

ICANN BOARD MEETING

28 July 2015

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REFERENCE MATERIALS TO BOARD SUBMISSION 2015.07.28.1b

Title: **Reconsideration Request 15-7**

Summary Background

While the full background can be found in the documentation attached to these Reference Materials, Reconsideration Request 15-7 brought by Booking.com B.V. and Travel Reservations SRL (formerly Despegar Online SRL) (collectively, the “Requesters”) seeks reconsideration of the ICANN Board’s approval of Resolutions 2015.4.04.26.14, 2015.4.04.26.15, and 2015.04.26.16, in which the Board adopted the findings contained in the Final Declaration of the IRP panel in *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247 (“*Booking.com* Final Declaration”) and directed the President and CEO, or his deignee(s), to move forward with processing the .hotels/.hoteis contention set.

The BGC considered Reconsideration Request 15-7, concluded that the Requesters have not stated proper grounds for reconsideration, and recommended that the Board deny Reconsideration Request 15-7. The Board agrees.

Document/Background Links

The following attachments are relevant to the BGC’s recommendation regarding Reconsideration Request 15-7.

Attachment A is [Reconsideration Request 15-7](#), submitted on 13 May 2015.

Attachment B is the [BGC’s Recommendation on Reconsideration Request 15-7](#), issued on 20 June 2015.

Other Relevant Materials

The Annexes to Reconsideration Request 15-7, available at:

<https://www.icann.org/en/system/files/files/reconsideration-request-15-7-booking-bv-travel-reservations-srl-annexes-13mar15-en.pdf>.

The letter from Booking.com B.V. and Travel Reservations SRL to the ICANN Board, submitted on 16 July 2015, available at:

<https://www.icann.org/en/system/files/correspondence/booking-bv-travel-reservations-srl-to-icann-board-redacted-16jul15-en.pdf>.

The Final Declaration of the IRP panel in *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247, available at: <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>.

Resolutions 2015.4.04.26.14, 2015.4.04.26.15, and 2015.04.26.16 (adopting the findings contained in the *Booking.com* Final Declaration), available at:

<https://www.icann.org/resources/board-material/resolutions-2015-04-26-en>.

Submitted by:	Amy A. Stathos
Position:	Deputy General Counsel
Date Noted:	20 July 2015
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Reconsideration Request Form

Version of 11 April 2013

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

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

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

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

Please submit completed form to reconsideration@icann.org.

1. Requesters Information

Name: Booking.com B.V.

Address: Contact Information Redacted

Email: Contact Information Redacted

Name: Travel Reservations SRL (formerly, Despegar Online SRL)

Address: Contact Information Redacted

Email: Contact Information Redacted

The Requesters are both represented by:

Name: Flip Petillion, Crowell & Moring LLP

Address: Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional): Contact Information Redacted

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

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

Board action/inaction

Staff action/inaction

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

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

The Requesters seek reconsideration of both actions and inactions of ICANN's Board of Directors. The specific actions/inactions of the Board are set forth in more detail below, specifically in response to Questions 8 and 10, and relate to the ICANN Board's Resolutions 2015.04.26.14 to 2015.04.26.16, approved on April 26, 2015 and published on April 28, 2015 (hereinafter, the 'Decision'), attached as **Annex 1**.

4. Date of action/inaction:

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

On April 28, 2015, the Board published the Decision, which had apparently been taken on April 26, 2015 (**Annex 1**).

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

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

The Requesters learned of the Decision on April 29, 2015.

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

The first Requester, Booking.com, is the applicant for the '.hotels' gTLD. The second Requester, Travel Reservations, is the applicant for the '.hoteis' gTLD. The Decision impacts the Requesters. In the Decision, the Board directed ICANN's President and CEO, or his designee(s), to move forward with processing the .hotels/.hoteis contention set. It appears that ICANN is unlikely to approve both the application for '.hotels' and the application for '.hoteis'.

This would directly impact the Requesters. As a result, either: one of the Requesters, Booking.com or Travel Reservations, would not have access to its desired gTLD (together with the attendant opportunities to improve their service offer); or both Requesters would be obliged to share the same gTLD, reducing differentiation between them and potentially causing customer confusion.

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

The decision to put .hotels and .hoteis in a contention set is not consistent with ICANN's goals of increasing competition and making the domain name system more global and understandable through the use of local languages.

The Requesters are competitors who target the same group of customers. Both offer online search and reservation services, which are free of charge for the customer. Were the Requesters to have access to the separate .hotels or .hoteis gTLDs, this would create new and significant opportunities to further differentiate and identify their services based on clear independent identities. Forcing these two competitors to fight for control of a gTLD, or share a single gTLD, would reduce these opportunities for greater competition in the market and may result in communications to customers becoming more confused.

In the light of customer demand for online travel services and the customer's preference to

compare the prices of multiple online travel agents, separate gTLDs would enable the Requesters to develop their own distinct and reliable platforms for online travel search and reservation services. This would promote competition, to the benefit of Internet users across the globe.

Indeed, the Requesters have every incentive to maintain their current strong and differentiated brand identities and therefore to operate the .hotels and .hoteis gTLDs in a way that ensures the continued distinctiveness of their respective brands.

In addition, Internet users would benefit from having information on hotels in their own/preferred language and accessible through domain names in that language. As the Decision appears to imply that ICANN will only allow either the .hotels or the .hoteis gTLD, this means that either the English language community or the Portuguese language community would be deprived of a gTLD related to hotels in their own language. This is not consistent with ICANN's goal to make the domain name system more global.

As a result, resolving the .hotels/.hoteis contention set by allowing only one of the gTLDs will limit competition and be detrimental to the public interest and the interests of the global Internet user.

8. Detail of Board or Staff Action – Required Information

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

Board action: If your request is in regards to a Board action or inaction, please provide a detailed explanation of the material information not considered by the Board. If that

information was not presented to the Board, provide the reasons why you did not submit the material information to the Board before it acted or failed to act. "Material information" means any information that are material to the decision.

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

Provide the Required Detailed Explanation here:

(You may attach additional sheets as necessary.)

As will be demonstrated in greater detail below, the ICANN Board (1) failed to consider material information, (2) relied on inaccurate material information in the Decision, and (3) took action in contravention of ICANN's own Articles of Incorporation, Bylaws and Affirmation of Commitments.

I. The ICANN Board failed to consider material information

The ICANN Board evidently did consider the final declaration of March 3, 2015 in the Independent Review proceeding ("IRP") filed by Booking.com ("Final IRP Declaration"). The Requesters appreciate that the ICANN Board took into account the IRP Panel's comments with respect to ways in which the New gTLD Program processes might improve in future rounds.

However, the ICANN Board failed to consider the fact that it had the discretion to improve the New gTLD Program processes and implementation for the current round. The IRP Panel explicitly encouraged the ICANN Board in the Final IRP Declaration to consider whether, notwithstanding the result of the string similarity review of .hotels and .hoteis, approval of both the Requesters' proposed strings would be in the best interest of the Internet community. The Decision and the rationale of the Decision show that ICANN did not consider this material information.

Reading between the lines, the Final IRP Declaration advocated that Booking.com and ICANN resolve the issue amicably. As one of the entities that is most affected by the outcome of the string similarity review, Booking.com has expressed its willingness to engage in a discussion with ICANN, its constituents and the ICANN Board, as to how the issue can be resolved in the best interests of the Internet community. The other entity most affected by the outcome of the string similarity review, Travel Reservations, is also willing to engage in these discussions, and shares the position of Booking.com that the Internet community would best be served by delegating both the .hotels and .hoteis gTLDs.

There are no indications that the ICANN Board considered the Requesters' willingness to engage in these discussions.

There are also no indications that the ICANN Board considered the evidence submitted by Booking.com in the context of the IRP, showing that there is no possible visual confusion. The evidence also showed that ICANN has allowed applications with at least equally serious visual string similarity concerns – such as .parts/.paris, .maif/.mail, .srt/.srl, .vote/.voto and .date/.data (Annex 2, p. 11) – to proceed while singling out .hotels/.hoteis. The ICANN Board did not consider this material information when making the Decision.

Finally, the ICANN Board did not consider the fact that it has previously approved changes to the New gTLD Program during its implementation, where those changes were justified by the public interest, according to the ICANN Board. These facts are material to the Decision, as it creates disparate treatment between the Requesters and other applicants advocating the public interest argument (*infra*, Section III).

II. The ICANN Board relied on inaccurate material information

The IRP Panel in the Final IRP Declaration considered that Booking.com was time-barred from raising its objections to the string similarity review. The IRP Panel reasoned that

Booking.com should have objected to the string similarity review process at the time the Guidebook was first implemented.

These findings of the IRP Panel, *i.e.* that Booking.com was time-barred, are flawed:

- The IRP Panel ignored the fact that neither the string similarity review process nor the string confusion objection procedures had been established and implemented in their entirety at the time the Guidebook was adopted. As a result, neither the Requesters nor any other interested party were in a position effectively to challenge these, as yet unfinalized, processes. Indeed, at that time, ICANN still had every opportunity to correctly implement the string confusion objection procedure in accordance with both the Guidebook and the fundamental principles in ICANN’s Articles of Incorporation (“AoI”) and Bylaws. The opportunity for the Requesters to challenge ICANN’s erroneous application of the Guidebook, which was in violation of ICANN’s fundamental obligations, only arose when the flaws in ICANN’s implementation of the Guidebook became apparent. Therefore, at the time of the adoption of the Guidebook, the Requesters were effectively barred from challenging the Guidebook, because the harm had not yet become manifest.
- Further, to raise an issue at that time would have required the Requesters to reveal that they were contemplating making an application for a new gTLD. This would have encouraged opportunistic applications from third parties seeking to extract monetary value from an application through a private auction.
- The IRP Panel did not draw a distinction between the adoption of the general principles and their subsequent implementation. The IRP Panel limited its review to ICANN’s compliance to the letter of the Guidebook. It refrained from reviewing the Board’s actions in relation to the implementation of the Guidebook, asserting that the

ICANN Board has ultimate discretion whether or not to intervene in the string similarity review.

Other IRP panels have recognized the inaccuracy of the findings in the Final IRP Declaration with respect to the issue of timing. Even if a decision is made entirely pursuant to the Guidebook, that decision must remain subject to possible review concerning its compliance with ICANN's AoI and Bylaws (*See* Interim Declaration on Emergency Request for Interim Measures of Protection in ICDR Case No. 01-14-0002-1065 (February 12, 2015), para. 79).

However, the Decision shows that the ICANN Board relied on the IRP Panel's inaccurate reasoning concerning the timing of Booking.com's objection, without considering those inaccuracies or the fact that other IRP panels have expressed themselves differently on the issue.

III. The ICANN Board contravened ICANN's Articles of Incorporation, Bylaws and Affirmation of Commitments

The ICANN Board rightfully considered the transparency and fairness issues identified in the Final IRP Declaration. However, it only did so for future new gTLD rounds and not with respect to the Requesters' applications. Instead of resolving the contraventions of ICANN's AoI and Bylaws present in the current new gTLD round, the ICANN Board relied on the erroneous reasoning that Booking.com was time-barred from raising these issues.

