

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

AMAZON EU S.À.R.L.,

Claimant,

v.

ICDR Case No. 01-16-0000-7056

INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS,

Respondent.

AMAZON'S PREHEARING BRIEF

List of Legal Authorities

Exhibit No.	Description
CLA-029	<i>Gulf Cooperation Council v. ICANN</i> , Interim Declaration on Emergency Request for Interim Measures of Protection, ICDR Case No. 01-14-0002-1065 (12 Feb. 2015)
CLA-030	<i>Corn Lake v. ICANN</i> , Final Declaration, ICDR Case No. 01-15-0002-9938 (17 Oct. 2016)
CLA-031	<i>Gulf Cooperation Council (CGC) v. ICANN</i> , Partial Final Declaration of the Independent Review Process Panel, ICDR Case No. 01-14-0002-1065 (19 Oct. 2016)
CLA-032	<i>Dot Sport Limited v. ICANN</i> , Final Declaration, ICDR Case No. 01-15-0002-9483 (31 Jan. 2017)

CLA-029

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)

Independent Review Panel

IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS

Pursuant to the Internet Corporation for Assigned Names and Number's (ICANN) Bylaws, the *International Dispute Resolution Procedures* of the ICDR, and the *Supplementary Procedures for ICANN Independent Review Process*.

Gulf Cooperation Council ("GCC"))

Gulf Cooperation Council Building)

Contact Information Redacted)

(Claimant))

Represented by Natasha Kohne and Kamran)

Salour of Akin Gump Strauss Hauer & Feld,)

Contact Information Redacted)

And)

**Internet Corporation for Assigned Names)
Numbers ("ICANN")**)

12055 Waterfront Drive, Suite 300)

Los Angeles, CA 90094-2)

(Respondent))

Represented by Eric Enson, Rachel Zernik, and)
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ICDR Case No. 01-14-0002-1065

**INTERIM DECLARATION ON EMERGENCY REQUEST
FOR INTERIM MEASURES OF PROTECTION**

**John A.M. Judge
Emergency IRP Panel
12 February 2015**

I. INTRODUCTION

1. The Claimant Gulf Cooperation Council (the “Claimant” or “GCC”) commenced this proceeding by filing a Notice of Independent Review with the International Centre for Dispute Resolution (“ICDR”) on December 5, 2014 in accordance with the Bylaws of the Respondent, the Internet Corporation for Assigned Names and Numbers (“ICANN”). The purpose of this filing is to review the approval by ICANN of a new generic top level domain (“gTLD”) for .PERSIANGULF and its proposed action to enter into a registry agreement with a third party for the award and operation of that top level domain under the New gTLD Program of ICANN. On the same day, December 5, 2014, the GCC also has sought emergency interim measures pursuant to the Rules of the (ICDR) for the appointment of an Emergency Arbitrator and also for an order compelling ICANN to refrain from taking any further steps to sign a registry agreement for .PERSIANGULF until the Independent Review Panel has been concluded.
2. Although the ICANN Bylaws and paragraph 12 of the Supplementary Rules for ICANN’s Independent Review Process expressly preclude the grant of emergency measures of protection, ICANN has consented to the appointment of an Emergency IRP Panellist and to the consideration and disposition of GCC’s Request for Emergency Measures in accordance with the Rule 6 of the ICDR Rules in effect June 1, 2014. By appointment dated 9 December 2014, John A.M. Judge was appointed by the ICDR as the Emergency IRP Panellist to consider the Claimant’s Request for Emergency Measures.
3. The applicant for the proposed gTLD .PERSIANGULF is a private Turkish company which is not a party to the Independent Review Process nor to this Request for Emergency Measures of Protection. However in resisting the application for emergency measures, counsel for ICANN advanced not only the interests of ICANN but also those of that applicant which is seeking to secure a registry agreement for the proposed domain in dispute.
4. The Emergency IRP Panellist has carefully reviewed the following written submissions, evidence and authorities filed by the Claimant and the Respondent:
 - a. The Notice of Independent Review and the accompanying Request for Independent Review Process, both dated 5 December 2014, with Annexes 1-34 (392 Pages) (the “Claimant IRP Request”) and the Expert Report of Steven Tepp filed by the GCC;

- b. The Request for Emergency Arbitrator and Interim Measures of Protection also dated 5 December 2014, with Annexes 1 - 18 (269 pages), filed by the GCC (the “Claimant ER Request”);
- c. ICANN’s Response to the Request for Emergency Relief dated 17 December 2014 with Annexes R-ER-1-18 (approximately 665 pages) (the “ICANN Response”);
- d. The Reply of GCC dated 22 December 2014 with the Witness Statement of Abdulrahman Al Marzouqi signed 22 December 2014, with attached letter exhibit (the “Claimant Reply” or the “Reply”);
- e. ICANN’S Cooperative Engagement Process provided by counsel for ICANN on 23 December 2014.

Oral submissions from counsel for each party were also received by way of telephone conference call on 23 December 2014.

5. Based on the review of these materials, filed, and the oral submissions, this Emergency Panellist is satisfied for the reasons more fully set out herein that interim relief is warranted and therefore hereby declares on an interim basis that ICANN shall refrain from taking any steps to sign a registry agreement for the new gTLD .PERSIANGULF, until further order by an Independent Review Panel to be constituted, such declaration being expressly conditional on the terms and conditions as set out in paragraph 96 hereof.

II. BACKGROUND FACTS

a. The Parties

6. The GCC is a political and economic alliance of six Arab nations whose members are: (1) United Arab Emirates; (2) Saudi Arabia; (3) Kuwait; (4) Qatar; (5) Bahrain; and, (6) Oman. All of the member states border on that body of water separating the Arabian peninsula and the geographic area of the Islamic Republic of Iran (“Iran”), an area formerly known as Persia. That body of water is referred to in these reasons by way of the neutral term the “Gulf”. Among other things, the GCC promotes common economic, cultural, religious and geographic beliefs shared by these Arab nations, including a belief that the proper name for the Gulf is the “Arabian Gulf”.

7. ICANN is a California not-for-profit public benefit corporation formed in 1998 for the express purpose of promoting the public interest in the operational stability of the Internet by, inter alia, “performing and overseeing functions related to the coordination of the Internet domain name system (‘DNS’), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system” (Exhibit R-ER-1, Articles of Incorporation, para. 3). According to ICANN’s Bylaws, Article 1 Section 1, its mission is “to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular to ensure the stable and secure operations of the Internet’s unique identifier systems” including the DNS.
8. ICANN is itself a complex organization which facilitates input from stakeholders around the world and acts, as submitted by counsel, “as a community of participants”. ICANN’s Articles of Incorporation further provide that in carrying out its mandate, 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 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.” (Ex. R-ER-1, Articles of Incorporation, para. 4).

b. The Historical Name Dispute: “Persian Gulf” vs. “Arabian Gulf”

9. There has been a long standing dispute for more than fifty years between Arab states, many of which are in the GCC, and Iran, which is a non-Arab nation bordering the Gulf, over the proper name for the Gulf. Iran uses the term Persian Gulf while the Arab states refer to it as the Arabian Gulf.
10. This naming dispute is part of a broader series of historical differences and conflicts between Iran and one or more Arabian members of the GCC involving various matters of culture, religion, contested sovereignty of lands and islands, the use of commercial air space, participation in sporting events and even censorship of publications due to the use of one or other of the disputed terms to describe the Gulf. As a result of this history of disputes, the GCC and its members are extremely sensitive to use of the term “Persian Gulf” in virtually any context, including its use as a top level domain. Various examples of the ongoing dispute are more particularly described in the Claimant’s IRP Request at paras. 25-29.

11. ICANN does not dispute that the GCC holds strong beliefs in its position regarding this naming dispute. However, ICANN challenges the merits of GCC's position in this IRP proceeding and on this Request for Emergency Measures on numerous grounds discussed below.

c. ICANN's Structure and the New gTLD Program

12. **Organizational Structure.** As a not for profit corporation, the business and affairs of ICANN are controlled and conducted by the ICANN Board, like any other corporation (Bylaws Article II, Section 1). However, ICANN has created a complex organization and governing structure, quite unlike that of any private or public corporation. It is a structure which promotes diversity, inclusion and participation on a global basis not only through its Board and staff, but also through various Supporting Organizations and Advisory Committees (see the Bylaws, Articles V to XI).
13. One such committee is the Governmental Advisory Committee (the "GAC") consisting of members appointed by and representing governments from around the world to consider and to advise ICANN on internet related issues and concerns of governments, particularly where there is an interaction between ICANN policies and national laws and international agreements or on matters otherwise engaging other public policy issues (Bylaws, Article XI, Section 2). Members of the Claimant GCC are members of the GAC.
14. Since the deliberations and advice of the GAC at specific times play an important role in the narrative of events on this application, it is appropriate to clarify the function of the GAC in relation to ICANN. According to ICANN's Bylaws, the GAC itself does not act for or on behalf of ICANN. Instead, it acts as an important advisory resource for ICANN. The interaction between the GAC and ICANN, acting through its Board, is specifically addressed in various provisions of the Bylaws including Article XI 2.1 as follows:

j. The advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account, both in the formulation and adoption of policies. In the event that the ICANN Board determines to take an action that is not consistent with the Governmental Advisory Committee advice, it shall so inform the Committee and state the reasons why it decided not to follow that advice. The Governmental Advisory Committee and the ICANN Board will then try, in good faith and in a timely and efficient manner, to find a mutually acceptable solution.

k. If no such solution can be found, the ICANN Board will state in its final decision the reasons why the Governmental Advisory Committee advice was not followed, and such statement will be without prejudice to the rights or obligations of Governmental Advisory Committee members with regard to

public policy issues falling within their responsibilities.

It is clear that the ICANN Board is not bound by the GAC Advice. However, it must consider it and provide an explanation if that advice is not followed.

15. While complex in its structure, ICANN also emphasizes and promotes accountability and transparency in its practices and decision making, objectives which are critical for its work in relation to the Internet and its global community of users and participants to ensure fairness in its procedures (see Bylaws Article III). Indeed, the Bylaws establish various procedures for the review of various actions or inactions of the ICANN Board. The Independent Review Process is one such process intended to facilitate the review of Board actions alleged by an affected party to be inconsistent with ICANN's Articles of Incorporation or Bylaws. It is this Independent Review Process (the "IRP") which has been invoked by the GCC. The material procedures and requirements for the IRP are reviewed more fully below.
16. **The New gTLD Program.** Historically, there have been a limited number of top level domain names, such as .com, .net and .org, as well as the country specific domains. As confirmed in the Articles of Incorporation, Article 3.(iii), the mandate of ICANN, pursued over many years, has been to develop procedures for expanding the number of top level domains and increasing the number of companies to act as registrars for the sale of domain name registrations. These efforts ultimately led to the introduction of the New gTLD Program to significantly expand the Internet's naming system and to thereby expand consumer choice and encourage competition and innovation. ICANN, with its community of supporting organizations and advisory committees, painstakingly developed through many iterations over time an Applicant Guidebook to set out the application instructions and procedures for the delegation of new generic domain names.
17. **GAC Input for the Applicant Guidebook.** As the Guidebook was under development, the GAC prepared its GAC Principles Regarding New gTLDs dated March 28, 2007 which set out certain GAC consensus advice to the ICANN Board on public policy principles to apply to the delegation of new gTLDs. The GAC recommended, inter alia, that the New gTLDs should respect the "sensitivities regarding terms with national, cultural, geographic and religious significance"(Claimant ER Request, Annex 1, Section 2.2.1.b). Furthermore, the GAC advised that "ICANN should avoid country, territory or place names, and country, territory or regional language or people descriptions, unless in agreement with the relevant

governments or public authorities.” (Annex 1, Section 2.2.2). Finally, with respect to the implementation of these principles, the GAC advised that if “individual members or other governments express formal concerns about any issues related to new gTLDs, the ICANN Board should fully consider those concerns and clearly explain how it will address them” (Annex 1, Section 3.3). While these set out the expectations of the GAC, it must be recalled that the GAC serves only an advisory role and does not bind ICANN.

18. The gTLD Application Guidebook version 2012-06-04 (the “Guidebook”) is the final version material to the application for and evaluation of the requested domain .PERSIANGULF as well as for the objection procedures which may be taken to the delegation of a proposed domain.

d. The Application for .PERSIANGULF and the Opposition of the GCC

19. On July 8, 2012, the Turkish company, Asia Green IT System Bilgisayar San. ve. Tic. Ltd. Sti (“Asia Green”) applied for the registration of the gTLD .PERSIANGULF in accordance with the Guidebook. The founders of Asia Green are said to be of Persian origin (see Claimant Request for Interim Measures at p. 34 of 269; Annex 3, Asia Green application at page 4 of 50). The purpose of the gTLD .PERSIANGULF is said to provide a forum for serving people of Persian descent and heritage who are living around the world (see Asia Green application at page 5 of 50) and who share common business, cultural and religious interests in the Middle East and Persia specifically.
20. Asia Green also applied for the new gTLD .PARS. The term Pars refers to the ancient country located in southwestern Iran, and in particular Fars province, which is regarded as the cultural capital of Iran and is the original homeland of ancient Persians (Claimant Application, Annex 18, Application for PARS, page 5 of 53). The application for .PARS is essentially the same as that for .PERSIANGULF. Asia Green has in fact been granted the gTLD for .PARS and a registry agreement was signed in early September 2014 for the operation of the .PARS registry and the sale of domain names under that gTLD.
21. While the Asia Green application for .PARS proceeded without objection or opposition, the opposite is true of the .PERSIANGULF application. The GCC has opposed the .PERSIANGULF application consistently since the fall of 2012 throughout the application process.

22. ICANN has in its Response carefully reviewed the application process for .PERSIANGULF to illustrate that ICANN has at all times acted consistently with ICANN's Articles, By-Laws and the Guidebook in considering the Asia Green application and the objections of the GCC before allowing the application to proceed. In light of the position taken by ICANN on the merits of the IRP and this Request for Interim measures, it is appropriate to briefly set out the Guidebook procedures for the .PERSIANGULF application and the chronology of the steps taken by the GCC in opposition to it.

23. **The Guidebook Procedures.** The Guidebook, at 339 pages in length, sets out comprehensive procedures to which a domain application is subjected, procedures relied upon by ICANN in its opposition to the request for interim measures. Following the submission of a completed application with the requisite deposits and evaluation fees and an initial administrative review for completeness, the application is publicly posted on the ICANN website for community review and comment which may be taken into account by ICANN in determining whether an application meets the required criteria for delegation. (Exhibit R-ER-3, Guidebook 1.1.2.1 and 2). Thereafter a number of objection procedures may be triggered including:

- a. An Early Warning Notice which is a notice issued by the GAC indicating that the application is seen as potentially sensitive or problematic by one or more governments, though such a warning is not a formal objection and is not fatal to an application;
- b. A Consensus GAC Advice in which the GAC provides public policy advice to the ICANN Board based on a consensus amongst GAC members that a particular application should not proceed. While also not fatal, such GAC Advice creates a "strong presumption" for the Board that the application should not proceed. Absent a GAC consensus, there is no such presumption. (Guidebook, Articles 1.2.2.7 and Module 3, Section 3.1).
- c. A formal Objection may be filed initiating an independent dispute process leading to an expert determination on the validity of the objection based on specified and limited grounds, one being the Community Objection where there is substantial opposition to an application from a significant portion of the community to which

the gTLD domain may be explicitly or implicitly targeted(Guidebook at Article 3.2.1);

- d. Independent Objection. The Independent Objector is a person appointed by ICANN with significant experience in the Internet community who exercises independent judgement in the public interest in determining whether to file and pursue a Limited Public Interest Objection or a Community Objection to an application (Guidebook, Module 3, Articles 3.2.1; 3.2.2.3; 3.2.2.4; 3.2.5).
- e. Mandatory Government Support for certain Geographic Names. If the proposed domain is a geographic name, as defined in the Guidebook, then the applicant must also file documented support from or non-objection by the relevant or affected government. Such geographic names are narrowly defined to include capital city names, sub-national place names, such as a county, province or state, and certain UNESCO and UN designated regions or sub-regions. However, geographic names which do not fall within these express designations or narrow definitions do not require documented support or non-objection by the relevant government. If there is any doubt, the Guidebook further suggests that the applicant consult with the relevant government and public authority to enlist support or non-objection prior to submission. (Guidebook, Article 2.2.1.4.2)

In the event that an application successfully completes these stages, the application transitions through the delegation process which includes certain testing and technical set up and the negotiation and execution of a registry agreement.

24. The Asia Green application for .PERSIANGULF engaged all of these objection procedures, save the need for obtaining prior government support from affected governments. In that regard, it cannot be disputed that .PERSIANGULF is not within the definition of designated geographic names under the Guidebook. Therefore, Asia Green was not required to obtain the written support from the Claimant or its member states. It is also undisputed that Asia Green did not in fact consult with the Claimant or its members, whether there was any obligation to do so or not. The evidence does show that the Claimant or its member states have consistently opposed the application for .PERSIANGULF and clearly would not have supported the application if consulted.

- 25. GCC Letters of Opposition.** In October 2012, representatives of the governments of the UAE, Bahrain, Qatar and Oman sent separate but similar letters to the Chair of ICANN and to the Chair of the GAC objecting to the delegation of .PERSIANGULF as a new gTLD on two grounds. First, the proposed domain referred to a geographical place whose name was disputed in light of the historical naming dispute over the Gulf. Second, the use of the proposed name targeted countries and communities bordering the Gulf (including the six member states of the GCC) which were not consulted about and did not support the use of this proposed domain, thereby confirming the absence of any community consensus for its use (Claimant ER Request, Annexes 8,9,10 and 11). Therefore, on these basic grounds, the governments objected to the delegation of the proposed domain.
- 26. GAC Early Warning.** On November 20, 2012, the governments of the UAE, Bahrain, Oman and Qatar issued a GAC Early Warning objecting to the delegation and recommending that Asia Green withdraw the application for the same reasons as had been set out in the October letters of objection (Claimant ER Request, Annex 12)
- 27. Review by the Independent Objector.** In December 2012, the Independent Objector completed a review of the naming dispute and the public comments against the .PERSIANGULF gTLD, concluding that an objection on either the limited public interest ground or the community objection procedure was not warranted (ICANN Response, Annex R-ER-5). With respect to the limited public interest ground, the Independent Objector noted that there were no binding international legal norms to settle the issue. Resolutions of the United Nations Conference on the Standardization of Geographical Names urge countries sharing a geographical feature to agree on a name, failing which the separate names used by each country should be accepted. As for the Community Objection, while accepting that there was a clearly delineated community implicitly targeted by the application and that a significant portion of that community opposed the application, the Independent Objector considered it “most debateable” that the gTLD would “create a likelihood of material detriment to the rights or legitimate interests of a significant portion of the targeted community”, that is the Arab communities, which was the threshold requirement under the Guidebook for the launch of an independent objection (ICAAN Response, Exhibit R-ER-5). In the view of the Independent Objector, the new gTLD should neither solve nor exacerbate the naming dispute. Instead it was appropriate to adapt to the *status quo* by taking no

position. He noted the GCC could file its own objection and could apply for the gTLD .ARABIANGULF. Therefore, the Independent Objector considered it inadvisable to file an objection.

- 28. GCC's Community Objection.** On 13 March 2013, the GCC filed a Community Objection to the .PERSIANGULF application. The International Chamber of Commerce ("ICC") was designated as the dispute service provider under the Guidebook and it appointed Judge Stephen Schwebel, a noted American international jurist, to serve as the Expert Panellist to hear and determine this Community Objection.(Claimant Submission, Annex 2, Expert Determination, para. 2.)
- 29. GAC Advice under the Guidebook for Pending Applications and GCC Objections.** As contemplated by the Bylaws, the Guidebook established a framework for the GAC to provide advice to the ICANN Board regarding pending gTLD applications. This is in addition to the general GAC advice provided in 2007 regarding the content of the Guidebook, as referred to in para. 17 above. Under Sections 1.1.2.7 and 3.1 of the Guidebook, any GAC member may raise concerns or sensitivities about any application with the GAC which must then consider and agree on advice to be forwarded to the ICANN Board for its consideration. Members of the Claimant raised the .PERSIANGULF application, amongst others, with the GAC and voiced objections at various meetings. The following GAC meetings and advice have been relied upon.
- 30.** At the April 11, 2013 Beijing meeting, the GAC provided advice to the ICANN Board in respect of a number of gTLD applications. Some advice was on a consensus basis, thereby creating a presumption that the subject applications should not be approved. Other advice was on a non-consensus basis. With respect to a number of geographically based strings, including .PERSIANGULF, the GAC determined that further consideration was warranted and therefore advised ICANN simply not to proceed beyond Initial Evaluation in respect of that string (Claimant ER Request, para 13, Annex 13, GAC Beijing Communique, p 3).
- 31.** In June 2013, the ICANN Board, acting through its New gTLD Program Committee (the "NGPC"), considered and accepted the advice of the GAC with respect to the .PERSIANGULF application, which advice was conveyed through the GAC Beijing Communique relied upon by the NGPC as being the official advice of the GAC. The NGPC decision, and rationale therefore, are set out in a resolution of the NGPC (ICANN Response,

Ex. R-ER-6) which annexed to it a table referred to as a “Scorecard” (ICANN Response, Ex R-ER-7), recording the NGPC Response to each item raised by GAC in the Beijing Communique. With respect to .PERSIANGULF, the NGPC accepted the GAC advice and it was noted in the Scorecard that the advice would not toll or suspend the processing of any of the applications.

32. At the July 13-18 Durban GAC Meeting, the GAC gave further consideration to .PERSIANGULF application , among others. This GAC meeting has generated two documents which contain conflicting information on the deliberation over .PERSIANGULF. The Claimant has relied upon the GAC Meeting Minutes, (Claimant ER Request, Annex 14 in which the discussion was recorded as follows:

“The GAC finalized its consideration of .persiangulf after hearing opposing views, the **GAC determined that it was clear that there would not be consensus on an objection regarding this string and therefore the GAC does not provide advice against this string proceeding.** The GAC noted the opinion of GAC members from UAE, Oman, Bahrain, and Qatar that this application should not proceed due to lack of community support and controversy of the name. [emphasis added]

33. ICANN contrasts this language with the GAC Durban Communique which is received as the official document providing GAC Advice to the ICANN Board. This Communique (Claimant IRP Request, Annex 24) provides that “The GAC has finalized its consideration of the following strings, and **does not object to them proceeding:** ... ii. persiangulf (application number 1-2128-55439”. This language suggests that there was in fact a consensus of the GAC members not to object to the application.

34. The Claimant’s Reply Witness Abdulrahman Al Marzouqi attended the Durban meeting as the representative of the UAE and his evidence makes clear, at paragraphs 5, 6 and 7 of his Statement, that there was no consensus reached whatsoever, whether to support the application or to oppose it. The position taken by the Iranian representative and the opposing position taken Mr. Al Marzouqi for the UAE, apparently shared by others, prevented any consensus on any position regarding .PERSIANGULF. The general discord over geographic names was also reflected in the recommendation in the Durban Communique calling for further collaboration with GAC in refining the Applicant Guidebook for future rounds regarding the protection of terms with national, cultural, geographic and religious significance in accordance with the 2007 GAC Principles referenced above.

35. ICANN Board Response and Notification September 2013. The Durban Communique was relied upon by the NGPC of the ICANN Board as the formal statement of advice from the GAC to ICANN. Therefore, the NGPC noted and considered that GAC advice and responded to it by way of resolution and an attached “Scorecard” as follows:

“**ICANN will continue to process the application** in accordance with the established procedures in the [Guidebook]. The NGPC notes that community objections have been filed with the International Centre for Expertise of the ICC against .PERSIANGULF.” (emphasis added)

This NGPC resolution and the Scorecard were posted online on September 12, 2013 and the minutes and related materials were posted on 30 September 2013 (the “NGPC Resolution and Scorecard”). It is this decision to “continue to process the application” which is said to be the action of the ICANN Board to approve the delegation of .PERSIANGULF and which therefore triggered the 30 period for filing a Request for an IRP. However, with the community objection still pending, the evidence is not clear as to the exact status of the application approval at that time. The ICANN Board and the NGPC did not and presumably would not unequivocally approve the delegation while the community objection was still pending.

36. Community Objection and Expert Determination. The Community Objection proceeded from March 2013 to October 30, 2013 when Judge Stephen Schwebel issued his Expert Determination, dismissing the Objection of the GCC. It must be noted that the necessary elements in support of a Community Objection are different from those required on an IRP. More importantly, they are significantly different from the threshold tests on an application for emergency measures in the context of an IRP. Judge Schwebel found that the GCC had met three of the four necessary elements for a successful Objection. He found that the GCC did have standing as an institution created by treaty having an ongoing relationship with a clearly delineated community, that is Arab inhabitants of the six member states of the GCC. It was plain and obvious that there was substantial opposition by the Arab inhabitants and the community to the application. It was also concluded that the Arab inhabitants would be implicitly targeted by the .PERSIANGULF gTLD. However, Judge Schwebel found that the GCC failed to meet the fourth element in that the GCC did not establish that the targeted community would “suffer the likelihood of material detriment to their rights or legitimate

interests”, as required and defined under the Guidebook. Therefore, the objection was dismissed. He accepted that naming disputes such as that regarding the Gulf can be of high importance to States, “roiling international relations”. However, in his view, the impact of the application .PERSIANGULF was difficult to discern and “it was far from clear that the registration would resolve or exacerbate or significantly affect the dispute”. Echoing the Independent Objector, he noted that the GCC was free to seek registration of the .ARABIANGULF. ICANN has repeated this argument in its Response although no such application for .ARABIANGULF has in fact been made by the GCC.

- 37. October 2013 to December 2014: Contact between GCC and ICANN Leading to the Notice of Independent Review.** ICANN asserted in its Response that the GCC was conspicuously silent for over one year following the NGPC Resolution and Scorecard before filing the Request for Independent Review. ICANN relied on that period of delay as the bases for resisting the application. In its Reply, the GCC has endeavoured to provide an explanation and response to that position with additional evidence in the Witness Statement of Mr. Al Marzouqi on the continued dealings between the GCC and ICANN over the continued opposition of the GCC to the delegation. Following the September 2013 posting of the NGPC Resolution and Scorecard, Mr. Al Marzouqi apparently reached out to ICANN representatives. However, any efforts to resolve the matter were by agreement postponed until after the delivery of the Expert Determination since that Determination may have affected those efforts. After the October release of the Expert Determination, further discussions were apparently had without success, though the evidence of Mr. Al Marzouqi is vague on the details of these discussions.
- 38.** The evidence of Mr. Al Marzouqi is however clear on a significant meeting held between ICANN and the GCC. It cannot be disputed that in June 2014, a meeting was arranged and held during the GCC Telecom Council Ministers Meeting in Kuwait City with the most senior representatives of ICANN, the CEO Fadi Chehade, and senior representatives of the GCC. According to the evidence of Mr. Al Marzouqi, the GCC representatives restated their concerns and objections regarding the application at that meeting. Following the meeting, these concerns were then confirmed in writing by letter dated 9 July 2014 from Mohanned Al Ghanim, Director General of the Telecommunication Regulatory Authority to the CEO of ICANN, Mr. Chehade (Letter Exhibit to the Witness Statement of Mr. Al Marzouqi). It has

not been disputed that this letter was received by ICANN. No written response from Mr. Chehade or ICANN was adduced in evidence, either before or after the oral argument of this application. No written response is referenced by Mr. Al Marzouqi in his statement. Indeed, he suggests that the only response was a suggestion in September by his unnamed “ICANN counterpart” that the GCC *may* have to file a request for independent review.

39. By September 2014, the manner of dealing with certain geographic names remained a live issue. At that time, there was no evidence of a definitive statement from ICANN that a registry agreement was about to be signed for .PERSIANGULF. By contrast, Asia Green had apparently signed a registry agreement for .PARS by early September 2014, which agreement is posted by ICANN online. Some proposed changes to the Guidebook had also been tabled which would require the agreement of relevant governments to the delegation of geographic names as new domains. (Claimant IRP Request, Annex 1, “the protection of geographic names in the new gTLDs process, v.3 August 29, 2014). Although the Claimant attributed this proposal to ICANN (Claimant IRP Request at para. 1), it appears on review to be the work of a sub-working group of the GAC, and not of ICANN itself. The evidence is not clear on this point. In any event, it serves to illustrate that the use of geographic names remained a live issue within the ICANN community of committees while the delegation of .PERSIANGULF remained pending.
40. According to Mr. Al Marzouqi, the handling of geographic names was a topic of continued discussion in October 2014 at the ICANN meetings in Los Angeles, all without a resolution. Thereafter, he advised the GCC in November to proceed with the request for an IRP which it did on December 5, 2014. He also states that at no time during the resolution efforts from September 2013 to November 2014 was it suggested that the GCC would be time barred from proceeding with an IRP.

III. THE INDEPENDENT REVIEW PROCESS AND THE REQUEST FOR INTERIM MEASURES OF PROTECTION

41. ICANN attaches considerable importance to the principle of accountability and to that end has enshrined two important procedures in Article IV of its Bylaws to ensure accountability of decisions: 1. Reconsideration of a Board action; and, 2. Independent Review of a Board decision or action (ICANN Response, Exhibit R-ER-1). The first provides for a review or

reconsideration of any ICANN action by the Board itself for the benefit of any person or entity materially affected by that action. That procedure was not implemented by the GCC. The second is for an Independent Review by a third party of the Board decision or action alleged by an affected party to be inconsistent with the Articles or Bylaws. The Claimant chose to proceed with the Independent Review Process, rather than a Reconsideration, as it was entitled to do.

42. Bylaw Article IV, Section 3 sets out the detailed procedures for the IRP and the following requirements were urged as material to this application:

- a.** A Request for IRP must be filed within 30 days of the posting of the Board meeting minutes said to demonstrate a violation of the Articles or Bylaws(Art. IV, Section 3.3);
- b.** In comparing the contested action with the Articles or Bylaws, the IRP panel must apply a standard of review that is specifically and narrowly defined, to focus on the following three questions(Art. IV, Section 3.4):
 - i.** Did the Board act without conflict of interest in taking its decision?
 - ii.** Did the Board exercise due diligence and care in having a reasonable amount of facts in from of them?
 - iii.** Did the Board members exercise independent judgement in taking the decision believed to be in the best interests of ICANN?
- c.** There shall be a standing panel of IRP panel members from which a panel can be readily constituted and all proceedings shall be administered by an international dispute provider (Art. IV, Section 3.6).
- d.** The IRP Panel has specific and limited remedial authority (Art. IV, Section 3.11) to order, *inter alia*:
 - i.** Summary dismissal for frivolous or vexatious requests;
 - ii.** A declaration whether an action or inaction is inconsistent with the Articles or Bylaws; or,
 - iii.** A recommendation to the Board to stay any action or decision until such time as the Board reviews and acts upon the IRP opinion.

43. Prior to initiating a request for an IRP, a complainant is encouraged under the Bylaw to enter into a cooperative engagement process which is a voluntary ICANN process with the detailed

procedures being incorporated by reference into Bylaw Article IV, Section 3. These procedures include the tolling of the time for filing an IRP during each day of the cooperative engagement process up to fourteen days, unless a longer extension is mutually agreed in writing.

44. ICANN has also prepared the Supplementary Procedures for the IRP which confirmed the designation of the ICDR as the Independent Review Panel Provider. The ICDR Rules, together with the Supplementary Procedures and the Bylaws govern the IRP process. While the Supplementary Procedures expressly exclude the emergency measures of protection under the ICDR Rules (Paragraph 12, Supplementary Procedures), certain specified interim measures of protection may be recommended by an IRP Panel to the Board. These include a stay of any decision of the Board, such measure being consistent with those permitted under the Bylaw. As noted earlier, ICANN has agreed for the purposes only of this proceeding that an emergency arbitrator or panelist be appointed with the authority to issue an interim declaration to the ICANN Board as an emergency measure.

45. **Claimant's Position on Emergency Interim Measures.** The main submission put forward by the GCC in support of its request for emergency measures can be briefly summarized as follows:

- a. Article 6 of the ICDR Rules applies as no IRP panel has been appointed. Since ICANN is about to sign a registry agreement for .PERSIANGULF, the IRP Request will be rendered moot absent emergency interim relief (Claimant's ER Submission, para. 16);
- b. The four part test for establishing an entitlement to emergency interim relief have been met on the evidence, specifically:
 - i. *Urgency.* The GCC will be deprived of a meaningful independent review if ICANN signs the registry agreement.
 - ii. *Necessity.* There is no harm to either ICANN or to applicant, Asia Green, which outweighs the harm to the GCC absent any emergency interim measures. While Asia Green may be delayed in the processing of its pending application, such delay will cause no prejudice as Asia Green has the registry agreement for the .PARS gTLD which is intended to serve the

same market and constituency as it intends to target with .PERSIANGULF.

- iii. *Protection of an Existing Right.* GCC has a right to a meaningful IRP in accordance with the ICANN Bylaws which will be protected by the relief sought. That right will be useless without the emergency relief.
- iv. *A Reasonable Possibility of Success on the Merits of the IRP.* The GCC emphasized that the standard of establishing a “reasonable possibility of success” is a lower standard than a “reasonable likelihood” of success for the purpose of showing that ICANN acted in a manner inconsistent with numerous “guidelines”. In the Claimant IRP Request dated December 5, 2014, the GCC placed emphasis and reliance on the GAC Principles Regarding New gTLDs presented March 28, 2007 and certain other GAC advice arising from GAC meetings in 2013 which ICANN is said to have ignored (see also Claimant’s ER Request, paragraphs 21 – 25).

46. Respondent’s Position on Emergency Interim Measures. ICANN resists the application for interim measures essentially on the general ground that ICANN did everything it was required to do under the applicable Articles and Bylaws and that it properly followed the procedures contemplated in the Guidebook. ICANN also submitted three specific grounds for denying the requested relief which can be briefly summarized as follows:

- a. The GCC is not reasonably likely to succeed on the merits of the IRP for two basic reasons. First, the IRP Request was filed long after the expiry of the 30 day filing period for doing so and is therefore time barred. Second, no ICANN Board action has been identified by the GCC said to violate the Articles or Bylaws.
- b. The unreasonable delay of over one year by the GCC in bringing the Request in and of itself justifies the dismissal of the request and serves to underscore the lack of any urgency, necessity and harm to GCC.
- c. The GCC has no demonstrable harm which outweighs the harm to others like Asia Green which has invested time, energy and money in its application. The integrity of the application process for which ICANN is responsible will also be harmed. The GCC will not be harmed as it can easily apply for .ARABIANGULF in order to serve its communities.

ICANN also reviewed in detail the procedures to be followed under the Guidebook and Bylaws and, based upon a detailed review of the chronology, submitted that ICANN did everything required of it to consider the concerns raised by the GCC members. In so doing, it took no steps inconsistent with the Articles or Bylaws.

47. Reply of the Claimant. In its Reply, the GCC addressed the key responding submissions of ICANN as follows:

- a. The ICANN decision and action in issue is well known and obvious – the decision to approve Asia Green’s application for the new gTLD .PERSIANGULF (GCC Reply, para 11).
- b. The IRP Request is not time barred as ICANN has by its conduct from September 2013 to November 2014 effectively extended the time for filing as a result of ongoing discussions between the GCC and ICANN to resolve the issue, some of which involved the most senior executives of both organizations. Informal discussions continued through September and October and it was suggested to GCC by an unnamed ICANN representative that it may have to file an IRP request to reach a resolution. Therefore, there was no unreasonable delay as the GCC then proceeded to prepare and to file the Request dated December 5, 2014(GCC Reply, para, 6-9,17).
- c. The GCC also asserted that ICANN’s action were inconsistent not only with the GAC advice previously identified, but also with certain specific core values of ICANN enshrined in Article 1, Section 1 of the Bylaws which are to guide decisions and actions of the Board, namely:
 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;
 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness;
 11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments’ or public authorities’ recommendations.
- d. As to the balancing of the relative harm, whether the interim measures are granted or not, the GCC asserted that the harm to it by a denial of relief would be irreparable as it would

lose the valuable right to an independent review. By contrast, ICANN has offered no evidence of harm to it, nor to Asia Green, which would outweigh the harm to the GCC.

48. The positions of both parties were further developed and clarified in oral argument on the application heard by way of telephone conference call on December 23, 2014 which was approximately one and one half hours in duration.

IV. ISSUE FOR DETERMINATION ON THE INTERIM DECLARATION

49. Is the GCC entitled to an interim declaration by way of an interim measure of protection that ICANN refrain from signing a registry agreement for .PERSIANGULF pending the hearing of the GCC Request for an IRP? Specifically, on the limited evidence available, has the GCC satisfied the following tests proposed by the parties for the grant of interim relief:

- a. urgency;
- b. necessity;
- c. protection of an existing right; and,
- d. a reasonable possibility of success on the merits of the IRP?

V. DISCUSSION, ANALYSIS AND REASONS FOR INTERIM DECLARATION

50. The parties in their written and oral submissions have analogized the independent review process and this request for interim emergency measures within this IRP to an international arbitral proceeding under the ICDR Rules and the Supplementary Procedures. It is generally accepted that interim or provisional measures are intended and designed to safeguard the rights of the parties, to avoid serious injury pending the hearing of a dispute and to thereby ensure that the dispute process may function in a fair and effective manner. Interim measures protect both the rights of a party and the integrity of the dispute process. While some measures may be aimed at preserving evidence critical to the disposition of the main dispute, other measures are intended to preserve a factual or legal status quo to safeguard a right, the recognition of which is sought before the tribunal hearing the substantive merits of the particular dispute (see Gary Born, *International Commercial Arbitration*, Kluwer, 2009, Vol. II at p. 1944). The necessary elements of proof will differ depending on the nature of the interim emergency relief sought, whether to preserve evidence or to preserve the status quo. Here, the requested interim emergency measure is in the nature of injunctive relief to restrain

an action, the execution of a registry agreement, in order to preserve the status quo pending the completion of the IRP.

51. The ICDR Rules expressly provide the power to grant interim measures, such as injunctive relief, including on an emergency basis under Article 6 prior to constitution of a panel. That article applies here by express agreement. Such extraordinary relief prior to the determination of the substantive merits is discretionary and largely fact driven. The ICDR Rules and the Supplementary Procedures are silent as to the necessary tests to guide the exercise of discretion to award such relief. The parties have referred to numerous authorities, some diverging, on the appropriate factors to consider, particularly with respect to the extent of an assessment and consideration of the substantive merits of a case. These authorities include not only U.S. domestic court cases and international arbitral institutional rules and awards, but also a prior decision of another ICANN IRP panel under the ICANN Bylaws. Given the divergence between the parties on the applicable test for considering the substantive merits, it is appropriate to clarify and confirm the tests emerging from the authorities to guide the exercise of discretion in awarding any interim emergency relief.
52. The Claimant has relied heavily on the decision of the ICANN IRP Panel in *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50 117 T 1083 13 (12 May 2014) in which an IRP Panel gave relief on an application for interim measures based on a four part test requiring proof of: (1) urgency; (2) necessity; (3) protection of an existing right; and, (4) a prima facie case or reasonable possibility of success on the merits (See Claimant ER Request, Annex 15, Decision at para. 37). ICANN has not put the first three criteria in issue, though each merits some elaboration. With respect to the fourth criterion, ICANN appeared to have accepted the applicability of that element, but then argued that the GCC has no reasonable *likelihood* of success for specific reasons.
53. The Claimant has also adopted the argument, which found success in the *DotConnectAfrica* IRP Panel decision, that interim relief was warranted as ICANN had failed to establish a standing panel of IRP panellists, as required under the Bylaws. In that case, the failure to establish a standing panel delayed the constitution of a panel for the specific case and significantly impaired the ability of the claimant to seek timely relief. There, the Panel found that the need for interim relief arose directly from the failure of ICANN to scrupulously honour its own procedural Bylaws. That argument does not carry the same weight or force in

this case as ICANN has designated the ICDR as the provider of panellists to serve on the IRP panel and the ICDR has acted promptly and efficiently in constituting a panel.

54. Here, the Request for an IRP was filed on December 5, 2014 and an IRP panellist was appointed on an emergency basis within four days, on December 9, 2014, with ICANN agreeing to the application of the ICDR Rules for emergency measures. A brief procedural hearing was held on the December 9 and the need for immediate emergency relief was then addressed but found unnecessary due to the undertaking of ICANN not to sign the registry agreement for .PERSIANGULF pending this application. The procedure for the appointment of the IRP panel or an Emergency Panel worked effectively and had no adverse impact whatsoever on the ability of the Claimant to seek effective interim relief. Interim emergency relief is not necessary or warranted based on this argument regarding the creation of the standing panel that found success in the *DotConnectAfrica* case. This case must be determined on the application of the generally accepted criteria for interim measures of protection.

a. Urgency or Irreparable Harm

55. The element of urgency imports the notion that the applicant will suffer imminent irreparable or serious harm if no interim relief is granted before the IRP hearing process is concluded at which time entitlement to relief for reparable or other harm may be finally addressed in the normal course (A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, Sweet & Maxwell, 4th ed. 2004, para. 7-29 and 7-30; Born, *supra*, page 1981 - 1982). Here, the GCC argues that its right to a fair and effective IRP process will be lost entirely if ICANN proceeds to sign a registry agreement for the disputed domain before the IRP proceeding can be held and completed. The relief sought by the GCC in its IRP Request expressly includes a declaration “requiring ICANN to refrain from signing the registry agreement [for .PERSIANGULF] with Asia Green or any other entity”(Claimant IRP Request, para. 75).

56. It is undisputed that ICANN intends to sign a registry agreement with Asia Green. ICANN’S undertaking to refrain from doing so is in place only pending the application for emergency measures and not until the final declaration in the IRP process. ICANN also intends to use its standard form registry agreement, a copy of which is available online. The registry agreement is for a term of ten years, subject to successive ten year renewals. As discussed

during oral argument, the terms of the standard registry agreement do not entitle or permit ICANN to terminate the agreement, without breach or compensation, if an IRP is successful and an IRP Panel declares that the ICANN should not have signed that particular agreement. The execution of the registry agreement cannot be readily and lawfully undone.

