Privilege

The arbitral tribunal shall take into account applicable principles of privilege, such as those involving the confidentiality of communications between a lawyer and client. When the parties, their counsel, or their documents would be subject under applicable law to different rules, the tribunal should, to the extent possible, apply the same rule to all parties, giving preference to the rule that provides the highest level of protection.

Article 23: Hearing

1. The arbitral tribunal shall give the parties reasonable notice of the date, time, and place of any oral hearing.

2. At least 15 days before the hearings, each party shall give the tribunal and the other parties the names and addresses of any witnesses it intends to present, the subject of their testimony, and the languages in which such witnesses will give their testimony.

3. The tribunal shall determine the manner in which witnesses are examined and who shall be present during witness examination.

4. Unless otherwise agreed by the parties or directed by the tribunal, evidence of witnesses may be presented in the form of written statements signed by them. In accordance with a schedule set by the tribunal, each party shall notify the tribunal and the other parties of the names of any witnesses who have presented a witness statement whom it requests to examine. The tribunal may require any witness to appear at a hearing. If a witness whose appearance has been requested fails to appear without valid excuse as determined by the tribunal, the tribunal may disregard any written statement by that witness.

5. The tribunal may direct that witnesses be examined through means that do not require their physical presence.

6. Hearings are private unless the parties agree otherwise or the law provides to the contrary.

Article 24: Interim Measures

1. At the request of any party, the arbitral tribunal may order or award any interim or conservatory measures it deems necessary, including injunctive relief and measures for the protection or conservation of property.

2. Such interim measures may take the form of an interim order or award, and the tribunal may require security for the costs of such measures.

3. A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

4. The arbitral tribunal may in its discretion allocate costs associated with applications for interim relief in any interim order or award or in the final award.

5. An application for emergency relief prior to the constitution of the arbitral tribunal may be made as provided for in Article 6.

Article 25: Tribunal-Appointed Expert

1. The arbitral tribunal, after consultation with the parties, may appoint one or more independent experts to report to it, in writing, on issues designated by the tribunal and communicated to the parties.

2. The parties shall provide such an expert with any relevant information or produce for inspection any relevant documents or goods that the expert may require. Any dispute between a party and the expert as to the relevance of the requested information or goods shall be referred to the tribunal for decision.

3. Upon receipt of an expert's report, the tribunal shall send a copy of the report to all parties and shall give the parties an opportunity to express, in writing, their opinion of the report. A party may examine any document on which the expert has relied in such a report.

4. At the request of any party, the tribunal shall give the parties an opportunity to question the expert at a hearing. At this hearing, parties may present expert witnesses to testify on the points at issue.

Article 26: Default

1. If a party fails to submit an Answer in accordance with Article 3, the arbitral tribunal may proceed with the arbitration.

2. If a party, duly notified under these Rules, fails to appear at a hearing without showing sufficient cause for such failure, the tribunal may proceed with the hearing.

3. If a party, duly invited to produce evidence or take any other steps in the proceedings, fails to do so within the time established by the tribunal without showing sufficient cause for such failure, the tribunal may make the award on the evidence before it.

Article 27: Closure of Hearing

1. The arbitral tribunal may ask the parties if they have any further submissions and upon receiving negative replies or if satisfied that the record is complete, the tribunal may declare the arbitral hearing closed.

2. The tribunal in its discretion, on its own motion, or upon application of a party, may reopen the arbitral hearing at any time before the award is made.

Article 28: Waiver

A party who knows of any non-compliance with any provision or requirement of the Rules or the arbitration agreement, and proceeds with the arbitration without promptly stating an objection in writing, waives the right to object.

Article 29: Awards, Orders, Decisions and Rulings

1. In addition to making a final award, the arbitral tribunal may make interim, interlocutory, or partial awards, orders, decisions, and rulings.

2. When there is more than one arbitrator, any award, order, decision, or ruling of the tribunal shall be made by a majority of the arbitrators.

3. When the parties or the tribunal so authorize, the presiding arbitrator may make orders, decisions, or rulings on questions of procedure, including exchanges of information, subject to revision by the tribunal.

Article 30: Time, Form, and Effect of Award

1. Awards shall be made in writing by the arbitral tribunal and shall be final and binding on the parties. The tribunal shall make every effort to deliberate and prepare the award as quickly as possible after the hearing. Unless otherwise agreed by the parties, specified by law, or determined by the Administrator, the final award shall be made no later than 60 days from the date of the closing of the hearing. The parties shall carry out any such award without delay and, absent agreement otherwise, waive irrevocably their right to any form of appeal, review, or recourse to any court or other judicial authority, insofar as such waiver can validly be made. The tribunal shall state the reasons upon which an award is based, unless the parties have agreed that no reasons need be given.

2. An award shall be signed by the arbitrator(s) and shall state the date on which the award was made and the place of arbitration pursuant to Article 17. Where there is more than one arbitrator and any of them fails to sign an award, the award shall include or be accompanied by a statement of the reason for the absence of such signature.

3. An award may be made public only with the consent of all parties or as required by law, except that the Administrator may publish or otherwise make publicly available selected awards, orders, decisions, and rulings that have become public in the course of enforcement or otherwise and, unless otherwise agreed by the parties, may publish

selected awards, orders, decisions, and rulings that have been edited to conceal the names of the parties and other identifying details.

4. The award shall be transmitted in draft form by the tribunal to the Administrator. The award shall be communicated to the parties by the Administrator.

5. If applicable law requires an award to be filed or registered, the tribunal shall cause such requirement to be satisfied. It is the responsibility of the parties to bring such requirements or any other procedural requirements of the place of arbitration to the attention of the tribunal.

Article 31: Applicable Laws and Remedies

1. The arbitral tribunal shall apply the substantive law(s) or rules of law agreed by the parties as applicable to the dispute. Failing such an agreement by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate.

2. In arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract.

3. The tribunal shall not decide as *amiable compositeur* or *ex aequo et bono* unless the parties have expressly authorized it to do so.

4. A monetary award shall be in the currency or currencies of the contract unless the tribunal considers another currency more appropriate, and the tribunal may award such pre-award and post-award interest, simple or compound, as it considers appropriate, taking into consideration the contract and applicable law(s).

5. Unless the parties agree otherwise, the parties expressly waive and forego any right to punitive, exemplary, or similar damages unless any applicable law(s) requires that compensatory damages be increased in a specified manner. This provision shall not apply to an award of arbitration costs to a party to compensate for misconduct in the arbitration.

Article 32: Settlement or Other Reasons for Termination

1. If the parties settle the dispute before a final award is made, the arbitral tribunal shall terminate the arbitration and, if requested by all parties, may record the settlement in the form of a consent award on agreed terms. The tribunal is not obliged to give reasons for such an award.

2. If continuation of the arbitration becomes unnecessary or impossible due to the non-payment of deposits required by the Administrator, the arbitration may be suspended or terminated as provided in Article 36(3).

3. If continuation of the arbitration becomes unnecessary or impossible for any reason other than as stated in Sections 1 and 2 of this Article, the tribunal shall inform the parties of its intention to terminate the arbitration. The tribunal shall thereafter issue an order terminating the arbitration, unless a party raises justifiable grounds for objection.

Article 33: Interpretation and Correction of Award

1. Within 30 days after the receipt of an award, any party, with notice to the other party, may request the arbitral tribunal to interpret the award or correct any clerical, typographical, or computational errors or make an additional award as to claims, counterclaims, or setoffs presented but omitted from the award.

2. If the tribunal considers such a request justified after considering the contentions of the parties, it shall comply with such a request within 30 days after receipt of the parties' last submissions respecting the requested interpretation, correction, or additional award. Any interpretation, correction, or additional award made by the tribunal shall contain reasoning and shall form part of the award.

3. The tribunal on its own initiative may, within 30 days of the date of the award, correct any clerical, typographical, or computational errors or make an additional award as to claims presented but omitted from the award.

4. The parties shall be responsible for all costs associated with any request for interpretation, correction, or an additional award, and the tribunal may allocate such costs.

Article 34: Costs of Arbitration

The arbitral tribunal shall fix the costs of arbitration in its award(s). The tribunal may allocate such costs among the parties if it determines that allocation is reasonable, taking into account the circumstances of the case.

Such costs may include:

a. the fees and expenses of the arbitrators;

b. the costs of assistance required by the tribunal, including its experts;

c. the fees and expenses of the Administrator;

d. the reasonable legal and other costs incurred by the parties;

e. any costs incurred in connection with a notice for interim or emergency relief pursuant to Articles 6 or 24;

f. any costs incurred in connection with a request for consolidation pursuant to Article 8; and

g. any costs associated with information exchange pursuant to Article 21.

Article 35: Fees and Expenses of Arbitral Tribunal

1. The fees and expenses of the arbitrators shall be reasonable in amount, taking into account the time spent by the arbitrators, the size and complexity of the case, and any other relevant circumstances.

2. As soon as practicable after the commencement of the arbitration, the Administrator shall designate an appropriate daily or hourly rate of compensation in consultation with the parties and all arbitrators, taking into account the arbitrators' stated rate of compensation and the size and complexity of the case.

3. Any dispute regarding the fees and expenses of the arbitrators shall be determined by the Administrator.

Article 36: Deposits

1. The Administrator may request that the parties deposit appropriate amounts as an advance for the costs referred to in Article 34.

2. During the course of the arbitration, the Administrator may request supplementary deposits from the parties.

3. If the deposits requested are not paid promptly and in full, the Administrator shall so inform the parties in order that one or more of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the proceedings. If the tribunal has not yet been appointed, the Administrator may suspend or terminate the proceedings.

4. Failure of a party asserting a claim or counterclaim to pay the required deposits shall be deemed a withdrawal of the claim or counterclaim.

5. After the final award has been made, the Administrator shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

Article 37: Confidentiality

1. Confidential information disclosed during the arbitration by the parties or by witnesses shall not be divulged by an arbitrator or by the Administrator. Except as provided in Article 30, unless otherwise agreed by the parties or required by applicable law, the members of the arbitral tribunal and the Administrator shall keep confidential all matters relating to the arbitration or the award.

2. Unless the parties agree otherwise, the tribunal may make orders concerning the confidentiality of the arbitration or any matters in connection with the arbitration and may take measures for protecting trade secrets and confidential information.

Article 38: Exclusion of Liability

The members of the arbitral tribunal, any emergency arbitrator appointed under Article 6, any consolidation arbitrator appointed under Article 8, and the Administrator shall not be liable to any party for any act or omission in connection with any arbitration under these Rules, except to the extent that such a limitation of liability is prohibited by applicable law. The parties agree that no arbitrator, emergency arbitrator, or consolidation arbitrator, nor the Administrator shall be under any obligation to make any statement about the arbitration, and no party shall seek to make any of these persons a party or witness in any judicial or other proceedings relating to the arbitration.

Article 39: Interpretation of Rules

The arbitral tribunal, any emergency arbitrator appointed under Article 6, and any consolidation arbitrator appointed under Article 8, shall interpret and apply these Rules insofar as they relate to their powers and duties. The Administrator shall interpret and apply all other Rules.

International Expedited Procedures

Article E-1: Scope of Expedited Procedures

1. These Expedited Procedures supplement the International Arbitration Rules as provided in Article 1(4).

Article E-2: Detailed Submissions

Parties are to present detailed submissions on the facts, claims, counterclaims, setoffs and defenses, together with all of the evidence then available on which such party intends to rely, in the Notice of Arbitration and the Answer. The arbitrator, in consultation with the parties, shall establish a procedural order, including a timetable, for completion of any written submissions.

Article E-3: Administrative Conference

The Administrator may conduct an administrative conference with the parties and their representatives to discuss the application of these procedures, arbitrator selection, mediating the dispute, and any other administrative matters.

Article E-4: Objection to the Applicability of the Expedited Procedures

If an objection is submitted before the arbitrator is appointed, the Administrator may initially determine the applicability of these Expedited Procedures, subject to the power of the arbitrator to make a final determination. The arbitrator shall take into account the amount in dispute and any other relevant circumstances.

Article E-5: Changes of Claim or Counterclaim

2. If, after filing of the initial claims and counterclaims, a party amends its claim or counterclaim to exceed USD $250,000.00 exclusive of interest and the costs of arbitration, the case will continue to be administered pursuant to these Expedited Procedures unless the parties agree otherwise, or the Administrator or the arbitrator determines otherwise. After the arbitrator is appointed, no new or different claim, counterclaim or setoff and no change in amount may be submitted except with the arbitrator’s consent.

Article E-6: Appointment and Qualifications of the Arbitrator

A sole arbitrator shall be appointed as follows. The Administrator shall simultaneously submit to each party an identical list of five proposed arbitrators. The parties may agree to an arbitrator from this list and shall so advise the Administrator. If the parties are unable to agree upon an arbitrator, each party may strike two names from the list and return it to the Administrator within 10 days from the transmittal date of the list to the parties. The parties are

not required to exchange selection lists. If the parties fail to agree on any of the arbitrators or if acceptable arbitrators are unable or unavailable to act, or if for any other reason the appointment cannot be made from the submitted lists, the Administrator may make the appointment without the circulation of additional lists. The parties will be given notice by the Administrator of the appointment of the arbitrator, together with any disclosures.

Article E-7: Procedural Conference and Order

After the arbitrator's appointment, the arbitrator may schedule a procedural conference call with the parties, their representatives, and the Administrator to discuss the procedure and schedule for the case. Within 14 days of appointment, the arbitrator shall issue a procedural order.

Article E-8: Proceedings by Written Submissions

In expedited proceedings based on written submissions, all submissions are due within 60 days of the date of the procedural order, unless the arbitrator determines otherwise. The arbitrator may require an oral hearing if deemed necessary.

Article E-9: Proceedings with an Oral Hearing

In expedited proceedings in which an oral hearing is to be held, the arbitrator shall set the date, time, and location of the hearing. The oral hearing shall take place within 60 days of the date of the procedural order unless the arbitrator deems it necessary to extend that period. Hearings may take place in person or via video conference or other suitable means, at the discretion of the arbitrator. Generally, there will be no transcript or stenographic record. Any party desiring a stenographic record may arrange for one. The oral hearing shall not exceed one day unless the arbitrator determines otherwise. The Administrator will notify the parties in advance of the hearing date.

Article E-10: The Award

Awards shall be made in writing and shall be final and binding on the parties. Unless otherwise agreed by the parties, specified by law, or determined by the Administrator, the award shall be made not later than 30 days from the date of the closing of the hearing or from the time established for final written submissions.

Administrative Fees

Administrative Fee Schedules (Standard and Flexible Fee)

The ICDR has two administrative fee options for parties filing claims or counterclaims: the Standard Fee Schedule and the Flexible Fee Schedule. The Standard Fee Schedule has a two-payment schedule, and the Flexible Fee Schedule has a three-payment schedule that offers lower initial filing fees but potentially higher total administrative fees of approximately 12% to 19% for cases that proceed to a hearing. The administrative fees of the ICDR are based on the amount of the claim or counterclaim. Arbitrator compensation is not included in this schedule. Unless the parties agree otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award.

Fees for incomplete or deficient filings: Where the applicable arbitration agreement does not reference the ICDR or the AAA, the ICDR will attempt to obtain the agreement of the other parties to the dispute to have the arbitration administered by the ICDR. However, where the ICDR is unable to obtain the agreement of the parties to have the ICDR administer the arbitration, the ICDR will administratively close the case and will not proceed with the administration of the arbitration. In these cases, the ICDR will return the filing fees to the filing party, less the amount specified in the fee schedule below for deficient filings.

Parties that file demands for arbitration that are incomplete or otherwise do not meet the filing requirements contained in these Rules shall also be charged the amount specified below for deficient filings if they fail or are unable to respond to the ICDR's request to correct the deficiency.

Fees for additional services: The ICDR reserves the right to assess additional administrative fees for services performed by the ICDR beyond those provided for in these Rules, which may be required by the parties' agreement or stipulation.

Suspension for Nonpayment: If arbitrator compensation or administrative charges have not been paid in full, the administrator may so inform the parties in order that one of them may advance the required payment. If such payment is not made, the tribunal may order the suspension or termination of the proceedings. If no arbitrator has yet been appointed, the ICDR may suspend or terminate the proceedings.

Standard Fee Schedule

An Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, setoff or additional claim, counterclaim, or setoff is filed. A Final Fee will be incurred for all cases that proceed to their first hearing. This fee will be payable in advance at the time that the first hearing is scheduled. This fee will be refunded at the conclusion of the case if no hearings have occurred. However, if the Administrator is not notified at least 24 hours before the time of the scheduled hearing, the Final Fee will remain due and will not be refunded.

These fees will be billed in accordance with the following schedule:

Fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are $2,800 for the filing fee, plus a $1,250 Case Service Fee.

Each party on cases filed under either the Flexible Fee Schedule or the Standard Fee Schedule that are held in abeyance for one year will be assessed an annual abeyance fee of $300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, failing which the matter will be administratively closed.

For more information, please contact the ICDR at Contact Information Redacted

Refund Schedule for Standard Fee Schedule

The ICDR offers a refund schedule on filing fees connected with the Standard Fee Schedule. For cases with claims up to $75,000, a minimum filing fee of $350 will not be refunded. For all other cases, a minimum fee of $600 will not be refunded. Subject to the minimum fee requirements, refunds will be calculated as follows:

· 100% of the filing fee, above the minimum fee, will be refunded if the case is settled or withdrawn within five calendar days of filing.

· 50% of the filing fee will be refunded if the case is settled or withdrawn between six and 30 calendar days of filing.

· 25% of the filing fee will be refunded if the case is settled or withdrawn between 31 and 60 calendar days of filing.

No refund will be made once an arbitrator has been appointed (this includes one arbitrator on a three-arbitrator panel). No refunds will be granted on awarded cases.

Note: The date of receipt of the demand for arbitration with the ICDR will be used to calculate refunds of filing fees for both claims and counterclaims.

Flexible Fee Schedule

A non-refundable Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. Upon receipt of the Demand for Arbitration, the ICDR will promptly initiate the case and notify all parties as well as establish the due date for filing of an Answer, which may include a Counterclaim. In order to proceed with the further administration of the arbitration and appointment of the arbitrator(s), the appropriate, non-refundable Proceed Fee outlined below must be paid.

If a Proceed Fee is not submitted within 90 days of the filing of the Claimant's Demand for Arbitration, the ICDR will administratively close the file and notify all parties.

No refunds or refund schedule will apply to the Filing or Proceed Fees once received.

The Flexible Fee Schedule below also may be utilized for the filing of counterclaims. However, as with the Claimant's claim, the counterclaim will not be presented to the arbitrator until the Proceed Fee is paid.

A Final Fee will be incurred for all claims and/or counterclaims that proceed to their first hearing. This fee will be payable in advance when the first hearing is scheduled but will be refunded at the conclusion of the case if no hearings have occurred. However, if the administrator is not notified of a cancellation at least 24 hours before the time of the scheduled hearing, the Final Fee will remain due and will not be refunded.

All fees will be billed in accordance with the following schedule:

Amount of Claim	Initial Filing Fee	Proceed Fee	Final Fee
Above $0 to $10,000	$400	$475	$200
Above $10,000 to $75,000	$625	$500	$300
Above $75,000 to $150,000	$850	$1,250	$750

Above $150,000 to $300,000	$1,000	$2,125	$1,250
Above $300,000 to $500,000	$1,500	$3,400	$1,750
Above $500,000 to $1,000,000	$2,500	$4,500	$2,500
Above $1,000,000 to $5,000,000	$2,500	$6,700	$3,250
Above $5,000,000 to $10,000,000	$3,500	$8,200	$4,000
Above $10,000,000	$4,500	$10,300 plus .01% of claim amount over $10,000,000 up to $65,000	$6,000
Nonmonetary Claims [1]	$2,000	$2,000	$1,250
Deficient Claim Filing Fee	$350		
Additional Services [2]			

1 This fee is applicable when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required to state a range of claims or be subject to a filing fee of $3,500 and a proceed fee of $8,200.

2 The ICDR reserves the right to assess additional administrative fees for services performed by the ICDR beyond those provided for in these Rules and which may be required by the parties' agreement or stipulation.

All fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are $1,000 for the Initial Filing Fee; $2,125 for the Proceed Fee; and $1,250 for the Final Fee.

Under the Flexible Fee Schedule, a party's obligation to pay the Proceed Fee shall remain in effect regardless of any agreement of the parties to stay, postpone, or otherwise modify the arbitration proceedings. Parties that, through mutual agreement, have held their case in abeyance for one year will be assessed an annual abeyance fee of $300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be administratively closed.

Note: The date of receipt by the ICDR of the demand/notice for arbitration will be used to calculate the 90-day time limit for payment of the Proceed Fee.

For more information, please contact the ICDR at Contact Information Redacted

There is no Refund Schedule in the Flexible Fee Schedule.

Expedited Procedures – Fees and Compensation

There are no additional administrative fees beyond the Fees outlined above to initiate a case under the Expedited Procedures. The compensation of the arbitrator will be determined by the Administrator, in consultation with the arbitrator, and in consideration of the specific nature of the case and the amount in dispute. There is no refund schedule for cases managed under the Expedited Procedures.

Hearing Room Rental

The fees described above do not cover the cost of hearing rooms, which are available on a rental basis. Check with the ICDR for availability and rates.

Annex 60b

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.

Annex 61

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Independent Review Process Panel

In the Matter of an Independent Review Process

Between:

Booking.com B.V.

Applicant

-and-

ICDR Case No: 50-20-1400-0247

Internet Corporation for Assigned Names and Numbers (ICANN)

Respondent

FINAL DECLARATION

The Panel:

Hon. A. Howard Matz
David H. Bernstein, Esq.
Stephen L. Drymer (Chair)

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DECLARATION

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

I. INTRODUCTION

1. This Declaration is issued in the context of an Independent Review Process ("**IRP**") as provided for in Article IV, Section 3 of the Bylaws of the Internet Corporation for Assigned Names and Numbers ("**ICANN**"; "**ICANN Bylaws**" or "**Bylaws**"). In accordance with those Bylaws, the conduct of this IRP is governed by the International Arbitration Rules of the International Centre for Dispute Resolution as amended and in effect June 1, 2009 ("**ICDR**"; "**ICDR Rules**") as supplemented by the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process ("**Supplementary Procedures**").

2. The subject matter of the dispute here concerns alleged conduct by the ICANN Board in relation to one particular facet of the process by which new generic top-level domains ("**gTLDs**", also known as gTLD "**strings**") are applied for, reviewed and delegated into the Internet's domain name system ("**DNS**") root zone.

3. As explained in this Declaration, the Applicant, Booking.com, alleges that, in establishing and overseeing the process by which so-called *string similarity reviews* are conducted, and in refusing to reconsider and overturn a decision to place Booking.com's applied-for gTLD string .hotels in a so-called *string contention set*, the Board acted in a manner inconsistent with applicable policies, procedures and rules as set out in ICANN's Articles of Incorporation, Bylaws and gTLD Applicant Guidebook ("**Guidebook**").

4. Reading between the lines of the parties' submissions, the Panel senses that both sides would welcome the opportunity to contribute to an exchange that might result in enabling disputants in future cases to avoid having to resort to an IRP to resolve issues such as have arisen here. Certainly the Panel considers that the present matter would ideally have been resolved amicably by the parties. This is particularly true given that the matter here concerns two of ICANN's guiding principles – transparency and fairness – as applied to one of ICANN's most essential activities – the delegation of new gTLDs[2] – in circumstances in which various members of the Internet community, including certain members of the ICANN Board's New gTLD Program Committee, have expressed their own concerns regarding the string similarity review process. That being the case, though, the Panel does not shy away from the duty imposed by the Bylaws to address the questions before it and to render the

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

[2] As stated in the very first sentence of the Guidebook: "New gTLDs have been in the forefront of ICANN's agenda since its creation."

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

II. THE PARTIES

A. The Applicant: Booking.com

5. The Applicant, Booking.com, is a limited liability company established under the law of the Netherlands. Booking.com describes itself as "the number one online hotel reservation service in the world, offering over 435,605 hotels and accommodations."[3] Booking.com's primary focus is on the U.S. and other English-language markets.

6. Booking.com is represented in this IRP by Mr. Flip Petillion and Mr. Jan Janssen of the law firm *Crowell & Moring* in Brussels, Belgium.

B. The Respondent: ICANN

7. The Respondent, ICANN, is a California not-for-profit public benefit corporation, formed in 1998. As set forth in Article I, Section 1 of its Bylaws, ICANN's mission is "to coordinate, at the overall level, the global Internet's system of unique identifiers, and in particular to ensure the stable and secure option of the Internet's unique identifier systems." ICANN describes itself as "a complex organization that facilitates input from a wide variety of Internet stakeholders. ICANN has a Board of Directors and staff members from around the globe, as well as an Ombudsman. ICANN, however, is much more than just the corporation—it is a community of participants."[4]

8. ICANN is represented in this IRP by Mr. Jeffrey A. LeVee, Esq. and Ms. Kate Wallace, Esq. of the law firm *Jones Day* in Los Angeles, California, USA.

III. FACTUAL AND PROCEDURAL BACKGROUND – IN BRIEF

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

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

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

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[3] Request, ¶ 10.

[4] Response, ¶ 11-12.

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

11. The Program has its origins in what the Guidebook refers to as "carefully deliberated policy development work" by the ICANN community.[6]

12. In 2005, ICANN's Generic Names Supporting Organization ("**GNSO**"), one of the groups that coordinates global Internet policy at ICANN, commenced a policy development process to consider the introduction of new gTLDs.[7] As noted in the Guidebook:

> *Representatives from a wide variety of stakeholder groups – governments, individuals, civil society, business and intellectual property constituencies, and the technology community – were engaged in discussions for more than 18 months on such questions as the demand, benefits and risks of new gTLDs, the selection criteria that should be applied, how gTLDs should be allocated, and the contractual conditions that should be required for new gTLD registries going forward.*

13. In October 2007, the GNSO formally completed its policy development work on new gTLDs and approved a set of 19 policy recommendations.

14. In June 2008, the ICANN Board decided to adopt the policies recommended by the GNSO.[8] As explained in the Guidebook, ICANN's work next focused on implementation of these recommendations, which it saw as "creating an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval."[9]

15. This process concluded with the decision by the ICANN Board in June 2011 to implement the New gTLD Program and its foundational instrument, the Guidebook.[10]

16. As described by ICANN in these proceedings, the Program "constitutes by far ICANN's most ambitious expansion of the Internet's naming system. The Program's goals include

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[6] Guidebook, *Preamble*

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

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

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

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

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

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

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

18. In accordance with the process set out in the Guidebook, Booking.com filed an application (Application ID 1-1016-75482) for the gTLD string .hotels.

19. At the same time, Despegar Online SRL ("**Despegar**"), a corporation established under the law of Uruguay, applied (Application ID 1-1249-87712) for the string .hoteis.

20. "Hoteis" is the Portuguese word for "hotels".

21. According to Booking.com, Despegar is "a competitor of Booking.com".[14] Booking.com claims that it intends "to operate .hotels as a secure Internet environment providing hotel reservation services for consumers, hotels, and other stakeholders,"[15] while Despegar similarly intends .hoteis to be dedicated primarily to "individuals that are interested in, and businesses that offer, hotel- and travel-related content."[16] That being said, a key difference between the two applications, as Booking.com acknowledges, is that Booking.com intends to focus the services it will offer under its proposed gTLD "on the U.S. (with its strongly Anglos-Saxon traditions) and other English-language markets,"[17] whereas Despegar intends to target "Portuguese-speaking" markets."[18]

22. As part of the Initial Evaluation to which all applied-for gTLDS were subject, .hotels and .hoteis were each required to undergo so-called *string review* in accordance with the Guidebook, the first component of which is a process known as *string similarity review*. As provided by the Guidebook, the string similarity review was conducted by an independent

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[11] Response, ¶ 14.

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

[1313] Request, ¶ 13. See also Guidebook, Module 1-2: "This Applicant Guidebook is the implementation of Board approved consensus policy concerning the introduction of new gTLDs, and has been revised extensively via public comment and consultation over a two-year period."

[1414] Request, ¶ 17.

[15] Request, ¶ 5.

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

[17] Request, ¶ 16.

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

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

23. On 26 February 2013 ICANN published the results of all of the string similarity reviews for all of the applications for new gTLDs submitted as part of the Program. The announcement revealed, among other things, that two "non-exact match" contention sets had been created: .hotels & .hoteis; and .unicorn & .unicom.[20] Booking.com's applied for string .hotels (as well as the .hoteis, .uncorn and .unicom strings) had thus failed the string similarity review.

24. The results of the string similarity review were notified to Booking.com by ICANN that same day. In its letter of 26 February 2013 ICANN wrote:

> *After careful consideration and extensive review performed against the criteria in Section 2.2.1.1 of the Applicant Guidebook, the String Similarity Panel has found that the applied-for string (.hotels) is visually similar to another applied-for string (.hoteis), creating a probability of user confusion.*
>
> *Due to this finding, the … two strings have been placed in a contention set.*[21]

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

C. DIDP Request and Request for Reconsideration

26. On 28 March 2013 Booking.com submitted a request for information under ICANN's Documentary Information Disclosure Policy ("**DIDP Request**") asking for "all documents directly and indirectly relating to (1) the standard used to determine whether gTLD strings are confusingly similar, and (2) the specific determination that .hotels and .hoteis are confusingly similar."[22]

27. On the same date, Booking.com also filed a formal Request for Reconsideration ("**Request for Reconsideration**"). The "specific action(s)" that Booking.com asked to be reconsidered were: the decision to place .hotels and .hoteis in a contention set; and the decision not to

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[19] See http://www.icc-uk.com/

[20] Request, Annex 3. ICANN published document dated 26 February 2013. As its name suggests, a "non-exact match" connotes a determination that two different (non-identical) strings are visually similar within the meaning of the Guidebook. Another752 applied-for gTLDs were put into 230 identical contention sets.

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

[22] Request, ¶ 30 and Annex 3.

provide a "detailed analysis or a reasoned basis" for the decision to place .hotels in contention.[23]

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

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

29. By letter dated 9 May 2013 Booking.com replied to ICANN, writing that "ICANN's response fails to provide any additional information or address any of Booking.com's concerns as conveyed in its DIDP Request or Request for Reconsideration."[25] On 14 May 2013, ICANN answered that it "intends to post the string similarity process documentation on or before ... 17 May 2013."[26] ICANN further informed Booking.com that "ICANN will afford you 30 days from the posting of the process document for the submission of a revised Request for Reconsideration."[27]

30. On 7 June 2013, ICANN published the "String Similarity New gTLD Evaluation Panel [i.e., the SSP] – Process Description" ("**SSP Process Description**").[28]

31. On 26 June 2013 Booking.com wrote to ICANN regarding both its DIDP Request and its 28 March 2013 Request for Reconsideration. In its letter, Booking.com noted among other things that "the generalized information ICANN thus far has provided does not explain a rationale for or analysis for the decision to put .hotels and .hoteis in a contention set and therefore does not allow Booking.com to appropriately amend its Request for Reconsideration." The letter concluded by stating: "Considering ICANN's obligations of transparency and accountability, there cannot be any 'compelling reason for confidentiality'.

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

[24] Request, Annex 5.

[25] Request, Annex 6.

[26] Request, Annex 7.

[27] Request, Annex 7.

[28] Request, Annex 8.

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

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

> *When ALL of the following features of a pairwise comparison [of non-exact match strings] are evident the evaluators found the string pair to be confusingly similar:*
>
> • *Strings of similar visual length on the page;*
>
> • *Strings within +/- 1 character of each other;*
>
> • *Strings where the majority of characters are the same and in the same position in each string; and*
>
> • *The two strings possess letter combinations that visually appear similar to other letters in the same position in each string*
>
> o *For example rn~m & l~i*

33. Meanwhile, on 7 July 2013 Booking.com had submitted its amended Request for Reconsideration. In its letter attaching the amended Request for Reconsideration, Booking.com stated: "Booking.com reserves the right to further amend its Request for Reconsideration upon receipt of the information it previously requested and urges ICANN to publish the requested information as specified in our letter of 26 June 2013."[32]

34. By virtue of Article IV, Section 3 of the Bylaws, ICANN's Board Governance Committee ("**BGC**") is charged with evaluating and making recommendation to the Board with respect to requests for reconsideration. The Board's New gTLD Program Committee ("**NGPC**") receives and acts on such recommendations on behalf of the ICANN Board. In accordance with this procedure, Booking.com's Request for Reconsideration was evaluated by the BGC. In a detailed analysis dated 1 August 2013, the BGC "conclude[d] that Booking.com has not

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[29] Request, Annex 9.

[30] Request, Annex 10.

[31] Request, Annex 11.

[32] Request, Annex 13.

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

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

D. The Cooperative Engagement Process

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

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

37. The CEP ultimately did not result in a resolution, and Booking.com duly commenced the present IRP.

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

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

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

[35] Request, Annex 17.

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

E. The IRP Proceedings

39. On 19 March 2014, Booking.com submitted a Notice of Independent Review, dated 18 March 2014, as well as a Request for Independent Review Process ("**Request**") accompanied by numerous supporting documents and reference materials.

40. In accordance with Article IV, Section 3(9) of the ICANN Bylaws, Booking.com requested that a three-member IRP panel be constituted to consider and determine the Request. As the omnibus standing panel referred to in Article IV, Section 3(6) of the ICANN Bylaws had yet to be established, Booking.com further proposed, in accordance with Article 6 of the ICDR Rules, that each party appoint one panelist, with the third (the Chair of the panel) to be appointed by the two party-appointed panelists.

41. On 25 April 2014, ICANN submitted a Response to ICANN's Request with supporting documents ("**Response**").

42. The parties having thereafter agreed on the number of panelists and the method of their appointment, David H. Bernstein, Esq. was duly appointed as panelist by Booking.com on 1 May 2014, and the Hon. A Howard Matz was duly appointed as panelist by ICANN on 30 May 2014.

43. On 17 July 2014, the ICDR notified the parties that Mr. Stephen L. Drymer had been duly nominated by the two party-appointed panelists as Chair of the Panel. Mr. Drymer's appointment became effective and the Panel was duly constituted as of 1 August 2014.

44. On 21 August 2014, further to consultations among the panelists and between the Panel and the parties, the Panel convened a preparatory conference with the parties (by telephone) for the purpose of discussing organizational matters, including a timetable for any further written statements or oral argument. Both parties requested the opportunity to make supplemental submissions and to present oral argument.

45. On 22 August 2014 the Panel issued Procedural Order No. 1 in which, among other things, it established a Procedural Timetable for the IRP. As specifically requested by the parties, the Procedural Order and Timetable provided for the submission of additional written statements by the parties as well as for a brief oral hearing to take place by telephone, all on dates proposed by and agreed between the parties.[36]

46. In accordance with the Procedural Timetable, on 6 October 2014 Booking.com submitted its Reply to ICANN's Response, accompanied by additional documents ("**Reply**").

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

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

F. The Hearing

48. As provided by Procedural Order No. 1 and the Procedural Timetable, a hearing was held (by telephone) on 10 December 2011, commencing at 9:00 PST/18:00 CET.

49. In the light of the significance of the issues raised by the parties, and given the many questions prompted by those issues and by the parties' extensive written submissions and supporting materials, the Panel indicated that it would allow the hearing to continue beyond the approximately one hour originally envisaged. The hearing ultimately lasted two and one-half hours. Counsel for each party made extensive oral submissions, including rebuttal and sur-rebuttal submissions, and responded to the panelists' questions.

50. Prior to the close of the hearing each party declared that it had no objection concerning the conduct of the proceedings, that it had no further oral submissions that it wished to make, and that it considered that it had had a full opportunity to present its case and to be heard.

51. As agreed and ordered prior to the close of the hearing, the parties were provided the opportunity to file limited additional materials post-hearing, in relation to a certain question asked of them by the Panel. This was done, and, on 13 December 2014, the proceedings were declared closed.

IV. ICANN ARTICLES, BYLAWS AND POLICIES – KEY ELEMENTS

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

A. Articles of Association

> *4. The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.*
>
> *[Underlining added]*

B. Bylaws

> ***ARTICLE I: MISSION AND CORE VALUES***
>
> *Section 1. MISSION*
>
> *The mission of The Internet Corporation for Assigned Names and Numbers ("ICANN") is to coordinate, at the overall level, the global Internet's systems of unique identifiers,*

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

[...]

Section 2. CORE VALUES

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

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

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

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

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

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

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

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

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

9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.

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

11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

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

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

[...]

ARTICLE III: TRANSPARENCY

Section 1. PURPOSE

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

[...]

ARTICLE IV: ACCOUNTABILITY AND REVIEW

Section 1. PURPOSE

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

Section 2. RECONSIDERATION

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

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

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

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

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

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

a. evaluate requests for review or reconsideration;

b. summarily dismiss insufficient requests;

c. evaluate requests for urgent consideration;

d. conduct whatever factual investigation is deemed appropriate;

e. request additional written submissions from the affected party, or from other parties;

f. make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and

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

[…]

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

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

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

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

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

a. did the Board act without conflict of interest in taking its decision?;

b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and

c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?

[…]

11. The IRP Panel shall have the authority to:

a. summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious;

b. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;

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

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

e. consolidate requests for independent review if the facts and circumstances are sufficiently similar; and

f. determine the timing for each proceeding.

[…]

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

15. Upon the filing of a request for an independent review, the parties are urged to participate in a conciliation period for the purpose of narrowing the issues that are stated within the request for independent review. A conciliator will be appointed from the members of the omnibus standing panel by the Chair of that panel. […]

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

[…]

18. The IRP Panel should strive to issue its written declaration no later than six months after the filing of the request for independent review. The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.

[Underlining added]

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

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

C. The gTLD Applicant Guidebook

54. As noted above and as understood by all, the Guidebook is (to borrow Booking.com's phrase) "the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs."[37]

55. The Guidebook is divided into "Modules", each of which contains various sections and sub-sections. The three Modules of primary relevance here are Modules 1, 2 and 4. Module 1, titled "Introduction to the gTLD Application Process," provides an "overview of the process for applying for a new generic top-level domains."[38] Module 2, titled "Evaluation Procedures," describes the "evaluation procedures and criteria used to determine whether applied-for gTLDs are approved for delegation."[39] Module 4, titled "String Contention Procedures," concerns "situations in which contention over applied-for gTLD strings occurs, and the methods available to applicants for resolving such contention cases."

(i) Initial Evaluation

56. As explained in Module 1, "[i]mmediately following the close of the application submission period, ICANN will begin checking all applications for completeness."[40] Initial Evaluation begins "immediately after the administrative completeness check concludes. All complete applications will be reviewed during Initial Evaluation."[41]

57. Initial Evaluation is comprised of two main elements or types or review: *string review*, which concerns the applied-for gTLD string; and *applicant review*, which concerns the entity applying for the gTLD and its proposed registry services. It is the first of these – string review, including more specifically the component known as *string similarity review* – that is particularly relevant.

(ii) String Review, including String Similarity Review

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

> *The following assessments are performed in the Initial Evaluation:*

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[37] Request, ¶ 13.

[38] Module 1-2. Each Module of the Guidebook is paginated separately. "Module 1-2" refers to Guidebook Module 1, page 2.

[39] Module 2-2.

[40] Guidebook, §1.1.2.2: "Administrative Completeness Check", Module 1-5.

[41] Guidebook, §1.1.2.5: "Initial Evaluation", Module 1-8 (underlining added).

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

[…]

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

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

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

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

> ***2.2.1.1 String Similarity Review***
>
> *This review involves a preliminary comparison of each applied-for gTLD string against existing TLDs, Reserved Names (see subsection 2.2.1.2), and other applied-for strings. The objective of this review is to prevent user confusion and loss of confidence in the DNS resulting from delegation of many similar strings.*
>
> *Note: In this Applicant Guidebook, "similar" means strings so similar that they create a probability of user confusion if more than one of the strings is delegated into the root zone.*

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

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

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

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

2.2.1.1.1 Reviews Performed

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

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

[…]

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

[…]

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

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

[…]

2.2.1.1.2 Review Methodology

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

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

[…]

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

> *The panel will use a common standard to test for whether string confusion exists, as follows:*
>
> ***Standard for String Confusion** – String confusion exists where a string so nearly resembles another visually that it is likely to deceive or cause confusion. For the likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.*
>
> ***2.2.1.1.3 Outcomes of the String Similarity Review***
>
> *An application that fails the String Similarity review due to similarity to an existing TLD will not pass the Initial Evaluation, and no further reviews will be available. Where an application does not pass the String Similarity review, the applicant will be notified as soon as the review is completed.*
>
> *An application for a string that is found too similar to another applied-for gTLD string will be placed in a contention set.*[44]
>
> *[Underlining added]*

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

> ***4.1 String Contention***
>
> *String contention occurs when either:*
>
> *1. Two or more applicants for an identical gTLD string successfully complete all previous stages of the evaluation and dispute resolution processes; or*
>
> *2. Two or more applicants for similar gTLD strings successfully complete all previous stages of the evaluation and dispute resolution processes, and the similarity of the strings is identified as creating a probability of user confusion if more than one of the strings is delegated.*
>
> *ICANN will not approve applications for proposed gTLD strings that are identical or that would result in user confusion, called contending strings. If either situation above occurs, such applications will proceed to contention resolution through either community priority evaluation, in certain cases, or through an auction. Both processes are described in this module. A group of applications for contending strings is referred to as a contention set.*

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

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

4.1.1 Identification of Contention Sets

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

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

[...]

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

[...]

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

[...]

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

4.1.3 Self-Resolution of String Contention

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

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

[...]

4.3 Auction: Mechanism of Last Resort

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

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

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

V. SUMMARY OF THE PARTIES' POSITIONS

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

A. Booking.com's position

(i) The Panel's Authority

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

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

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[45] Module 5-2.

[46] Module 5-4.

[47] Reply, ¶ 3.

[48] Reply, ¶ 3.

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

(ii) Booking.com's Claims

67. The purpose of the IRP initiated by Booking.com is, in its own words, "to challenge the ICANN Board's handling of Booking.com's application for the new gTLD .hotels."[50] This includes the determination of the SSP to place .hotels and .hoteis in contention and the refusal of the Board (and its committees) to revise that determination. Elsewhere in its submissions, Booking.com makes an even broader claim; it asserts that it challenges the conduct of the ICANN Board in relation to what Booking.com refers to as the *setting up*, *implementation, supervision* and *review* of the entire of string similarity review process, and the Board's alleged failure "to ensure due process and to respect its fundamental obligations to ensure good faith, transparency, fairness and non-discrimination" throughout.[51]

68. In effect, Booking.com's specific claims can be divided into two broad categories: claims related to the string similarity review process generally; and claims related to the particular case of .hotels.

69. Booking.com professes that this case "is not about challenging a decision on the merits [i.e., the decision to place .hotels in contention]"; it is about "ICANN's failure to respect fundamental [procedural] rights and principles in handling New gTLD applications, in particular in the context of String Similarity Review."[52]

70. Booking.com also repeatedly emphasizes – and this is crucial – that *it does not challenge the validity or fairness of the process as set out in the Guidebook.* Rather, as indicated, it contests "the way in which that process was established, implemented and supervised by (or under the authority of) the ICANN Board."[53] Equally crucial, as will be seen, is Booking.com's acknowledgment that *the established process was followed* in the case of the review of .hotels.

a. The string similarity review process

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

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[49] Reply, ¶ 6.

[50] Reply, ¶ 7.

[51] Reply, ¶ 15.

[52] Reply, ¶ 14.

[53] Reply, ¶ 17.

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

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

72. Booking.com also faults ICANN for "allowing the appointed SSP to develop and perform an unfair and arbitrary review process", specifically, by allowing the SSP "to perform the String Similarity Review (i) without any (documented) plan or methodology … (ii) without providing any transparency regarding the evaluators or the evaluation criteria ... and (iii) without informing applicants of its reasoning …".[56]

73. Among other things, Booking.com takes ICANN to task for establishing and posting the SSP Process Description and the SSP Manager's Letter (see Part III.C above) only long after the string similarity review process had ended.[57]

74. It also alleges that the factors identified in the SSP Manager's Letter are "arbitrary and baseless … not supported by any methodology capable of producing compelling and defensible conclusions … [which] has allowed applications with at least equally serious visual string similarity concerns – such as .parts/.paris, .maif/.mail, .srt/.srl, .vote/.voto and .date/.data … – to proceed while singling out .hotels/.hoteis."[58] According to Booking.com: "The failure to take actual human performance into account is at odds with the standard for assessment, *i.e.*, the likelihood of confusion on the part of the average Internet user. Hence, the approach is directly contrary to ICANN's own policy."[59]

75. Booking.com further contends that the SSP process is unfair and non-transparent due to the fact that the identity of SSP members has never been publicly disclosed.[60]

76. Further, Booking.com argues that the process is unfair, non-transparent and arbitrary – and thus violates ICANN policy – for failing to provide for a "well-documented rationale" for each

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[54] Reply, ¶ 20.

[55] Reply, ¶ 20.

[56] Reply, ¶ 23.

[57] Reply, ¶ 24.

[58] Reply, ¶ 25.

[59] Reply, ¶ 25.

[60] Reply, ¶ 26-27.

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

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

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

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

b. The case of .hotels

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

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[61] Reply, ¶ 28-29.

[62] Reply, ¶ 30.

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

[64] Response, ¶ 30.

[65] Reply, ¶ 34.

[66] Reply, ¶ 38.

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

[68] Request, ¶ 58.

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

80. According to Booking.com, the Board should have acted to overturn the determination of the SSP either in the context of the Request for Reconsideration or under the authority accorded it by Module 5-4 of the Guidebook to "individually consider a gTLD application".[70]

81. Booking.com claims that its DIDP Request alerted the Board to the need to intervene to "correct the errors in the process" related to .hotels, and that its Request for Reconsideration of the SSP determination further informed the Board of the many errors in the SSP's review of .hotels, "giving the Board ample opportunity to correct those errors."[71] Booking.com claims that the Board's failure, when responding to the DIDP Request, "to offer any insight into the SSP's reasoning", its refusal to reconsider and overturn the SSP determination regarding .hotels on the sole ground (says Booking.com) that "the Reconsideration process 'is not available as a mechanism to re-try the decisions of evaluation panels'", and its failure to investigate Booking.com's complaints of a lack of fairness and transparency in the SSP process, constitute violations of ICANN's governing rules regarding string similarity review.[72]

82. According to Booking.com, among the most compelling evidence of ICANN's failure in this regard are the statements made on the record by several members of the NGPC during its 10 September 2013 meeting at which Booking.com's Request for Reconsideration was denied.[73] Given the importance that the Panel attaches to these statements, they are addressed in some detail in the Analysis in Part VI, below.

83. In its written submissions Booking.com asks the Panel to grant the following relief:

> *Finding that ICANN breached its Articles of Incorporation, its Bylaws, and the gTLD Applicant Guidebook;*
>
> *Requiring that ICANN reject the determination that .hotels and .hoteis are confusingly similar and disregard the resulting contention set;*
>
> *Awarding Booking.com its costs in this proceeding; and*

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[69] Request, ¶ 59.

[70] Reply, ¶ 39.

[71] Reply, ¶ 41.

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

[73] See Part II.C, above.

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

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

B. ICANN's position

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

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

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

(i) The Panel's Authority

87. Throughout its submissions ICANN repeatedly stresses what it says is the very limited authority enjoyed by IRP panels.

88. As provided in Article IV, Section 3(4) of ICANN's Bylaws, ICANN observes that this Panel (as all IRP panels) is charged only with "comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws."[76]

89. ICANN notes that, in undertaking this *compare-and-declare* mission, the Panel is further constrained to apply the very specific "standard of review" set out in Bylaw Article IV, Section 3(4), which requires the Panel to focus on three particular questions: "did the Board act without conflict of interest in taking its decision?"; "did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?"; and "did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?"[77]

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[74] Response, ¶ 9.

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

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

[77] Response, ¶ 2.

90. ICANN further asserts that the IRP process "is not available as a mechanism to challenge the actions or inactions of ICANN staff or third parties that may be involved in ICANN activities,"[78] such as the action of the SSP which resulted in .hotels and .hoteis being placed in contention. Nor, says ICANN, may the IRP process be used as an "appeal mechanism" by which to overturn substantive decisions – such as the determination that .hotels and .hoteis are confusingly visually similar – with which an applicant may disagree.[79]

91. In this regard ICANN states that the affirmative relief sought by Booking.com – specifically, a declaration requiring that ICANN "reject the determination that .hotels and .hoteis are confusingly similar and disregard the resulting contention set" and (as requested at the hearing) that ICANN "delegate both .hotels and .hoteis" – exceeds the authority of the Panel.[80]

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

a. The string similarity review process

92. According to ICANN, "[e]arly on in the iterations of the Guidebook, it was determined that, in the initial evaluation stage, the String Similarity Panel would only examine strings for visual confusion;" and "[i]f applied-for strings are determined to so nearly resemble each other visually that it is likely to deceive or cause confusion, the string will be placed in a contention set, which is then resolved pursuant to the contention set resolution processes in Module 4 of the Guidebook."[81]

93. According to ICANN, it was also determined early on that, as stated in Section 2.2.1.1 of the Guidebook, "[t]his similarity review will be conducted by an independent String Similarity Panel," not by ICANN itself. ICC was duly selected to perform the string similarity review further to "an open and public request for proposals," pursuant to which, as the successful bidder, "ICC was responsible for the development of its own process documents and methodology for performing the String Similarity Review consistent with the provisions of the Guidebook."[82] ICANN emphasizes that "the Guidebook does not provide for any process by which ICANN (or anyone else) may conduct a substantive review of ICC's results."[83]

94. In ICANN's submission, the alternative proposed by Booking.com, that "the ICANN Board – and the ICANN Board alone – was obligated to perform the String Similarity Review for the more than 1,900 new gTLD applications submitted," is "untenable and is not supported by ICANN's Bylaws or Articles."[84] As noted by ICANN, the Guidebook defines six distinct

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[78] Response, ¶ 3.

[79] Response, ¶ 49.

[80] Response, ¶ 55.

[81] Response, ¶ 15 (underlining in original).

[82] Response, ¶ 16.

[83] Response, ¶ 17.

[84] Sur-Reply, ¶ 7.

review processes that every gTLD application is required to go through, including string similarity review; each of those review processes was conducted by independent experts specifically engaged by ICANN staff for the purpose.

95. ICANN submits that "there simply is no requirement – under ICANN's governing documents or imposed by law – that would mandate that the ICANN Board inject itself into the day-to-day affairs of the evaluation process in the manner Booking.com proposes."[85] It asserts that, consistent with well-settled legal principles, "neither ICANN's Bylaws, nor the Articles, nor the Guidebook requires the ICANN Board to conduct any analysis of the decisions of third party experts retained to evaluate string similarity."[86]

96. Moreover, ICANN asserts that "[s]imply because the ICANN Board has the discretion [under Section 5.1 (Module 5-4) of the Guidebook] to consider individual applications does not mean it is required to do so or that it should do so, particularly at an initial evaluation stage."[87]

97. ICANN claims that that Booking.com's repeated invocation of the Board's so-called obligation to ensure "due process" in the administration of the New gTLD Program is misplaced. First, neither applicable California law nor any provision of the Bylaws, Articles of Incorporation or Guidebook "specifically affords any gTLD applicant a right to procedural 'due process' similar to that which is afforded in courts of law."[88] Second, because ICANN conducts its activities in the public interest it nevertheless provides "more opportunity for parties to be heard and to dispute actions taken"[89] than most private corporate entities. Third, the "decision to proceed with the New gTLD Program followed many years of discussion, debate and deliberation within the ICANN community, including participation from end users, civil society, technical experts, business groups, governments and others."[90] Fourth, and perhaps most importantly, "ICANN adhered to the policies and procedures articulated in its Bylaws, Articles of Incorporation, and the Guidebook, the latter of which was adopted only after being publicly vetted with ICANN's stakeholders and the broader Internet community."[91]

98. ICANN's response to Booking.com's various allegations regarding particular elements of the string similarity review process – including for example the selection of the SSP, the publication of the SSP's methodology, the anonymity of the individuals SSP members, the supposed lack of quality control – is essentially three-fold: first, the actions challenged by Booking.com are *not Board actions*, but actions of ICANN staff or third parties, which cannot

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[85] Sur-Reply, ¶ 10.