The Requesters fail to understand why the ICANN Board did not consider the contraventions of the AoI and Bylaws with respect to the implementation of the string similarity review in the current round. The point is all the stronger in view of the fact that the ICANN Board has previously made changes to the New gTLD Program during implementation. For example, the ICANN Board has introduced a review mechanism for certain specific string confusion objection expert determinations. During the implementation of the New gTLD Program, the ICANN Board also introduced a public interest commitment specification to the standard

registry agreement as well as specific contractual provisions for .brand TLDs. These ICANN Board decisions are clear policy changes, which alter previously established policies.

The Requesters fail to understand why the ICANN Board has approved these policy changes, but has not considered changing the implementation of the string similarity review process in order to bring it into line with ICANN's AoI and Bylaws, not only for the future but also for the current new gTLD round.

9. What are you asking ICANN to do now?

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

The Requesters ask ICANN to reverse the decision in which '.hotels' (Application ID 1-1016-75482) and '.hoteis' (Application ID 1-1249-87712) were put in a non-exact match contention set.

ICANN is requested to modify the Decision and to decide that the '.hotels' gTLD, as applied for in the Application with ID 1-1016-75482, can co-exist with the '.hoteis' gTLD, as applied for in the Application with ID 1-1249-87712.

In the event that ICANN will not immediately reverse its decision, the Requesters ask that ICANN engage in conversations with the Requesters, and that a hearing be organized. In addition, ICANN is requested to stay the present reconsideration proceedings with a view to allowing the Requesters to further consider how best to exclude all perceived likelihood of visual confusion.

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

(Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the requester must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial) that is a directly and causally connected to the Board or staff action or inaction that is the basis of the Request for Reconsideration. The requestor must be

able to set out the loss or injury and the direct nature of that harm in specific and particular details. The relief requested from the BGC must be capable of reversing the harm alleged by the requester. Injury or harm caused by third parties as a result of acting in line with the Board's decision is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)

I. The ICANN Board's failure to consider material information harmed Requesters

The Requesters are harmed by the ICANN Board's failure to consider material information; the Requesters have been treated differently from other applicants in the current new gTLD round. There is no justification for this disparate treatment.

In addition, the Decision creates disparate treatment for the Requesters in comparison with applicants in future new gTLD rounds. There is no justification for the ICANN Board accepting the need to comply with its fundamental obligations of ensuring due process, transparency and fairness in a future round, while not accepting this in the current round.

The Decision directly harms the Requesters, as it blocks one of the Requesters' applications for strings that should otherwise be permitted for registration according to ICANN's policy as outlined in the Applicant Guidebook.

In addition, Booking.com has invested significant time and effort in defending its application for .hotels against the unreasoned advice by the string similarity review panel. This advice and ICANN's acceptance of it contravenes ICANN's AoI and Bylaws. As a result of ICANN's acceptance of the advice, the Requesters' respective applications for .hotels and .hoteis have suffered unnecessary delays and are currently experiencing further delays because of the Decision.

The IRP Panel recognized in the Final IRP Declaration that Booking.com's submissions contributed to the public interest. The Requesters expect the ICANN Board not to limit the public interest benefits of Booking.com's contributions to future new gTLD applicants, but

also to allow the Requesters to benefit from these contributions in the current new gTLD round. Otherwise, the parties that are harmed most severely by the lack of due process would be the only ones not to benefit from these contributions.

II. The requested relief reverses most of the harm

Although the requested relief in this Reconsideration Request does not compensate for the lost time, costs and effort, it would reverse most of the harm to the Requesters in that the relief would allow the Requesters to proceed with the safe and secure operation of gTLDs that are relevant to the Requesters' respective businesses.

The Requesters are willing to invest additional time and effort in developing solutions to alleviate the ICANN Board's concerns and to exclude as far as possible any perceived likelihood of visual confusion. The Requesters expect that ICANN contribute in good faith to this process.

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

Yes

No

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

Apart from differences in the time, costs and effort spent in resolving the perceived visual similarity issue, the Requesters' harm is identical, as explained in section 6 above.

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

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

1. ICANN Board's Resolutions 2015.04.26.14 to 2015.04.26.16
2. Expert report showing that .hotels and .hoteis cannot be considered confusingly similar

Terms and Conditions for Submission of Reconsideration Requests

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

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

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

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

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

Fly Petition

Signature

May 13, 2015

Date

RECOMMENDATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 15-7

20 JUNE 2015

The Requesters, Booking.com B.V. and Travel Reservations SRL (formerly Despegar Online SRL), seek reconsideration of the ICANN Board’s approval of Resolutions 2015.4.04.26.14, 2015.4.04.26.15, and 2015.04.26.16 (collectively, the “Resolutions”). By those Resolutions, the Board adopted findings contained in the Final Declaration of the IRP Panel in *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247 (“*Booking.com* Final Declaration”) and directed the President and CEO to move forward with processing the .hotels/.hoteis contention set.

I. Brief Summary.

Requester Booking.com B.V. (“Booking.com”) submitted a standard application for .hotels, and Requester Travel Reservations SRL (“TRS”) submitted a standard application for .hoteis (collectively, the “Applications”). On 26 February 2013, pursuant to a process called string similarity review (“SSR”), an expert string similarity review panel (“SSR Panel”) determined that the .hotels and .hoteis strings were visually confusingly similar. Pursuant to applicable procedure, the Applications were then placed into a contention set.

Requester Booking.com challenged the establishment of the contention set in a prior reconsideration request (Reconsideration Request 13-5), which was denied on 10 September 2013. Booking.com then initiated an Independent Review Process (“IRP”) on 18 March 2014, challenging the denial of Reconsideration Request 13-5 and ICANN’s adoption of the SSR Panel’s determination that the Applications were visually confusingly similar. In its Final

Declaration, the *Booking.com* IRP Panel unanimously rejected Booking.com's claims, determining that Booking.com's challenge to the decision of an independent evaluator did not challenge Board action and, moreover, that the ICANN Board had no obligation to review or otherwise intervene in the conclusions reached by third-party expert evaluators. At its 26 April 2015 meeting, the ICANN Board of Directors ("Board") approved the Resolutions, thereby adopting findings contained in the *Booking.com* Final Declaration and directing the President and CEO to move forward with processing the contention set.

On 13 May 2015, the Requesters filed the instant Reconsideration Request ("Request 15-7"), seeking reconsideration of ICANN's approval of the Resolutions. The Requesters argue that reconsideration is warranted because, in approving the Resolutions, the Board: (a) contravened certain of ICANN's "goals" or core values; (b) failed to consider material information; (c) relied on inaccurate information; and (d) violated unspecified provisions of ICANN's Articles of Incorporation ("Articles"), Bylaws, and Affirmation of Commitments.

At its core, Request 15-7 comprises nothing other than an attempt to appeal (only) those portions of the *Booking.com* Final Declaration with which the Requesters disagree. The Requesters' claims do not support reconsideration because they do not establish that the Board failed to consider material information, or considered false or inaccurate material information, in approving the Resolutions. Moreover, the Requester has not demonstrated that it has been materially adversely affected by the adoption of the Resolutions. Accordingly, the BGC recommends that Request 15-7 be denied.

II. Facts

A. Background Facts.

Requester Booking.com submitted a standard application for .hotels,¹ and Requester TRS submitted a standard application for .hoteis.²

On 26 February 2013, pursuant to the SSR process set forth in Section 2.2.1.1 of the Applicant Guidebook (“Guidebook”),³ an SSR Panel consisting of independent, third-party experts determined that Booking.com’s applied-for gTLD .hotels and TRS’s applied-for gTLD .hoteis were visually confusingly similar.⁴

Where the string similarity review panel determines that two strings are visually identical or similar to each other, per the Guidebook those applied-for strings *will* be placed in a contention set, which is then resolved pursuant to the contention resolution processes in Module 4 of the Guidebook. If a contention set is created, only one of the strings within that contention set may ultimately be approved for delegation.⁵ Following the SSR Panel’s determination that .hotels and .hoteis were visually confusingly similar, .hotels and .hoteis were placed in a contention set.⁶

On 28 March 2013, Requester Booking.com filed Reconsideration Request 13-5 (which was revised and re-submitted on 7 July 2013), challenging “ICANN’s decision to place [the

¹ Application 1-1016-75482, *available at* <https://gtdresult.icann.org/applicationstatus/applicationdetails/1589>.

² Application 1-1249-87712, *available at* <https://gtdresult.icann.org/applicationstatus/applicationdetails/1166>.

³ Within the New gTLD Program, every applied-for string has been subjected to the SSR process set out at Section 2.2.1.1 of the Applicant Guidebook. The SSR Panel checked each applied-for string against existing TLDs, reserved names, and other applied-for TLD strings (among other items) for “visual string similarities that would create a probability of user confusion.” Guidebook, Section 2.2.1.1.1. The Guidebook is available at <http://newgtlds.icann.org/en/applicants/agb>.

⁴New gTLD Program: String Similarity Contention Sets, *available at* <https://www.icann.org/news/announcement-2013-02-26-en>.

⁵ Guidebook, § 2.2.1.1.3.

⁶ *See* Contention Set Status, .hotels/hoteis, *available at* <https://gtdresult.icann.org/application-result/applicationstatus/stringcontentionstatus>.

Applications] in a non-exact match contention set” and arguing that ICANN did “not [] provide a detailed analysis or a reasoned basis for its decision.”⁷

On 1 August 2013, the BGC recommended that the New gTLD Program Committee (“NGPC”) deny Reconsideration Request 13-5, explaining:

Booking.com does not suggest that the process for String Similarity Review set out in the Applicant Guidebook was not followed, or that ICANN staff violated any established ICANN policy in accepting the String Similarity Review Panel (“Panel”) decision on placing .hotels and .hoteis in contention sets. Instead, Booking.com is supplanting what it believes the review methodology for assessing visual similarity should have been, as opposed to the methodology set out at Section 2.2.1.1.2 of the Applicant Guidebook. In asserting a new review methodology, Booking.com is asking the BGC (and the Board through the New gTLD Program Committee (NGPC)) to make a substantive evaluation of the confusability of the strings and to reverse the decision. In the context of the New gTLD Program, the Reconsideration process is not however intended for the Board to perform a substantive review of Panel decisions. While Booking.com may have multiple reasons as to why it believes that its application for .hotels should not be in contention set with .hoteis, Reconsideration is not available as a mechanism to re-try the decisions of the evaluation panels.⁸

On 10 September 2014, the NGPC adopted the BGC’s recommendation and denied Reconsideration Request 13-5.⁹

On 18 March 2014, Requester Booking.com initiated an IRP challenging the ICANN Board’s “adoption” of the SSR Panel’s determination that the .hotels and .hoteis strings were visually confusingly similar. An IRP is conducted pursuant to Article IV, Section 3 of ICANN’s Bylaws, and comprises a unique, non-binding method of evaluating certain actions of ICANN’s Board. The IRP is presided over by a panel “charged with comparing contested actions of the Board to the [ICANN] Articles of Incorporation and Bylaws, and with declaring whether the

⁷ See Recommendation of the Board Governance Committee (BGC), Reconsideration Request 13-5, *available at* <https://www.icann.org/en/system/files/files/recommendation-booking-01aug13-en.pdf>, at Pg. 5.