57. While ICANN argues the absence of any harm to the GCC, irreparable or otherwise, by the delegation of the domain and the signing of a registry agreement, it does so principally in the context of two other elements for relief, namely necessity or the balancing of the harm and also the absence of any reasonable likelihood of success on the merits of the IRP. ICANN's position on these points is discussed in detail below under those particular elements.
58. ICANN also argues that any perceptions or adverse impact arising from the registration of .PERSIANGULF can be simply counteracted by registration of the gTLD .ARABIANGULF by the GCC. There are two difficulties with this argument for this application. First, it does not address the importance of the right to a fair and effective IRP process and the loss of that right. Second, it raises the issue of the existence and scope of any duty or obligation to mitigate on a party which may suffer irreparable harm by the actions of another. Should the GCC be required to undertake the effort, time and expense of applying for and operating a competing registry in an effort to counteract the impact of the disputed domain? In any event, would such a competing registry avoid or undo harm caused by the other? This issue will be also discussed in connection with the primary arguments of ICANN on the consideration of the merits of the IRP. Suffice it to say at this point that the option of GCC applying for .ARABIANGULF does not avoid the harm to the GCC in respect of the IRP process, absent any interim relief nor does it negate the harm arising from the delegation of .PERSIANGULF.
59. For this application, this Panel accepts that the right to an independent review is a significant and meaningful one under the ICANN's Bylaws. This is so particularly in light of the importance of ICANN's global work in overseeing the DNS for the Internet and also the weight attached by ICANN itself to the principles of accountability and review which underpin the IRP process. If ICANN proceeds to sign the agreement, the integrity of the IRP process itself will be undermined. The Claimant's right of review will be of no consequence whatsoever. The signing of the registry agreement will frustrate the Claimant's IRP Request, rendering the issue of injunctive relief moot as no IRP Panel would then make a declaration

that ICANN refrain from signing. This constitutes clear irreparable harm which will be suffered by the Claimant absent interim relief at this stage of the process. This harm is not simply a possibility but is a reasonable likelihood if no interim is granted.

b. Necessity or the Balancing of Harm

60. The test of necessity imports an assessment of the relative proportionality of harm suffered, that is, a consideration and balancing of the harm to the Claimant if the interim relief is not granted with the harm caused to the Respondent if the relief is in fact ordered. The irreparable harm to the Claimant is already described above.
61. In terms of potential harm arising from or caused by the grant of the requested declaratory relief, ICANN relies on harm to itself and also to the Applicant Asia Green. ICANN is rightly concerned about maintaining the integrity of the gTLD application process and processing the application quickly and efficiently. Beyond that, counsel candidly admitted, when asked in oral argument, that there will be little harm to ICANN itself in the event that interim emergency relief is granted. It can also be said that the integrity of the ICANN independent review process, to ensure accountability and transparency in decision making, is also an integral part of ICANN's application process which merits promotion and protection. While some prejudice by delay to the gTLD application may arise from the granting of the requested interim relief, that is in part counterbalanced by the advancement of the integrity in and legitimacy of the IRP process. Furthermore, the delay in the IRP is likely to be far shorter than the delay to date in the processing of the application. It is not clear what has caused the delay from October 2013 to November 2014 in the decision to sign the registry agreement, other than, as suggested by counsel for ICANN, the routine processing of the application and the negotiation of the agreement. In any event, any harm to ICANN by the grant of interim relief does not outweigh the harm to the GCC through the deprivation of a meaningful IRP process if no relief is granted and the registry agreement is signed.
62. Counsel for ICANN also pointed to and relied on the harm caused by the delay in the delegation to the applicant Asia Green which has invested time, effort and money into the pursuit of its application. That harm is said to be real and significant, with added continuing expense and delay in the conduct of business using the domain. It is said that this real harm stands in contrast to the vague allegations of harm to the GCC which may be caused by the

delegation of the disputed domain, particularly when the GCC could itself apply for and obtain .ARABIANGULF. It may be argued that the harm to Asia Green is not relevant to a consideration of relief on this application as Asia Green is not a party to this proceeding. However, in my view it is appropriate to consider such harm as it will also reflect upon and reinforce the potential reputational harm to ICANN with respect to the integrity of the application process.

63. In considering the harm to Asia Green, it must be remembered that Asia Green already has access to another delegated domain .PARS, for which a registry agreement is signed and is intended to target the same market as .PERSIANGULF. Asia Green will not be precluded from actively developing its business. Counsel for ICANN candidly admitted during oral submissions that he was not certain of the need for Asia Green to have two registries for essentially the same market, but noted that Asia Green had in any event spent considerable time and money for the disputed domain. Apart from the general impact of delay, there was no specific evidence of harm to Asia Green, such as a particular lost business opportunity.
64. In my view, the harm to the GCC absent any interim relief clearly outweighs any harm to Asia Green which may be caused by the grant of interim relief requiring ICANN to refrain from signing a registry agreement for .PERSIANGULF pending the IRP process. Any delay can be kept to a minimum by the prompt constitution of the IRP panel through the ICDR and a reasonable and efficient schedule for the conduct of the review. The application process has not in any event been proceeding in an overly expeditious manner, given that the application was made in July 2012. By September 2013, the NGPC Scorecard noted that ICANN will “continue to process the application” and it was only in November 2014 that the signing of a registry agreement appeared imminent. There is no evidence that a few more months of delay during the IRP will cause any specific prejudice or harm to Asia Green.
65. In balancing the harm which may arise, whether interim relief is granted or not, it is clear on a balance of probabilities and not mere possibilities, that the harm to the GCC absent any relief is irreparable and that the loss of an effective meaningful IRP process outweighs any harm to either Asia Green or ICANN arising from delay in the signing of the registry agreement.

c. Protection of an Existing Right

66. This criterion was accepted and applied by the IRP Panel in the *DotConnectAfrica* Decision on Interim Measures of Protection, relied upon by the Claimant, although it is not entirely

clear where this requirement originates in the authorities and what is intended by it. This requirement is not normally separately identified either in case law or in authoritative texts as a specific criterion for the grant of interim injunctions or interim measures of protection. It is perhaps plain and obvious that the grant of an interim measure to preserve a factual or legal status quo is virtually always dependent on the assertion of an identified legal or equitable right. However, some interim measures not applicable here, such as an order to freeze assets to preserve rights of execution, may relate to only potential rights as opposed to existing rights. In any event, both the Claimant and the Respondent have proceeded on the basis of the existence and application of this third criterion.

67. The ICANN Bylaws, Article IV, Section 3.1 establishes “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.” As stated in the Reply, it is this right which the Claimant seeks to protect, failing which the review will become meaningless after the execution of the registry agreement by ICANN. The protection of this right for the independent review of a Board decision to delegate the domain and enter into a registry agreement is an existing right which meets this pre-requisite for the grant of interim emergency relief.

d. A Reasonable Possibility that the Requesting Party will succeed on the Merits

68. The consideration and impact of the merits of the IRP is the main point of contention between the parties. They disagree not only on the basis of the available evidence, but more fundamentally on the definition and scope of this legal requirement. The Claimant maintains that it need show only a *reasonable possibility* of success on the merits of the IRP. The Respondent, while appearing to confirm the applicability of that test in its written submission (ICANN Response, para. 42), also submitted a more stringent standard that the Claimant must show a *reasonable likelihood* of success, which, ICANN submits, cannot be established on the evidence.

69. **The Applicable Test.** In the *DotConnectAfrica* Decision on Interim Measures, the IRP panel considered the competing tests of proof of a *prima facie* case and proof of a reasonable possibility of success and found that there was no meaningful difference between those two tests. They are essentially one and the same standard. That panel in *DotConnectAfrica* also

went on to state that interim relief should be available “on a standard of proof which is less than required for the merits under applicable law”. This panel agrees with that finding. It should also be noted that in some fora, the requisite standard is couched in terms of whether a preliminary assessment reveals that there is a serious question to be tried or determined which is a standard the same or very similar to the standard of proof of *prima facie* case or proof of a reasonable possibility of success. The threshold is relatively low.

70. The standard of proof of a reasonable likelihood of success on the merits, as submitted by the Respondent, sets the bar too high for interim relief. That is essentially the same standard as balance of probabilities which is the normal civil standard to be applied at the hearing of the substantive merits of the IRP. The lesser standard of a *prima facie* case or a reasonable possibility of success is more appropriate for a number of reasons.
71. On an emergency interim application such as this, the submissions and the evidence are usually incomplete, largely due to the time constraints in developing the evidentiary record. That is the case here. More evidence and detailed submissions can be expected at a substantive hearing. Given the limited evidentiary record, the tribunal must refrain from prejudging the merits of the case on the interim relief application. If the higher standard of reasonable likelihood is applied, it is inevitable that the tribunal will be engaging in an early determination of the merits. A prejudgement of the merits cannot be avoided if the same standard of proof is applied for emergency interim measures as for the substantive hearing. The lesser standard facilitates a provisional assessment without any binding or preclusive impact on the merits hearing. Once the threshold is met, the focus of the analysis will be on the test of irreparable harm and the balance of the respective harm pending the decision on the merits.
72. Where the grant of interim relief may in effect amount to a final determination and put an end to the entire dispute, a more extensive review of the merits may well be appropriate to weigh the likelihood of success along with the irreparability of harm and the balance of the respective harm. However, that is not this case. The grant of interim relief will not foreclose the completion of the IRP process. However, the refusal of interim relief likely will have that effect.
73. The standard of a *prima facie* case or reasonable possibility of success quite properly requires some consideration of the legal sufficiency and relative strength of the respective parties’

cases. Therefore, frivolous and weak cases can be identified and rejected to ensure that the interim measure of protection does not become an unjustified lever or windfall that can damage an innocent party (see Born, *supra*, at page 1992). In that regard, it cannot be said that the merits of the GCC's IRP Request is either frivolous or vexatious. It appears to raise serious questions about the decision making process of the ICANN Board under the Bylaws in connection with the approval of the application for .PERSIANGULF as a new gTLD.

- 74. The Obligation of ICANN under the Bylaws.** The starting point for the discussion on whether the GCC has shown a reasonable possibility of success on the merits of the IRP is a clarification of the obligations of the ICANN Board under the Articles and Bylaws against which the actions and decision of the Board must be compared and measured. While the Claimant initially relied upon the various instances of GAC advice to the ICANN Board as the basis of its request for review, the Bylaws do not oblige the ICANN Board to accept any or all of the advice of the GAC or to take actions that are consistent only with the GAC advice. The Bylaws require the ICANN to take that advice into account and, where the advice is not followed, to provide reasons for so doing. (Exhibit R-ER-1, Bylaw Article XI, 2.1.j).
- 75.** In its Reply, the GCC also expressly referred to and relied upon the core values set out in Bylaw Article I, Section 2.4, 2.8 and 2.11, quoted earlier at paragraph 47.c.1, and the obligation of the ICANN Board to be guided by those core values in making decisions. The Claimant identified these three of the eleven core values as the yardstick to measure and to assess the ICANN Board action to delegate the domain and to enter into a registry agreement with Asia Green. However, the last paragraph of Article I, Section 2 of the Bylaws makes it clear that the application of the individual or specific core values is necessarily qualified. Due to the breadth of the general language in the stated core values, the closing paragraph of Section 2 expressly provides that "situations will inevitably arise in which perfect fidelity to all eleven core values is not possible". The Board has latitude in its decision making and must of necessity exercise discretion in the balancing of all of the core values to arrive at any decision. Not all core values may be advanced to the same extent.
- 76.** By the same token, the closing sentence of Article 1, Section 2 also sets out certain basic requirements with which the ICANN Board must comply in its decision making. According to the last sentence of Section 2, ICANN *shall*: (1) "*exercise its judgment*"; (2) "*to*

determine which core values are most relevant and how they apply to the specific circumstances of the case at hand"; and, (3) *"to determine, if necessary, an appropriate and defensible balance among competing values"*. It is against these requirements that the relevant decision in issue of the ICANN Board must be assessed on the evidence. The ICANN Board does not have an unfettered discretion in making decisions. In bringing its judgment to bear on an issue for decision, it must assess the applicability of different potentially conflicting core values and identify those which are most important, most relevant to the question to be decided. The balancing of the competing values must be seen as "defensible", that is it should be justified and supported by a reasoned analysis. The decision or action should be based on a reasoned judgment of the Board, not on an arbitrary exercise of discretion.

77. This obligation of the ICANN Board in its decision making is reinforced by the standard of review for the IRP process under Article IV, Section 3.4 of the Bylaws, quoted at paragraph 42 b. above, when the action of the Board is compared to the requirements under the Articles and Bylaws. The standard of review includes a consideration of whether the Board exercised due diligence and care in having a reasonable amount of facts before them and also whether the Board exercised its own independent judgement.
78. **The Decision in Issue.** The Respondent submitted, in part, that the Claimant had failed to identify any "action or decision" of the Board capable of review. The Respondent then also argued in the alternative that the only Board decision that could have injured the GCC is the September 2013 decision to "continue to process the application" in accordance with the Guidebook, following the GAC Durban Communique that the GAC did not object to the application (ICANN Response at para. 48). The Claimant submitted in Reply that the Board action in issue is well known and is simply the decision to proceed to delegate the domain .PERSIANGULF and to enter into a registry agreement. It is not disputed that ICANN is in fact about to enter a registry agreement with Asia Green for that domain.
79. The Emergency Panel accepts the Claimant's position that the Board decision and action in issue is the decision to proceed to delegate the domain .PERSIANGULF to Asia Green and to enter into a registry agreement, all pursuant to the Guidebook. If not for that decision, this Emergency Request would not have been brought. That decision is capable of review.

80. The only available documentary evidence of that Board decision adduced by the parties is the posting of the NGPC Resolution and Scorecard on September 12, 2013 to “continue to process the application”, followed by the posting on September 30, 2013 of the Minutes and Briefing Materials related to that decision. There are no other Board resolutions or memoranda after September 2013 which otherwise address or confirm the Board deliberation or decision to make the delegation. It is in relation to the posting of the Resolution, Scorecard and Minutes that the Respondent has based its main arguments against any emergency interim relief, namely that the request for the IRP was time-barred or was in any event unreasonably and fatally delayed. It is appropriate to now address these two main related arguments asserted by ICANN regarding the September decision.
81. **The Issues of Time-Bar and of Delay.** ICANN has relied on the requirement under Article IV, Section 3.3 of the Bylaws that the request for an IRP “must be filed within 30 days of the posting of the Board meeting (and the accompanying Board Briefing Materials, if available).” It is said that the 30 day time limit is mandatory and, in this case, commenced on September 30, 2013. Therefore the filing period expired on October 30, 2013. As a result, the December 5, 2014 filing of the IRP Request is, according to the ICANN, patently out of time. In addition, ICANN asserts that this lengthy delay from October 2013 to December 2014 was unreasonable and was left unexplained in the Claimant’s initial submission. Accordingly it is submitted that such delay, in and of itself, further justifies the denial of extraordinary discretionary relief.
82. The GCC responded to the time-bar and delay arguments in its Reply. The GCC relied on the Witness Statement of Mr. Al Marzouqi which outlined the ongoing contact between him, as the GCC representative, and ICANN over the disputed domain, including the high level meeting in June 2014 to attempt to resolve the issue. Therefore, the GCC asserted that any time limit for filing the IRP Request was extended by ICANN’s conduct.
83. In the view of the Emergency Panel, the evidence of the ongoing contact between representatives of ICANN and the GCC from October 2013 to November 2014 supports a reasonable possibility that the time period for the filing of the IRP has been extended by the conduct of ICANN representatives and that the delay, as explained, is reasonable. The evidence of Mr. Al Marzouqi, while vague in some of the detail, provides a number of reasonable examples of such conduct. First, as of September 30, 2013, the Expert

Determination was still pending and was not released until October 30, 2013. The alleged discussion with an unidentified ICANN representative to await the delivery of the Expert Determination before attempting any resolution is reasonable under the circumstances. Otherwise, the 30 day time limit would have expired by the time the Expert Determination was delivered. Second, and most importantly, it is beyond dispute that the President of ICANN met with the representatives of the GCC in early June 2014 with a follow up letter being delivered by the GCC representative to the ICANN President confirming a request not to proceed with the delegation of the disputed domain. The circumstances of the meeting and the unanswered follow up letter, while not expressly referring to the deadline for filing an IRP, are also suggestive of an extension of that filing period. Indeed, the tenor of the evidence with such a high level meeting in June 2014 reasonably suggests that the issue of the delegation was still under active consideration with no final decision having in fact been made. Third, Mr. Al Marzouqi also states that another ICANN representative, again unnamed, suggested in September 2014 that the GCC may have to file a request for IRP. The available evidence and reasonable inferences from that evidence support the defence that the time limit was extended for commencing the IRP, and there is a reasonable possibility that the GCC will succeed on this issue. It is recognized that the evidentiary record is far from complete and additional evidence can be expected on this issue on the IRP itself. After a full review of the evidence on the IRP and the application of the appropriate standard of proof, the IRP panel may well find that the time limit for filing was mandatory and that it expired on October 30, 2013 without any extension. However, at this stage, it is sufficient to find that there is a reasonable possibility that the time has been extended under the circumstances.

84. Counsel for ICANN also argued that the time limit for the IRP filing could be tolled or delayed, but only through the formal invocation of the Cooperative Engagement Process prior to the commencement of the IRP as provided for in the Bylaws Article IV, Section 3, para. 14. This is a voluntary process encouraged by ICANN to try to resolve issues or at least narrow the issues for a reference to the Board. A conciliation process following the commencement of an IRP is also encouraged. According to the copy provided by ICANN, the Cooperative Engagement procedure has an even shorter time limit for commencement, being only 15 days of the posting of the Minutes of the Board. While it is undisputed that the formal Cooperative Engagement Process was never started, it is also undisputed that an

analogous informal engagement process was in fact undertaken involving the most senior officers of both ICANN and the GCC with the apparent purpose of resolving the issues. The availability of the Cooperative Engagement Process is not the sole method for extending time for filing the IRP and is not determinative of this issue whether ICANN has extended the time for the commencement of an IRP by reason of its conduct in connection with the undisputed efforts at resolution undertaken in 2014, especially the June 2014 meeting with the senior representatives of the organizations and the July 9 letter.

85. Based on the limited evidence available at this stage, there is a reasonable possibility that, by reason of ICANN's conduct, any time limitation for filing an IRP was extended or otherwise would not be enforced. The Reply evidence of the GCC also provides a reasonable basis for a possible explanation of the delay of over one year, an explanation which may neutralize the defence of delay or laches to the grant of discretionary interim emergency relief.
86. During the IRP process, these issues can be more fully ventilated with additional evidence from both parties about the meeting and contacts. As ICANN did not file any evidence on this Emergency Request of the involvement and conduct of its representatives throughout 2014, it will have the opportunity to do so for the IRP hearing. This evidence will also further assist the determination of whether the 30 day time limit for filing the IRP under the Bylaws is mandatory or directory only or was extended or waived. The IRP Panel will therefore have a fresh opportunity on a complete evidentiary record to further consider the defences of the time bar and the delay.
87. **Comparison of the Bylaws with the Board's Decision and Decision Making Process.** The merits of the IRP will involve a determination of whether the action and decision of the Board with respect to the delegation and registry agreement for .PERSIANGULF was made in a manner consistent with the requirements under the Articles and Bylaws. The IRP Panel will make this comparative determination on the basis of a standard of balance of probabilities. At this stage, only a preliminary assessment can and should be made on these issues. It is sufficient to identify the presence of serious issues or serious questions and determine if there is a reasonable possibility of success on the available evidence. It is also essential to avoid any prejudgement or findings on the merits of these issues and to avoid influencing the IRP Panel in its eventual task.

88. The Respondent asserts that it has acted consistently with the Bylaws throughout. Based on a careful review of the Bylaws and the evidence, there are in my view a number of serious questions about the process of the Board's decision making and for which the Claimant has a reasonable possibility of establishing that the Board, or the NGPC has not met the Bylaw requirements in its decision making process. A series of more focussed questions about the decision making process emerge from the analysis of the evidence, including the following:

- a. Did the ICANN Board or the NGPC acting for the Board exercise its own independent judgment in deciding to proceed to delegate .PERISANGULF and to enter into a registry agreement or did it simply adopt the GAC advice in the GAC Durban Communique that the GAC did not object, without doing its own independent assessment?
- b. Did the NGPC identify, consider and take guidance from the core values as set out in Article I, Section 2 of the Bylaws, including values 4, 8, and 11 relied upon by the Claimant? Did the NGPC determine which of the core values were most relevant to the issue of the delegation of .PERSIANGULF in light of the history of the opposition and if so what is the evidence of that?
- c. Did the NGPC determine a balance of the competing values identified in Article I, Section 2 of the Bylaws with respect to the applied for gTLD and the objections to it? If so, what was it and on what was it based? Is that balance defensible, how, and where is that determination recorded? What is the evidence to confirm that a defensible balance of the competing values has been made?
- d. Did the NGPC exercise due diligence to consider a reasonable amount of facts in making its decision to proceed with the delegation under the circumstances? Apart from taking a position consistent with the GAC advice set out in the Durban Communique, what other facts were relied upon by the NGPC? Did the NGPC consider the opposition of the members of the GCC to the domain application as expressed in the Minutes of the Durban meeting, or alternatively was the NGPC entitled or obliged to disregard that opposition due to the wording of the Durban Communique? Given the delay from the September 2013 resolution to November 2014 when the registry agreement was about to be signed, was the NGPC obliged to consider and did it consider, in exercising due diligence, the facts of the

continued opposition of the GCC and the events occurring during that period, such as the June 2014 meeting between ICANN representatives, including President Chehade, and representatives of the GCC, as well as the July follow-up letter? Where is the evidence of that consideration in its decision making? Should the Board consider and weigh the August 29, 2014 policy statement setting out the concerns of the Sub-working group that geographic names generally should be avoided in absence of agreement of relevant affected governments?

- e. When did the ICANN Board in fact decide to delegate the domain? Is it in fact on September 10, 2013 with the adoption of the Scorecard in response to the GAC Durban Communique or was the decision made at a later date, such as after the June 2014 meeting of the ICANN President and the GCC representatives in Kuwait City, in which case how was that decision made?

89. The September 2013 Board decision, as taken, was simply to “continue to process the application in accordance with the established procedures in the AGB”. That decision does not reflect any assessment or application of the competing core values or a consideration of the three stated values relied upon by the GCC. Nor does it provide a statement of a defensible balance of the competing values. It is clear that the ICANN Board was aware of the objections of the GCC and its constituent governments to the application, both before and after the September resolution to continue to proceed. The evidence does not establish that this governmental opposition was taken into account at all in the Board decision to proceed with the delegation of the .PERSIANGULF domain to Asia Green, given the apparent reliance on the wording of the Durban communique. It is certainly not clear under the Bylaws that the evidence of the objections by the GCC and its member states, raised after the September 10 resolution and before the signing of the registry agreement, should **not** be taken into account. To the contrary, core value in Article I, Section 2.11 suggests that recommendations of governments are to be duly taken into account. That is a significant and serious issue for consideration on the IRP in respect of which the parties will be entitled to adduce additional evidence. On the basis of the available evidence, the Claimant has a reasonable possibility of success on the merits of the IRP.

90. ICANN has also asserted that “ICANN did precisely what it was supposed to do pursuant to the Guidebook” and that there “is no Article [of Incorporation], Bylaws provision or

‘guideline’ that requires the ICANN Board to do anything more than follow the processes that it has followed” (ICANN Response, para. 54). That argument itself raises a serious and fundamental question to be considered and determined by the IRP Panel about the inter-relationship of the obligations on ICANN under the Guidebook and the Bylaws. Does compliance with the Guidebook procedures for the processing of a domain application satisfy the obligations on the ICANN Board under Bylaws Article 1, Section 2 in terms of the consideration of competing relevant values and the determination of an appropriate and defensible balance of those competing values? That is not at all obvious and the circumstances suggest an answer in the negative. Upon completion of the various procedures for evaluation and for objections under the Guidebook, the question of the approval of the applied for domain still went back to the NGPC, representing the ICANN Board, to make the decision to approve, without being bound by recommendation of the GAC, the Independent Objector or even the Expert Determination. Such a decision would appear to be caught by the requirements of Article 1, Section 2 of the Bylaws requiring the Board or the NGPC to consider and apply the competing values to the facts and to arrive at a defensible balance among those values.

91. In its Response, ICANN also relied on the position expressed in the Comments of the Independent Objector (Exhibit R-ER-5) and on the findings of the Expert Determination (Claimant ER Request, Annex 2) to justify the propriety of the delegation. These specific recommendations are certainly material to the Board consideration, but they are not a substitute for the exercise by the Board of its own judgement in balancing the competing values as expressly required under Article 1, Section 2 of the Bylaws. Therefore, at this stage and based on the available evidence, the Claimant appears to have a reasonable possibility of success on the merits of the IRP.
92. Both the Independent Objector and the Expert also noted that the GCC could itself apply for .ARABIAN GULF and thereby neutralize any objection with the delegation of .PERSIAN GULF. ICANN in its Response has also relied on this argument. The Independent Objector stated that it is not the mission of the gTLD strings to solve or exacerbate such naming disputes, but they should adapt to the *status quo*. This directly raises the type of policy issue which should be addressed by the Board in a discussion and balancing of the core values of ICANN in Article 1, Section 2 and which calls out for a reasoned

discussion and defensible balance to be reached by the Board. There is no question about ICANN solving the naming dispute – it cannot. There is a serious question as to whether, in the context of a geographic naming dispute, the registration of one domain name and the encouragement to register the other will elevate the deeper dispute between the parties to a new level and introduce that dispute to the Internet and to the internet domain name system. As noted in the Expert Determination, denomination disputes can be of high importance, roiling international relations, particularly when it is a flashpoint for deeper disputes as appears to be the case here. While the suggestion of the Independent Objector is for the gTLD strings to adapt to the *status quo*, one of the objectives on an application for interim measures is to preserve the *status quo*. The context assists in determining what may be regarded as the *status quo*. According to the Independent Objector, since both disputed names are in fact used in practice in the different states, it is suggested that both be used. Absent agreement on a common name, that would be consistent with general rules for international cartography. However, in terms of the domain naming system and top level domains for the Internet, neither term is currently used – that is the *status quo* for top level domain names. It is that *status quo* which should be preserved pending the completion of the IRP. The GCC is not asking to use the domain .ARABIANGULF and at this point does not want to use that domain. It is simply seeking to maintain the status quo that neither name be used as a gTLD.

93. This Emergency Panel therefore finds that the GCC has a reasonable possibility of success on the IRP for the purposes of granting interim measures in the nature of injunctive relief. However, nothing in this Interim Declaration should be taken as a finding on the merits binding on the IRP panel or as a suggestion of any decision which the ICANN Board should or should not make in respect of the merits of the domain application in dispute. The IRP Panel will have an opportunity on a full evidentiary record to make the determination required of it pursuant to the ICANN Bylaws, Article IV, Section 3 whether the Board in making its decision has acted consistently with the provision of the Articles and Bylaws. That is not a review *de novo* of the merits of the decision of the ICANN Board, but a review of the decision-making process of the Board in light of requirements under the Bylaws.

e. Other Considerations for Interim Measures

94. Based on the foregoing analysis, the Claimant has established an entitlement to an order that ICANN refrain from taking any further steps towards the execution of a registry agreement for .PERSIANGULF until the IRP is completed, or until such other order of the IRP panel. Of course in the event that the parties are able to amicably resolve the issues to their mutual satisfaction, the interim order and the proceedings can be brought to an end upon their consent. It is a common term or condition for the grant of such interim measures in the nature of injunctive relief to require the applicant to post security for any potential monetary damages or costs which may be caused by the grant of such measures in the event that the order is subsequently set aside or terminated. No request has been made at this time for security and the parties were not asked to brief the point. Therefore no order for such security shall be made at this time. However, the order made herein is without prejudice to any request which may be made in due to the IRP Panel which shall be free to consider that issue afresh.
95. Neither the Claimant nor the Respondent has sought costs of this Request for Interim Measures. The issue of costs was simply not addressed in the written or oral submissions. No order as to costs will be made at this time, but the issue of costs of this Request for Interim Measures shall be reserved to IPR panel.

VI. Conclusion and Interim Declaration`

96. Based on the forgoing analysis, this Emergency Panel makes the following order by way of an interim declaration and recommendation to the ICANN Board that:
- a. ICANN shall refrain from taking any further steps towards the execution of a registry agreement for .PERSIANGULF, with Asia Green or any other entity, until the IRP is completed, or until such other order of the IRP panel when constituted;
 - b. This order is without prejudice to the IRP panel reconsidering, modifying or vacating this order and interim declaration upon a further request;
 - c. This order is without prejudice to any later request to the IRP panel to make an order for the provision of appropriate security by the Claimant; and,
 - d. The costs of this Request for Interim Measures shall be reserved to the IRP panel.
97. After the completion of the foregoing reasons for this emergency interim declaration and immediately before its release, the Tribunal received an email from the Claimant dated 11

February 2015, attaching a letter from ICANN dated 2 February 2015 which was apparently in response to the letter dated 9 July 2014 from Mr. Al Ghanim referred to in these reasons. In the February 2 letter, ICANN advised that the processing of the .PERSIANGULF application had been placed “On Hold”. Apparently, Asia Green invoked the Cooperative Engagement Process in respect of some decision of the ICANN Board. As noted earlier, that process must be commenced within 15 days of the posting of the minutes of the Board which are said to violate the Articles or Bylaws. As a result of the application being placed “On Hold”, the GCC took the position that their Emergency Request for Interim Measures had been rendered moot and asked for a declaration to be issued to that effect, but with an express reservation that the matter proceed in the event that ICANN does take further steps to sign an agreement with Asia Green.


98. As for ICANN’s position, the letter of February 11 also set out ICANN’s position, quoting a letter between counsel that the placement of the application on hold had no bearing on this request for interim measures or on other accountability mechanisms already invoked. On 12 February 2015, ICANN also delivered a response opposing the GCC request. ICANN asserted that the GCC should either withdraw the Request for Emergency Relief or allow the decision with respect to that Request to be released if the “GCC wishes to ensure that the .PERSIANGULF application remains on hold”. Clearly, ICANN did not agree that the Request was moot. ICANN asserted those accountability mechanisms under the Bylaws should proceed to completion, including this Request for Emergency Relief or, alternatively, that the GCC withdraw the Request for Emergency Relief.
99. On 12 February 2015 at 9:29 pm EST, the GCC replied to the ICANN position. The GCC did not withdraw its Request. The GCC maintained its position that the letter of February 2 from ICANN rendered the Request moot.
100. The parties are not in agreement on a consent disposition to this application. GCC has not withdrawn the Request for Emergency Relief. The Request remains extant. As a result, it is appropriate that this Declaration be released forthwith.
101. Having reviewed the letter of 2 February 2015 and the further submissions of the parties in the email of counsel of February 11 and 12, 2015, this Tribunal finds and confirms that the reasoning and result remains as set out above. The result is not altered or changed by these late submissions. Indeed, these materials reinforce the finding that the Declaration as set out

above should now be issued and released. Most importantly, the position taken by ICANN clearly indicates that, but for an order on this Request for Emergency Relief, the application will not remain on hold, suggesting that the registry agreement will be signed. The fact of the commencement of the Cooperative Engagement Process by Asia Green raises further questions as to what is the decision of ICANN Board in respect of the disputed application. For the purposes of the recently commenced Cooperative Engagement Process it may simply be the decision to put the application on hold pending the completion of the emergency request. The ICANN letter of 2 February 2015 is not an admission or commitment by ICANN that it will place the application on hold pending the completion of the GCC's IRP request. The request by Asia Green for the Cooperative Engagement Process raises many other questions as to the role if any of the GCC in that process and also the impact, if any at all, on the GCC request for the IRP. ICANN is rightly concerned that the accountability processes including the IRP should proceed as intended under the Bylaws. Therefore, for these reasons, the request of the GCC for a declaration that this Request is now moot is denied.

102. To be clear, and having taken into account the submissions of parties received on 11 and 12 February 2015, the interim declaratory relief as set out in paragraph 96 is hereby granted.

Signed in Toronto, Ontario, Canada for delivery to the Parties in Los Angeles, California, USA and Riyadh, Saudi Arabia.

Dated 12 February 2015.


John A.M. Judge, Emergency Panellist

CLA-030

ICDR CASE NO. 01-15-0002-9938

BETWEEN

CORN LAKE, LLC

Claimant

-and-

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

Respondent

FINAL DECLARATION

Independent Review Panel
Mark Morril
Michael Ostrove
Wendy Miles QC (Chair)

Dated 17 October 2016

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1. OVERVIEW

1.1 ICANN's Approved Board Resolutions, dated 12 October 2014 and 12 February 2014, established a new 'Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections' in the context of ICANN's New gTLD Program. Such perceived inconsistent Expert Determinations were not considered to be "in the best interest of the New gTLD Program and the Internet community". ICANN limited the scope of the new review mechanism to certain expert determinations concerning specifically designated string confusion objections. ICANN excluded from the new review mechanism the Claimant's .CHARITY Expert Determination concerning community objections.

1.2 The Claimant contends that the .CHARITY Expert Determinations "follow a pattern identical to the objection determinations for which the Board did order review." The Claimant asks the Panel in this Independent Review Process: to review the "decision or action by the Board" to exclude the Claimant's inconsistent .CHARITY Expert Determinations from the scope of the new review mechanism; to declare that "decision or action" to be "inconsistent with the Articles of Incorporation or Bylaws" of ICANN; and that this "materially affected" the Claimant. The Claimant appears also to seek review of the Expert Determination itself and/or its Request for Reconsideration of that Determination. This Final Declaration deals with the Claimant's requests for review.

2. THE PARTIES AND THEIR LAWYERS

2.1 The Claimant is Corn Lake, LLC, a limited liability company organised and existing under the laws of the State of Delaware.

2.2 The Claimant is represented by:

John Genga, Esq.
Genga & Associates P.C.
15260 Ventura Boulevard
Suite 1810
Sherman Oaks, CA
91403
USA

and

Don Moody Esq. and Khurram Nizami

The IP and Technology Legal Group P.C.
15260 Ventura Boulevard
Suite 1810
Sherman Oaks, CA
91403
USA

- 2.3 The Respondent is the Internet Corporation for Assigned Names and Numbers (“ICANN”), a non-profit public corporation organised and existing under the State of California with its principal place of business at:

12025 Waterfront Drive
Suite 300
Los Angeles, CA
90094-2536
USA

- 2.4 The Respondent is represented by:

Kate Wallace, Jeffrey LeVee and Eric Enson
Jones Day
555 South Flower Street
50th Floor
Los Angeles, CA
90071-2300
USA

3. THE PANEL

- 3.1 On 17 September 2015, the full Independent Review Process (“**IRP**”) Panel was confirmed in accordance with the International Centre for Dispute Resolution’s International Arbitration Rules (the “**ICDR Rules**”) and its Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process issued in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws (the “**Supplementary Rules**”).

- 3.2 The members of the IRP Panel are:

Mark Morril
Michael Ostrove
Wendy Miles QC (Chair)

4. PROCEDURAL HISTORY

- 4.1 On 24 March 2015, the Claimant filed a Request for Independent Review Process (the “**Request**”) with the ICDR. The Claimant alleges that ICANN’s Board of Directors (the “**Board**”) divested the Claimant of its right to compete for the .CHARITY new generic top level domain (“**gTLD**”), on the basis that “a single ICC panelist upheld a community objection against Corn Lake’s application for the .CHARITY gTLD and, at the same time, that same panelist denied an identical objection against a similarly situated applicant for the same string.”¹
- 4.2 On 15 May 2015, the Respondent filed ICANN’s Response to the Claimant’s Request for Independent Review Process (the “**Response to Request**”).
- 4.3 On 3 November 2015, the Parties and the Panel conducted by telephone the first procedural hearing.
- 4.4 On 9 November 2015, following the first procedural hearing, the Panel issued Procedural Order No. 1 (“**PO1**”) setting out the procedural stages and timetable for the proceedings and page limits for the Parties’ respective submissions.
- 4.5 On 17 November 2015, the Panel issued Procedural Order No. 2 (“**PO2**”) ruling on document production requests.
- 4.6 On 4 December 2015, the Parties produced documents as directed under PO2.
- 4.7 On 9 December 2015, the Claimant submitted its Reply (the “**Reply**”).
- 4.8 On 8 January 2016, the Respondent submitted its Sur-Reply (the “**Sur-Reply**”). In its Sur-Reply, the Respondent objected to the Claimant allegedly having exceeded the mandate for its Reply as set out by the Panel at PO1.²
- 4.9 On 20 January 2016, the Panel noted that certain aspects of the Claimant’s Reply did exceed the scope of PO1. The Panel notified the parties that it would take this into account when considering their respective written and oral submissions but that it was not inclined to

¹ Claimant’s Request for independent Review Process (“**Claimant Request**”), at page 1, para. 2.

² Respondent’s Sur-Reply (the “**ICANN Sur-Reply**”), at para. 1.

strike the Reply, instead reserving its position to take its scope into account in any costs decision.

- 4.10 Also on 20 January 2016, the Panel notified the parties that it had set time aside to meet together in London for the hearing and deliberations thereafter. It invited the parties' views as to whether or not this would be acceptable and whether they considered it necessary for the party representatives also to attend the hearing in person in London, or to join by videoconference.
- 4.11 On 20 January 2016, the Respondent informed the Panel that it had no objection to the Panel convening in London. It further proposed that, as all counsel were in Los Angeles, they could meet together at Jones Day's Los Angeles office, and the Panel could convene at Jones Day's London office to facilitate the video link.
- 4.12 On 8 February 2016, the Independent Review Process hearing proceeded by video link with the Panel convened in London and counsel convened in Los Angeles. Claimant and Respondent each submitted PowerPoint slides summarizing their hearing arguments. The Panel accepted the PowerPoint slides as part of the record.
- 4.13 On 17 February 2016, as requested by the Panel at the close of the hearing on 8 February 2016, the Claimant and Respondent each submitted a supplemental submission concerning the 3 February 2016 Board Resolution regarding .HOSPITAL (the "**Claimant Supplemental Submission**" and "**Respondent Supplemental Submission**", respectively).
- 4.14 Subsequently, on 16 May 2016, ICANN sent to the Panel the Final Declaration in the *Donuts v. ICANN* IRP proceeding issued 5 May 2016, involving the .SPORTS and .RUGBY strings. ICANN submitted that the Final Declaration addressed many issues relevant to the *Corn Lake v. ICANN* IRP and invited the Panel to permit each party to submit a four-page supplemental brief to address **only** the *Donuts* Final Declaration and its relevance to these proceedings.
- 4.15 On 18 May 2016, the Claimant disagreed with the need for additional briefing regarding the IRP Final Declaration involving the strings .SPORTS and .RUGBY and set out its detailed reasons for disagreement.
- 4.16 On 19 May 2016, ICANN provided its response to the Claimant's reasons in the form of a further written submission. On 20 May 2016, the Panel directed that the Claimant provide

its response submission, not more than 4 pages, by 25 May 2016, which was submitted (and accepted) on 27 May 2016.

- 4.17 On 11 July 2016, the ICDR notified the parties that the Panel had determined that the record for this matter had been closed as of 27 June 2016 and that the Panel expected to have the determination issued by no later than 26 August 2016.
- 4.18 On 3 August 2016, the Claimant sent to the Panel the Final Declaration in the *Dot Registry v. ICANN* IRP proceeding issued 29 July 2016. The Claimant submitted that the Final Declaration addressed many issues relevant to the *Corn Lake v. ICANN* IRP and invited the Panel to permit each party to submit a four-page supplemental brief to address **only** the *Dot Registry* Final Declaration and its relevance to these proceedings.
- 4.19 On 10 August 2016, the Panel directed that the record for this matter be reopened for the limited purpose of each party providing a brief of no more than 4 pages to address the Final Declaration in the *Dot Registry v. ICANN* IRP proceeding. On 15 August and 19 August, respectively, the Claimant and ICANN submitted further briefs accordingly.
- 4.20 On 26 August 2016, the Panel notified the parties that it had determined that the record for this matter had been reclosed as of 22 August 2016.

5. OVERVIEW OF THE ICANN NEW GTLD PROGRAM

5.1 This section sets out the relevant factual background to the ICANN Board's 12 October 2014 Resolutions, including a brief description of: (i) the ICANN New gTLD Program; (ii) the New gTLD Program application process; (iii) the New gTLD Program dispute resolution procedure; (iv) the GAC Beijing Communiqué and ICANN's response; and (v) the New Inconsistent Determinations Review Process.

(i) ICANN's New gTLD Program

5.2 ICANN is responsible for allocating Internet Protocol ("IP") address space, assigning protocol identifiers and Top-Level Domain names, and managing the Domain Name System. ICANN's Domain Name System ("DNS") centrally allocates Internet domain names for use in place of IP addresses. Top-Level Domains ("TLDs") exist at the top of the DNS naming hierarchy. These characters, which follow the rightmost dot in domain names, and are either generic TLDs ("gTLDs") or country code TLDs ("ccTLDs").

5.3 The main ICANN policy-making body for gTLDs is the Generic Names Supporting Organization (“**GNSO**”). In June 2008, the ICANN Board approved the GNSO recommendations for new gTLDs and adopted 19 specific GNSO policy recommendations for implementing new gTLDs, with certain allocation criteria and contractual conditions. Based on the GNSO recommendations as adopted, in June 2011, ICANN's Board of Directors approved a new Applicant Guidebook (the “**Applicant Guidebook**”) and authorized the launch of the 2012 gTLD Program (the “**New gTLD Program**”).³

5.4 ICANN describes the New gTLD Program’s goals as:

“enhancing competition and consumer choice, and enabling the benefits of innovation via the introduction of new gTLDs, including both new ASCII and internationalized domain name (IDN) top-level domains.”⁴

(ii) The New gTLD Program Application Process

5.5 The three-month registration period for the New gTLD Program opened on 12 January 2012 and closed on 12 April 2012, with applications due by June 2013.⁵ The stages of the application process are as follows:⁶

³ In relation to the Dispute Resolution Procedure, the Applicant Guidebook states that: “[f]or a comprehensive statement of filing requirements applicable generally, refer to the New gTLD Dispute Resolution Procedure (“Procedure”) included as an attachment to this module. In the event of any discrepancy between the information presented in this module and the Procedure, the Procedure shall prevail”, Applicant Guidebook, **ICANN Appendix C**, page 3-11, para. 3.3.

⁴ ICANN Response, para. 18.

⁵ Applicant Guidebook, Module 1, **ICANN Appendix C**, pages 1-2 to 1-3.

⁶ Applicant Guidebook, **ICANN Appendix C**, page 1-4.

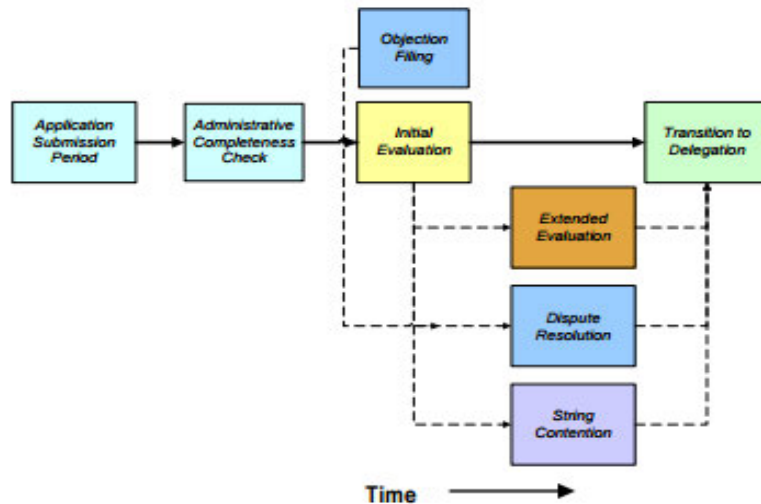


Figure 1-1 – Once submitted to ICANN, applications will pass through multiple stages of processing.

5.6 The application process allows for public comment and a formal objection procedure. The formal objection procedure is to allow full and fair consideration of objections based on certain limited grounds outside ICANN’s evaluation of applications on their merits. Formal objections may be filed on four grounds:

“String Confusion Objection – The applied-for gTLD string is confusingly similar to an existing TLD or to another applied for gTLD string in the same round of applications.

Legal Rights Objection – The applied-for gTLD string infringes the existing legal rights of the objector.

Limited Public Interest Objection – The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international 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.”⁷

5.7 Community objections – as in the current case – may be made by (i) “[e]stablished institutions associated with clearly delineated communities”; or (ii) the Independent Objector (“IO”).⁸ In both scenarios, “[t]he community named by the objector must be a

⁷ Claimant Request, para. 10. Applicant Guidebook, **ICANN Appendix C**, page 3-4, para. 3.2.1.

⁸ Applicant Guidebook, **ICANN Appendix C**, pages 3-7 to 3-8, para. 3.2.2.4, and pages 3-9 to 3-10, para. 3.2.5.

community strongly associated with the applied-for gTLD string in the application that is the subject of the objection”.⁹

5.8 The IO’s limited mandate and scope permit it to file objections against “‘highly objectionable’ gTLD applications to which no objection has been filed.”¹⁰ The Applicant Guidebook sets out that:¹¹

“The IO does not act on behalf of any particular persons or entities, but acts solely in the best interests of the public who use the global Internet. In light of this public interest goal, the Independent Objector is limited to filing objections on the grounds of Limited Public Interest and Community. Neither ICANN staff nor the ICANN Board of Directors has authority to direct or require the IO to file or not file any particular objection. If the IO determines that an objection should be filed, he or she will initiate and prosecute the objection in the public interest.”