[86] Sur-Reply, ¶ 10.

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

[88] Sur-Reply, ¶ 18.

[89] Sur-Reply, ¶ 18.

[90] Sur-Reply, ¶ 18, fn 18.

[91] Sur-Reply, ¶ 18, fn 18.

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

b. The case of .hotels

99. ICANN's position as regards the determination to place .hotels and .hoteis in contention is similar in many respects to its position regarding the string similarity review process generally. ICANN argues that the Board played no role whatsoever in performing the review of .hotels; that the SSP's determination was in any event well supported and there was no violation of applicable rules; and that the Guidebook does not provide for any process by which ICANN (or any other body, including an IRP panel) may conduct a substantive review of a string similarity determination.

100. In any event, ICANN asserts that .hotels and .hoteis in fact meet every one of the visual similarity criteria applied by the SSP, as set out in the SSP Manager's Letter. Moreover, .hotels and .hoteis scored a stunning 99% for visual similarity under the publicly available SWORD algorithm which, as provided by Section 2.2.1.1.2 (Module 2-7) of the Guidebook, establishes "one objective measure for consideration by the [SSP]". According to ICANN (in response to a question posed by the Panel during the hearing), this was the highest algorithmic score among the comparison of all non-identical pairs within the 1917 new gTLD applications received by ICANN;[93] the only other pair of non-exact match strings found to be confusingly visually similar – .unicorn and .unicom – scored only 94%.[94]

101. According to ICANN, "it was not clearly 'wrong,' as Booking.com argues, for the [SSP] to find that .hotels/.hoteis are confusingly similar.[95]

102. In conclusion, ICANN states that its conduct with respect to Booking.com's application for .hotels, including in evaluating Booking.com's Request for Reconsideration, was fully consistent with ICANN's Articles of Incorporation, its Bylaws and the procedures established in the Guidebook; and the fact that Booking.com disagrees with the SSP's determination to put .hotels and .hoteis in a contention set does not give rise to an IRP.

103. ICANN asks the Panel to deny Booking.com's IRP Request.

VI. ANALYSIS

A. The Panel's Authority

[92] Sur-Reply, ¶ 20-42.

[93] A number of these applications were subsequently withdrawn.

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

[95] Response, ¶ 53.

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

> *4. [The IRP Panel] shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:*
>
> *a. did the Board act without conflict of interest in taking its decision?;*
>
> *b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
>
> *c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?*
>
> *[…]*
>
> *11. The IRP Panel shall have the authority to:*
>
> *[…]*
>
> *c. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and*
>
> *d. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP;*
>
> *[…]*
>
> *18. […] The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties […]*
>
> *[Underlining added]*

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

> ***8. Standard of Review***
>
> *The IRP is subject to the following standard of review: (i) did the ICANN Board act without conflict of interest in taking its decision; (ii) did the ICANN Board exercise due diligence and care in having sufficient facts in front of them; (iii) did the ICANN Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*
>
> *If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the Internet community and the global public interest, the requestor will have established proper grounds for review.*

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

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

107. ICANN submits that its Bylaws "specify that a deferential standard of review be applied when evaluating the actions of the ICANN Board … the rules are clear that the appointed IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board."[96] Booking.com argues that this "is simply wrong. No such specification is made in ICANN's Bylaws or elsewhere, and a restrictive interpretation of the standard of review would … fail to ensure accountability on the part of ICANN and would be incompatible with ICANN's commitment to maintain (and improve) robust mechanisms for accountability."[97]

108. In the opinion of the Panel, there can be no question but that the provisions of the ICANN Bylaws establishing the Independent Review Process and defining the role of an IRP panel specify that the ICANN Board enjoys a large degree of discretion in its decisions and actions. So long as the Board acts without conflict of interest and with due care, it is entitled – indeed, required – to exercise its independent judgment in acting in what it believes to be the best interests of ICANN. The only substantive check on the conduct of the ICANN Board is that such conduct may not be inconsistent with the Articles of Incorporation or Bylaws – or, the parties agree, with the Guidebook. In that connection, the Panel notes that Article 1, Section 2 of the Bylaws also clearly states that in exercising its judgment, the Board (indeed "[a]ny ICANN body making a recommendation or decision") shall itself "determine which core values are most relevant and how they apply to the specific circumstances of the case at hand."

109. In other words, in making decisions the Board is required to conduct itself reasonably in what it considers to be ICANN's best interests; where it does so, the only question is whether its actions are or are not consistent with the Articles, Bylaws and, in this case, with the policies and procedures established in the Guidebook.

110. There is also no question but that the authority of an IRP panel to compare contested actions of the Board to the Articles of Incorporation and Bylaws, and to declare whether the Board has acted consistently with the Articles and Bylaws, does not extend to opining on the nature of those instruments. Nor, in this case, does our authority extend to opining on the nature of the policies or procedures established in the Guidebook. In this regard it is recalled that Booking.com itself repeatedly stresses that it does not contest the validity or fairness of the string similarity review process as set out in the Guidebook, but merely whether ICANN's actions were consistent with various elements of that process. Stated differently, our role in this IRP includes assessing whether the applicable rules – in this case, the rules regarding string similarity review – were followed, not whether such rules are appropriate or advisable.

111. Nevertheless, this does not mean that the IRP Panel may only review ICANN Board actions or inactions under the deferential standard advocated by ICANN in these proceedings. Rather, as explained below, the IRP Panel is charged with "objectively" determining whether

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[96] Response, ¶ 24.

[97] Reply, ¶ 6.

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

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

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

113. While on no way bound by that decision, we agree with its conclusions in this respect.

114. At the end of the day we fail to see any significant difference between the parties' positions in this regard. The process is clear, and both parties acknowledge, that the Panel is tasked with determining whether or not the Board's actions are consistent with ICANN's Articles of Incorporation, Bylaws and the Guidebook. Such a determination calls for what the panel in

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

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

115. That being said, we also agree with ICANN to the extent that, in determining the consistency of Board action with the Articles, Bylaws and Guidebook, an "IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board." In other words, it is not for the Panel to opine on whether the Board could have acted differently than it did; rather, our role is to assess whether the Board's action was consistent with applicable rules found in the Articles, Bylaws and Guidebook. Nor, as stated, is it for us to purport to appraise the policies and procedures established by ICANN in the Guidebook (since, again, this IRP is not a challenge to those policies and procedures themselves[99]), but merely to apply them to the facts.

116. With the foregoing firmly in mind, the Panel turns now to the issues to be determined in order to resolve the present dispute.

B. The String Similarity Review Process

117. The Panel is not unsympathetic to Booking.com's complaints regarding the string similarity review process as established by the Guidebook. There is no question but that that process lacks certain elements of transparency and certain practices that are widely associated with requirements of fairness. For example, the Guidebook provides no means for applicants to provide evidence or make submissions to the SSP (or any other ICANN body) and so be fully "heard" on the substantive question of the similarity of their applied-for gTLD strings to others.

118. Indeed, as stated at the outset of this Declaration, these observations and the concerns that they engender were voiced by several members of the ICANN Board's New gTLD Program Committee which voted to accept the BGC's Recommendation to deny Booking.com's Request for Reconsideration. The Panel can do no better than reproduce the statements made by the NGPC members in this respect, as recorded in the minutes of the NGPC's 10 September 2013 meeting:[100]

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

[100] Request, Annex 16.

- Mr. George Sadowski stated his intention to abstain from the vote because, although "he understood that the BGC did the right thing, [he] thought the end result that was contrary to ICANN's … and the user's best interests."

- Ms. Olga Madruga-Forti also stated her intention to abstain from voting on the BGC recommendation "because there was not sufficient rationale provided for why the string similarity review panel made its determination."

- In response to a comment by the Chair that the Request for Reconsideration deserved to be denied "[b]ecause the process was followed," Mr. Ray Plzak "agreed that the process was followed, but noted that the process needs to be reviewed to potentially add a mechanism that would allow persons who don't agree with the outcome to make an objection, other than using a Reconsideration Request."

- Mr. Plzak "recommended the Committee send a strong signal to the BGC, or adopt a resolution recommending that the BGC consider development of a different mechanism to provide an avenue for the community to appeal the outcome of a decision based on the merits."

- Ms. Madruga-Forti agreed and "recommended that in the future, a remand or appeals mechanism may help alleviate the concerns noted."

- Mr. Bill Graham also agreed with Mr. Plzak's suggestion, and noted that "generally, there is a considerable level of discomfort and dissatisfaction with the process as expressed by Committee members."

- The Chair "agreed with [Mr. Graham's] sentiment."

- The General Counsel and Secretary noted that ICANN … "has tried to encourage more use of the ombudsman, or other accountability mechanisms for these types of concerns."

119. Ultimately, five members of the NGPC voted in favour of the resolution accepting the BGC's Recommendation; two members were unavailable to vote; and four members abstained. The abstaining members offered the following voting statements:

- Mr. Plzak stated that he abstained from voting "because he is disappointed in what is being done to remedy the situation. [He] would like to see more resolve to fix the process."

- Ms. Madruga-Forti stated that:

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

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

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

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

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

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

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

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

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

120. These statements reflect to an important degree the Panel's own analysis.

121. The elements of the string similarity review process were established and widely published several years ago, after extensive consultation and debate among ICANN stakeholders and the Internet community. Booking.com correctly describes the process established (or "crystallized") in the Guidebook as a component of "a consensus policy" concerning the introduction of new gTLDs.[101]

122. The Guidebook makes clear that, as part of the initial evaluation to which all applied-for gTLDs are subject, each string would be reviewed for a number of factors, one of which is "string similarity", which involves a determination of "whether the applied-for gTLD string is so similar to other strings that it would create a probability of user confusion"[102]. The term "user" is elaborated elsewhere in the Guidebook, which speaks of confusion arising "in the mind of the average, reasonable Internet user."[103]

123. The Guidebook explains that string similarity review comprises merely a "visual similarity check",[104] with a view to identifying only "visual string similarities that would create a probability of user confusion."[105]

124. The Guidebook makes clear that string similarity reviews would be conducted by an independent third party – the SSP – that would have wide (though not complete) discretion both in formulating its methodology and in determining string similarity on the basis of that methodology.

125. Section 2.2.1.1.2 of the Guidebook, titled "Review Methodology", provides that the SSP "is informed in part by an algorithmic score for ... visual similarity," which "will provide one objective measure for consideration by the [SSP]." Section 2.2.1.1.2 further states that, in addition to "examin[ing] all the algorithm data," the SSP will "perform its own review of similarities between strings and whether they rise to the level of string confusion." It is noted that the objective algorithmic score is to be treated as "only indicative". Crucially, "the final determination of similarity is entirely up to the [SSP's] judgment." (Underlining added)

126. In sum, the Guidebook calls for the SSP to determine whether two strings are so "visually similar" as to create a "probability of confusion" in the mind of an "average, reasonable Internet user." In making this determination, the SSP is informed by an "algorithmic score", to ensure that the process comprises at least one "objective measure". However, the algorithmic score is not determinative. The SSP also develops and performs "its own review". At the end of the day, the determination is entirely a matter of "the [SSP's] judgment."

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[101] Request, ¶ 13.

[102] Guidebook, §2.2 (Module 2-4).

[103] Guidebook, §2.2.1.1.2. (Underlining added)

[104] Guidebook, §2.2.1.1. (Underlining added)

[105] Guidebook, §2.2.1.1.1. (Underlining added)

127. By its very nature this process is highly discretionary. It is also, to an important degree, subjective. The Guidebook provides no definition of "visual similarity", nor any indication of how such similarity is to be objectively measured other than by means of the SWORD algorithm. The Guidebook provides no definition of "confusion," nor any definition or description of an "average, reasonable Internet user." As Mr. Sadowski of the NGPC put it: "Confusion is a perceptual issue." (Mr. Sadowski further noted: "String similarity is only one consideration in thinking about perceptual confusion, and in fact it is not always an issue.) The Guidebook mandates the SSP to develop and apply "its own review" of visual similarity and "whether similarities rise to the level of user confusion", in addition to SWORD algorithm, which is intended to be merely "indicative", yet provides no substantive guidelines in this respect.

128. Nor does the process as it exists provide for gTLD applicants to benefit from the sort of procedural mechanisms – for example, to inform the SSP's review, to receive reasoned determinations from the SSP, or to appeal the merits of those determinations – which Booking.com claims are required under the applicable rules. Clearly, certain ICANN NGPC members themselves consider that such input would be desirable and that changes to the process are required in order for the string similarity review process to attain its true goal, which Mr. Sadowsky referred to as "the minimization of user confusion and ensuring user trust in using the DNS". However, as even the abstaining members of the NGPC conceded, the fact is that the sort of mechanisms that Booking.com asserts are required (and which those NGPC members believe should be required) are simply not part of the string similarity review process as currently established. As to whether they *should* be, it is not our place to express an opinion, though we note that such additional mechanisms surely would be consistent with the principles of transparency and fairness.

129. We add that we agree with ICANN that the time has long since passed for Booking.com or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to the establishment of the string similarity review process, including Booking.com's claims that specific elements of the process and the Board decisions to implement those elements are inconsistent with ICANN's Articles and Bylaws. Any such claims, even if they had any merit, are long since time-barred by the 30-day limitation period set out in Article IV, Section 3(3) of the Bylaws. As ICANN expressed during the hearing, if Booking.com believed that there were problems with the Guidebook, it should have objected at the time the Guidebook was first implemented.

130. When asked during the hearing about its failure to object timely, Booking.com argued that it could not have known how the Board's actions – that is, how the process established in the Guidebook – would affect it prior to the submission of its application for .hotels. However, that is not a persuasive or meritorious answer. As did all stakeholders, Booking.com had the opportunity to challenge the Board's adoption of the Guidebook, at the time, if it considered any of its elements to be inconsistent with ICANN's Articles of Incorporation or Bylaws.

C. The Case of .hotels

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

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

132. There are two principal elements to this part of Booking.com's case: a challenge in relation to the process followed by the SSP; and a challenge in relation to the Board's handling of Booking.com's Request for Reconsideration of the SSP's determination. However, the fundamental obstacle to Booking.com's case is that *the established process was followed* in all respects.

133. Booking.com itself acknowledges that "the process was followed" by the SSP, which determined that .hotels and .hoteis were so visually similar as to warrant being placed in a contention set. So too did all of the NGPC members who commented on the matter recognize that "the process was followed" – for all their stated misgivings concerning the outcome of the process.

134. The same is true of the Request for Reconsideration. The Panel is struck by the extent and thoughtfulness not only of the NGPC's consideration of the issue, certain aspects of which are discussed above, but of the BGC's detailed analysis and its Recommendation to the NGPC, on the basis of which Booking.com's Request for Reconsideration was denied. Contrary to Booking.com's allegations, in neither instance was this merely a blind acceptance of a decision of a subordinate body. In fact, the reconsideration process itself, however limited and perhaps imperfect it may be, is inconsistent with Booking.com's claims of lack of "due process".

135. Although not addressed in great detail by the parties, the Panel considers several observations made by the BGC in its 1 August 2013 Recommendation to be particularly apposite:

> ▪ *These standing requirements [for Requests for Reconsideration] are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge an action with which someone disagrees, but that it is limited to situations where the staff [or the Board] acted in contravention of established policies.*[106]
>
> ▪ *Although the String Similarity Review was performed by a third party, ICANN has determined that the Reconsideration process can properly be invoked for challenges of the third party's decisions where it can be stated that either the vendor failed to follow its process in reaching the decision, or that ICANN staff failed to follow its process in accepting that decision.*[107]
>
> ▪ *Booking.com does not suggest that the process for String Similarity Review set out in the Applicant Guidebook was not followed, or that ICANN staff violated any established ICANN policy in accepting the [SSP] decision on placing .hotels and .hoteis in contention sets. Instead, Booking.com is supplanting what it believes the review*

[106] BGC Recommendation, p. 2.

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

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

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

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

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

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

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

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[108] BGC Recommendation, p. 5.

[109] BGC Recommendation, p. 6.

[110] BGC Recommendation, p. 6.

[111] BGC Recommendation, pp. 6-7.

[112] BGC Recommendation, p. 7.

> *set out in the Applicant Guidebook. ICANN then coordinates a quality assurance review over a random selection of [SSP's] reviews to gain confidence that the methodology and process were followed. That is the process used for a making and assessing a determination of visual similarity. Booking.com's disagreement as to whether the methodology should have resulted in a finding of visual similarity does not mean that ICANN (including the third party vendors performing String Similarity Review) violated any policy in reaching the decision (nor does it support a conclusion that the decision was actually wrong).*[113]
>
> ▪ *The [SSP] reviewed all applied for strings according to the standards and methodology of the visual string similarity review set out in the Applicant Guidebook. The Guidebook clarifies that once contention sets are formed by the [SSP], ICANN will notify the applicants and will publish results on its website. (AGB, Section 2.2.1.1.1.) That the [SSP] considered its output as "advice" to ICANN (as stated in its process documentation) is not the end of the story. Whether the results are transmitted as "advice" or "outcomes" or "reports", the important query is what ICANN was expected to do with that advice once it was received. ICANN had always made clear that it would rely on the advice of its evaluators in the initial evaluation stage of the New gTLD Program, subject to quality assurance measures. Therefore, Booking.com is actually proposing a new and different process when it suggests that ICANN should perform substantive review (instead of process testing) over the results of the String Similarity Review Panel's outcomes prior to the finalization of contention sets.*[114]
>
> ▪ *As there is no indication that either the [SSP] or ICANN staff violated any established ICANN policy in reaching or accepting the decision on the placement of .hotels and .hoteis in a non-exact contention set, this Request should not proceed.*[115]

136. These excerpts of the BGC Recommendation not only illustrate the seriousness with which Booking.com's Request for Reconsideration was heard, they mirror considerations to which we fully subscribe and which we find apply as well, with equal force and effect, in the context of Booking.com's IRP Request.

137. It simply cannot be said – indeed, it is not even alleged by Booking.com – that the established process was not followed by the ICANN Board or any third party either in the initial string similarity review of .hotels or in the reconsideration process.

138. Booking.com was asked at the hearing to identify *with particularity* the ICANN Board's actions (including inactions) in this case that it claims are inconsistent with ICANN's Articles of Incorporation, Bylaws or the Guidebook and regarding which it asks the Panel to render a declaration. It identified four:

- The Board's adoption of certain provisions of the Guidebook, including the allegedly ill-defined, unfair and non-transparent procedures for selecting the SSP and supervising the SSP's performance of the string similarity review process. As discussed, any claims in this regard are time-barred.

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[113] BGC Recommendation, p. 7.

[114] BGC Recommendation, p. 8.

[115] BGC Recommendation, p. 10.

- The Board's acceptance of the SSP determination. As ICANN argues, there was no action (or inaction) by the Board here, no decision made (or not made) by the Board or any other body to accept the SSP's determination. The Guidebook provides that applied-for strings "*will* be placed in contention set" where the SSP determines the existence of visual similarity likely to give rise to user confusion. Simply put, under the Guidebook the Board is neither required nor entitled to intervene at this stage to accept or not accept the SSP's determination. Booking.com is correct that the Board could nevertheless have stepped in and reversed the SSP determination under Section 5.1 (Module 5-4) of the Guidebook, but did not do so; that inaction is addressed below.

- The Board's denial of Booking.com's Request for Reconsideration. As discussed above, there is nothing in the evidence that even remotely suggests that ICANN's conduct in this regard was inconsistent with its Articles, Bylaws or the Guidebook. On the contrary, we have already stated that the detailed analysis performed by the BGC and the extensive consideration of the BGC Recommendation by the NGCP undermine any claim that ICANN failed to exercise due care and independent judgment, or that its handling of the Request for Reconsideration was inconsistent with applicable rules or policy. As discussed above, just as in the present IRP, the question in the reconsideration process is whether the established process was followed. This was the question that the BGC and NGPC asked themselves in considering Booking.com's Request for Reconsideration, and which they properly answered in the affirmative in denying Booking.com's request.

- The Board's refusal to "step in" and exercise its authority under Section 5.1 (Module 5-4) of the Guidebook to "individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community." As pointed out by ICANN during the hearing, the fact that the ICANN Board enjoys such discretion and may choose to exercise it any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by Booking.com. In any case, the Panel does not believe that the Board's inaction in this respect was inconsistent with ICANN's Articles of Incorporation or Bylaws or indeed with ICANN's guiding principles of transparency and fairness, given (1) Booking.com's concession that the string similarity review process was followed; (2) the indisputable conclusion that any challenge to the adoption of the SSP process itself is time-barred; (3) the manifestly thoughtful consideration given to Booking.com's Request for Reconsideration by the BGC; and (4), the fact that, notwithstanding its protestations to the contrary, Booking.com's real dispute seems to be with the process itself rather than how the process was applied in this case (given that, as noted, Booking.com concedes that the process was indeed followed).

139. The Panel further considers that these – in addition to any and all other potential (and allegedly reviewable) actions identified by Booking.com during the course of these proceedings – fail on the basis of Booking.com's dual acknowledgement that it does not challenge the validity or fairness of the string similarity review process, and that that process was duly followed in this case.

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

D. Conclusion

141. In launching this IRP, Booking.com no doubt realized that it faced an uphill battle. The very limited nature of IRP proceedings is such that any IRP applicant will face significant obstacles in establishing that the ICANN Board acted inconsistently with ICANN's Articles of Incorporation or Bylaws. In fact, Booking.com acknowledges those obstacles, albeit inconsistently and at times indirectly.

142. Booking.com purports to challenge "the way in which the [string similarity review] process was established, implemented and supervised by (or under the authority of) the ICANN Board"; yet it also claims that it *does not challenge the validity or fairness of the string similarity review process as set out in the Guidebook.* It asks the Panel to overturn the SSP's determination in this case and to substitute an alternate result, in part on the basis of its own "expert evidence" regarding similarity and the probability of user confusion as between .hotels and .hoteis; yet it claims that it *does not challenge the merits of* the SSP determination and it acknowledges that *the process set out in the Guidebook was duly followed* in the case of its application for .hotels.

143. In sum, Booking.com has failed to overcome the very obstacles that it recognizes exist.

144. The Panel finds that Booking.com has failed to identify any instance of Board action or inaction, including any action or inaction of ICANN staff or a third party (such as ICC, acting as the SSP), that could be considered to be inconsistent with ICANN's Articles of Incorporation or Bylaws or with the policies and procedures established in the Guidebook. This includes the challenged actions of the Board (or any staff or third party) in relation to what Booking.com calls the implementation and supervision of the string similarity review process generally, as well as the challenged actions of the Board (or any staff or third party) in relation to the string similarity review of .hotels in particular.

145. More particularly, the Panel finds that the string similarity review performed in the case of .hotels was not inconsistent with the Articles or Bylaws or with what Booking.com refers to as the "applicable rules" as set out in the Guidebook.

146. To the extent that the Board's adoption and implementation of specific elements of the new gTLD Program and Guidebook, including the string similarity review process, could

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

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

VII. THE PREVAILING PARTY; COSTS

148. Article IV, Section 3(18) of the Bylaws requires that the Panel "specifically designate the prevailing party." This designation is germane to the allocation of costs, given that Article IV, Section 3(18) provides that the "party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider."

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

150. Similarly, the Supplementary Procedures state, at Article 11:

> *The IRP PANEL shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the costs to the*
>
> *prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.*
>
> *In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the requestor is not successful in the Independent Review, the IRP PANEL must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.*

151. The "IRP Provider" is the ICDR, and, in accordance with the ICDR Rules, the costs to be allocated between the parties – what the Bylaws call the "costs of the IRP Provider", and the Supplementary Procedures call the "costs of the proceedings" – include the fees and expenses of the Panel members and of the ICDR (we refer to all of these costs as "**IRP costs**").

152. ICANN is undoubtedly the prevailing party in this case. That being said, the Panel considers that the nature and significance of the issues raised by Booking.com, and the contribution to the "public interest" of its submissions, are such that it is appropriate and reasonable that the IRP costs be shared equally by the parties. We consider that the extraordinary circumstances of case – in which some members of ICANN's New gTLD Program Committee have publicly declared that, in their view, the rules on the basis of which Booking.com's claims fail should be reconsidered by ICANN – warrants such a holding.

153. The Panel cannot grant Booking.com the relief that it seeks. A panel such as ours can only declare whether, on the facts as we find them, the challenged actions of ICANN are

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

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

FOR THE FOREGOING REASONS, the Panel hereby declares:

(1) Booking.com's IRP Request is denied;

(2) ICANN is the prevailing party;

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

(4) This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Final Declaration of this IRP Panel.

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

David H, Bernstein
Date:

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

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

March 2, 2015
Date

Hon. A. Howard Matz

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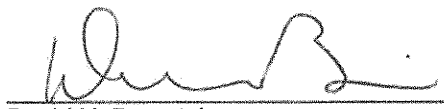
March 2, 2015
Date



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Stephen L. Drymer

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Hon. A. Howard Matz
Date:

David H, Bernstein
Date:

Stephen L. Drymer,
Chair of the IRP Panel
Date: 3 March 2015

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

Date

Hon. A. Howard Matz

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Date

David H, Bernstein

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3 March 2015

Date

Stephen L. Drymer

Annex 62

The Internet Corporation for Assigned Names and Numbers

ICANN

To All Prospective Applicants for New gTLDs –

Since ICANN's founding ten years ago as a not-for-profit, multi-stakeholder organization dedicated to coordinating the Internet's addressing system, one of its foundational principles has been to promote competition in the domain-name marketplace while ensuring Internet security and stability.

We are now engaging the Internet community in agreeing a way forward to introduce new gTLDs in the domain name space. Such expansion is driven by the demand for more innovation, choice and change to the Internet's addressing system, now constrained by only 21 generic top-level domain names. In a world with 1.5 billion Internet users—and growing—diversity, choice and competition are key to the continued success and reach of the global network.

The launch of these coming new gTLD application rounds followed a detailed and lengthy consultation process with all constituencies of the global Internet community. Representatives from a wide variety of stakeholders—governments, individuals, civil society, business and intellectual property constituencies, and the technology community—were engaged in discussions for more than 18 months. In October 2007, the Generic Names Supporting Organization (GNSO)—one of the groups that coordinate global Internet policy at ICANN—completed its policy development work on new gTLDs and approved a set of recommendations. Major contributors to this policy work were ICANN's Governmental Advisory Committee (GAC), At-Large Advisory Committee (ALAC), Country Code Names Supporting Organization (ccNSO) and Security and Stability Advisory Committee (SSAC). All this policy development work culminated with ICANN's Board of Directors deciding to adopt the community-developed policy at the ICANN Paris meeting in June 2008. You can see a thorough brief to the policy process and outcomes at http://gnso.icann.org/issues/new-gtlds/.

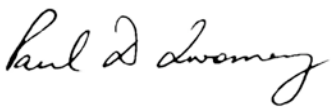
Please note that the Applicant Guidebook that follows this letter is a draft. Applicants should not rely on any of the proposed details of the new gTLD program, as the program remains subject to further consultation and revision. Also, some of the modules in this guidebook highlight areas of the process that remain under development. These areas will be made available for public consultation in the near future.

In addition to the Draft Applicant Guidebook, ICANN is posting a series of papers that serve as explanatory memoranda to assist the Internet community to better understand the implementation work.

ICANN expects to engage in a productive and robust dialogue with the Internet community through a consultative process. Comments will be used to revise and prepare the final Applicant Guidebook, to be released early in 2009.

The New gTLD Program enables the Internet community to open up the name space to new and innovative uses for top-level domains, and can meet some of the needs unmet by the current market. It has the potential to be one of the biggest influences on the future of the Internet.

Sincerely,



Paul Twomey
President and CEO

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Marina del Rey 4676 Admiralty Way, Suite 330 Marina del Rey, CA 90292 USA T +1 310 823 9358 F +1 310 823 8649
http://icann.org

New gTLD Program: Draft Applicant Guidebook (Draft RFP)

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

24 October 2008

Table of Contents

New gTLD Program: Applicant Guidebook

How to Use

The Draft Applicant Guidebook (Request for Proposals) consists of a series of modules, each focused on specific topics within the application and evaluation process:

Module 1: Introduction to the Application Process

Provides an overview of the application process, documentation requirements, and fees

Module 2: Evaluation Procedures

Describes the various reviews that occur during the evaluation process and criteria for approval of applications

Module 3: Dispute Resolution Procedures

Contains the grounds for formal objection by third parties concerning gTLD applications submitted, and the dispute resolution procedure triggered by an objection

Module 4: String Contention Procedures

Describes mechanisms for resolving contention when there is more than one qualified applicant for identical or similar gTLD strings

Module 5: Transition to Delegation

Describes the final steps required of an applicant, including execution of a registry agreement and completion of pre-delegation tests

Module 6: Terms and Conditions

Contains the terms and conditions applicable to all entities submitting an application

Glossary

Contains definitions for terms used in the Applicant Guidebook

ICANN is posting a series of explanatory memoranda to accompany this draft, to provide further details on the background work completed by ICANN. Links to these memoranda are noted within the relevant modules.

All materials contained in the Draft Applicant Guidebook are being presented for public comment. Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

Draft Applicant Guidebook

Module 1

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

24 October 2008

Module 1

Introduction to the gTLD Application Process

This module gives applicants an overview of the process for applying for a new generic top-level domain, and includes instructions on how to complete and submit an application, the supporting documentation an applicant must submit with an application, the fees required and when and how to submit them.

This module also describes the conditions associated with particular types of applications, and the application life cycle.

For more about the origins, history and details of ICANN's policies on new gTLDs, please see http://gnso.icann.org/issues/new-gtlds/.

A glossary of relevant terms is included with the Draft Applicant Guidebook (Draft RFP).

Prospective applicants are encouraged to read and become familiar with the content of this entire module as well as the others, before starting the application process to make sure they understand what is required of them and what they can expect at each stage of the application evaluation process.

1.1 Application Life Cycle and Timelines

This section provides a description of the stages that an application passes through once it is submitted. Some stages will occur for all applications submitted; others will only occur in specific circumstances. Applicants should be aware of the stages and steps involved in processing applications received.

1.1.1 Application Submission Dates

The application submission period opens at [time] UTC [date].

The application submission period closes at [time] UTC [date].

Applications may be submitted electronically through ICANN's online application system.

To receive consideration, all applications must be submitted electronically through the online application system by the close of the application submission period.

An application will not be considered, in the absence of exceptional circumstances, if:

- It is received after the due date.
- The application form is incomplete (either the questions have not been fully answered or required supporting documents are missing). Applicants will not ordinarily be permitted to supplement their applications after submission.
- The evaluation fee has not been paid by the deadline. Refer to Section 1.5 for fee information.

1.1.2 Application Processing Stages

This subsection provides an overview of the stages involved in processing an application submitted to ICANN. In Figure 1-1, the shortest and most straightforward path is marked with bold lines, while stages that may or may not apply in any given case are also shown. A brief description of each stage follows.

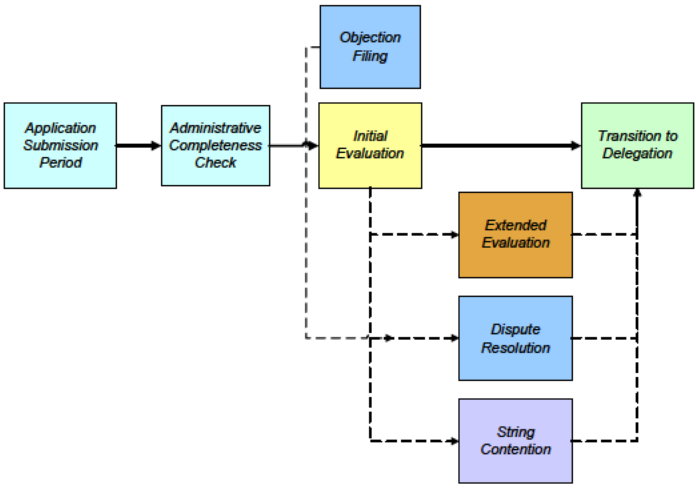


Figure 1-1 – Once submitted to ICANN, applications will pass through multiple stages of processing.

1.1.2.1 Application Submission Period

At the time the application submission period opens, applicants wishing to apply for a new gTLD can become registered users of the online application system.

Through the application system, applicants will answer a series of questions to provide general information, demonstrate financial capability, and demonstrate technical and operational capability. . The supporting documents listed in subsection 1.2.3 of this module must also be submitted through the application system.

Applicants must also submit their evaluation fees during this period. Refer to Section 1.5 of this module for additional information about fees and payments.

Following the close of the application period, applicants can continue to use the application system as a resource to track the progress of their applications, although they may receive communications from ICANN through other means.

1.1.2.2 Administrative Completeness Check

Immediately following the close of the application period, ICANN will check all applications for completeness. This check ensures that:

- All questions are answered (except those questions identified as optional);
- Required supporting documents are provided in the proper format(s); and
- The evaluation fees have been received.

ICANN will post a list of applications considered complete and ready for evaluation as soon as practical after the close of the application period. The status information for each application will also be updated in the online application system.

1.1.2.3 Initial Evaluation

Initial Evaluation will begin immediately after the administrative completeness check concludes. All complete applications will be reviewed during Initial Evaluation.

There are two main elements of the Initial Evaluation:

- String reviews (concerning the applied-for gTLD string); and
- Applicant reviews (concerning the entity applying for the gTLD and its proposed registry services).

Applicant reviews include a determination of whether the applicant has the requisite technical and financial capability to operate a registry.

- Panels of independent evaluators will perform these reviews based on the information provided by each applicant in its responses to the application form.
- There may be one round of questions and answers between the applicant and evaluators to clarify information contained in the application. Refer to Module 2 for further details on the evaluation process.

Evaluators will report whether the applicant passes or fails each of the parts of the Initial Evaluation. These reports will be available in the online application system.

At the conclusion of the Initial Evaluation period, ICANN will post a notice of all applications that have passed the Initial Evaluation. Depending on the volume of applications received, ICANN may post such notices in batches over the course of the Initial Evaluation period.

1.1.2.4 Objection Filing

Formal objections to applications can be filed on any of four enumerated grounds by parties with standing to object. The objection filing period will open after ICANN posts the list of complete applications as described in paragraph 1.1.2.2. Objectors will file directly with dispute resolution service providers (DRSPs). Refer to Module 3, Dispute Resolution Procedures, for further details.

The objection filing phase will close following the end of the Initial Evaluation period (refer to paragraph 1.1.2.3). Objections that have been filed during the objection filing phase will be addressed in the dispute resolution phase, which is outlined in paragraph 1.1.2.6 and discussed in detail in Module 3.

All applicants should be aware that third parties have the opportunity to file objections to any application during this period. Applicants whose applications are the subject of a formal objection will have an opportunity to file a response according to the dispute resolution service provider's rules and procedures (refer to Module 3).

An applicant wishing to file a formal objection to another application that has been submitted would do so within

the objection filing period, following the objection filing procedures in Module 3.

1.1.2.5 Extended Evaluation

Extended Evaluation applies only to applicants that do not pass Initial Evaluation.

Applicants failing certain elements of the Initial Evaluation can request an Extended Evaluation. If the applicant does not expressly request an Extended Evaluation, the application will proceed no further. The Extended Evaluation period allows for one additional round of questions and answers between the applicant and evaluators to clarify information contained in the application. The reviews performed in Extended Evaluation do not introduce additional evaluation criteria.

An Extended Evaluation may also be required if the applied-for gTLD string or one or more proposed registry services raise technical issues that might adversely affect the security and stability of the DNS. The Extended Evaluation period provides a time frame for these issues to be investigated. Applicants will be informed if such reviews are required at the end of the Initial Evaluation period. Evaluators and any applicable experts consulted will communicate their conclusions at the end of the Extended Evaluation period. These reports will be available in the online application system.

At the conclusion of the Extended Evaluation period, ICANN will post all evaluator reports from the Initial and Extended Evaluation periods.

If an application passes the Extended Evaluation, it can then proceed to the next stage. If the application does not pass the Extended Evaluation, it will proceed no further.

1.1.2.6 Dispute Resolution

Dispute resolution applies only to applicants that are the subject of a formal objection.

Where formal objections are filed and filing fees paid during the objection filing phase, dispute resolution service providers will initiate and conclude proceedings based on the objections received. The formal objection procedure exists to provide a path for those who wish to object to an application that has been received by ICANN. Dispute resolution service providers provide the fora to adjudicate the proceedings based on the subject matter and the needed expertise.

As a result of the proceeding, either the applicant will prevail (in which case the application can proceed to the next stage), or the objector will prevail (in which case either the application will proceed no further or the application will be bound to a contention resolution procedure). Refer to Module 3, Objection and Dispute Resolution, for detailed information. Applicants will be notified by the Dispute Resolution Service Provider of the results of dispute proceedings. The online application system will also be updated with these results.

1.1.2.7 String Contention

String contention applies only when there is more than one qualified applicant for the same or similar gTLD strings.

String contention refers to the scenario in which there is more than one qualified applicant for the same gTLD or for gTLDs that are so similar that they create a probability of detrimental user confusion if more than one is delegated. ICANN will resolve cases of string contention either through comparative evaluation or through an alternative mechanism for efficient resolution of string contention.

In the event of contention between applied-for strings that represent geographical names, the parties may be asked to follow a different process to resolve the contention.

Groups of applied-for strings that are either identical or confusingly similar are called contention sets. All applicants should be aware that if an application is identified as being part of a contention set, string contention resolution procedures will not begin until all applications in the contention set have completed all aspects of evaluation, including dispute resolution, if applicable.

To illustrate, as shown in Figure 1-2, Applicants A, B, and C all apply for .EXAMPLE and are identified as a contention set. Applicants A and C pass Initial Evaluation, but Applicant B does not. Applicant B elects Extended Evaluation. A third party files an objection to Applicant C's application, and Applicant C enters the dispute resolution proceeding. Applicant A must wait to see whether Applicants B and C successfully complete the Extended Evaluation and dispute resolution phases, respectively, before it can proceed to the string contention resolution stage. In this example, Applicant B passes the Extended Evaluation, but Applicant C does not prevail in the dispute resolution proceeding. String contention resolution then proceeds between Applicants A and B.

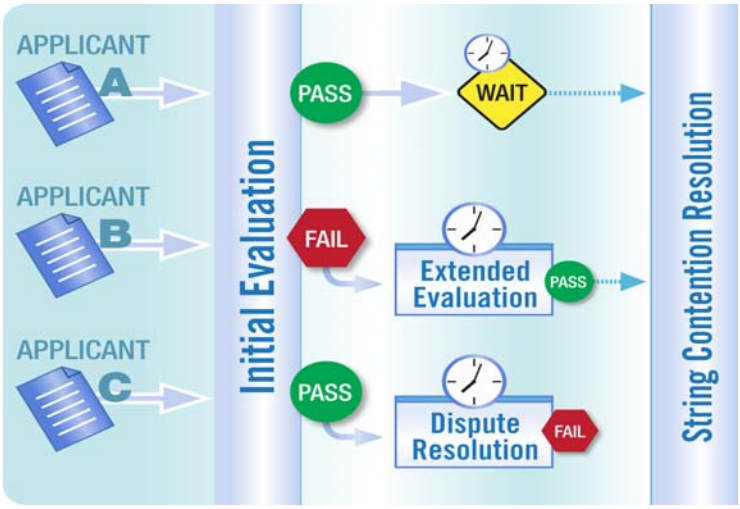


Figure 1-2 – All applications in a contention set must complete all previous evaluation and dispute resolution stages before string contention resolution can begin.

Applicants prevailing in a string contention resolution procedure will proceed toward delegation of applied-for gTLD strings. The online application system will be updated with the resolution of the string contention procedures.

1.1.2.8 Transition to Delegation

Applicants that successfully complete all the relevant stages outlined in this subsection 1.1.2 are required to carry out a series of concluding steps before delegation of the applied-for gTLD string into the root zone. These steps include execution of a registry agreement with ICANN and completion of a pre-delegation technical test to validate information provided in the application.

Following execution of a registry agreement, the prospective registry operator must complete technical set-up and satisfactory performance on technical checks before delegation of the gTLD into the root zone. If the initial start-up requirements are not satisfied so that the gTLD can be delegated into the root zone within the time frame specified in the registry agreement, ICANN may in its sole and absolute discretion elect to terminate the registry agreement.

Once all of these steps have been successfully completed, the applicant is eligible for delegation of its applied-for gTLD string into the DNS root zone.

1.1.3 Accounting for Public Comment in the Evaluation of Applications once the New gTLD Process is Launched

Public comment mechanisms are part of ICANN's policy development and implementation processes. As a private-public partnership, ICANN is dedicated to preserving the operational security and stability of the Internet, to promoting competition, to achieving broad representation of global Internet communities, and to developing policy appropriate to its mission through bottom-up, consensus-based processes. This necessarily involves the participation of many stakeholder groups in a public discussion.

In the new gTLD application process, public comments will be a mechanism for the public to bring relevant information and issues to the attention of those charged with handling new gTLD applications. ICANN will open a public comment forum at the time the applications are publicly posted on ICANN's website (refer to paragraph 1.1.2.2), which will remain open through the application round.

Public comments received will be provided to the evaluators during the Initial and Extended Evaluation periods. Evaluators will have discretion to take the information provided in these comments into consideration as deemed necessary. Consideration of the applicability of the information submitted through public comments will be included in the evaluators' reports.

Public comments may also be relevant to one or more objection grounds. (Refer to Module 3, Dispute Resolution Procedures, for the objection grounds.) ICANN will provide all public comments received to DRSPs, who will have discretion to consider them.

A distinction should be made between public comments, which may be relevant to ICANN's task of determining whether applications meet the established criteria, and formal objections that concern matters outside this evaluation. ICANN created the formal objection process to allow a full and fair consideration of objections based on subject areas outside ICANN's mission and expertise. A party contacting ICANN to pursue an objection will be referred to the formal objection channels designed specifically for resolving these matters in the new gTLD space. More information on the objection and dispute resolution processes is available in Module 3.

1.1.4 Sample Application Scenarios

The following scenarios briefly show a variety of ways in which an application may proceed through the evaluation process. The table that follows summarizes some processes and outcomes. This is not intended to be an exhaustive list of possibilities. There are other possible combinations of paths an application could follow.

Scenario Number	Initial Evaluation	Extended Evaluation	Objection(s) Raised	String Contention	Approved for Subsequent Steps
1	Pass	N/A	None	No	Yes
2	Fail	Pass	None	No	Yes
3	Pass	N/A	None	Yes	Yes
4	Pass	N/A	Applicant prevails	No	Yes
5	Pass	N/A	Objector prevails	N/A	No
6	Fail	Quit	n/a	N/A	No
7	Fail	Fail	n/a	N/A	No
8	Fail	Pass	Applicant prevails	Yes	Yes
9	Fail	Pass	Applicant prevails	Yes	No

Scenario 1 – Pass Initial Evaluation, No Objection, No Contention – In the most straightforward case, the application passes Initial Evaluation and there is no need for an Extended Evaluation. No objections are raised during the objection period, so there is no dispute to resolve. As there is no contention for the applied-for gTLD string, the applicant can enter into a registry agreement and the application can proceed toward delegation

Scenario 2 – Extended Evaluation, No Objection, No Contention – In this case, the application fails one or more aspects of the Initial Evaluation. The applicant is eligible for and requests an Extended Evaluation for the appropriate elements. Here, the application passes the Extended Evaluation. As with Scenario 1, no objections are raised during the objection period, so there is no dispute to resolve. As there is no contention for the gTLD string, the applicant can enter into a registry agreement and the application can proceed toward delegation.

Scenario 3 – Pass Initial Evaluation, No Objection, Contention – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. No objections are raised during the objection period, so there is no dispute to resolve and no appeal. However, there are

other applications for the same or a similar gTLD string, so there is contention. In this case, one application wins the contention resolution, and the other contenders are denied their applications, so the winning applicant can enter into a registry agreement and the application can proceed toward delegation.

Scenario 4 – Pass Initial Evaluation, Win Objection, No Contention – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. During the objection period, a valid objection is raised by an objector with standing on one of the objection grounds (refer to Module 3, Dispute Resolution Procedures). The objection is heard by a dispute resolution service provider panel that finds in favor of the applicant. The applicant can enter into a registry agreement and the application proceeds toward delegation.

Scenario 5 – Pass Initial Evaluation, Lose Objection – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. During the objection period, multiple valid objections are raised by one or more objectors with standing in one or more of the objection grounds. Each objection category for which there are objections is heard by a dispute resolution service provider panel. In this case, the panels find in favor of the applicant for most of the objections, but one finds in favor of the objector. As one of the objections has been upheld, the application does not proceed.

Scenario 6 – Fail Initial Evaluation, Applicant Withdraws – In this case, the application fails one or more aspects of the Initial Evaluation. The applicant decides to withdraw the application rather than continuing with Extended Evaluation. The application does not proceed.

Scenario 7 – Fail Initial Evaluation, Fail Extended Evaluation In this case, the application fails one or more steps in the Initial Evaluation. The applicant requests Extended Evaluation for the appropriate elements. However, the application fails Extended Evaluation also. The application does not proceed.

Scenario 8 – Extended Evaluation, Win Objection, Pass Contention –In this case, the application fails one or more aspects of the Initial Evaluation. The applicant is eligible for and requests an Extended Evaluation for the appropriate elements. Here, the application passes the Extended Evaluation. During the objection period, one valid objection is raised by an objector with standing. The objection is heard by a dispute resolution service provider

panel that rules in favor of the applicant. However, there are other applications for the same or a similar gTLD string, so there is contention. In this case, the applicant prevails over other applications in the contention resolution procedure, the applicant can enter into a registry agreement and the application can proceed toward the delegation phase.

Scenario 9 – Extended Evaluation, Objection, Fail Contention – In this case, the application fails one or more aspects of the Initial Evaluation. The applicant is eligible for and requests an Extended Evaluation for the appropriate elements. Here, the application passes the Extended Evaluation. During the objection period, one valid objection is raised by an objector with standing. The objection is heard by a dispute resolution service provider that rules in favor of the applicant. However, there are other applications for the same or a similar gTLD string, so there is contention. In this case, another applicant prevails in the contention resolution procedure, and the application does not proceed.

Transition to Delegation – After an application has completed Initial or Extended Evaluation, dispute resolution, if applicable, and string contention, if applicable, the applicant is required to complete a set of steps leading to delegation of the gTLD, including execution of a registry agreement with ICANN, and completion of pre-delegation testing. Refer to Module 5 for a description of the relevant steps in this phase.

1.1.5 Subsequent Application Rounds

ICANN's goal is to launch the next gTLD application rounds as quickly as possible. The exact timing will be based on experiences gained and changes required after this round is completed. The goal is for the next application round to begin within one year of the close of the application submission period for this round.

1.2 Information for All Applicants

1.2.1 Eligibility

Any established corporation, organization, or institution in good standing may apply for a new gTLD. Applications from individuals or sole proprietorships will not be considered.

1.2.2 Two Application Types: Open or Community-Based

All applicants are required to designate each application for a new gTLD as **open** or **community-based**.

1.2.2.1 Definitions

For purposes of this RFP, an **open gTLD** is one that can be used for any purpose consistent with the requirements of the application and evaluation criteria, and with the registry agreement. An open gTLD may or may not have a formal relationship with an exclusive registrant or user population. It may or may not employ eligibility or use restrictions.

For purposes of this RFP, a **community-based gTLD** is a gTLD that is operated for the benefit of a defined community consisting of a restricted population. An applicant designating its application as community-based will be asked to substantiate its status as representative of the community it names in the application, and additional information may be requested in the event of a comparative evaluation (refer to Section 4.2 of Module 4). An applicant for a community-based gTLD is expected to:

1. Demonstrate an ongoing relationship with a defined community that consists of a restricted population.
2. Have applied for a gTLD string strongly and specifically related to the community named in the application.
3. Have proposed dedicated registration and use policies for registrants in its proposed gTLD.
4. Have its application endorsed in writing by an established institution representing the community it has named.

1.2.2.2 Implications of Application Designation

Applicants should understand how their designation as open or community-based will affect application processing at particular stages, as described in the following paragraphs.

Objection/Dispute Resolution – All applicants should understand that an objection may be filed against any application on community opposition grounds, even if the applicant has not designated itself as community-based or declared the TLD to be aimed at a particular community. Refer to Module 3, Dispute Resolution Procedures.

String Contention – Any applicant that has been identified as part of a contention set (refer to Module 4.1) may be obliged to participate in either a comparative evaluation or another efficient mechanism for contention resolution if the application reaches the string contention stage and the applicant elects to proceed.

A **comparative evaluation** will take place if a community-based applicant in a contention set has elected comparative evaluation.

Another efficient mechanism for contention resolution will result in other cases. If a comparative evaluation occurs but does not produce a clear winner, the efficient mechanism will then result.

Refer to Module 4, String Contention Procedures, for detailed discussions of contention resolution procedures.

Contract Execution and Post-Delegation – A community-based gTLD applicant will be subject to certain post-delegation contractual obligations to operate the gTLD in a manner consistent with the restrictions associated with its community-based designation, once it begins operating the gTLD. ICANN must approve material changes to the community-based nature of the gTLD and any associated contract changes.

1.2.2.3 Changes to Application Designation

An applicant may not change its designation as open or community-based once it has submitted a gTLD application for processing.

1.2.3 Required Documents

Applicants should be prepared to submit the following documents, which are required to accompany each application:

1. **Proof of legal establishment –** Examples of acceptable documentation include articles or a certificate of incorporation, articles of association or equivalent documents relative to the type of entity and the jurisdiction in which it is formed, such as statutes or membership agreements of the entity.
2. **Proof of good standing** – Examples of acceptable documentation include a certificate of good standing or other equivalent official document issued by a competent government authority, if offered by a governmental authority for the jurisdiction.

Under some laws or jurisdictions, it may be possible to prove both establishment and good standing with a single document. That is, the same document may suffice for items 1 and 2.

If no such certificates or documents are available in the applicant's jurisdiction, an affidavit drafted and signed by a notary public or a legal practitioner duly qualified to represent clients before the courts of the country in which the applicant's organization is established, declaring that the organization is established and in good standing, must be submitted.

3. If the applicant is a government body or organization, it must provide a **certified copy of the act** wherein or governmental decision whereby the government body or organization was established.

ICANN is aware that practices and documentation standards vary from region to region, and has attempted to account for a variety of these practices when specifying the requirements. Applicants with exceptional circumstances should contact ICANN to determine how to provide appropriate documentation.

4. **Financial statements**. Applicants must provide audited financial statements for the most recently completed fiscal year for the applicant, and unaudited financial statements for the most recently ended interim financial period for the applicant.

5. Before delegation: **documentary evidence of ability to fund ongoing basic registry operations** for then-existing registrants for a period of three to five years in the event of registry failure, default or until a successor operator can be designated.

All documents must be valid at the time of submission.

Supporting documentation should be submitted in the original language. English translations are not required.

Some supporting documentation will be required only in certain cases:

1. ***Community endorsement –*** If an applicant has designated its application as community-based, it will be asked to submit a written endorsement of its application by an established institution representing the community it has named.

2. ***Government support or non-objection*** – If an applicant has applied for a string that is a geographical term, the

applicant is required to submit a statement of support or non-objection for its application from the relevant government(s) or public authorities. Refer to Section 2.1.1.4 for more information on the requirements for geographical names.

3. ***Documentation of outside funding commitments –*** If an applicant lists outside sources of funding in its application, it must provide evidence of commitment by the party committing the funds.

1.2.4 Notice Concerning Technical Acceptance Issues with New gTLDs

All applicants should be aware that acceptance of their applications by ICANN and entering into a registry agreement with ICANN does not guarantee that the new gTLD will immediately function throughout the Internet. Past experience indicates that ISPs and webhosters do not automatically allow passage of or access to new gTLD strings even when these strings are authorized by ICANN, since software modifications may be required that may not happen until there is a business case for doing so.

Similarly, web applications often validate namestrings on data entry and may filter out new or unknown strings. ICANN has no authority or ability to require acceptance of new gTLD namestrings although it does prominently publicize ICANN-authorized gTLD strings on its website. ICANN encourages applicants to familiarize themselves with these issues and account for them in startup and launch plans. Successful applicants may find themselves expending considerable efforts post-implementation in working with providers to achieve acceptance of their new gTLD namestring.