⁸ *Id.*, Pg. 5.

⁹ Approved Resolutions, Meeting of the New gTLD Program Committee, *available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-09-10-en#2.b>.

Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.”¹⁰

On 3 March 2015, the *Booking.com* IRP Panel released its Final Declaration, which unanimously rejected Booking.com’s claims. The *Booking.com* IRP Panel declared that Booking.com’s IRP Request challenged the decision of the SSR Panel, not any Board action, and thus was not appropriate for independent review under ICANN’s Bylaws.¹¹ Moreover, the *Booking.com* IRP Panel found that the ICANN Board had no obligation to review or otherwise intervene in the conclusions reached by that third-party expert SSR Panel.¹² In short, the *Booking.com* IRP Panel declared that ICANN was the prevailing party because Booking.com’s claims did not arise out of any Board action or inaction, let alone action or inaction that comprised a violation of ICANN’s Articles of Incorporation or Bylaws.¹³

On 26 April 2015, the ICANN Board considered the *Booking.com* Final Declaration, and approved the Resolutions adopting findings of *Booking.com* IRP Panel. The ICANN Board further directed ICANN’s President and CEO or his designees to “move forward with the processing of the hotels/hoteis contention set,” and to “take into consideration” for future new gTLD rounds the issues regarding transparency and fairness raised in the *Booking.com* Final Declaration.¹⁴

On 13 May 2015, the Requesters filed the instant Request (Request 15-7), seeking reconsideration of ICANN’s approval of the Resolutions.

¹⁰ Bylaws, Art. IV, § 3.4.

¹¹ *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247, (“*Booking.com* Final Declaration”), available at <https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>, at ¶ 138 (“there was no action (or inaction) by the Board here”).

¹² *Id.* ¶¶ 129, 138 (“[T]he fact that the ICANN Board enjoys such discretion and may choose to exercise it any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by Booking.com.”); see also *id.* ¶ 146.

¹³ See generally *id.*

¹⁴ See Resolutions, available at <https://www.icann.org/resources/board-material/resolutions-2015-04-26-en>.

B. Relief Requested.

The Requesters ask ICANN to “reverse the decision in which [the Applications] were put in a non-exact match contention set[,]” to “modify the [Resolutions] and to decide that the ‘.hotels’ gTLD [...] can co-exist with the ‘.hoteis’ gTLD[,]” or, in the alternative, to “engage in conversations with the Requesters, and that a hearing be organized.”¹⁵ The Requesters also seek a “stay [of] the present reconsideration proceedings with a view to allowing the Requesters to further consider how best to exclude all perceived likelihood of visual confusion.”¹⁶

III. Issues.

In view of the claims set forth in Request 15-7, the issues for reconsideration seem to be:

1. Whether reconsideration is warranted because:
 - a. The approval of the Resolutions purportedly contravened what the Requesters contend are ICANN’s “goals of increasing competition” and “making the domain name system more global and understandable through the use of local languages”¹⁷;
 - b. The Board failed to consider material information in approving the Resolutions;
 - c. The Board relied on false or inaccurate information in approving the Resolutions; or
 - d. The Resolutions violate unspecified provisions of ICANN’s Articles of Incorporation, Bylaws, and Affirmation of Commitments; and
2. Whether the Requesters have demonstrated that they have suffered material adverse harm due to the approval of the Resolutions.

¹⁵ Request, § 9, Pg. 9.

¹⁶ *Id.*

¹⁷ *Id.*, § 7, Pg. 3.

IV. The Relevant Standards for Evaluating Reconsideration Requests.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.¹⁸ The Requesters are challenging a Board action. A Board action may be subject to reconsideration where it was undertaken "without consideration of material information, except where the party submitting the request could have submitted, but did not submit, the information for the Board's consideration at the time of action or refusal to act," or, where it was "taken as a result of the Board's reliance on false or inaccurate material information."¹⁹

Denial of a request for reconsideration of Board action or inaction is appropriate if the BGC recommends, and the NGPC agrees, that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.

V. Analysis and Rationale.

Just as in Booking.com's prior reconsideration request and in its IRP Request, Request 15-7 again challenges the merits of the SSR Panel's determination that the .hotels and .hoteis strings are visually confusingly similar. However, there is no appeals mechanism to challenge the substance of an expert SSR Panel determination in ICANN's Articles, Bylaws or the Guidebook. Reconsideration of a Board action, the process that Requesters have invoked here, is warranted only where the Board took action without consideration of material information or with reliance upon false or inaccurate information. Because the Board did not fail to consider

¹⁸ Article IV, § 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

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

¹⁹ Bylaws, Art. IV, § 2.

material information and did not consider false or inaccurate information in approving the Resolutions, the BGC recommends that Request 15-7 be denied.

A. Requesters Provide No Evidence That The Board Failed To Consider ICANN’s “Goals” Or Core Values In Adopting The Resolutions.

The Requesters argue that the Resolutions are inconsistent with what the Requesters state to be “ICANN’s goals of increasing competition and making the DNS more global and understandable through the use of local languages.”²⁰ The Requesters’ vague allusions to “ICANN’s goals” are without citation, but it appears the Requesters may be referring to Article I, Section 2 of ICANN’s Bylaws, which sets out certain core values that are to guide the decisions and actions of ICANN. Regardless, even if there is some inconsistency between the Resolutions and ICANN’s “goals” or core values, which there is not, inconsistency itself is not *conduct* subject to review per ICANN’s Reconsideration process. In order to give the Request some consideration in this regard, however, the inference must be that the Requesters are suggesting that the Board somehow failed to consider ICANN’s core values in adopting the Resolutions. The Requesters, however, have not presented any facts to support such a suggestion.

Notwithstanding the Requesters’ characterization of ICANN’s “goals,” ICANN’s core values are as follows:

1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.
2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN’s activities to those matters within ICANN’s mission requiring or significantly benefiting from global coordination.
3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.

²⁰ Request, § 7, Pgs. 3-4.

4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.
5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.
6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.
7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.
8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.
9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.
10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.
11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.²¹

The Requesters present no evidence that the Board failed to consider these core values in considering the *Booking.com* Final Declaration and passing the Resolutions, which adopted the opinions that the *Booking.com* IRP Panel declared. Without evidence that the Board failed to consider material information or considered false or inaccurate information, no ground for reconsideration of a Board action exists.²² As noted above, a claim that the Resolutions themselves are in conflict with the Requesters' interpretation of ICANN's "goals" is not Board conduct, and is therefore not a proper basis for reconsideration.

²¹ Bylaws, Art. 1, § 2.6.

²² *Id.*, Art. IV, § 2.2(b)-(c).

Moreover, in passing the Resolutions the Board acted in a manner that was fully consistent with ICANN’s core values, including those relating to the promotion of competition where “[f]easible and appropriate,”²³ and when “beneficial to the public interest.”²⁴ Within the New gTLD Program, procedures such as the string similarity review were designed to ensure that the Program was administered in furtherance of the public interest. Specifically, every applied-for string has been subjected to the SSR process set out in Section 2.2.1.1 of the Guidebook. The SSR process checks each applied-for string against existing TLDs, reserved names, and other applied-for gTLDs for “visual string similarities that would create a probability of user confusion.”²⁵ The objective of this review “is to prevent user confusion and loss of confidence in the [domain name system] resulting from delegation of many similar strings.”²⁶

Per the SSR process, a panel of independent, third-party experts determined that .hotels and .hoteis were confusingly similar, such that the delegation of both would create a probability of user confusion. In accordance with applicable procedure, .hotels and .hoteis were thereafter placed into a contention set. In this regard, and as affirmed by the *Booking.com* IRP Panel, “the established process was followed in all respects.”²⁷ By approving the Resolutions, the Board upheld the public interest goals inherent in the SSR process, namely the prevention of “user confusion and loss of confidence in the [domain name system] resulting from delegation of many similar strings.”²⁸ The Requesters’ claim that the Board somehow violated its core values or “goals” in this regard is both unsubstantiated and inaccurate, and does not support reconsideration.

²³ Bylaws, Art. 1, § 2.5.

²⁴ *Id.*, Art. 1, § 2.6.

²⁵ Guidebook, § 2.2.1.1.1.

²⁶ *See id.*

²⁷ *Booking.com* Final Declaration, ¶ 132.

²⁸ *See* Guidebook, § 2.2.1.1.1.

B. The SSR Process Itself Is Not A Decision Subject To Reconsideration; Any Challenge To The Process Is Time Barred and Without Merit.

To the extent that Requesters are seeking reconsideration of “the *decision* to put [the Applications] in a contention set,”²⁹ any such claim is not a proper basis for reconsideration. Pursuant to the Guidebook, strings found to be confusingly similar through the SSR process must be placed into a contention set.³⁰ Accordingly, after the SSR Panel determined that the strings were visually confusingly similar, there was no “decision” to be made by any party, much less the ICANN Board, that is subject to reconsideration.

Further, to the extent that the Requesters could be seen as seeking reconsideration of the decision to include the SSR process in the Guidebook, any such claim is time-barred. The Guidebook was published on 4 June 2012 following an extensive review process, including public comment on multiple drafts.³¹ As such, any challenge to the SSR process should have been asserted years ago. Moreover, Booking.com has already tried twice (unsuccessfully) to challenge the SSR process laid out in the Guidebook, first in Reconsideration Request 13-5 and then again in its IRP.³² Now, this third attempt to reiterate the same argument should be deemed no more successful, particularly since it is not the proper basis for reconsideration, as the Requesters do not suggest that the Board failed to consider material information or relied on false or inaccurate material information in adopting the SSR process.

²⁹ Request, § 6, Pg. 3 (emphasis added).

³⁰ Guidebook, 2.2.1.1.3 (“An application for a string that is found too similar to another applied-for gTLD string *will* be placed in a contention set.”) (emphasis added).

³¹ *See id.*, Preamble.

³² The determination on Request 13-5 rejected this argument, noting that “Booking.com is supplanting what it believes the review methodology for assessing visual similarity should have been, as opposed to the methodology set out at Section 2.2.1.1.2 of the Applicant Guidebook.” *See* Recommendation of the Board Governance Committee (BGC), Reconsideration Request 13-5, *available at* <https://www.icann.org/en/system/files/files/recommendation-booking-01aug13-en.pdf>, at Pg. 5. The *Booking.com* IRP Final Declaration quoted this portion of the Request 13-5 determination and noted that Booking.com’s IRP Request failed because “it is not even alleged by Booking.com – that the established process was not followed by the ICANN Board or any third party either in the initial string similarity review of .hotels or in the reconsideration process.” *Booking.com* Final Declaration, ¶¶ 135, 137.