5.9 Following any formal objection (including a Community Objection), the applicant can (i) “work to reach a settlement with the objector, resulting in withdrawal of the objection or the application”; (ii) “file a response to the objection and enter the dispute resolution process” (within 30 days of notification); or (iii) “withdraw, in which case the objector will prevail by default and the application will not proceed further.”¹²

(iii) The New gTLD Program Dispute Resolution Procedure

5.10 In the event that an applicant elects to file a response to an objection, the parties’ dispute resolution process is governed by the Applicant Guidebook, Module 3, which sets out the New gTLD Dispute Resolution Procedure (the “**Procedure**”). The designated Dispute Resolution Service Provider (“DRSP”) for disputes arising out of community objections in particular is the International Centre for Expertise of the International Chamber of Commerce (the “**ICC Centre for Expertise**”).¹³

⁹ Applicant Guidebook, **ICANN Appendix C**, page 3-9, para. 3.2.5. See also ICANN Response, para. 21.

¹⁰ Applicant Guidebook, **ICANN Appendix C**, page 3-9, para. 3.2.5.

¹¹ Applicant Guidebook, **ICANN Appendix C**, page 3-9, para. 3.2.5.

¹² Applicant Guidebook, **ICANN Appendix C**, page 3-9, para. 3.2.4.

¹³ Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 3.

- 5.11 Following an initial administrative review by the ICC Centre for Expertise for procedural compliance, a response to an objection is deemed filed and the application will proceed.¹⁴ Consolidation of Objections is encouraged.¹⁵ Within 30 days after receiving the response to an objection, the ICC Centre for Expertise must appoint a panel comprising a single expert (the “**Expert Panel**”).¹⁶
- 5.12 The procedure is governed by the Rules for Expertise of the ICC, supplemented by the ICC as needed. In the event of any discrepancy, the Procedure prevails.¹⁷ The Expert Panel must remain impartial and independent of the parties.¹⁸ The ICC Centre for Expertise and the Expert Panel must make reasonable efforts to ensure that the Expert Determination is rendered within 45 days of the constitution of the Expert Panel. The Expert Panel is required to submit its Expert Determination in draft form to the ICC Centre for Expertise’s scrutiny as to form before it is signed. The ICC Centre for Expertise can make suggested modifications limited to the form of the Expert Determination only. The ICC Centre for Expertise communicates the Expert Determination to the parties and to ICANN.¹⁹
- 5.13 Substantively, the Expert Determination proceedings arising out of a Community Objection consider four tests to “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.”²⁰ These four tests, based on the Applicant Guidebook, require objector to prove²¹:
- (a) “that the community expressing opposition can be regarded as a clearly delineated community”, taking into account various identified factors;
 - (b) “substantial opposition within the community it has identified itself as representing”, taking into account various identified factors;
 - (c) “a strong association between the applied-for gTLD string and the community represented by the objector”, taking into account various identified factors; and

¹⁴ Applicant Guidebook, **ICANN Appendix C**, page 3-14, para. 3.4.1.

¹⁵ Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 12.

¹⁶ Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 13.

¹⁷ Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 4.

¹⁸ Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 13.

¹⁹ Applicant Guidebook, **ICANN Appendix C**, New gTLD Dispute Resolution Procedure, Article 21.

²⁰ Applicant Guidebook, **ICANN Appendix C**, page 3-22, para. 3.5.4.

²¹ Applicant Guidebook, **ICANN Appendix C**, pages 3-22 to 3-24, para. 3.5.4

- (d) “that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted”, taking into account the:
 - (i) “nature and extent of damage to the reputation of the community . . . that would result from the applicant’s operation of the applied-for gTLD string”;
 - (ii) “evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely”;
 - (iii) “interference with the core activities of the community that would result from the applicant’s operation of the applied-for gTLD string”;
 - (iv) “dependence of the community represented on the DNS for its core activities”;
 - (v) “nature and extent of concrete or economic damage to the community that would result from the applicant’s operation of the applied-for gTLD string”;
 - and
 - (vi) “level of certainty that alleged detrimental outcomes would occur”.²²

“The objector must meet all four tests in the standard for the objection to prevail”.²³

5.14 Following an Expert Determination, the applicant may further apply for: (i) reconsideration by ICANN's Board Governance Committee (the “**BGC**”) through a (“**Reconsideration Request**”); and/or (ii) independent third-party review of Board actions alleged by an affected party to be inconsistent with ICANN's Articles of Incorporation or Bylaws through an IRP.

5.15 ICANN has designated the International Centre for Dispute Resolution (“**ICDR**”) to operate the IRP for String Confusion, Existing Legal Rights, Morality and Public Order and Community Objections. The ICDR constitutes the panel of independent experts and

²² Applicant Guidebook, **ICANN Appendix C**, page 3-24, para. 3.5.4

²³ Applicant Guidebook, **ICANN Appendix C**, page 3-25, para. 3.5.4

administers the proceedings in accordance with ICANN's New gTLD Dispute Resolution Procedure, which incorporates by reference the ICDR's International Rules.²⁴

5.16 Every applicant in the New gTLD Application Process expressly agrees to the resolution of disputes arising from objections in accordance with the new gTLD Dispute Resolution Procedure (and, by reference, the relevant ICDR rules) when submitting an application to ICANN.

(iv) The GAC Beijing Communiqué and ICANN's Response

5.17 On 11 April 2013, the ICANN Board Governmental Advisory Committee ("**GAC**") proposed new safeguards for certain "sensitive strings" in sectors the GAC viewed as "regulated" or "highly regulated" (the "**Beijing GAC Communiqué**").²⁵ Specifically, the GAC recommended that ICANN adopt certain pre-registration eligibility restrictions in connection with the "sensitive strings" that it designated as "Category 1" and "Category 2." The GAC identified .CHARITY as a Category 1 sensitive string.²⁶ In this regard, the Beijing Communiqué contained important departures from the Applicant Guidebook. However, the Beijing GAC Communiqué was not binding on applicants until or unless it was adopted by the ICANN Board.

5.18 On 12 July 2013, ICANN sent to the gTLD Board a paper prepared for the New gTLD Program Committee (the "**NGPC**") setting out its concerns relating to the GAC Beijing Communiqué.²⁷ ICANN's cover email described the paper as having been "prepared for the NGPC dialogue with the GAC" taking place the following Sunday.²⁸

5.19 On 29 October 2013, ICANN wrote to the GAC to inform it that the NGPC intended "to accept the GAC Beijing Communiqué's advice concerning Category 1 and Category 2 Safeguards."²⁹ In relation to the proposed safeguards for Category 1, ICANN noted that:

²⁴ ICANN Bylaws, **ICANN Appendix A**, Article IV, Section 3(4) (See also: https://www.icdr.org/icdr/faces/icdrservices/icann?_afLoop=290874254740950&_afWindowMode=0&_afWindowId=nul#%40%3F_afWindowId%3Dnull%26_afLoop%3D290874254740950%26_afWindowMode%3D0%26_adf.ctrl-state%3D108xg7by0c_22).

²⁵ <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>

²⁶ Id., Annex I, page 9.

²⁷ NGPC Memo and Attachment, 12 July 2013, **Claimant Exhibit 22**.

²⁸ NGPC Memo and Attachment, 12 July 2013, **Claimant Exhibit 22**.

²⁹ ICANN Letter to GAC, 29 October 2013, **Claimant Exhibit 13**, page 1.

“The text of the Category 1 Safeguards has been modified as appropriate to meet the spirit and intent of the advice in a manner that allows the requirements to be implemented as public interest commitments in Specification 11 of the New gTLD Registry Agreement (“PIC Spec”). The PIC Spec and a rationale explaining the modifications are attached.”³⁰

5.20 The effect of ICANN’s 29 October 2013 statement was publicly to announce that new, mandatory registration requirements would be imposed in any and all registration agreements for Category 1 and Category 2 strings. In the case of .CHARITY, a Category 1 string, this would mean the imposition of a mandatory registration requirement under any .CHARITY registry agreement requiring that any domain operators using the .CHARITY gTLD demonstrate that they were a registered charity.³¹ This requirement would be imposed in any registry agreement, irrespective of the content of any existing PIC or gTLD application content relating to .CHARITY. As discussed in further detail below, ICANN’s 29 October 2013 announcement came while the Expert Determination process arising out of the .CHARITY community objections were underway.³²

5.21 On 5 February 2014, the ICANN Board passed Resolution 2014.02.05.NG01, formally adopting the GAC’s Beijing Communiqué recommendation.³³ Annexed to that Resolution was a list of eight safeguards that would apply to certain Category 1 strings (including .CHARITY) and that would be included in Specification 11 of the New gTLD Registry Agreement.³⁴

(v) ICANN’s New Inconsistent Determinations Review Process

5.22 In the course of the New gTLD Program, in late 2013, concerns arose in respect of a small number of Expert Determinations involving the same or similar string confusion objections (“**SCO**”s) which resulted in different outcomes. These initially included:

(a) three separate Expert Determinations arising out of SCOs by the registrants of .COM to applications to register .CAM, whereby two objections were overruled and one was upheld; and

³⁰ ICANN Letter to GAC, 29 October 2013, **Claimant Exhibit 13**, page 1.

³¹ ICANN Letter to GAC, 29 October 2013, **Claimant Exhibit 13**.

³² See paragraphs 6.24 to 6.25, below.

³³ **Claimant Exhibit 14**.

³⁴ **Claimant Exhibit 14**, Annex 2, pages 1 and 3.

(b) three separate Expert Determination arising out of SCOs by the registrants of .CAR to applications to register .CARS, whereby two objections were overruled and one was upheld.³⁵

5.23 On 10 October 2013, as a result of these perceived inconsistent decisions, the BGC requested that:

“staff draft a report for the NGPC on String Confusion Objections (SCOs) ‘setting out options for dealing with the situation raised within this [Reconsideration] Request, namely the differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes involving Amazon's Applied – for String and TLDH's Applied-for String’”.³⁶

5.24 The NGPC then:

“considered potential paths forward to address perceived inconsistent Expert Determinations from the New gTLD Program SCO process, including possibly implementing a new review mechanism”.³⁷

5.25 On 5 February 2014, the NGPC published Approved Resolutions, which included discussion of the report prepared in response to the BGC's 10 October 2013 request. The NGPC directed the ICANN President and CEO to initiate a public comment period on framework principles of a potential review mechanism to address perceived inconsistent SCO Expert Determinations. The NGPC stated that the review mechanism would be “limited to the String Confusion Objection Expert Determinations for .CAR/.CARS and .CAM/.COM”.³⁸

5.26 On 11 February 2014, ICANN published its “Proposed Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections: Framework Principles” (the “**Proposed Framework Principles**”).³⁹ The Proposed Framework Principles addressed two cases where SCOs were raised by the same objector against different applications for the same string, where the outcomes of the SCOs differed, namely .CAR/.CARS and .CAM/.COM.

³⁵ ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**, page 2.

³⁶ NGPC Resolutions, 5 February 2014, **Claimant Exhibit 14**, page 3.

³⁷ As set out in summary in NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 3.

³⁸ NGPC Resolutions, 5 February 2014, **Claimant Exhibit 14**, page 3.

³⁹ ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**.

- 5.27 The Proposed Framework Principles set out the proposed standard of review as being whether the 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 procedural rules”.⁴⁰ The proposed review process would be conducted by a new three member panel constituted by the ICDR as a “Panel of Last Resort” (the “**Inconsistent Determinations Review Procedure**”).⁴¹
- 5.28 ICANN specifically noted in the Proposed Framework Principles that the proposed review procedure mechanism must be limited and that:
- “[t]he use of a strict definition for Inconsistent SCO Expert Determinations conversely means that all other SCO Expert Determinations are *not inconsistent*. As a result, the review mechanism, or Panel of Last Resort, shall not be applicable to those other determinations.”⁴²
- 5.29 ICANN defined the “strict definition” as “objections raised by the same objector against different applications for the same string, where the outcomes of the SCOs differ.”⁴³
- 5.30 On 14 March 2014, as part of the public consultation process, the Claimant’s parent company, Donuts Inc., submitted that SCO Expert Determinations relating to .SHOP should also be included, as follows:
- “... this limited review should be extended to include a third contention set where there is an incongruent outcome. In the .SHOP vs. SHOPPING objection, the same panelist who found .SHOP to be confusing to a Japanese .IDN found in favor of the objector with regard to the Donuts’ .SHOPPING application.”⁴⁴
- 5.31 Donuts concluded: “Finally, we urge ICANN to undergo a similar review mechanism in cases of inconsistent outcomes with the Limited Public Interest and Community objections.”
- 5.32 On 12 October 2014, the NGPC issued Approved Resolutions “to address perceived inconsistent and unreasonable Expert Determinations resulting from the New gTLD Program

⁴⁰ ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**, page 2

⁴¹ ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**, pages 2 to 3.

⁴² ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**.

⁴³ ICANN Board Proposed Review Mechanism, 11 February 2014, **Claimant Exhibit 15**, page 2.

⁴⁴ <http://forum.icann.org/lists/comments-sco-framework-principles-11feb14/pdfJC5UktBBxf.pdf>

String Confusion Objections process.”⁴⁵ The NGPC directed ICANN’s President and CEO to establish a three-member panel to re-evaluate the materials presented in the two identified SCO Expert Determinations for .COM/.CAM and .SHOP/通販.⁴⁶

5.33 The 12 October 2014 Approved Resolutions set out in detail the scope of the New Inconsistent Determinations Review Procedure:

- (a) the NGPC took “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”;⁴⁷
- (b) the NGPC identified these Expert Determinations as “not in the best interest of the New gTLD Program and the Internet community”;⁴⁸
- (c) “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”;⁴⁹ and
- (d) 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”, and 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”.⁵⁰

⁴⁵ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16**, pages 5 to 6.

⁴⁶ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16**, page 5. The NGPC noted in relation to the SCO Expert Determinations for .CAR/.CARS that the parties “recently have resolved their contending applications” so “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.” NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16**, page 10.

⁴⁷ The dispute with respect to .CAR/.CARS was resolved and the new Inconsistent Determinations Review Procedure went forward with respect to the .SHOP/通販 and .CAM/.COM disputes. NGPC Resolutions, 5 February 2014, **Claimant Exhibit 14**, pages 5-6.

⁴⁸ NGPC Resolutions, 5 February 2014, **Claimant Exhibit 14**, page 3.

⁴⁹ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 10.

⁵⁰ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 7.

- 5.34 The NGPC also set out in detail its reasons for limiting application of the new process to the identified SCO Expert Determinations and “particularly why the identified Expert Determinations should be sent back to the ICDR while other Expert Determinations should not”.⁵¹
- (a) the Applicant Guidebook (Section 5.1) provides that 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”;⁵²
 - (b) “[a]ddressing 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”;⁵³
 - (c) “[w]hile 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”;⁵⁴
 - (d) “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”;⁵⁵
 - (e) “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” and “[t]wo panels confronting identical issues could –

⁵¹ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at pages 10 to 11.

⁵² NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at pages 9 to 10. (*See also*: Applicant Guidebook, **ICANN Appendix C**, page 5-1, para. 5.1.)

⁵³ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 10.

⁵⁴ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 10.

⁵⁵ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 11.

and if appropriate should – reach different determinations, based on the strength of the materials presented”,⁵⁶

- (f) “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” which “should not be ignored simply because a party to the dispute disagrees with the end result”;⁵⁷
- (g) “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”;⁵⁸
- (h) “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 reasonable ‘discrepancies’ may exist” and “[t]o allow these Expert Determinations to stand would not be in the best interests of the Internet community”;⁵⁹
- (i) 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”;⁶⁰
- (j) 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”;⁶¹
- (k) “[a]s 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

⁵⁶ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 11.

⁵⁷ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 11.

⁵⁸ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 11.

⁵⁹ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 11.

⁶⁰ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at pages 11-12.

⁶¹ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 9.

processes included in the Guidebook, which did not include this review mechanism, and applicants relied on these processes”;⁶²

- (l) “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”;⁶³
- (m) “[a]llowing 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”;⁶⁴ and
- (n) 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”.⁶⁵

5.35 The NGPC summarized its conclusion by noting that, “while on balance, a review mechanism is not appropriate for the current round of the New gTLD Program, it is recommended that the development of rules and processes for future rounds of the New gTLD Program (to be developed through the multi-stakeholder process) should explore whether there is a need for a formal review process with respect to Expert Determinations”.⁶⁶

5.36 As a result of this analysis, the New Inconsistent Determinations Review Procedure was therefore introduced to provide an additional layer of review in the New gTLD Program Application Process for a very limited category of applications – i.e. two SCOs. The .CHARITY applications were not included.

⁶² NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 10.

⁶³ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 12.

⁶⁴ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 12.

⁶⁵ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 12.

⁶⁶ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at page 9.

6. FACTUAL BACKGROUND TO THE .CHARITY EXPERT DETERMINATIONS

6.1 A brief summary of the specific facts relating to the .CHARITY applications is below. The Panel has considered the Parties' written and oral submissions in full, even where not included in the below summary and subsequent analysis.

(i) Claimant's .CHARITY Application

6.2 On 13 June 2012, the Claimant filed application no. 1-1384-49318 to operate the new gTLD .CHARITY (the "**Application**").⁶⁷ The Claimant purports to have invested \$185,000 for the application fee along with other significant resources in making the Application.⁶⁸

6.3 The Claimant's .CHARITY Application was one of the 1,930 applications made in the New gTLD Application Process in 2015.

6.4 The Claimant applied for .CHARITY to "allow consumers to make use of the gTLD in accordance with the meanings they ascribe to that dictionary word."⁶⁹ It described the "mission/purpose" of its proposed gTLD as follows:

"The CHARITY TLD will be of interest to the millions of persons and organizations worldwide involved in philanthropy, humanitarian outreach, and the benevolent care of those in need. This broad and diverse set includes organizations that collect and distribute funds and materials for charities, provide for individuals and groups with medical or other special needs, and raise awareness for issues and conditions that would benefit from additional resources. In addition, the term CHARITY, which connotes kindness toward others, is a means for expression for those devoted to compassion and good will. We would operate the .CHARITY TLD in the best interest of registrants who use the TLD in varied ways, and in a legitimate and secure manner."⁷⁰

⁶⁷ Corn Lake, LLC June 2012 Application for .CHARITY, App. ID 1-1384-49318, **Claimant Exhibit 1**.

⁶⁸ Claimant Request, para. 9.

⁶⁹ Claimant Request, para. 9. See also ICANN Response, para. 2.

⁷⁰ Corn Lake, LLC June 2012 application for .CHARITY, App. ID 1-1384-49318, **Claimant Exhibit 1**, para. 18(a), 3. See also Claimant Request, para. 16.

(ii) SRL and Excellent First's .CHARITY Applications

6.5 Also on 13 June 2012, Spring Registry Limited ("SRL") filed a separate application, no. 1-1241-87032, also to operate the new gTLD called .CHARITY (the "SRL Application").⁷¹ In the SRL Application, SRL described the "mission/purpose" of its proposed gTLD as follows:

"... the aim of 'charity' is to create a blank canvas for online charity services set within a secure environment. The Applicant will achieve this by creating a consolidated, versatile and dedicated space to access charity information and donation services. ... [T]here will be a ready marketplace specifically for charity-based enterprises to provide their goods and services."

6.6 Further, Excellent First Limited submitted an application for the Chinese character translation of .CHARITY.⁷²

6.7 By 5 March 2013, each applicant was required to submit a TLD-specific Public Interest Commitments Specification ("PIC").⁷³ Both the Claimant and SRL submitted PICs prior to 5 March 2013.⁷⁴ Neither the Claimant nor SRL, (nor, as far as the IPP Panel is aware Excellent First), addressed eligibility requirements in their original PICs.

(iii) The .CHARITY Applications Independent Objections

6.8 On 12 March 2013, Professor Alain Pellet, acting as IO, submitted a Community Objection to the ICC Centre for Expertise in relation to the Application by the Claimant.⁷⁵ The IO's objection was submitted on the basis that .CHARITY should be limited to "charities and charitable organizations".⁷⁶ In particular, the Claimant's IO stated that a "community objection" is warranted when "there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly targeted."⁷⁷

⁷¹ Spring Registry Ltd. June 2012 application for .CHARITY, **Claimant Exhibit 10**.

⁷² ICANN Response, para. 6, <http://newgtlds.icann.org/en/program-status/odr/determination>

⁷³ <https://www.icann.org/resources/pages/base-agreement-2013-02-05-en>

⁷⁴ Donuts Public Interest Commitment (PIC), **Claimant Exhibit 9**. SRL's original PIC is not in evidence in the proceedings.

⁷⁵ IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**.

⁷⁶ As per Claimant Request, para. 17. The Respondent explains the process in its Response, para. 2.

⁷⁷ IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**, para. 6.

- 6.9 The IO worked through the four tests of a community objection and found these to be met, including the community test, substantial opposition, targeting and detriment. In relation to the detriment test in particular, the IO contended that the Claimant “has not addressed the specific needs of the charity community in its proposed management of the gTLD .Charity, and there are three key factors that demonstrate the likelihood of detriment to the charity community.”⁷⁸
- 6.10 The three key factors were that the Claimant’s Application: (i) “has not been framed by [the Claimant] and its subsidiary as a community based gTLD”,⁷⁹ (ii) “does not propose any eligibility criteria for the string”,⁸⁰ and (iii) proposes security mechanisms “aimed at reacting to abuse [that] are unlikely to meet the specific requirements and needs of the charity community” as well as making “no commitment concerning the specific content of the “Anti-Abuse Policy””.⁸¹
- 6.11 The IO also brought separate Community Objections against SRL and Excellent First Limited, the two other applicants for the .CHARITY gTLD in English and Chinese respectively, on similar grounds.⁸²
- 6.12 On 7 May 2013, the ICC Centre for Expertise notified the Claimant that it had decided to consolidate the IO’s objection to Claimant’s application with the two other proceedings relating to the applications by SRL and Excellent First Limited.

(iv) The .CHARITY Independent Expert Panels

- 6.13 On 6 June 2013, the Claimant submitted to the ICC Centre for Expertise a response to the IO’s objection (the “**Response to IO Objection**”).⁸³ The Claimant submitted that the IO lacked standing to make the objection and that the objection failed on its merits. It further submitted that the IO’s Community Objection constituted a restriction on “rights of free

⁷⁸ IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**, para. 41.

⁷⁹ IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**, para. 42.

⁸⁰ IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**, para. 43.

⁸¹ IO 12 March 2013 objection to Corn Lake application, **Claimant Exhibit 2**, para. 45.

⁸² As per Claimant Request, para. 18. The Respondent provides further descriptions in its Response, para. 3.

<http://newgtlds.icann.org/en/program-status/odr/determination>

⁸³ Corn Lake 6 June 2013 response to IO objection, **Claimant Exhibit 3**.

expression”⁸⁴ which was contrary to the New gTLD program objective “to enhance choice, competition and expression in the namespace.”⁸⁵

6.14 On the merits, the Claimant submitted that the IO invoked no clearly delineated community, demonstrated no substantial opposition within the community he claims to represent, demonstrates no strong association between the community and applied for string and does not prove material detriment.⁸⁶

6.15 Specifically in response to the IO’s objection based on material detriment, the Claimant reiterated that it had:

“clearly stated its opposition to such constraints on access, expression and innovation: ‘attempts to limit abuse by limiting registrant eligibility is unnecessarily restrictive and harms users by denying access to many legitimate registrants. Restrictions on second level domain eligibility would prevent law-abiding individuals and organizations from participating in a space to which they are legitimately connected, and would inhibit the sort of positive innovation we intend to see in this TLD.’”⁸⁷

6.16 On 4 July 2013, the ICC Centre for Expertise appointed Mr. Tim Portwood of Bredin Prat as the Independent Expert Panel in the consolidated proceedings.

6.17 On 22 August 2013, the IO submitted to the ICC Centre for Expertise a reply (the “**IO Reply**”).⁸⁸ Among other things, the IO observed that the detriment test standard pursuant to the Applicant Guidebook is the “likelihood of detriment.”⁸⁹ The IO considered that he had “developed many elements establishing that there exists a likelihood of detriment, in particular because of the Applicant’s unwillingness to propose preventative security measures assuring the charitable nature, the integrity and the trustworthiness of the entities represented and the information provided under the gTLD.”⁹⁰

6.18 Specifically in relation to the GAC Beijing Communiqué, the IO noted that the Claimant:

⁸⁴ As per Claimant Request, para. 19.

⁸⁵ Corn Lake 6 June 2013 response to IO objection, **Claimant Exhibit 3**, page 1.

⁸⁶ Corn Lake 6 June 2013 response to IO objection, **Claimant Exhibit 3**.

⁸⁷ Corn Lake 6 June 2013 response to IO objection, **Claimant Exhibit 3**, page 13.

⁸⁸ IO 22 August 2013 reply in further support of objection, **Claimant Exhibit 4**.

⁸⁹ IO 22 August 2013 reply in further support of objection, **Claimant Exhibit 4**, para. 22.

⁹⁰ IO 22 August 2013 reply in further support of objection, **Claimant Exhibit 4**, para. 24.

“continues to ignore the specificity of this string despite the fact that the GAC Beijing Communiqué of 11 April 2013 listed the .Charity gTLD within the ‘sensitive strings that merits particular safeguards’ because this string is ‘likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm’.”⁹¹

6.19 On 6 September 2013, the Claimant submitted to the ICC Centre for Expertise a further response (the “**Expert Panel Sur-Reply**”).⁹² In its Expert Panel Sur-Reply, the Claimant argued that the word charity does not clearly delineate any community, the separate targeting test was not satisfied, the IO demonstrates no substantial opposition and that the IO mischaracterizes the material detriment standard “in a misplaced effort to justify having failed to satisfy it.”⁹³ The Claimant further objected to the IO’s reliance on the GAC’s Beijing Communiqué,⁹⁴ submitting that it “has little (if any) bearing on the material detriment analysis” and that,

“[w]hatever measures ICANN enacts will require implementation by Applicant in the form of a PIC [Public Interest Commitment], then embodied in a formal registry agreement by which Applicant must bind itself to undertake those measures under penalty of losing the registry.”⁹⁵

6.20 On 6 September 2013, SRL also submitted to the ICC Centre for Expertise its further response (the “**SRL Sur-Reply**”).⁹⁶ In the SRL Sur-Reply, it specifically offered to amend its PIC to take into account the IO’s concerns. According to the Claimant, SRL’s amendment to its PIC:

“would impose eligibility criteria in a .CHARITY domain that would limit registration of second-level names to those who could ‘establish that they are a charity of a ‘not-for-profit’ enterprise with charitable purposes.’”⁹⁷

6.21 SRL’s amended PIC stated that SRL “appreciates the opportunity to restate and once again commit to the following operational measures, where those matters are within its control,

⁹¹ IO 22 August 2013 reply in further support of objection, **Claimant Exhibit 4**, para. 24. See footnote 11: <http://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf>, Annex 1, Category 1, p. 8 (annex 1).

⁹² Corn Lake 6 September 2013 sur-reply in further support of opposition to objection, **Claimant Exhibit 5**.

⁹³ Corn Lake Sur-Reply, p.5.

⁹⁴ Corn Lake Sur-Reply, p.7.

⁹⁵ Corn Lake Sur-Reply, pp.8-9.

⁹⁶ September 6, 2013 email from SRL to ICC w/attachments, **Claimant Exhibit 23**.

⁹⁷ Claimant Request, para. 22.

as outlined in our application.”⁹⁸ SRL further noted that “[w]e reserve the right to amend or change this PIC Spec once the details of the Program are finalized.”⁹⁹ Specifically in relation to eligibility, SRL stated in its amended PIC that:¹⁰⁰

“[o]nly incorporated associations or entities, foundations or trusts which can establish that they are a charity or ‘not for profit’ enterprise with charitable purposes will qualify to be a registrant of a .CHARITY domain name.”

- 6.22 On 25 October 2013, SRL notified the Expert Panel by email of its “amended PIC SPEC” and sent a link to the document on the ICANN website.¹⁰¹ In its cover email, SRL noted that it was making its unsolicited submission:

“merely to make you aware of independent evidence that our eligibility policy is progressing through the new gTLD application process, and in the interests of justice I hope you can consider this evidence. It merely confirms what was stated in our Rejoinder, and should only take a moment to consider.

Articles 17 and 18 of the Dispute Rules do provide the Panel with the power to admit additional material, and making this submission is the only way to draw it to your attention.”

- 6.23 There is no record of any objection to the 25 October 2013 communication by the IO or the Expert Panel and no record that it was rejected by the Expert Panel.

- 6.24 On 3 December 2013, the Claimant notified the Expert Panel and the IO by email of further information “to update the Panel regarding matters raised in the Objection and further submissions made by the Objector.”¹⁰²

- 6.25 Specifically, the Claimant notified the Expert Panel that “ICANN has formally announced its intention to adopt the “GAC’s Beijing Communiqué advice concerning Category 1 and Category 2 Safeguards””. The Claimant further explained that as a result, the:

⁹⁸ SRL PIC, **Claimant Exhibit 12**, page 1.

⁹⁹ SRL PIC, **Claimant Exhibit 12**, page 1.

¹⁰⁰ SRL PIC, **Claimant Exhibit 12**.

¹⁰¹ October 25, 2014 email from SRL to ICC, **Claimant Exhibit 24**.

¹⁰² Corn Lake 3 December 2013 further requested submission, **Claimant Exhibit 6**.

“... Applicant must implement the safeguards, if awarded the subject string, as a term of its registry agreement with ICANN for the string. Applicant therefore respectfully submits that, to the extent Objector claims material detriment based on Applicant’s alleged lack of GAC-recommended safeguards, ICANN’s recent action has rendered that portion of the Objection moot, and eliminates it as a basis for denying Applicant its presumptive right to compete for and, if awarded, operate the string.”

- 6.26 On 5 December 2013, the IO objected to the Claimant’s further submission on procedural and substantive grounds.
- 6.27 On 11 December 2013, the ICC Centre for Expertise wrote to the parties and Expert Panel reserving to the Expert Panel the decision as to whether to admit the Parties’ further submissions.
- 6.28 On 13 December 2013, the Expert Panel rejected the Claimant’s further submission on the grounds that (a) further submissions “were not contemplated by the procedural timetable” of 9 August 2013 and (b) “the Expert Determination in each of the consolidated cases was submitted in draft to the Centre within the 45 day time period provided for in Article 21(a) of the ICANN New gTLD Dispute Resolution Procedure (the “**Procedure**”) for scrutiny by the Centre pursuant to Article 21(b) of the Procedure and Article 12(6) of the ICC Rules for Expertise (the “**Rules**”).¹⁰³
- 6.29 There was no further correspondence between the Parties, the IO and/or the Expert Panel prior to the issuance of the Expert Determinations.

(v) The .CHARITY Applications Expert Determinations

- 6.30 On 9 January 2014, the Expert Panel issued its three separate Expert Determinations in respect of the applications by the Claimant and SRL, respectively, despite the proceedings having been consolidated.¹⁰⁴ The Expert Determination in relation to the IO in the Claimant’s Application had a different outcome to the SRL and Excellent First Expert

¹⁰³ Letter from Expert Panel to Parties, 13 December 2013, **Claimant Exhibit 7**, page 1. Article 21(a) provides that: “(a) *The DRSP and the Panel shall make reasonable efforts to ensure that the Expert Determination is rendered within forty-five (45) days of the constitution of the Panel. In specific circumstances such as consolidated cases and in consultation with the DRSP, if significant additional documentation is requested by the Panel, a brief extension may be allowed*”, Applicant Guidebook, **ICANN Appendix C**, Module 3, page P-10.

¹⁰⁴ Expert Determination Corn Lake, 9 January 2014, **Claimant Exhibit 8** and Expert Determination SRL, 9 January 2014,

Claimant Exhibit 11. Expert Determination Excellent First is at:

<https://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-961-6109-en.pdf>.

Determinations. The reasoning sections in the Expert Panel Determinations for the Claimant and SRL community objections are virtually identical, and very similar for the Expert Determination for the Excellent First community objection, up to the determination concerning the detriment test.

6.31 The Expert Panel upheld the community objection against the Claimant, as set out by the IO on the basis that “there is a likelihood of material detriment to the charity sector community were the Application to proceed” and that:¹⁰⁵

“the targeted community ... would be harmed if access to the ‘.CHARITY’ string were not restricted to persons ... which can establish that they are a charity or a not-for-profit enterprise with charitable purposes”.¹⁰⁶

6.32 However, the Expert Panel rejected the IO’s identical community objections against both SRL and Excellent First.¹⁰⁷

6.33 In relation to SRL, the Expert Panel concluded that eligibility policy contained in its amended PIC “will be included in any registry agreement which Applicant would sign with ICANN if its Application is successful and which Applicant will therefore be contractually obliged to implement at the risk of legal action under the PIC Dispute Resolution Procedure in the event of breach.”¹⁰⁸ On that basis:

“the SRL Expert Panel found that SRL’s commitment set out its .CHARITY application to restrict registration ‘to members of the charity sector’ was sufficient to negate any concern of material detriment to the targeted community.”¹⁰⁹

6.34 In relation to Excellent First, the Expert concluded that its commitment in its application to limit registrations to: “charitable organizations or institutions which must represent and warrant that they are authorized to conduct charitable activities” was sufficient to negate concerns of material detriment.¹¹⁰

¹⁰⁵ Expert Determination Corn Lake, 9 January 2014, **Claimant Exhibit 8**. See As per ICANN Response, para. 4.

¹⁰⁶ As per Claimant Request, para. 24.

¹⁰⁷ Expert Determination SRL, 9 January 2014, **Claimant Exhibit 11**. ICANN Response, para. 6.

¹⁰⁸ Expert Determination SRL, 9 January 2014, **Claimant Exhibit 11**, para. 90.

¹⁰⁹ ICANN Response, para. 5.

¹¹⁰ ICANN Response, para. 6. See: <http://newgtlds.icann.org/en/program-status/odr/determination>

6.35 In both the SRL and Excellent First Expert Determinations, the Expert Panel included the following paragraph:

“Provided that Applicant’s undertaking [in respect of eligibility requirements] is honored, the Expert Panel considers therefore, that there would be no material detriment as identified by IO to the charity sector – registrants being limited to the members of that sector.”¹¹¹

6.36 In the preceding paragraph in the Excellent First Expert Determination (but not the SRL Expert Determination), the Expert Panel further noted that:

“... according to the Applicant the eligibility policy has been developed following and in response to the GAC Advice and will be further developed with ICANN.”¹¹²

6.37 The Expert Panel thus clearly relied on the differing PIC Specs as between SRL and Excellent First, on the one hand, and the Claimant on the other, in reaching differing results with respect to the identical community objections addressed to each application. The Expert Panel did not take into account ICANN’s 29 October 2013 announcement that it intended to adopt the Beijing Communiqué’s recommendation and the effect this would have on the three applications.

(vi) Claimant’s Board Governance Committee Reconsideration Request

6.38 On 24 January 2014, the Claimant filed a Reconsideration Request to the ICANN Board Governance Committee (the “**BGC**”) regarding action by ICANN that the Claimant alleged was contrary to established ICANN policies pertaining to Community Objections to New gTLD Applications.¹¹³ The Claimant requested that the BGC reconsider the action by the ICC Centre for Expertise as DRSP for community objections and, in particular, the 9 January 2014 Expert Determination.

6.39 The Claimant submitted in relation to jurisdiction in respect of the Reconsideration Request that:

¹¹¹ Expert Determination SRL, 9 January 2014, **Claimant Exhibit 11**, para. 132 and Expert Determination Excellent First is at: <https://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-961-6109-en.pdf>, para. 131.

¹¹² <https://newgtlds.icann.org/sites/default/files/drsp/17jan14/determination-1-1-961-6109-en.pdf>, para. 130.

¹¹³ <https://www.icann.org/en/system/files/files/request-corn-lake-24jan14-en.pdf>.

“The [Expert Determination] Ruling fails to follow ICANN processes and policies concerning community objections as expressed in Sections 3.5 and 3.5.4 of the gTLD Applicant Guidebook... . ICANN has determined that the reconsideration process can properly be invoked for challenges of the third party DRSP’s decisions as challenges of the staff action where it can be stated that ... the DRSP failed to follow the established policies or processes in reaching the decision”¹¹⁴

6.40 The Claimant submitted in relation to the merits of the Reconsideration Request that the Expert Panel contravened ICANN process and policy by reaching the opposite result in relation to two identical applications for the .CHARITY string. It pointed out that:

“In the SRL case, ... the Panel held that the alleged community would not likely incur material detriment because of obligations that SRL had indicated in a supplemental filing it would assume in its registry agreement with ICANN. The Panel in that case accepted SRL’s additional evidence negating the IO’s claim of material detriment, and denied the objection. Here, by contrast, the Panel refused to consider a proffered further submission showing that, by its proposed adoption of Government Advisory Council (“GAC”) advice regarding the String, ICANN would require Corn Lake to employ stringent protection mechanisms of the type the Panel found sufficient in SRL.”¹¹⁵

6.41 The Claimant submitted that reconsideration properly lies to remedy the Expert Determination as inconsistent with ICANN policy and process and with the Panel’s own decision in consolidated cases.

(vii) The Board Governance Committee’s Reconsideration Decision

6.42 On 27 February 2014, the BGC issued its determination in respect of the Claimant’s Reconsideration Request. The BGC determined that the Expert Panel had adhered to the factors in the Applicant Guidebook in determining whether the community invoked by the IO (the charity sector) was a delineated community and properly determined that the charity sector indeed “constitutes a clearly delineated community”.¹¹⁶

¹¹⁴ <https://www.icann.org/en/system/files/files/request-corn-lake-24jan14-en.pdf>, para. ii.

¹¹⁵ <https://www.icann.org/en/system/files/files/request-corn-lake-24jan14-en.pdf>, para. iv.

¹¹⁶ 27 February 2014 Determination, at page 8. <https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf>.

6.43 The BGC further determined that the Expert Panel did not fail to apply the proper standard for evaluating the likelihood of material detriment. It noted that:

“[t]he lack of an eligibility policy in the Requestor’s application ensuring that registration will be limited to members of the charity sector is precisely what distinguishes the Panel’s determination in the instant proceeding from that in the SRL proceeding. In the SRL proceeding, the Panel articulated the same concerns present here, namely the need to clearly distinguish charitable organizations from for-profit enterprises in particular in public giving and fund-raising activities. ... In the SRL proceeding, however, the Panel found that SRL’s proposed eligibility policy adequately assuaged the Panel’s concerns:

‘The eligibility criteria policy defined by Applicant and inspired by the criteria of the UK Charities Act 2011 which will be included in any registration agreement entered into by the Applicant with ICANN together with appropriate safeguards for registry operators respond in the Expert Panel’s view to the Detriment test concerns raised by IO.’

Specifically, SRL committed to an eligibility policy that defined the subset of the community to which registration will be limited as ‘incorporated entities, unincorporated associations or entities, foundations or trusts which can establish that they are a charity or ‘not for profit’ enterprise with charitable purposes’.”¹¹⁷

6.44 The BGC concluded that “[b]ecause the Requester presented no evidence that it intended to or was otherwise willing to adopt a similar eligibility policy, there is no support for the Requestor’s claim that “nothing distinguishes the application of SRL from that of Corn Lake.””¹¹⁸

6.45 As to the allegation of different treatment of the Claimant and SRL’s respective additional submissions dealing with eligibility, the BGC noted that SRL’s additional submission was “expressly requested and approved by the Expert Panel in the SRL proceeding before the close of evidence. Indeed, in the Panel’s determination in the SRL proceeding, the Panel stated that ‘on 9 August 2013, ... the Expert Panel wrote to the Parties informing them of its view that it would be assisted by a second round of written submissions and inviting the

¹¹⁷ 27 February 2014 Determination, at page 11. <https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf>.

¹¹⁸ 27 February 2014 Determination, at page 12. <https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf>.

Parties each to submit an Additional Witness Statement”¹¹⁹ SRL did so on 6 September 2014.

6.46 The BGC noted that by contrast, the evidence closed on 6 September 2014 and only on 4 December did the Claimant proffer new information regarding the proposed implementation of the GAC’s Beijing Communiqué. The Expert Panel had rejected that additional submission. Based on all of those grounds, the BGC concluded that the Claimant had not stated proper grounds for reconsideration and denied the Reconsideration Request. The BGC noted that “[i]f the Requester believes that it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.”¹²⁰

(viii) Office of the Ombudsman Review

6.47 On 8 July 2014, the Office of the Ombudsman issued a report relating to the dispute resolution process used for competing applicants to new gTLDs, initiated by the Claimant or a related entity.¹²¹ The Ombudsman determined that he did not have jurisdiction to look at any of the issues raised. He stated in his report that:

“In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of expert determination. Accordingly, the BGC is not required to evaluate the Panel’s substantive conclusion that there is substantial opposition from a significant portion of the community to which the string may be targeted. Rather, the BGC’s review is limited to whether the Panel violated any established policy or process.

“My jurisdiction is very similar, although I have a different approach, based on whether the way in which the expert processed the decisions was unfair, but like the BGC, I cannot review the substance of the determination. It is useful to refer to my bylaw which refers to unfairness and delay, but underlying this is the issue that there must be a failure of process. The comments from Donuts have looked to interpret the differences in the panel decisions as a failure of process, but that is not the correct interpretation of my jurisdiction.

Procedural fairness is very different from making an error of law in the decision itself. It is

¹¹⁹ 27 February 2014 Determination, at page 12. <https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf>.

¹²⁰ 27 February 2014 Determination, at pages 14 to 15. <https://www.icann.org/en/system/files/files/determination-corn-lake-27feb14-en.pdf>.

¹²¹ Report from Ombudsman Case 14-00122 In a matter of a Complaint by Donuts, **Claimant Exhibit 25**.

not appropriate for me to enter into any discussion or evaluation of the decisions themselves however. If I were to undertake the exercise urged upon me by Donuts, then I would step well outside my jurisdiction, and have not done so accordingly.”¹²²

(ix) Claimant’s Cooperative Engagement Process Request

6.48 On 18 July 2014, the Claimant filed a Cooperative Engagement Process (“CEP”) Request pursuant to Article 5.1 of the Bylaws. Article 5.1 provides that:

“[b]efore either party may initiate arbitration pursuant to Section 5.2 below, ICANN and Registry Operator, following initiation of communications by either party, must attempt to resolve the dispute by engaging in good faith discussion over a period of at least fifteen (15) calendar days.”

6.49 The Cooperative Engagement Process description further provides that:

“prior to initiating an independent review process, 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. It is contemplated that this cooperative engagement process will be initiated prior to the requesting party incurring any costs in the preparation of a request for independent review.”¹²³

6.50 On 20 March 2015, in accordance with that Cooperative Engagement Process, the Independent Review Process filing date for the Claimant was extended to 24 March 2015.¹²⁴

6.51 On 24 March 2015, the Claimant submitted the current Notice and Request for IRP. The procedural history thereafter is summarized at Section 4 above.

6.52 In its Notice and Request for IRP, the Claimant seeks, or potentially seeks, review of the following:

- (a) the ICANN Board’s 27 February 2014 decision to permit inconsistent Expert Determinations from the Corn Lake and SRL applications for .CHARITY to continue by denying the Claimant’s Reconsideration Request;

¹²² July 8, 2014 Ombudsman letter, **Claimant Exhibit 25**, page 2.

¹²³ ICANN Cooperative Engagement Process description, **ICANN Appendix H**.

¹²⁴ Cooperative Engagement and IRP Status Update 20 March 2014, **Claimant Exhibit 17**.

- (b) the ICANN Board’s 12 October 2014 decision to treat the Expert Determinations for .CHARITY differently to those for .COM/.CAM and/or .CAR/.CARS and/or .SHOP/ .通販 in respect of the new Inconsistent Determinations Review Procedure recorded in its Approved Resolutions;¹²⁵ and/or
- (c) “somewhat alternatively” (as characterized by ICANN),¹²⁶ the ICANN Board’s action to establish a new standard for review of all “inconsistent and unreasonable” decisions and decision not to apply that standard to .CHARITY, even though, in Claimant’s view, “the decisions on the .CHARITY objections, and no others [that were excluded], come within the realm of review established by the NGPC”.¹²⁷

7. IRP PANEL’S ANALYSIS OF ADMISSIBILITY

7.1 This IRP is the final stage in the ICANN New gTLD Application dispute resolution procedure. The process is governed by the ICANN Bylaws, Articles and “Core Values”.

