

Reference Material 35.

Nelissen, Mariet

From: Petillion, Flip
Sent: samedi 13 décembre 2014 02:32
To: Contact Information Redacted
Cc: Contact Information Redacted ; Janssen, Jan;
Nelissen, Mariet
Subject: FW: Booking.com v ICANN: follow-up from oral argument
Attachments: RM 36 - public comment on Algorithm-c.pdf; RM 34 - agv1-analysis-public-comments-18feb09-en-c.pdf; RM 35 - summary-analysis-agv4-12nov10-en-c.pdf

Mr. Drymer and Members of the Panel,

First let me thank Mr. Levee for his swift turnaround in submitting the ICANN's staff analysis of public comments. I also thank the Panel for the clarification on Mr. Bernstein's question and for the opportunity to briefly respond.

I was able to access the complete documents referred to by ICANN on:

- <https://archive.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf> ; and
- <https://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf>

Please find a complete version of these documents (named **RM 34** and **RM 35**) attached.

Context of RM 34 and RM 35

RM 34 and **RM 35** contain a summary and analysis by ICANN's staff of public comments that were made in connection with the first *resp.* fourth version of the Applicant Guidebook.

RM 34 shows that members of the ICANN community expressed their concerns about the lack of transparency on the algorithm. (The comment highlighted by ICANN on page 97 of **RM 34** was not expressed by C. Gomes, as indicated in the summary, but was expressed by Mr. Mark Davis. The full comment of Mr. Davis is available on <http://forum.icann.org/lists/gtld-guide/msg00021.html> and is attached as **RM 36**.)

ICANN's response to this concern was that "*the algorithm primarily has a filtering role, reducing the work load on the panel to focus on the most likely cases of similarity*" (**RM 34**, p. 100). ICANN also specified that the string similarity review was a "*first check for obvious cases of similarity*" (**RM 34**, p. 99).

ICANN also highlighted the following sentence: "*The decision whether a string pair is confusingly similar or not is entirely with the panel*" (**RM 34**, p. 99).

It is important that this sentence is read within its proper context. ICANN's staff made this statement when dealing with community concerns about the role of the algorithm, making it clear that string similarity was not going to be decided upon the results of the non-transparent algorithm. This statement has no bearing on the fact that (i) the ICANN Board was responsible for the new gTLD program and (ii) the String Similarity Review Panel itself considered to advise ICANN (**Annex 8**, step 10).

RM 35 contains an observation about the lack of a specific appeal mechanism or extended review in relation to the string similarity review. The commenters submit that "*an applicant should have an opportunity within the ICANN process to request reconsideration of an erroneous or adverse decision*" (**RM 35**, p. 19).

ICANN had indicated that "*clarifications may be sought for String Similarity*" (**RM 35**, p. 18), and clarified in response to the above comment "*the need for clarifications is expected to be minimal*" (**RM 35**, p. 21).

ICANN did not comment on the need for an opportunity within the ICANN process to request reconsideration. ICANN merely indicated that an appeal mechanism was not part of the initial evaluation process – “no area of IE offers a chance for appeal” (**RM 35**, p. 21). In any event, the possibility to file a reconsideration request did exist as part of the program and as part of ICANN’s overall obligations. ICANN did not limit – and could not limit – an applicant’s right for redress.

Here are some key takeaways on the additional documents

1. The documents do not show that the community endorsed limitations to fairness or transparency. To the contrary, the community expressed its concerns about the lack of a specific appeal mechanism and about the lack of transparency on the algorithm. At that point in time, no one could reasonably have expected that (i) the ICANN Board would allow the use of anonymous evaluators, (ii) ICANN would give no information on the reasons for the string similarity review outcome, and (iii) there would be no opportunity to check the credentials, independence and impartiality of the evaluators.
2. The comfort that ICANN may have tried to give to the community in relation to the processes in the Applicant Guidebook disappeared when ICANN started implementing those processes in individual cases. When a piece of legislation gets enacted – or in ICANN terms, when a resolution accepting a policy (or Applicant Guidebook) gets adopted by the ICANN Board – there may be a window of opportunity for challenges to that piece of legislation on the basis that it violates higher norms (e.g. a Constitution, ICANN’s Bylaws and/or Articles of Incorporation). A successful challenge during that period will have effect *erga omnes*. However, if no such challenge is made, it does not follow that the legislation can be enforced in individual cases, if it does violate higher norms. An entity that is subject to enforcement action must still have the opportunity to challenge the legality of the legislation or policy (specifically, its conformity with higher norms). The difference is that a successful challenge will only have effect in that individual case.

It is of no relevance whether there was a debate regarding the legality of new legislation (or an ICANN policy) prior to its adoption, since such a debate could not prevent an entity that is subject to an illicit enforcement action from challenging the (unlawful) implementation of the policy in individual cases. In other words, Booking.com cannot be prevented from challenging the (unlawful) implementation of the Applicant Guidebook in the context of its .hotels application.

The point is all the stronger here, since Booking.com never benefited from an initial window of opportunity during which it could challenge the legislation or policy. It was effectively barred from challenging the Applicant Guidebook at the time of its adoption by the fact that it could not – at that time – show any injury or harm. Furthermore, any challenge at that time risked causing substantial harm to Booking.com as it would have revealed its plans to apply for a new gTLD.

I remain at your disposal to answer any questions.

Sincerely yours,

Flip Petillion

-----Original Message-----

From: Stephen Drymer [<mailto:>Contact Information Redacted]

Sent: vendredi 12 décembre 2014 02:16

Cc: "Hon. A. Howard Matz (Contact Information Redacted >, "Bernstein, David H."
<Contact Information Redacted >, "Carolina
Cardenas-Venino Contact Information Redacted

Date: 12/11/2014 02:10 PM

Subject: RE: Booking.com v ICANN: follow-up from oral argument

Dear counsel:

The members of Panel are having difficulty identifying from among the many links accessible at each of the two links provided by Mr. LeVee in his email earlier today the two specific links/documents that we are supposed to open in order to see and consider the cited pages.

For the sake of both efficiency and fairness, ICANN is requested to provide the Panel and Booking.com, at its earliest convenience and in any event no later than midnight (PST) today, links to or pdf copies of the two specific references identified by Mr. LeVee.

Booking.com will then have until have until 24 hours to provide any additional documents that it considers relevant to the issues addressed in the material to be provided by ICANN.

As a final observation, it is noted that the question posed by the Tribunal during the hearing, which gave rise to ICANN's offer to provide additional brief documentation, was not whether an SSP decision was meant to be final. Rather, Mr. Bernstein asked whether the community specifically debated and endorsed the SSP process that is expressly described in the Applicant Guidebook, which does not expressly refer to "transparency" (eg published standards, published decisions) and "fairness" (eg, opportunity to be heard).

Sincerely,

Stephen L. Drymer
WOODS LLP
Contact Information Redacted

De : Jeffrey LeVee [Contact Information Redacted] Envoyé : 11 décembre 2014 14:27 À : Stephen Drymer; Hon. A. Howard Matz Contact Information Redacted); Bernstein, David H.
Cc : Carolina Cardenas-Venino (Contact Information Redacted); Petillion, Flip; Janssen, Jan; Kate Wallace (Contact Information Redacted) Objet : Booking.com v ICANN: follow-up from oral argument

Members of the Panel:

During yesterday's hearing, I offered to send some information reflecting whether ICANN had, during the development of the Applicant Guidebook, considered the question of whether the decision by the String Similarity Panel would be final. As I mentioned during the hearing, there were multiple drafts of the Guidebook, and each was posted for public comment.

ICANN Staff then would analyze and prepare written responses to those public comments.

Below are links to two of the Staff responses to public comments that ICANN views as relevant to our discussion yesterday:

New gTLD Draft Applicant Guidebook Version 4 Public Comment Summary and Analysis (12 November 2010), available at <http://www.icann.org/en/topics/new-gtlds/comments-4-en.htm> (at pages 19, 21)

Public Comments Analysis Report (18 February 2009) Available at <http://www.icann.org/en/topics/new-gtlds/comments-en.htm> (at pages 97-99)

Per our discussion yesterday, I will not characterize or quote from these materials. I would, of course, be happy to answer any questions.

Regards,

Jeff LeVee
JONES DAY® - One Firm Worldwide
Telephone: Contact Information Redacted

Fr Stephen Drymer <Contact Information Redacted>
om
:

To "Petillion, Flip" <Contact Information Redacted>, Jeffrey LeVee <Contact Information Redacted>, "Janssen, Jan" <Contact Information Redacted>, "Kate Wallace" <Contact Information Redacted>

Cc "Hon. A. Howard Matz" <Contact Information Redacted>
: "Bernstein, David H." <Contact Information Redacted>, "Carolina Cardenas-Venino" <Contact Information Redacted>

Da 12/09/2014 03:39 PM
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Su RE: Booking.com v ICANN - Telephone hearing - 10 December - 9:00 PST /
bj 12:00 EST / 18:00 CET
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Dear counsel :

The members of the Panel spoke briefly earlier today, and we look forward to tomorrow's hearing.

As you will recall, paragraph 9 of Procedural Order No. 1 provides: "Oral argument during the telephone hearing shall be limited to 20 minutes for each party (including time spent answering questions from the Panel), subject to

the Panel's right to extend the time as it deems appropriate and any right of reply or sur-reply as the Panel may order at that time."

The Panel is conscious of the importance of the issues raised in the parties' written submissions, and understands that the hearing will likely exceed the 40-60 minutes originally estimated in order to ensure that the parties' positions, including their responses to the Panel's questions, are adequately and fairly heard.

For ease of reference, I set out here the dial-in coordinates provided by the ICDR in its 23 November "Notice of Hearing" (copy attached):

For the US and Canada: Contact Information Redacted

For Belgium: Contact Information Redacted

Passcode: Contact Information Redacted

Kind regards,

Stephen L. Drymer
WOODS LLP
Contact Information Redacted

De : Petillion, Flip [mailto:Contact Information Redacted] Envoyé : 8 octobre 2014 04:22 À : Stephen Drymer; Jeffrey LeVee; Janssen, Jan; Kate Wallace (Contact Information Redacted)

Cc : Hon. A. Howard Matz (Contact Information Redacted); Carolina Cardenas-Venino (Contact Information Redacted); Bernstein, David H.

Objet : RE: Booking.com v ICANN - Telephone hearing - 10 December

Dear Mr. Chairman,

Thank you for your mail. This is well noted.

Best regards,

Flip Petillion

From: Stephen Drymer [mailto:Contact Information Redacted]

Sent: mardi 7 octobre 2014 22:22

To: Jeffrey LeVee; Petillion, Flip; Janssen, Jan; Kate Wallace (Contact Information Redacted)

Cc: Hon. A. Howard Matz (Contact Information Redacted); Carolina Cardenas-Venino (Contact Information Redacted); Bernstein, David H.

Subject: RE: Booking.com v ICANN - Telephone hearing - 10 December

Dear counsel :

Thank you for your very prompt replies. I propose that we schedule the telephone hearing for 10 December at 9:00 (PST)/12:00 (EST)/18:00/CET

Carolina: Are you able to provide a conference line for our use?

Stephen L. Drymer

WOODS LLP
Contact Information Redacted

De : Jeffrey LeVee [mailto:Contact Information Redacted] Envoyé : 7 octobre 2014 15:57 À : Petillion, Flip Cc : Hon. A. Howard Matz (Contact Information Redacted); Carolina Cardenas-Venino (Contact Information Redacted); Bernstein, David H.; Janssen, Jan; Kate Wallace (Contact Information Redacted); Stephen Drymer
Objet : RE: Booking.com v ICANN - Telephone hearing.

All:

ICANN would be available Dec. 9-11 but not the following week.

Regards,

Jeff LeVee
JONES DAY® - One Firm Worldwide
Telephone: Contact Information Redacted

Fr "Petillion, Flip"Contact Information Redacted
om
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To Stephen Drymer Contact Information Redacted, "Janssen, Jan" <
:Contact Information Redacted>, "Jeffrey A. LeVee Contact Information Redacted" <
Contact Information Redacted>, "Kate Wallace Contact Information Redacted" <
kwallace@jonesday.com>,

Cc "Hon. A. Howard Matz Contact Information Redacted
: "Bernstein, David H." Contact Information Redacted >, "Carolina
Cardenas-Venino (Contact Information Redacted

Da 10/07/2014 12:52 PM
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Su RE: Booking.com v ICANN - Telephone hearing.
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Dear Mr Chairman,

Dear Members of the Panel,
Dear Colleagues,

All dates are fine for us.

Best regards,

Flip Petillion

From: Stephen Drymer [mailto:[Contact Information Redacted](#)]

Sent: mardi 7 octobre 2014 21:39

To: Petillion, Flip; Janssen, Jan; Jeffrey A. LeVee [Contact Information Redacted](#)); Kate Wallace [Contact Information Redacted](#))

Cc: Hon. A. Howard Matz [Contact Information Redacted](#)); Bernstein, David H.; Carolina Cardenas-Venino [Contact Information Redacted](#))

Subject: Booking.com v ICANN - Telephone hearing.

Dear counsel,

As you are aware, the timetable set out in Procedural Order No. 1 provides for a telephone hearing to be held after Respondent submits its Sur-Reply (no later than 20 November 2014) and prior to 19 December 2014. The members of the Panel have identified several dates during that period when we could be available for such a hearing: 9, 10, 11, 15 and 16 December.

Knowing that the run-up to the holidays can be a very busy period, I would ask you please to advise the Panel of your availability on those dates, by the end of this week, so that we may all block the time required for the hearing.

Thank you – and kind regards.

Stephen L. Drymer

(Embedded Stephen L. Drymer
image moved to Partner, Head of International Arbitration and ADR
file: Associé, responsable de l'arbitrage international et
pic18636.jpg) d'ADR
Description : [Contact Information Redacted](#)
WOO0603-LOGO_RGB
Woods llp
www.litigationboutique.com
[Contact Information Redacted](#)

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This e-mail (including any attachments) may contain information that is private, confidential, or protected by attorney-client or other privilege.

If you received this e-mail in error, please delete it from your system without copying it and notify sender by reply e-mail, so that our records can be corrected.

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[attachment "INT044.pdf" deleted by Jeffrey LeVee/JonesDay]

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This e-mail (including any attachments) may contain information that is private, confidential, or protected by attorney-client or other privilege.

If you received this e-mail in error, please delete it from your system without copying it and notify sender by reply e-mail, so that our records can be corrected.

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Nelissen, Mariet

From: Jeffrey LeVee [Contact Information Redacted]
Sent: samedi 13 décembre 2014 14:25
To: Contact Information Redacted
Janssen, Jan; Contact Information Redacted ; Nelissen, Mariet; Petillion, Flip
Subject: Re: FW: Booking.com v ICANN: follow-up from oral argument

Members of the Panel:

I thank Mr. Petillion for finding the materials that we were not able to locate on short notice. And inasmuch as I initiated this detour during Wednesday's argument, I will not object to the fact that Mr. Petillion chose to provide additional argument. I will respond only by stating that I do not believe that these materials address the question posed by Mr.

Bernstein, and I obviously disagree with Mr. Petillion's "takeaways." Nor do I view these materials -- which were created two and three years before the final version of the Guidebook -- as shedding any important light on the questions before the Panel because the Guidebook says what it says, and the Board's role vis-a-vis the review of String Similarity review determinations has already been addressed at great length in the parties' papers and during argument.

Jeff LeVee
JONES DAY® - One Firm Worldwide
Telephone: Contact Information Redacted

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| From: |
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| "Petillion, Flip" Contact Information Redacted >
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; and

-
<https://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf>

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Context of RM 34 and RM 35

RM 34 and RM 35 contain a summary and analysis by ICANN's staff of public comments that were made in connection with the first resp. fourth version of the Applicant Guidebook. RM 34 shows that members of the ICANN community expressed their concerns about the lack of transparency on the algorithm. (The comment highlighted by ICANN on page 97 of RM 34 was not expressed by C. Gomes, as indicated in the summary, but was expressed by Mr. Mark Davis. The full comment of Mr.

Davis is available on <http://forum.icann.org/lists/gtld-guide/msg00021.html> and is attached as RM 36.)

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Here are some key takeaways on the additional documents

1. The documents do not show that the community endorsed limitations to fairness or transparency. To the contrary, the community expressed its concerns about the lack of a specific appeal mechanism and about the lack of transparency on the algorithm. At that point in time, no one could reasonably have expected that (i) the ICANN Board would allow the use of anonymous evaluators, (ii) ICANN would give no information on the reasons for the string similarity review outcome, and (iii) there would be no opportunity to check the credentials, independence and impartiality of the evaluators.

2. The comfort that ICANN may have tried to give to the community in relation to the processes in the Applicant Guidebook disappeared when ICANN started implementing those processes in individual cases. When a piece of legislation gets enacted - or in ICANN terms, when a resolution accepting a policy (or Applicant Guidebook) gets adopted by the ICANN Board - there may be a window of opportunity for challenges to that piece of legislation on the basis that it violates higher norms (e.g. a Constitution, ICANN’s Bylaws and/or Articles of Incorporation). A successful challenge during that period will have effect erga omnes. However, if no such challenge is made, it does not follow that the legislation can be enforced in individual cases, if it does violate higher norms. An entity that is subject to enforcement action must still have the opportunity to challenge the legality of the legislation or policy (specifically, its conformity with higher norms). The difference is that a successful challenge will only have effect in that individual case. It is of no relevance whether there was a debate regarding the legality of new legislation (or an ICANN policy) prior to its adoption, since such a debate could not prevent an entity that is subject to an illicit enforcement action from challenging the (unlawful) implementation of the policy in individual cases. In other words, Booking.com cannot be prevented from challenging the (unlawful) implementation of the Applicant Guidebook in the context of its .hotels application.

The point is all the stronger here, since Booking.com never benefited from an initial window of opportunity during which it could challenge the legislation or policy. It was effectively barred from challenging the Applicant Guidebook at the time of its adoption by the fact that it could not - at that time - show any injury or harm. Furthermore, any challenge at that time risked causing substantial harm to Booking.com as it would have revealed its plans to apply for a new gTLD.

I remain at your disposal to answer any questions.

Sincerely yours,
Flip Petillion

-----Original Message-----

From: Stephen Drymer [mailto:Contact Information Redacted]
Sent: vendredi 12 décembre 2014 02:16
To: 'Jeffrey LeVee'
Cc: Hon. A. Howard Matz (Contact Information Redacted); Carolina Cardenas-Venino (Contact Information Redacted); Bernstein, David H.; Petillion, Flip; Janssen, Jan; Kate Wallace (Contact Information Redacted)
Subject: RE: Booking.com v ICANN: follow-up from oral argument

Thank you, Mr. LeVee.

As indicated in my earlier email, Booking.com is invited to provide brief additional documents relevant to the issues addressed in the materials provided by ICANN, should it wish to do so, by 9:00 (CET) on 13 December.

Kind regards.

Stephen L. Drymer

WOODS LLP
Contact Information Redacted

-----Original Message-----

From: Jeffrey LeVee [mailto:Contact Information Redacted]
Sent: Thursday, December 11, 2014 7:35 PM
To: Stephen Drymer
Cc: Hon. A. Howard Matz (Contact Information Redacted); Carolina Cardenas-Venino (Contact Information Redacted); Bernstein, David H.; Petillion, Flip; Janssen, Jan; Kate Wallace Contact Information Redacted
Subject: RE: Booking.com v ICANN: follow-up from oral argument

Mr. Drymer and Members of the Panel:

First, let me apologize that the links that we provided to you earlier today are not taking you to the materials we referenced. The links to the responses to the public comments prepared by ICANN staff appear to be broken.

Second, and as you requested, I am attaching PDF copies of the specific pages from the responses to the public comments that I referenced in my email.

Third, we have not been able to identify any additional materials related to the other topics that Mr. Bernstein addressed in his question.

Again, I apologize for the confusion.

Jeff LeVee
JONES DAY® - One Firm Worldwide
Telephone: Contact Information Redacted

(See attached file:
Excerpts-from-agv1-analysis-public-comments-18feb09-en.pdf)

(See attached file: Excerpts-from-summary-analysis-agv4-12nov10-en-1.pdf)

From: Stephen Drymer <Contact Information Redacted

To: Jeffrey LeVee <Contact Information Redacted, "Petillion, Flip" < Contact Information Redacted >, "Janssen, Jan" <Contact Information Redacted >, "Kate Wallace (Contact Information Redacted >, "Hon. A. Howard Matz Contact Information Redacted " < Contact Information Redacted, "Bernstein, David H." Contact Information Redacted >, "Carolina Cardenas-Venino Contact Information Redacted >
Date: 12/11/2014 02:10 PM
Subject: RE: Booking.com v ICANN: follow-up from oral argument

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For the sake of both efficiency and fairness, ICANN is requested to provide the Panel and Booking.com, at its earliest convenience and in any event no later than midnight (PST) today, links to or pdf copies of the two specific references identified by Mr. LeVee.

Booking.com will then have until have until 24 hours to provide any additional documents that it considers relevant to the issues addressed in the material to be provided by ICANN.

As a final observation, it is noted that the question posed by the Tribunal during the hearing, which gave rise to ICANN's offer to provide additional brief documentation, was not whether an SSP decision was meant to be final. Rather, Mr. Bernstein asked whether the community specifically debated and endorsed the SSP process that is expressly described in the Applicant Guidebook, which does not expressly refer to "transparency" (eg published standards, published decisions) and "fairness" (eg, opportunity to be heard).

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WOODS LLP
Contact Information Redacted

De : Jeffrey LeVee [Contact Information Redacted Envoyé : 11 décembre 2014
14:27 À : Stephen Drymer; Hon. A. Howard Matz Contact Information Redacted); Bernstein, David H.
Cc : Carolina Cardenas-Venino Contact Information Redacted); Petillion, Flip; Janssen, Jan; Kate
Wallace Contact Information Redacted) Objet : Booking.com v
ICANN: follow-up from oral argument

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Regards,

Jeff LeVee
JONES DAY® - One Firm Worldwide
Telephone: Contact Information Redacted

Fr Stephen Drymer <Contact Information Redacted> om
:

To "Petillion, Flip" <Contact Information Redacted>, Jeffrey LeVee <Contact Information Redacted>, "Janssen, Jan" <Contact Information Redacted>, "Kate Wallace" <Contact Information Redacted>

Cc "Hon. A. Howard Matz" <Contact Information Redacted>, "Bernstein, David H." <Contact Information Redacted>, "Carolina Cardenas-Venino" <Contact Information Redacted>

Da 12/09/2014 03:39 PM
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Su RE: Booking.com v ICANN - Telephone hearing - 10 December - 9:00 PST / bj 12:00 EST / 18:00 CET ec
t:

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Kind regards,

Stephen L. Drymer
WOODS LLP
Contact Information Redacted

De : Petillion, Flip [mailto:Contact Information Redacted] Envoyé : 8 octobre 2014 04:22 À : Stephen Drymer; Jeffrey LeVee; Janssen, Jan; Kate Wallace (Contact Information Redacted)
Cc : Hon. A. Howard Matz (Contact Information Redacted); Carolina Cardenas-Venino (Contact Information Redacted); Bernstein, David H.
Objet : RE: Booking.com v ICANN - Telephone hearing - 10 December

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Flip Petillion

From: Stephen Drymer [Contact Information Redacted]
Sent: mardi 7 octobre 2014 22:22
To: Jeffrey LeVee; Petillion, Flip; Janssen, Jan; Kate Wallace (Contact Information Redacted)
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Carolina: Are you able to provide a conference line for our use?

Stephen L. Drymer
WOODS LLP
Contact Information Redacted

De : Jeffrey LeVee [mailto:Contact Information Redacted] Envoyé : 7 octobre 2014

15:57 À : Petillion, Flip Cc : Hon. A. Howard Matz Contact Information Redacted ; Carolina Cardenas-Venino (Contact Information Redacted Bernstein, David H.; Janssen, Jan; Kate Wallace (Contact Information Redacted Stephen Drymer Objet :
RE: Booking.com v ICANN - Telephone hearing.

All:

ICANN would be available Dec. 9-11 but not the following week.

Regards,

Jeff LeVee
JONES DAY® - One Firm Worldwide
Telephone: Contact Information Redacted

Fr "Petillion, Flip" Contact Information Redacted > om
:

To Stephen Drymer <Contact Information Redacted >, "Janssen, Jan" <
: Contact Information Redacted, "Jeffrey A. LeVee Contact Information Redacted
, "Kate Wallace Contact Information Redacted

Cc "Hon. A. Howard Matz Contact Information Redacted
: "Bernstein, David H." Contact Information Redacted "Carolina
Cardenas-Venino Contact Information Redacted

Da 10/07/2014 12:52 PM
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Su RE: Booking.com v ICANN - Telephone hearing.
bj
ec
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Dear Mr Chairman,
Dear Members of the Panel,
Dear Colleagues,

All dates are fine for us.

Best regards,

Flip Petillion

From: Stephen Drymer [mailto:Contact Information Redacted]

Sent: mardi 7 octobre 2014 21:39

To: Petillion, Flip; Janssen, Jan; Jeffrey A. LeVee Contact Information Redacted ; Kate Wallace Contact Information Redacted

Cc: Hon. A. Howard Matz Contact Information Redacted ; Bernstein, David H.; Carolina Cardenas-Venino Contact Information Redacted

Subject: Booking.com v ICANN - Telephone hearing.

Dear counsel,

As you are aware, the timetable set out in Procedural Order No. 1 provides for a telephone hearing to be held after Respondent submits its Sur-Reply (no later than 20 November 2014) and prior to 19 December 2014. The members of the Panel have identified several dates during that period when we could be available for such a hearing: 9, 10, 11, 15 and 16 December.

Knowing that the run-up to the holidays can be a very busy period, I would ask you please to advise the Panel of your availability on those dates, by the end of this week, so that we may all block the time required for the hearing.

Thank you - and kind regards.

Stephen L. Drymer

(Embedded image moved to file: pic18636.jpg)
Description : W000603-LOGO_RGB

Stephen L. Drymer
Partner, Head of International Arbitration and ADR
Associé, responsable de l'arbitrage international et d'ADR
Contact Information Redacted

Woods llp
www.litigationboutique.com
Contact Information Redacted

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===== [attachment "INT044.pdf" deleted by Jeffrey LeVee/JonesDay]

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=====[attachment "RM 36 - public comment on Algorithm-c.pdf" deleted by Jeffrey LeVee/JonesDay] [attachment "RM 34 - agv1-analysis-public-comments-18feb09-en-c.pdf" deleted by Jeffrey LeVee/JonesDay] [attachment "RM 35 - summary-analysis-agv4-12nov10-en-c.pdf" deleted by Jeffrey LeVee/JonesDay]

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Nelissen, Mariet

From: Stephen Drymer [Contact Information Redacted]
Sent: samedi 13 décembre 2014 18:03
To: 'Jeffrey LeVee'; Petillion, Flip; Janssen, Jan; Contact Information Redacted ; Nelissen, Mariet
Cc: Contact Information Redacted
Subject: Booking.com v ICANN: PROCEEDINGS CLOSED

Dear counsel:

The Panel acknowledges receipt of the parties' post-hearing submissions. The proceedings are now closed. The Panel will proceed to deliberate and to prepare its Declaration.

Sincerely,

Stephen L. Drymer

WOODS LLP
Contact Information Redacted

-----Original Message-----

From: Jeffrey LeVee [mailto:Contact Information Redacted]
Sent: Saturday, December 13, 2014 8:25 AM
To: Stephen Drymer; Contact Information Redacted
Cc: Contact Information Redacted Janssen, Jan; Contact Information Redacted Nelissen, Mariet; Petillion, Flip
Subject: Re: FW: Booking.com v ICANN: follow-up from oral argument

Members of the Panel:

I thank Mr. Petillion for finding the materials that we were not able to locate on short notice. And inasmuch as I initiated this detour during Wednesday's argument, I will not object to the fact that Mr. Petillion chose to provide additional argument. I will respond only by stating that I do not believe that these materials address the question posed by Mr.

Bernstein, and I obviously disagree with Mr. Petillion's "takeaways." Nor do I view these materials -- which were created two and three years before the final version of the Guidebook -- as shedding any important light on the questions before the Panel because the Guidebook says what it says, and the Board's role vis-a-vis the review of String Similarity review determinations has already been addressed at great length in the parties' papers and during argument.

Jeff LeVee
JONES DAY® - One Firm Worldwide
Telephone: Contact Information Redacted

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| "Petillion, Flip" Contact Information Redacted
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| To: |
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"Contact Information Redacted"
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| Cc: |
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Contact Information Redacted
"Janssen, |
| Jan" <Contact Information Redacted >, "Nelissen, Mariet" <Contact Information Redacted
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| Date: |
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| 12/12/2014 05:34 PM
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| Subject: |
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| FW: Booking.com v ICANN: follow-up from oral argument
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Mr. Drymer and Members of the Panel,
First let me thank Mr. Levee for his swift turnaround in submitting the ICANN's staff analysis of public comments. I also thank the Panel for the clarification on Mr. Bernstein's question and for the opportunity to briefly respond. I was able to access the complete documents referred to by ICANN on:
-
<https://archive.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf>
; and
-
<https://archive.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf>

Please find a complete version of these documents (named RM 34 and RM 35) attached.
Context of RM 34 and RM 35
RM 34 and RM 35 contain a summary and analysis by ICANN's staff of public comments that were made in connection with the first resp. fourth version of the Applicant Guidebook.

RM 34 shows that members of the ICANN community expressed their concerns about the lack of transparency on the algorithm. (The comment highlighted by ICANN on page 97 of RM 34 was not expressed by C. Gomes, as indicated in the summary, but was expressed by Mr. Mark Davis. The full comment of Mr.

Davis is available on <http://forum.icann.org/lists/gtld-guide/msg00021.html> and is attached as RM 36.)

ICANN's response to this concern was that "the algorithm primarily has a filtering role, reducing the work load on the panel to focus on the most likely cases of similarity" (RM 34, p. 100). ICANN also specified that the string similarity review was a "first check for obvious cases of similarity" (RM 34, p. 99).

ICANN also highlighted the following sentence: "The decision whether a string pair is confusingly similar or not is entirely with the panel" (RM 34, p. 99).

It is important that this sentence is read within its proper context.

ICANN's staff made this statement when dealing with community concerns about the role of the algorithm, making it clear that string similarity was not going to be decided upon the results of the non-transparent algorithm.

This statement has no bearing on the fact that (i) the ICANN Board was responsible for the new gTLD program and (ii) the String Similarity Review Panel itself considered to advise ICANN (Annex 8, step 10).

RM 35 contains an observation about the lack of a specific appeal mechanism or extended review in relation to the string similarity review. The commenters submit that "an applicant should have an opportunity within the ICANN process to request reconsideration of an erroneous or adverse decision" (RM 35, p. 19).

ICANN had indicated that "clarifications may be sought for String Similarity" (RM 35, p. 18), and clarified in response to the above comment "the need for clarifications is expected to be minimal" (RM 35, p. 21).

ICANN did not comment on the need for an opportunity within the ICANN process to request reconsideration. ICANN merely indicated that an appeal mechanism was not part of the initial evaluation process - "no area of IE offers a chance for appeal" (RM 35, p. 21). In any event, the possibility to file a reconsideration request did exist as part of the program and as part of ICANN's overall obligations. ICANN did not limit - and could not limit - an applicant's right for redress.

Here are some key takeaways on the additional documents

1. The documents do not show that the community endorsed limitations to fairness or transparency. To the contrary, the community expressed its concerns about the lack of a specific appeal mechanism and about the lack of transparency on the algorithm. At that point in time, no one could reasonably have expected that (i) the ICANN Board would allow the use of anonymous evaluators, (ii) ICANN would give no information on the reasons for the string similarity review outcome, and (iii) there would be no opportunity to check the credentials, independence and impartiality of the evaluators.

2. The comfort that ICANN may have tried to give to the community in relation to the processes in the Applicant Guidebook disappeared when ICANN started implementing those processes in individual cases. When a piece of legislation gets enacted - or in ICANN terms, when a resolution accepting a policy (or Applicant Guidebook) gets adopted by the ICANN Board - there may be a window of opportunity for challenges to that piece of legislation on the basis that it violates higher norms (e.g. a Constitution, ICANN's Bylaws and/or Articles of Incorporation). A successful challenge during that period will have effect erga omnes. However, if no such challenge is made, it does not follow that the legislation can be enforced in individual cases, if it does violate higher norms. An entity that is subject to enforcement action must still have the opportunity to challenge the legality of the legislation or policy (specifically, its conformity with higher norms). The difference is that a successful challenge will only have effect in that individual case. It is of no relevance whether there was a debate regarding the legality of new legislation (or an ICANN policy) prior to its

adoption, since such a debate could not prevent an entity that is subject to an illicit enforcement action from challenging the (unlawful) implementation of the policy in individual cases. In other words, Booking.com cannot be prevented from challenging the (unlawful) implementation of the Applicant Guidebook in the context of its .hotels application.

The point is all the stronger here, since Booking.com never benefited from an initial window of opportunity during which it could challenge the legislation or policy. It was effectively barred from challenging the Applicant Guidebook at the time of its adoption by the fact that it could not - at that time - show any injury or harm. Furthermore, any challenge at that time risked causing substantial harm to Booking.com as it would have revealed its plans to apply for a new gTLD.

I remain at your disposal to answer any questions.

Sincerely yours,
Flip Petillion

-----Original Message-----

From: Stephen Drymer [mailto:Contact Information Redacted]

Sent: vendredi 12 décembre 2014 02:16

To: 'Jeffrey LeVee'

Cc: Hon. A. Howard Matz Contact Information Redacted ; Carolina Cardenas-Venino (Contact Information Redacted ; Bernstein, David H.; Petillion, Flip; Janssen, Jan; Kate Wallace Contact Information Redacted

Subject: RE: Booking.com v ICANN: follow-up from oral argument

Thank you, Mr. LeVee.

As indicated in my earlier email, Booking.com is invited to provide brief additional documents relevant to the issues addressed in the materials provided by ICANN, should it wish to do so, by 9:00 (CET) on 13 December.

Kind regards.

Stephen L. Drymer

WOODS LLP

Contact Information Redacted

-----Original Message-----

From: Jeffrey LeVee [mailto:Contact Information Redacted]

Sent: Thursday, December 11, 2014 7:35 PM

To: Stephen Drymer

Cc: Hon. A. Howard Matz (Contact Information Redacted ; Carolina Cardenas-Venino (Contact Information Redacted); Bernstein, David H.; Petillion, Flip; Janssen, Jan; Kate Wallace Contact Information Redacted

Subject: RE: Booking.com v ICANN: follow-up from oral argument

Mr. Drymer and Members of the Panel:

First, let me apologize that the links that we provided to you earlier today are not taking you to the materials we referenced. The links to the responses to the public comments prepared by ICANN staff appear to be broken.

Second, and as you requested, I am attaching PDF copies of the specific pages from the responses to the public comments that I referenced in my email.

Third, we have not been able to identify any additional materials related to the other topics that Mr. Bernstein addressed in his question.

Again, I apologize for the confusion.

Jeff LeVee
JONES DAY® - One Firm Worldwide
Telephone: Contact Information Redacted

(See attached file:
Excerpts-from-agv1-analysis-public-comments-18feb09-en.pdf)

(See attached file: Excerpts-from-summary-analysis-agv4-12nov10-en-1.pdf)

From: Stephen Drymer Contact Information Redacted
To: Jeffrey LeVee Contact Information Redacted, "Petillion, Flip" <
Contact Information Redacted, "Janssen, Jan" Contact Information Redacted, "Kate Wallace
Contact Information Redacted
Cc: "Hon. A. Howard Matz" Contact Information Redacted
"Bernstein, David H." Contact Information Redacted, "Carolina
Cardenas-Venino" (Contact Information Redacted)
Date: 12/11/2014 02:10 PM
Subject: RE: Booking.com v ICANN: follow-up from oral argument

Dear counsel:

The members of Panel are having difficulty identifying from among the many links accessible at each of the two links provided by Mr. LeVee in his email earlier today the two specific links/documents that we are supposed to open in order to see and consider the cited pages.

For the sake of both efficiency and fairness, ICANN is requested to provide the Panel and Booking.com, at its earliest convenience and in any event no later than midnight (PST) today, links to or pdf copies of the two specific references identified by Mr. LeVee.

Booking.com will then have until have until 24 hours to provide any additional documents that it considers relevant to the issues addressed in the material to be provided by ICANN.

As a final observation, it is noted that the question posed by the Tribunal during the hearing, which gave rise to ICANN's offer to provide additional brief documentation, was not whether an SSP decision was meant to be final.

Rather, Mr. Bernstein asked whether the community specifically debated and endorsed the SSP process that is expressly described in the Applicant Guidebook, which does not expressly refer to "transparency" (eg published standards, published decisions) and "fairness" (eg, opportunity to be heard).

Sincerely,

Stephen L. Drymer
WOODS LLP
Contact Information Redacted

De : Jeffrey LeVee Contact Information Redacted Envoyé : 11 décembre 2014
14:27 À : Stephen Drymer; Hon. A. Howard Matz Contact Information Redacted; Bernstein, David H.
Cc : Carolina Cardenas-Venino Contact Information Redacted; Petillion, Flip; Janssen, Jan; Kate
Wallace Contact Information Redacted Objet : Booking.com v
ICANN: follow-up from oral argument

Members of the Panel:

During yesterday's hearing, I offered to send some information reflecting whether ICANN had, during the development of the Applicant Guidebook, considered the question of whether the decision by the String Similarity Panel would be final. As I mentioned during the hearing, there were multiple drafts of the Guidebook, and each was posted for public comment.

ICANN Staff then would analyze and prepare written responses to those public comments.

Below are links to two of the Staff responses to public comments that ICANN views as relevant to our discussion yesterday:

New gTLD Draft Applicant Guidebook Version 4 Public Comment Summary and Analysis (12 November 2010), available at <http://www.icann.org/en/topics/new-gtlds/comments-4-en.htm> (at pages 19, 21)

Public Comments Analysis Report (18 February 2009) Available at <http://www.icann.org/en/topics/new-gtlds/comments-en.htm> (at pages 97-99)

Per our discussion yesterday, I will not characterize or quote from these materials. I would, of course, be happy to answer any questions.

Regards,

Jeff LeVee
JONES DAY® - One Firm Worldwide
Telephone: Contact Information Redacted

Fr Stephen Drymer Contact Information Redacted om
:

To "Petillion, Flip" Contact Information Redacted, Jeffrey LeVee <
: Contact Information Redacted, "Janssen, Jan" Contact Information Redacted "Kate
Wallace Contact Information Redacted

Cc "Hon. A. Howard Matz Contact Information Redacted
: "Bernstein, David H." Contact Information Redacted "Carolina
Cardenas-Venino Contact Information Redacted

Da 12/09/2014 03:39 PM
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Su RE: Booking.com v ICANN - Telephone hearing - 10 December - 9:00 PST / bj 12:00 EST /
18:00 CET ec
t:

Dear counsel :

The members of the Panel spoke briefly earlier today, and we look forward to tomorrow's hearing.

As you will recall, paragraph 9 of Procedural Order No. 1 provides: "Oral argument during the telephone hearing shall be limited to 20 minutes for each party (including time spent answering questions from the Panel), subject to the Panel's right to extend the time as it deems appropriate and any right of reply or sur-reply as the Panel may order at that time."

The Panel is conscious of the importance of the issues raised in the parties' written submissions, and understands that the hearing will likely exceed the 40-60 minutes originally estimated in order to ensure that the parties' positions, including their responses to the Panel's questions, are adequately and fairly heard.

For ease of reference, I set out here the dial-in coordinates provided by the ICDR in its 23 November "Notice of Hearing" (copy attached):

For the US and Canada: Contact Information Redacted

For Belgium: Contact Information Redacted

Passcode: Contact Information Redacted

Kind regards,

Stephen L. Drymer
WOODS LLP
Contact Information Redacted

De : Petillion, Flip [mailto:Contact Information Redacted] Envoyé : 8 octobre 2014 04:22 À : Stephen Drymer; Jeffrey LeVee; Janssen, Jan; Kate Wallace (Contact Information Redacted)

Cc : Hon. A. Howard Matz Contact Information Redacted; Carolina Cardenas-Venino (Contact Information Redacted) Bernstein, David H.

Objet : RE: Booking.com v ICANN - Telephone hearing - 10 December

Dear Mr. Chairman,

Thank you for your mail. This is well noted.

Best regards,

Flip Petillion

From: Stephen Drymer [mailto:Contact Information Redacted]

Sent: mardi 7 octobre 2014 22:22

To: Jeffrey LeVee; Petillion, Flip; Janssen, Jan; Kate Wallace (Contact Information Redacted)

Cc: Hon. A. Howard Matz (Contact Information Redacted); Carolina Cardenas-Venino (Contact Information Redacted); Bernstein, David H.

Subject: RE: Booking.com v ICANN - Telephone hearing - 10 December

Dear counsel :

Thank you for your very prompt replies. I propose that we schedule the telephone hearing for 10 December at 9:00 (PST)/12:00 (EST)/18:00/CET

Carolina: Are you able to provide a conference line for our use?

Stephen L. Drymer
WOODS LLP
Contact Information Redacted

De : Jeffrey LeVee [Contact Information Redacted] Envoyé : 7 octobre 2014
15:57 À : Petillion, Flip Cc : Hon. A. Howard Matz Contact Information Redacted); Carolina Cardenas-Venino (Contact Information Redacted Bernstein, David H.; Janssen, Jan; Kate Wallace (Contact Information Redacted); Stephen Drymer Objet :
RE: Booking.com v ICANN - Telephone hearing.

All:

ICANN would be available Dec. 9-11 but not the following week.

Regards,

Jeff LeVee
JONES DAY® - One Firm Worldwide
Telephone: Contact Information Redacted

Fr "Petillion, Flip" Contact Information Redacted > om
:

To Stephen Drymer Contact Information Redacted >, "Janssen, Jan" <
: Contact Information Redacted >, "Jeffrey A. LeVee Contact Information Redacted)" <
Contact Information Redacted >, "Kate Wallace (Contact Information Redacted

Cc "Hon. A. Howard Matz (Contact Information Redacted
: "Bernstein, David H." Contact Information Redacted "Carolina
Cardenas-Venino Contact Information Redacted

Da 10/07/2014 12:52 PM
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Su RE: Booking.com v ICANN - Telephone hearing.
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Dear Mr Chairman,
Dear Members of the Panel,
Dear Colleagues,

All dates are fine for us.

Best regards,

Flip Petillion

From: Stephen Drymer [mailto:Contact Information Redacted]
Sent: mardi 7 octobre 2014 21:39
To: Petillion, Flip; Janssen, Jan; Jeffrey A. LeVee Contact Information Redacted ; Kate Wallace Contact Information Redacted
Cc: Hon. A. Howard Matz Contact Information Redacted ; Bernstein, David H.; Carolina Cardenas-Venino Contact Information Redacted
Subject: Booking.com v ICANN - Telephone hearing.

Dear counsel,

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Knowing that the run-up to the holidays can be a very busy period, I would ask you please to advise the Panel of your availability on those dates, by the end of this week, so that we may all block the time required for the hearing.

Thank you - and kind regards.

Stephen L. Drymer

(Embedded image moved to file: pic18636.jpg)
Description : W000603-LOGO_RGB

Stephen L. Drymer
Partner, Head of International Arbitration and ADR
Associé, responsable de l'arbitrage international et d'ADR
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=====[attachment "INT044.pdf" deleted by Jeffrey LeVee/JonesDay]

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Reference Material 36.

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

Independent Review Process Panel

In the Matter of an Independent Review Process

Between:

Booking.com B.V.

Applicant

-and-

ICDR Case No: 50-20-1400-0247

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

Respondent

FINAL DECLARATION

The Panel:

Hon. A. Howard Matz

David H. Bernstein, Esq.

Stephen L. Drymer (Chair)

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DECLARATION

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

I. INTRODUCTION

1. This Declaration is issued in the context of an Independent Review Process (“**IRP**”) as provided for in Article IV, Section 3 of the Bylaws of the Internet Corporation for Assigned Names and Numbers (“**ICANN**”; “**ICANN Bylaws**” or “**Bylaws**”). In accordance with those Bylaws, the conduct of this IRP is governed by the International Arbitration Rules of the International Centre for Dispute Resolution as amended and in effect June 1, 2009 (“**ICDR**”; “**ICDR Rules**”) as supplemented by the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process (“**Supplementary Procedures**”).
2. The subject matter of the dispute here concerns alleged conduct by the ICANN Board in relation to one particular facet of the process by which new generic top-level domains (“**gTLDs**”, also known as gTLD “**strings**”) are applied for, reviewed and delegated into the Internet’s domain name system (“**DNS**”) root zone.
3. As explained in this Declaration, the Applicant, Booking.com, alleges that, in establishing and overseeing the process by which so-called *string similarity reviews* are conducted, and in refusing to reconsider and overturn a decision to place Booking.com’s applied-for gTLD string .hotels in a so-called *string contention set*, the Board acted in a manner inconsistent with applicable policies, procedures and rules as set out in ICANN’s Articles of Incorporation, Bylaws and gTLD Applicant Guidebook (“**Guidebook**”).
4. Reading between the lines of the parties’ submissions, the Panel senses that both sides would welcome the opportunity to contribute to an exchange that might result in enabling disputants in future cases to avoid having to resort to an IRP to resolve issues such as have arisen here. Certainly the Panel considers that the present matter would ideally have been resolved amicably by the parties. This is particularly true given that the matter here concerns two of ICANN’s guiding principles – transparency and fairness – as applied to one of ICANN’s most essential activities – the delegation of new gTLDs² – in circumstances in which various members of the Internet community, including certain members of the ICANN Board’s New gTLD Program Committee, have expressed their own concerns regarding the string similarity review process. That being the case, though, the Panel does not shy away from the duty imposed by the Bylaws to address the questions before it and to render the

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

² As stated in the very first sentence of the Guidebook: “New gTLDs have been in the forefront of ICANN’s agenda since its creation.”

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

II. THE PARTIES

A. The Applicant: Booking.com

5. The Applicant, Booking.com, is a limited liability company established under the law of the Netherlands. Booking.com describes itself as “the number one online hotel reservation service in the world, offering over 435,605 hotels and accommodations.”³ Booking.com’s primary focus is on the U.S. and other English-language markets.
6. Booking.com is represented in this IRP by Mr. Flip Petillion and Mr. Jan Janssen of the law firm *Crowell & Moring* in Brussels, Belgium.

B. The Respondent: ICANN

7. The Respondent, ICANN, is a California not-for-profit public benefit corporation, formed in 1998. As set forth in Article I, Section 1 of its Bylaws, ICANN’s mission is “to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems.” ICANN describes itself as “a complex organization that facilitates input from a wide variety of Internet stakeholders. ICANN has a Board of Directors and staff members from around the globe, as well as an Ombudsman. ICANN, however, is much more than just the corporation—it is a community of participants.”⁴
8. ICANN is represented in this IRP by Mr. Jeffrey A. LeVee, Esq. and Ms. Kate Wallace, Esq. of the law firm *Jones Day* in Los Angeles, California, USA.

III. FACTUAL AND PROCEDURAL BACKGROUND – IN BRIEF

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

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

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

³ Request, ¶ 10.

⁴ Response, ¶ 11-12.

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

11. The Program has its origins in what the Guidebook refers to as “carefully deliberated policy development work” by the ICANN community.⁶
12. In 2005, ICANN’s Generic Names Supporting Organization (“GNSO”), one of the groups that coordinates global Internet policy at ICANN, commenced a policy development process to consider the introduction of new gTLDs.⁷ As noted in the Guidebook:

Representatives from a wide variety of stakeholder groups – governments, individuals, civil society, business and intellectual property constituencies, and the technology community – were engaged in discussions for more than 18 months on such questions as the demand, benefits and risks of new gTLDs, the selection criteria that should be applied, how gTLDs should be allocated, and the contractual conditions that should be required for new gTLD registries going forward.
13. In October 2007, the GNSO formally completed its policy development work on new gTLDs and approved a set of 19 policy recommendations.
14. In June 2008, the ICANN Board decided to adopt the policies recommended by the GNSO.⁸ As explained in the Guidebook, ICANN’s work next focused on implementation of these recommendations, which it saw as “creating an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval.”⁹
15. This process concluded with the decision by the ICANN Board in June 2011 to implement the New gTLD Program and its foundational instrument, the Guidebook.¹⁰
16. As described by ICANN in these proceedings, the Program “constitutes by far ICANN’s most ambitious expansion of the Internet’s naming system. The Program’s goals include

⁶ Guidebook, *Preamble*

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

⁸ Guidebook, *Preamble*. A review of this policy process can be found at <http://qns0.icann.org/issues/new-gtlds> (last accessed on January 15, 2015).

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

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

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

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

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

18. In accordance with the process set out in the Guidebook, Booking.com filed an application (Application ID 1-1016-75482) for the gTLD string .hotels.
19. At the same time, Despegar Online SRL (“Despegar”), a corporation established under the law of Uruguay, applied (Application ID 1-1249-87712) for the string .hoteis.
20. “Hoteis” is the Portuguese word for “hotels”.
21. According to Booking.com, Despegar is “a competitor of Booking.com”.¹⁴ Booking.com claims that it intends “to operate .hotels as a secure Internet environment providing hotel reservation services for consumers, hotels, and other stakeholders,”¹⁵ while Despegar similarly intends .hoteis to be dedicated primarily to “individuals that are interested in, and businesses that offer, hotel- and travel-related content.”¹⁶ That being said, a key difference between the two applications, as Booking.com acknowledges, is that Booking.com intends to focus the services it will offer under its proposed gTLD “on the U.S. (with its strongly Anglo-Saxon traditions) and other English-language markets,”¹⁷ whereas Despegar intends to target “Portuguese-speaking” markets.¹⁸
22. As part of the Initial Evaluation to which all applied-for gTLDs were subject, .hotels and .hoteis were each required to undergo so-called *string review* in accordance with the Guidebook, the first component of which is a process known as *string similarity review*. As provided by the Guidebook, the string similarity review was conducted by an independent

¹¹ Response, ¶ 14.

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

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

¹⁴ Request, ¶ 17.

¹⁵ Request, ¶ 5.

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

¹⁷ Request, ¶ 16.

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

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

23. On 26 February 2013 ICANN published the results of all of the string similarity reviews for all of the applications for new gTLDs submitted as part of the Program. The announcement revealed, among other things, that two “non-exact match” contention sets had been created: .hotels & .hoteis; and .unicorn & .unicom.²⁰ Booking.com’s applied for string .hotels (as well as the .hoteis, .uncorn and .unicom strings) had thus failed the string similarity review.
24. The results of the string similarity review were notified to Booking.com by ICANN that same day. In its letter of 26 February 2013 ICANN wrote:

After careful consideration and extensive review performed against the criteria in Section 2.2.1.1 of the Applicant Guidebook, the String Similarity Panel has found that the applied-for string (.hotels) is visually similar to another applied-for string (.hoteis), creating a probability of user confusion.

*Due to this finding, the ... two strings have been placed in a contention set.*²¹

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

C. DIDP Request and Request for Reconsideration

26. On 28 March 2013 Booking.com submitted a request for information under ICANN’s Documentary Information Disclosure Policy (“**DIDP Request**”) asking for “all documents directly and indirectly relating to (1) the standard used to determine whether gTLD strings are confusingly similar, and (2) the specific determination that .hotels and .hoteis are confusingly similar.”²²
27. On the same date, Booking.com also filed a formal Request for Reconsideration (“**Request for Reconsideration**”). The “specific action(s)” that Booking.com asked to be reconsidered were: the decision to place .hotels and .hoteis in a contention set; and the decision not to

¹⁹ See <http://www.icc-uk.com/>

²⁰ Request, Annex 3. ICANN published document dated 26 February 2013. As its name suggests, a “non-exact match” connotes a determination that two different (non-identical) strings are visually similar within the meaning of the Guidebook. Another 752 applied-for gTLDs were put into 230 identical contention sets.

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

²² Request, ¶ 30 and Annex 3.

provide a “detailed analysis or a reasoned basis” for the decision to place .hotels in contention.²³

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

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

29. By letter dated 9 May 2013 Booking.com replied to ICANN, writing that “ICANN’s response fails to provide any additional information or address any of Booking.com’s concerns as conveyed in its DIDP Request or Request for Reconsideration.”²⁵ On 14 May 2013, ICANN answered that it “intends to post the string similarity process documentation on or before ... 17 May 2013.”²⁶ ICANN further informed Booking.com that “ICANN will afford you 30 days from the posting of the process document for the submission of a revised Request for Reconsideration.”²⁷
30. On 7 June 2013, ICANN published the “String Similarity New gTLD Evaluation Panel [i.e., the SSP] – Process Description” (“**SSP Process Description**”).²⁸
31. On 26 June 2013 Booking.com wrote to ICANN regarding both its DIDP Request and its 28 March 2013 Request for Reconsideration. In its letter, Booking.com noted among other things that “the generalized information ICANN thus far has provided does not explain a rationale for or analysis for the decision to put .hotels and .hoteis in a contention set and therefore does not allow Booking.com to appropriately amend its Request for Reconsideration.” The letter concluded by stating: “Considering ICANN’s obligations of transparency and accountability, there cannot be any ‘compelling reason for confidentiality’.

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

²⁴ Request, Annex 5.

²⁵ Request, Annex 6.

²⁶ Request, Annex 7.

²⁷ Request, Annex 7.

²⁸ Request, Annex 8.

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

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

When ALL of the following features of a pairwise comparison [of non-exact match strings] are evident the evaluators found the string pair to be confusingly similar:

- *Strings of similar visual length on the page;*
- *Strings within +/- 1 character of each other;*
- *Strings where the majority of characters are the same and in the same position in each string; and*
- *The two strings possess letter combinations that visually appear similar to other letters in the same position in each string*

o For example m~m & l~i

33. Meanwhile, on 7 July 2013 Booking.com had submitted its amended Request for Reconsideration. In its letter attaching the amended Request for Reconsideration, Booking.com stated: “Booking.com reserves the right to further amend its Request for Reconsideration upon receipt of the information it previously requested and urges ICANN to publish the requested information as specified in our letter of 26 June 2013.”³²
34. By virtue of Article IV, Section 3 of the Bylaws, ICANN’s Board Governance Committee (“**BGC**”) is charged with evaluating and making recommendation to the Board with respect to requests for reconsideration. The Board’s New gTLD Program Committee (“**NGPC**”) receives and acts on such recommendations on behalf of the ICANN Board. In accordance with this procedure, Booking.com’s Request for Reconsideration was evaluated by the BGC. In a detailed analysis dated 1 August 2013, the BGC “conclude[d] that Booking.com has not

²⁹ Request, Annex 9.

³⁰ Request, Annex 10.

³¹ Request, Annex 11.

³² Request, Annex 13.

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

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

D. The Cooperative Engagement Process

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

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

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

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

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

³⁵ Request, Annex 17.

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

E. The IRP Proceedings

39. On 19 March 2014, Booking.com submitted a Notice of Independent Review, dated 18 March 2014, as well as a Request for Independent Review Process (“**Request**”) accompanied by numerous supporting documents and reference materials.
40. In accordance with Article IV, Section 3(9) of the ICANN Bylaws, Booking.com requested that a three-member IRP panel be constituted to consider and determine the Request. As the omnibus standing panel referred to in Article IV, Section 3(6) of the ICANN Bylaws had yet to be established, Booking.com further proposed, in accordance with Article 6 of the ICDR Rules, that each party appoint one panelist, with the third (the Chair of the panel) to be appointed by the two party-appointed panelists.
41. On 25 April 2014, ICANN submitted a Response to ICANN’s Request with supporting documents (“**Response**”).
42. The parties having thereafter agreed on the number of panelists and the method of their appointment, David H. Bernstein, Esq. was duly appointed as panelist by Booking.com on 1 May 2014, and the Hon. A Howard Matz was duly appointed as panelist by ICANN on 30 May 2014.
43. On 17 July 2014, the ICDR notified the parties that Mr. Stephen L. Drymer had been duly nominated by the two party-appointed panelists as Chair of the Panel. Mr. Drymer’s appointment became effective and the Panel was duly constituted as of 1 August 2014.
44. On 21 August 2014, further to consultations among the panelists and between the Panel and the parties, the Panel convened a preparatory conference with the parties (by telephone) for the purpose of discussing organizational matters, including a timetable for any further written statements or oral argument. Both parties requested the opportunity to make supplemental submissions and to present oral argument.
45. On 22 August 2014 the Panel issued Procedural Order No. 1 in which, among other things, it established a Procedural Timetable for the IRP. As specifically requested by the parties, the Procedural Order and Timetable provided for the submission of additional written statements by the parties as well as for a brief oral hearing to take place by telephone, all on dates proposed by and agreed between the parties.³⁶
46. In accordance with the Procedural Timetable, on 6 October 2014 Booking.com submitted its Reply to ICANN’s Response, accompanied by additional documents (“**Reply**”).

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

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

F. The Hearing

48. As provided by Procedural Order No. 1 and the Procedural Timetable, a hearing was held (by telephone) on 10 December 2011, commencing at 9:00 PST/18:00 CET.
49. In the light of the significance of the issues raised by the parties, and given the many questions prompted by those issues and by the parties’ extensive written submissions and supporting materials, the Panel indicated that it would allow the hearing to continue beyond the approximately one hour originally envisaged. The hearing ultimately lasted two and one-half hours. Counsel for each party made extensive oral submissions, including rebuttal and sur-rebuttal submissions, and responded to the panelists’ questions.
50. Prior to the close of the hearing each party declared that it had no objection concerning the conduct of the proceedings, that it had no further oral submissions that it wished to make, and that it considered that it had had a full opportunity to present its case and to be heard.
51. As agreed and ordered prior to the close of the hearing, the parties were provided the opportunity to file limited additional materials post-hearing, in relation to a certain question asked of them by the Panel. This was done, and, on 13 December 2014, the proceedings were declared closed.

IV. ICANN ARTICLES, BYLAWS AND POLICIES – KEY ELEMENTS

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

A. Articles of Association

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

[Underlining added]

B. Bylaws

ARTICLE I: MISSION AND CORE VALUES

Section 1. MISSION

The mission of The Internet Corporation for Assigned Names and Numbers (“ICANN”) is to coordinate, at the overall level, the global Internet’s systems of unique identifiers,

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

[..]

Section 2. CORE VALUES

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

- 1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.*
- 2. Respecting the creativity, innovation, and flow of information made possible by the Internet by limiting ICANN's activities to those matters within ICANN's mission requiring or significantly benefiting from global coordination.*
- 3. To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.*
- 4. Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making.*
- 5. Where feasible and appropriate, depending on market mechanisms to promote and sustain a competitive environment.*
- 6. Introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest.*
- 7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.*
- 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*
- 9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.*
- 10. Remaining accountable to the Internet community through mechanisms that enhance ICANN's effectiveness.*
- 11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.*

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

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

[...]

ARTICLE III: TRANSPARENCY

Section 1. PURPOSE

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

[...]

ARTICLE IV: ACCOUNTABILITY AND REVIEW

Section 1. PURPOSE

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

Section 2. RECONSIDERATION

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

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

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

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

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

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

a. evaluate requests for review or reconsideration;

- b. *summarily dismiss insufficient requests;*
- c. *evaluate requests for urgent consideration;*
- d. *conduct whatever factual investigation is deemed appropriate;*
- e. *request additional written submissions from the affected party, or from other parties;*
- f. *make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and*
- g. *make a recommendation to the Board of Directors on the merits of the request, as necessary.*

[...]

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

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

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

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

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

- a. *did the Board act without conflict of interest in taking its decision?;*
- b. *did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. *did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?*

[...]

11. *The IRP Panel shall have the authority to:*

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

[...]

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

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

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

[...]

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

[Underlining added]

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

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

C. The gTLD Applicant Guidebook

54. As noted above and as understood by all, the Guidebook is (to borrow Booking.com’s phrase) “the crystallization of Board-approved consensus policy concerning the introduction of new gTLDs.”³⁷
55. The Guidebook is divided into “Modules”, each of which contains various sections and sub-sections. The three Modules of primary relevance here are Modules 1, 2 and 4. Module 1, titled “Introduction to the gTLD Application Process,” provides an “overview of the process for applying for a new generic top-level domains.”³⁸ Module 2, titled “Evaluation Procedures,” describes the “evaluation procedures and criteria used to determine whether applied-for gTLDs are approved for delegation.”³⁹ Module 4, titled “String Contention Procedures,” concerns “situations in which contention over applied-for gTLD strings occurs, and the methods available to applicants for resolving such contention cases.”

(i) *Initial Evaluation*

56. As explained in Module 1, “[i]mmediately following the close of the application submission period, ICANN will begin checking all applications for completeness.”⁴⁰ Initial Evaluation begins “immediately after the administrative completeness check concludes. All complete applications will be reviewed during Initial Evaluation.”⁴¹
57. Initial Evaluation is comprised of two main elements or types of review: *string review*, which concerns the applied-for gTLD string; and *applicant review*, which concerns the entity applying for the gTLD and its proposed registry services. It is the first of these – string review, including more specifically the component known as *string similarity review* – that is particularly relevant.

(ii) *String Review, including String Similarity Review*

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

The following assessments are performed in the Initial Evaluation:

³⁷ Request, ¶ 13.

³⁸ Module 1-2. Each Module of the Guidebook is paginated separately. “Module 1-2” refers to Guidebook Module 1, page 2.

³⁹ Module 2-2.

⁴⁰ Guidebook, §1.1.2.2: “Administrative Completeness Check”, Module 1-5.

⁴¹ Guidebook, §1.1.2.5: “Initial Evaluation”, Module 1-8 (underlining added).

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

[...]

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

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

[String review] focuses on the applied-for gTLD string to test:

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

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

2.2.1.1 String Similarity Review

This review involves a preliminary comparison of each applied-for gTLD string against existing TLDs, Reserved Names (see subsection 2.2.1.2), and other applied-for strings. The objective of this review is to prevent user confusion and loss of confidence in the DNS resulting from delegation of many similar strings.

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

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

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

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

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

2.2.1.1.1 Reviews Performed

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

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

[...]

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

[...]

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

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

[...]

2.2.1.1.2 Review Methodology

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

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

[...]

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

The panel will use a common standard to test for whether string confusion exists, as follows:

Standard for String Confusion – String confusion exists where a string so nearly resembles another visually that it is likely to deceive or cause confusion. For the likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

2.2.1.1.3 Outcomes of the String Similarity Review

An application that fails the String Similarity review due to similarity to an existing TLD will not pass the Initial Evaluation, and no further reviews will be available. Where an application does not pass the String Similarity review, the applicant will be notified as soon as the review is completed.

An application for a string that is found too similar to another applied-for gTLD string will be placed in a contention set.⁴⁴

[Underlining added]

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

4.1 String Contention

String contention occurs when either:

1. Two or more applicants for an identical gTLD string successfully complete all previous stages of the evaluation and dispute resolution processes; or
2. Two or more applicants for similar gTLD strings successfully complete all previous stages of the evaluation and dispute resolution processes, and the similarity of the strings is identified as creating a probability of user confusion if more than one of the strings is delegated.

ICANN will not approve applications for proposed gTLD strings that are identical or that would result in user confusion, called *contending strings*. If either situation above occurs, such applications will proceed to contention resolution through either community priority evaluation, in certain cases, or through an auction. Both processes are described in this module. A group of applications for contending strings is referred to as a contention set.

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

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

4.1.1 Identification of Contention Sets

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

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

[...]

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

[...]

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

[...]

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

4.1.3 Self-Resolution of String Contention

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

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

[...]

4.3 Auction: Mechanism of Last Resort

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

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

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

[Underlining added]

V. SUMMARY OF THE PARTIES' POSITIONS

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

A. Booking.com's position

(i) *The Panel's Authority*

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

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

⁴⁵ Module 5-2.

⁴⁶ Module 5-4.

⁴⁷ Reply, ¶ 3.

⁴⁸ Reply, ¶ 3.

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

(ii) Booking.com’s Claims

67. The purpose of the IRP initiated by Booking.com is, in its own words, “to challenge the ICANN Board’s handling of Booking.com’s application for the new gTLD .hotels.”⁵⁰ This includes the determination of the SSP to place .hotels and .hoteis in contention and the refusal of the Board (and its committees) to revise that determination. Elsewhere in its submissions, Booking.com makes an even broader claim; it asserts that it challenges the conduct of the ICANN Board in relation to what Booking.com refers to as the *setting up, implementation, supervision and review* of the entire of string similarity review process, and the Board’s alleged failure “to ensure due process and to respect its fundamental obligations to ensure good faith, transparency, fairness and non-discrimination” throughout.⁵¹
68. In effect, Booking.com’s specific claims can be divided into two broad categories: claims related to the string similarity review process generally; and claims related to the particular case of .hotels.
69. Booking.com professes that this case “is not about challenging a decision on the merits [i.e., the decision to place .hotels in contention]”; it is about “ICANN’s failure to respect fundamental [procedural] rights and principles in handling New gTLD applications, in particular in the context of String Similarity Review.”⁵²
70. Booking.com also repeatedly emphasizes – and this is crucial – that *it does not challenge the validity or fairness of the process as set out in the Guidebook*. Rather, as indicated, it contests “the way in which that process was established, implemented and supervised by (or under the authority of) the ICANN Board.”⁵³ Equally crucial, as will be seen, is Booking.com’s acknowledgment that *the established process was followed* in the case of the review of .hotels.

a. The string similarity review process

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

⁴⁹ Reply, ¶ 6.

⁵⁰ Reply, ¶ 7.

⁵¹ Reply, ¶ 15.

⁵² Reply, ¶ 14.

⁵³ Reply, ¶ 17.

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

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

72. Booking.com also faults ICANN for “allowing the appointed SSP to develop and perform an unfair and arbitrary review process”, specifically, by allowing the SSP “to perform the String Similarity Review (i) without any (documented) plan or methodology ... (ii) without providing any transparency regarding the evaluators or the evaluation criteria ... and (iii) without informing applicants of its reasoning ...”.⁵⁶
73. Among other things, Booking.com takes ICANN to task for establishing and posting the SSP Process Description and the SSP Manager’s Letter (see Part III.C above) only long after the string similarity review process had ended.⁵⁷
74. It also alleges that the factors identified in the SSP Manager’s Letter are “arbitrary and baseless ... not supported by any methodology capable of producing compelling and defensible conclusions ... [which] has allowed applications with at least equally serious visual string similarity concerns – such as .parts/.paris, .maif/.mail, .srt/.srl, .vote/.voto and .date/.data ... – to proceed while singling out .hotels/.hoteis.”⁵⁸ According to Booking.com: “The failure to take actual human performance into account is at odds with the standard for assessment, *i.e.*, the likelihood of confusion on the part of the average Internet user. Hence, the approach is directly contrary to ICANN’s own policy.”⁵⁹
75. Booking.com further contends that the SSP process is unfair and non-transparent due to the fact that the identity of SSP members has never been publicly disclosed.⁶⁰
76. Further, Booking.com argues that the process is unfair, non-transparent and arbitrary – and thus violates ICANN policy – for failing to provide for a “well-documented rationale” for each

⁵⁴ Reply, ¶ 20.

⁵⁵ Reply, ¶ 20.

⁵⁶ Reply, ¶ 23.

⁵⁷ Reply, ¶ 24.

⁵⁸ Reply, ¶ 25.

⁵⁹ Reply, ¶ 25.

⁶⁰ Reply, ¶ 26-27.

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

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

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

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

b. The case of .hotels

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

⁶¹ Reply, ¶ 28-29.

⁶² Reply, ¶ 30.

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

⁶⁴ Response, ¶ 30.

⁶⁵ Reply, ¶ 34.

⁶⁶ Reply, ¶ 38.

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

⁶⁸ Request, ¶ 58.

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

80. According to Booking.com, the Board should have acted to overturn the determination of the SSP either in the context of the Request for Reconsideration or under the authority accorded it by Module 5-4 of the Guidebook to “individually consider a gTLD application”.⁷⁰
81. Booking.com claims that its DIDP Request alerted the Board to the need to intervene to “correct the errors in the process” related to .hotels, and that its Request for Reconsideration of the SSP determination further informed the Board of the many errors in the SSP’s review of .hotels, “giving the Board ample opportunity to correct those errors.”⁷¹ Booking.com claims that the Board’s failure, when responding to the DIDP Request, “to offer any insight into the SSP’s reasoning”, its refusal to reconsider and overturn the SSP determination regarding .hotels on the sole ground (says Booking.com) that “the Reconsideration process ‘is not available as a mechanism to re-try the decisions of evaluation panels’”, and its failure to investigate Booking.com’s complaints of a lack of fairness and transparency in the SSP process, constitute violations of ICANN’s governing rules regarding string similarity review.⁷²
82. According to Booking.com, among the most compelling evidence of ICANN’s failure in this regard are the statements made on the record by several members of the NGPC during its 10 September 2013 meeting at which Booking.com’s Request for Reconsideration was denied.⁷³ Given the importance that the Panel attaches to these statements, they are addressed in some detail in the Analysis in Part VI, below.
83. In its written submissions Booking.com asks the Panel to grant the following relief:

Finding that ICANN breached its Articles of Incorporation, its Bylaws, and the gTLD Applicant Guidebook;

Requiring that ICANN reject the determination that .hotels and .hoteis are confusingly similar and disregard the resulting contention set;

Awarding Booking.com its costs in this proceeding; and

⁶⁹ Request, ¶ 59.

⁷⁰ Reply, ¶ 39.

⁷¹ Reply, ¶ 41.

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

⁷³ See Part II.C, above.

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

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

B. ICANN's position

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

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

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

(i) The Panel's Authority

87. Throughout its submissions ICANN repeatedly stresses what it says is the very limited authority enjoyed by IRP panels.
88. As provided in Article IV, Section 3(4) of ICANN's Bylaws, ICANN observes that this Panel (as all IRP panels) is charged only with “comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.”⁷⁶
89. ICANN notes that, in undertaking this *compare-and-declare* mission, the Panel is further constrained to apply the very specific “standard of review” set out in Bylaw Article IV, Section 3(4), which requires the Panel to focus on three particular questions: “did the Board act without conflict of interest in taking its decision?”; “did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?”; and “did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?”⁷⁷

⁷⁴ Response, ¶ 9.

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

⁷⁶ See for example Response, ¶2, ¶ 9.

⁷⁷ Response, ¶ 2.