Applicants should review (Informational) RFC 3696 (see http://www.ietf.org/rfc/rfc3696.txt?number=3696) for background. IDN applicants should review the material concerning experiences with IDN test strings in the root zone (see http://idn.icann.org/).

1.2.5 Terms and Conditions

All applicants must agree to a standard set of Terms and Conditions for the application process. The Terms and Conditions are available in Module 6 of this RFP.

1.3 Information for Internationalized Domain Name Applicants

Some applied-for gTLD strings are expected to be Internationalized Domain Names (IDNs) that require the insertion of IDN-encoded A-labels into the DNS root zone. IDNs are labels that contain one or more letters or characters other than LDH (letters a,...z; digits 0,...9; and the hyphen "-").

If an applicant applies for such a string, it must provide accompanying information indicating compliance with the IDNA protocol and other requirements. The IDNA protocol is currently under revision and its documentation can be found at http://www.icann.org/en/topics/idn/rfcs.htm. Applicants must provide applied-for gTLD strings in the form of both a **U-label** and an **A-label**.

An A-label is the ASCII-Compatible Encoding form of an IDNA-valid string. Every A-label begins with the IDNA ACE prefix, "xn--", followed by a string that is a valid output of the Punycode algorithm, and hence is a maximum of 59 ASCII characters in length. The prefix and string together must conform to all requirements for a label that can be stored in the DNS including conformance to the LDH (host name) rule described in RFC 1034, RFC 1123 and elsewhere.

A U-label is an IDNA-valid string of Unicode characters, including at least one non-ASCII character, expressed in a standard Unicode Encoding Form, normally UTF-8 in an Internet transmission context.

For example, using the current IDN test string in Cyrillic script, the U-label is <**испытание**> and the A-label is <**xn—80akhbyknj4f>.** An A-label must be capable of being produced by conversion from a U-label and a U-label must be capable of being produced by conversion from an A-label.

Applicants for IDN gTLDs will also be required to provide the following at the time of the application:

1. Short form of string (English). The applicant will provide a short description of what the string would mean in English.
2. Language of label (ISO 639-1). The applicant will specify the language of the applied-for TLD string, both

according to the ISO's codes for the representation of names of languages, and in English.

3. Script of label (ISO 15924). The applicant will specify the script of the applied-for gTLD string, both according to the ISO code for the presentation of names of scripts, and in English.
4. Unicode code points. The applicant will list all the code points contained in the U-label according to its Unicode form.
5. Representation of label in phonetic alphabet. The applicant will provide its applied-for gTLD string notated according to the International Phonetic Alphabet (http://www.arts.gla.ac.uk/IPA/ipachart.html).
6. Its IDN table. This table provides the list of characters eligible for registration in domain names according to registry policy. It will contain any multiple characters that can be considered "the same" for the purposes of registrations at the second level. For examples, see http://iana.org/domains/idn-tables/.
7. Applicants must further demonstrate that they have made reasonable efforts to ensure that the encoded IDN string does not cause any rendering or operational problems. For example, problems have been identified in strings with characters of mixed right-to-left and left-to-right directionality when numerals are adjacent to the path separator. If an applicant were applying for a string with known issues, it should document steps that will be taken to mitigate these issues in applications.

1.4 Submitting an Application

Applicants may complete the application form and submit supporting documents using ICANN's TLD Application System (TAS). To access the tool, applicants must first register as a TAS user, which involves paying a user registration fee of USD100.

As TAS users, applicants will be able to provide responses in open text boxes and submit required supporting documents as attachments. Restrictions on the size of attachments as well as the file formats are included in the instructions on the TAS site.

ICANN will not accept application forms or supporting materials submitted through other means than TAS (that is, hard copy, fax, email), unless such submission is in accordance with specific instructions from ICANN to applicants.

1.4.1 Accessing the TLD Application System

The TAS site is located at [URL to be inserted in final version of RFP].

TAS features include:

1.4.1.1 Sub-user Management

This feature allows applicants to create sub-users with varying permission levels to assist in completing the application. For example, if an applicant wishes to designate a user to complete the technical section of the application, the applicant can create a sub-user account with access only to that section.

1.4.1.2 Workflow Management

This feature allows applicants to check the status of their applications through TAS.

1.4.1.3 Security

ICANN uses all reasonable efforts to protect applicant information submitted through TAS. TAS uses advanced Internet security technology to protect applicant information against unauthorized access. This technology includes:

Secure Socket Layer (SSL) – To ensure that confidential information remains confidential, it is sent to TAS in a secure session using SSL technology. SSL technology scrambles or encrypts information as it moves between the user's browser and TAS.

Limited TAS Authorized Users and Permission Levels – TAS is a hierarchical system with defined user roles and permissions. ICANN-authorized personnel have access only to the portions of the system they need. For example, an accounting user may only need access to perform updates to the portion of a record indicating whether an applicant's evaluation fee has been received.

Although ICANN intends to follow the security precautions outlined here, it offers no assurances that these procedures will keep an applicant's data confidential and secure from access by unauthorized third parties.

1.4.2 Technical Support

TAS users can refer to the FAQ/knowledge base or contact [email address to be inserted in final version of RFP] for help using the system. Users can expect to receive a tracking

ticket number and a response within 24 to 48 hours through the TAS submission tool.

1.4.3 Backup Application Process

If the online application system is not available, ICANN will provide alternative instructions for submitting applications.

1.5 Fees and Payments

This section describes the fees to be paid by the applicant. Payment instructions are also included here.

1.5.1 Breakdown of Fees and Amounts

The following fees are required from all applicants:

- ***TAS User Registration Fee –*** USD 100. This fee enables a user to enter the online application system. This fee is nonrefundable.

- ***gTLD Evaluation fee –*** USD 185,000. ICANN will not begin its evaluation of an application unless it has received the gTLD evaluation fee by the due date. Refer to subsection 1.5.4. The gTLD evaluation fee is set to recover costs associated with the new gTLD program. The fee is set to ensure that the program is fully funded, and doesn't take resources from other ICANN funding sources, including generic registries and registrars, cc TLD contributions and RIR contributions.

  In certain cases, refunds of a portion of this fee may be available for applications that are withdrawn before the evaluation process is complete. The amount of refund will depend on the point in the process at which the withdrawal is made. (Refer to subsection 1.5.5.) Details will be made available when the application process is launched.

Applicants may be required to pay additional fees in certain cases. Those possible additional fees include:

- ***Registry Services Review Fee –*** If applicable, this fee is payable for additional costs incurred in referring an application to the RSTEP for an extended review. Applicants will be notified if such a fee is due. The fee for a three member RSTEP review team is anticipated to be USD 50,000. In some cases, five-member panels might be required, or there might be increased scrutiny at a greater cost. In every case, the applicant will be advised of the review

cost before its initiation. Refer to Section 2.1.3 of Module 2 on Registry Services review.

- ***Dispute Resolution Filing Fee –*** This amount must accompany any filing of a formal objection and any response that an applicant files to an objection. This fee is payable to the applicable dispute resolution service provider in accordance with the provider's payment instructions. ICANN estimates that non-refundable filing fees could range from approximately USD 1,000 to USD 5,000 (or more) per party per proceeding. Refer to the appropriate provider for the relevant amount. Refer to Module 3 for dispute resolution procedures.

- ***Dispute Resolution Adjudication Fee –*** This fee is payable to the applicable dispute resolution service provider in accordance with that provider's procedures and schedule of costs. Both parties in the dispute resolution proceeding will be required to submit an advance payment of costs in an estimated amount to cover the entire cost of the proceeding. This may be either an hourly fee based on the estimated number of hours the panelists will spend on the case (including review of submissions, facilitation of a hearing, if allowed, and preparation of a decision), or a fixed amount. The prevailing party in a dispute resolution proceeding will have its advance payment refunded, while the non-prevailing party will not receive a refund and thus will bear the cost of the proceeding.

  ICANN estimates that a proceeding involving a fixed amount could range from USD 2,000 to USD 8,000 (or more) per proceeding. ICANN further estimates that an hourly rate based proceeding with a one-member panel could range from USD 32,000 to USD 56,000 (or more) and with a three-member panel it could range from USD 70,000 to USD 122,000 (or more). These estimates may be lower if the panel does not call for written submissions beyond the objection and response, and does not allow a hearing. Please refer to the appropriate provider for the relevant amounts or fee structures. Refer also to Section 3.2 of Module 3 for further details.

- ***Comparative Evaluation Fee –*** This fee is payable to the provider appointed to handle comparative evaluations, in the event that the applicant participates in a comparative evaluation.

Applicants will be notified if such a fee is due. Refer to Section 4.2 of Module 4.

This list does not include fees (that is, registry fees) that will be payable to ICANN following execution of a registry agreement. See http://www.icann.org/en/topics/new-gtld-draft-agreement-24oct08-en.pdf.

1.5.2 Payment Methods

Payments to ICANN may be submitted by wire transfer, ACH, money order, or check.

1.5.2.1 Wire Transfer Payment

Instructions for making a payment by **wire transfer** will be available in TAS.

1.5.2.2 ACH Payment

Instructions for making **ACH payments** will be available in TAS.

1.5.2.3 Credit Card Payment

To make a **credit card payment**, note:

ICANN accepts Visa, MasterCard/Maestro, American Express and Discover credit cards as forms of payment. The maximum amount accepted is USD 20,000 per invoice.

- Fill out and sign the Credit Card Payment Form at http://www.icann.org/en/financials/credit.pdf.
- Send the completed form to ICANN at fax: +1.310.823.8649

Or mail the form to:

Internet Corporation for Assigned Names and Numbers (ICANN)
Attention: Finance Department
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292-6601 USA

1.5.2.4 Check or Money Order Payment

To make a **payment by check or money order** (USD only), mail or deliver by private carrier to:

Internet Corporation for Assigned Names and Numbers (ICANN)
Attention: Finance Department
4676 Admiralty Way, Suite 330
Marina del Rey, CA 90292-6601 USA

1.5.3 Requesting an Invoice

The TAS interface allows applicants to request issuance of an invoice for any of the fees payable to ICANN. This service is for the convenience of applicants that require an invoice to process payments.

1.5.4 Deadlines for Payments

The Evaluation Fee must be received by [time] UTC [date].

ICANN or its providers will notify the applicants of due dates for payment in respect of additional fees (if applicable).

1.5.5 Withdrawals and Refunds

Refunds may be available to applicants who choose to withdraw at certain stages of the process.

An applicant that wishes to withdraw an application must use the TAS interface to request a refund. ICANN will not consider any other form of request for refunds. Refunds will only be issued to the organization that submitted the original payment. All refunds are paid by wire transfer. Any bank transfer or transaction fees incurred by ICANN will be deducted from the amount paid.

Further details on refund amounts will be available in the final version of the RFP.

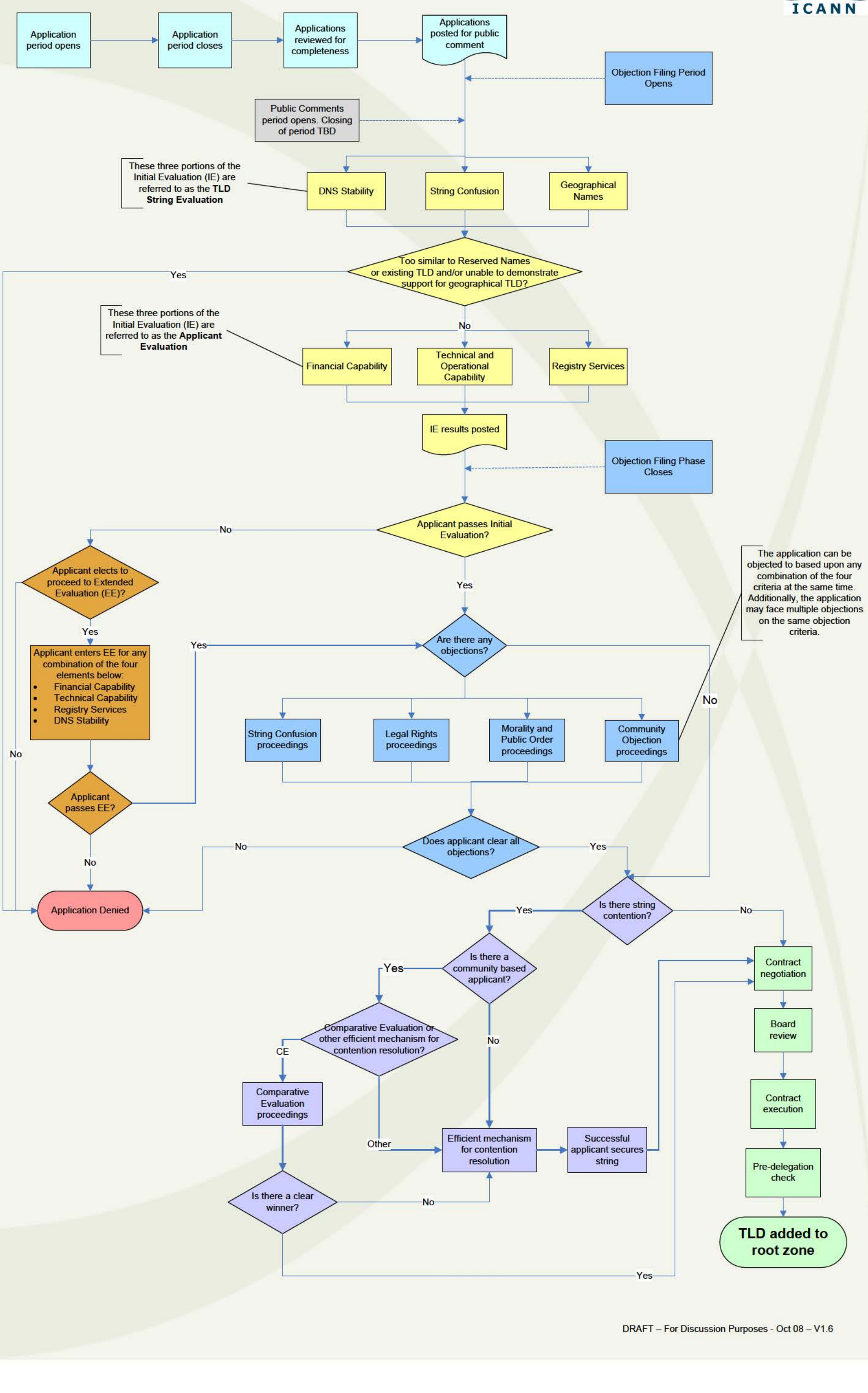
1.6 Questions about this RFP

Applicants may submit questions about completing the application form to [email address to be inserted in final version of RFP]. To provide all applicants equitable access to information, ICANN will post all questions and answers in a centralized location on its website.

All requests to ICANN for information about the process or issues surrounding preparation of an application must be submitted in writing to the designated email address. ICANN will not grant requests from applicants for personal or telephone consultations regarding the preparation of an application. Applicants that contact ICANN for clarification about aspects of the application will be referred to the dedicated online question and answer area.

Answers to inquiries will only provide clarification about the application forms and procedures. ICANN will not provide consulting, financial, or legal advice.

New gTLD Program - Evaluation Process
DRAFT- For Discussion Purposes



Draft Applicant Guidebook

Module 2

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

24 October 2008

Module 2

Evaluation Procedures

This module describes the evaluation procedures and criteria used to determine whether applications are approved for delegation as a gTLD. All applicants will undergo an Initial Evaluation and those that do not pass all phases may enter into an Extended Evaluation.

The first, required evaluation is the **Initial Evaluation**, during which ICANN first assesses an applied-for gTLD string, an applicant's qualifications, and proposed registry services.

The following elements make up **Initial Evaluation**:

- String Reviews
  - String confusion
  - Reserved Names
  - DNS stability
  - Geographical names
- Applicant Reviews
  - Demonstration of technical and operational capability
  - Demonstration of financial capability
  - Registry services

These elements, which are described in greater detail later in this module, are intended to ensure applied-for gTLD strings do not negatively impact DNS security or stability, and to ensure that applicants are capable of operating the gTLD in a stable and secure manner, and that new services can be introduced without adverse effect on the security or stability of the DNS.

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

Extended Evaluation may be applicable in cases in which an applicant does not pass the Initial Evaluation or additional inquiry is required.

2.1 Initial Evaluation

The Initial Evaluation consists of two types of examination. Each type is composed of several elements.

The first examination focuses on the applied for string to test:

- Whether the applied-for gTLD string is similar to others and would cause user confusion;
- Whether the applied-for gTLD string might disrupt DNS security or stability; and
- Whether requisite government approval is given in the case of certain geographical names.

The second examination focuses on the applicant to test:

- Whether the applicant has the requisite technical and financial capability; and
- Whether the registry services offered by the applicant might adversely affect DNS security or stability.

2.1.1 String Reviews

In the Initial Evaluation, ICANN reviews every applied-for gTLD string for string confusion, potential to introduce instability into the DNS, and whether relevant government approval is required. Those reviews are described in greater detail in the following paragraphs.

2.1.1.1 String Confusion Review

The objective of this review is to prevent user confusion and loss of confidence in the DNS. This review involves a comparison of each applied-for gTLD string against existing TLDs and against other applied-for gTLD strings. The examination is to determine whether the applied-for gTLD string is so similar to one of the others that it would create a probability of detrimental user confusion if it were to be delegated to the root zone. ICANN will perform determinations of string similarity in accordance with the steps outlined here.

The similarity review will be conducted by a panel of String Similarity Examiners. This examination will be informed by an algorithmic score for the visual similarity between each applied-for string and each of other existing and applied-for TLDs. The score will provide one objective measure for consideration by the panel.

The examiners' task is to identify string similarities that would create a probability of detrimental user confusion. The examiners will use a common standard to test for whether string confusion exists, as follows:

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

The standard will be applied in two sets of circumstances, when comparing:

- Applied-for gTLD strings against existing TLDs and reserved names.
- Applied-for gTLD strings against other applied for gTLD strings or strings requested in ccTLD processes).

Existing String Similarity Examination – This review involves cross-checking between each applied-for string and the list of existing TLD strings to determine whether the two strings are so similar to one another that they create a probability of detrimental user confusion.

All TLDs currently in the root zone can be found at http://iana.org/domains/root/db/.

An application that fails the string confusion review and is found too similar to an existing string will not pass the Initial Evaluation, and no further reviews will be available.

In the simple case in which an applied-for TLD string is identical to an existing TLD, the application system will recognize the existing TLD and not allow the application to be submitted.

Such testing for identical strings also takes into consideration the code point variants listed in any relevant language reference table.

For example, protocols treat equivalent labels as alternative forms of the same label, just as "foo" and "Foo" are treated as alternate forms of the same label (RFC 3490).

An applied-for gTLD string that passes the string confusion review is still subject to challenge by an existing TLD operator or by another gTLD applicant in the current

application round. That process requires that a specific objection be filed by an objector having the standing to make such an objection. Refer to Module 3, Dispute Resolution Procedures, for more information about the objection process.

String Contention Sets: Similarity with Other Applied-for gTLD Strings – All applied-for gTLD strings will be reviewed against one another to identify any strings that are so similar that they create a probability of detrimental user confusion would result if more than one is delegated into the root zone. In performing the string confusion review, the panel of String Similarity Examiners will create contention sets that may be used later in the process. A contention set contains at least two applied-for strings identical to one another or so similar that string confusion would result if more than one were delegated into the root zone. Refer to Module 4, String Contention Procedures, for more information on contention sets and contention resolution. ICANN will notify applicants who are part of a contention set by the conclusion of the Initial Evaluation period. These contention sets will also be published on ICANN's website.

Similarity to TLD strings applied for as ccTLDs -- Applied-for gTLD strings will also be reviewed for similarity to TLD strings applied for in the IDN ccTLD Fast Track process (see http://www.icann.org/en/topics/idn/fast-track/). Should conflict with a prospective fast-track IDN ccTLD be identified, ICANN will take steps to resolve the conflict. (See process for Geographical Names in paragraph 2.1.1.4.)

String Similarity Algorithm – The String Similarity Algorithm (Algorithm) is a tool the examiners use to provide one objective measure as part of the process of identifying strings likely to result in confusion. The Algorithm is also available to applicants for testing and informational purposes. The Algorithm and user guidelines are available at http://80.124.160.66/icann-algorithm.

The Algorithm calculates scores for visual similarity between any two strings, using factors such as letters in sequence, number of similar letters, number of dissimilar letters, common prefixes, common suffixes, and string length.

2.1.1.2 Review for Reserved Names

The Reserved Names review involves comparison with the list of top-level Reserved Names to ensure that the applied-for gTLD string does not appear on that list.

Top-Level Reserved Names List

AFRINIC	*IANA-SERVERS*	*NRO*
ALAC	*ICANN*	*RFC-EDITOR*
APNIC	*IESG*	*RIPE*
ARIN	*IETF*	*ROOT-SERVERS*
ASO	*INTERNIC*	*RSSAC*
CCNSO	*INVALID*	*SSAC*
*EXAMPLE**	*IRTF*	*TEST**
GAC	*ISTF*	*TLD*
GNSO	*LACNIC*	*WHOIS*
GTLD-SERVERS	*LOCAL*	*WWW*
IAB	*LOCALHOST*	
IANA	*NIC*	
*Note that in addition to the above strings, ICANN will also reserve translations of the terms "test" and "example" in multiple languages.		

If an applicant enters a Reserved Name as its applied-for gTLD string, the application system will recognize the Reserved Name and not allow the application to be submitted.

In addition, applied-for gTLD strings are reviewed in a process identical to that described in the preceding section to determine whether they exceed a similarity threshold with a Reserved Name. An application for a gTLD string that is identified as too similar to a Reserved Name will not pass the Reserved Names review.

2.1.1.3 Review for Potential DNS Instability

This review determines whether an applied-for gTLD string might cause instability to the DNS. In all cases, this will involve a review for conformance with technical and other requirements for gTLD labels. In some exceptional cases, an extended review may be necessary to investigate possible technical stability problems with the applied-for gTLD string.

2.1.1.3.1 String Stability Review

New gTLD labels must not adversely affect on the security or stability of the DNS. Although no string complying with the requirements in paragraph 2.1.1.3.2 of this module is expected to adversely affect DNS security or stability, an extended review is possible if technical reviewers identify an issue with the applied-for gTLD string that requires further investigation.

String Stability Review Procedure – During the Initial Evaluation period, ICANN will conduct a preliminary review on the set of applied-for gTLD strings to ensure that proposed strings comply with relevant standards provided in the preceding section and determine whether any strings raise significant technical stability issues that may require an Extended Evaluation.

There is low probability that this review will be necessary for a string that fully complies with the string requirements in paragraph 2.1.1.3.2 of this module. However, the technical stability review process provides an additional safeguard if unanticipated security or stability issues arise concerning an applied-for gTLD string.

See Section 2.2 for further information on the Extended Evaluation process.

2.1.1.3.2 String Requirements

ICANN will review each applied-for gTLD string to ensure that it conforms with the requirements outlined in the following paragraphs.

If an applied-for gTLD string is found to violate any of these rules, the application will be denied. No further reviews are available.

Technical Requirements for all Labels (Strings) – The technical requirements for the selection of top-level domain labels follow.

- The ASCII label (that is, the label as transmitted on the wire) must be valid as specified in the technical standards *Domain Names: Implementation and Specification* (RFC 1035), and *Clarifications to the DNS Specification* (RFC 2181). This includes the following:
  - The label must have no more than 63 characters.
  - Upper and lower case characters are treated as identical.
- The ASCII label must be a valid host name, as specified in the technical standards *DOD Internet Host Table Specification* (RFC 952), *Requirements for Internet Hosts — Application and Support* (RFC 1123), and *Application Techniques for Checking and Transformation of Names (RFC 3696).* This includes the following:

- The label must consist entirely of letters, digits and hyphens.
- The label must not start or end with a hyphen.

- There must be no possibility for confusing an ASCII label for an IP address or other numerical identifier by application software. For example, representations such as "255", "o377" or "0xff"representing decimal, octal, and hexadecimal strings, can be confused for IP addresses. As such, labels:
  - Must not be wholly composed of digits between "0" and "9".
  - Must not commence with "0x" or "x", and have the remainder of the label wholly composed of hexadecimal digits, "0" to "9" and "a" through "f".
  - Must not commence with "0o" or "o", and have the remainder of the label wholly composed of digits between "0" and "7".
- The ASCII label may only include hyphens in the third and fourth position if it represents a valid Internationalized Domain Name in its A-label form (ASCII encoding).
- The presentation format of the domain (that is, either the label for ASCII domains, or the U-label for Internationalized Domain Names) must not begin or end with a digit.

Requirements for Internationalized Domain Names – These requirements apply only to prospective top-level domains that use non-ASCII characters. Applicants for these internationalized top-level domain labels are expected to be familiar with the IETF IDNA standards, Unicode standards, and the terminology associated with Internationalized Domain Names.

- The label must be a valid internationalized domain name, as specified in the technical standard *Internationalizing Domain Names in Applications* (RFC 3490). This includes the following nonexhaustive list of limitations:
  - Must only contain Unicode code points that are defined as "Valid" in *The Unicode Codepoints and IDNA* (http://www.ietf.org/internet-

drafts/draft-ietf-idnabis-tables-02.txt) and be accompanied by unambiguous contextual rules where necessary.

- Must be fully compliant with Normalization Form C, as described in *Unicode Standard Annex #15: Unicode Normalization Forms*. See also examples in http://unicode.org/faq/normalization.html.
- Must consist entirely of characters with the same directional property.

- The label must meet the relevant criteria of the ICANN *Guidelines for the Implementation of Internationalised Domain Names*. See http://www.icann.org/en/topics/idn/implementation-guidelines.htm. This includes the following nonexhaustive list of limitations:
  - All code points in a single label must be taken from the same script as determined by the Unicode Standard Annex #24: Unicode Script Property.
  - Exceptions are permissible for languages with established orthographies and conventions that require the commingled use of multiple scripts. However, even with this exception, visually confusable characters from different scripts will not be allowed to co-exist in a single set of permissible code points unless a corresponding policy and character table is clearly defined.

The IDNA protocol used for internationalized labels is currently under revision through the Internet standardization process. As such, additional requirements may be specified that need to be adhered to as this revision is being completed. The current status of the protocol revision is documented at http://tools.ietf.org/wg/idnabis.

Policy Requirements for Generic Top-Level Domains – Applied-for strings must be composed of three or more visually distinct letters or characters in the script, as appropriate.

2.1.1.4 Geographical Names

ICANN will review all applied-for strings to ensure that appropriate consideration is given to the interests of governments or public authorities in country or territory

names, as well as certain other types of sub-national place names. The requirements and procedure ICANN will follow is described in the following paragraphs.

2.1.1.4.1 Requirements for Strings Intended to Represent Geographical Entities

The following types of applications must be accompanied by documents of support or non-objection from the relevant government(s) or public authority(ies).

- Applications for any string that is a meaningful representation of a *country or territory name* listed in the ISO 3166-1 standard (see http://www.iso.org/iso/country_codes/iso_3166_databases.htm). This includes a representation of the country or territory name in any of the six official United Nations languages (French, Spanish, Chinese, Arabic, Russian and English) and the country or territory's local language.
- Applications for any string that represents a *sub-national place name*, such as a county, province, or state, listed in the ISO 3166-2 standard.
- Applications for a city name, where the applicant clearly intends to use the gTLD to leverage from the city name.
- An application for a string which represents a continent or UN region appearing on the

  Composition of macro geographical (continental) regions, geographical sub-regions, and selected economic and other groupings list at http://unstats.un.org/unsd/methods/m49/m49regin.htm.

An applied-for gTLD string that falls into the above categories is considered to represent a geographical name. It is the applicant's responsibility to identify whether its applied-for gTLD string falls into the above categories and to determine the relevant government or governments, or the relevant public authority or authorities. In the case of an application for a string which represents a continent or UN region, evidence of support, or non-objection, will be required from a substantial number of the relevant governments and/or public authorities associated with the continent or the UN region.

The evidence of support or non-objection from the relevant government or public authority should include a signed

letter of support or non-objection from the minister with the portfolio responsible for domain name administration, ICT, foreign affairs or the Office of the Prime Minister or President of the relevant jurisdiction. If there are reasons for doubt about the authenticity of the communication, ICANN will consult with the diplomatic authorities or members of ICANN's Governmental Advisory Committee for the government or public authority concerned on the competent authority and appropriate point of contact with their administration for communications.

The letter must clearly express the government's or public authority's support or non-objection for the applicant's application and demonstrate the government's or public authority's understanding of the string being requested and what it will be used for.

The requirement to include evidence of support for certain applications does not preclude or exempt applications from being the subject of objections on community grounds (refer to section 3.1.1 of Module 3), under which applications may be rejected based on objections showing substantial opposition from the targeted community.

2.1.1.4.2 Review Procedure for Geographical Names

A Geographical Names Panel (GNP) will be established to evaluate applications and confirm whether each string represents a geographic term, and to verify the authenticity of the supporting documentation where necessary. The Geographic Names Panel may consult with additional experts as they consider appropriate.

The steps ICANN and the Geographical Names Panel intend to follow to ensure compliance with these requirements are described here.

1. During the Initial Evaluation period, ICANN evaluates each application for a geographical name to confirm that the applicant has provided a letter of support or nonobjection from the relevant government.

2. ICANN forwards applications considered complete to the GNP for confirmation that:

    - The strings are a meaningful representation of a country or territory name or a subnational place name, and

- The communication from the government or public authority is legitimate and contains the suggested content.

3. The GNP also reviews applications that are not self-identified as a geographical name to ensure that the applied-for string is not a meaningful representation of a country or territory name or a sub-national place name.

4. All applications determined to be geographical but without necessary supporting documents will be considered incomplete. The applicant will be notified and the application will not pass Initial Evaluation.

5. The GNP may consult additional expertise if uncertainty arises about the name the applied-for gTLD string is claimed to represent.

The results of the evaluation will be publicly posted on ICANN's website at the conclusion of the Initial Evaluation, and will also be available to applicants.

If there is more than one application for a string representing a certain geographical term as described in this section, and the applications are considered complete (that is, have requisite government approvals), the applications will be suspended pending resolution by the applicants. If there is contention between identical (or similar) applicants where one is identified as a geographical name, the string contention will be settled using the string contention methodology described in Module 4.

2.1.2 Applicant Reviews

Concurrent with the applied-for gTLD string reviews described in subsection 2.1.1, ICANN will review the applicant's technical and operational capability, its financial capability, and its proposed registry services. Those reviews are described in greater detail in the following subsections.

2.1.2.1 Information Sought

The questions provided for applicants in the application form are available at http://www.icann.org/en/topics/new-gtld-draft-evaluation-criteria-24oct08-en.pdf. Applicants answer questions which cover the following three areas in relation to themselves: general information, technical and operational capability, and financial capability.

Applicants should be aware that the application materials submitted in the online application system, as well as any evaluation materials and correspondence, will be publicly posted on ICANN's website. The sections in the application that are marked CONFIDENTIAL will not be posted. Any sections of the application that ICANN has not designated CONFIDENTIAL will be posted.

The applicant questions cover the following three areas:

General Information – These questions are intended to gather information about an applicant's legal identity, contact information, and applied-for gTLD string. Failure to provide any of this information will result in an application being considered incomplete. Under specific areas of questions under this category are: the identification of the applied-for string; selection of TLD type; and requests for certain documents.

Demonstration of Technical and Operational Capability – These questions are intended to gather information about an applicant's technical capabilities and plans for operation of the proposed gTLD.

Applicants are not required to have deployed an actual registry to complete the requirements for a successful application. It will be sufficient at application time for an applicant to demonstrate a clear understanding and accomplishment of some groundwork toward the key technical and operational aspects of running a gTLD registry. Each applicant that passes the technical evaluation and all other steps will be required, following execution of a registry agreement, to complete a pre-delegation technical test before delegation of the applied-for gTLD. Refer to Module 5, Transition to Delegation, for additional information.

Demonstration of Financial Capability – These questions are intended to gather information about an applicant's financial capabilities to operate a gTLD registry business and its financial planning in preparation for long-term operation of a new gTLD.

2.1.2.2 Evaluation Methodology

Initial Evaluations are conducted on the basis of the information each applicant makes available to ICANN in its response to the questions in the application form. ICANN and its evaluators are not obliged to take into account any information or evidence that is not made available in the application and submitted by the due date, unless explicitly requested by the evaluators.

Evaluators are entitled, but not obliged, to request further information or evidence from an applicant, and any such request will be made solely through TAS, rather than by direct means such as phone, letter, email, or other similar means. Only one exchange of information between the applicant and the evaluators may take place within the Initial Evaluation period.

Because different registry types and purposes may justify different responses to individual questions, evaluators will pay particular attention to the consistency of an application across all criteria. For example, an applicant's scaling plans noting hardware to ensure its capacity to operate at a particular volume level should be consistent with its financial plans to secure the necessary equipment.

2.1.3 Registry Services Review

Concurrent with the string reviews described in subsection 2.1.1, ICANN will review the applicant's proposed registry services. The applicant will be required to provide a list of proposed registry services in its application.

Registry services are defined as: (1) operations of the registry critical to the following tasks: the receipt of data from registrars concerning registrations of domain names and name servers; provision to registrars of status information relating to the zone servers for the TLD; dissemination of TLD zone files; operation of the registry zone servers; and dissemination of contact and other information concerning domain name server registrations in the TLD as required by the registry agreement; (2) other products or services that the registry operator is required to provide because of the establishment of a consensus policy; and (3) any other products or services that only a registry operator is capable of providing, by reason of its designation as the registry operator.

A full definition of registry service can be found at http://www.icann.org/en/registries/rsep/rsep.html and in the draft registry agreement at http://www.icann.org/en/topics/new-gtld-draft-agreement-24oct08-en.pdf. Registry services will be examined to determine if the proposed registry service might raise significant stability or security issues. Examples of services submitted to the registry services process by established registries can be found at http://www.icann.org/en/registries/rsep.

The registration of domain names, for example, is a registry service. Lists of registry services currently provided by

registries can be found in registry agreement appendices. In general cases, these services successfully pass this inquiry. See http://www.icann.org/en/registries/agreements.htm.

Review of all applicants' proposed registry services will occur during the Initial Evaluation.

Procedure – ICANN's first review will be a preliminary determination of whether a proposed registry service requires further consideration based on whether the registry service may raise significant security or stability issues.

If ICANN's preliminary determination reveals that there may be significant security or stability issues surrounding the proposed service, the application will be flagged for an extended review by the RSTEP (see http://www.icann.org/en/registries/rsep/rstep.html). This review will occur during the Extended Evaluation phase (refer to section 2.2).

Definitions for security and stability applied in the registry services review are:

Security – an effect on security by the proposed registry service means (1) the unauthorized disclosure, alteration, insertion or destruction of registry data, or (2) the unauthorized access to or disclosure of information or resources on the Internet by systems operating in accordance with all applicable standards.

Stability – an effect on stability means that the proposed registry service (1) does not comply with applicable relevant standards that are authoritative and published by a well-established, recognized, and authoritative standards body, such as relevant standards-track or best current practice RFCs sponsored by the IETF, or (2) creates a condition that adversely affects the throughput, response time, consistency, or coherence of responses to Internet servers or end systems, operating in accordance with applicable relevant standards that are authoritative and published by a well-established, recognized and authoritative standards body, such as relevant standards-track or best current practice RFCs and relying on registry operator's delegation information or provisioning services.

2.1.4 Applicant's Withdrawal of an Application

An applicant who does not pass the Initial Evaluation may be permitted to withdraw its application at this stage for a partial refund (refer to subsection 1.5.5 of Module 1, Introduction to gTLD Application Process).

2.2 Extended Evaluation

An applicant may request an Extended Evaluation if the application has failed to pass the Initial Evaluation elements concerning:

- Demonstration of technical and operational capability (refer to paragraph 2.1.2.1).
- Demonstration of financial capability (refer to paragraph 2.1.2.1).

An Extended Evaluation may also result if ICANN identifies a need for further review on the following elements:

- DNS stability (refer to paragraph 2.1.1.3).
- Registry services (refer to subsection 2.1.3). Note that this investigation incurs an additional fee (the Registry Services Review Fee) if the applicant wishes to proceed. See Section 1.5 of Module 1 for fee and payment information.

From the time an applicant receives notice of failure to pass the Initial Evaluation, it has 15 calendar days to submit to ICANN the Notice of Request for Extended Evaluation through the online application interface. If the applicant does not explicitly request the Extended Evaluation, and pay any additional fees as applicable, the application will not proceed.

2.2.1 Technical and Operational or Financial Extended Evaluation

This subsection applies to an Extended Evaluation of an applicant's technical and operational capability or financial capability, as described in paragraph 2.1.2.1.

The Extended Evaluation allows one additional round of inquiry and answer between the evaluators and the applicant to clarify information contained in the application. This supplemental information will become part of the application. Applicants may not change the information submitted in their original applications. Through the online system, the evaluators will provide the applicant a set of questions describing any deficiencies in the application and request clarification. Such communications will include a deadline for the applicant to respond.

The same panel that reviewed an application during Initial Evaluation will conduct the Extended Evaluation, using the

same criteria as outlined at http://www.icann.org/en/topics/new-gtld-draft-evaluation-criteria-24oct08-en.pdf, to determine whether the application, now that certain information has been clarified, meets the criteria.

ICANN will notify applicants at the end of the Extended Evaluation period as to whether they have passed. If an applicant passes Extended Evaluation, its application continues to the next stage in the process. If an applicant does not pass Extended Evaluation, the application will proceed no further. No further reviews are available.

2.2.2 String Stability Extended Evaluation

This section applies to an Extended Evaluation of DNS security or stability issues with an applied-for gTLD string, as described in paragraph 2.1.1.3.

If the evaluators determine that a string poses stability issues that require further investigation, the applicant must either confirm that it intends to move forward with the application process or withdraw its application.

If an application is subject to such an Extended Evaluation, an independent 3-member panel will be formed to review the security or stability issues identified during the Initial Evaluation.

The panel will review the string and determine whether the string complies with relevant standards or creates a condition that adversely affects the throughput, response time, consistency, or coherence of responses to Internet servers or end systems, and will communicate its findings to ICANN and to the applicant.

If the panel determines that the string does not comply with relevant standards or creates a condition that adversely affects the throughput, response time, consistency, or coherence of responses to Internet servers or end systems, the application cannot proceed.

2.2.3 Registry Services Extended Evaluation

This section applies to an Extended Evaluation of Registry Services, as described in subsection 2.1.3.

If a proposed registry service has been referred to the Registry Services Technical Evaluation Panel (RSTEP) for an extended review, the RSTEP will form a review team of members with the appropriate qualifications.

The review team will generally consist of 3 members, depending on the complexity of the registry service proposed. In a 3-member panel, the review could be conducted within 30 to 45 days. In cases where a 5-member panel is needed, this will be identified before the extended evaluation starts. In a 5-member panel, the review could be conducted in 45 days or fewer.

The cost of an RSTEP review will be covered by the applicant through payment of the Registry Services Review Fee. Refer to payment procedures in section 1.5 of Module 1. The RSTEP team review will not commence until payment has been received.

If the RSTEP finds that one or more of the applicant's proposed registry services may be introduced without risk of a meaningful adverse effect on security or stability, these services may be included in the applicant's contract with ICANN.

If the RSTEP finds that the proposed service would create a risk of a meaningful adverse effect on security or stability, the applicant may elect to proceed with its application without the proposed service, or withdraw its application for the gTLD.

2.3 Probity and Conflicts of Interest

ICANN staff and by various independent service providers will review all applications during **Initial Evaluation** and **Extended Evaluation**. During this entire evaluation process, applicants must not approach, or have any other person or entity approach on their behalf, any ICANN staff member, any ICANN Board member, or any person associated with the evaluation process, including any evaluators, experts, examiners, or reviewers retained by ICANN.

DRAFT - New gTLD Program – Initial Evaluation and Extended Evaluation

Administrative Completeness Check - Application is confirmed as complete and ready for evaluation

Initial Evaluation – *String Review*

String Confusion

String is reviewed by String Similarity Panel to determine if the proposed string is I kely to cause user confusion with existing TLDs or Reserved Names

String Similarity Panel compares all applied-for gTLDs and creates contention sets

DNS Stability

Technical experts review all applied-for gTLDs to ensure they do not violate string criteria. In extraordinary cases, the technical experts may determine that an applied-for gTLD has a strong likelihood of causing DNS instability and will require review during Extended Evaluation

Geographical Names

The GNP reviews all applied-for gTLDs, to ensure that any geographical name is properly designated

The GNP confirms that the applicant has provided the required documentation and that it is valid

Initial Evaluation – *Applicant Review*

Business Operational Criteria

Evaluators review applicant's answers to questions and supporting documentation

Technical Criteria

Evaluators review applicant's answers to questions and supporting documentation

Registry Services

ICANN performs initial review of registry services to be offered by applicant. ICANN identifies which registry services require review by RSTEP during Extended Evaluation

Does applicant pass all elements of Initial Evaluation?

NO

Applicant elects to pursue ***Extended Evaluation***

NO

YES

Extended Evaluation can be for any or all of the four elements below:

- Technical and Operational Capability
- Financial Capability
- DNS Stability
- Registry Services

Does applicant pass all elements of Extended Evaluation?

NO

Application Denied

YES

Applicant continues to subsequent steps

YES

Draft Applicant Guidebook

Module 3

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

24 October 2008

Module 3

Dispute Resolution Procedures

This module describes the purpose of the objection and dispute resolution mechanisms, the grounds for lodging an objection to a gTLD application, the general procedures for filing or responding to an objection, and the manner in which dispute resolution proceedings are conducted.

This module also discusses the guiding principles, or standards, that each DRSP will apply in its decisions.

All applicants should be aware of the possibility that an objection may be filed against their applications, and of the options available in the event of such an objection.

3.1 Purpose and Overview of the Dispute Resolution Process

The independent dispute resolution process is designed to protect certain interests and rights. The process provides a path for formal objections during evaluation of the applications. It allows certain parties with standing to have their objections considered before a panel of qualified experts. A formal objection can be filed only on four enumerated grounds, as described in this module. A formal objection initiates a dispute resolution proceeding. In filing an application for a gTLD, the applicant agrees to accept this gTLD dispute resolution process. Similarly, an objector accepts the gTLD dispute resolution process by filing its objection.

3.1.1 Grounds for Objection

An objection may be filed on any one of the following four grounds:

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

Legal Rights Objection – The applied-for gTLD string infringes existing legal rights of the objector.

Morality and Public Order Objection – The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under international principles of law.

Community Objection – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

The rationales for these grounds are discussed in the final report of the ICANN policy development process for new gTLDs. For more information on this process, see http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm.

3.1.2 Standing to Object

Objectors must satisfy standing requirements to have their objections considered. As part of the dispute proceedings, all objections will be reviewed by panelists designated by the applicable Dispute Resolution Service Provider (DRSP) to determine whether the objector has standing to object. Standing requirements for the four objection grounds are:

Objection Ground	Who may object
String confusion	Existing TLD operator or gTLD applicant in current round
Legal rights	Rightsholders
Morality and Public Order	To be determined
Community	Established institution

3.1.2.1 String Confusion Objection

Two types of entities have standing to object:

- An existing TLD operator may file a string confusion objection to assert string confusion between an applied-for gTLD and the TLD that it currently operates.
- Any gTLD applicant in this application round may also file a string confusion objection to assert string confusion between an applied-for gTLD and the gTLD for which it has applied.

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

3.1.2.2 Legal Rights Objection

Only a rightsholder has standing to file a legal rights objection. The source and documentation of the existing legal rights the objector is claiming are infringed by the applied-for gTLD must be included in the filing.

3.1.2.3 Morality and Public Order Objection

Standing requirements for morality and public order objections remain under study. In the case of morality and public order objections, it may be appropriate to grant standing only to parties who have recognized authority in the arena of morality or public order, such as governments, or it may be appropriate to make this option available to any interested parties who assert harm due to an applied-for gTLD string.

3.1.2.4 Community Objection

Established institutions associated with defined communities are eligible to file a community objection. To qualify for standing for a community objection, the objector must prove both of the following:

It is an established institution – Factors that may be considered in making this determination include:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process.

It has an ongoing relationship with a defined community that consists of a restricted population – Factors that may be considered in making this determination include:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

3.1.3 Options in the Event of Objection

Applicants whose applications are the subject of an objection have the following options:

The applicant can file a response to the objection and enter the dispute resolution process (refer to subsection 3.3); or

The applicant can withdraw, in which case the objector will prevail by default and the application will not proceed further.

If for any reason the applicant does not file a response to an objection, the objector will prevail by default.

3.2 Procedure for Filing an Objection

To trigger a dispute resolution proceeding, an objection must be filed by the posted deadline date. Objections must be filed directly with the appropriate DRSP for each objection ground.

The **International Centre for Dispute Resolution** has agreed in principle to administer disputes brought pursuant to string confusion objections.

The Arbitration and Mediation Center of the World Intellectual Property Organization has agreed in principle to administer disputes brought pursuant to legal rights objections.

The **International Chamber of Commerce** has agreed in principle to administer disputes brought pursuant to Morality and Public Order and Community Objections.

3.2.1 Objection Filing Procedures

The procedures outlined in this subsection must be followed by any party wishing to file a formal objection to an application that has been posted by ICANN. These procedures are provided to applicants for reference and are intended to cover dispute resolution procedures generally. Each provider has its own rules and procedures that also must be followed when filing an objection.

Should an applicant wish to file a formal objection to another gTLD application, it would follow these procedures.

- All objections must be filed by the posted deadline date. Objections will not be accepted by the DRSPs after this date.

- All objections must be filed in English.
- Each objection must be filed separately. That is, if any objector wishes to object to several applications at the same time, the objector must file an objection and pay a filing fee for each application that is the subject of an objection. If an objector wishes to object to one application on different grounds, the objector must file an objection and pay a filing fee for each objection ground.
- All objections must be filed with the appropriate DRSP. If an objection is filed with a DRSP other than the DRSP specified for the objection ground, that DRSP will promptly notify the objector of the error. The objector then has 5 calendar days after receiving that notification to file its objection with the appropriate DRSP.
- Objections must be filed electronically and all interactions with the DRSPs during the objection process must be conducted online.

Each objection filed by an objector must include:

- The name and contact information, including address, phone, and email address, of all parties submitting an objection.
- The basis for standing; that is, why the objector believes it has the right to object.
- A statement of the nature of the dispute, which should include:
  - A statement giving the specific ground under which the objection is being filed.
  - A detailed explanation of how the objector's claim meets the requirements for filing a claim pursuant to that particular ground or standard.
  - A detailed explanation of the validity of the objection and why the application should be denied.
- Copies of any documents that the objector considers to be a basis for the objection.

Objections are limited to 2500 words, excluding attachments.

The DRSP will use electronic means to deliver copies of all materials filed to the applicant and to all objectors.

Each applicant and all objectors must provide copies of all submissions to the DRSP associated with the objection proceedings to one another, and to ICANN.

ICANN will publish a document on its website identifying all objections shortly after the deadline for filing objections has passed (refer to Item 1 above). Objections will not be published before that deadline.

3.2.2 Objection Filing Fees

At the time an objection is filed, the objector is required to pay a nonrefundable filing fee in the amount set and published by the relevant DRSP. If the filing fee is not paid, the DRSP will dismiss the objection without prejudice. See Section 1.5 of Module 1 regarding fees.

3.3 Filing a Response to an Objection

3.3.1 Filing Procedures

These procedures are intended to cover dispute resolution procedures generally. Each DRSP will have its own rules that also must be followed.

Upon notification that ICANN has published the list of objections filed (refer to subsection 3.2.1), the DRSPs will notify the parties that responses must be filed within 30 calendar days of receipt of that notice. DRSPs will not accept late responses. Any applicant that fails to respond to an objection within the 30-day response period will be in default, which will result in the objector prevailing.

- All responses must be filed in English.
- Each response must be filed separately. That is, if an applicant wishes to respond to several objections, the applicant must file a response and pay a filing fee to respond to each objection.
- All responses must be filed with the appropriate DRSP. If a response is filed with a DRSP other than the DRSP specified for the objection ground, that DRSP will promptly notify the applicant of the error. The applicant then has 5 calendar days after receiving the notification to file its objection with the appropriate DRSP.

- Responses must be filed electronically and all interactions with the DRSPs during the dispute resolution process must be conducted online.
- Each response filed by an applicant must include the name and contact information, including address, phone, and email address, of all parties submitting the response.
- Each responding applicant's response must contain a point-by-point confirmation or denial of the claims made by each objector. The applicant also should attach any copies of documents that it considers to be a basis for the response.
- Responses are limited to 2500, excluding attachments.
- The DRSP will use electronic means to deliver copies of all materials filed to the applicant and to all objectors.
- Each applicant and all objectors must provide copies of all submissions to the DRSP associated with the objection proceedings to one another and to ICANN.

3.3.2 Response Filing Fees

At the time an applicant files its response, it is required to pay a nonrefundable filing fee in the amount set and published by the relevant DRSP, which will be the same as the filing fee paid by the objector. If the filing fee is not paid, the response will be disregarded.

3.4 Dispute Resolution Procedure

3.4.1 Preliminary Objection Processing

Each DRSP will conduct an administrative review of each objection for compliance with all procedural rules within 14 calendar days of receiving the objection. Depending on the number of objections received, the DRSP may ask ICANN for a short extension of this deadline.

If the DRSP finds that the objection complies with procedural rules, the objection will be deemed filed, and the proceedings will continue. If the DRSP finds that the objection does not comply with procedural rules, the DRSP will dismiss the objection and close the proceedings without prejudice to the objector's submission of a new objection that complies with procedural rules. The DRSP's review or rejection of the objection will not interrupt the time limit for submitting an objection.

3.4.2 Consolidation of Objections

Once the DRSP receives and processes all objections, at its discretion the DRSP may elect to consolidate certain objections.

An example of circumstances in which consolidation might occur is multiple objections to the same application based on the same ground.

In assessing whether to consolidate objections, the DRSP will weigh the efficiencies in time, money, effort, and consistency that may be gained by consolidation against the prejudice or inconvenience consolidation may cause. The DRSPs will endeavor to have all objections resolved on a similar timeline. It is intended that no sequencing of objections will be established.

New gTLD applicants and objectors also will be permitted to propose consolidation of objections, but it will be at the DRSP's discretion whether to agree to the proposal.

3.4.3 Negotiation and Mediation

The parties to a dispute resolution proceeding are encouraged—but not required—to participate in a cooling off period to determine whether the dispute can be resolved by the parties. Each DRSP has panelists who can be retained as mediators to facilitate this process, should the parties elect to do so, and the DRSPs will communicate with the parties concerning this option and any associated fees.

If a mediator is appointed, that person may not serve on the panel to resolve the objection.

There are no automatic extensions of time associated with any cooling off period. The parties may submit joint requests for extensions of time to the DRSP according to its procedures, and the DRSP or the panel, if appointed, will decide whether to grant the requests, although extensions will be discouraged. The parties must limit their requests for extension to 30 calendar days.

3.4.4 Selection and Number of Panelists

Appropriately qualified panelists will be appointed to each proceeding by the designated DRSP.

Panelists must be independent of the parties to an objection resolution proceeding. Each DRSP will follow its adopted procedures for requiring such independence,

including procedures for challenging and replacing a panelist for lack of independence.

There will be one panelist in proceedings involving a **string confusion objection**.

There will be one panelist with relevant experience in intellectual property rights disputes in proceedings involving an existing **legal rights objection**.

There will be three panelists recognized as eminent jurists of international reputation, in proceedings involving a **morality and public order objection**.

There will be one panelist in proceedings involving a **community objection**.

Neither the panelists, the DRSP, ICANN, nor their respective employees, Board members, or consultants will be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any proceeding under the dispute resolution procedures.

3.4.5 Adjudication

At its discretion, the panel appointed by the DRSP may request further statements or documents from the parties, although such requests will be limited and infrequent.

To keep costs down and limit delays, the panel will discourage and, if practicable, not permit any document production or other discovery-style requests from the parties.