7.2 In the course of its written and oral submissions, the Claimant invites the IRP Panel to review certain ICANN Board “actions or decisions” arising out of or relating to the Expert Determination upholding the community objection in the Claimant’s .CHARITY Application. The IRP Panel appears to be invited to review some or all of the following alleged “actions or decisions”:

- (a) the Claimant’s Expert Determination dated 9 January 2014;
- (b) the Board’s Denial of the Claimant’s Reconsideration Request dated 27 February 2014 and published in the Board Minutes of 27 February 2014, which were posted to the ICANN website on 13 March 2014, arising out of the Claimant’s Expert Determination;
- (c) the NGPC Approved Resolutions, 5 February 2014, proposing the new Inconsistent Determinations Review Procedure and the ensuing consultation (the “**5 February 2014 Decision and Action**”); and

¹²⁵ Claimant Request at para. 47.

¹²⁶ ICANN Response at para 52.

¹²⁷ Claimant Request at para. 42.

(d) the NGPC Approved Resolutions, 12 October 2014, adopting the new Inconsistent Determinations Review Procedure and omitting .CHARITY from its purview (the “**12 October 2014 Decision and Action**”).

7.3 The requirements for an IRP are that: (a) the Claimant was materially affected by a decision or action of the Board; (b) the decision or action is inconsistent with the Articles of Incorporation or Bylaws; and (c) the request for the IRP was made within 30 days of the posting of the Board minutes recording that decision or action.¹²⁸ The issues of material effect and inconsistency with the Articles of Incorporation or Bylaws are integral to the exercise of substantive review, and are dealt with in Section 8 below. The question of timeliness, by contrast, may be disposed of as a threshold admissibility issue.

7.4 As to the threshold issue of timeliness of the request to review the 12 October 2014 Decision (and to the extent that the subsequent decision was based on it, the 5 February 2014 Decision or Action), there is no dispute between the Parties. ICANN has not asserted any timeliness objection in relation to the IRP Panel’s review of these decisions and actions and proceeds on the basis that review is not precluded on timing grounds.¹²⁹ On that basis, this IRP Panel accepts that it has jurisdiction in respect of the 12 October 2014 Decision and Action (and to the extent that the subsequent decision was based on it, the 5 February 2014 Decision or Action). The IRP Panel’s review of those “decisions and actions” is set out below, including in relation to material effect and inconsistency.

7.5 As to the threshold issue of timeliness of the request to review the Expert Determination and/or Denial of the Reconsideration Request, there is a dispute between the Parties as to admissibility.

7.6 The Claimant’s primary position is that its request that the IRP Panel review the Expert Determination and the BCG’s Denial of the Reconsideration Request is timely despite its failure to file its IRP request within the time period specified in Article IV, Section 3.3 of the

¹²⁸ The Claimant’s Request for IRP was submitted on 24 March 2015, the filing deadline previously agreed by the parties. Cooperative Engagement and IRP Status Update 20 March 2014, **Claimant Exhibit 17**.

¹²⁹ Claimant Request, para. 31 and fn 26. ICANN and Claimant agreed to toll until 24 March 2015 the deadline for Claimant to file an IRP in relation to the 12 October 2014 action while Claimant pursued the CEP.

Bylaws. In particular, the Claimant contended at the hearing that the filing deadline provided in the Bylaws is “not a statute of limitations” and “lacks the rationale.”¹³⁰

7.7 ICANN, in response, denies that the Claimant’s request for IRP in relation to the Denial of the Reconsideration Request is timely. It refers to the posting on 13 March 2014 of the 27 February 2014 minutes of the meeting at which the BCG denied Claimant’s Reconsideration Request. According to ICANN, the Claimant’s right to file an IRP Request in relation to that decision expired on 28 March 2014.¹³¹ In support of that position, ICANN specifically relies on the Bylaws, which provide that:

“[a] request for independent review must be filed within thirty days of the posting of the minutes of the Board meeting (and the accompanying Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws of Articles of Incorporation.”¹³²

7.8 There is no suggestion by either party that the deadline for an IPR application concerning the Reconsideration Request (or Expert Determination) has been tolled.

7.9 Having carefully considered the submissions of both Parties in relation to admissibility, the IRP Panel has determined that the Claimant’s application for review of the Expert Determination Denial of the Reconsideration Request is out of time. The Panel considers that ICANN is entitled and indeed required to establish reasonable procedural rules in its Bylaws, including in respect of filing deadlines, in order to provide for orderly management of its review processes.

7.10 Article IV, Section 3.3 of ICANN’s Bylaws clearly states that:

“[a] request for independent review must be filed **within thirty days of the posting of the minutes** of the Board meeting (and the accompanying Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws of Articles of Incorporation.”¹³³

¹³⁰ Claimant’s Hearing Slides at 5.2

¹³¹ ICANN Sur-Reply, para. 40; The Panel notes that the date 30 days after the 13 March 2014 posting of the 27 February minutes was 12 April 2014, a Saturday.

¹³² ICANN Sur-Reply, para. 40 and Bylaws, Article IV, Section 3.3.

¹³³ ICANN Sur-Reply, para. 40 and Bylaws, Article IV, Section 3.3. (Emphasis added.)

- 7.11 The Claimant failed to file its request for independent review within 30 days of the posting of the 27 February 2014 Minutes of the Board meeting in respect of the 27 February 2014 Denial of Request for Reconsideration concerning the .CHARITY Expert Determination of 9 January 2014. Claimant did not file the IRP request at issue here until 24 March 2015 and, arguably, did not raise the 27 February 2014 denial of its Reconsideration Request until its Reply Memorandum in this IRP, filed on 10 December 2015.¹³⁴
- 7.12 Moreover, the Claimant did not file its CEP request, which would have extended the independent review filing period, until 18 July 2014.¹³⁵ By that time, the 30 day period following publication of the Denial of the Reconsideration Request had already expired, i.e., on 28 March 2014, or, at latest, in mid-April 2014.
- 7.13 Although the CEP rules contemplate a process that will take place prior to initiating an IRP, the record before this Panel is insufficient to conclude that Claimant’s CEP request operated to revive the already-expired time to file an IRP as to the denial of Claimant’s Reconsideration Request or that ICANN waived that deadline.¹³⁶ Accordingly, the Panel has not considered the Denial of the Reconsideration Request (or indeed the underlying Expert Determination) in this IRP proceeding, except as background.
- 7.14 In summary, the Panel has determined that Claimant’s only timely claim in this IRP is its application for relief from the Board’s specific action to omit .CHARITY from the purview of its Resolution of 12 October 2014, and, to the extent related thereto, the 5 February 2014 Decision or Action.¹³⁷ Therefore, the Panel proceeds on the basis that the other “actions or decisions” discussed at length in the parties’ submissions are background to the specific “action or decision” recorded in the 12 October 2014 Approved Resolutions.
- 7.15 The Parties further addressed the threshold question whether or not an Expert Determination was a “board decision” capable of review within the IRP process. As the Panel has already rejected any invitation to review the Expert Determination on the basis of timeliness, it is not required to address this further threshold issue.

¹³⁴ See ICANN Sur-Reply at para. 38-40; Corn Lake Reply at fn. 60.

¹³⁵ Witness Statement of Jonathon Nevett at para. 15

¹³⁶ Claimant Request, **Appendix H**.

¹³⁷ Claimant Request, para. 31.

8. IRP PANEL REVIEW OF THE BOARD'S "ACTION OR DECISION"

8.1 The IRP of ICANN Board's 12 October 2014 Decision and Action (and its preceding 5 February 2014 Decision and Action) to adopt the Inconsistent Determination Review Process and omit .CHARITY from its purview is set out below.

(i) Summary of Alleged Grounds for Review

8.2 The Claimant has raised four separate grounds for review. **First**, the Claimant relies on Article II of the Bylaws, which sets out the powers of ICANN, including restrictions at Section 2 and non-discriminatory treatment standards at Section 3. Specifically, Article II, Section 3, provides that:¹³⁸

"ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition."

8.3 The Claimant stated in its submissions to the Panel and at the hearing that "discrimination is the primary basis for Corn Lake's IRP... ." ¹³⁹

8.4 **Second**, the Claimant relies on ICANN's "Core Values" set out in the ICANN Bylaws, Article I, Section 2, together with ICANN's mission statement. Specifically, the 11 core values that the ICANN Bylaws, Article I, Section 2 states "should guide the decisions and actions of ICANN" when it is "performing its mission" include to:

- (a) preserve and enhance the operational stability, reliability, security, and global interoperability of the Internet;¹⁴⁰
- (a) respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to matters within ICANN's mission;¹⁴¹
- (b) to the extent feasible and appropriate, delegate coordination functions;¹⁴²

¹³⁸ ICANN Bylaws, **ICANN Appendix A**, Article II, Section 3. See Claimant Request para. 4(a).

¹³⁹ Claimant's hearing slides at 1.1 ("Framing the Issues").

¹⁴⁰ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.1.

¹⁴¹ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.2.

¹⁴² ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.3.

- (c) seek and support broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet;¹⁴³
- (d) *where feasible and appropriate, to promote and sustain a competitive environment;*¹⁴⁴
- (e) *introduce and promote competition in the registration of domain names;*¹⁴⁵
- (f) employ open and transparent policy development mechanisms;¹⁴⁶
- (g) make decisions by applying documented policies neutrally and objectively, with integrity and fairness;¹⁴⁷
- (h) act with a speed that is responsive to the needs of the Internet;¹⁴⁸
- (i) *remain accountable to the Internet community through mechanisms that enhance ICANN's effectiveness;*¹⁴⁹ and
- (j) recognize that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.¹⁵⁰

8.5 The Claimant relies in particular on core values at Article I, Sections 2.5, 2.6 and 2.10, as italicized above.¹⁵¹

8.6 Article I of the Bylaws further provides that the 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.” The Bylaws state that:

¹⁴³ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.4.

¹⁴⁴ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.5.

¹⁴⁵ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.6.

¹⁴⁶ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.7.

¹⁴⁷ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.8.

¹⁴⁸ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.9.

¹⁴⁹ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.10.

¹⁵⁰ ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.11.

¹⁵¹ ICANN Bylaws, **ICANN Appendix A**, Article I, Sections 2.5 and 2.6. See Claimant Request para. 4(b). ICANN Bylaws, **ICANN Appendix A**, Article I, Section 2.10. See Claimant Request para. 4(d).

“[a]ny 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.”¹⁵²

8.7 **Third**, the Claimant relies on the ICANN Articles of Incorporation, Article 4, which requires that ICANN operate for the benefit of the Internet community as a whole:¹⁵³

“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. ...”

8.8 **Fourth**, and anticipating the IRP Standard of Review provided in Article IV, Section 3.4, the Claimant asserts that the:

“Board simply failed to ‘exercise due diligence and care in having a reasonable amount of facts in front of them’ regarding the .CHARITY objection decisions when it refused to provide for their review as similarly ‘inconsistent and unreasonable’ as the determinations for which it did order review.”¹⁵⁴

8.9 As to procedure, Article IV, Section 3 of the ICANN Bylaws – as part of the accountability and review provisions – deals with the IRP. The process is confined to review of ICANN Board actions asserted by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.¹⁵⁵ In particular, Article IV, Section 3.2 provides that:

“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

¹⁵² ICANN Bylaws, **ICANN Appendix A**, Article I.

¹⁵³ ICANN Articles of Incorporation, **ICANN Appendix B**, Article 4. See Claimant Request para. 4(c).

¹⁵⁴ Claimant Request, para. 47.

¹⁵⁵ ICANN Bylaws, **ICANN Appendix A**, Article IV (3) (1).

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.”

8.10 For the sake of completeness, the Panel further notes that the Applicant Guidebook is described in its preamble as being “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.” It is described in the IRP Final Declaration in *Booking.com v ICANN* as “the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs.”¹⁵⁶

(ii) Standard of Review

8.11 Both Parties accept that the standard of review is set out at Article IV, Section 3.4 of the Bylaws and Article 8 of the Supplemental Procedures.

8.12 Article IV, Section 3.4 of the Bylaws provides that:

“Requests for such independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. 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?”

8.13 Article 8 of the Supplementary Rules reiterates those three questions and further provides as follows:

“8. Standard of Review

¹⁵⁶ *Booking.com v ICANN* IRP Final Declaration, 3 March 2015, **ICANN Appendix I**, at para. 54.

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.”

8.14 The IRP Panels in *Booking.com v ICANN* and *ICM Registry v ICANN* confirmed that the defined standard quoted above does not constitute the exclusive basis for an IRP of ICANN’s Board action or inaction. Rather, they described this business judgement rule standard as “the 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.”¹⁵⁷ Where, as here, the Board’s action or inaction may be compared against relevant provisions of ICANN’s governing documents, the IRP Panel’s task is to *compare* the Board’s action or inaction to the governing documents and to *declare* whether they are consistent.¹⁵⁸

8.15 The IRP in *Booking.com v ICANN* further elaborated the standard at paragraphs 108 to 110 and 115 of its Final Declaration:

108. “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.”

¹⁵⁷ *ICM Registry v ICANN* Final Declaration, 19 February 2010, **ICANN Appendix K**, para. 123.

¹⁵⁸ *Vistaprint v ICANN*, Final Declaration, 9 July 2015, **ICANN Appendix E**, para. 123 to 124.

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. ...”

...

115. “[I]t 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 ... but merely to apply them to the facts.”¹⁵⁹

8.16 Taking into account the Board’s broad authority as described above, IRP Panels nonetheless consistently have declined to adopt a deferential review standard. As the IRP Panel in *Vistaprint v ICANN* stated:

“the IRP is the only accountability mechanism by which ICANN holds itself accountable through *independent third-party review* of its actions or inactions. Nothing in the Bylaws specifies that the IRP Panel’s review must be founded on a deferential standard, as ICANN has asserted. Such a standard would undermine the Panel’s primary goal of ensuring accountability on the part of ICANN and its Board, and would be incompatible with ICANN’s commitment to maintain and improve robust mechanisms for accountability... .”¹⁶⁰

8.17 The IRP Panel in *Booking.com v ICANN* concurred, noting:

“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, ... the IRP Panel is charged with ‘objectively’ determining whether or not the Board’s

¹⁵⁹ *Booking.com v ICANN*, Final Declaration, 3 March 2015, **ICANN Appendix I**, paras. 108 to 110 and 115.

¹⁶⁰ *Vistaprint v ICANN*, Final Declaration, 9 July 2015, **ICANN Appendix E**, para. 124.

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.”¹⁶¹

8.18 Having reviewed the IRP Final Declarations in the *Vistaprint v ICANN*, *ICM Registry v ICANN* and *Booking.com v ICANN*, this Panel concludes that it is now well established that:

“... the IRP Panel is charged with ‘objectively’ determining whether or not the Board’s actions are in fact consistent with the Articles, Bylaws and Guidebook, which the Panel understands as requiring that the Board’s conduct be appraised independently, and without any presumption of correctness.”¹⁶²

8.19 While it is in no way bound by these earlier decisions, this IRP Panel agrees with those conclusions and sees no reason to depart from the standard of review set out in *Booking.com v ICANN*, which in turn relied on the Final Declaration in *ICM Registry LLC v ICANN*, dated 19 February 2010. That the Panel is not called upon to revisit or vary the substance of the Articles, Bylaws or Guidebook generally does not lessen its charge to analyse the specific Board action or inaction at issue here objectively against the standards contained in those instruments.

8.20 The current IRP Request raises a direct and concededly timely challenge to an ICANN “action or decision”, namely the Board’s 12 October 2014 establishment of the new Inconsistent Determinations Process and specifically, the Board’s determination to limit that process to String Confusion Objections and not to extend it to inconsistent Community and Limited Public Interest Objections, such as .CHARITY.

(iii) Analysis

8.21 In accordance with the standard adopted by the IRP Panels in the *Booking.com v ICANN* and *ICM Registry v ICANN*, this Panel considers below whether the Board acted consistently with ICANN’s Articles of Incorporation, Bylaws and the procedures established in the Applicant Guidebook. We initially compare the Board’s action to Article II, Section 3 of the Bylaws. In addition, we compare the Board’s action to the standard set out in Article IV, Section 3.4 of

¹⁶¹ *Booking.com v ICANN*, Final Declaration, 3 March 2015, **ICANN Appendix I**, paras. 111.

¹⁶² *Booking.com v ICANN*, Final Declaration, 3 March 2015, **ICANN Appendix I**, paras. 111.

the Bylaws and Article 8 of the Supplementary Rules and consider other relevant Bylaws and ICANN governing documents, including the Guidebook and ICANN's Core Values.

8.22 The issues addressed in turn are:

- (a) Did the Board Apply Its Standards, Policies, Procedures or Practices Inequitably or Single Out Any Particular Party for Disparate Treatment Without Substantial and Reasonable Justification? (Bylaws Article II, Section 3)
- (b) As to the Defined Review Standard (Bylaws Article IV, Section 3.4):
 - i. Did the Board act without conflict of interest in taking its decision to omit .CHARITY, as a Community Objection determination, from the new Inconsistent Determinations Review Procedure?
 - ii. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them in taking its decision to omit .CHARITY, as a Community Objection determination, from the new Inconsistent Determinations Review Procedure?
 - iii. Did the Board members exercise independent judgment in taking the decision to omit .CHARITY, as a Community Objection determination, from the new Inconsistent Determinations Review Procedure, believed to be in the best interests of the community?
- (c) Did the Board Act in the Best Interests of the Internet Community? (Articles of Incorporation, Article 4)
- (d) Did the Board Abdicate Its Accountability Responsibility? (Bylaws, Article I, Section 2.10)

8.23 Each of these issues is considered in relation to the 12 October 2014 Decision and Action (and the preceding 5 February 2014 Decision and Action) to adopt the Inconsistent Determination Review Procedure which omitted .CHARITY from its purview of the new Inconsistent Determinations Review Procedure.

ISSUE 1: Did the Board Apply Its Standards, Policies, Procedures or Practices Inequitably or Single Out Any Particular Party for Disparate Treatment Without Substantial and Reasonable Justification?

8.24 The first ground for review is whether or not the Board applied its standards, policies, procedures or practices inequitably or singled out any particular party for disparate treatment. The applicable Bylaw is Article II, Section 3, set out above.¹⁶³

8.25 This IRP Panel is required to determine whether or not the ICANN Board, in its 12 October 2014 Approved Resolutions “action or decision” not to extend the new Inconsistent Determination Review Procedure to the Claimant’s .CHARITY Expert Determination, accorded the Claimant unfair or disparate treatment without substantial and reasonable cause as compared to other unsuccessful applicants who had received perceived inconsistent Expert Determinations, i.e., the unsuccessful applicants for the gTLDs for .CAM and .通販 (and originally .CARS).

(i) The Claimant’s Position

8.26 First, the Claimant contends that the Board’s decision to establish a review process for “inconsistent and unreasonable” determinations whilst at the same time excluding .CHARITY from that review process materially affected the Claimant. In this regard, the Claimant refers, among other things, to:

- (a) the NGPC’s 5 February 2014 proposed review mechanism “for addressing perceived inconsistent Expert Determinations from the New gTLD Program String Confusion Objections process”, established for public comment;¹⁶⁴
- (b) community criticism at the time that the review proposal was not sufficiently expansive and that the review process should be widened;
- (c) the Board decision to encompass the .CAM and .COM decisions as “inconsistent or otherwise unreasonable” and “not in the best interest of the Internet community” in relation to “objections raised by the same objector against different applications for the same string, where the outcomes of the [objections] differ”,¹⁶⁵ in circumstances where the description of the problem arising out of inconsistent decisions on .CAM

¹⁶³ ICANN Bylaws, **ICANN Appendix A**, Article II, Section 3. See Claimant Request para. 4(a).

¹⁶⁴ Claimant Request, para. 28.

¹⁶⁵ Claimant Request, para. 30.

and .COM applies to the .CHARITY situation, according to the Claimant, “*exactly*”;¹⁶⁶
and

(d) ICANN’s characterization of the “strict definition” of “inconsistency” contained in the NGPC 12 October 2014 Resolution as extending to “objections raised by the same objector against different applications for the same string, where the outcome of the [objections] differ”.¹⁶⁷

8.27 Based on those factors, the Claimant submits that the Board’s decision to not include .CHARITY (as a Community Objection determination) has resulted in the Claimant being “materially affected by a decision or action by the Board”.¹⁶⁸ According to the Claimant, it was materially affected because it was deprived of an opportunity for review of an objection where another party subject to the identical circumstances was granted an opportunity for review.

8.28 The Claimant further submits that those same factors render that decision “inconsistent with the Articles of Incorporation or Bylaws”.¹⁶⁹ In the Claimant’s submission, the Board established a process for handling inconsistent and unreasonable objection decisions and then consciously disregarded that process in the case of .CHARITY.¹⁷⁰

8.29 The Claimant submits that it “does not challenge the Board’s decision not to extend review beyond only ‘inconsistent and unreasonable’ objection determinations.”¹⁷¹ Rather, it submits that its complaint arises out of “the Board’s stated rationale for limiting its review only to one type of objection, SCO”, which the Claimant submitted “raises at least three critical issues that the Board appears to have overlooked.”¹⁷² Essentially addressing the question of whether there was “substantial and reasonable cause” for the limitation, the Claimant notes, in particular:

(a) the Board did not identify any action taken by anyone in reliance on an inconsistent objection determination of any type and, in particular, in relation to .CHARITY,

¹⁶⁶ Claimant Request, para. 31 (emphasis in original); see also Claimant Request, para. 42.

¹⁶⁷ Claimant Request, para. 31; 11 February 2014 Proposed Review Mechanism, **Claimants Exhibit 15**, at page 2.

¹⁶⁸ Claimant Request, para. 32.

¹⁶⁹ Claimant Request, para. 32.

¹⁷⁰ Claimant Request, para. 37.

¹⁷¹ Claimant Request, para. 39.

¹⁷² Claimant Request, para. 39.

nothing indicates that SRL has done anything to pursue its application further after the objection ruling in its favor;¹⁷³

- (b) the Board’s concern about actions taken in reliance on the Applicant Guidebook ignores those applications for new gTLDs made in reliance upon the Applicant Guidebook’s strict criteria and made in the expectation that experts would apply those criteria properly;¹⁷⁴ and
- (c) the Board’s conclusion that to expand the review would unfairly impact a number of participants without reasonably considering the available facts ignores the fact that “*only* the decisions on the .CHARITY community objections, and *no others*, come within the realm of review established by the NGPC.”¹⁷⁵

8.30 The Claimant further relies on recent decisions in which Final Review Panels established pursuant to the October 2014 Resolution have overturned “inconsistent and unreasonable” new gTLD objection determinations.¹⁷⁶ In particular, the Claimant relies on Final Review Determinations issued by both of the three member Final Review Panels convened as a result of the Board’s October 2014 Resolution to re-review two specifically identified string confusion objection expert determinations.

8.31 The Claimant argues that each of these Final Expert Determinations reversed the SCO challenged determinations and provide evidence that the Panel “cannot reasonably uphold the disparate treatment that Corn Lake has suffered.” The Panel is asked to correct this situation.¹⁷⁷

8.32 The Claimant submits that:

“[a]t *minimum*, it [ICANN] can and should defer to the same review mechanism provided for in the Resolution: a 3-member review panel, examining only the materials offered in the original proceedings, asking solely ‘whether the original Expert Panel could have reasonably

¹⁷³ Claimant Request, para. 40.

¹⁷⁴ Claimant Request, para. 41.

¹⁷⁵ Claimant Request, para. 42.

¹⁷⁶ Reply, paras. 21 to 28.

¹⁷⁷ Reply, para. 23.

come to the decision reached ... through an *appropriate* application of the standard review as set forth in the Applicant Guidebook.”¹⁷⁸

8.33 In the course of its written and oral submissions in this IRP, the Claimant put forward its substantive concerns as to the content of the original Expert Determination and Denial of the Reconsideration Request in support of its position for further review.¹⁷⁹ In particular, it submitted that:

- (a) “a single ICC panelist upheld a community objection against Corn Lake’s application for the .CHARITY gTLD and, at the same time, that same panelist denied an identical objection against a similarly situated applicant for the same string”¹⁸⁰ and such differing determinations are “inconsistent and unreasonable” in the same sense the Board applied those terms to the SCO determinations to which it extended the new review mechanism;
- (b) in “[r]eviewing the decision against Corn Lake and the ruling in favor [of] SRL together, it becomes clear that the PIC offered by SRL formed the sole basis for the differing outcomes. The analyses on the other three community objection criteria track closely, and often verbatim, in the two rulings”;¹⁸¹
- (c) “[n]o legitimate basis exists ... to distinguish the two applications” because “[b]oth the IO’s objection and the panel’s ruling against Corn Lake turn entirely on its perceived lack of the type of protections to which the panel found SRL had acceded in its PIC”;¹⁸²
- (d) “[b]ecause Corn Lake must in fact implement such protections as a contractual condition to an award of the TLD, and because SRL has the unilateral right to change its PIC language, the applicants should not be subject to disparate treatment”;¹⁸³

¹⁷⁸ Claimant Request, para. 45 (emphasis in original). See also, Reply, para. 15 (“Corn Lake does not, as ICANN contends, seek substantive review of the Ruling. Rather, it claims that the Ruling improperly discriminates against Corn Lake. The Board acted by failing to rectify the Ruling despite the requirement that the Board ensure the integrity of its processes, which include consistency, fairness and non-discriminatory treatment of similarly situated applicants.”)

¹⁷⁹ Claimant Request, para. 27.

¹⁸⁰ Claimant Request, Introduction. See also, Reply, para. 12.

¹⁸¹ Claimant Request, para. 26.

¹⁸² Claimant Request, para. 27.

¹⁸³ Claimant Request, para. 27.

- (e) the Claimant “made clear to the IO that it would fully comply with more stringent safeguard requirements (or PICs) should they be adopted by ICANN”¹⁸⁴ and, as a result, the disparate treatment between the Claimant’s and SRL’s eligibility criteria, which it alleges was effectively the same, was inconsistent and unreasonable;
- (f) the procedure by which SRL was permitted to make additional submissions was inconsistent with the procedure afforded to the Claimant and unreasonable. In particular, despite ICANN’s publicly stated commitment to transparency and accountability, it failed to make public the substance of SRL’s proposed amendment for almost two months – during a critical phase in the application process. Moreover, ICANN published the new mandatory PICs applicable to .CHARITY only for comment. According to the Claimant, this effectively left it in the dark;¹⁸⁵
- (g) “even though the panel had accepted SRL’s late submission, it rejected Corn Lake’s identical attempt to support its own application” to alert the Expert Panel that ICANN had accepted the GAC’s Beijing Communiqué recommendations, thereby mooting the IO’s objection;¹⁸⁶
- (h) the Expert Panel based the decision to deny the IO’s objection against SRL’s .CHARITY application entirely on the amended PIC that was the subject of SRL’s late submission and “[t]he panel’s decision to deny the objection against SRL’s application allowed SRL’s .CHARITY application to move forward in the process,” whereas Claimant’s application was disqualified and removed from contention altogether;¹⁸⁷ and
- (i) as a result, the Board’s actions have materially affected the Claimant in that it has now seemingly lost the right to the .CHARITY domain, by refusing to allow Corn Lake to provide evidence of the PIC it would have to adopt.¹⁸⁸

8.34 In relation to this position, as set out in Section 7 above, the IRP Panel has determined that, irrespective of whether or not the Expert Determination and/or Denial of the Reconsideration Request were subject to review, the current IRP application as applied to those actions is out of time. Therefore, in its analysis below the IRP Panel takes the

¹⁸⁴ Reply, para. 5.

¹⁸⁵ Reply, para. 7.

¹⁸⁶ Reply, para. 8.

¹⁸⁷ Reply, para. 9-10.

¹⁸⁸ Reply, para. 10.

aforementioned factors into account by way of background only, and does not review the merits of the Expert Determination or the Denial of the Reconsideration Request. Irrespective of what might have happened in the expert proceeding or the reconsideration process, this Panel addresses the Board’s independent obligation, at the time it acted to adopt the new review mechanism, to act in accordance with the requirements of its Bylaws, other governing documents and ICANN’s Core Values on the facts and the record then before it.

- 8.35 The Claimant made further post-hearing submissions regarding the ICANN Board’s 3 February 2016 Resolution¹⁸⁹ to address the “perceived inconsistency and unreasonableness” of the .HOSPITAL Limited Public Interest objection Expert Determination by referring the objection proceeding to the Inconsistent Determinations Review Procedure. The .HOSPITAL Expert Determination was found to have been the only Limited Public Interest objection out of nine “health-related” Limited Public Interest objections that resulted in a determination in favor of the objector rather than the applicant. As a consequence, the Board invoked the Inconsistent Determinations Review Procedure for the third time – this time beyond the original string confusion objections scope referred to in the 12 October 2014 Approved Resolutions. In the .HOSPITAL: case, identical objections were lodged by the same objector, not to the same string, but to strings related by subject matter.
- 8.36 The Claimant contended that the Board’s action with respect to .HOSPITAL provides additional evidence of the disparate treatment of .CHARITY in that the .CHARITY situation is “*more* similarly situated to .CAM and .SHOP than is .HOSPITAL.”¹⁹⁰
- 8.37 The Claimant relies on the Final Declaration in *Dot Registry v. ICANN* to urge that ICANN must establish that it complied with its Bylaw obligations regarding accountability, diligence and independent judgment based on affirmative proof of the record on which the Board relied in denying Claimant’s Reconsideration Request and in excluding the .CHARITY expert determinations from the new review mechanism.

¹⁸⁹ Claimant Post-Hearing Submission dated 16 February 2016.

¹⁹⁰ Claimant Post-Hearing Submission dated 16 February 2016.

(ii) The Respondent's Position

8.38 ICANN rejects the Claimant's arguments: (a) that the .CHARITY Expert Determinations should have been included in the 12 October 2014 Approved Resolutions relating to the limited review mechanism for expert determinations from specifically identified sets of String Confusion Objections; and (b) that the Board should have expanded the limited review process and implemented a similar review to cover the .CHARITY Expert Determinations.¹⁹¹

8.39 ICANN denies that the Claimant was materially affected by the Board establishing a review process for "inconsistent and unreasonable" determinations whilst excluding .CHARITY from that review process. It submits that the NGPC identified several bases to distinguish inconsistent Expert Determinations between specifically identified sets of objections to string confusion and other Expert Determinations which were not included in the new process. In particular:

"the NGPC identified several bases to distinguish the seemingly inconsistent determinations resulting from specifically identified sets of String Confusion Objections on the one hand, and the expert determinations resulting from Community Objections, such as those relating to .CHARITY or .慈善, on the other. Based upon these differences, the NGPC concluded that permitting the specifically identified sets of String Confusion Objections to stand 'would not be in the best interests of the Internet community,' but that 'reasonable explanations' existed for the seeming discrepancies concerning determinations on Community Objections, such as for .CHARITY."¹⁹²

8.40 ICANN further submits that the 12 October 2014 Approved Resolutions were deliberately narrow and consciously limited to only the String Confusion Objection Expert Determinations relating to .COM/.CAM and .SHOP/通販.¹⁹³ The Respondent submits therefore that the NGPC did not establish a new standard for review of all "inconsistent and unreasonable" Expert Determinations and was under no obligation to provide such a review mechanism.¹⁹⁴

¹⁹¹ ICANN Response, para. 52. See also ICANN Sur-Reply, para. 9.

¹⁹² ICANN Response, para. 11.

¹⁹³ ICANN Response, para. 53.

¹⁹⁴ ICANN Response, para. 62.

8.41 ICANN argues that in limiting the review to two specifically identified sets of String Confusion Objection Expert Determinations, the NGPC did not breach its obligations under the Bylaws or Articles of Incorporation.¹⁹⁵ It cites two recent IRP Final Declarations (claiming that such decisions have “precedential value”¹⁹⁶) that it submits contradict the Claimant’s arguments, and rejects the Claimant’s reliance on the third case.¹⁹⁷

(a) *Vistaprint v ICANN*: ICANN relies on the following findings:

- (i) “the Panel is not tasked with reviewing the actions or decisions of ICANN staff or other third parties who may be involved in ICANN activities or provide services to ICANN”,¹⁹⁸ and
- (ii) “the ICANN Board has no affirmative duty to review the result in any particular SCO [string confusion objection] case”,¹⁹⁹ and has no duty to establish an appeals process to challenge Expert Determinations in objection proceedings²⁰⁰ and “had properly limited its consideration to whether the contested actions comported with established policies and procedures.”²⁰¹

(b) *Merck v ICANN*: ICANN relies on the IRP Final Declaration findings that:

- (i) “the claimant’s disagreement with the outcome of the Merck Expert Determination cannot form the basis for an IRP”,²⁰² and
- (ii) “the Guidebook does not include any appeals process for determinations on objection proceedings.”²⁰³

(c) *DCA v ICANN*: ICANN argues that this determination is not applicable because “[t]he DCA Panel premised its declaration on the GAC’s status as an ICANN constituent

¹⁹⁵ ICANN Response, para. 11.

¹⁹⁶ ICANN Sur-Reply, para. 7. See also, ICANN Bylaws, as amended 30 Jul 2014, **ICANN Appendix A**, Art. IV, para. 3.21.

¹⁹⁷ ICANN Sur-Reply, paras. 3-6.

¹⁹⁸ ICANN Sur-Reply, para. 15, as per Final Declaration, *Vistaprint Ltd v. ICANN*, ICDR No. 01-14-0000-6505, **ICANN Appendix K**, para. 127.

¹⁹⁹ ICANN Sur-Reply, para. 16, as per Final Declaration, *Vistaprint Ltd v. ICANN*, ICDR No. 01-14-0000-6505, **ICANN Appendix K**, para. 157.

²⁰⁰ ICANN Sur-Reply, para. 17.

²⁰¹ ICANN Sur-Reply, para. 18.

²⁰² ICANN Sur-Reply, para. 20.

²⁰³ ICANN Sur-Reply, para. 20.

body, but here neither the ICC nor the expert panels it established to preside over the two objection proceedings at issue are constituent bodies of ICANN.”²⁰⁴

8.42 In addition, ICANN argues that the review mechanism which was approved was “a very narrow review mechanism to be applied only to specifically identified Expert Determinations arising out of the String Confusion Objection process. The NGPC explicitly decided not extend the review to any Community Objection expert determinations. Moreover, the NGPC was not obligated to create or implement a broader review mechanism.”²⁰⁵ There is no appellate mechanism in the Bylaws, the Articles or the Guidebook “for objection proceedings that are conducted as part of the New gTLD Programme.”²⁰⁶

8.43 ICANN rejects the Claimant’s reliance on the Final Determinations (as exhibited to the Reply) by IRP Panels convened as a result of the Board’s October 2014 Resolution to re-review two specific SCO Expert Determinations. ICANN submits that the Claimant’s reliance on these is inapplicable because: (i) the NGPC was explicit that the New Inconsistent Determination Review Process would encompass only the SCOs addressed in the October 2014 Approved Resolutions; (ii) these findings have no bearing on community objection Expert Determinations; (iii) the New Inconsistent Determination Review Process involved different Expert Panels; and (iv) the Claimant is incorrect to presuppose that the Board has an affirmative duty to intervene with respect to the Corn Lake Expert Determination.²⁰⁷

8.44 Finally in response to the Claimant’s submissions regarding the content of the Expert Determination and Denial of the Reconsideration Request, ICANN noted that:²⁰⁸

- (a) “[e]valuation of a Community Objection necessarily goes far beyond a review of the string, and instead requires careful consideration of the application materials and an applicant’s proposed commitments, which (and likely do, as here) vary among applicants. As a result, one could reasonably expect that Community Objections

²⁰⁴ ICANN Sur-Reply, para. 24.

²⁰⁵ ICANN Response, para. 12.

²⁰⁶ ICANN Response, para. 12.

²⁰⁷ ICANN Sur-Reply, para. 10.

²⁰⁸ ICANN Response, para. 24. See also Applicant Guidebook, **ICANN Appendix C**, para. 3.5.4.

filed against different applications, even applications for the same string, may be resolved differently”;²⁰⁹

- (b) the IO found that the “various comments in opposition” to Claimant’s .CHARITY Application had “mainly focused on the views that the string should be administered by a not for profit organization and/or that there are insufficient protection mechanisms in place such that non-bona fide organizations may adopt the .CHARITY gTLD, and create confusion in the mind of the public over what is in fact a charity”²¹⁰ and, as such, the IO concluded that in the absence of preventative security measures assuring the charitable nature of the applicant i.e. Corn Lake, adopting .CHARITY as a gTLD would create “likelihood of detriment to the rights or legitimate interests of the charity community, to users and to the general public”,²¹¹
- (c) the Expert Determination further found that the public opposition statements “point out the absence of any limitation in the Application of the ‘.CHARITY’ string to not-for-profit or charitable organizations ... and emphasize the need for strict registration eligibility criteria limited to persons regulated as charitable bodies or their equivalent depending upon domestic law”,²¹²
- (d) the IO and the Expert Panel clearly considered that harm would occur if .CHARITY gTLD was not limited to persons or entities who could clearly establish that they were charities or not-for-profit organizations and that the IO had established the likelihood of material detriment,²¹³
- (e) the IO had raised the same concerns in respect of the Claimant’s and SRL’s applications but the SRL Expert Panel considered that: “[t]he eligibility policy defined by the Applicant [SRL] and inspired by the criteria of the UK Charities Act 2011 which will be included in any registration agreement entered into by Applicant

²⁰⁹ ICANN Response, para. 25.

²¹⁰ As per ICANN Response, para. 28. See also IO 12 March 2013 Community Objection to Corn Lake’s Application, **Claimant Exhibit 2**, para. 4.

²¹¹ ICANN Response, para. 28.

²¹² ICANN Response, para. 32. See also Panel 9 January 2014 objection determination against Corn Lake, **Claimant Exhibit 8**, paras. 150-151.

²¹³ ICANN Response, para. 33.

with ICANN together with appropriate safeguards for registry operators respond in the Expert Panel’s view to the Detriment test concerns raised by IO”;²¹⁴

- (f) unlike the Claimant, SRL had committed to an eligibility policy that indicated registration would be limited to entities that could establish that they were a charity or a not-for-profit entity with charitable purposes;²¹⁵
- (g) “it is not the role of the Board (or, for that matter, this IRP Panel) to second-guess the substantive determination of independent, third-party experts”²¹⁶ or inject itself into the objection process and it was not for the Board to reverse the Corn Lake Expert Determination;²¹⁷ and
- (h) the Applicant Guidebook contains no suggestion – and certainly no requirement – that the Board should conduct substantive reviews of expert panel determinations.²¹⁸

8.45 As to ICANN’s post-hearing submission concerning .HOSPITAL, ICANN relied primarily on the argument that different panels assessed the nine health-related applications and only the .HOSPITAL panel sustained an objection. It also argued that the .HOSPITAL situation confirms that the Board has, and may exercise, discretion to act where it believes there has been an unjust result.

8.46 In its .HOSPITAL post-hearing submission, ICANN confirmed that it did not dispute Claimant’s position that “.CHARITY was the only other TLD ... where the same objector brought the same objection to different applications for the same strings and reached different results to the detriment of the losing applicant.”²¹⁹ Nonetheless, ICANN argued that other applicants also have complained that the results in their Expert Determinations were “unreasonable” and to give credence to Claimant’s arguments here “would risk opening a floodgate of “appeals” for other objection determinations.

²¹⁴ ICANN Response, para. 34, as per Panel 9 January 2014 objection determination in favor of SRL; **Claimant Exhibit 11**, para. 129.

²¹⁵ ICANN Response, para. 35.

²¹⁶ ICANN Response, para. 48.

²¹⁷ ICANN Response, para. 49.

²¹⁸ ICANN Sur-Reply, para. 2.

²¹⁹ ICANN letter 2 February 2016 at fn 5.

8.47 ICANN contends that the facts at issue in the *Dot Registry v. ICANN* IRP are not remotely similar to those present here and the *Dot Registry* Final Declaration has little relevance to the instant IRP.

(iii) The Panel's Decision

8.48 As stated above, this IRP Panel is not reviewing the Expert Determination or the Denial of the Reconsideration Request, as any application in respect of either is out of time. The Panel's analysis does not end there, however. Irrespective of what might have happened in the expert proceeding or the reconsideration process, this Panel has before it a separate and timely challenge to the Board's Decisions and Actions of 12 October 2014 and 5 February 2014. The Panel therefore analyses the Board's independent obligation, at the time it acted to adopt the new review mechanism, to act in accordance with the requirements of its Bylaws, other governing documents and ICANN's Core Values on the facts and the record then before it.

8.49 In its consideration as to whether or not the Board applied its standards, policies, procedures or practices inequitably or singled out any particular party for disparate treatment, this IRP Panel specifically examines the Board's "decision or action" in determining "whether it was appropriate ... to expand the scope of the proposed review mechanism to include other Expert Determinations, such as some resulting from Community and Limited Public Objections".²²⁰

8.50 In that specific context, the IRP Panel considers whether or not the Board "singled out" the Claimant for "disparate treatment" without substantial and reasonable cause, in contravention of Article II, Section 3 of the Bylaws, by excluding the .CHARITY Expert Determination, being the only community objection where the same objection from the same objector led to a different determination, from its consideration. The Panel further considers whether or not the Board's decision was based on an exercise of due diligence and care in having a reasonable amount of facts in front of it.

8.51 The IRP Panel accepts that, subject to its duty to act in the best interests of the community as discussed below at Issue 3, ICANN was under no obligation to create the new Inconsistent Determinations Review Procedure. However, once it had done so, this IRP

²²⁰ NGPC Resolutions, 12 October 2014, **Claimant Exhibit 16** at pages 11-12.

Panel considers that the Bylaws required ICANN to ensure that it did not single out a similarly situated applicant for disparate treatment in relation to the application of the new Inconsistent Determinations Review Procedure without “substantial and reasonable cause”.

8.52 It is central to this Panel’s analysis that ICANN has admitted that “.CHARITY was the only other TLD ... where the same objector brought the same objection to different applications for the same strings and reached different results to the detriment of the losing applicant.”²²¹ In other words, ICANN has accepted that the Expert Determination at issue here fits within the “strict definition” of inconsistent Expert Determinations that the ICANN Board used to determine the scope of the new review procedure.

8.53 Ultimately, the 12 October 2014 Decision and Action (and its preceding 5 February 2014 Decision and Action) was not to extend the scope of the new review mechanism to apparently inconsistent Expert Determinations made as to objections other than certain designated Expert Determinations based on string confusion objections. Rather, the Board’s decision was to limit the new Inconsistent Determinations Review Procedure to a hand-picked subset of inconsistent SCO Expert Determinations.²²² ICANN accepted that “to promote the goals of predictability and fairness” a broader review mechanism “may be more appropriate as part of future community discussions about subsequent rounds of the New gTLD Program,” but declined to extend the new review mechanism at the time it acted because:

- (a) “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”;
- (b) “[a]llowing 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”;

²²¹ ICANN letter 2 February 2016 at fn 5.

²²² Notably, the Board did not refer the full suite of inconsistent SCO determinations to the new review process to reconcile the differing outcomes. Rather, the Board selected only one determination from each set for review in the new process. Reply, fn. 10. The basis on which the Board made this selection was not disclosed, other than to state that each “falls outside normal standards of what is perceived to be reasonable and just.” Approved Resolutions, 12 October 2014 resolution, **Claimant Exhibit 16**. This Panel’s review of whether the Board had a reasonable basis to distinguish the selected string contention objection Expert Determinations, which were subjected to the new process, from the community objections to .CHARITY, which were excluded, is limited by this non-disclosure.

- (c) while on their face other SCO Expert Determinations and Expert Determinations of the Limited Public Interest and Community Objections might appear inconsistent, there were “reasonable explanations for these seeming discrepancies, both procedurally and substantively”;²²³ and
- (d) those “reasonable explanations” lay in the “materials presented,” i.e. the applications and the parties’ responses to the IO’s objection and in “nuanced distinctions” between the Expert Determinations relevant to the particular objection.”²²⁴

8.54 These factors may have explained the different treatment in respect of other perceived inconsistent Expert Determinations, but in relation to the .CHARITY Expert Determinations they are problematic for the reasons explained below.