90. ICANN further asserts that the IRP process “is not available as a mechanism to challenge the actions or inactions of ICANN staff or third parties that may be involved in ICANN activities,”⁷⁸ such as the action of the SSP which resulted in .hotels and .hoteis being placed in contention. Nor, says ICANN, may the IRP process be used as an “appeal mechanism” by which to overturn substantive decisions – such as the determination that .hotels and .hoteis are confusingly visually similar – with which an applicant may disagree.⁷⁹
91. In this regard ICANN states that the affirmative relief sought by Booking.com – specifically, a declaration requiring that ICANN “reject the determination that .hotels and .hoteis are confusingly similar and disregard the resulting contention set” and (as requested at the hearing) that ICANN “delegate both .hotels and .hoteis” – exceeds the authority of the Panel.⁸⁰

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

a. The string similarity review process

92. According to ICANN, “[e]arly on in the iterations of the Guidebook, it was determined that, in the initial evaluation stage, the String Similarity Panel would only examine strings for visual confusion;” and “[i]f applied-for strings are determined to so nearly resemble each other visually that it is likely to deceive or cause confusion, the string will be placed in a contention set, which is then resolved pursuant to the contention set resolution processes in Module 4 of the Guidebook.”⁸¹
93. According to ICANN, it was also determined early on that, as stated in Section 2.2.1.1 of the Guidebook, “[t]his similarity review will be conducted by an independent String Similarity Panel,” not by ICANN itself. ICC was duly selected to perform the string similarity review further to “an open and public request for proposals,” pursuant to which, as the successful bidder, “ICC was responsible for the development of its own process documents and methodology for performing the String Similarity Review consistent with the provisions of the Guidebook.”⁸² ICANN emphasizes that “the Guidebook does not provide for any process by which ICANN (or anyone else) may conduct a substantive review of ICC’s results.”⁸³
94. In ICANN’s submission, the alternative proposed by Booking.com, that “the ICANN Board – and the ICANN Board alone – was obligated to perform the String Similarity Review for the more than 1,900 new gTLD applications submitted,” is “untenable and is not supported by ICANN’s Bylaws or Articles.”⁸⁴ As noted by ICANN, the Guidebook defines six distinct

⁷⁸ Response, ¶ 3.

⁷⁹ Response, ¶ 49.

⁸⁰ Response, ¶ 55.

⁸¹ Response, ¶ 15 (underlining in original).

⁸² Response, ¶ 16.

⁸³ Response, ¶ 17.

⁸⁴ Sur-Reply, ¶ 7.

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

95. ICANN submits that “there simply is no requirement – under ICANN’s governing documents or imposed by law – that would mandate that the ICANN Board inject itself into the day-to-day affairs of the evaluation process in the manner Booking.com proposes.”⁸⁵ It asserts that, consistent with well-settled legal principles, “neither ICANN’s Bylaws, nor the Articles, nor the Guidebook requires the ICANN Board to conduct any analysis of the decisions of third party experts retained to evaluate string similarity.”⁸⁶
96. Moreover, ICANN asserts that “[s]imply because the ICANN Board has the discretion [under Section 5.1 (Module 5-4) of the Guidebook] to consider individual applications does not mean it is required to do so or that it should do so, particularly at an initial evaluation stage.”⁸⁷
97. ICANN claims that that Booking.com’s repeated invocation of the Board’s so-called obligation to ensure “due process” in the administration of the New gTLD Program is misplaced. First, neither applicable California law nor any provision of the Bylaws, Articles of Incorporation or Guidebook “specifically affords any gTLD applicant a right to procedural ‘due process’ similar to that which is afforded in courts of law.”⁸⁸ Second, because ICANN conducts its activities in the public interest it nevertheless provides “more opportunity for parties to be heard and to dispute actions taken”⁸⁹ than most private corporate entities. Third, the “decision to proceed with the New gTLD Program followed many years of discussion, debate and deliberation within the ICANN community, including participation from end users, civil society, technical experts, business groups, governments and others.”⁹⁰ Fourth, and perhaps most importantly, “ICANN adhered to the policies and procedures articulated in its Bylaws, Articles of Incorporation, and the Guidebook, the latter of which was adopted only after being publicly vetted with ICANN’s stakeholders and the broader Internet community.”⁹¹
98. ICANN’s response to Booking.com’s various allegations regarding particular elements of the string similarity review process – including for example the selection of the SSP, the publication of the SSP’s methodology, the anonymity of the individuals SSP members, the supposed lack of quality control – is essentially three-fold: first, the actions challenged by Booking.com are *not Board actions*, but actions of ICANN staff or third parties, which cannot

⁸⁵ Sur-Reply, ¶ 10.

⁸⁶ Sur-Reply, ¶ 10.

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

⁸⁸ Sur-Reply, ¶ 18.

⁸⁹ Sur-Reply, ¶ 18.

⁹⁰ Sur-Reply, ¶ 18, fn 18.

⁹¹ Sur-Reply, ¶ 18, fn 18.

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

b. The case of .hotels

99. ICANN's position as regards the determination to place .hotels and .hoteis in contention is similar in many respects to its position regarding the string similarity review process generally. ICANN argues that the Board played no role whatsoever in performing the review of .hotels; that the SSP's determination was in any event well supported and there was no violation of applicable rules; and that the Guidebook does not provide for any process by which ICANN (or any other body, including an IRP panel) may conduct a substantive review of a string similarity determination.
100. In any event, ICANN asserts that .hotels and .hoteis in fact meet every one of the visual similarity criteria applied by the SSP, as set out in the SSP Manager's Letter. Moreover, .hotels and .hoteis scored a stunning 99% for visual similarity under the publicly available SWORD algorithm which, as provided by Section 2.2.1.1.2 (Module 2-7) of the Guidebook, establishes "one objective measure for consideration by the [SSP]". According to ICANN (in response to a question posed by the Panel during the hearing), this was the highest algorithmic score among the comparison of all non-identical pairs within the 1917 new gTLD applications received by ICANN;⁹³ the only other pair of non-exact match strings found to be confusingly visually similar – .unicorn and .unicom – scored only 94%.⁹⁴
101. According to ICANN, "it was not clearly 'wrong,' as Booking.com argues, for the [SSP] to find that .hotels/.hoteis are confusingly similar."⁹⁵
102. In conclusion, ICANN states that its conduct with respect to Booking.com's application for .hotels, including in evaluating Booking.com's Request for Reconsideration, was fully consistent with ICANN's Articles of Incorporation, its Bylaws and the procedures established in the Guidebook; and the fact that Booking.com disagrees with the SSP's determination to put .hotels and .hoteis in a contention set does not give rise to an IRP.
103. ICANN asks the Panel to deny Booking.com's IRP Request.

VI. ANALYSIS

A. The Panel's Authority

⁹² Sur-Reply, ¶¶ 20-42.

⁹³ A number of these applications were subsequently withdrawn.

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

⁹⁵ Response, ¶¶ 53.

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

4. [The IRP Panel] shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?;*
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company [ICANN]?*

[...]

11. *The IRP Panel shall have the authority to:*

[...]

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

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

[...]

18. [...] *The IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties [...]*

[Underlining added]

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

8. Standard of Review

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

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

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

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

107. ICANN submits that its Bylaws “specify that a deferential standard of review be applied when evaluating the actions of the ICANN Board ... the rules are clear that the appointed IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.”⁹⁶ Booking.com argues that this “is simply wrong. No such specification is made in ICANN’s Bylaws or elsewhere, and a restrictive interpretation of the standard of review would ... fail to ensure accountability on the part of ICANN and would be incompatible with ICANN’s commitment to maintain (and improve) robust mechanisms for accountability.”⁹⁷
108. In the opinion of the Panel, there can be no question but that the provisions of the ICANN Bylaws establishing the Independent Review Process and defining the role of an IRP panel specify that the ICANN Board enjoys a large degree of discretion in its decisions and actions. So long as the Board acts without conflict of interest and with due care, it is entitled – indeed, required – to exercise its independent judgment in acting in what it believes to be the best interests of ICANN. The only substantive check on the conduct of the ICANN Board is that such conduct may not be inconsistent with the Articles of Incorporation or Bylaws – or, the parties agree, with the Guidebook. In that connection, the Panel notes that Article 1, Section 2 of the Bylaws also clearly states that in exercising its judgment, the Board (indeed “[a]ny ICANN body making a recommendation or decision”) shall itself “determine which core values are most relevant and how they apply to the specific circumstances of the case at hand.”
109. In other words, in making decisions the Board is required to conduct itself reasonably in what it considers to be ICANN’s best interests; where it does so, the only question is whether its actions are or are not consistent with the Articles, Bylaws and, in this case, with the policies and procedures established in the Guidebook.
110. There is also no question but that the authority of an IRP panel to compare contested actions of the Board to the Articles of Incorporation and Bylaws, and to declare whether the Board has acted consistently with the Articles and Bylaws, does not extend to opining on the nature of those instruments. Nor, in this case, does our authority extend to opining on the nature of the policies or procedures established in the Guidebook. In this regard it is recalled that Booking.com itself repeatedly stresses that it does not contest the validity or fairness of the string similarity review process as set out in the Guidebook, but merely whether ICANN’s actions were consistent with various elements of that process. Stated differently, our role in this IRP includes assessing whether the applicable rules – in this case, the rules regarding string similarity review – were followed, not whether such rules are appropriate or advisable.
111. Nevertheless, this does not mean that the IRP Panel may only review ICANN Board actions or inactions under the deferential standard advocated by ICANN in these proceedings. Rather, as explained below, the IRP Panel is charged with “objectively” determining whether

⁹⁶ Response, ¶ 24.

⁹⁷ Reply, ¶ 6.

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

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

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

[Underlining added.]

113. While on no way bound by that decision, we agree with its conclusions in this respect.
114. At the end of the day we fail to see any significant difference between the parties' positions in this regard. The process is clear, and both parties acknowledge, that the Panel is tasked with determining whether or not the Board's actions are consistent with ICANN's Articles of Incorporation, Bylaws and the Guidebook. Such a determination calls for what the panel in

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

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

115. That being said, we also agree with ICANN to the extent that, in determining the consistency of Board action with the Articles, Bylaws and Guidebook, an “IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.” In other words, it is not for the Panel to opine on whether the Board could have acted differently than it did; rather, our role is to assess whether the Board’s action was consistent with applicable rules found in the Articles, Bylaws and Guidebook. Nor, as stated, is it for us to purport to appraise the policies and procedures established by ICANN in the Guidebook (since, again, this IRP is not a challenge to those policies and procedures themselves⁹⁹), but merely to apply them to the facts.
116. With the foregoing firmly in mind, the Panel turns now to the issues to be determined in order to resolve the present dispute.

B. The String Similarity Review Process

117. The Panel is not unsympathetic to Booking.com’s complaints regarding the string similarity review process as established by the Guidebook. There is no question but that that process lacks certain elements of transparency and certain practices that are widely associated with requirements of fairness. For example, the Guidebook provides no means for applicants to provide evidence or make submissions to the SSP (or any other ICANN body) and so be fully “heard” on the substantive question of the similarity of their applied-for gTLD strings to others.
118. Indeed, as stated at the outset of this Declaration, these observations and the concerns that they engender were voiced by several members of the ICANN Board’s New gTLD Program Committee which voted to accept the BGC’s Recommendation to deny Booking.com’s Request for Reconsideration. The Panel can do no better than reproduce the statements made by the NGPC members in this respect, as recorded in the minutes of the NGPC’s 10 September 2013 meeting.¹⁰⁰

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

¹⁰⁰ Request, Annex 16.

- Mr. George Sadowski stated his intention to abstain from the vote because, although “he understood that the BGC did the right thing, [he] thought the end result that was contrary to ICANN’s ... and the user’s best interests.”
 - Ms. Olga Madruga-Forti also stated her intention to abstain from voting on the BGC recommendation “because there was not sufficient rationale provided for why the string similarity review panel made its determination.”
 - In response to a comment by the Chair that the Request for Reconsideration deserved to be denied “[b]ecause the process was followed,” Mr. Ray Plzak “agreed that the process was followed, but noted that the process needs to be reviewed to potentially add a mechanism that would allow persons who don’t agree with the outcome to make an objection, other than using a Reconsideration Request.”
 - Mr. Plzak “recommended the Committee send a strong signal to the BGC, or adopt a resolution recommending that the BGC consider development of a different mechanism to provide an avenue for the community to appeal the outcome of a decision based on the merits.”
 - Ms. Madruga-Forti agreed and “recommended that in the future, a remand or appeals mechanism may help alleviate the concerns noted.”
 - Mr. Bill Graham also agreed with Mr. Plzak’s suggestion, and noted that “generally, there is a considerable level of discomfort and dissatisfaction with the process as expressed by Committee members.”
 - The Chair “agreed with [Mr. Graham’s] sentiment.”
 - The General Counsel and Secretary noted that ICANN ... “has tried to encourage more use of the ombudsman, or other accountability mechanisms for these types of concerns.”
119. Ultimately, five members of the NGPC voted in favour of the resolution accepting the BGC’s Recommendation; two members were unavailable to vote; and four members abstained. The abstaining members offered the following voting statements:
- Mr. Plzak stated that he abstained from voting “because he is disappointed in what is being done to remedy the situation. [He] would like to see more resolve to fix the process.”
 - Ms. Madruga-Forti stated that:

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

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

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

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

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

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

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

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

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

120. These statements reflect to an important degree the Panel's own analysis.
121. The elements of the string similarity review process were established and widely published several years ago, after extensive consultation and debate among ICANN stakeholders and the Internet community. Booking.com correctly describes the process established (or "crystallized") in the Guidebook as a component of "a consensus policy" concerning the introduction of new gTLDs.¹⁰¹
122. The Guidebook makes clear that, as part of the initial evaluation to which all applied-for gTLDs are subject, each string would be reviewed for a number of factors, one of which is "string similarity", which involves a determination of "whether the applied-for gTLD string is so similar to other strings that it would create a probability of user confusion"¹⁰². The term "user" is elaborated elsewhere in the Guidebook, which speaks of confusion arising "in the mind of the average, reasonable Internet user."¹⁰³
123. The Guidebook explains that string similarity review comprises merely a "visual similarity check",¹⁰⁴ with a view to identifying only "visual string similarities that would create a probability of user confusion."¹⁰⁵
124. The Guidebook makes clear that string similarity reviews would be conducted by an independent third party – the SSP – that would have wide (though not complete) discretion both in formulating its methodology and in determining string similarity on the basis of that methodology.
125. Section 2.2.1.1.2 of the Guidebook, titled "Review Methodology", provides that the SSP "is informed in part by an algorithmic score for ... visual similarity," which "will provide one objective measure for consideration by the [SSP]." Section 2.2.1.1.2 further states that, in addition to "examin[ing] all the algorithm data," the SSP will "perform its own review of similarities between strings and whether they rise to the level of string confusion." It is noted that the objective algorithmic score is to be treated as "only indicative". Crucially, "the final determination of similarity is entirely up to the [SSP's] judgment." (Underlining added)
126. In sum, the Guidebook calls for the SSP to determine whether two strings are so "visually similar" as to create a "probability of confusion" in the mind of an "average, reasonable Internet user." In making this determination, the SSP is informed by an "algorithmic score", to ensure that the process comprises at least one "objective measure". However, the algorithmic score is not determinative. The SSP also develops and performs "its own review". At the end of the day, the determination is entirely a matter of "the [SSP's] judgment."

¹⁰¹ Request, ¶ 13.

¹⁰² Guidebook, §2.2 (Module 2-4).

¹⁰³ Guidebook, §2.2.1.1.2. (Underlining added)

¹⁰⁴ Guidebook, §2.2.1.1. (Underlining added)

¹⁰⁵ Guidebook, §2.2.1.1.1. (Underlining added)

127. By its very nature this process is highly discretionary. It is also, to an important degree, subjective. The Guidebook provides no definition of “visual similarity”, nor any indication of how such similarity is to be objectively measured other than by means of the SWORD algorithm. The Guidebook provides no definition of “confusion,” nor any definition or description of an “average, reasonable Internet user.” As Mr. Sadowski of the NGPC put it: “Confusion is a perceptual issue.” (Mr. Sadowski further noted: “String similarity is only one consideration in thinking about perceptual confusion, and in fact it is not always an issue.) The Guidebook mandates the SSP to develop and apply “its own review” of visual similarity and “whether similarities rise to the level of user confusion”, in addition to SWORD algorithm, which is intended to be merely “indicative”, yet provides no substantive guidelines in this respect.
128. Nor does the process as it exists provide for gTLD applicants to benefit from the sort of procedural mechanisms – for example, to inform the SSP’s review, to receive reasoned determinations from the SSP, or to appeal the merits of those determinations – which Booking.com claims are required under the applicable rules. Clearly, certain ICANN NGPC members themselves consider that such input would be desirable and that changes to the process are required in order for the string similarity review process to attain its true goal, which Mr. Sadowski referred to as “the minimization of user confusion and ensuring user trust in using the DNS”. However, as even the abstaining members of the NGPC conceded, the fact is that the sort of mechanisms that Booking.com asserts are required (and which those NGPC members believe should be required) are simply not part of the string similarity review process as currently established. As to whether they *should* be, it is not our place to express an opinion, though we note that such additional mechanisms surely would be consistent with the principles of transparency and fairness.
129. We add that we agree with ICANN that the time has long since passed for Booking.com or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to the establishment of the string similarity review process, including Booking.com’s claims that specific elements of the process and the Board decisions to implement those elements are inconsistent with ICANN’s Articles and Bylaws. Any such claims, even if they had any merit, are long since time-barred by the 30-day limitation period set out in Article IV, Section 3(3) of the Bylaws. As ICANN expressed during the hearing, if Booking.com believed that there were problems with the Guidebook, it should have objected at the time the Guidebook was first implemented.
130. When asked during the hearing about its failure to object timely, Booking.com argued that it could not have known how the Board’s actions – that is, how the process established in the Guidebook – would affect it prior to the submission of its application for .hotels. However, that is not a persuasive or meritorious answer. As did all stakeholders, Booking.com had the opportunity to challenge the Board’s adoption of the Guidebook, at the time, if it considered any of its elements to be inconsistent with ICANN’s Articles of Incorporation or Bylaws.

C. The Case of .hotels

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

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

132. There are two principal elements to this part of Booking.com’s case: a challenge in relation to the process followed by the SSP; and a challenge in relation to the Board’s handling of Booking.com’s Request for Reconsideration of the SSP’s determination. However, the fundamental obstacle to Booking.com’s case is that *the established process was followed in all respects*.
133. Booking.com itself acknowledges that “the process was followed” by the SSP, which determined that .hotels and .hoteis were so visually similar as to warrant being placed in a contention set. So too did all of the NGPC members who commented on the matter recognize that “the process was followed” – for all their stated misgivings concerning the outcome of the process.
134. The same is true of the Request for Reconsideration. The Panel is struck by the extent and thoughtfulness not only of the NGPC’s consideration of the issue, certain aspects of which are discussed above, but of the BGC’s detailed analysis and its Recommendation to the NGPC, on the basis of which Booking.com’s Request for Reconsideration was denied. Contrary to Booking.com’s allegations, in neither instance was this merely a blind acceptance of a decision of a subordinate body. In fact, the reconsideration process itself, however limited and perhaps imperfect it may be, is inconsistent with Booking.com’s claims of lack of “due process”.
135. Although not addressed in great detail by the parties, the Panel considers several observations made by the BGC in its 1 August 2013 Recommendation to be particularly apposite:
- *These standing requirements [for Requests for Reconsideration] are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge an action with which someone disagrees, but that it is limited to situations where the staff [for the Board] acted in contravention of established policies.*¹⁰⁶
 - *Although the String Similarity Review was performed by a third party, ICANN has determined that the Reconsideration process can properly be invoked for challenges of the third party’s decisions where it can be stated that either the vendor failed to follow its process in reaching the decision, or that ICANN staff failed to follow its process in accepting that decision.*¹⁰⁷
 - *Booking.com does not suggest that the process for String Similarity Review set out in the Applicant Guidebook was not followed, or that ICANN staff violated any established ICANN policy in accepting the [SSP] decision on placing .hotels and .hoteis in contention sets. Instead, Booking.com is supplanting what it believes the review*

¹⁰⁶ BGC Recommendation, p. 2.

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

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

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

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

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

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

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

¹⁰⁸ BGC Recommendation, p. 5.

¹⁰⁹ BGC Recommendation, p. 6.

¹¹⁰ BGC Recommendation, p. 6.

¹¹¹ BGC Recommendation, pp. 6-7.

¹¹² BGC Recommendation, p. 7.

set out in the Applicant Guidebook. ICANN then coordinates a quality assurance review over a random selection of [SSP's] reviews to gain confidence that the methodology and process were followed. That is the process used for a making and assessing a determination of visual similarity. Booking.com's disagreement as to whether the methodology should have resulted in a finding of visual similarity does not mean that ICANN (including the third party vendors performing String Similarity Review) violated any policy in reaching the decision (nor does it support a conclusion that the decision was actually wrong).¹¹³

▪ *The [SSP] reviewed all applied for strings according to the standards and methodology of the visual string similarity review set out in the Applicant Guidebook. The Guidebook clarifies that once contention sets are formed by the [SSP], ICANN will notify the applicants and will publish results on its website. (AGB, Section 2.2.1.1.1.) That the [SSP] considered its output as "advice" to ICANN (as stated in its process documentation) is not the end of the story. Whether the results are transmitted as "advice" or "outcomes" or "reports", the important query is what ICANN was expected to do with that advice once it was received. ICANN had always made clear that it would rely on the advice of its evaluators in the initial evaluation stage of the New gTLD Program, subject to quality assurance measures. Therefore, Booking.com is actually proposing a new and different process when it suggests that ICANN should perform substantive review (instead of process testing) over the results of the String Similarity Review Panel's outcomes prior to the finalization of contention sets.¹¹⁴*

▪ *As there is no indication that either the [SSP] or ICANN staff violated any established ICANN policy in reaching or accepting the decision on the placement of .hotels and .hotelis in a non-exact contention set, this Request should not proceed.¹¹⁵*

136. These excerpts of the BGC Recommendation not only illustrate the seriousness with which Booking.com's Request for Reconsideration was heard, they mirror considerations to which we fully subscribe and which we find apply as well, with equal force and effect, in the context of Booking.com's IRP Request.
137. It simply cannot be said – indeed, it is not even alleged by Booking.com – that the established process was not followed by the ICANN Board or any third party either in the initial string similarity review of .hotels or in the reconsideration process.
138. Booking.com was asked at the hearing to identify *with particularity* the ICANN Board's actions (including inactions) in this case that it claims are inconsistent with ICANN's Articles of Incorporation, Bylaws or the Guidebook and regarding which it asks the Panel to render a declaration. It identified four:
- The Board's adoption of certain provisions of the Guidebook, including the allegedly ill-defined, unfair and non-transparent procedures for selecting the SSP and supervising the SSP's performance of the string similarity review process. As discussed, any claims in this regard are time-barred.

¹¹³ BGC Recommendation, p. 7.

¹¹⁴ BGC Recommendation, p. 8.

¹¹⁵ BGC Recommendation, p. 10.

- The Board’s acceptance of the SSP determination. As ICANN argues, there was no action (or inaction) by the Board here, no decision made (or not made) by the Board or any other body to accept the SSP’s determination. The Guidebook provides that applied-for strings “will be placed in contention set” where the SSP determines the existence of visual similarity likely to give rise to user confusion. Simply put, under the Guidebook the Board is neither required nor entitled to intervene at this stage to accept or not accept the SSP’s determination. Booking.com is correct that the Board could nevertheless have stepped in and reversed the SSP determination under Section 5.1 (Module 5-4) of the Guidebook, but did not do so; that inaction is addressed below.
 - The Board’s denial of Booking.com’s Request for Reconsideration. As discussed above, there is nothing in the evidence that even remotely suggests that ICANN’s conduct in this regard was inconsistent with its Articles, Bylaws or the Guidebook. On the contrary, we have already stated that the detailed analysis performed by the BGC and the extensive consideration of the BGC Recommendation by the NGCP undermine any claim that ICANN failed to exercise due care and independent judgment, or that its handling of the Request for Reconsideration was inconsistent with applicable rules or policy. As discussed above, just as in the present IRP, the question in the reconsideration process is whether the established process was followed. This was the question that the BGC and NGPC asked themselves in considering Booking.com’s Request for Reconsideration, and which they properly answered in the affirmative in denying Booking.com’s request.
 - The Board’s refusal to “step in” and exercise its authority under Section 5.1 (Module 5-4) of the Guidebook to “individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community.” As pointed out by ICANN during the hearing, the fact that the ICANN Board enjoys such discretion and may choose to exercise it any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by Booking.com. In any case, the Panel does not believe that the Board’s inaction in this respect was inconsistent with ICANN’s Articles of Incorporation or Bylaws or indeed with ICANN’s guiding principles of transparency and fairness, given (1) Booking.com’s concession that the string similarity review process was followed; (2) the indisputable conclusion that any challenge to the adoption of the SSP process itself is time-barred; (3) the manifestly thoughtful consideration given to Booking.com’s Request for Reconsideration by the BGC; and (4), the fact that, notwithstanding its protestations to the contrary, Booking.com’s real dispute seems to be with the process itself rather than how the process was applied in this case (given that, as noted, Booking.com concedes that the process was indeed followed).
139. The Panel further considers that these – in addition to any and all other potential (and allegedly reviewable) actions identified by Booking.com during the course of these proceedings – fail on the basis of Booking.com’s dual acknowledgement that it does not challenge the validity or fairness of the string similarity review process, and that that process was duly followed in this case.

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

D. Conclusion

141. In launching this IRP, Booking.com no doubt realized that it faced an uphill battle. The very limited nature of IRP proceedings is such that any IRP applicant will face significant obstacles in establishing that the ICANN Board acted inconsistently with ICANN’s Articles of Incorporation or Bylaws. In fact, Booking.com acknowledges those obstacles, albeit inconsistently and at times indirectly.
142. Booking.com purports to challenge “the way in which the [string similarity review] process was established, implemented and supervised by (or under the authority of) the ICANN Board”; yet it also claims that it *does not challenge the validity or fairness of the string similarity review process as set out in the Guidebook*. It asks the Panel to overturn the SSP’s determination in this case and to substitute an alternate result, in part on the basis of its own “expert evidence” regarding similarity and the probability of user confusion as between .hotels and .hoteis; yet it claims that it *does not challenge the merits of the SSP determination and it acknowledges that the process set out in the Guidebook was duly followed* in the case of its application for .hotels.
143. In sum, Booking.com has failed to overcome the very obstacles that it recognizes exist.
144. The Panel finds that Booking.com has failed to identify any instance of Board action or inaction, including any action or inaction of ICANN staff or a third party (such as ICC, acting as the SSP), that could be considered to be inconsistent with ICANN’s Articles of Incorporation or Bylaws or with the policies and procedures established in the Guidebook. This includes the challenged actions of the Board (or any staff or third party) in relation to what Booking.com calls the implementation and supervision of the string similarity review process generally, as well as the challenged actions of the Board (or any staff or third party) in relation to the string similarity review of .hotels in particular.
145. More particularly, the Panel finds that the string similarity review performed in the case of .hotels was not inconsistent with the Articles or Bylaws or with what Booking.com refers to as the “applicable rules” as set out in the Guidebook.
146. To the extent that the Board’s adoption and implementation of specific elements of the new gTLD Program and Guidebook, including the string similarity review process, could

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

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

VII. THE PREVAILING PARTY; COSTS

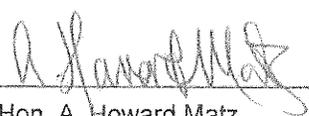
148. Article IV, Section 3(18) of the Bylaws requires that the Panel "specifically designate the prevailing party." This designation is germane to the allocation of costs, given that Article IV, Section 3(18) provides that the "party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider."
149. The same provision of the Bylaws also states that "in an extraordinary case the IRP Panel may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses."
150. Similarly, the Supplementary Procedures state, at Article 11:
- The IRP PANEL shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.*
- In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the requestor is not successful in the Independent Review, the IRP PANEL must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.*
151. The "IRP Provider" is the ICDR, and, in accordance with the ICDR Rules, the costs to be allocated between the parties – what the Bylaws call the "costs of the IRP Provider", and the Supplementary Procedures call the "costs of the proceedings" – include the fees and expenses of the Panel members and of the ICDR (we refer to all of these costs as "**IRP costs**").
152. ICANN is undoubtedly the prevailing party in this case. That being said, the Panel considers that the nature and significance of the issues raised by Booking.com, and the contribution to the "public interest" of its submissions, are such that it is appropriate and reasonable that the IRP costs be shared equally by the parties. We consider that the extraordinary circumstances of case – in which some members of ICANN's New gTLD Program Committee have publicly declared that, in their view, the rules on the basis of which Booking.com's claims fail should be reconsidered by ICANN – warrants such a holding.
153. The Panel cannot grant Booking.com the relief that it seeks. A panel such as ours can only declare whether, on the facts as we find them, the challenged actions of ICANN are

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

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

FOR THE FOREGOING REASONS, the Panel hereby declares:

- (1) Booking.com's IRP Request is denied;
- (2) ICANN is the prevailing party;
- (3) In view of the circumstances, each party shall bear one-half of the costs of the IRP Provider, including the fees and expenses of the Panel members and the fees and expenses of the ICDR. As a result, the administrative fees and expenses of the ICDR, totaling US\$4,600.00, as well as the compensation and expenses of the Panelists totaling US\$163,010.05 are to be borne equally. Therefore, ICANN shall pay to Booking.com the amount of US\$2,300.00 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Booking.com
- (4) This Final Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Final Declaration of this IRP Panel.



Hon. A. Howard Matz

Date: March 2, 2015

David H. Bernstein

Date:

Stephen L. Drymer,
Chair of the IRP Panel

Date:

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

March 2, 2015
Date


Hon. A. Howard Matz

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March 2, 2015
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Date

Stephen L. Drymer

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Hon. A. Howard Matz

Date:

David H. Bernstein

Date:



Stephen L. Drymer,
Chair of the IRP Panel

Date: 3 March 2015

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

Date

Hon. A. Howard Matz

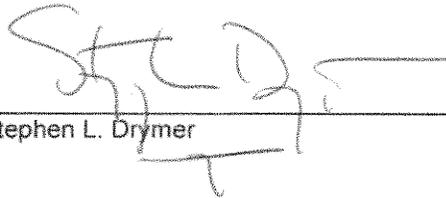
I, David H, Bernstein, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is the Final Declaration of the IRP Panel.

Date

David H, Bernstein

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

3 March 2015
Date



Stephen L. Drymer

Reference Material 37.

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)

Independent Review Panel

IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS

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

Gulf Cooperation Council ("GCC"))

Gulf Cooperation Council Building)
Contact Information Redacted)

(Claimant))

Represented by Natasha Kohne and Kamran)
Salour of Akin Gump Strauss Hauer & Feld,)
Contact Information Redacted)

And)

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

12055 Waterfront Drive, Suite 300)
Los Angeles, CA 90094-2)

(Respondent))

Represented by Eric Enson, Rachel Zernik, and)
Jeffrey LeVee of Jones Day, ^{Contact Information Redacted})
Contact Information Redacted)

ICDR Case No. 01-14-0002-1065

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

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

I. INTRODUCTION

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

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

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

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

II. BACKGROUND FACTS

a. The Parties

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

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

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

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

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

c. ICANN's Structure and the New gTLD Program

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

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

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

public policy issues falling within their responsibilities.

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

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

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

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

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

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

22. ICANN has in its Response carefully reviewed the application process for .PERSIANGULF to illustrate that ICANN has at all times acted consistently with ICANN's Articles, By-Laws and the Guidebook in considering the Asia Green application and the objections of the GCC before allowing the application to proceed. In light of the position taken by ICANN on the merits of the IRP and this Request for Interim measures, it is appropriate to briefly set out the Guidebook procedures for the .PERSIANGULF application and the chronology of the steps taken by the GCC in opposition to it.
23. **The Guidebook Procedures.** The Guidebook, at 339 pages in length, sets out comprehensive procedures to which a domain application is subjected, procedures relied upon by ICANN in its opposition to the request for interim measures. Following the submission of a completed application with the requisite deposits and evaluation fees and an initial administrative review for completeness, the application is publicly posted on the ICANN website for community review and comment which may be taken into account by ICANN in determining whether an application meets the required criteria for delegation. (Exhibit R-ER-3, Guidebook 1.1.2.1 and 2). Thereafter a number of objection procedures may be triggered including:
- a. An Early Warning Notice which is a notice issued by the GAC indicating that the application is seen as potentially sensitive or problematic by one or more governments, though such a warning is not a formal objection and is not fatal to an application;
 - b. A Consensus GAC Advice in which the GAC provides public policy advice to the ICANN Board based on a consensus amongst GAC members that a particular application should not proceed. While also not fatal, such GAC Advice creates a "strong presumption" for the Board that the application should not proceed. Absent a GAC consensus, there is no such presumption. (Guidebook, Articles 1.2.2.7 and Module 3, Section 3.1).
 - c. A formal Objection may be filed initiating an independent dispute process leading to an expert determination on the validity of the objection based on specified and limited grounds, one being the Community Objection where there is substantial opposition to an application from a significant portion of the community to which

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

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

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

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

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

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

28. GCC's Community Objection. On 13 March 2013, the GCC filed a Community Objection to the .PERSIANGULF application. The International Chamber of Commerce ("ICC") was designated as the dispute service provider under the Guidebook and it appointed Judge Stephen Schwebel, a noted American international jurist, to serve as the Expert Panellist to hear and determine this Community Objection.(Claimant Submission, Annex 2, Expert Determination, para. 2.)

29. GAC Advice under the Guidebook for Pending Applications and GCC Objections. As contemplated by the Bylaws, the Guidebook established a framework for the GAC to provide advice to the ICANN Board regarding pending gTLD applications. This is in addition to the general GAC advice provided in 2007 regarding the content of the Guidebook, as referred to in para. 17 above. Under Sections 1.1.2.7 and 3.1 of the Guidebook, any GAC member may raise concerns or sensitivities about any application with the GAC which must then consider and agree on advice to be forwarded to the ICANN Board for its consideration. Members of the Claimant raised the .PERSIANGULF application, amongst others, with the GAC and voiced objections at various meetings. The following GAC meetings and advice have been relied upon.

30. At the April 11, 2013 Beijing meeting, the GAC provided advice to the ICANN Board in respect of a number of gTLD applications. Some advice was on a consensus basis, thereby creating a presumption that the subject applications should not be approved. Other advice was on a non-consensus basis. With respect to a number of geographically based strings, including .PERSIANGULF, the GAC determined that further consideration was warranted and therefore advised ICANN simply not to proceed beyond Initial Evaluation in respect of that string (Claimant ER Request, para 13, Annex 13, GAC Beijing Communique, p 3).

31. In June 2013, the ICANN Board, acting through its New gTLD Program Committee (the "NGPC"), considered and accepted the advice of the GAC with respect to the .PERSIANGULF application, which advice was conveyed through the GAC Beijing Communique relied upon by the NGPC as being the official advice of the GAC. The NGPC decision, and rationale therefore, are set out in a resolution of the NGPC (ICANN Response,

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

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

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

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

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

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

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

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

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

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

37. October 2013 to December 2014: Contact between GCC and ICANN Leading to the Notice of Independent Review. ICANN asserted in its Response that the GCC was conspicuously silent for over one year following the NGPC Resolution and Scorecard before filing the Request for Independent Review. ICANN relied on that period of delay as the bases for resisting the application. In its Reply, the GCC has endeavoured to provide an explanation and response to that position with additional evidence in the Witness Statement of Mr. Al Marzouqi on the continued dealings between the GCC and ICANN over the continued opposition of the GCC to the delegation. Following the September 2013 posting of the NGPC Resolution and Scorecard, Mr. Al Marzouqi apparently reached out to ICANN representatives. However, any efforts to resolve the matter were by agreement postponed until after the delivery of the Expert Determination since that Determination may have affected those efforts. After the October release of the Expert Determination, further discussions were apparently had without success, though the evidence of Mr. Al Marzouqi is vague on the details of these discussions.

38. The evidence of Mr. Al Marzouqi is however clear on a significant meeting held between ICANN and the GCC. It cannot be disputed that in June 2014, a meeting was arranged and held during the GCC Telecom Council Ministers Meeting in Kuwait City with the most senior representatives of ICANN, the CEO Fadi Chehade, and senior representatives of the GCC. According to the evidence of Mr. Al Marzouqi, the GCC representatives restated their concerns and objections regarding the application at that meeting. Following the meeting, these concerns were then confirmed in writing by letter dated 9 July 2014 from Mohammed Al Ghanim, Director General of the Telecommunication Regulatory Authority to the CEO of ICANN, Mr. Chehade (Letter Exhibit to the Witness Statement of Mr. Al Marzouqi). It has

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. ISSUE FOR DETERMINATION ON THE INTERIM DECLARATION

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

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

V. DISCUSSION, ANALYSIS AND REASONS FOR INTERIM DECLARATION

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

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

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

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

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

a. Urgency or Irreparable Harm

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

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

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

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

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

b. Necessity or the Balancing of Harm

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

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

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

c. Protection of an Existing Right

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

e. Other Considerations for Interim Measures

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

VI. Conclusion and Interim Declaration`

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

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

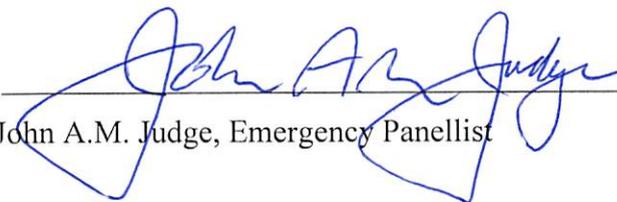
98. As for ICANN’s position, the letter of February 11 also set out ICANN’s position, quoting a letter between counsel that the placement of the application on hold had no bearing on this request for interim measures or on other accountability mechanisms already invoked. On 12 February 2015, ICANN also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

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

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

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

Dated 12 February 2015.


John A.M. Judge, Emergency Panellist

Reference Material 38.

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
Independent Review Panel**

CASE # 50 2013 001083

DECLARATION ON THE IRP PROCEDURE

In the matter of an Independent Review Process (IRP) pursuant to the Internet Corporation for Assigned Names and Number's (ICANN's) Bylaws, the *International Dispute Resolution Procedures (ICDR Rules)* of the International Centre for Dispute Resolution (ICDR), and the *Supplementary Procedures for ICANN Independent Review Process*

Between: DotConnectAfrica Trust;
("Claimant" or "DCA Trust")

Represented by Mr. Arif H. Ali, Ms. Marguerite Walter and Ms. Erica Franzetti of Weil, Gotshal, Manges, LLP located at 1300 Eye Street, NW, Suite 900, Washington, DC 20005, U.S.A.

And

Internet Corporation for Assigned Names and Numbers (ICANN);
("Respondent" or "ICANN")

Represented by Mr. Jeffrey A. LeVee of Jones Day, LLP located at 555 South Flower Street, Fiftieth Floor, Los Angeles, CA 90071, U.S.A.

Claimant and Respondent will together be referred to as "Parties".

IRP Panel:
Babak Barin, *Chair*
Prof. Catherine Kessedjian
Hon. Richard C. Neal (Ret.)

I. BACKGROUND

- 1) DCA Trust is a non-profit organization established under the laws of the Republic of Mauritius on 15 July 2010 with its registry operation – DCA Registry Services (Kenya) Limited – as its principal place of business in Nairobi, Kenya. DCA Trust was formed with the charitable purpose of, among other things, advancing information technology education in Africa and providing a continental Internet domain name to provide access to internet services for the people of Africa and for the public good.
- 2) In March 2012, DCA Trust applied to ICANN for the delegation of the .AFRICA top-level domain name in its 2012 General Top-Level Domains (“gTLD”) Internet Expansion Program (the “New gTLD Program”), an internet resource available for delegation under that program.
- 3) ICANN is a non-profit corporation established under the laws of the State of California, U.S.A., on 30 September 1998 and headquartered in Marina del Rey, California. According to its Articles of Incorporation, ICANN was established for the benefit of the Internet community as a whole and is tasked with carrying out its activities in conformity with relevant principles of international law, international conventions, and local law.
- 4) On 4 June 2013, the ICANN Board New gTLD Program Committee (“NGPC”) posted a notice that it had decided not to accept DCA Trust’s application.
- 5) On 19 June 2013, DCA Trust filed a request for reconsideration by the ICANN Board Governance Committee (“BGC”), which denied the request on 1 August 2013.
- 6) On 19 August 2013, DCA Trust informed ICANN of its intention to seek relief before an Independent Review Panel under ICANN’s Bylaws. Between August and October 2013, DCA Trust and ICANN participated in a Cooperative Engagement Process (“CEP”) to try and resolve the issues relating to DCA Trust’s application. Despite several meetings, no resolution was reached.
- 7) On 24 October 2013, DCA Trust filed a Notice of Independent Review Process with the ICDR in accordance with Article IV, Section 3, of ICANN’s Bylaws.

II. SUMMARY OF THE PARTIES’ POSITIONS ON THE MERITS

- 8) According to DCA Trust, the central dispute between it and ICANN in the Independent Review Process (“IRP”) invoked by DCA Trust in October 2013 and described in its Amended Notice of Independent Review Process submitted to ICANN on 10 January 2014 arises out of:

“(1) ICANN’s breaches of its Articles of Incorporation, Bylaws, international and local law, and other applicable rules in the administration of applications for the .AFRICA top-level domain name in its 2012 General Top-Level Domains (“gTLD”) Internet Expansion Program (the “New gTLD Program”); and (2) ICANN’s wrongful decision that DCA’s application for .AFRICA should not proceed [...]”¹

- 9) According to DCA Trust, “ICANN’s administration of the New gTLD Program and its decision on DCA’s application were unfair, discriminatory, and lacked appropriate due diligence and care, in breach of ICANN’s Articles of Incorporation and Bylaws.”² DCA Trust also advanced that “ICANN’s violations materially affected DCA’s right to have its application processed in accordance with the rules and procedures laid out by ICANN for the New gTLD Program.”³
- 10) In its 10 February 2014 [sic]⁴ Response to DCA Trust’s Amended Notice, ICANN submitted that in these proceedings, “DCA challenges the 4 June 2013 decision of the ICANN Board New gTLD Program Committee (“NGPC”), which has delegated authority from the ICANN Board to make decisions regarding the New gTLD. In that decision, the NGPC unanimously accepted advice from ICANN’s Governmental Advisory Committee (“GAC”) that DCA’s application for .AFRICA should not proceed. DCA argues that the NGPC should not have accepted the GAC’s advice. DCA also argues that ICANN’s subsequent decision to reject DCA’s Request for Reconsideration was improper.”⁵
- 11) ICANN argued that the challenged decisions of ICANN’s Board “were well within the Board’s discretion” and the Board “did exactly what it was supposed to do under its Bylaws, its Articles of Incorporation, and the Applicant Guidebook (“Guidebook”) that the Board adopted for implementing the New gTLD Program.”⁶
- 12) Specifically, ICANN also advanced that “ICANN properly investigated and rejected DCA’s assertion that two of ICANN’s Board members had conflicts of interest with regard to the .AFRICA applications, [...] numerous African countries issued “warnings” to ICANN regarding DCA’s application, a signal from those governments that they had serious concerns regarding DCA’s application; following the issuance of those warnings, the GAC issued “consensus advice” against DCA’s application; ICANN then accepted the GAC’s advice, which was entirely consistent with ICANN’s Bylaws and the

¹ Claimant’s Amended Notice of Independent Review Process, *para.* 2.

² *Ibid.*

³ *Ibid.*

⁴ ICANN’s Response to Claimant’s Amended Notice contains a typographical error; it is dated “February 10, 2013” rather than 2014.

⁵ ICANN’s Response to Claimant’s Amended Notice, *para.* 4. Underlining is from the original text.

⁶ *Ibid.*, *para.* 5.

Guidebook; [and] ICANN properly denied DCA's Request for Reconsideration."⁷

13) In short, ICANN argued that in these proceedings, "the evidence establishes that the process worked exactly as it was supposed to work."⁸

14) In the merits part of these proceedings, the Panel will decide the above and other related issues raised by the Parties in their submissions.

III. PROCEDURAL BACKGROUND LEADING TO THIS DECISION

15) On 24 April 2013, 12 May, 27 May and 4 June 2014 respectively, the Panel issued a Procedural Order No. 1, a Decision on Interim Measures of Protection, a list of questions for the Parties to brief in their 20 May 2014 memorials on the procedural and substantive issues identified in Procedural Order No. 1 ("12 May List of Questions"), a Procedural Order No. 2 and a Decision on ICANN's Request for Partial Reconsideration of certain portions of its Decision on Interim Measures of Protection. The Decision on Interim Measures of Protection and the Decision on ICANN's Request for Partial Reconsideration of certain portions of the Decision on Interim Measures of Protection have no bearing on this Declaration. Consequently, they do not require any particular consideration by the Panel in this Declaration.

16) In Procedural Order No. 1 and the 12 May List of Questions, based on the Parties' submissions, the Panel identified a number of questions relating to the future conduct of these proceedings, including the method of hearing of the merits of DCA Trust's amended Notice of Independent Review Process that required further briefing by the Parties. In Procedural Order No. 1, the Panel identified some of these issues as follows:

B. Future conduct of the IRP proceedings, including the hearing of the merits of Claimant's Amended Notice of Independent Review Process, if required.

Issues:

- a) Interpretation of the provisions of ICANN's Bylaws, the *International Dispute Resolution Procedures* of the ICDR, and the *Supplementary Procedures for ICANN Independent Review Process* (together the "IRP Procedure"), including whether or not there should be *viva voce* testimony permitted.
- b) Document request and exchange.
- c) Additional filings, including any memoranda and hearing exhibits (if needed and appropriate).

⁷ *Ibid.*

⁸ ICANN's Response to Claimant's Amended Notice, *para.* 6. Underlining is from the original text.

- d) Consideration of method of hearing of the Parties, i.e., telephone, video or in-person and determination of a location for such a hearing, if necessary or appropriate, and consideration of any administrative issues relating to the hearing.

17) In that same Order, in light of: (a) the exceptional circumstances of this case; (b) the fact that some of the questions raised by the Parties implicated important issues of fairness, due process and equal treatment of the parties (“Outstanding Procedural Issues”); and (c) certain *primaie impressionis* or first impression issues that arose in relation to the IRP Procedure, the Panel requested the Parties to file two rounds of written memorials, including one that followed the 12 May List of Questions.

18) On 5 and 20 May 2014, the Parties filed their submissions with supporting material for consideration by the Panel.

IV. ISSUES TO BE DECIDED BY THE PANEL

19) Having read the Parties’ submissions and supporting material, and listened to their respective arguments by telephone, the Panel answers the following questions in this Declaration:

- 1) Does the Panel have the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings?
- 2) If so, what directions does the Panel give the Parties with respect to the Outstanding Procedural Issues?
- 3) Is the Panel's decision concerning the IRP Procedure and its future Declaration on the Merits in this proceeding binding?

Summary of the Panel’s findings

20) The Panel is of the view that it has the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings and consequently, it issues the procedural directions set out in paragraphs 58 to 61, 68 to 71 and 82 to 87 (below), which directions may be supplemented in a future procedural order. The Panel also concludes that this Declaration and its future Declaration on the Merits of this case are binding on the Parties.

V. ANALYSIS OF THE ISSUES AND REASONS FOR THE DECISION

1) Can the Panel interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings?

Interpretation and Future Conduct of the IRP Proceedings

DCA Trusts' Submissions

21) In its 5 May 2014 Submission on Procedural Issues ("DCA Trust First Memorial"), DCA Trust submitted, *inter alia*, that:

"[Under] California law and applicable federal law, this IRP qualifies as an arbitration. It has all the characteristics that California courts look to in order to determine whether a proceeding is an arbitration: 1) a third-party decision-maker; 2) a decision-maker selected by the parties; 3) a mechanism for assuring the neutrality of the decision-maker; 4) an opportunity for both parties to be heard; and 5) a binding decision[...]. Thus, the mere fact that ICANN has labeled this proceeding an independent review process rather than an arbitration (and the adjudicator of the dispute is called a Panel rather than a Tribunal) does not change the fact that the IRP – insofar as its procedural framework and the legal effects of its outcome are concerned – is an arbitration."⁹

22) According to DCA Trust, the IRP Panel is a neutral body appointed by the parties and the ICDR to hear disputes involving ICANN. Therefore, it "qualifies as a third-party decision-maker for the purposes of defining the IRP as an arbitration."¹⁰ DCA Trust submits that, "ICANN's Bylaws contain its standing offer to arbitrate, through the IRP administered by the ICDR, disputes concerning Board actions alleged to be inconsistent with the Articles of Incorporation or the Bylaws."¹¹

23) DCA Trust submits that, it "accepted ICANN's standing offer to arbitrate by submitting its Notice of Independent Review [...] to the ICDR on 24 October 2013 [...] when the two party-appointed panelists were unable to agree on a chairperson, the ICDR made the appointment pursuant to Article 6 of the ICDR Rules, amended and effective 1 June 2009. The Parties thus chose to submit their dispute to the IRP Panel for resolution, as with any other arbitration."¹²

24) According to DCA Trust, "the Supplementary Procedures provide that the IRP is to be comprised of 'neutral' [individuals] and provide that the panel shall be comprised of members of a standing IRP Panel or as selected by the

⁹ DCA Trust First Memorial, *para.* 4 and 5.

¹⁰ *Ibid*, *para.* 8.

¹¹ *Ibid*, *para.* 9.

¹² *Ibid*.

parties under the ICDR Rules. The ICDR Rules [...] provide that panelists serving under the rules, ‘shall be impartial and independent’, and require them to disclose any circumstances giving rise to ‘justifiable doubts’ as to their impartiality and independence [...] The IRP therefore contains a mechanism for ensuring the neutrality of the decision-maker, just like any other arbitration.”¹³

25) DCA Trust further submitted that the “IRP affords both parties an opportunity to be heard, both in writing and orally” and the “governing instruments of the IRP – *i.e.*, the Bylaws, the ICDR Rules, and the Supplementary Procedures – confirm that the IRP is final and binding.” According to DCA Trust, the “IRP is the final accountability and review mechanism available to the parties materially affected by ICANN Board decisions. The IRP is also the only ICANN accountability mechanism conducted by an independent third-party decision-maker with the power to render a decision resolving the dispute and naming a prevailing party [...] The IRP represents a fundamentally different stage of review from those that precede it. Unlike reconsideration or cooperative engagement, the IRP is conducted pursuant to a set of independently developed international arbitration rules (as minimally modified) and administered by a provider of international arbitration services, not ICANN itself.”¹⁴

26) As explained in its 20 May 2014 Response to the Panel’s Questions on Procedural Issues (“DCA Trust Second Memorial”), according to DCA Trust, “the IRP is the ***sole forum*** in which an applicant for a new gTLD can seek independent, third-party review of Board actions. Remarkably, ICANN makes no reciprocal waivers and instead retains all of its rights against applicants in law and equity. ICANN cannot be correct that the IRP is a mere ‘corporate accountability mechanism’. Such a result would make ICANN – the caretaker of an immensely important (and valuable) global resource – effectively judgment-proof.”¹⁵

27) Finally DCA Trust submitted that:

“[It] is [...] critical to understand that ICANN created the IRP as an alternative to allowing disputes to be resolved by courts. By submitting its application for a gTLD, DCA agreed to eight pages of terms and conditions, including a nearly page-long string of waivers and releases. Among those conditions was the waiver of all of its rights to challenge ICANN’s decision on DCA’s application in court. For DCA and other gTLD applicants, the IRP is their only recourse; no other legal remedy is available. The very design of this process is evidence that the IRP is fundamentally unlike the forms of

¹³ *Ibid*, paras. 10, 11 and 12.

¹⁴ *Ibid*, paras. 13, 16, 21 and 23.

¹⁵ DCA Trust Second Memorial, *para.* 6. Bold and italics are from the original text.

administrative review that precede it and is meant to provide a final and binding resolution of disputes between ICANN and persons affected by its decisions.”¹⁶

ICANN’s Submissions

28) In response, in its first memorial entitled ICANN’s Memorandum Regarding Procedural Issues filed on 5 May 2014 (“ICANN First Memorial”), ICANN argued, *inter alia*, that:

“[This] proceeding is *not* an arbitration. Rather, an IRP is a truly unique ‘Independent Review’ process established in ICANN’s Bylaws with the specific purpose of providing for ‘independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws’. Although ICANN is using the International Center [sic] for Dispute Resolution (‘ICDR’) to administer these proceedings, nothing in the Bylaws can be construed as converting these proceedings into an ‘arbitration’, and the Bylaws make clear that these proceedings are not to be deemed as the equivalent of an ‘international arbitration.’ Indeed, the word ‘arbitration’ does not appear in the relevant portion of the Bylaws, and as discussed below, the ICANN Board retains full authority to accept or reject the declaration of all IRP Panels [...] ICANN’s Board had the authority to, and did, adopt Bylaws establishing internal accountability mechanisms and defining the scope and form of those mechanisms. Cal. Corp. Code § 5150(a) (authorizing the board of a non-profit public benefit corporation to adopt and amend the corporation’s bylaws).”¹⁷

29) In its 20 May 2014 Further Memorandum Regarding Procedural Issues (“ICANN Second Memorial”), ICANN submitted that many of the questions that the Panel posed “are outside the scope of this Independent Review Proceeding [...] and the Panel’s mandate.”¹⁸ According to ICANN:

“The Panel’s mandate is set forth in ICANN’s Bylaws, which limit the Panel to ‘comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and [...] declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.’”¹⁹

The Panel’s Decision on its power to interpret and determine the IRP Procedure

(i) Mission and Core Values of ICANN

30) ICANN is not an ordinary California non-profit organization. Rather, ICANN has a large international purpose and responsibility, to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular, to ensure the stable and secure operation of the Internet’s unique identifier systems.

¹⁶ DCA Trust First Memorial, *para.* 22.

¹⁷ ICANN First Memorial, *paras.* 10 and 11. Bold and italics are from the original text.

¹⁸ ICANN Second Memorial, *para.* 2.

¹⁹ *Ibid.*

31) ICANN coordinates the allocation and assignment of the three sets of unique identifiers for the Internet. ICANN's special and important mission is reflected in the following provisions of its Articles of Incorporation:

3. This Corporation is a [non-profit] public benefit corporation and is not organized for the private gain of any person. It is organized under the California [Non-profit] Public Benefit Corporation Law for charitable and public purposes. The Corporation is *organized, and will be operated, exclusively for charitable, educational, and scientific purposes ...* In furtherance of the foregoing purposes, and in *recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization*, the Corporation shall, except as limited by Article 5 hereof, *pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet* by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).

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

32) In carrying out its mission, ICANN must be accountable to the global internet community for operating in a manner that is consistent with its Bylaws, and with due regard for its core values.

33) In performing its mission, among others, the following core values must guide the decisions and actions of ICANN: preserve and enhance the operational stability, security and global interoperability of the internet, employ open and transparent policy development mechanisms, make decisions by applying documented policies neutrally and objectively, with integrity and fairness and remain accountable to the internet community through mechanisms that enhance ICANN's effectiveness.

34) The core values of ICANN as described in its Bylaws are deliberately expressed in general terms, so as to provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each situation will necessarily depend on many factors that cannot be fully anticipated or enumerated.

(ii) Accountability of ICANN

35) Consistent with its large and important international responsibilities, ICANN's Bylaws acknowledge a responsibility to the community and a need for a means of holding ICANN accountable for compliance with its mission and "core values." Thus, Article IV of ICANN's Bylaws, entitled "Accountability and Review," states:

"In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws."

36) ICANN's Bylaws establish three accountability mechanisms: the Independent Review Process and two other avenues: Reconsideration Requests and the Ombudsman.

37) ICANN's BGC is the body designated to review and consider Reconsideration Requests. The Committee is empowered to make final decisions on certain matters, and recommendations to the Board of Directors on others. ICANN's Bylaws expressly provide that the Board of Directors "*shall not be bound to follow the recommendations of the BGC.*"

38) ICANN's Bylaws provide that the "charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Reconsideration Policy [...] or the Independent Review Policy have not been invoked." The Ombudsman's powers appear to be limited to "clarifying issues" and "using conflict resolution tools such as negotiation, facilitation, and 'shuttle diplomacy'." The Ombudsman is specifically barred from "instituting, joining, or supporting in any way any legal actions challenging ICANN's structure, procedures, processes, or any conduct by the ICANN Board, staff, or constituent bodies."

39) The avenues of accountability for applicants that have disputes with ICANN do *not* include resort to the courts. Applications for gTLD delegations are governed by ICANN's Guidebook, which provides that applicants waive all right to resort to the courts:

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

OF ANY OTHER LEGAL CLAIM AGAINST ICANN ON THE BASIS OF ANY OTHER LEGAL CLAIM.”²⁰

40) Thus, assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, the ultimate “accountability” remedy for applicants is the IRP.

(iii) IRP Procedures

41) The Bylaws of ICANN as amended on 11 April 2013, in Article IV (Accountability and Review), Section 3 (Independent Review of Board Actions), paragraph 1, require ICANN to put in place, in addition to the reconsideration process identified in Section 2, a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with ICANN’s Articles of Incorporation or Bylaws.

42) Paragraphs 7 and 8 of Section 2 of the Bylaws, require all IRP proceedings to be administered by an international dispute resolution provider appointed by ICANN, and for that IRP Provider (“IRPP”) to, with the approval of the ICANN’s Board, establish operating rules and procedures, which shall implement and be consistent with Section 3.

43) In accordance with the above provisions, ICANN selected the ICDR, the international division of the American Arbitration Association, to be the IRPP.

44) With the input of the ICDR, ICANN prepared a set of Supplementary Procedures for ICANN IRP (“Supplementary Procedures”), to “supplement the [ICDR’s] International Arbitration Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws.”

45) According to the Definitions part of the Supplementary Procedures, “Independent Review or IRP” refers to “the procedure that takes place upon filing of a request to review ICANN Board actions or inactions alleged to be inconsistent with ICANN’s Bylaws or Articles of Incorporation”, and “International Dispute Resolution Procedures or Rules” refers to the ICDR’s International Arbitration Rules (“ICDR Rules”) that will govern the process in combination with the Supplementary Rules.

46) The Preamble of the Supplementary Rules indicates that these “procedures supplement the [ICDR] Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws” and Article

²⁰ Applicant Guidebook, Terms and Conditions for Top Level Domain Applications, *para.* 6. Capital letters are from the original text.

2 of the Supplementary Procedures requires the ICDR to apply the Supplementary Procedures, *in addition* to the ICDR Rules, in all cases submitted to it in connection with Article IV, Section 3(4) of ICANN's Bylaws. In the event there is any inconsistency between the Supplementary Procedures and the ICDR Rules, ICANN requires the Supplementary Procedures to govern.

- 47)The online Oxford English Dictionary defines the word “supplement” as “a thing added to something else in order to complete or enhance it”. Supplement, therefore, means to complete, add to, extend or supply a deficiency. In this case, according to ICANN’s desire, the Supplementary Rules were designed to “add to” the ICDR Rules.
- 48)A key provision of the ICDR Rules, Article 16, under the heading “Conduct of Arbitration” confers upon the Panel the power to “conduct [proceedings] in whatever manner [the Panel] considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.”
- 49)Another key provision, Article 36 of the ICDR Rules, directs the Panel to “interpret and apply these Rules insofar as they relate to its powers and duties”. Like in all other ICDR proceedings, the details of exercise of such powers are left to the discretion of the Panel itself.
- 50)Nothing in the Supplementary Procedures either expressly or implicitly conflicts with or overrides the general and broad powers that Articles 16 and 36 of the ICDR Rules confer upon the Panel to interpret and determine the manner in which the IRP proceedings are to be conducted and to assure that each party is given a fair opportunity to present its case.
- 51)To the contrary, the Panel finds support in the “Independent Review Process Recommendations” filed by ICANN, which indicates that the Panel has the *discretion* to run the IRP proceedings in the manner it thinks appropriate. [Emphasis added].
- 52)Therefore, the Panel is of the view that it has the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings, and it does so here, with specificity in relation to the issues raised by the Parties as set out below.

2) What directions does the Panel give the Parties with respect to the Outstanding Procedural Issues?

a) Document request and exchange

Parties' Submissions

- 53) In the DCA Trust First Memorial, DCA Trust seeks document production, since according to it, "information potentially dispositive of the outcome of these proceedings is in ICANN's possession, custody or control."²¹ According to DCA Trust, in this case, "ICANN has submitted witness testimony that, among other things, purports to rely on secret documents that have not been provided." Given that these proceedings may be "DCA's only opportunity to present and have its claims decided by an independent decision-maker", DCA Trust argues "that further briefing on the merits should be allowed following any and all document production in these proceedings."²²
- 54) According to DCA Trust, "by choosing the ICDR Rules, the Parties also chose the associated ICDR guidelines including the Guidelines for Arbitrators Concerning Exchanges of Information ("ICDR Guidelines"). The ICDR Guidelines provide that 'parties shall exchange, in advance of the hearing, all documents upon which each intends to rely' [...]"²³ DCA Trust submits that, "nothing in the Bylaws or Supplementary Procedures excludes such document production, leaving the ICDR Rules to cover the field."²⁴
- 55) DCA Trust therefore, requests that the Panel issue a procedural order providing the Parties with an opportunity to request documents from one another, and to seek an order from the Panel compelling production of documents if necessary.
- 56) ICANN agrees with DCA Trust, that pursuant to the ICDR Guidelines, which it refers to as "Discovery Rules", "a party must request that a panel order the production of documents."²⁵ According to ICANN, "those documents must be 'reasonably believed to exist and to be relevant and material to the outcomes of the case,' and requests must contain 'a description of specific documents or classes of documents, along with an explanation of their materiality to the outcome of the case."²⁶ ICANN argues, however, that despite the requirement by the Supplementary Rules that, '**all necessary evidence** to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation

²¹ DCA Trust First Memorial, *para.* 61.

²² *Ibid*, *paras.* 61 and 66.

²³ *Ibid*, *para.* 67.

²⁴ *Ibid*.

²⁵ ICANN First Memorial, *para.* 28.

²⁶ *Ibid*.

should be part of the [initial written] submission’, DCA Trust has not to date “provided any indication as to what information it believes the documents it may request may contain and has made no showing that those documents could affect the outcome of the case.”²⁷

57) ICANN further submits that, “while ICANN recognizes that the Panel may order the production of documents within the parameters set forth in the Discovery Rules, ICANN will object to any attempts by DCA to propound broad discovery of the sort permitted in American civil litigation.”²⁸ In support of its contention, ICANN refers to the ICDR Guidelines and states that those Guidelines have made it ‘clear that its Discovery Rules do not contemplate such broad discovery. The introduction of these rules states that their purpose is to promote ‘the goal of providing a simpler, less expensive and more expeditious form of dispute resolution than resort to national courts.’ According to ICANN, the ICDR Guidelines note that:

“One of the factors contributing to complexity, expense and delay in recent years has been the migration from court systems into arbitration of procedural devices that allow one party to a court proceeding access to information in the possession of the other, without full consideration of the differences between arbitration and litigation. The purpose of these guidelines is to make it clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process.”²⁹

The Panel’s directions concerning document request and exchange

58) Seeing that the Parties are both in agreement that some form of documentary exchange is permitted under the IRP Procedure, and considering that Articles 16 and 19 of the ICDR Rules respectively specify, *inter alia*, that, “[s]ubject to these Rules the [Panel] may conduct [these proceedings] in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case” and “at any time during the proceedings, the tribunal may order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate”, the Panel concludes that some document production is necessary to allow DCA Trust to present its case.

59) The Panel is not aware of any international dispute resolution rules, which prevent the parties to benefit from some form of document production. Denying document production would be especially unfair in the circumstances of this case given ICANN’s reliance on internal confidential documents, as advanced by DCA Trust. In any event, ICANN’s espoused goals

²⁷ *Ibid*, para. 29. Bold and italics are from the original text.

²⁸ *Ibid*, para. 30.

²⁹ ICDR Guidelines for Arbitrators on Exchanges of Information, Introduction.

of accountability and transparency would be disserved by a regime that truncates the usual and traditional means of developing and presenting a claim.

60)The Panel, therefore, orders a reasonable documentary exchange in these proceedings with a view to maintaining efficiency and economy, and invites the Parties to agree by or before 29 August 2014, on a form, method and schedule of exchange of documents between them. If the Parties are unable to agree on such a documentary exchange process, the Panel will intervene and, with the input of the Parties, provide further guidance.

61)In this last regard, the Panel directs the Parties attention to paragraph 6 of the ICDR Guidelines, and advises, that it is very “receptive to creative solutions for achieving exchanges of information in ways that avoid costs and delay, consistent with the principles of due process expressed in these Guidelines.”

b) Additional filings, including memoranda and hearing exhibits

Parties’ Submissions

62)In the DCA Trust First Memorial, DCA Trust submits that:

“[The] plain language of the Supplementary Procedures pertaining to written submissions clearly demonstrates that claimants in IRPs are not limited to a single written submission incorporating all evidence, as argued by ICANN. Section 5 of the Supplementary Procedures states that ‘initial written submissions of the parties shall not exceed 25 pages.’ The word ‘initial’ confirms that there may be subsequent submissions, subject to the discretion of the Panel as to how many additional written submissions and what page limits should apply.”³⁰

63)DCA Trust also submits that, “Section 5 of the Supplementary Procedures [...] provides that ‘[a]ll necessary evidence to demonstrate the requestor’s claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission.’ Use of the word ‘should’—and not ‘shall’—confirms that it is desirable, but not required that all necessary evidence be included with the Notice of Independent Review. Plainly, the Supplementary Procedures do not preclude a claimant from adducing additional evidence nor would it make any sense if they did given that claimants may, subject to the Panel’s discretion, submit document requests.”³¹

64)According to DCA Trust, in addition, “section 5 of the Supplementary Procedures provides that ‘the Panel may request additional written submissions from the party seeking review, the Board, the Supporting

³⁰ DCA Trust First Memorial, *para.* 57.

³¹ *Ibid*, *para.* 58.

Organizations, or from other parties.’ Thus, the Supplementary Procedures clearly contemplate that additional written submissions may be necessary to give each party a fair opportunity to present its case.”³²

65) In response, ICANN submits that, DCA Trust “has no automatic right to additional briefing under the Supplementary Procedures.”³³ According to ICANN, “paragraph 5 of the Supplementary Procedures, which governs written statements, provides:

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

ICANN adds:

“This section clearly provides that DCA [Trust’s] opportunity to provide briefing and evidence in this matter has concluded, subject only to a request for additional briefing from the Panel. DCA has emphasized that the rule references the ‘initial’ written submission, but the word ‘initial’ refers to the fact that the Panel ‘may request additional written submissions,’ not that DCA [Trust] has some ‘right’ to a second submission. There is no Supplementary Rule that even suggests the possibility of a second submission as a matter of right. The fact that DCA [Trust] has twice failed to submit evidence in support of its claims is not justification for allowing DCA [Trust] a third attempt.”³⁴

66) ICANN further notes, that in its 20 April 2014 letter to the Panel, ICANN already submitted that, “DCA [Trust’s] argument that it submitted its papers ‘on the understanding that opportunities would be available to make further submissions’ is false. ICANN stated in an email to DCA [Trust’s] counsel on 9 January 2014—prior to the submission of DCA [Trust’s] Amended Notice—that the Supplementary [Procedures] bar the filing of supplemental submissions absent a request from the Panel.”³⁵

67) According to ICANN:

“[The] decision as to whether to allow supplemental briefing is within the Panel’s discretion, and ICANN urges the Panel to decline to permit supplemental briefing for two reasons. First, despite having months to consider how DCA [Trust] might respond to ICANN’s presentation on the merits, DCA [Trust] has never even attempted to explain

³² *Ibid*, para. 59.

³³ ICANN First Memorial, para. 24.

³⁴ *Ibid*.

³⁵ *Ibid*, para. 25.

what it could say in additional briefing that would refute the materials in ICANN's presentation. [...] The fact that DCA is unable to identify supplemental witnesses six months after filing its Notice of IRP is strong indication that further briefing would not be helpful in this case. Second, as ICANN has explained on multiple occasions, DCA [Trust] has delayed these proceedings substantially, and further briefing would compound that delay [...] as ICANN noted in its letter of 20 April 2014, despite DCA [Trust's] attempts to frame this case as implicating issues 'reach[ing] far beyond the respective rights of the parties as concerns the delegation of .AFRICA,' the issues in this case are in fact extremely limited in scope. This Panel is authorized only to address whether ICANN violated its Bylaws or Articles of Incorporation *in its handling of DCA's Application for .AFRICA*. The parties have had the opportunity to submit briefs and evidence regarding that issue. DCA [Trust] has given no indication that it has further dispositive arguments to make or evidence to present. The Panel should resist DCA's attempt to delay these proceedings even further via additional briefing."³⁶

The Panel's directions concerning additional filings

- 68) As with document production, in the face of Article 16 of the ICDR Rules, the Panel is of the view that both Parties ought to benefit from additional filings. In this instance again, while it is possible as ICANN explains, that the drafters of the Supplementary Procedures may have desired to preclude the introduction of additional evidence not submitted with an initial statement of claim, the Panel is of the view that such a result would be inconsistent with ICANN's core values and the Panel's obligation to treat the parties fairly and afford both sides a reasonable opportunity to present their case.
- 69) Again, every set of dispute resolution rules, and every court process that the Panel is aware of, allows a claimant to supplement its presentation as its case proceeds to a hearing. The goal of a fair opportunity to present one's case is in harmony with ICANN's goals of accountability, transparency, and fairness.
- 70) The Panel is aware of and fully embraces the fact that ICANN tried to curtail unnecessary time and costs in the IRP process. However, this may not be done at the cost of a fair process for both parties, particularly in light of the fact that the IRP is the exclusive dispute resolution mechanism provided to applicants.
- 71) Therefore, the Panel will allow the Parties to benefit from additional filings and supplemental briefing going forward. The Panel invites the Parties in this regard to agree on a reasonable exchange timetable. If the Parties are unable to agree on the scope and length of such additional filings and supplemental briefing, the Panel will intervene and, with the input of the Parties, provide further guidance.

³⁶ *Ibid*, paras. 26 and 27.

c) Method of Hearing and Testimony

Parties' Submissions

72) In the DCA Trust First Memorial, DCA Trust submitted that:

“[The] parties agree that a hearing on the merits is appropriate in this IRP. DCA [Trust] respectfully requests that the Panel schedule a hearing on the merits after document discovery has concluded and the parties have had the opportunity to file memorials on the merits. Although the Panel clearly has the authority to conduct a hearing in-person, in the interest of saving time and minimizing costs, DCA [Trust] would agree to a video hearing, as stated during the April 22 hearing on procedural matters.”³⁷

73) In response, ICANN submitted that, “during the 22 April 2014 Call, ICANN agreed that this IRP is one in which a telephonic or video conference would be helpful and offered to facilitate a video conference.”³⁸ In addition, in the ICANN First Memorial, ICANN argued that according to Article IV, Section 3.12 of the Bylaws and paragraph 4 of the Supplementary Procedures, the IRP should conduct its proceedings by email and otherwise via Internet to the maximum extent feasible and in the extraordinary event that an in-person hearing is deemed necessary by the panel, the in-person hearing shall be limited to argument only.