C. The Board Did Not Fail To Consider Material Information In Approving The Resolutions.

The Requesters claim that the Board failed in four ways to consider material information in approving the Resolutions: first, the Requesters argue that the Board disregarded its discretion to improve the current application round in the New gTLD Program; second, the Requesters claim that ICANN ignored their requests to engage in “discussions” about “how the issue can be resolved in the best interests of the community”; third, the Requesters contend that the expert report Booking.com submitted in support of its IRP should have been considered by the Board before it approved the Resolutions; and fourth, the Requesters argue that the Board did not consider the fact that the Board has previously made changes to the New gTLD Program.³³ None of these claims withstand scrutiny.

As to the first point, the Requesters concede it is in the Board’s discretion whether, when and under what circumstances to “improve” the New gTLD Program, yet argue reconsideration is warranted because the Board failed to consider that discretion in determining not to make any changes to the *current* new gTLD application round based on certain suggestions within the *Booking.com* Final Declaration.³⁴ Not so. As an initial matter, only a Board failure to consider *material information* can support reconsideration, and any purported Board failure to consider *the existence of its own discretion* does not meet that standard.³⁵ Moreover, the *Booking.com* Final Declaration did not recommend that any changes be made to the current application round. It simply “acknowledged certain legitimate concerns regarding the string similarity review process” and noted that “we can, and do, encourage ICANN to *consider whether it wishes* to address these issues in an appropriate manner and forum, for example, *when drafting the*

³³ Request, § 8.I, Pgs. 5-6.

³⁴ *Id.*, § 8.I, Pg. 5.

³⁵ Bylaws, Art. IV, § 2.2.

Guidebook for round two of the new gTLD program.”³⁶ These statements did not recommend that the Board “improve” the *current* round of the New gTLD Program at all, and the Requesters have not shown that the Board failed to consider material information in connection with these statements when it adopted the Resolutions. Indeed, it is clear that the Board seriously considered the *Booking.com* IRP Panel’s comments regarding transparency and fairness, as the Resolutions directed ICANN’s President and CEO or his designees to “move forward with the processing of the hotels/hoteis contention set,” and to prospectively “take into consideration” the issues about transparency and fairness raised by the *Booking.com* Final Declaration.³⁷

Second, the Requesters claim (without providing any documentation or detail) that they have expressed their willingness to engage in a “discussion with ICANN, its constituents and the ICANN Board, as to how [the Requesters’ disagreement with the *Booking.com* IRP Final Declaration and the Resolutions] can be resolved in the best interests of the Internet community.”³⁸ No reconsideration is warranted on this basis. To start, reconsideration is only warranted where the Board failed to consider material information or considered false or inaccurate information.³⁹ The Requesters do not specify what information they had planned on sharing during any potential talks with ICANN, and so it cannot be said that the Board failed to consider any *material* information because those discussions did not take place. In any event, while the Requesters do not specify when they expressed a willingness to engage in talks with ICANN, it appears the request post-dated the Board’s passing of the Resolutions, and therefore nothing about the proposed talks could support reconsideration because the Board action the Requesters challenge would already have occurred. Moreover, the failure to engage in

³⁶ *Booking.com* Final Declaration, ¶ 154 (emphasis added).

³⁷ See Resolution, available at <https://www.icann.org/resources/board-material/resolutions-2015-04-26-en>.

³⁸ Request, § 8.I, Pg. 6.

³⁹ Bylaws, Art. IV, § 2.2.

unspecified informal talks with the Requesters does not relate to what information the Board considered in passing the Resolutions. Further, the Board is *not* obligated to engage in any discussions in the wake of an IRP; the Board is required only to “consider” the final declaration of the IRP panel,⁴⁰ which is exactly what occurred here when the Board approved the Resolutions. No reconsideration is warranted due to any alleged Board failure to engage in informal talks with the Requesters prior to or after approving the Resolutions, as no such talks are required. Therefore, whether or not such talks took place, or were requested, has no bearing on whether the Board considered all material information in adopting the Resolutions.

Third, no reconsideration is warranted due to any Board failure to consider Booking.com’s expert report dated 10 March 2014 (“Expert Report”) regarding the visual similarity of .hotel and .hoteis, which Booking.com submitted to the IRP Panel.⁴¹ That the Requesters seek to fault the Board for a failure to consider the evidence Booking.com presented to the IRP Panel highlights the fact that this Request is, in fact, an attempt to appeal the merits of the IRP Panel’s decision and another of several attempts to appeal the SSR Panel’s determination. The *Booking.com* IRP Panel considered the Expert Report, and found it did not advance Booking.com’s position in the IRP because it bore no relation to Board conduct. In fact, the *Booking.com* IRP Panel found that the Board properly did not intervene in the SSR Panel’s conclusion that the .hotels and .hoteis strings were confusingly similar.⁴² As such, the Expert Report was not material information with respect to the adoption of the Resolutions, and the Board had no obligation to review it.

⁴⁰ *Id.*, § 3.21.

⁴¹ See Request, Annex 2; *Booking.com v. ICANN*, Annex 20, Pgs. 2-3, available at <https://www.icann.org/en/system/files/files/booking-irp-request-annex-18mar14-en.pdf>.

⁴² *Booking.com* Final Declaration ¶¶ 79, 142.

Fourth, the Requesters argue that in approving the Resolutions the Board did not consider the fact that the Board has previously made changes to the current New gTLD Program. The Requesters claim that the Board’s decision not to intervene in this SSR Panel’s determination “creates disparate treatment” between the Board’s treatment of the Requesters’ Applications as compared with others.⁴³ Specifically, the Requesters appear to argue that the Applications received unfair disparate treatment as compared to other applications because a 12 October 2014 NGPC resolution approved the implementation of a limited review mechanism for expert determinations regarding specifically identified sets of string confusion objections.⁴⁴ This argument does not support reconsideration.

The Requesters do not explain how the fact that the Board intervened in a matter not relevant here comprises a failure to consider material information in passing the Resolutions. The ICANN Board is under no obligation to intervene in this or any expert determination. As the *Booking.com* IRP Panel explained, “the fact that the ICANN Board enjoys [the] discretion [to individually consider an application for a New gTLD] and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by [claimant].”⁴⁵ Moreover, the circumstances in which the Board did exercise its discretion⁴⁶ and intervened with respect to particular third party expert determinations are not the same as the circumstances presented here. There, the Board directed further review of *differing expert determinations* on string confusion objections (a procedure unrelated to the instant matter)

⁴³ Request, § 8.I, Pg. 6.

⁴⁴ See NGPC Resolution 2014.10.12.NG02, available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#1.a>; Request, § 8.III, Pgs. 8-9. The Requesters also note that the Board has approved certain changes to the new gTLD program such as providing applicants with the opportunity to submit specifications of public interest commitments, and permitted “special contractual provisions for .brand TLDs[.]”

⁴⁵ *Booking.com* Final Determination ¶ 138.

⁴⁶ As it relates to this decision, the Board was acting through the New gTLD Program Committee (NGPC), to which the Board delegated its decision making authority as it relates to New gTLD Program related matters. The NGPC is made up of all Board members who are not generally conflicted with respect to new gTLDs.

regarding the *same strings*.⁴⁷ Here, there is a *single* SSR Panel determination at issue concerning .hotels and .hoteis, that the Requesters simply do not like.

In sum, the Requesters have not demonstrated that the Board failed to consider any material information when adopting the Resolutions.

D. The Board Did Not Rely On False or Inaccurate Information In Passing The Resolutions.

The Requesters argue that because the *Booking.com* IRP Panel was “wrong” in finding that Booking.com’s challenges to the SSR process as a whole were time-barred, the Board therefore relied upon false or inaccurate information in approving the Resolutions insofar as they accepted that finding.⁴⁸ The Requesters’ claim is nothing more than an attempt to re-argue the question of whether its IRP claim was time-barred, and does not present any grounds for reconsideration.

1. A Reconsideration Request May Not Be Used As A Vehicle To Appeal The Results Of An IRP.

In the course of its IRP, Booking.com had ample opportunity to—and did—argue that its objections to the SSR process were not time-barred. The Panel noted that it “asked during the hearing about [Booking.com]’s failure to timely object,” and that Booking.com offered arguments that comprised “not a persuasive or meritorious answer.”⁴⁹ The Board’s acceptance of the *Booking.com* IRP Panel’s declaration that certain of Booking.com’s claims were time-barred does not present an opportunity for the Requesters to challenge that IRP Panel’s declaration. Simply put, ICANN’s Bylaws provide no mechanism to appeal the outcome of an IRP. As such, the Requesters’ argument that reconsideration is warranted because “the findings

⁴⁷ See NGPC Resolution 2014.10.12.NG02, available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#1.a>.

⁴⁸ Request, § 8.II, Pgs. 6-8.

⁴⁹ *Booking.com* Final Declaration, ¶ 130.

of the IRP Panel, i.e., that Booking.com was time-barred, are flawed”⁵⁰ fails at the outset. The Requesters superficially attempt to resolve the mismatch between this argument and the reconsideration process by couching it as a concern that the Board relied on “inaccurate material information” by accepting the *Booking.com* Final Declaration.⁵¹ However, those semantics cannot conceal the fact that the Requesters merely seek to challenge the substantive findings of the *Booking.com* Final Declaration, which is not a proper basis for a reconsideration request. Nor can the Requesters conceal the fact that they have not identified any false or inaccurate information upon which the Board purportedly relied related to the time-barred argument.⁵²

2. The Requesters’ New Arguments As To Why Their IRP Claims Were Not Untimely Do Not Support Reconsideration.

The Requesters now raise four new arguments as to why their challenge to the SSR process was timely, in an attempt to show that the *Booking.com* IRP Panel’s finding in this regard is false or inaccurate. Booking.com had ample opportunity to argue the timeliness of its challenges to the Guidebook procedures during the course of the IRP, and cannot now seek to appeal the IRP Panel’s rejection of those arguments here. Not one of these “new” arguments supports reconsideration.

First, the Requesters argue that “neither the string similarity review process nor the string confusion objection procedures had been established and implemented in their entirety at the

⁵⁰ Request, § 8.II, Pg. 7.

⁵¹ *Id.*, § 8.II, Pg. 6.

⁵² Moreover, the *Booking.com* IRP Panel properly evaluated whether Booking.com’s challenges to the SSR process were time-barred. The IRP Panel recognized that the current version of the Guidebook was published on 4 June 2012 following an extensive review process, including public comment on multiple drafts. *Booking.com* Final Declaration, ¶¶ 12-17. The IRP Panel further noted that, despite having ample opportunity to do so, Booking.com did not object to these aspects of the Guidebook when it was implemented. *Id.* ¶ 129. Accordingly, while the Requesters may not like it, there can be no error assigned to the *Booking.com* IRP Panel’s finding that “the time has long since passed for Booking.com or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to the establishment of the string similarity review process . . . Any such claims, even if they had any merit, are long since time-barred by the 30-day [IRP] limitation period set out in Article IV, Section 3(3) of the Bylaws.” *Booking.com.com* Final Declaration, ¶ 129.

time the Guidebook was adopted.⁵³ As an initial matter, the string *confusion* objection process is not at issue in this Request 15-7, so it need not be addressed. As to the SSR process, the Requesters do not identify any specific SSR procedures that were allegedly adopted after the release of the Guidebook in June 2012 that would render the IRP Panel’s finding false or inaccurate. As such reconsideration of the Board’s adoption of that finding is not warranted.