8.55 **First**, as acknowledged by ICANN, pending the outcome of this IRP Final Determination, the .CHARITY applicant SRL has taken no action in reliance on the Expert Determination overruling the IO’s Community Objection to its application, including but not limited to signing Registry Agreements, transitioning to delegation, withdrawing its application or requesting refunds.

8.56 **Second**, as a consequence, there are no actions in respect of the .CHARITY applications to be undone such as to delay consideration of all applications, were the new review mechanism to apply. As to issues of unfairness for those that have already acted in reliance on the Applicant Guidebook, there is no evidence in the carefully documented record that the Board considered the fact that ICANN Board’s October 2013 decision that it would adopt the Beijing Communiqué recommendations – some three months prior to the .CHARITY Expert Determinations – materially changed the Applicant Guidebook requirements in respect of the .CHARITY registration eligibility requirements, equally affecting *all* applicants and potentially eliminating any meaningful distinction between the pending applications.

8.57 **Third**, given ICANN’s admission that on their face the .CHARITY Expert Determinations appear “inconsistent” within the same “strict definition” the Board relied upon in considering the new review mechanism, and in light of the Board’s October 2013

²²³ Approved Resolutions, 12 October 2014 resolution, **Claimant Exhibit 16**.

²²⁴ Approved Resolutions, 12 October 2014 resolution, **Claimant Exhibit 16**.

announcement that it would adopt the Beijing Communiqué recommendations, there do not appear to be “reasonable explanations for these seeming discrepancies, both procedurally and substantively”.

8.58 **Fourth**, as to the existence of “reasonable explanations” that the perceived inconsistency in the .CHARITY Expert Determinations could be explained by the “materials presented” or “nuanced distinctions” between the different applications, the carefully documented record of the Board’s 5 February 2014 and 12 October 2014 consideration of the new process contains no consideration of the potentially levelling impact of the October 2013 announcement that the Board intended to adopt of the GAC Beijing Communiqué recommendations – three months before the Expert Determinations were issued.²²⁵

8.59 The IRP Panel recognizes and has carefully considered the fact that the Expert Panel had rejected as untimely the Claimant’s attempt to introduce evidence of the October 2013 announcement in the Expert Determination proceeding. The IRP Panel takes no position as to the correctness of that procedural decision, as the IRP Panel has concluded that the Claimant’s IRP claims as to the Expert Determination itself are untimely. In any event, it is doubtful that such a procedural decision would in any case have been subject to an IRP, even if timely.

8.60 Nevertheless, situating this IRP Panel’s review at the time that the Board took its decision not to extend the new review procedure to the inconsistent .CHARITY determinations, nothing in the record indicates that the Board took into account the following:

- (a) that the decision that ICANN would adopt the GAC Beijing Communiqué recommendations was a major policy development for ICANN, announced in October 2013, that would lead to the establishment of new undertakings in its registry agreements, which would be mandatory and applicable across-the-board to all Category I and Category II gTLD’s, including but not limited to .CHARITY, providing an important change to the Applicant Guidebook;

²²⁵ This is despite the fact that the Claimant’s Reconsideration Request was pending at the time the NGPC first published framework principles of a potential review mechanism that would be limited only to “perceived Inconsistent String Confusion Expert Determinations.” The Claimant filed its Reconsideration Request on 24 January 2014 and the NGPC published Approved Resolutions formally adopting the recommendations of the Beijing Communiqué and describing the new review mechanism, which would be limited to identified SCO Expert Determinations, on 5 February 2014. Approved Resolutions, 5 February 2014 resolutions, **Claimant Exhibit 14**, page 3.

- (b) that the Board indicated publicly that it planned to adopt the GAC Beijing Communiqué recommendations relating to .CHARITY three months prior to the issuance of the inconsistent .CHARITY Expert Determinations;
- (c) that the effect of that decision was to render the eligibility requirements in respect of all applicants for the .CHARITY gTLD identical, including those proposed by the Claimant;
- (d) that all .CHARITY gTLD applicants originally elected to protect their positions in respect to any future action relating to the Beijing Communiqué by clearly stating in their application materials that they would comply with any ICANN registration requirements, including in the submission of their final PICs for approval;
- (e) that the IO had lodged identical objections in March 2013 to the .CHARITY applications based on the initial lack of a commitment to operate a limited registry, but the Expert Panel nevertheless overruled the IO community objection for the SRL and Excellent First applications based on their amended commitment to limit the eligibility requirements in a manner that was consistent with the GAC Beijing Communiqué recommendations and, in the case of Excellent First's amended commitment, explicitly referred to the recommendation; and
- (f) that the Expert Panel upheld the IO community objection to the Claimant's application despite the practical effect of ICANN's announcement in October 2013 that it intended to adopt the GAC Beijing Communiqué's recommendations concerning Category I and Category II safeguards, coupled with the Claimant's (and SRL and Excellent First's) advance undertakings to comply with such safeguards being to level all applications for the .CHARITY gTLD, to put all three applications on a level playing field and rendering them functionally indistinguishable in respect of eligibility requirements.

8.61 Given the procedural and substantive effect of the announcement that the Board would adopt the GAC Beijing Communiqué recommendations, at the time the Board determined the scope of the new Inconsistent Determination Review Process, any practical differences in the "materials presented", as well as any "nuanced distinctions" perceived to have existed between the .CHARITY applications in relation to eligibility requirements prior to October 2013, had ceased to have any material effect prior to the .CHARITY Expert Determinations.

- 8.62 For the same reasons, any “reasonable explanations” for perceived inconsistencies between the .CHARITY Expert Determinations based on the different eligibility requirement undertakings prior to October 2013 were eliminated by the ICANN Board’s announcement that it would adopt the GAC Beijing Communiqué recommendations. The effect of that decision, coupled with *all* applicants’ undertakings to follow any GAC Beijing Communiqué recommendations adopted by ICANN, was to render the applicants’ eligibility requirements criteria identical across all three applications.
- 8.63 The Panel concludes that the Board’s decision not to expand the scope of the proposed mechanism to include other Expert Determinations, and in particular the .CHARITY Expert Determinations, failed to take into account the following factors:
- (a) the .CHARITY Expert Determinations were the only other set of inconsistent Expert Determinations dealing with the same objection by same objector to identical strings that was outstanding at the time that the ICANN Board determined the scope of the process, making them the only other non-SCO Expert Determinations to fit the “strict definition” of “inconsistent” the NGPC set forth in the 5 February 2014 Approved Resolution;²²⁶
 - (b) the Claimant, SRL and Excellent First were the only applicants for the .CHARITY gTLD and at the time of the Expert Determinations and the Claimant’s application was distinguished only by the absence of a separately proffered amended public interest commitment to operate a limited registry in response to the IO’s objection;
 - (c) as at 12 October 2014, SRL had not taken any action in reliance on the Expert Determination, including signing Registry Agreements, transitioning to delegation, withdrawing their applications, and requesting refunds; and
 - (d) the effect of ICANN’s action in determining it would implement new mandatory registration requirements applicable to all Category I and Category II gTLDs was to eliminate any practical distinction between the competing .CHARITY applications, including the basis on which the Expert Panel had distinguished the Claimant’s applications by upholding the community objection in relation to it.

²²⁶ As far as the IRP Panel is aware, any other inconsistent Expert Determinations did not involve identical objections to identical strings, including .Vistaprint and .HOSPITAL. In the circumstances, there is no support in the record for ICANN’s contention that extending review to Claimant risks opening floodgates.

- 8.64 As a result of these factors, the impact on “predictability and fairness” in the application process of including this additional set of similarly situated Expert Determinations in the new Inconsistent Determination Review would be limited.
- 8.65 The fact that the inconsistent Expert Determinations in the .CHARITY applications were the only other inconsistent determinations of identical objections by the same objector to the same gTLD string that existed at the time the Board determined the scope of the new review process, and the fact that the Claimant was the only party prejudiced by such an inconsistent Expert Determination that was not entitled to participate in the new review process, strongly suggests that it was an inequitable action and did single out the Claimant. The requirement for discrimination is not that it was malicious or even intentional, and this Panel has not been presented with any evidence that ICANN acted maliciously or intentionally to single out the Claimant. Rather, the requirement for discrimination is that a party was treated differently from others in its situation without “substantial and reasonable” justification. The IRP Panel does find that this standard was met.
- 8.66 For the reasons discussed above, the Panel finds the reasons ICANN advanced for limiting the scope of the new process to the designated SCO determinations insufficient to constitute “substantial and reasonable cause” to subject Claimant to the disparate treatment of being denied access to the new process.
- 8.67 Although the Panel believes that it is appropriate to determine whether the Board acted in conformance with the Articles, Bylaws and Guidebook primarily based on the record of the Board’s contemporaneously stated rationale for its actions, the Panel also has considered two further arguments that ICANN advanced in the IRP proceeding as follows.
- (a) ICANN submitted that community and limited public interest objections differ from string contention objections in that the latter can be judged on the face of competing strings, while the two former categories of objection require recourse to the underlying applications for determination. The Panel finds this argument inconsistent, however, with the Board’s contemporaneously stated rationale in its 12 October 2014 Decision and Action to exclude apparently inconsistent Expert Determinations other than the ones referred to the new process, *including other SCO Expert Determinations*, on the basis that “reasonable explanations” of the

apparent inconsistencies in differing Expert Determinations were found in the “materials presented” and the existence of other “nuanced distinctions.”²²⁷

- (b) ICANN submitted that there was less need for an additional process to review the apparently inconsistent Expert Determinations of the competing .CHARITY applications because they were determined by a single expert panelist “who therefore had all of the evidence for both objection proceedings in hand.” ICANN contrasts this situation to the SCO determinations the Board designated for review, which were determined by different panels.²²⁸ Although ICANN at the hearing characterized the new process as a “re-evaluation” in which “a single expert panel was tasked with re-evaluating the determinations,”²²⁹ the Inconsistent Determination Review Process ICANN actually adopted did not involve reconciliation of the differing results of “both [SCO] objection proceedings”, but rather independent review of a single SCO expert determination from each of the two sets which the NGPC designated, for reasons it chose not to state. The Panel finds ICANN’s distinction on the basis that different panels issued the inconsistent SCO determinations insufficient to constitute “substantial and reasonable cause” for disparate treatment of the .CHARITY inconsistent determinations as compared to the SCO determinations that were accorded access to the new process.

- 8.68 The Panel therefore determines that the Board’s action in excluding the Claimant from the new Inconsistent Determinations Review Procedure was inconsistent with the non-discrimination provision of Article II, Section 3 of ICANN’s Bylaws.

ISSUE 2: Defined Review Standard (Article IV, Section 3.4)

- 8.69 The IRP Panel’s findings as to the Defined Review Standard (Bylaws Article IV, Section 3.4) are set out below.

- i. Did the Board act without conflict of interest in taking its decision to omit .CHARITY from the new Inconsistent Determinations Review Procedure?*

²²⁷ The distinction between open and limited registries may also be relevant to the resolution of string contention objections where the objection alleges a likelihood of confusion in relevant markets. The commitment to a limited registry, or lack thereof, appears in application materials and is not apparent from the face of the gTLD string. Report of Final Review Panel, *Verisign, Inc. v. United TLD Holdco Ltd.*, ICDR No. 01-15-0003-3822, **ICANN Appendix L**.

²²⁸ ICANN Sur-Reply at para. 49; ICANN’s hearing slides at 21.

²²⁹ ICANN hearing slides at 21.

8.70 There is no suggestion that the Board had a conflict of interest, and the IRP Panel finds that the Board acted without conflict.

ii. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them in taking its decision to omit .CHARITY from the new Inconsistent Determinations Review Procedure?

8.71 As to the 12 October 2014 Decision and Action (and its preceding 5 February 2014 Decision and Action), the research, analysis, investigation and consultation process undertaken by the ICANN Board in establishing its new Inconsistent Determination Review Process is carefully documented. The Approved Resolutions of 12 October 2014 appear comprehensively to summarize the matter on which the Board relied in determining to limit the scope of application of the new process to selected inconsistent SCO Expert Determinations.

8.72 The carefully documented record does not reflect, however, that the Board considered the effect of its then-recent adoption of the GAC Beijing Communiqué recommendations in determining the scope of application of the new review mechanism. In particular, the Board does not appear to have considered the levelling effect on the pending .CHARITY applications of its decision to adopt the new PIC requirement.

8.73 The Board's announcement that it would adopt the GAC's Beijing Communiqué recommendations was a fact known to ICANN. ICANN, in exercising due diligence and care in deciding whether or not to include the perceived inconsistent .CHARITY Expert Determinations in the new Inconsistent Determinations Review Procedure at minimum should have taken that into account. Absent such consideration, in light of the circumstances outlined above, the IRP Panel must conclude that Bylaw standard of due diligence and care was not met on this occasion. Again, we make no finding that the Board's failure to consider the impact of its adoption of the Beijing Communiqué recommendations was malicious or intentional. We find simply that the levelling effect on the eligibility requirements in the pending applications of the new PIC requirement was a material fact that should have been considered, and apparently it was not.

iii. Did the Board members exercise independent judgment in taking the decision to omit .CHARITY from the new Inconsistent Determinations Review Procedure, believed to be in the best interests of the community?

8.74 There is no indication that the Board members were acting in any way other than in good faith and exercising independent judgment, with the subjective belief that they were acting in the best interests of the community. The IRP Panel finds that the Board members exercised independent judgment, believed to be in the best interests of the community.

ISSUE 3: Did the Board Act For the Benefit of the Internet Community as a Whole? (ICANN Articles of Incorporation, Section 4)

(i) The Claimant's Position

8.75 The Claimant further submits that ICANN's Articles state that the Board must act "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."²³⁰ The Claimant considers that the Board has failed to do so in relation to its .CHARITY Application. By failing to reconcile differing outcomes for the same objection, at least in respect to the differing .CHARITY Expert Determinations, which Claimant contends fit the same definition of "inconsistent determinations" the Board applied to .COM and .CAM, the Board has failed to act in the best interests of the Internet community.

8.76 ICANN adopted its new gTLD programme "to enhance choice and competition in domain names and promote free expression online."²³¹ The Claimant argues that the Board must remain "faithful to 'the public interest' and 'accountable to the Internet community'."²³² Furthermore, the Claimant considers that the Board has not acted in the best interests of the Internet community in its decision in relation to the Claimant and should have granted a review for "inconsistent and unreasonable" objection rulings.²³³

8.77 The Claimant also argues that the Bylaws and Articles compel the Board to remain accountable to the Internet community, as well as acting in the best interests of the Internet community. The Claimant further argues that the Board has conceded that it has not acted in the best interests of the Internet community: "[t]he Board fails the Bylaw directive of 'remaining accountable to the Internet community' by refusing to employ the

²³⁰ Claimant Request, para. 48.

²³¹ Claimant Request, para. 9.

²³² Claimant Request, para. 7.

²³³ Claimant Request, para. 8.

very ‘mechanism’ it created to right the wrong perpetrated by the types of conflicting objection rulings that include those made regarding .CHARITY”.²³⁴

8.78 The Claimant relies on *Booking.com v ICANN* to show that “even where the Board acts reasonably and in what it believes to be the best interests of ICANN, a panel must still independently determine whether the Board acted or chose not to act in a manner ‘consistent with the Articles, Bylaws, and ... the policies and procedures of the Guidebook.’”²³⁵

(ii) The Respondent’s Position

8.79 ICANN takes the position that the 12 October 2014 Decision and Action (and the preceding 5 February 2014 Decision and Action) are purposefully narrow and limited specifically to SCOs.²³⁶ It expressly distinguished the objection decisions rendered in the context of other objection proceedings, such as those relating to Community Objections. The NGPC’s procedural rationale was that “[t]wo panels confronting identical issues could – and if appropriate should – reach different determinations based on the strength of the material presented.”

8.80 ICANN goes on to conclude that the materials presented to the two Expert Panels in .CHARITY were not the same and, in particular:

“SRL presented evidence demonstrating its commitment to limit registration in .CHARITY to members of the charity sector, while Corn Lake did not and instead maintained that .CHARITY would be ‘open to all consumers.’”²³⁷

8.81 According to ICANN, SRL’s proposed registration eligibility requirements for the .CHARITY gTLD were in the best interests of the community and the Claimant’s open registration was not.

(iii) The Panel’s Decision

8.82 The ICANN Articles of Incorporation, Article 4, require that ICANN act:

²³⁴ Claimant Request, Introduction.

²³⁵ Reply, para. 37.

²³⁶ ICANN Response, at para. 53.

²³⁷ ICANN Response, at para. 56.

“for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and ... local law.”

- 8.83 It is plainly in the best interests of the Internet community as a whole that ICANN maintains a procedurally fair system with the highest levels of consistency and integrity. The Panel is of the view that well-reasoned, non-discriminatory application of the new Inconsistent Review Procedure would be in the best interests of the Internet community.
- 8.84 Prior to the issuance of the .CHARITY Expert Determinations, ICANN had announced that it would adopt the GAC Beijing Communiqué. As a consequence, *all* applicants were committed to the same registration limitations, both because the recommendations became mandatory and, importantly, because all had indicated in their applications a commitment to comply with any adopted recommendations. The impact of the decision to adopt the GAC Beijing Communiqué recommendations was a material factor in determining whether or not there were reasonable explanations for the perceived inconsistencies in the .CHARITY Expert Determinations.
- 8.85 ICANN’s failure to take the impact of its decision to adopt the GAC Beijing Communiqué recommendations into account was not in conformity with its own Bylaws or generally accepted standards of natural justice and due process reflected in its Core Values and other governing documents. Accordingly, the Panel finds that in this instance, ICANN cannot be found to have acted for the benefit of the Internet community as a whole.
- 8.86 It is not suggested by the Claimant that ICANN was motivated by anything other than the best interests of the Internet community. However, assessing its actions from an objective standard, failure to take into account material factors in its decision-making results in a procedural unfairness and disparate treatment that is not in the interests of that community as a whole.
- 8.87 For the reasons discussed above, we find the reasons the Board advanced at the time of its action to exclude .CHARITY insufficient to meet this standard. We likewise, for the reasons discussed, find ICANN’s *post hoc* justification based on the fact that the .CHARITY applications were decided by a single Expert Panelist also insufficient.

ISSUE 4: Did the Board Action Abdicate Its Accountability Obligation?

(i) The Claimant's Position

8.88 The Claimant submits that one of ICANN's core values is for the Board to remain accountable to the Internet community through mechanisms that can enhance ICANN's effectiveness.²³⁸ It submits that:

"[t]he Board had an opportunity to bring such accountability to all of the inconsistent objection results reached on common TLDs, but excluded the sole community objection situation that fell within the ambit of what it did."²³⁹

8.89 The Claimant appears to argue that by deciding not to review all inconsistent Expert Determinations, the Board somehow abdicated its accountability obligation to uphold a certain standard in all Expert Determinations rendered pursuant to its procedures.²⁴⁰

(ii) The Respondent's Position

8.90 The Respondent submits that the Reconsideration Request is the only way for it to be involved in review of the Expert Determination of the objection to Claimant's Application because:

"[r]econsideration is an accountability mechanism available under ICANN's Bylaws and involves a review by ICANN's Board Governance Committee ("BGC"). The BGC's consideration of reconsideration requests is limited to assessing whether the challenged action (or inaction) violated established policies or procedures."²⁴¹

8.91 The Respondent also argues that the Claimant's challenge of the BGC's denial of Request 14-3 is time-barred because the Claimant did not assert any such claim in its IRP Request and waited until its Reply to raise the argument.²⁴² The Bylaws provide that such a claim should be submitted within thirty days of the posting of the Board meeting contested by the

²³⁸ Claimant Request, para. 54.

²³⁹ Claimant Request, para. 55.

²⁴⁰ Claimant Request, para. 57.

²⁴¹ ICANN Sur-Reply, para. 8.

²⁴² ICANN Sur-Reply, para. 39.

prospective applicant.²⁴³ On 27 February 2014, the BGC denied the Claimant's Request 14-3. The Claimant's right to file an IRP Request on this issue expired on 28 March 2014.²⁴⁴

8.92 The Respondent argues in favor of dismissal of the Claimant's claims in this respect on time-barred grounds alone.

8.93 The Respondent also argues that the Claimant's claims fail substantively too because the Claimant has been unable to identify any Bylaws or Articles which have been allegedly breached by the BGC.²⁴⁵

(iii) The Panel's Decision

8.94 The Panel has carefully considered the parties' respective positions concerning the allegation of ICANN's abdication of its accountability responsibilities and finds there to be no basis for those claims. We do not fault ICANN for its attempt to enhance its accountability through the creation of the new process. Rather, we have found that having created the process, ICANN's Core Values and Bylaws required that it be extended on a non-discriminatory basis to similarly situated applicants and that such distinctions as were to be made regarding the scope of the process were required to be determined based on a reasonable factual record.

8.95 As to any suggestion that ICANN abdicated obligations by its Denial of the Reconsideration Request, as set out above in Section 7, any application to review to Reconsideration Request is out of time.

IPR PANEL REVIEW CONCLUSION

8.96 In conclusion, the IRP Panel determines that the ICANN Board's 12 October 2014 Decision and Action (as preceded by its February 2014 Decision and Action) is a "decision or action by the Board" that is "inconsistent with the Articles of Incorporation of Bylaws" of ICANN and "materially affected" the Claimant.

8.97 This Panel stresses that this is a unique situation and peculiar to its own unique and unprecedented facts. The facts were rendered particularly complicated and unusual by a

²⁴³ ICANN Sur-Reply, para. 40.

²⁴⁴ ICANN Sur-Reply, para. 40.

²⁴⁵ ICANN Sur-Reply, para. 41.

combination of (i) the Claimant's insistence throughout the Expert Determination proceeding that it would operate .CHARITY as an open registry – up to and until it became apparent that ICANN had decided not to permit that to occur, and (ii) the exceedingly unlikely and difficult timing of the Board's announcement that it would adopt the GAC's Beijing Communiqué recommendations – coming after the Expert Panel had closed the record but before the Expert Determination was made.²⁴⁶ This unique set of circumstances created what was doubtless a difficult situation for ICANN to consider in establishing the scope of the new review process, but it does not relieve ICANN from its ultimate responsibility to act in accordance with its Bylaws and Articles of Incorporation.

8.98 This IRP Panel does not suggest that ICANN lacks discretion to make decisions regarding its review processes as set out in the Applicant Guidebook, which may well require it to draw nuanced distinctions between different applications or categories of applications. Its ability to do so must be preserved as being in the best interests of the Internet community as a whole.

8.99 In reaching this conclusion, the Panel carefully considered other relevant IRP Final Determinations and considers its approach to be consistent with these. In particular, the IRP Panels in *Booking.com v ICANN*, *Vistaprint v ICANN* and *ICM Registry v ICANN* were asked to review underlying Expert Determinations, which had been, or might have been, subject to Reconsideration Requests. Each considered that Reconsideration Review provides for procedural review and is not a substantive appeal (and that ICANN's Board was under no obligation to create a different appeal mechanism). For example:

(a) *Booking.com v ICANN* found it “crucial” to its decision that the Claimant there was not challenging the validity or fairness of the process and that no such challenge would have been timely;

²⁴⁶ These circumstances, in which ICANN agreed to adopt the Beijing Communiqué recommendations while the .CHARITY Expert Determinations were still underway but after the record was closed led to a circumstance in which the Expert upheld a community objection that the Claimant could legitimately have considered moot. As noted already, however, it is outside the scope of this Panel's mission to determine whether the Expert rightly or wrongly excluded the Claimant's late submission regarding the Beijing Communiqué. It is also beyond this Panel's mission to express a view as to whether review of that Expert Determination under the Inconsistent Determinations Review Procedure, applying the standard of review determined by ICANN, should or will lead to a reversal of that Expert Determination. The sole issue before this Panel is whether the Board properly or improperly excluded the .CHARITY Expert Determinations from the Inconsistent Determinations Review Procedure in the first place.

- (b) *ICM Registry v ICANN* found the “fundamental obstacle” to the Claimant’s assertions to be that the established process had been followed in all respects and the time “long had passed” to challenge the processes themselves;²⁴⁷
- (c) *Donuts v ICANN*²⁴⁸ considered whether the Board should have extended the Inconsistent Determinations Review Procedure “to correct and prevent community objection rulings exceeding or failing to apply documented Guidebook standards”²⁴⁹ and found that “the only differences in treatment that implicate Bylaws Article II, Section 3 are those which occur in like circumstances” and thus held that the record did not allow it to conclude that the “considerable consistency issues” raised in connection with string similarity cases were present in “community objection cases as a whole...”; and
- (d) *VistaPrint v ICANN* characterized the claim as arising from “similarly situated” strings, as compared to the “inconsistent determinations” the NGPC addressed in the 12 October 2014 Resolution, (i.e. .WEB./WEBS being similar to .CAR/.CARS) and the claim of disparate treatment “a close question”,²⁵⁰ recommending that the Board conduct the Reconsideration Request step in the process that was, at the time of the IRP Panel, not yet engaged.

8.100 The Panel considers the Final Determination in *Dot Registry v ICANN*, which addressed primarily issues of adequacy and burden of proof in respect to the BCG’s denial of a Reconsideration Request, to be of little relevance here. The Panel has found the instant IRP request untimely in respect to the denial of Claimant’s Reconsideration Request. In reaching its findings in respect of the basis on which the NGPC acted in determining the scope of the new review mechanism, the Panel here has relied on a record it considered carefully documented and apparently comprehensive.

8.101 The current IRP is not a review of a Reconsideration Request or Expert Determination but, rather, of a decision not to extend the scope of the new Inconsistent Determinations Review Procedure to the .CHARITY Expert Determinations, despite those Determinations meeting the strict criteria for inclusion. This is further supported by the ICANN Board’s

²⁴⁷ *ICM Registry v ICANN*, para. 129.

²⁴⁸ As addressed in post hearing submissions.

²⁴⁹ Final Declaration of the Independent Review Panel in *Donuts, Inc. and ICANN* at para. 73.

²⁵⁰ Final Declaration, *VistaPrint Ltd. v. ICANN*, ICDR No. 01-14-0000-6505, **ICANN Appendix K**, at para. 176

subsequent decision to include the .HOSPITAL Expert Determinations, despite those Determinations appearing to have been less clearly within the criteria that the .CHARITY Determinations.

9. COSTS

9.1 The Supplementary Rules provide, at Article 11 that:

“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.”

9.2 The ICDR Rules, Article 34, define costs to include the fees and expenses of the arbitrators and Administrator as well as the reasonable legal and other costs incurred by the parties.

9.3 The IRP Panel considers that these IRP proceedings involve extraordinary circumstances. The relevant factors, which go to the reasonableness of the parties’ positions and their contribution to the public interest, include as follows:

- (a) the exceedingly unlikely and difficult timing of the Board’s announcement that it would adopt the GAC’s Beijing Communiqué recommendations – coming after the Expert Panel had closed the record but before the Expert Determination was made;
- (b) the unique impact of the Beijing Communiqué recommendations on the .CHARITY applications and the nuances thereof;
- (c) the Claimant’s insistence throughout the Expert Determination proceeding that it would operate .CHARITY as an open registry – up to and until it became apparent that ICANN had agreed not to permit that to occur;
- (d) the lack of any deliberate disparate treatment of the Claimant by ICANN;
- (e) the Panel’s 20 January 2016 determination that the Claimant’s Reply exceeded the scope of PO1; and
- (f) the fact that the new Inconsistent Determination Review Process is to be funded by ICANN.

9.4 These factors created what was doubtless a difficult situation for ICANN to consider in establishing the scope of the new review process. Although they do not relieve ICANN from its ultimate responsibility to do so in accordance with its Bylaws and Articles of Incorporation, they do influence the IRP Panel's costs determination.

9.5 The IRP Panel accordingly determines that, although ICANN is not the prevailing party in the IRP, due to the extraordinary circumstances described above, ICANN shall not be responsible for bearing all costs of the proceedings. Instead, pursuant to Article 11 of the Supplementary Rules, the IRP Panel determines that no costs shall be allocated to the Claimant as the prevailing party. Consequently, each Party shall bear its own costs in respect of this IRP Panel proceeding.

10. RELIEF REQUESTED

10.1 The Claimant seeks:

- (a) a direction from the Panel to ICANN's Board of Directors to reverse the .CHARITY objection ruling against CORN LAKE, LLC;
- (b) a direction from the Panel to ICANN's Board of Directors to subject that ruling to the same review as provided in the Resolution for the .COM and .CAM decisional conflicts; or
- (c) a direction from the Panel to ICANN's Board of Directors to reinstate CORN LAKE, LLC's application conditioned upon its acceptance of the PIC, agreed to by SRL; and
- (d) an order from the Panel [to ICANN's Board of Directors] to place all .CHARITY applications on hold during the course of these proceedings and for ICANN to refrain from engaging in any contracting or delegation processes related to the same.

11. DISPOSITIVE

11.1 In Accordance with Article IV, Section 3.11 of the Bylaws, the Panel:

- (a) Declares that the Claimant, Corn Lake, is the prevailing party;
- (b) Declares that the action of the Board in omitting .CHARITY from the new Inconsistent Determinations Review Procedure was inconsistent with the Articles of Incorporation and Bylaws;

- (c) Recommends that the Board extend the new Inconsistent Determinations Review Procedure to include a review of Corn Lake's .CHARITY Expert Determination;
- (d) Recommends that the Board continue to stay any action or decision in relation to SRL's .CHARITY application until such time as the Board reviews and acts upon the opinion of the IRP Panel; and
- (e) Determines that no costs shall be allocated to the prevailing party.

Signed:



Mark Morril

Michael Ostrove

Date: 17 October 2016

Date: 17 October 2016



Wendy Miles QC

Date: 17 October 2016

CLA-031

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)

Independent Review Panel

IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS
Pursuant to the Bylaws of the Internet Corporation for Assigned Names and Numbers (ICANN), the *International Arbitration Rules of the ICDR*, and the *ICDR Supplementary Procedures for ICANN Independent Review Process*

Gulf Cooperation Council (GCC))	
Claimant)	
and)	ICDR Case
Internet Corporation for Assigned Names and Numbers (ICANN))	No. 01-14-0002-1065
Respondent)	

**PARTIAL FINAL DECLARATION OF THE INDEPENDENT REVIEW PROCESS
PANEL**

Independent Review Panel

Lucy Reed, Chair
Anibal Sabater
Albert Jan van den Berg

I. INTRODUCTION

1. This case concerns the dispute between the Gulf Cooperation Council (“**GCC**”), and the Internet Corporation for Assigned Names and Numbers (“**ICANN**”) over the generic Top-Level-Domain name (“**gTLD**”) “.persiangulf”.
2. The underlying dispute is a broader one, concerning the name for the body of water separating the Arabian Peninsula from the Islamic Republic of Iran (“**Iran**”), which is a non-Arab nation historically called Persia. The Arab states, including members of the GCC, use the name “Arabian Gulf”, while Iran uses the name “Persian Gulf”. The sensitivity of this geographical name dispute, which has gone on for over 50 years, is well-known. It is representative of deeper disputes between GCC members and Iran over matters of religion, culture and sovereignty, prompting sanctions such as the banning of maps and censorship of publications that use either “Arabian Gulf” or “Persian Gulf”. (For purposes of neutrality, we will use the simple term “Gulf” in this Declaration.)
3. The particular dispute has its origins in the July 2012 application by a Turkish company founded by Iranian nationals, Asia Green IT System Bilgisayar San. Ve Tic. Ltd Sti (“**Asia Green**”), for registration of the “.persiangulf” gTLD as an international forum for people of Persian descent and heritage. The GCC has contested this application at every step of the ICANN gTLD review process, primarily on grounds that “.persiangulf” targets the Arabian Gulf Arab community, which was not consulted and opposes this use of the disputed geographical name.
4. The GCC initiated this Independent Review Process (“**IRP**”) in December 2015 to challenge the ICANN Board’s taking any further steps to approve registration of “.persiangulf” gTLD to Asia Green, alleged to violate the ICANN Articles and Bylaws.
5. Based on the IRP Panel’s review and assessment of the Parties’ submissions and evidence, our Partial Declaration is in the GCC’s favor. At the Parties’ joint request, the IRP Panel will allocate costs in a Final Declaration at a later stage.

II. THE PARTIES AND COUNSEL

6. The Claimant GCC is a political and economic alliance established in 1981 among six countries: the United Arab Emirates (“UAE”), Saudi Arabia, Kuwait, Qatar, Bahrain and Oman. The GCC is based in Saudi Arabia. Its address is Contact Information Redacted
7. The GCC is represented by Natasha Kohne and Kamran Salour of Akin Gump Strauss Hauer & Feld LLP, Sawwah Square, Al Sila Tower, 21st Floor, P.O. Box 55069, Abu Dhabi, UAE.
8. The Respondent ICANN is a non-profit public benefit corporation established under the laws of the State of California, USA. ICANN’s mission is “*to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems*”, including the domain name system.¹ ICANN’s address is 12025 Waterfront Drive, Suite 300, Los Angeles, CA 90094-2536, USA.
9. ICANN is represented by Jeffrey A. LeVee, Eric P. Enson, Charlotte Wasserstein and Rachel Zernik of Jones Day, 555 South Flower Street, 50th Floor, Los Angeles, CA 90071, USA.

III. BACKGROUND FACTS

10. We set out below the basic background facts, which are undisputed except where otherwise noted. More detailed background facts are included in the separate sections below on the jurisdiction and merits issues in dispute.

A. ICANN’s New gTLD Program

11. As set out in Article 3 of its Articles of Incorporation, ICANN is mandated to develop procedures to expand the number of top level domains and increase the number of companies approved to act as registry operators and sell domain name registrations. In

¹ ICANN’s Response to Gulf Cooperation Council’s Request for Emergency Relief (“**Response to Emergency Request**”), ¶ 6.

June 2011, ICANN launched a significant expansion with the “New gTLD Program”. According to ICANN, this Program is its “most ambitious expansion of the Internet’s naming system”. To illustrate, ICANN approved only seven gTLDs in 2000 and another small number in 2004-2005² and then received almost 2000 applications in response to the New gTLD Program.³

12. ICANN developed an Applicant Guidebook through several iterations, with Version 4 of the New gTLD Application Guidebook dated 4 June 2012 (“**Guidebook**”) being relevant here.⁴ The Guidebook, running to almost 350 pages, sets out comprehensive procedures for the gTLD application and review process. It includes instructions for applicants, procedures for ICANN’s evaluation of applications, and procedures for objections to applications. In line with ICANN’s policies of transparency and accountability, applications for new gTLDs are posted on the ICANN website for community review and comment. ICANN may take such community comments into account in deciding whether an application meets the criteria for approval of a new gTLD registry operator.
13. Decisions on applications for new gTLDs are made by the New gTLD Program Committee of the ICANN Board (“**NGPC**”).

B. The “.persiangulf” New gTLD Application

14. On 8 July 2012, Asia Green applied for the “.persiangulf” gTLD. In its application form, Asia Green identified the mission/purpose of the proposed gTLD in relevant part as follows:

There are in excess of a hundred million of Persians worldwide. They are a disparate group, yet they are united through their core beliefs. They are a group whose origins are found several millennia in the past, their ethnicity often inextricably linked with their heritage. Hitherto, however, there has been no way to easily unify them and their common cultural, linguistic and historical heritage. The .PERSIANGULF gTLD will help change this.⁵

² Response to Emergency Request, ¶¶ 12-13.

³ <https://newgtlds.icann.org/en/about/program>.

⁴ Response to Emergency Request, Exh. R-ER-3/R-2 (“**Guidebook**”).

⁵ Request for Independent Review Process (“**Request for IRP**”), ¶¶ 31 and 66.

15. Asia Green has also applied for a number of other gTLDs. Its application for “.pars” (referring to the ancient Persian homeland of Pars), which was based on essentially the same mission/purpose as “.persiangulf” to unite the Persian community, was successful and led to a registry agreement in 2014.⁶ Its applications for “.islam” and “.halal”, however, were not accepted by ICANN.⁷

C. The GCC’s Objections to Asia Green’s “.persiangulf” gTLD Application

16. The GCC objected to Asia Green’s application within the mechanisms provided by ICANN.

1. Concerns Raised with the Governmental Advisory Committee to ICANN

17. ICANN, which is a complex global organization, relies on committees to provide advice from different constituencies. As relevant here, the Governmental Advisory Committee to ICANN (“GAC”) consists of members appointed by and representing governments. The GAC was created to:

*consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements, or where they may affect public policy issues.*⁸

18. Module 3.1 of the Guidebook, which is entitled “GAC Advice on New gTLDs”, allows GAC members to raise governmental concerns about a gTLD application. Such concerns are considered by the GAC as a whole, which may agree on advice to forward to the ICANN Board. Such GAC advice to the ICANN Board is one of two methods of governmental recourse against an application for a gTLD. (The second method, an “Early Warning Notice”, is discussed below.)
19. As set out in Module 3.1 of the Guidebook, the advice from the GAC to the ICANN Board may take one of the following three forms:
 - a. A “Consensus GAC Advice”, in which the GAC, on consensus, provides public policy advice to the ICANN Board that an application **should not** proceed, creating a strong

⁶ Request for IRP, ¶ 65.

⁷ Ibid., ¶ 61.

⁸ Guidebook, Module 3.1, p. 1.

- presumption of non-approval of the application by the ICANN Board; there is no equivalent form of consensus GAC advice that an application **should** proceed;
- b. The expression of **concerns** in the GAC about an application, after which the ICANN Board is expected to enter into a dialogue with the GAC to understand those concerns, and to give reasons for its ultimate decision; or
 - c. Advice that the application should not proceed unless remediated, creating a strong presumption that the ICANN Board should not allow the application to proceed unless the applicant implements a remediation method available in the Guidebook.
20. On 14 October 2012, the UAE wrote to the GAC and ICANN expressing its disapproval and non-endorsement of Asia Green’s “.persiangulf” application.⁹ Similar letters from Oman, Qatar and Bahrain followed.¹⁰ As members of the GCC and GAC, these governments objected to registration of “.persiangulf” as a new gTLD on grounds that the proposed domain refers to a geographical place subject to a long historical naming dispute and targets countries bordering the Gulf that were not consulted and did not support the domain, confirming that there was not community consensus in favor of the new gTLD. (The subsequent GAC consideration of these concerns is described below.)

2. Early Warning Process

21. During the public comment period for gTLD applications, the Guidebook (Module 1.1.2.4) also allows the GAC to issue an “Early Warning Notice” to the ICANN Board flagging that one or more governments consider the application to be sensitive or problematic. The Board in turn notifies the applicant for the gTLD. As the Early Warning is merely a notice, and not a formal objection, it alone cannot lead to ICANN’s rejection of the application.
22. On 20 November 2012, the governments of Bahrain, Oman, Qatar and the UAE raised their concerns about Asia Green’s “.persiangulf” application through the GAC Early Warning process. The reasons mirrored those of their GAC objections: “*The applied for*

⁹ Request for IRP, Annex 6.

¹⁰ Ibid., Annexes 7-9.

*new gTLD is problematic and refers to a geographical place with disputed name”; and “Lack of community involvement and support”.*¹¹

3. Independent Objector Review

23. The Guidebook (Module 3, Articles 3.2.1–3.2.5) also provides an “Independent Objector” process, when there has been negative public comment before any formal objection. ICANN appoints an Independent Objector whose role, as the name indicates, is to exercise independent judgement in the public interest to determine whether to file and pursue a “Limited Public Interest Objection” or a “Community Objection” to the application.
24. In December 2012, the Independent Objector for the “.persiangulf” gTLD application, Professor Alain Pellet, issued his comments aimed at “*informing the public of the reasons why the [Independent Objector] does not consider filing an objection*” in relation to the “.persiangulf” application.¹² Professor Pellet concluded that a Limited Public Interest Objection was not warranted, because there were no binding international legal norms to settle the naming dispute. Likewise, he found a Community Objection to be “*unadvisable*”.¹³ Although Professor Pellet found that there was a clearly delineated Gulf community at least implicitly targeted by Asia Green’s application and that a significant portion of that community opposed delegation of “.persiangulf”, he considered it “*most debateable*” that the gTLD would “*create a likelihood of material detriment to the rights or legitimate interests of a significant portion of the targeted community*” (meaning the Arab portion), which is a necessary criterion in the Guidebook for a Community Objection.¹⁴ He stated in this regard that:

*it is a matter of fact that there is a long-term dispute over the name of the Gulf and that both designation[s] [i.e. Persian Gulf and Arabian Gulf] are in use. It is indeed not the mission of the gTLD strings to solve nor to exacerbate such a dispute; but they probably should adapt to the status quo and the [Independent Objector] deems it unsuitable to take any position on the question. He notes that it is open to the Arabian Gulf community to file an objection as well as the same community could have applied for a “.Arabiangulf” gTLD.*¹⁵

¹¹ Ibid., Annex 10.

¹² Independent Objector’s Comments on Controversial Applications, Response to Emergency Request, Exh. R-ER-5.

¹³ Ibid., p. 6.

¹⁴ Ibid., p. 5.

¹⁵ Ibid., pp. 5-6.

4. Formal Community Objection by the GCC

25. Module 3 of the Guidebook also provides for formal objection by third parties to challenge a gTLD application. There are four types of formal objections, of which a “Community Objection” is one.
26. A Community Objection is made on the basis that “[t]here 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*” (Module 3.2). Pursuant to Paragraph 3.2.3 of the Guidebook, the International Centre of Expertise of the International Chamber of Commerce (“ICC”) administers disputes brought by Community Objection. One expert hears a Community Objection (Paragraph 3.4.4).
27. On 13 March 2013, the GCC filed a Community Objection to the “.persiangulf” application. The ICC appointed Judge Stephen M. Schwebel as the Expert Panelist to hear the Objection (Case No. EXP/423/ICANN/40). (Judge Schwebel’s determination, which he issued on 30 October 2013, is discussed below.)

D. GAC Advice to the ICANN Board

28. Concurrent with the various opposition avenues described above, the GAC was considering the GCC’s concerns in the course of its regular meetings.
29. In its 11 April 2013 meeting in Beijing, China, the GAC issued advice to the ICANN Board concerning a number of gTLD applications, using the typical format of a post-meeting Communiqué. Certain of the advice in the Beijing Communiqué was Consensus GAC Advice against gTLD applications, creating a presumption that the ICANN Board should **not** approve the relevant applications. In the case of certain geographically-based strings, including “.persiangulf”, the Beijing Communiqué reflected that the GAC required time for further consideration. On that basis, the GAC advised the ICANN Board not to proceed beyond initial evaluation of Asia Green’s application.¹⁶

¹⁶ Request for IRP, Annex 23, p. 3.

30. The NGPC of the ICANN Board accepted this advice. The NGPC documented its decision in a Resolution with an annexed “Scorecard” setting out its response to each item in the GAC’s Beijing Communiqué.¹⁷

31. In its 13-18 July 2013 meeting in Durban, South Africa, the GAC gave further consideration to the Asia Green application for “.persiangulf”: Mr Abdulrahman Al Marzouqi, who represented the UAE and the GCC at the Beijing and Durban GAC meetings, testified that no consensus was reached to oppose or support the application. In his words:

5. I also attended the GAC Meetings in Durban, South Africa in July 2013. During the meetings in Durban, I again voiced the GCC’s opposition to the .PERSIANGULF gTLD application, again emphasizing the lack of community support and strong community opposition from the Arab community because “Persian Gulf” is a disputed name. A substantial amount of GAC members in attendance shared these concerns.

6. Despite this substantial opposition, GAC could not reach a consensus. Iran is the only nation in the Gulf that favors the “Persian Gulf” name, and Iran’s GAC representative obviously does not share the other GAC members’ concerns about the .PERSIANGULF gTLD application. Not wanting a single GAC member to block consensus, the GAC Meeting Chairperson... pulled me to the side to express her frustration that GAC could not reach a consensus.¹⁸

32. The Minutes of the Durban meeting (“**Durban Minutes**”), on which the GCC relies in these IRP proceedings, reported:

*The GAC finalized its consideration of .persiangulf after hearing opposing views, the GAC determined that it was **clear that there would not be consensus of an objection regarding this string** and therefore the GAC does not provide advice against this string proceeding. The GAC noted the opinion of GAC members from UAE, Oman, Bahrain, and Qatar that this application should not proceed due to lack of community support and controversy of the name.¹⁹ (Emphasis added.)*

33. The 18 July 2013 Durban Communiqué, on which ICANN relies as the document formally providing GAC advice to the ICANN Board, reported:

¹⁷ Response to Emergency Request, Exhs. R-ER-6 and R-ER-7.