74) ICANN also advanced, that:

“[It] does not believe [...] that this IRP is sufficiently ‘extraordinary’ so as to justify an in-person hearing, which would dramatically increase the costs for the parties. As discussed above, the issues in this IRP are straightforward – limited to whether ICANN’s Board acted consistent with its Bylaws and Articles of Incorporation in relation to DCA’s application for. AFRICA. – and can, easily [...], be resolved following a telephonic oral argument with counsel and the Panel.”³⁹

75) In the DCA Trust First Memorial, DCA Trust also argued that, in “April 2013, ICANN amended its Bylaws to limit telephonic or in-person hearings to ‘argument only.’ At some point after the *ICM* Panel’s 2009 decision in *ICM v. ICANN*, ICANN also revised the Supplementary Procedures to limit hearings to ‘argument only.’ Accordingly, and as ICANN argued at the procedural hearing, ICANN’s revised Bylaws and Supplementary Procedures suggest that there is to be no cross-examination of witnesses at the hearing. However, insofar as neither the Supplementary Procedures nor the Bylaws expressly exclude cross-examination, this provision remains ambiguous.”⁴⁰

³⁷ DCA Trust First Memorial, *para.* 63.

³⁸ ICANN First Memorial, *para.* 36.

³⁹ *Ibid*, *para.* 36.

⁴⁰ DCA Trust First Memorial, *para.* 64.

76) DCA Trust submitted that:

“[Regardless] of whether the parties themselves may examine witnesses at the hearing, it is clear that the Panel may do so. Article 16(1) provides that the Panel ‘may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.’ It is, moreover, customary in international arbitration for tribunal members to question witnesses themselves – often extensively – in order to test their evidence or clarify facts that are in dispute. In this case, ICANN has submitted witness testimony that, among other things, purports to rely on secret documents that have not been provided. As long as those documents are withheld from DCA [Trust], it is particularly important for that witness testimony to be fully tested by the Panel, if not by the parties. Particularly in light of the important issues at stake in this matter and the general due process concerns raised when parties cannot test the evidence presented against them, DCA [Trust] strongly urges the Panel to take full advantage of its opportunity to question witnesses. Such questioning will in no way slow down the proceedings, which DCA [Trust] agrees are to be expedited – but not at the cost of the parties’ right to be heard, and the Panel’s right to obtain the information it needs to render its decision.”⁴¹

77) In response, ICANN submitted that:

“[Both] the Supplementary Procedures and ICANN’s Bylaws unequivocally and unambiguously prohibit live witness testimony in conjunction with any IRP.” Paragraph 4 of the Supplementary Procedures, which according to ICANN governs the “Conduct of the Independent Review”, demonstrates this point. According to ICANN, “indeed, two separate phrases of Paragraph 4 explicitly prohibit live testimony: (1) the phrase limiting the in-person hearing (and similarly telephonic hearings) to ‘argument only,’ and (2) the phrase stating that ‘all evidence, including witness statements, must be submitted in advance.’ The former explicitly limits hearings to the argument of counsel, excluding the presentation of any evidence, including any witness testimony. The latter reiterates the point that *all evidence, including witness testimony*, is to be presented in writing and prior to the hearing. Each phrase unambiguously excludes live testimony from IRP hearings. Taken together, the phrases constitute irrefutable evidence that the Supplementary Procedures establish a truncated hearing procedure.”⁴²

78) ICANN added:

“[Paragraph] 4 of the Supplementary Procedures is based on the exact same and unambiguous language in Article IV, Section 3.12 of the Bylaws, which provides that ‘[i]n the unlikely event that a telephonic or in-person hearing is convened, **the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance**.’” [...] While DCA [Trust] may prefer a different procedure, the Bylaws and the Supplementary Procedures could not be any clearer in this regard. Despite the Bylaws’ and Supplementary Procedures’ clear and unambiguous prohibition of live witness testimony, DCA [Trust] attempts to argue that the Panel should instead be guided by Article 16 of the ICDR Rules, which states that subject to the ICDR Rules, ‘the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each

⁴¹ *Ibid*, paras. 65 and 66.

⁴² ICANN First Memorial, paras. 15 and 16.

party has the right to be heard and is given a fair opportunity to present its case.’ However, as discussed above, the Supplementary Procedures provide that ‘[i]n the event there is any inconsistency between these Supplementary Procedures and [ICDR’s International Arbitration Rules], these Supplementary Procedures will govern,’ and the Bylaws require that the ICDR Rules ‘be consistent’ with the Bylaws. As such, the Panel **does not have discretion** to order live witness testimony in the face of the Bylaws’ and Supplementary Procedures’ clear and unambiguous prohibition of such testimony.”⁴³

79) ICANN further submitted:

“[During] the 22 April Call, DCA vaguely alluded to ‘due process’ and ‘constitutional’ concerns with prohibiting cross-examination. As ICANN did after public consultation, and after the *ICM* IRP, ICANN has the right to establish the rules for these procedures, rules that DCA agreed to abide by when it filed its Request for IRP. First, ‘constitutional’ protections do not apply with respect to a *corporate accountability mechanism*. Second, ‘due process’ considerations (though inapplicable to corporate accountability mechanisms) were already considered as part of the design of the revised IRP. And the United States Supreme Court has repeatedly affirmed the right of parties to tailor unique rules for dispute resolution processes, including even *binding arbitration proceedings* (which an IRP is not). The Supreme Court has specifically noted that ‘[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. . . . And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution’.”⁴⁴

80) According to ICANN:

“[The] U.S. Supreme Court has explicitly held that the right to tailor unique procedural rules includes the right to dispense with certain procedures common in civil trials, including the right to cross-examine witnesses [...] Similarly, international arbitration norms recognize the right of parties to tailor their own, unique arbitral procedures. ***‘Party autonomy is the guiding principle in determining the procedure to be followed in international arbitration.’*** It is a principle that is endorsed not only in national laws, but by international arbitral institutions worldwide, as well as by international instruments such as the New York Convention and the Model Law.”⁴⁵

81) In short, ICANN advanced that:

“[Even] if this were a formal ‘arbitration’, ICANN would be entitled to limit the nature of these proceedings so as to preclude live witness testimony. The fact that this proceeding is not an arbitration further reconfirms ICANN’s right to establish the rules that govern these proceedings [...] DCA [Trust] argues that it will be prejudiced if cross-examination of witnesses is not permitted. However, the procedures give both parties equal opportunity to present their evidence—the inability of either party to examine witnesses at the hearing would affect both the Claimant and ICANN equally. In this instance, DCA [Trust] did not submit witness testimony with its Amended Notice (as clearly it should have). However, were DCA [Trust] to present any written witness statements in support of its position, ICANN would not be entitled to cross examine

⁴³ *Ibid*, paras. 17 and 18. Bold and italics are from the original text.

⁴⁴ *Ibid*, para. 19.

⁴⁵ *Ibid*, paras. 20 and 21. Bold and italics are from the original text.

those witnesses, just as DCA [Trust] is not entitled to cross examine ICANN's witnesses. Of course, the parties are free to argue to the IRP Panel that witness testimony should be viewed in light of the fact that the rules do not permit cross-examination."⁴⁶

The Panel's directions on method of hearing and testimony

- 82) The considerations and discussions under the prior headings addressing document exchange and additional filings apply to the hearing and testimony issues raised in this IRP proceeding as well.
- 83) At this juncture, the Panel is of the preliminary view that at a minimum a video hearing should be held. The Parties appear to be in agreement. However, the Panel does not wish to close the door to the possibility of an in-person hearing and live examination of witnesses, should the Panel consider that such a method is more appropriate under the particular circumstances of this case after the Parties have completed their document exchange and the filing of any additional materials.
- 84) While the Supplementary Procedures appear to limit both telephonic and in-person hearings to "argument only", the Panel is of the view that this approach is fundamentally inconsistent with the requirements in ICANN's Bylaws for accountability and for decision making with objectivity and fairness.
- 85) Analysis of the propriety of ICANN's decisions in this case will depend at least in part on evidence about the intentions and conduct of ICANN's top personnel. ICANN should not be allowed to rely on written statements of these officers and employees attesting to the propriety of their actions without an appropriate opportunity in the IRP process for DCA Trust to challenge and test the veracity of such statements.
- 86) The Panel, therefore, reserves its decision to order an in-person hearing and live testimony pending a further examination of the representations that will be proffered by each side, including the filing of any additional evidence which this Decision permits. The Panel also permits both Parties at the hearing to challenge and test the veracity of statements made by witnesses.
- 87) Having said this, the Panel acknowledges the Parties' desire that the IRP proceedings be as efficient and economical as feasible, consistent with the overall objectives of a fair and independent proceeding. The Panel will certainly bear this desire and goal in mind as these proceedings advance further.

⁴⁶ *Ibid*, paras. 22 and 23.

3) Is the Panel's Decision on the IRP Procedure and its future Declaration on the Merits in this proceeding binding?

DCA Trust's Submissions

88) In addition to the submissions set out in the earlier part of this Decision, DCA Trust argues that, the language used in the Bylaws to describe the IRP process is demonstrative that it is intended to be a binding process. When the language in the Bylaws for reconsideration is compared to that describing the IRP, DCA Trust explains:

“[It] is clear that the declaration of an IRP is intended to be final and binding [...] For example, the Bylaws provide that the [ICANN] [Board Governance Committee] BGC ‘shall act on a Reconsideration Request on the basis of the written public record’ and ‘shall make a final determination or recommendation.’ The Bylaws even expressly state that **‘the Board shall not be bound to follow the recommendations’** of the BGC. By contrast, the IRP Panel makes **‘declarations’** — defined by ICANN in its Supplementary Procedures as ‘decisions/opinions’— that **‘are final and have precedential value.’** The IRP Panel ‘shall specifically designate the prevailing party’ and may allocate the costs of the IRP Provider to one or both parties. Moreover, nowhere in ICANN’s Bylaws or the Supplementary Procedures does ICANN state that the Board shall not be bound by the declaration of the IRP. If that is what ICANN intended, then it certainly could have stated it plainly in the Bylaws, as it did with reconsideration. The fact that it did not do so is telling.”⁴⁷

89) In light of the foregoing, DCA Trust advances:

“[The] IRP process is an arbitration in all but name. It is a dispute resolution procedure administered by an international arbitration service provider, in which the decision-makers are neutral third parties chosen by the parties to the dispute. There are mechanisms in place to assure the neutrality of the decision-makers and the right of each party to be heard. The IRP Panel is vested with adjudicative authority that is equivalent to that of any other arbitral tribunal: it renders decisions on the dispute based on the evidence and arguments submitted by the parties, and its decisions are binding and have *res judicata* and precedential value. The procedures appropriate and customary in international arbitration are thus equally appropriate in this IRP. But in any event, and as discussed below, the applicable rules authorize the Panel to conduct this IRP in the manner it deems appropriate regardless of whether it determines that the IRP qualifies as an arbitration.”⁴⁸

ICANN's Submissions

90) In response, ICANN submits that:

“[The] provisions of Article IV, Section 3 of the ICANN Bylaws, which govern the Independent Review process and these proceedings, make clear that the declaration of the Panel will not be binding on ICANN. Section 3.11 gives the IRP panels the authority

⁴⁷ DCA Trust First Memorial, *paras.* 33, 34 and 35. Bold and italics are from the original text.

⁴⁸ *Ibid.* *para.* 44.

to ‘declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws’ and ‘recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.’ Section 3.21 provides that ‘[w]here feasible, the Board shall consider the IRP Panel declaration at the Board’s next meeting.’ Section 3 never refers to the IRP panel’s declaration as a ‘decision’ or ‘determination.’ It does refer to the ‘Board’s subsequent action on [the IRP panel’s] declaration [...]’ That language makes clear that the IRP’s declarations are advisory and not binding on the Board. Pursuant to the Bylaws, the Board has the discretion to consider an IRP panel’s declaration and take whatever action it deems appropriate.”⁴⁹

91) According to ICANN:

“[This] issue was addressed extensively in the *ICM* IRP, a decision that has precedential value to this Panel. The *ICM* Panel specifically considered the argument that the IRP proceedings were ‘arbitral and not advisory in character,’ and unanimously concluded that its declaration was ‘not binding, but rather advisory in effect.’ At the time that the *ICM* Panel rendered its declaration, Article IV, Section 3 of ICANN’s Bylaws provided that ‘IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators . . . nominated by that provider.’ *ICM* unsuccessfully attempted to rely on that language in arguing that the IRP constituted an arbitration, and that the IRP panel’s declaration was binding on ICANN. Following that IRP, that language was removed from the Bylaws with the April 2013 Bylaws amendments, further confirming that, under the Bylaws, an IRP panel’s declaration is not binding on the Board.”⁵⁰

92) ICANN also submits that:

“[The] lengthy drafting history of ICANN’s independent review process confirms that IRP panel declarations are not binding. Specifically, the Draft Principles for Independent Review, drafted in 1999, state that ‘the ICANN Board should retain ultimate authority over ICANN’s affairs – after all, it is the Board ... that will be chosen by (and is directly accountable to) the membership and supporting organizations.’ And when, in 2001, the Committee on ICANN Evolution and Reform (‘ERC’) recommended the creation of an independent review process, it called for the creation of ‘a process to require non-binding arbitration by an international arbitration body to review any allegation that the Board has acted in conflict with ICANN’s Bylaws.’ The individuals who actively participated in the process also agreed that the review process would not be binding. As one participant stated: IRP ‘decisions will be nonbinding, because the Board will retain final decision-making authority’.”⁵¹

93) According to ICANN:

“[The] only IRP Panel ever to issue a declaration, the *ICM* IRP Panel, unanimously rejected the assertion that IRP Panel declarations are binding and recognized that an IRP panel’s declaration ‘is not binding, but rather advisory in effect.’ Nothing has occurred since the issuance of the *ICM* IRP Panel’s declaration that changes the fact that IRP Panel declarations are not binding. To the contrary, in April 2013, following the

⁴⁹ ICANN First Memorial, *para.* 33,

⁵⁰ *Ibid*, *para.* 34,

⁵¹ ICANN Second Memorial, *para.* 5,

ICM IRP, in order to clarify even further that IRPs are not binding, all references in the Bylaws to the term ‘arbitration’ were removed as part of the Bylaws revisions. ICM had argued in the IRP that the use of the word ‘arbitration’ in the portion of the Bylaws related to Independent Review indicated that IRPs were binding, and while the *ICM* IRP Panel rejected that argument, to avoid any lingering doubt, ICANN removed the word ‘arbitration’ in conjunction with the amendments to the Bylaws.”⁵²

94) ICANN further submits that:

“[The] amendments to the Bylaws, which occurred following a community process on the proposed IRP revisions, added, among other things, a sentence stating that ‘declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.’ DCA argues that this new language, which does not actually use the word ‘binding,’ nevertheless provides that IRP Panel declarations are binding, trumping years of drafting history, the sworn testimony of those who participated in the drafting process, the plain text of the Bylaws, and the reasoned declaration of a prior IRP panel. DCA is wrong.”⁵³

95) According to ICANN:

“[The] language DCA references was added to ICANN’s Bylaws to meet recommendations made by ICANN’s Accountability Structures Expert Panel (‘ASEP’). The ASEP was comprised of three world-renowned experts on issues of corporate governance, accountability, and international dispute resolution, and was charged with evaluating ICANN’s accountability mechanisms, including the Independent Review process. The ASEP recommended, *inter alia*, that an IRP should not be permitted to proceed on the same issues as presented in a prior IRP. The ASEP’s recommendations in this regard were raised in light of the second IRP constituted under ICANN’s Bylaws, where the claimant presented claims that would have required the IRP Panel to [re-evaluate] the declaration of the IRP Panel in the *ICM* IRP. To prevent claimants from challenging a prior IRP Panel declaration, the ASEP recommended that ‘[t]he declarations of the IRP, and ICANN’s subsequent actions on those declarations, should have precedential value.’ The ASEP’s recommendations in this regard did not convert IRP Panel declarations into binding decisions.”⁵⁴

96) Moreover, ICANN argues:

“[One] of the important considerations underlying the ASEP’s work was the fact that ICANN, while it operates internationally, is a California non-profit public benefit corporation subject to the statutory law of California as determined by United States courts. That law requires that ICANN’s Board retain the ultimate responsibility for decision-making. As a result, the ASEP’s recommendations were premised on the understanding that the declaration of the IRP Panel is not ‘binding’ on the Board. In any event, a declaration clearly can be both non-binding and precedential.”⁵⁵

97) In short, ICANN argues that the IRP is *not* binding. According to ICANN, “not only is there no language in the Bylaws stating that IRP Panel declarations

⁵² *Ibid*, para. 6.

⁵³ *Ibid*, para. 7.

⁵⁴ *Ibid*, paras. 8 and 9.

⁵⁵ *Ibid*, paras. 9 and 10.

are binding on ICANN, there is no language stating that an IRP Panel even may determine if its advisory Declarations are binding.”⁵⁶ According to ICANN, words such as “arbitration” and “arbitrator” were removed from the Bylaws to ensure that the IRP Panel’s declarations do not have the force of normal commercial arbitration. ICANN also argues that DCA Trust, “fails to point to a *single piece of evidence* in all of the drafting history of the Bylaws or any of the amendments to indicate that ICANN intended, through its 2013 amendments, to convert a non-binding procedure into a binding one.”⁵⁷ Finally, ICANN submits that “it is not within the scope of this Panel’s authority to declare whether IRP Panel declarations are binding on ICANN’s Board...the Panel does not have the authority to re-write ICANN’s Bylaws or the rules applicable to this proceeding. The Panel’s mandate is strictly limited to ‘comparing contested actions of the Board [and whether it] has acted consistently with the provisions of those Articles of Incorporation and Bylaws, and [...] declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws’.”⁵⁸

The Panel’s Decision on Binding or Advisory nature of IRP decisions, opinions and declarations

98) Various provisions of ICANN’s Bylaws and the Supplementary Procedures support the conclusion that the Panel’s decisions, opinions and declarations are binding. There is certainly nothing in the Supplementary Rules that renders the decisions, opinions and declarations of the Panel either advisory or non-binding.⁵⁹

99) In paragraph 1, the Supplementary Procedures define “Declaration” as the “decisions and/or opinions of the IRP Panel”. In paragraph 9, the Supplementary Procedures require any Declaration of a three-member IRP Panel to be signed by the majority and in paragraph 10, under the heading “Form and Effect of an IRP Declaration”, they require Declarations to be in writing, based on documentation, supporting materials and arguments submitted by the parties. The Supplementary Procedures also require the Declaration to “specifically designate the prevailing party”.⁶⁰

⁵⁶ ICANN letter of 2 June 2014 addressed to the Panel.

⁵⁷ *Ibid.* Italics are from the original decision.

⁵⁸ *Ibid.*

⁵⁹ The Reconsideration process established in the Bylaws expressly provides that ICANN’s “Board *shall not be bound to follow* the recommendations” of the BGC for action on requests for reconsideration. No similar language in the Bylaws or Supplementary Procedures limits the effect of the Panel’s IRP decisions, opinions and declarations to an advisory or non-binding effect. It would have been easy for ICANN to clearly state somewhere that the IRP’s decisions, opinions or declarations are “advisory”—this word appears in the Reconsideration Process.

⁶⁰ Moreover, the word “Declaration” in the common law legal tradition is often synonymous with a binding decision. According to Black’s Law Dictionary (7th Edition 1999) at page 846, a “declaratory

- 100) Section 10 of the Supplementary Procedures, resembles Article 27 of the ICDR Rules. Whereas Article 27 refers to “Awards”, section 10 refers to “Declarations”. Section 10 of the Supplementary Procedures, however, is silent on whether Declarations made by the IRP Panel are “final and binding” on the parties.
- 101) As explained earlier, as per Article IV, Section 3, paragraph 8 of the Bylaws, the Board of Directors of ICANN has given its approval to the ICDR to establish a set of operating rules and procedures for the conduct of the IRP set out in section 3. The operating rules and procedures established by the ICDR are the ICDR Rules as referred to in the preamble of the Supplementary Procedures. These Rules have been supplemented⁶¹ with the Supplementary Procedures.
- 102) This is clear from two different parts of the Supplementary Procedures. First, in the preamble, where the Supplementary Procedures state that: “These procedures supplement the International Centre for Dispute Resolution’s International Arbitration Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws”.
- 103) And second, under section 2 entitled (Scope), that states that the “ICDR will apply these Supplementary Procedures, in addition to the INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, in all cases submitted to the ICDR in connection with the Article IV, Section 3(4) of the ICANN Bylaws”. It is therefore clear that ICANN intended the operating rules and procedures for the independent review to be an international set of arbitration rules supplemented by a particular set of additional rules.
- 104) There is also nothing inconsistent between section 10 of the Supplementary Procedures and Article 27 of the ICDR Rules.
- 105) One of the hallmarks of international arbitration is the binding and final nature of the decisions made by the adjudicators. Binding arbitration is the essence of what the ICDR Rules, the ICDR itself and its parent, the American Arbitration Association, offer. The selection of the ICDR Rules as the baseline

judgment” is, “a binding adjudication that establishes the rights and other legal obligations of the parties without providing for or ordering enforcement”.

⁶¹ As explained by the Panel before, the word “supplement” means to complete, add to, extend or supply a deficiency. The Supplementary Procedures, therefore, *supplement* (not replace or supersede) the ICDR Rules. As also indicated by the Panel before, in the event there is any inconsistency between the Supplementary Procedures and the ICDR Rules, ICANN requires the Supplementary Procedures to govern.

set of procedures for IRP's, therefore, points to a binding adjudicative process.

106) Furthermore, the process adopted in the Supplementary Procedures is an adversarial one where counsel for the parties present competing evidence and arguments, and a panel decides who prevails, when and in what circumstances. The panelists who adjudicate the parties' claims are also selected from among experienced arbitrators, whose usual charter is to make binding decisions.

107) The above is further supported by the language and spirit of section 11 of ICANN's Bylaws. Pursuant to that section, the IRP Panel has the authority to summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious. Surely, such a decision, opinion or declaration on the part of the Panel would not be considered advisory.

108) Moreover, even if it could be argued that ICANN's Bylaws and Supplementary Procedures are ambiguous on the question of whether or not a decision, opinion or declaration of the IRP Panel is binding, in the Panel's view, this ambiguity would weigh against ICANN's position. The relationship between ICANN and the applicant is clearly an adhesive one. There is no evidence that the terms of the application are negotiable, or that applicants are able to negotiate changes in the IRP.

109) In such a situation, the rule of *contra proferentem* applies. As the drafter and architect of the IRP Procedure, it was open to ICANN and clearly within its power to adopt a procedure that expressly and clearly announced that the decisions, opinions and declarations of IRP Panels were advisory only. ICANN did not adopt such a procedure.

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

111) The force of the foregoing textual and construction considerations as pointing to the binding effect of the Panel's decisions and declarations are reinforced by two factors: 1) the exclusive nature of the IRP whereby the non-binding argument would be clearly in contradiction with such a factor⁶²;

⁶² If the waiver of judicial remedies ICANN obtains from applicants is enforceable, and the IRP process is non-binding, as ICANN contends, then that process leaves TLD applicants and the Internet community with no compulsory remedy of any kind. This is, to put it mildly, a highly watered down notion of "accountability". Nor is such a process "independent", as the ultimate decision maker,

and, 2) the special, unique, and publicly important function of ICANN. As explained before, ICANN is not an ordinary private non-profit entity deciding for its own sake who it wishes to conduct business with, and who it does not. ICANN rather, is the steward of a highly valuable and important international resource.

112) Even in ordinary private transactions, with no international or public interest at stake, contractual waivers that purport to give up *all* remedies are forbidden. Typically, this discussion is found in the Uniform Commercial Code Official Comment to section 2719, which deals with “Contractual modification or limitation of remedy.” That Comment states:

“Under this section parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect. However, *it is the very essence of a sales contract that at least minimum adequate remedies be available.* If the parties intend to conclude a contract for sale within this Article *they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract.*” [Panel’s emphasis by way of italics added]

113) The need for a minimum adequate remedy is indisputably more important where, as in this case, the party arguing that there is no compulsory remedy is the party entrusted with a special, internationally important and valuable operation.

114) The need for a compulsory remedy is concretely shown by ICANN’s longstanding failure to implement the provision of the Bylaws and Supplementary Procedures requiring the creation of a standing panel. ICANN has offered no explanation for this failure, which evidences that a self-policing regime at ICANN is insufficient. The failure to create a standing panel has consequences, as this case shows, delaying the processing of DCA Trust’s claim, and also prejudicing the interest of a competing .AFRICA applicant.

115) Moreover, assuming for the sake of argument that it is acceptable for ICANN to adopt a remedial scheme with no teeth, the Panel is of the opinion that, at a minimum, the IRP should forthrightly explain and acknowledge that the process is merely advisory. This would at least let parties know before embarking on a potentially expensive process that a victory before the IRP panel may be ignored by ICANN. And, a straightforward acknowledgment that the IRP process is intended to be merely advisory might lead to a legislative or executive initiative to create a truly independent compulsory process. The Panel seriously doubts that the Senators questioning former ICANN President Stuart Lynn in 2002 would have been satisfied had they

ICANN, is also a party to the dispute and directly interested in the outcome. Nor is the process “neutral,” as ICANN’s “core values” call for in its Bylaws.

understood that a) ICANN had imposed on all applicants a waiver of all judicial remedies, *and* b) the IRP process touted by ICANN as the “ultimate guarantor” of ICANN accountability was only an advisory process, the benefit of which accrued only to ICANN.⁶³

ICM Case

116)The Parties in their submissions have discussed the impact on this Decision of the conclusions reached by the IRP panel in the matter of *ICM v. ICANN* (“*ICM Case*”). Although this Panel is of the opinion that the decision in the *ICM Case* should have no influence on the present proceedings, it discusses that matter for the sake of completeness.

117)In the *ICM Case*, another IRP panel examined the question centrally addressed in this part of this Decision: whether declarations and/or decisions by an IRP panel are binding, or merely advisory. The *ICM Case* panel concluded that its decision was advisory.⁶⁴

118)In doing so, the *ICM Case* panel noted that the IRP used an “international arbitration provider” and “arbitrators nominated by that provider,” that the ICDR Rules were to “govern the arbitration”, and that “arbitration connotes a binding process.” These aspects of the IRP, the panel observed, were “suggestive of an arbitral process that produces a binding award.”⁶⁵ But, the panel continued, “there are other indicia that cut the other way, and more deeply.” The panel pointed to language in the Interim Measures section of the Supplementary Procedures empowering the panel to “recommend” rather than order interim measures, and to language requiring the ICANN Board to “consider” the IRP declaration at its next meeting, indicating, in the panel’s view, the lack of binding effect of the Declaration.

119)The *ICM Case* panel specifically observed that “the relaxed temporal proviso to do no more than ‘consider’ the IRP declaration, and to do so at the next meeting of the Board ‘where feasible’, emphasized that it is not binding. If the IRP’s declaration were binding, there would be nothing to consider but rather a determination or decision to implement in a timely manner. The Supplementary Procedures adopted for IRP, in the article on ‘Form and Effect of an IRP Declaration’, significantly omit provision of Article 27 of the ICDR Rules specifying that an award ‘shall be final and binding on the parties’. Moreover, the preparatory work of the IRP provisions...confirms that the

⁶³ See in this regard the Memorandum of Jack Goldsmith dated 29 July 2010 at <https://cyber.law.harvard.edu/pubrelease/icann/pdfs/Jack%20Goldsmith%20on%20ICANN-final.pdf>, referred to in footnote 58 of DCA Trust’s Second Memorial.

⁶⁴ *ICM Case*, footnote 30. The panel’s brief discussion on this issue appears in *paras.* 132-134 of the *ICM Decision*.

⁶⁵ *Ibid*, *para.* 132.

intention of the drafters of the IRP process was to put in place a process that produced declarations that would not be binding and that left ultimate decision-making authority in the hands of the Board.”⁶⁶

120)Following the issuance of the *ICM* Case Declaration, ICANN amended its Bylaws, and related Supplementary Procedures governing IRPs, removing most, but not all, references to “arbitration”, and adding that the “declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.”

Difference between this IRP and the *ICM* Case

121)According to DCA Trust, the panel in the *ICM* Matter, “based its decision that its declaration would not be binding, ‘but rather advisory in effect,’ on specific language in both a ***different*** set of Bylaws and a ***different*** set of Supplementary Procedures than those that apply in this dispute...one crucial difference in the Bylaws applicable during the *ICM* was the absence of the language describing panel declarations as ‘final and precedential’.”⁶⁷ The Panel agrees.

122)Section 3(21) of the 11 April 2013 ICANN Bylaws now provides: “Where feasible, the Board shall consider the IRP Panel declaration at the Board’s next meeting. The declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.” At the time the *ICM* Matter was decided, section 3(15) of Article IV of ICANN’s Bylaws did not contain the second sentence of section 3(21).

123)As explained in the DCA Trust First Memorial:

“[In] finding that the IRP was advisory, the *ICM* Panel also relied on the fact that the Bylaws gave the IRP [panel] the authority to ‘declare,’ rather than ‘decide’ or ‘determine,’ whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or the Bylaws. However, the *ICM* Panel did not address the fact that the Supplementary Procedures, which govern the process in combination with the ICDR Rules, defined ‘declaration’ as ‘decisions/opinions of the IRP’. If a ‘declaration’ is a ‘decision’, then surely a panel with the authority to ‘declare’ has the authority to ‘decide’.”⁶⁸

The Panel agrees with DCA Trust.

124)Moreover, as explained by DCA Trust:

⁶⁶ *Ibid*, para. 133.

⁶⁷ DCA Trust First Memorial, para. 36. Bold and italics are from the original text.

⁶⁸ *Ibid*, para. 39.

“[The] *ICM* Panel [...] found it significant that the Supplementary Procedures adopted for the IRP omitted Article 27 of the ICDR Rules – which specifies that an award ‘shall be final and binding on the parties.’ On that basis, the *ICM* Panel concluded that Article 27 did not apply. ICANN’s Supplementary Rules, however, were – and continue to be – silent on the effect of an award. In the event there is inconsistency between the Supplementary Procedures and the ICDR Rules, then the Supplementary Procedures govern; but there is nothing in the applicable rules suggesting that an **omission** of an ICDR Rule means that it does not apply. Indeed, the very same Supplementary Procedures provide that ‘the ICDR’s International Arbitration Rules [...] will govern the process **in combination** with these Supplementary Procedures. Furthermore, it is only in the event there is ‘any inconsistency’ between the Supplementary Procedures and the ICDR Rules that the Supplementary Procedures govern.”⁶⁹

Again, the Panel agrees with DCA Trust.

125) With respect, therefore, this Panel disagrees with the panel in the *ICM* Case that the decisions and declarations of the IRP panel are not binding. In reaching that conclusion, in addition to failing to make the observations set out above, the *ICM* panel did not address the issue of the applicant’s waiver of all judicial remedies, it did not examine the application of the *contra proferentem* doctrine, and it did not examine ICANN’s commitment to accountability and fair and transparent processes in its Articles of Incorporation and Bylaws.

126) ICANN argues that the panel’s decision in the *ICM* Case that declarations are not binding is dispositive of the question. ICANN relies on the provision in the Bylaws, quoted above, (3(21)) to the effect that declarations “have precedential value.” Like certain other terms in the IRP and Supplementary Procedures, the Panel is of the view that this phrase is ambiguous. Legal precedent may be either binding or persuasive.⁷⁰ The Bylaws do not indicate which kind of precedent is intended.

127) *Stare decisis* is the legal doctrine, which gives binding precedential effect, typically to earlier decisions on a settled point of law, decided by a higher court. The doctrine is not mandatory, as illustrated by the practice in common law jurisdictions of overruling earlier precedents deemed unwise or unworkable. In the present case, there is no “settled” law in the usual sense of a body of cases approved by a court of ultimate resort, but instead, a single decision by one panel on a controversial point, which this Panel, with respect, considers to be unconvincing.

128) Therefore, the Panel is of the view that the ruling in the *ICM* Case is *not* persuasive and binding upon it.

⁶⁹ *Ibid*, para. 40. Bold and italics are from the original text.

⁷⁰ Black’s Law Dictionary, (7th Edition 1999), p. 1195.

VI. DECLARATION OF THE PANEL

129)Based on the foregoing and the language and content of the IRP Procedure, the Panel is of the view that it has the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings.

130)Based on the foregoing and the language and content of the IRP Procedure, the Panel issues the following procedural directions:

(i) The Panel orders a reasonable documentary exchange in these proceedings with a view to maintaining efficacy and economy, and invites the Parties to agree by or before 29 August 2014, on a form, method and schedule of exchange of documents between them;

(ii) The Panel permits the Parties to benefit from additional filings and supplemental briefing going forward and invites the Parties to agree on a reasonable exchange timetable going forward;

(iii) The Panel allows a video hearing as per the agreement of the Parties, but reserves its decision to order an in-person hearing and live testimony pending a further examination of the representations that will be proffered by each side, including the filing of any additional evidence which this Decision permits; and

(iv) The Panel permits both Parties at the hearing to challenge and test the veracity of statements made by witnesses.

If the Parties are unable to agree on a reasonable documentary exchange process or to agree on the scope and length of additional filings and supplemental briefing, the Panel will intervene and, with the input of the Parties, provide further guidance.

131)Based on the foregoing and the language and content of the IRP Procedure, the Panel concludes that this Declaration and its future Declaration on the Merits of this case are binding on the Parties.

132)The Panel reserves its views with respect to any other issues raised by the Parties for determination at the next stage of these proceedings. At that time, the Panel will consider the Parties' respective arguments in those regards.

133)The Panel reserves its decision on the issue of costs relating to this stage of the proceeding until the hearing of the merits.

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

This Declaration on the IRP Procedure has thirty-three (33) pages.

Thursday, 14 August 2014

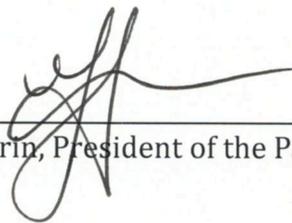
Place of the IRP, Los Angeles, California.



Professor Catherine Kessedjian



Hon. Richard C. Neal



Babak Barin, President of the Panel

Reference Material 39.

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
Independent Review Panel**

CASE #50 2013 001083

FINAL DECLARATION

In the matter of an Independent Review Process (IRP) pursuant to the Internet Corporation For Assigned Names and Number's (ICANN's) Bylaws, the *International Dispute Resolution Procedures* (ICDR Rules) and the *Supplementary Procedures for ICANN Independent Review Process* of the International Centre for Dispute Resolution (ICDR),

Between: DotConnectAfrica Trust;
("Claimant" or "DCA Trust")

Represented by Mr. Arif H. Ali, Ms. Meredith Craven, Ms. Erin Yates and Mr. Ricardo Ampudia of Weil, Gotshal & Manges, LLP located at 1300 Eye Street, NW, Suite 900, Washington, DC 20005, U.S.A.

And

Internet Corporation for Assigned Names and Numbers (ICANN);
("Respondent" or "ICANN")

Represented by Mr. Jeffrey A. LeVee and Ms. Rachel Zernik of Jones Day, LLP located at 555 South Flower Street, Fiftieth Floor, Los Angeles, CA 90071, U.S.A.

Claimant and Respondent will together be referred to as "Parties".

IRP Panel

**Prof. Catherine Kessedjian
Hon. William J. Cahill (Ret.)
Babak Barin, *President***

I. BACKGROUND

1. DCA Trust is non-profit organization established under the laws of the Republic of Mauritius on 15 July 2010 with its registry operation – DCA Registry Services (Kenya) Limited – as its principal place of business in Nairobi, Kenya.
2. DCA Trust was formed with the charitable purpose of, among other things, advancing information technology education in Africa and providing a continental Internet domain name to provide access to internet services for the people of Africa and not for the public good.
3. In March 2012, DCA Trust applied to ICANN for the delegation of the .AFRICA top-level domain name in its 2012 General Top-Level Domains (“gTLD”) Internet Expansion Program (the “New gTLD Program”), an internet resource available for delegation under that program.
4. ICANN is a non-profit corporation established on 30 September 1998 under the laws of the State of California, and headquartered in Marina del Rey, California, U.S.A. According to its Articles of Incorporation, ICANN was established for the benefit of the Internet community as a whole and is tasked with carrying out its activities in conformity with relevant principles of international law, international conventions and local law.
5. On 4 June 2013, the ICANN Board New gTLD Program Committee (“NGPC”) posted a notice that it had decided not to accept DCA Trust’s application.
6. On 19 June 2013, DCA Trust filed a request for reconsideration by the ICANN Board Governance Committee (“BGC”), which denied the request on 1 August 2013.
7. On 19 August 2013, DCA Trust informed ICANN of its intention to seek relief before an Independent Review Panel under ICANN’s Bylaws. Between August and October 2013, DCA Trust and ICANN participated in a Cooperative Engagement Process (“CEP”) to try and resolve the issues relating to DCA Trust’s application. Despite several meetings, no resolution was reached.
8. On 24 October 2013, DCA Trust filed a Notice of Independent Review Process with the ICDR in accordance with Article IV, Section 3 of ICANN’s Bylaws.

9. In an effort to safeguard its rights pending the ongoing constitution of the IRP Panel, on 22 January 2014, DCA Trust wrote to ICANN requesting that it immediately cease any further processing of all applications for the delegation of the .AFRICA gTLD, failing which DCA Trust would seek emergency relief under Article 37 of the ICDR Rules.
10. DCA Trust also indicated that it believed it had the right to seek such relief because there was no standing panel as anticipated in the Supplementary Procedures for ICANN Independent Review Process (“Supplementary Procedures”), which could otherwise hear requests for emergency relief.
11. In response, on 5 February 2014, ICANN wrote:

Although ICANN typically is refraining from further processing activities in conjunction with pending gTLD applications where a competing applicant has a pending reconsideration request, ICANN does not intend to refrain from further processing of applications that relate in some way to pending independent review proceedings. In this particular instance, ICANN believes that the grounds for DCA’s IRP are exceedingly weak, and that the decision to refrain from the further processing of other applications on the basis of the pending IRP would be unfair to others.
12. In its Request for Emergency Arbitrator and Interim Measures of Protection subsequently submitted on 28 March 2014, DCA Trust pleaded, *inter alia*, that, in an effort to preserve its rights, in January 2014, DCA requested that ICANN suspend its processing of applications for .AFRICA during the pendency of this proceeding. ICANN, however, summarily refused to do so.
13. DCA Trust also submitted that “on 23 March 2014, DCA became aware that ICANN intended to sign an agreement with DCA’s competitor (a South African company called ZACR) on 26 March 2014 in Beijing [...] Immediately upon receiving this information, DCA contacted ICANN and asked it to refrain from signing the agreement with ZACR in light of the fact that this proceeding was still pending. Instead, according to ICANN’s website, ICANN *signed its agreement with ZACR the very next day, two days ahead of plan, on 24 March instead of 26 March.*”
14. According to DCA Trust, that same day, “ICANN then responded to DCA’s request by presenting the execution of the contract as a *fait accompli*, arguing that DCA should have sought to stop ICANN from proceeding with ZACR’s application, as ICANN had already informed DCA of its intention [to] ignore its obligations to participate in this proceeding in good faith.”

15. DCA Trust also submitted that on 25 March 2014, as per ICANN's email to the ICDR, "ICANN for the first time informed DCA that it would accept the application of Article 37 of the ICDR Rules to this proceeding contrary to the express provisions of the Supplementary Procedures of ICANN has put in place for the IRP Process."
16. In its Request, DCA Trust argued that it "is entitled to an accountability proceeding with legitimacy and integrity, with the capacity to provide a meaningful remedy. [...] DCA has requested the opportunity to compete for rights to .AFRICA pursuant to the rules that ICANN put into place. Allowing ICANN to delegate .AFRICA to DCA's only competitor – which took actions that were instrumental in the process leading to ICANN's decision to reject DCA's application – would eviscerate the very purpose of this proceeding and deprive DCA of its rights under ICANN's own constitutive instruments and international law."
17. Finally, among other things, DCA Trust requested the following interim relief:
 - a. An order compelling *ICANN to refrain from any further steps toward delegation of the .AFRICA gTLD*, including but not limited to execution or assessment of pre-delegation testing, negotiations or discussions relating to delegation with the entity ZACR or any of its officers or agents; [...]
18. On 24 April and 12 May 2014, the Panel issued Procedural Order No. 1, a Decision on Interim Measures of Protection, and a list of questions for the Parties to answer.
19. In its 12 May 2014 Decision on Interim Measures of Protection, the Panel required ICANN to "immediately refrain from any further processing of any application for .AFRICA until [the Panel] heard the merits of DCA Trust's Notice of Independent Review Process and issued its conclusions regarding the same".
20. In the Panel's unanimous view, among other reasons, it would have been "unfair and unjust to deny DCA Trust's request for interim relief when the need for such a relief...[arose] out of ICANN's failure to follow its own Bylaws and procedures." The Panel also reserved its decision on the issue of costs relating to that stage of the proceeding until the hearing of the merits.
21. On 27 May and 4 June 2015, the Panel issued Procedural Order No. 2 and a Decision on ICANN's request for Partial Reconsideration of certain portions of its Decision on Interim Measures of Protection.

22. In its 4 June 2014 Decision on ICANN's request for Partial Reconsideration, the Panel unanimously concluded that ICANN's request must be denied. In that Decision, the Panel observed:

9. After careful consideration of the Parties' respective submissions, the Panel is of the unanimous view that ICANN's Request must be denied for two reasons.

10. First, there is nothing in ICANN's Bylaws, the International Dispute Resolution Procedures of the ICDR effective as at 1 June 2009 or the Supplementary Procedures for ICANN Independent Review Process that in any way address the Panel's ability to address ICANN's Request. The Panel has not been able to find any relevant guidance in this regard in any of the above instruments and ICANN has not pointed to any relevant provision or rule that would support its argument that the Panel has the authority to reconsider its Decision of 12 May 2014.

11. Moreover, ICANN has not pointed to any clerical, typographical or computation error or shortcoming in the Panel's Decision and it has not requested an interpretation of the Panel's Decision based on any ambiguity or vagueness. To the contrary, ICANN has asked the Panel to reconsider its prior findings with respect to certain references in its Decision that ICANN disagrees with, on the basis that those references are in ICANN's view, inaccurate.

12. Second, even if the Panel were to reconsider based on any provision or rule available, its findings with respect to those passages complained of by ICANN as being inaccurate in its Decision – namely paragraphs 29 to 33 – after deliberation, the Panel would still conclude that ICANN has failed to follow its own Bylaws as more specifically explained in the above paragraphs, in the context of addressing which of the Parties should be viewed as responsible for the delays associated with DCA Trust's Request for Interim Measures of Protection. It is not reasonable to construe the By-law proviso for consideration by a provider-appointed *ad hoc* panel when a standing panel is not in place as relieving ICANN indefinitely of forming the required standing panel. Instead, the provider appointed panel is properly viewed as an interim procedure to be used before ICANN has a chance to form a standing panel. Here, more than a year has elapsed, and ICANN has offered no explanation why the standing panel has not been formed, nor indeed any indication that formation of that panel is in process, or has begun, or indeed even is planned to begin at some point.

The Panel also reserved its decision on the issue of costs relating to that stage of the proceeding until the hearing of the merits.

23. On 14 August 2014, the Panel issued a Declaration on the IRP Procedure ("2014 Declaration") pursuant to which it (1) ordered a reasonable documentary exchange, (2) permitted the Parties to benefit from additional filings and supplementary briefing, (3) allowed a video hearing, and (4) permitted both Parties at the hearing to

challenge and test the veracity of any written statements made by witnesses.

The Panel also concluded that its Declaration on the IRP and its future Declaration on the Merits of the case were binding on the Parties. In particular, the Panel decided:

98. Various provisions of ICANN's Bylaws and the Supplementary Procedures support the conclusion that the Panel's decisions, opinions and declarations are binding. There is certainly nothing in the Supplementary Rules that renders the decisions, opinions and declarations of the Panel either advisory or non-binding.

[...]

100. Section 10 of the Supplementary Procedures resembles Article 27 of the ICDR Rules. Whereas Article 27 refers to "Awards", section 10 refers to "Declarations". Section 10 of the Supplementary Procedures, however, is silent on whether Declarations made by the IRP Panel are "final and binding" on the parties.

101. As explained earlier, as per Article IV, Section 3, paragraph 8 of the Bylaws, the Board of Directors of ICANN has given its approval to the ICDR to establish a set of operating rules and procedures for the conduct of the IRP set out in section 3. The operating rules and procedures established by the ICDR are the ICDR Rules as referred to in the preamble of the Supplementary Procedures. These Rules have been supplemented with the Supplementary Procedures.

102. This is clear from two different parts of the Supplementary Procedures. First, in the preamble, where the Supplementary Procedures state that: "These procedures supplement the International Centre for Dispute Resolution's International Arbitration Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws".

103. And second, under section 2 entitled (Scope), that states that the "ICDR will apply these Supplementary Procedures, in addition to the INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, in all cases submitted to the ICDR in connection with the Article IV, Section 3(4) of the ICANN Bylaws". It is therefore clear that ICANN intended the operating rules and procedures for the independent review to be an international set of arbitration rules supplemented by a particular set of additional rules.

104. There is also nothing inconsistent between section 10 of the Supplementary Procedures and Article 27 of the ICDR Rules.

105. One of the hallmarks of international arbitration is the binding and final nature of the decisions made by the adjudicators. Binding arbitration is the essence of what the ICDR Rules, the ICDR itself and its parent, the American Arbitration Association, offer. The selection of the ICDR Rules as the baseline set of procedures for IRP's, therefore, points to a binding adjudicative process.

106. Furthermore, the process adopted in the Supplementary Procedures is an adversarial one where counsel for the parties present competing evidence and arguments, and a panel decides who prevails, when and in what circumstances. The panellists who adjudicate the parties' claims are also selected from among experienced arbitrators, whose usual charter is to make binding decisions.

107. The above is further supported by the language and spirit of section 11 of ICANN's Bylaws. Pursuant to that section, the IRP Panel has the authority to summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious. Surely, such a decision, opinion or declaration on the part of the Panel would not be considered advisory.

[...]

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

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

[...]

115. Moreover, assuming for the sake of argument that it is acceptable for ICANN to adopt a remedial scheme with no teeth, the Panel is of the opinion that, at a minimum, the IRP should forthrightly explain and acknowledge that the process is merely advisory. This would at least let parties know before embarking on a potentially expensive process that a victory before the IRP panel may be ignored by ICANN. And, a straightforward acknowledgment that the IRP process is intended to be merely advisory might lead to a legislative or executive initiative to create a truly independent compulsory process. The Panel seriously doubts that the Senators questioning former ICANN President Stuart Lynn in 2002 would have been satisfied had they understood that a) ICANN had imposed on all applicants a waiver of all judicial remedies, *and* b) the IRP process touted by ICANN as the "ultimate guarantor" of ICANN accountability was only an advisory process, the benefit of which accrued only to ICANN. [Underlining is from the original decision.]

The Panel also reserved its decision on the issue of costs relating to that stage of the proceeding until the hearing of the merits.

24. On 5 September and 25 September 2014, the Panel issued Procedural Orders No. 3 and No. 4. In Procedural Order No. 3, the Panel notably required the Parties to complete their respective filing of briefs in accordance with the IRP Procedure Guidelines by 3 November 2014 for DCA Trust and 3 December 2014 for ICANN.
25. In Procedural Order No. 4 dated 25 September 2014, the Panel reached a decision regarding document production issues.
26. On 3 November 2014 and 3 December 2014, the Parties filed their Memorial and Response Memorial on the Merits in accordance with the timetable set out in Procedural Order No. 3.
27. On 26 February 2015, following the passing away of the Hon. Richard C. Neal (Ret.) and confirmation by the ICDR of his replacement arbitrator, the Hon. William J. Cahill (Ret.), ICANN requested that this Panel consider revisiting the part of this IRP relating to the issue of hearing witnesses addressed in the Panel's 2014 Declaration.
28. In particular, ICANN submitted that given the replacement of Justice Neal, Article 15.2 of the ICDR Rules together with the Supplementary Procedures permitted this IRP to in its sole discretion, determine "whether all or part" of this IRP should be repeated.
29. According to ICANN, while it was not necessary to repeat all of this IRP, since the Panel here had exceeded its authority under the Supplementary Procedures when it held in its 2014 Declaration that it could order live testimony of witnesses, the Panel should then at a minimum consider revisiting that issue.
30. According to ICANN, panelists derived "their powers and authority from the relevant applicable rules, the parties' requests, and the contractual provisions agreed to by the Parties (in this instance, ICANN's Bylaws, which establish the process of independent review). The authority of panelists is limited by such rules, submissions and agreements."
31. ICANN emphasized that "compliance with the Supplementary Procedures [was] critical to ensure predictability for ICANN, applicants for and objectors to gTLD applications, and the entire ICANN community...", and while "ICANN [was] committed to fairness and accessibility...ICANN [was] also committed to predictability and the like treatment of all applicants. For this Panel to change the rules

for this single applicant [did] not encourage any of these commitments.”

32. ICANN also pleaded that, DCA specifically agreed to be bound by the Supplementary Procedures when it initially submitted its application, the Supplementary Procedures apply to both ICANN and DCA alike, ICANN is now in the same position when it comes to testing witness declarations and finally, in alternative dispute resolution proceedings where cross examination of witnesses is allowed, parties often waive cross-examination.

33. Finally, ICANN advanced that:

[T]he Independent Review process is an alternative dispute resolution procedure adapted to the specific issues to be addressed pursuant to ICANN’s Bylaws. The process cannot be transformed into a full-fledged trial without amending ICANN’s Bylaws and the Supplementary Procedures, which specifically provide for a hearing that includes counsel argument only. Accordingly, ICANN strongly urges the Panel to follow the rules for this proceeding and to declare that the hearing in May will be limited to argument of counsel.

34. On 24 March 2015, the Panel issued its Declaration on ICANN’s Request for Revisiting of the 14 August Declaration on the IRP Procedure following the Replacement of Panel Member. In that Declaration, the newly constituted Panel unanimously concluded that it was not necessary for it to reconsider or revisit its 2014 Declaration.

35. In passing and not at all as a result of any intended or inadvertent reconsideration or revisiting of its 2014 Declaration, the Panel referred to Articles III and IV of ICANN’s Bylaws and concluded:

Under the general heading, Transparency, and title “Purpose”, Section 1 of Article III states: “ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness.” Under the general heading, Accountability and Review, and title “Purpose”, Section 1 of Article IV reads: “In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws.” In light of the above, and again in passing only, it is the Panel’s unanimous view, that the filing of fact witness statements (as ICANN has done in this IRP) and limiting telephonic or in-person hearings to argument only is inconsistent with the objectives setout in Articles III and IV setout above.

The Panel again reserved its decision on the issue of costs relating to that stage of the proceeding until the hearing of the merits.

36. On 24 March and 1 April 2015, the Panel rendered Procedural Orders No. 5 and 6, in which, among other things, the Panel recorded the Parties' "agreement that there will no cross-examination of any of the witnesses" at the hearing of the merits.
37. On 20 April 2015, the Panel rendered its Third Declaration on the IRP Procedure. In that Declaration, the Panel decided that the hearing of this IRP should be an in-person one in Washington, D.C. and required all three witnesses who had filed witness statements to be present at the hearing.
38. The Panel in particular noted that:

13. [...] Article IV, Section 3, and Paragraph 4 of ICANN's Bylaws (reproduced above) – the Independent Review Process – was designed and set up to offer the Internet community, an accountability process that would ensure that ICANN acted in a manner consistent with ICANN's Articles of Incorporation and Bylaws.

14. Both ICANN's Bylaws and the Supplementary Rules require an IRP Panel to *examine* and *decide* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws. As ICANN's Bylaws explicitly put it, an IRP Panel is "*charged with* comparing contested actions of the Board [...], and with *declaring* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws.

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

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

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

16. Accountability requires an organization to explain or give reasons for its activities, accept responsibility for them and to disclose the results in a transparent manner.

[...]

21. In order to keep the costs and burdens of independent review as low as possible, ICANN's Bylaws, in Article IV, Section 3 and Paragraph 12, suggests that the IRP Panel conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible, and where necessary the IRP Panel may hold meetings by telephone. Use of the words "should" and "may" versus "shall" are demonstrative of this point. In the same paragraph, however, ICANN's Bylaws state that, "in the unlikely event that a telephonic or in-person hearing is convened, the hearing *shall* be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance."

22. The Panel finds that this last sentence in Paragraph 12 of ICANN's Bylaws, unduly and improperly restricts the Panel's ability to conduct the "independent review" it has been explicitly mandated to carryout in Paragraph 4 of Section 3 in the manner it considers appropriate.

23. How can a Panel compare contested actions of the Board and declare whether or not they are consistent with the provisions of the Articles of Incorporation and Bylaws, without the ability to fact find and make enquiries concerning those actions in the manner it considers appropriate?

24. How can the Panel for example, determine, if the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, or exercised independent judgment in taking decisions, if the Panel cannot ask the questions it needs to, in the manner it needs to or considers fair, just and appropriate in the circumstances?

25. How can the Panel ensure that the parties to this IRP are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case with respect to the mandate the Panel has been given, if as ICANN submits, "ICANN's Bylaws do not permit any examination of witnesses by the parties or the Panel during the hearing"?

26. The Panel is unanimously of the view that it cannot. The Panel is also of the view that any attempt by ICANN in this case to prevent it from carrying out its independent review of ICANN Board's actions in the manner that the Panel considers appropriate under the circumstances deprives the accountability and review process set out in the Bylaws of any meaning.

27. ICANN has filed two 'Declarations' in this IRP, one signed by Ms. Heather Dryden, a Senior Policy Advisor at the International Telecommunications Policy and Coordination Directorate at Industry Canada, and Chair of ICANN Government Advisory Committee from 2010 to 2013, and the other by Mr. Cherine Chalaby, a member of the Board of Directors of ICANN since 2010. Mr. Chalaby is also, since its inception, one of three members of the Subcommittee on Ethics and Conflicts of ICANN's Board of Governance Committee.

28. In their respective statements, both individuals have confirmed that they "have personal knowledge of the matters set forth in [their] declaration and [are] competent to testify to these matters *if called as a witness*."

[...]

29. In his Declaration, Mr. Chalaby states that “all members of the NGPC were asked to and did specifically affirm that they did not have a conflict of interest related to DCA’s application for .AFRICA when they voted on the GAC advice. In addition, the NGPC asked the BGC to look into the issue further, and the BGC referred the matter to the Subcommittee. After investigating the matter, the Subcommittee concluded that Chris Disspain and Mike Silber did not have conflicts of interest with respect to DCA’s application for .AFRICA.”

30. The Panel considers it important and useful for ICANN’s witnesses, and in particular, Mr. Chalaby as well as for Ms. Sophia Bekele Eshete to be present at the hearing of this IRP.

31. While the Panel takes note of ICANN’s position depicted on page 2 of its 8 April 2015 letter, the Panel nonetheless invites ICANN to reconsider its position.

32. The Panel also takes note of ICANN’s offer in that same letter to address written questions to its witnesses before the hearing, and if the Panel needs more information after the hearing to clarify the evidence presented during the hearing. The Panel, however, is unanimously of the view that this approach is fundamentally inconsistent with the requirements in ICANN’s Bylaws for it to act openly, transparently, fairly and with integrity.

33. As already indicated in this Panel’s August 2014 Declaration, analysis of the propriety of ICANN’s decisions in this case will depend at least in part on evidence about the intentions and conduct of ICANN’s top personnel. Even though the Parties have explicitly agreed that neither will have an opportunity to cross-examine the witnesses of the other in this IRP, the Panel is of the view that ICANN should not be allowed to rely on written statements of its top officers attesting to the propriety of their actions and decisions without an opportunity for the Panel and thereafter DCA Trust’s counsel to ask any follow-up questions arising out of the Panel’s questions of ICANN’s witnesses. The same opportunity of course will be given to ICANN to ask questions of Ms. Bekele Eshete, after the Panel has directed its questions to her.

34. The Parties having agreed that there will be no cross-examination of witnesses in this IRP, the procedure for asking witnesses questions at the hearing shall be as follows:

- a) The Panel shall first have an opportunity to ask any witness any questions it deems necessary or appropriate;
- b) Each Party thereafter, shall have an opportunity to ask any follow-up questions the Panel permits them to ask of any witness.

The Panel again reserved its decision on the issue of costs relating to that stage of the proceeding until the hearing of the merits.

39. On 27 April and 4 May 2015, the Panel issued its Procedural Order No. 7 and 8, and on that last date, it held a prehearing conference call with the Parties as required by the ICDR Rules. In Procedural

Order No. 8, the Panel set out the order of witness and party presentations agreed upon by the Parties.

40. On 18 May 2015, and in response to ZA Central Registry's (ZACR) request to have two of its representatives along with a representative from the African Union Commission (AUC) attend at the IRP hearing scheduled for 22 and 23 May 2015 in Washington, D.C., the Panel issued its Procedural Order No. 9, denying the requests made by ZACR and AUC to be at the merits hearing of this matter in Washington, D.C.
41. In a letter dated 11 May 2015, ZACR and AUC's legal representative had submitted that both entities had an interest in this matter and it would be mutually beneficial for the IRP to permit them to attend at the hearing in Washington, D.C.
42. ZACR's legal representative had also argued that "allowing for interests of a materially affected party such as ZACR, the successful applicant for the dotAfrica gTLD, as well as broader public interests, to be present enhances the legitimacy of the proceedings and therefore the accountability and transparency of ICANN and its dispute resolution procedures."
43. For the Panel, Article 20 of the ICDR Rules, which applied in this matter, stated that the hearing of this IRP was "private unless the parties agree otherwise". The Parties in this IRP did not consent to the presence of ZACR and AUC. While ICANN indicated that it had no objection to the presence of ZACR and AUC, DCA Trust was not of the same view. Therefore, ZACR and AUC were not permitted to attend.
44. The in-person hearing of the merits of this IRP took place on 22 and 23 May 2015 at the offices of Jones Day LLP in Washington, D.C. All three individuals who had filed witness statements in this IRP, namely Ms. Sophia Bekele Eshete, representative for DCA Trust, Ms. Heather Dryden and Mr. Cherine Chalaby, representatives for ICANN, attended in person and answered questions put to them by the Panel and subsequently by the legal representatives of both Parties. In attendance at the hearing was also Ms. Amy Stathos, Deputy General Counsel of ICANN.
45. The proceedings of the hearing were reported by Ms. Cindy L. Sebo of TransPerfect Legal Solutions, who is a Registered Merit Real-Time Court Reporter.

46. On the last day of the hearing, DCA Trust was asked by the Panel to clearly and explicitly articulate its prayers for relief. In a document entitled Claimant's Final Request for Relief which was signed by the Executive Director of DCA Trust, Ms. Sophia Bekele and marked at the hearing as Hearing Exhibit 4, DCA Trust asked the Panel to:

Declare that the Board violated ICANN's Articles of Incorporation, Bylaws and the Applicant Guidebook (AGB) by:

- Discriminating against DCA and wrongfully assisting the AUC and ZACR to obtain rights to the .AFRICA gTLD;
- Failing to apply ICANN's procedures in a neutral and objective manner, with procedural fairness when it accepted the GAC Objection Advice against DCA; and
- Failing to apply its procedures in a neutral and objective manner, with procedural fairness when it approved the BGC's recommendation not to reconsider the NGPC's acceptance of the GAC Objection Advice against DCA;

And to declare that:

- DCA is the prevailing party in this IRP and, consequently, shall be entitled to its costs in this proceeding; and
- DCA is entitled to such other relief as the Panel may find appropriate under the circumstances described herein.

Recommend, as a result of each of these violations, that:

- ICANN cease all preparations to delegate the .AFRICA gTLD to ZACR;
- ICANN permit DCA's application to proceed through the remainder of the new gTLD application process and be granted a period of no less than 18 months to obtain Government support as set out in the AGB and interpreted by the Geographic Names Panel, or accept that the requirement is satisfied as a result of the endorsement of DCA Trust's application by UNECA; and
- ICANN compensate DCA for the costs it has incurred as a result of ICANN's violations of its Articles of Incorporation, Bylaws and AGB.

47. In its response to DCA Trust's Final Request for Relief, ICANN submitted that, "the Panel should find that no action (or inaction) of the ICANN Board was inconsistent with the Articles of Incorporation or Bylaws, and accordingly none of DCA's requested relief is appropriate."

48. ICANN also submitted that:

DCA urges that the Panel issue a declaration in its favor...and also asks that the Panel declare that DCA is the prevailing party and entitled to its costs. Although ICANN believes that the evidence does not support the

declarations that DCA seeks, ICANN does not object to the form of DCA's requests.

At the bottom of DCA's Final Request for Relief, DCA asks that the Panel recommend that ICANN cease all preparations to delegate the .AFRICA gTLD to ZACR, and that ICANN permit DCA's application to proceed and give DCA no less than 18 additional months from the date of the Panel's declaration to attempt to obtain the requisite support of the countries in Africa. ICANN objects to that appropriateness of these requested recommendations because they are well outside the Panel's authority as set forth in the Bylaws.

[...]

Because the Panel's authority is limited to declaring whether the Board's conduct was inconsistent with the Articles or the Bylaws, the Panel should limit its declaration to that question and refrain from recommending how the Board should then proceed in light of the Panel's declaration. Pursuant to Paragraph 12 of that same section of the Bylaws, the Board will consider the Panel's declaration at its next meeting, and if the Panel has declared that the Board's conduct was inconsistent with the Articles or the Bylaws, the Board will have to determine how to act upon the opinion of the Panel.

By way of example only, if the Panel somehow found that the unanimous NGPC vote on 4 June 2013 was not properly taken, the Board might determine that the vote from that meeting should be set aside and that the NGPC should consider the issue anew. Likewise, if the Panel were to determine that the NGPC did not adequately consider the GAC advice at [the] 4 June 2013 meeting, the Board might require that the NGPC reconsider the GAC advice.

In all events, the Bylaws mandate that the Board has the responsibility of fashioning the appropriate remedy once the Panel has declared whether or not it thinks the Board's conduct was inconsistent with ICANN's Articles of Incorporation and Bylaws. The Bylaws do not provide the Panel with the authority to make any recommendations or declarations in this respect.

49. In response to ICANN's submissions above, on 15 June 2015, DCA Trust advanced that the Panel had already ruled that its declaration on the merits will be binding on the Parties and that nothing in ICANN's Bylaws, the Supplementary Procedures or the ICDR Rules applicable in these proceedings prohibits the Panel from making a recommendation to the ICANN Board of Directors regarding an appropriate remedy. DCA Trust also submitted that:

According to ICANN's Bylaws, the Independent Review Process is designed to provide a remedy for "any" person materially affected by a decision or action by the Board. Further, "in order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation. Indeed, the ICANN New gTLD Program Committee, operating under the delegated authority of the ICANN Board, itself suggested that DCA could seek relief through ICANN's accountability

mechanisms or, in other words, the Reconsideration process and the Independent Review Process. If the IRP mechanism – the mechanism of last resort for gTLD applicants – is intended to provide a remedy for a claimant materially injured or harmed by Board action or inaction, and it serves as the only alternative to litigation, then naturally the IRP Panel may recommend how the ICANN Board might fashion a remedy to redress such injury or harm.

50. On 25 June 2015, the Panel issued its Procedural Order No. 10, directing the Parties to by 1 July 2015 simultaneously file their detailed submissions on costs and their allocation in these proceedings.
51. The additional factual background and reasons in the above decisions, procedural orders and declarations rendered by the Panel are hereby adopted and incorporated by reference in this Final Declaration.
52. On 1 and 2 July 2015, the Parties filed their respective positions and submissions on costs.

II. BRIEF SUMMARY OF THE PARTIES' POSITIONS ON THE MERITS & REQUEST FOR RELIEF

53. According to DCA Trust and as elaborated on in its Memorial on Merits dated 3 November 2014, the central dispute between it and ICANN in this IRP may be summarized as follows:

32. By preventing DCA'S application from proceeding through the new gTLD review process and by coordinating with the AUC and others to ensure that the AUC obtained the rights to .AFRICA, ICANN breached its obligations of independence, transparency and due process contained in its Articles of Incorporation and Bylaws, including its obligation to conduct itself consistent with its duty of good faith under relevant principles of international law.

54. According to DCA Trust, among other things, "instead of functioning as a disinterested regulator of a fair and transparent gTLD application process, ICANN used its authority and oversight over that process to assist ZACR and to eliminate its only competitor, DCA, from the process."
55. DCA Trust also advanced that, "as a result, ICANN deprived DCA of the right to compete for .AFRICA in accordance with the rules ICANN established for the new gTLD program, in breach of the Applicant Guidebook ("AGB") and ICANN's Articles of Incorporation and Bylaws."

56. In its 3 December 2014 Response to DCA's Memorial on the Merits, among other things, ICANN submitted that, "ICANN's conduct with respect to DCA's application for .AFRICA was fully consistent with ICANN's Bylaws, its Articles of Incorporation and the Applicant Guidebook. ICANN also pleaded that it acted through open and transparent processes, evaluated DCA's application for .AFRICA in accordance with the procedures set forth in the Guidebook, and followed the procedures set forth in its Bylaws in evaluating DCA's Request for Reconsideration."
57. ICANN advanced that, "DCA is using this IRP as a mean to challenge the right of African countries to support a specific (and competing) application for .AFRICA, and to rewrite the Guidebook."
58. ICANN also added that, "ICANN provided assistance to those who requested, cooperated with governmental authorities, and respected the consensus advice issued by the GAC, which speaks on behalf of the governments of the world."
59. In its Final Request for Relief filed on 23 May 2015, DCA Trust asked this Panel to:
 1. Declare that the Board violated ICANN's Articles of Incorporation, Bylaws and the Applicant Guidebook (AGB);
 2. Declare that DCA Trust is the prevailing party in this IRP and, consequently entitled to its costs in this proceeding; and
 3. Recommend as a result of the Board violations a course of action for the Board to follow going forward.
60. In its response letter of 1 June 2015, ICANN confirmed that it did not object to the form of DCA Trust's requests above, even though it believes that the evidence does not support the declarations that DCA Trust seeks. ICANN did, however, object to the appropriateness of the request for recommendations on the ground that they are outside of the Panel's authority as set forth in the Bylaws.

III. THE ISSUES RAISED AND THE PANEL'S DECISION

61. After carefully considering the Parties' written and oral submissions, perusing the three witness statements filed and hearing *viva voce* the testimonies of the witnesses at the in-person hearing of this IRP in Washington, D.C., the Panel answers the following four questions put to it as follows:

1. Did the Board act or fail to act in a manner inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook?

Answer: Yes.

2. Can the IRP Panel recommend a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act in a manner inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook (AGB)?

Answer: Yes.

3. Who is the prevailing party in this IRP?

Answer: DCA Trust

4. Who is responsible for bearing the costs of this IRP and the cost of the IRP Provider?

Answer: ICANN, in full.

Summary of Panel's Decision

For reasons explained in more detail below, and pursuant to Article IV, Section 3, paragraph 11 (c) of ICANN's Bylaws, the Panel declares that both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN.

Furthermore, pursuant to Article IV, Section 3, paragraph 11 (d) of ICANN's Bylaws, the Panel recommends that ICANN continue to refrain from delegating the .AFRICA gTLD and permit DCA Trust's application to proceed through the remainder of the new gTLD application process.

Finally, DCA Trust is the prevailing party in this IRP and ICANN is responsible for bearing, pursuant to Article IV, Section 3, paragraph 18 of the Bylaws, Article 11 of Supplementary Procedures and Article 31 of the ICDR Rules, the totality of the costs of this IRP and the totality of the costs of the IRP Provider.

As per the last sentence of Article IV, Section 3, paragraph 18 of the Bylaws, DCA Trust and ICANN shall each bear their own expenses. The Parties shall also each bear their own legal representation fees.

IV. ANALYSIS OF THE ISSUES AND REASONS FOR THE PANEL'S DECISION

1) Did the Board act or fail to act in a manner inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook?

62. Before answering this question, the Panel considers it necessary to quickly examine and address the issue of "standard of review" as referred to by ICANN in its 3 December 2014 Response to DCA's Memorial on the Merits or the "law applicable to these proceedings" as pleaded by DCA Trust in its 3 November 2014 Memorial on the Merits.

63. According to DCA Trust:

30. The version of ICANN's Articles of Incorporation and its Bylaws in effect at the time DCA filed its Request for IRP applies to these proceedings. [Articles of Incorporation of Internet Corporation for Assigned Names and Numbers (21 November 1998) and Bylaws of the Internet Corporation for Assigned Names and Numbers (11 April 2013)]. ICANN's agreement with the U.S. Department of Commerce, National Telecommunications & Information Administration ("NTIA"), the "Affirmation of Commitments," is also instructive, as it explains ICANN's obligations in light of its role as regulator of the Domain Name System ("DNS"). The standard of review is a *de novo* "independent review" of whether the actions of the Board violated the Bylaws, with focus on whether the Board acted without conflict of interest, with due diligence and care, and exercised independent judgment in the best interests of ICANN and its many stakeholders. (Underlining added).

31. All of the obligations enumerated in these documents are to be carried out *first* in conformity with "relevant principles of international law" and *second* in conformity with local law. As explained by Dr. Jack Goldsmith in his Expert Report submitted in *ICM v. ICANN*, the reference to "principles of international law" in ICANN's Articles of Incorporation should be understood to include both customary international law and general principles of law.

64. In response, ICANN submits that:

11. The IRP is a unique process available under ICANN's Bylaws for persons or entities that claim to have been materially and adversely affected by a decision or action of the ICANN Board, but only to the extent that Board action was inconsistent with ICANN's Bylaws or Articles. This IRP Panel is tasked with providing its opinion as to whether the challenged Board actions violated ICANN's Bylaws or Articles. ICANN's Bylaws specifically identify the deferential standard of review that the IRP Panel must apply when evaluating the actions of the ICANN Board, focusing on:

- a. Did the Board act without conflict of interest in taking its decision?;
- b. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

12. DCA disregards the plain language of ICANN's Bylaws and relies instead on the IRP Panel's declaration in a prior Independent Review proceeding, *ICM v. ICANN*. However, *ICM* was decided in 2010 under a previous version of ICANN's Bylaws. In its declaration, the *ICM* Panel explicitly noted that ICANN's then-current Bylaws "d[id] not specify or imply that the [IRP] process provided for s[hould] (or s[hould] not) accord deference to the decisions of the ICANN Board." As DCA acknowledges, the version of ICANN's Bylaws that apply to this proceeding are the version as amended in April 2013. The current Bylaws provide for the deferential standard of review set forth above. [Underlining is added]

- 65. For the following reasons, the Panel is of the view that the standard of review is a *de novo*, objective and independent one examining whether the Board acted or failed to act in a manner inconsistent with ICANN's Articles of Incorporation and Bylaws.
- 66. ICANN is not an ordinary California nonprofit organization. Rather it has a large international purpose and responsibility to coordinate and ensure the stable and secure operation of the Internet's unique identifier systems.
- 67. Indeed, Article 4 of ICANN's Articles of Incorporation require ICANN to "operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets." ICANN's Bylaws also impose duties on it to act in an open, transparent and fair manner with integrity.
- 68. ICANN's Bylaws (as amended on 11 April 2013) which both Parties explicitly agree that applies to this IRP, reads in relevant parts as follows:

ARTICLE IV: ACCOUNTABILITY AND REVIEW

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

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

[...]