Second, the Requesters argue that in order to timely object to the string similarity review process they would have had to “reveal that they were contemplating making an application for a new gTLD,”⁵⁴ and that such revelation might have “encouraged opportunistic applications seeking to extract monetary value from an application through a private auction.”⁵⁵ However, the Requesters fail to explain how this hypothetical concern would render as false or inaccurate the *Booking.com* IRP Panel’s finding that challenges to the SSR process were untimely. As such, reconsideration of the Board’s adoption of this *Booking.com* IRP Panel’s finding is not warranted.

Third, the Requesters argue that the *Booking.com* IRP Panel “did not draw a distinction between the adoption of the general principles and their subsequent implementation[,]” insofar as it “limited its review to ICANN’s compliance to the letter of the Guidebook” as opposed to the “implementation of the Guidebook.”⁵⁶ Again, the Requesters fail to demonstrate how, even if true, the above claim would render the *Booking.com* IRP Panel’s finding false or inaccurate, such that the Board should reconsider its adoption of that finding. To the contrary, the *Booking.com* IRP Panel in fact did carefully untangle those two concepts: it distinguished between “the ICANN Board’s actions in relation to the string similarity review process generally” and “the

⁵³ Request, § 8, Pg. 7.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

Board's conduct in relation to the review of .hotels specifically."⁵⁷ Just because the Requesters do not like the distinction the IRP Panel drew, does not make it false or inaccurate information relied upon by the Board.

Fourth, the Requesters complain that other IRP panels have reached different conclusions as to when claims arising out of Guidebook procedures are time-barred.⁵⁸ Specifically, the Requesters cite an interim declaration issued by the IRP panel in *Gulf Cooperation Council v. ICANN*, where that panel determined that actions taken "pursuant to the Guidebook" were "capable of review."⁵⁹ However, the fact that IRP panels may have reached different conclusions on similar issues under different circumstances does not mean the Board considered false or inaccurate information in passing the Resolutions.

In sum, as the *Booking.com* Final Declaration confirms, the time for the Requesters to have objected to the SSR procedures in general has long since passed, and neither the Board's adoption of the *Booking.com* Final Declaration nor the Requesters' new arguments on the time-barred issue present any grounds for reconsideration of the Board's approval of the Resolutions.

E. No Reconsideration Is Warranted On The Basis Of Any Purported Violation Of The Bylaws, Articles Of Incorporation Or Affirmation Of Commitments.

Finally, the Requesters argue that the Board's approval of the Resolutions warrants reconsideration because it violated unspecified provisions of ICANN's Bylaws, Articles of Incorporation, and Affirmation of Commitments insofar as the Resolutions indicate that the Board will consider the concerns raised regarding the transparency and fairness of the string similarity review process only in future rounds of new gTLD applications.⁶⁰ The Requesters

⁵⁷ *Booking.com* Final Declaration, ¶ 131.

⁵⁸ Request, § 8, Pg. 8.

⁵⁹ See *Gulf Cooperation Council v. ICANN*, , ICDR Case No. 01-14-0002-1065, Interim Declaration on Emergency Request ¶ 79, available at <https://www.icann.org/en/system/files/files/interim-declaration-emergency-protection-redacted-12feb15-en.pdf>.

⁶⁰ Request, § 8.III, Pgs. 8-9.

appear to confuse reconsideration with the standard of review for an IRP, which evaluates Board action to assess whether any violation of ICANN’s Articles or Bylaws has taken place.⁶¹

Reconsideration of Board action or inaction is appropriate only if the Board failed to consider material information or acted upon false or misleading information. An alleged violation of the Articles, Bylaws, or Affirmation of Commitments is not a basis for reconsideration under ICANN’s Bylaws.⁶² Furthermore, the Requesters do not reference any particular provision of the Articles, Bylaws, or Affirmation of Commitments that were allegedly violated, because none were, so it is nearly impossible for ICANN to respond substantively to charges that the approval of the Resolutions violated any provisions of these documents.

In any event, as discussed above, the *Booking.com* Final Declaration did *not* instruct the Board to make any changes to the current application round. Rather, it specifically noted that changes were only even potentially warranted as to “round two.”⁶³

In sum, Requesters’ unsubstantiated and inaccurate claim that some unspecified provisions of ICANN’s Articles of Incorporation, Bylaws, and Affirmation of Commitments have been violated does not present grounds for reconsideration.

F. The Requesters Have Not Demonstrated That They Have Been Materially Affected By The Approval Of The Resolutions.

Absent evidence that the Requesters have been materially and adversely affected by the adoption of the Resolutions, reconsideration is not appropriate.⁶⁴ Here, the Requesters argue they were materially affected by the approval of the Resolutions because “it appears that ICANN is unlikely to approve both [of the Applications]” and so “one of the Requesters . . . would not have access to its desired gTLD . . . or both Requesters would be obliged to share the same

⁶¹ Compare Bylaws, Art. IV, § 2.2 with *id.* § 2.3.

⁶² Bylaws, Art. IV, § 2.2.

⁶³ *Booking.com* Final Declaration ¶ 154.

⁶⁴ Bylaws, Art. IV, §§ 2.1-2.2.

gTLD[.]’⁶⁵ However, this harm was not caused by the approval of the Resolutions. As soon as the SSR Panel determined that the .hotels and .hoteis strings were visually confusingly similar, the applicable procedure required that the strings be placed in a contention set. The approval of the Resolutions did not change anything about the constitution of the contention set, or render it more or less likely that one or the other of the Requesters would eventually prevail therein.

The formation of the contention set, not the adoption of the Resolutions, caused the only harm Requesters claim to have suffered here. In addition, the formation of this contention set has already been challenged (unsuccessfully) several times. Booking.com sought to challenge the SSR Panel’s decision that led to the contention set being formed in Reconsideration Request 13-5 and was unsuccessful. Booking.com tried again in its IRP and was unsuccessful. Now having banded together with contention-set mate and fellow Requester TRS, Booking.com seeks to use the instant Reconsideration Request to appeal the *Booking.com* Final Declaration. Here too, the effort to undermine the SSR Panel’s determination is unsuccessful, not only for the reasons set forth above, but also because the only material adverse harm alleged by either Requester stems from the creation of the contention set, not any Board failure to consider material information or reliance upon false information related to the Resolutions. For this separate and independent reason, reconsideration is not warranted.

VI. Recommendation.

Based upon the foregoing, the BGC concludes that the Requesters have not stated proper grounds for reconsideration, and therefore recommends that Request 15-7 be denied. If the Requesters believe they have somehow been treated unfairly in the process, the Requesters are free to ask the Ombudsman to review this matter.

⁶⁵ Request, § 3, Pg. 6.

REFERENCE MATERIALS - BOARD PAPER NO. 2015.07.28.1c

TITLE: Structural Improvements Committee Charter Revisions

Exhibits:

Exhibit A: SIC-Charter- (Revised-Redlined-from-Current)

Exhibit B: SIC-Charter- (Revised-Clean)

Signature Block:

Submitted by: Larisa Gurnick

Position: Director, Strategic Initiatives

Date Noted: 20 July 2015

Email: larisa.gurnick@icann.org

Structural Improvements Organizational Effectiveness Committee Charter

~~As approved by the ICANN Board of Directors 6 March 2009 [ddmm/yyyy]~~ on 28 July 2015

1. Purpose

The ~~Structural Improvements~~ Organizational Effectiveness Committee (~~SIC~~OEC) of the ICANN Board is responsible for the following:

A. The review and oversight of all organizational reviews mandated by Article IV, Section 4 of ICANN's Bylaws or any replacement or revisions to that Section of the Bylaws (Reviews), which are aimed at enhancing ICANN's overall effectiveness, and achieving specific organizational objectives, structural relevance and effectiveness.

B. The review and oversight of policies, processes, and procedures relating to ICANN's ongoing organizational review process, as mandated by Article IV, Section 4 (Periodic ~~the~~ Reviews).

C. ~~The Participating in the development and maintenance of a Review Framework which is subject to Board approval, that encapsulates set out the policies, y and processes and procedures for applicable to the conduct of the Reviews, subject to approval by the Board.~~

The of Committee shall use the Reviews to help assess whether ICANN Structure and Operations) of ICANN's Bylaws. The reviews shall be conducted in accordance with the Bylaws. ~~has made progress in achieving key organizational objectives and whether its organizational structure is effective and relevant to its mission.~~ The Committee shall use such reviews to assess whether each organization has a continuing purpose in the ICANN structure and shall issue recommendations ~~aimed to enhance~~ towards enhancing ICANN's overall organizational effectiveness ~~of the structure.~~

2. Scope of Responsibilities

The following ~~responsibilities~~ activities are set forth as a guide for fulfilling the Committee's ~~purposes~~ responsibilities. The Committee is authorized to carry out these activities and other actions reasonably related to the Committee's purposes or as assigned by the Board from time to time:

Reviewing

A. Review, and ~~suggesting~~ recommend changes as warranted to streamline and standardize, where possible, ICANN's

policies, ~~and~~ processes and procedures governing organizational review the Reviews;

~~1. Oversight of ICANN's organizational review process through the engagement of one or more consulting firms to conduct independent reviews, and use of ICANN Staff as appropriate. The Committee must submit to the Board, for its approval:~~

~~A. schedule and preliminary budget for all independent reviews;~~ B. Oversee the conduct of the Reviews as describe in the Review Framework-

~~1. The proposed mechanisms for engagement of outside consultants (RFP or otherwise);~~

~~2. Criteria for the selection~~ C. Oversee work of the independent consulting firm to conduct each review and the desired work product; and

~~3. The methodological approach, terms of reference, and any other relevant instructions for independent reviews.~~

~~Oversee the work, in conjunction with ICANN Staff, of the independent consulting firm/s engaged, including the quality and content of the independent consulting firm's work product and pursuing all necessary follow-up;~~

D. Create and populate Working Groups for ~~each of the~~ ICANN Board directed Ad Hoc Reviews, if and when deemed necessary. The ~~m~~members of the Working Groups are chosen among present and past Board Directors and Liaisons;

E. Coordinate the work of the Working Groups for ICANN Board-directed Ad Hoc Reviews, and evaluate the recommendations coming from the review process, ~~in particular, but not limited to, pointing out inconsistencies in the recommendations presented for different bodies; and;~~

F. Regularly report to the full Board with respect to the Committee's activities; ~~and,~~

G. Oversee the implementation of review recommendations resulting from the Reviews and regularly report to the full Board on the implementation status.

3. Relationships with ~~Other ICANN Structures~~ Affected Parties

There shall be a designated ICANN ~~Staff~~staff member responsible for support of the periodic review process and the functions of the Committee. In carrying out its responsibilities, the ~~Structural Improvements~~Committee shall consult with ~~the Supporting Organizations, the Advisory Committees, all relevant~~ and ~~the Nominating Committee, respectively,~~affected parties regarding all pertinent aspects of the review of each such organization.