¹⁸ Claimant’s Request for Emergency Arbitrator and Interim Measures of Protection, Witness Statement of Abdulrahman Al Marzouqi (22 December 2014) (“**Al Marzouqi Statement**”), paras. 5-6.

¹⁹ Request for IRP, Annex 34.

The GAC has finalised its consideration of the following strings, and does not object to them proceeding:

...

ii. *.persiangulf* (application number 1-2128-55439).²⁰ (Emphasis added.)

34. On 10 September 2013, relying on the Durban Communiqué, the NGPC of the ICANN Board passed a resolution to continue to process the “.persiangulf” gTLD application, with a notation that there was a Community Objection:

*ICANN will continue to process the application in accordance with the established procedures in the [Guidebook]. The NGPC notes that community objections have been filed with the International Centre for Expertise of the ICC against .PERSIANGULF.*²¹ (Emphasis added.)

35. The NGPC resolution and related Scorecard were posted on the ICANN website on 12 September 2013. The Board Minutes and related materials were posted more than two weeks later, on 30 September 2013.
36. It is the ICANN Board’s decision on 10 September 2013 to continue to process Asia Green’s “.persiangulf” gTLD application that the Claimant GCC challenges in these IRP proceedings.

E. Expert Determination of the Community Objection

37. On 30 October 2013, one month after ICANN’s posting of the Durban Minutes, Judge Schwebel issued his Expert Determination dismissing the GCC’s Community Objection.²²
38. Judge Schwebel first found that the GCC had standing to object to the “.persiangulf” application, as an institution created by treaty and having an ongoing relationship with a clearly delineated community, namely the Arab inhabitants of the six GCC states on the Gulf. He then proceeded to find in the GCC’s favor on the first three of the four elements required by the Guidebook for a successful Community Objection (which, it bears noting, are not the same as the elements applicable to these IRP proceedings). Judge Schwebel found that: (a) the community invoked is a clearly delineated community; (b) the relevant

²⁰ Ibid., Annex 24.

²¹ Response to Emergency Request, Exhs. R-ER-9 and R-ER-10.

²² Case No. EXP/423/ICANN/40, Expert Determination of Judge Stephen M. Schwebel, Request for IRP, Annex 2.

community was substantially opposed to the “.persiangulf” application, and (c) the relevant community was closely associated with and implicitly targeted by the gTLD string.

39. Judge Schwebel, however, then found against the GCC on the fourth element, on grounds that the GCC had failed to prove that the targeted community would “*suffer the likelihood of material detriment to their rights or legitimate interests*”. In his assessment, even though geographical name disputes such as the Arabian Gulf-Persian Gulf dispute can have significant impacts on international relations, “*it was far from clear that the registration would resolve or exacerbate or significantly affect the dispute*”.²³ Like the Independent Objector before him, Judge Schwebel noted that the GCC could apply for its own “.arabiangulf” string.
40. This Independent Review Process followed.

IV. THE INDEPENDENT REVIEW PROCESS: THE ARCHITECTURE

41. Article IV (Accountability and Review), Section 3 (Independent Review of Board Actions), of the ICANN Bylaws sets out the procedure for independent review of actions taken by the ICANN Board.
42. Paragraph 2 of Article IV, Section 3, provides:

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 of the Articles of Incorporation, and not as a result of third parties acting in line with the Board’s action.

43. Paragraph 7 of Article IV, Section 3, provides that “[a]ll IRP proceedings shall be administered by an international dispute resolution provider appointed from time to time by ICANN”. As stated in the Supplementary Procedures for ICANN Independent Review Process (“**Supplementary Procedures**”), the ICANN Board has designated and approved

²³ Ibid., p. 11.

the International Centre for Dispute Resolution (“ICDR”) as the Independent Review Panel Provider.²⁴

44. The Supplementary Procedures apply to these proceedings, in addition to the ICDR International Arbitration Rules (“ICDR Rules”). Pursuant to Article 2 of the Supplementary Procedures, in the event of any inconsistency between the Supplementary Procedures and the ICDR Rules, the former prevail.
45. The Parties dispute whether the ICANN Bylaws are also applicable to this procedure, in particular in relation to the determination of costs. (This is discussed in Section IX below.)
46. The ICANN Bylaws provide a three-question standard of review for the Independent Review Process. As set out in Paragraph 4 of Article IV, Section 3:

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?*

47. Article 8 of the Supplementary Procedures replicates this standard of review in similar terms.

V. THE INDEPENDENT REVIEW PROCESS: PROCEDURAL HISTORY

48. On 5 December 2014, the GCC filed its Request for Independent Review Process with the ICDR (“**Request for IRP**”). The Claimant attached a number of Annexes, and the Expert Report of Mr. Steven Tepp.

²⁴ The standing panel of reviewers contemplated in Article, IV, Section 3, Paragraph 6, of the ICANN Bylaws has not been established. Claimant’s Supplementary Request for Independent Review Process (“**Supplementary IRP Request**”), Annex S-8.

49. The Request for IRP invokes ICANN's accountability mechanisms for the independent review of ICANN Board action, as set out in Article IV, Section 3, of the ICANN Bylaws.
50. Also on 5 December 2014, the Claimant filed a Request for Emergency Arbitrator and Interim Measures of Protection ("**Emergency Request**"). In the Emergency Request, the GCC sought:
 - a. Timely appointment of an Emergency Arbitrator to hear its request for emergency relief to preserve its right to a meaningful independent review; and
 - b. An order enjoining ICANN from executing the ".persiangulf" registry agreement with Asia Green while the Request for IRP was pending.
51. On 9 December 2014, ICANN consented to the appointment of an Emergency Panelist. Mr. John A.M. Judge was appointed on the same day to fulfil that role.
52. On 17 December 2014, the Respondent submitted its Response to Gulf Cooperation Council's Request for Emergency Relief, asking that the Emergency Request be denied.
53. On 22 December 2014, the Claimant filed its Reply in Support of its Request for Emergency Arbitrator and Interim Measures of Protection. This submission included the Witness Statement of Mr. Al Marzouqi ("**Al Marzouqi Statement**").
54. On 23 December 2014, the Emergency Panelist conducted a hearing by telephone conference call.
55. On 20 January 2015, ICANN submitted its Response to Claimant's Request for Independent Review Process.
56. On 12 February 2015, Mr. Judge issued his Interim Declaration on Emergency Request for Interim Measures of Protection ("**Emergency Declaration**"). The Conclusion of the Emergency Declaration provided as follows:

96. Based on the foregoing analysis, this Emergency Panel makes the following order by way of an interim declaration and recommendation to the ICANN Board that:

- a. *ICANN shall refrain from taking any further steps towards the execution of a registry agreement for .PERSIANGULF, with Asia Green or any other entity, until the IRP is completed, or until such other order of the IRP panel when constituted;*
- b. *This order is without prejudice to the IRP panel reconsidering, modifying or vacating this order and interim declaration upon a further request;*
- c. *This order is without prejudice to any later request to the IRP panel to make an order for the provision of appropriate security by the Claimant; and*
- d. *The costs of this Request for Interim Measures shall be reserved to the IRP panel.*²⁵

- 57. Following the Emergency Declaration, the present IRP Panel was constituted. The chair was appointed on 4 December 2015.
- 58. On 6 January 2016, the IRP Panel held a preparatory conference call with the Parties. The Panel issued Procedural Order No. 1 on 8 January 2016 (corrected 13 January 2016), establishing the submissions and setting the timetable for the proceedings. The merits hearing by telephone conference call was scheduled for 17 May 2016.
- 59. Pursuant to Procedural Order No. 1, the GCC filed its Supplementary Request for Independent Review Process ("**Supplementary IRP Request**") on 12 February 2016. This submission included the Supplementary Witness Statement of Mr. Al Marzouqi ("**Supplementary Marzouqi Statement**"), which described the GCC's unsuccessful attempts to conduct a conciliation process with both ICANN and Asia Green after the GCC filed its Request for IRP.
- 60. On 14 March 2016, ICANN filed its Response to Claimant's Supplementary IRP Request ("**Response to Supplementary IRP Request**"). As was the case in the emergency proceedings, ICANN did not file any witness statements.
- 61. On 29 March 2016, the GCC submitted its Reply in Support of its Supplementary Request for IRP, with no additional witness statements. ICANN's Response followed on 12 April 2016, ("**Rejoinder to IRP Request**"), again with no witness statements.

²⁵ Interim Declaration on Emergency Request for Interim Measures of Protection ("**Emergency Declaration**"), ¶ 96.

62. On 7 May 2016, the Claimant requested that the hearing be postponed until July 2016. ICANN did not oppose. The IRP Panel rescheduled the hearing for 7 July 2016.
63. The hearing took place by telephone conference call on 7 July 2016, lasting approximately two hours. The IRP Panel heard submissions from counsel for both Parties. As agreed by the Parties, there was no fact or expert witness testimony.
64. Having determined that there was no need for further submissions, the Panel declared the hearing officially closed on 19 October 2016, except as to costs.

VI. THE RELIEF SOUGHT

65. The Claimant GCC seeks a Declaration:
 - a. stating that the ICANN Board violated ICANN's Articles, Bylaws and the New gTLD Application Guidebook of 4 June 2012;
 - b. recommending to the Board that ICANN take no further action on the ".persiangulf" gTLD, including by enjoining ICANN from signing the registry agreement with Asia Green, or any other entity;
 - c. awarding the GCC its costs in this proceeding; and
 - d. awarding such other relief as the Panel may find appropriate or that the GCC may request.²⁶
66. The Respondent ICANN seeks a Declaration:
 - a. denying the GCC's IRP Request;
 - b. awarding ICANN its reasonable fees and costs incurred, including legal fees, if it is the prevailing party.²⁷

²⁶ Supplementary IRP Request, ¶ 63.

²⁷ Response to Supplementary IRP Request, ¶¶ 30 and 32.

VII. JURISDICTION: TIMELINESS OF THE REQUEST FOR IRP

A. The Issue and Legal Framework

67. A preliminary jurisdictional issue for decision is whether the GCC's Request for IRP is time-barred. ICANN argues that the Request is time-barred; the GCC disagrees.
68. As a starting point, the 30-day deadline for challenging an ICANN Board action appears in Article IV, Section 3, Paragraph 3 of the ICANN Bylaws ("**IRP Deadline**"), which provides in relevant part:

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.

69. Article IV, Section 3, of the ICANN Bylaws, together with the ICANN document entitled "Cooperative Engagement Process – Requests for Independent Review" dated 11 April 2013 ("**CEP-IRP Document**"),²⁸ codify two exceptions to the IRP Deadline.
- a. The IRP Deadline is tolled if the parties are engaged in a Cooperative Engagement Process ("**CEP**"), referred to in Paragraph 14 of Article IV, Section 3, of the ICANN Bylaws:

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. The cooperative engagement process is published on ICANN.org and is incorporated into this Section 3 of the Bylaws.

Pursuant to the CEP-IRP Document (pp. 1-2):

If ICANN and the requestor have not agreed to a resolution of issues upon the conclusion of the cooperative engagement process, or if issues remain for a request for independent review, the requestor's time to file a request for independent review designated in the Bylaws shall be extended for each day of the cooperative engagement process, but in no event, absent mutual written agreement by the parties, shall the extension be for more than fourteen (14) days.

²⁸ Response to Claimant's Request for Independent Review Process ("**Response to IRP Request**"), Exh. R-5; Supplementary IRP Request, Exh. S-10.

b. Pursuant to the CEP-IRP Document (para. 6), ICANN and an IRP requestor may agree, in writing, to extend the IRP Deadline.

70. To recall, certain relevant facts are undisputed. Following the Durban GAC meeting and Communiqué, ICANN posted the Durban Minutes and related materials on 30 September 2013. The GCC filed its Request for IRP on 5 December 2014. Obviously, 5 December 2014 is more than 30 days after the 30 September 2013 posting of the Durban Minutes and related materials.
71. It is also undisputed that the Parties neither initiated a formal CEP nor agreed in writing to extend the IRP Deadline.
72. Accordingly, the issue before the IRP Panel is whether the 30-day IRP Deadline was tolled or otherwise extended despite the absence of a CEP or written extension of the IRP Deadline.

B. The Respondent's Position

73. ICANN takes the firm legal position, as advocated in both its written submissions and during the 7 July 2016 hearing, that the IRP Deadline is mandatory and cannot be tolled or extended for non-codified reasons. To allow equitable tolling in general would be to create unacceptable uncertainty for gTLD applicants and IRP applicants. To allow tolling in the instant circumstances for the GCC, which waited over a year to file its IRP Request, would be to provide impermissible special treatment.
74. As for the specific circumstances alleged by the GCC (described below), ICANN denies that any dealings and communications between its officials and GCC representatives effectively substituted for the CEP process or excused the GCC's failure to initiate the CEP process. To recall, as in the Emergency Request proceedings, ICANN presented no witness statements from named or unnamed representatives or any other factual evidence.

C. The Claimant's Position

75. The GCC presents an equitable reliance defense to its delayed initiation of the IRP process. The GCC argues, as a general matter, that ICANN should acknowledge non-written tolling

circumstances and, in the specific circumstances here, that the IRP Deadline must be deemed tolled by reason of the explicit and/or implicit representations made by ICANN officials to Mr. Al Marzouqi between October 2013 and November 2014.

76. The GCC asserts that *“following the Board’s September 2013 Board Action, ICANN represented repeatedly – through its words and actions – to the GCC that the deadline to file the IRP had not yet passed”*.²⁹
77. The GCC relies primarily on the Al Marzouqi Statement, and a 9 July 2014 letter from Mr. Mohammed Al Ghanim, Director General of the UAE Telecommunications Regulatory Authority, to ICANN CEO Mr. Fadi Chehade, to support this assertion. According to Mr. Al Marzouqi:
 - a. He and other GAC members expected that ICANN would treat the “.persiangulf” gTLD application in the same way it had treated the “.islam” and “.halal” applications, because all three applications *“lack community support, and the .PERSIANGULF gTLD application, unlike the .ISLAM and .HALAL gTLD applications, also is strongly opposed by the Arab community because ‘Persian Gulf’ is a disputed name”*.³⁰
 - b. After the posting of the ICANN Board decision to proceed with the “.persiangulf” application on 30 September 2013, he *“reached out to [his] ICANN counterparts to initiate an attempt at resolution”* and they *“instructed [him] to wait until the Independent Expert issued a declaration on the GCC’s Community Objection”*, which he did.³¹
 - c. After Judge Schwebel dismissed the Community Objection on 30 October 2013, Mr. Al Marzouqi again reached out and his *“ICANN counterparts advised they would get back to [him]”*.³²

²⁹ Supplementary IRP Request, ¶ 35.

³⁰ Al Marzouqi Statement, ¶ 7.

³¹ Ibid., ¶¶ 8-10.

³² Ibid., ¶ 11.

- d. “After several months of dialogue with [his] ICANN counterparts proved unsuccessful”, he arranged for “high-level” meetings “in hopes of facilitating a resolution”, which arrangements took substantial time due to schedules.³³
- e. In June 2014, Mr. Al Marzouqi and other GCC representatives met with the ICANN CEO, Mr. Chehade, during the GCC Telecom Council Ministers Meeting in Kuwait City.³⁴ According to Mr. Al Marzouqi, GCC representatives reiterated their objections to the “.persiangulf” application in that meeting.
- f. Mr. Al Marzouqi’s testimony about the meeting is corroborated by a 9 July 2014 letter from Mr. Al Ghanim to Mr. Chehade.³⁵ Mr. Al Ghanim reiterated the GCC’s concerns about lack of community involvement and support for the gTLD, which is “problematic and refers to a geographical place with disputed name”, and added:

While the GAC did not issue an advice objecting against the Application (due to lack of consensus because one particular country did not agree to the objection), this does not mean those countries which are part [sic] of the community targeted by the Application are agreeing to the Application to proceed and this certainly does not mean that ICANN should ignore this fact and continue to allow the Application to proceed.

.... The security, functionality and stability of Internet rely greatly on a successful operation of the DNS system. It is worrying to see how a TLD being opposed by majority of the community targeted would be able to operate and sustain. We believe the motive behind this Application has nothing to do with Internet community interest, nor commercial interest. We request ICANN to analyze the Application from financial and sustainability angle given that the community continues to oppose the Application.³⁶

- g. Thereafter, Mr. Al Marzouqi’s “ICANN counterparts again advised [him] that they had taken the GCC’s position under advisement and would get back to the GCC with an answer”.³⁷ That answer, testified Mr Al Marzouqi, came in September 2014, when Mr. Al Marzouqi’s “ICANN counterparts ... suggested to

³³ Ibid., ¶¶ 12-13.

³⁴ Ibid., ¶ 14.

³⁵ Ibid., attached Letter from Mr. Mohammed Al Ghanim to Mr. Fadi Chehade, 9 July 2014 (“Al Ghanim Letter”).

³⁶ Al Ghanim Letter, p. 2.

³⁷ Al Marzouqi Statement, ¶ 15.

[him] that the GCC's only recourse toward resolution *may be to file a request for independent review of ICANN's Board action*" (emphasis in original).³⁸

- h. Mr. Al Marzouqi spoke again with his "*ICANN counterparts*" in October 2014 at ICANN meetings in Los Angeles. As "*ICANN's handling of geographic gTLD applications was a topic of discussion at those meetings*", he "*remained hopeful that the GCC and ICANN could finally resolve the dispute*".³⁹
- i. In November 2014, there having been no resolution at the October meetings, Mr. Al Marzouqi advised the GCC to proceed with the IRP process.⁴⁰ He learned only in December 2014 that ICANN intended to sign the registry agreement for ".persiangulf", after which he advised the GCC to file the Emergency Request "*to ensure that the independent review process would not be rendered meaningless*".⁴¹
- j. According to Mr. Al Marzouqi: "*At no time from September 2013 to November 2014 did ICANN state, let alone suggest, that if the GCC engaged in resolution efforts it would be time-barred from seeking an independent review of the September 2013 Board action*".⁴²

78. Mr. Marzouqi, in his Supplementary Witness Statement, describes further attempts at conciliation with both ICANN and Asia Green after the GCC filed its IRP Request.⁴³ These attempts proved unsuccessful.

79. The GCC also relies, in support of its equitable reliance defense, on an email dated 19 December 2014 from Mr. Eric Enson, outside counsel to ICANN, to Mr. Kamran Salour, outside counsel to the GCC ("**ICANN Counsel Email**").⁴⁴ The relevant language is as follows:

³⁸ Ibid., ¶ 16.

³⁹ Ibid., ¶ 17.

⁴⁰ Ibid., ¶ 18.

⁴¹ Ibid., ¶ 22.

⁴² Ibid., ¶ 19.

⁴³ Supplementary Marzouqi Statement, Exh. S-9, ¶¶ 2-16.

⁴⁴ Supplementary Request for IRP, Exh. S-11.

Fourth, during the call yesterday, you mentioned the possibility of entering a Cooperative Engagement Process (“CEP”), as set forth in ICANN’s Bylaws. A CEP is supposed to take place before the filing of an IRP in the hope of avoiding, or at least minimizing, the costs associated with an IRP. That, obviously, did not happen in this matter. In addition, a CEP is supposed to be a dialogue between the parties, rather than counsel for the parties. ICANN is always willing to discuss amicable resolutions of issues, but I think we need additional information from the GCC before agreeing to engage in a CEP, at this point. First, ICANN would like to know whether the GCC believes that there is a realistic possibility that the GCC would dismiss its IRP based on CEP discussions. The reason this is important to ICANN is because ICANN representatives informed GCC representative[s], on several occasions, that the CEP was available to the GCC and should be invoked before the filing of an IRP.

80. The GCC considers this email to evidence ICANN’s earlier tolling of the 30-day IRP Deadline, because ICANN expressed willingness to enter into a CEP despite the GCC’s initiation of the IRP process on 5 December 2014.⁴⁵

D. The IRP Panel’s Analysis and Decision

81. Turning first to the Parties’ general arguments on whether and how the IRP Deadline can be tolled or extended other than by the two codified exceptions, we do not consider it our role as an IRP Panel to issue general directives. It suffices to record that, under an equitable reliance theory, a requesting party should be allowed to request an IRP after expiry of the 30-day IRP Deadline if that party can show reliance on a representation or representations by ICANN inviting or allowing extension of the IRP Deadline. Otherwise, ICANN would be allowed “to blow hot and cold” and ultimately undermine its own mandate. Such contradictory actions would be inconsistent with, for example, the core value set out in Article 1, Section 2, of the ICANN Bylaws, of ICANN’s “[m]aking decisions by applying documented policies neutrally and objectively, with integrity and fairness”.
82. Beyond that general proposition, our Declaration must be focused on the facts and circumstances of the case before us. The issue is whether ICANN did make such a representation or representations here, either explicitly or implicitly by conduct.

⁴⁵ Claimant’s Reply in Support of its Supplementary Request for IRP, ¶ 26.

83. We have carefully examined the GCC's evidence of contacts and communications between GCC and ICANN representatives between September 2013 and November 2014. Although the Marzouqi Statement was conclusory and short on detail, for example, in not providing names for his "*ICANN counterparts*" who participated in discussions after September 2013, he did provide a credible account of a series of communications with ICANN, commensurate with the credible level of serious GCC concerns about registry of ".persiangulf" as a new gTLD.
84. We have not been helped by any contradictory or confirming witness statements, or other evidence, from ICANN, about that alleged series of contacts and communications. It is striking that ICANN does not dispute the fact that the meeting with its most senior representative, CEO Chehade, occurred in June 2014. ICANN does dispute other points of Mr. Al Marzouqi's testimony, for example, his description of the instruction by unnamed ICANN officials that the GCC wait until after the Expert Panelist's decision on the Community Objection to commence an IRP process, and his testimony that unnamed ICANN officials suggested an IRP process in September 2014 and participated actively in negotiations thereafter. However, ICANN provided no witness statements from ICANN representatives who did participate in the June 2014 meeting, no copy of any written response from ICANN to the Al Ghanim letter about the content of the discussions in that meeting, or any other factual evidence whatsoever countering Mr. Al Marzouqi's account.
85. Having weighed such evidence as there is in the record, we find as follows, on the balance of probabilities:
 - a. In October 2013, ICANN requested the GCC, through Mr. Al Marzouqi, not to commence dispute resolution proceedings – which by definition encompass an IRP process – until the Expert Panelist had resolved the GCC's Community Objection to the ".persiangulf" gTLD application. This request was in effect a representation that the IRP Deadline was tolled until Judge Schwebel issued his expert decision, regardless of when that might be.
 - b. The GCC relied on that representation from ICANN, to the effect that the 30-day IRP Deadline was not yet running, in not filing an IRP request within 30 days

after the posting of the GAC's Durban Minutes and related materials on 30 September 2013.

- c. After Expert Panelist Schwebel dismissed the GCC's Community Objection on 30 October 2013, which happened to be the expiry of the IRP Deadline, ICANN continued to welcome – if not actively encourage – a series of communications and meetings to discuss the GCC's objections to registration of “.persiangulf”. Having previously tolled the IRP Deadline, if ICANN at that point believed that the 30-day deadline was running or had expired, it is reasonable to assume that ICANN would have told the GCC. It is thus reasonable – indeed, necessary – to conclude that, while those communications and meetings were taking place, the IRP Deadline remained tolled.
- d. By far the most compelling evidence is that the ICANN CEO himself, Mr. Chehade, met with Mr. Al Marzouqi and other GCC representatives in June 2014 to discuss the GCC's objections to the “.persiangulf” gTLD application, a meeting testified to by Mr. Al Marzouqi and corroborated by the 9 July 2014 Al Ghanim Letter. Regardless of whether ICANN officials thereafter expressly advised the GCC that ICANN had taken the GCC's objections under advisement, as Mr. Al Marzouqi testified, CEO Chehade's personal involvement made it reasonable for the GCC to consider that their opposition to “.persiangulf” remained under active consideration by the ICANN Board through July 2014.
- e. Not long thereafter, in September 2014, an ICANN representative or representatives suggested to Mr. Al Marzouqi that an IRP request might be the GCC's only recourse toward resolution. Considering that the 30-day IRP Deadline had passed over a year before, and assuming good faith on the part of ICANN throughout, it is reasonable that the GCC considered the IRP Deadline to remain tolled at this time.
- f. The GCC pursued a further settlement attempt with ICANN at meetings in Los Angeles in October 2014, which reflects that the GCC continued to rely on ICANN's holding the IRP Deadline open in hopes of settlement. Those hopes

dissipated by November 2014 when the GCC received nothing positive from the Los Angeles meetings.

- g. At this point, absent any further representations from ICANN about further negotiations, the limitations period reasonably ceased to be tolled and the IRP Deadline started to run.
 - h. On 5 December 2014, within the 30-day IRP Deadline, the GCC filed its Request for IRP.
86. Exchanges thereafter – in specific, the ICANN Counsel Email confirming that ICANN had entertained a CEP process – support the conclusion that ICANN itself considered the deadline for the submission of an IRP to have been tolled. Those exchanges show that ICANN could and did continue discussions with the GCC aimed at resolving the “.persiangulf” gTLD dispute by way of a formal or informal CEP process even after the 30-day IRP Deadline had passed and before the GCC filed a Request for IRP. As confirmed in the ICANN Counsel Email, the CEP is a dispute resolution mechanism that typically precedes, and is aimed at avoiding, an IRP filing. We need not interpret Mr. Enson’s email as confirmation that a CEP took place before the IRP was filed, to find that ICANN reasonably appeared to the GCC to remain open to a CEP, with certain conditions, well after 30 October 2013.
87. While there was no formal CEP, we conclude from the evidentiary record overall that ICANN explicitly and implicitly cooperated in a shadow conciliation process with the GCC. It was reasonable for the GCC to continue to participate in that process, without concern that ICANN would retroactively impose a strict 30 October 2013 time-bar for an IRP request should the shadow conciliation process fail.
88. In coming to this conclusion, we have not been swayed by the GCC’s umbrella argument that ICANN should have formally notified the GCC, at very least in the December 2014 ICANN Counsel Email, that the IRP Deadline was mandatory and had expired by 30 October 2014. Nor have we been swayed by ICANN’s mirror argument that the GCC should have formally reserved and documented its position that the IRP Deadline was tolled by ICANN’s conduct. It is because neither Party took such formal action that this

dispute comes before this Panel, and we are tasked with evaluating the legal import of the actions the Parties did take.

89. Nor have we been swayed by the political context. While the well-known sensitivities around the disputed names “Persian Gulf” and “Arabian Gulf” cannot **excuse** ICANN’s ignoring its own IRP Deadline for over a year, which implicitly encouraged the GCC to postpone filing its IRP Request, those sensitivities perhaps **explain** ICANN’s reluctance to apply the IRP Deadline strictly in this case. It would seem that both Parties hoped that such a political dispute would somehow resolve itself.
90. Although neither Party asked the IRP Panel to take any formal action in relation to the status of the Emergency Declaration, it should be clear from our conclusion that we agree with the assessment of Mr. Judge that *“the evidence of the ongoing contact between representatives of ICANN and the GCC from October 2013 to November 2014 supports a reasonable possibility that the time period for the filing of the IRP has been extended by the conduct of ICANN representatives and that the delay, as explained, is reasonable”*.⁴⁶ The Emergency Panelist cautioned that *“the evidentiary record is far from complete and additional evidence can be expected on this issue on the IRP itself”*,⁴⁷ but, as it transpired, ICANN did not provide any such additional evidence concerning the conduct of its officials.
91. To conclude, the Panel finds that: (a) at no point did the GCC cease its objections to ICANN’s registration of the “.persiangulf” gTLD; (b) through its conduct, ICANN made representations that the IRP Deadline, measured against the 30 September 2013 Board action, was tolled; (c) the GCC relied on those representations, in hopes of a resolution, in postponing a formal IRP process; and (d) the GCC timely submitted its IRP Request on 5 December 2014.

⁴⁶ Emergency Declaration, ¶ 83.

⁴⁷ Ibid., ¶¶ 83 and 86.

VIII. THE MERITS

A. The Standard of Review

92. As a preliminary matter, the Panel considers the standard of review to be clear. Pursuant to Article IV, Section 3, Paragraph 4, of the ICANN Bylaws (echoed in Article 8 of the Supplementary Procedures), we are:

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. . . . [and] 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?*

(Emphasis added.)

93. The IRP Panel agrees with the GCC that this is a *de novo* standard of review, without a component of deference to the ICANN Board with regard to the consistency of the contested action with the Articles and Bylaws.⁴⁸ This is consistent with the very name of the IRP process – an **independent** review of the contested Board action. Other IRP Panels have recognized and applied this *de novo* standard of review.⁴⁹
94. We also agree with ICANN that an IRP Panel cannot abuse this independence to substitute its own view of the underlying merits of the contested action for the view of the Board, which has substantive discretion.⁵⁰ This proposition is reflected in the language of Article IV, Section 3, Paragraph 4, of the Bylaws: an IRP Panel is not entrusted with second-

⁴⁸ Supplementary IRP Request, ¶¶ 9-11.

⁴⁹ Relying upon Annex S-3, 19 February 2010, Final Declaration in *ICM Registry LLC v. ICANN*; Annex S-4, 3 March 2015, Final Declaration in *Booking.com v. ICANN*; Annex S-5, 9 July 2015 Final Declaration in *DotConnectAfrica Trust v. ICANN*.

⁵⁰ Response to Claimant's Supplementary IRP Request ("Response to Supplementary IRP Request"), ¶ 5; Annex S-2, 9 October 2015, Final Declaration in *Vistaprint v. ICANN*, ¶ 124; Exh. R-24, Final Declaration in *Merck v. ICANN*, ¶ 21; Annex S-4, Final Declaration in *Booking.com v. ICANN*, ¶ 108.

guessing the Board, but rather “*with declaring whether the Board has acted consistently with the provisions of [the ICANN] Articles of Incorporation and Bylaws*”.

95. To recall, the contested ICANN Board action here is the Board’s decision on 10 September 2013 to proceed with the “.persiangulf” gTLD application. It is irrelevant whether the IRP Panel considers this decision to be right or wrong on the merits, much less to be politically wise or unwise. Our role is to examine the **process** of the Board’s decision-making, in specific to answer the questions in Article IV, Section 3, Paragraph 4, of the Bylaws: (a) did the Board act without conflict of interest? (b) did the Board exercise due diligence and care in having a reasonable amount of facts? and (c) did the Board members exercise independent judgment, believed to be in the best interests of ICANN?
96. If the answer to any of those questions is “no”, the GCC will prevail in this Request.

B. The Claimant’s Standing to Pursue the IRP

97. A second preliminary question goes, as we find below, to the GCC’s standing to pursue this IRP proceeding.
98. The Parties devoted substantial attention in their written and oral submissions to the question of the type and level of harm that the GCC must establish it has suffered or will suffer as a result of the contested ICANN Board action. This question arises from the IRP-related test in Article IV, Section 3, Paragraph 2, of the ICANN Bylaws:

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

99. The Parties agree that the term “*materially affected*” must be distinguished from the term “*material detriment*”, which is relevant in assessing the merits of a Community Objection to a gTLD application. One of the four elements to be proven for a successful Community Objection is that the application “*creates a likelihood of **material detriment** to the rights or legitimate interests of a significant portion of the community to which the string may be*

explicitly or implicitly targeted” (emphasis added). Factors evidencing material detriment go to actual operation of the gTLD by the applicant, including the likelihood that operation will cause reputational, security, and/or economic harm to the community represented.

100. ICANN, however, effectively equates the two terms “*materially affected*” and “*material detriment*” by using them interchangeably. The basic inquiry for both tests, according to ICANN, is whether an IRP requestor will be materially injured or harmed by the actual operation of the relevant string.⁵¹ In ICANN’s view, the GCC, however, has failed to identify any legally recognizable harm it will suffer if “.persiangulf is registered; the contention that a “.persiangulf” gTLD will create the false impression that the Gulf Arab nations accept the disputed name “Persian Gulf” is not a cognisable harm.⁵² To support its position, ICANN puts substantial weight on the findings of the Independent Objector and the Expert Panelist that the GCC fell short of proving that it would suffer harm reaching the level of “*material detriment*”.⁵³

101. In comparison, the GCC in its Supplementary IRP Request argues that the only relevant inquiry is whether it suffered injury or harm connected to ICANN’s alleged action inconsistent with the ICANN Articles or Bylaws.⁵⁴ The IRP Panel, according to the GCC, is to examine only whether that action – here, the Board’s 10 September 2013 decision to allow processing of the “.persiangulf” application – did cause harm “*materially affect[ing]*” the GCC and its members.⁵⁵ The GCC identifies that harm to be the denial of its due process rights to an ICANN decision on the contested “.persiangulf” gTLD application in which its objections were fully considered by the Board, and apparent discrimination against its Arab members in favor of Iran.⁵⁶

102. The IRP Panel agrees with ICANN that the question of whether the GCC was “*materially affected*” for purposes of Article IV, Section 3, Paragraph 2, of the ICANN Bylaws is one

⁵¹ Rejoinder to ICANN’s Response to Gulf Cooperation Council’s Reply in Support of Supplementary Request for Independent Panel Review (“**Rejoinder to IRP Request**”, ¶ 15.

⁵² Ibid., ¶¶ 13-15; Response to Supplementary IRP Request, ¶ 25.

⁵³ Rejoinder to IRP, ¶ 14.

⁵⁴ Supplementary IRP Request, ¶ 41. The GCC took a position closer to ICANN’s in this respect in its original Request for IRP; see, e.g., ¶¶ 70-74.

⁵⁵ Supplementary IRP Request, ¶ 49.

⁵⁶ Ibid., ¶ 42.

of standing.⁵⁷ This is the logical meaning of the language in Paragraph 2 that a “*person materially affected*” by an ICANN Board action perceived to be inconsistent with the Bylaws or Articles “*may submit a request for independent review*”; this cannot and does not presuppose a successful request for IRP. As a standing question, this question precedes the core IRP question of whether the ICANN Board acted inconsistently with its Articles or Bylaws.⁵⁸

103. However, we cannot agree with ICANN’s effective conflation of the two tests of “*materially affected*” and “*material detriment*”. Only the former test appears in, and is relevant to, the IRP-related standing test in Article VI, Section 3, Paragraph 2, of the ICANN Bylaws. To apply the “*material detriment*” test, which is a critical component of the Community Objection evaluation process under the Guidebook, would be to put the IRP Panel into a role it does not have – to examine and offer its views on the merits of the “.persiangulf” gTLD application under the relevant ICANN criteria. The determinations of the Independent Objector and the Expert Panelist, which were made in the Community Objection context and hence necessarily focused on the likelihood of “*material detriment*” to the interests of the Gulf community, are therefore irrelevant.⁵⁹
104. In this connection, we do not need to address the submissions of the Parties as to whether the GCC could have minimized or avoided injury or harm by applying for an “.arabiangulf” gTLD, and whether such an application is or is not foreclosed in the future. This may have been a factor for the Independent Objector and the Expert Panelist to consider in the Community Objection context, but it is not a proper issue of standing in an IRP case.
105. We recognize that the “*materially affected*” test in Article IV, Section 3, Paragraph 2, of the ICANN Bylaws is defined in relation to “*injury or harm that is directly or causally connected to the Board’s alleged violation of the Bylaws or the Articles*”. As Paragraph 2 goes to standing, however, it cannot reasonably be interpreted as requiring an IRP panel to find proof of concrete and measurable injury or harm at the time an IRP request is filed. It

⁵⁷ Rejoinder to IRP Request, ¶ 16.

⁵⁸ *Ibid.*, ¶ 16.

⁵⁹ Supplementary IRP Request, ¶¶ 43-49; The Gulf Cooperation Council’s Reply in Support of its Supplementary Request for Independent Review Process (“**Reply to IRP Request**”), ¶ 21.

must suffice for the IRP requestor, to meet the standing test, to allege reasonably credible injury or harm connected to the contested ICANN Board action. We are satisfied that the GCC has done so here by describing the harm caused to its Gulf members' due process rights, by definition, if the processing of the ".persiangulf" gTLD application were to continue on the basis of a Board decision made without regard to the GCC's objections. We now turn to the core merits question of whether the GCC has proven such inconsistent action by ICANN.

C. The Claimant's Position

106. The GCC's main submission is that ICANN failed to follow the GAC's advice from the Durban meeting, as well as the Guidebook procedures, in deciding in September 2013 to allow further processing of the ".persiangulf" gTLD.
107. The GCC relies on Module 3.1 of the Guidebook, which sets out three possible forms for GAC advice to the ICANN Board. These are set out at paragraph 19 above. Given that the GAC did not issue Consensus GAC Advice that the ".persiangulf" gTLD application should **not** proceed or advice that the application should not proceed unless remediated, by elimination the only available form of advice was an "*expression of concerns in the GAC*" about Asia Green's application, meant to prompt a dialogue between the GAC and the Board.⁶⁰ The GAC did identify such concerns, in the Durban Minutes, which explicitly: (i) referred to the opinions of GAC members from the UAE, Oman, Bahrain and Qatar that the application should not proceed; (ii) noted that the GAC had heard "*opposing views*" on the application; and (iii) concluded that "*it was clear that there would not be consensus on an objection*".⁶¹ In the GCC's view, these vigorous comments were a fully recognizable expression of its members' concerns.
108. The GCC disagrees with ICANN that only the Durban Communiqué constituted recognizable GAC advice to the ICANN Board. The GCC relies on Principle 51 of GAC's Operating Principles, which does not limit the GAC's advice to a communiqué.⁶² Further, ICANN's failure to review the Durban Minutes before passing its resolution on the

⁶⁰ Supplementary IRP Request, ¶ 20.

⁶¹ Ibid., ¶ 18; Reply to IRP Request, ¶ 6.

⁶² Reply to IRP, ¶ 8.

“.persiangulf” application was, in itself, a failure to exercise due diligence in making the decision, in violation of Article IV, Section 3, Paragraph 4(b), of the ICANN Bylaws.⁶³

109. In light of the foregoing, the ICANN Board was obligated to enter into a dialogue with the GAC to understand its members’ concerns, and to give reasons for its ultimate decision to allow Asia Green’s application to move forward – which ICANN failed to do.
110. The GCC argues in the alternative that, even if ICANN was somehow correct in following the GAC’s non-compliant advice to allow the “.persiangulf” application to proceed, ICANN violated several other Articles and Bylaws. Among others, the GCC identifies:

a. Bylaws, Article I, Section 2:

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

....

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.

....

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

....

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

b. Bylaws, Article II, Section 3:

ICANN shall not apply its standards, policies, procedures or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.

c. Bylaws, Article III, Section 1:

⁶³ Reply to IRP Request, ¶ 10.

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

d. Articles of Incorporation, Article 4:

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

111. The GCC puts special emphasis on Paragraph 2.1(b) of the GAC Principles Regarding New gTLDs, which directs that “*New gTLDs should respect: ... the sensitivities regarding terms with national, cultural, geographic and religious significance*”.
112. Against this backdrop of ICANN constituent documents, the GCC argues that the ICANN Board failed to collect and independently assess all relevant facts before resolving to allow the “.persiangulf” gTLD application to proceed. The Board failed to review the GAC’s Durban Minutes, which flagged that there were serious objections to the application and hence no consensus in favor of its proceeding. Nor did the Board explain, or even give any indication of, the reasons for its decision to allow the vigorously contested application to proceed. The bare Board resolution of 10 September 2013 gives no hint that the Board fulfilled its obligation to assess and balance the competing core values of ICANN. Neither that resolution nor any other document contains any reference to the ICANN core values guiding the Board in its 10 September 2013 decision on the “.persiangulf” application or any statement as to how the Board balanced core values that it found to be competing.
113. The Board also discriminated against the GCC by giving credence only to the Iranian position at the GAC and by ignoring the GCC’s Community Objection and strong government opposition. If registered with Asia Green, the “.persiangulf” string will be discriminatory because “it will falsely create the perception that the GCC accepts the disputed ‘Persian Gulf’ name”.⁶⁴ This is particularly egregious because the Persian

⁶⁴ Request for IRP, ¶ 58.

community already has the benefit of the “.pars” string, already registered with Asia Green for purposes overlapping with the “.persiangulf” application.

114. Further, according to the GCC, the Board handled Asia Green’s “.persiangulf” application inconsistently with Asia Green’s “.halal” and “.islam” applications. In those cases, although the Independent Expert dismissed the Community Objections because he did not find substantial community opposition, the Board intervened to stop the processing of both strings. Here, where the Community Objection and the Durban Minutes documented substantial community opposition, the Board nonetheless decided to allow continued processing of the “.persiangulf” application.
115. Overall, says the GCC, the Board’s NGPC acted unfairly in a non-transparent and discriminatory manner, without sensitivity to the national, cultural and geographic issues in the Gulf.⁶⁵ In reviewing the Board’s decision to allow Asia Green’s “.persiangulf” application to go forward, the Panel should follow the path of the IRP Panel in the *DotConnectAfrica Trust v ICANN* case. There, the IRP Panel held that the Board had breached its transparency obligations by simply adopting the GAC’s consensus advice not to proceed with the application for the “.africa” gTLD, stating that it “*would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting [DotConnectAfrica] Trust’s application*”.⁶⁶

D. The Respondent’s Position

116. ICANN’s defense to the GCC’s argument that the Board failed to follow the GAC’s advice is straightforward: the ICANN Board followed the GAC’s advice to the letter. According to ICANN, the GAC did **not** advise of any member concerns regarding the “.persiangulf” gTLD application, and so the proper course was for the Board’s NGPC to allow Asia Green’s application to progress. The Durban Communiqué expressly stated that the GAC had “*finalised its consideration ... and does not object to [the “.persiangulf” application] proceeding*”, without advising of any concerns whatsoever. ICANN emphasizes that the Board did not make a decision to approve the “.persiangulf application” based on the

⁶⁵ Supplementary IRP Request, ¶ 23-26; Reply to IRP Request, ¶¶ 16-18.

⁶⁶ *Ibid.*, Exh. S-5; Final Declaration, *DotConnectAfrica Trust v ICANN*, 9 July 2015, ¶ 113.

GAC's advice, but simply resolved to allow the ICANN staff to continue to process the application.⁶⁷

117. ICANN relies on GAC Operating Principles 51 to argue that the Durban Minutes, to the extent those Minutes say anything more than the Durban Communiqué, are not an official statement of GAC advice to the ICANN Board.⁶⁸ Nor were the Durban Minutes approved or posted until November 2013, and so they were not even before the Board for consideration at its meeting on 10 September 2013 to review and pass resolutions on the Durban Communiqué and Scorecard items. Further, in ICANN's view, the Durban Minutes are consistent with the Dublin Communiqué in reporting that there was no advice against the “.persiangulf” application proceeding. Comments made by individual GAC members at the Durban meeting, recorded in the Minutes, do not constitute GAC advice triggering Board duties under Module 3 of the *Guidebook*.⁶⁹
118. As for the GCC's alternative argument based on ICANN's failure to meet its mission and core value standards, ICANN denies both the theory and the facts. In ICANN's view, the Board independently evaluated the “.persiangulf” gTLD application, in an open and transparent fashion, as evidenced by: the posting of the Durban Communiqué and subsequent public comment period; the Board meetings to determine actions based on the GAC's advice in the Durban Communiqué, with a public record of the discussion on each item in the Durban Scorecard responding to the GAC's advice; and a unanimous vote adopting resolutions based on the Scorecard, again publicly posted. Nor can it be inferred that the Board failed to consider ICANN's core values simply because the Board did not explicitly state how it did so; it would be impossible for the Board to spell this out for the hundreds of resolutions it must manage each year.⁷⁰ Further, the Bylaws do not oblige the Board to accept any and all advice from the GAC; Article XI, 2.1.j of the Bylaws only requires the Board to take GAC advice into account and, if the advice is not followed, to provide reasons for not doing so.