4. Requests for such independent review shall be referred to an Independent Review Process Panel [...], which shall be charged with comparing contested actions of the Board to Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:
 - a. did the Board act without conflict of interest in taking its decision?
 - b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
 - c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

69. Section 8 of the Supplementary Procedures similarly subject the IRP to the standard of review set out in subparagraphs a., b., and c., above, and add:

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

70. In the Panel's view, Article IV, Section 3, and Paragraph 4 of ICANN's Bylaws (reproduced above) – the Independent Review Process – was designed and set up to offer the Internet community, a *de novo, objective and independent* accountability process that would ensure that ICANN acted in a manner consistent with ICANN's Articles of Incorporation and Bylaws.
71. Both ICANN's Bylaws and the Supplementary Rules require an IRP Panel to *examine* and *decide* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws. As ICANN's Bylaws explicitly put it, an IRP Panel is "*charged with* comparing contested actions of the Board [...], and with *declaring* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws.

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

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

73. Thus, assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, then the only and ultimate “accountability” remedy for an applicant is the IRP.
74. As previously decided by this Panel, such accountability requires an organization to explain or give reasons for its activities, accept responsibility for them and to disclose the results in a transparent manner.
75. Such accountability also requires, to use the words of the IRP Panel in the *Booking.com B.V. v. ICANN* (ICDR Case Number: 50-20-1400-0247), this IRP Panel to “objectively” determine whether or not the Board’s actions are in fact consistent with the Articles of Incorporation, Bylaws and Guidebook, which this Panel, like the one in *Booking.com* “understands as requiring that the Board’s conduct be appraised independently, and without any presumption of correctness.”
76. The Panel therefore concludes that the “standard of review” in this IRP is a *de novo, objective and independent* one, which does not require any presumption of correctness.
77. With the above in mind, the Panel now turns its mind to whether or not the Board in this IRP acted or failed to act in a manner inconsistent

with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook.

DCA Trust's Position

78. In its 3 November 2014 Memorial on the Merits, DCA Trust criticizes ICANN for variety of shortcomings and breaches relating to the Articles of Incorporation, Bylaws and Applicant Guidebook. DCA Trust submits:

32. By preventing DCA's application from proceeding through the new gTLD review process and by coordinating with the AUC and others to ensure that the AUC obtained the rights to .AFRICA, ICANN breached its obligations of independence, transparency and due process contained in its Articles of Incorporation and Bylaws, including its obligation to conduct itself consistent with its duty of good faith under relevant principles of international law.

79. DCA Trust also pleads that ICANN breached its Articles of Incorporation and Bylaws by discriminating against DCA Trust and failing to permit competition for the .AFRICA gTLD, ICANN abused its Regulatory authority in its differential treatment of the ZACR and DCA Trust applications, and in contravention of the rules for the New gTLD Program, ICANN colluded with AUC to ensure that the AUC would obtain control over .AFRICA.

80. According to DCA Trust:

34. ICANN discriminated against DCA and abused its regulatory authority over new gTLDs by treating it differently from other new gTLD applicants without justification or any rational basis— particularly relative to DCA's competitor ZACR—and by applying ICANN's policies in an unpredictable and inconsistent manner so as to favor DCA's competitor for .AFRICA. ICANN staff repeatedly disparaged DCA and portrayed it as an illegitimate bidder for .AFRICA, and the Board failed to stop the discriminatory treatment despite protests from DCA.

35. Moreover, ICANN staff worked with InterConnect to ensure that ZACR, but not DCA, would be able to pass the GNP evaluation, even going so far as to draft a letter supporting ZACR for the AUC to submit back to ICANN. While ICANN staff purported to hold DCA to the strict geographic support requirement set forth in the AGB, once DCA was removed from contention for .AFRICA, ICANN staff immediately bypassed these very same rules in order to allow ZACR's application to pass the GNP evaluation. After DCA's application was pulled from processing on 7 June 2013, ICANN staff directed InterConnect to equate the AUC's support for ZACR's application as support from 100% of African governments. This was a complete change of policy for ICANN, which had insisted (until DCA's application was no longer being considered) that the AUC endorsement was not material to the geographic requirement.

36. However, none of the AUC statements ZACR submitted were adequate endorsements under the AGB, either. ICANN staff then took the remarkable step of drafting the AUC endorsement letter in order to enable ZACR to pass review. The Director of gTLD Operations, Trang Nguyen, personally composed an endorsement letter corresponding to all the AGB requirements for Commissioner Ibrahim's signature. Once Commissioner Ibrahim responded with a signed, stamped copy of the letter incorporating minor additions, ICANN staff rushed to pass ZACR's application just over one week later.

37. In its Response to the GAC Advice rendered against its application, DCA raised concerns that the two .AFRICA applications had been treated differently, though at the time it had no idea of just how far ICANN was going or would go to push ZACR's application through the process. Apparently the NGPC failed to make any inquiry into those allegations. .AFRICA was discussed at one meeting only, and there is no rationale listed for the NGPC's decision in the "Approved Resolutions" for the 4 June 2013 meeting. An adequate inquiry into ICANN staff's treatment of DCA's and ZACR's application—even simply asking the Director of gTLD Operations whether there was any merit to DCA's concerns—would have revealed a pattern of discriminatory behavior against DCA and special treatment by both ICANN staff and the ICANN Board in favor of ZACR's application.

38. In all of these acts and omissions, ICANN breached the AGB and its own Articles of Incorporation and Bylaws, which require it to act in good faith, avoid discriminating against any one party, and ensure open, accurate and unbiased application of its policies. Furthermore, ICANN breached principles of international law by failing to exercise its authority over the application process in good faith and committing an abuse of right by ghost-writing an endorsement letter for ZACR and the AUC, and then decreeing that the letter was all that would be needed for ZACR to pass. Finally, the Board's failure to inquire into the actions of its staff, even when on notice of the myriad of discriminatory actions, violates its obligation to comply with its Bylaws with appropriate care and diligence.

81. DCA Trust submits that the NGPC breached ICANN's Articles of Incorporation and Bylaws by failing to apply ICANN's Procedures in a neutral and objective manner with procedural fairness, when it accepted the GAC Objection Advice against DCA Trust, the NGPC should have investigated questions about the GAC Objection Advice being obtained through consensus, and the NGPC should have consulted with an independent expert about the GAC advice given that the AUC used the GAC to circumvent the AGB's community objection procedures.

82. According to DCA Trust:

44. The decision of the NGPC, acting pursuant to the delegated authority of the ICANN Board, to accept the purported "consensus" GAC Objection Advice, violated ICANN's Articles of Incorporation and Article III § 1 of its Bylaws, requiring transparency, consistency and fairness. ICANN ignored

the serious issues raised by DCA and others with respect to the rendering and consideration of the GAC Objection Advice, breaching its obligation to operate “to the maximum extent possible in an open and transparent manner and consistent with procedures designed to ensure fairness.” It also breaches ICANN’s obligation under Article 4 of its Articles of Incorporation to abide by principles of international law, including good faith application of rules and regulations and the prohibition on the abuse of rights.

45. The NGPC gave undue deference to the GAC and failed to investigate the serious procedural irregularities and conflicts of interest raised by DCA and others relating to the GAC’s Objection Advice on .AFRICA. ICANN had a duty under principles of international law to exercise good faith and due diligence in evaluating the GAC advice rather than accepting it wholesale and without question, despite having notice of the irregular manner in which the advice was rendered. Importantly, ICANN was well aware that the AUC was using the GAC to effectively reserve .AFRICA for itself, pursuant to ICANN’s own advice that it should use the GAC for that purpose and contrary to the New gTLD Program objective of enhancing competition for TLDs. The AUC’s very presence on the GAC as a member rather than an observer demonstrates the extraordinary lengths ICANN took to ensure that the AUC was able to reserve .AFRICA for its own use notwithstanding the new gTLD application process then underway.

46. The ICANN Board and staff members had actual knowledge of information calling into question the notion that there was a consensus among the GAC members to issue the advice against DCA’s application, prohibiting the application of the rule in the AGB concerning consensus advice (which creates a “strong presumption” for the Board that a particular application “should not proceed” in the gTLD evaluation process). The irregularities leading to the advice against DCA’s application included proposals offered by Alice Munyua, who no longer represented Kenya as a GAC advisor at the time, and the fact that the genuine Kenya GAC advisor expressly refused to endorse the advice. Redacted - GAC Designated

Confidential Information

Finally, the ICANN Board knew very well that the AUC might attempt to use the GAC in an anticompetitive manner, since it was ICANN itself that informed the AUC it could use the GAC to achieve that very goal.

47. At a bare minimum, this information put ICANN Board and staff members on notice that further investigation into the rationale and support for the GAC’s decision was necessary. During the very meeting wherein the NGPC accepted the Objection Advice, the NGPC acknowledged that due diligence required a conversation with the GAC, even where the advice was consensus advice. The evidence shows that ICANN simply decided to push through the AUC’s appointed applicant in order to allow the AUC to control .AFRICA, as it had previously requested.

48. Even if the GAC’s Objection Advice could be characterized as “consensus” advice, the NGPC’s failure to consult with an independent expert about the GAC’s Objection Advice was a breach of ICANN’s duty to act to the “maximum extent feasible in an open and transparent manner

and consistent with procedures designed to ensure fairness.” The AGB specifically provides that when the Board is considering any form of GAC advice, it “may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.”

49. Given the unique circumstances surrounding the applications for .AFRICA—namely that one applicant was the designee of the AUC, which wanted to control .AFRICA without competition— ICANN should not have simply accepted GAC Objection Advice, proposed and pushed through by the AUC. If it was in doubt as to how to handle GAC advice sponsored by DCA’s only competitor for .AFRICA, it could have and should have consulted a third-party expert in order to obtain appropriate guidance. Its failure to do so was, at a minimum, a breach of ICANN’s duty of good faith and the prohibition on abuse of rights under international law. In addition, in light of the multiple warning signs identified by DCA in its Response to the GAC Objection Advice and its multiple complaints to the Board, failure to consult an independent expert was certainly a breach of the Board’s duty to ensure its fair and transparent application of its policies and its duty to promote and protect competition.

83. DCA Trust also submits that the NGPC breached ICANN’s Articles of Incorporation and Bylaws by failing to apply its procedures in a neutral and objective manner, with procedural fairness, when it approved the BGC’s recommendation not to reconsider the NGPC’s acceptance of the GAC Objection Advice against DCA.

84. According to DCA Trust:

50. Not only did the NGPC breach ICANN’s Articles of Incorporation and its Bylaws by accepting the GAC’s Objection Advice, but the NGPC also breached ICANN’s Articles of Incorporation and its Bylaws by approving the BGC’s recommendation not to reconsider the NGPC’s earlier decision to accept the GAC Objection Advice. Not surprisingly, the NGPC concluded that its earlier decision should not be reconsidered.

51. First, the NGPC’s decision not to review its own acceptance of the GAC Objection Advice lacks procedural fairness, because the NGPC literally reviewed its own decision to accept the Objection Advice. It is a well-established general principle of international law that a party cannot be the judge of its own cause. No independent viewpoint entered into the process. In addition, although Mr. Silber recused himself from the vote on .AFRICA, he remained present for the entire discussion of .AFRICA, and Mr. Disspain apparently concluded that he did not feel conflicted, so both participated in the discussion and Mr. Disspain voted on DCA’s RFR.

52. Second, the participation of the BGC did not provide an independent intervention into the NGPC’s decision-making process, because the BGC is primarily a subset of members of the NGPC. At the time the BGC made its recommendation, the majority of BGC members were also members of the NGPC.

53. Finally, the Board did not exercise due diligence and care in accepting the BGC's recommendation, because the BGC recommendation essentially proffered the NGPC's inadequate diligence in accepting the GAC Objection Advice in the first place, in order to absolve the NGPC of the responsibility to look into any of DCA's grievances in the context of the Request for Review. The basis for the BGC's recommendation to deny was that DCA did not state proper grounds for reconsideration, because failure to follow correct procedure is not a ground for reconsideration, and DCA did not identify the actual information an independent expert would have provided, had the NGPC consulted one. Thus, the BGC essentially found that the NGPC did not fail to take account of material information, because the NGPC did not have before it the material information that would have been provided by an independent expert's viewpoint. The BGC even claimed that if DCA had wanted the NGPC to exercise due diligence and consult an independent expert, DCA should have made such a suggestion in its Response to the GAC Objection Advice. Applicants should not have to remind the Board to comply with its Bylaws in order for the Board to exercise due diligence and care.

54. ICANN's acts and omissions with respect to the BGC's recommendation constitute further breaches of ICANN's Bylaws and Articles of Incorporation, including its duty to carry out its activities in good faith and to refrain from abusing its position as the regulator of the DNS to favor certain applicants over others.

85. Finally, DCA Trust pleads that:

[As] a result of the Board's breaches of ICANN's Articles of Incorporation, Bylaws and general principles of international law, ICANN must halt the process of delegating .AFRICA to ZACR and ZACR should not be permitted to retain the rights to .AFRICA it has procured as a result of the Board's violations. Because ICANN's handling of the new gTLD application process for .AFRICA was so flawed and so deeply influenced by ICANN's relationships with various individuals and organizations purporting to represent "the African community," DCA believes that any chance it may have had to compete for .AFRICA has been irremediably lost and that DCA's application could not receive a fair evaluation even if the process were to be re-set from the beginning. Under the circumstances, DCA submits that ICANN should remove ZACR's application from the process altogether and allow DCA's application to proceed under the rules of the New gTLD Program, allowing DCA up to 18 months to negotiate with African governments to obtain the necessary endorsements so as to enable the delegation and management of the .AFRICA string.

ICANN's Position

86. In its Response to DCA's Memorial on the Merits filed on 3 December 2014 ("ICANN Final Memorial"), ICANN submits that:

2. [...] Pursuant to ICANN's New gTLD Applicant Guidebook ("Guidebook"), applications for strings that represent geographic regions—such as "Africa"—require the support of at least 60% of the respective national governments in the relevant region. As DCA has acknowledged on

multiple occasions, including in its Memorial, DCA does not have the requisite governmental support; indeed, DCA now asks that ICANN be required to provide it with eighteen more months to try to gather the support that it was supposed to have on the day it submitted its application in 2012.

3. DCA is using this IRP as a means to challenge the right of African countries to support a specific (and competing) application for .AFRICA, and to rewrite the Guidebook. The Guidebook provides that countries may endorse multiple applications for the same geographic string. However, in this instance, the countries of Africa chose to endorse only the application submitted by ZA Central Registry (“ZACR”) because ZACR prevailed in the Request for Proposal (“RFP”) process coordinated by the African Union Commission (“AUC”), a process that DCA chose to boycott. There was nothing untoward about the AUC’s decision to conduct an RFP process and select ZACR, nor was there anything inappropriate about the African countries’ decision to endorse only ZACR’s application.

4. Subsequently, as they had every right to do, GAC representatives from Africa urged the GAC to issue advice to the ICANN Board that DCA’s application for .AFRICA not proceed (the “GAC Advice”). One or more countries from Africa—or, for that matter, from any continent—present at the relevant GAC meeting could have opposed the issuance of this GAC Advice, yet not a single country stated that it did not want the GAC to issue advice to the ICANN Board that DCA’s application should not proceed. As a result, under the GAC’s rules, the GAC Advice was “consensus” advice.

5. GAC consensus advice against an application for a new gTLD creates a “strong presumption” for ICANN’s Board that the application should not proceed. In accordance with the Guidebook’s procedures, the Board’s New gTLD Program Committee (the “NGPC”) considered the GAC Advice, considered DCA’s response to the GAC Advice, and properly decided to accept the GAC Advice that DCA’s application should not proceed. As ZACR’s application for .AFRICA subsequently passed all evaluation steps, ICANN and ZACR entered into a registry agreement for the operation of .AFRICA. Following this Panel’s emergency declaration, ICANN has thus far elected not to proceed with the delegation of the .AFRICA TLD into the Internet root zone.

6. DCA’s papers contain much mudslinging and many accusations, which frankly do not belong in these proceedings. According to DCA, the entire ICANN community conspired to prevent DCA from being the successful applicant for .AFRICA. However, the actions that DCA views as nefarious were, in fact, fully consistent with the Guidebook. They also were not actions taken by the Board or the NGPC that in any way violated ICANN’s Bylaws or Articles, the only issue that this IRP Panel is tasked with assessing.

87. ICANN submits that the Board properly advised the African Union’s member states of the Guidebook Rules regarding geographic strings, the NGPC did not violate the Bylaws or Articles of Incorporation by accepting the GAC Advice, the AUC and the African GAC members properly supported the .AFRICA applicant chosen through the RFP

process, the GAC issued consensus advice opposing DCA's application and the NGPC properly accepted the consensus GAC Advice.

88. According to ICANN:

13. DCA's first purported basis for Independent Review is that ICANN improperly responded to a 21 October 2011 communiqué issued by African ministers in charge of Communication and Information Technologies for their respective countries ("Dakar Communiqué"). In the Dakar Communiqué, the ministers, acting pursuant to the Constitutive Act of the African Union, committed to continued and enhanced participation in ICANN and the GAC, and requested that ICANN's Board take numerous steps aimed at increasing Africa's representation in the ICANN community, including that ICANN "include ['Africa'] and its representation in any other language on the Reserved Names List in order [for those strings] to enjoy [] special legislative protection, so [they could be] managed and operated by the structure that is selected and identified by the African Union."

14. As DCA acknowledges, in response to the request in the Dakar Communiqué that .AFRICA (and related strings) be reserved for a operator of the African ministers' own choosing, ICANN advised that .AFRICA and its related strings could not be placed on the Reserved Names List because ICANN was "not able to take actions that would go outside of the community-established and documented guidelines of the program." Instead, ICANN explained that, pursuant to the Guidebook, "protections exist that w[ould] allow the African Union and its member states to play a prominent role in determining the outcome of any application for these top-level domain name strings."

15. It was completely appropriate for ICANN to point the AU member states to the publicly-stated Guidebook protections for geographic names that were put in place to address precisely the circumstance at issue here—where an application for a string referencing a geographic designation did not appear to have the support of the countries represented by the string. DCA argues that ICANN was giving "instructions . . . as to how to bypass ICANN's own rules," but all ICANN was doing was responding to the Dakar Communiqué by explaining the publicly-available rules that ICANN already had in place. This conduct certainly did not violate ICANN's Bylaws or Articles.

16. In particular, ICANN explained that, pursuant to the Guidebook, "Africa" constitutes a geographic name, and therefore any application for .AFRICA would need: (i) documented support from at least 60% of the national governments in the region; and (ii) no more than one written statement of objection . . . from "relevant governments in the region and/or from public authorities associated with the continent and region." Next, ICANN explained that the Guidebook provides an opportunity for the GAC, whose members include the AU member states, to provide "Early Warnings" to ICANN regarding specific gTLD applications. Finally, ICANN explained that there are four formal objection processes that can be initiated by the public, including the Community Objection process, which may be filed where there is "substantial opposition to the gTLD application from a significant

portion of the community to which the gTLD string may be explicitly or implicitly targeted. Each of these explanations was factually accurate and based on publicly available information. Notably, ICANN did not mention the possibility of GAC consensus advice against a particular application (and, of course, such advice could not have occurred if even a single country had voiced its disagreement with that advice during the GAC meeting when DCA's application was discussed).

17. DCA's objection to ICANN's response to the Dakar Communiqué reflects nothing more than DCA's dissatisfaction with the fact that African countries, coordinating themselves through the AUC, opposed DCA's application. However, the African countries had every right to voice that opposition, and ICANN's Board acted properly in informing those countries of the avenues the Guidebook provided them to express that opposition.

18. In another attempt to imply that ICANN improperly coordinated with the AUC, DCA insinuates that the AUC joined the GAC at ICANN's suggestion. ICANN's response to the Dakar Communiqué does not even mention this possibility. Further, in response to DCA's document requests, ICANN searched for communications between ICANN and the AUC relating to the AUC becoming a voting member of the GAC, and the search revealed no such communications. This is not surprising given that ICANN has no involvement in, much less control over, whether the GAC grants to any party voting membership status, including the AUC; that decision is within the sole discretion of the GAC. ICANN's Bylaws provide that membership in the GAC shall be open to "multinational governmental organizations and treaty organizations, on the invitation of the [GAC] through its Chair." In any event, whether the AUC was a voting member of the GAC is irrelevant to DCA's claims. As is explained further below, the AUC alone would not have been able to orchestrate consensus GAC Advice opposing DCA's application.

19. DCA's next alleged basis for Independent Review is that ICANN's NGPC improperly accepted advice from the GAC that DCA's application should not proceed. However, nearly all of DCA's Memorial relates to conduct of the AUC, the countries of the African continent, and the GAC. None of these concerns is properly the subject of an Independent Review proceeding because they do not implicate the conduct of the ICANN Board or the NGPC. The only actual decision that the NGPC made was to accept the GAC Advice that DCA's application for .AFRICA should not proceed, and that decision was undoubtedly correct, as explained below.

20. Although the purpose of this proceeding is to test whether ICANN's Board (or, in this instance, the NGPC) acted in conformance with its Bylaws and Articles, ICANN addresses the conduct of third parties in the next few sections because that additional context demonstrates that the NGPC's decision to accept the GAC Advice—the only decision reviewable here—was appropriate in all aspects.

21. After DCA's application was posted for public comment (as are all new gTLD applications), sixteen African countries—Benin, Burkina Faso, Comoros, Cameroon, Democratic Republic of Congo, Egypt, Gabon, Ghana, Kenya, Mali, Morocco, Nigeria, Senegal, South Africa, Tanzania and Uganda—submitted GAC Early Warnings regarding DCA's application.

Early Warnings are intended to “provid[e] [] applicant[s] with an indication that the[ir] application is seen as potentially sensitive or problematic by one or more governments.” These African countries used the Early Warnings to notify DCA that they had requested the AUC to conduct an RFP for .AFRICA, that ZACR had been selected via that RFP, and that they objected to DCA’s application for .AFRICA. They further notified DCA that they did not believe that DCA had the requisite support of 60% of the countries on the African continent.

22. DCA minimizes the import of these Early Warnings by arguing that they did not involve a “permissible reason” for objecting to DCA’s application. But DCA does not explain how any of these reasons was impermissible, and the Guidebook explicitly states that Early Warnings “may be issued for any reason.” DCA demonstrated the same dismissive attitude towards the legitimate concerns of the sixteen governments that issued Early Warnings by arguing to the ICANN Board and the GAC that the objecting governments had been “teleguided (or manipulated).”

23. In response to these Early Warnings, DCA conceded that it did not have the necessary level of support from African governments and asked the Board to “waive th[e] requirement [that applications for geographic names have the support of the relevant countries] because of the confusing role that was played by the African Union.” DCA did not explain how the AUC’s role was “confusing,” and DCA ignored the fact that, pursuant to the Guidebook, the AUC had every right to promote one applicant over another. The AUC’s decision to promote an applicant other than DCA did not convert the AUC’s role from proper to improper or from clear to confusing.

24. Notably, long before the AUC opposed DCA’s application, DCA itself recognized the AUC’s important role in coordinating continent-wide technology initiatives. In 2009, DCA approached the AUC for its endorsement prior to seeking the support of individual African governments. DCA obtained the AUC’s support at that time, including the AUC’s commitment to “assist[] in the coordination of [the] initiative with African Ministers and Governments.”

25. The AUC, however, then had a change of heart (which it was entitled to do, particularly given that the application window for gTLD applications had not yet opened and would not open for almost two more years). On 7 August 2010, African ministers in charge of Communication and Information Technologies for their respective countries signed the Abuja Declaration. In that declaration, the ministers requested that the AUC coordinate various projects aimed at promoting Information and Communication Technologies projects on the African continent. Among those projects was “set[ting] up the structure and modalities for the [i]mplementation of the DotAfrica Project.”

26. Pursuant to that mandate, the AUC launched an open RFP process, seeking applications from private organizations (including DCA) interested in operating the .AFRICA gTLD. The AUC notified DCA that “following consultations with relevant stakeholders . . . [it] no longer endorse[d] individual initiatives [for .AFRICA].” Instead, “in coordination with the Member States . . . the [AUC] w[ould] go through [an] open [selection]

process”—hardly an inappropriate decision (and not a decision of ICANN or its Board). DCA then refused to participate in the RFP process, thereby setting up an inevitable clash with whatever entity the AUC selected. When DCA submitted its gTLD application in 2012 and attached its 2009 endorsement letter from the AUC, DCA knew full well (but did not disclose) that the AUC had retracted its support.

27. In sum, the objecting governments' concerns were the result of DCA's own decision to boycott the AUC's selection process, resulting in the selection of a different applicant, ZACR, for .AFRICA. Instead of addressing those governments' concerns, and instead of obtaining the necessary support of 60% of the countries on the African continent, DCA asked ICANN to re-write the Guidebook in DCA's favor by eliminating the most important feature of any gTLD application related to a geographic region—the support of the countries in that region. ICANN, in accordance with its Bylaws, Articles and Guidebook, properly ignored DCA's request to change the rules for DCA's benefit.

28. At its 10 April 2013 meeting in Beijing, the GAC advised ICANN that DCA's application for .AFRICA should not proceed.⁴⁰ As noted earlier, the GAC operates on the basis of consensus: if a single GAC member at the 10 April 2013 meeting (from any continent, not just from Africa) had opposed the advice, the advice would not have been considered “consensus.”⁴¹ As such, the fact that the GAC issued consensus GAC Advice against DCA's application shows that not a single country opposed that advice. Most importantly, this included Kenya: Michael Katundu, the GAC Representative for Kenya, and Kenya's only official GAC representative, was present at the 10 April 2013 Beijing meeting and did not oppose the issuance of the consensus GAC Advice.

29. DCA attempts to argue that the GAC Advice was not consensus advice and relies solely on the purported email objection of Sammy Buruchara, Kenya's GAC advisor (as opposed to GAC representative). As a preliminary matter (and as DCA now appears to acknowledge), the GAC's Operating Principles require that votes on GAC advice be made in person. Operating Principle 19 provides that:

If a Member's accredited representative, or alternate representative, is not present at a meeting, then it shall be taken that the Member government or organisation is not represented at that meeting. Any decision made by the GAC without the participation of a Member's accredited representative shall stand and nonetheless be valid.

Similarly, Operating Principle 40 provides:

One third of the representatives of the Current Membership with voting rights shall constitute a quorum at any meeting. A quorum shall only be necessary for any meeting at which a decision or decisions must be made. The GAC may conduct its general business face-to-face or online.

25. DCA argues that Mr. Buruchara objected to the GAC Advice via email, but even if objections could be made via email (which they cannot), Mr. Katundu, Kenya's GAC representative who was in Beijing at the GAC

meeting, not Mr. Buruchara, Kenya's GAC advisor, was authorized to speak on Kenya's behalf. Accordingly, under the GAC rules, Mr. Buruchara's email exchanges could not have constituted opposition to the GAC Advice.

26. Redacted - GAC Designated Confidential Information

And, tellingly, DCA did not to submit a declaration from Mr. Buruchara, which might have provided context or support for DCA's argument.

27. Redacted - GAC Designated Confidential Information

28. Notably, immediately prior to becoming Kenya's GAC advisor, Mr. Buruchara had served as the chairman of DCA's Strategic Advisory Board. But despite Mr. Buruchara's close ties with DCA and with Ms. Bekele, the Kenyan government had: (i) endorsed the Abuja Declaration; (ii) supported the AUC's processes for selecting the proposed registry operator; and (iii) issued an Early Warning objecting to DCA's application.

In other words, the Kenyan government was officially on record as supporting ZACR's application and opposing DCA's application, regardless of what Mr. Buruchara was writing in emails.

29. Furthermore, correspondence produced by DCA in this proceeding (but not referenced in either of DCA's briefs) shows that, despite Ms. Bekele's and Mr. Buruchara's efforts to obtain the support (or at least non-opposition) of the Kenyan government, the Kenyan government had rescinded its earlier support of DCA in favor of ZACR. For example, in February 2013, Ms. Bekele emailed a Kenyan government official asking that Kenya issue an Early Warning regarding ZACR's application. The official responded that he would have to escalate the matter to the Foreign Ministry because the Kenyan president "was part of the leaders of the AU who endorsed AU to be the custodian of dot Africa." On 10 April 2013, Ms. Bekele emailed Mr. Buruchara, asking him to make further points objecting to the proposed GAC advice. Mr. Buruchara responded that he was unable to do so because the Kenyan government had been informed (erroneously informed, according to Mr. Buruchara), that Mr. Buruchara was "contradict[ing] the Heads of State agreement in Abuja." On 8 July 2013,

Mr. Buruchara explained to Ms. Bekele that he “stuck [his] neck out for DCA inspite [*sic*] of lack of Govt support.”

30. Because DCA did not submit a declaration from Mr. Buruchara (and because Ms. Bekele’s declaration is, of course, limited to her own interpretation of email correspondence drafted by others), the Panel is left with a record demonstrating that: (i) Mr.

Buruchara was not authorized by the Kenyan government to oppose the GAC Advice; Redacted - GAC Designated Confidential Information and (iii) the actual GAC representative from Kenya (Mr. Katundu) attended the 10 April 2013 meeting in Beijing and did not oppose the issuance of the consensus GAC Advice that DCA’s application for .AFRICA should not proceed.

31. In short, DCA’s primary argument in support of this Independent Review proceeding—that the GAC should not have issued consensus advice against DCA’s application—is not supported by any evidence and is, instead, fully contradicted by the evidence. And, of course, Independent Review proceedings do not test whether the GAC’s conduct was appropriate (even though in this instance there is no doubt that the GAC appropriately issued consensus advice).

32. As noted above, pursuant to the Guidebook, GAC consensus advice that a particular application should not proceed creates a “strong presumption for the ICANN Board that the application should not be approved.” The ICANN Board would have been required to develop a reasoned and well-supported rationale for not accepting the consensus GAC Advice; no such reason existed at the time the NGPC resolved to accept that GAC Advice (5 June 2013), and no such reason has since been revealed. The consensus GAC Advice against DCA’s application was issued in the ordinary course, it reflected the sentiment of numerous countries on the African continent, and it was never rescinded.

33. DCA’s objection to the Board’s acceptance of the GAC Advice is twofold. First, DCA argues that the NGPC failed to investigate DCA’s allegation that the GAC advice was not consensus advice. Second, DCA argues that the NGPC should have consulted an independent expert prior to accepting the advice. DCA also argued in its IRP Notice that two NGPC members had conflicts of interest when they voted to accept the GAC Advice, but DCA does not pursue that argument in its Memorial (and the facts again demonstrate that DCA’s argument is incorrect).

34. As to the first argument, the Guidebook provides that, when the Board receives GAC advice regarding a particular application, it publishes that advice and notifies the applicant. The applicant is given 21 days from the date of the publication of the advice to submit a response to the Board. Those procedures were followed here. Upon receipt of the GAC Advice, ICANN posted the advice and provided DCA with an opportunity to respond. DCA submitted a lengthy response explaining “[w]hy DCA Trust disagree[d]” with the GAC Advice. A primary theme was that its application had been unfairly blocked by the very countries whose support the Guidebook required DCA to obtain, and that the AUC should not have been allowed to endorse an applicant for .AFRICA. DCA argued that it had been

unfairly “victimized” and “muzzled into insignificance” by the “collective power of the governments represented at ICANN,” and that “the issue of government support [should] be made irrelevant in the process so that both contending applications for .Africa would be allowed to move forward” In other words, DCA was arguing that the AUC’s input was inappropriate, and DCA was requesting that ICANN change the Guidebook requirement regarding governmental support for geographic names in order to accommodate DCA. ICANN’s NGPC reviewed and appropriately rejected DCA’s arguments.

35. One of DCA’s three “supplementary arguments,” beginning on page 10 of its response to the GAC Advice, was that there had been no consensus GAC advice, in part allegedly evidenced by Mr. Buruchara’s (incomplete) email addressed above. DCA, however, chose not to address the fact that: (i) DCA lacked the requisite support of the African governments; (ii) Mr. Buruchara was not the Kenyan GAC representative; (iii) Mr. Buruchara was not at the Beijing meeting; (iv) the government of Kenya had withdrawn any support it may have previously had for DCA’s application; and (iv) the actual Kenyan GAC representative (Mr. Katundu) was at the ICANN meeting in Beijing and did not oppose the issuance of the GAC Advice against DCA’s application for .AFRICA. All of these facts were well known to DCA at the time of its response to the GAC Advice.

36. The NGPC’s resolution accepting the GAC Advice states that the NGPC considered DCA’s response prior to accepting the GAC Advice, and DCA presents no evidence to the contrary. DCA’s disagreement with the NGPC’s decision does not, of course, demonstrate that the NGPC failed to exercise due diligence in determining to accept the consensus GAC Advice.

37. As to DCA’s suggestion that the NGPC should have consulted an independent expert, the Guidebook provides that it is within the Board’s discretion to decide whether to consult with an independent expert:

ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.

The NGPC clearly did not violate its Bylaws, Articles or Guidebook in deciding that it did not need to consult any independent expert regarding the GAC Advice. Because DCA’s challenge to the GAC Advice was whether one or more countries actually had opposed the advice, there was no reason for the NGPC to retain an “expert” on that subject, and DCA has never stated what useful information an independent expert possibly could have provided.

89. ICANN also submits that the NGPC properly denied DCA’s request for reconsideration, ICANN’s actions following the acceptance of the GAC Advice are not relevant to the IRP, and in any event they were not improper, the ICANN staff directed the ICC to treat the two

African applications consistently, and ICANN staff did not violate any policy in drafting a template letter at the AUC request.

90. According to ICANN:

38. DCA argues that the NGPC improperly denied DCA's Reconsideration Request, which sought reconsideration of the NGPC's acceptance of the GAC Advice. Reconsideration is an accountability mechanism available under ICANN's Bylaws and administered by ICANN's Board Governance Committee ("BGC"). DCA's Reconsideration Request asked that the NGPC's acceptance of the GAC Advice be rescinded and that DCA's application be reinstated. Pursuant to the Bylaws, reconsideration of a Board (or in this case NGPC) action is appropriate only where the NGPC took an action "without consideration of material information" or in "reliance on false or inaccurate material information."

39. In its Reconsideration Request, DCA argued (as it does here) that the NGPC failed to consider material information by failing to consult with an independent expert prior to accepting the GAC Advice. The BGC noted that DCA had not identified any material information that the NGPC had not considered, and that DCA had not identified what advice an independent expert could have provided to the NGPC or how such advice might have altered the NGPC's decision to accept the GAC Advice. The BGC further noted that, as discussed above, the Guidebook is clear that the decision to consult an independent expert is at the discretion of the NGPC.

40. DCA does not identify any Bylaws or Articles provision that the NGPC violated in denying the Reconsideration Request. Instead, DCA simply disagrees with the NGPC's determination that DCA had not identified any material information on which the NGPC failed to rely. That disagreement is not a proper basis for a Reconsideration Request or an IRP. DCA also argues (again without citing to the Bylaws or Articles) that, because the NGPC accepted the GAC Advice, the NGPC could not properly consider DCA's Reconsideration Request. In fact, the DCA's Reconsideration Request was handled exactly in the manner prescribed by ICANN's Bylaws: the BGC—a separate Board committee charged with considering Reconsideration Requests—reviewed the material and provided a recommendation to the NGPC. The NGPC then reviewed the BGC's recommendation and voted to accept it. In short, the various Board committees conducted themselves exactly as ICANN's Bylaws require.

41. The NGPC accepted the GAC Advice on 4 June 2013. As a result, DCA's application for .AFRICA did not proceed. In its Memorial, DCA attempts to cast aspersions on ICANN's evaluation of ZACR's application, but that evaluation has no bearing on whether the NGPC acted consistently with its Bylaws and Articles in handling the GAC advice related to DCA's application. Indeed, the evaluation of ZACR's application did not involve any action by ICANN's Board (or NGPC), and is therefore not a proper basis for Independent Review. Although the actions of ICANN's staff are not relevant to this proceeding, ICANN addresses DCA's allegations for the sake of thoroughness and because the record demonstrates that ZACR's application was evaluated fully in conformance with the Guidebook requirements.

42. DCA alleges that “ICANN staff worked with [the ICC] to ensure that ZACR, but not DCA, would be able to pass the GNP evaluation.” DCA’s argument is based on false and unsupported characterizations of the ICC’s evaluation of the two .AFRICA applications.

43. First, DCA claims (without relevant citation) that ICANN determined that the AUC’s endorsement would count as an endorsement from each of the AU’s member states only after ICANN had stopped processing DCA’s application. In fact, the record indicates that ICANN accepted the ICC’s recommendation that the AUC’s endorsement would qualify as an endorsement from each of the AU’s member states while DCA’s application was still in contention, at a time when the recommendation had the potential to benefit both applicants for .AFRICA (had DCA also in fact received the AUC’s support).

44. The Guidebook provides that the Geographic Names Panel is responsible for “verifying the relevance and authenticity of supporting documentation.” Accordingly, it was the ICC’s responsibility to evaluate how the AUC’s endorsement should be treated. The ICC recommended that the AUC’s endorsement should count as an endorsement from each of the AU’s member states. The ICC’s analysis was based on the Abuja Declaration, which the ICC interpreted as “instruct[ing] the [AUC] to pursue the DotAfrica project, and in [the ICC’s] independent opinion, provide[d] suitable evidence of support from relevant governments or public authorities.” The evidence shows that ICANN accepted the ICC’s recommendation before the NGPC accepted the GAC Advice regarding DCA’s application— in a 26 April 2013 email discussing the preparation of clarifying questions regarding the AUC’s letters of support, ICANN explained to the ICC that “if the applicant(s) is/are unable to obtain a revised letter of support from the AU [], they may be able to fulfill the requirements by approaching the individual governments.”

45. DCA also claims that ICANN determined that endorsements from the UNECA would not be taken into account for geographic evaluations. This simply is not true. Pursuant to the ICC’s advice, the UNECA’s endorsement was taken into account. Like the AUC, the UNECA had signed letters of support for both DCA and ZACR. The ICC advised that because the UNECA was specifically named in the Abuja Declaration, it too should be treated as a relevant public authority. ICANN accepted the ICC’s advice.

46. DCA argues that, after ICANN had stopped processing DCA’s application, ICANN staff improperly assisted the AUC in drafting a support letter for ZACR. As is reflected in the clarifying questions the ICC drafted regarding the endorsement letters submitted on behalf of each of the two .AFRICA applications, the Guidebook contains specific requirements for letters of support from governments and public authorities. In addition to “clearly express[ing] the government’s or public authority’s support for or non- objection to the applicant’s application,” letters must “demonstrate the government’s or public authority’s understanding of the string being requested and its intended use” and that “the string is being sought through the gTLD application process and that the applicant is willing to accept the conditions under which the string will be available, i.e., entry into a registry agreement with ICANN”. In light of these specific requirements, the Guidebook even includes a sample letter of support.

47. The first letter of support that the AUC submitted for ZACR's application did not follow the correct format and resulted in a clarifying question from the ICC. As a result, the AUC requested ICANN staff's assistance in drafting a letter that conformed to the Guidebook's requirements. ICANN staff drafted a template based on the sample letter of support in the Guidebook, and the AUC then made significant edits to that template. DCA paints this cooperation as nefarious, but there was absolutely nothing wrong with ICANN staff assisting the AUC, assistance that DCA would certainly have welcomed, and which ICANN would have provided, had the AUC been supporting DCA instead of ZACR.

91. Finally, ICANN submits:

50. ICANN's conduct with respect to DCA's application for .AFRICA was fully consistent with ICANN's Bylaws, its Articles of Incorporation and the Applicant Guidebook. ICANN acted through open and transparent processes, evaluated DCA's application for .AFRICA in accordance with the procedures set forth in the Guidebook, and followed the procedures set forth in its Bylaws in evaluating DCA's Request for Reconsideration. ICANN provided assistance to those who requested, cooperated with governmental authorities, and respected the consensus advice issued by the GAC, which speaks on behalf of the governments of the world.

51. DCA knew, as did all applicants for new gTLDs, that some of the applications would be rejected. There can only be one registry operator for each gTLD string, and in the case of strings that relate to geographic regions, no application can succeed without the significant support of the countries in that region. There is no justification whatsoever for DCA's repeated urging that the support (or lack thereof) of the countries on the African continent be made irrelevant to the process.

52. Ultimately, the majority of the countries in Africa chose to support another application for the .AFRICA gTLD, and decided to oppose DCA's application. At a critical time, no country stood up to defend DCA's application. These countries—and the AUC— had every right to take a stand and to support the applicant of their choice. In this instance, that choice resulted in the GAC issuing consensus advice, which the GAC had every right to do. Nothing in ICANN's Bylaws or Articles, or in the Guidebook, required ICANN to challenge that decision, to ignore that decision, or to change the rules so that the input of the AUC, much less the GAC, would become irrelevant. To the contrary, the AUC's role with respect to the African community is critical, and it was DCA's decision to pursue a path at odds with the AUC that placed its application in jeopardy, not anything that ICANN (or ICANN's Board or the NGPC) did. The NGPC did exactly what it was supposed to do in this circumstance, and ICANN urges this IRP Panel to find as such. Such a finding would allow the countries of Africa to soon provide their citizens with what all parties involved believe to be a very important step for Africa – access to .AFRICA on the internet.

The Panel's Decision

92. The Panel in this IRP, has been asked to determine whether, in the case of the application of DCA Trust for the delegation of the .AFRICA top-level domain name in its 2012 General Top-Level Domains (“gTLD”) Internet Expansion Program (the “New gTLD Program”), the Board acted or failed to act in a manner inconsistent with ICANN’s Articles of Incorporation, Bylaws or the Applicant Guidebook?
93. After reviewing the documentation filed in this IRP, reading the Parties’ respective written submissions, reading the written statements and listening to the testimony of the three witnesses brought forward, listening to the oral presentations of the Parties’ legal representatives at the hearing in Washington, D.C., reading the transcript of the hearing, and deliberating, the Panel is of the unanimous view that certain actions and inactions of the ICANN Board (as described below) with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN.
94. ICANN is bound by its own Articles of Incorporation to act fairly, neutrally, non-discriminatorily and to enable competition. Article 4 of ICANN’s Articles of Incorporation sets this out explicitly:
4. The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.
95. ICANN is also bound by its own Bylaws to act and make decisions “neutrally and objectively, with integrity and fairness.”
96. These obligations and others are explicitly set out in a number of provisions in ICANN’s Bylaws:

ARTICLE I: MISSION AND CORE (Council of Registrars) VALUES

Section 2. CORE (Council of Registrars) VALUES

In performing its mission, the following core values should guide the decisions and actions of ICANN (Internet Corporation for Assigned Names and Numbers):

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

[...]

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

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

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

10. Remaining accountable to the Internet community through mechanisms that enhance ICANN (Internet Corporation for Assigned Names and Numbers)'s effectiveness.

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

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN (Internet Corporation for Assigned Names and Numbers) body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

ARTICLE II: POWERS

Section 1. GENERAL POWERS

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN (Internet Corporation for Assigned Names and Numbers) shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board.

Section 3. NON-DISCRIMINATORY TREATMENT

ICANN (Internet Corporation for Assigned Names and Numbers) shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by

substantial and reasonable cause, such as the promotion of effective competition.

ARTICLE III: TRANSPARENCY

Section 1. PURPOSE

ICANN (Internet Corporation for Assigned Names and Numbers) and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. [Underlining and bold is that of the Panel]

97. As set out in Article IV (Accountability and Review) of ICANN's Bylaws, in carrying out its mission as set out in its Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article I of the Bylaws.
98. As set out in Section 3 (Independent Review of Board Actions) of Article IV, "any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action. In order to be materially affected, the person must suffer injury or harm that is directly and casually connected to the Board's alleged violation of the Bylaws or Articles of Incorporation, and not as a result of third parties acting in line with the Board's action."
99. In this IRP, among the allegations advanced by DCA Trust against ICANN, is that the ICANN Board, and its constituent body, the GAC, breached their obligation to act transparently and in conformity with procedures that ensured fairness. In particular, DCA Trust criticizes the ICANN Board here, for allowing itself to be guided by the GAC, a body "with apparently no distinct rules, limited public records, fluid definitions of membership and quorums" and unfair procedures in dealing with the issues before it.
100. According to DCA Trust, ICANN itself asserts that the GAC is a "constituent body." The exchange between the Panel and counsel for ICANN at the in-person hearing in Washington, D.C. is a living proof of that point.

HONORABLE JUDGE CAHILL:

Are you saying we should only look at what the Board does? The reason I'm asking is that your -- the Bylaws say that ICANN and its constituent bodies shall operate, to the maximum extent feasible, in an open and transparent manner. Does the constituent bodies include, I don't know,

GAC or anything? What is "constituent bodies"?

MR. LEVEE:

Yeah. What I'll talk to you about tomorrow in closing when I lay out what an IRP Panel is supposed to address, the Bylaws are very clear. Independent Review Proceedings are for the purpose of testing conduct or inaction of the ICANN Board. They don't apply to the GAC. They don't apply to supporting organizations. They don't apply to Staff.

HONORABLE JUDGE CAHILL:

So you think that the situation is a -- we shouldn't be looking at what the constituent -- whatever the constituent bodies are, even though that's part of your Bylaws?

MR. LEVEE:

Well, when I say not -- when you say not looking, part of DCA's claims that the GAC did something wrong and that ICANN knew that.

HONORABLE JUDGE CAHILL:

So is GAC a constituent body?

MR. LEVEE:

It is a constituent body, to be clear --

HONORABLE JUDGE CAHILL:

Yeah.

MR. LEVEE:

-- whether -- I don't think an IRP Panel -- if the only thing that happened here was that the GAC did something wrong --

HONORABLE JUDGE CAHILL:

Right.

MR. LEVEE:

-- an IRP Panel would not be -- an Independent Review Proceeding is not supposed to address that, whether the GAC did something wrong.

Now, if ICANN knew -- the Board knew that the GAC did something wrong, and that's how they link it, they say, Look, the GAC did something wrong, and ICANN knew it, the Board -- if the Board actually knew it, then we're dealing with Board conduct.

The Board knew that the GAC did not, in fact, issue consensus advice. That's the allegation. So it's fair to look at the GAC's conduct.

101. The Panel is unanimously of the view that the GAC is a constituent body of ICANN. This is not only clear from the above exchange between the Panel and counsel for ICANN, but also from Article XI (Advisory Committees) of ICANN's Bylaws and the Operating Principles of the GAC. Section 1 (General) of Article XI of ICANN's Bylaws states:

The Board may create one or more Advisory Committees in addition to those set forth in this Article. Advisory Committee membership may consist of Directors only, Directors and non-directors, or non-directors only, and may also include non-voting or alternate members. Advisory Committees shall have no legal authority to act for ICANN (Internet Corporation for Assigned Names and Numbers), but shall report their findings and recommendations to the Board.

Section 2, under the heading, Specific Advisory Committees states:

There shall be at least the following Advisory Committees:

1. Governmental Advisory Committee

a. The Governmental Advisory Committee should consider and provide advice on the activities of ICANN (Internet Corporation for Assigned Names and Numbers) as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN (Internet Corporation for Assigned Names and Numbers)'s policies and various laws and international agreements or where they may affect public policy issues. [Underlining is that of the Panel]

Section 6 of the preamble of GAC's Operating Principles is also relevant. That Section reads as follows:

The GAC commits itself to implement efficient procedures in support of ICANN and to provide thorough and timely advice and analysis on relevant matters of concern with regard to government and public interests.

102. According to DCA Trust, based on the above, and in particular, Article III (Transparency), Section 1 of ICANN's Bylaws, therefore, the GAC was bound to the transparency and fairness obligations of that provision to "operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness", but as ICANN's own witness, Ms. Heather Dryden acknowledged during the hearing, the GAC did not act with transparency or in a manner designed to insure fairness.

Mr. ALI:

Q. But what was the purpose of the discussion at the Prague meeting with respect to AUC? If there really is no difference or distinction between voting/nonvoting, observer or whatever might be the opposite of observer,

or the proper terminology, what was -- what was the point?

THE WITNESS:

A. I didn't say there was no difference. The issue is that there isn't GAC agreement about what are the -- the rights, if you will, of -- of entities like the AUC. And there might be in some limited circumstances, but it's also an extremely sensitive issue. And so not all countries have a shared view about what those -- those entities, like the AUC, should be able to do.

Q. So not all countries share the same view as to what entities, such as the AUC, should be able to do. Is that what you said? I'm sorry. I didn't --

A. Right, because that would only get clarified if there is a circumstance where that link is forced. In our business, we talk about creative ambiguity. We leave things unclear so we don't have conflict.

103. As explained by ICANN in its Closing Presentation at the hearing, ICANN's witness, Ms. Heather Dryden also asserted that the GAC Advice was meaningless until the Board acted upon it. This last point is also clear from examining Article 1, Principle 2 and 5 of ICANN GAC's Operating Principles. Principle 2 states that "the GAC is not a decision making body" and Principle 5 states that "the GAC shall have no legal authority to act for ICANN".

MR. ALI:

Q. I would like to know what it is that you, as the GAC Chair, understand to be the consequences of the actions that the GAC will take --

HONORABLE JUDGE CAHILL:

The GAC will take?

MR. ALI:

Q. -- the GAC will take -- the consequences of the actions taken by the GAC, such as consensus advice?

HONORABLE JUDGE CAHILL:

There you go.

THE WITNESS:

That isn't my concern as the Chair. It's really for the Board to interpret the outputs coming from the GAC.

104. Ms. Dryden also stated that the GAC made its decision without providing any rationale and primarily based on politics and not on potential violations of national laws and sensitivities.

ARBITRATOR KESSEDJIAN:

So, basically, you're telling us that the GAC takes a decision to object to an applicant, and no reasons, no rationale, no discussion of the concepts that are in the rules?

THE WITNESS:

I'm telling you the GAC did not provide a rationale. And that was not a requirement for issuing a GAC --

HONORABLE JUDGE CAHILL:

But you also want to check to see if the countries are following the right -- following the rules, if there are reasons for rejecting this or it falls within the three things that my colleague's talking about.

THE WITNESS:

The practice among governments is that governments can express their view, whatever it may be. And so there's a deference to that.

That's certainly the case here as well.

105. ICANN was bound by its Bylaws to conduct adequate diligence to ensure that it was applying its procedures fairly. Section 1 of Article III of ICANN's Bylaws, require it and its constituent bodies to "operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. The Board must also as per Article IV, Section 3, Paragraph 4 exercise due diligence and care in having a reasonable amount of facts in front of it.
106. In this case, on 4 June 2013, the NGPC accepted the GAC Objection Advice to stop processing DCA Trust's application. On 1 August 2013, the BGC recommended to the NGPC that it deny DCA Trust's Request for Reconsideration of the NGPC's 4 June 2013 decision, and on 13 August 2013, the NGPC accepted the BGC's recommendation (i.e., the NGPC declined to reconsider its own decision) without any further consideration.
107. In this case, ICANN through the BGC was bound to conduct a meaningful review of the NGPC's decision. According to ICANN's Bylaws, Article IV, Section 2, the Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The [BGC] shall have the authority to, among other things, conduct whatever factual investigation is deemed appropriate, and request additional written submissions from the affected party, or from others.

108. Finally, the NGPC was not bound by – nor was it required to give deference to – the decision of the BGC.

109. The above, combined with the fact that DCA Trust was never given any notice or an opportunity in Beijing or elsewhere to make its position known or defend its own interests before the GAC reached consensus on the GAC Objection Advice, and that the Board of ICANN did not take any steps to address this issue, leads this Panel to conclude that both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were not procedures designed to insure the fairness required by Article III, Sec. 1 above, and are therefore inconsistent with the Articles of Incorporation and Bylaws of ICANN.

110. The following excerpt of exchanges between the Panel and one of ICANN's witnesses, Ms. Heather Dryden, the then Chair of the GAC, provides a useful background for the decisions reached in this IRP:

PRESIDENT BARIN:

But be specific in this case. Is that what happened in the .AFRICA case?

THE WITNESS:

The decision was very quick, and --

PRESIDENT BARIN:

But what about the consultations prior? In other words, were -- were you privy to --

THE WITNESS:

No. If -- if colleagues are talking among themselves, then that's not something that the GAC, as a whole, is -- is tracking or -- or involved in. It's really those interested countries that are.

PRESIDENT BARIN:

Understood. But I assume -- I also heard you say, as the Chair, you never want to be surprised with something that comes up. So you are aware of -- or you were aware of exactly what was happening?

THE WITNESS:

No. No. You do want to have a good sense of where the problems are, what's going to come unresolved back to the full GAC meeting, but that's -- that's the extent of it.

And that's the nature of -- of the political process.

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HONORABLE JUDGE CAHILL:

Okay.

THE WITNESS:

-- that question was addressed via having that meeting.

PRESIDENT BARIN:

And what's your understanding of what -- what the consequence of that decision is or was when you took it? So what happens from that moment on?

THE WITNESS:

It's conveyed to the Board, so all the results, the agreed language coming out of GAC is conveyed to the Board, as was the case with the communiqué from the Beijing meeting.

PRESIDENT BARIN:

And how is that conveyed to the Board?

THE WITNESS:

Well, it's a written document, and usually Support Staff are forwarding it to Board Staff.

ARBITRATOR KESSEDJIAN:

Could you speak a little bit louder? I don't know whether I am tired, but I --

THE WITNESS:

Okay. So as I was saying, the document is conveyed to the Board once it's concluded.

PRESIDENT BARIN:

When you say "the document", are you referring to the communiqué?

THE WITNESS:

Yes.

PRESIDENT BARIN:

Okay. And there are no other documents?

THE WITNESS:

The communiqué --

PRESIDENT BARIN:

In relation to .AFRICA. I'm not interested in any other.

THE WITNESS:

Yes, it's the communiqué.

PRESIDENT BARIN:

And it's prepared by your staff? You look at it?

THE WITNESS:

Right --

PRESIDENT BARIN:

And then it's sent over to --

THE WITNESS:

-- right, it's agreed by the GAC in full, the contents.

PRESIDENT BARIN:

And then sent over to the Board?

THE WITNESS:

And then sent, yes.

PRESIDENT BARIN:

And what happens to that communiqué? Does the Board receive that and say, Ms. Dryden, we have some questions for you on this, or --

THE WITNESS:

Not really. If they have questions for clarification, they can certainly ask that in a meeting. But it is for them to receive that and then interpret it and -- and prepare the Board for discussion or decision.

PRESIDENT BARIN:

Okay. And in this case, you weren't asked any questions or anything?

THE WITNESS:

I don't believe so. I don't recall.

PRESIDENT BARIN:

Any follow-ups, right?

THE WITNESS:

Right.

PRESIDENT BARIN:

And in the subsequent meeting, I guess the issue was tabled. The Board meeting that it was tabled, were you there?

THE WITNESS:

Yes. I don't particularly recall the meeting, but yes.

[...]

ARBITRATOR KESSEDJIAN:

Can I turn your attention to Paragraph 5 of your declaration?

Here, you basically repeat what is in the ICANN Guidebook literature, whatever. These are the exact words, actually, that you use in your declaration in terms of why there could be an objection to an applicant -- to a specific applicant. And you use three criteria: problematic, potentially violating national law, and raise sensitivities.

Now, I'd like you to, for us -- for our benefit, to explain precisely, as concrete as you can be, what those three concepts -- how those three concepts translate in the DCA case. Because this must have been discussed in order to get this very quick decision that you are mentioning. So I'd like to understand, you know, because these are the criteria -- these are the three criteria; is that correct?

THE WITNESS:

That is what the witness statement says, but the link to the GAC and the role that I played in terms of the GAC discussion did not involve me interpreting those three things. In fact, the GAC did not provide rationale for the consensus objection.

ARBITRATOR KESSEDJIAN:

No.

But, I mean, look, the GAC is taking a decision which -- very quickly -- I'm using your words, "very quickly" -- erases years and years and years of work, a lot of effort that have been put by a single applicant. And the way I understand the rules is that the -- the GAC advice -- consensus advice against that applicant are -- is based on those three criteria. Am I wrong in that analysis?

THE WITNESS:

I'm saying that the GAC did not identify a rationale for those governments that put forward a string or an application for consensus objection. They might have identified their reasons, but there was not GAC agreement about those reasons or -- or -- or -- or rationale for that. We had some discussion earlier about Early Warnings. So Early Warnings were issued by individual countries, and they indicated their rationale. But, again, that's not a GAC view.

ARBITRATOR KESSEDJIAN:

So, basically, you're telling us that the GAC takes a decision to object to an applicant, and no reasons, no rationale, no discussion of the concepts that are in the rules?

THE WITNESS:

I'm telling you the GAC did not provide a rationale. And that was not a requirement for issuing a GAC --

HONORABLE JUDGE CAHILL:

But you also want to check to see if the countries are following the right -- following the rules, if there are reasons for rejecting this or it falls within the three things that my colleague's talking about.

THE WITNESS:

The practice among governments is that governments can express their view, whatever it may be. And so there's [...] deference to that. That's certainly the case here as well. The -- if a country tells -- tells the GAC or says it has a concern, that's not really something that -- that's evaluated, in the sense you mean, by the other governments. That's not the way governments work with each other.

HONORABLE JUDGE CAHILL:

So you don't go into the reasons at all with them?

THE WITNESS:

To issue a consensus objection, no.

HONORABLE JUDGE CAHILL:

Okay. ---

[...]

PRESIDENT BARIN:

I have one question for you. We spent, now, a bit of time or a considerable amount of time talking to you about the process, or the procedure leading to the consensus decision.

Can you tell me what your understanding is of why the GAC consensus objection was made finally?

[...]

But in terms of the .AFRICA, the decision -- the issue came up, the agenda -- the issue came up, and you made a decision, correct?

THE WITNESS:

The GAC made a decision.

PRESIDENT BARIN:

Right. When I say "you", I mean the GAC.

Do you know -- are you able to express to us what your understanding of the substance behind that decision was? I mean, in other words, we've spent a bit of time dealing with the process.

Can you tell us why the decision happened?

THE WITNESS:

The sum of the GAC's advice is reflected in its written advice in the communiqué. That is the view to GAC. That's -- that's --

[...]

ARBITRATOR KESSEDJIAN:

I just want to come back to the point that I was making earlier. To your Paragraph 5, you said -- you answered to me saying that is my declaration, but it was not exactly what's going on. Now, we are here to --

at least the way I understand the Panel's mandate, to make sure that the rules have been obeyed by, basically. I'm synthesizing. So I don't understand how, as the Chair of the GAC, you can tell us that, basically, the rules do not matter -- again, I'm rephrasing what you said, but I'd like to give you another opportunity to explain to us why you are mentioning those criteria in your written declaration, but, now, you're telling us this doesn't matter.

If you want to read again what you wrote, or supposedly wrote, it's Paragraph 5.

THE WITNESS:

I don't need to read again my declaration. Thank you. The header for the GAC's discussions throughout was to refer to strings or applications that were controversial or sensitive. That's very broad. And –

ARBITRATOR KESSEDJIAN:

I'm sorry. You say the rules say problematic, potentially violate national law, raise sensitivities. These are precise concepts.

THE WITNESS:

Problematic, violate national law -- there are a lot of laws -- and sensitivities does strike me as being quite broad.

[...]

ARBITRATOR KESSEDJIAN:

Okay. So we are left with what? No rules?

THE WITNESS:

No rationale with the consensus objections.

That's the -- the effect.

ARBITRATOR KESSEDJIAN:

I'm done.

HONORABLE JUDGE CAHILL:

I'm done.

PRESIDENT BARIN:

So am I.

111. The Panel understands that the GAC provides advice to the ICANN Board on matters of public policy, especially in cases where ICANN activities and policies may interact with national laws or international agreements. The Panel also understands that GAC advice is developed through consensus among member nations. Finally, the Panel understands that although the ICANN Board is required to consider GAC advice and recommendations, it is not obligated to follow those recommendations.

112. Paragraph IV of ICANN’s Beijing, People’s Republic of China 11 April 2013 Communiqué [Exhibit C-43] under the heading “GAC Advice to the ICANN Board” states:

IV. GAC Advice to the ICANN Board

1. New gTLDs

a. GAC Objections to the Specific Applications

i. The GAC Advises the ICANN Board that:

i. The GAC has reached consensus on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook on the following applications:

1. The application for .africa (Application number 1-1165-42560)

[...]

Footnote 3 to Paragraph IV.1. (a)(i)(i) above in the original text adds, “Module 3.1: The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved.” A similar statement in this regard can be found in paragraph 5 of Ms. Dryden’s 7 February 2014 witness statement.

113. In light of the clear “Transparency” obligation provisions found in ICANN’s Bylaws, the Panel would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting DCA Trust’s application.

114. The Panel would have had a similar expectation with respect to the NGPC Response to the GAC Advice regarding .AFRICA which was expressed in ANNEX 1 to NGPC Resolution No. 2013.06.04.NG01 [Exhibit C-45]. In that document, in response to DCA Trust’s application, the NGPC stipulated:

The NGPC accepts this advice. The AGB provides that “if GAC advised ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved. The NGPC directs staff that pursuant to the GAC advice and Section 3.1 of the Applicant Guidebook, Application number 1-1165-42560 for .africa will not be approved. In accordance with the AGB the applicant may withdraw [...] or seek relief according to ICANN’s accountability mechanisms (see ICANN’s Bylaws, Articles IV and V) subject to the appropriate standing and procedural requirements.

115. Based on the foregoing, after having carefully reviewed the Parties’ written submissions, listened to the testimony of the three witnesses, listened to the oral submissions of the Parties in various telephone conference calls and at the in-person hearing of this IRP in Washington, D.C. on 22 and 23 May 2015, and finally after much deliberation, pursuant to Article IV, Section 3, paragraph 11 (c) of ICANN’s Bylaws, the Panel declares that both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN.

116. As indicated above, there are perhaps a number of other instances, including certain decisions made by ICANN, that did not proceed in the manner and spirit in which they should have under the Articles of Incorporation and Bylaws of ICANN.

117. DCA Trust has criticized ICANN for its various actions and decisions throughout this IRP and ICANN has responded to each of these criticisms in detail. However, the Panel, having carefully considered these criticisms and decided that the above is dispositive of this IRP, it does not find it necessary to determine who was right, to what extent and for what reasons in respect to the other criticisms and other alleged shortcomings of the ICANN Board identified by DCA Trust.

2) Can the IRP Panel recommend a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act in a manner inconsistent with ICANN’s Articles of Incorporation, Bylaws or the Applicant Guidebook?

118. In the conclusion of its Memorial on the Merits filed with the Panel on 3 November 2014, DCA Trust submitted that ICANN should remove ZACR’s application from the process altogether and allow DCA’s application to proceed under the rules of the New gTLD Program, allowing DCA up to 18 months to negotiate with African governments

to obtain the necessary endorsements so as to enable the delegation and management of the .AFRICA string.

119. In its Final Request for Relief filed with the Panel on 23 May 2015, DCA Trust requested that this Panel recommend to the ICANN Board that it cease all preparations to delegate the .AFRICA gTLD to ZACR and recommend that ICANN permit DCA's application to proceed through the remainder of the new gTLD application process and be granted a period of no less than 18 months to obtain Government support as set out in the AGB and interpreted by the Geographic Names Panel, or accept that the requirement is satisfied as a result of the endorsement of DCA Trust's application by UNECA.

120. DCA Trust also requested that this Panel recommend to ICANN that it compensate DCA Trust for the costs it has incurred as a result of ICANN's violations of its Articles of Incorporation, Bylaws and AGB.

121. In its response to DCA Trust's request for the recommendations set out in DCA Trust's Memorial on the Merits, ICANN submitted that this Panel does not have the authority to grant the affirmative relief that DCA Trust had requested.

122. According to ICANN:

48. DCA's request should be denied in its entirety, including its request for relief. DCA requests that this IRP Panel issue a declaration requiring ICANN to "rescind its contract with ZACR" and to "permit DCA's application to proceed through the remainder of the application process." Acknowledging that it currently lacks the requisite governmental support for its application, DCA also requests that it receive "18 months to negotiate with African governments to obtain the necessary endorsements." In sum, DCA requests not only that this Panel remove DCA's rival for .AFRICA from contention (requiring ICANN to repudiate its contract with ZACR), but also that it rewrite the Guidebook's rules in DCA's favor.

49. IRP Panels do not have authority to award affirmative relief. Rather, an IRP Panel is limited to stating its opinion as to "whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws" and recommending (as this IRP Panel has done previously) that the Board stay any action or decision, or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP Panel. The Board will, of course, give extremely serious consideration to the Panel's recommendations.

123. In its response to DCA Trust's amended request for recommendations filed on 23 May 2015, ICANN argued that because the Panel's authority is limited to declaring whether the Board's conduct was inconsistent with the Articles or the Bylaws, the Panel should limit its declaration to that question and refrain from

recommending how the Board should then proceed in light of the Panel's declaration.

124. In response, DCA Trust submitted that according to ICANN's Bylaws, the Independent Review Process is designed to provide a remedy for "any" person materially affected by a decision or action by the Board. Further, "in order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation.

125. According to ICANN, "indeed, the ICANN New gTLD Program Committee, operating under the delegated authority of the ICANN Board, itself [suggests] that DCA could seek relief through ICANN's accountability mechanisms or, in other words, the Reconsideration process and the Independent Review Process." Furthermore:

If the IRP mechanism – the mechanism of last resort for gTLD applicants – is intended to provide a remedy for a claimant materially injured or harmed by Board action or inaction, and it serves as the only alternative to litigation, then naturally the IRP Panel may recommend how the ICANN Board might fashion a remedy to redress such injury or harm.

126. After considering the Parties' respective submissions in this regard, the Panel is of the view that it does have the power to recommend a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act in a manner inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook.

127. Article IV, Section 3, paragraph 11 (d) of ICANN's Bylaws states:

ARTICLE IV: ACCOUNTABILITY AND REVIEW
Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

11. The IRP Panel shall have the authority to:

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

128. The Panel finds that both the language and spirit of the above section gives it authority to recommend how the ICANN Board might fashion a remedy to redress injury or harm that is directly related and causally connected to the Board's violation of the Bylaws or the Articles of Incorporation.

129. As DCA Trust correctly points out, with which statement the Panel agrees, "if the IRP mechanism – the mechanism of last resort for

gTLD applicants – is intended to provide a remedy for a claimant materially injured or harmed by Board action or inaction, and it serves as the only alternative to litigation, then naturally the IRP Panel may recommend how the ICANN Board might fashion a remedy to redress such injury or harm.”

130. Use of the imperative language in Article IV, Section 3, paragraph 11 (d) of ICANN’s Bylaws, is clearly supportive of this point. That provision clearly states that the IRP Panel has the authority to recommend a course of action until such time as the Board considers the opinion of the IRP and acts upon it.
131. Furthermore, use of the word “opinion”, which means the formal statement by a judicial authority, court, arbitrator or “Panel” of the reasoning and the principles of law used in reaching a decision of a case, is demonstrative of the point that the Panel has the authority to recommend affirmative relief. Otherwise, like in section 7 of the Supplementary Procedures, the last sentence in paragraph 11 would have simply referred to the “declaration of the IRP”. Section 7 under the heading “Interim Measures of Protection” says in part, that an “IRP PANEL may recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the IRP declaration.”
132. The scope of Article IV, Section 3, paragraph 11 (d) of ICANN’s Bylaws is clearly broader than Section 7 of the Supplementary Procedures.
133. Pursuant to Article IV, Section 3, paragraph 11 (d) of ICANN’s Bylaws, therefore, the Panel recommends that ICANN continue to refrain from delegating the .AFRICA gTLD and permit DCA Trust’s application to proceed through the remainder of the new gTLD application process.

3) Who is the prevailing party in this IRP?

134. In its letter of 1 July 2015, ICANN submits that, “ICANN believes that the Panel should and will determine that ICANN is the prevailing party. Even so, ICANN does not seek in this instance the putative effect that would result if DCA were required to reimburse ICANN for all of the costs that ICANN incurred. This IRP was much longer [than] anticipated (in part due to the passing of one of the panelists last summer), and the Panelists’ fees were far greater than an ordinary IRP, particularly because the Panel elected to conduct a live hearing.”

135.DCA Trust on the other hand, submits that, “should it prevail in this IRP, ICANN should be responsible for all of the costs of this IRP, including the interim measures proceeding.” In particular, DCA Trust writes:

On March 23, 2014, DCA learned via email from a supporter of ZA Central Registry (“ZACR”), DCA’s competitor for .AFRICA, that ZACR would sign a registry agreement with ICANN in three days’ time (March 26) to be the registry operator for .AFRICA. The very same day, we sent a letter on behalf of DCA to ICANN’s counsel asking ICANN to refrain from executing the registry agreement with ZACR in light of the pending IRP proceedings. See DCA’s Request for Emergency Arbitrator and Interim Measures of Protection, Annex I (28 Mar. 2014). Instead, ICANN entered into the registry agreement with ZACR the very next day—two days ahead of schedule. [...] Later that same day, ICANN responded to DCA’s request by treating the execution of the contract as a *fait accompli* and, for the first time, informed DCA that it would accept the application of Rule 37 of the 2010 [ICDR Rules], which provides for emergency measures of protection, even though ICANN’s Supplementary Procedures for ICANN Independent Review Process expressly provide that Rule 37 does not apply to IRPs. A few days later, on March 28, 2014, DCA filed a Request for Emergency Arbitrator and Interim Measures of Protection with the ICDR. ICANN responded to DCA’s request on April 4, 2014. An emergency arbitrator was appointed by the ICDR; however, the following week, the original panel was fully constituted and the parties’ respective submissions were submitted to the Panel for its review on April 13, 2014. After a teleconference with the parties on April 22 and a telephonic hearing on May 5, the Panel ruled that “ICANN must immediately refrain from any further processing of any application for .AFRICA” during the pendency of the IRP. Decision on Interim Measures of Protection, ¶ 51 (12 May 2014).

136.A review of the various procedural orders, decisions, and declarations in this IRP clearly indicates that DCA Trust prevailed in many of the questions and issues raised.