Without its being requested by the parties, the panelists may appoint experts to be paid for by the parties, request live or written witness testimony, or request limited exchange of documents.

Any party may request a hearing; however, it is within the panel's discretion whether to allow such a hearing. The presumption is that the panel will render decisions based on written submissions and without a hearing.

If a request for a hearing is granted, videoconferences are to be used if possible. If not possible, then the DRSP panel will select a place for hearing if the parties cannot agree. The panel will determine whether the hearings are to be public or private. Hearings will last no more than one day, except in the most exceptional circumstances.

Typically, dispute resolution proceedings will be conducted in English, but may be conducted in another language in accordance with the rules of the provider.

3.4.6 Decision

The DRSPs' final decisions will be in writing and will include:

- A summary of the dispute and findings; and
- The reasoning upon which the decision is based.

Each DRSP will develop a single format for all final decisions that its panelists render. The DRSP will notify the parties of the decision via email.

ICANN will strongly encourage DRSPs to use reasonable efforts to issue all final decisions within 45 days of the panel appointment date unless, after both parties have completed their initial submissions, the parties jointly request a short postponement of their adjudication date to accommodate negotiation or mediation or to accommodate other aspects of the proceedings, and the panel agrees.

When the panel is composed of three panelists, the decision will be made by a majority of the panelists.

Unless the panel decides otherwise, each DRSP will publish all decisions rendered by its panels in full on its website.

A dispute resolution panel decision will be considered an expert determination, and will be considered by ICANN in making a final decision regarding the success of any application.

3.4.7 Dispute Resolution Fees

Before acceptance of objections, each DRSP will publish a schedule of costs for the proceedings that it administers under this procedure. These costs cover the fees and expenses of the members of the panel and the DRSP's administrative costs.

ICANN expects that string confusion and legal rights objection proceedings will involve a fixed amount charged by the panelists while morality and public order and community objection proceedings will involve hourly rates charged by the panelists.

Within 7 business days of constituting the panel, the DRSP will estimate the total costs and request advance payment in full of its costs from both the objector and the applicant.

Each party must make its advance payment within 15 calendar days of receiving the DRSP's request for payment. The respective filing fees paid by the parties will be credited against the amounts due for this advance payment of costs.

The DRSP may revise its estimate of the total costs and request additional advance payments from the parties during the resolution proceedings.

Additional fees may be required in specific circumstances; for example, if the DRSP receives supplemental submissions or elects to hold a hearing.

If an objector fails to pay these costs in advance, the DRSP will dismiss its objection and no fees paid by the objector will be refunded.

If an applicant fails to pay these costs in advance, the DSRP will sustain the objection and no fees paid by the applicant will be refunded.

After the hearing has taken place and the panel renders its decision, the DRSP will refund any costs paid in advance to the prevailing party.

3.5 Dispute Resolution Principles (Standards)

Each panel will use appropriate general principles (standards) to evaluate the merits of each objection. The principles for adjudication on each type of objection are specified in the paragraphs that follow. The panel may also refer to other relevant rules of international law in connection with the standards.

The objector bears the burden of proof in each case.

The principles outlined below are subject to evolution based on ongoing consultation with DRSPs, legal experts, and the public.

3.5.1 String Confusion Objection

A DRSP panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion.

String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the

average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

3.5.2 Legal Rights Objection

In interpreting and giving meaning to GNSO Recommendation 3 ("Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law"), a DRSP panel presiding over a legal rights objection will determine whether the potential use of the applied-for TLD by the applicant takes unfair advantage of the distinctive character or the reputation of the objector's trademark or service mark ("mark"), or unjustifiably impairs the distinctive character or the reputation of the objector's mark, or otherwise creates an impermissible likelihood of confusion between the applied-for TLD and the objector's mark, by considering the following non-exclusive factors:

1. Whether the applied-for TLD is identical or similar, including in appearance, phonetic sound or meaning, to the objector's existing mark.

2. Whether the objector's acquisition and use of rights in the mark has been bona fide.

3. Whether and to what extent there is recognition in the relevant sector of the public of the sign corresponding to the TLD, as the mark of the objector, of the applicant or of a third party.

4. Applicant's intent in applying for the TLD, including whether the applicant, at the time of application for the TLD, had knowledge of the objector's mark, or could not have reasonably been unaware of that mark, and including whether the applicant has engaged in a pattern of conduct whereby it applied for or operates TLDs or registrations in TLDs which are identical or confusingly similar to the marks of others.

5. Whether and to what extent the applicant has used, or has made demonstrable preparations to use, the sign corresponding to the TLD in connection with a bona fide offering of goods or services or a bona fide provision of information in a way that does not interfere with the legitimate exercise by the objector of its mark rights.

6. Whether the applicant has marks or other intellectual property rights in the sign corresponding to the TLD,

and, if so, whether any acquisition of such a right in the sign, and use of the sign, has been bona fide, and whether the purported or likely use of the TLD by the applicant is consistent with such acquisition or use.

7. Whether and to what extent the applicant has been commonly known by the sign corresponding to the TLD, and if so, whether any purported or likely use of the TLD by the applicant is consistent therewith and bona fide.

8. Whether the applicant's intended-use of the TLD would create a likelihood of confusion with the objector's mark as to the source, sponsorship, affiliation, or endorsement of the TLD.

3.5.3 Morality and Public Order Objection

This section is under construction. ICANN expects to implement a standard for morality and public order objections in accordance with international legal principles. Accordingly, ICANN has reviewed legal systems in all ICANN regions. ICANN has also consulted with judges, attorneys, and legal experts in many jurisdictions. The general principles guiding ICANN in the establishment of dispute resolution standards are: (1) everyone has the right to freedom of expression; and (2) such freedom of expression may be subject to certain narrowly interpreted exceptions that are necessary to protect other important rights. See Articles 19 and 20 of the International Covenant on Civil and Political Rights. ICANN continues to address the challenge of identifying standards appropriate for the global namespace.

3.5.4 Community Objection

The four tests described here will enable a DRSP panel to determine whether there is substantial opposition from a significant portion of the community to which the string may be targeted. For an objection to be successful, the objector must prove that:

- The community invoked by the objector is a defined community; and
- Community opposition to the application is substantial; and
- There is a strong association between the community invoked and the applied-for gTLD string; and

- There is a likelihood of detriment to the community named by the objector if the gTLD application is approved.

Each of these tests is described in further detail below.

Community – The objector must prove that the community expressing opposition can be regarded as a well-defined community. A panel could balance a number of factors to determine this, including:

- Level of public recognition of the group as a community at a local and / or global level;
- Level of formal boundaries around the community and what elements are considered to form the community;
- How long the community has been in existence;
- How globally distributed is the community (breadth, level of importance)(this may not apply if the community is territorial); and
- How many people make up the community.

If opposition by a number of people is found, but the group claiming opposition is not determined to be a distinct community, the objection will fail.

Substantial opposition – The objector must prove substantial opposition within the community it has identified. A panel could balance a number of factors to determine whether there is substantial opposition, including:

- Number of expressions of opposition relative to the composition of the community;
- Distribution or diversity among sources of expressions of opposition, including:
    - Regional
    - Subsectors of community
    - Leadership of community
    - Membership of community
- Nature/intensity of opposition; and
- Costs incurred by objector in expressing opposition, including what other channels they have used to convey their opposition.

If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail.

Targeting – The objector must prove an association between the applied-for gTLD string and the community expressing opposition. Factors that could be balanced by a panel to determine this include:

- Statements contained in application;
- Other public statements by the applicant;
- Associations by the public.

If opposition by a community is determined, but there is no clear connection between the community and the applied-for gTLD string, the objection will fail.

Detriment – The objector must prove that there is a likelihood of detriment to the rights or legitimate interests of its associated community. Factors that could be used by a panel in making this determination include:

- Damage to the reputation of the community that would result from the applicant's operation of the applied-for gTLD string;
- Evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community;
- Interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string; and
- Dependence of the community on the DNS for its core activities.

Defenses – Satisfaction of the standing requirements for filing a Community Objection (refer to paragraph 3.1.2.4) by the applicant is a complete defense to an objection filed on community grounds.

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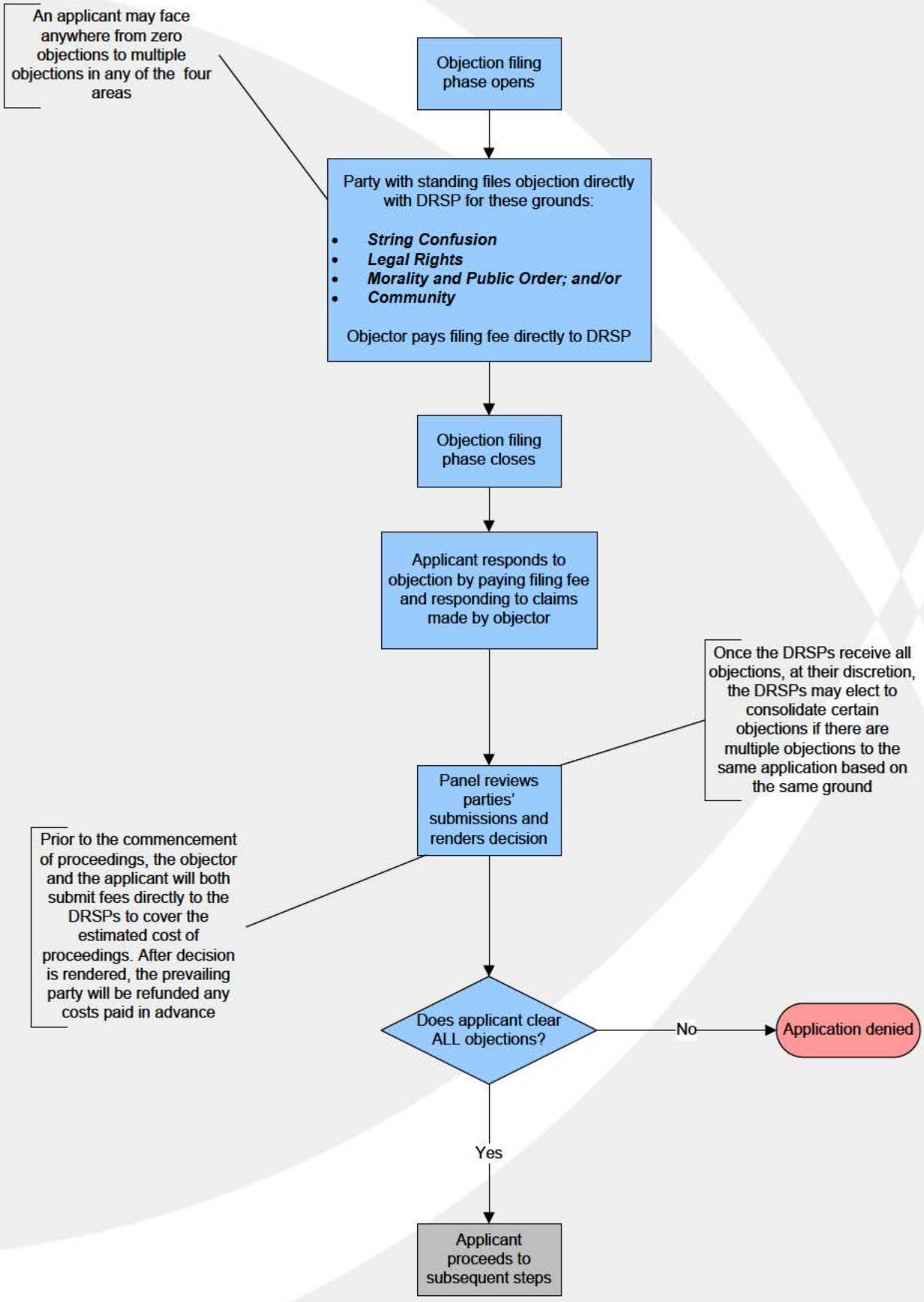

Draft Applicant Guidebook

Module 4

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

24 October 2008

Module 4

String Contention Procedures

This module describes situations in which contention over applied-for gTLD strings occurs, and the two methods available to applicants for resolving such contention cases.

4.1 String Contention

String contention occurs when either:

1. Two or more applicants for an identical gTLD string successfully complete all previous stages of the evaluation and dispute resolution processes; or

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

ICANN will not approve applications for proposed gTLD strings that are identical or that would result in string confusion, called contending strings. If either situation 1 or 2 above occurs, such applications will proceed to contention resolution through either comparative evaluation or an efficient mechanism for contention resolution, both of which are described in this module. A group of applications for contending strings is referred to as a contention set.

4.1.1 Identification of Contention Sets

Contention sets are groups of applications containing identical or similar applied-for gTLD strings. (In this RFP, "similar" means strings so similar that it is probable that detrimental user confusion would result if the two similar gTLDs are delegated into the root zone.) Contention sets are identified during Initial Evaluation from review of all applied-for TLD strings by the panel of String Similarity Examiners. ICANN will publish contention sets by the close of the Initial Evaluation period.

Applications for identical gTLD strings will be automatically assigned to a contention set. For example, if Applicant A and Applicant B both apply for .TLDSTRING, they will be

identified as being in a contention set. Such testing for identical strings also takes into consideration the code point variants listed in any relevant language reference table.

The String Similarity Examiners will also review the entire pool of applied-for strings to determine whether the strings proposed in any two or more applications are so similar that they would create a probability of user confusion if allowed to coexist in the DNS. The panel will make such a determination for each pair of applied-for gTLD strings. The outcome of the String Confusion Review described in subsection 2.1.1 is the identification of contention sets among applications that have direct or indirect contention relationships with one another.

Two strings are in **direct contention** if they are identical or so similar that there is a probability of user confusion if both were to be delegated as TLDs in the root zone. More than two applicants might be represented in a direct contention situation: if four different applicants applied for the same gTLD string, they would all be in direct contention with one another.

Two strings are in **indirect contention** if they are both in direct contention with a third string, but not with one another. Direct and indirect contention are explained in greater detail in the example that follows.

In Figure 4-1, Strings A and B are an example of direct contention. Strings C and G are an example of indirect contention. C and G both contend with B, but not with one another. The figure as a whole is one contention set. A contention set consists of all applications that are linked by string contention to one another, directly or indirectly.

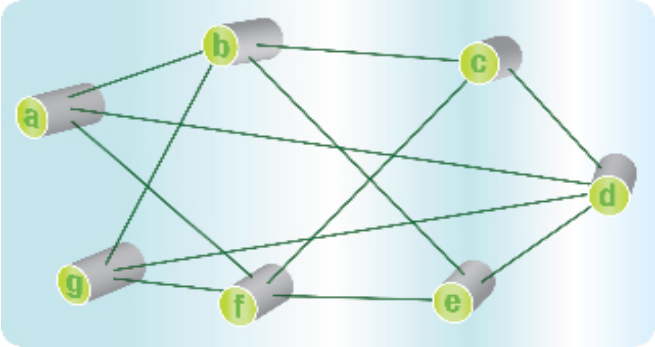

Figure 4-1 – This diagram represents one contention set, featuring both directly and indirectly contending strings.

While contention sets are determined during Initial Evaluation, the final configuration of the contention sets can only be established once the evaluation and dispute resolution process steps have concluded. This is because any application excluded through those steps might modify a contention set identified earlier. A contention set may be split it into two sets or it may be eliminated altogether as a result of an Extended Evaluation or dispute resolution proceeding.

Refer to Figure 4-2: In contention set 1, applications D and G are eliminated. Application A is the only remaining application, so there is no contention left to resolve.

In contention set 2, all applications successfully complete Extended Evaluation and Dispute Resolution, so the original contention set remains to be resolved.

In contention set 3, application F is eliminated. Since application F was in direct contention with E and J, but E and J are not in contention with one other, the original contention set splits into two sets: one containing E and K in direct contention, and one containing I and J.

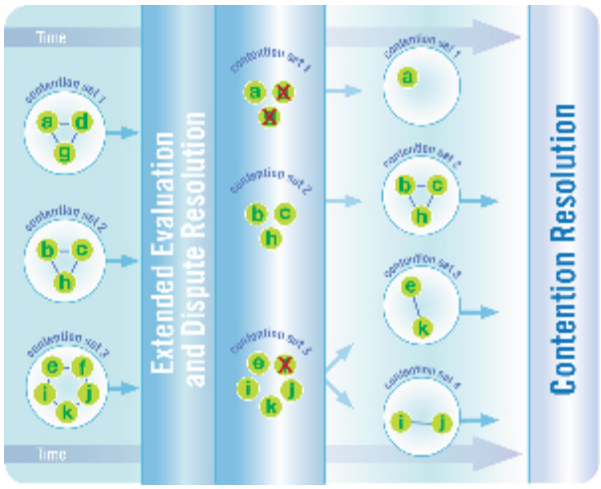

Figure 4-2 – Resolution of string contention cannot begin until all applicants within a contention set have completed all applicable previous stages.

The remaining contention cases must then be resolved through comparative evaluation or an efficient mechanism for contention resolution, depending on the circumstances. In this process, ICANN addresses each contention set to achieve an unambiguous resolution.

In their policy advice, the GNSO called for an efficient process to resolve cases of contention where there was no claim of community representation to be used as a factor for resolving the contention. While not settled, candidate means for this process are discussed below and in more detail in a companion paper to the Draft Applicant Guidebook called "Resolving string contention—a complete lifecycle including string contention resolution."

4.1.2 *Impact of Dispute Resolution Proceedings on Contention Sets*

If an applicant files a string confusion objection against another applicant (refer to Module 3), and the panel does find that string confusion exists; that is, rules in favor of the objector, the two applicants will be placed in direct contention with each other. Thus, the outcome of a proceeding based on a string confusion objection would result in a new contention set structure for the relevant applications.

4.1.3 Self-Resolution of String Contention

Applicants that are identified as being in contention may elect to reach a settlement or agreement among themselves whereby one or more applicants withdraws its application. This may occur at any stage of the process, once ICANN publicly posts the applications received on its website.

Applicants may not resolve a case of string contention by changing their applications by, for instance, selecting a new TLD string or creating a joint venture as a means to resolve the contention case.

4.1.4 Possible Contention Resolution Outcomes

Any application with no contention situation left to resolve is allowed to proceed to the next step. In some cases, an applicant who is not the outright winner of a string contention resolution process can still proceed. This situation is explained in the following paragraphs.

There may be more than one application that passes contention resolution within a contention set. If the strings within a given contention set are all identical, the applications are in direct contention with each other and there can only be one winner that proceeds to the next step.

However, where there are both direct and indirect contention situations within a set, more than one string may survive the resolution.

For example, if string A is in contention with B, B is in contention with C, but C is not in contention with A. If A wins the contention, B is eliminated but C can go on since C is not in direct contention with the winner and both strings can coexist in the DNS without risk for confusion.

4.2 Comparative Evaluation

Comparative evaluation can begin once all applicants in the contention set have completed all previous stages of the process.

The comparative evaluation is an independent analysis. Scores received in the applicant reviews are not carried forward to the comparative evaluation. Each applicant participating in the comparative evaluation begins with a score of zero.

4.2.1 Eligibility for Comparative Evaluation

As described in subsection 1.2.2 of Module 1, all applicants are required to identify whether their application type is:

- Open; or
- Community-based.

Only community-based applicants may elect a comparative evaluation. ICANN policy states that if there is contention for strings, a claim to support a community by one party will be a reason to award priority to that application. If one community-based applicant within a contention set makes this election, all other community-based applicants in the same contention set will be part of the comparative evaluation.

Applicants designating their applications as community-based will also be asked to respond to a set of questions in the application form that would provide relevant information if a comparative evaluation occurs.

Before the comparative evaluation begins, all community-based applicants in the contention set may be asked to provide additional information relevant to the comparative evaluation. Additionally, the community-based applicants will be required to pay a Comparative Evaluation Fee (refer to Section 1.5 of Module 1) to participate in the comparative evaluation.

4.2.2 Comparative Evaluation Procedure

Comparative evaluations for each contention set will be performed by a comparative evaluation provider appointed by ICANN to review all applications for contending gTLD strings. The panel's charter is to determine whether one of the community-based applications clearly and demonstrably would add more value to the Internet's Domain Name System. Open applicants within the contention set will not participate in the comparative evaluation.

If no single community-based applicant emerges as one that clearly and demonstrably adds more value to the namespace than all the competing contending applications, then all of the parties in the contention set (both open and community-based applicants) will proceed to an alternate mechanism for efficient contention resolution.

4.2.3 Comparative Evaluation Criteria

A panel appointed by the comparative evaluation provider will review and score the one or more community-based applicants who elected comparative evaluation against the criteria in the following table:

Criteria	Score		
	3	2	1
Nexus between Proposed String and Community	String is name or well-known abbreviation of community institution.	String is relevant to applicant's area of interest but also has other well-known associations.	No connection.
Dedicated Registration Policies	Registration eligibility is strictly limited to members of the pre-established community identified in the application. Registration policies also include name selection and use requirements consistent with the articulated scope and community-based nature of the TLD. Proposed policies include specific enforcement measures including investigation practices, penalties, takedown procedures and appeal mechanisms.	Registration eligibility is predominantly available to members of the pre-established community identified in the application, and also permits people or groups informally associated with the community to register. Policies include some elements of the above but one or more elements are missing.	No dedicated registration policies.
Community Establishment	Clearly identified, organized and pre-established community of considerable size and longevity.	The community addressed fulfills some but not all the requirements for a score of 3.	No community addressed.
Community Endorsement	Endorsement by a recognized institution or by member organizations.	Endorsement by some groups with apparent relevance, but also some opposition by groups with apparent relevance.	Assorted endorsements from individuals or groups of unknown relevance – or – no endorsement by any community.

If no applicant scores 11 or more, there is no clear winner. If only one applicant scores 11 or more, that applicant will be declared the winner.

If more than one applicant scores 11 or more, the evaluators will consider what portion of the community is represented by the application. *If one applicant represents*

a much larger share of the relevant community than another, that will be a basis for awarding priority.

Following the comparative evaluation, ICANN will review the results and reconfigure the contention set as needed. The same procedure will occur for remaining contention sets involving any community-based application that has elected comparative evaluation. If no community-based applicant that has elected comparative evaluation is left in the contention set, any applications remaining in contention will proceed to a subsequent contention resolution process. Applications not in contention will proceed toward delegation.

4.3 Efficient Mechanism for Contention Resolution

A tie-breaker mechanism will be developed for resolving string contention among the applicants within a contention set, if the contention has not been resolved by other means. Unless the specific conditions for comparative evaluation outlined in Section 4.2 apply, this mechanism will be used to resolve the contention. This mechanism may also be used if no clear winner is identified during the comparative evaluation process.

The GNSO policy recommendations call for an efficient means of resolution. Continued investigation regarding the availability of alternative methods will guide ICANN's development of this mechanism.

The first efficient means of resolution that will be employed is a settlement arrived at by contending parties. Applicants for identical or similar TLDs can arrive at an accommodation where all in direct contention withdraw except for one. As described earlier, those withdrawing cannot apply for a new string. Nor can contending parties combine to form a new applicant. It is expected that many cases of contention will be resolved in this manner as it will be the most efficient and economical for the contending parties.

Failing to arrive at accommodation of the type described just above, auctions are one means of last resort that is being explored to resolve the contention. The purpose of an auction is to resolve contention in a clear, objective manner.

Auction proceeds – The purpose of an auction is to resolve contention in a clear, objective manner. It is not to raise revenue. While there may be significant proceeds from auctions in the event they occur, it is important to understand that this in no way the purpose of the auction. The annual budget process sets ICANN's funding and spending limits. ICANN has no authorization to spend beyond the budget. ICANN already has precedent of returning revenue to the community when last year and in 2006 ICANN reduced registration fees from 25¢ to 20¢ over two years as a result of an unforeseen growth in revenue. Proceeds from auctions will be reserved until the uses of the proceeds are determined through a community consultation. The proceeds will not go into ICANN's general expense budget but will be separately earmarked for projects or uses identified by the community. This important aspect of the auction process and its result will be an important part of the communications plan for the new gTLD program.

The new gTLD application fee is designed to be cost/revenue neutral. It factors in costs already forgone, future processing costs and legal expenses that are significant and would be a large drain on the Corporation's established budget.

See further details on the exploration of an auction model in the contention lifecycle at http://www.icann.org/en/topics/string-contention-22oct08.pdf.

In practice, ICANN expects that most contention cases will be resolved through other means before reaching this stage.

4.4 Contention Resolution and Contract Execution

An applicant that has been declared winner of a contention resolution process will proceed by entering into the contract execution phase. (Refer to section 5.1 of Module 5.)

If the winner of the contention resolution has not executed a contract within 90 days of the decision, ICANN has the right to extend an offer to the runner-up applicant to proceed with its application. For example, in a comparative evaluation, the applicant with the second-

highest score (if equal to or greater than eleven, might be selected to go on to the next step, delegation. (Refer to Module 5.) Similarly, in an efficient mechanism for contention resolution, another applicant who would be considered the runner-up applicant might proceed to the delegation step. This offer is at ICANN's option only. The runner-up applicant in a contention resolution process has no automatic right to an applied-for gTLD string if the first place winner does not execute a contract within a specified time.

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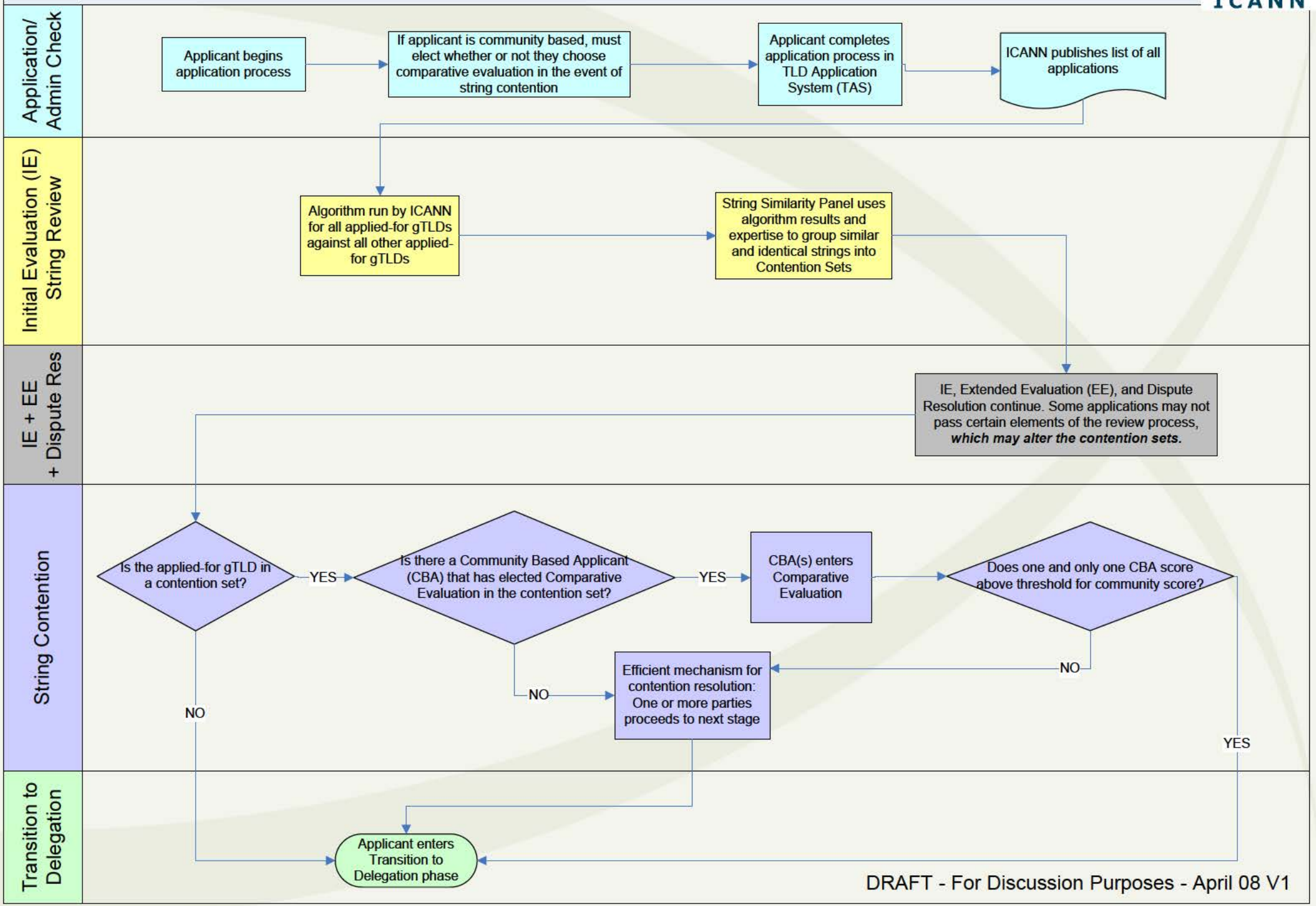

DRAFT - For Discussion Purposes - April 08 V1

Draft Applicant Guidebook

Module 5

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

24 October 2008

Module 5

Transition to Delegation

This module describes the final steps required of an applicant, including execution of a registry agreement with ICANN and preparing for delegation of the new gTLD string into the root zone.

5.1 Registry Agreement

All applicants that have successfully completed the evaluation process—including, if necessary, the dispute resolution and string contention processes—are required to enter into a registry agreement with ICANN in order to proceed to delegation.

It is important to note that the agreement referred to below does not constitute a formal position by ICANN and has not been approved by the ICANN Board of Directors. The agreement is set out here for review and community discussion purposes and as a means to improve the effectiveness of the agreement in providing for increased competition and choice for consumers in a stable, secure DNS.

The contract terms can be reviewed at http://www.icann.org/en/topics/new-gtld-draft-agreement-24oct08-en.pdf. All successful applicants are expected to enter into the agreement substantially as written. The terms of the contract and, in particular, differences with existing registry agreements are explained in a companion paper to the agreement, *Summary of Changes to Base Agreement for New gTLDs,* http://www.icann.org/en/topics/new-gtld-draft-summary-changes-24oct08-en.pdf.

After an applicant has successfully completed the application process, ICANN may conduct a pre-contract review. To ensure that an applicant continues to be a going concern in good legal standing, ICANN reserves the right to ask the applicant to submit updated documentation and information before entering into the registry agreement.

If at any time during the evaluation process information previously submitted by an applicant becomes untrue or

inaccurate, the applicant must promptly notify ICANN and submit updated information. This includes applicant-specific information such as changes in financial position and changes in ownership or control of the applicant.

5.2 Pre-Delegation Testing

Following completion of the Board review, each applicant will be required to complete pre-delegation steps as a prerequisite to entering the IANA process for delegation into the root zone. The pre-delegation check must be completed within the time period specified in the registry agreement.

5.2.1 Technical Testing

The purpose of the pre-delegation technical test is to verify the applicant has met its commitment to establish registry operations in accordance with the technical and operational criteria described, along with the applicant questions. (Refer to Module 2.) The checks are also intended to ensure that the applicant can operate the gTLD in a stable and secure manner. All applicants will be tested on a pass/fail basis according to the questions and criteria that follow.

Question		Criteria
1	**IDN (variant) tables**	
	If applicant will be supporting IDNs, was the IDN table attached to the application when originally submitted and does it fulfill IDN and IANA guidelines and requirements?	IDN tables must be developed and provided by the IDN string applicant at the time the application was submitted. The table must fulfill the requirements from the IDN Guidelines as well as the IANA repository requirements in order to be considered valid (see http://iana.org/procedures/idn-repository.html).
2	**DNSSEC keys, materials**	
	If DNSSEC is offered as part of registry services at time of application, can applicant comply with requirements?	Trust anchor for the registry will be published in the IANA Interim Trust Anchor Repository. Validity will be determined by verifying that DNS resolvers that support DNSSEC can successfully retrieve and DNSSEC validate information from that zone when configured with the published trust anchor for the zone.
3	**Architecture load requirements**	
	Has the applicant implemented a network architecture necessary to support load characteristics, as outlined in its application?	Applicant will self-certify adherence to this requirement and provide materials to ICANN that demonstrate adherence. Examples of self-certification documents include but are not limited to a network/system diagram of the as-built network system (demonstrating correspondence to documentation in initial application), results of load testing performed by the applicant, and actual performance of the configuration in use for other registries. At ICANN's discretion, aspects of this self-certification documentation can be audited on-site at the services delivery point of the registry.

Question		Criteria
4	**IPv6 for registrants**	
	Does registry support provisioning of IPv6 services for its registrants?	Registry must support provisioning of IPv6 services on behalf of its registrants. This means that registrar systems will allow entry of IPv6 addresses in all relevant address fields, that the SRS system is set up to support the communication of IPv6 addresses, and that registry name servers can be provisioned with IPv6 addresses. Applicant will demonstrate successful provisioning of a test account with IPv6 name server entries.
5	**IPv6 reachability**	***Note:*** *This requirement is under consideration and the community is urged to provide feedback on this requirement.*
	Does registry support access to DNS servers over an IPv6 network?	IANA currently has a minimum set of technical requirements for IPv4 name service. These include two nameservers separated by geography and by network topology, which each serve a consistent set of data, and are reachable from multiple locations across the globe. The registry will meet this same criterion for IPv6, requiring IPv6 transport to their network. Applicant will identify IPv6-reachable name servers that meet these requirements, and reachability will be verified by ICANN.
6	**Escrow deposit sample**	
	Has the applicant demonstrated the ability to conform to registry escrow requirements? See http://www.icann.org/en/topics/new-gtld-draft-escrow-spec-24oct-08-en.pdf.	The applicant will provide a conforming sample of a dummy data deposit showing correct type and formatting of content. The applicant will also provide evidence of an agreement with an escrow provider complying with Part B of the Data Escrow Requirements.
7	**System monitoring**	
	Has the applicant implemented the system monitoring described by the applicant in the initial application?	Applicant will self-certify adherence to this requirement and provide materials to ICANN that demonstrate adherence. Examples of self-certification documents include but are not limited to: diagrams of monitoring systems (demonstrating correspondence to documentation provided in the application), output of periodic monitoring runs performed by the applicant demonstrating capability claimed in the application, and actual performance of this monitoring set up in use for other registries. At ICANN's discretion, aspects of this self-certification documentation can be audited on-site at the services delivery point of the registry.
8	**Registry continuity planning**	
	Has applicant demonstrated capability to comply with ICANN's Registry Continuity Plan? See http://www.icann.org/registries/failover/icann-registry-failover-plan-15jul08.pdf	Applicant will self-certify adherence to this requirement and provide materials to ICANN that demonstrate adherence. Examples include identification of appropriate contact points and evidence of the registry's own continuity plan, and identification of a registry services continuity provider.
9	**System performance requirements**	
	Has applicant demonstrated capability to comply with the performance specifications? See http://www.icann.org/en/topics/new-gtld-draft-performance-spec-24oct08-en.pdf	Applicant will self-certify adherence to this requirement and provide materials to ICANN that demonstrate adherence. Examples of self-certification documents include but are not limited to performance and availability results that demonstrate DNS availability at stated levels for at least one month, and Whois service availability for at least one month. At ICANN's discretion, aspects of this self-certification documentation can be audited on-site at the services delivery point of the registry.

5.2.2 Additional Requirements

At the pre-delegation stage, an applicant must also provide documentary evidence of its ability to fund ongoing basic registry operations for then-existing registrants for a period of three to five years in the event of registry failure, default or until a successor operator can be designated. This obligation can be met by securing a financial instrument such as a bond or letter of credit (i.e., evidence of ability to provide financial security guaranteed by a creditworthy financial institution); contracting with and funding a services provider to extend services; segregating funding; or other means.

Once an applicant has met the requirements in 5.2.1 and 5.2.2 above, it is eligible to proceed to delegation of its applied-for gTLD string by IANA.

If an applicant does not complete the pre-delegation steps within the time period specified in the registry agreement, ICANN reserves the right to terminate the registry agreement.

5.3 IANA Delegation Process

Upon notice of successful completion of the ICANN pre-delegation testing, applicants may initiate the process for delegation of the new gTLD into the root zone database. Information about the delegation process is available at http://iana.org/domains/root/.

5.4 Ongoing Operations

ICANN will continue to provide support for gTLD registry operators as they launch and maintain registry operations. ICANN's gTLD registry liaison function provides a point of contact for gTLD registry operators for assistance on a continuing basis.

The registry agreement contains a provision for ICANN to perform audits to ensure that the registry operators remain in compliance with agreement obligations.

Draft Applicant Guidebook

Module 6

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

24 October 2008

Module 6

Top-Level Domain Application – Terms and Conditions

By submitting this application through ICANN's online interface for a generic Top Level Domain (gTLD) (this application), applicant (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on its behalf) agrees to the following terms and conditions (these terms and conditions) without modification. Applicant understands and agrees that these terms and conditions are binding on applicant and are a material part of this application.

1. Applicant warrants that the statements and representations contained in the application (including any documents submitted and oral statements made in connection with the application) are true and accurate and complete in all material respects, and that ICANN may rely on those statements and representations fully in evaluating this application. Applicant acknowledges that any material misstatement or misrepresentation (or omission of material information) will reflect negatively on this application and may cause ICANN and the evaluators to reject the application.

2. Applicant warrants that it has the requisite organizational power and authority to make this application on behalf of applicant, and is able to make all agreements, representations, waivers, and understandings stated in these terms and conditions and to enter into the form of registry agreement as posted with these terms and conditions.

3. Applicant acknowledges and agrees that ICANN has the right to reject any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to proceed with review and consideration of an application to establish one or more gTLDs is entirely at ICANN's discretion. ICANN reserves the right to reject any application that ICANN is prohibited from considering for a gTLD under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant.

4. Applicant agrees to pay all fees that are associated with this application. These fees include the evaluation fee (which is to be paid in conjunction with the submission of this application), and any fees associated with the progress of the application to the extended evaluation stages of the review and consideration process with respect to the application, including any and all fees as may be required in conjunction with the dispute resolution process as set forth in the application. Applicant acknowledges that the initial fee due upon submission of the application is only to obtain consideration of an application. ICANN makes no assurances that an application will be approved or will result in the delegation of a gTLD proposed in an application. Applicant acknowledges that if it fails to pay fees within the designated time period at any stage of the application review and consideration process, applicant will forfeit any fees paid up to that point and the application will be cancelled.

5. Applicant shall indemnify, defend, and hold harmless ICANN (including its affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents, collectively the ICANN Affiliated Parties) from and against any and all third-party claims, damages, liabilities, costs, and expenses, including legal fees and expenses, arising out of or relating to: (a) ICANN's consideration of the application, and any approval or rejection of the application; and/or (b) ICANN's reliance on information provided by applicant in the application.

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

ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER START-UP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD.

7. Applicant hereby authorizes ICANN to publish on ICANN's website, and to disclose or publicize in any other manner, any materials submitted to, or obtained or generated by, ICANN and the ICANN Affiliated Parties in connection with the application, including evaluations, analyses and any other materials prepared in connection with the evaluation of the application; provided, however, that information will not be published to the extent that the application specifically identifies such information as confidential. A general statement as the confidentiality of the application will not be sufficient for these purposes. Except for information that ICANN determines to treat as confidential, applicant understands and acknowledges that ICANN does not and will not keep the remaining portion of the application or materials submitted with the application confidential.

8. Applicant certifies that it has obtained permission for the posting of any personally identifying information included in this application or materials submitted with this application. Applicant acknowledges that the information that ICANN posts may remain in the public domain in perpetuity, at ICANN's discretion.

9. Applicant gives ICANN permission to use applicant's name and/or logo in ICANN's public announcements (including informational web pages) relating to top-level domain space expansion.

10. Applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that it enters into a registry agreement with ICANN, and that applicant's rights in connection with such gTLD will be limited to those expressly stated in the registry agreement. In the event ICANN agrees to recommend the approval of the application for applicant's proposed gTLD, applicant agrees to enter into the registry agreement with ICANN in the form published in

connection with the application materials. Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application.

11. Applicant authorizes ICANN to:

    a. Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that, in ICANN's sole judgment, may be pertinent to the application;

    b. Consult with persons of ICANN's choosing regarding the information in the application or otherwise coming into ICANN's possession.

12. For the convenience of applicants around the world, the application materials published by ICANN in the English language have been translated into certain other languages frequently used around the world. applicant recognizes that the English language version of the application materials (of which these terms and conditions is a part) is the version that binds the parties, that such translations are non-official interpretations and may not be relied upon as accurate in all respects, and that in the event of any conflict between the translated versions of the application materials and the English language version, the English language version controls.

Glossary

Terms Applicable to this RFP and to the New gTLD Application Process

A-Label	The ASCII-Compatible Encoding (ACE) form of an IDNA-valid string.
Applicant	An entity that has applied to ICANN for a new gTLD by submitting its application form through the online application system.
Application	An application for a new gTLD lodged in response to this RFP. An application includes the completed Application Form any supporting documents, and any other information that may be submitted by the applicant at ICANN's request.
Application form	The set of questions to which applicants provide responses, as at http://www.icann.org/en/topics/new-gtld-draft-evaluation-criteria-24oct08-en.pdf.
Application interface	The web-based interface operated by ICANN, available at [URL to be inserted in final version of RFP]
Application round	The complete succession of stages for processing the applications received during one application submission period for gTLDs. This RFP is for one application round. Any subsequent application rounds will be the subject of subsequent RFPs.
Application submission period	The period during which applicants may submit applications through the application interface.
Applied for gTLD string	A gTLD string that is subject of an application.
American Standard Code for Information Interchange (ASCII)	A character encoding based on the English alphabet. ASCII codes represent text in computers, communications equipment, and other devices that work with text. Most modern character encodings—which support many more characters than did the original—have a historical basis in ASCII.
AXFR	Asynchronous full transfer, a DNS protocol mechanism through which a DNS zone can be replicated to a remote DNS server.
Business ID	A number such as a federal tax ID number or employer information number.

ccTLD	Two-letter top-level domains corresponding with the ISO 3166-1 country code list. See http://iana.org/domains/root/db/.
Community-based TLD	A community-based gTLD is a gTLD that is operated for the benefit of a defined community consisting of a restricted population. An applicant designating its application as community-based must be prepared to substantiate its status as representative of the community it names in the application
Community objection	An objection based on the grounds that there is substantial opposition to a gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.
Comparative evaluation	A process to resolve string contention, which may be elected by a community-based applicant.
Consensus policy	A policy created through the GNSO policy development process listed in Annex A of the ICANN Bylaws. See http://www.icann.org/en/general/bylaws.htm#AnnexA. A list of current consensus policies is available at http://www.icann.org/en/general/consensus-policies.htm.
Contention sets	A group of applications containing identical or similar applied-for gTLD strings.
Country-code TLD	See ccTLD.
Delegation	The process through which the root zone is edited to include a new TLD, and the management of domain name registrations under such TLD is turned over to the registry operator.
Digit	Any digit between "0" and "9" (Unicode code points U+0030 to U+0039).
Dispute Resolution Service Provider (DRSP)	An entity engaged by ICANN to adjudicate dispute resolution proceedings in response to formally filed objections.
Domain name	A name consisting of two or more (for example, john.smith.name) levels, maintained in a registry database.
Domain Name System Security Extensions (DNSSEC)	DNSSEC secures domain name look-ups on the Internet by incorporating a chain of digital signatures into the DNS hierarchy.
Existing TLD	A string included on the list at http://iana.org/domains/root/db

Extended Evaluation	The second stage of evaluation applicable for applications that do not pass the Initial Evaluation, but are eligible for further review.
Extended Evaluation period	The period that may follow the Initial Evaluation period, for eligible applications which do not pass the Initial Evaluation.
Evaluator	The individuals or organization(s) appointed by ICANN to perform review tasks within Initial Evaluation and Extended Evaluation under ICANN direction
Evaluation fee	The fee due from each applicant to obtain consideration of its application.
Geographical Names Panel (GNP)	A panel of experts charged by ICANN with reviewing applied-for TLD strings that relate to geographical names.
Generic Names Supporting Organization (GNSO)	ICANN's policy-development body for generic TLDs and the lead in developing the policy recommendations for the introduction of new gTLDs.
Generic top-level domain	See gTLD
gTLD	A TLD with three or more characters that does not correspond to any country code.
Hyphen	The hyphen "-" (Unicode code point U+0029).
Internet Assigned Numbers Authority (IANA)	IANA is the authority originally responsible for overseeing IP address allocation, coordinating the assignment of protocol parameters provided for in Internet technical standards, and managing the DNS, including delegating top-level domains and overseeing the root name server system. Under ICANN, IANA distributes addresses to the Regional Internet Registries, coordinate with the IETF and other technical bodies to assign protocol parameters, and oversees DNS operation.
ICANN	Internet Corporation for Assigned Names and Numbers
ICANN-accredited registrar	A company that registers domain names for Internet users. There are more than 900 ICANN-accredited registrars who provide domains to Internet users. The list of ICANN-accredited registrars is available at http://www.icann.org/en/registrars/accredited-list.html
Internationalized Domain Name (IDN)	A domain name including at least one character other than those in letters (a,…,z), digits (0,…,9) and the hyphen (-).
Internationalizing Domain Names in Applications (IDNA)	The technical protocol used for processing domain names containing non-ASCII characters in the DNS.

IDN ccTLD Fast Track	The process for introducing a limited number of IDN ccTLDs associated with the ISO-3166 two-letter codes. See http://www.icann.org/en/topics/idn/fast-track/.
IDN table	A table listing all those characters that a particular TLD registry supports. If one or more of these characters are considered a variant this is indicated next to that/those characters. It is also indicated which character a particular character is a variant to. The IDN tables usually hold characters representing a specific language, or they can be characters from a specific script. Therefore the IDN table is sometimes referred to as "language variant table", "language table", "script table" or something similar.
IGO	Inter-governmental organization.
Internet Engineering Task Force (IETF)	The IETF is a large, open international community of network designers, operators, vendors, and researchers concerned with the evolution of the Internet architecture and the smooth operation of the Internet.
Initial Evaluation period	The period during which ICANN will review an applied-for gTLD string, an applicant's technical and financial capabilities, and an applicant's proposed registry services.
International Phonetic Alphabet	A notational standard for phonetic representation in multiple languages. See http://www.arts.gla.ac.uk/IPA/IPA_chart_(C)2005.pdf.
IXFR	Incremental Zone Transfer, a DNS protocol mechanism through which a partial copy of a DNS zone can be replicated to a remote DNS server.
LDH (Letter Digit Hyphen)	The hostname convention defined in RFC 952, as modified by RFC 1123.
Legal Rights objection	An objection on the grounds that the applied-for gTLD string infringes existing legal rights of the objector.
Letter	Any character between "a" and "z" (in either case) (Unicode code points U+0061 to U+007A or U+0041 to U+005A).
LLC	Limited liability corporation.
Morality and public order objection	An objection made on the grounds that the applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under international principles of law.
Objection	A formal objection filed with a Dispute Resolution Service Provider in accordance with that provider's procedures.
Objection filing period	The period during which formal objections may be filed

	concerning a gTLD application submitted to ICANN
Objector	One or more persons or entities that have filed a formal objection against a new gTLD application with the appropriate DRSP.
Open TLD	An open TLD can be used for any purpose consistent with the requirements of the application and evaluation criteria, and with the registry agreement. An open TLD may or may not have a formal relationship with an exclusive registrant or user population. It may or may not employ eligibility or use restrictions.
Pre-delegation test	A technical test and other steps required of applicants before delegation of the applied-for gTLD string into the root zone.
Primary contact	The person named by the applicant as the main contact for the application, and having authority to execute decisions concerning the application.
Principal place of business	The location of the head office of a business or organization.
Registrar	See ICANN-accredited registrar.
Registry	A registry is the authoritative, master database of all domain names registered in each top-level domain. The registry operator keeps the master database and also generates the zone file that allows computers to route Internet traffic to and from top-level domains anywhere in the world.
Registry Agreement	The agreement executed between ICANN and successful gTLD applicants, which appears in draft form at http://www.icann.org/en/topics/new-gtld-draft-agreement-24oct08-en.pdf.
Registry operator	The entity entering into the Registry Agreement with ICANN, responsible for setting up and maintaining the operation of the registry.
Registry services	(1) Operations of the registry critical to the following tasks: (i) the receipt of data from registrars concerning registrations of domain names and name servers; (ii) provision to registrars of status information relating to the zone servers for the TLD; (iii) dissemination of TLD zone files; (iv) operation of the registry zone servers; and (v) dissemination of contact and other information concerning domain name server registrations in the TLD as required by the registry agreement; and (2) other products or services that the registry operator is required to provide because of the establishment of a consensus policy; and (3) any other products or services that only a registry operator is capable of providing, by reason of its

	designation as the registry operator.
Registry Services Technical Evaluation Panel (RSTEP)	The Registry Services Technical Evaluation Panel is a group of experts in the design, management, and implementation of the complex systems and standards-protocols used in the Internet infrastructure and DNS. RSTEP members are selected by its chair. All RSTEP members and the chair have executed an agreement requiring that they consider the issues before the panel neutrally and according to the definitions of security and stability.
Reserved Name	A string included on the Top-Level Reserved Names List (Refer to paragraph 2.1.1.2 of Module 2.)
Request for Comments (RFC)	The RFC document series is the official publication channel for Internet standards documents and other publications of the IESG, IAB, and Internet community.
Rightsholder	The person or entity that maintains a set of rights to a certain piece of property.
Root Zone	The root zone database represents the delegation details of top-level domains, including gTLDs and country-code TLDs. As manager of the DNS root zone, IANA is responsible for coordinating these delegations in accordance with its policies and procedures.
Round	See application round.
Script	A collection of symbols used for writing a language. There are three basic kinds of script. One is the alphabetic (e.g. Arabic, Cyrillic, Latin), with individual elements termed “letters”. A second is ideographic (e.g. Chinese), the elements of which are “ideographs”. The third is termed a syllabary (e.g. Hangul), with its individual elements represent syllables. The writing systems of most languages use only one script but there are exceptions such as for example, Japanese, which uses four different scripts, representing all three of the categories listed here. It is important to note that scripts which do not appear in the Unicode Code Chart are completely unavailable for inclusion in IDNs.
Security	In relation to a proposed registry service, an effect on security by the proposed Registry Service means (1) unauthorized disclosure, alteration, insertion, or destruction of registry data, or (2) unauthorized access to or disclosure of information or resources on the Internet by systems operating in accordance with all applicable standards.
Shared Registry System (SRS)	A system that allows multiple registrars to make changes

	to a registry simultaneously.
Stability	In relation to a proposed registry service, an effect on stability means that the proposed registry service (1) does not comply with applicable relevant standards that are authoritative and published by a well-established, recognized, and authoritative standards body, such as relevant standards-track or best current practice RFCs sponsored by the IETF; or (2) creates a condition that adversely affects the throughput, response time, consistency, or coherence of responses to Internet servers or end systems, operating in accordance with applicable relevant standards that are authoritative and published by a well-established, recognized and authoritative standards body, such as relevant standards-track or best current practice RFCs and relying on registry operator's delegation information or provisioning services.
String	The string of characters comprising an applied-for gTLD.
String confusion objection	An objection filed on the grounds that the applied-for gTLD string is confusingly similar to an existing TLD or to another applied-for gTLD.
String Similarity Algorithm	An algorithmic tool used to identify applied-for gTLD strings that may result in string confusion.
String Similarity Examiners	A panel charged with identifying applied-for gTLD strings that may result in string confusion.
String contention	The scenario in which there is more than one qualified applicant for the same gTLD or for gTLDs that are so similar that detrimental user confusion would be the probable result if more than one were to be delegated to the root zone.
TLD Application System (TAS)	The online interface for submission of applications to ICANN.
Top-level domain (TLD)	TLDs are the names at the top of the DNS naming hierarchy. They appear in domain names as the string of letters following the last (right-most) dot, such as "net" in www.example.net. The TLD administrator controls what second-level names are recognized in that TLD. The administrators of the root domain or root zone control what TLDs are recognized by the DNS.
U-Label	A "U-label" is an IDNA-valid string of Unicode characters, including at least one non-ASCII character, expressed in a standard Unicode Encoding Form, normally UTF-8 in an Internet transmission context.
Uniform Domain Name Dispute Resolution Policy	A policy for resolving disputes arising from alleged abusive registrations of domain names (for example, cybersquatting), allowing expedited administrative

(UDRP)	proceedings that a trademark rights holder initiates by filing a complaint with an approved dispute resolution service provider.
User registration fee	The fee paid by prospective applicants for new TLDs to obtain access to the TLD Application System (TAS).
Whois	Records containing registration information about registered domain names.