⁶⁷ Response to IRP Request, ¶ 21.

⁶⁸ Ibid., ¶ 10, Exh. R-25.

⁶⁹ Reply to IRP Request, ¶ 9.

⁷⁰ Response to IRP Request, ¶¶ 13-20.

119. ICANN argues that the IRP Panel’s Declaration in the *DotConnectAfrica* case is inapposite, because the GAC provided Consensus Advice against the string proceeding. Similarly, as for the alleged inconsistent treatment of Asia Green’s applications for “.halal” and “.islam”, ICANN points out that in those cases, unlike the instant case, the GAC did in fact express concerns to the Board base on community concerns about the obvious religious sensitivities.
120. In sum, the ICANN Board’s NGPC considered and followed the GAC’s advice exactly as it was supposed to, fully consistently with the ICANN Articles and Bylaws.
121. Should the Tribunal find in the GCC’s favor, ICANN contests the GCC’s request for a declaration ordering ICANN to refrain from signing the registry agreement with Asia Green or any other entity. ICANN argues that, pursuant to Article IV, Section 3, Paragraph 3.11, of the Bylaws, an IRP Panel is limited to stating its opinion by “*declar[ing] whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws*” and recommending that the Board stay any action or decision or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP Panel.

E. The IRP Panel’s Analysis and Decision

122. We turn first to the GCC’s main submission that the ICANN Board failed to follow the GAC’s advice from the Durban meeting, as well as the Guidebook, in deciding on 10 September 2013 to allow the “.persiangulf” gTLD to proceed in the application process.
123. This turns on whether the GAC did in fact properly provide post-Durban advice to the Board. We find this to be a difficult question, which overlaps with the GCC’s alternative submission concerning ICANN’s overall compliance with its mission and core values under the Bylaws and Articles.
124. To recall, Module 3.1 of the Guidebook envisions three forms of GAC advice to the Board: (a) Consensus GAC Advice that an application should **not** proceed, creating a strong presumption of non-approval; (b) the expression of **concerns** within the GAC, after which the ICANN Board is expected to enter into a dialogue with the GAC to understand those

concerns and then give reasons for its decision; or (c) advice that the application should not proceed unless **remediated**. It is undisputed, and we agree, that the GAC did not issue Consensus GAC Advice against the “.persiangulf” application or suggest remediation, leaving only the second form of advice – the expression of **concerns**, meant to prompt interaction with the Board.

125. If, as ICANN argues, only the Durban Communiqué could provide GAC advice to the Board, then the GAC clearly did **not** express concerns about the “.persiangulf” gTLD application. That Communiqué stated no more than this: “*The GAC has finalised its consideration of [the application] and does not object to [it] proceeding*”. This underlies ICANN’s main defense that the ICANN Board followed the GAC’s advice to the letter, by resolving to allow Asia Green’s application to proceed.
126. We find ICANN’s defense to be unduly formalistic and simplistic.
127. As we see it, the GAC sent a missive to the ICANN Board that fell outside all three permissible forms for its advice. The GAC’s statement in the Durban Communiqué that the GAC “*does not object*” to the application reads like consensus GAC advice that the application **should** proceed, or at very least non-consensus advice that the application should proceed. Neither form of advice is consistent with Module 3.1 of the Guidelines. Yet the ICANN Board proceeded to resolve to allow the application to proceed, as a routine matter, based on the Durban Communiqué.
128. Some of the fault for the outcome falls on the GAC, for not following its own principles. In particular, GAC Operating Principle 47 provides that the GAC is to work on the basis of consensus, and “[w]here consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN Board”.⁷¹ The GAC chair clearly did not do so. Mr. Al Marzouqi testified to the views he expressed at the Durban meeting and that consensus proved impossible, which testimony stands unrebutted by ICANN here (quoted in paragraph 31 above):

⁷¹ ICANN Response to IRP Request, Exh. R-25.

5. *I also attended the GAC Meetings in Durban, South Africa in July 2013. During the meetings in Durban, I again voiced the GCC's opposition to the .PERSIANGULF gTLD application, again emphasizing the lack of community support and strong community opposition from the Arab community because "Persian Gulf" is a disputed name. A substantial number of GAC members in attendance shared these concerns.*

6. *Despite this substantial opposition, GAC could not reach a consensus. Iran is the only nation in the Gulf that favors the "Persian Gulf" name, and Iran's GAC representative obviously does not share the other GAC members' concerns about the .PERSIANGULF gTLD application. Not wanting a single GAC member to block consensus, the GAC Meeting Chairperson pulled me to the side to express her frustration that GAC could not reach a consensus.*

129. If the GAC had properly relayed these serious concerns as formal advice to the ICANN Board under the second advice option in Module 3.1 of the Guidebook, there would necessarily have been further inquiry by and dialogue with the Board. The directive of Module 3.1, which is a **procedural** protection for opponents to gTLD applications, bears emphasis:

The GAC advises ICANN that there are concerns about a particular application "dot.example." The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.

130. It is difficult to accept that ICANN's core values of transparency and fairness are met, where one GAC member can not only block consensus but also the expression of serious concerns of other members in advice to the Board, and thereby cut off further Board inquiry and dialogue.
131. In any event, the IRP Panel is not convinced that just because the GAC failed to express the GCC's concerns (made in their role as GAC members) in the Durban Communiqué that the Board did not need to consider these concerns. The record reveals not only substantial sensitivity with respect to Asia Green's ".persiangulf" application, but also general discord around religious or culturally tinged geographic gTLD names. In addition to the Durban Minutes, the pending Community Objection, and public awareness of the sensitivities of the "Persian Gulf"- "Arabian Gulf" naming dispute, the Durban Communiqué itself – on which ICANN relies so heavily here – contained an express recommendation that "ICANN collaborate with the GAC in refining, for future rounds, the Applicant Guidebook with

regard to the protection of terms with national, cultural, geographic and religious significance".⁷² These materials and this general knowledge could and should have come into play, if not as a matter of following GAC advice then as part of the Board's responsibility to fulfil ICANN's mission and core values.

132. Although it is not necessary to the outcome of this IRP, the Panel cannot accept ICANN's argument that the GAC may provide official advice to the Board only through a Communiqué. It is Principle 46 of the GAC's Operating Principles that provides that "[a]dvice from the GAC to the ICANN Board shall be communicated through the Chair", while Principle 51 speaks only of the Chair's authority to "issue a communiqué to the Media" following a meeting.

133. Even if, as a matter of practice, ICANN is correct that the Durban Minutes were not a form of official communication from the GAC, the Minutes do express serious GAC member concerns and confirm that there was, in fact, no consensus in Durban in favor of the ".persiangulf" gTLD application proceeding. As quoted in paragraph 32 above, those Minutes recorded as follows:

The GAC finalized its consideration of .persiangulf after hearing opposing views, the GAC determined that it was clear that there would not be consensus of an objection regarding this string and therefore the GAC does not provide advice against this string proceeding. The GAC noted the opinion of GAC members from UAE, Oman, Bahrain, and Qatar that this application should not proceed due to lack of community support and controversy of the name. (Emphasis added.)

Given this language, we cannot accept ICANN's argument that the Durban Minutes are consistent with the Durban Communiqué, which succinctly stated that the GCC "*does not object to [the application] proceeding*", thereby creating the impression that GAC members took the position – whether by consensus or not – that the application **should** proceed.

134. It is difficult to accept that the Board was not obliged to consider the concerns expressed in the Durban Minutes if it had access to the Minutes. If it was not given the Minutes, it is equally difficult to accept that the Board – as part of basic due diligence – would not have

⁷² Request for IRP, Annex 24, Durban Communiqué, para. 7.

asked for draft Minutes concerning GAC discussions of such a geo-politically charged application.

135. This failure of due diligence is compounded by the fact that, as noted by the NGPC itself in the Minutes of the critical 10 September 2013 meeting, the GCC's Community Objection was pending. The relevant Board resolution bears quoting again:

ICANN will continue to process the application in accordance with the established procedures in the [Guidebook]. The NGPC notes that community objections have been filed with the International Centre for Expertise of the ICC against .PERSIANGULF. (Emphasis added.)

136. Yet there is no evidence or indication in the record that the NGPC bothered to consider the content of the Community Objection, before allowing the processing of the obviously controversial string application to proceed. Certainly, that the Expert Panelist – some three weeks later – dismissed the Community Objection cannot support the procedural propriety of the Board's decision on 10 September 2013 to allow the “.persiangulf” application to proceed.

137. In sum, ICANN may be correct that the Board followed all the routine steps of posting information about the application, meeting to review the application, and acting strictly on the basis of the Durban Communiqué and Scorecard items. The Board did post the Durban Communiqué on 1 August 2013 for public comment – but it contained only the one-line conclusion that the GAC had “*finalised its consideration of the [“.persiangulf”] string, and does not object to it proceeding*”. The Board did meet on 13 August 2013 – but the only discussion was whether to respond to the Durban Communiqué advice by Scorecard. The Board did meet on 10 September 2013 to discuss each of the Durban Scorecard items, and did vote unanimously in favor of continuing to process the “.persiangulf” application – but the relevant entry on the Scorecard merely repeated the one-line Durban Communiqué reporting that the GAC “*does not object*” to the “.persiangulf” application proceeding. The Minutes of the Board meetings were publicly posted.

138. In the IRP Panel's assessment, these were empty steps. ICANN's insistence in its Response to the Supplementary IRP Request (at paragraph 2) and Rejoinder to IRP Request (at paragraph 10) is equally empty. At the end of the day, there is simply no

evidence – or even the slightest indication – that the Board collected facts and engaged with the GCC’s serious concerns before resolving to allow the “.persiangulf” application to proceed. ICANN’s willingness to meet GCC representatives after the 10 September 2013 decision to allow the application to proceed was belated and could not cure or validate its failure to conduct due diligence and engage with the GCC before that uninformed decision.

139. If the Board had undertaken a modicum of due diligence and independent investigation, it would readily have learned about the GCC’s serious concerns as raised in the GAC meetings in Durban and in Beijing, and how and why the GAC failed to reach consensus in Durban against the “.persiangulf” application. The GCC may be right or wrong in submitting that it was Iran’s solitary support for the application in Durban that motivated the message in the Durban Communiqué. The correctness of the GCC’s position on this point is irrelevant in this IRP. The relevant issue is whether the Board’s decision to allow the “.persiangulf” application to proceed was consistent with the Bylaws and Articles.

140. While not binding upon this Panel, the IRP precedent that we find most helpful is the decision concerning the application by DotConnectAfrica Trust for the “.africa” string, in which the IRP Panel found that the actions and inactions of the ICANN Board were inconsistent with its Articles and Bylaws. In particular, the IRP Panel held that the ICANN Board had breached its transparency obligations by rotely adopting the GAC’s Consensus Advice not to proceed with that application. The Panel stated that it “*would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting [DotConnectAfrica] Trust’s application*”.⁷³ Contrary to ICANN’s attempt to distinguish the DotConnectAfrica case, we find that ICANN’s transparency obligations arose here despite the absence of Consensus GAC Advice. Indeed, transparency and the related need for further due diligence were more compelling in this case, given the pending Community Objection concerning a sensitive application.

141. Overall, based on the submissions and evidence in the record, we are constrained to find that the Board passed a bare-bones resolution, based on a bare-bones GAC Communiqué

⁷³ Note 66, *supra*.

and Scorecard, to allow Asia Green's ".persiangulf" application to proceed, to virtually certain registration and operation. We can only regard the Board's routine treatment of the non-routine ".persiangulf" gTLD application to have been non-transparent, unfair and essentially oblivious to the well-known geo-political sensitivities associated with the name "Persian Gulf". This treatment consequently fell far short of the mission and core values enshrined in ICANN's Articles of Incorporation and Bylaws, specifically Article 1, Section 2, Paragraphs 4, 8 and 11, of the Bylaws; Article II, Section 3, of the Bylaws; Article III, Section 1, of the Bylaws; and Article 4 of the Articles of Incorporation.

142. In this connection, we are sympathetic to ICANN's argument that the Board cannot be expected to spell out considerations going to mission and core values in every resolution passed on every gTLD application. However, our finding is not based on inferences from the lack of discussion about mission and core values in the Board's 10 September 2013 decision to allow the ".persiangulf" application to proceed. As noted, there was **no** discussion of **any** factors whatsoever in that decision. This cannot be reconciled with the requirement in Article 1, Section 2, of the Bylaws that ICANN "*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*".
143. In related vein, we are not here second-guessing the Board's assessment of a difficult application against the backdrop of its mission and core values. That is because, if nothing else, we have no evidence or indication of what, if anything, the Board **did** assess in taking its decision. Our role is to review the **decision-making process** of the Board, which here was virtually non-existent. By definition, core ICANN values of transparency and fairness were ignored.
144. Having made findings on the Board's duties to make decisions fairly and transparently, we do not need to make an additional finding on the GCC's allegation that the Board discriminated against the GCC, or failed to provide the GCC with consistent treatment, in failing to intervene to stop the ".persiangulf" application as it did with Asia Green's application for the ".halal" and ".islam" gTLDs, to which the GCC had also objected. We do note that it would seem mechanistic indeed for ICANN to justify the different treatment

of “.halal” and “.islam” on the basis that the GAC expressed member concerns about those strings based on community objections and religious sensitivity, when the GAC failed to relay similar member concerns about “.persiangulf”. This is despite the glaring fact that the Independent Expert reviewing the GCC’s Community Objections against all three strings dismissed them all on the same grounds.

145. In conclusion, turning to the IRP standard of review in Article IV, Section 3, Paragraph 4(b), of the ICANN Bylaws, we conclude that the ICANN Board failed to “*exercise due diligence and care in having a reasonable amount of facts in front of them*” before deciding, on 10 September 2013, to allow the “.persiangulf” application to proceed. We find, on the balance of probabilities on the basis of the Parties’ submissions and evidence, that this decision effectively was an unreasoned vote on an unreasoned Scoreboard entry reciting the one-line Durban Communiqué statement that the GAC “*does not object*” to the application proceeding. Under the circumstances, and by definition, the Board members could not have “*exercise[d] independent judgment in taking the decision, believed to be in the best interests of the company*”, as they did not have the benefit of proper due diligence and all the necessary facts. This reflects Board action inconsistent with the Articles and Bylaws, contrary to Article IV, Section 3, Paragraph 4(c), of the ICANN Bylaws.
146. As a final matter, we do not accept ICANN’s position that we lack authority to include affirmative declaratory relief. Like the IRP Panel in the *DotConnectAfrica Trust* case, we consider that Article IV, Section 3, Paragraph 11(d), of the ICANN Bylaws does give us “*the power to recommend a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act*” inconsistently with its Articles of Incorporation and Bylaws.⁷⁴ That Bylaw bears repeating:

*The IRP Panel shall have the authority to recommend that the Board stay any action or decision or that the Board take any interim action, until such time as the Board reviews and acts upon the **opinion** of the IRP. (Emphasis added.)*

147. Recalling that, under Article IV, Section 3, Paragraph 2, of the Bylaws, the IRP process is designed to provide a remedy for any person “*materially affected*” by suffering injury or harm causally connected to the relevant Board violation, we agree with the

⁷⁴ Ibid, ¶ 126.

DotConnectAfrica Trust IRP Panel that the “*language and spirit*” of Paragraph 11(d) empowers us to recommend redress for such injury or harm.⁷⁵ The words “*shall*” and “*opinion*” reflect that, similar to any decision maker, the Panel may and should recommend affirmative steps to be taken by the Board to correct the consequences of actions it took inconsistent with the Bylaws and Articles of Incorporation. Here, given the harm caused to the GCC’s due process rights by the Board’s decision – taken without even basic due diligence despite known controversy – to allow Asia Green’s “.persiangulf” gTLD application to go forward, adequate redress for the GCC requires us to recommend not a stay of Asia Green’s application but the termination of any consideration of “.persiangulf” as a gTLD. The basic flaws underlying the Board’s decision cannot be undone with future dialogue. In recognition of ICANN’s core values of transparency and consistency, it would seem unfair, and could open the door to abuse, for ICANN to keep Asia Green’s application open despite the history. If the issues surrounding “.persiangulf” were not validly considered with the first application, the IRP Panel considers that any subsequent application process would subject all stakeholders to undue effort, time and expense.

IX. FIXING OF COSTS

148. The Parties disagree on whether the procedural rules governing this IRP include the ICANN Bylaws. This is potentially relevant because of differences in language between the costs sections of the Bylaws and the Supplementary Procedures, connected to the good faith pursuit of the cooperative engagement and conciliation processes.

149. Article 9 of the ICANN Supplementary Procedures provides:

The IRP 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.

⁷⁵ Ibid, ¶ 128.

150. Article IV, Section 3, of the ICANN Bylaws provides:

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 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 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.

151. The Parties agreed to postpone final submissions on costs, including on the question of whether Paragraphs 16 and 18 of Article IV, Section 3, of the ICANN Bylaws apply in this IRP.

152. As the IRP Panel has determined that the GCC is the prevailing party, no question arises as to the application of Paragraph 16 of Article IV, Section 3, of the ICANN Bylaws.

153. We will await further submissions from the Parties before allocating all or a percentage of the costs of the proceedings to the GCC.

X. DECLARATION

For the foregoing reasons, the Independent Review Process Panel hereby Declares:

1. The action of the ICANN Board with respect to the application of Asia Green relating to the “.persiangulf” gTLD was inconsistent with the Articles of Incorporation and Bylaws of ICANN. These are, in specific: Article 1, Section 2, Paragraphs 4, 8 and 11, of the Bylaws; Article II, Section 3, of the Bylaws; Article III, Section 1, of the Bylaws; and Article 4 of the Articles of Incorporation.
2. Pursuant to Article IV, Section 3, Paragraph 11(d), of the ICANN Bylaws, the IRP Panel recommends that the ICANN Board take no further action on the “.persiangulf” gTLD application, and in specific not sign the registry agreement with Asia Green, or any other entity, in relation to the “.persiangulf” gTLD.

3. The GCC is the prevailing Party in this IRP.
4. The Parties are to file submissions on costs by 18 November 2016. Following those submissions, all or a percentage of costs will be allocated against ICANN in favor of the GCC.

This Partial Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute the Partial Declaration of this IRP Panel

<u>19 OCTOBER 2016</u>	<u>Lucy Reed</u>
Date	Lucy Reed, Panelist - Chair
<u>19 October 2016</u>	<u>[Signature]</u>
Date	Anibal Sabater, Panelist
<u>19 OCTOBER 2016</u>	<u>[Signature]</u>
Date	Albert Jan van den Berg, Panelist

CLA-032

ICDR CASE NO. 01-15-0002-9483

BETWEEN

DOT SPORT LIMITED

Claimant

-and-

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

Respondent

FINAL DECLARATION

Independent Review Panel

Prof. Dr. Klaus Sachs

Dr. Brigitte Joppich

Wendy Miles QC (Chair)

Dated 31 January 2017

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1. OVERVIEW

- 1.1. This Final Declaration is issued in an Independent Review Process (“**IRP**”) under Article IV, Section 3 of the Bylaws for Internet Corporation for Assigned Names and Numbers (“**ICANN**”) as amended 30 July 2014 (“**Bylaws**”), which stipulates that an IRP is “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”. In accordance with Article IV, Section 3.7 of the Bylaws, this IRP is administered by the International Centre for Dispute Resolution (“**ICDR**”).
- 1.2. The dispute arises out of alleged actions or decisions by the ICANN Board: (i) to permit and uphold a third-party community objection to the Claimant’s application for the .sport gTLD; and (ii) to fail to take into account the alleged lack of independence and impartiality of the Expert appointed pursuant to the ICANN dispute resolution procedures finally to determine that community objection. The Claimant alleges that the ICANN Board failed to assure compliance with ICANN’s Articles of Incorporation (“**Articles**”) and Bylaws as well as secondary rules created by ICANN, such as the Applicant Guidebook, in dealing with the community objection.

2. THE PARTIES AND THEIR LAWYERS

- 2.1. The Claimant is dot Sport Limited (“**dSL**”), a subsidiary of Famous Four Media. The Claimant and Famous Four Media are offering services in the Internet’s Domain Name System (“**DNS**”).
- 2.2. The Claimant is represented by:
Mr. Flip Petillion
Crowell & Moring LLP
7, rue Joseph Stevens
B-1000 Brussels
Belgium
- 2.3. The Respondent is ICANN, a non-profit public-benefit corporation organised and existing under the laws of the State of California with its principal place of business at:

12025 Waterfront Drive
Suite 300
Los Angeles

CA 90094-2536

USA

- 2.4. The Respondent is represented by:

Messrs. Jeffrey LeVee and Eric Enson and Ms. Rachel Zernik

Jones Day

555 South Flower Street

50th Floor

Los Angeles

CA 90071-2300

USA

3. THE PANEL

- 3.1. On 9 September 2015, the full IRP Panel was confirmed, in accordance with the ICDR International Arbitration Rules (the “**ICDR Rules**”) and its “Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process” issued in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws (the “**Supplementary Rules**”).

- 3.2. The members of the IRP Panel are:

Professor Dr. Klaus Sachs

Dr. Brigitte Joppich

Ms. Wendy Miles QC (Chair)

4. PROCEDURAL HISTORY

- 4.1. On 19 March 2015, the Claimant filed a Request for IRP (the “**Request**”) with the ICDR. The Claimant alleged that ICANN had accepted the decision of an Expert in an Expert Determination “that is contrary to its policies” and that in so doing it had “failed both to act with due diligence and to exercise independent judgment.”
- 4.2. On 8 May 2015, the Respondent filed ICANN’s Response to the Request (the “**Response to Request**”).
- 4.3. On 28 September 2015, the Parties and the Panel conducted by telephone the first procedural hearing.

-
- 4.4. On 5 October 2015, following the first procedural hearing, the Panel issued Procedural Order No. 1 setting out the procedural stages and timetable for the proceedings and page limits for the Parties' respective submissions.
 - 4.5. On 9 November 2015, the Claimant submitted its Reply (the "**Reply**").
 - 4.6. On 21 December 2015, the Respondent submitted its Sur-Reply (the "**Sur-Reply**").
 - 4.7. On 3 May 2016, the IRP hearing proceeded by three-way video link with the Panel convened in Cologne, Germany, counsel for the Claimant convened in Brussels, Belgium and counsel for ICANN convened in Los Angeles. ICANN sought to use PowerPoint with its oral submissions. Following the Claimant's objection to further written submissions in the form of PowerPoint slides, the Panel directed that ICANN could use PowerPoint during its oral presentation but that the Panel would not retain hard copy slides as part of the record.
 - 4.8. On 11 May 2016, ICANN sent a further written communication to the Panel regarding two issues raised at the hearing in relation to the Ombudsman process. ICANN submitted two further documents as Respondent Exhibits 25 and 26. Also on 11 May 2016, the Claimant (without objecting to the new communication and exhibits) submitted comments in response.
 - 4.9. On 10 January 2017, the ICDR notified the Parties that the Panel had determined that the record for this matter had been closed as of 15 December 2016 and that the Panel should have the Final Declaration issued by no later than mid-January 2017.

5. OVERVIEW OF ICANN'S NEW GTLD PROGRAM AND DISPUTE RESOLUTION PROCESS

- 5.1. The Claimant raises fundamental procedural fairness issues arising out of two aspects of the program administered by ICANN for the allocation of new generic Top-Level Domain ("**gTLD**") names from 2012: (i) the community objection procedure; and (ii) the Expert Determination procedure. This IRP relates to the ICANN Board's alleged actions or decisions arising out of an Expert Determination that upheld the community objection against the Claimant, including its decision on the Claimant's two Requests for Reconsideration.
- 5.2. ICANN is the administrative body responsible for allocating Internet Protocol address space and assigning protocol identifiers and generic ("**gTLD**") and country-code

("ccTLD") TLDs and managing the DNS. TLDs exist at the top of the DNS naming hierarchy and consist of two or more letters.

- 5.3. The main policy-making body for gTLDs is the Generic Names Supporting Organization ("**GNSO**"). In 2005, the GNSO started a policy development process aimed at introducing new gTLDs. Representatives were consulted from a wide variety of stakeholder groups, including governments, individuals, civil society, business and intellectual property constituencies, and the technology community. They considered the demand, benefits and risks of new gTLDs, selection criteria to be applied, allocation procedures for new gTLDs, and contractual conditions for new gTLD registries going forward.
- 5.4. As of 2011, TLDs were limited in number to 22 gTLDs, and around 250 ccTLDs. Based on the GNSO recommendations, ICANN introduced a new gTLD Program, further opening up gTLDs in order to foster diversity, encourage competition, and enhance the utility of the DNS.
- 5.5. In June 2011, again based on the GNSO consultation, ICANN's Board approved and adopted a new Applicant Guidebook (the "**Applicant Guidebook**"). The ICANN Board further authorized the launch of the 2012 New gTLD Program (the "**New gTLD Program**") in accordance with ICANN's Bylaws, Articles and the new Applicant Guidebook.
- 5.6. The New gTLD Program application round, launched in 2012, permitted interested applicants to compete for the right to operate new gTLDs. The Applicant Guidebook preamble states that:

"The new gTLD program will open up the top level of the Internet's namespace to foster diversity, encourage competition, and enhance the utility of the DNS."

- 5.7. The Applicant Guidebook describes the New gTLD Program application process in six modules. The objection procedures are dealt with in Module 3, followed by an attachment containing the New gTLD Dispute Resolution Procedure for resolving disputes arising out of objections.
- 5.8. The application process specifically permits public comment and formal objection. Within the Module 3 objection procedures, Section 3.2.1 of the Applicant Guidebook

sets out the grounds for objections. The formal objection procedures ensure full and fair consideration of objections based on certain limited grounds outside ICANN’s evaluation of applications on their merits.

5.9. The four stated grounds for formal objections are:

“String Confusion Objection – The applied-for gTLD string is confusingly similar to an existing TLD or to another applied for-gTLD string in the same round of applications.

Legal Rights Objection – The applied-for gTLD string infringes the existing legal rights of the objector.

Limited Public Interest Objection – The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international 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.”

5.10. The Applicant Guidebook provides that community objections may be made by “[e]stablished institutions associated with clearly delineated communities”. However, “[t]he community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection”.

5.11. A community objection must show:

- (a) “that the community expressing opposition can be regarded as a clearly delineated community” taking into account various identified factors;
 - (b) “substantial opposition within the community it has identified itself as representing” taking into account various identified factors;
 - (c) “a strong association between the applied-for gTLD string and the community represented by the objector” taking into account various identified factors;
- and

(d) “that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted” taking into account certain identified factors.

5.12. Following a formal community objection the applicant may file a response to the objection and enter the dispute resolution process within 30 days of notification. The designated Dispute Resolution Service Provider (“**DRSP**”) for disputes arising out of community objections is the International Centre for Expertise of the International Chamber of Commerce (the “**ICC Centre for Expertise**”). Through the ICC Centre for Expertise, any objection is resolved by Expert Determination.

5.13. Following an Expert Determination, the applicant may further apply for: (i) reconsideration by ICANN’s Board Governance Committee (the “**BGC**”) through a request for reconsideration (“**Reconsideration Request**”); (ii) involvement of the Ombudsman; and/or (iii) independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles or Bylaws through the IRP.

5.14. ICANN has designated the ICDR to administer the IRP. The Supplementary Rules apply, which incorporate by reference the ICDR Rules.

5.15. The current IRP arises out of the Claimant’s dispute with ICANN arising out of the community objection to its application, the Expert Determination that followed, two Reconsideration Requests and involvement of the Ombudsman.

6. FACTUAL BACKGROUND TO .SPORT GTLD

6.1. This IRP arises out of the Claimant’s application for the .sport gTLD in the New gTLD Program. The background to the Claimant’s application is summarized below.

A. Claimant’s .SPORT Application

6.2. On 13 June 2012, the Claimant filed Application No. 1-1174-59954 to operate the new gTLD called .sport (the “**Application**”).

6.3. According to the Application, the Claimant applied for .sport to:

“create an environment where individuals and companies can interact and express themselves in ways never before seen on the Internet, in a more

targeted, secure and stable environment. Its aim is to become the premier online destination for such creators and their wide range of users.”

6.4. The Claimant further submitted in its Application that:

“... the aim of .sport is to create a blank canvas for the online sports sector set within a secure environment. The Applicant will achieve this by creating a consolidated, versatile and dedicated space for the sport sector. As the new space is dedicated to those within this affinity group the Applicant will ensure that consumer trust is promoted. Consequently consumer choice will be augmented as there will be a ready marketplace specifically for sports-related enterprises to provide their goods and services. ...”

B. SportAccord’s .sport Application

6.5. On 13 June 2012 a separate applicant, SportAccord, also applied for the .sport gTLD (the “**SportAccord Application**”). SportAccord described itself in the SportAccord Application as a “Not-for-profit Association” that:

“serves as the umbrella organization for all (Olympic and non-Olympic) international sports federations as well as organizers of multi-sports games and sport-related international associations ... [comprising] 90 international sports federations governing specific sports and 15 organizations which conduct activities closely related to the international sports federations.”

C. SportAccord’s Community Objection

6.6. On 13 March 2013, the same SportAccord that had submitted the SportAccord Application for the .sport gTLD also opposed the Claimant’s Application by way of community objection.

6.7. On 21 May 2013, the Claimant filed a response to SportAccord’s objection. In its response, the Claimant alleged that the objector failed to prove that it had: “an on-going relationship” with a “clearly delineated Sport community”; that the alleged community was “clearly delineated”; “substantial opposition” to the application in the alleged community; a strong association between the applied-for gTLD string and alleged community represented by the objector; and a likelihood of material detriment

to the rights or legitimate interests of a significant portion of the alleged community to which the string might be explicitly or implicitly targeted.

D. The .sport Expert Determination

- 6.8. ICANN subsequently submitted the .sport community objection to a third-party Expert appointed by the ICC Centre for Expertise in accordance with Section 3.4.4 of the Applicant Guidebook. Section 3.4.4 provides, among other things, that:

“A panel will consist of appropriately qualified experts appointed to each proceeding by the designated DRSP. Experts must be independent of the parties to a dispute resolution proceeding. Each DRSP will follow its adopted procedures for requiring such independence, including procedures for challenging and replacing an expert for lack of independence.”

- 6.9. On 25 June 2013, the ICC Centre for Expertise notified the parties that it had appointed Mr. Jonathan P. Taylor as Expert. In his Statement of Impartiality and Independence, Mr. Taylor indicated that he had nothing to disclose. In his accompanying curriculum vitae, he indicated that he had previously been involved with organizations and federations that are members of the objector SportAccord.
- 6.10. On 27 June 2013, the Claimant objected to the appointment of Mr. Taylor on the grounds that: (i) the issues at stake did not require sports law expertise and any sports lawyer would likely prefer a sports organization or federation over a commercial registry operator; and (ii) Mr. Taylor’s career appeared to have been intertwined with and depend heavily upon the entities involved with the community objection.
- 6.11. On 25 July 2013, the ICC notified the parties that it had decided not to confirm the appointment of Mr. Taylor.
- 6.12. On 30 July 2013, the ICC Center for Expertise informed the parties that it had proceeded with the appointment of Prof. Dr. Guido Santiago Tawil instead (the “**Expert**”). In his Statement of Impartiality and Independence, the Expert stated that he had nothing to disclose. There is nothing to suggest that the ICC Centre for Expertise took additional steps to ensure that the Expert was not also “intertwined with” or dependent upon the entities involved with the community objection. Nor is

there anything to suggest that the Claimant made any further or particular enquiries in that regard at the time of the Expert's appointment.

6.13. On 23 October 2013, the Expert issued his decision (the "**Expert Determination**") upholding SportAccord's community objection. In the Expert Determination, the Expert determined, inter alia, that:

- (a) "SportAccord is an established institution which has an ongoing relationship with a clearly delineated community";
- (b) SportAccord has "proved several links between potential detriments that the Sport Community may suffer and the operation of the gTLD by an unaccountable registry, such as the sense of official sanction or the disruption of some community efforts";
- (c) "the Appointed Expert shares Objector's argument that all domain registrations in a community based '.sport' gTLD will assure sports acceptable use policies" and "this cannot be warranted by Applicant in the same way in the event that the application for the '.sport' gTLD is approved by ICANN"; and
- (d) "... even though SportAccord has not proved that dot Sport Limited will not act (or will not intend to act) in accordance with the interests of the Sport Community, the Appointed Expert considers that this is only one factor, among others, that may be taken into account in making this determination."

6.14. The ICANN Board accepted the Expert Determination. Upon receipt of the Expert Determination, however, the Claimant says it started to investigate the Expert's links with the sports industry based on what the Claimant considered to be the "surprising" outcome of the Expert Determination. The Claimant's findings prompted it to submit a Request for Reconsideration.

E. Claimant's First Reconsideration Request

6.15. On 8 November 2013, pursuant to Article IV, Section 2 of the Bylaws, the Claimant filed a first Reconsideration Request with the BGC. The BGC is responsible for assisting the ICANN Board to enhance its performance and, among other things, to consider and respond to Reconsideration Requests submitted to the Board pursuant to the Bylaws. The Claimant sought reconsideration of the ICANN Board's acceptance of the Expert

Determination upholding the community objection regarding its .sport gTLD Application.

- 6.16. The Claimant raised two primary grounds for review: (i) failure to observe ICANN’s procedure by the Expert when applying the relevant standard (likelihood of material detriment to a community); and (ii) breach of ICANN’s policy on transparency based on the Expert’s failure to disclose material information relevant to his appointment.
- 6.17. In relation to the second ground, the Claimant alleged that the Expert had not disclosed his attendance at a conference of the International Bar Association in Rio de Janeiro, Brazil, on 22 February 2011 entitled “Olympic-Size Investments: Business Opportunities and Legal Framework”, where he co-chaired a panel entitled “The quest for optimising the dispute resolution process in major sport-hosting events”.
- 6.18. On 8 January 2014, the BGC denied the Claimant’s first Reconsideration Request. The BGC concluded that the Expert did not apply the wrong standard in contravention of established policy or process and did not appear to have proceeded inconsistently with the standards set forth in the Applicant Guidebook. In particular, the BGC concluded that the Claimant failed to demonstrate that the Expert had applied the wrong standards in that: (i) the Expert did not create a new standard for determining the likelihood of material detriment; (ii) the Expert did not fail to apply the existing standard for cause of the likelihood of material detriment to a community; and (iii) the Expert did not create a new test for examining the alleged material detriment.
- 6.19. The BGC further concluded that the Expert’s purported failure to disclose a possible conflict of interest did not support reconsideration, as a matter of process. In particular, the BGC noted that:

“[I]t does not appear that the [Claimant] has sought to challenge the Expert’s independence under the ICC Rules of Expertise. Although the alleged conflict of interest was discovered after the Expert rendered a determination, the ICC Rules of Expertise would still govern any issues relating to the independence of experts. The reconsideration process is for the consideration of policy- or process-related complaints. Without the [Claimant] attempting to challenge the Expert through the established process set forth in the Guidebook and the ICC Rules of Expertise, there can be no policy or process violation to support

reconsideration - *i.e.*, reconsideration is not the appropriate mechanism to raise the issue for the first time.”

6.20. In its determination, the BGC also stated that in accordance with Article IV, Section 2.15 of the Bylaws its determination would be final and did not require Board consideration.

6.21. On 15 January 2014, following the first Reconsideration Request decision, the Claimant wrote to the ICC Centre for Expertise to notify it of the Expert’s failure to disclose his involvement in the conference in Rio de Janeiro. On 21 January 2014, the ICC Centre for Expertise responded that:

“[T]he Expert is no longer in place in this matter and does not have any current functions in connection with this matter. In such situation, neither the Procedure nor the Rules provide a basis for a challenge or a request for the replacement of an Expert.”

6.22. The ICC Centre for Expertise concluded therefore that the Expert, having rendered his determination, was *functus officio* and that the ICC Centre for Expertise’s role as DRSP in the New gTLD Dispute Resolution Procedure in this matter was therefore at an end.

F. Claimant’s Complaint with ICANN’s Ombudsman

6.23. On 6 February 2014, the Claimant filed a complaint with ICANN’s Ombudsman pursuant to Article V, Section 2 of the Bylaws. The Ombudsman’s role is to make sure that ICANN community members are treated fairly. It acts as an impartial mediator to help resolve disputes on issues involving the ICANN Board or supplementary organisations.

6.24. Article V, Section 3 of the Bylaws describes the Ombudsman’s role as follows:

“The Office of Ombudsman shall:

1. facilitate the fair, impartial, and timely resolution of problems and complaints that affected members of the ICANN community (excluding employees and vendors/suppliers of ICANN) may have with specific actions or failures to act by the Board or ICANN staff which have not otherwise become the subject of either the Reconsideration or Independent Review Policies;

2. exercise discretion to accept or decline to act on a complaint or question, including by the development of procedures to dispose of complaints that are insufficiently concrete, substantive, or related to ICANN's interactions with the community so as to be inappropriate subject matters for the Ombudsman to act on. In addition, and without limiting the foregoing, the Ombudsman shall have no authority to act in any way with respect to internal administrative matters, personnel matters, issues relating to membership on the Board, or issues related to vendor/supplier relations”

6.25. The Claimant, meanwhile, continued its investigation into the Expert’s links to the sports industry and discovered new information that it considered further heightened the appearance of bias. In particular, the Claimant discovered that: (i) the Expert’s law firm represented a client, DirecTV, in negotiations with the International Olympic Committee (“**IOC**”) concerning broadcasting and sponsorship rights to the Olympic Games, which resulted in an agreement concluded 7 February 2014; and (ii) a senior partner in the Expert’s law firm acted as president of one of those clients, TyC.

6.26. On 26 March 2014, the Claimant informed ICANN and the Ombudsman about this additional information, as well as the ICC Centre for Expertise on 27 March 2014. On 29 March 2014, the ICC Centre for Expertise responded that there was a specific time limit to object to or challenge Experts within the ICC Expert Determination process, that an Expert Determination had been rendered and this case was closed, and that there was no procedure for re-opening the matter or making a challenge to the Expert within the Rules after closure of the matter.

6.27. On 31 March 2014, the Ombudsman issued a recommendation to members of the ICANN Board. The Ombudsman described the scope of inquiry before him as follows:

“I have been asked to consider whether new material, which has just come to hand, justifies a recommendation by me to the New gTLD Committee, that they not accept the decision of the expert, Dr. Guido Tawil, in the matter of the .sports objection.”

6.28. The Ombudsman took the view that the Expert should have disclosed the new information and that a reasonable appearance of bias might have been created by the ICC Centre of Expertise’s stance that it was too late for the Claimant to challenge the Expert Determination on the basis of that material. The Ombudsman recommended

to the ICANN Board that there should be a rehearing of the objection with a different Expert appointed:

“I am concerned that in this case, there has been no direct comment from Dr. Tawil. I am also concerned that the ICC have taken a stance that it is too late for Famous Four Media to challenge the decision on the basis of material recently disclosed. My concern is, that this may create a reasonable appearance of bias. My view is that the commercial relationship ought to have been disclosed, to give the applicant Famous Four Media an opportunity to make a considered choice as to the suitability of this appointment. Transparency is the best way to ensure that parties are able to make the best choices.

It is therefore my recommendation to the board, that there should be a rehearing of the objection with a different expert appointed.”

- 6.29. On 1 April 2014, the ICC Centre for Expertise sent a letter to ICANN objecting that the Ombudsman had never contacted the ICC for comment regarding the issue of the Expert. According to the ICANN, “the Ombudsman clarified for the Claimant that his email was not a final report and recommendation, and offered the ICC a chance to comment”.
- 6.30. On 2 April 2014, the Claimant filed a second Reconsideration Request with the BGC, as described in more detail below.
- 6.31. On 7 May 2014, the Ombudsman reported to ICANN that he had spoken to the Claimant’s representative “explaining that his [second request for] reconsideration would need to be withdrawn if he was to progress any complaint to me.” There is no other contemporaneous record of that conversation taking place or the Claimant’s reaction to it.
- 6.32. On 21 June 2014 in the second Reconsideration Request recommendation discussed further below, ICANN concluded in relation to the Ombudsman review as follows:

“Recognizing that pursuant to Article V, Section 2 of the ICANN Bylaws, a complaint lodged with the Ombudsman cannot concurrently be pursued while another accountability mechanism on the same issue is ongoing, ICANN has

been advised that the Ombudsman sought confirmation from the [Claimant] as to whether it was aware of these limitations in the Bylaws and how it wished to proceed. ICANN was advised on or about 13 May 2014 that the [Claimant] confirmed that it was fully aware of these Bylaws provisions and that it would like to pursue this [second] Reconsideration Request rather than the Ombudsman's request."

- 6.33. Subsequently, on 5 May 2015, in connection with the current IRP application, ICANN wrote to the Ombudsman stating that:

"I understand that in March of last year, you sent a draft report to Cherine, but that report was subsequently withdrawn pending a response from the ICC. Then, around April/May of last year, the Ombudsman investigation was placed on hold because [the Claimant] elected to pursue its reconsideration request. This request was considered and denied by the NGPC on 18 July 2014. Can you tell me what happened with the [Claimant's] complaint after the NGPC's 18 July 2014 decision? Did you finalize your report? Please let me know."

- 6.34. On the same day the Ombudsman responded by email:

"I did not take any steps at all after the draft report, and have not been asked to do so by any party. So I closed the file. After the NGPC rejected their complaint I think they decided not to continue with me, but I just never heard again. When I realised they had sought IRP that explained the lack of contact I think, as they had decided to review this differently. Does that help?"

G. Claimant's Second Reconsideration Request

- 6.35. On 2 April 2014, the Claimant filed its second Reconsideration Request with the BGC pursuant to Article IV, Section 2 of the Bylaws. In its second Reconsideration Request, the Claimant requested reconsideration of: (i) the Expert Determination and ICANN's acceptance of it; (ii) the ICC Centre for Expertise's designation of the Expert; and (iii) the BGC's determination denying the Claimant's first Reconsideration Request, in the light of the Expert's apparent bias (having attended an International Bar Association conference in February 2011 and as a consequence of the Expert's law firm's involvement with interested parties) and violation of ICANN policy and process.

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- 6.36. On 21 June 2014, the BGC recommended that the second Reconsideration Request be denied on the grounds that: (i) the Reconsideration Request was untimely; and (ii) even if it were timely, the “newly-discovered” evidence did not support reconsideration because neither the DirecTV contract nor the TyC relationship was evidence of a conflict of interest sufficient to support reconsideration.
- 6.37. The BGC found all three claims to be untimely pursuant to Article IV, Section 2.5 of the Bylaws as follows:

“The [Claimant] claims that its belated discovery of new evidence of a conflict of interest on the part of the Expert justifies a tolling of the 15-day deadline for reconsideration requests. Specifically, [the Claimant] claims that on 25 March 2014 it discovered that: (i) one of the Expert’s clients, DirecTV, acquired broadcasting rights for the Olympics on 7 February 2014, following the issuance of the Expert Determination (‘DirecTV Contract’); and (ii) a partner in the Expert’s law firm is president of TyC, a company which has a history of securing Olympics broadcasting rights and of which DirecTV Latin America is the principal shareholder (‘TyC Relationship’). In other words, the [Claimant] suggests that an alleged connection between the Expert (or his law firm) and DirecTV, a ‘recipient of IOC broadcasting rights,’ creates a conflict of interest because SportAccord and the IOC enjoy a ‘close collaborative relationship.’

“The [Claimant’s] argument does not support reconsideration. The [Claimant] does not explain how it suddenly became aware of this information on 25 March 2014, or explain why it could not reasonably have become aware of the information at an earlier date. The only recent event that the [Claimant] claims creates an alleged conflict of interest is the DirecTV Contract, but that contract was signed on 7 February 2014, almost two months prior to the filing of the instant Request (and nearly five months after the Expert issued the Determination). [The Claimant’s] only other evidence for an alleged conflict is the TyC Relationship, a business relationship that appears to be decades old. Further, all of the [Claimant’s] evidence regarding the DirecTV Contract and the TyC Relationship is based on publicly available information from Internet sites such as Wikipedia, Chambers and Partners, and a public sports website, which could have been discovered prior to 25 March 2014.