137.In its letter of 1 July 2015, DCA Trust refers to several instances in which ICANN was not successful in its position before this Panel. According to DCA Trust, the following are some examples, “ICANN’s Request for Partial Reconsideration, ICANN’s request for the Panel to rehear the proceedings, and the evidentiary treatment of ICANN’s written witness testimony in the event it refused to make its witnesses available for questioning during the merits hearing.”

138.The Panel has no doubt, as ICANN writes in its letter of 1 July 2015, that the Parties’ respective positions in this IRP “were asserted in good faith.” According to ICANN, “although those positions were in many instances diametrically opposed, ICANN does not doubt that DCA believed in the credibility of the positions that it took, and

[ICANN believes] that DCA feels the same about the positions ICANN took.”

139. The above said, after reading the Parties’ written submissions concerning the issue of costs and deliberation, the Panel is unanimously of the view that DCA Trust is the prevailing party in this IRP.

4) Who is responsible for bearing the costs of this IRP and the cost of the IRP Provider?

140. DCA Trust submits that ICANN should be responsible for *all* costs of this IRP, including the interim measures proceeding. Among other arguments, DCA Trust submits:

This is consistent with ICANN’s Bylaws and Supplementary Procedures, which together provide that in ordinary circumstances, the party not prevailing shall be responsible for all costs of the proceeding. Although ICANN’s Supplementary Procedures do not explain what is meant by “all costs of the proceeding,” the ICDR Rules that apply to this IRP provide that “costs” include the following:

- (a) the fees and expenses of the arbitrators;
- (b) the costs of assistance required by the tribunal, including its experts;
- (c) the fees and expenses of the administrator;
- (d) the reasonable costs for legal representation of a successful party; and
- (e) any such costs incurred in connection with an application for interim or emergency relief pursuant to Article 21.

Specifically, these costs include all of the fees and expenses paid and owed to the [ICDR], including the filing fees DCA paid to the ICDR (totaling \$4,750), all panelist fees and expenses, including for the emergency arbitrator, incurred between the inception of this IRP and its final resolution, legal costs incurred in the course of the IRP, and all expenses related to conducting the merits hearing (*e.g.*, renting the audiovisual equipment for the hearing, printing hearing materials, shipping hard copies of the exhibits to the members of the Panel).

Although in “extraordinary” circumstances, the Panel may allocate up to half of the costs to the prevailing party, DCA submits that the circumstances of this IRP do not warrant allocating costs to DCA should it prevail. The reasonableness of DCA’s positions, as well as the meaningful contribution this IRP has made to the public dialogue about both ICANN’s accountability mechanisms and the appropriate deference owed by ICANN to its Governmental Advisory Committee, support a full award of costs to

DCA.

[...]

To the best of DCA's knowledge, this IRP was the first to be commenced against ICANN under the new rules, and as a result there was little guidance as to how these proceedings should be conducted. Indeed, at the very outset there was controversy about the applicable version of the Supplemental Rules as well as the form to be filed to initiate a proceeding. From the very outset, ICANN adopted positions on a variety of procedural issues that have increased the costs of these proceedings. In DCA's respectful submission, ICANN's positions throughout these proceedings are inconsistent with ICANN's obligations of transparency and the overall objectives of the IRP process, which is the only independent accountability mechanism available to parties such as DCA.

141. DCA Trust also submits that ICANN's conduct in this IRP increased the duration and expense of this IRP. For example, ICANN failed to appoint a standing panel, it entered into a registry agreement with DCA's competitor for .AFRICA during the pendency of this IRP, thereby forcing DCA Trust to request for interim measures of protection in order to preserve its right to a meaningful remedy, ICANN attempted to appeal declarations of the Panel on procedural matters where no appeal mechanism was provided for under the applicable procedures and rules, and finally, ICANN refused only a couple of months prior to the merits hearing, to make its witnesses available for viva voce questioning at the hearing.

142. ICANN in response submits that, "both the Bylaws and the Supplementary Procedures provide that, in the ordinary course, costs shall be allocated to the prevailing party. These costs include the Panel's fees and the ICDR's fees, [they] would also include the costs of the transcript."

143. ICANN explains on the other hand that this case was extraordinary and this Panel should exercise its discretion to have each side bear its own costs as this IRP "was in many senses a first of its kind." According to ICANN, among other things:

This IRP was the first associated with the Board's acceptance of GAC advice that resulted in the blocking of an application for a new gTLD under the new gTLD Program;

This was the first IRP associated with a claim that one or more ICANN Board members had a conflict of interest with a Board vote; and

This was the first (and still only) IRP related to the New gTLD Program that involved a live hearing, with a considerable amount of debate associated with whether to have a hearing.

144. After reading the Parties' written submissions concerning the issue of costs and their allocation, and deliberation, the Panel is unanimous in deciding that DCA Trust is the prevailing party in this IRP and ICANN shall bear, pursuant to Article IV, Section 3, paragraph 18 of the Bylaws, Article 11 of Supplementary Procedures and Article 31 of the ICDR Rules, the totality of the costs of this IRP and the totality of the costs of the IRP Provider.

145. As per the last sentence of Article IV, Section 3, paragraph 18 of the Bylaws, however, DCA Trust and ICANN shall each bear their own expenses, and they shall also each bear their own legal representation fees.

146. For the avoidance of any doubt therefore, the Panel concludes that ICANN shall be responsible for paying the following costs and expenses:

- a) the fees and expenses of the panelists;
- b) the fees and expenses of the administrator, the ICDR;
- c) the fees and expenses of the emergency panelist incurred in connection with the application for interim emergency relief sought pursuant to the Supplementary Procedures and the ICDR Rules; and
- d) the fees and expenses of the reporter associated with the hearing on 22 and 23 May 2015 in Washington, D.C.

147. The above amounts are easily quantifiable and the Parties are invited to cooperate with one another and the ICDR to deal with this part of this Final Declaration.

V. DECLARATION OF THE PANEL

148. Based on the foregoing, after having carefully reviewed the Parties' written submissions, listened to the testimony of the three witnesses, listened to the oral submissions of the Parties in various telephone conference calls and at the in-person hearing of this IRP in Washington, D.C. on 22 and 23 May 2015, and finally after much deliberation, pursuant to Article IV, Section 3, paragraph 11 (c) of ICANN's Bylaws, the Panel declares that both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN.

149. Furthermore, pursuant to Article IV, Section 3, paragraph 11 (d) of ICANN's Bylaws, the Panel recommends that ICANN continue to

refrain from delegating the .AFRICA gTLD and permit DCA Trust's application to proceed through the remainder of the new gTLD application process.

150. The Panel declares DCA Trust to be the prevailing party in this IRP and further declares that ICANN is to bear, pursuant to Article IV, Section 3, paragraph 18 of the Bylaws, Article 11 of Supplementary Procedures and Article 31 of the ICDR Rules, the totality of the costs of this IRP and the totality of the costs of the IRP Provider as follows:

- a) the fees and expenses of the panelists;
- b) the fees and expenses of the administrator, the ICDR;
- c) the fees and expenses of the emergency panelist incurred in connection with the application for interim emergency relief sought pursuant to the Supplementary Procedures and the ICDR Rules; and
- d) the fees and expenses of the reporter associated with the hearing on 22 and 23 May 2015 in Washington, D.C.
- e) As a result of the above, the administrative fees of the ICDR totaling US\$4,600 and the Panelists' compensation and expenses totaling US\$403,467.08 shall be born entirely by ICANN, therefore, ICANN shall reimburse DCA Trust the sum of US\$198,046.04

151. As per the last sentence of Article IV, Section 3, paragraph 18 of the Bylaws, DCA Trust and ICANN shall each bear their own expenses. The Parties shall also each bear their own legal representation fees.

The Panel finally would like to take this opportunity to fondly remember its collaboration with the Hon. Richard C. Neal (Ret. and now Deceased) and to congratulate both Parties' legal teams for their hard work, civility and responsiveness during the entire proceedings. The Panel was extremely impressed with the quality of the written work presented to it and oral advocacy skills of the Parties' legal representatives.

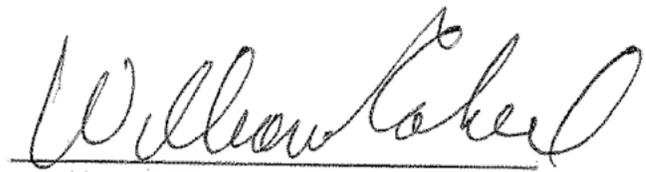
This Final Declaration has sixty-three (63) pages.

Date: Thursday, 9 July 2015.

Place of the IRP, Los Angeles, California.



Professor Catherine Kessedjian



Hon. William J. Cahill (Ret.)



Babak Barin, President

Reference Material 40.

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
INDEPENDENT REVIEW PANEL

ICDR Case No. 01-14-0001-5004

Dot Registry, LLC,

Claimant

v.

Internet Corporation for Assigned Names and Numbers,

Respondent

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

EMERGENCY INDEPENDENT REVIEW PANELIST'S ORDER ON REQUEST FOR
EMERGENCY MEASURES OF PROTECTION

Mark C. Morril
Emergency Independent Review Panelist

December 23, 2014

This Order determines Claimant Dot Registry, LLC.'s ("Dot Registry") application to the undersigned as Emergency Independent Review Panelist for emergency relief under Article 6 of the International Centre for Dispute Resolution ("ICDR") International Dispute Resolution Rules.

Dot Registry applied to Respondent Internet Corporation for Assigned Names and Numbers ("ICANN") for the right to operate three new generic Top Level Domains ["gTLDs"].¹ In the underlying proceeding, Dot Registry has invoked ICANN's Independent Review Process ("IRP") to review the July 24, 2014 Determination of ICANN's Board Governance Committee ("BGC") denying reconsideration of a Community Priority Evaluation ("CPE") panel report finding that Dot Registry's applications did not qualify for "community-based" status.

ICANN has announced its intention to proceed with an auction of the gTLDs at issue on January 21, 2015. Dot Registry seeks an order enjoining ICANN from taking any further steps toward delegating the gTLDs at issue pending the conclusion of its IRP. I find emergency relief to be required to preserve the pending IRP as a process capable of providing an effective remedy.

The Parties

1. Claimant Dot Registry is a limited liability company registered in the State of Kansas. It was formed in 2011 to apply for the rights to operate certain new gTLDs, including .CORP, .LTD and .LLP (collectively "the corporate identifier strings"), which are at issue in the underlying proceeding.
2. Respondent ICANN is a California non-profit public benefit corporation established "for the benefit of the Internet community as a whole." It is responsible, among other things, for administering certain aspects of the Internet Domain Name System.

Applicable Law

3. The parties agree that international law principles, applicable international conventions and local law govern this application.² Although there are a variety of formulations, the tests listed below are commonly applied in both international and U.S. matters to determine an application for preliminary relief or interim measures.

¹ Top-Level Domain or "TLDs" are the string of letters following the rightmost dot in domain names, such as the original gTLDs - .com, gov, .org, .net, .mil and .edu. ICANN began planning for the introduction of new TLDs in 2007 and in 2011 launched its "New gTLD Program" which provided policies and procedures to accomplish the expansion of available TLDs.

² ICANN Article of Incorporation ("Articles"), Article 4.

i. The existence of a right to be protected

Interim measures are available in international arbitration to preserve a party's rights or property pending a resolution on the merits. Article 6 of the ICDR rules, applicable here by consent of the parties, empowers the Emergency Independent Review Panelist to order or award any interim or conservancy measures deemed "necessary." The ICSID convention similarly refers to provisional measures "to preserve the specific rights of either party." The UNCITRAL Arbitration Rules provide in Article 26 for interim measures, among other things, to preserve the *status quo* and prevent action that might prejudice the arbitration process. Some formulations also identify the public interest as an interest to be protected.³

ii. Urgency

This factor requires a showing that in the absence of interim measures, actions prejudicial to the rights sought to be protected are likely to be taken before the arbitration panel has the opportunity to determine the merits.

iii. Necessity

This factor assesses a) the nature and risk of the harm interim measures are intended to avoid; and b) the balance of hardships as between the parties resulting from the grant or withholding of interim measures.

iv. Possibility of success on the merits

It generally is required that the party seeking interim measures makes some showing on the merits of its underlying claim. Article 26 of the UNCITRAL Arbitration Rules requires demonstration of a "reasonable possibility that the requesting party will succeed on the merits of the claim."

Procedural History and Jurisdiction of the Emergency Independent Review Panelist

4. Dot Registry commenced the underlying IRP by a Request for Independent Review Process submitted on September 22, 2014 ("the IRP Request.") Article IV, Section 3 of ICANN's Bylaws provides in pertinent part that:
 2. Any person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for independent review of that decision or action.

³ See *Alliance for the Wild Rockies v. Cottrell*, 632 F.3D 1127 (9th Cir. 2011)

7. All IRP proceedings shall be administered by an international dispute resolution provider appointed from time to time by ICANN (“the IRP Provider.”)

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

5. ICANN’s Board appointed the ICDR as the IRP Provider. The parties agree that the current IRP is governed by the ICDR International Dispute Resolution Rules as in effect from June 1, 2014 (“the ICDR Rules”) and the ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process.

6. The parties agreed that Article 6 of the ICDR Rules would apply to any application Dot Registry might make for emergency relief during the pendency of the IRP.⁴ Dot Registry filed a Request for Emergency Independent Review Panelist and Interim Measures of Protection dated November 19, 2014 (“the Emergency Request.”) The undersigned was appointed Emergency Independent Review Panelist on November 24, 2014 and made certain disclosures in connection with the appointment.

7. I conducted a telephonic preliminary hearing on November 25, 2014, which was attended by counsel for both parties and a Dot Registry executive. During the preliminary hearing, the parties confirmed their acceptance of the undersigned as Emergency Independent Review Panelist. Following that preliminary hearing, I issued Procedural Order No. 1, dated November 26, 2014, which provided *inter alia* that:

- a) ICANN confirmed that Dot Registry would not be required to pay any deposits associated with the auctions for the gTLD strings that are the subject of this dispute until sometime after January 2, 2015 and that no auction would be conducted for the gTLD strings prior thereto;
- b) The Emergency Independent Review Panelist would conduct a telephonic hearing on December 16, 2014; and
- c) The Emergency Independent Review Panelist would provide a reasoned order or award.

8. I have reviewed on this application the IRP Request, ICANN’s Response thereto dated October 27, 2014 (“ICANN Merits Response”), the Emergency Request, ICANN’s Response thereto dated December 8, 2014 (“ICANN Emergency Response”), a letter from Dot Registry’s counsel Weil, Gotshal & Manges LLP

⁴ See C-ER-40 (Email from Jeffrey LeVee dated October 29, 2014 to Ali Arif and others); Procedural Order No. 1, ¶ 1.

dated December 15, 2014, a post-hearing submission from each party and exhibits to each of the foregoing documents.⁵

9. I conducted a telephonic hearing on December 16, 2014. Both parties appeared through their respective counsel. Executives from Dot Registry and ICANN also were in attendance. With the agreement of both parties, the record on this application was closed on December 18, 2014.

Factual Background

ICANN Governance and Accountability

10. ICANN's governance documents include the Articles and ICANN's Bylaws. The Articles require ICANN to carry "out its activities in conformity with relevant principles of international law and applicable international conventions and local law."⁶ The Bylaws provide enumerated "Core Values" to "guide the decisions and actions of ICANN."⁷ The Core Values include "making decisions by applying documented policies neutrally and objectively with integrity and fairness" and "remaining accountable to the Internet community..." Article III of the Bylaws, "Transparency," provides that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."
11. Article IV of the Bylaws, "Accountability and Review" sets out two formal review tiers for persons materially affected by an action of ICANN – A Reconsideration Request and the Independent Review Process.⁸ The stated purpose is to hold ICANN "accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values."
12. The Bylaws provide that a Reconsideration Request is available to review "one or more staff actions or inactions that contradict established ICANN policies" as well as Board actions or inactions where the Board failed to consider material information

⁵ The exhibits are cited herein as: "C-[number]" (IRP Petition); "C-ER-[number]" (Emergency Request); "I-[number]" (ICANN Merits Response); "I-ER-[number]" (ICANN Emergency Response.)

⁶ Articles ¶4

⁷ Bylaws, Article 1, §2

⁸ In addition to the these formal review processes, the Bylaws provide complainants a voluntary period of "cooperative engagement" with ICANN prior to initiating an IRP for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. Upon the filing of an IRP request, the Bylaws provide for a further voluntary "conciliation period" for the purpose of narrowing the issues that are stated within the IRP request. ICANN also maintains an ombudsman program.

or relied on false or inaccurate material information.⁹ ICANN's board has designated its Board Governance Committee ("BGC") to review and consider Reconsideration Requests.¹⁰ The Bylaws do not provide a standard of review for Reconsideration Requests. At the hearing, ICANN's counsel stated that the BGC has determined that review of staff or agent action on a Reconsideration Requests would be limited to whether there were any "procedural irregularities" in the activity reviewed. Counsel stated that the BGC's Determination on Dot Registry's Request applied that standard. ICANN's Merits Response asserts here that the Board made a "considered decision" not to review the substance of any agent or staff action on a Reconsideration Request.¹¹

13. The Independent Review Process is available to any "person materially affected by a decision or action by the Board that he or she asserts is inconsistent" with the Articles or the Bylaws.¹² Requests for Independent Review are referred to an Independent Process Panel which is "charged with comparing contested actions of the Board" to the Articles and Bylaws.¹³
14. The Government Advisory Committee ("GAC") is an Advisory Committee to the Board, comprised of representatives of national governments, distinct economies and multinational and treaty organizations, whose role is to provide advice on ICANN's activities as they relate to concerns of governments.¹⁴

The New gTLD Program

15. The ICANN Board delegated authority to its New gTLD Program Committee ("NGPC") to manage "any and all issues that may arise relating to the New gTLD Program," including the administration of applications to register new gTLDs.¹⁵ In June, 2011 ICANN published its "gTLD Applicant Guidebook" ("AGB"), a detailed handbook which sets out policies and procedures to guide applicants seeking to register new gTLDs.¹⁶

⁹ The BGC determined that the reconsideration process is available also to challenge expert determinations rendered by panels formed by third party service providers. See C-ER-18 at fn. 41

¹⁰ Article IV, §2 (3); The BGC is empowered to request additional information and to conduct a meeting with the requester. Article IV, §2 (12)

¹¹ ICANN Merits Response at 21

¹² Bylaws Article IV, §3 (2)

¹³ Id. The section also states that the IRP Panel "must apply a defined standard of review" "focusing on" whether the Board acted without conflict of interest and exercised due diligence and care in having a reasonable amount of facts in front of them and exercised independent judgment in taking the decision, believed to be in the best interests of the company." Article IV, §3 (4)

¹⁴ Article XI, §2 (1)

¹⁵ Resolution of 10 April 2012, cited at Merits Response R-3.

¹⁶ C-ER-6

16. The AGB provided for ICANN to appoint Community Priority Panels to Review Community applications.¹⁷ ICANN engaged the Economist Intelligence Unit (“EIU”) to conduct the CPE panels. EIU is the “business information arm” of the Economist Group, publisher of the Economist magazine.¹⁸
17. The AGB provides that applications for a gTLD “operated for the benefit of a clearly-defined community” may be designated as “community-based.” All applications not so designated are designated as “standard” applications. An applicant for a community-based gTLD is expected to i) demonstrate an ongoing relationship with a clearly delineated community; ii) have applied for a gTLD string strongly and specifically related to the community; iii) have proposed dedicated registration and use policies... including appropriate security verification procedures; and iv) have the application endorsed in writing by one or more established institutions representing the community it has named.¹⁹
18. The GAC recommended in its Beijing Communiqué of 11 April 2013 that certain categories of gTLDs be designated “Category I” on the basis that they are “likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm.” It recommended a series of “safeguards” to be applied to this category.²⁰ GAC identified the corporate identifier strings as Category I gTLDs. By Resolution of 5 February 2014, ICANN’s NGPC classified the corporate identifier strings as involving a “highly-regulated” sector and required applicants for these strings to implement certain “Safeguards as Public Interest Commitments.” One such safeguard was to mandate that Registrars include in their Registration Agreements a provision requiring any applicant for a corporate identifier string to “represent that it possesses any necessary authorizations ...for participation in the sector associated with the Registry TLD string.”²¹
19. The AGB provides a “string contention process” to resolve competing applications to register the same gTLD.²² Applications determined to have Community status are entitled to priority over all Standard applications. In the case of competing applications within either the Community or the Standard category, the string contention process culminates in an auction of the gTLD. The AGB denominates the auction the “Mechanism of Last Resort.” It states the expectation that “most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants.”²³

¹⁷ AGB 4.2.2

¹⁸ C-16

¹⁹ AGB 1.2.3

²⁰ C-10.

²¹ I-3 at 8.

²² AGB 4.1

²³ AGB 4.3

20. ICANN issued Auction Rules for New gTLDs (“the Auction Rules.”) Auction Rule 8 provides that no auction may take place unless all active applications in the contention set have “no pending ICANN Accountability Measures.”²⁴
21. At the hearing, ICANN’s counsel stated that ICANN has applied Auction Rule 8 to preclude all auctions during the pendency of Reconsideration Requests. ICANN has determined to make case-by-case determinations whether to schedule an auction during the pendency of an IRP request. Counsel stated that ICANN determined to proceed with the auction in this case because it deemed Dot Registry’s position in the IRP to be “frivolous.” ICANN’s counsel stated that the question of whether to proceed with an auction while an IRP is outstanding has arisen in only a few instances.²⁵
22. The new gTLD application form included in the AGB contains a mandatory broad waiver of any remedies other than those expressly set forth in the Bylaws:

Applicant agrees not to challenge, in court or in any other judicial fora, any final decision made by ICANN with respect to the application and irrevocably waives any right to sue or proceed in court or any other judicial fora on the basis of any other legal claim against ICANN and ICANN affiliated parties with respect to the application.²⁶
23. The waiver contains a proviso “that applicant may utilize any accountability mechanism set forth in ICANN’s Bylaws for purposes of challenging any final decision made by ICANN with respect to the application.” (“the Proviso”)

Review of Dot Registry’s CPE Applications

24. Dot Registry submitted separate applications for the .INC, .LLP and .LLC gTLDs on or about 13 June 2012, designating each as a community-based application. Dot Registry identified the relevant “community” in its .INC application as “the Community of Registered Corporations.”²⁷ Dot Registry’s application stated the “Mission/Purpose” of its proposed gTLD to be “authenticating each of our registrant’s right to conduct business in the United States.” It cited to the “rise of business identity thefts online which in turn creates a loss of consumer confidence” and an NASS White Paper on Business Identity Theft. Dot Registry stated its

²⁴ ICANN Auction Rules for New gTLDs, Version 2014-11-03 at 1.

²⁵ In at least one such instance, the IRP Panel enjoined the auction during the pendency of the IRP. See Decision on Interim Measures of Protection, *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-117-T-1083-13 (2014) (C-ER-60) It appears that ICANN has agreed to put other contention sets on hold pending IRPs. See IRP Request at fn. 73.

²⁶ See Top Level Domain Application – Terms and Conditions at AGB Module 6 (C-5)

²⁷ The .LLC and .LLP applications had similar community descriptions. Dot Registry submitted the only community based application as to each of the corporate identifier strings.

intention to verify the identity of each registrant through the records of Secretaries of State “by the creation of a seamless connection and strong communication channel between our organization and the governmental authority charged with monitoring the creation and good standing of corporations.”²⁸ It claimed to be a “corporate affiliate” of the NASS and cited support from “various Secretaries of States offices.”²⁹

25. The record before the CPE Panel included letters from several Secretaries of State expressing concerns about fraudulent use of corporate entities and business identity theft online, stating the need to “protect consumers and the community of interest that exists among validly registered U.S. companies and ...secretaries of state ...that are responsible for administering the nation’s legal entity registration system.”³⁰ The NASS in a letter dated 1 April 2014 to EUI affirmed its position that “the community application process is the only option to ensure that safeguards and restrictions to protect U.S. businesses can and will be enforced...” It noted Dot Registry’s work as the only community applicant with NASS and Secretaries of State over “several years” and urged that “Any award by ICANN should be to the applicant that will commit to maintaining and enforcing a system with regular, real-time verification of each company’s legal status, in accordance with state law.”³¹
26. EIU issued its CPE panel determinations of Dot Registry’s applications on 11 June 2014. The panels awarded each of Dot Registry’s applications a score of 5 of the available 16 points. Since a score of 14 was required to achieve Community Priority status, each of Dot Registry’s applications for priority failed.
27. Among EIU’s most significant findings in its evaluation of Dot Registry’s applications were that the applications failed to identify a “community” within the AGB definition because businesses “typically do not associate themselves with being part of the community as defined by the applicant” and instead “Research showed that firms are typically organized around specific industries, locales and other criteria not related to the entities’ structure...” EIU also found that the Secretaries of State could not represent the community Dot Registry stated because they “are not mainly dedicated to the community as they have other functions beyond processing corporate registrations.”³²
28. Dot Registry applied for reconsideration of the CPE Panel determination on 25 June 2014. Dot Registry cited numerous instances in which it alleged EUI mismanaged the CPE process, as well as scoring errors in each of the four categories by which

²⁸ C-ER-12 at 7-9.

²⁹ Id. at 15.

³⁰ C-ER 18 at Annex 1 (letter dated 20 March 2012 from Jeffrey W. Bullock, Secretary of State of the State of Delaware to ICANN.) The FTC Office of International Affairs expressed similar concerns about the need for a “proactive approach ...to combat fraudulent websites” in a letter dated 29 January 2014. Id.

³¹ C-ER 18 at Annex 1

³² C-18, 19, 20

EIU evaluated the applications. Dot Registry also asserted that EIU had a conflict of interest in respect to the corporate identifier strings. NASS was a co-Requester on the face of the Reconsideration Request Form.³³

29. The BGC denied Dot Registry's Reconsideration Request in a written Determination dated 24 July 2014. The BGC did not list NASS on its Determination and did not discuss NASS or the interests it asserted in the body of its Determination. The BGC stated that it had not evaluated the CPE Panels substantive conclusions that Dot Registry's applications did not prevail in the CPE process. Rather its review was limited to whether the Panels violated any established policy or procedure.³⁴ It found that Dot Registry had not demonstrated any procedural violation or that it had been adversely affected by the challenged actions of the Panels.

The Parties' Contentions

Dot Registry's contentions regarding the scope of the IRP process

30. The IRP Request alleges broad and detailed errors in EIU's management of the CPE process, including "conflating applications, deducting points when requisite criteria were admittedly met, engaging in double-counting, failing to verify statements of support and objection, engaging in unprofessional and arbitrary harassment and conclusively disposing of the rights of applicant based upon undisclosed and unverifiable "research."³⁵
31. The IRP petition attributes responsibility for EIU's alleged mismanagement of the CPE process and EIU's alleged errors in the scoring of Dot Registry's applications to ICANN and its Board. It asserts that ICANN failed to operate in a transparent and accountable manner, consistent with applicable principles of international law and its Bylaws, by allowing EIU to act in an "arbitrary and unprofessional manner" in numerous respects, and by failing to ensure that its policies were implemented accurately and in a transparent, unbiased manner and failing to address the EIU's violations when brought explicitly to the Board's attention.
32. The IRP petition further alleges that ICANN violated the forgoing obligations by appointing EIU which, it alleges, lacked the "requisite skill and expertise" to carry out the CPE review, and had a conflict of interest in relation to the corporate identifier strings.³⁶

Dot Registry's contentions regarding the Reconsideration Request

33. Dot Registry asserts that the Board, acting through its BGC, failed to exercise diligence and care on Dot Registry's Reconsideration Request. The BGC also mischaracterized Dot Registry's claims as challenges to the substantive

³³ C-ER-18

³⁴ C-ER-17 at 8

³⁵ IRP Request at 23

³⁶ Id.

determinations of the CPE panels rather than acknowledging that its challenges were to violations of established policies and procedures. ICANN “deliberately ignored” the role of the NASS and NASS’ participation as a co-Requester on Dot Registry’s Reconsideration Request.³⁷

Dot Registry’s contentions regarding the Board’s response to GAC advice

34. Dot Registry further avers that ICANN breached its Articles of Incorporation and Bylaws by failing to address adequately the GAC Beijing Communiqué findings relating to the risks inherent in the corporate identifier strings.³⁸

ICANN’s contentions regarding the scope of the IRP process

35. ICANN alleges that Dot Registry cannot succeed in the IRP because IRPs are not a vehicle to challenge third party reports such as the EIU scoring of Dot Registry’s application. The creation or acceptance of CPE panel reports is not Board action and the fact that a CPE panel may have come to a particular conclusion on an application is not evidence that the panel lacked skill and expertise and does not constitute a violation of ICANN’s Articles or Bylaws. The IRP Panel is tasked with providing a non-binding opinion, applying a defined deferential standard of review, as to whether challenged Board actions violated ICANN’s Articles or Bylaws.³⁹
36. Reserving its position regarding the proper scope of of an IRP (and a Reconsideration Request), ICANN nonetheless responded to Dot Registry’s claims in relation to EIU’s management of the CPE. Among other things, ICANN asserts i) the BGC properly found no evidence that the CPE panel had mismanaged the support and opposition letters relating to Dot Registry’s application ii) Dot Registry’s separate applications were separately evaluated to the extent required notwithstanding some degree of permitted collaboration between CPE panels; iii) the CPE panels were authorized to conduct independent research and not required to make any disclosure in relation thereto; and iv) there is no evidence that EIU’s alleged conflict of interest ever was brought to the attention of ICANN’s board since it is the obligation of third party providers, not ICANN, to address potential conflicts of interest.⁴⁰
37. Any error in EIU’s CPE scoring caused no harm to Dot Registry. Since Dot Registry received only 5 of the 14 points required to achieve community priority status, the errors it alleges would not have changed the result of the CPE review.

ICANN’s Contentions Regarding the Reconsideration Request

38. ICANN asserts that the BGC acted properly in denying Dot Registry’s Reconsideration Request. The BGC is not required on a reconsideration petition to

³⁷ IRP Request at 17-19, 24

³⁸ GAC also criticized ICANN for adopting the “looser requirement” of requiring registrants to represent their status, as opposed to the “validation and verification” process it had recommended in the Beijing Communiqué. C-13, 14.

³⁹ IR at 8.

⁴⁰ ICANN Merits Response at 7.

perform a substantive review of CPE panel reports. Rather, its role is to review whether the panel violated any policy or procedure in scoring the application.⁴¹ The BGC's failure to list NASS as a co-Requester on BGC's determination of the Reconsideration Request was inadvertent and "had no effect on the substance of the BGC's determination."

ICANN's contentions regarding the Board's response to GAC advice

39. ICANN argued that it instituted additional safeguards applicable to the operation of the corporate identifier strings, responsive to the recommendations of the GAC Beijing Communiqué, which will be included as non-negotiable terms of binding Registry Agreements. Dot Registry lacks standing to raise harm to consumers or other businesses and the CPE review of its application was not affected by the content of any other application.⁴²

Relief Sought

40. Dot Registry's application seeks interim measures
- Enjoining ICANN from taking any further steps towards delegating the corporate identifier strings until the conclusion of the IRP proceedings commenced by Dot Registry; and
 - Requiring ICANN to place the contention sets and each active application for .INC, .LLC and .LLP "on hold" and designate them "ineligible for auction" pending the outcome of the IRP proceedings commenced by Dot Registry.
41. On December 15, 2014, Dot Registry's counsel submitted a letter addressing its interactions with ICANN regarding the deadline to submit an "Auction Date Advancement/Postponement Request Form" pursuant to Auction Rule 10. It sought to extend the emergency relief requested in its application to "freeze all deadlines and actions in connection with the auction or disposition of the corporate identifier strings." ICANN's counsel responded at the hearing.

Issues To Be Decided

I find that the following are the issues to be decided on this application:

42. Has Dot Registry established the existence of one or more rights potentially requiring protection by means of interim measures?
43. Is there an urgent need for interim measures?

⁴¹ ICANN Merits Response at 17-18; statement of ICANN counsel at hearing that BGC review is limited to "procedural irregularities"

⁴² ICANN Merits Response at 13-15

44. Are interim measures necessary, including i) has Dot Registry shown a risk of irreparable injury in the absence of such measures; and ii) does the potential harm to Dot Registry from the withholding of interim measures outweigh the potential harm to ICANN or other parties by imposing interim measures?
45. Has Dot Registry demonstrated the existence of substantial questions going to the merits in the underlying IRP?

Analysis

Rights subject to protection

46. I find the preservation of the IRP as a process that is capable of providing an effective remedy in the IRP to be a substantial right at issue on this application. ICANN's Bylaws provide a narrowly tailored tiered dispute resolution process with a defined and limited set of remedies. The stated core values of fairness and accountability, together with the Bylaw commitment to "procedures designed to ensure fairness," reinforce the importance of preserving an opportunity for the IRP Panel to provide an effective remedy to the extent the Panel deems relief to be required.⁴³
47. The terms and structure of the litigation waiver likewise reinforce the rights of applicants in the New gTLD registry process to a meaningful IRP process with the potential for an effective remedy. The structure of the broad waiver, coupled with the Proviso, suggests that the availability of "any accountability mechanism... for the purposes of challenging any final decision made by ICANN with respect to the application" is the *quid pro quo* for the relinquishment of substantial rights
48. The underlying substantive rights at issue in the IRP, priority registration rights available to a successful applicant in the Community Priority Evaluation process, also are substantial and potentially subject to preservation on the current application.

Urgency

49. I find the need for interim measures to be urgent since ICANN has stated its unequivocal intention to auction registry rights to the corporate identifier strings on January 21, 2015. Consummation of the procedures set out in the Auction Rules will confer unconditional and irrevocable rights to the prevailing party.

⁴³ I find the preservation of an opportunity for the IRP Panel to rule before an irrevocable auction of the corporate identifier strings takes place to be a substantial right, whether the IRP Panel determination is merely advisory, as ICANN contends, or is binding, as some authority has found. *See Declaration on the IRP Procedure, DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-117-T-1083-13 (2014) (holding that IRP Panel decision will be binding); *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 at 22 (C-ER-38) (holding preservation of the effectiveness of a potential future award to be a right subject to protection by provisional measures)

Accordingly, the need for interim measures is urgent to prevent the imminent dissipation of substantial rights.⁴⁴

Necessity

Irreparable Injury

50. Recognizing that a common basis for the denial of preliminary relief is the availability of monetary damages to compensate any claimed injury, I consider here the nature of the injury Dot Registry claims is threatened. Commonly stated in U.S. jurisprudence as “irreparable injury,” the Model Law requirement is that the asserted harm is “not adequately repaired by an award of damages.”⁴⁵
51. The potential harm to Dot Registry is the irrevocable loss of the priority registration rights it sought to obtain and the ongoing operation of the corporate identifier strings under the terms and conditions set out in its application. The loss of those rights would not be compensable by monetary damages.
52. ICANN has not claimed here that monetary damages will be available to compensate Dot Registry if it is determined in the IRP process that Dot Registry’s rights were violated, but in the meantime another bidder has obtained registry rights to the corporate identifier strings in the auction. Emergency relief is necessary to preserve the *status quo* of the corporate identifier strings remaining undelegated.

Balance of Harms

53. The UNCITRAL Rule requires a finding that the harm “substantially outweighs the harm that is likely to result to the party against whom the measure is directed...”⁴⁶ I find that the balance of hardships as between the parties from the grant or withholding of interim measures tips decidedly in favor of Dot Registry. As discussed, Dot Registry has at stake significant procedural and substantive rights, which may be irrevocably lost and cannot be compensated with monetary damages.
54. While ICANN surely has an interest in the streamlined and orderly administration of its processes, it cannot show hardship comparable to that threatened against Dot Registry. The interim measures sought here are rather modest, involving a delay of perhaps several months in a registration process that has been ongoing since 2012.⁴⁷ ICANN has not identified any concrete harm that would result from the relatively short delay required for the IRP Panel to complete its review.

⁴⁴ In light of the interim measures provided here, I find that the relief requested in Dot Registry’s letter of December 15 is not urgent. Of course, Dot Registry may renew that application to the IRP Panel if it chooses to do so.

⁴⁵ UNCITRAL Arbitration Rule Article 26 (3)(a)

⁴⁶ *Id.*

⁴⁷ At least some of the timing of the IRP process and the review by ICANN’s board of the IRP panel’s determination will be within ICANN’s control. The IRP process itself is quite limited and streamlined.

55. Moreover, it appears that the requested relief does not differ greatly from that provided in ICANN's Auction Rule 8 which provides on its face that no auction will be scheduled while an accountability measure is pending. While ICANN at the hearing stated that it has applied a different standard when the pending accountability measure is an IRP, its claim of hardship is at least tempered by the plain language of its own rule.
56. ICANN argues that competing applicants for the strings will suffer substantial harm if further processing is delayed. It does not specify such harm beyond noting that a number of new gTLDs have been delegated and that there is "growing competition" in the gTLD space. However, Dot Registry's December 15 letter stated, and ICANN's counsel confirmed at the hearing, that all of the contending applicants for the corporate identifier strings, save one applicant for .INC, already have submitted formal Auction Rule 10 requests to postpone the January 21 auction date.⁴⁸
57. I also find that there is a significant public interest element at stake on this application. NASS, an association of public officials which supported Dot Registry's application and was a co-Requester on its Reconsideration Request, asserted that safeguards are important to protect consumers and that the Community Application process is the most appropriate to secure the necessary safeguards. The FTC and ICANN's own Government Advisory Committee raised similar concerns. The GAC expressed continuing concerns even after ICANN implemented a set of safeguards after the Beijing Communiqué. It is not appropriate to determine on this emergency application the merits of Dot Registry's proposals for safeguards to protect the interests it asserts, the sufficiency of the safeguards ICANN states it would impose instead or Dot Registry's standing to challenge this aspect of ICANN's actions. However, the expressed interest of accountable public officials in the subject matter of the IRP, coupled with an identified potential risk to the public interest, weighs in favor of granting the application.

Dot Registry's Possibility of Success on the Merits

58. ICANN relies primarily on this factor, arguing that it determined to move forward with the auction process because it deems Dot Registry's IRP "frivolous and unlikely to succeed on the merits."
59. UNCITRAL Arbitration Rule 26 (3) (b) conditions the grant of interim measures on a showing of a "reasonable possibility that the requesting party will succeed on the merits of the claim." The parties are not in full agreement on the strength of the required showing. Where, as here, the balance of hardships tips decidedly in favor of the party seeking relief, some courts have held that the required showing on the

⁴⁸ Auction Rule 10 permits a delay of up to two scheduled auction dates in ICANN's discretion if all applicants in a string contention so request. Dot Registry asserts that it did not file a timely Auction Rule 10 request to postpone the January 21 auction date because it was seeking the same relief on this application and it did not want to use up the sole Auction Rule 10 request permitted by the ICANN rules.

merits maybe somewhat relaxed.⁴⁹ For purposes of this application, I adopt ICANN's formulation that the requesting party must, at a minimum, show that it has raised "substantial questions going to the merits" on its underlying claim, a formulation that recognizes the flexible interplay among the various factors.⁵⁰

60. I find that Dot Registry has raised "substantial questions going to the merits" on this application. I do not attempt a comprehensive listing of such questions, but identify here some examples:

i) BGC Determination of the Reconsideration Request

ICANN states in its Merits Response, and emphasized at the hearing, that the Board made a "considered decision" not to perform any substantive reviews of third party evaluators' reports in the Reconsideration process. Rather, the BGC consistently is applying a policy of reviewing CPE determinations solely for procedural irregularities. Dot Registry has raised a substantial question going to the merits whether the standard the BGC applied to its Reconsideration Request is consistent with ICANN's Bylaws and the New gTLD application form.

ii) Failure to recognize NASS as a co-Requester on Dot Registry's Reconsideration Request

ICANN concedes that the BGC "inadvertently failed to list the NASS as a co-Requester," but argues that this "omission has no effect on the substance of the BGC's Determination."⁵¹ I cannot conclude at this preliminary stage that the omission in the heading of the BGC Determination was harmless error, given that the text of the Determination likewise lacks any reference to NASS or the positions that it (as well as the GAC and the FTC) asserted in respect to such issues as the existence of a cognizable community and the importance of invoking the Community process in relation to the corporate identifier strings.

(iii) Scope of IRP review as applied to new gTLD application

ICANN's principal defense to the IRP is that Dot Registry cannot succeed because most of its claims are no more than a challenge to the substance of EIU's evaluation of its applications. ICANN asserts that IRPs are not a forum for challenging third party expert reports, which it contends, involve no board action.⁵² I find that Dot Registry has raised a colorable argument that the term "Board action," when read against the broad accountability and review provisions in Articles III and IV of the Bylaws, and against the Proviso, should be construed to encompass some aspects of Dot Registry's claims in respect to the selection of EUI and the processes EIU applied to

⁴⁹ See *Alliance for the Wild Rockies v. Cottrell*, 632 F.3D 1127 (9th Cir. 2011)

⁵⁰ *Id.*

⁵¹ ICANN Merits Response at fn. 25

⁵² ICANN Merits Response at 10; ICANN Emergency Response at 9

the CPE review of Dot Registry's applications.⁵³ This substantial question of scope and construction will be for the IRP Panel to determine.

iv) Board's response to the recommendations of the GAC's Beijing Communiqué

ICANN contends that it responded adequately to the GAC's recommendations as to special safeguards required for the corporate identifier strings. It further contends that Dot Registry lacks standing to question the Board's response. The NASS nonetheless urged both EIU and the BGC to consider the importance of the collaboration of NASS and its members with Dot Registry over several years to develop a "regular, real time verification system."⁵⁴ Dot Registry has raised substantial questions going to the merits as to its standing to address the issue and, if it is found to have standing, as to the adequacy of the Board's responses as a substitute for the safeguards proposed in Dot Registry's application.

iii) EIU's Conduct of the CPE

If the IRP Panel determines that review of any aspect of EIU's management of the CPE process (or the BGC's review thereof) is within the scope of the IRP, I find that Dot Registry has raised substantial questions going to the merits in relation to some of the processes EIU applied in the CPE panel review. These questions include whether each of Dot Registry's applications was independently evaluated to the extent required by the AGB and whether EIU made sufficient disclosure in relation to its independent research to enable Dot Registry to obtain a meaningful review of its findings at the Reconsideration stage.⁵⁵

Conclusion

61. I conclude that emergency measures of protection are required to preserve the pending IRP as a process that is capable of providing a meaning remedy should Dot Registry prevail in whole or in part. The IRP Panel will not be in a position to award effective relief should it find in favor of Dot Registry on some or all of its claims if ICANN previously has delegated to another party in an auction irrevocable and unconditional rights to the corporate identifier strings.

⁵³ I note that even the "deferential" IRP review standard ICANN cites requires examination of whether the Board exercised "due diligence and care in having a reasonable amount of facts in front of them." Bylaws Article IV, §3.4; *See also Declaration of the Independent Review Panel in the Matter of an Independent Review Process between ICM Registry, LLC and ICANN* ("[T]he actions and decisions of the ICANN Board are not entitled to deference whether by application of the "business judgment" rule or otherwise; they are to be appraised not deferentially but objectively.") (C-ER-5)

⁵⁴ C-ER-18 at Annex 1

⁵⁵ I cannot conclude on this preliminary application that the errors Dot Registry alleges in respect to EIU's management of the CPE process would be harmless individually or in the aggregate even if sustained.

62. Mindful that interim measures are not to be imposed lightly, I find the least intrusive measure adequate to protect the interests identified to be to require ICANN to apply its Auction Rule 8 in this IRP. Specifically, ICANN will be ordered to refrain from scheduling an Auction for the corporate identifier strings while the current IRP is pending.

Costs of the Application for Emergency Relief

63. I have carefully reviewed all of the facts and circumstances of this application for emergency relief and carefully considered the allocation of costs. I have considered Dot Registry's request for an award of costs, including its legal fees and expenses, and ICANN's response to that request. Based on such careful review, I find it appropriate that the costs of the application should be borne as incurred, the Emergency Independent Review Panelist's compensation should be shared equally and each party should bear its own attorneys' fees and expenses.

Order

Upon consideration of the parties' submissions, including the evidence submitted therewith, and the arguments made by counsel, it is hereby ORDERED as follows:

1. The Emergency Independent Review Panelist finds that emergency measures of protection are necessary to preserve the pending Independent Review Process as an effective remedy should the Independent Review Panel determine that that the award of relief is appropriate.
2. It is therefore ORDERED that ICANN refrain from scheduling an auction for the new gTLDs .INC, .LLP and .LLC until the conclusion of the pending Independent Review Process.
3. The administrative fees of the ICDR shall be borne as incurred. The compensation of the Emergency Independent Review Panelist shall be borne equally by both parties. Each party shall bear all other costs, including its attorneys' fees and expenses, as incurred.
4. This Order renders a final decision on Claimant's Request for Emergency Independent Review Panel and Interim Measures of Protection. All other requests for relief not expressly granted herein are hereby denied.

Dated: December 23, 2014
New York, New York

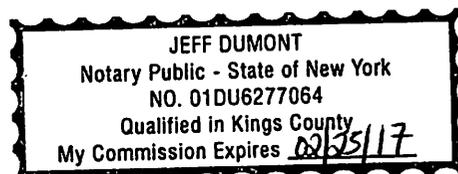

Mark C. Morril
Emergency Independent Review Panelist

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

On this 23rd day of December, 2014, before me came Mark C. Morril, known to me to be the individual described in and who executed the foregoing instrument and acknowledged to me that he executed the same.

Date: December 23, 2014


Notary Public



Reference Material 41.

**DETERMINATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 14-44**

20 JANUARY 2015

The Requester, Dotgay LLC,¹ seeks reconsideration of the Community Priority Evaluation (“CPE”) Panel’s Report, and ICANN’s acceptance of that Report, finding that the Requester’s application for .GAY did not prevail in CPE. The Requester also seeks reconsideration of ICANN staff’s response to the Requester’s request, pursuant to ICANN’s Document Information Disclosure Policy (“DIDP”), for documents relating to the CPE Panel’s Report.

I. Brief Summary.

The Requester submitted a community application for .GAY (the “Application”). Three other applicants submitted standard (meaning not community-based) applications for .GAY. All four .GAY applications were placed into a contention set. As the Requester’s Application was community-based, the Requester was invited to and did participate in CPE for .GAY. The Requester’s Application did not prevail in CPE. As a result, the Application remained in contention with the other applications for .GAY. The contention can be resolved by auction or some arrangement among the involved applicants.

Following the CPE determination, the Requester filed a request pursuant to ICANN’s DIDP (“DIDP Request”), seeking documents relating to the CPE Panel’s Report. In its response

¹ At many (but not all) points throughout its Reconsideration Request, the Requester refers to itself in the plural, as “Requesters.” Since Section 1 of the Request, seeking “Requester Information,” only indicates one Requester (dotgay LLC), and since the Requester stated it was not “bringing this Reconsideration Request on behalf of multiple persons or entities” (*see* Request, § 11, Pg. 24), this Determination will deem the Request to have been filed by a single Requester, dotgay LLC.

to the DIDP Request (“DIDP Response”), ICANN staff identified and provided links to all publicly available responsive documents, and further noted that many of the requested documents did not exist or were not in ICANN’s possession. With respect to those requested documents that were in ICANN’s possession and not already publicly available, ICANN explained that those documents would not be produced because they were subject to certain of the Defined Conditions of Nondisclosure (“Conditions of Nondisclosure”) set forth in the DIDP. The Requester now seeks reconsideration of the CPE determination and ICANN’s acceptance of it, as well as ICANN’s DIDP Response. As for CPE, the Requester makes three claims: (i) the Economic Intelligence Unit (“EIU”), the entity that administers the CPE process, imposed additional criteria or procedural requirements beyond those set forth in the Applicant Guidebook (“Guidebook”); (ii) the CPE Panel failed to comply with certain established ICANN policies and procedures in rendering the CPE Panel’s Report; and (iii) the CPE Panel’s Report is inconsistent with other CPE panels’ reports. The Requester also seeks reconsideration of ICANN’s DIDP Response on the basis that it violates ICANN’s transparency principles.

The BGC concludes that, upon investigation of Requester’s claims, the CPE Panel inadvertently failed to verify 54 letters of support for the Application and that this failure contradicts an established procedure. The BGC further concludes that the CPE Panel’s failure to comply with this established CPE procedure warrants reconsideration. Accordingly, the BGC determines that the CPE Panel Report shall be set aside, and that the EIU shall identify two different evaluators to perform a new CPE for the Application.² Further, the BGC recommends that the EIU include new members of the core team that assesses the evaluation results.³

² While the new CPE is in process, the resolution of the contention set will be postponed. Therefore, Requester’s request that ICANN stay the processing of the .GAY contention set is rendered moot.

³ See Annex B-3, CPE Panel Process Document, Pg. 4 (summarizing role of core team).

With respect to the Requester's other arguments, the BGC finds that the Requester has not stated a sufficient basis for reconsideration.

II. Facts.

A. Background Facts.

The Requester submitted a community application for .GAY.⁴

Top Level Design, LLC, United TLD Holdco Ltd., and Top Level Domain Holdings Limited each submitted standard applications for .GAY.⁵ Those applications were placed in a contention set with the Requester's community-based application.

On 23 February 2014, the Requester's Application for .GAY was invited to participate in CPE. CPE is a method of resolving string contention, described in section 4.2 of the Guidebook. It will occur only if a community application is in contention and if that applicant elects to pursue CPE. The Requester elected to participate in CPE for .GAY, and its Application was forwarded to the EIU, the CPE provider, for evaluation.⁶

On 6 October 2014, the CPE Panel issued its report on the Requester's Application.⁷ The CPE Panel's Report explained that the Application did not meet the CPE requirements specified in the Guidebook and therefore concluded that the Application had not prevailed in CPE.⁸

On 22 October 2014, the Requester submitted a reconsideration request, requesting reconsideration of the CPE Panel's Report, and ICANN's acceptance of that Report.⁹

⁴ See Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/444>.

⁵ See Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1460>; Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1115>; Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/1519>.

⁶ See Community Priority Evaluation (CPE), <http://newgtlds.icann.org/en/applicants/cpe#status>.

⁷ *Id.*

⁸ See CPE Report, available at <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf> and as Annex A-1.

⁹ In this original Request, the Requester contended that the Panel failed to comply with ICANN policies and procedures because it purportedly misapplied two of the criteria an application must meet to prevail in CPE: (1) the

Also on 22 October 2014, the Requester submitted a request pursuant to ICANN's DIDP, seeking documents related to the CPE Panel's Report.

On 31 October 2014, ICANN responded to the DIDP Request.¹⁰ ICANN identified and provided links to all publicly available documents responsive to the DIDP Request, including comments regarding the Application, which were posted on ICANN's website and considered by the CPE Panel.¹¹ ICANN noted that the documents responsive to the requests were either: (1) already public; (2) not in ICANN's possession; or (3) not appropriate for public disclosure because they were subject to certain Conditions of Nondisclosure and that the public interest in disclosing the information did not outweigh the harm that may be caused by such disclosure.¹²

On 29 November 2014, the Requester submitted a revised reconsideration request ("Request" or "Request 14-44"), which sets forth different arguments than those raised in the 22 October reconsideration request, but still seeks reconsideration of the CPE Panel's Report and ICANN's acceptance of that Report, and also seeks reconsideration of the DIDP Response.¹³

B. Relief Requested.

The Requester asks ICANN to reverse the CPE Panel's decision not to grant the Application community priority status, and requests that ICANN or a newly-appointed third party "perform a new determination" after holding a hearing.¹⁴ In the meantime, the Requester asks ICANN to "suspend the process for string contention resolution in relation to the .GAY

(continued...)

Application's nexus to the community; and (2) the community's endorsement. *See* Annex A-3, Initial Reconsideration Request, § 8.1.1, Pg. 5.

¹⁰ *See* Annex A-4, DIDP Response, Pg. 1.

¹¹ *See id.*, Pgs. 3-4.

¹² *See generally id.*

¹³ ICANN confirmed with the Requester that the Requester is only pursuing the issues raised in the revised Reconsideration Request. Therefore this determination addresses the arguments raised in the revised Request, and not the claims made in the original reconsideration request.

¹⁴ Request, § 9, Pgs. 23-24.

gTLD.”¹⁵ The Requester also seeks disclosure of “the information requested” in its DIDP Request.¹⁶ Further, the Requester asks ICANN to reconsider its “position towards Requester’s allegations regarding spurious activity.”¹⁷

III. Issues.

In view of the claims set forth in Request 14-44 and ICANN’s investigation thereof, the issues are:

A. Whether reconsideration of the CPE Panel’s determination that the Requester did not prevail in CPE is warranted because:

- (1) The CPE Panel did not adhere to procedures governing the verification of letters in support of the Application;
- (2) The EIU imposed additional criteria or procedural requirements;
- (3) The EIU did not follow established policies or procedures insofar as:
 - (a) The CPE Panel declined to ask clarifying questions;
 - (b) The CPE Panel did not identify the objectors to the Application;
 - (c) ICANN did not transmit the Requester’s evidence of false allegations made against the Application to the EIU;
 - (d) The CPE Panel purportedly misread the Application;
 - (e) The CPE Panel awarded the Requester zero points with respect to the nexus element of the CPE criteria; or

¹⁵ *Id.*, Pg. 23.

¹⁶ *Id.*

¹⁷ *Id.*, § 3, Pg. 2.

(f) The CPE Panel did not consider comments made in the determination rendered in a separate community objection proceeding regarding the .LGBT string; or

(4) The CPE Panel's Report is inconsistent with other CPE panel reports in a manner constituting a policy or procedure violation.

B. Whether ICANN staff violated established policy or procedure by determining that certain documents sought in the DIDP Request were subject to DIDP Conditions of Nondisclosure.

IV. The Relevant Standards For Evaluating Reconsideration Requests, Community Priority Evaluations And DIDP Requests.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.¹⁸ Dismissal of a request for reconsideration of staff action or inaction is appropriate if the BGC concludes, and the Board or the NGPC¹⁹ agrees to the extent that the BGC deems that further consideration by the Board or NGPC is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws.

A. Community Priority Evaluation.

The reconsideration process can properly be invoked for challenges to expert determinations rendered by panels formed by third party service providers, such as the EIU,

¹⁸ Bylaws, Art. IV, § 2. 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 New gTLD Program Committee.

where it can be demonstrated that a panel failed to follow the established policies or procedures in reaching its determination, or that staff failed to follow its policies or procedures in accepting that determination.²⁰

In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of CPE reports. Accordingly, the BGC does not evaluate the CPE Panel’s substantive conclusion that the Requester did not prevail in the CPE. Rather, the BGC’s review is limited to whether the CPE Panel violated any established policy or process in making its determination.

ICANN has made public all documents regarding the standards and process governing CPE on the New gTLD microsite. (See <http://newgtlds.icann.org/en/applicants/cpe>.) The specific standards governing CPE are set forth in Section 4.2 of the Guidebook. In addition, the EIU – the firm selected to perform CPE – has published supplementary guidelines (“CPE Guidelines”) that provide more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.²¹

CPE will occur only if a community-based applicant selects this option and after all applications in the contention set have completed all previous stages of the gTLD evaluation process.²² CPE is performed by an independent community priority panel appointed by the EIU to review such applications.²³ A CPE panel’s role is to determine whether the community-based application satisfies the four community priority criteria set forth in Section 4.2.3 of the Guidebook. The four criteria include: (i) community establishment; (ii) nexus between proposed

²⁰ See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>, BGC Recommendation on Reconsideration Request 13-5.

²¹ The CPE Guidelines may be found here: <http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en>, and as Annex B-4.

²² Guidebook, § 4.2.

²³ Guidebook, § 4.2.2.

string and community; (iii) registration policies; and (iv) community endorsement. To prevail in CPE, an application must receive a minimum of 14 points on the scoring of the foregoing four criteria, each of which is worth a maximum of four points (for a maximum total of 16 points).

B. Document Information Disclosure Policy.

ICANN's DIDP is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, that is not already publicly available is made available to the public unless there is a compelling reason for confidentiality.²⁴ As part of its commitment to transparency, ICANN makes available a comprehensive set of materials on its website as a matter of course.²⁵

In responding to a request submitted pursuant to ICANN's DIDP, ICANN follows the guidelines set forth in the "Process For Responding To ICANN's Documentary Information Disclosure Policy (DIDP) Requests"²⁶ ("DIDP Response Process"). Specifically, the DIDP Response Process provides that "[a] review is conducted as to whether any of the documents identified as responsive to the Request are subject to any of the [Conditions] of Nondisclosure identified [on ICANN's website]."²⁷ ICANN reserves the right to withhold documents if they fall within any of the Conditions of Nondisclosure.²⁸ In addition, ICANN may refuse "[i]nformation requests: (i) which are not reasonable; (ii) which are excessive or overly burdensome; (iii) complying with which is not feasible; or (iv) [which] are made with an abusive or vexatious purpose or by a vexatious or querulous individual."²⁹

²⁴ See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

²⁵ See *id.*

²⁶ See <https://www.icann.org/resources/files/didp-response-process-2013-10-29-en>.

²⁷ *Id.*; see also <https://www.icann.org/en/about/transparency/didp>.

²⁸ See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

²⁹ See *id.*

The DIDP Response Process also provides that “[t]o the extent that any responsive documents fall within any [Conditions of Nondisclosure], a review is conducted as to whether, under the particular circumstances, the public interest in disclosing the documentary information outweighs the harm that may be caused by such disclosure.”³⁰ It is within ICANN’s sole discretion to determine whether the public interest in the disclosure of responsive documents that fall within one of the Conditions of Nondisclosure outweighs the harm that may be caused by such disclosure.³¹ Finally, the DIDP does not require ICANN staff to “create or compile summaries of any documented information,” including logs of documents withheld under one of the Conditions of Nondisclosure.³²

V. Analysis And Rationale.

The Requester first objects to the CPE Panel’s Report finding that the Application did not prevail in CPE, asserting three overarching arguments as to why reconsideration is warranted. As discussed below, only one of the Requester’s claims identifies conduct that contradicted an established policy or procedure, as required to support reconsideration. Specifically, in the course of evaluating the Requester’s claims, ICANN discovered that the EIU failed to verify 54 letters of support for the Application, and on that ground (only), the BGC determines that reconsideration is warranted.

The Requester also objects to ICANN staff’s DIDP Response. However, the Requester presents only its substantive disagreement with ICANN staff’s application of the DIDP Response Process, which does not support reconsideration.

³⁰ See <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

³¹ See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

³² *Id.*

A. Reconsideration Of The CPE Report Is Warranted Because The EIU Did Not Verify All Relevant Letters Of Support, But The Remainder Of The Requester's Claims Do Not Support Reconsideration.

1. Reconsideration Is Warranted Because The CPE Panel Did Not Adhere To Procedures Governing The Verification Of Support Letters.

CPE panels “will attempt to validate all letters” submitted in support of or in opposition to an application “to ensure that the individuals who have signed the documents are in fact the sender, have the authority to speak on behalf of their institution, and that the panel clearly understands the intentions of the letter.”³³ Only letters that the EIU deems “relevant” to the CPE are forwarded to the CPE evaluators, and it is only those letters that the evaluators must verify.³⁴ Here, the Requester claims reconsideration is warranted because it contends that the CPE Panel only attempted to verify “less than 20%” of the letters of support received.³⁵

Over the course of investigating the claims made in Request 14-44, ICANN learned that the CPE Panel inadvertently did not verify 54 of the letters of support it reviewed. All 54 letters were sent by the Requester in one correspondence bundle, and they are publicly posted on ICANN’s correspondence page.³⁶ The 54 letters were deemed to be relevant by the EIU, but the EIU inadvertently failed to verify them. Given that established policies and procedures require relevant letters to be verified, reconsideration is warranted.

The BGC’s acceptance of Request 14-44 should in no way reflect poorly upon the EIU. Rather, this determination is a recognition that, in response to the Requester’s claims and ICANN’s investigation of the circumstances surrounding the CPE Panel’s Report, ICANN

³³ See Annex B-5, FAQ Page, Pg. 6

³⁴ Annex B-3, CPE Panel Process Document, Pg. 5.

³⁵ Request, §§ 8.4-8.5, Pgs. 8-10.

³⁶ See <https://www.icann.org/en/system/files/correspondence/baxter-to-icann-2-05may14-en.pdf>.

discovered that the EIU inadvertently did not adhere to established policies and procedures insofar as it did not verify some of the support letters it considered.

2. The EIU Did Not Improperly Impose Any Additional Criteria Or Procedural Requirements.

The Requester claims that the EIU has promulgated documents that impose requirements that are inconsistent with and supplemental to those set forth in the Guidebook.³⁷ Specifically, the Requester claims that the following four documents, all finalized after the Guidebook was published, “contain additional criteria, accents and specifications to the criteria laid down in the Applicant Guidebook”³⁸: (1) the EIU’s “Community Priority Evaluation Panel and Its Processes” document (“CPE Panel Process Document”)³⁹; (2) the CPE Guidelines⁴⁰; (3) ICANN’s CPE Frequently Asked Questions page, dated 10 September 2014 (“FAQ Page”)⁴¹; and (4) an ICANN document summarizing a typical CPE timeline (“CPE Timeline”)⁴² (collectively, “CPE Materials”). However, the Requester cites no example of any contradiction with established procedures set forth in the Guidebook within the CPE Materials.

First, the CPE Panel Process Document is a five-page document explaining that the EIU has been selected to implement the Guidebook’s provisions concerning CPE⁴³ and summarizing those provisions.⁴⁴ The CPE Panel Process Document strictly adheres to the Guidebook’s criteria and requirements. The Requester has identified no specific aspect of the CPE Panel

³⁷ Request, § 8.3, Pg. 6.

³⁸ *Id.*

³⁹ Annex B-3.

⁴⁰ Annex B-4.

⁴¹ Annex B-5.

⁴² Annex B-6.

⁴³ The internationally renowned EIU, a leading provider of impartial intelligence on international political, business, and economic issues was selected as the CPE panel firm through ICANN’s public Request for Proposals process in a 2009 call for Expressions of Interest. *See* Annex B-3, CPE Panel Process Document; *see also*, ICANN CALL FOR EXPRESSIONS OF INTEREST (EOIs) for a New gTLD Comparative Evaluation Panel, 25 February 2009, *available at* <https://archive.icann.org/en/topics/new-gtlds/eoi-comparative-evaluation-25feb09-en.pdf>.

⁴⁴ Annex B-3, CPE Panel Process Document.

Process Document that imposes obligations greater or different than those set forth in the Guidebook. Indeed, none exists.

Second, the CPE Guidelines expressly state that they do “not modify the [Guidebook] framework [or] change the intent or standards laid out in the [Guidebook].”⁴⁵ Rather, the Guidelines are “an accompanying document to the [Guidebook] and are meant to provide additional clarity around the scoring principles outlined in the [Guidebook] . . . [and to] increase transparency, fairness, and predictability around the assessment process.”⁴⁶ Moreover, the CPE Guidelines were published after extensive input from the Internet community,⁴⁷ and are “intended to increase transparency, fairness and predictability around the assessment process.”⁴⁸ Indeed, the final version of the CPE Guidelines “takes into account all feedback from the community.”⁴⁹ The Requester does not provide any examples of a requirement set forth in the CPE Guidelines that contravenes the Guidebook.

Third, the FAQ Page does not impose any CPE requirements whatsoever. Rather, the FAQ Page summarizes requirements in the Guidebook and accompanying CPE Materials, and provides information such as the estimated duration of a CPE and applicable fees. The FAQ Page makes clear that all CPE procedures must be consistent with the Guidebook: “The CPE guidelines are an accompanying document to the [Guidebook] and are intended to provide additional clarity around process and scoring principles as defined in the [Guidebook]. The CPE

⁴⁵ CPE Guidelines, Pg. 2.

⁴⁶ *Id.*

⁴⁷ See <http://newgtlds.icann.org/en/applicants/cpe>.

⁴⁸ CPE Guidelines, Pg. 2.

⁴⁹ See newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en.

guidelines do not change the [Guidebook] framework or change the intent or standards established in the [Guidebook].”⁵⁰

Fourth, the CPE Timeline does not impose any requirements, but instead summarizes the timeframes typical for the CPE process. The Guidebook does not impose any deadlines upon either CPE participants or the EIU, thus there is no conflict between the CPE Timeline and any applicable policy or procedure.

The Requester claims ICANN should have permitted applicants to amend their applications after the promulgation of the CPE Materials.⁵¹ However, as set forth above, the CPE Materials did not effectuate any amendment to the Guidebook, or render more stringent any requirement set forth therein. Furthermore, the CPE Materials the Requester now challenges were promulgated quite some time ago; the CPE Guidelines, for instance, were made final on 27 September 2013, and the CPE Panel Process Document was published on 7 August 2014.⁵² Any challenge to ICANN action or inaction concerning the publication or implementation of these documents would be time-barred in all events.⁵³

For these reasons, no reconsideration is warranted on the grounds that any of the CPE Materials improperly impose obligations upon community applicants in a manner inconsistent with the Guidebook.

3. The Remainder Of Requester’s Claims Regarding Policies And Procedures Applicable to CPE Do Not Support Reconsideration.

(a) No Policy Or Process Requires The EIU To Ask Clarifying Questions.

⁵⁰ Annex B-5, FAQ Pg. 4.

⁵¹ Request, § 8.3, Pg. 7.

⁵² See <http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en>;
<http://newgtlds.icann.org/en/announcements-and-media/announcement-07aug14-en>.

⁵³ Bylaws, Art. IV, § 2.5 (setting forth fifteen day deadline for reconsideration requests).

The Requester claims reconsideration is warranted because the EIU “deliberately decided” not to ask the Requester any clarifying questions during the course of CPE.⁵⁴ The Requester, however, acknowledges that there is no established policy or procedure *requiring* the CPE panels to pose clarifying questions to applicants and that the decision to ask clarifying questions is optional.⁵⁵ Indeed, the CPE Panel Process Document provides: “*If the core team so decides, the EIU may provide a clarifying question (CQ) to be issued via ICANN to the applicant*”⁵⁶ Because there is no established policy or procedure requiring any CPE panel to ask clarifying questions, no reconsideration is warranted based on the fact that the CPE Panel here did not.

(b) No Policy Or Process Requires The CPE Panel To Identify Objectors To The Application.

The fourth CPE criterion, community endorsement, evaluates community support for and/or opposition to an application through the scoring of two elements—4-A, “support” (worth two points), and 4-B, “opposition” (worth two points).⁵⁷ Pursuant to the Guidebook, to receive a maximum score for the opposition element, there must be “no opposition of relevance” to the application, and a score of one point is appropriate where there is “[r]elevant opposition from one group of non-negligible size.”⁵⁸ Here, the CPE Panel awarded the Requester one out of two points, because it:

determined that there is opposition to the application from a group of non-negligible size, coming from an organization within the communities explicitly addressed by the application, making it relevant. The organization is a chartered 501(c)(3) nonprofit organization with fulltime staff members, as well as ongoing events and activities with a substantial following. The grounds of the objection do not fall under any of those excluded by the

⁵⁴ Request, § 8.4, Pg. 9.

⁵⁵ *Id.*

⁵⁶ Annex B-3, CPE Panel Process Document, Pg. 3 (emphasis added).

⁵⁷ Guidebook, § 4.2.3.

⁵⁸ *Id.*

[Guidebook] (such as spurious or unsubstantiated claims), but rather relate to the establishment of the community and registration policies. Therefore, the Panel has determined that the applicant partially satisfied the requirements for Opposition.⁵⁹

The Requester contends that reconsideration is warranted because the CPE Panel did not identify *which* opponent to the Application the CPE Panel refers to in the above-quoted analysis.⁶⁰ While the Requester objects that it is “impossible to verify” whether the opposing entity is relevant and of non-negligible size, the Requester points to no Guidebook or CPE Guideline requiring the CPE Panel to provide the Requester with the name of the opposing entity, and none exists. Notably, the CPE Guidelines explicitly set forth the evaluation process with respect to the “opposition” element, and do not include any disclosure requirements regarding the identity of the opposition.⁶¹ The Requester contends that the Guidebook should have included such a procedural requirement and, on that basis, argues that reconsideration is warranted. However, the Guidebook was extensively vetted by the community over a course of years and included a total of ten versions with multiple notice and public comment periods, and it does not impose such a requirement. No reconsideration is warranted by virtue of the CPE Panel’s decision not to identify the opposition.

(c) No Policy Or Procedure Requires ICANN To Directly Transmit The Requester’s Evidence Of False Allegations Made Against The Application To The EIU.

The Requester claims reconsideration is warranted because the evidence of alleged “spurious activity” that the Requester submitted to ICANN prior to the issuance of the CPE Panel’s Report was not provided to the EIU.⁶² For example, the Requester brought to ICANN’s

⁵⁹ Annex A-1, CPE Report, Pg. 8.

⁶⁰ Request, § 8.6, Pg. 11.

⁶¹ CPE Guidelines, Pgs. 19-20.

⁶² Request, § 8.7, Pgs 12-13.

attention its views regarding the motivations and financing sources of certain objectors to the Application, derogatory statements about the Requester made in the press by other applicants for the .GAY string, and similar allegations of untoward conduct.⁶³ However, there is no established policy or procedure requiring ICANN to provide the EIU with supplemental information at an applicant's request.

Further, there is no suggestion that any of the alleged spurious activities that the Requester references (such as Requester's allegation that "a community center from Portland, Oregon (USA) – the city where one of the other applicants for the .GAY gTLD is based" provided false information to ICANN⁶⁴) had any effect upon the CPE Panel's Report. Moreover, the Requester had the opportunity to refute these negative claims. Specifically, as ICANN reminded the Requester in a 14 November 2014 letter,⁶⁵ the public comment forum provides applicants with the ability to refute any negative remarks or allegations, and evaluators, including CPE panels, are instructed to review those comments and responses.⁶⁶ In the 14 November letter, ICANN also noted that it had "not identified anything that indicates the evaluation processes of the New gTLD Program were compromised by the activities cited, and [] determined that all of these processes have been followed in all respects" concerning the Application.⁶⁷ In other words, the Requester had ample opportunity to be heard as to the alleged "spurious activities" and to bring its concerns to the attention of the CPE Panel.

⁶³ Annexes C-2-C-12.

⁶⁴ Request, § 8.7, Pg. 12.

⁶⁵ See Annex C-3, Pgs. 2-3.

⁶⁶ *Id.*, citing Guidebook §§ 1.1.2.3, 4.2.3.

⁶⁷ Annex C-3, Pg. 5.

In sum, the Requester has identified no policy or procedure requiring ICANN to directly send to the EIU information concerning the alleged “spurious activities,” and no reconsideration is warranted based on any decision ICANN may have reached not to do so.

(d) The Requester’s Claim That The CPE Panel Misread The Application Does Not Support Reconsideration.