Annex 63

DRAFT GNSO Recommendation Summary

Last Updated: 31 August 2009

Date 14 September 2006

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Principles

The following Recommendations have been derived from the work of the GNSO Committee on the introduction of new top level domains in accordance with the Terms of Reference set by the GNSO, with reference to ICANN's Mission and Core Values.

a) That new generic top level domains (gTLDs) will be introduced in anorderly and predictable way.

b) That some new generic top level domains will be internationalised domain names (IDNs). IDNs use characters drawn from a large repertoire (Unicode). There is a mechanism called Internationalizing Domain Names in Applications (DNA) that allows the non-ASCII characters to be representing using only the ASCII characters already allowed in so-called host names today (see RFC3490).

c) That the principal objective of the introduction of new top level domains is to permit market mechanisms to support competition and consumer choice in the technical management of the DNS. This competition will lower costs, promote innovation, and enhance user choice and satisfaction.

d) That a set of "technical criteria" for a new gTLD registry applicant minimises the risk of harming the operational stability, reliability, security, and global interoperability of the Internet.

f) That a set of "business capability criteria" for a new gTLD registry applicant provides an assurance that an applicant has the capability to meet its business ambitions.

Recommendations

1 Whether to introduce new top level domains

1.1 Additional new generic top-level domains should be introduced and work should proceed to enable the introduction of new generic top level domains, taking into account the recommendations found in the following sections.

2 Selection Criteria

2.1 The process for introducing new top level domains will follow a prepublished application system including the levying of an application fee to recover the costs of the application process. The application process will also include probity rules and clear timelines.

2 2 Application fees will be set at the start of the process and application materials will be available prior to any application round. Some applications may cost different amounts to evaluate. Therefore, different fees may be levied depending on what stage in the process the application reaches. If applicants find the application fee a barrier to entry, ICANN could have a system of grants to assist applicants. This grant would only allow the applicant to apply, without any presumption that the application would be successful. Grant applications would go through an evaluation process. ICANN should evaluate options for
funding the grants.

2 3 Technical criteria will include compliance with a minimum set of technical standards that would include IETF Requests for Comment related to the operation of the DNS and other technical standards. Standards may include RFC3730-3735, RFC2246, RFC1035, RFC2181, RFC2182, and the ICANN Guidelines for the Implementation of Internationalized Domain Names.

2.4 Applicants must comply with all ICANN consensus policies as and when they are developed.

2 5 Applicants must choose a string of characters for the new generic top level domain name that complies with the process for string checks below.

2 5.1 ICANN will use the following process for TLD string checks.

2 5.1.1 ICANN will make a preliminary determination on whether the application complies with the string requirements and may seek expert advice in order to make its preliminary determination.

2 5.1.2 ICANN will establish public comment processes (which may include input from governments or the Governmental Advisory Committee) that are specific to the criteria for the new string.

2 5.1.3 In the event that ICANN reasonably believes that the application for a particular string may not be compliant with the string requirements, ICANN will refer the issue to a panel of experts with appropriate backgrounds.

2 5.2 String Criteria

2 5.2.1 The gTLD string should not be confusingly similar to an existing TLD string. Confusingly similar means there is a likelihood of confusion on the part of the relevant public.

2 5.2.2 The string must not infringe the legal rights of any third party (consistent with the current requirements of Registered Name Holders V see Clause 3.7.7.9 of the gTLD Registrar Accreditation Agreement).

2 5.2.3 The string should not cause any technical issues, for example, .localhost and exe would be unacceptable name strings.

2 5.2.4 The string should not be in conflict with national or international laws or cause conflicts with public policy [for example, controversial, political, cultural religious terms]. (Develop text related to public policy issues with GAC assistance).

2 5.2.5 The string should not be a reserved word (for example, RFC2606).

2 5.3 Dispute resolution with respect to ICANN accepting a new string.

2 5.3.1 ICANN must establish a dispute resolution process, using independent arbitrators, where existing registry operators could challenge a decision made by ICANN regarding whether a new gTLD string is confusingly similar to an existing gTLD string. If a string application is successfully challenged as being confusingly similar, then no other operator may subsequently apply for it.

2 5.3.2 ICANN may establish a new dispute resolution process, using independent arbitrators, where existing trademark holders could challenge an ICANN decision regarding a string. This new dispute resolution process would be modeled on use existing Uniform Domain-Name Dispute Resolution Processes (UDRP).

2 6 An applicant for a new gTLD must use ICANN accredited registrars to provide registration services to Registered Name Holders (registrants). The registry shall not act as a registrar with respect to the TLD (consistent with the current registry-registrar structural separation requirements, for example, see clause 7.1 (b) and (c) of the .jobs registry agreement). An organization wishing to become a registrar for a new gTLD would need to become accredited using ICANN's existing accreditation process.

2.7 An applicant must demonstrate that they have the capability to operate a new gTLD that meets the minimum technical criteria to preserve the operational stability, reliability, security, and global interoperability of the Internet.

2 8 The applicant must provide a financial and business plan that provides an assurance that the applicant has the capability to meets its business ambitions.

3 **Allocation Methods**

3.1 To ensure an orderly introduction of new TLDs, the applications should be accessed in rounds to allow issues of contention between applicants for the same string to be resolved. First come first served (FCFS) is the preferred method of assessing applications within an initial round. Subsequently, processes may be developed that would enable an "apply as you go" system.

3.1.1 The start date for the round should be at least four months after the ICANN Board has issued the Request for Applications. ICANN must promote the opening time and details of the new round of applications to the broader worldwide Internet community.

3.1.2 Applications will be date stamped as they are received and will form a queue with the ability to work on multiple applications in parallel.

3.1.3 The closing date for the first round of new applications should be at least thirty days after the start date.

3.1.4 Applications for strings are not published until after the closing date.

3 2 The following process should be used to resolve contention between multiple applicants for the same new gTLD.

3 2.1 Ensure each application for the same gTLD (or a set of gTLDs that may be considered to be confusingly similar) is compliant with the selection criteria (with some flexibility to correct minor application form errors).

3 2.2 Establish a timeframe for a mediation process amongst the applicants to identify a solution amongst competing applications. A possible solution is for the applicants to choose different TLD strings to avoid the conflict, or for the applicants to combine their resources.

3 2.3 If there is no agreement between the applicants, ICANN will evaluate the additional criteria of the level of support of the community of potential registrants within that TLD to resolve contention. Both applicants would have a timeframe (e g 90 days) to supply this additional material for evaluation. ICANN will determine what evidence is acceptable, and the evidence must be measurable and verifiable. An applicant that is not successful will need to wait until the next application round to submit a new application.

3 2.4 If ICANN staff are unable to distinguish between the level of support for each applicant for the gTLD, then the Board will make a choice based on the ICANN Mission and Core Values which include introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest; and supporting the functional, geographic and cultural diversity of the Internet. An applicant that is not successful will need to wait until the next application round to submit a new application.

3 3 An applicant who is granted a gTLD string has an obligation to begin using it within an appropriate time-frame.

4 **Contractual Conditions**

4.1 There should be a frame agreement to provide some level of consistency (for example, as for the registrars accreditation agreement) amongst gTLD agreements, with the ability for staff to have delegated authority to approve. Any material alterations to the frame agreement, will be subject to public comments before approval by the ICANN Board.

4 2 The contract should strike the right balance between ensuring certainty for market players and preserving flexibility of ICANN to accommodate the rapidly changing market, technological and policy conditions.

4 3 The initial term of the new gTLD agreement should be of commercially reasonable length (for example, default 10 years, although may be changed on a case-by-case basis).

4.4 There should be renewal expectancy. A contract would be renewed provided that the license holder is not in material breach of the contract, or has not been found in repeated non-performance of the contract, and provided the license holder agrees to the any new framework contract conditions that are reasonably acceptable. Any new framework contract would

take into account the consensus policies in place at that time.

4 5 There should be a clear sanctions process outlined within the frame agreement to terminate a contract if the new gTLD operator has been found in repeated non-performance of the contract.

4 6 During the term of the agreement, the registry must comply with new or changed consensus policies to one or more of the following areas: ICANN Policy Development

- (1) issues for which uniform or coordinated resolution is reasonably necessary to facilitate interoperability, security and/or stability of the Internet or DNS;

- (2) functional and performance specifications for the provision of Registry Services (as defined in Section 3.1(d)(iii) below);

- (3) security and stability of the registry database for the TLD;

- (4) registry policies reasonably necessary to implement Consensus Policies relating to registry operations or registrars;

- or (5) resolution of disputes regarding the registration of domain names (as opposed to the use of such domain names).

4.7 Any deviation from consensus policies should be explicitly stated and justified in the agreement.

4 8 Where a registry provides IDNs, the contract should require that the registry adhere to IDN standards, and ICANN guidelines for IDNs.

4 9 Initially rely on the appropriate external competition/anti-trust Government authorities to ensure compliance with laws relating to market power or pricing power. This can be reviewed after an initial term.

4.10 ICANN should take a consistent approach with respect to registry fees ?V taking into account differences in regional, economic and business models

4.11 Use of Personal Data: limit it to the purpose for which it is collected, and the registry operator must define the extent to which it is made available to third parties.

Annex 64

RECOMMENDATION

OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 13-5

1 AUGUST 2013[1]

On 7 July 2013, Booking.com B.V. ("Booking.com"), through its counsel, Crowell & Moring, submitted a reconsideration request ("Request"). The Request was revised from Booking.com's 28 March 2013 submission of a similar reconsideration request, which was put on hold pending the completion of a request pursuant to ICANN's Documentary Information Disclosure Policy ("DIDP").

The Request asked the Board to reconsider the ICANN staff action of 26 February 2013, when the results of the String Similarity Panel were posted for the New gTLD Program. Specifically, the Request seeks reconsideration of the placement of the applications for .hotels and .hoteis into a string similarity contention set.

I. Relevant Bylaws

As the Request is deemed filed as of the original 28 March 2013 submission, this Request was submitted and should be evaluated under the Bylaws that were in effect from 20 December 2012 through 10 April 2013. Article IV, Section 2.2 of that version of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

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[1] At its 1 August 2013 meeting, the Board Governance Committee deliberated and reached a decision regarding this Recommendation. During the discussion, however, the BGC noted revisions that were required to the draft Recommendation in order to align with the BGC's decision. After revision and allowing for the BGC member review, the BGC Recommendation on Request 13-5 was finalized and submitted for posting on 21 August 2013.

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

A third criteria was added to the Bylaws effective 11 April 2013, following the Board's adoption of expert recommendations for revisions to the Reconsideration process. That third basis for reconsideration, focusing on Board rather than staff conduct, is "one or more actions or inactions of the ICANN Board that are taken as a result of the Board's reliance on false or inaccurate material information." (See http://www.icann.org/en/about/governance/bylaws#IV.)

When challenging a staff action or inaction, a request must contain, among other things, a detailed explanation of the facts as presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN policy(ies). See Article IV §2.6(g) of the 20 December 2012 version of Bylaws (http://www.icann.org/en/about/governance/bylaws/bylaws-20dec12-en.htm#IV) and the current Reconsideration form effective as of 11 April 2013 (http://www.icann.org/en/groups/board/governance/reconsideration/request-form-11apr13-en.doc).

Dismissal of a request for reconsideration is appropriate if the Board Governance Committee ("BGC") finds that the requesting party does not have standing because the party failed to satisfy the criteria set forth in the Bylaws. These standing requirements are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge an action with which someone disagrees, but that it is limited to situations where the staff acted in contravention of established policies.

The Request was originally received on 28 March 2013, which makes it timely under the then effective Bylaws.[2] Bylaws, Art. IV, § 2.5.

II. Background

Within the New gTLD Program, every applied-for string has been subjected to the String Similarity Review set out at Section 2.2.1.1 of the Applicant Guidebook. The String Similarity Review checks each applied-for string against existing TLDs, reserved names and other applied-for TLD strings (among other items) for "visual string similarities that would create a probability of user confusion." (Applicant Guidebook, Section 2.2.1.1.1.) If applied-for strings are determined to be visually identical or similar to each other, the strings will be placed in a contention set, which is then resolved pursuant to the contention resolution processes in Module 4 of the Applicant Guidebook. If a contention set is created, only one of the strings within that contention set may ultimately be approved for delegation.

After issuing a request for proposals, ICANN selected InterConnect Commumications ("ICC") to perform the string similarity review called for in the Applicant Guidebook. On 26 February 2013, ICANN posted ICC's report, which included two non-exact match contention sets (.hotels/.hoteis and .unicorn/.unicom) as well as 230 exact match contention sets. http://www.icann.org/en/news/announcements/announcement-26feb13-en.htm. The String Similarity Review was performed in accordance with process documentation posted at http://newgtlds.icann.org/en/program-status/evaluation-panels/geo-names-similarity-process-07jun13-en.pdf. As part of ICANN's acceptance of the ICC's results, a quality assurance review

[2] ICANN staff and the requester communicated regarding the holds placed on the Request pending the DIDP Response, and the requester met all agreed-upon deadlines, thereby maintaining the timely status of this Request.

was performed over a random sampling of applications to, among other things, test whether the process referenced above was followed.

Booking.com is an applicant for the .hotels string. As a result of being placed in a contention set, .hotels and .hoteis cannot both proceed to delegation. Booking.com will have to resort to private negotiations with the applicant for .hoteis, or proceed to an auction to resolve the contention issue. Request, page 4.

Although the String Similarity Review was performed by a third party, ICANN has determined that the Reconsideration process can properly be invoked for challenges of the third party's decisions where it can be stated that either the vendor failed to follow its process in reaching the decision, or that ICANN staff failed to follow its process in accepting that decision. Because the basis for the Request is not Board conduct, regardless of whether the 20 December 2012 version, or the 11 April 2013 version, of the Reconsideration Bylaws is operative, the BGC's analysis and recommendation below would not change.

III. Analysis of Booking.com's Request for Reconsideration

Booking.com seeks reconsideration and reversal of the decision to place .hotels and .hoteis in a non-exact match contention set. Alternatively, Booking.com requests that an outcome of the Reconsideration process could be to provide "detailed analysis and reasoning regarding the decision to place .hotels into a non-exact match contention set" so that Booking.com may "respond" before ICANN takes a "final decision." (Request, Page 9.)

A. Booking.com's Arguments of Non-Confusability Do Not Demonstrate Process Violations

The main focus of Booking.com's Request is that .hotels and .hoteis can co-exist in the root zone without concern of confusability. (Request, pages 10 – 12.) To support this assertion, Booking.com cites to the opinion of an independent expert that was not part of the string

similarity review panel (Request, pages 10-11), references the intended uses of the .hotels and .hoteis strings (Request, page 11) and the difference in language populations that is expected to be using .hotels and .hoteis (Request, page 11), references ccTLDs that coexist with interchangeable "i"s and "l"s (Request, page 11), notes the keyboard location of "i"s and "l"s (Request, page 12), and contends that potential users who get to the wrong page would understand the error they made to get there (Request, page 12).

Booking.com does not suggest that the process for String Similarity Review set out in the Applicant Guidebook was not followed, or that ICANN staff violated any established ICANN policy in accepting the String Similarity Review Panel ("Panel") decision on placing .hotels and .hoteis in contention sets. Instead, Booking.com is supplanting what it believes the review methodology for assessing visual similarity should have been, as opposed to the methodology set out at Section 2.2.1.1.2 of the Applicant Guidebook. In asserting a new review methodology, Booking.com is asking the BGC (and the Board through the New gTLD Program Committee (NGPC)) to make a substantive evaluation of the confusability of the strings and to reverse the decision. In the context of the New gTLD Program, the Reconsideration process is not however intended for the Board to perform a substantive review of Panel decisions.. While Booking.com may have multiple reasons as to why it believes that its application for .hotels should not be in contention set with .hoteis, Reconsideration is not available as a mechanism to re-try the decisions of the evaluation panels.[3]

[3] Notably, Booking.com fails to reference one of the key components of the documented String Similarity Review, the use of the SWORD Algorithm, which is part of what informs the Panel in assessing the visual similarity of strings. .hotels and .hoteis score a 99% on the publicly available SWORD algorithm for visual similarity. See https://icann.sword-group.com/algorithm/.

Booking.com also claims that its assertions regarding the non-confusability of the .hotels and .hoteis strings demonstrate that "it is contrary to ICANN policy[4] to put them in a contention set." (Request, pages 6-7.) This is just a differently worded attempt to reverse the decision of the Panel. No actual policy or process is cited by Booking.com, only the suggestion that – according to Booking.com – the standards within the Applicant Guidebook on visual similarity should have resulted in a different outcome for the .hotels string. This is not enough for Reconsideration.

Booking.com argues that the contention set decision was taken without material information, including Booking.com's linguistic expert's opinion, or other "information that would refute the mistaken contention that there is likely to be consumer confusion between '.hotels' and '.hoteis.'" (Request, page 7.) However, there is *no* process point in the String Similarity Review for applicants to submit additional information. This is in stark contrast to the reviews set out in Section 2.2.2 of the Applicant Guidebook, including the Technical/Operational review and the Financial Review, which allow for the evaluators to seek clarification or additional information through the issuance of clarifying questions. (AGB, Section 2.2.2.3 (Evaluation Methodology).) As ICANN has explained to Booking.com in response to its DIDP requests for documentation regarding the String Similarity Review, the Review was based upon the methodology in the Applicant Guidebook, supplemented by the Panel's process documentation; the process does not allow for additional inputs.

Just as the process does not call for additional applicant inputs into the visual similarity review, Booking.com's call for further information on the decision to place .hotels and .hoteis in

[4] It is clear that when referring to "policy", Booking.com is referring to the process followed by the String Similarity Review.

a contention set "to give the Requester the opportunity to respond to this, before taking a final decision" is similarly not rooted in any established ICANN process at issue. (Request, page 9.) First, upon notification to the applicants and the posting of the String Similarity Review Panel report of contention sets, the decision was already final. While applicants may avail themselves of accountability mechanism to challenge decisions, the use of an accountability mechanism when there is no proper ground to bring a request for review under the selected mechanism does not then provide opportunity for additional substantive review of decisions already taken.

Second, while we understand the impact that Booking.com faces by being put in a contention set, and that it wishes for more narrative information regarding the Panel's decision, no such narrative is called for in the process. The Applicant Guidebook sets out the methodology used when evaluating visual similarity of strings. The process documentation provided by the String Similarity Review Panel describes the steps followed by the Panel in applying the methodology set out in the Applicant Guidebook. ICANN then coordinates a quality assurance review over a random selection of Panel's reviews to gain confidence that the methodology and process were followed. That is the process used for a making and assessing a determination of visual similarity. Booking.com's disagreement as to whether the methodology should have resulted in a finding of visual similarity does not mean that ICANN (including the third party vendors performing String Similarity Review) violated any policy in reaching the decision (nor does it support a conclusion that the decision was actually wrong).[5]

[5] In trying to bring forward this Request, Booking.com submitted requests to ICANN under the Documentary Information Disclosure Policy (DIDP). As of 25 July 2013, all requests had been responded to, including the release of the Panel process documentation as requested. See Request 20130238-1 at http://www.icann.org/en/about/transparency. Booking.com describes the information it sought through the DIDP at Pages 8 – 9 of its Request. The discussion of those requests, however, has no bearing on the outcome of this Reconsideration.

B. Booking.com's Suggestion of the "Advisory Status" of the String Similarity Panel Decision Does Not Support Reconsideration

In its Request, Booking.com suggests that the Board has the ability to overturn the Panel's decision on .hotels/.hoteis because the Panel merely provided "advice to ICANN" and ICANN made the ultimate decision to accept that advice. Booking.com then suggests that the NGPC's acceptance of GAC advice relating to consideration of allowing singular and plural versions of strings in the New gTLD Program, as well as the NGPC's later determination that no changes were needed to the Applicant Guidebook regarding the singular/plural issue, shows the ability of the NGPC to override the Panel determinations. (Request, pages 5-6.) Booking.com's conclusions in these respects are not accurate and do not support Reconsideration.

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

The subsequent receipt and consideration of GAC advice on singular and plural strings does not change the established process for the development of contention sets based on visual

similarity. The ICANN Bylaws require the ICANN Board to consider GAC advice on issues of public policy (ICANN Bylaws, Art. XI, Sec. 2.1.j); therefore the Board, through the NGPC, was obligated to respond to the GAC advice on singular and plural strings. Ultimately, the NGPC determined that no changes were needed to the Guidebook on this issue. (Resolution 2013.06.25.NG07, at http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm#2.d.) Notably, neither the GAC advice nor the NGPC resolution focused on the issue of visual similarity (which the String Similarity Review Panel was evaluating), but instead the issue was potential consumer confusion from having singular and plural versions of the same word in the root zone. It is unclear how the NGPC's decision on a separate topic – and a decision that did not in any way alter or amend the work of an evaluation panel – supports reconsideration of the development of the .hotels/.hoteis contention set.

VIII. Recommendation And Conclusion

Based on the foregoing, the BGC concludes that Booking.com has not stated proper grounds for reconsideration and we therefore recommend that Booking.com's request be denied without further consideration. This Request challenges a substantive decision taken by a panel in the New gTLD Program and not the process by which that decision was taken. As stated in our Recommendation on Request 13-2, Reconsideration is not a mechanism for direct, de novo appeal of staff or panel decisions with which the requester disagrees, and seeking such relief is, in fact, in contravention of the established processes within ICANN. See http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-nameshop-01may13-en.pdf.

The BGC appreciates the impact to an applicant when placed in a contention set and does not take this recommendation lightly. It is important to recall that the applicant still has the

opportunity to proceed through the New gTLD Program subject to the processes set out in the Applicant Guidebook on contention. We further appreciate that applicants, with so much invested and so much at stake within the evaluation process, are interested in seeking any avenue that will allow their applications to proceed easily through evaluation. However, particularly on an issue such as visual similarity, which is related to the security and stability of the domain name system, there is not – nor is it desirable to have – a process for the BGC or the Board (through the NGPC) to supplant its own determination as to the visual similarity of strings over the guidance of an expert panel formed for that particular purpose. As there is no indication that either the Panel or ICANN staff violated any established ICANN policy in reaching or accepting the decision on the placement of .hotels and .hoteis in a non-exact contention set, this Request should not proceed.

If Booking.com thinks that it has been treated *unfairly* in the new gTLD evaluation process, and the NGPC adopts this Recommendation, Booking.com is free to ask the Ombudsman to review this matter. (*See* ICANN Bylaws the Ombudsman shall "have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN staff and constituent bodies to enable an informed evaluation of the complaint and to assist in dispute resolution where feasible (subject only to such confidentiality obligations as are imposed by the complainant or any generally applicable confidentiality policies adopted by ICANN)".)

Annex 65

New gTLD Program
Explanatory Memorandum

Protection of Rights of Others in New gTLDs

Date of Publication: 22 October 2008

Background - New gTLD Program

Since ICANN was founded ten years ago as a not-for-profit, multi-stakeholder organization dedicated to coordinating the Internet's addressing system, one of its foundational principles, recognized by the United States and other governments, has been to promote competition in the domain-name marketplace while ensuring Internet security and stability. The expansion will allow for more innovation, choice and change to the Internet's addressing system, now constrained by only 21 generic top-level domain names. In a world with 1.5 billion Internet users—and growing—diversity, choice and competition are key to the continued success and reach of the global network.

The decision to launch these coming new gTLD application rounds followed a detailed and lengthy consultation process with all constituencies of the global Internet community. Representatives from a wide variety of stakeholders—governments, individuals, civil society, business and intellectual property constituencies, and the technology community—were engaged in discussions for more than 18 months. In October 2007, the Generic Names Supporting Organization (GNSO)—one of the groups that coordinate global Internet policy at ICANN—completed its policy development work on new gTLDs and approved a set of recommendations. The culmination of this policy development process was a decision by the ICANN Board of Directors to adopt the community-developed policy in June 2008 at the ICANN meeting in Paris. A thorough brief to the policy process and outcomes can be found at http://gnso.icann.org/issues/new-gtlds/.

This paper is part of a series of papers that will serve as explanatory memoranda published by ICANN to assist the Internet community to better understand the Request for Proposal (RFP), also known as *applicant guidebook.* A public comment period for the RFP will allow for detailed review and input to be made by the Internet community. Those comments will then be used to revise the documents in preparation of a final RFP. ICANN will release the final RFP in the first half of 2009. For current information, timelines and activities related to the New gTLD Program, please go to http://www.icann.org/en/topics/new-gtld-program.htm.

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

Summary of Key Points in this Paper

- An objection process will enable rights holders to assert that proposed gTLD strings would infringe their legal rights.
- The new gTLD registry agreements will provide for post-delegation dispute mechanisms to deal with claims of infringement that might arise after a new gTLD is delegated and begins operation.
- At the second-level, applicants for new gTLDs will be required to describe in their applications a proposed rights protection mechanism, which will be published when its agreement is made public.
- All new gTLDs must ensure that all second-level registrations will be subject to ICANN's Uniform Domain Name Dispute Resolution Policy (UDRP).

Introduction and Solicitation of Comments

ICANN is seeking comments on the role of Protecting the Rights of Others in ICANN's New gTLD Program. This paper is part of a series of papers that will serve as explanatory memoranda published by ICANN to assist the Internet community to better understand the Request for Proposal (RFP), also known as *applicant guidebook*. A public comment period for the RFP will allow for detailed review and input to be made by the Internet community. Those comments will then be used to revise the documents in preparation of a final RFP that will be released in the first half of 2009. For current information, timelines and activities related to the New gTLD Program, please go to http://www.icann.org/en/topics/new-gtld-program.htm.

Background

Since ICANN was founded 10 years ago, one of its key mandates has been to promote competition in the domain-name marketplace. Beginning with the White Paper http://www.icann.org/general/white-paper-05jun98.htm and ICANN's first Memorandum of Understanding http://www.icann.org/en/general/agreements.htm with the United States Government, the introduction of new gTLDs has been one of ICANN's central tasks.

The introduction of new generic top-level domains (gTLDs) will foster choice and innovation by increasing competition at the registry level. The decision to launch these coming new gTLD application rounds followed a detailed and lengthy consultation process with all constituencies of the global Internet community. Representatives from a wide variety of stakeholders—governments, individuals, civil society, business and intellectual property constituencies, and the technology community—were engaged in discussions for more than 18 months. In October 2007, the Generic Names Supporting Organization (GNSO)—one of the groups that coordinate global Internet policy at ICANN—completed its policy development work on new gTLDs and approved a set of recommendations. The culmination of this policy development process was a decision

by the ICANN Board of Directors to adopt the community-developed policy in June 2008 at the ICANN meeting in Paris.

In 2000, ICANN accepted applications for new TLDs resulting in new gTLDs being introduced in 2001. In 2004, ICANN accepted additional applications for sponsored TLDs, which were created in 2005 and 2006. In each of these prior new gTLD rounds, the protection of legal rights of third parties was a feature of the application and evaluation process. ICANN has not mandated any specific pre- or post-launch rights protection mechanism. Instead, as part of the application process, the applicant was asked, "What measures will be taken to discourage registration of domain names that infringe intellectual property rights?" and "What registration practices will be employed to minimize abusive registrations?" The applicant then had the opportunity to outline its own rights protection mechanism, which could be considered and commented on by ICANN.

As one of ICANN's goals is to encourage diversity of registry services and service providers, a wide variety of gTLD registry models have developed. In 2007, the GNSO's Protecting the Rights of Others working group concluded that best practice guidelines that would be suitable for one registry model may not be appropriate for another. It therefore declined to recommend any particular approved model Rights Protection Mechanism." (See *PRO WG Final Report* http://gnso.icann.org/drafts/GNSO-PRO-WG-final-01Jun07.pdf, and also for reference *The Perfect Sunrise?: How pre-launch Rights Protection Mechanisms and successful registry operations go hand in hand.* http://www.ipconstituency.org/PDFs/A%20Perfect%20Sunrise.PDF.)

The GNSO's conclusion is supported by registry community practice. In the recent rounds of expansion, several new gTLDs were approved including, .info, .biz, .asia, .aero and .mobi. These gTLDs each had a unique model for protecting rights holders. Some of the expansion gTLDs used a Sunrise Process (though no two gTLDs used the process in the same way) by which rights holders had the opportunity to register domain names before opening up registration to the public, while others, like .aero, eschewed the Sunrise Process in exchange for a more formalistic mechanism that suited their community-based systems.

ICANN has long recognized the importance of ensuring that the introduction of new gTLDs is conducted consistent with the protection of the rights of trademark holders, communities and other rights holders from abusive registration and infringement. For the new gTLD process, ICANN has sought input from numerous stakeholders, including, businesses, its constituencies and governments to devise an approach to protecting the rights of third-parties. The plan consists of addressing rights protection issues at both the top-level and the second-level. At the top-level, ICANN is implementing an objection-based process for dispute resolution. At the second-level, ICANN is implementing a process whereby new gTLDs will be required to describe their proposed "Rights Protection Mechanism." All new gTLDs will be obligated to ensure that, at a minimum, all second-level registrations will be subject to ICANN's long-standing and successful Uniform Dispute Resolution Policy http://www.icann.org/en/udrp/#udrp.

Protection of Rights of Others at the Top Level

ICANN is implementing an objection-based process pursuant to which rights holders can assert that proposed gTLD strings would infringe their legal rights. This process should discourage entities from applying for gTLD strings that obviously would violate intellectual

property rights of others. To that end, the dispute resolution panels presiding over these matters will be provided specific criteria that are being developed with intellectual property experts, to consider when determining whether a TLD infringes the rights of others. One consideration in this analysis, however, is that it is not unusual for more than one entity to have a trademark in the same word or phrase either for different products or services or registered in different jurisdictions. Accordingly, the process is being developed with that understanding.

To further protect against infringement ICANN is also including a placeholder in the new gTLD registry agreements for the future development of post-delegation dispute resolution processes to deal with claims of infringement that might arise after a new gTLD is delegated and begins operation.

The proposed process for protecting rights at the top level is based on the policy-development work conducted by ICANN's GNSO. As part of the evaluation process for the introduction of new gTLDs, the GNSO conducted an in-depth study to determine whether new gTLDs should be granted and if so, what safeguards should be put in place to protect the Internet, its stakeholders, applicants and other interested third parties. The GNSO enlisted the help of all GNSO council members and a wide range of interested stakeholders and observers. The GNSO received constituency impact statements from the Commercial and Business Users Constituency, the Intellectual Property Constituency, the Internet Service Provider and Connectivity Provider Constituency, the Non-Commercial Users' Constituency, the Registrars Constituency and the gTLD Registry Constituency. (See *ICANN Generic Names Supporting Organization's Final Report on the Introduction of New Generic Top-Level Domains,* dated August 8, 2007 http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm.)

In its final report on the introduction of new gTLDs, the GNSO made a number of recommendations designed to maintain the security and stability of the Internet. As part of this report, the GNSO stated, "Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law." For the most part, the constituencies agreed that appropriate mechanisms must be in place to address conflicts that may arise between any proposed new string and the rights of others.

Protection of Rights of Others at the Second Level

At the second-level, ICANN is implementing a process whereby new gTLDs will be required to describe in their applications a proposed Rights Protection Mechanism. The Rights Protection Mechanism will be published to the community at the time the applications are made public. In addition, all new gTLDs will be obligated to ensure that, at a minimum, all second-level registrations will be subject to ICANN's long-standing and successful Uniform Dispute Resolution Policy http://www.icann.org/en/udrp/#udrp. Also, the Registry Agreement for new gTLDs will incorporate the recommendations of the GNSO's Working Group on Protecting the Rights of Others http://gnso.icann.org/drafts/GNSO-PRO-WG-final-01Jun07.pdf.

The GNSO's PRO working group used several different work methods, including an analysis of existing registry operations and some ccTLD registries, an online questionnaire which posed a range of questions related to existing and future rights protection mechanism and the working group utilized internal expertise. The working group

discussed various approaches to protecting the rights of others including whether to provide additional protections beyond the current registration agreement and Uniform Dispute Resolution Process in new top-level domains, or whether to recommend a "best practices" approach to providing such protections.

The online questionnaire provided some interesting results. Though not statistically significant, there was a 50:50 split between respondents who answered the question about whether "IP owners need new or enhanced protection rights." The majority of respondents said that the rights protection mechanism provided by registry operators met their needs.

In its report on the protection of rights holders, the working group recommended that all registry operators should implement a Rights Protection Mechanism. The working group, in part, based its recommendations on the online questionnaire, in which 81% of the respondents indicated that registries should be mandated to provide enhanced protections during the introduction of new top-level domains. The working group found that there is no universal plan but that, any number of strategies may be successful, including the Sunrise Process, by which rights holders have the opportunity to register domain names before opening up registration to the public. Additionally, the working group recommended that each registry operator should implement an authentication process to verify the rights holders' standing. The GNSO received constituency impact statements from the Commercial and Business Users Constituency, the Intellectual Property Constituency, the Internet Service Provider and Connectivity Provider Constituency, the Non-Commercial Users' Constituency, the Registrars Constituency and the gTLD Registry Constituency.

Below is a summary of the working group's recommendations, which will be incorporated into the Registry Agreement for new gTLDs:

1. That there is no universal rights protection mechanism.
2. That each new gTLD should adopt and implement a dispute mechanism under which a third party could challenge another's use of that gTLD's rights protection mechanism that results in obtaining a domain name registration.
3. That the legal rights on which a party bases its participation and seeks to protect in a rights protection mechanism should be subject to actual authentication, at least if the authenticity of such rights is challenged.
4. That if a new gTLD elects to use a Sunrise Process as its rights protection mechanism, it should restrict eligible legal rights in such a manner as to discourage abusive registration.
5. That regardless of other authentication of legal rights, all new gTLDs should institute measures to deter abuse of the rights protection mechanisms and clearly false submissions. These measures could be automated or conducted on an ad hoc basis to focus on rights protection mechanism submissions that are nonsensical or likely to be false (e.g., registration number is 12345, date is 00/00/00, name is John Doe).
6. That all legal rights to be protected in a rights protection mechanism must be capable of being authenticated.

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ICANN Annual Report 2012

ICANN

Message from the CEO

Since my appointment was announced in June 2012, I have been privileged by the extraordinary opportunity to be a part of an organization, and the larger ICANN community, that is helping to shape the evolution of Internet governance on a daily basis.

Much like the air we breathe, the Internet is a precious global resource that is open, equal, vital, transparent and borderless; and moreover, one which transcends groups and nations to serve the public interest. Without the bottom-up, consensus-driven, multistakeholder model that makes ICANN work, a secure and stable Internet would not be possible.

In its 14-year history, ICANN has grown to reflect a changing landscape of continued innovation, interconnectedness, and unprecedented growth in the Domain Name System (DNS) ecosystem. For instance, new gTLDs represent the biggest change to the Internet since its inception, offering new possibilities for industry, greater competition, and increased consumer choice. Raising the profile of the DNS sector is just one step in this critical process to ensure everyone who uses the Internet has a voice and can contribute to the positive impact it is having on the world.

The introduction of Internationalized Domain Names (IDNs) was an important milestone for ICANN, serving as a powerful tool to making the web more user friendly for global participants regardless of where they live or what language they speak. I am pleased that ICANN is continuing with these efforts to broaden the Internet's capacity and accessibility, and is committed to strengthening its international engagement and global outreach activities.

The annual report for fiscal year 2012 reflects the tremendous achievements and feats made by the talented ICANN staff, volunteers and board members who take great pride in preserving the security, stability and resiliency of the Internet. Ensuring responsible and transparent use of ICANN's funds for ongoing operations and initiatives is not only required but imperative, as ICANN can only be an effective steward when it balances the needs of its diverse constituencies.

Fiscal year 2012 lays the groundwork and roadmap for the future, which holds enormous promise and exciting potential. Our immense thanks are extended to those, who through their hard work and unwavering dedication to ICANN's mission, have helped contribute to the greatness of the Internet, as we know it today.

Warm Regards,
Fadi Chehadé

Message from the Board Chair

The awarding of the Internet Assigned Numbers Authority (IANA) functions contract to ICANN this past fiscal year confirmed that our private-sector-led, multistakeholder organization is uniquely qualified to operate the domain name system and the Internet's other systems of identifiers. Indeed, we were created to do just that.

The decision by the United States Department of Commerce's National Telecommunications and Information Agency underscored the importance of the Affirmation of Commitments, the 2009 agreement that ratified ICANN's independence, accountability to the global community, and commitment to making decisions in the public interest that are accountable and transparent.

Today we keep the AoC alive through perennial community reviews that ensure we are meeting our obligations and identify areas for improvement. This annual report includes an update on the status of the various reviews, including the implementation of the Accountability & Transparency Review Team recommendations and information on reviews begun this year on Whois policy and on Security, Stability and Resiliency.

The Whois report is part of a larger goal of improving confidence in the marketplace, and ultimately security for legitimate domain holders. And the SSR report is just one aspect of ICANN's continuing focus on security. In light of the problems with the New gTLD Program in fiscal year 2012, we are reinforcing ICANN's internal systems to both resolve outstanding issues and learn from those unanticipated events.

Building on the signing of the domain name system root in July 2010, the Internet and ICANN community have continued to strongly encourage Internet Service Providers and others to adopt Domain Name System Security Extensions (DNSSEC). As you know, DNSSEC will be most useful when it is widely deployed.

We saw a number of significant changes within the organization during the past year. Both the size of the staff and the community have grown, reflecting the increased activity related to the New gTLD Program. This year, we also said farewell to CEO Rod Beckstrom, who completed his three-year contract in June. Board members Reinhard Scholl and Katim Touray also stepped down at the Annual Meeting in October. A list of volunteers who concluded their service with ICANN this year is at the end of this report. We express our deep gratitude for the time and expertise they contributed to this organization.

Warmly,
Steve Crocker

Highlights of the year 2012

ICANN prepared the path for more "dots," or TLDs like dot-com, in fiscal year 2012 through the implementation of the New generic Top-Level Domain Program. But while that program might have dominated the ICANN community's attention, ICANN also continued its sharp focus on the security and stability of the domain name system. Here are a few highlights of the year.

New gTLD Program Sparked Nearly 2000 Applications

The first large-scale expansion of the top-level domain name space drew 1930 applications from 60 countries and territories, including 116 internationalized domain names in non-Latin characters. A communications campaign about New gTLDs included online and search advertising as well as extensive media coverage and global outreach. A June "Reveal Day" gathering in London drew the attention of hundreds of attendees and from journalists around the world, all curious to glimpse into the future of the gTLD world.

ICANN Earned IANA Functions Contract

In June 2012, the United States Department of Commerce's National Telecommunications and Information Administration reaffirmed ICANN's standing as the performer of the Internet Assigned Numbers Authority Functions for up to an additional seven years. The IANA Functions are a limited but important set of responsibilities that include management of the root of the Domain Name System (DNS), allocation of Internet Protocol numbering resources and the coordination of the assignment of ports and protocol parameters.

ICANN Received Badge of Honor for Work on Internationalized Domain Names

In May, ICANN received the prestigious Informatics Badge of Honor of H.H. Sheikh Salem Al-Ali Al-Sabah for 2011, a leading initiative created to foster information technology development in the Arab world. This was the first time this annual award was presented to a global organization. The selection of ICANN came in recognition for its role in coordinating and developing the Internet's unique identifier systems, and for its contribution to diversify languages and scripts and promote the use of Arabic in the domain name space.

Affirmation of Commitments

The Affirmation of Commitments, which "turned two" during this fiscal year, reaffirms ICANN's independence, accountability to the global community, and commitment to making decisions in the public interest that are accountable and transparent. ICANN's commitment to fulfilling—and exceeding—these obligations is demonstrated in numerous ways throughout our organization, including through a series of community reviews of ICANN's fundamental organizational objectives. The first such review recommended 27 ways in which ICANN could improve its accountability and transparency. Significant improvements were made in all of these areas and the review inspired additional, long-term improvements in Board and GAC operations and public input processes. Near the end of this fiscal year, the next two community reviews—Whois Policy Review Team, and the Security, Stability & Resiliency of the DNS Review Team—completed their assessments. Their recommended improvements were acted upon by the Board in late 2012, and are in the implementation phase.

IPv6 Deployment Grew as ICANN Board Ratified Plan for Recovered IPv4 Addresses

A year-and-a-half after ICANN—along with the Number Resources Organization, the Internet Architecture Board and the Internet Society—announced that the last of the IPv4 (Internet Protocol version 4) addresses had been allocated, the use of the next generation of Internet addressing—IPv6—steadily grew.

ICANN participated in the Internet Society's World IPv6 Launch Day on 6 June 2012, when Internet service providers, web companies and home networking equipment manufacturers around the world permanently enabled IPv6.

The ICANN Board ratified a Global Policy in May 2012 developed by the five Regional Internet Registries for the reallocation of recovered IPv4 addresses.

Record Meeting Participation

Nowhere was the growing interest in ICANN and its New gTLD Program more evident than at its Public Meetings in Dakar, Senegal; San Jose, Costa Rica and Prague, Czech Republic. ICANN 44 in Prague was the most well-attended meeting in ICANN's history, drawing 1821 members of the Internet community. Remote participation continued to be strong at all three meetings, enabling those who could not physically attend to add their voices to the dialogue.

		Attendees	Remote Participation total, all languages
ICANN 42	Dakar, Senegal	1,246	3,192
ICANN 43	San Jose, Costa Rica	1,426	2,536
ICANN 44	Prague, Czech Republic	1,821	1,552

Happy Anniversary At-Large Advisory Committee, Regional At-Large Organizations and Fellowship Program!

2012 marked the ten-year anniversary of the At-Large Advisory Committee (ALAC) and the five-year anniversaries of the Fellowship Program and the At-Large Regional At-Large Organizations. All three of these programs support ICANN's efforts to expand the reach of the individual Internet user and participation of those from developing countries into ICANN's community-based policy-making process.

AT-LARGE ADVISORY COMMITTEE

2002–2012

The At-Large Advisory Committee, in its current form, was established in 2002 to provide a way for active individual users of the Internet from around the world to participate in ICANN. As such, it is the primary organizational home within ICANN for individual Internet users, and its role is to provide advice on the activities of ICANN as they relate to their interests. The ALAC submitted 41 statements, resolutions and communications in fiscal year 2012. The ALAC is also active in outreach activities to expand the number of organizations becoming accredited At-Large Structures (ALSes). In mid-2012, the total number of ALSes reached 144, with several applications pending.

REGIONAL AT-LARGE ORGANIZATIONS

2007–2012

There are five Regional At-Large Organizations, or RALOs, that organize the different At-Large Structures by geographic region. They are tasked with keeping the Internet user community in their region informed about ICANN's activities through public outreach and distribution of information and knowledge, as well as contributing the regional perspective to the ALAC's policy advice development. Two of the RALOs organized a series of capacity-building sessions and General Assemblies at the ICANN meetings in Dakar, Senegal and San Jose, Costa Rica in 2012.

FELLOWSHIP PROGRAM
2007–2012

ICANN's Fellowship Program provides grants to members of the Internet community who would otherwise be unable to attend an ICANN public meeting. Today, there are more than 400 alumni from the ccTLD community, governments, civil society, the business community and academia, proving the program's success at capacity-building as well as bringing new and fresh ideas into our discussions.

Registrar Accreditation Agreement Negotiations

At ICANN 42 in Dakar, Senegal, in October 2011, the Board directed ICANN and its accredited registrars to begin bilateral negotiations on revisions to the Registrar Accreditation Agreement. Focused on advancing the twin goals of protecting registrants and ensuring greater security, the negotiations incorporated recommendations developed by law enforcement agencies and the broader Internet community.

By the end of fiscal year 2012, the Registrar Stakeholder Group (through its negotiating team) and ICANN held 18 extended negotiation sessions. Agreement was reached in many areas, such as on the Registrar responsibilities upon the creation of a proxy/privacy service accreditation program, and the maintenance of abuse points of contact. Key issues remaining in negotiation include approaches to validation of registration (Whois) data and the scope of data retention obligations.

*"In May, ICANN received the prestigious **Informatics Badge of Honor of H.H. Sheikh Salem Al-Ali Al-Sabah** for 2011, a leading initiative created to foster information technology development in the Arab world. This was the first time this annual award was presented to a global organization."*

ICANN's Achievements in its Four Strategic Focus Areas

ICANN's operations are driven by a three-year rolling, annually updated strategic planning process that feeds into the larger ICANN planning process and development of each year's operating plan and budget. Below are ICANN's achievements as measured in its four strategic focus areas for fiscal year 2012:

DNS Stability & Security

Competition, Consumer Trust & Consumer Choice

Core Operations Including IANA

A Healthy Internet Governance Eco-System

STRATEGIC OBJECTIVES — DNS STABILITY & SECURITY

+ Maintain and drive domain name system uptime
+ Enhance domain name system risk management
+ Broad Domain Name System Security Extensions (DNSSEC) adoption
+ Enhance international domain name system cooperation
+ Improve DNS resiliency

COMPETITION, CONSUMER TRUST & CONSUMER CHOICE

+ Maintain single authoritative root
+ Increase TLD options in more languages
+ New gTLDs including internationalized domain names
+ Lower registration abuse
+ Increase industry competition

CORE OPERATIONS INCLUDING IANA

+ Flawless IANA operations
+ Resilient L-Root operations
+ Continual improvements
+ Internationalization
+ Continue long-term IANA functions responsibility

A HEALTHY INTERNET GOVERNANCE ECO-SYSTEM

+ Continuing role in Internet governance
+ Stakeholder diversity
+ World-class accountability and transparency
+ Enhance trust in ICANN's stewardship
+ Act in global public interest
+ Cross-stakeholder work

DNS Stability & Security

STRATEGIC OBJECTIVES

+ **Maintain and drive domain name system uptime**
+ **Enhance domain name system risk management**
+ **Broad Domain Name System Security Extensions (DNSSEC) adoption**
+ **Enhance international domain name system cooperation**
+ **Improve DNS resiliency**

PROMOTING DNSSEC ADOPTION

ICANN Domain Name System Security Extensions (DNSSEC) awareness and outreach efforts in international, regional, and domestic forums have accelerated the pace of DNSSEC deployment with 92 out of the total of 315 top-level domains signed (as of 28 August 2012) and growing Internet Service Provider and registrar support. ICANN staff presented to corporate, governmental, law enforcement and Internet audiences at events or conferences such as the International Conference on Cyber Security, the Caribbean Telecommunications Union Ministerial, Commonwealth Cybercrime Initiative, APECTEL, and Security ConFAB.

Broadening its audience reach, ICANN also leveraged efforts with other organizations, such as the Internet Society, to promote DNSSEC adoption. Together, all of these regional DNSSEC awareness and training efforts resulted in a spike in requests for DNSSEC training and follow on deployment plans for TLDs.

Close cooperation and direct technical assistance to ccTLDs and operators resulted in deployments of DNSSEC by the Tanzania Network Information Centre, and Trinidad & Tobago Network Information Centre as well as self-driven efforts, such as that by Network Information Center-Internet Costa Rica, to help others in its region with deployment.

DNS CAPABILITY TRAINING

ICANN staff conducted a number of law enforcement and operational security community workshops on domain name system security. Staff also supported a workshop by the Anti-Phishing Working Group in Prague, Czech Republic and presented a session on domain seizures. In addition, staff conducted a ccTLD training session with regional TLD organizations.

SINGLE-CHARACTER AND DOTLESS DOMAINS

The Security and Stability Advisory Committee issued reports on the technical considerations for implementation of single character internationalized top level domains, and "dotless domains." SSAC recommended a conservative approach for the consideration of single character IDNs. SSAC found that dotless domains are not universally reachable and could introduce some security risks given the current DNS implementation and application behavior.

DOMAIN NAME REGISTRATION DATA MODEL

With a goal of promoting consistency in domain name registration data, the Security and Stability Advisory Committee developed a model for domain name registration data for community consideration, which could be the basis for a standards-based, structured and extensible model for logging information that is associated with a domain name before it is "instantiated" in the domain name system.

SECURITY, STABILITY AND RESILIENCY OF THE DNS REVIEW TEAM

At the end of this fiscal year, the community review team charged under the Affirmation of Commitments with assessing the effectiveness of ICANN's plans and activities related to the security, stability and resiliency of the DNS completed its work. This independent team's assessment, along with 28 recommendations for advancing ICANN's work in this area, was posted for public comment and accepted by the Board in October 2012. The recommendations, now in the implementation phase, address ICANN's security plan implementation, the effectiveness of the plan to deal with actual and potential challenges and threats, and the extent to which the security plan is sufficiently robust to meet future challenges and threats to the security, stability and resiliency of the Internet DNS (consistent with ICANN's limited technical mission). More information is available at www.icann.org/en/news/public-comment/ssr-rt-final-report-21jun12-en.htm.

Competition, Consumer Trust and Consumer Choice

STRATEGIC OBJECTIVES

+ **Maintain single authoritative root**
+ **Increase TLD options in more languages**
+ **New gTLDs including internationalized domain names**
+ **Lower registration abuse**
+ **Increase industry competition**

NEW GTLD PROGRAM

After more than seven years of planning, ICANN initiated a process for accepting and evaluating new generic top-level domains that will trigger an increase in top-level internationalized domains as well as an increase in domain name industry competition.

Expanding on the world of .com, .gov, .org and 19 other gTLDs, ICANN's New gTLD Program opened the door for all types of words in many different languages and scripts to become top-level domains.

From **11 January 2012 to 30 May 2012,** ICANN accepted 1930 applications for 1409 different new gTLDs. **Of the 1930 applications received:**

+ 66 were geographic name applications.
+ 116 applications were for Internationalized Domain Names, or IDNs, for strings in scripts such as Arabic, Chinese and Cyrillic.

911
North America

675
Europe

303
Asia Pacific

24
Latin America & the Caribbean

17
Africa

Applications Received

Statistics from 60 countries & territories, broken down by ICANN's geographic regions.

NEW GTLD PROGRAM RIGHTS PROTECTION MECHANISMS

Trademark protection is an important component of the New gTLD Program. ICANN worked collaboratively with the Internet community throughout the policy development and implementation process to develop the strong trademark protection mechanisms that are fundamental to the program. Recent work on two of these rights protection mechanisms is highlighted below.

Trademark Clearinghouse

The Trademark Clearinghouse will function as an information repository, offering authentication and validation services for trademark data. Trademark holders and gTLD registry operators will rely on the Clearinghouse to support rights protection mechanisms for the new gTLD space. The Clearinghouse is designed to be available globally, with capabilities for validating trademark data from around the globe.

Volunteer stakeholders including IP stakeholders, registries, registrars and others worked together from November 2011 to March 2012 on an Implementation Assistance Group to give advice on key implementation issues. Their input was used in development of a draft implementation model for the Clearinghouse, including the implementation of the Sunrise and Trademark Claims Services that will be required of all new gTLD registries.

ICANN selected Deloitte Enterprise Risk Services and IBM as partners for Trademark Clearinghouse operations in June 2012, after a selection process originating with a Request for Information published in October 2011.

Uniform Rapid Suspension System

During ICANN 44 in Prague, community stakeholders participated in a session on another rights protection mechanism, the Uniform Rapid Suspension (URS) system. The URS provides trademark holders with a rapid and efficient mechanism to "take down" undeniably infringing domain names. Participants discussed possible adaptations to the URS that could help satisfy the goals of an efficient, low-cost process, while retaining registrant protections embedded in the process. Discussions will continue until a full, successful URS model is in place.

NEW GTLDS INCLUDING INTERNATIONALIZED DOMAIN NAMES

The Internationalized Domain Name Variant Program continued its study of issues associated with the potential delegation of IDN TLDs, to help work towards technical or policy solutions for those issues. Six case study teams including linguistic and technical experts defined variant issues about Arabic, Chinese, Cyrillic, Devanagari, Greek and Latin scripts and published their findings and recommendations in a report.