4. Composition

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The Committee shall be comprised of at least ~~two~~three but not more than ~~five~~seven members. The majority of the Committee members shall be voting Board Directors and not more than [] Liaison Directors~~the minority shall be Liaisons~~, as determined and appointed annually by the Board, ~~each of whom~~. Each Committee member shall comply with the Conflicts of Interest Policy. The voting Directors shall be the voting members of the Committee. The members of the Committee shall serve at the discretion of the Board.

Unless a Committee Chair is appointed by the full Board, the members of the Committee may designate its Chair from among the voting members of the Committee by majority vote of the full Committee membership.

The Committee may choose to organize itself into subcommittees to facilitate the accomplishment of its work. The Committee may seek approval and budget from the Board for the appointment of consultants and advisers to assist in its work as deemed necessary, and such appointees may attend the relevant parts of the Committee meetings.

5. Meetings

A. Regularly Scheduled Meetings.

The Committee shall meet at least three times per year, or more frequently as it deems necessary to carry out its responsibilities. The schedule of these meetings will be established at the beginning of the calendar year. The Committee's meetings may be held by telephone and/or other remote meeting technologies. Regularly scheduled meetings shall be noticed at least one week in advance, unless impracticable, in which case the notice shall be as soon as practicable.

B. Special/Extraordinary Meetings.

Special/Extraordinary meetings may be called upon no less than forty-eight (48) hours notice by either (i) the Chair of the Committee or (ii) any two members of the Committee acting together, ~~provided that regularly scheduled meetings generally shall be noticed at least one week in advance.~~ The purpose of the meeting must be included with the call for the meeting.

C. Action Without a Meeting

i. Making a Motion:

The Committee may take an action without a meeting for an individual item by using electronic means such as email. An action without a meeting shall only be taken if a motion is proposed by a member of the Committee, and seconded by

another voting member of the Committee. All voting members of the Committee must vote electronically and in favor of the motion for it to be considered approved. The members proposing and seconding the motion will be assumed to have voted in the affirmative. The action without a meeting and its results will be noted in the next regularly scheduled Committee meeting and will be included in the minutes of that meeting.

ii. Timing:

- a. Any motion for an action without a meeting must be seconded by another Committee member within 48 hours of its proposal.
- b. The period of voting on any motion for an action without a meeting will be seven days unless the Chair changes that time period. However, the period must be a minimum of two days and a maximum of seven days.

6. Voting and Quorum

A majority of the voting members of the Committee shall constitute a quorum. Voting on Committee matters shall be on a one vote per voting member basis. When a quorum is present, the vote of a majority of the voting Committee members present shall constitute the action or decision of the Committee.

7. Records of Proceedings

A preliminary report with respect to actions taken at each meeting (telephonic or in-person) of the Committee shall be recorded and distributed to committee members within two working days, and meeting minutes shall be posted promptly following approval by the Committee.

8. Review

The performance of the Committee shall be reviewed annually and informally by the Board Governance Committee. The Board Governance Committee shall recommend to the full Board changes in membership, procedures, or responsibilities and authorities of the Committee if and when deemed appropriate. Performance of the Committee shall also be formally reviewed as part of the periodic independent review of the Board and its Committees.

EXHIBIT B

Organizational Effectiveness Committee Charter

Approved by the ICANN Board on 28 July 2015

1. Purpose

The Organizational Effectiveness Committee (OEC) of the ICANN Board is responsible for the following:

- A. The review and oversight of all organizational reviews mandated by Article IV, Section 4 of ICANN's Bylaws or any replacement or revisions to that Section of the Bylaws (Reviews), which are aimed at enhancing ICANN's overall effectiveness, and achieving specific organizational objectives, structural relevance and effectiveness.
- B. The review and oversight of policies, processes, and procedures relating to the Reviews.
- C. The development and maintenance of a Review Framework, which is subject to Board approval, that encapsulates the policies, processes and procedures applicable to the conduct of the Reviews.

The Committee shall use the Reviews to help assess whether ICANN has made progress in achieving key organizational objectives and whether its organizational structure is effective and relevant to its mission. The Committee shall issue recommendations towards enhancing ICANN's overall organizational effectiveness.

2. Scope of Responsibilities

The following activities are set forth as a guide for fulfilling the Committee's responsibilities. The Committee is authorized to carry out these activities and other actions reasonably related to the Committee's purposes or as assigned by the Board from time to time:

- A. Review, and recommend changes as warranted to streamline and standardize, where possible, ICANN's policies, processes and procedures governing the Reviews;
- B. Oversee the conduct of the Reviews as described in the Review Framework;
- C. Oversee work of the independent consulting firm/s engaged, including the quality and content of the independent consulting

- firm's work product and all necessary follow-up;
- D. Create and populate Working Groups for ICANN Board directed Ad Hoc Reviews, if and when deemed necessary. The members of the Working Groups are chosen among present and past Board Directors and Liaisons;
 - E. Coordinate the work of the Working Groups for ICANN Board-directed Ad Hoc Reviews, and evaluate the recommendations coming from the review process;
 - F. Regularly report to the full Board with respect to the Committee's activities; and,
 - G. Oversee the implementation of review recommendations resulting from the Reviews and regularly report to the full Board on the implementation status.

3. Relationships with Affected Parties

There shall be a designated ICANN staff member responsible for support of the periodic review process and the functions of the Committee. In carrying out its responsibilities, the Committee shall consult with all relevant and affected parties regarding all pertinent aspects of the review.

4. Composition

The Committee shall be comprised of at least three but not more than seven members. The majority of the Committee members shall be voting Board Directors and the minority shall be Liaisons, as determined and appointed annually by the Board. Each Committee member shall comply with the Conflicts of Interest Policy. The voting Directors shall be the voting members of the Committee. The members of the Committee shall serve at the discretion of the Board.

Unless a Committee Chair is appointed by the full Board, the members of the Committee may designate its Chair from among the voting members of the Committee by majority vote of the full Committee membership.

The Committee may choose to organize itself into subcommittees to facilitate the accomplishment of its work. The Committee may seek approval and budget from the Board for the appointment of consultants and advisers to assist in its work as deemed necessary, and such appointees may attend the relevant parts of the Committee meetings.

5. Meetings

- A. Regularly Scheduled Meetings.

The Committee shall meet at least three times per year, or more

frequently as it deems necessary to carry out its responsibilities. The schedule of these meetings will be established at the beginning of the calendar year. The Committee's meetings may be held by telephone and/or other remote meeting technologies. Regularly scheduled meetings shall be noticed at least one week in advance, unless impracticable, in which case the notice shall be as soon as practicable.

B. Special/Extraordinary Meetings.

Special/Extraordinary meetings may be called upon no less than forty-eight (48) hours notice by either (i) the Chair of the Committee or (ii) any two members of the Committee acting together. The purpose of the meeting must be included with the call for the meeting.

C. Action Without a Meeting

ii. Making a Motion:

The Committee may take an action without a meeting for an individual item by using electronic means such as email. An action without a meeting shall only be taken if a motion is proposed by a member of the Committee, and seconded by another voting member of the Committee. All voting members of the Committee must vote electronically and in favor of the motion for it to be considered approved. The members proposing and seconding the motion will be assumed to have voted in the affirmative. The action without a meeting and its results will be noted in the next regularly scheduled Committee meeting and will be included in the minutes of that meeting.

ii. Timing:

- a. Any motion for an action without a meeting must be seconded by another Committee member within 48 hours of its proposal.
- b. The period of voting on any motion for an action without a meeting will be seven days unless the Chair changes that time period. However, the period must be a minimum of two days and a maximum of seven days.

6. Voting and Quorum

A majority of the voting members of the Committee shall constitute a quorum. Voting on Committee matters shall be on a one vote per voting member basis. When a quorum is present, the vote of a majority of the voting Committee members present shall constitute the action or decision of the Committee.

7. Records of Proceedings

A preliminary report with respect to actions taken at each meeting (telephonic or in-person) of the Committee shall be recorded and distributed to committee members within two working days, and meeting minutes shall be posted promptly following approval by the Committee.

8. Review

The performance of the Committee shall be reviewed annually and informally by the Board Governance Committee. The Board Governance Committee shall recommend to the full Board changes in membership, procedures, or responsibilities and authorities of the Committee if and when deemed appropriate. Performance of the Committee shall also be formally reviewed as part of the periodic independent review of the Board and its Committees.

DRAFT

REFERENCE MATERIALS TO BOARD SUBMISSION 2015.07.28.1d

Title: **Board IDN Working Group**

Board IDN WG Charter
Approved: (ddmmyyyy)

Purpose: To provide oversight on efforts related to work on the planning, design, development and implementation of Internationalized Domain Names (IDNs) in the context of both generic top-level domains (gTLDs) and country code TLDs (ccTLDs), including but not limited to the analysis of feasibility and introduction of IDN TLDs in a manner that ensures the continued security and stability of the Internet.

The working group will also provide oversight on aspects of Universal Acceptance specifically related to IDN TLDs.

Longevity: The WG's continuing need will be reassessed two years following the creation date.

Membership: Rinalia Abdul Rahim, Ram Mohan (Chair), Jonne Soninen, Suzanne Woolf, and Kuo-Wei Wu

REFERENCE MATERIALS TO BOARD SUBMISSION 2015.07.28.1e

Annex A - Proposed Amendments to the ICANN Bylaws to Implement the GNSO Council recommendations concerning Policy & Implementation

Redlined Language:

Article X: Generic Names Supporting Organization

Section 3. GNSO Council

9. Except as otherwise specified in these Bylaws, [Annex A](#), [Annex A-1](#) and [Annex A-2](#) hereto, or the GNSO Operating Procedures, the default threshold to pass a GNSO Council motion or other voting action requires a simple majority vote of each House. The voting thresholds described below shall apply to the following GNSO actions:
- a. Create an Issues Report: requires an affirmative vote of more than one-fourth (1/4) vote of each House or majority of one House.
 - b. Initiate a Policy Development Process ("PDP") Within Scope (as described in [Annex A](#)): requires an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.
 - c. Initiate a PDP Not Within Scope: requires an affirmative vote of GNSO Supermajority.
 - d. Approve a PDP Team Charter for a PDP Within Scope: requires an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.
 - e. Approve a PDP Team Charter for a PDP Not Within Scope: requires an affirmative vote of a GNSO Supermajority.
 - f. Changes to an Approved PDP Team Charter: For any PDP Team Charter approved under d. or e. above, the GNSO Council may approve an amendment to the Charter through a simple majority vote of each House.
 - g. Terminate a PDP: Once initiated, and prior to the publication of a Final Report, the GNSO Council may terminate a PDP only for significant cause, upon a motion that passes with a GNSO Supermajority Vote in favor of termination.
 - h. Approve a PDP Recommendation Without a GNSO Supermajority: requires an affirmative vote of a majority of each House and further requires that one GNSO Council member representative

of at least 3 of the 4 Stakeholder Groups supports the Recommendation.