The Requester claims reconsideration is warranted because the CPE Panel awarded the Requester’s Application zero out of four points on the second criterion, which assesses the nexus between the proposed string and the community.⁶⁸ This criterion evaluates “the relevance of the string to the specific community that it claims to represent” through the scoring of two elements—2-A, “nexus” (worth three points), and 2-B, “uniqueness” (worth one point).⁶⁹ The Requester contends that the CPE Panel misinterpreted the Application and therefore erred in awarding no points in the nexus category. Specifically, the CPE Panel’s Report construed the Application as providing that membership with an “Authenticating Partner” is a prerequisite for becoming a member of the community the Application defines.⁷⁰ The Requester contends that the CPE Panel wrongly interpreted the Application because the Requester intended only that Authenticating Partners would merely screen potential registrants to ensure they match the community definition.⁷¹

While this interpretation may have been the Requester’s intended meaning in drafting the Application, the CPE Panel’s interpretation does not evince any policy or procedure violation. The Application states that the Requester is “*requiring* community members to have *registered*

⁶⁸ Guidebook, § 4.2.3; Request, § 8.9.3, Pgs. 16-17.

⁶⁹ Guidebook, § 4.2.3.

⁷⁰ Annex A-1, CPE Report, Pg. 5.

⁷¹ Request, § 8.9.3B, Pg. 19.

with one of our Authenticating Partners.”⁷² The CPE Panel applied the Guidebook provisions and found this assertion signaled a mismatch between the string and the community as defined in the Application. While the Requester states that “[t]his is, in the Requester’s opinion, an obvious misreading of the Application,”⁷³ the Requester’s substantive disagreement with the CPE Panel’s conclusions does not form a basis for reconsideration.

(e) The CPE Panel Properly Applied Element 2-A (Nexus).

The Requester contends that the CPE Panel also erred in its analysis of the nexus element because it did not take into account the specific arguments raised in the Application relating to the parameters of the gay community.⁷⁴ The Requester, however, does not identify any policy or procedure violation, but instead only offers substantive disagreement with the CPE Panel’s determination that zero points were warranted with respect to the nexus element.⁷⁵

In awarding zero points for element 2-A (nexus), the CPE Panel accurately described and applied the Guidebook scoring guidelines.⁷⁶ Pursuant to Section 4.2.3 of the Guidebook, to receive a maximum score for the nexus element, the applied-for string must “match[] the name of the community or [be] a well-known short-form or abbreviation of the community name.”⁷⁷

The Application describes the gay community as including:

individuals who identify themselves as male or female homosexuals, bisexual, **transgender**, queer, **intersex**, **ally** and many other terminology - in a variety of languages - that has been used at various points to refer most simply to those individuals who do not participate in mainstream

⁷² See .GAY Application Details, available at <https://gtldresult.icann.org/applicationstatus/applicationdetails/444> (“... dotgay LLC has established a conservative plan with [Authenticating Partners] representing over 1,000 organizations and 7 million members. This constitutes our base line estimate for projecting the size of the Gay Community and the minimum pool from which potential registrants will stem.”).

⁷³ Request, § 8.9.3B, Pg. 19.

⁷⁴ Request, § 8.9.3, Pgs. 16-17.

⁷⁵ The Requester also claims that the CPE Panel’s analysis of the nexus element was inconsistent with other CPE reports (Request, § 8.9.3.A, Pg. 18), which argument is addressed in section V.A.2(b) *infra*.

⁷⁶ See Annex A-1, CPE Report, Pgs. 5-6.

⁷⁷ Guidebook, § 4.2.3.

cultural practices pertaining to gender identity, expression and adult consensual sexual relationships. . . .

The membership criterion to join the Gay Community is the process of “coming out”. This process is unique for every individual, organization and ally involving a level of risk in simply becoming visible. While this is sufficient for the world at large in order to delineate more clearly, ***dotgay LLC is also requiring community members to have registered with one of our Authenticating Partners (process described in 20E).***⁷⁸

The CPE Panel determined that the Application did not merit a score on the nexus criteria because the string does not “identify” the community. As the CPE Panel noted, according to the Guidebook, “identify” in this context “means that the applied for string closely describes the community or the community members, *without over-reaching substantially beyond the community.*”⁷⁹ The CPE Panel provided two independent reasons why “the applied-for string substantially over-reaches beyond the community defined by the application” and therefore does not merit any points in this category.⁸⁰

First, the Application stated that the community will include only those who have registered with one of the Requester’s “Authenticating Partners,” and the CPE Panel held that this subset of the “gay community” is not commensurate with the “large group of individuals – all gay people worldwide” to which the string corresponds.⁸¹ In fact, the CPE Panel noted that the Application itself estimates the self-identified gay community as 1.2% of the world population, or about 70 million people, whereas “the size of the community it has defined, based on membership with [Authenticating Partners], is 7 million.”⁸² As discussed in section V.A.2(d), *supra*, while the Requester contends that the CPE Panel misinterpreted the Application in this

⁷⁸ See Response to Question 20(a), .GAY Application Details, *available at* <https://gtldresult.icann.org/applicationstatus/applicationdetails/444>.

⁷⁹ *Id.* § 4.2.3 (emphasis added).

⁸⁰ Annex A-1, CPE Report, Pg. 5.

⁸¹ *Id.*

⁸² *Id.*

regard, the CPE Panel’s reasonable interpretation does not evince any policy or procedure violation.

Second, the CPE Panel found that the Application defines the community as those who have *publicly* “come out” as homosexual, whereas the word “gay” encompasses also “those who are privately aware of their non-heterosexual sexual orientation.”⁸³ The CPE Panel concluded that the string did not match the Application’s definition of the community because there are people who are members of the gay community who have not come out, and also, there are “significant subsets of the [Application’s] defined community that are not identified by the string .GAY,” such as transgender or intersex persons, or allies of what is commonly considered the gay community.⁸⁴ In other words, the CPE Panel held that the definition of community proposed in the Application was both over- and under-inclusive in comparison to the string. As to this rationale for the CPE Panel’s award of zero points, the Requester claims that the EIU “has not taken into account Requester’s specific arguments for including ‘allies’ in its community definition.”⁸⁵ Yet the Requester offers no evidence that the CPE Panel improperly excluded any document or information from its consideration in rendering the CPE Panel’s Report.

In sum, the Requester does not identify any policy or procedure that the CPE Panel misapplied in scoring element 2-A, and the Requester’s substantive disagreement with the CPE Panel’s conclusion does not support reconsideration.

(f) No Policy Or Procedure Requires The CPE Panel To Consider Determinations Rendered In Community Objection Proceedings.

⁸³ *Id.*

⁸⁴ Annex A-1, CPE Report, Pg. 6.

⁸⁵ Request, § 8.9.3, Pg. 17.

The Requester claims reconsideration is warranted because the CPE Panel’s Report did not take into account statements made in a determination overruling a community objection to an application for a different string, namely .LGBT.⁸⁶ The New gTLD Program’s dispute resolution processes, such as the community objection process, provide parties with the opportunity to object to an application and have their concerns considered by an independent panel of experts. In contrast, CPE is a method of resolving string contention and is intended to resolve cases where two or more applicants for an identical or confusingly similar string *successfully complete* all previous stages of the evaluation and dispute resolution processes. The dispute resolution and string contention procedures were developed independently of each other with their distinct purposes in mind, as is made clear by the fact that the Guidebook addresses each in separate provisions. There is no instruction or even suggestion that CPE panels should consider statements made in objection determinations, especially those made in objection determinations regarding a different gTLD. Given that no established policy or procedure requires CPE panels to consider expert determinations issued to resolve community objections, no reconsideration is warranted on the ground that the CPE Panel here did not do so.

- 4. The CPE Panel’s Report Is Not Inconsistent With Other CPE Panels’ Reports In A Manner Constituting A Policy Or Procedure Violation.**
 - (a) The CPE Panel’s Reference To The Oxford English Dictionary Presents No Ground For Reconsideration.**

The Requester suggests that reconsideration is warranted because the CPE Panel consulted the Oxford English Dictionary (“OED”) in seeking to define the string name, whereas the Requester claims that other CPE panels, in considering other applied-for strings, did not.⁸⁷ However, the Guidebook expressly authorizes CPE panels to “perform independent research, if

⁸⁶ Request, § 8.8, Pg. 13.

⁸⁷ Request, § 8.9.1, Pg. 14.

deemed necessary to reach informed scoring decisions.”⁸⁸ The Requester cites no established policy or procedure (because there is none) requiring every CPE panel to use the same sources of independent research in their analyses. As such, the fact that the CPE Panel consulted the OED does not support reconsideration.⁸⁹

(b) The CPE Panel’s Analysis Of Element 2-A (Nexus) Is Not Inconsistent With Other CPE Panels’ Reports In A Manner Constituting A Policy Or Procedure Violation.

With respect to the nexus element, the Requester contends that the EIU has “used double standards in preparing the various CPE panel reports, and is discriminating between the various community-based applicants[.]”⁹⁰ Specifically, the Requester notes that the CPE Panel found that the Application lacked a nexus to the gay community because the Application’s community definition was over-inclusive insofar as it included “allies”—specifically, the CPE Panel determined that because the proposed community included allies, “there are significant subsets of the defined community that are not identified by the string ‘.GAY’.”⁹¹

The Requester cites two CPE panel reports that purportedly show that “the EIU does not seem to have issues with similar concepts” with respect to other applications.⁹² First, it cites the CPE panel evaluating an application for the string .OSAKA, which awarded full points in the nexus category even though the community definition included not just those living in Osaka but also “those who self identify as having a tie to Osaka.”⁹³ Second, the Requester cites the CPE panel evaluating an application for the string .HOTEL, which awarded partial points in the nexus

⁸⁸ Guidebook, § 4.2.3.

⁸⁹ Furthermore, the Requester states that the OED comprised the “sole basis” for evaluating the definition of the community (Request, § 8.9.1, Pg. 14); to the contrary, the Report cites the OED only in a footnote, and includes a detailed discussion of the community definition separate and apart from the OED definition. Annex A-1, Pgs. 5-6.

⁹⁰ Request, § 8.9.3.A, Pg. 18.

⁹¹ Annex A-1, CPE Report, Pg. 6.

⁹² Request, § 8.9.3A, Pg. 18.

⁹³ Annex C-13, Pgs. 1, 4.

category even though it noted there was an insubstantial amount of overreach inherent to the community definition, which includes some entities that are merely “related to hotels.”⁹⁴

However, comparing these reports to the CPE Panel’s Report here discloses no inconsistency that could comprise a policy or procedure violation.

Different outcomes by different independent experts related to different gTLD applications is to be expected, and is hardly evidence of any policy or procedure violation. For instance, the .OSAKA string has been designated a geographic name string, unlike .GAY.⁹⁵ As such, a host of distinct considerations come into play with respect to each step of the evaluation and, in addressing the nexus component, the CPE Panel evaluating .OSAKA specifically referred to the governmental support the applicant had demonstrated.⁹⁶ As for .HOTEL, the CPE panel awarded partial credit to the applicant, finding the “string nexus closely describes the community,” and noted only one potential deficiency, namely the possibility that a “small part of the community” identified in the application might not match the string name.⁹⁷ Here, in contrast, the CPE Panel’s Report found that the proposed community was both over- and under-inclusive.⁹⁸ There is no policy or procedure violation because there is simply no inconsistency: the .HOTEL report found only mild problems with the proposed community definition and awarded a partial nexus score, whereas the CPE Panel’s Report here identified multiple mismatches between the proposed community and the string name, and awarded no points for the nexus element.

In essence, the Requester complains that it lost whereas other applicants prevailed in

⁹⁴ Annex C-14, Pg. 4.

⁹⁵ See Initial Evaluation for Interlink Co., Ltd.’s Application for .OSAKA, *available at* <http://newgtlds.icann.org/sites/default/files/ier/viun4exoaqie2hl0qojm7uvi/ie-1-901-9391-en.pdf>.

⁹⁶ Annex C-13, Pg. 4.

⁹⁷ Annex C-14, Pg. 4.

⁹⁸ Annex A-1, CPE Report, Pgs. 5-6.

scoring nexus points, but no reconsideration is warranted on this ground given that the Requester has failed to show any policy or procedure violation that led to the award of zero points.

(c) The CPE Panel’s Analysis of Element 4-A (Support) Is Not Inconsistent With Other CPE Panels’ Reports In A Manner Constituting A Policy Or Procedure Violation.

The Requester contends that reconsideration is warranted because it claims two other CPE panels have awarded the applicants the full two points with respect to the support criterion (element 4-A) even while finding there was no single organization representative of the entire community, whereas the CPE Panel here awarded the Requester only one point because no such organization exists.⁹⁹ Once again, it is to be expected that different panels will come to different conclusions with respect to different applications. Moreover, there is no inconsistency in the first instance.

The CPE Guidelines provide that an Application will be awarded one point for element 4-A if it demonstrates “[d]ocumented support from at least one group with relevance.”¹⁰⁰ The CPE Panel found that the Application met this one-point standard because at least one relevant group supported the Application.¹⁰¹ To warrant an award of *two* points, though, it must be the case that the “Applicant is, or has documented support from, *the* recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community[.]”¹⁰² Here, the CPE Panel concluded that the Requester was ineligible for a two-point award given that it is “not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from

⁹⁹ Request, § 8.9.4, Pg. 20.

¹⁰⁰ CPE Guidelines, *available at* <http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en>, Pg. 16.

¹⁰¹ Annex A-1, CPE Report, Pgs. 7-8.

¹⁰² CPE Guidelines, *available at* <http://newgtlds.icann.org/en/announcements-and-media/announcement-27sep13-en>, Pg. 16 (emphasis added).

the recognized community institution(s)/member organization(s)” in part because “[t]here is no single such organization recognized by the defined community as representative of the community.”¹⁰³

The Requester cites two CPE panel reports where the CPE panel awarded the full two points as to the support element, namely one CPE panel report evaluating an application for .RADIO, and the other for .HOTEL. Nevertheless, there is no inconsistency between those reports and the CPE Panel’s Report giving rise to the instant Reconsideration Request: neither of the previous reports *expressly* found that *no* single organization represents the community.¹⁰⁴ The Requester recognizes as much, arguing merely that it “does not appear to Requester that there is one single organization recognized by the ‘radio’ community or the ‘hotel’ community[.]”¹⁰⁵ In other words, the purported inconsistency between the CPE Panel’s Report here and others simply does not exist; the .RADIO and .HOTEL CPE reports did *not* include an express finding that the community is *not* represented by any single organization. Here, in contrast, the CPE Panel explicitly found that no such organization exists with respect to the gay community. The CPE Panel thereafter followed the Guidebook, which does not permit a two-point award in the absence of support from a “recognized” organization, defined as one that is “clearly recognized by the community members as representative of the community.”¹⁰⁶

Far from identifying any procedural irregularity with respect to the “support” prong of the community endorsement element, the Requester appears to fault the CPE Panel for adhering to the applicable rules and policies. As such, no reconsideration is warranted on this ground.

¹⁰³ Annex A-1, CPE Report, Pg. 8.

¹⁰⁴ See .RADIO CPE Report, *available at* <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>, .HOTEL CPE Report, *available at* <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>.

¹⁰⁵ Request, § 8.9.4, Pg. 20.

¹⁰⁶ See Guidebook § 4.2.3.

B. ICANN’s DIDP Response Did Not Contravene Any Established Policy Or Procedure.

1. ICANN Staff Adhered To Applicable Policies And Procedures In Responding To The DIDP Request.

The Requester disagrees with the ICANN staff’s determination that certain requested documents were subject to DIDP Conditions of Nondisclosure, as well as ICANN’s determination that, on balance, the potential harm from the release of the documents subject to the Conditions of Nondisclosure outweighs the public interest in disclosure.¹⁰⁷ The Requester claims that in declining to produce documents, ICANN’s violated its core commitment to transparency.¹⁰⁸ The Requester, however, does not identify any policy or procedure that ICANN staff violated in responding to the DIDP Request. As such, reconsideration is not appropriate.

The DIDP identifies a number of “conditions for the nondisclosure of information,” such as documents containing “[c]onfidential business information and/or internal policies and procedures” and/or containing “[i]nternal information that, if disclosed, would or would be likely to compromise the integrity of ICANN’s deliberative and decision-making process by inhibiting the candid exchange of ideas and communications.”¹⁰⁹ It is ICANN’s responsibility to determine whether requested documents fall within those Conditions for Nondisclosure. Pursuant to the DIDP process, “a review is conducted as to whether the documents identified as responsive to the Request are subject to any of the [Conditions for Nondisclosure] identified [on ICANN’s website].”¹¹⁰

¹⁰⁷ Request, § 8.10, Pgs. 20-22.

¹⁰⁸ *Id.*

¹⁰⁹ See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

¹¹⁰ See <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf> (Process For Responding To ICANN’s Documentary Information Disclosure Policy (DIDP) Requests); *see also*, <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

The Requester states that it does not find ICANN's position in the DIDP Response "convincing" that three categories of documents are not suitable for public disclosure because they fall into one of the enumerated Conditions of Nondisclosure: (1) agreements between ICANN and the organizations or individuals involved in the CPE; (2) "communications with persons from EIU who are not involved in the scoring of a CPE, but otherwise assist in a particular CPE [...]"; and (3) work papers of CPE Panel members.¹¹¹ The Requester, however, fails to demonstrate that ICANN contravened the DIDP Response Process in determining that these categories of documents fall under one or more of the Conditions of Nondisclosure.

Indeed, in finding that each of these three categories of requested documents were subject to Conditions of Nondisclosure, ICANN adhered to the DIDP Response Process. First, ICANN has made public all documents regarding the standards and process governing CPE, as well as its instructions to the EIU on how the CPE process should be conducted, on its new gTLD microsite. (See <http://newgtlds.icann.org/en/applicants/cpe>.) In particular, Section 4.2 of the Guidebook, the CPE Panel Process Document, and the CPE Guidelines, set forth the guidelines and criteria by which the CPE panels are to evaluate applications undergoing CPE. These documents also encompass the instructions from ICANN to the EIU on how the CPE process should be conducted. There are no CPE process documents, guidelines, or instructions from ICANN to the EIU on how the CPE process should be conducted that have not been publicly posted. As to the contract between ICANN and the EIU for the coordination of the independent panels to perform CPEs, ICANN analyzed the Requester's request in view of the DIDP Conditions of Nondisclosure. ICANN determined that the contract was subject to several Conditions of Nondisclosure, including those covering "information . . . provided to ICANN pursuant to a

¹¹¹ Request, § 8.10, Pgs. 20-21.

nondisclosure agreement or nondisclosure condition within an agreement” and “confidential business information and/or internal policies and procedures.”¹¹²

Second, as to ICANN’s determination that it will not publicly disclose “communications with persons from EIU who are not involved in the scoring of a CPE,” ICANN analyzed the Requester’s requests in view of the DIDP Conditions of Nondisclosure. ICANN noted that it had already determined in response to a previous request (No. 20140804-1) that this category of documents is subject to several Conditions of Nondisclosure.¹¹³ The DIDP response to which ICANN referred discloses that the requested category of documents falls under Conditions of Nondisclosure including those covering information that “if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of . . . [a third] party[,]” “information exchanged, prepared for, or derived from the deliberative and decision-making processes,” and “confidential business information and/or internal policies and procedures.”

Third, as to the work papers of CPE evaluators or other documents internal to the EIU, ICANN indicated that it is not involved with the EIU’s deliberative process in order to “help assure independence of the process,” and therefore ICANN does not possess any such documents that might be responsive to this requested category.¹¹⁴

As ICANN noted in the DIDP Response, notwithstanding the fact that the Requester’s “analysis in [the DIDP] Request concluded that no Conditions for Nondisclosure should apply, ICANN must independently undertake the analysis of each Condition as it applies to the documentation at issue, and make the final determination as to whether any [Conditions of

¹¹² Annex A-4, DIDP Response, Pg. 2.

¹¹³ *Id.*, Pg. 3 (citing Response to DIDP Request No. 20140804, *available at* <https://www.icann.org/en/system/files/files/response-donuts-et-al-03sep14-en.pdf>).

¹¹⁴ Annex A-4, DIDP Response, Pgs. 2, 4.

Nondisclosure].”¹¹⁵ In conformance with the publicly posted DIDP process,¹¹⁶ ICANN undertook such analysis, as noted above, and articulated its conclusions in the DIDP Response. ICANN also noted that at least some of these documents were draft documents and explained that drafts not only fall within a Condition of Nondisclosure but also are “not reliable sources of information regarding what actually occurred or standards that were actually applied.”¹¹⁷ While the Requester may not agree with ICANN’s determination that certain Conditions of Nondisclosure apply here, the Requester identified no policy or procedure that ICANN staff violated in making its determination, and the Requester’s substantive disagreement with that determination is not a basis for reconsideration.

2. ICANN Staff Adhered To The DIDP Response Process In Determining That The Potential Harm Caused By Disclosure Outweighed The Public Interest In Disclosure.

The DIDP states that if documents have been identified within the Conditions of Nondisclosure, they “may still be made public if ICANN determines, under the particular circumstances, that the public interest in disclosing the information outweighs the harm that may be caused by such disclosure.”¹¹⁸ The Requester’s substantive disagreement with the determination made by ICANN staff in this regard in responding to the DIDP Request does not serve as a basis for reconsideration.

The Requester argues that ICANN’s determination not to make public the documents it requested through the DIDP “restricts [its] fundamental rights to challenge” the CPE Panel’s evaluation, and “ultimately, to use the transparency and accountability mechanisms embedded

¹¹⁵ *Id.*, Pg. 5.

¹¹⁶ See <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>.

¹¹⁷ Annex A-4, DIDP Response, Pg. 5.

¹¹⁸ See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

into ICANN’s By-laws.”¹¹⁹ Yet, the fact that the Requester believes that in this case the public interest in disclosing information outweighs any harm that might be caused by such disclosure does not bind ICANN to accept the Requester’s analysis. In accordance with the DIDP Response Process, ICANN conducted a review of all responsive documents that fell within the Conditions of Nondisclosure, and determined that the potential harm did outweigh the public interest in the disclosure of certain documents.¹²⁰ The Requester identifies no policy or procedure that ICANN staff violated in reaching this decision.

Finally, the Requester states that “[i]n Requester’s opinion, the EIU . . . is subject to the same policies—especially those relating to transparency and accountability—as ICANN.”¹²¹ However, as stated in the DIDP Response, “DIDP is limited to requests for information already in existence *within ICANN* that is not publicly available,”¹²² as the DIDP is “intended to ensure that information contained in documents concerning ICANN’s operational activities, *and within ICANN’s possession, custody, or control*, is made available to the public unless there is a compelling reason for confidentiality.”¹²³ The documents are not within ICANN’s possession, custody or control.¹²⁴ Even though the Requester wishes it otherwise, there is no established policy or procedure that requires ICANN to gather documents from third party service providers such as the EIU.

In sum, ICANN staff properly followed all policies and procedures with respect to the Requester’s DIDP Request—ICANN staff assessed the request in accordance with the guidelines set forth in the DIDP and determined, pursuant to those guidelines, that certain categories of

¹¹⁹ Request, § 8.10, Pg. 21.

¹²⁰ Annex A-4, DIDP Response, Pgs. 2-5.

¹²¹ Request, § 8.10, Pg. 22.

¹²² Annex A-4, DIDP Response, Pg. 5 (emphasis added).

¹²³ See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

¹²⁴ Annex A-4, DIDP Response, Pg. 2.

requested documents were subject to Conditions of Nondisclosure, and that the potential harm from the disclosure of certain documents outweighed the benefits. The Requester's substantive disagreement with that determination is not a basis for reconsideration.

VI. Accepting The Reconsideration Request.

Based on the foregoing, the BGC concludes that reconsideration is warranted. Specifically, ICANN discovered in the course of investigating the claims presented in this Request that the CPE Panel inadvertently neglected to verify some of the letters submitted in support of the Application. This conduct is in contradiction of an established process. Accordingly, the BGC has determined that the CPE Panel's Report will be set aside and that new evaluators will be appointed to conduct a new CPE for the Application. The BGC also recommends that the EIU include new members of the core team to assess the evaluation results.

The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that the BGC's determination on such matters is final.¹²⁵ As discussed above, Request 14-44 seeks reconsideration of a staff action or inaction. After consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board (or the New gTLD Program Committee) is warranted.

The BGC's decision to accept this reconsideration request and convene a new CPE Panel to evaluate the Requester's Application does not mean that a newly constituted CPE panel necessarily will overturn, reverse, or otherwise alter the decision that ultimately serves as the basis of this Request, namely that the Requester's application for .GAY did not meet the CPE criteria. Accepting the Request merely allows the appointment of new CPE evaluators (and

¹²⁵ Bylaws, Art. IV, § 2.15.

potentially new core team members) to conduct a new evaluation and issue a new report that will supersede the existing CPE Panel's Report.

In terms of the timing of the BGC's Determination, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a Reconsideration Request within thirty days following receipt of the request, unless impractical.¹²⁶ To satisfy the thirty-day deadline, the BGC would have to have acted by 29 December 2014. Due to the intervening holidays, it was impractical for the BGC to render a determination on revised Request 14-44 prior to 20 January 2015.

¹²⁶ Bylaws, Article IV, § 2.16.

Reference Material 42.

Reconsideration Request

1. Requester Information

Name: dotgay LLC

Address: Contact Information Redacted

Email: Contact Information Redacted

Counsel: Bart Lieben Contact Information Redacted

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.

On October 6, 2014, ICANN published its Community Priority Evaluation Panel's New gTLD Program Community Priority Evaluation Report for the .GAY gTLD application submitted by the Requester. Reference is made to <https://www.icann.org/sites/default/files/tlds/gay/gay-cpe-1-1713-23699-en.pdf> (hereinafter: the "CPE Report").

According to this CPE Report, the Community Priority Evaluation concluded that:

"After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel has determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation."

Although the Disclaimer contained in the Determination states that "[...] these Community Priority Evaluation results do not necessarily determine the final result of the application", ICANN has changed the "Contention Resolution Status" of the Application into "Active", and the "Contention Resolution Result" into "Into Contention", apparently following the publication of the CPE Report. This action by ICANN is hereinafter referred to as the "Determination", which Requester is seeking to have reconsidered.¹

Following receipt of the Determination, Requesters have submitted a detailed Request for Information to ICANN under the latter's Documentary Information

¹ See Requester's Application Status Page at <https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails/444>.

Disclosure Policy (DIDP).

More in particular, Requester has asked ICANN to disclose further information relating to the Determination. The full Request for Information has been enclosed to this Reconsideration Request as **Annex A-2** and is incorporated herein by reference.

ICANN's Response to the Request for Information states:

“For each of the items identified above as subject to Defined Conditions of Nondisclosure, ICANN has determined that there are no particular circumstances for which the public interest in disclosing the information outweighs the harm that may be caused to ICANN, its contractual relationships and its contractors’ deliberative processes by the requested disclosure” (see **Annex A-3** for the full Response).

Furthermore, Requester has provided ICANN with additional information that demonstrates that certain parties – upon information and belief: even supported by another applicant for the .GAY gTLD – have engaged in spurious activities which have obviously influenced the scoring in the CPE Report (see Annexes **C-2** to **C-12**). However, ICANN informed Requester that they would not take any action in this respect (see **Annexes C-2** and **C-3**).

Considering the fact that all of the above elements are in essence connected, as they relate to the Community Priority Evaluation process, including the criteria and information that have been assessed in this respect, Requester has combined each of these elements into one single Reconsideration Request, seeking:

- reconsideration of the CPE Report and the Determination;
- disclosure of the information requested in its Request for Information;
- reconsideration of ICANN's position towards Requester's allegations regarding spurious activity.

4. Date of action/inaction:

- October 6, 2014 in relation to the publication of the CPE Report and the Determination;
- October 31, 2014 in relation to ICANN's response to Requester's Request for Information;
- November 14, 2014 as regards ICANN's response to Requester's email containing allegations regarding spurious activity;

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

- October 7, 2014 in relation to the publication of the CPE Report and the Determination;
- November 3, 2014 in relation to ICANN's response to Requester's Request for Information;
- November 17, 2014 as regards ICANN's response to Requester's email containing allegations regarding spurious activity.

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

Requester is the applicant for the community-based gTLD .GAY, (Application ID: 1-1713-23699, Prioritization Number: 179; see <https://gtldresult.icann.org/application-result/applicationstatus/applicationdetails/444>) (hereinafter referred to as the "Application").

Requester has elected to participate in the Community Priority Evaluation ("CPE") in accordance with the provisions set out in the Applicant Guidebook.

On October 7, ICANN published the CPE Report that has been drawn up by the EIU, which states that the Requester's application for the .GAY gTLD "*did not prevail in Community Priority Evaluation*".

Having experienced the process carried out by ICANN in approving the Application following Initial Evaluation, publishing the Determination, not responding to Requester's Request for Information nor its allegations regarding spurious activity it has become clear that:

- (i) the EIU has, in the context of the CPE Guidelines, interpreted criteria and implemented evaluation processes contrary to ICANN policy, and more in particular the Applicant Guidebook;
- (ii) the EIU has acted contrary to the processes described in the Applicant Guidebook when collecting and interpreting information in view of preparing the CPE Report, which has led to the Determination;
- (iii) the EIU has, when carrying out the CPE, intentionally misguided parties who have sponsored and endorsed Requester's Application for the .GAY gTLD;
- (iv) ICANN has not taken into account relevant information provided by Requester prior to the commencement of CPE;
- (v) the EIU has not taken into account prior Expert Determinations regarding the .GAY gTLD and Requester's supporters;
- (vi) the EIU has not taken into account relevant information provided to ICANN

- by Requester prior to and after the commencement of CPE;
- (vii) the CPE Panel has been inconsistent in applying the criteria and guidelines in drafting the CPE Report, considering the information contained in other community-based applications and, more in particular, when comparing this information to the information and criteria relied upon by the EIU;
 - (viii) notwithstanding the fact that Requester has requested ICANN to provide them with relevant information in order to obtain a better insight in the actual CPE process and the way how the CPE criteria have been applied in the context of Requester's Application, ICANN has deliberately refused to provide Requester with such information both within and outside ICANN's transparency and accountability processes.

Bearing in mind the above elements, Requester is convinced that the approach taken by ICANN in allowing the latter to define processes and criteria different from those reflected in the Applicant Guidebook, applying scores and scoring criteria that are flawed, in particular by not having conducted a "careful and extensive review" as they have stated in the CPE Report, and this based on the information, arguments and evidence provided herein.

Therefore, the Requester is now facing contention resolution with three other applicants for the same string "*through the other methods as described in Module 4 of the Applicant Guidebook*", requiring Requester to – ultimately – resolve such contention directly with the other applicants for the .GAY gTLD. Such contention resolution may include the participation in an auction organized by ICANN for which additional and substantial funding must be sought, which could have been avoided if the Determination had been developed in accordance with ICANN's standards, in particular those set out in the Applicant Guidebook.

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

Considering the fact that the .GAY gTLD, as contemplated by Requester, intends to be operated to the benefit of and as a safe haven on the internet for a wide variety of members of the gay community, our current and future members and endorsers will be adversely affected if the .GAY gTLD would be awarded to a registry operator that turns it into an unrestricted extension and not necessarily having the best interests in mind for the community as a whole and the community members it wishes to serve.

Given the fact that gays are still considered a vulnerable group by the United Nations, the EU, the USA and in many other countries, the intention of reserving a specific zone on the Internet dedicated to the gay community will promote the self-awareness of this community and its members.

The fact that the gay community is affected by the CPE Report and the

Determination is substantiated by the various letters of support for this Reconsideration Request that have been submitted to ICANN by the Federation of Gay Games (**Annex C-22**), the International Lesbian, Gay, Bisexual, Trans and Intersex Association (**Annex C-23**), and the National Gay & Lesbian Chamber of Commerce (**Annex C-24**).

8. Detail of Board or Staff Action – Required Information

8.1. Introduction

According to the Requester, the EIU and ICANN has not acted in compliance with a wide variety of processes, procedures, and rules, in particular ICANN's own By-Laws as well as the Applicant Guidebook at various stages of the CPE process and thereafter, which has materially affected Requester's Application for the .GAY gTLD and more in particular Requester's position for operating such new gTLD in favor of the gay community.

Requester refers to the claims made in its response to the requirements set out in §6 hereof.

8.2. Summary

As will be outlined in further detail below and in the Annexes hereto, Requester has identified the following issues:

- (1) ICANN having allowed the EIU to develop processes and criteria outside of ICANN's policy development process and the Applicant Guidebook without providing the Requester with an opportunity to amend its Application, and hence discriminate community-based applicants in general, and Requester in particular (§8.3 below);
- (2) Various process errors in identifying, assessing, verifying and evaluating Requester's Application as well as information provided by third parties against the criteria set out in the Applicant Guidebook (§§8.4 – 8.8 below);
- (3) Various inconsistencies in the CPE evaluation processes when comparing the CPE Report with other reports developed by the EIU in the context of the CPE process (§8.9); and
- (4) Clear violations of ICANN's By-Laws, in particular in relation to ICANN's transparency and accountability mechanisms, by not providing clear answers to Requester's Request for Information under ICANN's Documentary Information Disclosure Policy (§8.10).

8.3. The EIU has, in the context of the CPE Guidelines, interpreted criteria and implemented evaluation processes contrary to ICANN policy, and more in particular the Applicant Guidebook

Following ICANN's announcement that the EIU would be the sole evaluator for community-based applications having selected CPE, the EIU promulgated its own criteria for conducting such reviews, which included requirements in addition to those in the AGB.

According to the first Recommendation of the GNSO, which formed the basis of the New gTLD Program:

"ICANN must implement a process that allows the introduction of new top-level domains.

The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.

All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process."²

The EIU has published four documents in the timeframe September 2013 – September 2014, being more than one and a half years, respectively two and a half years *after* the publication of the final version of the Applicant Guidebook, and more than a year / two years following the closing of the application window for new gTLDs, which are available on ICANN's website:³

- *CPE Panel Process Document*, published on August 6, 2014 (**Annex B-3**);
- *CPE Guidelines*, published on September 27, 2013 (**Annex B-4**);
- *Updated Frequently Asked Questions (FAQs)*, published on September 10, 2014 (**Annex B-5**); and
- *CPE Processing Timeline*, published on September 10, 2014 (**Annex B-6**) (jointly referred to as the "CPE Documents").

Not only could one question the legitimacy of these documents, which undisputedly contain additional criteria, accents, and specifications to the criteria laid down in the Applicant Guidebook, but have not gone through ICANN's policy development processes, it is moreover undisputedly so that applicants have not been in the position to base their applications upon such new requirements when

² This was in fact the first GNSO Recommendation, contained in its Principles, Recommendations & Implementation Guidelines, attached hereto as **Annex B-1**.

³ See **Annex B-2**.

they submitted them in the beginning of 2012 ...⁴

In order to deal with similar situations – for instance in order to respond to concerns expressed by the Governmental Advisory Committee (“GAC”) or brand owners – ICANN has also created additional criteria or interpretations thereof, but these processes have been implemented by allowing affected applicants to clarify their position on an individual basis, or even make changes to their applications.

Requester points out in this respect to the policy development process that led to Specification 13 to the Registry Agreement.⁵ In the context of this process, applicants of so-called brand-TLDs have had the opportunity to indicate in a separate document whether they complied with such new rules, processes and criteria, and have even been given the possibility to draft specific terms and conditions for the registration of domain names in their gTLDs.

Also, applicants for TLDs that have been earmarked by the GAC in 2013 as “Category 2 – Exclusive Access” gTLDs have been given the express opportunity to clarify their positions in relation to such qualification and have been given the opportunity to amend their applications accordingly. Specific response forms have been developed by ICANN to this end, which have been published on the ICANN website.

For community-based gTLDs, however, requests for dialogue expressed by the cTAG went ignored, no such outreach has taken place, no specific clarifying questions have been issued, no opportunities were presented to clarify – on an individual basis – their position in relation to the CPE Documents that have been used by the EIU in order to prepare their CPE reports.

In Requester’s view, ICANN has therefore clearly discriminated community-based gTLDs by changing or “interpreting” the processes and criteria set out in the Applicant Guidebook more than a year and a half after the closing of the application window, without providing applicants with the opportunity to amend their applications accordingly.

Therefore, Requester is of the opinion that:

- ICANN has not acted in compliance with the requirement set out by the GNSO and the ICANN community at large that applicants had to be evaluated against transparent and predictable criteria, since the processes and criteria contained in the CPE Documents are to be considered *“additional selection criteria used in the selection process”* that have not been made *“fully available to the applicants prior to the initiation of the process”*.

⁴ Requester points out to the fact that the final version of the Applicant Guidebook dates from June 2012, i.e. after the closing of the application window.

⁵ Reference is made to <http://newgtlds.icann.org/en/applicants/agb/base-agreement-contracting/specification-13-applications>.

The fact that ICANN and the EIU have requested input from the ICANN community on the draft CPE Documents:

- (i) is a clear demonstration of the fact that both ICANN and the EIU have attempted to make additional (or modified) criteria or additional or modified interpretations thereof been part of the CPE process. Indeed, if the processes and criteria set out in the Applicant Guidebook were clear, why would there be a need to publish four additional documents dealing with this process ...?; and
 - (ii) does not take away that these CPE Documents have not been made available to applicants prior to the initiation of the selection process (i.e. during the first 5 months of 2012);
- the EIU has not acted in compliance with the criteria set out in the AGB as they have applied their own standards in developing the CPE Report; and
 - ICANN has obviously discriminated community-based applicants by not providing each applicant, and Requester in particular, on an individual basis with the opportunity to clarify its position in relation thereto.

8.4. The EIU has acted contrary to the processes described in the Applicant Guidebook when collecting and interpreting information in view of preparing the CPE Report, which has led to the Determination

According to the CPE Panel Process document:

With few exceptions, verification emails are sent to every entity that has sent a letter(s) of support or opposition to validate their identity and authority.⁶

Following an enquiry organized by Requester with its sponsors, it appears that only a minority of the 240+ supporters of Requester's Application have received a verification email from the EIU. Indeed, according to the feedback obtained from the Requester's supporters, less than 20% of them have received such a verification email.

According to the EIU's own CPE Panel Process Document, a number of exceptions apply to the EIU's basic obligation to contact all of the parties who have endorsed or who are opposed to a particular application, which exceptions apply in the following circumstances:

- *If there are no contact details included in the letter(s). However, the evaluator will attempt to obtain this information through independent research.*

⁶ CPE Panel Process Document, page 5.

- *If the person sending the letters(s) does not represent an organization. However, if the content of the letter(s) suggests that the individual sending a letter has sent this letter(s) on behalf of an organization/entity the evaluator will attempt to validate this affiliation.*⁷

None of these “exceptions” apply in this case. Furthermore, if the EIU or ICANN would not have access to contact information of a particular supporter, this issue could have been easily resolved by sending a clarifying question to the Requester, who is in permanent contact with all of its sponsoring organizations.

Indeed, according to the EIU’s own CPE Panel Process Document, they clearly had this option:

*“If the core team so decides, the EIU may provide a clarifying question (CQ) to be issued via ICANN to the applicant to clarify statements in the application materials and/or to inform the applicant that letter(s) of support could not be verified.”*⁸

For reasons unknown to the Requester, the EIU deliberately decided not to issue such clarifying question.

According to the Applicant Guidebook: *“As part of the evaluation process, evaluators may request clarification or additional information during the Initial Evaluation period. For each application, clarifying questions will be consolidated and sent to the applicant from each of the panels. The applicant will thus have an opportunity to clarify or supplement the application in those areas where a request is made by the evaluators.”*

According to the Frequently Asked Questions page relating to ICANN’s Clarifying Questions process,⁹ it is clear that such questions may be sent from the following panels:

- Background screening
- Geographic name
- String similarity
- DNS stability
- Registry services
- Technical/Operational
- Financial
- Community priority evaluation (if applicable)

⁷ CPE Panel Process Document, page 5.

⁸ CPE Panel Process Document, page 3.

⁹ See **Annex B-7**.

ICANN has consistently been sending clarifying questions throughout the Initial Evaluation phase if – according to the evaluation panels’ – the applicant’s answers to the evaluation questions did not qualify for a passing score. For instance, Requester received a clarifying question in relation to its response to Question 44.

When ICANN forwarded such clarifying question to Requester on March 4 of 2013, ICANN indicated that *“The evaluators will complete the evaluation based on the most current application information, which will include any new information you submit. If the new information introduces inconsistencies in the application, creates new issues, or is still insufficient for the evaluators to award a passing score, the application will be scored and results posted without further notice.”* (emphasis added)

Requester did not receive any further questions relating to its answers to community-related Questions 20 *et seq.*, it rightfully assumed that ICANN had no further questions with respect to the answers provided by Requester to such community-related questions.¹⁰

Since ICANN has nowhere and never indicated that Requester’s answers to Questions 20 *et seq.* posed issues to the evaluators, ICANN has misguided and misled Requester by creating the impression that the answers to Questions 20 *et seq.* were sufficient for the evaluators to award a passing score.

8.5. The EIU has, when carrying out the CPE, intentionally misguided parties who have sponsored and endorsed Requester’s Application for the .GAY gTLD;

Besides the fact that the EIU has not acted in accordance with the processes designed by ICANN or even by the EIU itself by not reaching out to all of Requester’s supporters, it has moreover intentionally misguided those parties to whom a verification email has been sent.

Indeed, many of the letters that have been sent out by the EIU to the Requester’s sponsors state a response date that predates the date of the actual verification email: as evidence shows, recipients have been invited to respond to the EIU’s verification email, sent on June 30, 2014, by June 24, 2014 ...

Reference is made to **Annexes C-18 to C-21**, which all contain a true copy of the email received by some of Requester’s sponsors, and which clearly show that the EIU has set a due date for a response that predates the actual date of sending the email to Requester’s supporters. Based on the feedback and questions Requester has received, it is clear that many of its sponsors have not provided input or have verified their endorsement for Requester’s Application, since the response due date had already passed at the time of receipt of the

¹⁰ Reference is made to ICANN Case #00022186, where ICANN has asked for additional information in relation to Requester’s response to Question 44.

email.

Requester has received an overwhelming support from various organizations and LGBTQIA interest groups from all over the world, as is shown by the list attached hereto as **Annex C-17**. There is no doubt that all of these endorsers and supporters combined are “clearly recognized by the community members as representative of the community” as required by the Applicant Guidebook in order to qualify for a score of 2. However, the EIU chose to ignore Requester’s supporters.

Furthermore, there is no doubt that the likely limited response received by the EIU following its flawed outreach has led to the latter giving a score of 1 out of 2 possible points.

8.6. ICANN has not taken into account relevant information provided by Requester prior to the commencement of CPE

According to the CPE Panel Process Document, the EIU’s “core team” may carry out additional research *“to answer questions that arise during the review, especially as they pertain to the qualitative aspects of the Applicant Guidebook scoring procedures”*.¹¹

Referring to the CPE Report, it is clear that such additional research has been carried out by the EIU. Some examples include:

- the EIU expressly referring to the definition of “gay” in the Oxford English Dictionary, which definition was not referred to in the Application;
- the EIU has referred to an organization within the communities explicitly addressed by the application, which has opposed to Requester’s Application, and which organization – according to the CPE Report – is purported to be *“a chartered 501(c)3 nonprofit organization with full-time staff members, as well as ongoing events and activities with a substantial following”*, however without disclosing who this organization was, making it impossible for Requester to verify whether the EIU’s evaluation was accurate.

By doing so, the EIU completely disregarded the transparency requirement that forms an integral part of ICANN’s (and, apparently, also the EIU’s) decision making standards. Requester has submitted a Request for Information under ICANN’s Documentary Information Disclosure Policy. However, ICANN refused to disclose the identity of this organization, leaving Requester completely in the dark with respect to an essential element in determining whether ICANN’s (and the EIU’s) Determination is in line with the Applicant Guidebook ...

¹¹ CPE Panel Process Document, page 3.

For this reason, Requester is of the opinion that:

- the EIU has not followed its own process, which enabled the EIU to issue clarifying questions to Requester when performing additional research;
- the EIU has not acted in a transparent way by not reaching out to Requester when analyzing additional information outside the context of Requester's Application;
- the EIU deliberately acted in an intransparent way in developing the CPE Report, which does not allow Requester to verify whether the CPE Report in general and the information relied upon by the EIU in particular meet the standards set out in the Applicant Guidebook; and
- ICANN has deliberately not provided access to the information relied upon by the EIU following Requester's Request for Information, which made it impossible for Requester to verify whether the Determination was founded.

8.7. The EIU has not taken into account relevant information provided to ICANN by Requester during the CPE process

Bearing in mind the fact that various incorrect allegations have been made with respect to Requester's Application (on public fora, in the context of objections that have been initiated against Requester's Application, etc.), Requester has reached out to ICANN on various occasions, providing proof of the fact that such allegations were false. Such information included clear and irrefutable evidence of the fact that a community center from Portland, Oregon (USA) – the city where one of the other applicants for the .GAY gTLD is based – provided ICANN with false information with respect to Requester's intentions. Reference is made to the correspondence with and evidence provided to ICANN contained in Annex **C-2** to **C-12** hereto.

ICANN staff has confirmed that such information would be provided to the EIU, but the CPE Report does not refer at all to the evidence of spurious activity submitted by Requester to ICANN. However, ICANN allowed misleading and untruthful documents to be presented by at least one other applicant for the .GAY gTLD to be used as evidence, without allowing Requester to provide for any context or challenge.¹²

For these reasons alone, Requester is of the opinion that the EIU has relied on incorrect, at least biased information, and has not taken action (e.g., by reaching out to Requester directly) in order to obtain a position from Requester in relation to any opposition received in connection with its Application.

¹² More in general, ICANN staff refused to hear comments from cTAG and multiple community applicants concerning vulnerability to spurious activity faced by community applicants when opposed by standard applicants.

The EIU (and ICANN) have therefore not complied with their standards of transparency, which makes Requester believe that there was a clear bias against Requester's Application.

8.8. The EIU has not taken into account relevant expert opinions provided to and decisions taken by ICANN in relation to Requester's Application

It is obvious that the EIU has not taken into account the various decisions taken in the context of Community Objections.¹³

Requester hereby particularly refers to §22 of the Decision rendered by Prof. Dr. Bernhard Schlink, who was the Expert appointed by the International Chamber for Expertise of the International Chamber of Commerce *in re: The International Lesbian Gay Bisexual Trans and Intersex Association vs. Affilias Limited* (sic), and many other objections concerning applications relating to the ".gay" and ".lgbt" gTLDs. Indeed, Dr. Schlink recognized in multiple Expert Determinations, after having carefully examined the more stringent criteria and conditions required to initiate Community Objection proceedings that:

*"[t]he legitimate interests of the gay community can only legitimize a claim to a gTLD that is exclusively linked to the gay community. A community that represents the legitimate interests of its members can claim a safe and secure position in the society and on the market, and this holds particularly for a community that represents the legitimate interests of a minority. Its claim to a safe and secure position on the society and on the market includes a safe and secure position in the internet. Therefore, while the gay community cannot exclude competition, it could file and has filed its own application for a gTLD that is designed to serve the gay community and to operate accordingly: dotgay's community application for the string .gay."*¹⁴

And although Requester respects the fact that CPE and Community Objections are distinct processes, it does not understand the reasons why the EIU has simply and entirely disregarded any of these elements in developing the CPE Report, nor has it provided for any reasons why it did not agree with these unambiguous and unilateral decisions to the contrary. Indeed, not a single reference has been made to these Expert Determinations throughout the CPE

¹³ See ICDR Case No. EXP/390/ICANN/7, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Affilias Limited*, **Annex B-8**; ICDR Case No. EXP/394/ICANN/11, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. United TLD Holdco Ltd*, **Annex B-9**; ICDR Case No. EXP/392/ICANN/9, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Top Level Design, LLC*, **Annex B-10**; and ICDR Case No. EXP/393/ICANN/10, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Top Level Domain Holdings Limited*, **Annex B-11**.

¹⁴ See: ICDR Case No. EXP/390/ICANN/7, *The International Lesbian Gay Bisexual Trans and Intersex Association vs. Affilias Limited*, **Annex B-8**.

Report.

Requester is therefore of the opinion that the EIU obviously did not rely on essential information publicly available to ICANN and the EIU that was directly relevant for Requester's Application. Hence, the EIU (and ICANN) did not act in an open and transparent manner in rendering the CPE Report and the Determination, the outcome whereof is diametrically opposed to previous Expert Determinations endorsed by ICANN.

8.9. The CPE Panel has been inconsistent in applying the criteria and guidelines in drafting the CPE Report, considering the information contained in other community-based applications and, more in particular, when comparing this information to the information and criteria relied upon by the EIU

According to the EIU, *"consistency of approach in scoring applications is of particular importance"*.¹⁵

In order to verify whether the EIU has been consistent, a comparison needs to be made between the elements and arguments used by the EIU in this particular CPE with other CPE results.

8.9.1. Using the Oxford English Dictionary as a "standard"

In a number of cases, the EIU expressly referred to the definition of the string in the Oxford English Dictionary. However, in some of the CPEs that have been published, no such reference was made which, in essence, shows that the approach propagated by the EIU has not been consistent.

The fact of only using the Oxford English Dictionary as the sole basis for "evaluating" the community definition has not been established as a standard in the community priority evaluation criteria set out in the AGB. Therefore, Requester is of the opinion that this reference point should not have been used, as:

- (i) it shows a clear bias towards using the British English language on the Internet;
- (ii) the different versions of the Oxford English Dictionary appear to use different criteria and standards by themselves: according to the EIU, the Oxford English Dictionary refers to a "gay" person as "a homosexual, especially a man", while the online version of the Oxford English Dictionary defines the term "gay" as "(a): of a person: homosexual; (b) of a place, milieu, way of life, etc.) of or relating to

¹⁵ Community Priority Evaluation Panel Process, page 1.

homosexuals,” whereby it is expressly stated that “Although more frequently used of male homosexuals, this sense can either include or exclude lesbians” (emphasis added).¹⁶

Therefore, notwithstanding the fact that the EIU has apparently *unilaterally* (i.e., not supported by any AGB criterion) promoted the Oxford English Dictionary as *the* standard to evaluate the community definition provided by *some* of the community-based applicants, it is clear that the Oxford English Dictionary by itself is using different (or even contradicting) definitions and standards ...

8.9.2. The EIU is using different standards than the ones set out in the AGB

According to the criteria for Community Priority Evaluation set out by the Applicant Guidebook, as well as the Community Priority Evaluation (CPE) Guidelines, the following question must be scored when evaluating the application:

“Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.”

“Name” of the community means the established name by which the community is commonly known by others. It may be, but does not need to be, the name of an organization dedicated to the community.” “Others” refers to individuals outside of the community itself, as well as the most knowledgeable individuals in the wider geographic and language environment of direct relevance. It also refers to recognition from other organization(s), such as quasi-official, publicly recognized institutions, or other peer groups.

“Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community. “Match” is of a higher standard than “identify” and means ‘corresponds to’ or ‘is equal to’. “Identify” does not simply mean ‘describe’, but means ‘closely describes the community’. “Over-reaching substantially” means that the string indicates a wider geographical or thematic remit than the community has”.

As indicated above, Requester has performed an Internet search, as suggested by the CPE Guidelines, and has found substantial evidence that proves that in common language, the words “gay”, “LGBT” and “LGBTQIA” are used as synonyms.¹⁷ Requester refers to various references in quality press, including the

¹⁶ See **Annex C-1**, page 8.

¹⁷ See the research report and press articles contained in **Annex C-16**.

Economist¹⁸ and the New York Times,¹⁹ where the word “gay” is being used as a “catch-all term”, synonym or *pars pro toto* term for LGBTQIAs.

Requester has not only obtained the official endorsement and support for its application for the .GAY gTLD from the Complainant in the case referred to above, namely the International Lesbian Gay Bisexual Trans and Intersex Association (ILGA),²⁰ but is also recognized by the ICDR and ICANN as an established institution associated with a clearly delineated community.²¹

Considering the above, Requester does not understand why, on the one hand, ICANN recognizes the fact that Requester and one of its key supporters “*could file and have filed its own application for a gTLD that is designed to service the gay community and to operate accordingly*” as expressly confirmed by the ICDR, whilst, ICANN and the CPE Panel determining on the other hand that “*the string does not identify or match the name of the community as defined in the application*”.

Furthermore, Requester does not understand that although the ILGA has obtained the recognition from the ICDR – and hence also from ICANN – to be “*clearly recognized by the community members as representative of the community*” as required by the AGB in order to qualify for a score of 2 out of 2 points on the CPE criterion “Support”, the EIU has countered such argument without even having reached out to the ILGA nor the Requester in the context of the CPE process ...

Therefore, it is undisputedly so that the evaluation processes and procedures designed and followed by the EIU is flawed, at least has generated outcomes that are inconsistent with previous determinations made by or on behalf of ICANN.

8.9.3. Community definition not to include non-community members

As regards the definition of the community contained in the various community-based applications, the EIU has considered whether or not the applicant has attempted to include certain “non-community members”. Rightfully so, registries of community-based gTLDs should restrict the registration of domain names to members of their respective community. Therefore, the EIU should indeed assess whether or not a particular applicant is basically not imposing any restrictions or requirements upon registrants of domain names in the proposed community-based gTLDs.

¹⁸ <http://www.economist.com/news/international/21595034-more-places-are-seeing-gay-marches-or-clever-substitutes-pride-and-prejudice>;

<http://www.economist.com/blogs/johnson/2013/01/gender-and-sexual-orientation>;

¹⁹ <http://www.nytimes.com/2013/01/10/fashion/generation-lgbtqia.html?pagewanted=all&r=0>.

²⁰ See <https://www.icann.org/en/system/files/correspondence/baxter-to-icann-3-05may14-en.pdf>;

²¹ See ICDR Case No. EXP/390/ICANN/7, §13.

In the case of Requester's Application, the EIU has determined that:

"The applied-for string neither matches the name of the community as defined by the application nor does it identify the defined community without over-reaching substantially, as required for a full or partial score on Nexus."

The CPE Panel emphasizes the fact that Requester has included "allies" in its community definition, and appears to have found therein an argument for determining that Requester's community definition has been "overreaching substantially" beyond the "gay" concept.

According to Requester:

- the EIU has not taken into account Requester's specific arguments for including "allies" into its community definition;
- the EIU has in this context not considered the Requester's requirement for an "ally" to be verified by Authentication Partners prior to being eligible to register a domain name in the .GAY gTLD and, in general, has ignored endorsing organizations with defined roles for allies;
- the EIU has accepted in other CPE Reports similar concepts as eligibility requirement for a "community-based gTLD"; and
- no clarifying questions have been issued in this respect.

A. Specific arguments for including "allies" into the gay community definition

LGBTQIA stands for "Lesbian", "Gay", "Bisexual", "Transgender", "Queer", "Intersex", and "Allies" and is one of the commonly used terms to emphasize a diversity of sexuality and gender identity-based cultures.

As Requester has demonstrated throughout its Application, it has obtained the support from more than 240 organizations and companies from all over the world for its .gay gTLD application, all of which are supporting at least one of the cultures set out above. Given their membership, posture and outreach, it goes without saying that these sponsors will play an important moral, and – for Authentication Partners – even an operational role in the establishment and management of the .gay gTLD.

Now, since an organization or company in itself can impossibly be "lesbian" or "gay", Requester has been seeking for a way to also position these companies and organizations in this community definition. For this reason, Requester has referred to these organizations as "allies" in the context of the LGBTQIA definition.

Furthermore, as stated in the Application, LGBTQIAs are a vulnerable group in

many countries and societies, and too often still the subject of prosecution for who they are. In order to put in place safeguards for those gay community members who do not wish to be directly associated with a domain name registration, organizations and companies who in essence cannot be “non-heterosexual” should have the possibility to act as a proxy service, which is common practice in the domain name industry.

In any case, any such “ally” must be approved by an Authentication Partner in order to be able to register a domain name in its own name or in the name or on behalf of a third party who meets the LGBTQI requirements.

Irrespective of the fact that the EIU has clearly misunderstood the concept of “allies” in Requester’s Application, it is obvious that they have attempted to find herein an argument that Requester is over-reaching substantially beyond the community. Requesters point out to the fact that the EIU does not seem to have issues with similar concepts in other CPE reports, which clearly shows that the EIU has not been consistently applying the policy requirements for community-based applications:

- the community definition contained in the .OSAKA gTLD application # 1-901-9391 states: *[m]embers of the community are defined as those who are within the Osaka geographical area as well as those who self identify as having a tie to Osaka, or the culture of Osaka. Major participants of the community include, but are not limited to the following: [...] Entities, including natural persons who have a legitimate purpose in addressing the community.*” (emphasis added);²²
- the community definition contained in the .HOTEL gTLD application #1-1032-95136 includes: *“Other Organizations representing Hotels, Hotel Owners and other solely Hotel related organizations representing on members from 1. and/or 2”;*

Request does not understand why, on the one hand, an “ally” who assumes a supporting role for a vulnerable individual or group of individuals and, on the other hand, “other organizations representing hotels” are treated differently in view of community membership criteria. Nor does it understand why someone who “self-identifies as having a tie to [the community]” or “entities or natural persons who have a legitimate purpose in addressing the community” can possibly be considered as have a closer connection to a community than an “ally”, especially when in the latter case such connection is verified by an independent Authentication Partner, and in the former case a self-identified “tie” to the community suffices ...

It is therefore clear to Requester that the EIU has used double standards in preparing the various CPE reports, and is discriminating between the various community-based applicants, since they have been evaluating similar definitions and criteria in a different way.

²² See the .OSAKA CPE Report, attached hereto as **Annex C-13**, page 2.

B. The role of .GAY Authentication Partners

The CPE Panel seems to incorrectly assume here that, in order to become a registrant of a .GAY domain name, the candidate registrant must be a member of an Authentication Partner.

This is not the case: the application clearly states that Authentication Partners have two key tasks in the context of the .GAY gTLD, being: (1) connecting to potential registrants, and (2) confirming whether potential registrants meet the eligibility requirements that are inherent to the .GAY gTLD.²³

Indeed, the Requester's Application clearly states:

“Through the use of established membership organizations in the Gay Community as Authentication Partners, dotgay LLC not only complies with the most restrictive community registration requirements, but also provides the best solution for connecting with potential registrants. Authentication Partners are the community membership organizations used by dotgay LLC to confirm eligibility. Authentication Partners become advocates for the .gay TLD and provide a trusted entry point for members of the community. Authentication Partners are also the advocates for their registrants within the .gay community-model.” Application, answer to Question 18 (c) ii.

Furthermore, the Panel has determined that the community described in Requester's Application “over-reaches substantially” referring to, on the one hand, the 7 million members of the Applicant's Authentication Partners identified at the time of submission of the Application, and – on the other hand – the estimated 1.2% of the global population who are considered to be LGBTQI.

This is, in the Requester's opinion, an obvious misreading of the Application, as these two elements are not interrelated in relation to determining the scope of “gay”. Indeed, the 1.2% of the global population is an illustrative estimate that has been put into Requester's Application in order to demonstrate the size of the community: absent any official numbers. Considering the fact that LGBTQIs are in some countries not recognized (or even prosecuted), there is no way in determining the actual size at this stage.

Therefore, Requester is of the opinion that the perceived “discrepancy” between the two numbers (i.e., 7 million members of Authentication Partners and 1.2% of the global population that is estimated to be LGBTQI) is irrelevant in this respect. Any other uncertainty on behalf of the EIU could have easily been resolved by issuing a clarifying question to Requester.

²³ The latter being a requirement in order to meet the criteria for Registration Policies, for which the Requester obtained a score of 4 out of 4 points.

8.9.4. Support

In relation to the criterion “Support”, the EIU concludes in the CPE Report that

“There is no single such organization recognized by the defined community as representative of the community. However, the applicant possesses documented support from many groups with relevance; their verified documentation of support contained a description of the process and rationale used in arriving at the expression of support, showing their understanding of the implications of supporting the application. Despite the wide array of organizational support, however, the applicant does not have the support from the recognized community institution, as noted above, and the Panel has not found evidence that such an organization exists.”

It does not appear to Requester that there is one single organization recognized by the “radio” community²⁴ or the “hotel” community²⁵, who have both obtained a score of 2 out of 2 points on this criterion. Based on these CPE reports, it is clear that also these community-based applicants appear to have sought (and found) support from a number of national and international endorsers in a similar way than Requester, who only scored 1 out of 2 points.

8.10. Notwithstanding the fact that Requester has requested ICANN to provide them with relevant information in order to obtain a better insight in the actual CPE process and the way how the CPE criteria have been applied in the context of Requester’s Application, ICANN has deliberately refused to provide Requester with such information both within and outside ICANN’s transparency and accountability processes

Notwithstanding the EIU’s claim that its evaluation process *“respects the principles of fairness, transparency, avoidance of potential conflicts of interest, and non-discrimination”*, ICANN’s response to Requester’s Request for Information clearly shows that this is clearly not the case.

Indeed, ICANN denied Requesters’ Request for Information, whereby Requesters refer to the following quotes from the Response to the Request for Information:

- 1) *“The contract between ICANN and the EIU is not appropriate for public disclosure through the DIDP”*. More in particular, ICANN refers to certain alleged Defined Conditions for Nondisclosure that would apply to the requested contract:

²⁴ <https://www.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>.

²⁵ <https://www.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>.

- *Internal information that, if disclosed, would or would be likely to compromise the integrity of ICANN's deliberative and decision-making process by inhibiting the candid exchange of ideas and communications, including internal documents, memoranda, and other similar communications to or from ICANN Directors, ICANN Directors' Advisors, ICANN staff, ICANN consultants, ICANN contractors, and ICANN agents.*
 - *Information provided to ICANN by a party that, if disclosed, would or would be likely to materially prejudice the commercial interests, financial interests, and/or competitive position of such party or was provided to ICANN pursuant to a nondisclosure agreement or nondisclosure provision within an agreement.*
 - *Confidential business information and/or internal policies and procedures.*
- 2) *"ICANN has previously indicated in response to Request No. 20140804-1 that ICANN has communications with persons at EIU that are not involved in the scoring of a CPE (but otherwise assist in the facilitation of a particular CPE), and identified that those communications are not appropriate for public disclosure";*
- 3) *"To help assure independence of the process and evaluation of CPEs, ICANN (either Board or staff) is not involved with the CPE Panel's evaluation of criteria, scoring decisions, or underlying analyses. The coordination of the CPE Panel, as explained in the CPE Panel Process Document, is entirely within the work of the EIU's team. ICANN does not have, nor does it collect or maintain, the work papers of the individual CPE Panels (including the .GAY CPE Panel) that would likely contain the information called for within these items."*

None of the above arguments are convincing in light of ICANN's By-Laws obligations relating to transparency and accountability:

The mere fact of denying Requesters access to information that has been used in connection with the evaluation of the Application without (i) expressly referring on which information the Community Priority Evaluation Panel has relied, (ii) providing a statement regarding the relevancy of such information in connection with the actual evaluation, nor (iii) arguments on why such information is supporting the outcome of the actual evaluation deprives Requesters of the possibility to review the Determination, and restricts their fundamental rights to challenge such Determination in the context of a Reconsideration Request and, ultimately, use the transparency and accountability mechanisms embedded into ICANN's By-Laws.

Indeed, it is not because of the fact that the EIU is independent from ICANN or Requesters, that it would not be required to be subject to the same obligations of transparency and accountability as ICANN itself. Indeed, if a decision or determination by such third party materially affects and/or has a material effect in

a process that is managed by ICANN – as it has been described in the Applicant Guidebook, the CPE Guidelines, etc. – then such party should be subject to the same transparency and accountability mechanisms as ICANN.

In Requester's opinion, the EIU, who has been appointed by ICANN as the community priority evaluation independent panel firm, is subject to the same policies – especially those relating to transparency and accountability – as ICANN. Since the EIU is considered an "ICANN Affiliated Party" under ICANN's Top-Level Domain Application Terms and Conditions,²⁶ the EIU is subject to the same rules and procedures as ICANN, and more precisely those roles and procedures reflected in ICANN's By-Laws.

Therefore, ICANN cannot simply deny its own By-Laws obligations when entering into undisclosed agreements with third parties, in particular when such party or parties assume(s) a role that is actually ICANN's to fulfill.

Indeed, the fact that ICANN has apparently deferred the actual community priority evaluation to a third party does not release ICANN or such third party from the transparency and accountability obligations contained in ICANN's By-Laws.

8.11. Conclusion

Requester has paid USD 22,000 in order to participate to the CPE Process, which is an amount that is far higher than the USD 10,000 estimate that has been referred to in the AGB. One would expect that for such an amount, ICANN and the CPE firm, under the delegated authority of ICANN, would act diligently when applying the standards set out in the AGB, follow the processes defined prior to the establishment of the New gTLD Program, and – at least as a form of what is generally referred to as "customer service" – reach out to applicants if certain elements contained in their application are unclear or verify statements made by others in an open and transparent manner.

None of this has happened in the development of the CPE Report and the Determination:

- new criteria and standards have been developed until more than two years after the closing of the application window in May of 2012, without having given Requester the opportunity to amend its application;
- additional research has been performed without verifying and validating the outcome thereof with the Requester;
- undisputable process errors have been made by the EIU when verifying the identity and statements made by Requester's supporters, including but not limited to:

²⁶ See <http://newgtlds.icann.org/en/applicants/agb/terms>.

- not having reached out to all of Requester's supporters, although the CPE Panel had the express obligation to do so;
- for the limited number of cases where a supporter of Requester has been contacted, the EIU has provided a response time to its enquiry that was in the past, which has obviously misguided quite a few of Requester's supporters;
- information that has been provided by Requester to ICANN in order to counter and put into context certain false information has been disregarded despite multiple attempts to gain resolve;
- inconsistent standards have been used by the EIU in actually performing the evaluation, especially when comparing the arguments and information relied upon by the EIU in other CPEs.

On top of this, ICANN has refused to provide additional information to Requester in accordance with ICANN's own transparency and accountability processes, and more in particular specific information relating to the various process and policy errors identified, as well as the inconsistencies identified, notwithstanding the fact that also the EIU is committed to these transparency and accountability obligations.

Therefore, Requester is of the opinion that ICANN and the EIU have not respected the processes and policies relating to openness, fairness, transparency and accountability as set out above, and even have carried out the CPE for Requester's Application in a discriminatory manner.

9. What are you asking ICANN to do now?

Considering the information and arguments included in this Reconsideration Request, Requesters request ICANN to:

- (i) acknowledge receipt of this Reconsideration Request;
- (ii) review the Requester's requests referred to in §§8.2 to 8.9 above, in particular in view of identifying and correcting process and policy errors that have been made by the EIU and ICANN, and hence to reverse the Determination as set out in (viii) below;
- (iii) in the meantime, suspend the process for string contention resolution in relation to the .GAY gTLD;
- (iv) provide Requester with all relevant information in light of the elements set out in §8.10 above, and more in particular the information requested in Requester's Request for Information;
- (v) request a third party appointed by ICANN to or have ICANN perform a new determination in view of the CPE criteria set out in the Applicant

Guidebook, and bearing in mind the information provided by Requester as referred to in §8.10 above;

- (vi) within a timeframe of one month following the appointment of such third party, allow Requester to submit a written statement to such third party;
- (vii) following that, organize a telephonic or in-person hearing whereby the Requester can submit, present and discuss its arguments and relevant information before ICANN or such third party appointed by ICANN, in view of enabling the latter to take an informed decision on the issue;
- (viii) if ICANN would decide not to award the remedies sought by Requester set out in (i) to (vii) above, Requester respectfully requests ICANN to reconsider the Determination and determine that the Application meets the required thresholds for eligibility under the Community Priority Evaluation criteria set out in the Applicant Guidebook on the basis of the information and arguments provided herein, and provide to the Application:
 - a score of 4 out of 4 points in relation to Criterion #2: Nexus between Proposed String and Community; and
 - a score of 4 out of 4 points in relation to Criterion #4: Community Endorsement,

whilst keeping the scores on the other criteria reflected in the CPE Report.

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.

As stated above, ICANN published on October 7, 2014 its Determination on the basis of the CPE Report, stating that Requester's application for the .GAY gTLD did not meet the criteria for community-based applications, as defined in the Applicant Guidebook.

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.

N/A

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

Reference is made to the Annexes attached hereto, a list whereof has been contained in a separate overview.

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.

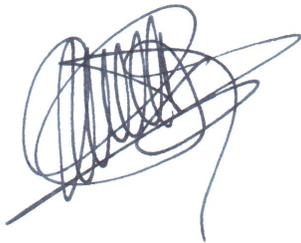
The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

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.

Respectfully Submitted,



November 29, 2014

Bart Lieben

Date

Attorney-at-Law

Reference Material 43.

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Approved Resolutions | Meeting of the New gTLD Program Committee

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12 Oct 2014

12 – 14 October 2014

1. [Consent Agenda:](#)

a. [Approval of Minutes](#)

2. [Main Agenda:](#)

a. [GAC Advice in Beijing Communiqué regarding Category 2 Safeguards – Exclusive Registry Access](#)

b. [Perceived Inconsistent String Confusion Objection Expert Determinations Rationale for Resolutions 2014.10.12.NG02 – 2014.10.12.NG03](#)

c. [Reconsideration Request 14-37, I-Registry Ltd Rationale for Resolution 2014.10.12.NG04](#)

d. [GAC Advice regarding Protections for the Red Cross and Red Crescent – Singapore Communiqué Rationale for Resolution 2014.10.12.NG05](#)

e. [Any Other Business](#)

The [ICANN](#) Board New gTLD Program Committee meeting on 12 October 2014 was continued to 14 October 2014. The following resolutions were adopted during the meeting:

1. [Consent Agenda:](#)

Contact

► Help

a. Approval of Minutes

Resolved (2014.10.12.NG01), the Board New gTLD Program Committee (NGPC) approves the minutes of its 8 September 2014 meeting.

2. Main Agenda:

a. GAC Advice in Beijing Communiqué regarding Category 2 Safeguards – Exclusive Registry Access

No resolution taken.

b. Perceived Inconsistent String Confusion Objection Expert Determinations

Whereas, on 10 October 2013 the Board Governance Committee (BGC) requested that staff draft a report for the NGPC on String Confusion Objections (SCOs) "setting out options for dealing with the situation raised within this [Reconsideration] Request, namely the differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes involving Amazon's Applied – for String and TLDH's Applied-for String."

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

Whereas, on 5 February 2014, the ICANN Board New gTLD Program Committee (NGPC) directed the ICANN President and CEO, or his designee, to initiate a public comment period on framework principles of a potential review mechanism to address perceived inconsistent String Confusion Objection Expert Determinations (the "proposed review mechanism"). The proposed review mechanism, if adopted, would have been limited to the String Confusion Objection Expert Determinations for .CAR/.CARS and .CAM/.COM, and would have constituted a change to the Objection process set forth in the New gTLD Applicant Guidebook.