IDN Fast Track Department

The number of Internationalized Domain Names entered into the DNS root zone increased from 30 to 32 this fiscal year, bringing the total number of approved IDN strings through the IDN Fast Track program to 40. IDNs allow the use of scripts other than Latin (such as Arabic and Chinese).

WHOIS POLICY REVIEW TEAM

Towards the end of this fiscal year, the independent community team charged under the Affirmation of Commitments with reviewing Whois policy and implementation submitted its report to ICANN's Board. The team's report included 16 recommendations for improving the effectiveness of Whois policy implementation, including the ability to meet the legitimate needs of law enforcement and promote consumer trust. After extensive community discussion, input and analysis of the team's recommendations, in November 2012 the Board decided to 1) launch a new effort to redefine the purpose of collecting, maintaining and providing access to gTLD registration data in order to provide the foundation for a new policy, and 2) fully enforce existing contractual obligations relating to the collection, access and accuracy of gTLD Whois data. More information is available at www.icann.org/en/groups/board/documents/resolutions-08nov12-en.htm.

NEW CCNSO MEMBERS

The Country Code Names Supporting Organization, or ccNSO, develops global policies relating to country code top-level domains and provides a forum for ccTLD managers to meet and share best practices.

New ccNSO Members in Fiscal Year 2012

+ .ae (United Arab Emirates)
+ .bf (Burkina Faso)
+ .cw (Curaçao)
+ .gg (Guernsey)
+ .iq (Iraq)
+ .is (Iceland)
+ .je (Jersey)
+ .km (Comores)
+ .mn (Mongolia)
+ .na (Namibia)
+ .nc (New Caledonia)
+ .nr (Nauru)
+ .om (Oman)
+ .pf (French Polynesia)
+ .ph (Philippines)
+ .ps (Palestinian Territory)
+ .sx (Sint Maarten)
+ .tl (Timor-Leste)

AT-LARGE BY THE NUMBERS

ALAC continued to increase its activities and its voice in the ICANN policy development, submitting 41 statements, resolutions and communications regarding issues including among others the Inter-Registrar Transfer Policy and New gTLD Program.

New At-Large Structures in Fiscal Year 2012

+ Internet Society Armenia Chapter
+ Internet Society Bahrain Chapter
+ Internet Society Trinidad & Tobago Chapter
+ ISOC CR—Costa Rica Society for Internet Development
+ Media Education Center NGO
+ TaC—Together Against Cybercrime
+ Wikimedia Austria

TWO KEY POLICY DEVELOPMENT PROCESSES CONCLUDED

In May, the ICANN Board adopted the last remaining recommendation of the Inter-Registrar Transfer Policy Part B Policy Development Process. This two-year process was the second in a series of five examining the procedure for domain name holders to transfer their names from one ICANN-accredited registrar to another.

In October, the ICANN Board adopted recommendations related to what happens after domain names expire made by the Post-Expiration Domain Name Recovery Working Group. This concluded a two-year process that examined current registrar policies regarding the renewal, transfer and deletion of expired domain names.

Core Operations Including IANA

STRATEGIC OBJECTIVES

+ **Flawless IANA operations**
+ **Resilient L-Root operations**
+ **Continual improvements (EFQM)**
+ **Internationalization**
+ **Continue long-term IANA functions responsibility**

IANA DEPARTMENT

Behind the scenes of the Internet is a decentralized infrastructure designed with resilience and reliability. An important part of the infrastructure is a name and address system that uses three sets of unique "identifiers" that allow computers and networks to talk to one another across a variety of platforms and formats. These unique identifiers are domain names, Internet Protocol addresses and protocol port and parameter numbers, and their allocation and assignment are referred to as the IANA functions.

In June 2012, ICANN earned the renewal of the contract from the United States Department of Commerce's National Telecommunications and Information Administration to provide IANA functions for a maximum of seven years, the longest potential contract for these functions to date.

The IANA Department conducted the third year of its business excellence self-assessment, based on the EFQM Excellence Model. It registered a 49 percent improvement year-over-year in the processes, products and services, customer results, leadership and key results. Additionally, the department completed its first-ever customer survey measuring satisfaction with its provision of the IANA services—with more than 80 percent of respondents expressing satisfaction in all categories.

ICANN also signed a one-year amendment to the IETF ICANN 2000 Memorandum of Understanding for Service Level Agreements.

Root Zone Management System Automated

Increasing flexibility for TLD managers while providing greater transparency for the community, ICANN, Verisign and NTIA completed the first full year of automated end-to-end handling of root zone requests such as name server or delegation signer change requests. Following years of work, the system was launched in July 2011 by the three parties to increase efficiency and reduce the possibility of human error.

Root Zone Marks Second Year of Digital Signing Security

June 2012 marked the second full year that the signed root was available, incorporating public key cryptography into the DNS hierarchy and resulting in a single, open, global Public Key Infrastructure (PKI) for domain names. It is the result of over a decade of community based, open standards development.

L-ROOT OPERATIONS

As part of an ongoing trial project to expand distribution of L-Root globally, ICANN worked with local partners to install L-Root nodes in 28 countries this fiscal year. The goal of the effort is to increase resilience to abuse or attacks on the domain name system by boosting name resolution capacity.

A map of node locations and more information can be found at www.root-servers.org.

"The IANA Department conducted the third year of its business excellence self-assessment, based on the EFQM Excellence Model. It registered a 49 percent improvement year-over-year in the processes, products and services, customer results, leadership and key results."

List of countries with L-Root installations in fiscal year 2012:

1 **Australia**—Brisbane
2 **Austria**—Vienna
3 **Brazil**—Belo Horizonte, Brasilia, Campinas, Curitiba, Florianopolis, Fortaleza, Londrina, Porto Alegre, Rio de Janeiro, Salvador, and Sao Jose dos Campos
4 **Canada**—Mississauga, Ottawa, and Vancouver
5 **Costa Rica**—San Jose
6 **Ecuador**—Quito
7 **France**—Reunion
8 **Germany**—Berlin, Hamburg, and Munich
9 **Ireland**—Dublin
10 **Italy**—Turin
11 **Japan**—Tokyo
12 **Kazakhstan**—Semey
13 **Mexico**—Monterrey
14 **Mozambique**—Maputo
15 **New Zealand**—Christchurch, Mangere, and Wellington
16 **Norway**—Ullensaker
17 **People's Republic of China**—Beijing
18 **Portugal**—Porto
19 **Russia**—Moscow
20 **Senegal**—Dakar
21 **Singapore**—Changi
22 **South Korea**—Incheon
23 **Spain**—Barcelona
24 **Switzerland**—Geneva
25 **Turkey**—Istanbul
26 **United Kingdom**—Leeds
27 **Ukraine**—Odessa
28 **United States**—Boston, Massachusetts; Portland, Oregon; and Culpeper, Virginia
29 **Yemen**—Sanaa

WHOIS

"Whois" provides public access to data on registered domain names, registrant contacts and other critical information (also referred to as "registration data"). ICANN accredited registrars are obligated to publish contact and other information about registered domain name holders through Whois. In fiscal year 2012, several community discussions took place concerning different aspects of Whois, addressing the concerns of law enforcement as well as privacy advocates.

The GNSO Council commissioned several studies to provide current, reliable information for community discussions about Whois, including:

+ Whois privacy/proxy abuse study by the National Physical Laboratory of the United Kingdom
+ Whois misuse study by Carnegie Mellon University CyLab
+ Whois Registrant identification Study by the National Opinion Research Center at the University of Chicago
+ Survey of ICANN community members in furtherance of an inventory of Whois Service requirements report published by staff

This year, the ICANN Board approved a policy developed by the community aimed at streamlining domain name transfer requests. The policy, part of a larger, multi-part effort to improve the Inter-Registrar Transfer Policy, requires accredited registrars to more clearly define terms under which a domain name would be unavailable for transfer, or "locked."

The GNSO Council initiated a new Policy Development Process regarding the Uniform Domain Name Dispute Resolution Policy to examine how domain name locking should be handled in disputes. The Council also initiated a PDP looking at whether existing top-level domain registrars should be required to maintain as much data on registrants as New gTLD operators will under the terms of the New gTLD Program.

ORGANIZATIONAL EFFECTIVENESS PROGRAM

In its second year, ICANN's Organizational Effectiveness Program produced notable results in areas such as staff development and the integration of employees working remotely. Among these were an integrated staff development program requiring managers to train and coach staff and a management and leadership development program available both in e-learning and classroom formats. Staff measured progress through a second annual Organizational Effectiveness survey this year that serves as the basis for continuous improvement efforts in processes, people and planning.

HUMAN RESOURCES & ADMINISTRATION

ICANN continued to improve its human resources and administrative functions by completing a staff compensation framework adopted by the Board, as well as implementing a Human Resources Management System. More than 30 new staff members were hired during the fiscal year. Staff moved into new, larger offices with enhanced security and technology features in Brussels, Belgium, and Los Angeles, California. Staff provided travel support to more than 400 total travelers to three ICANN meetings.

A Healthy Internet Governance Eco-System

Increased Public Participation in Multistakeholder Model

STRATEGIC OBJECTIVES

+ **Continuing role in Internet governance**
+ **Stakeholder diversity**
+ **World-class accountability and transparency**
+ **Enhanced trust in ICANN's stewardship**
+ **Act in global public interest**
+ **Cross-stakeholder work**

INCREASED PUBLIC PARTICIPATION IN MULTISTAKEHOLDER MODEL

Meeting Participation

Attendee numbers at ICANN's Public Meetings have steadily increased over time, demonstrating that ICANN is retaining its existing community while attracting new and diverse community members. Attendance achieved a new record in June 2012 at the meeting in Prague, Czech Republic.

Remote Participation

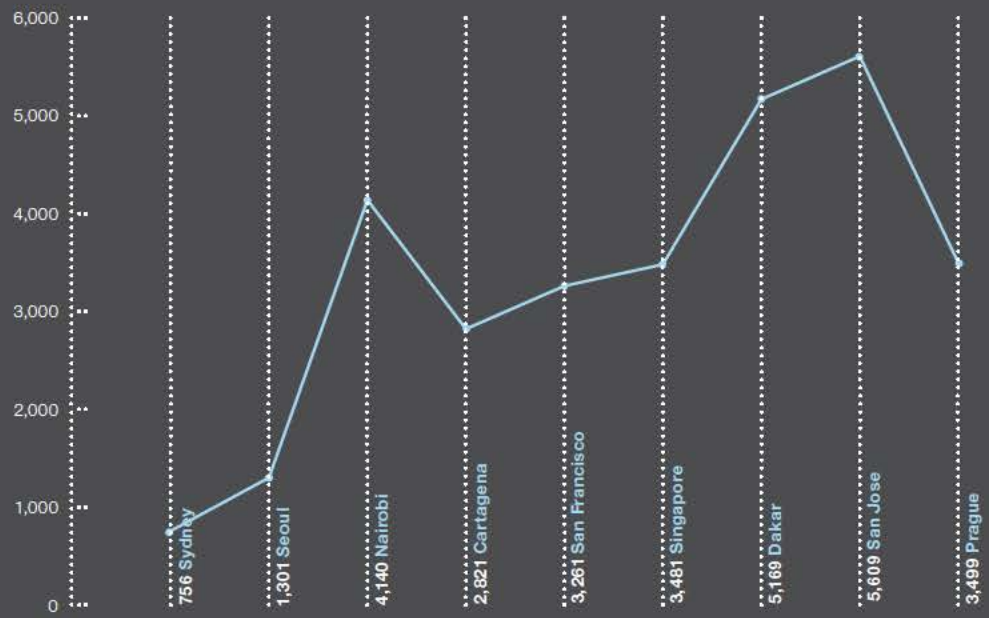
With stakeholders in every country in the world, ICANN strives for world-class remote participation services that enable Internet users to add their voices to the discussion from wherever they are. These remote participation services have continued to improve and were the standard services provided at each meeting this fiscal year. Audio, video and scribing services, in English as well as local languages, were provided for more than 100 simultaneous public sessions (on average) at each of the three ICANN meetings held this fiscal year in Africa, Europe and Latin America.

ICANN used Adobe Connect as the main remote participation tool, but also provided low bandwidth services through sole mp3 streaming and scribe feed though separate links.

Remote participation hit all-time high numbers at two meetings this fiscal year. ICANN 42 in Dakar, Senegal, reached 5169, surpassing by 25 percent the previous high set in Nairobi in 2010. At the very next meeting—ICANN 43 in Costa Rica—remote participation reached a brand new high, growing by eight percent to 5609.

The Costa Rica meeting also surpassed on-site attendance figures for the previous ICANN meeting in the Latin American and Caribbean region in 2010 in Cartagena, Colombia. A total of 1026 people attended the Cartagena meeting on-site, and remote participation numbers were considered high at that time with 2821 Adobe Connections.

Prague drew the most in-person attendees and thus has the lowest number of remote participants among the fiscal year 2012 meetings. However, Prague still had 3499 remote participants, more than any one meeting's remote participation numbers the year prior.



AC Connections

MP3 Streaming Statistics by Meeting

	LANGUAGES				
	ENGLISH	SPANISH	FRENCH	OTHER	TOTAL MP3
Cartagena	1,489	223	61	0	1,773
San Francisco	2,403	518	444	0	3,365
Singapore	2,417	316	1,026	338	4,097
Dakar	1,666	1,177	341	8	3,192
San Jose	1,497	395	563	81	2,536
Prague	1,238	136	130	48	1,552

NEWCOMERS
Individuals who have attended less than three meetings.

140

Dakar SENEGAL
#42, 10.2011

421

San Jose COSTA RICA
#43, 03.2012

389

Prague CZECH REPUBLIC
#44, 06.2012

ATTRACTING NEW AND DIVERSE COMMUNITY MEMBERS

ICANN welcomes Newcomers into its multistakeholder process through a special orientation program during ICANN Public Meetings. In its second year, the program provides a starting point for understanding ICANN's role in Internet governance, how its community is structured and how the policy-making process works. Its goal is to educate Newcomers so they can be effective and engaged participants in their first, second or third meeting, and to leave the meeting well informed and willing to come back.

Newcomers are paired with alumni from ICANN's Fellowship Program who serve as mentors. These mentors, as well as ICANN staff, provide hands-on support, guidance and introductions to community members, the ICANN structure and process, and the sessions best suited for newcomers. The Newcomers Lounge, a special gathering place designated at each Public Meeting, is the focal point for this activity.

The first day of each ICANN Public Meeting includes introductory sessions designed just for Newcomers. These sessions, coordinated and led by ICANN staff, offer overviews of potential policy discussions, ICANN structure, the multistakeholder model, contractual compliance, registries, registrars and more.

94 percent of Newcomers reported very high overall satisfaction with these services, according to a survey sent to registered Newcomers after each meeting this year.

Watch this video to learn more about the Newcomer experience at ICANN 43 in Costa Rica: www.icann.org/en/about/participate/newcomers

PUBLIC COMMENT ENHANCEMENTS

The public comment process is fundamental to ICANN's multistakeholder, bottom-up, consensus-driven process. Through public comment, individuals can provide their opinion on any active issue being considered by the ICANN community. Comments may be shared during public forums at ICANN Public Meetings or via ICANN's online public comment platform.

The Accountability & Transparency Review Team made recommendations regarding public comment in 2011, and since then the ICANN staff and community have devoted many hours to brainstorming over how to improve the process. This work included a community member focus group, a public comment period on the implementation plans as well as various consultations through webinars and sessions during ICANN meetings in Dakar and Costa Rica.

Changes during fiscal year 2012 included

+ **Better Descriptions of Public Comment Topics:** For each public comment topic listed online, consistent fields were added showing purpose, current status and next steps. Starting in January 2012, staff began categorizing each topic to help users quickly find ones that concerned them. Categories include Top-Level Domains, Internet Protocol Addressing and Contracted Party Agreements.
+ **Comment/Reply Periods:** Each public comment period opened after 1 January 2012 has a 21-day Comment period. If comments are received during this period, then a 21-day Reply period begins. The 21-day periods are minimums and may be longer depending on community requests.

In June 2011, a regular process began to update and maintain the "Upcoming Public Comments" web page in order to provide community members with a preview of potential future public comment topics. The current list is compiled through this process with input from ICANN community leaders and the ICANN staff.

Monitoring the real use of these enhancements on the system since 1 January 2012, ICANN staff and community started working towards further enhancements. These are under discussion and are in the fiscal year 2013 plan, including technical developments on the Public Forum interface.

"Several ICANN staff and Board members participated in the annual World Summit on the Information Society (WSIS) Review meeting, in Geneva in May demonstrating ICANN's important contribution to 'enhanced cooperation;' a key objective agreed to in 2005."

ACCOUNTABILITY & TRANSPARENCY

The first independent community review under the Affirmation of Commitments—the Accountability and Transparency Review Team (ATRT)—provided ICANN's Board with 27 recommendations to maintain and improve ICANN's robust mechanisms for public input, accountability, and transparency. All the recommendations were accepted by the Board and implemented. **Highlights include:**

To provide better access to, and insight into, Board decisions, ICANN's standard operating procedures (SOP) now include:

+ Posting extensive Board meeting information (including briefing materials).
+ Publishing conditions for redaction of posted Board briefing materials.
+ Providing translations into the six UN Languages of approved Board resolutions and minutes of Board meetings, which are posted within the 21-day timeframe.
+ Posting rationales for Board actions.

To improve ICANN's "Review Mechanisms for Board Decisions":

+ The "Reconsideration Requests" webpage has been revamped so the public has a standard timeline, format, and explanations for all Reconsideration Requests (all part of SOP).
+ Independent experts recommended improvements to ICANN's accountability structures; these recommendations were posted for public comment and scheduled for Board action in December 2012.
+ The Board approved the Ombudsman framework, incorporated it in the SOP, and confirmed that it is consistent with international standards.

To improve the process for selecting ICANN Directors and address recommendations on Board composition, ICANN's SOP now include:

+ The Nominating Committee (NomCom) annually consults with the ICANN community and public on skill set requirements to consider when making appointments to leadership positions.
+ The Board annually provides the NomCom with information on the Board's skill sets.
+ New NomCom guidelines were approved by the Board and instituted, including internal procedures and a code of conduct.
+ The Board approved compensation to voting Directors for their services to ICANN, and revised the "ICANN Conflicts of Interest Policy and ICANN Bylaws."

To help advance the effectiveness of the Governmental Advisory Committee (GAC) and its interaction with the Board:

+ ICANN increased funding, multilingual access services, and staff resources to support the work of the GAC.
+ The GAC has clarified what constitutes GAC advice.
+ A formal, documented process for requesting and tracking GAC advice has been launched.
+ Regional plans were developed for increasing involvement in ICANN.
+ Board-GAC face-to-face interactions have been increased.

To improve the processes ICANN uses to gain public input and develop policy, ICANN's SOP now include:

+ The translation of ICANN's Bylaws into multiple languages.
+ The creation of "Language Services Policies and Procedures."
+ A revamped Public Comment webpage, and a list of up-coming comment periods.
+ A new "public notice & comment process" for issues under public comment.

To help ensure ICANN staffing arrangements are appropriately multilingual, ICANN's SOP now includes updated job postings and related forms, and staff language-training programs.

For a complete list of ATRT recommendations, visit the Accountability & Transparency web page at www.icann.org/en/accountability/overview-en.htm

MULTISTAKEHOLDER APPROACHES IN UNITED NATIONS

Several ICANN staff and Board members participated in the annual World Summit on the Information Society (WSIS) Review meeting, in Geneva in May demonstrating ICANN's important contribution to "enhanced cooperation;" a key objective agreed to in 2005. ICANN subsequently organized a briefing with the Internet Society and the International Chamber of Commerce in New York during which staff, business leaders and members of the ICANN community discussed enhanced cooperation with UN delegates attending the Economic and Social Council (ECOSOC) meeting. At this meeting, ECOSOC adopted a report recognizing, among other issues, the contribution ICANN makes in integrating governmental views into discussions on Internet governance issues.

PREPARATION FOR WORLD CONFERENCE ON INTERNATIONAL TELECOMMUNICATIONS

During fiscal year 2012, ICANN staff worked with colleagues from the Regional Internet Registries and the Internet Society within the International Telecommunications Union regional prep meetings to submit proposals for the upcoming treaty-based World Conference on International Telecommunications (WCIT). Staff also discussed ICANN's potential concerns with key governments and other stakeholders. Scheduled for December 2012, the conference will focus on amendments and updates to the International Telecommunication Regulations adopted in 1988.

ENHANCED COMMUNICATIONS AND ACCESSIBILITY AT ICANN.ORG

The redesign of ICANN.ORG was launched in February 2012. The new information architecture was designed to organize the resources that ICANN.ORG offers in order to enhance communications and accessibility. More than 38,000 pages and files were carefully examined and migrated into new locations following extensive consultation with the ICANN community.

New features include

+ Most recent information up front: The latest Board activity and the most recent topics open for public comment now appear on the home page.
+ Groups: All visitors can now go directly from ICANN's home page to any Supporting Organization or Advisory Committee page.
+ Multilingual content bar: Choose a language and immediately see a list of all materials available in that language, starting with the most recent.
+ Footer Acronym Helper: Type in an acronym and get the definition on demand.
+ Inline Acronym Helper: Acronym definitions appear when you hover over underlined terms in HTML portions of the site.
+ Planet ICANN: Read every RSS and Twitter feed from ICANN in one place.

GNSO WEB SITE UPDATED

Designed to better communicate with the growing ICANN community, the new GNSO web site was launched in May 2012. In addition to cosmetic and design changes, the new site was designed to make it easier for anyone to participate in the GNSO's important policy activities. It includes new content on GNSO basics and reorganizes other materials by subject matter.

SO/AC REVIEWS

Organizational reviews of Supporting Organizations and Advisory Committees are critical to ICANN's ability to adapt and meet the changing needs of Internet users worldwide.

The At-Large Advisory Committee/At-Large Improvements Implementation Project was completed in June 2012. Among its achievements were the adoption of a vision and mission for ALAC and At-Large, inclusion of a revised definition of ALAC in the ICANN Bylaws, and organization of At-Large Capacity Building events.

A multi-year effort to restructure the GNSO was concluded with several milestones completed in fiscal year 2012, including the adoption of a new GNSO policy development process. The new PDP streamlines the GNSO's policy activities and embraces the working group model that is a critical component of ICANN's bottom-up, consensus driven, multistakeholder model.

RALO Capacity Building Sessions in Dakar (AFRALO) and Costa Rica (LACRALO) both were successful and have had sustained impact in their regions.

With our Thanks

Volunteers are the lifeblood of the ICANN community, collectively devoting thousands and thousands of hours a year to furthering policy development as it relates to domain name system stability and security, as well as how ICANN itself works. We extend our sincerest gratitude to these community volunteers who have ended their terms of service with ICANN in fiscal year 2012.

BOARD OF DIRECTORS

+ **Reinhard Scholl,** TLG Liaison *12.2010–10.2011*
+ **Katim Seringe Touray** *11.2008–10.2011*

AT-LARGE ADVISORY COMMITTEE

+ **Mohamed El Bashir,** ALAC representative elected by AFRALO, *03.2007–10.2011*
+ **Dave Kissoondoyal,** NomCom appointed ALAC representative from the Africa Region, *10.2009–10.2011*
+ **Cheryl Langdon-Orr,** ALAC representative elected by APRALO, *06.2007–10.2011*
+ **Sylvia Herlein Leite,** ALAC representative elected by LACRALO, *10.2009–2011*
+ **Gareth Shearman,** ALAC representative elected by NARALO, *10.2009–2011*
+ **James Seng,** NomCom appointed ALAC representative from the Asian, Australasian & Pacific Islands Region, *10.2009–10.2011*
+ **Patrick Vande Walle,** ALAC Liaison to the SSAC, *11.2008–10.2011*
+ **Andres Piazza,** ALAC Liaison to Dotmobi, *11.2008–10.2011*

COUNTRY CODE NAMES SUPPORTING ORGANIZATION

+ **Hiro Hotta,** Vice Chair, ccNSO Council
+ **Patricio Poblete,** ccNSO Council
+ **Jian Zhang,** ccNSO Council

GENERIC NAMES SUPPORTING ORGANIZATION

+ **Olga Cavalli,** Nominating Committee Appointee
+ **Debbie Hughes,** Non-commercial Stakeholder Group
+ **Adrian Kinderis,** Registrar Stakeholder Group
+ **Andrei Kolesnikov,** Nominating Committee Appointee
+ **Kristina Rosette,** Intellectual Property Constituency
+ **Tim Ruiz,** Registrar Stakeholder Group
+ **Rosemary Sinclair,** Non-commercial Stakeholder Group
+ **Jaime Wagner,** Internet Service and Connectivity Providers Constituency

GOVERNMENTAL ADVISORY COMMITTEE

None

NOMINATING COMMITTEE

+ **Adam Peake,** Chair, *10.2010–10.2011*
+ **Wolfgang Kleinwaechter,** Advisor, *10.2010–10.2011*
+ **Yaovi Atohoun,** ALAC from Africa region, *10.2009–10.2011*
+ **Dr. V.C. Vivekanandan,** ALAC from Asia/Pacific/Australia region, *12.2010–10.2011*
+ **Eduardo Diaz,** ALAC from North America region, *10.2009–10.2011*
+ **José Ovidio Salgueiro,** ALAC from Latin America/Caribbean region, *10.2009–10.2011*
+ **Mike Roberts,** Business Constituency, *10.2009–10.2011*
+ **Chris Martin,** Business Constituency, *10.2009–10.2011*
+ **Michael Palage,** Registry Stakeholder Group, *10.2009–10.2011*
+ **Giovanni Seppia,** ccNSO, *12.2010–10.2011*
+ **Tony Holmes,** ISPCP, *10.2009–10.2011*
+ **Mark Partridge,** IPC, *10.2009–10.2011*
+ **Wilfried Woeber,** ASO AC, *10.2009–10.2011*
+ **Henk Uijterwaal,** IAB for IETF, *10.2009–10.2011*
+ **Francisco da Silva,** Tech Liasion Group—ITU, *12.2010–10.2011*

ROOT SERVER SYSTEM ADVISORY COMMITTEE

None

SECURITY AND STABILITY ADVISORY COMMITTEE

+ **Xiaodong Lee,** 06.2010–01.2012

Board of Directors

Steve Crocker

Chairman
Board of Directors

Experience includes research management at **DARPA, University of Southern California Information Sciences Institute** and the **Aerospace Corporation,** vice president of **Trusted Information Systems,** and co-founder of **CyberCash, Inc., Executive DSL** and **Longitude Systems, Inc.**

Involved in the Internet since its inception. As a graduate student, helped develop protocols for the **Arpanet** and laid the foundation for today's Internet; organized the **Network Working Group,** the forerunner of the modern **Internet Engineering Task Force,** and initiated the **Request for Comment** series through which protocol designs are documented and shared.

CEO and **Co-founder**, Shinkuro, Inc.
Chair, Executive Committee
Member, Risk and Compensation Committees
Recipient of the **2002 IEEE Internet Award**

Bruce Tonkin

Vice Chair Board of Directors

Evaluates new product opportunities and analyzes emerging technology trends for domain name registrar providing services for many gTLDs and ccTLDs. Has represented Melbourne IT in ICANN's registrars' constituency since 2001. Later, elected to the **GNSO Council;** chair of the DNSO Names Council and GNSO Council.

Active participant in policy development for the .au ccTLD. Major policy work includes the introduction of registrar competition in the .au namespace and the introduction of a range of policies covering areas such as domain name registration policies and Whois.

Chief Strategy Officer, Melbourne IT Limited.
Fellow, Australian Institute of Company Directors
Chair, Board Governance Committee
Member, Compensation, Executive and Risk Committees

Sébastien Bachollet

Organized **European Global Event** on Domain Names and Addresses in Paris from 2002–2008. The event drew more than 250 participants each year. He launched France's largest e-business web site, **www.sncf.fr.**

Leveraging his early career experience in leading innovative information systems projects at **Air Inter** and **French National Railways,** he became involved in the relaunch and promotion of **CIO networks** in France, and the creation of **EuroCio.**

Founding CEO, BBS International Consulting
Member, the Internet Society French Chapter (serving on its board since 2003), named **Honorary President** in 2009
Deputy General Manager, Club Informatique des Grandes Entreprises Francaises
Chair, Public Participation Committee
Member, Finance & Structural Improvements Committees

EX OFICIO MEMBER
President & CEO
ICANN
July 2009–June 2012

Rod Beckstrom

Serial entrepreneur, founder and CEO of a publicly-traded company, author, environmentalist, and public diplomacy leader.

In 2008, Director, **National Cybersecurity Center,** reporting to the Secretary of Homeland Security; charged with protecting US Federal networks against cyber attacks, and supporting the Attorney General, National Security Council, and the Secretary of Defense. Developed a new economic model for valuing networks and cybersecurity risk management.

Co-founded and led CATS Software, Inc.
Co-author, *The Starfish and the Spider: The Unstoppable Power of Leaderless Organizations*
Trustee, Environmental Defense Fund and Jamii Bora Trust
Member, Executive Committee

Cherine Chalaby

Held many leadership roles in banking and technology. During a 28-year tenure at IT service company **Accenture,** he held key managing positions, ultimately serving on **Accenture's Executive Committee** and its **Global Leadership Council.**

His experience includes strategy development, systems implementation, transformational change and running operations.

Joined Middle East-based regional investment bank Rasmala in March 2006, serving as chairman of the supervisory board, chairman of the management board and chairman of the bank's subsidiary in Egypt.

Previous Middle East experience included developing one of the first Internet-based brokerage systems in the region and developing and installing a local exchange system.

Chair, Finance and New gTLD Program Committees
Member, Board Governance and Executive Committees

Chris Disspain

CEO of **.au Domain Administration Ltd.** since October 2000. Instrumental in Australian government's endorsement of auDA as manager of .au. Responsible for negotiating re-delegation of .au to auDA and guiding the evolution of the DNS in Australia from a monopoly to a competitive, regulated and price-sensitive regime.

Served as corporate attorney; held executive management positions and directorships in private and public companies in United Kingdom and Australia. Served as chair or director of several companies listed on the Australian Stock Exchange.

Founding chair, ICANN's ccNSO 2004–2011
Member, United Nations Internet Governance Multistakeholder Advisory Group
Member, Finance, Global Relationships, New gTLD Program & Public Participation Committees

Heather Dryden

Government Advisory Committee Liaison—Non-Voting GAC Chair

Senior Advisor at Industry Canada in the International Telecommunications Policy directorate of the Telecommunications Policy Brand, with lead responsibility for Internet governance & DNS policy matters.

Serves in an ex officio capacity on the **Canadian Internet Registration Authority Board of Directors** and participates in the **American Registry for Internet Numbers—Government Working Group.**

Appointed to **Multistakeholder Advisory Group** of the Internet Governance Forum and participated in the Canadian delegation to the United Nations World Summit on the Information Society.

Bill Graham

Independent Consultant

Worked with **Internet Society** from 2007–2011, responsible for expanding its engagement with organizations such as the United Nations, the Organization for Economic Cooperation and Development, the World Intellectual Property Organization, and the International Telecommunication Union.

Served as Director of International Telecommunications Policy and Coordination in the Canadian government. First joined Canadian government in 1988, and held management positions in program evaluation and strategic planning.

Involved in early promotion of community networking and Internet use in Canada, as well as in international business development in the spectrum, information, and communications technology sector.

Former Director of Government Relations, Teleglobe, Inc.
Member, Audit, Board Governance, IANA and New gTLD Program Committees

Previously worked at the **NATO Information Office** in Moscow & worked on capacity-building programs in Ukraine funded by the Canadian International Development Agency.

Bertrand de La Chapelle

Program Director at International Diplomatic Academy. Diplomat who held many positions in the French government.

Cofounder and president of **Virtools,** provider of the world's leading development environment for 3D interactive content. Served as CEO from 1993–1998.

Founded consulting department of French technology monitoring firm. Active participant in **World Summit on the Information Society** process from 2002–2005 to promote dialogue among civil society, the private sector and governmental representatives. Director of collaborative platform WSIS-online.

Served as France's Thematic Ambassador and Special Envoy for the Information Society.

Member of the G-8 Digital Opportunities Task Force, an early multistakeholder effort in ICT.

Member, Global Relationships, IANA and Structural Improvements Committees

Erika Mann

German member of the European Parliament from 1994–2009, concentrating on trade and World Trade Organization policy, transatlantic relations, digital economy, telecommunications and Internet policy, and research policy.

European chairperson of the Transatlantic Policy Network and proponent of transatlantic market between the EU and US. Member of advisory board of Transatlantic Economic Council.

Lecturer and author of publications on trade, transatlantic relations and the Internet.

Recipient of **European-American Business Council** for **Exceptional Transatlantic Commitment award,** and **Bundesverdienstkreuz am Bande (the German Federal Cross of Merit).**

Head of Facebook Brussels office
Executive Vice President, Computer & Communications Industry Association
Chair, Audit Committee
Member, Global Relationships and New gTLD Program Committees

Ram Mohan

Security and Stability Advisory Committee Liaison—Non-Voting

Executive Vice President & Chief Technology Officer of **Afilias Limited.**

Oversees key strategic, management and technology choices in support of .info and .org, sponsored domains .mobi, .asia, and .aero and country code domains including .in (India) and .me (Montenegro).

Led the strategic growth of the company in registry services, security and new product sectors. At Infonautics Corp., founded award-winning **CompanySleuth** product and line of business. Helped design online references **Electric Library** and **Encyclopedia.com.** Cofounder of the technology behind anti-spam company **TurnTide.** Held leadership, engineering and technology positions with **First Data Corporation, Unisys Corporation** and **KPMG Peat Marwick.**

Liaison to Board Governance Committee.

Thomas Narten

Internet Engineering Task Force Liaison—Non-voting

Engineer, Internet technology and strategy at IBM. 20 years of networking experience.
Active Internet Engineering Task Force contributor for 15 years, coauthoring 10 Request for Comments, including two core IPv6 specifications.

IETF Area Director for the Internet area, focused on strengthening the working relationships with IANA and the Regional Internet Registry community. Helped develop RIR IPv6 address policy.

Participates in public policy discussions in the Asia Pacific Network Information Center, American Registry for Internet Numbers and Réseaux IP Européens regions.
Key participant in development of globally-coordinated IPv6 address policy adopted by all RIRs in 2002.

Former computer science faculty member at SUNY-Albany.

Liaison to IANA, New gTLD Program and Public Participation Committees

Gonzalo Navarro

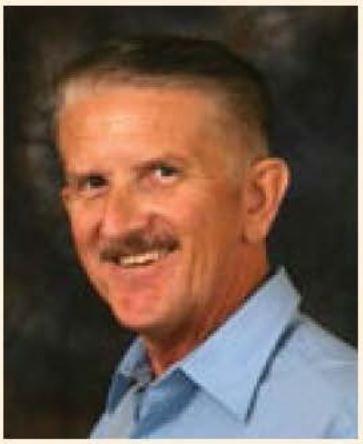
Served as senior adviser on international affairs, **Undersecretary of Telecommunications of Chile,** representing Chile on the Governmental Advisory Committee. Associate at **Morales & Besa.**

Advised the Chilean government on the implementation of public policies derived from international processes, negotiated and drafted telecommunications chapters in several free trade agreements, including those between Chile and the United States and China; permanent representative of Chile at the **International Telecommunication Union,** the **World Summit on the Information Society, the Internet Governance Forum, Comisión Interamericana de Telecomunicaciones** and **Asia-Pacific Economic Cooperation Telecommunications and Information Working Group.**

Chief of Staff, National Institute of Industrial Property of Chile.
Chair, Global Relationships Committee
Member, Audit, New gTLD Program and Public Participation Committees.

Raymond A. Plzak

More than 20 years experience in Internet registry operations, first with the Defense Data Network/ Department of Defense Network Information Center.



Extensive experience in allocation of Internet Number Resources, administration of domain names, management of root server and directory services such as Whois and IRR, and help desk operations.

Past co-chair of the **Internet Engineering Task Force Domain Name System Operation Working Group.**

Coauthor of *Legal and Policy Aspects of Internet Numbers* (Santa Clara Computer & High Technology Law Journal, 2008) on need for a consistent legal and public policy approach to management of Internet number resources.

President Emeritus, American Registry for Internet Numbers
Chair, Structural Improvements Committee
Member, Board Governance, New gTLD Program and Risk Committees.

Rajasekhar Ramaraj

Venture partner/mentor, Sequoia Capital. Founder and former CEO of Sify Limited, the first Indian Internet company to be listed on the NASDAQ national market. Sify was chosen as company of the year in 2000 at Silicon India Annual Technology and Entrepreneurship Conference.

Named **Evangelist of the Year** at the **India Internet World Convention** in 2000.

Voted **IT Person of the Year** in 2000 CNET poll in India; invited by the United Nations Secretary-General to join Working Group on Internet Governance.

President of the **ISP Association of India.** Pioneered Indian computer retail marketing in 1984.

Founder/director, Microland Ltd.
Director, Sterling Cellular
Chair, Compensation Committee
Member, Board Governance, New gTLD Program and Risk Committees

Thomas Roessler

Technical Liaison Group Liaison—Non-voting

Technology and Society Domain Leader, World Wide Web Consortium (W3C). Part of W3C's global management team since 2009, and oversees work in the Semantic Web, eGovernment, Security, Privacy and Web Services activities.

Prior to joining W3C in 2004, he worked at the University of Bonn on numerics of partial differential equations. Lead maintainer of the open source email program while there.

Published and spoke on topics including anonymization technologies, legal questions of digital signatures, and online privacy. Frequent speaker on web security and privacy topics.

Board Chair of the World Wide Web Foundation in Delaware, United States.

Liaison to New gTLD Program, Risk and Structural Improvements Committees

George Sadowsky

Independent Consultant

Computer scientist who has worked as a mathematician and programmer, and headed computing centers at Brookings Institution, Northwestern University and New York University.

At United Nations, supported technical assistance projects and has worked in more than 50 developing countries; consultant to U.S. Treasury, U.S. Agency for International Development, World Wide Web Consortium, the Swiss government, and the World Bank.

Served on boards of AppliedTheory Corporation, Corporation for Educational Research & Educational Networking and New York State Education and Research Network, and the Internet Society where he directed Developing Country Network Training Workshops.

Executive Director, Global Internet Policy Initiative
Member, Compensation, Finance, Global Relationships and New gTLD Program Committees.

Mike Silber

Attorney and Head, Legal and Commercial, Liquid Telecomms.

Former independent legal and regulatory consultant in the information and communication technologies spheres. Selected as a leading South African Internet and e-Commerce lawyer by Who's Who Legal and as one of the leading Technology, Media and Telecommunications lawyers in South Africa by Expert Guides.

Management Committee member and regulatory advisor to the **South African Internet Service Providers' Association.** Helped form and served as a regulatory advisor and adjudicator to the **South African Wireless Application Service Providers' Association.**

Founding member of Internet Society South African chapter. Director of the .za Domain Name Authority.

Chair, Risk Committee
Member, Board Governance, New gTLD Program and Public Participation Committees.

Judith Vazquez

Founder and Chair, **PHCOLO, Inc.,** the Philippines telecommunications cross connection site.

Early investor in ICT in Philippines. Laid the first fiber in 1995 in the nation's Central Business District and constructed its first 45-story skyscraper and intelligent building.

Her company PHCOLO provides colocation and local infrastructure to leading carriers and Internet service providers on wireless, cable, Ethernet and copper platforms.

Owns telecommunications towers and data centre-grade properties leased to data providers such as the financial industry.

Board member for more than 20 years of GMA Network, the Philippines leading media corporation.

Board Member, the Management Association of the Philippines
Member, Audit, New gTLD Program, Risk and Structural Improvements Committees

Suzanne Woolf

Root Server System Advisory Committee Liaison—Non-voting

Manager, Strategic Partnerships at **Internet Systems Consortium,** provider of open source software for the Internet community.

Held a variety of roles with ISC since 2002, including product management, strategic considerations for software and protocol development projects, and participation in technical policy activities with ICANN, American Registry of Internet Numbers & others.

Served as systems administrator, programmer & network engineer for the **University of Southern California Information Sciences Institute, Metromedia Fiber Networks,** and private consulting clients.

Member of the **ICANN Root Server System Advisory Committee** and **ARIN Advisory Council.** Participant in **Internet Engineering Task Force** and **North American Network Operators' Group.**

Liaison to IANA and Risk Committees

Kuo-Wei Wu

CEO of **National Information Infrastructure Enterprise Promotion Association,** a non-profit in Taipei focused on global Internet and security policy research.

Cofounder, **High Performance Computing Asia Conference** series held since 1995 in Taipei.

Established the **Taiwan Academic Network** in 1990. Coordinated Asia ccTLD operators' formation of Asia Pacific Top-Level Domain Association in 1998.

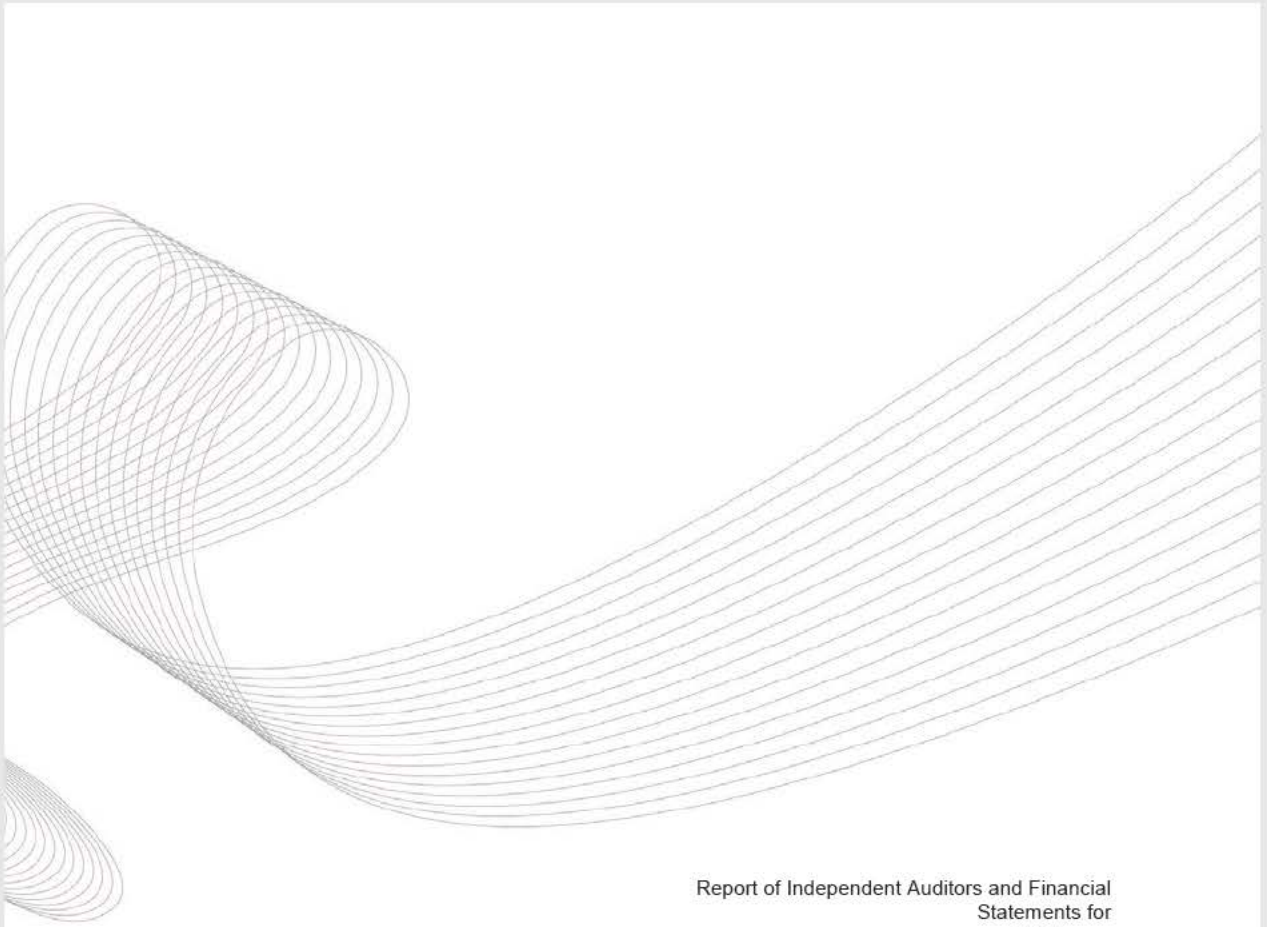
Organized an Internationalized Domain Names joint engineering taskforce in Asia.

Served on **Asia Pacific Network Information Center Executive Council** from 1999 to 2010, and as treasurer since 2003 to 2009.

Currently serves as Taiwan Network Information Center board member since 2000.

Former Vice President Acer, Inc.
Chair, IANA Committee
Member, Global Relationships, New gTLD Program and Public Participation Committees

Audited Financial Statements



Report of Independent Auditors and Financial Statements for

ICANN

Internet Corporation for Assigned Names and Numbers

June 30, 2012 and 2011

MOSS-ADAMS LLP

Certified Public Accountants | Business Consultants

Acumen. Agility. Answers.

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MOSS-ADAMS LLP
Certified Public Accountants | Business Consultants

REPORT OF INDEPENDENT AUDITORS

To the Board of Directors (Board)
Internet Corporation for Assigned Names and Numbers

We have audited the accompanying statements of financial position of Internet Corporation for Assigned Names and Numbers ("ICANN" or the "Organization") as of June 30, 2012 and 2011, and the related statements of activities and cash flows for the years then ended. These financial statements are the responsibility of the management of ICANN. Our responsibility is to express an opinion on these financial statements based on our audits.

We conducted our audits in accordance with auditing standards generally accepted in the United States of America. Those standards require that we plan and perform the audits to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes consideration of internal control over financial reporting as a basis for designing audit procedures that are appropriate in the circumstances, but not for the purpose of expressing an opinion on the effectiveness of the ICANN's internal control over financial reporting. Accordingly, we express no such opinion. An audit also includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements, assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the financial statements referred to above present fairly, in all material respects, the financial position of ICANN as of June 30, 2012 and 2011, and the changes in its net assets and its cash flows for the years then ended, in conformity with accounting principles generally accepted in the United States of America.

Moss Adams LLP

Los Angeles, California
October 4, 2012

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS
STATEMENTS OF FINANCIAL POSITION
JUNE 30, 2012 AND 2011
Amounts are rounded to the nearest thousand in US Dollars

	Notes	2012	2011
ASSETS			
Cash and cash equivalents	2, 3, 4	$ 383,018,000	$ 29,073,000
Accounts receivable, net	2, 4, 5	17,881,000	15,068,000
Investments	2, 4, 6	53,035,000	51,716,000
Prepaid expenses	3	3,288,000	207,000
Other assets	3	3,367,000	105,000
Capital assets, net	2, 7	5,787,000	3,651,000
Total assets		$ 466,376,000	$ 99,820,000
LIABILITIES AND NET ASSETS			
Liabilities			
Accounts payable and accrued liabilities	3	$ 12,851,000	$ 8,195,000
Deferred revenue	2, 3	369,933,000	11,475,000
Total liabilities		382,784,000	19,670,000
Unrestricted net assets	2	83,592,000	80,150,000
Total liabilities and net assets		$ 466,376,000	$ 99,820,000

Please see Note 3 for the 2012 breakout between ICANN operations and the NgTLD Program.

See accompanying notes to financial statements.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS
STATEMENTS OF ACTIVITIES
YEARS ENDED JUNE 30, 2012 AND 2011
Amounts are rounded to the nearest thousand in US Dollars

	2012	2011
UNRESTRICTED SUPPORT AND REVENUE		
Registry	$ 35,202,000	$ 33,202,000
Registrar	33,133,000	31,259,000
R.I.R.	823,000	823,000
ccTLD	1,798,000	1,990,000
IDN ccTLD Fast track request fees	52,000	468,000
Contributions	1,405,000	1,551,000
Total support and revenue	72,413,000	69,293,000
EXPENSES		
Personnel	27,780,000	26,321,000
Travel and meetings	12,553,000	12,258,000
Professional services	19,462,000	12,864,000
Administration	10,582,000	8,541,000
Total expenses	70,377,000	59,984,000
OTHER INCOME		
Interest income	87,000	127,000
Investment gain	1,319,000	6,006,000
Total other income	1,406,000	6,133,000
Change in net assets	3,442,000	15,442,000
UNRESTRICTED NET ASSETS		
Beginning of year	80,150,000	64,708,000
End of year	$ 83,592,000	$ 80,150,000

See accompanying notes to financial statements.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS
STATEMENTS OF CASH FLOWS
YEARS ENDED JUNE 30, 2012 AND 2011
Amounts are rounded to the nearest thousand in US Dollars

	2012	2011
CASH FLOWS FROM OPERATING ACTIVITIES		
Change in net assets	$ 3,442,000	$ 15,442,000
Adjustments to reconcile change in net assets to cash provided by operating activities:		
Depreciation expense	1,868,000	1,490,000
Bad debt expense	173,000	686,000
Investment gains, net	(1,319,000)	(6,006,000)
Changes in operating assets and liabilities		
Accounts receivable	(2,985,000)	969,000
Prepaid expenses	(3,080,000)	120,000
Other assets	(3,263,000)	290,000
Accounts payable and accrued liabilities	4,657,000	2,514,000
Deferred revenue	358,457,000	(1,128,000)
Net cash provided by operating activities	357,950,000	14,377,000
CASH FLOWS FROM INVESTING ACTIVITIES		
Purchases of capital assets	(4,005,000)	(2,479,000)
Sales of investments	48,516,000	-
Purchases of investments	(48,516,000)	(30,000)
Net cash used in investing activities	(4,005,000)	(2,509,000)
NET INCREASE IN CASH AND CASH EQUIVALENTS	353,945,000	11,868,000
CASH AND CASH EQUIVALENTS		
Beginning of year	29,073,000	17,205,000
End of year	$ 383,018,000	$ 29,073,000

See accompanying notes to financial statements.

Note 1 - Organization

The Internet Corporation for Assigned Names and Numbers (ICANN) was established in September 1998 under the laws of the state of California as a non-profit public benefit corporation.

ICANN coordinates a select set of the Internet's technical management functions, such as the assignment of protocol parameters, the management of the domain name system, the allocation of Internet protocol (IP) address space, and the management of the root server system. Categories of Internet domains include Generic Top Level Domains (gTLDs), examples of which are *.com, .net, .org,* and *.edu* domains, Country Code Top Level Domains (ccTLDs), examples of which are *.us, .uk, .de* and *.fr*, and Internationalized Domain Name (IDN) ccTLDs for countries that use non-Latin based languages.

ICANN's primary sources of revenue are generated from domain name registration activities and DNS service providers as follows:

Registry fees - ICANN has contracts with registry operators of 22 generic top-level domains (gTLDs) such as dot-asia, dot-com and dot-post. Registry fees are described in the respective registry agreements. Based on those agreements, registries pay a fixed fee, transaction-based fee, or both.

Registrar fees - ICANN accredits registrars in accordance with the Registrar Accreditation Agreement (RAA). The RAA provides for the following types of fees:

- Application fees are paid one time by prospective registrars at the time of the application.
- Annual accreditation fees are fees that all registrars are required to pay annually to maintain accreditation.
- Per-registrar variable fees are based upon a set amount divided by the number of accredited registrars and is based on a validated concept that ICANN often expends the same quantum of effort in providing services to a registrar regardless of size. However, some registrars may qualify for "forgiveness" of two-thirds of the standard per-registrar variable fee.
- Transaction-based fees from registrants via registrars are assessed on each annual increment of an add, transfer, or renewal domain name registration transaction.
- Add Grace Period (AGP) deletion fees are charged to registrars that delete added names within the grace period in excess of a threshold.

Address registry fees - ICANN coordinates with organizations responsible for the assignment and administration of Internet addresses (RIRs). RIR's contribute annually to ICANN.

Note 1 - Organization (continued)

Application fees - **Registrar** - Application fees are non-refundable and are paid at the time of application by applicants seeking to become an ICANN accredited domain name registrar.

Application fees - New generic Top Level Domain (gTLD) - The application fees are paid during the application window by applicants seeking to become a New gTLD registry operator for a particular registry. Application fees are refundable at a diminishing rate according to the processing phase in which the request for refund occurs.