i. Approve a PDP Recommendation With a GNSO Supermajority: requires an affirmative vote of a GNSO Supermajority,

j. Approve a PDP Recommendation Imposing New Obligations on Certain Contracting Parties: where an ICANN contract provision specifies that "a two-thirds vote of the council" demonstrates the presence of a consensus, the GNSO Supermajority vote threshold will have to be met or exceeded.

k. Modification of Approved PDP Recommendation: Prior to Final Approval by the ICANN Board, an Approved PDP Recommendation may be modified or amended by the GNSO Council with a GNSO Supermajority vote.

l. Initiation of an Expedited Policy Development Process (EPDP): requires an affirmative vote of a GNSO Supermajority.

m. Approve an EPDP Team Charter: requires an affirmative vote of a GNSO Supermajority

n. Approval of EPDP recommendations: requires an affirmative vote of a GNSO Supermajority.

o. Approve an EPDP Recommendation Imposing New Obligations on Certain Contracting Parties: where an ICANN contract provision specifies that "a two-thirds vote of the council" demonstrates the presence of a consensus, the GNSO Supermajority vote threshold will have to be met or exceeded.

p. Initiation of a GNSO Guidance Process (GGP): requires an affirmative vote of more than one-third (1/3) of each House or more than two-thirds (2/3) of one House.

q. Rejection of initiation of a GGP requested by the ICANN Board: requires an affirmative vote of a GNSO Supermajority.

r. Approval of GGP recommendations: requires an affirmative vote of a GNSO Supermajority.

s. A "GNSO Supermajority" shall mean: (a) two-thirds (2/3) of the Council members of each House, or (b) three-fourths (3/4) of one House and a majority of the other House."

New Annex A-1 GNSO Expedited Policy Development Process

The following process shall govern the specific instances where the GNSO Council invokes the GNSO Expedited Policy Development Process ("EPDP"). The GNSO Council may invoke the EPDP in the following limited circumstances: (1) to address a narrowly defined policy issue that was identified and scoped after either the adoption of a GNSO policy recommendation by the ICANN Board or the implementation of such an adopted recommendation; or (2) to create new or additional recommendations for a specific policy issue that had been substantially scoped previously such that extensive, pertinent background information already exists, e.g. (a) in an Issue Report for a possible PDP that was not initiated; (b) as part of a previous PDP that was not completed; or (c) through other projects such as a GGP. The following process shall be in place until such time as modifications are recommended to and approved by the ICANN Board of Directors. Where a conflict arises in relation to an EPDP between the PDP Manual (see Annex 2 of the GNSO Operating Procedures) and the procedures described in this Annex A-1, the provisions of this Annex A-1 shall prevail.

The role of the GNSO is outlined in Article X of these Bylaws. Provided the Council believes and documents via Council vote that the above-listed criteria are met, an EPDP may be initiated to recommend an amendment to an existing Consensus Policy; however, in all cases where the GNSO is conducting policy-making activities that do not meet the above criteria as documented in a Council vote, the Council should act through a Policy Development Process (see Annex A).

Section 1. Required Elements of a GNSO Expedited Policy Development Process

The following elements are required at a minimum to develop expedited GNSO policy recommendations, including recommendations that could result in amendments to an existing Consensus Policy, as part of a GNSO Expedited Policy Development Process (EPDP):

- a) Formal initiation of the GNSO Expedited Policy Development Process by the GNSO Council, including an EPDP scoping document;
- b) Formation of an EPDP Team or other designated work method;
- c) Initial Report produced by an EPDP Team or other designated work method;
- d) Final EPDP Policy Recommendation(s) Report produced by an EPDP Team, or other designated work method, and forwarded to the Council for deliberation;

- e) GNSO Council approval of EPDP Policy Recommendations contained in the Final EPDP Policy Recommendation(s) Report, by the required thresholds;
- f) EPDP Recommendations and Final EPDP Recommendation(s) Report forwarded to the Board through a Recommendations Report approved by the Council; and
- g) Board approval of EPDP Recommendation(s).

Section 2. Expedited Policy Development Process Manual

The GNSO shall include a specific section(s) on the EPDP process as part of its maintenance of the GNSO Policy Development Process Manual (PDP Manual), described in Annex 2 of the GNSO Operating Procedures. The EPDP section(s) of the PDP Manual shall contain specific additional guidance on completion of all elements of an EPDP, including those elements that are not otherwise defined in these Bylaws. The PDP Manual and any amendments thereto are subject to a twenty-one (21) day public comment period at minimum, as well as Board oversight and review, as specified at Article X, Section 3.6.

Section 3. Initiation of the EPDP

The Council may initiate an EPDP as follows:

The Council may only initiate the EPDP by a vote of the Council. Initiation of an EPDP requires an affirmative Supermajority vote of the Council (as defined in these Bylaws) in favor of initiating the EPDP.

The request to initiate an EPDP must be accompanied by an EPDP scoping document, which is expected to include at a minimum the following information:

1. Name of Council Member / SG / C;
2. Origin of issue (e.g. previously completed PDP);
3. Scope of the effort (detailed description of the issue or question that the EPDP is expected to address);
4. Description of how this issue meets the criteria for an EPDP, i.e. how the EPDP will address either: (1) a narrowly defined policy issue that was identified and scoped after either the adoption of a GNSO policy recommendation by the ICANN Board or the implementation of

such an adopted recommendation, or (2) new or additional policy recommendations on a specific GNSO policy issue that had been scoped previously as part of a PDP that was not completed or other similar effort, including relevant supporting information in either case;

5. If not provided as part of item 4, the opinion of the ICANN General Counsel as to whether the issue proposed for consideration is properly within the scope of the ICANN's mission, policy process and more specifically the role of the GNSO;
6. Proposed EPDP mechanism (e.g. WG, DT, individual volunteers);
7. Method of operation, if different from GNSO Working Group Guidelines;
8. Decision-making methodology for EPDP mechanism, if different from GNSO Working Group Guidelines;
9. Target completion date.

Section 4. Council Deliberation

Upon receipt of an EPDP Final Recommendation(s) Report, whether as the result of an EPDP Team or otherwise, the Council chair will (i) distribute the Final EPDP Recommendation(s) Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the PDP Manual.

Approval of EPDP Recommendation(s) requires an affirmative vote of the Council meeting the thresholds set forth in in Article X, Section 3, paragraphs 9 n-o, as supplemented by the PDP Manual.

Section 5. Preparation of the Board Report

If the EPDP Recommendation(s) contained in the Final EPDP Recommendation(s) Report are approved by the GNSO Council, a Recommendation(s) Report shall be approved by the GNSO Council for delivery to the ICANN Board.

Section 6. Board Approval Processes

The Board will meet to discuss the EPDP recommendation(s) as soon as feasible, but preferably not later than the second meeting after receipt of the Recommendations Report from the Staff Manager. Board deliberation on the EPDP Recommendations contained within the Recommendations Report shall proceed as follows:

a. Any EPDP Recommendations approved by a GNSO Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such policy is not in the best interests of the ICANN community or ICANN. If the GNSO Council recommendation was approved by less than a GNSO Supermajority Vote, a majority vote of the Board will be sufficient to determine that such policy is not in the best interests of the ICANN community or ICANN.

b. In the event that the Board determines, in accordance with paragraph a above, that the proposed EPDP Recommendations are not in the best interests of the ICANN community or ICANN (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.

c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.

d. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more than two-thirds (2/3) of the Board determines that such guidance is not in the interests of the ICANN community or ICANN. For any Supplemental Recommendation approved by less than a GNSO Supermajority Vote, a majority vote of the Board shall be sufficient to determine that the guidance in the Supplemental Recommendation is not in the best interest of the ICANN community or ICANN.

Section 7. Implementation of Approved Policies

Upon a final decision of the Board adopting the EPDP recommendations, the Board shall, as appropriate, give authorization or direction to ICANN staff to implement the EPDP Recommendations. If deemed necessary, the Board shall direct ICANN staff to work with the GNSO Council to create a guidance implementation plan, based upon the guidance recommendations identified in the Final EPDP Recommendation(s) Report.

Section 8. Maintenance of Records

Throughout the EPDP, from initiation to a final decision by the Board, ICANN will maintain on the Website, a status web page detailing the progress of each EPDP issue. Such status page will outline the completed and upcoming steps in the EPDP process, and contain links to key resources (e.g. Reports, Comments Fora, EPDP Discussions, etc.).

Section 9. Applicability

The procedures of this Annex A-1 shall be applicable from [date] onwards.

NEW ANNEX A-2 GNSO Guidance Process

The following process shall govern the GNSO guidance process ("GGP") until such time as modifications are recommended to and approved by the ICANN Board of Directors ("Board"). The role of the GNSO is outlined in Article X of these Bylaws. If the GNSO is conducting activities that are intended to result in a Consensus Policy, the Council should act through a Policy Development Process (see Annex A).

Section 1. Required Elements of a GNSO Guidance Process

The following elements are required at a minimum to develop GNSO guidance:

1. Formal initiation of the GNSO Guidance Process by the Council, including a GGP scoping document;
2. Identification of the types of expertise needed on the GGP Team;
3. Recruiting and formation of a GGP Team or other designated work method;
4. Proposed GNSO Guidance Recommendation(s) Report produced by a GGP Team or other designated work method;
5. Final GNSO Guidance Recommendation(s) Report produced by a GGP Team, or other designated work method, and forwarded to the Council for deliberation;
6. Council approval of GGP Recommendations contained in the Final Recommendation(s) Report, by the required thresholds;
7. GGP Recommendations and Final Recommendation(s) Report shall be forwarded to the Board through a Recommendations Report approved by the Council]; and
8. Board approval of GGP Recommendation(s).

Section 2. GNSO Guidance Process Manual

The GNSO shall maintain a GNSO Guidance Process (GGP Manual) within the operating procedures of the GNSO maintained by the GNSO Council. The GGP Manual shall contain specific additional guidance on completion of all elements of a GGP, including those elements that are not otherwise defined in these Bylaws. The GGP Manual and any amendments thereto are subject to a twenty-one (21) day public comment period at minimum, as well as Board oversight and review, as specified at Article X, Section 3.6.

Section 3. Initiation of the GGP

The Council may initiate a GGP as follows:

The Council may only initiate the GGP by a vote of the Council or at the formal request of the ICANN Board. Initiation of a GGP requires a vote as set forth in Article X, Section 3, paragraph 9.p in favor of initiating the GGP. In the case of a GGP requested by the ICANN Board, a GGP will automatically be initiated unless the GNSO Council votes against the initiation of a GGP as set forth in Article X, Section 3, paragraph 9 q¹.