Whereas, the NGPC has carefully considered the report that the BGC asked staff to draft in response to Reconsideration Request 13-9, the received public comments to the proposed review mechanism, other comments provided to the NGPC for consideration, as well as the processes set out in the Applicant Guidebook.

Whereas, as set out in the Applicant Guidebook, ICANN has reserved the right to individually consider any application for a new gTLD to determine whether approval would be in the best interest of the Internet community.

Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the Board on 10 April 2012, to exercise the ICANN Board's authority for any and all issues that may arise relating to the New gTLD Program.

Resolved (2014.10.12.NG02), the NGPC has identified the following String Confusion Objection Expert Determinations as not being in the best interest of the New gTLD Program and the Internet community:

SCO Expert Determinations for Review	String	Related SCO Expert Determinations
VeriSign Inc. (Objector) v. United TLD Holdco Ltd. (Applicant)	.CAM [PDF, 5.96 MB]	<ul style="list-style-type: none"> ■ Dot Agency Limited [PDF, 248 KB](.CAM) ■ AC Webconnecting Holding B.V. [PDF, 264 KB] (.CAM)
Commercial Connect LLC (Objector) v. Amazon EU S.à r.l. (Applicant)	. [PDF, 73 KB] ¹	Top Level Domain Holdings Limited [PDF, 721 KB](.)

Resolved (2014.10.12.NG03), the NGPC directs the President and CEO, or his designee(s), take all steps necessary to establish processes and procedures, in accordance with this resolution and related rationale, pursuant to which the International Centre for Dispute Resolution (ICDR) shall establish a three-member panel to re-evaluate the materials presented, and the Expert Determinations, in the two objection proceedings set out in the chart above under the "SCO Expert Determinations for Review" column and render a Final Expert Determination on these two proceedings. In doing so, the NGPC recommends that the three-member panel also review as background the "Related SCO Expert Determinations" referenced in the above chart.

Rationale for Resolutions 2014.10.12.NG02 – 2014.10.12.NG03

Today, the NGPC is taking action to address perceived inconsistent and unreasonable Expert Determinations resulting from the New gTLD Program String Confusion Objections process. The NGPC's action today is part of its role to provide general oversight of the New gTLD Program. One component of the NGPC's responsibilities is "resolving issues relating to the approval of applications and the delegation of gTLDs pursuant to the New gTLD Program for the current round of the Program." (See [NGPC Charter](#), Section II.D).

The New gTLD Applicant Guidebook (AGB or Guidebook) identifies four grounds upon which a formal objection may be filed against an applied-for string. One such objection is a String Confusion Objection or SCO, which may be filed by an objector (meeting the standing requirements) if the objector believes that an applied-for gTLD string is confusingly similar to an existing TLD or to another applied-for gTLD string in the same round of applications. If successful, an SCO could change the configuration of the preliminary contention sets in that the two applied-for

gTLD strings at issue in the objection proceedings will be considered in direct contention with one another (see AGB Module 4, String Contention Procedures). All SCO proceedings were administered by the International Centre for Dispute Resolution (ICDR), and Expert Determinations in all such proceedings have been issued.

Some stakeholders have raised concerns about the perceived inconsistencies with or unreasonableness of certain SCO Expert Determinations. The NGPC has monitored these concerns over the past year, and discussed the issue at several of its meetings. On 10 October 2013, the Board Governance Committee (BGC) asked staff to draft a report for the NGPC on String Confusion Objections "setting out options for dealing with the situation raised within this Request, namely the differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes involving Amazon 's Applied – for String and TLDH's Applied-for String." (See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-amazon-10oct13-en.pdf> [PDF, 131 KB]).

In light of the BGC request following its consideration of Reconsideration Requests 13-9 and 13-10, and community-raised concerns about perceived inconsistent SCO Expert Determinations, the NGPC considered its options, including possibly implementing a review mechanism not contemplated in the Applicant Guidebook that would be available in limited circumstances.

On 5 February 2014, the NGPC directed the ICANN President and CEO to initiate a public comment period on framework principles of a potential review mechanism to address the perceived inconsistent String Confusion Objection Expert Determinations. The proposed review mechanism, as drafted and posted for public comment, would be limited to the SCO Expert Determinations for .CAR/.CARS and .CAM/.COM. The public comment period on the proposed review mechanism closed on 3 April 2014, and a [summary of the comments](#) [PDF, 165 KB] has been publicly posted.

At this time, the NGPC is taking action to address certain perceived inconsistent or otherwise unreasonable SCO Expert Determinations by sending back to the ICDR for a three-member panel evaluation of certain Expert Determinations. The NGPC has identified these Expert Determinations as not in the best interest of the New gTLD Program and the Internet community. The ICDR will be provided supplemental rules to guide the review of the identified Expert Determinations, which include the following:

- The review panel will consist of three members appointed by the ICDR (the "Review Panel").
- The only issue subject to review by the Review Panel shall be the SCO Expert Determinations identified in these resolutions.
- The record on review shall be limited to the transcript of the proceeding giving rise to the original Expert Determination, if any,

expert reports, documentary evidence admitted into evidence during the original proceeding, or other evidence relevant to the review that was presented at the original proceeding. No additional documents, briefs or other evidence may be submitted for consideration, except that it is recommended that the Review Panel consider the identified "Related SCO Expert Determinations" in the above chart as part of its review.

- The standard of review to be applied by the Review Panel is: whether the original Expert Panel could have reasonably come to the decision reached on the underlying SCO through an appropriate application of the standard of review as set forth in the Applicant Guidebook and the ICDR Supplementary Procedures for ICANN's New gTLD Program.
- ICANN will pay the applicable fees to conduct the review by the Review Panel.
- The possible outcomes of the review are: (1) the original Expert Determination is supported by the standard of review and reference to the identified related Expert Determinations, and will stand as is; or (2) the original Expert Determination reasonably cannot be supported based on the standard of review and reference to the identified related Expert Determinations, and will be reversed. The Review Panel will submit a written determination including an explanation and rationale for its determination.

As part of its months-long deliberations on this issue, the following are among the factors the NGPC found to be significant:

1. The NGPC notes that the Guidebook was developed by the community in a multi-stakeholder process over several years. The NGPC considered whether it was appropriate to change the Guidebook at this time to implement a review mechanism to address certain perceived inconsistent Expert Determinations. On 18 April 2013, ICANN posted a proposed review mechanism for public comment. The NGPC carefully considered the public comments received. The NGPC notes that comments submitted during the public comment period generally fell into the following categories and themes, each of which is discussed more fully in the summary of public comments:
 - a. Do not adopt the proposed review mechanism.
 - b. Adopt the proposed review mechanism.
 - c. Adopt a review mechanism with an expanded scope.
 - d. Do not adopt the proposed review mechanism or expand the scope.
 - e. Adopt some form of review, but not necessarily the one posted for public comment.

- f. Recommended modifications to the framework principles of the proposed review mechanism, if any review mechanism is adopted.

The comments presented by various stakeholders highlight the difficulty of the issue and the tension that exists between balancing concerns about perceived inconsistent Expert Determinations, and the processes set forth in the Guidebook that were the subject of multiple rounds of public comment over several years.

As highlighted in many of the public comments, adopting a review mechanism this far along in the process could potentially be unfair because applicants agreed to the processes included in the Guidebook, which did not include this review mechanism, and applicants relied on these processes. The NGPC acknowledges that, while on balance, a review mechanism is not appropriate for the current round of the New gTLD Program, it is recommended that the development of rules and processes for future rounds of the New gTLD Program (to be developed through the multi-stakeholder process) should explore whether there is a need for a formal review process with respect to Expert Determinations.

2. The NGPC considered its role and purpose to provide general oversight of the New gTLD Program. One component of the NGPC's responsibilities in providing general oversight of the New gTLD Program is "[r]esolving issues relating to the approval of applications and the delegation of gTLDs pursuant to the New gTLD Program for the current round of the Program." (See [NGPC Charter](#), Section II.D). Additionally, the Applicant Guidebook (Section 5.1) provides that:

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

Addressing the perceived inconsistent and unreasonable String Confusion Objection Expert Determinations is part of the discretionary authority granted to the NGPC in its Charter regarding "approval of applications" and "delegation of gTLDs", in addition to the authority reserved to the Board in the Guidebook to consider individual gTLD applications under exceptional circumstances. The NGPC considers that the identified SCO Expert Determinations present exceptional circumstances warranting action by the NGPC because each of the Expert Determinations falls outside normal standards of what is

perceived to be reasonable and just. While some community members may identify other Expert Determinations as inconsistent or unreasonable, the SCO Expert Determinations identified are the only ones that the NGPC has deemed appropriate for further review. The NGPC notes, however, that it also identified the String Confusion Objection Expert Determinations for .CAR/.CARS as not in the best interest of the New gTLD Program and the Internet community. Nonetheless, because the parties in the .CAR/.CARS contention set recently have resolved their contending applications, the NGPC is *not* taking action to send these SCO Expert Determinations back to the ICDR for re-evaluation to render a Final Expert Determination.

3. The NGPC also considered whether there was a reasonable basis for certain perceived inconsistent Expert Determinations to exist, and particularly why the identified Expert Determinations should be sent back to the ICDR while other Expert Determinations should not. The NGPC notes that while on their face some of the Expert Determinations may appear inconsistent, including other SCO Expert Determinations, and Expert Determinations of the Limited Public Interest and Community Objection processes, there are reasonable explanations for these seeming discrepancies, both procedurally and substantively.

First, on a procedural level, each expert panel generally rests its Expert Determination on materials presented to it by the parties to that particular objection, and the objector bears the burden of proof. Two panels confronting identical issues could – and if appropriate should – reach different determinations, based on the strength of the materials presented.

Second, on a substantive level, certain Expert Determinations highlighted by the community that purportedly resulted in "inconsistent" or "unreasonable" results, presented nuanced distinctions relevant to the particular objection. These nuances should not be ignored simply because a party to the dispute disagrees with the end result. Further, the standard guiding the expert panels involves some degree of subjectivity, and thus independent expert panels would not be expected to reach the same conclusions on every occasion. However, for the identified Expert Determinations, a reasonable explanation for the seeming discrepancies is not as apparent, even taking into account all of the previous explanations about why reasonably "discrepancies" may exist. To allow these Expert Determinations to stand would not be in the best interests of the Internet community.

4. The NGPC considered whether it was appropriate, as suggested by some commenters, to expand the scope of the proposed review mechanism to include other Expert Determinations, such as some resulting from Community and Limited Public Objections, as well as other String Confusion Objection Expert Determinations, and possibly singular and plural versions of the same string. The NGPC determined that to promote the goals of

predictability and fairness, establishing a review mechanism more broadly may be more appropriate as part of future community discussions about subsequent rounds of the New gTLD Program. Applicants have already taken action in reliance on many of the Expert Determinations, including signing Registry Agreements, transitioning to delegation, withdrawing their applications, and requesting refunds. Allowing these actions to be undone now would not only delay consideration of all applications, but would raise issues of unfairness for those that have already acted in reliance on the Applicant Guidebook.

It should also be noted that in response to advice from the Governmental Advisory Committee (GAC), the NGPC previously considered the question of whether consumer confusion may result from allowing singular and plural versions of the same strings. On 25 June 2013, the NGPC adopted a resolution resolving "that no changes [were] needed to the existing mechanisms in the Applicant Guidebook to address potential consumer confusion resulting from allowing singular and plural versions of the same string" <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm#2.d>. The NGPC again notes that the topic of singular and plural versions of the same string also may be the subject of further community discussion as it relates to future rounds of the New gTLD Program.

5. The NGPC considered community correspondence on this issue in addition to comments from the community expressed at the ICANN meetings. The concerns raised in the ICANN meetings and in correspondence have been factored into the deliberations on this matter.

The NGPC previously delayed its consideration of BGC Recommendations on Reconsideration Requests 13-9 and 13-10 pending the completion of the NGPC's review of the issues discussed above. Now that the NGPC has taken action as noted above, it will resume its consideration of the BGC Recommendations on Reconsideration Requests 13-9 and 13-10 as soon as feasible.

There will be direct fiscal impacts on ICANN associated with the adoption of this resolution since certain proceedings will be sent back to the ICDR for re-review by a three-member expert panel. Approval of the resolution will not impact security, stability or resiliency issues relating to the domain name system.

Taking this action is an Organizational Administrative Action that was the subject of public comment. The summary of public comments is available for review here: (<https://www.icann.org/en/system/files/files/report-comments-sco-framework-principles-24apr14-en.pdf> [PDF, 165 KB]).

c. Reconsideration Request 14-37, I-Registry Ltd.

Whereas, iRegistry Ltd. ("Requester") filed Reconsideration Request 14-37 asking the New gTLD Program Committee ("NGPC") to reverse Resolutions 2014.07.30.NG01 – 2014.07.30.NG04 (the "Resolution") "or at least amend[]" the Resolution, and to then put the decision as to how to address name collisions "on hold" until the issues the Requester raises have "been solved."

Whereas, the BGC considered the issues raised in Reconsideration Request 14-37.

Whereas, the BGC recommended that the Request be denied because the Requester has not stated proper grounds for reconsideration and the NGPC agrees.

Resolved (2014.10.12.NG04), the NGPC adopts the BGC Recommendation on Reconsideration Request 14-37, which can be found at <https://www.icann.org/en/system/files/files/recommendation-i-registry-04sep14-en.pdf> [PDF, 150 KB].

Rationale for Resolution 2014.10.12.NG04

I. Brief Summary

iRegistry Ltd. ("Requester") is a domain name registry that disputes the NGPC's adoption of the Name Collision Occurrence Management Framework (the "Framework").

After conducting several independent studies regarding the name collision issue, ICANN implemented a public comment period from 26 February 2014 through 21 April 2014 where the community provided feedback on possible solutions to the name collision issue, including the issue of implementing a framework to manage and mitigate name collisions. ICANN received 28 comments, none of which were from the Requester.²

After considering the public comments received, the detailed studies analyzing the issue, and advice from the relevant ICANN advisory committee, the NGPC approved Resolutions 2014.07.30.NG01 – 2014.07.30.NG04 (the "Resolution")³ on 30 July 2014, adopting the Framework. The Framework sets forth procedures that registries must follow to prevent name collisions from compromising the security or stability of the Internet.

The Requester filed the instant Request (Request 14-37), arguing that the NGPC failed to sufficiently involve the public in its decision to adopt the Framework and contending that the Framework will lead to confusion amongst registrants, a lower volume of registrations, and thus adversely impact the Requester financially. The Board Governance Committee (BGC) considered Request 14-37 and concluded that: (i) there is no evidence that the NGPC's actions in adopting the Resolution support reconsideration; (ii) the Requester has not demonstrated that the NGPC failed to consider any material information in passing the

Resolution or that the NGPC relied on false or inaccurate material information in passing the Resolution; and (iii) the Requester has not demonstrated that it has been materially and adversely affected by the Resolution. Therefore, the BGC recommended that Reconsideration Request 14-37 be denied (and the entirety of the BGC Recommendation is incorporated by reference as though fully set forth in this rationale). The NGPC agrees.

II. Summary of Relevant Background Facts

In furtherance of ICANN's core values aimed at "[p]reserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet" (Bylaws, Art. 1, § 2.1), ICANN's Security and Stability Advisory Committee ("SSAC") published SAC057: SSAC Advisory on Internal Name Certificates on 15 March 2013.⁴ The report identified a Certificate Authority ("CA") practice that, if widely exploited, could pose risks to the privacy and integrity of secure Internet communications (name collisions). The SSAC advised ICANN to take immediate steps to mitigate the risks. The issues identified in SAC057 are part of the more general category of name collision issues. Accordingly, on 18 May 2013, the ICANN Board approved a resolution commissioning a study in response to the SSAC's advice in SAC057.⁵

On 5 August 2013, ICANN released the study, prepared by Interisle Consulting Group, of the likelihood and potential consequences of collision between new public gTLD labels and existing private uses of the same strings.⁶

On 7 October 2013, ICANN introduced the New gTLD Collision Occurrence Management Plan (the "Plan"), which permitted the use of an alternate path to delegation.⁷ As part of the Resolution adopting the Plan, the NGPC recommended that the ICANN Board "direct the ICANN President and CEO to develop a long term plan to manage name collision risks related to the delegation of new TLDs, and to work with the community to develop a long-term plan to retain and measure root-server data."⁸

In November 2013, ICANN engaged JAS Global Advisors LLC ("JAS") to lead the development of the Framework, in cooperation with the community.⁹

From 26 February 2014 through 21 April 2014, ICANN implemented a public comment period where the community provided feedback on possible solutions to the name collision issue, including the issue of implementing a framework to manage and mitigate name collisions; ICANN received 28 comments, none of which were from the Requester¹⁰ The Requester did not participate in the public comment forum. After collection of the public comments, JAS released the final version of its Phase One Report on Mitigating the Risk of DNS Namespace Collisions.¹¹

On 6 June 2014, [SSAC](#) published SAC066: [SSAC Comment Concerning JAS Phase One Report on Mitigating the Risk of DNS Namespace Collisions](#), in which it offered advice and recommendations to the Board on the framework presented in the JAS Study and Name Collision Framework.¹²

On 27 July 2014, the Requester sent a letter to [ICANN](#): (i) asking [ICANN](#) to "thoroughly evaluate" a proposal for addressing the problem of name collisions; and (ii) providing five specific proposals as to the how the issue should be addressed. (Request, Ex. D.) [ICANN](#) acknowledged receipt of the Requester's letter on 29 July 2014. (Request, Ex. E.)

On 30 July 2014, the NGPC approved Resolutions 2014.07.30.NG01 – 2014.07.30.NG04 (the "Resolution"), which adopted the Framework. The Framework sets forth procedures that registries must follow to prevent name collisions from compromising the security or stability of the Internet and directs the "President and CEO, or his designee(s), to take the necessary actions to implement" the Framework.¹³

On 4 August 2014, [ICANN](#)'s Global Domains Division issued each new gTLD registry operator a Name Collision Occurrence Assessment ("Assessment"), which identified which measures registries must take to avoid name collision issues, in accordance with the Framework.¹⁴ On that same date, the Requester received the Assessment via email. (Request, Ex. A.)

On 12 August 2014, [ICANN](#) presented a webinar providing an overview of the Framework specifically geared towards registry operators.¹⁵

On 13 August 2014, the Requester filed the instant Request, seeking reconsideration of the NGPC's Resolution.

While how to treat one category of names affected by the name collision issue is not yet part of the Framework, [ICANN](#) is in the process of gathering public input on this topic. Specifically, [ICANN](#) has opened a public comment forum on this particular issue, which will run from 25 August 2014 through 7 October 2014.¹⁶

On 4 September 2014, the Board Governance Committee ("BGC") issued its Recommendation regarding Reconsideration Request 14-37.¹⁷ On 11 September 2014, the Requester filed a Clarification to Reconsideration Request 14-37,¹⁸ containing further alleged details regarding how the Requester has been materially affected by the Resolution and the adoption of the Framework.

III. Issues

The issues for reconsideration are whether the NGPC:

1. Failed to consider material input from the community in approving the Resolution (Request, § 8, Pg. 11); and
2. Improperly underestimated the Resolution's potential negative consequences. (*Id.*, § 8, Pgs. 7-8.).

IV. The Relevant Standards for Evaluating Reconsideration Requests

ICANN's Bylaws call for the BGC to evaluate and, for challenged Board (or NGPC) action, make recommendations to the Board (or NGPC) with respect to Reconsideration Requests. See Article IV, Section 2 of the Bylaws. The NGPC, bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC Recommendation on Request 14-37 and finds the analysis sound.¹⁹

V. Analysis and Rationale

The Requester has not demonstrated that the Board failed to consider material information or relied on false or inaccurate material information in passing the Resolutions; therefore, reconsideration is not appropriate.

A. The Request Warrants Summary Dismissal.

The BGC concluded, and the NGPC agrees, that the Requester does not have standing because the Requester "had notice and opportunity to, but did not, participate in the public comment period relating to the contested action [.]" (Bylaws, Art. IV, § 2.9.). Specifically, ICANN's Bylaws permit the BGC to summarily dismiss a request for reconsideration if "the requestor had notice and opportunity to, but did not, participate in the public comment period relating to the contested action[.]" (Bylaws, Art. IV, § 2.9.)

From 26 February 2014 through 21 April 2014, ICANN implemented a public comment period, which was announced on ICANN's website, and where the community provided feedback on possible solutions, including a framework, to name collision issues²⁰ The forum generated 28 comments, but the Requester did not participate in the public comment forum, and has offered no justification, excuse or explanation for its decision to refrain from doing so. The only communication it claims to have had with ICANN regarding name collisions is a letter dated 27 July 2014, which was well after the public comment period had closed.²¹ Given that the public comment period here is indisputably related to the Resolution, summary dismissal is warranted on the basis of the Requester's non-participation. However, in the interest of completeness, the NGPC will nonetheless address the merits of the Request.

B. The NGPC Considered All Material Information.

The BGC concluded, and the NGPC agrees, that the Requester has not demonstrated that the NGPC failed to consider material relevant information.

In order to state a basis for reconsideration of a Board action, the Requester must demonstrate that the Board (or in this case the NGPC) failed to consider material information or considered false or inaccurate material information in adopting the Resolution. (Bylaws, Art. IV, § 2.2.) The Requester does not argue that the NGPC considered false or inaccurate material information, but it does claim that the NGPC failed to consider material information in two ways. First, the Requester claims that the NGPC did not sufficiently consult with the public prior to adopting the Resolution. Second, the Requester claims that the NGPC failed to consider how the Resolution will have material adverse effects on registries and internet users. Neither argument withstands scrutiny, and neither is grounds for reconsideration.

1. The NGPC Considered Public Comments Solicited During A Lengthy Public Comment Period.

The Requester claims that the NGPC "failed to take material input from the community into account." (Request, § 8, Pg. 11.) Contrary to the Requester's claims, the NGPC did consider feedback received in "the public comment forum"²² that was open from 26 February 2014 through 21 April 2014. The Requester does not explain why it failed to participate in that forum. Had it participated, its views would have been included along with the 28 detailed comments considered that were submitted by various stakeholders and members of the public, including other registries.²³ Notably, the public comment period for this matter was actually longer than required. Typically, public comment periods are open 21 days, and if comments are received during that time, there is a 21-day reply period.²⁴ Here, the public comment period was open for 33 days, with a 21-day reply period. In addition, ICANN facilitated an entire public session about the name collision issue at the London ICANN meeting on 23 June 2014 that provided yet another opportunity for public commentary and participation; the Requester again chose not to participate.²⁵ As such, the Requester cannot reasonably claim that the NGPC did not

consider public input before adopting the Resolution.

In sum, the Requester does not persuasively argue that the NGPC failed to consider material information in the form of public comments in adopting the Resolution, and therefore has not stated proper grounds for reconsideration on that basis. (Bylaws, Art. IV, § 2.2.)

2. The NGPC Considered All Material Information Relevant To The Resolution.

The Requester seeks reconsideration of the Resolution because it claims the NGPC "did not properly assess the implications of the decision." (Request, § 8, Pg. 12.) The Requester's main basis for this assertion is that the issues raised in its own 27 July 2014 letter were not expressly addressed in the "Rationale" section of the Resolution. This argument fails to provide a basis for reconsideration for two reasons.

First, the Resolution *does* take into account the substance of the information provided in the Requester's 27 July 2014 letter. The 27 July 2014 letter made five requests, all related to either the "RPM rules" or the Requester's view that one common set of rules should apply to all gTLDs. (Request, § 8, Pg. 10 & Ex. D.) Despite Requester's claims to the contrary, the same issues raised in the 27 July 2014 letter were all presented to the NGPC during the public comment period by other stakeholders and were addressed by the NGPC. The Resolution acknowledges that the NGPC considered the public comments that: (i) expressed concern regarding the "interaction between the name collision block lists and intellectual property rights protection mechanisms"²⁶; (ii) referenced how the "name collision issue is creating an uneven competitive landscape"; and (iii) discussed the pros and cons of treating new gTLD operators differently from legacy operators.²⁷ Furthermore, ICANN has already determined that the RPM issue requires further public comment before a decision can be made as to how to handle the issue. In fact, ICANN is currently soliciting comments, between 25 August 2014 and 7 October 2014, on the approach that should be taken "regarding the appropriate Rights Protection Mechanisms for release of SLD Block List names."²⁸ In other words, the NGPC was not lacking any material information on the applicable

issues, regardless of whether it specifically considered the Requester's 27 July 2014 letter.

Second, the Requester's disagreement with the substance of the Framework does not form the proper basis for reconsideration. The NGPC considered independent, detailed studies discussing the name collision issue, including one prepared by JAS and one prepared by Interisle Consulting Group.²⁹ Further, the NGPC took into account advice from the SSAC before adopting the Resolution. The SSAC's role is to "advise the ICANN community and Board on matters relating to the security and integrity of the Internet's naming and address allocation systems." (Bylaws, Art. XI, § 2.a.) In sum, the NGPC considered public comments, independent analytical reports, and advice from the relevant ICANN advisory committee. While the Requester complains that the NGPC "did not mention the letter" (that the Requester sent months after the public comment period had closed) and as such "did not properly address the implications of the decision" to approve the Framework, those allegations do not amount to a claim that the NGPC failed to consider any material information. As such, no reconsideration is warranted.

As a final note, the Requester also claims reconsideration is warranted because "[t]here is no indication that the GAC³⁰ has been given the opportunity to provide feedback" to the JAS reports or the SSAC advice. (Request, § 7, Pg. 7) The GAC provides "advice on the activities of ICANN as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues." (Bylaws, Art. XI, § 2.1.) That the GAC did not issue any formal advice related to how ICANN should address name collisions does not mean the NGPC failed to consider any material information. Had the GAC issued such advice, the ICANN Board would have considered it, as is required under ICANN's Bylaws. (Bylaws, Art. XI, §§ 2.1.i, 2.1.j.) Further, in July 2013, the GAC Durban Communiqué did advise that the Board "[a]s a matter of urgency consider the recommendations contained in the SSAC Report on Dotless Domains (SAC053) and Internal Name Certificates (SAC057)," and the latter involved name collision issues.³¹ The Board did consider the SSAC's advice, and in turn, adopted the Framework.

Again, as the Requester does not show that the NGPC failed to consider material information in adopting the Resolution, reconsideration is not appropriate. (Bylaws, Art. IV, § 2.2.)

c. Alleged Confusion is not a Basis for Reconsideration.

The BGC concluded, and the NGPC agrees, that the Requester has not demonstrated that the NGPC failed to consider material relevant information concerning the importance of educating the public about the Framework.

The Requester complains that the NGPC failed to consider the supposed fact that the "overall majority" of registrants are not aware of the name collision problem and will therefore be "confus[ed] about the availability of domain names in general." (Request, § 7, Pg. 6.) However, it is evident that the NGPC did consider information concerning the importance of educating the public about the Framework. The Resolution dedicates an entire provision (section B.6) to "Informational Materials" and requires ICANN to "produce informational materials as needed . . . [and] work to make this information available to parties potentially affected by name collision."³² Even though the Framework was just recently adopted, ICANN has already posted and provided a wide variety of informational materials, including webinars geared towards registry operators, handbooks and videos for IT professionals, and a "Frequently Asked Questions" page regarding the Framework.³³ Moreover, ICANN has dedicated resources towards ensuring questions about the Assessment or the Framework will be answered promptly and accurately. In other words, far from failing to consider the potential for confusion regarding the Resolution, ICANN has taken proactive and significant steps to ensure that affected parties comprehend the Framework and the steps it requires.³⁴ No reconsideration is warranted on the grounds that the NGPC did not consider information regarding public outreach, as it is clear that the NGPC did consider such information and acted on it by way of the aforementioned educational resources.

D. The Requester Has Not Demonstrated It Has Been Materially Affected By The Resolution.

The BGC concluded, and the NGPC agrees, that the Requester has not demonstrated that it has been materially and adversely affected by the Resolution.

Absent evidence that the Requester has been materially and adversely affected by the Resolution, reconsideration is not appropriate. (Bylaws, Art. IV, §§ 2.1-2.2.) Here, the

Requester argues it is materially affected by the Resolution for two reasons. (Request, § 6, Pgs. 4-5.) First, it contends that the Framework does not provide clear guidance as to how to prevent harms related to name collisions. (*Id.*, Pg. 5.) Second, the Requester contends that it will suffer "lower registration rates" due to the confusion the Framework will purportedly cause, because the Requester predicts that registrars will "not offer domain name registrations from the Name Collision lists." (*Id.*) Neither of these concerns has yet come to fruition, however, and both are merely speculative at this point.³⁵ Again, only those persons who "have been adversely affected by" an ICANN action may file a request for reconsideration. (Bylaws, Art. IV, § 2.2) (emphasis added). Because the only harm the Requester identifies is, at this point, merely speculative and hypothetical, the request for reconsideration is premature.³⁶

As such, the Requester has failed to demonstrate it *has been* materially affected by the Resolution and, on that independent basis, reconsideration of the adoption of the Resolution is not warranted.

VI. Decision

The NGPC had the opportunity to consider all of the materials submitted by or on behalf of the Requester or that otherwise relate to Request 14-37. Following consideration of all relevant information provided, the NGPC reviewed and has adopted the BGC's Recommendation on Request 14-37 <https://www.icann.org/en/system/files/files/recommendation-i-registry-04sep14-en.pdf> [PDF, 150 KB], which shall be deemed a part of this Rationale and is attached to the Reference Materials to the NGPC Submission on this matter.

Adopting the BGC's recommendation has no direct financial impact on ICANN and will not negatively impact the systemic security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

d. GAC Advice regarding Protections for the Red Cross and Red Crescent – Singapore Communiqué

Whereas, the GAC met during the ICANN 49 meeting in Singapore and issued a Communiqué [PDF., 449 KB] on 27 March 2014 ("Singapore Communiqué").

Whereas, in the Singapore Communiqué the GAC clarified its previous advice to the ICANN Board to permanently protect from unauthorized use the terms associated with the International Red Cross and Red Crescent Movement, and advised that the protections should also include "the 189

National Red Cross and Red Crescent Societies, in English and the official languages of their respective states of origin," and the "full names of the International Committee of the Red Cross and International Federation of the Red Cross and Red Crescent Societies in the six (6) United Nations Languages." The [GAC Advice](#) is identified in the [GAC Register of Advice](#) as [2014-03-27-RCRC](#).

Whereas, the [GNSO](#) has developed policy recommendations to the Board concerning the Red Cross and Red Crescent names that are the subject of the [GAC's Singapore Communiqué](#). The scope of protections in the [GNSO](#) policy recommendations differ from the [GAC's](#) advice, and the [GAC](#), [GNSO](#), Board, and [ICANN](#) community continue to actively work on resolving the differences.

Whereas, the NGPC is responsible for considering the [GAC](#) advice pursuant to the authority granted to it by the Board on 10 April 2012, to exercise the [ICANN](#) Board's authority for any and all issues that may arise relating to the New [gTLD](#) Program.

Resolved (2014.10.12.NG05), the President and CEO, or his designee (s), is directed to provide temporary protections for the names of the International Committee of the Red Cross and International Federation of the Red Cross and Red Crescent Societies, and the 189 National Red Cross and Red Crescent Societies, as identified in the [GAC](#) Register of Advice as [2014-03-27-RCRC](#) while the [GAC](#), [GNSO](#), Board, and [ICANN](#) community continue to actively work on resolving the differences in the advice from the [GAC](#) and the [GNSO](#) policy recommendations on the scope of protections for the RCRC names.

Rationale for Resolution 2014.10.12.NG05

The NGPC is taking action to provide temporary protections for Red Cross/Red Crescent (RCRC) names identified in the [GAC's](#) advice in the Singapore Communiqué, while being mindful of the outstanding discussions among the [GAC](#), [GNSO](#), Board, and [ICANN](#) community to actively work on resolving the differences in the [GAC](#) advice and the [GNSO](#) policy recommendations on the scope of protections for the RCRC names.

[Article XI, Section 2.1](#) of the [ICANN](#) Bylaws permits the [GAC](#) to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies." The [GAC](#) issued advice to the Board on the New [gTLD](#) Program through its Singapore Communiqué dated 27 March 2014 ("Singapore Communiqué"). The [ICANN](#) Bylaws require the Board to take into account the [GAC's](#) advice on public policy matters in the formulation and adoption of the policies. If the Board decides to take an action that is not consistent with the [GAC](#) advice, it must inform the [GAC](#) and state the reasons why it decided not to follow the advice. The Board and the [GAC](#) will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the [GAC](#) advice was not followed.

In the Singapore Communiqué, the GAC clarified its previous advice to the ICANN Board to permanently protect from unauthorized use the terms associated with the International Red Cross and Red Crescent Movement, and advised that the protections should also include "the 189 National Red Cross and Red Crescent Societies, in English and the official languages of their respective states of origin," and the "full names of the International Committee of the Red Cross and International Federation of the Red Cross and Red Crescent Societies in the six (6) United Nations Languages".

The GNSO has also provided policy recommendations to the ICANN Board on the same RCRC names that are the subject of the GAC's advice in the Singapore Communiqué. Unlike the GAC's advice, the GNSO policy recommendations do not call for permanent protections for the set of RCRC names. Instead, the GNSO policy recommends that these names be protected by entering them into the TMCH for 90-days claims notification.

On 30 April 2014, the ICANN Board **adopted** the GNSO Council's policy recommendations on IGO-INGO protections that were not inconsistent with the GAC's advice, and requested additional time to consider the remaining policy recommendations that are inconsistent with the GAC's advice on the same topic. The Board committed to facilitate discussions among the relevant parties to reconcile any remaining differences between the policy recommendations and the GAC advice on the topic, and previously tasked the NGPC to help with this process. The NGPC action today is to provide temporary protections for the RCRC names identified in the GAC's advice in the Singapore Communiqué, while being mindful of the outstanding discussions among the GAC, GNSO, Board, and ICANN community to actively work on resolving the differences in the advice from the GAC and the GNSO policy recommendations on the scope of protections for the RCRC names.

The NGPC's action will have a positive impact on the community as it will allow for temporary protections for RCRC names, while allowing for discussions to continue. As part of its deliberations, the NGPC reviewed the following significant materials and documents:

- GAC Singapore Communiqué:
<https://www.icann.org/en/system/files/correspondence/gac-to-board-27mar14-en.pdf> [PDF, 449 KB]
- GNSO PDP Working Group Final Report on Protection of IGO and INGO Identifiers in all gTLDs: <http://gnso.icann.org/en/issues/igo-ingo-final-10nov13-en.pdf> [PDF, 645 KB]

There are no foreseen fiscal impacts associated with the adoption of this resolution. Approval of the proposed resolution will not impact security, stability or resiliency issues relating to the DNS. This action is not a defined policy process within ICANN's Supporting Organizations or ICANN's Organizational Administrative Function decision requiring public comment or not requiring public comment. Subsequent actions related to protections for RCRC names may be subject to public comment.

e. Any Other Business

No resolution taken.

Published on 14 October 2014

¹ Japanese translation of "online shopping"

² See Report of Public Comments, *available at* <https://www.icann.org/en/system/files/files/report-comments-name-collision-10jun14-en.pdf> [PDF, 229 KB].

³ See Resolution, *available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-07-30-en>.

⁴ See <https://www.icann.org/en/system/files/files/sac-057-en.pdf> [PDF, 1.13 MB].

⁵ See <https://features.icann.org/ssac-advisory-internal-name-certificates>.

⁶ See Addressing the Consequences of Name Collisions, *available at* <https://www.icann.org/news/announcement-3-2013-08-05-en>.

⁷ See New gTLD Collision Occurrence Management Plan Frequently Asked Questions, *available at* <https://www.icann.org/news/announcement-2013-12-03-en>.

⁸ See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-10-07-en#1.a>.

⁹ See <https://www.icann.org/resources/pages/name-collision-2013-12-06-en>.

¹⁰ See Report of Public Comments, *available at* <https://www.icann.org/en/system/files/files/report-comments-name-collision-10jun14-en.pdf> [PDF, 229 KB].

¹¹ See JAS Report, *available at* <https://www.icann.org/en/system/files/files/name-collision-mitigation-study-06jun14-en.pdf> [PDF, 391 KB].

¹² See <https://www.icann.org/en/system/files/files/sac-066-en.pdf> [PDF, 305 KB].

¹³ See Resolution, *available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-07-30-en>.

¹⁴ See Name Collision Occurrence Assessment, *available at* <http://newgtlds.icann.org/sites/default/files/agreements/name-collision-assessment-04aug14-en.pdf> [PDF, 91 KB].

¹⁵ See <https://www.icann.org/resources/pages/name-collision-2013-12-06-en>.

¹⁶ See Implementing Rights Protection Mechanisms in the Name Collision Mitigation Framework, *available at* <https://www.icann.org/public-comments/name-collision-rpm-2014-08-25-en>.

¹⁷ <https://www.icann.org/en/system/files/files/recommendation-i-registry-04sep14-en.pdf> [PDF, 150 KB]

¹⁸ <https://www.icann.org/en/system/files/files/clarification-i-registry-11sep14-en.pdf> [PDF, 59 KB]

¹⁹ Having a reconsideration process whereby the BGC reviews and, if it chooses, makes a recommendation to the Board/NGPC for approval, positively affects ICANN's transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, Bylaws, and Articles of Incorporation.

²⁰ See Report of Public Comments, *available at* <https://www.icann.org/en/system/files/files/report-comments-name-collision-10jun14-en.pdf> [PDF, 229 KB].

²¹ The Requester states that it sent a letter to the NGPC "well in advance" of the NGPC meeting, but that statement is wrong given the mere three days between the date of the letter and the 30 July 2014 NGPC meeting. (See Request, § 8, Pg. 9.)

²² See Resolution, *available at* <https://www.icann.org/en/system/files/files/name-collision-framework-30jul14-en.pdf> [PDF, 634 KB].

²³ See Report of Public Comments, *available at* <https://www.icann.org/en/system/files/files/report-comments-name-collision-10jun14-en.pdf> [PDF, 229 KB].

²⁴ See <https://www.icann.org/resources/pages/how-2014-03-17-en>

²⁵ See Name Collision Presentation, London: ICANN 50, *available at* <https://london50.icann.org/en/schedule/mon-name-collision/presentation-name-collision-23jun14-en>.

²⁶ See Resolution, *available at* <https://www.icann.org/en/system/files/files/name-collision-framework-30jul14-en.pdf> [PDF, 634 KB].

²⁷ See Report of Public Comments, at Pg. 11, *available at* <https://www.icann.org/en/system/files/files/report-comments-name-collision-10jun14-en.pdf> [PDF, 229 KB].

²⁸ See Implementing Rights Protection Mechanisms in the Name Collision Mitigation Framework, *available at* <https://www.icann.org/public-comments/name-collision-rpm-2014-08-25-en>

²⁹ See Resolution, *available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-07-30-en>.

³⁰ Governmental Advisory Committee.

³¹ See GAC Communiqué Issued at ICANN 47, *available at* <https://www.icann.org/news/announcement-2013-07-18-en>; SAC057, *available at* <https://www.icann.org/en/system/files/files/sac-057-en.pdf> [PDF, 1.13 KB].

³² See Resolution, *available at* <https://www.icann.org/en/system/files/files/name-collision-framework-30jul14-en.pdf> [PDF, 634 KB].

³³ See Name Collision Resources & Information, *available at* <https://www.icann.org/resources/pages/name-collision-2013-12-06-en>.

³⁴ ICANN has also engaged in significant outreach activities on LinkedIn and via various media outlets, as well as launching a Google Adwords promotion.

³⁵ In fact, the Framework will permit names to be activated in the DNS now that were previously not allowed to be activated. As such, the Framework may well lead to an increase in registrations.

³⁶ On 11 September 2014, after the BGC issued its Recommendation, the Requester filed a Clarification to Reconsideration Request 14-37, purportedly providing additional details regarding ways in which the Requester has been materially and adversely affected by the Resolution. Despite its claims to the contrary, the Requester's continued allegations of potential harm are still speculative and hypothetical.



You Tube



Twitter



LinkedIn



Flickr



Facebook



RSS Feeds



Community Wiki



ICANN Blog

Who We Are

Get Started
Learning
Participate
Board
President's
Corner
Staff
Careers
Newsletter

Contact Us

Offices
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Security Team
PGP Keys
Certificate
Authority
Registry Liaison
AOC Review
Organizational
Reviews
Request a
Speaker
For Journalists

Accountability & Transparency

Accountability
Mechanisms
Independent
Review Process
Request for
Reconsideration
Ombudsman

Governance

Documents
Agreements
AOC Review
Annual Report
Financials
Document
Disclosure
Planning
Dashboard
RFPs
Litigation
Correspondence

Help

Dispute
Resolution
Domain Name
Dispute
Resolution
Name Collision
Registrar
Problems
WHOIS

Reference Material 44.

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

Vistaprint Limited)
Contact Information Redacted)
)
)
Claimant)
)
v.)
)
INTERNET CORPORATION FOR)
ASSIGNED NAMES AND NUMBERS)
)
Respondent)
_____)

ICDR Case No. 01-14-0000-6505

**ADDITIONAL SUBMISSION
REPLY TO ICANN'S RESPONSE BY VISTAPRINT LIMITED**

Flip Petillion,
Crowell & Moring LLP
Contact Information Redacted

Counsel for Claimant

1. This IRP concerns ICANN's handling of Vistaprint's application for the generic top-level domain (gTLD) .webs. ICANN has accepted an arbitrary and baseless determination by an ICDR-appointed expert in which Vistaprint's application for .webs was considered confusingly similar to Web.com Group Inc. ('Web.com')'s application for .web. If upheld, this acceptance may allow ICANN to only delegate one of both applications.
2. ICANN has set a high standard for a finding of confusing similarity between two gTLD strings, requiring a likelihood of confusion with the average, reasonable Internet user. An expert, Professor Piet Desmet, has confirmed to Vistaprint that, by any standard, no Internet user is likely to be confused between .webs and .web.
3. In addition, Web.com had previously accepted that the average, reasonable Internet user that may be interested in Web.com's services is sophisticated enough to understand the difference between WEB.COM and WEBCOM, terms which are even more similar than .webs and .web. Indeed, Web.com's <web.com> domain name and Vistaprint's <webs.com> domain name have co-existed since 1996. Significant and distinct businesses have thrived under these separate domain names, with each business possessing its own independent identity and goodwill.
4. In an attempt to prevent Vistaprint's unique application for .webs going through, Web.com was the only applicant – out of the 7 applicants for .web – arguing that .webs and .web are confusingly similar. However, Web.com has never made a sound argument why .webs and .web are confusingly similar.
5. Much to Vistaprint's surprise, Web.com's unsubstantiated allegation of confusing similarity was accepted in string confusion objection (SCO) proceedings which contain numerous substantive and procedural errors.
6. Vistaprint has raised these issues with the ICANN Board through the appropriate request for reconsideration (RfR) procedure installed by ICANN, but the ICANN Board has nonetheless decided to accept the said expert determination.

7. Other applicants have equally criticized SCO proceedings. In a letter to ICANN’s CEO, United TLD Holdco, Ltd. denounced the process flaws in the SCO proceedings involving the strings .com and .cam. DERCars, LCC filed an RfR, challenging the expert determination in the SCO proceedings relating to the strings .car and .cars. Amazon EU S.a.r.l. filed an RfR, challenging the expert determination in the SCO proceedings relating to the strings .shop and .通販 (which means ‘online shopping’ in Japanese). The ICANN Board took action in each of these matters.

- With respect to the Expert Determination finding .cam confusingly similar to .com, the ICANN Board ordered that an appeals process be developed to address the “perceived inconsistent or otherwise unreasonable SCO Expert Determination”.
- With regard to the Expert Determination finding .cars confusingly similar to .car, the ICANN Board ordered its staff to propose a review mechanism. DERCars decided to withdraw its application for .cars before the review mechanism was implemented. As a result, it was no longer necessary for the ICANN Board to further consider the proposed review process.
- With regard to the Expert Determination finding .通販 confusingly similar to .shop, the ICANN Board ordered that an appeals process be developed to address the “perceived inconsistent or otherwise unreasonable SCO Expert Determination”.

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

9. Vistaprint is harmed by ICANN’s unequal treatment. In addition, the substantive and procedural errors in the SCO proceedings forced Vistaprint to spend time and effort (in preparing

an RfR, CEP and this IRP) in order to resolve the unreasonable outcome of the contention set determination.

10. Rather than mitigating Vistaprint's damage, in this IRP ICANN argues – as it did in other IRPs since the current IRP was initiated – that the ICANN Board is not responsible for ICANN accepting expert determinations and that there is no Board action for the IRP Panel to review. However, the ICANN Board is the only entity responsible for ICANN's actions. The ICANN Board deliberately decided not to remedy the substantive and procedural errors in the SCO proceedings, involving Vistaprint.

11. Vistaprint will demonstrate below that the IRP Panel has authority to decide whether or not actions or inactions on the part of the ICANN Board are compatible with ICANN's Articles of Incorporation and ICANN's By-laws. When the ICANN Board adopts policies or accepts determinations made according to those policies, it must ensure that such adoption complies with its Bylaws and Articles of Incorporation. This is no different with respect to the new gTLD program and ICANN's treatment of applications. The ICANN Board is responsible for the correct implementation of the new gTLD program. The ICANN Board cannot simply accept an expert determination because the process was allegedly followed, or because the Board finds that there is no demonstrable harm that directly follows from deviations in the process.

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

I. THE ERRONEOUS EXPERT DETERMINATION

A. ICANN applied its string similarity standard discriminatorily

13. As explained in Vistaprint’s request for IRP, the string confusion test is a high bar and SCO panels have to apply a strict standard.¹ ICANN has always stressed the strict nature of the string similarity standard. It has done so both during the development phase of the Applicant Guidebook (**RM 14**, p. 149, **RM 15**, p. 4) and, afterwards, in Board resolutions dealing with the implementation of the Applicant Guidebook’s string similarity standard (**RM 16**, rationale). Since the filing of Vistaprint’s request for IRP, the ICANN Board clarified how the string similarity standard must be applied. In its resolutions of 12 October 2014, the ICANN Board identified certain SCO determinations “*as not being in the best interest of the New gTLD Program and the Internet community*” and set out the rules for a re-evaluation of these SCO determinations (**RM 22**, p. 3):

- A first SCO determination that needed re-evaluation is the SCO determination in which ICDR’s expert accepted Verisign Inc.’s objection to United TLD Holdco Ltd. (‘United TLD’)’s application for .cam. We refer to this SCO determination as the ‘United TLD Determination’. In the United TLD Determination, ICDR’s appointed expert found United TLD’s application for .cam confusingly similar to Verisign Inc. (‘Verisign’)’s .com gTLD (**RM 23**). The ICANN Board decided that (i) the United TLD Determination was not in the best interest of the New gTLD Program and the Internet community and (ii) a new three-member panel must be established to re-evaluate the United TLD Determination (**RM 22**).

Verisign had also raised a SCO on the basis of its .com gTLD against the application for .cam by Dot Agency Limited and the application for .cam by AC Webconnecting Holding B.V. In both cases, the appointed experts determined that no confusing similarity existed

¹ Vistaprint’s Request for IRP, paras. 20-24.

between the .cam and .com strings (**RM 24 and 25**). We refer to these SCO determinations as the ‘Related .cam/.com Determinations’. The ICANN Board decided that the Related .cam/.com Determinations need no re-evaluation. In addition, the ICANN Board recommended that the three-member panel charged with re-evaluating the United TLD Determination must review the Related .cam/.com Determinations as background (**RM 22**).

- Another SCO determination that needed re-evaluation is the determination in which ICDR’s appointed expert accepted Commercial Connect LLC’s objection to Amazon EU S.à.r.l. (‘Amazon’)’s application for .通販 (which means .onlineshopping in Japanese) (**RM 26**). We refer to this SCO determination as the ‘Onlineshopping Determination’. ICDR’s appointed expert found in the Onlineshopping Determination that Amazon’s application for .通販 was confusingly similar to Commercial Connect LLC’s application for .shop. Commercial Connect LLC also invoked its application for .shop in a SCO against Top Level Domain Holdings Limited’s application .购物 (which means ‘shop’ in Chinese). ICDR’s appointed expert rejected the latter SCO (**RM 27**). We refer to this SCO determination as the ‘Related shop/.shop Determination’. The ICANN Board decided that a three-member panel needs to re-evaluate the Onlineshopping Determination and that no re-evaluation is needed for the Related shop/.shop Determination. The ICANN Board decided that the Related shop/.shop Determination must be reviewed as background by the three-member panel that is charged with re-evaluating the Onlineshopping Determination (**RM 22**).

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

15. Upon instigation of the ICANN Board, ICANN had developed the same process for re-evaluating the SCO determination in which ICDR's appointed expert accepted Charleston Road Registry Inc. ('CRR')'s objection to DERCars, LLC's application for .cars. We refer to this SCO determination as the 'DERCars Determination'. In the DERCars Determination, ICDR's appointed expert found DERCars, LLC's application for .cars confusingly similar to CRR's application for .car. CRR had also objected to the applications for .cars by Uniregistry, Corp. and Koko Castle, LLC, claiming confusing similarity with CRR's application for .car. The latter objections by CRR were not successful. ICANN decided that DERCars, LLC should be given the option of having the DERCars Determination reviewed. ICANN was not allowing a review of the other SCO determinations involving .car and .cars (**RM 28**).²

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

17. Why did the ICANN Board intervene in the DERCars determination – involving the strings .car and .cars – but refused to intervene in the SCO Determination involving .web and .webs? In view of the small number of SCO Determinations finding confusing similarity between two strings (**RM 29**), it is a true mystery why the ICANN Board intervened in some matters, but refused to do so in the SCO determinations on Vistaprint's applications for .webs.

² DERCars decided to withdraw its application for .cars before the review mechanism was implemented. As a result, it was no longer necessary for the ICANN Board to further consider the proposed review process.

18. If anything, the .webs/.web string pair is less similar than the .cars/.car string pair. *Cars* is commonly used as the plural for *car*. Web, however, commonly refers to the world wide web, and as such, it is not normally a word where the plural form would be used.³

19. There were no reasons for a finding of confusing similarity between .webs and .web. Vistaprint is supported by the independent expert advice of Professor Piet Desmet, full professor at the University of Leuven in linguistics and language teaching methodology (Annex 32). Professor Desmet was asked whether the .webs and .web strings are confusingly similar, both regardless of the ICANN framework and within the ICANN framework on confusing similarity. Professor Desmet concluded that string confusion between .webs and .web is highly improbable. Professor Desmet's conclusion was based on the following findings, which are well supported in scientific literature:

- Exterior letters serve as visual clues for word recognition. The first and last letters of a word have been shown to be more salient than the rest of the letters and to receive priority in processing. Readers can recognize a word even when its interior letters are scrambled. Exterior letters serve as visual clues for word recognition. The first and last letters of a word have been shown to be more salient than the rest of the letters and to receive priority in processing. Readers can recognize a word even when its interior letters are scrambled. As a result, visually, 'webs' and 'web' are recognized as two radically different words since their last letters are completely different.
- In the case of 'web' and 'webs', completely regular patterns allow for a one-to-one mapping of spelling to sound. In other words, a word that consists of completely regular patterns is spelled out exactly as it sounds. The sound of the word easily translates into the spelling of the word and *vice versa*. Words consisting of completely regular patterns

³ When referring to networks of fine threads constructed by spiders, 'webs' may be used as a plural for 'web'. However, in the context of the DNS, the word 'web' refers to the world wide web and not to a spider web.

facilitate word recognition. Professor Desmet considers that ‘webs’ and ‘web’ have completely regular patterns allowing for one-to-one mapping of spelling to sound, which highly facilitates the word recognition of both words.

- There is an extremely limited number of words that could be generated by changing only one single letter in ‘webs’ and ‘web’. In other words, ‘webs’ and ‘web’ have a limited number of orthographic neighbors. Words with a high number of orthographic neighbors are more difficult to recognize and have an inhibitory effect when reading, as evidenced by eye-fixation patterns. Words with fewer orthographic neighbors are more easily recognizable. Professor Desmet concludes that this results in a higher word recognition for ‘webs’ and ‘web’ which have a limited number of orthographic neighbors.
- Fourth, a reader will first decompose the word ‘webs’ into meaningful units. ‘Webs’ is composed of two meaningful units, namely ‘web’ and the plural marker ‘-s’. ‘Web’ only has one meaningful unit. For professor Desmet, this is an extra factor that enhances the ability to recognize the difference between ‘web’ and ‘webs’.
- The plural ‘-s’ is a completely regular plural and easily recognizable compared to irregular plurals (e.g. with vowel change such as ‘hero’/’heroes’) that have been proven to be less easily recognizable.

20. Professor Desmet considers the 5 elements above reason enough to dismiss the idea of string confusion in the case of ‘webs’/‘web’ (Annex 32).

21. Furthermore, by its own admission, and as argued by Vistaprint, Web.com considered that the average, reasonable Internet user that may be interested in the Web.com’s services is sophisticated enough to understand the difference between the much more similar WEB.COM and WEBCOM (Annexes 10 and 33). Finally, Web.com’s <web.com> domain name and Vistaprint’s <webs.com> domain name have co-existed since 1996 (Annexes 34 and 35). Significant and distinct businesses have thrived under these separate domain names, with each business possessing its own independent identity and goodwill.

22. In sum, Vistaprint could rely on both scientific evidence and close real-life evidence (including Web.com’s own considerations) that the average, reasonable Internet user is not confused between .webs and .web. Web.com’s allegation of confusing similarity was unsubstantiated and strongly rebutted by Vistaprint’s evidence. As a result, the SCO determination by the ICDR panel very much came as a surprise to Vistaprint.

B. The erroneous and discriminatory expert determination was only possible because of the many process violations

23. The surprising nature of the manifestly incorrect SCO determination on .webs inspired Vistaprint to examine the root causes of the erroneous determination. The examination revealed that numerous process violations surrounded the SCO determination. As explained in detail in Vistaprint’s Request for IRP, (i) errors were made in the appointment procedure, (ii) the SCO determination was untimely, (iii) the appointment of a biased panel led to the unjustified acceptance of additional submissions, (iv) appointed panels failed to maintain their independence and impartiality, (v) the appointed panel reversed the burden of proof, and (vi) the appointed panel failed to duly motivate its SCO determination, as it failed to respond to Vistaprint’s arguments.⁴

24. ICANN’s New gTLD Program required that (i) there was “*a clear and pre-published application process using objective and measurable criteria*” (**RM 30**, p. 4), (ii) all applicants for a new gTLD registry be “*evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process*” (**RM 30**) and (iii) “[*d*]ispute resolution and challenge processes [*were*] established prior to the start of the process”. This would only be possible if a panel (ruling on a SCO or other objection) consisted of “*appropriately qualified experts appointed to each proceeding by the designated DRSP*”, as required by the program (**RM**

⁴ Vistaprint’s Request for IRP, paras. 33 and following.

5, Module 3-16). ICANN committed itself to communicate regularly with the ICDR and to seek to optimize the service that the ICDR provides as a DRSP in the New gTLD Program.

25. ICANN clearly failed. On 8 October 2014, ICANN’s former Chief Strategy Officer and Senior Vice President of Stakeholders Relations, Kurt Pritz, who had been leading the introduction of the New gTLD Program, witnessed on ICANN’s objection procedure:

“There is no doubt that the New gTLD Program objection results are inconsistent, and not predictable. The fact is most easily demonstrated in the ‘string confusion,’ objections where challenges to exactly the same strings yielded different results. [...] With globally diverse, multiple panelists invoking untried standards and questions of first impression in an industry with which they were not familiar and had little training, the panelists were bound to deliver inconsistent, unpredictable results. ICANN put no mechanism put [sic] into place to rationalize or normalize the answers. [...] It is my opinion that ICANN, having proven in the initial evaluation context that it could do so, should have implemented measures to create as much consistency as possible on the merits in the objection rulings, requiring DRSPs to educate and train their experts as to the specific (and only) standards to employ, and to review and correct aberrant results. The failure to do so resulted in violation of the overarching policy articulated by the GNSO and adopted by the Board at the outset of the new gTLD Program, as well as policies stated in the Bylaws and Articles of Incorporation concerning on discrimination, application of document policies neutrally, objectively and fairly, promotion of competition, and accountability.” (RM 31, emphasis added).

26. This man who had been leading the introduction of the New gTLD Program recognizes that the appointed panels had not received adequate training and were not familiar with the industry. In other words, he acknowledged that the panels were not ‘appropriately qualified experts’. This violation resulted in clear policy violations and a failure of ICANN to provide due process.

27. Justice must not only be done, it must also be seen to be done. ICANN has a duty to ensure compliance with its obligations to act in good faith, transparently, fairly, and in a manner that is non-discriminatory and ensures due process.⁵ In view of (i) the erroneous application of the string similarity standard, (ii) the numerous violations of the procedural rules, (iii) the lack of adequate training and appropriately qualified experts, and (iv) the resulting failure to provide the

⁵ Vistaprint’s Request for IRP, paras. 55-68.

required legal certainty, ICANN's acceptance of the erroneous SCO determination on .webs was a clear violation of ICANN's fundamental obligations.⁶

28. ICANN and its Board have done nothing to correct the numerous errors in the SCO process. The ICANN Board selected SCO determinations for which it proposed a re-evaluation. There is no reason for the ICANN Board to intervene in some matters and not to intervene in other matters, where the applicant suffered from at least equally severe policy violations. This is a clear violation of ICANN's duty to apply its standards, policies, procedures, or practices equitably and without discrimination.

II. THE ICANN BOARD'S OBLIGATION TO INTERVENE

29. ICANN only acts through its Board. As ICANN expressly recognizes⁷, the Board is ICANN's decision-making body and it cannot delegate its responsibilities.⁸ It is the only entity that can be held responsible for ICANN's actions. In relation to the New gTLD Program, the Applicant Guidebook explicitly confirms that "*ICANN's Board of Directors has ultimate responsibility for the New gTLD Program*" (**RM 5**, Module 5-4).

30. The fact that the ICANN Board may rely on third parties for advice does not alter the Board's responsibility. The Board remains ICANN's decision-making body. This means that the ICANN Board cannot blindly accept advice by third parties or expert determinations. The ICANN Board must always verify compliance with its Articles of Incorporation and Bylaws, particularly when the third party advice or expert determination is questioned. The fact that the ICANN Board cannot blindly accept third-party expert determinations is the reason why the Applicant Guidebook explicitly mentions that "*[t]he Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best*

⁶ Vistaprint's Request for IRP, 33-49.

⁷ ICANN's Response, para. 35: "*the Board is not permitted to outsource its decision-making authority*".

⁸ Article I, Section 1 of ICANN's Bylaws provide: "*Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board*" (**RM 2**).

interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of [...] the use of an ICANN accountability mechanism” (RM 5, Module 5-4). Vistaprint used an ICANN accountability mechanism when it challenged the SCO proceedings and the expert determination on its application for .webs in RfR 14-5.

31. When the ICANN Board individually considers an application, it must make sure that it does not treat applicants inequitably and that it does not discriminate among applicants. Article II, Section 3 of ICANN’s Bylaws provides that “*ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition” (RM 2).* However, with regard to the SCO proceedings, the ICANN Board has done the exact opposite. It created the opportunity for some aggrieved applicants to participate in an appeals process, while denying others.

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

III. THE IRP PANEL HAS THE AUTHORITY TO ORDER THAT THE ICANN BOARD REJECTS THE CHALLENGED EXPERT DETERMINATION

33. In accordance with Article IV(3) of ICANN’s Bylaws, an IRP Panel must determine whether the contested actions of the ICANN Board are consistent with applicable rules.⁹

34. As described in detail in Vistaprint’s Request for IRP, the set of rules against which the actions of the ICANN Board must be assessed includes: (i) ICANN’s Articles of Incorporation and Bylaws – both of which must be interpreted in light of ICANN’s Affirmation of Commitments, and both of which require compliance with *inter alia* International law and generally accepted good governance principles – and (ii) secondary rules created by ICANN,

⁹ See also ICANN’s Response, para. 36.

such as the Applicant Guidebook. In setting up, implementing and supervising its policies and processes, the Board must comply with the fundamental principles embodied in these rules. That obligation includes a duty to ensure compliance with its obligations to act in good faith, transparently, fairly, and in a manner that is non-discriminatory and ensures due process.¹⁰

35. The IRP Panel has authority to decide whether or not actions or inactions on the part of the ICANN Board are compatible with these principles. The most recent version of ICANN’s Bylaws¹¹ – which had not been introduced at the time of Vistaprint’s submission of its application for .webs¹² – also requires the IRP Panel to focus on whether the ICANN Board was free from conflicts of interest and exercised an appropriate level of due diligence and independent judgment in its decision making. However, these issues are mentioned by way of example only. The Bylaws nowhere restrict the IRP Panel’s remit to these issues alone.

36. In its Response to the Request for IRP, ICANN submits that its “*Bylaws specify that a deferential standard of review be applied when evaluating the actions of the ICANN Board*”.¹³ This is simply wrong. No such specification is made in ICANN’s Bylaws or elsewhere, and a restrictive interpretation of the standard of review would be inappropriate. It would fail to ensure accountability on the part of ICANN and would be incompatible with ICANN’s commitment to maintain (and improve) robust mechanisms for accountability, as required by Article 9.1 of ICANN’s Affirmation of Commitments (**RM 4**) and ICANN’s core values, which require ICANN to “*remain accountable to the Internet community through mechanisms that enhance ICANN’s effectiveness*” (**RM 2-3**, Article I(2)(10)).

37. The outcome of the IRP is binding upon ICANN. Since ICANN’s amendment of its Bylaws on 11 April 2013, IRP declarations have precedential value (**RM 2**, Article IV(3)(21), *in*

¹⁰ See Vistaprint’s Request for IRP, paras. 55-68.

¹¹ Adopted on 11 April 2013.

¹² In 2012.

¹³ ICANN’s Response, para. 33. A standard of review refers to the amount of deference that must be given in reviewing a decision of a lower court or tribunal. There is no legal basis and no reason to accord deference to actions of the ICANN Board.

fine).¹⁴ The precedential value – and binding force – of IRP declarations was recently confirmed in an IRP Panel declaration¹⁵ that itself has precedential effect. It follows that the IRP declaration requested in this case by Vistaprint would be binding upon ICANN. Any other outcome would effectively grant ICANN arbitrary and unlimited power. It would make ICANN virtually untouchable, something which was never intended¹⁶ and it would be incompatible with ICANN’s obligation to maintain and improve robust mechanisms for accountability (*E.g.*, **RM 4**, Article 9.1 and **RM2-3**, Article I(2)(10)).

IV. THE IRP PANEL MUST ORDER THAT THE ICANN BOARD REJECTS THE CHALLENGED EXPERT DETERMINATION

38. Vistaprint has demonstrated that numerous process violations in the SCO process have led to an erroneous SCO determination. Vistaprint was not given due process and ICANN’s acceptance of the SCO determination was not a fair and neutral application of ICANN’s policy on SCOs. ICANN’s acceptance of the SCO determination despite the lack of due process is attributable to the ICANN Board. The ICANN Board refused to take any action, even after Vistaprint – and many others, including Kurt Pritz who led the introduction of the New gTLD Program – demonstrated numerous policy violations. Rather than correcting these errors, the ICANN Board discriminated against Vistaprint even further by granting remedies to some, but

¹⁴ “*The declarations of the IRP Panel [...] are final and have precedential value*”.

¹⁵ See the declaration of 14 August 2014 by the IRP panel in Case No. 50 2013 001083 where it was decided that “[v]arious provisions of ICANN’s Bylaws and the Supplementary Procedures support the conclusion that the [IRP] Panel’s decisions, opinions and declarations are binding” and that “[t]here is certainly nothing in the Supplementary Rules that renders the decisions, opinions and declarations of the [IRP] Panel either advisory or non-binding” (**RM 32**, para. 98). The panel considered that ICANN’s Bylaws and the Supplementary Procedures were unambiguous as to the binding nature of an IRP declaration and that “*even if it could be argued that ICANN’s Bylaws and Supplementary Procedures are ambiguous on the question of whether or not a decision, opinion or declaration of the IRP Panel is binding, [...] this ambiguity would weigh against ICANN’s position*” (**RM 32**, para 108).

¹⁶ When ICANN was assigned the task of managing the Domain Name System, ICANN’s interim Chairman at the time, Esther Dyson, wrote, on behalf of the ICANN Board: “*We must create an organization that can begin to assume responsibility for the administration and policies of the Internet name and address system, and we must do so quickly, openly and effectively. This Board is committed to accomplishing all of these somewhat conflicting objectives*” (**RM 33**).

not to Vistaprint. The ICANN Board decision to discriminate and to deny Vistaprint of its right to due process are clear violations of ICANN's most fundamental obligations.

39. Any relief ordered must be sufficient to avoid another unfair, arbitrary and discriminatory decision. Evidently, Vistaprint's request for relief may have an impact on the outcome of the case on the merits. Vistaprint is convinced that .webs and .web would not have been put into a contention set – and that there would have been a different decision on the merits – if the SCO process had been organized, implemented and supervised in accordance with ICANN's established policies and ICANN's fundamental obligations. The expert advice submitted by Vistaprint shows that a proper implementation of the SCO process should have led to a different decision on the merits. The ICANN Board's decision to put .webs and .web into a contention set is unfair, arbitrary and discriminatory. This does not, however, make the request for relief a request for a decision on the merits.

40. Any outcome that allows the contention set between .webs and .web to remain would leave ICANN in ongoing violation of the fundamental principles that bind it, because, since this case began, ICANN has delegated various strings that are at least as similar to each other as .webs and .web. As shown in the [Annexes 36 and 37](#), the .car and .cars gTLDs have both been delegated and allow for the registration of domain names. The .auto and .autos gTLDs have also been delegated ([Annexes 38 and 39](#)), as have the .accountant and .accountants gTLDs ([Annexes 40 and 41](#)), as well as the .fan and .fans gTLDs ([Annexes 42 and 43](#)), the .gift and .gifts gTLDs ([Annexes 44 and 45](#)), the .loan and .loans gTLDs ([Annexes 46 and 47](#)), the .new and .news gTLDs ([Annexes 48 and 49](#)), and the .work and .works gTLDs ([Annexes 50 and 51](#)). ICANN should therefore delegate both .webs and .web. If the decision to put .webs and .web in a single contention set is upheld, then ICANN should also revoke the delegation of those gTLDs with at least equal string similarities. Any other outcome would result in Vistaprint continuing to suffer discrimination. ICANN would also remain in

violation of its contractual obligations and continue to deprive registry operators of legal certainty and their legitimate expectations. The only way in which ICANN can act in accordance with its Articles of Incorporation and Bylaws is to reject the determination that .webs and .web are confusingly similar and to dissolve the resulting contention set.

41. At the very least, it must be ordered that the SCO determination on Vistaprint's application is re-evaluated in accordance with the same procedure and with similar recommendations as in the re-evaluation procedures on the United TLD Determination and the Onlineshopping Determination. The appointed panel should take into account (i) the ICANN Board's resolutions on singular and plural gTLDs, on the DERCars Determination, on the United TLD Determination, and on the Onlineshopping Determination, and (ii) ICANN's decisions to delegate the car and .cars gTLDs, the .auto and .autos gTLDs, the .accountant and .accountants gTLDs, the .fan and .fans gTLDs, the .gift and .gifts gTLDs, the .loan and .loans gTLDs, the .new and .news gTLDs and the .work and .works gTLDs. For reasons of procedural economy, Vistaprint sees no reason why the IRP Panel would not be entitled to make such a determination.

V. RELIEF REQUESTED

42. In light of the foregoing and Vistaprint's request for IRP, Vistaprint respectfully requests that the IRP Panel issue a declaration:

- Finding that ICANN breached its Articles of Incorporation, its Bylaws, and the gTLD Applicant Guidebook;
- Requiring that ICANN reject the determination that .webs and .web are confusingly similar and disregard the resulting contention set;
- In subordinate order, requiring that ICANN organizes a new independent and impartial string confusion objection procedure, according to which a three-member panel re-evaluates the Expert Determination in the matter before the ICDR with case numbers 50 504 T 00221 13 and 50 504 T 00246 13, taking into account (i) the ICANN Board's resolutions on singular and plural gTLDs, on the DERCars Determination, on the United TLD Determination, and on the Onlineshopping Determination, and (ii) ICANN's decisions to delegate the .car and .cars gTLDs, the .auto and .autos gTLDs, the .accountant and .accountants gTLDs, the .fan and .fans gTLDs, the .gift and .gifts gTLDs, the .loan and .loans gTLDs, the .new and .news gTLDs and the .work and .works gTLDs;
- In any event, awarding Vistaprint its costs in this proceeding; and
- In any event, awarding such other relief as the Panel may find appropriate or Vistaprint may request.