ICANN recognizes revenue as follows:

- Transaction fees are determined based upon an established rate per registration times the volume and number of contract years of the underlying domain registration. Transaction fees are earned and recognized in the year the billed fee applies (e.g., 1/10th of a registration transaction fee will be recognized in each year of a 10 year domain name registration).
- Fixed fees are billed in accordance with the underlying contract, and are recognized as earned over the contractual period.
- Registrar application fees are non-refundable, and are recognized at the time the application fees are received.
- New gTLD application fees are recognizable ratably as direct application processing costs are incurred. The rate of recognition of the fees is determined by the proportion of the direct costs incurred versus the total costs. The New gTLD application fees are refundable at a diminishing rate according to the processing phase in which the request for refund occurs.
- Accreditation fee amounts and timing are due in accordance with agreements, are not event dependent, and are recognized ratably monthly over the term of the accreditation.

ICANN has three supporting organizations that serve as the policy development bodies for ICANN within three specialized areas, including the system of IP addresses and the domain name system. The three supporting organizations are the Address Supporting Organization (ASO), the Generic Names Supporting Organization (GNSO) and the Country Code Names Supporting Organization (ccNSO). These supporting organizations are the primary source of substantive policy recommendations for matters lying within their respective specialized areas. The supporting organizations are not separately incorporated entities.

ICANN provides accounting support to the Registrar Constituency, a constituency within the ICANN community that serves as the representative for registrars and their customers. The accompanying financial statements do not reflect the financial results of the Registrar Constituency.

Note 2 - Significant Accounting Policies

Basis of presentation - The financial statements of ICANN have been prepared in accordance with generally accepted accounting principles in the United States. ICANN recognizes contributions, including unconditional promises to give, as revenue in the period received. Contributions and net assets are classified based on the existence or absence of donor-imposed restrictions. As such, the net assets of ICANN and the changes therein are classified and reported as follows:

- ***Unrestricted net assets*** **-** Net assets that are not subject to donor-imposed stipulations and that may be expendable for any purpose in performing the objectives of ICANN. ICANN's Board adopted an investment policy in November 2007. This investment policy established a Board designated Reserve Fund that limits use of the Reserve Fund based upon specific Board actions. All investments are designated under the Reserve Fund. The Board has also designated a $2,000,000 fund to be used to support financially needy applicants in the New gTLD Program.

- ***Temporarily restricted assets*** - Net assets subject to donor-imposed stipulations that may or will be met either by actions of ICANN and/or the passage of time. As the restrictions are satisfied, temporarily restricted net assets are reclassified to unrestricted net assets and reported in the accompanying financial statements as net assets released from restrictions.

- ***Permanently restricted net assets*** - Net assets for which the donor has stipulated that the principal be maintained in perpetuity, but permits ICANN to use, or expend, all or part of the income derived from the donated assets for general or specific purposes, subject to statutory regulations.

As of June 30, 2012 and 2011, ICANN had no permanently or temporarily restricted net assets.

Cash and cash equivalents - Cash and cash equivalents include deposits in bank, money market accounts and marketable commercial paper. ICANN considers all cash and financial instruments with original maturities of three months or less to be cash and cash equivalents.

Accounts receivable, net - Accounts receivable net of allowances for doubtful accounts are approximately $17,881,000 and $15,068,000 as of June 30, 2012 and 2011, respectively. On a periodic basis, ICANN adjusts its allowance based on an analysis of historical collectability, current receivables aging, and assessment of specific identifiable customer accounts considered at risk or uncollectible.

ICANN had bad debt expense of approximately $173,000 and $686,000 during the years ended June 30, 2012 and 2011, respectively.

Note 2 - Significant Accounting Policies (continued)

Investments - Investments are reported at their fair value and all related transactions are recorded on the trade date. Interest, dividends and realized and unrealized gains and losses are accounted for within unrestricted net assets, or as changes in temporarily or permanently restricted net assets, if so stipulated by the donor of such assets.

Investment securities, in general, are exposed to various risks, such as interest rate risk, credit risk and overall market volatility risk. Due to the level of risk associated with certain investment securities, it is reasonably possible that changes in the values of investment securities will occur in the near term and that such changes could materially affect the amounts reported in the statement of financial position.

Fair value is defined as the price that would be received to sell an asset or paid to transfer a liability in an orderly transaction between market participants at the measurement date. The Accounting Standards Codification (ASC) establishes a fair value hierarchy that requires an entity to maximize the use of observable inputs and minimize the use of unobservable inputs when measuring fair value.

The standard describes three levels of inputs that may be used to measure fair value:

Level 1 Quoted prices in active markets for identical assets or liabilities.

Level 2 Observable inputs other than Level 1 prices, such as quoted prices for similar assets or liabilities; quoted prices in markets that are not active; or other inputs that are observable or can be corroborated by observable market data for substantially the full term of the assets or liabilities.

Level 3 Unobservable inputs that are supported by little or no market activity and that are significant to the fair value of the assets or liabilities.

The following is a description of the valuation methodologies used for instruments measured at fair value on a recurring basis and recognized in the accompanying statement of financial position, as well as the general classification of such instruments pursuant to the valuation hierarchy. Where quoted market prices are available in an active market, securities are classified within Level 1 of the valuation hierarchy. Level 1 securities include domestic equities, international equities and domestic fixed income. If quoted market prices are not available, then fair values are estimated by using pricing models, quoted prices of securities with similar characteristics or discounted cash flows. Level 2 securities include funds invested in collective trusts, which are valued by the manager using the fair value of the underlying equity security investments and valued dependent on the redemption features, respectively, which approximates net asset value (NAV).

ICANN's policy is to recognize transfers in and transfers out at the end of the reporting period. This policy includes transfers in and transfers out of Level 1 and Level 2. ICANN has no Level 3 investments.

Note 2 - Significant Accounting Policies (continued)

Capital assets - Capital assets consist of capitalized computer equipment, software, furniture and fixtures and leasehold improvements and are stated at cost or, for contributed items, at fair value at date of contribution. Capital assets are depreciated using the straight-line method over their estimated useful lives, which range from three to seven years. Leasehold improvements are amortized using the straight-line method over the shorter of their estimated useful life or the remaining lease term. Acquisitions in excess of $10,000 and one year useful life as well as laptop computers are capitalized.

Deferred revenue - Deferred revenue is recorded when fees are billed but not yet earned. Deferred revenue consists of the following as of June 30:

	2012	2011
Deferred registrar income - transactions	$ 4,684,000	$ 4,371,000
Deferred registrar income - unbilled	2,119,000	2,196,000
Deferred registry income - transactions	4,039,000	3,679,000
Deferred registrar income - accreditation	606,000	1,229,000
Deferred income - gTLD	358,485,000	-
Total deferred revenue	$ 369,933,000	$ 11,475,000

Advertising costs - Direct advertising costs are expensed in the period incurred. Direct advertising costs amounted to approximately $19,000 and $24,000, for the years ended June 30, 2012 and 2011, respectively.

Income taxes - ICANN is exempt from Federal and state income taxes under Section 501(c)(3) of the Internal Revenue Code and Section 23701(d) of the California Revenue and Taxation Code. Accordingly, no provision for income taxes has been made in the accompanying financial statements. However, ICANN is subject to income taxes on any net income that is derived from a trade or business, regularly carried on, and not in furtherance of the purposes for which it was granted exemption. No income tax provision has been recorded as the net income, if any, from any unrelated trade or business, in the opinion of management, is not material to the basic financial statements taken as a whole.

ICANN, under the provisions of ASC 740, *Income Taxes*, had no uncertain tax positions requiring accrual as of June 30, 2012 and 2011. ICANN is no longer subject to income tax examinations by taxing authorities for years before 2009 for its federal filings and for years before 2008 for its state filings.

Note 2 - Significant Accounting Policies (continued)

Functional allocation of expenses - Expenses that can be identified to a specific program or supporting service are charged directly to the related program or supporting service. Expenses that are associated with more than one program or supporting service are allocated based on methods determined by management. ICANN's expenses are classified approximately as follows for the fiscal years ended June 30:

	2012	2011
Program services	$ 47,187,000	$ 42,108,000
Support services: management and general	23,190,000	17,876,000
Total expenses	$ 70,377,000	$ 59,984,000

Use of estimates - The preparation of financial statements in conformity with generally accepted accounting principles in the United States of America requires management to make estimates and assumptions that affect the reported amounts of assets and liabilities at the date of the financial statements and the reported amounts of revenues and expenses during the reporting period. Actual results could differ from those estimates.

Reclassifications - Certain 2011 amounts have been reclassified in the financial statements to conform to the 2012 presentation. These reclassifications have no impact on net assets.

Subsequent events - ASC 855, *Subsequent Events,* establishes general standards of accounting for and disclosure of events that occur after the statement of financial position date but before financial statements are issued. ICANN recognizes in the financial statements the effects of all subsequent events that provide additional evidence about conditions that existed at the date of the statement of financial position, including the estimates inherent in the process of preparing the financial statements. ICANN does not recognize subsequent events that provide evidence about conditions that did not exist at the date of the statement of financial position but arose after the financial position date and before the financial statements are available to be issued. ICANN has evaluated subsequent events through October 4, 2012 which is the date the financial statements were available to be issued.

Note 3 - New generic Top Level Domain Program

Currently the Internet namespace consists of 22 generic Top Level Domains (gTLDs) and over 250 country code Top Level Domains (ccTLDs) operating on various models. Each of the gTLDs has a designated "registry operator" and, in most cases, a Registry Agreement between the operator (or sponsor) and ICANN. The registry operator is responsible for the technical operation of the TLD, including all of the names registered in that TLD. Over 1,000 ICANN accredited registrars interact with registrants (and others) to perform domain name registration and other related services for gTLDs. The New gTLD Program provides a means for prospective registry operators to apply for new gTLDs, and create new options for consumers. The Program opened its first application round in January 2012.

Note 3 - New generic Top Level Domain Program (continued)

The New gTLD Program requires applicants to pay an application fee. Revenue is reported gross, and therefore, revenue and expenses are separately disclosed. ICANN believes that direct costs incurred throughout the evaluation of applications provides the best representation of the pattern of performance of services of the New gTLD Program, and recognizes revenues generated from application fees (limited to the cumulative amount of application fees that have become non-refundable) ratably based upon direct application processing costs (e.g., initial evaluation panel reviews) incurred (percentage of completion of the service) throughout the application process. ICANN establishes estimates for total direct costs related to the new gTLD application process, and recognizes these direct costs as incurred. Indirect costs are expensed as incurred.

In the case that additional non-refundable fees are collected, ICANN recognizes unearned revenue upon receipt of the additional non-refundable fees, and recognizes the unearned revenue as revenue when additional evaluation services are performed (or immediately in the case an application is withdrawn/rejected) as this is consistent with the earnings process.

The New gTLD Program is segregated from the rest of the ICANN operations with respect to separate accounting segments and bank accounts.

All intracompany payables and receivables will be settled in cash on a monthly basis.

JUNE 30, 2012	ICANN	NgTLD	Total
ASSETS			
Cash and cash equivalents	$ 25,554,000	$ 357,464,000	$ 383,018,000
Accounts receivable, net	17,881,000	-	17,881,000
Investments	53,035,000	-	53,035,000
Prepaid expenses	(1,080,000)	4,368,000	3,288,000
Other assets	3,367,000	-	3,367,000
Intra-company clearing	5,937,000	(5,937,000)	-
Capital assets, net	5,787,000	-	5,787,000
	-	-	
Total assets	$ 110,481,000	$ 355,895,000	$ 466,376,000
LIABILITIES AND NET ASSETS			
Liabilities			
Accounts payable and accrued liabilities	$ 9,622,000	$ 3,229,000	$ 12,851,000
Deferred revenue	11,448,000	358,485,000	369,933,000
Total liabilities	21,070,000	361,714,000	382,784,000
Unrestricted net assets	89,411,000	(5,819,000)	83,592,000
Total liabilities and net assets	$ 110,481,000	$ 355,895,000	$ 466,376,000

Note 3 - New generic Top Level Domain Program (continued)

YEAR ENDED JUNE 30, 2012	ICANN	NgTLD	Total
UNRESTRICTED SUPPORT AND REVENUE			
Registry	$ 35,202,000	$ -	$ 35,202,000
Registrar	33,133,000	-	33,133,000
R.I.R.	823,000	-	823,000
ccTLD	1,798,000	-	1,798,000
IDN ccTLD Fast track request fees	52,000	-	52,000
Contributions	1,405,000	-	1,405,000
Total support and revenue	72,413,000	-	72,413,000
EXPENSES			
Personnel	26,009,000	1,771,000	27,780,000
Travel and meetings	12,508,000	45,000	12,553,000
Professional services	15,521,000	3,941,000	19,462,000
Administration	10,520,000	62,000	10,582,000
Total expenses	64,558,000	5,819,000	70,377,000
OTHER INCOME			
Interest income	87,000	-	87,000
Investment gain	1,319,000	-	1,319,000
Total other income	1,406,000	-	1,406,000
Change in net assets	9,261,000	(5,819,000)	3,442,000
UNRESTRICTED NET ASSETS			
Beginning of year	80,150,000	-	80,150,000
End of year	$ 89,411,000	$ (5,819,000)	$ 83,592,000

Note 3 - New generic Top Level Domain Program (continued)

YEAR ENDED JUNE 30, 2012	ICANN	NgTLD	Total
CASH FLOWS FROM OPERATING ACTIVITIES			
Change in net assets	$ 9,262,000	$ (5,820,000)	$ 3,442,000
Adjustments to reconcile change in net assets to cash provided by operating activities:			
Depreciation expense	1,868,000	-	1,868,000
Bad debt expense	173,000	-	173,000
Investment gains, net	(1,319,000)	-	(1,319,000)
Changes in operating assets and liabilities			-
Accounts receivable	(2,985,000)	-	(2,985,000)
Prepaid expenses	1,287,000	(4,367,000)	(3,080,000)
Other assets	(9,200,000)	5,937,000	(3,263,000)
Accounts payable and accrued liabilities	1,427,000	3,230,000	4,657,000
Deferred revenue	(27,000)	358,484,000	358,457,000
Net cash provided by operating activities	486,000	357,464,000	357,950,000
CASH FLOWS FROM INVESTING ACTIVITIES			
Purchases of capital assets	(4,005,000)	-	(4,005,000)
Sales of investments	48,516,000	-	48,516,000
Purchases of investments	(48,516,000)	-	(48,516,000)
Net cash used in investing activities	(4,005,000)	-	(4,005,000)
NET INCREASE (DECREASE) IN CASH AND CASH EQUIVALENTS	(3,519,000)	357,464,000	353,945,000
CASH AND CASH EQUIVALENTS			
Beginning of year	29,073,000	-	29,073,000
End of year	$ 25,554,000	$ 357,464,000	$ 383,018,000

Note 4 - Concentration of Credit Risk

Financial instruments that potentially subject ICANN to concentrations of credit risk consist primarily of cash and cash equivalents, accounts receivable and investments. ICANN places its cash with major financial institutions. Cash held at these financial institutions may, at times, exceed the amount insured by the Federal Deposit Insurance Corporation. Concentration of credit risk with respect to receivables is mitigated by the diversity of registries/registrars comprising ICANN's registry/registrar base. ICANN places its investments with a major investment broker. The investments held are subject to volatility of the market and industries in which they are invested.

Note 4 - Concentration of Credit Risk (continued)

ICANN had two major registries/registrars totaling approximately $37,665,000 or 51% of the total support in fiscal year 2012 and $36,606,000 or 53% of the total support in fiscal year 2011. ICANN had accounts receivable amounting to approximately $4,812,000 and $4,329,000 due from these two major registries/registrars at June 30, 2012 and 2011, respectively.

Note 5 - Accounts Receivable

Accounts receivable is comprised of the following as of June 30:

	2012	2011
gTLD registries and registrars	$ 15,498,000	$ 14,019,000
IP address registries	823,000	-
ccTLD's	1,860,000	1,116,000
IDN Fast track	31,000	772,000
Other	235,000	145,000
	18,447,000	16,052,000
Less: allowance for doubtful accounts	(566,000)	(984,000)
	$ 17,881,000	$ 15,068,000

Note 6 - Investments

Investments consist of the following as of June 30, 2012:

	Level 1	Level 2	Level 3	Total
Collective trusts	$ -	$ 53,035,000	$ -	$ 53,035,000

The ICANN Reserve Fund is invested in various collective trusts, which seek an investment return that approximates as closely as practicable before expenses the performance of various indexes.

Note 6 - Investments (continued)

The following table represents the liquidity and redemption restrictions on the financial instruments above:

	Fair Value at 6/30/12	Redemption Frequency	Redemption Notice Period
Collective trusts	$ 53,035,000	Daily to semi-monthly	3 Days

There were no unfunded commitments related to these investments at June 30, 2012.

Investments consist of the following as of June 30, 2011:

	Level 1	Level 2	Level 3	Total
Equities - domestic	$ 18,436,000	$ -	$ -	$ 18,436,000
Equities - international	5,460,000	-	-	5,460,000
Fixed income - domestic	27,820,000	-	-	27,820,000
	$ 51,716,000	$ -	$ -	$ 51,716,000

Net investment gain is comprised of the following for the years ended June 30:

	2012	2011
Dividend and interest income	$ 4,268,000	$ 2,121,000
Realized and unrealized (losses)/gains	(2,859,000)	4,222,000
Management fees and other	(90,000)	(337,000)
Total net investment gain	$ 1,319,000	$ 6,006,000

Note 7 - Capital Assets

Capital assets consist of the following as of June 30 (useful lives of respective asset class in parentheses):

	2012	2011
Computer equipment (Three years)	$ 6,728,000	$ 5,097,000
Computer software (Five years)	1,805,000	520,000
Furniture and fixtures (Seven years)	300,000	295,000
Leasehold improvements (Varies per lease)	1,468,000	1,394,000
Construction in progress (None)	1,426,000	416,000
	11,727,000	7,722,000
Less: accumulated depreciation	(5,940,000)	(4,071,000)
	$ 5,787,000	$ 3,651,000

Note 8 - Legal Matters

In the ordinary course of business, ICANN is occasionally named as a defendant in lawsuits and may be involved in other alternative dispute resolution proceedings. Management cannot at this time determine the probable outcome or the effect, if any, that these matters may have on the financial position and the ongoing operations of ICANN. Accordingly, the accompanying financial statements do not include a provision for any losses that may result from ICANN's current involvement in legal matters.

Note 9 - Related Party Transactions

A portion of ICANN's incoming (effective September 14, 2012) President and Chief Executive Officer Fadi Chehadé's services were provided to ICANN directly, including time and expenses during the fiscal year ended June 30, 2012. During the year ended June 30, 2012, Fadi Chehadé was paid $39,000 for services rendered during the period of May through June 2012.

Dr. Bruce Tonkin is a voting member of the Board of Directors. Dr. Tonkin is also Chief Strategy Officer of Melbourne IT, an ICANN accredited registrar. Revenue from Melbourne IT amounted to $732,000 and $767,000 for the years ended June 30, 2012 and 2011, respectively, under the fee structure of the standard Registrar Accreditation Agreement. To avoid any conflict of interest between ICANN and Melbourne IT, Dr. Tonkin abstains from voting on all matters he identifies as potential conflicts of interest that come before the Board.

Additionally, during years ended June 30, 2012 and 2011, the following voting Board members identified that they may have or have had conflicts in accordance with ICANN's Conflicts of Interest Policy: Harald Tveit Alvestrand, Sébastien Bachollet, Steve Crocker, Bertrand de La Chapelle, Chris Disspain, Bill Graham, Rita Rodin Johnston, Mike Silber, Judith Vazquez, and Kuo-Wei Wu.

Note 10 - Commitments

ICANN leases its offices and certain other facilities under operating lease agreements. The lease agreements have various termination clauses requiring three to thirty-four months' rent for early termination. A minimum future payments under operating leases for the future years ending June 30 are approximately:

2013	$	2,754,000
2014		2,768,000
2015		2,851,000
2016		2,983,000
2017		3,027,000
Thereafter		11,949,000
Total	$	26,332,000

Rent expense amounted to approximately $2,550,000 and $2,684,000 for the years ended June 30, 2012 and 2011, respectively. ICANN also has pass-through and additional charges from certain sub-lessors that are not included in the minimum expected payments above. The pass-through and additional charges cannot be reasonably estimated for future periods. Pass-through and additional charges amounted to approximately $164,000 and $299,000 for the years ended June 30, 2012 and 2011, respectively.

Note 11 - Defined Contribution Plan

ICANN's 401(k) Plan (the "Plan") is available to all employees in the United States at the first of the month following hire date with ICANN. Subject to legal limitations, ICANN contributes 5% of employee's salary to the Plan regardless of employee contributions. ICANN also matches employee contributions up to 10% of the employee's annual salary, subject to legal limitations. Employer contributions recognized for the years ended June 30, 2012 and 2011 amounted to approximately $2,165,000 and $1,967,000, respectively. The June 30, 2012 and 2011 payroll contributions were $146,000 and $117,000, respectively.

An internal audit of the 401(k) plan performed by ICANN revealed that between 2005 and 2008, some untimely payments to the Plan consisting of employee deferrals were made after the date required under the Department of Labor's regulations. To correct this error and to compensate for all lost interest, ICANN made a corrective payment to the Plan and reported the correction to the Department of Labor through the Department's Voluntary Fiduciary Correction Program. Contributions were made to affected participants of the Plan to compensate for the lost earnings resulting from the late payments. On January 31, 2011, the Department of Labor issued a no action letter in recognition of ICANN's voluntary compliance.

The above noted internal audit also revealed errors related to administration of the Plan. ICANN filed an application with the Internal Revenue Service ("IRS") for making the necessary corrections to the Plan under the IRS's Voluntary Correction Program. On July 18, 2011, the IRS issued a compliance letter constituting enforcement resolution and accepting ICANN's application for making necessary corrections to the Plan. The corrections were completed December 15, 2011.

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Annex 67

New Generic Top-Level Domains

NEW GTLD AUCTION PROCEEDS

Auctions are the mechanism of last resort to resolve string contention within the New gTLD Program. ICANN expects that most string contention will be resolved through other means before reaching an Auction conducted by ICANN's authorized Auction service provider, Power Auctions LLC. However, there is a possibility that significant funding will accrue as a result of several Auctions. Auction proceeds will be reserved and earmarked until the Board determines a plan for the appropriate use of the funds through consultation with the community. Auction proceeds are net of any Auction costs. Auction costs may include initial set-up costs, auction management fees, and escrow fees.

Information about the Auction process or Auction Results can be found on the Auctions page (/en/applicants/auctions) or Auction Results page (https://gtldresult.icann.org/application-result/applicationstatus/auctionresults), respectively.

Below is a breakdown of Auction proceeds as of 01 May 2015.

4 June 2014 | 9 July 2014 | 6 August 2014 | 17 September 2014 | 22 October 2014 | 19 November 2014 | 17 December 2014 | 21 January 2015 | 25 February 2015 | 25 March 2015 | 29 April 2015

Description	Proceeds	Costs	Net Proceeds
Auction Development Costs			
Direct Contention		$ 230,000	
Indirect Contention		$ 120,000	
Wilmington Trust Annual Fee		$ 1,750	
Subtotal: Auction Development Costs	$ -	$ 351,750	$ (351,750)
4 June 2014 Auction			
Completed Auctions	$ 600,000	$ 24,000	
Escrow Fees		$ 500	
Subtotal: 4 June 2014 Auction	$ 600,000	$ 24,500	$ 575,500
9 July 2014 Auction			
Scheduled and Cancelled		$ 10,000	
Escrow Fees		$ 500	
Subtotal: 9 July 2014 Auction	$ -	$ 10,500	$ (10,500)
6 August 2014 Auction			
Scheduled and Cancelled		$ 20,000	
Escrow Fees		$ 500	
Subtotal: 6 August 2014 Auction	$ -	$ 20,500	$ (20,500)
17 September 2014 Auction			

Completed Auctions	$ 14,349,776	$ 573,991	
Scheduled and Cancelled		$ 60,000	
Escrow Fees		$ 3,750	
Subtotal: 17 September 2014 Auction	$ 14,349,776	$ 637,741	$ 13,712,035
22 October 2014 Auction			
Completed Auctions	$ 12,889,463	$ 515,579	
Scheduled and Cancelled		$100,000	
Escrow Fees		$5,750	
Subtotal: 22 October 2014 Auction	$ 12,889,463	$ 621,329	$ 12,268,134
19 November 2014 Auction			
Completed Auctions	$ 700,000	$ 28,000	
Scheduled and Cancelled		$150,000	
Escrow Fees		$4,250	
Subtotal: 19 November 2014 Auction	$ 700,000	$ 182,250	$ 517,750
17 December 2014 Auction			
Completed Auctions	$ 6,447,888	$ 257,916	
Scheduled and Cancelled		$ 90,000	
Escrow Fees		$ 3,500	
Subtotal: 17 December 2014 Auction	$6,447,888	$351,416	$6,096,472
21 January 2015 Auction			
Scheduled and Cancelled		$ 30,000	
Escrow Fees		$ 750	
Subtotal: 21 January 2015 Auction	$ -	$ 30,750	$ (30,750)
25 February 2015 Auction			
Completed Auctions	$ 25,001,000	$ 700,020	
Scheduled and Cancelled		$ 40,000	
Escrow Fees		$ 1,750	
Subtotal: 25 February 2015 Auction	$ 25,001,000	$ 741,770	$24,259,230
25 March 2015 Auction			
Completed Auctions	$ 1,901,000	$ 76,040	
Scheduled and Cancelled		$ 20,000	
Escrow Fees		$ 750	
Subtotal: 25 March 2015 Auction	$ 1,901,000	$ 96,790	$1,804,210

29 April 2015 Auction			
Scheduled and Cancelled		$ 10,000	
Subtotal: 29 April 2015 Auction	$ -	$ 10,000	$ (10,000)
Current Total	$ 61,889,127	$ 3,079,295	$ 58,809,832

Site Map

Annex 68

Reconsideration Request Form

Pursuant to Article IV, Section 2 of the Bylaws for the Internet Corporation for Assigned Names and Numbers, Medistry LLC, the applicant for .MED, hereby requests reconsideration of various actions and inactions of ICANN staff related to the Expert Determination in *Alain Pellet v. Medistry LLC*, ICC Case No. EXP/403/ICANN/20 (community objection to .MED) (~~"~~*Medistry* Determination").

The Expert in the *Medistry* Determination sustained the objection to Medistry's application despite the fact that the filing of the objection contradicted ICANN policies and procedures, and the objection met none of the required criteria relevant to the merits. Accordingly, the Expert responsible for the *Medistry* Determination ~~"~~failed to follow the established policies or processes in reaching the expert determination," and, therefore, ~~"~~ICANN staff failed to follow its policies or processes in accepting that determination."[1]

In particular and at the outset, the Expert failed to enforce the policy requiring at least one comment opposing the application before an objection by the Independent Objector may be lodged or sustained. Because there is not, and never was, such a public comment against Medistry's application, the Expert should have dismissed the objection without ever considering the merits. This clear contradiction of ICANN policy is, by itself, enough to make the *Medistry* Determination invalid, and requires the BGC to grant this Request for Reconsideration.

Additionally, however, the Expert also failed to follow the established policies requiring the objector to bear the burden of proof, and further failed to follow the

[1] *See,* Recommendation of the Board Governance Committee, Reconsideration Request 13-16, p. 6, 8 Jan. 2014, *available at* http://www.icann.org/en/groups/board/governance/reconsideration/determination-sport-08jan14-en.pdf (citing Recommendation of the Board Governance Committee, Reconsideration Request 13-5, p. 4, 1 Aug. 2013, *available at* http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.pdf).

established policies requiring a clearly delineated community, targeted by .MED, that substantially opposed and would be harmed by its delegation. Instead, the Expert sustained the objection despite the complete lack of proof on any of these four standards.

Sustaining the objection in contradiction to the policies established for such objections also contradicted fundamental ICANN policies requiring fairness, non-discriminatory treatment, neutral application of established policies, and openness, transparency and predictability.

1. Requester Information

Name: Medistry LLC

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional):

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

___ Board action/inaction

_X_ Staff action/inaction

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

Medistry LLC (Medistry) seeks reconsideration of the following actions or inactions of ICANN staff:

1. The action of the Expert in failing to follow ICANN policy requiring that there be a public comment in opposition to an application before an objection by the Independent Objector can be lodged or sustained;[2]
2. The inaction of the Expert in failing to follow ICANN processes by requesting additional evidence or holding a hearing regarding a material fact and thereby

[2] Expert Determination in *Alain Pellet v. Medistry LLC*, ICC Case No. EXP/403/ICANN/20 (community objection to .MED, application ID 1-907-38758), 30 Dec. 2013, ¶¶ 73-74, *available at* http://newgtlds.icann.org/sites/default/files/drsp/10jan14/determination-1-1-907-38758-en.pdf [hereinafter *Medistry* Determination] [Attachment 1]; gTLD Applicant Guidebook, v. 2012-06-04, Module 3.2.5, *available at* http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf [hereinafter Guidebook].

wrongly allowing the Objection against Medistry's application to proceed to a determination on the merits;[3]

3. The actions of the Expert in failing to follow ICANN policies regarding the standards for evaluating an objection on the merits;[4]

4. The action of ICANN staff in, apparently, accepting the *Medistry* Determination despite its violation of ICANN policies, including the policy requiring a pre-existing public comment in opposition to the application before an objection by the Independent Objector can be lodged or sustained;

5. The action of the Independent Objector in failing to follow ICANN policy by filing a community objection without the requisite public comment in opposition, and the inaction of ICANN staff in allowing the invalid objection to proceed;[5]

6. The inaction of the ICC in failing to ensure compliance with ICANN policies and processes by the Expert appointed to decide the *Medistry* Determination; and

7. The inaction of ICANN staff in failing to ensure that the New gTLD Dispute Resolution Process (DRSP) complied with ICANN policies.

Each of these actions and inactions is described in more detail below, in particular in response to questions 8 and 10.

4. Date of action/inaction:

The Expert Determination in *Medistry* is dated 30 December 2013. The Determination was posted to ICANN's New gTLD microsite on 10 January 2014; this posting appears to constitute ICANN's acceptance of the Determination.

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

The ICC notified Medistry of the Expert Determination on 2 January 2014. The decision was posted to ICANN's New gTLD microsite on 10 January 2014.

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

[3] *Medistry* Determination, ¶ 6 [Attachment 1]; Guidebook, Module 3.4.6; New gTLD Dispute Resolution Procedure, Arts. 19-20, *available at* http://newgtlds.icann.org/en/applicants/agb/dispute-resolution-procedure-04jun12-en.pdf [hereinafter Procedure].

[4] *Medistry* Determination [Attachment 1]; Guidebook, Module 3.5.4.

[5] The IO, like the ICC and the other Dispute Resolution Service Providers (DRSPs) for the new gTLD program, is a third party authorized by ICANN to carry out certain actions in compliance with ICANN policy. Accordingly, ICANN's determination that the reconsideration process can properly be invoked for challenges to the actions of the DRSP applies with equal force to challenges to actions of the IO.

The actions and inactions materially affect Medistry because they prevent Medistry from operating the applied-for .MED gTLD.

Medistry has already invested substantial time, effort, and money in applying for the .MED gTLD, including the effort and expense of developing the concept and applying for the gTLD, the $185,000 application fee, the effort and expense of maintaining its application, and the fees associated with responding to objections, including the objection at issue here. These investments will be rendered futile if Medistry's application is improperly rejected.

Moreover, Medistry applied for the new gTLD bound by the Cleveland Clinic's charitable commitment and mission that mandates serving the public to provide community benefit—such benefit encompasses not only regional public health, but expands across the full spectrum of global public health.[6] Improperly rejecting Medistry's application will deprive Medistry of that opportunity.

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

As operated by Medistry, .MED would benefit the global Internet community by establishing a trusted space for reliable health information, and would also benefit medical and health professionals by providing research and education to improve patient treatment. Thus, depriving Medistry of the opportunity to operate .MED also adversely affects the global Internet community, and in particular, medical professionals.

Additionally, ICANN's failure to follow its policies creates unfairness, inconsistency and unpredictability, and thus calls into question the legitimacy of the new

[6] Application Submitted to ICANN by: Medistry LLC for .MED, Application No. 1-907-38758, *public version available at* https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/216?t:ac=216 [hereinafter .MED Application] [Attachment 2].

gTLD process. This adversely affects all applicants for new gTLDs.

8. Detail of Board or Staff Action – Required Information

I. MEDISTRY'S APPLICATION FOR .MED

Between 12 January and 30 May 2012, ICANN accepted applications for new generic Top-Level Domains (gTLDs or TLDs). The Cleveland Clinic, a world-class, not-for-profit, multispecialty hospital and academic center, partnered with a management team with experience operating a TLD, and created Medistry LLC to apply for .MED. .MED is intended to be a trusted Internet space that provides reliable health-related information as an extension of the Clinic's commitment to education and communication.

Medistry's .MED application explained these goals and how they would be accomplished.[7] During ICANN's public comment period, only one comment was submitted that related to the substance of Medistry's application. That comment, submitted by the National Association of Boards of Pharmacy (NABP), did not oppose Medistry's application, but merely expressed the opinion that certain safeguards ought to be created in any health-related gTLDs.[8]

Additionally, ICANN's Government Advisory Committee (GAC) formally advised ICANN that it believed statements made in all new gTLD applications should be ~~–be~~ transformed into binding contractual commitments," and further identified specific

[7] .MED Application [Attachment 2].

[8] Public Comment 8u7jazet submitted on behalf of the National Association of Boards of Pharmacy, 9 Aug. 2012, *available at* https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/5006 [hereinafter "NABP Comment"] [Attachment 3]. The only other comment that referenced Medistry was unrelated to the substance of the application; instead, it commented on a previous business dispute involving one of the company's owners. *See* Public Comment kswu7m9h submitted on behalf of the .JOBS Charter Compliance Coalition, 25 Sept. 2012, *available at* https://gtldcomment.icann.org/comments-feedback/applicationcomment/commentdetails/9238 [Attachment 4]. Neither the IO nor the Expert rely on (or even mention) this comment, nor could this comment be considered opposition to Medistry's .MED application. Moreover, the dispute was resolved before the IO's objection was decided.

proposed gTLDs, including .MED, that should be subjected to additional safeguards.[9] In response, ICANN established a new policy allowing applicants to submit "Public Interest Commitments" (PICs) that would be incorporated in registry agreements to provide additional assurance that application commitments would be binding. Medistry complied, submitting PICs formalizing the commitments in its .MED application. ICANN also established a set of PICs that would be incorporated in the registry agreements for the specific strings identified by the GAC, including .MED.[10] These PICs addressed areas of concern raised in the NABP comments.[11]

II. THE INDEPENDENT OBJECTOR'S COMMUNITY OBJECTION

Seemingly without considering the Cleveland Clinic's plans for .MED, or the global reputation of the Clinic, or the requirement for public opposition to Medistry's application, the Independent Objector (IO) filed an objection arguing that delegating .MED to Medistry would be detrimental to the "medical community."[12] The objection was filed on 12 March 2013.

On 22 May 2013, Medistry filed a response.[13] Among other things, this response demonstrated that the NABP did not, in fact, oppose a .MED gTLD operated by

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[9] GAC Communiqué – Toronto, Canada, 17 October 2012, *available at* https://gacweb.icann.org/download/attachments/27132070/FINAL_Toronto_Communique_20121017.pdf?version=1&modificationDate=1354149148000&api=v2; GAC Communiqué – Beijing, People's Republic of China, 11 April 2013, *available at* https://gacweb.icann.org/download/attachments/27131917/Beijing%20Communique%20april2013_Final.pdf?version=1&modificationDate=1385487299278&api=v2 [hereinafter "Beijing Communiqué"].

[10] *See* Letter from Stephen D. Crocker (Chair, ICANN Board of Directors) to Heather Dryden (Chair, Governmental Advisory Committee), 29 Oct. 2013, *available at* http://www.icann.org/en/news/correspondence/crocker-to-dryden-3-29oct13-en.pdf.

[11] *See* Specification 11: Public Interest Commitments, submitted for .MED by Medistry LLC, *available at* https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails:downloadpicposting/216?t:ac=216 [Attachment 5]; *see also* Applicant's Response to Objection in ICC Case No. EXP/403/ICANN/20, 22 May 2013, p. 10 [hereinafter Response] [Attachment 6].

[12] Community Objection filed by the Independent Objector against .Med (Application ID 1-907-38758), 12 March 2013 [hereinafter Objection] [Attachment 7].

[13] Response [Attachment 6]

Medistry. Additionally, Medistry's response demonstrated that the IO had not met the burden of proof required by ICANN's New gTLD Applicant Guidebook on any of the four factors required to sustain an objection.

On 21 June 2013, the sole member of the Expert Panel was appointed to decide the Objection.[14] The Panel was fully constituted on 31 July 2013.[15]

The IO subsequently requested permission to file an additional written statement. Following additional communications, both the IO and Medistry filed additional statements on 12 and 23 August 2013, respectively.[16]

III. THE EXPERT DETERMINATION

Following the submissions, the Expert determined that no hearing was necessary.[17]

The Expert Determination is dated 30 December 2013 and was transmitted to the parties on 2 January 2014. The Expert summarily concluded that the IO had standing by virtue of his role. The Expert also concluded that the objection met all four standards established by the Guidebook for a community objection.[18]

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[14] *Medistry* Determination, ¶ 5 [Attachment 1].
[15] *Id.*
[16] *See* Additional Statement of the Independent Objector in ICC Case No. EXP/403/ICANN/20, 12 Aug. 2013 [Attachment 8]; Additional Statement of Medistry in ICC Case No. EXP/403/ICANN/20, 23 Aug. 2013 [Attachment 9]
[17] *Medistry* Determination, ¶ 5 [Attachment 1].
[18] *Medistry* Determination [Attachment 1]; Guidebook, Module 3.5.4. The Expert failed to follow ICANN policies in reaching the determination on all four standards. However, for the purposes of this Request for Reconsideration, Medistry focuses on the *Medistry* Determination's discussion of the third and fourth standards. Medistry in no way concedes any arguments related to the Expert's failure to apply ICANN policies regarding the existence of a sufficiently delineated community targeted by the .MED string. In particular, Medistry notes that the Expert himself expressed doubts as to whether it would be possible to determine whether certain entities were included in the community, *see Medistry* Determination, ¶ 51, and that the Expert deciding the Independent Objector's community objection against .HEALTHCARE, which proposed the same defining factors for the community, determined that there was no sufficiently delineated community. *Alain Pellet v. Silver Glen, LLC*, ICC Case No. EXP/405/ICANN/22 (community objection to .HEALTHCARE, application ID 1-1492-32589), 9 January 2014, ¶¶ 60-75, *available at* http://www.iccwbo.org/Data/Documents/Buisness-Services/Dispute-Resolution-Services/Expertise/ICANN-New-gTLD-Dispute-Resolution/EXP_405-ICANN_22_Expert-determination/.

Accordingly, the Expert determined that the objection prevailed and that Medistry's .MED application should be rejected.

9. What are you asking ICANN to do now?

Medistry asks that ICANN overturn or refuse to accept the *Medistry* Determination;[19] conclude that the IO's community objection against Medistry's .MED application did not and cannot meet the required criteria and therefore must be rejected; and allow Medistry's application for .MED to proceed.

Alternatively Medistry asks that ICANN stay any action on the *Medistry* Determination, and:

> Refer the Independent Objector's community objection against Medistry's .MED application back to the Standing Committee of the Centre for appointment of a new Expert Panel for *de novo* review and determination;[20] or
>
> Refer the Independent Objector's community objection against Medistry's .MED application back to an accountability mechanism established by ICANN to deal with incorrect, inconsistent, or otherwise improper determinations by the DRSP bodies; or
>
> Refer the Independent Objector's community objection against Medistry's .MED application to the ICANN Board's New gTLD Program Committee for further evaluation consistent with, *inter alia*, the evidence; ICANN policies, including the Applicant Guidebook; Medistry's Public Interest Commitments; and the ICANN Board's action in response to the GAC's Beijing Communiqué.

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

Medistry has invested substantial time, effort, and resources in its application for .MED because it wants to create an on-line space that can serve as a valuable source of health information and education. The *Medistry* Determination, if allowed to stand,

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[19] Again, Medistry understands that ICANN's posting of the *Medistry* Determination to the New gTLD Microsite constitutes ICANN's acceptance of that determination in accord with the Guidebook's statement that such determinations are "advice that ICANN will accept." Guidebook, Module 3.4.6.

[20] The New gTLD Dispute Resolution Procedures prohibit a rehearing of the objection by the same panelist. *See* Procedures, Art. 13(e).

would unjustly deprive Medistry of the opportunity to create .MED and render Medistry's investment futile, contrary to numerous ICANN policies.

Reconsideration is necessary to prevent these harms and to avoid further violations of ICANN policies. ICANN has determined that:

> the reconsideration process can properly be invoked for challenges to expert determinations rendered by panels formed by third party dispute resolution service providers, such as the ICC, where it can be stated that the Panel failed to follow the established policies or processes in reaching the expert determination, or that staff failed to follow its policies or processes in accepting that determination.[21]

In this instance, the Expert repeatedly failed to follow policies as established in the Guidebook and in ICANN's Bylaws and Articles of Incorporation.

Most importantly, as explained in Section I below, the Expert ignored ICANN policy prohibiting the IO from filing an objection unless there was at least one public comment opposing the relevant application. As there was no such comment opposing Medistry's application, the IO's community objection never should have been filed, let alone sustained, and this Request should be granted on that basis alone. Additionally, as explained in Section II, the Expert did not impose the correct burden of proof on the IO. Indeed, the Expert did not require the IO to provide <u>any</u> proof on the four relevant standards, but instead sustained the objection on nothing more than the IO's unsubstantiated assertions and speculations. Moreover, in deciding the merits, the Expert failed to apply the four standards established by ICANN, but instead interposed his own, entirely made up, standards. As the difference between the standards established by

[21] *See, e.g.*, Recommendation of the Board Governance Committee, Reconsideration Request 13-16, p. 6, 8 Jan. 2014, *available at* http://www.icann.org/en/groups/board/governance/reconsideration/determination-sport-08jan14-en.pdf (citing Recommendation of the Board Governance Committee, Reconsideration Request 13-5, p. 4, 1 Aug. 2013, *available at* http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.pdf).

ICANN and the standards applied by the Expert is most obvious with regard to the Expert's determinations that there was substantial community opposition and that there was a likelihood of material detriment to a significant portion of the community, the discussion in Sections III and IV focus on those two violations. Finally, Section V demonstrates that failure to follow the specific policies just described results in further contradiction of ICANN policies regarding fairness, nondiscrimination and transparency.

I. THE EXPERT FAILED TO APPLY ICANN POLICY REQUIRING A PUBLIC COMMENT OPPOSING AN APPLICATION

The IO failed to follow ICANN policy by objecting to Medistry's application despite the fact that there was no comment opposing it, and the Expert perpetuated that failure by allowing the IO's invalid objection to proceed to a determination on the merits.

The relevant Guidebook policy requires that:

> In light of the public interest goal [behind the establishment of the IO] the IO shall not object to an application unless at least one comment in opposition to the application is made in the public sphere.[22]

The Expert ignored this policy altogether and instead determined that the IO's objection could proceed simply because of the IO's unique role.[23]

With no comments opposing Medistry's application, the IO never should have filed the objection, and the Expert should have rejected it without any consideration of the merits. As this policy was not followed, the *Medistry* Determination should be considered void, and the BGC should therefore overturn or refuse to accept the Expert Determination, independent of any other consideration.

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[22] Guidebook, Module 3.2.5. Regardless of whether this policy is considered to be a requirement for standing, a requirement for admissibility, a condition precedent, or something else, the policy is clear and requires that there be a public comment opposing an application before the IO can file a valid objection. Here, none exists, and therefore the objection should never had been filed and should have been rejected.

[23] *Medistry* Determination, ¶¶ 6, 16 [Attachment 1].

Despite ignoring the fundamental requirement of an opposition comment, in reviewing the merits of the objection, the Expert concluded that a comment from the NABP (merely suggesting safeguards for health-related gTLDS) "expressed opposition against" and showed "resistance to" Medistry's .MED application.[24]

However, as shown by the plain language of the NABP's comment, and as further evidenced by the NABP's recent letter, this conclusion is plainly incorrect. Instead of opposing Medistry's .MED application, the NABP merely advised that "all medical themed gTLDs . . . should have certain safeguard mechanisms . . . in order to ensure patient safety and legitimate use of domain names."[25] NABP's letter unequivocally states:

> In submitting th[e] comment, NABP did not oppose Medistry's application to be the Registry Operator for the .MED TLD, nor take any position as to whether Medistry's .MED application contained appropriate safeguards.[26]

This letter is an explicit statement that the NABP's previous suggestion of safeguards for health-related gTLDs does not constitute, and never constituted, opposition to Medistry's .MED application. This lack of opposition was obvious in the plain language of the NABP's original comment, but, given the Expert's mistake of fact, the NABP has now reiterated its position. Because the NABP's comment did not express opposition to Medistry's .MED application, it cannot have satisfied the condition precedent for the IO's objection, as required by the Guidebook.

Remarkably, the Expert also concluded that the opposition of the American Hospital Association (AHA) to other health-related gTLDs could be considered relevant

[24] *Medistry* Determination, ¶ 74 [Attachment 1].
[25] Letter from Carmen A Catizone (Executive Director/Secretary, NABP) to Joe Turk (Sr. Director, Information Technology, Cleveland Clinic), 10 Jan. 2014 [hereinafter "NABP Letter"] [Attachment 10]; *see also* NABP Comment [Attachment 3].
[26] NABP Letter (emphasis added) [Attachment 10].

to determining opposition the Medistry's .MED, despite the fact that the AHA has provided an explicit statement that it does not, and never did, oppose Medistry's application.[27]

The conclusion that neither the NABP nor the AHA opposed Medistry's application was clear from the information available to the Expert, including Medistry's statements submitted to the Expert explaining why these comments did not represent opposition; but to the extent that the Expert believed it was not clear, the proper procedure was to seek additional evidence or call a hearing.[28] Yet the Expert did neither; accordingly, his failure to correctly apply the required policy cannot be excused, especially considering that it could have been avoided through following the proper processes at his disposal.

This failure to apply the required policy is not only clearly contradictory, unfair and discriminatory, but because it prevents applicants or others from determining in advance what policies will apply, is also contrary to ICANN policies requiring fairness, non-discriminatory treatment, and neutral application of documented policies, including, *inter alia*:

- Module 3.2.5 of the Guidebook, which requires the Independent Objector to act ~~"s~~olely in the best interests of the public who use the global Internet;"
- Section 2.4.4 of the New gTLD Procedures, which require that the dispute resolution process must operate ~~"in~~ the interests of fairness and equivalent treatment for all;"
- Bylaws, Art. 1, § 2(8), which requires ICANN to ~~"m~~ak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness;
- Bylaws, Art. 2, § 3, requiring ICANN to act in a non-discriminatory manner; and
- Articles of Incorporation, para. 4, requiring ICANN to ~~"o~~perate for the benefit of the Internet community as a whole, carrying out its activities in conformity with

[27] Letter from Melinda Reid Hatton (Senior Vice President & General Counsel, AHA) to Joe Turk (Sr. Director, Information Technology, Cleveland Clinic), 14 Jan. 2014 [hereinafter ~~"~~AHA Letter"] [Attachment 11].
[28] Procedures, Arts. 18-19.

relevant principles of international law and applicable international conventions and local law."

The Expert's failure to follow ICANN policy requiring a public comment opposing an application before an objection by the IO can be lodged or sustained is, in and of itself, sufficient reason to grant this Request. As there was no comment opposing Medistry's application for .MED, the IO's objection was invalid from the outset, and the *Medistry* Determination sustaining that Objection is likewise invalid and should never have been accepted by ICANN. For that reason alone, ICANN must grant the remedy requested herein.

II. THE EXPERT FAILED TO APPLY ICANN'S BURDEN OF PROOF POLICIES

The Expert Determination is also flawed throughout because it fails to impose the proper burden of proof on the IO. The Guidebook policy, reiterated several times, is that:

- "[t]he objector bears the burden of proof in each case;"[29]
- "the objector must prove" that each of the required tests for an objection have been met;[30] and
- "[t]he Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards."[31]

But the Expert failed to impose any requirement that the objector prove the elements of the objection, or even require the objector to provide any evidence. Instead, the Expert relied on nothing more than unsupported and counterfactual assertions, concluding that the IO's allegations were "proof." For example, although Medistry stated that neither the NABP nor the AHA opposed Medistry's application, the Expert clearly did not require the IO to prove such opposition—nor could the IO have proved it, as the

[29] Guidebook, Module 3.5.
[30] *Id.*
[31] Procedures, Art. 20(e).

recent letters clearly demonstrate.[32] Additionally, the Expert determined that, in the absence of conclusive proof that the AHA did not object to Medistry's application, the AHA's objection to other .MED applications could still be evidence of community opposition to Medistry's application. This reasoning reversed the burden of proof, imposing it on Medistry instead of the IO. Moreover, as the comments cited by the Expert were submitted before Medistry agreed to PICs, ICANN policies required the IO to prove that the application, as amended through the PIC processes established by ICANN, was subject to substantial community opposition; instead, the Expert completely disregarded the possibility that the PICs resolved the previous issues.[33]

Another example of the Expert's failure to require proof from the IO is the Expert's conclusion that raising "doubts" as to whether Medistry's .MED application would be operated in the interest of the alleged medical community sufficed to prove the likelihood of harm.[34] Not only does this reverse the burden of proof, but the Expert's "doubts" are based on no evidence outside of the IO's assertions and speculation. The Objector's burden of proof cannot be met if the Objector provides zero evidence.[35]

These examples are indicative of the Expert's treatment of the burden of proof throughout his consideration of the case; on every element where proof was required, the Expert ruled for the IO despite the complete lack of proof. Even if the Expert was unwilling to reject the objection because the IO failed to provide the required proof, the Expert could have sought further information on his own initiative, by, for example,

[32] NABP Letter [Attachment 10], AHA Letter [Attachment 11].
[33] *Medistry* Determination, ¶ 85.
[34] *Medistry* Determination, ¶ 101 [Attachment 1].
[35] For further evidence of the importance of evidence, see New gTLDs Proposed Final Applicant Guidebook: Public Comment Summary, 21 Feb. 2011, *available at* http://archive.icann.org/en/topics/new-gtlds/summary-analysis-proposed-final-guidebook-21feb11-en.pdf.

contacting the NABP or the AHA, or asking Medistry for additional information, or holding a hearing.[36] But the Expert did nothing. As a result, the Expert Determination completely failed to apply the Guidebook policy requiring objectors to prove each element of the objection.

Other applicants for new gTLDs prevailed against objections because the evaluating Expert applied the correct standard of proof. For example, one panel rejected an objection for failure to prove detriment where the allegations of harm were ―generalized," not ―concrete," and ―speculative and basically unsubstantiated."[37] Yet these are precisely the types of allegations sustained by the Expert in the *Medistry* Determination. For an Expert to apply an entirely different standard than the one required by the Guidebook, and for various expert panels to apply differing standards, is not only unfair and discriminatory, but because it prevents applicants or others from determining in advance what standards will apply, is also contrary to ICANN policies requiring transparency, accountability, and neutral application of documented policies.

Thus, in addition to violating the Guidebook policies addressing the burden of proof, the Expert failed to comply with ICANN policies requiring fairness, non-discriminatory treatment, and neutral application of policies, including, *inter alia*:

- Section 2.4.4 of the New gTLD Procedures, which require that the dispute resolution process must operate ―in the interests of fairness and equivalent treatment for all;"
- Bylaws, Art. 1, § 2(8), requiring ICANN to ―mak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness;
- Bylaws, Art. 2, § 3, requiring ICANN to act in a non-discriminatory manner; and
- Articles of Incorporation, para. 4, requiring ICANN to ―operate for the benefit of

[36] Procedure, Arts. 18-19.
[37] *See, e.g.*, Expert Determination in *Fairsearch.org v. Charleston Road Registry Inc.*, ICC Case No. EXP/493/ICANN/110 (community objection to .FLY, application ID 1-1141-48206), 3 Sept. 2013, ¶ 54, *available at* http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-1141-48206-en.pdf.

the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law."