The request to initiate a GGP must be accompanied by a GGP scoping document, which is expected to include at a minimum the following information:

1. Name of Council Member / SG / C
4. Origin of issue (e.g., board request)
5. Scope of the effort (detailed description of the issue or question that the GGP is expected to address)
6. Proposed GGP mechanism (e.g. WG, DT, individual volunteers)
7. Method of operation, if different from GNSO Working Group Guidelines
8. Decision-making methodology for GGP mechanism, if different from GNSO Working Group Guidelines
9. Desired completion date and rationale

In the event the Board makes a request for a GGP, the Board should provide a mechanism by which the GNSO Council can consult with the Board to provide information on the scope, timing, and priority of the request for a GGP.

Section 4. Council Deliberation

Upon receipt of a Final Recommendation(s) Report, whether as the result of a GGP Team or otherwise, the Council chair will (i) distribute the Final Recommendation(s) Report to all Council members; and (ii) call for Council deliberation on the matter in accordance with the GGP Manual.

¹ A GNSO Supermajority Vote will be required to not initiate a GGP following a formal request from the ICANN Board.

The Council approval process is set forth in Article X, Section 3, paragraph 9. r² as supplemented by the GGP Manual.

Section 5. Preparation of the Board Report

If the GGP recommendations contained in the Final Recommendation(s) Report are approved by the GNSO Council, a Recommendations Report shall be approved by the GNSO Council for delivery to the ICANN Board.

Section 6. Board Approval Processes

The Board will meet to discuss the GNSO Guidance recommendation(s) as soon as feasible, but preferably not later than the second meeting after receipt of the Board Report from the Staff Manager. Board deliberation on the GGP Recommendations contained within the Recommendations Report shall proceed as follows:

a. Any GGP Recommendations approved by a GNSO Supermajority Vote shall be adopted by the Board unless, by a vote of more than two-thirds (2/3) of the Board, the Board determines that such guidance is not in the best interests of the ICANN community or ICANN.

b. In the event that the Board determines, in accordance with paragraph a above, that the proposed GNSO Guidance recommendation(s) adopted by a GNSO Supermajority Vote is not in the best interests of the ICANN community or ICANN (the Corporation), the Board shall (i) articulate the reasons for its determination in a report to the Council (the "Board Statement"); and (ii) submit the Board Statement to the Council.

c. The Council shall review the Board Statement for discussion with the Board as soon as feasible after the Council's receipt of the Board Statement. The Board shall determine the method (e.g., by teleconference, e-mail, or otherwise) by which the Council and Board will discuss the Board Statement.

d. At the conclusion of the Council and Board discussions, the Council shall meet to affirm or modify its recommendation, and communicate that conclusion (the "Supplemental Recommendation") to the Board, including an explanation for the then-current recommendation. In the event that the Council is able to reach a GNSO Supermajority Vote on the Supplemental Recommendation, the Board shall adopt the recommendation unless more

² Approval of GGP recommendations requires a GNSO Supermajority Vote.

than two-thirds (2/3) of the Board determines that such guidance is not in the interests of the ICANN community or ICANN.

Section 7. Implementation of Approved GNSO Guidance

Upon a final decision of the Board adopting the guidance, the Board shall, as appropriate, give authorization or direction to ICANN staff to implement the GNSO Guidance. If deemed necessary, the Board may direct ICANN Staff to work with the GNSO Council to create a guidance implementation plan, if deemed necessary, based upon the guidance recommendations identified in the Final Recommendation(s) Report.

Section 8. Maintenance of Records

Throughout the GGP, from initiation to a final decision by the Board, ICANN will maintain on the Website, a status web page detailing the progress of each GGP issue. Such status page will outline the completed and upcoming steps in the GGP process, and contain links to key resources (e.g. Reports, Comments Fora, GGP Discussions, etc.).

Section 9. Additional Definitions

"Comment Site", "Comment Forum", "Comments Fora" and "Website" refer to one or more websites designated by ICANN on which notifications and comments regarding the GGP will be posted.

"GGP Staff Manager" means an ICANN staff person(s) who manages the GGP.

ICANN REFERENCE MATERIALS NO. 2015.07.28-1g

TITLE: Update to Contracting and Disbursement policy
[Changes are highlighted in yellow]

ICANN Contracting and Disbursement Policy

Effective [INSERT DATE]

1. *Purpose:*

The purpose of this Policy is to outline contracting and disbursement approval authority granted to Officers of the Internet Corporation for Assigned Names and Numbers (ICANN). This Policy also defines the authority granted to ICANN Officers in order to facilitate making payments in furtherance of approved disbursements.

2. *Definition of obligations:*

Contractual and disbursement obligations include all oral and/or written commitments on ICANN's behalf including contracts for goods or services, employment contracts, lease commitments, investments, purchase orders, vendor invoices and other similar obligations.

3. *Review and due care:*

All contractual and disbursement obligations must be reviewed for budget impact, risks, legal considerations, optimal procurement practices, ICANN's internal control policies, and consistency with ICANN's strategic mission.

4. *Who approves or authorizes (see chart):*

ICANN Officers include: Chief Executive Officer (CEO), President, Global Domains Division, Chief Operating Officer (COO), Chief Financial Officer (CFO), General Counsel and Secretary, Chief Innovation and Information Officer (CIIO), and Vice President, Policy Development Support.

5. *Approval and payment authorization Limits (see chart):*

The entry into all contractual or disbursement obligations must be approved by an ICANN Officer, as designated by the Board of Directors pursuant to the Bylaws. All contractual or disbursement obligations up to US\$50,000 must be approved by at least one ICANN Officer. All contractual or disbursement obligations over US\$50,000 and up to \$100,000 must be approved by at least two ICANN

Officers. All contracting or disbursement obligations over US\$100,000 and up to \$500,000 must be approved by at least three ICANN Officers, two of whom must be the CEO, COO, or CFO. Any contractual or disbursement obligation of US\$500,000 or more must be approved by the Board.

Who approves?	Approval Limits
Any one ICANN Officer	Up to US\$50,000
Any two ICANN Officers	Up to US\$100,000
Any three ICANN Officers, two of whom must be the CEO, COO, or CFO	Up to US\$500,000
Board of Directors	US\$500,000 or more.

Only one ICANN Officer needs to approve any disbursement obligation if that disbursement is made pursuant to a previously approved contractual or other obligation.

Notwithstanding the approval limits set forth in this policy, no further Board approvals for contractual or disbursement obligations are required if the Board has previously approved a specific budget within which the contractual or disbursement obligation is included. For example only, if the Board approves a budget for a Public Meeting, which includes US\$1,000,000 for hotel and venue expenses, staff will be authorized to contract for and make any disbursement of payment for such hotel and venue expenses without further Board approval.

In terms of this Policy, a payment is defined as an authorization from ICANN to a financial institution to release funds from an ICANN account in furtherance of a contracting or disbursement obligation. Such a payment can be in the form of a check, a wire transfer, ACH, a cash withdrawal, or any other means of payment.

The Officer(s) authorizing payment as defined in this Policy must first verify that the disbursement being made has been approved by one, two, or three officers, or by the Board, in accordance with the approval limits set forth above.

Who authorizes payment?	Authorization Limits
Any one ICANN Officer	Up to US\$1,000,000
Any two ICANN Officers, one of whom must be the CEO, COO, or CFO	US\$1,000,000 or more

The following other financial related matters may be authorized by any one ICANN Officer: (i) authentication of manual funds transfers; (ii) entering into agreements for electronic banking; (iii) opening of safe deposit box; (iv) application for letter of credit; and (v) other administrative actions required to operate existing bank accounts.

Payments made to any ICANN Officer must be approved by another ICANN Officer.

Payments made to any Board member must be approved by the CEO, COO, or CFO.

6. *Approval process:*

Approvals may be structured as "up to" approvals. For example, the Board of Directors may approve of a known commitment in advance with a maximum amount approved. If the item is negotiated for a greater amount, then the approval must be requested again.

7. *Reporting:*

The CFO must report on a periodic basis to the Board of Directors, through the Board Finance Committee, on all significant disbursement activities including reporting on the new gTLD expenditures as referenced in paragraph No. 6 above, as well as report on financial performance and significant variances from budgets.

8. *Compliance with Policy:*

The CFO is responsible for complying with and reporting on all financial internal controls, including complying with this Policy.

9. *Review of Policy:*

The Board Finance Committee is to review this Policy and the appropriate limits periodically.

REFERENCE MATERIALS - BOARD PAPER NO. 2015.07.28.2a

TITLE: Proposed Schedule and Process/Operational Improvements for AoC and Organizational Reviews

Background and Discussion of Issues

Under the current Review schedule, seven Reviews under the Bylaws and the Affirmation of Commitments (AoC) are scheduled to take place in FY2016. Public comments were received on the [proposal](#) that: three AoC Reviews and initial work on the At-Large Review take place in FY2016; three Organizational Reviews be deferred until FY2017; and several improvements be introduced to increase the efficiency and effectiveness of Reviews. Widespread concerns were received regarding the community's and ICANN's ability to conduct this large number of simultaneous Reviews, in addition to the already heavy workload, such as the IANA stewardship transition and the many policy initiatives underway which are anticipated to start in FY2016. Additional background information can be found in Board Vantage in the April 2015 Workshop Board Papers.

Consultation with Key Stakeholders

The Board reviewed public comments, participated in the public session on Reviews held at ICANN53 and considered Community views and comments discussed during all proceedings during ICANN53. Staff has been discussing this issue with community leaders over the last year.

Public Comment Analysis

Written comments to the public comment forum were submitted by seven organizations/groups and six individuals, in addition numerous attendees at the public sessions held at [ICANN52](#) and [ICANN53](#). Public forum comments represented one GNSO constituency and stakeholder group, the At-Large Community, as well as a global not-for-profit association and several consultancy firms.

Potential Objections

Several potential objections could appear to be an issue if the proposed Review schedule is adopted by: (i) delaying AoC reviews is not fulfilling accountability

obligations under the AoC; (ii) delaying ATRT3 will mean less focus and emphasis on implementation of prior review recommendations and no assurance that the implementation is done in accordance with the original intention; (iii) disagreeing with the proposed streamlining of AoC Reviews by Staff and community ceding effective control to Staff and to the process; (iv) the desire for the community to have more direct control over the scope of Reviews and the means that Reviews are conducted; (v) not supporting individual reviews of SO/ACs ongoing existence – the structure in its entirety should be reviewed by the Community; (vi) not agreeing with focusing Reviews on operational effectiveness to the exclusion of structural change issues; and (vii) appearing that the proposed schedule is a delay orchestrated by Staff.

Resource Implications

In addition to considering volunteer resources, the Board considered the financial and human resources necessary to support the operations of Reviews during the review and approval of ICANN's FY2016 Operating Plan and Budget. Reflecting on the community's views on prioritization of Reviews and Review recommendations, the Board considers that the implementation of "Organizational Reviews Policies, Procedures and Guidelines" will facilitate a clear and focused Review scope, consistent budgeting, and cost tracking, and a streamlined Review process and duration.

Exhibit

Exhibit A: Proposed AoC Review Schedule and Proposed Organizational Reviews Schedule

Signature Block:

Submitted by: Denise Michel and Larisa Gurnick

Position: VP, Strategic Initiatives and Director, Strategic Initiatives

Date Noted: 21 July 2015

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