“The [Claimant] does not explain why it failed to discover the alleged conflicts earlier. Because the [Claimant] could have become aware of the alleged conflicts earlier, the [Claimant’s] belated discovery of publicly-available information does not justify tolling the 15-day time limit.”

- 6.38. Following consideration of all relevant information provided, on 18 July 2014, the New gTLD Program Committee (“**NGPC**”) reviewed and adopted the BGC’s recommendation and denied the second Request for Reconsideration as being untimely, and on the further basis that the allegedly “newly-discovered” information relating to a purported conflict of interest did not support reconsideration.
- 6.39. On the record, neither the BGC’s recommendation nor the NGPC’s decision took into account the substantive findings or recommendations of the Ombudsman, noting merely that the Ombudsman process had been discontinued when the second Reconsideration Request was commenced in accordance with the ICANN dispute resolution procedures.

H. Cooperative Engagement Process

- 6.40. The Claimant subsequently filed a Cooperative Engagement Process (“**CEP**”) Request pursuant to Article IV, Section 3.14 of the Bylaws.
- 6.41. The cooperative engagement process is published on ICANN.org and is incorporated into Section 3 of the Bylaws. The Cooperative Engagement Process description provides that:

“[P]rior to initiating an independent review process, 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. It is contemplated that this cooperative engagement process will be initiated prior to the requesting party incurring any costs in the preparation of a request for independent review.”

- 6.42. In accordance with that Cooperative Engagement Process, the Independent Review Process filing date for the Claimant was extended.

I. IRP Request

- 6.43. On 19 March 2015, the Claimant submitted the current Notice and Request for IRP. The procedural history thereafter is summarized at Section 4 above.
- 6.44. In its Notice and Request for IRP, the Claimant seeks review of ICANN’s actions or decisions on the alleged grounds that:
- (a) the ICANN Board failed to establish, implement and supervise a fair and transparent dispute resolution process in failing to remedy apparent bias;
 - (b) the ICANN Board failed to establish, implement and supervise a fair and transparent dispute resolution process in the selection of the Expert;
 - (c) the ICANN Board failed to establish, implement and supervise a fair and transparent dispute resolution process in allowing the Expert to develop and perform an unfair and arbitrary review process:
 - (i) the ICANN Board failed to comply with its obligation to provide non-discriminatory treatment by accepting SportAccord’s community objection, while other objections with identical characteristics were denied;
 - (ii) the dispute resolution process was unfair and non-transparent because of the Expert’s disregard of ICANN’s policy;
 - (iii) the dispute resolution process was unfair, non-transparent and arbitrary because of the lack of meaningful reasoning; and
 - (d) the ICANN Board failed to correct the mistakes in the dispute resolution process and denied the Claimant its right to be heard by an independent and impartial Expert.

7. IRP PANEL’S ANALYSIS

A. Overview

- 7.1. This IRP is the final stage in the ICANN New gTLD Dispute Resolution Procedure. The process is governed by the ICANN Bylaws, Articles, Applicant Guidebook and “Core Values”. The IRP requires the Claimant to show that: (i) it was materially affected by a decision or action by the Board; (ii) the decision or action is inconsistent with the Articles or Bylaws; and (iii) the request for IRP was made within 30 days of the posting of the Board minutes recording that decision or action.

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- 7.2. The essence of the Claimant’s complaint has been consistent throughout the New gTLD application, objection and dispute resolution process. The Claimant alleges that it: (i) satisfied the necessary criteria for the application process for .sport, which, unlike .olympic, was subject to an unrestricted, open and competitive application process; (ii) was treated less favourably than SportAccord during the community objection process as a result of SportAccord’s (a competitor’s) community objection; and (iii) was treated unfairly in the Expert Determination process by which SportAccord’s community objection was upheld because of the Expert’s apparent bias.
- 7.3. The Claimant contends that throughout the Reconsideration Requests, the Ombudsman procedure and the CEP, ICANN failed properly to take into account the Claimant’s concerns and reconsider and reject the Expert Determination in light of those concerns. According to the Claimant, it remains for this IRP Panel to determine whether or not the ICANN Board acted inconsistently with its Articles, Bylaws and other governing instruments in finding that the Expert Determination was not subject to reconsideration by ICANN, including as a result of apparent lack of independence or impartiality on the part of the Expert.

B. Timeliness

- 7.4. ICANN’s Bylaws, Article IV, Section 3.3 provides that:

“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.”

- 7.5. ICANN accepts that the Claimant’s request for IRP in relation to the first and second Reconsideration Requests is timely. ICANN does not accept that earlier decisions or actions by the ICANN Board, including its adoption of the Applicant Guidebook and/or the Expert Determination itself, are timely or otherwise open to review.
- 7.6. It is not necessary, however, for this IRP Panel to determine whether or not the Claimant is out of time to seek review of the Applicant Guidebook or the Expert Determination. The ICANN Board decisions or actions that the Claimant seeks to review are all contained within the scope of the first and second Reconsideration Requests. Some of those decisions and actions pertain to the ICANN Board’s

interpretation and application of the Applicant Guidebook and its response to and treatment of the Expert Determination. However, the decisions and actions themselves were taken within the scope of the Reconsideration Requests and therefore within the timely scope of the current IRP.

C. Alleged Grounds for Review

7.7. The Claimant has raised four separate grounds for review of the ICANN Board’s adoption of the BGC’s and NGPC’s decisions on the first and second Reconsideration Requests.

7.8. **First**, the Claimant relies on an overriding principle of good faith, which it claims “is considered to be the foundation of all law and all conventions”. The Claimant refers specifically to ICANN’s Core Values as requiring ICANN, among other things, “to obtain informed input from those entities most affected by ICANN’s decisions.”

7.9. Article I, Section 2 of the Bylaws further provides that the 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”. The Bylaws state that:

“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.”

7.10. **Second**, the Claimant relies on ICANN’s requirement of accountability. In particular, ICANN’s Core Values require that it must “[r]emain[] accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness.” It further relies upon Article VI, Section 1 of the Bylaws, which requires ICANN to “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.”

7.11. **Third**, the Claimant relies on Article II of the Bylaws, which sets out the powers of ICANN, including restrictions at Section 2 and non-discriminatory treatment standards at Section 3. Specifically, Article II, Section 3 provides that:

“ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.”

- 7.12. **Fourth**, the Claimant relies on ICANN’s “Core Values” set out in the ICANN Bylaws, Article I, Section 2, together with ICANN’s mission statement, in respect of transparency. The Bylaws “should guide the decisions and actions of ICANN” when it is “performing its mission”, include, the Claimant submits, to “employ[] open and transparent policy development mechanisms”.
- 7.13. In general, ICANN’s Core Values, as set out in full in the ICANN Bylaws, Article I, Section 2, describe the overall goals and objectives that govern ICANN’s decision-making. Specifically, the 11 Core Values that “should guide the decisions and actions of ICANN” when it is “performing its mission” are:
- (a) to preserve and enhance the operational stability, reliability, security, and global interoperability of the Internet;
 - (b) to respect the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN’s activities to matters within ICANN’s mission;
 - (c) to the extent feasible and appropriate, to delegate coordination functions;
 - (d) to seek and support broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet;
 - (e) where feasible and appropriate, to promote and sustain a competitive environment;
 - (f) to introduce and promote competition in the registration of domain names;
 - (g) to employ open and transparent policy development mechanisms;
 - (h) to make decisions by applying documented policies neutrally and objectively, with integrity and fairness;
 - (i) to act 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;

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- (j) to remain accountable to the Internet community through mechanisms that enhance ICANN's effectiveness; and
 - (k) to recognize that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

7.14. As to procedure, Article IV, Section 3 of the ICANN Bylaws – as part of the accountability and review provisions – deals with the IRP. The process is confined to review of ICANN Board actions or decisions asserted by an affected party to be inconsistent with the Articles or Bylaws. In particular, Section 3.2 provides that:

“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.”

7.15. For the sake of completeness, the Panel further notes that the Applicant Guidebook is described in its preamble as being “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.” It is described in the IRP Final Declaration in *Booking.com v ICANN* as “the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs.”

D. Standard of Review

7.16. The standard of review is set out at Article IV, Section 3.4 of the Bylaws and Article 8 of the Supplementary Rules.

7.17. Article IV, Section 3.4 of the Bylaws provides that:

“Requests for such independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of

those Articles of Incorporation and Bylaws. 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 community?"

7.18. Article 8 of the Supplementary Rules reiterates those three questions and further provide as follows:

"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."

7.19. The IRP Panels in *Booking.com v ICANN* and *ICM Registry v ICANN* confirmed that the business judgement rule standard 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." Where the Board's action or inaction may be compared against relevant provisions of ICANN's governing documents, the IRP Panel's task is to *compare* the Board's action or inaction to the governing documents and to *declare* whether they are consistent.

7.20. Unlike the IRP Requests in *Booking.com v ICANN* and *VistaPrint v ICANN*, which were determined effectively to be untimely challenges to the underlying process that had been established by the ICANN Board, this IRP Request concerns the review of the ICANN Board’s adoption of the two Reconsideration Request decisions.

E. Analysis

7.21. The Panel considers below whether the Board acted consistently with ICANN’s Articles, Bylaws and the procedures established in the Applicant Guidebook, comparing the Board’s decisions to Article II, Section 3 of the Bylaws, then to the standard set out in Article IV, Section 3.4 of the Bylaws and Article 8 of the Supplementary Rules and considers other relevant Bylaws and ICANN governing documents, including the Applicant Guidebook and ICANN’s Core Values.

7.22. The primary issues, once distilled, are as follows:

- (a) Did the ICANN Board fail to establish, implement and supervise a fair and transparent dispute resolution process:
 - (i) in failing to remedy apparent bias?
 - (ii) in the selection of the Panel?
 - (iii) in allowing the appointed Panel to develop and perform an unfair and arbitrary review process?
- (b) Did the ICANN Board fail to correct the mistakes in the dispute resolution process and deny the Claimant its right to be heard by an independent and impartial Panel?

7.23. Each of these issues is considered in relation to the two ICANN Board decisions to reject the Claimant’s Reconsideration Requests.

- (i) *Did the ICANN Board fail to establish, implement and supervise a fair and transparent dispute resolution process in failing to remedy apparent bias, in the selection of the Panel and/or in allowing the appointed Panel to develop and perform an unfair and arbitrary review process?*

1. Claimant's Position

- 7.24. The Claimant's first complaint arises out of the process that led to the appointment of the Expert and the lack of any opportunity to take into account the Expert's alleged lack of independence or impartiality and/or apparent bias if discovered only after the Expert Determination had been rendered.
- 7.25. The Claimant points out that "ICANN's community objection dispute resolution rules are silent on the discovery of apparent bias after an expert determination has been rendered." In its first Request for Reconsideration, the BGC concluded that the ICC Rules of Expertise would still govern the Expert's independence and impartiality; that was plainly not the case. The Claimant considers that the ICANN Board's decision to accept the Expert Determination knowing that there was no recourse to deal with the discovery of the Expert's apparent bias was in breach of ICANN's obligations to act in good faith, transparently, and without discrimination.
- 7.26. The Claimant further alleges that ICANN failed to provide the appointed panels with adequate training and to ensure that they were familiar with the industry, and that this violation resulted in ICANN's failure to provide due process.
- 7.27. As to the international law standard of good faith, the Claimant alleges that this encompasses an obligation to ensure procedural fairness and due process which was not discharged in this case. In particular, the Claimant alleges that the ICANN Board "allowed a community objection that was (i) arbitrary and discriminatory, (ii) not a fair application of ICANN's policy, and (iii) lacking in meaningful reasoning."
- 7.28. In particular, the Claimant alleges that:
- (a) the ICANN Board failed to comply with its obligation to provide non-discriminatory treatment by accepting SportAccord's community objection in circumstances where other objections with "identical characteristics" such as for .basketball, .gay, and .islam were all rejected;
 - (b) the ICANN Board permitted a dispute resolution process that was unfair and non-transparent because the Expert disregarded ICANN's policy by failing to make the necessary disclosures in his Declaration of Acceptance and Statement of Independence and Impartiality and "made an erroneous and unfair application of ICANN's policy on community objections by reversing the

burden of proof and using a divergent standard to assess the likelihood of material detriment to the community invoked by the objector”; and

- (c) the ICANN Board’s dispute resolution process was unfair, non-transparent and arbitrary because of the lack of meaningful reasoning in the Expert Determination.

2. ICANN’s Position

- 7.29. According to ICANN, “neither the appointment of the Expert nor the Expert Determination constitutes ICANN Board action.” Therefore, ICANN identifies the “only Board actions at issue here” as being “(1) the decisions by the Board to deny Claimants’ two Reconsideration Requests; and (2) the Board’s adoption of the Guidebook.”
- 7.30. ICANN submits that the Board properly denied reconsideration to the Claimant’s allegation concerning the Expert’s conflict of interest.
- 7.31. First, ICANN maintains that the Claimant “fails to demonstrate that the BGC or the NGPC violated ICANN’s Articles or Bylaws with respect to its determination on Claimant’s reconsideration requests” based on the Expert’s failure to disclose “his participation in the Dispute Resolution Conference” and “his law firm’s relationships with two companies with alleged ties to the IOC.”
- 7.32. In particular, ICANN submits that “[r]econsideration of the actions of a third-party service provider or expert in the New gTLD Program, such as the ICC (or its appointed expert), is appropriate only when its actions [contradicted] established ICANN policy(ies) or procedures”, in accordance with Article IV, Section 2.2(a) of the Bylaws. ICANN argues that:

“The Board (through the BGC and NGPC) properly denied both of Claimant’s reconsideration requests because, as the Board explained, the evidence reflects that: (1) both the ICC and the Expert followed the ICC’s established policies and procedures with respect to the Expert’s appointment (and thereby, followed ICANN’s established procedure that the ICC use its process for determining an expert’s impartiality); and (2) Claimant’s challenge to the Expert was untimely under the ICC’s Rules and Practice Note (and thereby

ICANN's established procedure that challenges to experts must comport with the ICC's rules)."

7.33. Secondly, ICANN submits that the Board correctly found that the ICC and Expert had followed established procedures with respect to the Expert's appointment. In particular, ICANN refers to Article 7(4) of the ICC Rules for Expertise. In response to the Claimant's allegation that the Expert failed to disclose certain information in relation to DirecTV and TyC, ICANN submits that:

"[T]he BGC and NGPC correctly determined that the Expert had followed established policy and procedure in completing the Impartiality Statement required by the ICC. Disclosure requirements for neutrals are generally assessed in accordance with the guidelines set forth in the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration ("**IBA Conflict Guidelines**"). Nothing in the IBA Conflict Guidelines, however, requires disclosure of the type of information identified by the Claimant."

7.34. ICANN goes on to argue that (i) there is no provision in the IBA Conflict Guidelines to require an Expert to disclose that he participated in a conference involving an area of law allegedly relevant to a party; (ii) IBA Conflict Guideline 2.3.6 requiring disclosure of a significant commercial relationship "does not apply to the DirecTV Contract or the TyC Relationship" because "[n]either ... involves a commercial relationship with the IOC"; and (iii) even if there were a commercial relationship with the IOC, "the IOC is not an affiliate of SportAccord" but instead is "an umbrella organization for all international sports federations (*Olympic and non-Olympic*), as well as organizers of multi-sport games and sport-related international associations."

7.35. Thirdly, as to timeliness of the second Reconsideration Request, ICANN submitted that the Board was correct to find that the challenge to the Expert was untimely. ICANN cites Articles 7(4) and 11(4) of the ICC Rules for Expertise, and paragraph 9 of the ICC Practice Note, which provide that any objections to the Expert must be made within five days. ICANN relies upon this deadline as its basis for arguing that any challenge by the Claimant to the appointment of the Expert arising out of the DirecTV Contract and TyC Relationship is out of time. Moreover, after the Expert decision is delivered, the case is closed and cannot be reopened, i.e., the Expert is *functus officio* and cannot be subject to challenge.

7.36. Finally regarding timeliness, ICANN argues that “all of the information Claimant cites to support its conflicts argument was publicly available and could have been discovered earlier with an exercise of due diligence.”

3. Panel’s Determination

7.37. In considering whether or not the ICANN Board failed to establish, implement and supervise a fair and transparent New gTLD application dispute resolution process, it is necessary for the IRP Panel to review the dispute resolution process and examine its implementation and supervision by the ICANN Board in the current application. Such review is limited to considering the role of the ICANN Board in remedying apparent bias, in ensuring fairness in the selection of a Panel and in preventing an unfair and arbitrary Expert Determination review process, specifically in the context of the Claimant’s application for the .sport gTLD.

7.38. As set out at paragraphs 5.6 to 5.14 above, based on the GNSO recommendations, ICANN organized a new gTLD application process as set out in the Applicant Guidebook. The Applicant Guidebook sets out in six modules the stages in the application process. Module 3 sets out the objection procedures and the New gTLD Dispute Resolution Procedure.

7.39. Section 3.2.1 of the Applicant Guidebook provides that “[a] formal objection may be filed on any one of ... four grounds”, including:

“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.”

7.40. The Guidebook provides that community objections may be made by “[e]stablished institutions associated with clearly delineated communities”. However, “[t]he community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection”. In particular Section 3.2.2.4 provides in relation to standing that only:

“Established institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in

the application that is the subject of the 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, but are not limited to:

- 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 a 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 clearly delineated community – Factors that may be considered in making this determination include, but are not limited to:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to the benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

The panel will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements.”

- 7.41. There is nothing in the objection procedure that prevents an objection by another applicant in the gTLD process, including for the same gTLD. The string confusion objection process specifically names other applicants in the gTLD process as having standing in respect of a string objection. Therefore, provided that the community

objector satisfies the criteria outlined above, it is entitled to object irrespective of whether it is also an applicant in respect of the same gTLD.

- 7.42. Any complaint by the applicant arising out of a community objection is subject to the Applicant Guidebook, Module 3, New gTLD Dispute Resolution Procedure. The designated DRSP for community objections is the ICC Centre for Expertise. As indicated above, the Claimant in this IRP objected to the SportAccord community objection and the dispute was referred to the ICC Centre for Expertise for determination.
- 7.43. If the standing of a community objector is subject to challenge, it is for the Expert to determine whether or not the community objector has the necessary standing as a matter of fact. In the .sport Expert Determination, the Expert determined that SportAccord did have the necessary standing.
- 7.44. That said, it would appear that the Claimant's primary concern is not the standing of SportAccord to submit a community objection as such, but rather the treatment of the Claimant throughout the dispute resolution process in relation to that objection once it had been brought. In particular, the Claimant alleges that there was apparent bias on the part of the Expert insofar as he was, or appeared to have been, predisposed in favour of SportAccord in making his Expert Determination to uphold the community objection.
- 7.45. Thereafter, according to the Claimant, in failing to take any steps to deal with the apparent bias of the Expert, instead approving the Expert Determination, rejecting two Reconsideration Requests and failing to take into account the matters raised in the Ombudsman's report, the ICANN Board's own actions and decisions were inconsistent with the ICANN Articles, Bylaws and other governing instruments.
- 7.46. As set out above, the standard of review is set out at Article IV, Section 3.4 of the Bylaws and Article 8 of the Supplementary Rules. Therefore, in examining whether the ICANN Board acted in good faith, was accountable, and acted in a non-discriminatory and transparent manner, this IRP Panel must focus on the (i) existence of any conflict of interest; (ii) exercise of due diligence and care; and (iii) exercise of independent judgment believed to be in the best interests of the community.

7.47. **First**, in relation to conflict of interest, the Claimant has made no allegation in this respect on the part of the ICANN Board. The Claimant strongly suggests that potential conflicts of interest existed on the part of SportAccord in making its community objection and, potentially, on the part of the Expert due to his alleged apparent bias in favour of SportAccord. However, in order to meet the necessary standard of review for this IRP Panel, the Claimant would need to allege and establish that the ICANN Board, as opposed to a third-party objector or the Expert appointed pursuant to the dispute resolution procedure in the Applicant Guidebook, acted with a conflict of interest. Such conflict of interest may have been alleged on the part of the BGC, NGPC, or some other function of the ICANN Board, but it was not.

7.48. **Secondly**, the ICANN Board, including the BGC and NGPC, must have exercised due diligence and care in having a reasonable amount of facts in front of them in taking the decision or action under review. Accordingly, the IRP Panel must consider whether or not this standard was met in relation to:

- (a) the BGC's decision of 8 January 2014 to reject the first Reconsideration Request in light of the Claimant's concerns as to the Expert's apparent bias, the ICC Centre for Expertise's inability to take into account allegations of lack of independence and impartiality and the NGPC's acceptance of the Expert Determination despite these factors; and
- (b) the BGC's recommendation of 21 June 2014 and the NGPC's decision of 18 July 2014 to reject the second Reconsideration Request in light of the Claimant's new and additional concerns as to the Expert's apparent bias and in light of the content of the Ombudsman's recommendation to conduct a new Expert Determination.

7.49. Other IRP Panel Declarations have made clear that neither the NGPC acceptance of the Expert Determination nor the IRP itself is intended to be an appeal process or forum for substantive review of Expert Determinations. The IRP Panels in *Booking.com v ICANN* and *Vistaprint v ICANN* were asked to review the underlying Expert Determinations. Each concluded that a Reconsideration Request provides for procedural review and is not a substantive appeal:

- (a) in *Booking.com v ICANN*, the IRP Panel concluded that the Claimant was not challenging the validity or fairness of the process;

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- (b) in *Donuts v ICANN*, the IRP Panel stated that “whatever label one uses to describe the approach (e.g., ‘objective’, ‘de novo,’ or ‘independent’) that approach does not allow the Panel to base its determination on what it, itself, might have done, had it been the Board. The explicit standard of review—for better or for worse—is much narrower than that”;
 - (c) in *VistaPrint v ICANN* the IRP Panel characterized the claim of disparate treatment in the Expert Determination as “a close question”, recommending that the Board conduct the Reconsideration Request step in the process that was, at the time of the IRP Panel, not yet engaged; and
 - (d) in *Dot Registry v ICANN*, the IRP Panel addressed primarily issues of adequacy and burden of proof in respect to the BGC’s denial of a Reconsideration Request.

7.50. In the next gTLD application round, it has been proposed that a new appeal procedure for Expert Determinations be considered; at present no such appeal process exists. Accordingly, it is not currently possible for the Claimant to seek or obtain substantive review of the Expert Determination.

7.51. In the current case, in addition to substantive issues, questions of fairness and validity of the process are directly engaged. It is the Claimant’s fundamental concern of bias, or apparent bias, on the part of the Expert towards SportAccord and the organisations it is connected with, in particular, which leads to a procedural fairness concern. In the Claimant’s view, the Expert’s perceived connections and affinity to the IOC and other bodies associated with SportAccord may render him more inclined to consider SportAccord, as a sporting body, to be better suited to administer the .sport gTLD than a commercial body such as the Claimant. By contrast, an Expert with no such sporting affiliations would be more likely to assess the Claimant against the applicant criteria without making a choice of a sport body over a commercial body.

7.52. The procedural fairness concern created by the alleged apparent bias was at the centre of the first Reconsideration Request. The BGC rejected that first Reconsideration Request after the Claimant had drawn to the BGC’s attention its concerns as to the Expert’s alleged apparent bias. In particular, in its first Request for Reconsideration, the Claimant raised its concern that:

“[At] a major conference of the International Bar Association in Rio de Janeiro, Brazil entitled ‘Olympic-Size Investments: Business Opportunities and Legal Framework’, [the Expert] was co-chair of a panel entitled ***‘The quest for optimising the dispute resolution process in major sport-hosting events’*** in which the following was discussed:

‘The panel will debate the trends and best practices of resolving disputes in challenging environments with time-sensitive deadlines. Panellists will address issues related to arbitration, dispute boards, expert determination, mediation and electronic discovery on infrastructure projects for big international sports events. The experiences of Atlanta, Barcelona and the London Olympic Games will be discussed. The panel will also address the unique aspects of sports disputes and the potential use of a fast-track dispute resolution process in this area.’”

7.53. The Claimant submitted to the BGC that the Expert “failed in his obligation to disclose a material factor relevant to confirmation of his appointment, and for this reason the resulting Determination must now be considered invalid on the grounds of failure to disclose facts or circumstances that would have, in the eyes of the parties, given rise to doubts as to the arbitrator’s impartiality or independence, prior to accepting his or her appointment as Expert.” This, according to the Claimant, was an obvious breach of the ICANN policy on transparency.

7.54. In its decision to reject the first Reconsideration Request, dated 8 January 2014, the BGC applied the standard of review set out in the Bylaws, Article IV, Section 2. According to the BGC, a successful reconsideration requires that an action or inaction contradicts established ICANN policy, failed to take into account material information or resulted from the Board’s reliance on false or inaccurate information. It stated that:

“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, here the BGC is not to evaluate the Panel’s conclusion that there is substantial opposition from a significant portion of the community to which the Requester’s applications for .sports may be targeted. Rather, the BGC’s review is limited to whether the Panel violated any established policy or process, which the Requester suggests was accomplished when the Panel

‘derogated substantially’ from the applicable standard for evaluating community objections.”

- 7.55. The BGC found that the Expert had not derogated substantially from the applicable standard because:
- (a) the Claimant had failed to demonstrate that the Expert had applied the wrong standards in contravention of established policy or process in that the Expert:
 - (i) did not create a new standard for determining the likelihood of material detriment;
 - (ii) did not fail to apply the existing standard for cause of the likelihood of material detriment to a community; and
 - (iii) did not create a new test for examining the alleged material detriment; and
 - (b) the Expert’s purported failure to disclose a possible conflict of interest does not support reconsideration.
- 7.56. The basis for the BGC’s conclusion that the Expert’s purported failure to disclose a possible conflict of interest did not support reconsideration was that the Applicant Guidebook provides that the ICC Centre of Expertise will follow its adopted procedures for requiring independence and that “[t]he ICC Rules of Expertise would therefore govern any challenges to the independence of experts appointed to evaluate community objections,” and that the Claimant “provides no evidence demonstrating that the Expert failed to follow the applicable ICC procedures for independence and impartiality prior to his appointment.”
- 7.57. The BGC’s conclusion in this respect is flawed. The duty of impartiality and independence is an ongoing one; the duty to disclose information that may, in the eyes of a party, give rise to concerns as to the impartiality or independence of the Expert continues throughout the dispute resolution process until a final decision is rendered. Accordingly, the fact that the Expert completed his Statement of Independence and Impartiality at the time of his appointment does not mean that no issue as to independence or impartiality can arise at a later stage.
- 7.58. This ongoing duty to disclose lies at the heart of ICC dispute resolution.

7.59. The second flaw in the BGC’s reasoning is its conclusion that:

“Although the alleged conflict of interest was discovered after the Expert rendered a determination, the ICC Rules of Expertise would still govern any issues relating to the independence of experts. The reconsideration process is for the consideration of policy- or process-related complaints. Without the [Claimant] attempting to challenge the Expert through the established process set forth in the Guidebook and the ICC Rules of Expertise, there can be no policy or process violation to support reconsideration – *i.e.*, reconsideration is not the appropriate mechanism to raise the issue for the first time.”

7.60. The BGC further relied upon the Claimant’s successful challenge of the initial Expert, Mr. Taylor, in support of the Claimant having “demonstrated familiarity with the ICC Rules of Expertise by successfully challenging and replacing the first expert appointed to the matter.”

7.61. This reasoning is wrong and failed to take into account the fact that once the Expert has rendered a decision he is *functus officio* and the ICC as administering body similarly has no ongoing role.

7.62. Nevertheless, on 15 January 2014, immediately following the BGC’s decision to reject the Claimant’s first Reconsideration Request, the Claimant wrote to the ICC Centre for Expertise to request that it “reconsider whether in fact the appointment of [the Expert] was valid in light of the information at hand.” By response dated 21 January 2014, the ICC stated that:

“... the Expert has rendered the Expert Determination in case EXP/471/ICANN/88 and that it was notified to the parties by letter dated 25 October 2013.

Subsequently, this matter has been closed.

Accordingly, the Expert is no longer in place in this matter and does not have any current functions in connection to this matter. In such situation, neither the Procedure nor the Rules provide a basis for a challenge or a request for the replacement of an Expert.”

7.63. According to the Applicant Guidebook, ICANN’s New gTLD Dispute Resolution Procedures “were designed with an eye toward timely and efficient dispute resolution” and “apply to all proceedings administered by each of the dispute resolution service providers (DRSP).” Moreover, “[e]ach of the DRSPs has a specific set of rules that will also apply to such proceedings.”

7.64. The scope of the dispute resolution procedure and role of the relevant DRSP is set out in more detail in the Applicant Guidebook as follows:

“(b) The new gTLD program includes a dispute resolution procedure, pursuant to which disputes between a person or entity who applies for a new gTLD and a person or entity who objects to that gTLD are resolved in accordance with this New gTLD Dispute Resolution Procedure (the “Procedure”).

(c) Dispute resolution proceedings shall be administered by a Dispute Resolution Service Provider (“DRSP”) in accordance with this Procedure and the applicable DRSP Rules that are identified in Article 4(b).

(d) By applying for a new gTLD, an applicant accepts the applicability of this Procedure and the applicable DRSP’s Rules that are identified in Article 4(b); by filing an objection to a new gTLD, an objector accepts the applicability of this Procedure and the applicable DRSP’s Rules that are identified in Article 4(b). The parties cannot derogate from this Procedure without the express approval of ICANN and from the applicable DRSP Rules without the express approval of the relevant DRSP.”

7.65. The purpose of delegating dispute resolution services to independent third-party providers, such as the ICC and the ICDR, is to create an independent process outside of the ICANN framework. In order to retain that independence, it is unsurprising that ICANN, through the BGC or otherwise, has very limited review power in respect of the substantive procedure conducted through a DRSP, such as an Expert Determination.

7.66. In the implementation of the New gTLD Program as a whole, occasionally a situation may arise where the New gTLD Dispute Resolution Procedure and the applicable DRSP’s Rules, applied according to established policy or process, nevertheless do not

result in a fair, transparent or non-discriminatory outcome. One such example is the apparent inconsistency in several Expert Determinations arising out of string confusion objections, which led the ICANN Board to interfere with individual Expert Determinations which, on their face, appear to meet the necessary standard.

- 7.67. In the current situation, the Expert was appointed in accordance with the DRSP's Rules and rendered an Expert Determination. Subsequently, the Claimant raised an express concern that factors relating to the Expert's independence and impartiality became apparent only after the Expert Determination. The Claimant's concern appears to have at least facial validity.
- 7.68. As indicated above, as a matter of the ICC Centre for Expertise's procedure, as the ICC Centre for Expertise made clear in its letter of 21 January 2014, by the time these factors arose, the Expert Determination had been rendered and the Expert was *functus officio*. Accordingly, the ICC Centre for Expertise had no further function or role in relation to the Expert Determination. That power rested solely and exclusively with ICANN and its remaining procedures of Reconsideration Request, the Ombudsman and the IRP.
- 7.69. The BGC's decision to reject the first Request for Reconsideration on the basis that the Claimant "has not stated proper grounds for reconsideration" because "there is no indication that [the] Panel violated any policy or process in reaching the determination sustaining SportAccord's community objection" fails to take into account the following factors:
- (a) the Claimant reasonably became aware of the information concerning the independence and impartiality of the Expert after the Expert Determination had been rendered;
 - (b) such information may have impacted the integrity of the decision-making process and, therefore, the integrity of the Expert Determination;
 - (c) there was no "established process set forth in the Guidebook and the ICC Rules of Expertise" through which option "to challenge the Expert" at that time; and
 - (d) absent any "established process", any action or decision by the ICANN Board in response to a genuine complaint as to the Expert's impartiality or

independence arising after the Expert is *functus officio*, must be guided by the Core Values in ICANN's Bylaws, including to:

- (i) preserve and **enhance the operational stability, reliability**, security, and global interoperability of the Internet;
- (ii) where feasible and appropriate, to **promote and sustain a competitive environment**;
- (iii) **introduce and promote competition** in the registration of domain names;
- (iv) employ **open and transparent policy** development mechanisms;
- (v) make decisions by **applying documented policies neutrally and objectively, with integrity and fairness**; and
- (vi) **remain accountable** to the Internet community through **mechanisms that enhance ICANN's effectiveness**.

7.70. ICANN's documented policies leave a Claimant with the options only of a Reconsideration Request, Ombudsman or an IRP in order to seek redress in the event of an arbitrator's apparent bias that only arises or becomes known after the Expert Determination is rendered. In those circumstances, the outsourced delegated role of the ICC Centre for Expertise is fulfilled and at an end.

7.71. Broadly, it is for the ICANN Board, through its NGPC, BGC and/or Ombudsman, to preserve **and** enhance the reliability of the system, the competitive environment of the registration process and the neutrality, objectivity, integrity and fairness of the decision-making system.

7.72. In the event that an Expert appointed in accordance with the Module 3 procedure were lacking in independence or impartiality, or there were otherwise an appearance of bias, then it is the ICANN Board that must redress that bias. In the current circumstances, it is plain that reconsideration is the only mechanism available to the Claimant to raise the issue of new information concerning independence and impartiality that has arisen only after the Expert Determination has been rendered and the DRSP process is at an end.

7.73. Had the BGC considered and assessed the new information and determined that it did not give rise to a material concern as to lack of independence or impartiality so as to undermine the integrity or fairness of the Expert Determination, and refused reconsideration on that basis, that action or decision may have been unreviewable. However, the BGC simply refused to consider the new information and its refusal is in contravention of the BGC's obligation to exercise due care and diligence.

7.74. Immediately following the first Reconsideration Request decision, on 6 February 2014, the Claimant filed a complaint with ICANN's Ombudsman. According to the ICANN website:

"The ICANN Ombudsman is independent, impartial and neutral. The Ombudsman's function is to act as an informal dispute resolution office for the ICANN community, who may wish to lodge a complaint about ICANN staff, board or problems in supporting organizations. The purpose of the office is to ensure that the members of the ICANN community have been treated fairly. The Ombudsman is impartial and will attempt to resolve complaints about unfair treatment, using techniques like mediation, shuttle diplomacy and if needed, formal investigation. The Ombudsman is not an advocate for you, but will investigate without taking sides in a dispute. The process is informal, and flexible.

...

"The Ombudsman cannot make, change or set aside a policy, administrative or Board decision, act, or omission, but may investigate these events, and to use ADR technique to resolve them and make recommendations as to changes."

7.75. Given the nature of the Ombudsman's role, as neutral mediator, the status of his recommendation to the ICANN Board as a draft as opposed to a final recommendation, as alleged by ICANN, is irrelevant. The Ombudsman was engaged in a process to "facilitate the fair, impartial, and timely resolution of problems and complaints" raised by the Claimant as an "affected member[] of the ICANN community."

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- 7.76. The existence of a written recommendation to the ICANN Board, and the fact that the ICANN Board appears wholly to have disregarded that recommendation, is a relevant factor for this IRP Panel's consideration as to whether or not the ICANN Board acted in accordance with its governing instruments.
- 7.77. As ICANN is at pains to point out, including in further and unsolicited post-hearing submissions and evidence, the Ombudsman did not proceed after the Claimant submitted its second Reconsideration Request. The ICANN Board accordingly did not follow or refer to his recommendation in considering the Reconsideration Request.
- 7.78. Nevertheless, the content of the Ombudsman's recommendation, including his neutral recommendation that a new expert determine the .sport community objection, was before the BGC when it received the Claimant's second Reconsideration Request. It had not been formally withdrawn or revoked by the Ombudsman and provided valuable information to the BGC. That recommendation suggested that the Board refer the Claimant's community objection to a new expert due to concerns regarding the Expert's apparent bias.
- 7.79. The second Reconsideration Request contained two additional items of information that were neither before the BGC during its first Reconsideration Request decision nor the Ombudsman when he made his recommendation. These were that:
- (a) one of the Expert's clients, DirecTV, acquired broadcasting rights for the Olympics on 7 February 2014, following the issuance of the Expert Determination; and
 - (b) a partner in the Expert's law firm is president of TyC, a company which has a history of securing Olympics broadcasting rights and of which DirecTV Latin America is the principal shareholder.
- 7.80. The new allegations gave rise to a concern that the connection between the Expert (or his law firm) and DirecTV, a recipient of IOC broadcasting rights, created a conflict of interest because SportAccord and the IOC enjoy a close collaborative relationship.
- 7.81. In its recommendation on the second Reconsideration Request, commenced with the benefit of further allegations of apparent bias and following the Ombudsman's

recommendation, the BGC did consider the “newly-discovered” evidence, but found that it did not support reconsideration. In particular:

- (a) in relation to the DirecTV Contract, the BGC deemed this to be irrelevant because the contract in question had not been executed at the time of the Expert Determination and the first BGC decision; and
- (b) in relation to the TyC Relationship, the BGC considered this to be “decades old” and not considered earlier because it had not been raised earlier.

7.82. As with the first Reconsideration Request decision, the BGC appeared to focus on the role of the ICC procedures and the Expert’s duty to disclose. In relation to the TyC Relationship in particular, the BGC concluded that:

“[T]he Expert submitted to the ICC, and to the parties, his *curriculum vitae*, as well as his Declaration of Acceptance and Availability and Statement of Impartiality and Independence in accordance with the ICC Rules of Expertise. ... As such, reconsideration is not appropriate with respect to the Expert’s disclosure.”

7.83. The BGC failed to take into account the problems that arise from what the Expert **did not** disclose in his Statement of Impartiality and Independence. He did not disclose the panel participation that gave rise to the first Reconsideration Request, nor any existing DirecTV relationship that ultimately gave rise to the DirecTV Contract or TyC Relationship. In relation to the DirecTV relationship, although the DirecTV Contract itself was executed after the Expert Determination, the Expert’s law firm was likely in the process of negotiating that contract prior to the Expert Determination. All or some of these matters may give rise to apparent bias and the fact that they were not disclosed cannot be preclusive of any reconsideration in relation to them.

7.84. As to the BGC’s finding that the Claimant’s challenge to the Expert was untimely, the IRP Panel considers that, provided the Claimant was not reasonably aware of the factors giving rise to concerns of apparent bias at the time of the disclosure, and it has submitted that it was not, then it simply was not in a position to have challenged the arbitrator earlier. It quite justifiably relied on the Expert’s disclosure in the carefully designed ICC standard forms. As the Ombudsman said in his report:

“[T]he failure to undertake due diligence would in my view prevent any subsequent challenge to the appointment. In this case, there appears to have been both an adequate search, but also the entirely reasonable reliance upon the certificate of impartiality.”

7.85. As the Ombudsman recognized, a fair system of dispute resolution must allow for review of a decision by an impartial and independent decision-maker in the event that previously undisclosed information reasonably becomes available only after the final decision is rendered. The sole basis for the decision-maker’s mandate is the existence of his or her contracted-for independence and impartiality. If that falls away, the decision must be capable of reconsideration.

7.86. As to the BGC’s second finding that the “newly discovered” evidence did not support reconsideration, the Ombudsman, in contrast, looked to the IBA Conflict Guidelines 2004 to assess whether or not “in the eyes of the reasonable bystander, an appearance of bias” existed. In particular, the Ombudsman referred to the IBA Conflict Guidelines’ Waivable Red List, paragraph 2.3.7, which provides that “[t]he arbitrator’s law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.”

7.87. The Ombudsman referred further to the IBA Conflict Guidelines’ comment that:

“In addition, a later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in either non-appointment, later disqualification or successful challenge to any award. In the view of the Working Group, non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so.”

7.88. Tellingly, the BGC did not consider the IBA Conflict Guidelines (although it accepts in its submissions in this IRP that they are the standard governing neutrals), or any other standards for the requirements of independence and impartiality in neutral, binding decision-making bodies. Instead, it repeatedly relied upon a very technical argument that the necessary forms were completed, no objection was made during the process, and no steps can be taken now with the ICC as its role is at an end, therefore all delegated DRSPs have been complied with and the BGC having reviewed that process is satisfied.

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- 7.89. In relying on this technical, procedural point, the BGC fails to engage with the substance of the concerns raised by the Claimant, i.e., the actual evidence that it alleges gives rise to apparent bias. Only the Ombudsman engaged in that analysis to any degree, and the BGC failed to take into account his analysis. If the BGC refuses to deal with apparent bias based on information arising only after an Expert Determination is rendered, then the question arises what other mechanism exists in the ICANN dispute resolution process to address it. It cannot be the case that there is no such mechanism, otherwise the process would risk extremely unfair and unjust results.
- 7.90. Accordingly, the IRP Panel is of the view that in order to have upheld the integrity of the system, in accordance with its Core Values, the ICANN Board was required properly to consider whether allegations of apparent bias in fact gave rise to a basis for reconsideration of an Expert Determination. It failed to do so and, consequently, is in breach of its governing documents.
- 7.91. This is a meaningful breach because several of the IBA Conflict Guidelines are invoked by the factors raised by the Claimant. In particular:
- (a) in relation to the panel, Guideline 3.5.2 refers to circumstances where “[t]he arbitrator has publicly advocated a specific position regarding the case that is being arbitrated, whether in a published paper or speech or otherwise” and identifies that as Orange List;
 - (b) in relation to the TyC Relationship, Guideline 2.3.6 (referred to by the Ombudsman) refers to circumstances where “[t]he arbitrator’s law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties” and identifies that as Waivable Red List; and
 - (c) in relation to the TyC Relationship and/or the DirecTV Contract, three Orange List Guidelines are applicable:
 - (i) Guideline 3.1.4: “The arbitrator’s law firm has within the past three years acted for one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator”;

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- (ii) Guideline 3.2.1: “The arbitrator’s law firm is currently rendering services to one of the parties or to an affiliate of one of the parties without creating a significant commercial relationship for the law firm and without the involvement of the arbitrator”; and
 - (iii) Guideline 3.2.3: “The arbitrator or his or her firm represents a party or an affiliate to the arbitration on a regular basis but is not involved in the current dispute.”

7.92. In light of the direct applicability of the IBA Conflict Guidelines in repeated respects, it is highly possible that a proper review of the evidence of apparent bias against those Guidelines as a whole could result in the BGC – like the Ombudsman – ordering a rehearing with a different expert appointed.

- (ii) *Did the ICANN Board fail to correct the mistakes in the dispute resolution process and deny the Claimant its right to be heard by an independent and impartial Expert?*

7.93. The second limb of this IRP Request is that the Board failed to correct the mistakes in the process. In this respect, ICANN’s technical procedural argument is more compelling. That is, provided the process was followed to the letter, it is not subject to mistakes that require rectification.

7.94. The finding of the IRP Panel is that the process is not in fact at fault; it is implicit in the Bylaws, Articles and Applicant Guidebook that an apparent bias must be dealt with by the Board, if it arises after the Expert Determination has been rendered and no other recourse is available.

7.95. The process itself therefore does not contain mistakes; the mistake is in the implementation of the process. In particular, the BGC and NGPC failed to apply the necessary consideration to the new evidence of apparent bias, in substance, against a satisfactory standard such as the IBA Conflict Guidelines.

7.96. Accordingly, on this second limb, the IRP Panel finds no basis for review.

8. COSTS

8.1. The Claimant seeks recovery of its costs in this IRP. Neither party has submitted any costs submission as to the amount of legal or other costs incurred by the parties.

8.2. The ICDR Rules, Article 34, provide in relation to the costs of arbitration that:

“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.”

8.3. The Panel fixes costs in respect of (i) fees and expenses of the Panel and (ii) fees and expenses of the ICDR acting as administrator of the proceedings in the sum of US\$152,673.26

8.4. Taking into account the specific circumstances of this case, in particular the concerns outlined above in particular at paragraph 7.70, the Panel allocates the costs at paragraph 8.3 in favour of the Claimant. Accordingly, ICANN must reimburse to the Claimant its share of fees and expenses of the Panel and fees and expenses of the ICDR acting as administrator of the proceedings.