III. THE EXPERT FAILED TO APPLY ICANN POLICIES REQUIRING SUBSTANTIAL COMMUNITY OPPOSITION

Guidebook policy unequivocally states that an objector must prove there is:

> substantial opposition to the gTLD application from a significant portion of the community.[38]

Clearly, as the NABP is not and never was opposed to Medistry's .MED application, as confirmed by the recent letter, there is not a scintilla of evidence of any community opposition, let alone "substantial" opposition from "a significant portion of the community."

Both the IO and the Expert rely on comments submitted regarding other health-related applications and various GAC advice to provide "context" demonstrating additional opposition.[39] But, as already noted, the AHA does not oppose Medistry's application, notwithstanding its opposition to other applicants. The AHA's recent letter could not be more clear:

> AHA affirmatively filed Public Comments objecting to HEXAP SAS, DocCheck AG, and Charleston Road Registry related to any of these three entities operating the gTLD string .MED for the reasons outlined in AHA's Public Comments. AHA purposefully did not file a similar Public Comment related to Medistry LLC. Any other interpretation of AHA's Public Comments . . . , and any purported expansion of those Public Comments to apply to any other party[] are mistakes of fact.[40]

As with the NABP letter, this letter is an explicit statement from the AHA, offered to correct the Expert's mistake of fact, that it does not and never has opposed Medistry's

[38] Guidebook, Module 3.2.1.
[39] *Medistry* Determination, ¶¶ 78-80.
[40] AHA Letter [Attachment 11] (emphasis added).

application.

Given that each application is different, even before this letter, there was no basis for assuming that the AHA failed to comment on Medistry's application out of oversight instead of out of a purposeful decision—especially after Medistry informed the Expert of this fact.

Moreover, the Expert's focus on GAC statements as evidence of opposition does not comply with the Guidebook standards because the GAC is not a part of the alleged community. The Guidebook specifically requires opposition come from the targeted community to sustain a community objection.[41] GAC statements are not opposition from the relevant community, and are thus outside of the scope of a community objection.[42]

Leaving aside comments from non-community entities or entities that commented only on other health-related gTLDS, and even ignoring the mistake of fact regarding NABP's and AHA's opposition, the Expert still failed to apply the appropriate policies to determine if there was sufficient community opposition.

Instead, the Expert established his own, entirely made-up standard to determine that the community opposition was so "important" or "of such a basic nature" that it overcame numerical deficiencies.[43] The Expert here concluded that his review of the four required standards was not limited to the factors listed for each in the Guidebook. Even assuming this is correct, the listed factors provide the only guidance as to what the four

[41] Guidebook, Modules 3.2.1, 3.5.4 The language of the Guidebook is clear and unambiguous, reiterating that there must be opposition "from a significant portion of the community," and that the opposition must come from "within the community."

[42] Such statements may be relevant to determinations of objections based on public interest concerns. In this case, the IO also objected to Medistry's .MED application on the basis of public interest, citing as part of the objection the GAC statements. That objection was rejected by the appropriate panel. Expert Determination in *Alain Pellet v. Medistry LLC*, ICC Case No. EXP/414/ICANN/31 (limited public interest objection to .MED, application ID 1-907-38758), 19 Dec. 2013, ¶¶ 73-74, *available at* http://newgtlds.icann.org/sites/default/files/drsp/10jan14/determination-2-1-907-38758-en.pdf [Attachment 12].

[43] *Medistry* Determination, ¶¶ 71, 78-79, 87 [Attachment 1].

standards mean. Accordingly, the types of factors the Expert may consider must be similar to the types of factors enumerated in the Guidebook; otherwise, the Expert is applying a completely different standard. The Expert is not free to make up whatever standard he or she chooses for determining whether community opposition is substantial. Yet that is what the Expert has done.

Attempting to determine whether there is substantial opposition "from a significant portion of the community" inherently requires determination of the amount of opposition.[44] The Guidebook makes it clear that the types of factors an Expert may consider in this determination relate not to the substance of the opposition, but rather to quantifying the amount of opposition: for example, the number of expressions of opposition, the portion of the community represented by those expressions, and the amount of cost and effort such entities are willing to expend. Even if substantial opposition is not strictly numerical, there must nonetheless be some evidence that a significant portion—for example a particularly representative portion, or a particularly diverse portion—is opposed. The Expert's determination that "substantial" opposition can be determined merely based on the Expert's conclusion that the concerns are particularly "important" if those concerns are not also widely shared is based on considerations wholly outside of the scope of the standard and does not comply with the policies in ICANN's Guidebook.

By comparison, although the Objector in the .HALAL and .ISLAM objections argued that the question of religion was a particularly "sensitive" one—and although it is generally accepted that religious freedom and freedom of expression are particularly important—the Expert did not consider the importance of the opposition expressed in

[44] Guidebook, Module 3.5.4.

determining that there was insufficient opposition from within the community.[45]

As already noted, the failure to apply the required standards is also unfair and discriminatory, and prevents applicants or others from determining in advance what standards will apply, and thus violates, *inter alia*:

- Section 2.4.4 of the New gTLD Procedures, which require that the dispute resolution process must operate ~~"~~in the interests of fairness and equivalent treatment for all;"
- Bylaws, Art. 1, § 2(8), requiring ICANN to ~~"~~mak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness;
- Bylaws, Art. 2, § 3, requiring ICANN to act in a non-discriminatory manner; and
- Articles of Incorporation, para. 4, requiring ICANN to ~~"~~operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law."

IV. THE EXPERT FAILED TO FOLLOW ICANN POLICIES REQUIRING LIKELIHOOD OF COMMUNITY DETRIMENT

ICANN policies require the IO to prove a likelihood of material harm. Instead of inquiring, in any way, whether the alleged harms were likely, the Expert simply asserted that ~~"~~a low level of likelihood" is sufficient, and then concluded that because the alleged risks ~~"~~cannot be reasonably denied to exist," no further proof was needed.[46] According to the Expert, any risk that is not ~~"~~improbable" is sufficient reason to reject Medistry's application. Given that this is the first time that ICANN has engaged in a process that will drastically alter the number of TLDs, it is not improbable that any new gTLD will be detrimental in some sense, as many who are opposed to new gTLDs generally have

[45] Expert Determination in *Telecommunications Regulatory Authority of the United Arab Emirates v. Asia Green IT System Bilgisayar San. ve Tic. Ltd.*, ICC Case No. EXP/430/ICANN/47 (community objection to .ISLAM, application ID 1-2130-23450), 24 Oct. 2013, ¶¶ 85-108, 125, *available at* http://newgtlds.icann.org/sites/default/files/drsp/04nov13/determination-1-1-2131-60793-en.pdf; Expert Determination in *Telecommunications Regulatory Authority of the United Arab Emirates v. Asia Green IT System Bilgisayar San. ve Tic. Ltd.*, ICC Case No. EXP/427/44 (community objection to .HALAL, application ID 1-2131-60793) 24 Oct. 2013, ¶¶ 93-115, 132, *available at* http://newgtlds.icann.org/sites/default/files/drsp/04nov13/determination-1-1-2131-60793-en.pdf.

[46] *Medistry* Determination, ¶ 98 [Attachment 1].

argued. The Expert's analysis therefore deprives this fourth standard of all meaning, and therefore fails to apply the standard established by ICANN. This is supported by the fact that provisions of the Guidebook relating to string similarity specify that likelihood means "probable, not merely possible."[47] There is no reason to conclude that the meaning of "likelihood" varies from one category of objection to another.

Additionally, the Expert utterly failed to consider whether the harm would be "material." His logic, never fully explained, appears to be that if the interests that might be harmed are "important" or "significant," then the harm is material. But important interests may still be subject to non-material harms; by failing to engage in any analysis of the materiality of the harm, the Expert has failed to apply the required standard.

Using these improperly low standards, the Expert simply accepts various unsupported assertions by the IO as "proof" of the likelihood of detriment. And the IO's assertions are not based on any concerns actually expressed by the alleged community—even the NABP comment, the sole comment from the community that addresses Medistry's application, does not address whether a .MED gTLD would cause reputational or economic harm to any community. Nor is there any evidence or analysis—no research, survey, studies, statistics, or even expert opinion—of whether the issues raised by the NAPB, such as misuse of sensitive medical information, would result in any loss of reputation to the community as a whole.

The Expert also accepts, with no evidence, that a .MED gTLD operated without broad community participation will necessarily damage those who are excluded. The medical profession's use of Internet communications simply does not mean that exclusion from one health-related gTLD will interfere with core community activities.

[47] Guidebook, Module 3.5.1.

The IO and the Expert seem to take as a given that exclusion from a particular community-related gTLD is automatically a harm to community members, without any analysis of the likely importance of various gTLDs, the specific policies that could be implemented, or whether the likely existence of multiple health-related gTLDs mitigates any detriment.

Moreover, even if delegating a gTLD to a particular applicant without guaranteed community participation can be considered detrimental, such detriment is clearly not sufficient to sustain an objection. The Guidebook clearly states that ~~"a~~n allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient."[48] The same logic holds when the complaint is merely that the string will be delegated to the applicant instead of to ~~"t~~he community."[49]

Other Experts have concluded that mere assertions that, for example, unlicensed or fraudulent activity may occur in the applied-for gTLD, is not evidence that community members will be harmed ~~"s~~imply because of the possibility that [bad] operators may register under the same gTLD."[50]

Yet again, the failure to apply the required standards is also unfair and discriminatory, and prevents applicants or others from determining in advance what standards will apply, and thus violates, *inter alia*:

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[48] *Id.*, Module 3.5.4; *see also* New gTLD Draft Applicant Guidebook Version 4: Public Comment Summary and Analysis, 12 Nov. 2010, p. 10, *available at* http://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf.

[49] *See, e.g.*, Expert Determination in *The International Lesbian Gay Bisexual Trans and Intersex Association v. United TLD Holdco* (community objection to .GAY, application ID 1-1039-47682), ICC Case No. EXP/394/ICANN/11, ¶ 23, *available at* http://newgtlds.icann.org/sites/default/files/drsp/25nov13/determination-1-1-1039-47682-en.pdf.

[50] Expert Determination in *European State Lotteries and Toto Association v. Affilias Ltd* (community objection to .LOTTO, application ID 1-868-7904), ICC Case No. EXP/422/ICANN/39, ¶ 9.17, *available at* http://newgtlds.icann.org/sites/default/files/drsp/16dec13/determination-1-1-868-7904-en.pdf.

- Section 2.4.4 of the New gTLD Procedures, which require that the dispute resolution process must operate ~~in~~ the interests of fairness and equivalent treatment for all;"
- Bylaws, Art. 1, § 2(8), requiring ICANN to ~~in~~ak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness;
- Bylaws, Art. 2, § 3, requiring ICANN to act in a non-discriminatory manner; and
- Articles of Incorporation, para. 4, requiring ICANN to ~~o~~perate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law."

V. ICANN'S FAILURE TO ENSURE CONSISTENT AND FAIR EXPERT DETERMINATIONS VIOLATES ICANN POLICIES

As the above demonstrates, the failure of Expert Panels to follow the policies and procedures established by ICANN have resulted in repeated inconsistencies, subjecting applicants to different standards resulting in unpredictable decisions.

In this particular instance, the inconsistency results in an outcome that is completely opposite to ICANN policies that were enacted in an effort to protect communities potentially affected by new gTLDs. Three applications were submitted for .MED; because two objections were sustained (by the same Expert) on the basis of community detriment, the third .MED application will be delegated without any ICANN review of whether that application sufficiently serves the community. Although the remaining .MED application is a community-based application, that designation is not proof that the applied-for gTLD will serve or benefit the community; that question would not even be addressed until the community priority evaluation. But if there are no other applications, then the remaining application will never be subjected to community evaluation. This result is inconsistent—one gTLD will be delegated by default, with no review of its community policies, whereas others will have been rejected based on just

such a review.[51]

This general, and significant, problem of inconsistency and unpredictability has repeatedly been raised with ICANN. For instance, in November 2013, a number of new gTLD applicants informed ICANN that the Guidebook standards were being incorrectly applied in community objections, noting it was likely that "community objectors will unfairly prevail over applicants who applied as standard applicants in good faith."[52]

Likewise, both ICANN's GNSO and the BGC itself have expressed its concern with "apparent inconsistencies with existing policy" and proposed investigating the matter in more detail.[53]

Yet ICANN has thus far refused to review these inconsistent decisions on the basis that if the "correct procedure" was followed, the outcome should not be questioned. But ICANN's attempt to avoid responsibility for compliance with its substantive policies is, in itself, an impermissible abdication of its responsibilities under its Bylaws and Articles of Incorporation to ensure fairness, non-discrimination, and neutral application of its policies. ICANN cannot allow third parties to which it has delegated authority to continually violate ICANN policies and then disavow any responsibility for remedying the process. That's not how ICANN was structured to work by the community. In fact, that turns the entire ICANN experiment on its head, ensuring increased criticism and

[51] Although it may not be the role of an Expert in a particular case to evaluate the inconsistencies that result from such situations, the fact that such inconsistencies have occurred and ICANN has not reconciled them is not consistent with ICANN's policies, Bylaws and Articles of Incorporation.

[52] Letter from Shweta Sahjwani *et al* to Cherine Chalaby (Chair, ICANN Board NGPC) *et al*, 1 Nov. 2013, *available at* http://www.icann.org/en/news/correspondence/sahjwani-et-al-to-chalaby-et-al-01nov13-en. This is the very situation that may arise with regard to the various .MED applications.

[53] Letter from Jonathan Robinson (Chair, ICANN GNSO Council) to Steve Crocker (Chair, ICANN Board) and Cherine Chalaby (Chair, ICANN Board NGPC), 18 Sept. 2013, *available at* http://gnso.icann.org/en/correspondence/robinson-to-crocker-chalaby-18sep13-en.pdf; Recommendation of the Board Governance Committee, Reconsideration Request 13-10, p.11, 10 Oct. 2013, *available at* http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-commercial-connect-10oct13-en.pdf.

delegitimizing the entire organization.

In this regard, it can be said that both ICANN and the ICC have failed to take the necessary measures to ensure that ICANN policies are followed, whether by failing to ensure the IO's objections complied with ICANN policies, failing to properly train and educate Experts regarding the applicable policies, failing to exercise oversight of Expert Panels to ensure consistency and fairness, or failing to establish a methodology for applicants or others to remedy incorrect decisions.

Thus, in addition to the substantive failures described above, ICANN's failure to remedy the incorrect and inconsistent decisions is a clear violation of policies requiring ICANN to act fairly, transparently, and in a non-discriminatory manner, including:

- Section 2.4.4 of the New gTLD Procedures, which require that the dispute resolution process must operate ~~in~~ the interests of fairness and equivalent treatment for all;"
- Bylaws, Art. 1, § 2(8), requiring ICANN to ~~m~~ak[e] decisions by applying documented policies neutrally and objectively, with integrity and fairness.
- Bylaws, Art. 1, § 2(10), requiring ICANN to ~~[r~~]emain[] accountable to the Internet community through mechanisms that enhance ICANN's effectiveness."
- Bylaws, Art. 2, § 3, requiring ICANN to act in a non-discriminatory manner.
- Bylaws, Art. 3, § 1, requiring ICANN to ~~—op~~erate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."
- Articles of Incorporation, para. 4, requiring ICANN to ~~o~~perate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and . . . through open and transparent processes that enable competition and open entry in Internet-related markets."

For all of these reasons, Medistry requests the relief specified above.

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

____ Yes

__X__ No

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

N/A

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

Yes; see attached.

Terms and Conditions for Submission of Reconsideration Requests

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

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

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

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

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

__/Brian Johnson/_____ _17 Jan 2014_____

Signature Date

ATTACHMENTS

Attachment 1	Expert Determination in *Alain Pellet v. Medistry LLC*, ICC Case No. EXP/403/ICANN/20 (community objection to .MED, application ID 1-907-38758), 30 December 2013
Attachment 2	Application Submitted to ICANN by Medistry LLC for .MED, Application No. 1-907-38758 (public version)
Attachment 3	Public Comment 8u7jazet submitted on behalf of the National Association of Boards of Pharmacy, 9 Aug. 2012
Attachment 4	Public Comment kswu7m9h submitted on behalf of the .JOBS Charter Compliance Coalition, 25 Sept. 2012
Attachment 5	Specification 11: Public Interest Commitments, submitted for .MED by Medistry LLC
Attachment 6	Applicant's Response to Objection in ICC Case No. EXP/403/ICANN/20 (community objection to .MED, application ID 1-907-38758), 22 May 2013
Attachment 7	Community Objection filed by the Independent Objector against .Med (application ID 1-907-38758), 12 March 2013
Attachment 8	Additional Statement of the Independent Objector in ICC Case No. EXP/403/ICANN/20, 12 August 2013
Attachment 9	Additional Statement of Medistry in ICC Case No. EXP/403/ICANN/20, 23 August 2013
Attachment 10	Letter from Carmen A Catizone (Executive Director/Secretary, NABP) to Joe Turk (Sr. Director, Information Technology, Cleveland Clinic), 10 Jan. 2014
Attachment 11	Letter from Melinda Reid Hatton (Senior Vice President & General Counsel, AHA) to Joe Turk (Sr. Director, Information Technology, Cleveland Clinic), 14 Jan. 2014
Attachment 12	Expert Determination in *Alain Pellet v. Medistry LLC*, ICC Case No. EXP/414/ICANN/31 (limited public interest objection to .MED, application ID 1-907-38758), 19 Dec. 2013

Annex 69

DETERMINATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 14-1

21 JUNE 2014

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

I. Brief Summary.

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

The BGC[1] concludes that, based on information submitted with this Request, there is substantial and relevant evidence indicating that the Objection was inconsistent with ICANN procedures, despite the diligence and best efforts of the IO and staff. Specifically, the Requester has provided the BGC with uncontroverted information demonstrating that the public comments

[1] Board Governance Committee.

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

II. Facts.

A. Background Facts.

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

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

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

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

On 12 March 2013, the IO[3] filed the Objection to Requester's Application asserting that there is "substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted." (Applicant Guidebook ("Guidebook"), § 3.2.1; New gTLD Dispute Resolution Procedure ("Procedure"), Art. 2(e); http://www.independent-objector-newgtlds.org/home/the-independent-objector-s-objections/med-cty-medistry/.)

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

On 2 January 2014, the ICC[4] notified the Requester of the Panel's decision.

On 10 January 2014, ICANN published the Expert Determination.

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

(continued…)

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

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

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

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

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

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

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

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

B. The Requester's Claims.

The Requester seeks reconsideration on the following grounds:

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

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

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

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

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

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

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

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

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

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

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

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

C. Relief Requested.

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

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

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

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

(Request, Section 9, Pg. 8.)

III. Issues.

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

A. Whether ICANN procedure that prohibits the IO from filing an objection unless there was at least one public comment in the public sphere opposing the relevant application was followed?

B. Whether staff failed to follow ICANN procedure that prohibits the IO from filing an objection unless there was at least one public comment in the public sphere opposing the relevant application by allowing the Objection to proceed and by accepting the Expert Determination?

C. Whether the Panel applied the wrong standard in contravention of established policy or process by:

1. Failing to apply the proper burden of proof;

2. Failing to apply the proper standard for evaluating substantial opposition; and

3. Failing to apply the proper standard for evaluating the likelihood of material detriment.

D. Whether ICANN's purported failure to ensure consistent and fair expert determinations supports reconsideration?

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

IV. The Relevant Standards for Evaluating Reconsideration Requests.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.[8] (Bylaws, Art. IV, § 2.) Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, or if the Board or the NGPC[9] agrees to the extent that the BGC deems that further consideration is necessary, that the requesting party failed to satisfy the reconsideration criteria set forth in the Bylaws. ICANN has previously determined that the reconsideration process can properly be invoked for challenges to expert determinations rendered by panels formed by third party dispute resolution service providers, such as the ICC, where it can be stated that the Panel failed to follow the established policies or processes in reaching the expert determination, or that staff failed to follow its policies or processes in accepting that determination.[10]

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

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

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

[9] New gTLD Program Committee.

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

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

V. Analysis and Rationale.

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

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

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

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

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

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

> We wish to clarify that NABP's comment was intended to be advisory in nature, stressing that health-related gTLDs should account for patient safety and implement protections against fraud and abuse. In submitting this comment, NABP did not oppose Medistry's application to be the Registry Operator for the .MED gTLD, nor take any position as to whether Medistry's .MED application contained appropriate safeguards.
>
> NABP acknowledges that the Public Interest Commitments filed by Medistry in response to the Governmental Advisory Committee's Safeguard Advice may satisfactorily address the issues raised in NABP's Public Comment.

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

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

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

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

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

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

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

VI. Decision.

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

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

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

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

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

Annex 70

Perceived Inconsistent String Confusion Objection Expert Determinations

Resolution of the New gTLD Program Committee

Meeting Date:

Sun, 12 Oct 2014

Resolution Number:

2014.10.12.NG02 – 2014.10.12.NG03

URL for Resolution:

https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-e... (https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b)

Resolution Text:

The NGPC has identified the following String Confusion Objection Expert Determinations as not being in the best interest of the New gTLD Program and the Internet community:

SCO Expert Determinations for Review String Related SCO Expert Determinations
VeriSign Inc. (Objector) v. United TLD
Holdco Ltd. (Applicant) .CAM [PDF, 5.96 MB] Dot Agency Limited [PDF, 248 KB](.CAM) AC Webconnecting Holding B.V. [PDF, 264 KB] (.CAM)

Commercial Connect LLC (Objector) v. Amazon EU S.à r.l. (Applicant) .通販 [PDF, 73 KB]1 Top Level Domain Holdings Limited [PDF, 721 KB](.购物)

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

Rationale for Resolution:

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

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

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

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

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

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

The review panel will consist of three members appointed by the ICDR (the "Review Panel").

The only issue subject to review by the Review Panel shall be the SCO Expert Determinations

identified in these resolutions.

The record on review shall be limited to the transcript of the proceeding giving rise to the original Expert Determination, if any, expert reports, documentary evidence admitted into evidence during the original proceeding, or other evidence relevant to the review that was presented at the original proceeding. No additional documents, briefs or other evidence may be submitted for consideration, except that it is recommended that the Review Panel consider the identified "Related SCO Expert Determinations" in the above chart as part of its review.

The standard of review to be applied by the Review Panel is: whether the original Expert Panel could have reasonably come to the decision reached on the underlying SCO through an appropriate application of the standard of review as set forth in the Applicant Guidebook and the ICDR Supplementary Procedures for ICANN's New gTLD Program.

ICANN will pay the applicable fees to conduct the review by the Review Panel.

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

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

The NGPC notes that the Guidebook was developed by the community in a multi-stakeholder process over several years. The NGPC considered whether it was appropriate to change the Guidebook at this time to implement a review mechanism to address certain perceived inconsistent Expert Determinations. On 18 April 2013, ICANN posted a proposed review mechanism for public comment. The NGPC carefully considered the public comments received. The NGPC notes that comments submitted during the public comment period generally fell into the following categories and themes, each of which is discussed more fully in the summary of public comments:

Do not adopt the proposed review mechanism.

Adopt the proposed review mechanism.

Adopt a review mechanism with an expanded scope.

Do not adopt the proposed review mechanism or expand the scope.

Adopt some form of review, but not necessarily the one posted for public comment.

Recommended modifications to the framework principles of the proposed review mechanism, if any review mechanism is adopted.

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

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

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

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

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

Determinations back to the ICDR for re-evaluation to render a Final Expert Determination.

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

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

Second, on a substantive level, certain Expert Determinations highlighted by the community that purportedly resulted in "inconsistent" or "unreasonable" results, presented nuanced distinctions relevant to the particular objection. These nuances should not be ignored simply because a party to the dispute disagrees with the end result. Further, the standard guiding the expert panels involves some degree of subjectivity, and thus independent expert panels would not be expected to reach the same conclusions on every occasion. However, for the identified Expert Determinations, a reasonable explanation for the seeming discrepancies is not as apparent, even taking into account all of the previous explanations about why reasonably "discrepancies" may exist. To allow these Expert Determinations to stand would not be in the best interests of the Internet community.

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

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

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

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

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

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

Taking this action is an Organizational Administrative Action that was the subject of public comment. The summary of public comments is available for review here: (https://www.icann.org/en/system/files/files/report-comments-sco-framewor... (https://www.icann.org/en/system/files/files/report-comments-sco-framework-principles-24apr14-en.pdf) [PDF, 165 KB]).

Annex 71

9 U.S. Code § 10 - Same; vacation; grounds; rehearing

Current through Pub. L. 114-9 (http://www.gpo.gov/fdsys/pkg/PLAW-114publ9/html/PLAW-114publ9.htm). (See Public Laws for the current Congress (http://thomas.loc.gov/home/LegislativeData.php?n=PublicLaws).)

US Code (/uscode/text/9/10?qt-us_code_temp_noupdates=0#qt-us_code_temp_noupdates)

Notes (/uscode/text/9/10?qt-us_code_temp_noupdates=1#qt-us_code_temp_noupdates)

prev (/uscode/text/9/9) | next (/uscode/text/9/11)

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 (/uscode/text/5/580) of title 5 (/uscode/text/5) may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 (/uscode/text/5/572) of title 5 (/uscode/text/5).

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Table of Popular Names (/topn)
Parallel Table of Authorities (/ptoa)

FIND A

Arbitration Act 1996

68 Challenging the award serious irregularity.

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award.

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—

(a) failure by the tribunal to comply with section 33 (general duty of tribunal);

(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);

(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;

(d) failure by the tribunal to deal with all the issues that were put to it;

(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;

(f) uncertainty or ambiguity as to the effect of the award;

(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;

(h) failure to comply with the requirements as to the form of the award; or

(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—

(a) remit the award to the tribunal, in whole or in part, for reconsideration,

(b) set the award aside in whole or in part, or

(c) declare the award to be of no effect, in whole or in part.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(4) The leave of the court is required for any appeal from a decision of the court under this section.

Annotations

Modifications etc. (not altering text)

C1 S. 68 applied (with modifications) (E.W.) (21.5 2001) by S.I 2001/1185, arts. 2, 3, Sch. para. 163(1) (which amending S.I. was revoked (6.4.2004) by S.I 2004/753, art. 3 (subject to art. 8))

C2 S. 68 applied (with modifications) (E.W.) (6.4 2003) by The ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003 (S.I. 2003/694), art. 2, Sch. para. 114 (which amending S.I. was revoked (1.10.2004) by S.I. 2004/2333, art. 3 (subject to art. 6))

C3 S. 68 applied (with modifictaions) (E.W.) (6.4 2004) by The ACAS Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/753), art. 1, Sch. para. 194EW

C4 S. 68 applied (with modifications) (E.W.) (1.10 2004) by The ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/2333), art. 4, Sch. para. 145EW (with art. 6)

C5 S. 68 applied (with modifications) (N.I.) (21.5 2006) by The Labour Relations Agency (Flexible Working) Arbitration Scheme Order (Northern Ireland) 2006 (S R. 2006/206), arts. 2, 3, Sch. para. 114

Arbitration Act 1996

69 Appeal on point of law.

(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

(2) An appeal shall not be brought under this section except—

(a) with the agreement of all the other parties to the proceedings, or

(b) with the leave of the court.

The right to appeal is also subject to the restrictions in section 70(2) and (3).

(3) Leave to appeal shall be given only if the court is satisfied—

(a) that the determination of the question will substantially affect the rights of one or more of the parties,

(b) that the question is one which the tribunal was asked to determine,

(c) that, on the basis of the findings of fact in the award—

(i) the decision of the tribunal on the question is obviously wrong, or

(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.

(6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.

(7) On an appeal under this section the court may by order—

(a) confirm the award,

(b) vary the award,

(c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or

(d) set aside the award in whole or in part.

The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(8) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal.

But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.

Annotations

Modifications etc. (not altering text)

C1 S. 69 applied (with modifications) (E.W.) (21.5 2001) by S.I 2001/1185, arts. 2, 3, Sch. para. 164(1) (which amending S.I. was revoked (6.4.2004) by S.I 2004/753, art. 3 (subject to art. 8))

C2 S. 69 applied (with modifications) (E.W.) (6.4 2003) by The ACAS (Flexible Working) Arbitration Scheme (England and Wales) Order 2003 (S.I. 2003/694), art. 2, Sch. para. 115 (which amending S.I. was revoked (1.10.2004) by S.I. 2004/2333, art. 3 (subject to art. 6))

C3 S. 69 applied (with modifictaions) (E.W.) (6.4 2004) by The ACAS Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/753), art. 1, Sch. para. 200EW

C4 S. 69 applied (with modifications) (E.W.) (1.10 2004) by The ACAS (Flexible Working) Arbitration Scheme (Great Britain) Order 2004 (S.I. 2004/2333), art. 4, Sch. para. 151EW (with art. 6)

C5 S. 69 applied (with modifications) (N.I.) (21.5 2006) by The Labour Relations Agency (Flexible Working) Arbitration Scheme Order (Northern Ireland) 2006 (S R. 2006/206), arts. 2, 3, Sch. para. 115

Previous Provision Next Provision

Chemin :

Code de procédure civile
- Livre IV : L'arbitrage.
  - Titre VI : La reconnaissance, l'exécution forcée et les voies de recours à l'égard des sentences arbitrales rendues à l'étranger ou en matière d'arbitrage international.

Chapitre II : Les voies de recours contre les sentences arbitrales rendues à l'étranger ou en matière d'arbitrage international.

Article 1501

Créé par Décret 81-500 1981-05-12 art. 5 et 52 JORF 14 mai 1981 rectificatif JORF 21 mai 1981

La décision qui refuse la reconnaissance ou l'exécution est susceptible d'appel.

Article 1502

Créé par Décret 81-500 1981-05-12 art. 5 et 52 JORF 14 mai 1981 rectificatif JORF 21 mai 1981

L'appel de la décision qui accorde la reconnaissance ou l'exécution n'est ouvert que dans les cas suivants :

1° Si l'arbitre a statué sans convention d'arbitrage ou sur convention nulle ou expirée ;

2° Si le tribunal arbitral a été irrégulièrement composé ou l'arbitre unique irrégulièrement désigné ;

3° Si l'arbitre a statué sans se conformer à la mission qui lui avait été conférée ;

4° Lorsque le principe de la contradiction n'a pas été respecté ;

5° Si la reconnaissance ou l'exécution sont contraires à l'ordre public international.

Article 1503

Créé par Décret 81-500 1981-05-12 art. 5 et 52 JORF 14 mai 1981 rectificatif JORF 21 mai 1981

L'appel prévu aux articles 1501 et 1502 est porté devant la cour d'appel dont relève le juge qui a statué. Il peut être formé jusqu'à l'expiration du délai d'un mois à compter de la signification de la décision du juge.

Article 1504

Créé par Décret 81-500 1981-05-12 art. 5 et 52 JORF 14 mai 1981 rectificatif JORF 21 mai 1981

La sentence arbitrale rendue en France en matière d'arbitrage international peut faire l'objet d'un recours en annulation dans les cas prévus à l'article 1502.

L'ordonnance qui accorde l'exécution de cette sentence n'est susceptible d'aucun recours. Toutefois, le recours en annulation emporte de plein droit, dans les limites de la saisine de la cour, recours contre l'ordonnance du juge de l'exécution ou dessaisissement de ce juge.

Article 1505

Créé par Décret 81-500 1981-05-12 art. 5 et 52 JORF 14 mai 1981 rectificatif JORF 21 mai 1981

Le recours en annulation prévu à l'article 1504 est porté devant la cour d'appel dans le ressort de laquelle la sentence a été rendue. Ce recours est recevable dès le prononcé de la sentence ; il cesse de l'être s'il n'a pas été exercé dans le mois de la signification de la sentence déclarée exécutoire.

Article 1506

Créé par Décret 81-500 1981-05-12 art. 5 et 52 JORF 14 mai 1981 rectificatif JORF 21 mai 1981

Le délai pour exercer les recours prévus aux articles 1501, 1502 et 1504 suspend l'exécution de la sentence arbitrale. Le recours exercé dans le délai est également suspensif.

Article 1507

Créé par Décret 81-500 1981-05-12 art. 5 et 52 JORF 14 mai 1981 rectificatif JORF 21 mai 1981

Les dispositions du titre IV du présent livre, à l'exception de celles de l'alinéa 1er de l'article 1487 et de l'article 1490, ne sont pas applicables aux voies de recours.

Art. 190

IX. Caractère définitif. Recours

1. Principe

[1] La sentence est définitive dès sa communication.

[2] Elle ne peut être attaquée que:

a. lorsque l'arbitre unique a été irrégulièrement désigné ou le tribunal arbitral irrégulièrement composé;

b. lorsque le tribunal arbitral s'est déclaré à tort compétent ou incompétent;

c. lorsque le tribunal arbitral a statué au-delà des demandes dont il était saisi ou lorsqu'il a omis de se prononcer sur un des chefs de la demande;

d. lorsque l'égalité des parties ou leur droit d'être entendues en procédure contradictoire n'a pas été respecté;

e. lorsque la sentence est incompatible avec l'ordre public.

[3] En cas de décision incidente, seul le recours pour les motifs prévus à l'al. 2, let. a et b, est ouvert; le délai court dès la communication de la décision.

Annex 72

Resources
- About ICANN
- Board
  - Board Activity
  - Resolutions
  - Board Recommendations
  - Board Meetings
  - Audit Committee
  - Governance Committee
  - Compensation Committee
  - Executive Committee
  - Finance Committee
  - New gTLD Program Committee
  - Risk Committee

Board Governance Committee

Chris Disspain
Chair

Cherine Chalaby
Member

Erika Mann
Member

Gonzalo Navarro
Member

Structural Improvements Committee

- Accountability & Transparency
- Governance
- Groups

Business

- Contractual Compliance
- Registrars
- Registries

Operational Metrics

- Identifier Systems Security, Stability and Resiliency (IS-SSR)
- ccTLDs
- Internationalized Domain Names
- Universal Acceptance Initiative
- Policy
- Public Comment
- Contact
- Help

Mike Silber
Member

Bruce Tonkin
Member

Suzanne Woolf
Non Voting Liaison

Background

The Board Governance Committee was established by the Board at its 12 March 2003 meeting.

Charter - Current

The Committee's charter was adopted and approved by the Board on 13 October 2012.

Documents

- Practice for Informing Board Leadership Slate (10 November 2013)
- Board Code of Conduct (6 May 2012)

- Code of Conduct Guidelines (21 April 2011)

- Board Committee and Leadership Selection Procedures (26 June 2009)
- Board Conflicts of Interest Policy (6 May 2012)
- Governance Guidelines (18 October 2012)
- Advice from the ICANN Board on Board Skills to the Nominating Committee [PDF, 137 KB]
- Board Member Evaluation Process [PDF, 65 KB]

Document Archive

Reconsideration Requests

Annual Reports on Reconsideration Requests

Annual Reports on Code of Conduct

Presentations at ICANN Public Meetings

From 3 February 2009, Reconsideration Requests Are the Responsibility of the Board Governance Committee.

How to file a request for reconsideration. Requests for reconsideration must contain at least the following information:

a. name, address, and contact information for the requesting party, including postal and e-mail addresses;

b. the specific action or inaction of ICANN for which review or reconsideration is sought;

c. the date of the action or inaction;

d. the manner by which the requesting party will be affected by the action or inaction;

e. the extent to which, in the opinion of the party

submitting the Request for Reconsideration, the action or inaction complained of adversely affects others;

f. whether a temporary stay of any action complained of is requested, and if so, the harms that will result if the action is not stayed;

g. in the case of staff action or inaction, a detailed explanation of the facts as presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN policy(ies);

h. in the case of Board action or inaction, a detailed explanation of the material information not considered by the Board and, if the information was not presented to the Board, the reasons the party submitting the request did not submit it to the Board before it acted or failed to act;

i. what specific steps the requesting party asks ICANN to take-i.e., whether and how the action should be reversed, cancelled, or modified, or what specific action should be taken;

j. the grounds on which the requested action should be taken; and

k. any documents the requesting party wishes to submit in support of its request.

The above information must be submitted by e-mail to reconsider@icann.org.Requests will be publicly posted.

How to comment on a request for reconsideration. Comments on requests for reconsideration should be submitted to reconsider@icann.org.

Cherine Chalaby

BOARD

ICANN Board Member

United Kingdom

Biography

Cherine Chalaby's extensive international career encompasses leadership roles in banking and technology.

Beginning in London in 1977, Cherine joined one of the world's largest IT services companies, Accenture. As senior partner, he held key managing positions, ultimately serving on Accenture's Executive Committee and its Global Leadership Council. During his 28-year tenure at Accenture, he led several projects aimed at improving the flow of information between financial markets participants, projects that have been made possible by the expansion of the internet. His experience is broad

Areas of Interest

Technology

DNS Marketplace

Memberships

No Membership

Level of Experience

With ICANN

Expert

With Internet Governance

Expert

Browse Profiles

and extensive. It ranges from strategy development through systems implementation and transformational change to running operations.

In March 2006, Cherine joined Rasmala, a Middle East-based regional investment bank, where he held several positions including chairman of the supervisory board, chairman of the management board and chairman of the bank's subsidiary in Egypt. Previous Middle East experience involved projects dating from the 1980s and included setting up a trading and back office system for a local commercial bank, developing a blueprint for an international exchange, developing and installing a local exchange system, and developing one of the first Internet-based brokerage systems in the region.

Cherine has considerable board experience, having served on seven separate boards of directors.

Cherine is a citizen of Egypt and also holds a British citizenship. He attended the French Jesuits School of Cairo, holds a BSc in Electrical Engineering from Cairo University and an MSc in Computing Sciences from the Imperial College of London. He is fluent in English, French and Arabic.

Cherine was selected by the Nominating Committee to serve on the Board. His term starts following the Annual General Meeting in Cartagena Colombia on 10 December 2010 and will expire on 21 November 2013.

Brittney Marie powers

Bruno Camacho
Graphic Designer

Chris Uhland
Digital Publishing

Lewis Stanley

Chandrakant Narayan Shinde

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Chris Disspain

BOARD

ICANN Board Member

Australia

Areas of Interest

DNS Marketplace

Civil Society

Memberships

No Membership

Level of Experience

With ICANN

Expert

With Internet Governance

Expert

Biography

Since October 2000 Chris has been the Chief Executive Officer of .au Domain Administration Ltd (auDA), a non-profit company that is the independent governing body/manager of the Australian Internet domain name space (.au) and the policy body governing the Domain Name Space (DNS) in Australia.

He was instrumental in auDA becoming endorsed by the Australian Government as the appropriate body to become the manager of .au and responsible for negotiating the re-delegation of .au to auDA and for guiding the DNS in Australia through the transition from an unregulated monopoly regime to a

Browse Profiles

new, regulated, fully competitive, price-sensitive regime.

Chris was for 14 years a corporate lawyer in the U.K. and Australia, and has experience in all aspects of Corporate & Commercial Law including IPOs, prospectus issues, venture capital, take-overs, mergers and acquisitions in UK, Australia, USA and Asia, and corporate tax planning and structuring.

In 1996, Chris ceased practising as a lawyer to concentrate on other business interests.

Since 1985 Chris has held executive management positions and directorships in private and public companies in the U.K. and Australia. These companies have included those involved in mining, e-commerce and the Internet.

He has been Chairman or Director of several companies listed on the Australian Stock Exchange.

Until he stood down in March 2011, Chris was the Chair, since its foundation in June 2004, of the Country Code Name Supporting Organisation (ccNSO), the body that represents the interests of and sets global policy and best practice for country code top level domains (ccTLD) within ICANN. He has been instrumental in developing the IDN ccTLD Fast Track which enables the delegation of country codes in non-Latin scripts.

Prior to becoming Chair, Chris was a member of the ICANN Assistance Group that negotiated with the ICANN Evolution and Reform Committee leading to the establishment of the ccNSO, and a member of and spokesperson for the ccNSO Launching Group.

Since 2006 Chris has been a member of the United Nations Secretary-General's Internet Governance Multi-stakeholder Advisory Group.

Chris was selected by the ccNSO to join the Board of ICANN in June 2011 and his term will expire at the Annual General Meeting in 2014.


Dierdre Sidjanski
Office Manager


Suzanne Woolf
Liaison to Board of Directors, RSSAC


Brandon huynh


KSDESIGNER


Saidy Poemzz

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LinkedIn


Flickr


Facebook


RSS Feeds


Community Wiki


ICANN Blog

Erika Mann

BOARD

ICANN Board Member

Germany

Biography

Erika Mann brings to the ICANN Board extensive knowledge in foreign policy matters. Between 1994 and 2009, Erika was a German member of the European Parliament, where she concentrated on trade and World Trade Organization (WTO) policy, transatlantic relations, digital economy, telecommunications and Internet policy, and research policy.

Between 2003 and 2008, while she was the European chairperson of the Transatlantic Policy Network (TPN), Erika conceived the notion of a Transatlantic Market between the EU and US. This concept led to the founding of the Transatlantic

Areas of Interest

Government

Memberships

No Membership

Level of Experience

With ICANN

Expert

With Internet Governance

Expert

Browse Profiles

LauraPasse
Web

Economic Council (TEC), where she was a member of the European Parliaments advisory board until 2009. She was a founder of the European Internet Foundation, which she chaired until mid-2009.

Erika has acquired considerable expertise in transatlantic relations and international Internet policy formation. She is a lecturer and author of many publications on trade, transatlantic relations and Internet-world related topics, and has received awards from multiple organizations, including the European-American Business Council for Exceptional Transatlantic Commitment, and has also been awarded the Bundesverdienstkreuz am Bande (the German Federal Cross of Merit).

Erika joined Facebook as Director end of October 2011 as Director Public Policy in Brussels. Until October 2011 Erika was the Executive Vice President of the Computer & Communications Industry Association; she is a non-resident Senior Fellow of the Atlantic Council and a Trustee of Friends of Europe and serves on the Advisory Board of the European Policy Center. She holds a degree in social science from the University of Hannover, Germany.

Erika was selected by the Nominating Committee to serve on the Board. Her term starts following the Annual General Meeting in Cartagena Colombia on 10 December 2010 and will expire on 21 November 2013.

 
Mykyta Zadorozhnyi
feel free


Mohit Dubey


Edzil Ann Libay
Human Resources Professional


OZAN OKTAY

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Glossary: **Internet Corporation for Assigned Names and Numbers**

The Internet Corporation for Assigned Names and Numbers (ICANN) is an internationally organized, non-profit corporation that has responsibility for Internet Protocol (IP) address space allocation, protocol identifier assignment, generic (gTLD) and country code (ccTLD) Top-Level Domain name system management, and root server system management functions. Originally, the Internet Assigned Numbers Authority (IANA) and other entities performed these services under U.S. Government contract. ICANN now performs the IANA function. As a private-public partnership, ICANN is dedicated to preserving the operational stability of the Internet; to promoting competition; to achieving broad representation of global Internet communities; and to developing policy appropriate to its mission through bottom-up, consensus-based processes. The DNS translates the domain name you type into the corresponding IP address, and connects you to your desired website. The DNS also enables email to function properly, so the email you send will reach the intended recipient.

Who We Are
Get Started
Learning
Participate
Groups
Board
President's Corner
Staff
Careers
Newsletter

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

Accountability & Transparency
Accountability Mechanisms
Independent Review Process
Request for Reconsideration
Ombudsman

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

Help
Dispute Resolution
Domain Name Dispute Resolution
Name Collision
Registrar Problems
WHOIS

Glossary: **Internet Corporation for Assigned Names and Numbers**

The Internet Corporation for Assigned Names and Numbers (ICANN) is an internationally organized, non-profit corporation that has responsibility for Internet Protocol (IP) address space allocation, protocol identifier assignment, generic (gTLD) and country code (ccTLD) Top-Level Domain name system management, and root server system management functions. Originally, the Internet Assigned Numbers Authority (IANA) and other entities performed these services under U.S. Government contract. ICANN now performs the IANA function. As a private-public partnership, ICANN is dedicated to preserving the operational stability of the Internet; to promoting competition; to achieving broad representation of global Internet communities; and to developing policy appropriate to its mission through bottom-up, consensus-based processes. The DNS translates the domain name you type into the corresponding IP address, and connects you to your desired website. The DNS also enables email to function properly, so the email you send will reach the intended recipient.

Gonzalo Navarro

BOARD

ICANN Board Member

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Biography

Gonzalo Navarro is a Chilean national and part of the legal team of Figueroa, Valenzuela & Cia. Previously, he was the Chief of Staff, National Institute of Industrial Property of Chile. At thirty-three years old, Gonzalo was the youngest Director ever appointed to the ICANN Board. However, Gonzalo has already served over six years on the Government Advisory Committee, representing Chile, with significant experience in international trade negotiations and also Internet governance.

Gonzalo's education includes qualifications in informatics and telecommunications law from the Universidad de Chile and a Masters in Law (LLM) from Columbia University, New York.

From 2001 to 2007, Gonzalo served as Senior Adviser on International Affairs, Undersecretary of Telecommunications of Chile. In this role, Gonzalo represented Chile on the Government Advisory Committee ofICANN for over six years. He also advised the Chilean government on the implementation of public policies derived from international processes, negotiated and drafted telecommunications chapters in several Free Trade Agreements (including US-Chile FTA and China-Chile FTA) and acted as permanent representative of Chile at the International Telecommunications Union (ITU), the World Summit on the Information Society (WSIS), Internet Governance Forum, CITEL and APEC TEL.

Gonzalo was appointed for his first 3-year term on the Board of Directors, beginning after ICANN's annual meeting in Seoul on 30 October, 2009, and serving through the annual meeting in 2012. He has been re-appointed for a second 3-year term on the Board of Directors, beginning after ICANN's annual meeting in Toronto on 19 October, 2012, and serving through the annual meeting in 2015.

Areas of Interest

Government

Memberships

No Membership

Level of Experience

With ICANN

Expert

With Internet Governance

Expert

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gkmine com
carrer consultant

Halal Medias Inc.

Hostindia
domain registration and web hosting

Dylan Emerson

0 Sara Wintz
zdfercfuk[illegible]

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Report Profile

Mike Silber

BOARD

ICANN Board Member

South Africa

Biography

Michael "Mike" Silber is a South African attorney and Head Legal and Commercial of Liquid Telecomms after years as an independent legal and regulatory consultant in the information and communication technologies spheres. Mike has been selected as a leading South African Internet and e-Commerce lawyer by Who's Who Legal and as one of the leading Technology, Media and Telecommunications lawyers in South Africa by Expert Guides.

Mike also serves as a Management Committee member and previously served as regulatory advisor to the South African Internet Service Providers' Association. He helped form and served as a

Areas of Interest

DNS Marketplace

Civil Society

Memberships

No Membership

Level of Experience

With ICANN

Expert

With Internet Governance

Expert

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regulatory advisor and adjudicator to the South African Wireless Application Service Providers' Association.

Mike is a founder member of the South African chapter of the Internet Society (ISOC-ZA) and co-chaired the ISOC-ZA Drafting Committee responsible for restructuring the administration of the .ZA ccTLD. Mike was involved in this process through to the formation of the .ZA Domain Name Authority and has served a Director of the Authority since its formation in 2004.

Mike's professional expertise covers telecommunications regulatory, commercial, Internet and e-commerce issues.

Mike has been involved in the ccTLD and ICANN communities for a number of years and was a ccNSO representative on the ICANN Nominating Committee in 2005 and 2006.

Mike was selected for the ICANN Board by the Country Code Names Supporting Organisation in 2009 and elected to a second term, which will expire at the Annual General Meeting in 2015.


Riccardo Ruffolo
GSE Specialist


Knut Harald Nylaende
Founder and CEO of Moxie AS


Anan Buathes
Manager

AHMED BEL

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Report Profile

Bruce Tonkin

BOARD

Vice Chair, ICANN Board Of Directors

Australia

Biography

Dr Bruce Tonkin is an Australian citizen and is currently Chief Strategy Officer for Melbourne IT Limited, where he is responsible for managing the development of the company's strategic and operating plans, strategic initiatives with major customers and suppliers, and managing evaluation of merger and acquisition opportunities.

Bruce holds a bachelor of Electrical and Electronic Engineering (1st class honours) and a Ph.D. in electrical and electronic engineering. Before joining Melbourne IT in 1999, he worked in small private engineering consulting businesses, universities, and industry research laboratories (e.g., AT&T Bell Labs

Areas of Interest

Technology

Memberships

No Membership

Level of Experience

With ICANN

Expert

With Internet Governance

Expert

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Lesroy Durand
Actor

in the 1980s). Bruce is also a Fellow of the Australian Institute of Company Directors.

Melbourne IT was the first commercial administrator for the .com.au namespace (beginning in 1996), and in 1999 was one of the first five test-bed registrars when ICANN established registrar competition for the existing com/net/org registry. Melbourne IT now provides domain name registration services for many gTLDs and ccTLDs.

Bruce attended his first ICANN meeting in Melbourne in March 2001 and became involved with the registrars constituency on behalf of Melbourne IT. He was subsequently elected to the GNSO Council by the Registrars constituency, and became chair of the DNSO Names Council, and subsequently the GNSO Council in 2002. During his term on the GNSO Council, the GNSO has introduced new ICANN policies for transfers, Whois, and deleted names, and has also progressed the work on new gTLDS and further improvements in Whois.

Bruce has also been an active participant in policy development for the .au ccTLD on behalf of Melbourne IT. Major policy work has included the introduction of registrar competition in the .au namespace, and the introduction of a range of policies covering areas such as domain name registration policies and Whois.

He was first elected to the ICANN Board by the Generic Names Supporting Organisation for a three year term that started in June 2007. He was re-elected in March 2010 for another 3 year term which expires on 21 November 2013. In May 2013 he was re-elected for a three year term which will expire at the end of the Annual General Meeting in 2016.

At the organizational meeting following the regular ICANN Board meeting on June 24, 2011, Bruce was elected Vice-Chair of the ICANN Board. Bruce was re-elected Vice-Chair at the Organizational meeting


Sunil Verma


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Iaggari


Ardeshir Kalani

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in Dakar on 28 October 2011 and again at the Organizational Meeting in Toronto on 18 October 2012.

Report Profile

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Request for Reconsideration
Ombudsman

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Financials
Document Disclosure
Planning
Dashboard
RFPs
Litigation
Correspondence

Help
Dispute Resolution
Domain Name Dispute Resolution
Name Collision
Registrar Problems
WHOIS

Suzanne Woolf

BOARD

Liaison To Board Of Directors, RSSAC

United States

Biography

Suzanne Woolf is experienced in both the technical and policy aspects of the evolution of the Internet, particularly DNS and other network operations. She has held a variety of roles for the Internet Systems Consortium since 2002, currently including product management, strategic considerations for ISC's software and protocol development projects, and participation in Internet technical policy activities with ICANN, ARIN, and others.

As Technical operations manager for ICANN, Suzanne worked on the initial design and implementation of ICANN's internal network and providing operational support for ICANN's root

Areas of Interest

Technology

Memberships

No Membership

Level of Experience

With ICANN

Expert

With Internet Governance

Expert

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nameserver. Earlier, she performed programming and systems administration for USC Information Sciences Institute. Her projects included programming and systems support, network engineering, and nameserver management.

Suzanne's current networking interests center on large scale infrastructure, DNSSEC deployment, promoting the operational use of IPv6, and IETF participation in related working groups such as DNSEXT and V6OPS. She is especially interested in securing the DNS and the global routing system, implications of the growing adoption of IPv6 in areas such as multi-homing, and global policy issues for the IP address registries to consider together.

Suzanne is a Member, ICANN Security and Stability Advisory Committee, Root Server System Advisory Committee, and ARIN Advisory Council; she actively participates in NANOG and IETF.

Board liaison terms end (subject to possible re-appointment) after the conclusion of ICANN's annual meeting each year. Suzanne has served as the Root Server System Advisory Committee Liaison since 2004.

Alper Fatih Abidin


Dennis Chang
GDD Services Programs & Engagement Director

Anil Bandoji

Kaleigh Keley

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