Respectfully submitted,



Flip Petillion,
Crowell & Moring LLP

Contact Information Redacted

Counsel for Claimant

List of annexes

- Annex 1 - Vistaprint's applications to operate the .webs gTLD (Application ID 1-1033-22687 and 1-1033-73917)
- Annex 2 - Overview of US and non-US members of the Webs community
- Annex 3 - Web.com, Inc.'s application to operate the .web gTLD (Application ID 1-1009-97005)
- Annex 4 - Application for gTLD '.web' by DotWeb Inc. (AE)
- Annex 5 - Application for gTLD '.web' by Charleston Road Registry Inc., (US)
- Annex 6 - Application for gTLD '.web' by Afiliis Domains No. 3 Limited (IE)
- Annex 7 - Application for gTLD '.web' by Ruby Glen, LLC (US)
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- Annex 9 - Application for gTLD '.web' by NU DOT CO LLC (US)
- Annex 10 - Vistaprint's Response to the Objection, as filed on May 22, 2013
- Annex 11 - Communication by the ICDR of May 31, 2013
- Annex 12 - Communication by the ICDR of June 28, 2013
- Annex 13 - Communication by Mr. Koh of August 8, 2013
- Annex 14 - Communication by the ICDR of September 18, 2013
- Annex 15 - Communication by the ICDR of October 1, 2013
- Annex 16 - Communication by the ICDR of October 14, 2013
- Annex 17 - Communication by Web.com of October 24, 2013
- Annex 18 - Communication by Vistaprint of October 30, 2013
- Annex 19 - Communication of the ICDR of November 4, 2013
- Annex 20 - Communication by Vistaprint of November 5, 2013
- Annex 21 - Communication by the ICDR of On November 8, 2013
- Annex 22 - Communication by the ICDR of November 20, 2013
- Annex 23 - Communication by Vistaprint of On 31 July 2013
- Annex 24 - Expert Determination in the matter before the ICDR with case numbers 50 504 T 00221 13 and 50 504 T 00246 13
- Annex 25 - Request for Reconsideration 14-5 as filed on February 6, 2014
- Annex 26 - Board Governance Committee determination on Request for Reconsideration 14-5
- Annex 27 - Vistaprint's request for a Cooperative Engagement Process on March 17, 2014
- Annex 28 - Minutes of the Meeting of the Board Governance Committee on February 27, 2014 published on March 13, 2014
- Annex 29 - Printout of the website where the String Similarity Assessment Tool is used to compare .ACCOUNTANTS and .ACCOUNTANT
- Annex 30 - Printout of the website where the String Similarity Assessment Tool is used to compare .COUPONS and .COUPON
- Annex 31 - Printout of the website where the String Similarity Assessment Tool is used to compare .IO and .JO
- Annex 32 - Independent Expert Report by Professor Piet Desmet
- Annex 33 - Supplemental Consent to Registration of Web.com with Verio
- Annex 34 - Whois records of <webs.com>
- Annex 35 - Whois records of <web.com>
- Annex 36 - Application status of the application for .car and .car Registry Agreement
- Annex 37 - Application status of the application for .cars and .cars Registry Agreement
- Annex 38 - Application status of the application for .auto and .auto Registry Agreement
- Annex 39 - Application status of the application for .autos and .autos Registry Agreement
- Annex 40 - Application status of the application for .accountant and .accountant Registry Agreement

- Annex 41 - Application status of the application for .accountants and .accountants Registry Agreement
- Annex 42 - Application status of the application for .fan and .fan Registry Agreement
- Annex 43 - Application status of the application for .fans and .fans Registry Agreement
- Annex 44 - Application status of the application for .gift and .gift Registry Agreement
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- Annex 46 - Application status of the application for .loan and .loan Registry Agreement
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- Annex 49 - Application status of the application for .news and .news Registry Agreement
- Annex 50 - Application status of the application for .work and .work Registry Agreement
- Annex 51 - Application status of the application for .works and .works Registry Agreement

List of Reference Material (RM)

1. ICANN's Articles of Incorporation
2. ICANN's Bylaws of 11 April 2013
3. ICANN's Bylaws as amended on 16 March 2012, *available at* <http://www.icann.org/en/about/governance/bylaws/bylaws-16mar12-en.htm>
4. Affirmation of Commitments
5. gTLD Applicant Guidebook (v. 2012-06-04)
6. Overview of the Internet Root Zone Database on May 15, 2013
7. Public Comment Forum for Terms of Reference for New gTLDs (6 December 2005), <http://www.icann.org/en/news/announcements/announcement-06dec05-en.htm#TOR>
8. GNSO Issues Report, Introduction of New Top-Level Domains (5 December 2005)
9. ICANN Board Resolution 2008.06.26.02, <http://www.icann.org/en/groups/board/documents/resolutions-26jun08-en.htm>
10. ICANN Board Resolution 2011.06.20.01, <http://www.icann.org/en/groups/board/documents/resolutions-20jun11-en.htm>
11. ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, <http://www.icann.org/en/groups/board/documents/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf>
12. Information on the Applicant Guidebook as published on <http://newgtlds.icann.org/en/applicants/agb>
13. New gTLD Update (30 May 2012) on the close of the TLD Application system, <http://newgtlds.icann.org/en/announcements-and-media/announcement-3-30may12-en>
14. New gTLD Draft Applicant Guidebook-Version 2: Analysis of Public Comment, p. 149, available at <http://archive.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf>
15. ICANN's call for expression of interest for new gTLD String Similarity Examiners, <http://archive.icann.org/en/topics/new-gtlds/eoi-string-sim-31jul09-en.pdf>
16. NGPC Resolution 2013.06.25.NG07
17. ICDR Supplementary Procedures for String Confusion Objections (DRSP Rules)
18. Announcement by the ICDR
19. Memorandum of Understanding between ICANN and the ICDR
20. NGPC Resolution 2014.02.05.NG02
21. Declaration of the Independent Review Panel in ICDR Case No. 50 117 T 00224 08
22. NGPC Resolutions 2014.10.12.NG02 – 2014.10.12.NG03
23. Expert Determination in the matter before the ICDR with case number 50 504 229 13
24. Expert Determination in the matter before the ICDR with case number 50 504 224 13
25. Expert Determination in the matter before the ICDR with case number 50 504 226 13
26. Expert Determination in the matter before the ICDR with case number 50 504 261 13
27. Expert Determination in the matter before the ICDR with case number 50 504 258 13
28. ICANN's Proposed Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections
29. Overview of SCO determinations
30. ICANN Generic Names Supporting Organization, Final Report - Introduction of New Generic Top-Level Domains, 8 August 2007, Part A: Final Report, <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>
31. Witness statement by Kurt Pritz of 8 October 2014
32. Declaration of the Independent Review Panel in ICDR Case No. 50 2013 001083
33. Transmittal Letter from Esther Dyson to Becky Burr of 6 November 1998.

Reference Material 45.

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

Vistaprint Limited)
Contact Information Redacted)

Claimant)

v.)

INTERNET CORPORATION FOR)
ASSIGNED NAMES AND NUMBERS)

Respondent)
_____)

ICDR Case No. 01-14-0000-6505

**SECOND ADDITIONAL SUBMISSION
IN ACCORDANCE WITH PROCEDURAL ORDER No. 2**

Flip Petillion,
Crowell & Moring LLP
Contact Information Redacted

Counsel for Claimant

1. With this additional submission, Vistaprint uses the opportunity granted by the IRP Panel to discuss the *Booking.com IRP Declaration* (**RM 38**) and the post-hearing material and communications in that matter. The post-hearing material and communications are attached as **RM 34-37**. Vistaprint is surprised that ICANN did not publish these materials *proprio motu*, and that ICANN asserted that it “*does not post IRP email correspondence on its website*”. In other matters, ICANN did post IRP email and other correspondence on its website.¹ ICANN appears to be selective about the information it publishes, and about when it publishes that information. This creates unbalanced access to information.

2. In the *Booking.com* case, the IRP Panel decided that ICANN’s process to identify confusing similarity between two strings was neither transparent nor fair. The Panel decided that the process “*lacks certain elements of transparency and certain practices that are widely associated with requirements of fairness*” (**RM 38**, para. 117). The process to which Vistaprint’s applications for .webs were subjected is a different one, but it raises the same transparency and fairness concerns as the process that is discussed in the *Booking.com IRP Declaration*. As is pointed out in a series of other cases, the lack of transparency and fairness in the implementation of the New gTLD Program is a recurrent issue.²

¹ On ICANN’s IRP webpage, accessible through <https://www.icann.org/resources/pages/accountability/irp-en>, ICANN posted the following correspondence: Chain of emails of 21 November 2014 in the IRP proceedings initiated by Donuts, Inc. (<https://www.icann.org/en/system/files/files/donuts-resolution-request-21nov14-en.pdf>); Letter of 21 November 2014 by SportAccord to the Emergency Arbitrator in the IRP proceedings initiated by Donuts, Inc. (<https://www.icann.org/en/system/files/correspondence/omahoney-et-al-to-klitgaard-21nov14-en.pdf>); Letter by counsel to ICANN of 14 October 2009 in the IRP proceedings initiated by ICM Registry, on <https://www.icann.org/en/system/files/files/icann-letter-to-panel-re-icm-post-hearing-submission-14oct09-en.pdf>; Joint letters in the IRP proceedings initiated by Manwin Licensing International, accessible through <https://www.icann.org/resources/pages/manwin-v-icann-2012-02-25-en>; Letter by counsel to DCA Trust of 29 May 2014 (<https://www.icann.org/en/system/files/files/dca-response-on-partial-reconsideration-29may14-en.pdf>) and 5 March 2015 (<https://www.icann.org/en/system/files/files/dca-response-rehear-proceedings-05mar15-en.pdf>); Letters by counsel to ICANN of 2 June 2014 (<https://www.icann.org/en/system/files/files/icann-supplemental-brief-02jun14-en.pdf>) and 26 February 2015 (<https://www.icann.org/en/system/files/files/icann-to-irp-26feb15-en.pdf>) in the IRP proceedings initiated by DCA Trust.

² See e.g., Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC v. ICANN (<https://www.icann.org/resources/pages/various-v-icann-2015-03-16-en>); Little Birch LLC and Minds + Machines Group Limited v. ICANN ([https://www.icann.org/resources/pages/birch-mmx-v-icann-2015-03-27-\(Continued...\)](https://www.icann.org/resources/pages/birch-mmx-v-icann-2015-03-27-(Continued...)))

3. The Panel acknowledged that Booking.com’s submissions were of “public interest”. For this reason, it felt compelled to depart from the standard position set out in Article IV, Section 3(18) of ICANN’s Bylaws, that provides that the: “*party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider.*” Rather, the Panel declared that ICANN should bear one half of the IRP related costs.

4. The Panel in the *Booking.com IRP Declaration* felt compelled to:

“encourage ICANN to consider whether it wishes to address these issues in an appropriate manner and forum, for example, when drafting the Guidebook for round two of the New gTLD Program or, [...] to consider whether, notwithstanding the result of the string similarity review of .hotels and .hotéis, approval of both of [the] proposed strings would be in the best interest of the Internet community” (RM 38, para. 154).

5. The Panel found in the *Booking.com IRP Declaration* that it could not grant the specific relief that Booking.com sought (RM 38, para. 153) on the basis of two central observations. First, it determined that Booking.com should have raised its concerns regarding the process at the time of the ICANN Board’s adoption of the Guidebook. Second, the Panel felt bound to defer to the wide discretion that constitutional documents afford ICANN, finding that:

“the provisions of the ICANN Bylaws establishing the Independent Review Process and defining the role of an IRP panel specify that the ICANN Board enjoys a large degree of discretion in its decisions and actions [...] The only substantive check on the conduct of the ICANN Board is that such conduct may not be inconsistent with the Articles of Incorporation or Bylaws — or, the parties agree, with the Guidebook.” (RM 38, para. 108)

6. Vistaprint will demonstrate below that:

- the Panel’s reasoning in relation to the timing of Booking.com’s action is wrong;
- the ICANN Board’s discretion is limited;
- the ICANN Board’s exercise of its discretion is subject to review by the IRP Panel;
- the IRP panel has the authority to order the ICANN Board to take specific action;
- the IRP Panel makes decisions which are binding upon ICANN.

en); dot Sport Limited v. ICANN (<https://www.icann.org/resources/pages/dot-sport-v-icann-2015-03-27-en>); Gulf Cooperation Council (GCC) v. ICANN (<https://www.icann.org/resources/pages/gcc-v-icann-2014-12-06-en>).

7. Vistaprint will demonstrate that an IRP panel can do more than merely encourage ICANN to take action. In the case at hand, the IRP Panel can and must order ICANN to take specific action.

I. VISTAPRINT'S ACTION IS TIMELY

8. Vistaprint raised its objections to the erroneous expert determination at the appropriate stage in the process. ICANN goes to great lengths to argue that the time for Vistaprint to object to the string confusion objection procedures has long passed. ICANN relies on the reasoning of the Panel in the *Booking.com IRP Declaration* (the “Booking.com Panel”) that Booking.com should have objected to the string similarity review process at the time the Guidebook was first implemented.³

9. ICANN and the Booking.com Panel’s reasoning on the timing has no merit. The Booking.com 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. At that time, neither Booking.com nor Vistaprint nor any other interested party could effectively challenge these, as yet unfinalized, processes. 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 Vistaprint to challenge the erroneous application of the Guidebook in violation of ICANN’s fundamental principles only arose when the flaws in ICANN’s implementation of the Guidebook became apparent. At the time of the adoption of the Guidebook, Vistaprint was effectively barred from challenging the Guidebook by the fact that it could not – at that time – show any harm.

10. Further, to raise an issue at that time would have required Vistaprint to reveal that it was contemplating making an application for a new gTLD, which would have encouraged

³ ICANN’s Sur-Reply of 3 April 2015, para. 28-29.

opportunistic applications seeking to extract monetary value from an application by Vistaprint by applying for a TLD corresponding to the name of a product or business entity of Vistaprint or an affiliate, like ‘.webs’.⁴

11. Booking.com raised similar concerns (RM 37), but the Booking.com Panel simply did not draw the distinction between the adoption of the general principles and their subsequent implementation. The Booking.com Panel limited its review to ICANN’s compliance to the letter of the Guidebook. It refrained from reviewing the Board’s actions in the implementation of the Guidebook, asserting that the ICANN Board has ultimate discretion whether or not to intervene.

12. Other panels disagree (*infra*). The ICANN Board’s discretion is limited (II below) and an IRP panel’s review goes beyond the question as to whether or not the ICANN Board’s actions are in contradiction with the high-level procedural framework of the Guidebook (III, IV, V below).

II. THE ICANN BOARD’S DISCRETION IS LIMITED

13. As explained in earlier submissions, ICANN only acts through its Board, and the ICANN Board has ultimate responsibility for the New gTLD Program. In its Sur-Reply ICANN confirms this, arguing that Californian law requires that all activities and affairs of ICANN be managed and that all corporate powers be exercised under the ultimate direction of the Board.⁵

14. However, the fact that the ICANN Board exercises all the corporate powers of ICANN does not mean that its actions are beyond scrutiny or that the ICANN Board has unlimited discretionary powers. The Board must still comply with its fundamental obligations and can be held accountable for any violation thereof. Ruling otherwise would mean that no Californian corporation could be held accountable in court or be subject to binding (international) arbitration.

15. In this respect, one must distinguish between i) the ICANN Board’s internal role towards its stakeholders, and ii) ICANN (and the ICANN’s Board)’s external responsibility towards third

⁴ Webs, Inc. is a subsidiary of Vistaprint.

⁵ ICANN’s Sur-Reply of 3 April 2015, para. 41.

parties. Internally, towards its stakeholders, ICANN might be able to argue that its Board retains ultimate decision-making power, subject to its governing principles. Externally, the ICANN Board's discretionary power is limited. ICANN and its Board must offer redress, when its decisions or actions harm third parties. ICANN has the obligation to act "*consistently with relevant principles of international law, including the general principles of law recognized as a source of international law*" by virtue of Article IV of the AoI (**RM 21**, para. 140).

16. The ICANN Board's latitude in its decision making does not bestow the Board with "*an unfettered discretion in making decisions. [...] The decision or action [of the ICANN Board] should be based on a reasoned judgment of the Board, not on an arbitrary exercise of discretion*" (**RM 39**, para. 76). The limitation to the ICANN Board's discretion is explicitly mentioned in the ICANN Bylaws:

"ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition." (Article II(3) of the ICANN Bylaws)

17. The obligations of the ICANN Board in its decision making are "*reinforced by the standard of review for the IRP process [...] when the action of the Board is compared to the requirements under the [AoI] and Bylaws. The standard of review includes a consideration of whether the Board exercised due diligence and care in having a reasonable amount of facts before them and also whether the Board exercised its own independent judgement*" (**RM 39**, para. 77).

III. THE IRP PANEL CONTROLS THE ICANN BOARD'S EXERCISE OF ITS DISCRETION

18. The Applicant Guidebook explicitly provides that an "*applicant may utilize any accountability mechanism set forth in ICANN's Bylaws for purposes of challenging any final decision made by ICANN with respect to the application*" (**RM 5**, Module 6-4). An ICANN decision only becomes final when its Board has expressed itself on the issue. Indeed, the ICANN Board remains responsible for the New gTLD Program (**RM 5**, Module 5-4). And any final

decision can be challenged in an IRP. Even if a decision is made entirely pursuant to the Guidebook, that decision remains subject to possible review by the IRP Panel (**RM 39**, para. 79).

19. Interventions of the ICANN Board in some cases (.cars/.car, .cam/.com and .通販/.shop) show that an expert determination on a string confusion objection (SCO) is not a final decision. The SCO expert determination only becomes final when the parties have accepted the SCO expert determination or when the ICANN Board has expressed itself on it. Any other reasoning would be impossible according to ICANN's own logic: that all activities and affairs of ICANN must be managed and that all corporate powers must be exercised under the ultimate direction of the Board.

20. When the Board intervenes (or elects not to intervene) on an SCO expert determination, that action of the Board is subject to review by the IRP Panel. As explained in detail in Vistaprint's Reply, the IRP Panel must review and determine whether the contested actions of the ICANN Board are consistent with i) ICANN's AoI and Bylaws and ii) secondary rules created by ICANN. These rules require ICANN and its Board to act in good faith and in accordance with principles of international law. The IRP Panel's mandate includes a review as to whether or not ICANN's Board discriminates in its interventions on SCO expert determinations.

21. Discriminating between applicants in its interventions on SCO expert determinations is exactly what the Board has done with respect to Vistaprint's applications.

22. ICANN's attempt to justify its disparate treatment of Vistaprint's applications is without merit. ICANN argues that its Board only intervened with respect to specific expert determinations because there had been several expert determinations regarding the same strings that were seemingly inconsistent.⁶ Vistaprint recognizes that the ICANN Board intervened to address "*perceived inconsistent or otherwise unreasonable SCO Expert Determinations*" (**RM 22**).

⁶ ICANN's Sur-Reply of 3 April 2015, para. 5.

However, ICANN fails to explain why the SCO Expert Determination on Vistaprint's .webs applications was not just as unreasonable as the SCO Expert Determinations involving .cars/.car, .cam/.com and .通販/.shop. Indeed, the determination concerning Vistaprint's .webs applications expressly relies on the determination concerning .cars/.car, that was considered inconsistent or otherwise unreasonable by the ICANN Board that rejected the reasoning applied in the two other .cars/.car expert determinations (**Annex 24**, pp. 16-18).

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

IV. THE IRP PANEL HAS THE AUTHORITY TO ORDER THAT THE ICANN BOARD REJECT THE CHALLENGED EXPERT DETERMINATION

24. The right to an independent review is "*a significant and meaningful one under the ICANN's Bylaws. This is so particularly in light of the importance of ICANN's global work in overseeing the DNS for the Internet and also the weight attached by ICANN itself to the principles of accountability and review which underpin the IRP process*" (**RM 39**, para. 59). The IRP Panel's authority is not limited to declare that ICANN breached its obligations under its AoI, Bylaws and the Applicant Guidebook. To offer effective redress to applicants, the IRP Panel may indicate what action ICANN must take to cease violating these obligations. The point is all the stronger here, as ICANN conceived the IRP to be the sole dispute resolution mechanism available to new gTLD applicants (*infra*).

25. In the case at hand, the only way in which ICANN can act in accordance with its AoI and Bylaws is to reject the determination that .webs and .web are confusingly similar. ICANN must also disregard the resulting contention set, failing which ICANN continues to be in breach.

26. In the alternative, ICANN must reject the determination that .webs and .web are confusingly similar and organize a new and independent and impartial SCO procedure, as specified in Vistaprint's request for IRP. However, being an ICDR panel, there is no reason why this IRP Panel could not serve as the panel in said SCO procedure.

V. THE IRP PANEL RENDERS DECISIONS THAT ARE BINDING UPON ICANN

27. The IRP has all the characteristics of an international arbitration. The IRP is conducted pursuant to a set of independently developed international arbitration rules: the ICDR's International Arbitration Rules ("ICDR Rules") as minimally modified by the Supplementary Procedures for ICANN Independent Review Process ("Supplementary Procedures"). The IRP is administered by a provider of international arbitration services. The decision-maker is not ICANN, but a panel of neutral individuals selected by the parties in consultation with the ICDR, and appointed pursuant to the ICDR Rules.

28. Within its New gTLD Program, ICANN conceived the IRP as an alternative to dispute resolution by courts. To submit a new gTLD application, Vistaprint had to agree to eight pages of terms and conditions (**RM 5**, Module 6). The terms and conditions include a waiver of all of Vistaprint's rights to challenge ICANN's decisions on Vistaprint's applications in court, or in any other judicial forum, provided that, as an applicant, Vistaprint may utilize any accountability mechanism set forth in ICANN's Bylaws (**RM5**, Module 6-4). "*[A]ssuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, the ultimate 'accountability' remedy for [Vistaprint] is the IRP*" (**RM 32**, para. 40).

29. The IRP is not a mere "corporate accountability mechanism" aimed at ICANN's internal stakeholders. The IRP is open to *any* person materially affected by a decision or action by the Board (Article IV(3)(2) of ICANN's Bylaws). It is made explicitly available to applicants (**RM 5**, Module 6-4), who are by definition third parties.

30. The IRP cannot be an effective and robust mechanism for accountability – as required under ICANN's Affirmation of Commitments (**RM 4**, Article 9.1) and ICANN's Bylaws (**RM2-3**, Article I(2)(10) – unless it is binding upon ICANN. Otherwise, the ICANN Board's discretion would indeed be unfettered and ICANN's AoI and Bylaws would be moot.

31. As mentioned in Vistaprint's Reply, a previous IRP panel ruled that "*[v]arious provisions of ICANN's Bylaws and the Supplementary Procedures support the conclusion that the [IRP] Panel's decisions, opinions and declarations are binding*" and that "*[t]here is certainly nothing*

in the Supplementary Rules that renders the decisions, opinions and declarations of the [IRP] Panel either advisory or non-binding” (RM 32, para. 98).

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

33. Finally, even if ICANN’s Bylaws and Supplementary Procedures are ambiguous – *quod non* – on the question of whether or not an IRP Declaration is binding, this ambiguity would weigh against ICANN. The relationship between ICANN and Vistaprint is clearly an adhesive one. In such a situation, the rule of *contra proferentem* applies. As the drafter and architect of the IRP Procedure, it was possible for ICANN, and clearly within its power, to adopt a procedure that

expressly and clearly announced that the decisions, opinions and declarations of IRP Panels were advisory only. ICANN did not adopt such a procedure (RM 32, paras. 108-109).

34. For all these reasons, the IRP Declaration is binding upon ICANN.

VI. RELIEF REQUESTED

35. In light of the foregoing, Vistaprint's request for IRP and Vistaprint's Reply, Vistaprint respectfully requests that the IRP Panel issue a declaration:

- Finding that ICANN breached its Articles of Incorporation, its Bylaws, and the gTLD Applicant Guidebook;
- Requiring that ICANN reject the determination that .webs and .web are confusingly similar and disregard the resulting contention set;
- In the alternative, requiring that ICANN reject the determination that .webs and .web are confusingly similar and organize a new independent and impartial string confusion objection procedure, during which a three-member panel re-evaluate the Expert Determination in the matter before the ICDR with case numbers 50 504 T 00221 13 and 50 504 T 00246 13, taking into account (i) the ICANN Board's resolutions on singular and plural gTLDs, on the DERCars Determination, on the United TLD Determination, and on the Onlineshopping Determination, and (ii) ICANN's decisions to delegate the .car and .cars gTLDs, the .auto and .autos gTLDs, the .accountant and .accountants gTLDs, the .fan and .fans gTLDs, the .gift and .gifts gTLDs, the .loan and .loans gTLDs, the .new and .news gTLDs and the .work and .works gTLDs;
- In any event, awarding Vistaprint its costs in this proceeding; and
- In any event, awarding such other relief as the Panel may find appropriate or Vistaprint may request.

Respectfully submitted,

Flip Petillion
April 24, 2015

Flip Petillion,
Crowell & Moring LLP

Contact Information Redacted

Counsel for Claimant

List of annexes

- Annex 1 - Vistaprint's applications to operate the .webs gTLD (Application ID 1-1033-22687 and 1-1033-73917)
- Annex 2 - Overview of US and non-US members of the Webs community
- Annex 3 - Web.com, Inc.'s application to operate the .web gTLD (Application ID 1-1009-97005)
- Annex 4 - Application for gTLD '.web' by DotWeb Inc. (AE)
- Annex 5 - Application for gTLD '.web' by Charleston Road Registry Inc., (US)
- Annex 6 - Application for gTLD '.web' by Afilias Domains No. 3 Limited (IE)
- Annex 7 - Application for gTLD '.web' by Ruby Glen, LLC (US)
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- Annex 10 - Vistaprint's Response to the Objection, as filed on May 22, 2013
- Annex 11 - Communication by the ICDR of May 31, 2013
- Annex 12 - Communication by the ICDR of June 28, 2013
- Annex 13 - Communication by Mr. Koh of August 8, 2013
- Annex 14 - Communication by the ICDR of September 18, 2013
- Annex 15 - Communication by the ICDR of October 1, 2013
- Annex 16 - Communication by the ICDR of October 14, 2013
- Annex 17 - Communication by Web.com of October 24, 2013
- Annex 18 - Communication by Vistaprint of October 30, 2013
- Annex 19 - Communication of the ICDR of November 4, 2013
- Annex 20 - Communication by Vistaprint of November 5, 2013
- Annex 21 - Communication by the ICDR of On November 8, 2013
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- Annex 23 - Communication by Vistaprint of On 31 July 2013
- Annex 24 - Expert Determination in the matter before the ICDR with case numbers 50 504 T 00221 13 and 50 504 T 00246 13
- Annex 25 - Request for Reconsideration 14-5 as filed on February 6, 2014
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- Annex 27 - Vistaprint's request for a Cooperative Engagement Process on March 17, 2014
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- Annex 29 - Printout of the website where the String Similarity Assessment Tool is used to compare .ACCOUNTANTS and .ACCOUNTANT
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- Annex 33 - Supplemental Consent to Registration of Web.com with Verio
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- Annex 49 - Application status of the application for .news and .news Registry Agreement
- Annex 50 - Application status of the application for .work and .work Registry Agreement
- Annex 51 - Application status of the application for .works and .works Registry Agreement

List of Reference Material (RM)

1. ICANN's Articles of Incorporation
2. ICANN's Bylaws of 11 April 2013
3. ICANN's Bylaws as amended on 16 March 2012, *available at* <http://www.icann.org/en/about/governance/bylaws/bylaws-16mar12-en.htm>
4. Affirmation of Commitments
5. gTLD Applicant Guidebook (v. 2012-06-04)
6. Overview of the Internet Root Zone Database on May 15, 2013
7. Public Comment Forum for Terms of Reference for New gTLDs (6 December 2005), <http://www.icann.org/en/news/announcements/announcement-06dec05-en.htm#TOR>
8. GNSO Issues Report, Introduction of New Top-Level Domains (5 December 2005)
9. ICANN Board Resolution 2008.06.26.02, <http://www.icann.org/en/groups/board/documents/resolutions-26jun08-en.htm>
10. ICANN Board Resolution 2011.06.20.01, <http://www.icann.org/en/groups/board/documents/resolutions-20jun11-en.htm>
11. ICANN Board Rationales for the Approval of the Launch of the New gTLD Program, <http://www.icann.org/en/groups/board/documents/rationale-board-approval-new-gtld-program-launch-20jun11-en.pdf>
12. Information on the Applicant Guidebook as published on <http://newgtlds.icann.org/en/applicants/agb>
13. New gTLD Update (30 May 2012) on the close of the TLD Application system, <http://newgtlds.icann.org/en/announcements-and-media/announcement-3-30may12-en>
14. New gTLD Draft Applicant Guidebook-Version 2: Analysis of Public Comment, p. 149, available at <http://archive.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf>
15. ICANN's call for expression of interest for new gTLD String Similarity Examiners, <http://archive.icann.org/en/topics/new-gtlds/eoi-string-sim-31jul09-en.pdf>
16. NGPC Resolution 2013.06.25.NG07
17. ICDR Supplementary Procedures for String Confusion Objections (DRSP Rules)
18. Announcement by the ICDR
19. Memorandum of Understanding between ICANN and the ICDR
20. NGPC Resolution 2014.02.05.NG02
21. Declaration of the Independent Review Panel in ICDR Case No. 50 117 T 00224 08
22. NGPC Resolutions 2014.10.12.NG02 – 2014.10.12.NG03
23. Expert Determination in the matter before the ICDR with case number 50 504 229 13
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27. Expert Determination in the matter before the ICDR with case number 50 504 258 13
28. ICANN's Proposed Review Mechanism to Address Perceived Inconsistent Expert Determinations on String Confusion Objections
29. Overview of SCO determinations
30. ICANN Generic Names Supporting Organization, Final Report - Introduction of New Generic Top-Level Domains, 8 August 2007, Part A: Final Report, <http://gns0.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>
31. Witness statement by Kurt Pritz of 8 October 2014
32. Declaration of the Independent Review Panel in ICDR Case No. 50 2013 001083
33. Transmittal Letter from Esther Dyson to Becky Burr of 6 November 1998;
34. New gTLD Draft Applicant Guidebook: Analysis of Public Comment (18 February 2009), <https://archive.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf>

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36. Public comment on string similarity algorithm by Mr. Davis, <http://forum.icann.org/lists/gtld-guide/msg00021.html>
37. Post-hearing communications in ICDR Case No. 50-20-1400-0247
38. Final Declaration of the Independent Review Process Panel in ICDR Case No. 50-20-1400-0247
39. Interim Declaration on Emergency Request for Interim Measures of Protection in ICDR Case No. 01-14-0002-1065 (12 February 2015)

Reference Material 46.



New gTLD Program
Community Priority Evaluation Report
Report Date: 13 March 2015

Application ID:	1-890-52063
Applied-for String:	SHOP
Applicant Name:	GMO Registry, Inc.

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	Did Not Prevail
<p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.</p> <p>Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.</p>	

Panel Summary

Overall Scoring	6 Point(s)	
<u>Criteria</u>	<u>Earned</u>	<u>Achievable</u>
#1: Community Establishment	0	4
#2: Nexus between Proposed String and Community	0	4
#3: Registration Policies	3	4
#4: Community Endorsement	3	4
Total	6	16
Minimum Required Total Score to Pass <u>14</u>		

Criterion #1: Community Establishment	0/4 Point(s)
1-A Delineation	0/2 Point(s)
<p>The Community Priority Evaluation panel determined that the community as defined by the application did not meet the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook (AGB), as the community defined in the application does not demonstrate sufficient delineation, organization, or pre-existence. The application received a score of 0 out of 2 points under criterion 1-A: Delineation.</p>	

Delineation

Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition¹ and there must be awareness and recognition of a community (as defined by the application) among its members.

The membership definition articulated in the application is as follows:

The target community for .SHOP is business entities or organizations that deploy commercial activities in an online or offline environment or provide information in relation thereto over the Internet. Their common goal is to sell products and services to third parties, using the Internet as a direct or indirect sales channel.

Under .SHOP, only those who engage or intend to engage in commercial activities qualify to register domain names, if they meet requirements that – once finalized – will be laid down by the Applicant.

The application states that the community it is committing to serve “is a broad and heterogeneous community not defined by any geographical borders, limited to certain cultures or form of trade,” but states that the “community can be delineated more specifically” by the following parameters:

- community members deploy commercial activities with a certain continuity, whereas most Internet users only sporadically engage in commercial transactions, mainly as buyers (demand side);
- in some countries, to deploy commercial activities, registration with an official register is required prior to or shortly after engaging in such activities; and, in some countries, a VAT or sales tax number, or equivalent thereof is also required;
- those engaging in ecommerce related activities have 1 or more websites on which they offer products or services etc. Internet users in general do not usually have transactional websites, and use the Internet only for trading in their own name and for their own purpose. Also, generally, Internet users are not engaged in marketing activities or promotional campaigns for products or services;
- in some countries, specific commercial activities are regulated by an official or non-official body.

According to the AGB, “Delineation relates to the membership of a community, where a clear and straightforward membership definition scores high, while an unclear, dispersed or unbound definition scores low.” The membership definition for the proposed .SHOP community is dispersed and unbound. The application states that, “members must deploy commercial activities with a certain continuity,” but what qualifies as “certain continuity”, a key element of the community’s delineation, is insufficiently detailed in the application. Moreover, the applicant seeks to delineate some of its members by way of their “commercial activities” being “regulated by an official or non-official body” but this proposed delineating measure lacks the clarity and specificity that would adequately delimit any subset of entities. This unclear requirement furthermore only applies “in some countries” and in others it is unclear whether any “official” or “non-official” regulation would help to delineate membership at all. In sum, the application fails to articulate with adequate precision attributes that clearly and straight-forwardly define the membership of the proposed community. Instead, the application materials demonstrate that the membership of the community is unbound and dispersed.

According to the AGB’s second Delineation criterion, “community” implies “more of cohesion than a mere commonality of interest” and there should be “an awareness and recognition of a community among its members.” The community as defined in the application does not demonstrate an awareness and recognition among its members. The application materials and further research provide no substantive evidence of what the AGB calls “cohesion” – that is, that the various members of the community as defined by the application are “united or form a whole” (Oxford Dictionaries).

The application cites a “common goal” of community members “to sell products and services... using the Internet” but this does not meet the AGB’s standard of cohesion. While any person or organization engaged

¹ According to the AGB, “an unclear, dispersed, or unbound definition scores low” (ICANN Applicant Guidebook 4.2.3)

in business has an implicit goal to sell a good or service, this goal – or this “commonality of interest” – does not constitute participation in, awareness of or recognition of a community among its members. The lack of required cohesion stems from the defined community’s breadth, encompassing all entities that engage or intend to engage in online commercial activities as sellers. This definition is (1) too broad a delineating measure and (2) does not ensure that the various entities defined cohere in any way with one another, despite their engaging in commercial activities. The community as defined in the application, according to its own estimates, includes from hundreds of thousands to millions of retailers and service providers. However, the application provides no information regarding awareness and recognition among the proposed community’s members. Furthermore, based on the Panel’s research, various representative entities in this cohort do not show an awareness or recognition of the several other parts of the applicant’s proposed community, whether by way of interaction or an explicit statement of cohesion.²

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for delineation.

Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities.

According to the AGB, “organized” implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.” There must exist, therefore, at least one organization that encompasses entities in all the fields of business included in the application’s membership definition, including but not limited to the examples cited in the previous section. That entity must also have documented evidence of community activities. Based on information provided in the application materials and the Panel’s research, there is no entity that organizes the community defined in the application, in all the breadth of categories explicitly and implicitly defined.

The community as defined in the application is dispersed geographically and across a wide array of business types and activities, including all business entities or organizations that deploy commercial activities in an online or offline environment. According to the application:

There is no worldwide coordinating body representing the entire community, though there are organizations and associations related to the industry at regional, national, state, and city levels, such as Chambers of Commerce, professional employer organizations, etc. The targeted community members are globally distributed, with organized activities undertaken by various organizations, stakeholder groups, etc.

Globally, various organizations represent the interests of businesses, including the International Chamber of Commerce (ICC), Business Europe, the International Fair Trade Association, etc. On a national or regional level, community members are organizing themselves in an attempt to promote use of the Internet in commercial activities, and establish trust in ecommerce.

The application therefore acknowledges that there is no entity mainly dedicated to the community as defined by the application. The ICC, for example, although it represents businesses of all sizes in more than 120 countries, has a remit to work with and represent entities which themselves conduct international or cross-border business and/or have an active involvement in international economic and business issues. The ICC with its members aims to “shape rules and policies that stimulate international trade and investment”³. This mission does not represent, for example, the many entities included in the application’s community definition that have no ties to international business, including individually owned and operated businesses that are not members of the ICC and whose business is not served by the work of the ICC. Other organizations with a large geographic remit, those cited in the application and others in the Panel’s review, are similarly limited in

² The Panel acknowledges that an exhaustive review of all proposed community member entities is not possible and has reviewed a number of representative examples to determine awareness and recognition among proposed community members.

³ <http://www.iccwbo.org/worldwide-membership/members/members/>

the type of businesses to which they cater.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for organization.

Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed) and must display an awareness and recognition of a community among its members.

The community as defined in the application was not active prior to September 2007. According to section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to obtain a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application). The Panel determined that this application refers to a “community” construed to obtain a sought-after generic word as a gTLD string, and that the application is attempting to organize the various groups mentioned in the documentation through a gTLD. The proposed community therefore could not have been active prior to the above date (although many of its constituent parts were active).

According to the application,

Community activities include, but are not limited to, buying, selling, exchanging, trading and leasing of goods, services, information, or any other property on the Internet, or activities of a similar nature. Since the community is not represented by a single organization, there is no one establishment date.

The application refers to several organizations that existed prior to 2007, including organizations that have endorsed its application and others that represent parts of the defined community. However, the fact that these organizations were active prior to 2007 does not mean that these organizations were active as a community prior to 2007, as required by the AGB guidelines.

The Panel determined that the community as defined in the application does not fulfill the requirements for pre-existence.

1-B Extension

0/2 Point(s)

The Panel determined that the community as identified in the application did not meet the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as the application did not fulfill the requirements for size, nor demonstrate the longevity of the community. The application received a score of 0 out of 2 points under criterion 1-B: Extension.

Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size. The community for .SHOP as defined in the application is large both in terms of geographical reach and number of members. According to the applicant:

Given its nature, it is difficult to demonstrate community size: statistics vary from hundreds of thousands to millions of entities who sell products and services using the Internet. On a daily basis, new businesses appear, and existing merchants go out of business...

According to a recent report by EURid, the registry operator for .EU, 26.5% of domain names in their sample pointed to websites used for business purposes...

If we extrapolate this result to the total number of domain names registered in the world, and

conservatively estimate the number of community members, the result is that currently about 40-50 million websites exist with commercial characteristics.

However, as previously noted, the community as defined in the application does not show evidence of “cohesion” among its members, as required by the AGB.⁴ Therefore, it fails the second criterion for Size. The Panel determined that the community as defined in the application meets only one of the two criteria required.

Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application does not demonstrate longevity. According to section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to get a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application).

The Panel determined that this application refers to a proposed community construed to obtain a sought-after generic word as a gTLD. Moreover, the applicant appears to be attempting to use the gTLD to organize the various groups noted in the application documentation, as opposed to applying on behalf of an already organized and cohesive community. As previously stated, the community as defined in the application does not have awareness and recognition among its members. Failing this kind of “cohesion,” the community defined by the application does not meet the AGB’s standards for a community. Therefore, as a construed community, the proposed community cannot meet the AGB's requirements for longevity.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for longevity.

Criterion #2: Nexus between Proposed String and Community	0/4 Point(s)
2-A Nexus	0/3 Point(s)
<p>The Panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB. The string does not identify or match the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.</p> <p>To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community name. To receive a partial score for Nexus (of 2 out of 3 points; 1 point not possible), the applied-for string must identify the community. “Identify” means that the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community.</p> <p>The application for .SHOP defines the community as “business entities or organizations that deploy commercial activities in an online or offline environment... using the Internet as a direct or indirect sales channel.” According to the application documentation:</p> <p style="padding-left: 40px;">The target community does not have one “name”, members have several common characteristics and features, and their activities (and industry) are generally referred to as “online shopping”, “ecommerce”, “ebusiness”, etc...</p> <p>[SHOP] is a commonplace word for a location – in the real or virtual world – where commercial</p>	

⁴As stated previously, according to the AGB, “community” implies “more of cohesion than a mere commonality of interest... There should be: (a) an awareness and recognition of a community among its members...” Failing such qualities, the AGB’s requirements for community establishment are not met.

activities are deployed, products or services are offered for sale and can be bought...

The applied-for string does not match the name of the community as defined in the application and the application itself cites several other names (“online shopping,” “ecommerce,” and “ebusiness”) that are applied to the proposed community members as defined in its application. According to the AGB, match means “the established name by which the community is commonly known by others.” The application’s reference to several other names by which its proposed community members are known indicates, therefore, the applied-for string “SHOP” does not *match* the name of the community as the AGB requires for a full score.

The applied-for string furthermore does not *identify* the defined community, as the AGB requires for a partial score, because the applicant is over-reaching in its use of the applied-for string “SHOP” in its reference to all the members of the community it describes. The applied-for string does identify some entities that the application intends to include in its proposed community. For example, the application cites as an example of a community member The Body Shop “retail business”, an international chain of over 2,000 stores. However, the application does not offer any other examples that are identified by the applied-for string “SHOP”. In particular, it does not cite any examples of “organizations that deploy commercial activities” but whose names do not include the word “shop” or whose places of business are not physical storefronts where “retail business” occurs, as in the case of The Body Shop. The application similarly does not offer any reason why such entities, even in the absence of any examples, might be considered to be identified by the string.

The Panel’s research has included a broad review of publicly available information related to sellers of services, including legal, media, consulting, and financial⁵. Many of these entities are not identified by the word “SHOP”, which, as the application acknowledges, “is a commonplace word for a location – in the real or virtual world – where commercial activities are deployed, products or services are offered for sale and can be bought.” For example, a commercial bank is a business entity that deploys commercial activities (e.g. banking services, insurance services, retirement investments, etc.) in an online and offline environment, and also provides information in relation thereto over the Internet. A commercial bank sells services to third parties, using the Internet as a direct or indirect sales channel, thereby placing it within the community proposed by the application⁶. However, the string “SHOP” does not identify a commercial bank. According to the AGB, in order for the string “SHOP” to *identify* a commercial bank, the string must “closely describe” it. However, following the Panel’s review of online and other documented usages of the word “shop”, neither the word “bank” nor any of the unique functions of a commercial bank are described by “shop”. Furthermore, the websites of commercial banks, and the mission statements of associations of commercial banks that were reviewed by the Panel do not use the word “shop” to describe their business. Therefore, the applied-for string “SHOP” does not identify this sub-set of proposed community members. Given the size of the commercial banking sector⁷, this sub-set of entities not identified by the applied-for string is substantial.

The Panel determined that while “SHOP” does identify some businesses providing goods and services, the applied-for string does not match or identify the community or the community members as defined in the application. It therefore does not meet the requirements for Nexus.

⁵ The application states, “The target community for .SHOP is business entities or organizations that deploy commercial activities in an online or offline environment or provide information in relation thereto over the Internet. Their common goal is to sell products and services to third parties, using the Internet as a direct or indirect sales channel.” Thus entities such as those included in the Panel’s research are presumed to fall within the proposed community membership.

⁶ As discussed above, the parameters for inclusion in this proposed community fail the AGB’s requirements for a clearly delineated community (see section 1: Delineation). For the purposes of evaluating Nexus, however, and so that a score of 0 in one section does not preclude the objective scoring of another section, the Panel proceeds as though some basic cohort of membership is delineated, even if, as is the case with this application, the bounds are unclear.

⁷ In the US alone there are 5,705 commercial banks each with assets totaling US\$13.5 trillion. See: <https://www.fdic.gov/bank/statistical/stats/>

2-B Uniqueness	0/1 Point(s)
<p>The Panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB as the string does not score a 2 or a 3 on Nexus. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.</p> <p>To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application and it must also score a 2 or a 3 on Nexus. The string as defined in the application does not demonstrate uniqueness as the string does not score a 2 or a 3 on Nexus and is therefore ineligible for a score of 1 for Uniqueness. This is based on the Panel’s determination that the applied-for string “.SHOP” does not identify the community defined by the application according to AGB standards. Therefore, since the string does not identify the community, it cannot be said to “have no other significant meaning <i>beyond identifying the community</i>” (emphasis added, AGB). The Panel determined that the applied-for string does not satisfy the condition to fulfill the requirements for Uniqueness.</p>	

Criterion #3: Registration Policies	3/4 Point(s)
3-A Eligibility	1/1 Point(s)
<p>The Panel determined that the application meets the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.</p> <p>To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. According to the application:</p> <p style="padding-left: 40px;">The Applicant intends to put in place the following eligibility requirements for registrants in .SHOP: In order to qualify for registering a domain name in the .SHOP TLD, the registrant must be a business entity or organization that deploys commercial activities in an online or offline environment, i.e. offering for sale and selling products or services on a more than occasional basis, or provide information in relation thereto over the Internet.</p> <p style="padding-left: 40px;">.SHOP domain name registrations will also be made available to business entities or organizations that currently do not deploy commercial activities, but that have expressed intention to engage in the activities within one year following the registration of a .SHOP domain name.</p> <p>The application therefore demonstrates adherence to the AGB’s requirement by restricting domain registration to individuals who are members of the community defined by the application. The Panel determined that the application satisfies the condition to fulfill the requirements for Eligibility.</p>	
3-B Name Selection	1/1 Point(s)
<p>The Panel determined that the application meets the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria). The application provides evidence that the name selection rules included are consistent with the articulated community-based purpose of the applied-for TLD. The application therefore received a score of 1 point under criterion 3-B: Name Selection.</p> <p>To fulfill the requirements for Name Selection, the registration policies for name selection for registrants must be consistent with the articulated community-based purpose of the applied-for gTLD. According to the application:</p> <p style="padding-left: 40px;">Registrants will be entitled to register domain names that are identical or similar to their current or future trademark, business name, trade name, business identifier, name of business entity or organization, names under which they are commonly known, slogans, acronyms, etc., including combinations thereof, in the .SHOP gTLD.</p> <p>The application therefore demonstrates adherence to the AGB’s requirement of name selection rules that are consistent with the application’s community-based purpose, which “is to establish a clear, unambiguous and easy to remember online identity for the community and promote a defined, meaningful, and secure</p>	

namespace in order to contribute to the further development of the community and the (commercial) activities of its members.”

3-C Content and Use

1/1 Point(s)

The Panel determined that the application meets the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria). The application provides evidence that the content and use rules included are consistent with the articulated community-based purpose of the applied-for TLD. The application therefore received a score of 1 point under criterion 3-C: Content and Use.

To fulfill the requirements for Content and Use, the registration policies for content and use must be consistent with the articulated community-based purpose of the applied-for gTLD. According to the application:

- a. Registered .SHOP domain names must be used for commercial activities in an online or offline environment or to provide information in relation thereto over the internet; or
- b. Registered .SHOP domain names must be intended to be used for commercial activities in an online or offline environment or to provide information in relation thereto over the internet.

Registering a .SHOP domain name solely for the purpose of selling, exchanging, trading, or leasing such domain name shall be deemed as inappropriate use or intent, and will be prohibited by the registry operator.

The application therefore demonstrates adherence to the AGB’s requirement of content and use rules that are consistent with the application’s community-based purpose, which “is to establish a clear, unambiguous and easy to remember online identity for the community and promote a defined, meaningful, and secure namespace in order to contribute to the further development of the community and the (commercial) activities of its members.”

3-D Enforcement

0/1 Point(s)

The Panel determined that the application does not meet the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB. The application provides specific enforcement measures but does not include a coherent and appropriate appeals mechanisms. The application received a score of 0 points under criterion 3-D: Enforcement.

Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. The applicant outlined policies that include specific enforcement measures constituting a coherent set. The applicant outlines a comprehensive list of investigation procedures, and circumstances in which the registry is entitled to suspend domain names. The application does not, however, make reference to an appeals process. It refers to “a grace period within which the registrant needs to demonstrate that registration and/or use of the domain name is compliant with” the policies that have allegedly been violated, but not an appeals mechanism. The Panel determined that the application satisfies only one of the two conditions to fulfill the requirements for Enforcement and therefore scores 0 points.

Criterion #4: Community Endorsement

3/4 Point(s)

4-A Support

1/2 Point(s)

The Panel determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.

To receive the maximum score for Support, the applicant is, or must have documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. “Recognized” means that the institution(s)/organization(s), through membership or otherwise, are clearly recognized by the community members as representative of the community as a whole. To receive a partial score for Support, the applicant must have documented support from at least one

group with relevance. “Relevance” refers to the communities explicitly and implicitly addressed by the application.

The Panel determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s). A recognized community institution or member organization is one which not only (1) represents the entirety of the community as defined by the application (in all its breadth of categories as described in Delineation), but is also (2) recognized by the same community as its representative. No such organization among the applicant’s supporters demonstrates the kind of structure required to be a “recognized” organization, as per AGB guidelines, and the Panel has determined that no such organization exists. However, the applicant possesses documented support from at least one group with relevance and this documentation contained a description of the process and rationale used in arriving at the expression of support, as required by the AGB. The Community Priority Evaluation Panel determined that the applicant partially satisfies the requirements for Support. See also the table in the following subsection for a summary of all pieces of support and opposition.

4-B Opposition 2/2 Point(s)

The Community Priority Evaluation panel determined that the application met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application did not receive any relevant opposition. The application received the maximum score of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one group of non-negligible size.

The application received one letter of opposition, determined not to be relevant, as it was (1) not from communities either explicitly mentioned in the application nor from those with an implicit association to such communities, and/or (2) made for a purpose incompatible with competition objectives. The Community Priority Evaluation Panel determined that the applicant fully satisfies the requirements for Opposition. The table below summarizes the review and verification results for all pieces of support and opposition related to this application for the applied-for string “SHOP”:⁸

	Total	Total Valid for Verification	Verification Attempted	Successfully Verified
Comments	1 (not support or opposition)	0	0	0
Attachments to 20(f)	5 (all support)	5	5	2
Correspondence	1 (opposition)	0	0	0
Grand Total	7	5	5	2

Disclaimer: Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the AGB or the Registry Agreement. For updated application status and complete details on the program, please refer to the AGB and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

⁸ Details and procedures regarding the review and verification of pieces of support and opposition can be found on the ICANN CPE website: <http://newgtlds.icann.org/en/applicants/cpe>

Reference Material 47.



New gTLD Program
Community Priority Evaluation Report
Report Date: 21 May 2015

Application ID:	1-1830-1672
Applied-for String:	SHOP
Applicant Name:	Commercial Connect LLC

Overall Community Priority Evaluation Summary

Community Priority Evaluation Result	Did Not Prevail
<p>Thank you for your participation in the New gTLD Program. After careful consideration and extensive review of the information provided in your application, including documents of support, the Community Priority Evaluation panel determined that the application did not meet the requirements specified in the Applicant Guidebook. Your application did not prevail in Community Priority Evaluation.</p> <p>Your application may still resolve string contention through the other methods as described in Module 4 of the Applicant Guidebook.</p>	

Panel Summary

Overall Scoring	5 Point(s)																		
<table border="1"> <thead> <tr> <th>Criteria</th> <th>Earned</th> <th>Achievable</th> </tr> </thead> <tbody> <tr> <td>#1: Community Establishment</td> <td align="center">0</td> <td align="center">4</td> </tr> <tr> <td>#2: Nexus between Proposed String and Community</td> <td align="center">0</td> <td align="center">4</td> </tr> <tr> <td>#3: Registration Policies</td> <td align="center">3</td> <td align="center">4</td> </tr> <tr> <td>#4: Community Endorsement</td> <td align="center">2</td> <td align="center">4</td> </tr> <tr> <td>Total</td> <td align="center">5</td> <td align="center">16</td> </tr> </tbody> </table> <p>Minimum Required Total Score to Pass <u>14</u></p>	Criteria	Earned	Achievable	#1: Community Establishment	0	4	#2: Nexus between Proposed String and Community	0	4	#3: Registration Policies	3	4	#4: Community Endorsement	2	4	Total	5	16	
Criteria	Earned	Achievable																	
#1: Community Establishment	0	4																	
#2: Nexus between Proposed String and Community	0	4																	
#3: Registration Policies	3	4																	
#4: Community Endorsement	2	4																	
Total	5	16																	

Criterion #1: Community Establishment	0/4 Point(s)
1-A Delineation	0/2 Point(s)
<p>The Community Priority Evaluation panel determined that the community as defined by the application did not meet the criterion for Delineation as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook (AGB), as the community defined in the application does not demonstrate sufficient delineation, organization, or pre-existence. The application received a score of 0 out of 2 points under criterion 1-A: Delineation.</p>	

Delineation

Two conditions must be met to fulfill the requirements for delineation: there must be a clear, straightforward membership definition¹ and there must be awareness and recognition of a community (as defined by the application) among its members.

The applicant defines its community as follows:

The community for the .SHOP will be for eCommerce Operators - For the purpose of this application we are defining our community as eCommerce operators that directly sell to the general public on the internet. This community is basically a B2C site that utilizes credit card processing requiring them to abide by PCI DSS (Payment Card Industry Data Security Standards) to operate.

The application further delineates its users from the general public with the following:

This community is easily identified as websites that have shopping cart programs that utilize SSL (Secured Socket Layer) certificates (required under PCI DSS) to process their transactions. Studies have been performed to help identify these website operators and we have a 95% confidence that we have a clear and defined subset of the internet.

According to the AGB, “Delineation relates to the membership of a community, where a clear and straightforward membership definition scores high, while an unclear, dispersed or unbound definition scores low.” Given the applicant’s restriction of its proposed community to online businesses that require use of SSL certificates, the Panel has determined that the application provides a clear and straight-forward membership definition and thus meets the first of the AGB’s two criteria for Delineation.

According to the AGB’s second Delineation criterion, “community” implies “more of cohesion than a mere commonality of interest” and there should be “an awareness and recognition of a community among its members.” The application materials and further research provide no substantive evidence of what the AGB calls “cohesion” – that is, that the various members of the community as defined by the application are “united or form a whole” (Oxford Dictionaries). The proposed community encompasses a very large and growing field of diverse and geographically dispersed online retailers. While the application’s reliance on SSL certificates delineates a subset of retailers, SSL is simply one of several necessary tools for conducting online business. Use of SSL, however, is not sufficient to ensure that all entities using it are aware of one another as a community, and that the proposed community coheres as per the AGB. Furthermore, based on the Panel’s research, various entities in the proposed community do not show an awareness or recognition of other segments of the applicant’s proposed community, whether by way of interaction or an explicit statement of cohesion.²

The Panel determined that the community as defined in the application satisfies only one of the two conditions to fulfill the requirements for delineation.

Organization

Two conditions must be met to fulfill the requirements for organization: there must be at least one entity mainly dedicated to the community and there must be documented evidence of community activities.

According to the AGB, "organized" implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.” Based on information provided in the application materials and the Panel’s research, there is no entity that is mainly dedicated to the community defined in the application.

¹ According to the AGB, “an unclear, dispersed, or unbound definition scores low” (ICANN Applicant Guidebook 4.2.3)

² The Panel acknowledges that an exhaustive review of all proposed community member entities is not possible and has reviewed a number of representative examples to determine awareness and recognition among proposed community members.

The community as defined in the application is dispersed geographically and across a wide array of business types and activities, including all business entities or organizations that sell to consumers using websites that have shopping cart programs that utilize SSL certificates to process their transactions. According to the application:

Initially, since there was no clear community representation, we worked on establishing some form of a member trade association. The result was the creation of ECWR.net (eCommerce World Retailers). This was formed in March, 2004 and clearly predates the 2007 requirement in the Applicant Guidebook.

The applicant acknowledges that the proposed community was not organized, and that it has sought to organize the proposed community members through ECWR.net, which provides information and resources to the e-commerce community. The application states that the ECWR has “in excess of 1,000 members representing a substantial amount of eCommerce,” though evidence of these retailers’ participation or of the group’s activity generally is not significant. Additionally, recent estimates put the number of US-based e-commerce retailers at over 102,000³; this figure does not include e-commerce retailers from other major global markets that the applicant also includes in its proposed community. Therefore, the ECWR is only dedicated to a subset of the community defined by the application. The applicant states that its members “represent an equivalent [*vis*] in excess of \$866 trillion in annual sales.” However, estimates of the total retail market (both online and in-store) for 2014 show total sales of around US\$22.5 trillion.⁴ Another entity to which the application makes reference, the National Retail Federation⁵, and a subsidiary organization, Shop.org, are committed to the retail (including e-commerce) community defined by the applicant, but its advocacy and policy activities are largely limited to US policy issues.⁶ Therefore, the Panel has determined that there is no entity mainly dedicated to the community in all the breadth and geographic range defined in the application.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for organization.

Pre-existence

To fulfill the requirements for pre-existence, the community must have been active prior to September 2007 (when the new gTLD policy recommendations were completed) and must display an awareness and recognition of a community among its members.

The community as defined in the application was not active prior to September 2007. According to section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to obtain a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application). The Panel determined that this application refers to a “community” construed to obtain a sought-after generic word as a gTLD string, and that the application is attempting to organize the entities described in the application materials through a gTLD. The proposed community therefore could not have been active prior to the above date (although many of its constituent parts were active).

The application refers to several organizations that existed prior to 2007, including organizations that have endorsed its application and others that represent parts of the defined community. However, the fact that

³ See <http://www.forbes.com/sites/mikalbelicove/2013/09/18/how-many-u-s-based-online-retail-stores-are-on-the-internet/>

⁴ See “Retail Sales Worldwide Will Top \$22 Trillion This Year,” <http://www.emarketer.com/Article/Retail-Sales-Worldwide-Will-Top-22-Trillion-This-Year/1011765>

⁵ According to its website, the National Retail Federation “is the world’s largest retail trade association, representing discount and department stores, home goods and specialty stores, Main Street merchants, grocers, wholesalers, chain restaurants and Internet retailers from the United States and more than 45 countries.”

⁶ See <https://nrf.com/advocacy/policy-agenda>; also see <https://nrf.com/membership/committees/shoporg-policy-advisory-group>

these organizations were active prior to 2007 does not mean that these organizations were active as part of the larger community as defined in the application prior to 2007, as required by the AGB.

The Panel determined that the community as defined in the application does not fulfill the requirements for pre-existence.

1-B Extension

0/2 Point(s)

The Panel determined that the community as identified in the application did not meet the criterion for Extension specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as the application did not fulfill the requirements for size, nor demonstrate the longevity of the community. The application received a score of 0 out of 2 points under criterion 1-B: Extension.

Size

Two conditions must be met to fulfill the requirements for size: the community must be of considerable size and must display an awareness and recognition of a community among its members.

The community as defined in the application is of considerable size. According to the application, “We currently have in excess of 1,000 members representing a substantial amount of eCommerce (these members represent an equivalent [sic] in excess of \$866 trillion in annual sales).”⁷ The community for .SHOP as defined in the application, therefore, is large both in terms of geographical reach and number of members globally. However, as previously noted, the community as defined in the application does not show evidence of “cohesion” among its members, as required by the AGB.⁸ Therefore, it fails the second criterion for Size. The Panel determined that the community as defined in the application meets only one of the two criteria required.

Longevity

Two conditions must be met to fulfill the requirements for longevity: the community must demonstrate longevity and must display an awareness and recognition of a community among its members.

The community as defined in the application does not demonstrate longevity. According to section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, the CPE process is conceived to identify qualified community-based applications, while preventing both “false positives” (awarding undue priority to an application that refers to a “community” construed merely to get a sought-after generic word as a gTLD string) and “false negatives” (not awarding priority to a qualified community application).

The Panel determined that this application refers to a proposed community construed to obtain a sought-after generic word as a gTLD. As previously stated, the community as defined in the application does not have awareness and recognition among its members. Failing this kind of “cohesion,” the community defined by the application does not meet the AGB’s standards for a community. Therefore, as a construed community, the proposed community cannot meet the AGB’s requirements for longevity.

The Panel determined that the community as defined in the application does not satisfy either of the two conditions to fulfill the requirements for longevity.

Criterion #2: Nexus between Proposed String and Community

0/4 Point(s)

2-A Nexus

0/3 Point(s)

The Panel determined that the application did not meet the criterion for Nexus as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB. The string does not identify or match the name of the community as defined in the application, nor is it a well-known short-form or abbreviation of the community. The application received a score of 0 out of 3 points under criterion 2-A: Nexus.

⁷ See footnote 4, regarding the implicit errors here; nevertheless, the size of the community as defined is substantial.

⁸As stated previously, according to the AGB, “community” implies “more of cohesion than a mere commonality of interest...There should be: (a) an awareness and recognition of a community among its members...” Failing such qualities, the AGB’s requirements for community establishment are not met.

To receive the maximum score for Nexus, the applied-for string must match the name of the community or be a well-known short-form or abbreviation of the community name. To receive a partial score for Nexus (of 2 out of 3 points; 1 point is not possible), the applied-for string must identify the community. “Identify means that the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community.”

The application for .SHOP defines the community as “eCommerce operators that directly sell to the general public on the internet.” According to the application documentation, “.SHOP matches the name of the community and is well known in many languages” and “.SHOP has no other significant meaning than eCommerce.” Elsewhere in its application, however, the applicant states a more commonly understood definition for the string: “.Shop is globally recognized and exists in excess of twenty different languages all with the same meaning: a building or room stocked with merchandise for sale: a store.”

The applied-for string does not *match* the name of the community as defined in the application. According to the AGB, a string is a “match” if it is “the established name by which the community is commonly known by others” – i.e., that the applied-for string is the same as the one name that is most commonly understood to refer to the community. However, in addition to making reference to the “SHOP” community in its application, the applicant also refers to its commitment to the “e-commerce community” in its mission statement and uses “e-commerce” throughout its application to refer to the community defined in the application. It is evident, therefore, that “SHOP” is not the *established* name as required for a string to be considered a match and that it does not meet the AGB requirements for a full score.

The applied-for string does not *identify* the defined community, as the AGB requires for a partial score. The string .SHOP over-reaches substantially beyond the applicant’s proposed community. This is because the string .SHOP identifies both online (i.e. e-commerce) as well as brick-and-mortar entities⁹ that sell goods and services. The latter represent a significant portion of overall global retail¹⁰ sales, but are not included in the applicant’s proposed community, which is “eCommerce operators that directly sell to the general public on the internet” only and not brick-and-mortar stores. Indeed, in 2014 an estimated 94.1% of global retail sales were accounted for by brick-and-mortar establishments.¹¹ Thus the string significantly overreaches beyond the proposed community.

The Panel determined that the applied-for string does not match or identify the community or the community members as defined in the application. It therefore does not meet the requirements for Nexus.

2-B Uniqueness

0/1 Point(s)

The Panel determined that the application did not meet the criterion for Uniqueness as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB as the string does not score a 2 or a 3 on Nexus. The application received a score of 0 out of 1 point under criterion 2-B: Uniqueness.

To fulfill the requirements for Uniqueness, the string must have no other significant meaning beyond identifying the community described in the application and it must also score a 2 or a 3 on Nexus. The string as defined in the application does not demonstrate uniqueness as the string does not score a 2 or a 3 on Nexus and is therefore ineligible for a score of 1 for Uniqueness. This is based on the Panel’s determination that the applied-for string “.SHOP” does not identify the community defined by the application according to AGB standards. Therefore, since the string does not identify the community, it cannot be said to “have no other significant meaning *beyond identifying the community*” (emphasis added, AGB). The Panel determined that the applied-for string does not satisfy the condition to fulfill the requirements for Uniqueness.

⁹ The applicant itself notes that “.Shop is globally recognized and exists in excess of twenty different languages all with the same meaning: a building or room stocked with merchandise for sale...”

¹⁰ The Panel acknowledges that the word “shop” may also identify establishments outside of the retail industry.

¹¹ <http://www.emarketer.com/Article/Retail-Sales-Worldwide-Will-Top-22-Trillion-This-Year/1011765>

Criterion #3: Registration Policies	3/4 Point(s)
3-A Eligibility	1/1 Point(s)
<p>The Panel determined that the application meets the criterion for Eligibility as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as eligibility is restricted to community members. The application received a maximum score of 1 point under criterion 3-A: Eligibility.</p> <p>To fulfill the requirements for Eligibility, the registration policies must restrict the eligibility of prospective registrants to community members. According to the application:</p> <p style="padding-left: 40px;">The .SHOP domain name is intended for eCommerce purposes. This means that a website using .SHOP must have eCommerce-enabled ability to provide a direct conduit to making transaction on the web. In other words, it is expected that a .SHOP website will have items or services available for sale on that site and that there is an easy path to purchasing these items. These transaction [<i>sic</i>] must also use secure communications when processing said transactions.</p> <p>The application therefore demonstrates adherence to the AGB’s requirement by restricting domain registration to individuals who are members of the community defined by the application. The Panel determined that the application satisfies the condition to fulfill the requirements for Eligibility.</p>	
3-B Name Selection	0/1 Point(s)
<p>The Panel determined that the application did not meet the criterion for Name Selection as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as name selection rules are not consistent with the articulated community-based purpose of the applied-for TLD. The application received a score of 0 out of 1 point under criterion 3-B: Name Selection.</p> <p>According to the application:</p> <p style="padding-left: 40px;">In order for an applicant to be considered “qualified” to purchase a .SHOP top-level domain name, they must go through a strict verification process where Commercial Connect researches the identity of that applicant and his business using semi-automated process patent pending processes. Once the registrant is “verified,” they are assigned a contact ID which will, then, allow them to register a .SHOP domain name. ...</p> <p style="padding-left: 40px;">The minimum character length for a domain name is one character, excluding the .SHOP extension. The maximum character length for a domain name is 63 characters excluding the extension. A domain name must not begin with a dash "-" or dot "." and must not begin with the following sequence: "alphanumeric_alphanumeric_dash ("-")_dash ("-")".</p> <p style="padding-left: 40px;">Each character in the domain name, excluding the dots (".")s must be a letter, digit, or dash ("-"). The last character must be a digit or letter. It cannot be a dash ("-").</p> <p>The application does not directly refer to its community-based purpose in discussion of name selection rules, nor are they implicitly based on the community-based purpose of the applied for TLD, which is to “aid in the the [<i>sic</i>] development of a safer, cheaper, and more secure platform for eCommerce, providing for a better online shopping experience.” Furthermore, the above mentioned technical requirements are the same as the minimum requirements for any second level domain in a gTLD, Therefore, the Panel determined that the application did not satisfy the condition to fulfill the requirements for Name Selection.</p>	
3-C Content and Use	1/1 Point(s)
<p>The Panel determined that the application meets the criterion for Content and Use as specified in section 4.2.3 (Community Priority Evaluation Criteria). The application provides evidence that the content and use rules included are consistent with the articulated community-based purpose of the applied-for TLD. The application therefore received a score of 1 point under criterion 3-C: Content and Use.</p> <p>To fulfill the requirements for Content and Use, the registration policies for content and use must be consistent with the articulated community-based purpose of the applied-for gTLD. According to the application:</p>	

Requirements for the applicant initially will be an agreement that the website will be offering goods and/or services under a secured socket layer (SSL) trusted connection. [...] There may be additional circumstances whereby it will not be required for the registrant of a .SHOP domain name have a functioning eCommerce site. [...] Generic .SHOP domain names should be eCommerce site-enabled and not forwarded to other sites. [...] property.

The application therefore demonstrates adherence to the AGB's requirement of content and use rules that are consistent with the application's community-based purpose, which is to "aid in the the [sic] development of a safer, cheaper, and more secure platform for eCommerce, providing for a better online shopping experience."

3-D Enforcement

1/1 Point(s)

The Panel determined that the application meets the criterion for Enforcement as specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB. The application provides specific enforcement measures and outlines a coherent and appropriate appeals mechanisms. The application received a score of 1 point under criterion 3-D: Enforcement.

Two conditions must be met to fulfill the requirements for Enforcement: the registration policies must include specific enforcement measures constituting a coherent set, and there must be appropriate appeals mechanisms. According to the application:

Commercial Connect, LLC may, in its sole discretion, suspend or terminate a user's service for violation of any of the requirements or provisions of the United States government on receipt of a complaint if Commercial Connect LLC believes suspension or termination is necessary to comply with the law, protect the public interest, prevent unlawful activity or protect the health, safety, or privacy of an individual.

If immediate action is not required, Commercial Connect, LLC will work with registrants and a complainant to remedy violations. [...] Disputes arising under or in connection with this Agreement, including requests for specific performance shall be resolved through binding arbitration conducted as provided in this Section pursuant to the rules of the International Court of Arbitration of the International Chamber of Commerce ("ICC"). [...] Mechanisms will be in place for the notificaton [sic] and eventual suspension of domain regisrants [sic] that either do not qualify to operate a .SHOP TLD or are operating it inconsistently with its intended use. Two Warning [sic] will be sent and an appeal process will be available before action is taken to suspend a .SHOP TLD.

The applicant outlined policies that include specific enforcement measures constituting a coherent set. The applicant outlines a comprehensive list of investigation procedures, and circumstances in which the registry is entitled to suspend domain names and refers to an appeals process available to registrants. The Panel determined that the application satisfies both of the two conditions to fulfill the requirements for Enforcement and therefore scores 1 point.

Criterion #4: Community Endorsement

2/4 Point(s)

Support for or opposition to a CPE gTLD application may come by way of an application comment on ICANN's website, attachment to the application, or by correspondence with ICANN. The Panel reviews these comments and documents and as applicable attempts to verify them as per the guidelines published on the ICANN CPE website. Further details and procedures regarding the review and verification process may be found at <http://newgtlds.icann.org/en/applicants/cpe>. The table below summarizes the review and verification of all support for and opposition to the Commercial Connect LLC application for the string .SHOP.

Summary of Review & Verification of Support/Opposition Materials

	Total Received and Reviewed	Total Valid for Verification	Verification Attempted	Successfully Verified
Application Comments	7	2	2	1
Attachments to 20(f)	17	3	3	2
Correspondence	6 ¹²	3	3	2
Grand Total	30	8	8	5

4-A Support

1/2 Point(s)

The Panel determined that the application partially met the criterion for Support specified in section 4.2.3 (Community Priority Evaluation Criteria) of the AGB, as there was documented support from at least one group with relevance. The application received a score of 1 out of 2 points under criterion 4-A: Support.

To receive the maximum score for Support, the applicant is, or must have documented support from the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community. "Recognized" means that the institution(s)/organization(s), through membership or otherwise, are clearly recognized by the community members as representative of the community as a whole. To receive a partial score for Support, the applicant must have documented support from at least one group with relevance. "Relevance" refers to the communities explicitly and implicitly addressed by the application.

The Panel determined that the applicant was not the recognized community institution(s)/member organization(s), nor did it have documented authority to represent the community, or documented support from the recognized community institution(s)/member organization(s). A recognized community institution or member organization is one which not only (1) represents the entirety of the community as defined by the application (in all its breadth of categories as described in Delineation), but is also (2) recognized by the same community as its representative. No such organization among the applicant's supporters demonstrates the kind of structure required to be a "recognized" organization, as per AGB guidelines, and the Panel has determined that no such organization exists. However, the applicant possesses documented support from at least one group with relevance and this documentation contained a description of the process and rationale used in arriving at the expression of support, as required by the AGB. The Community Priority Evaluation Panel determined that the applicant partially satisfies the requirements for Support.

4-B Opposition

1/2 Point(s)

The Community Priority Evaluation panel has determined that the application partially met the criterion for Opposition specified in section 4.2.3 (Community Priority Evaluation Criteria) of the Applicant Guidebook, as the application received relevant opposition from one source. The application received a score of 1 out of 2 points under criterion 4-B: Opposition.

To receive the maximum score for Opposition, the application must not have received any opposition of relevance. To receive a partial score for Opposition, the application must have received opposition from, at most, one relevant group of non-negligible size.

The Community Priority Evaluation panel has determined that there is relevant opposition to the application from a group of non-negligible size, from an entity within the community explicitly addressed by the

¹² Five pieces of correspondence were received by 4/17/15, one of which included two letters.

application. The entity is a multinational company. The grounds for the objection do not fall under any of those excluded by the AGB (such as spurious or unsubstantiated claims), but rather relate to the applicant's right to regulate a namespace in which the opponent has a place. Therefore, the Panel has determined that the applicant partially satisfied the requirements for Opposition.

Disclaimer: Please note that these Community Priority Evaluation results do not necessarily determine the final result of the application. In limited cases the results might be subject to change. These results do not constitute a waiver or amendment of any provision of the AGB or the Registry Agreement. For updated application status and complete details on the program, please refer to the AGB and the ICANN New gTLDs microsite at <newgtlds.icann.org>.

Reference Material 48.

Community Priority Evaluation (CPE) Guidelines

Prepared by The Economist Intelligence Unit

Interconnection between Community Priority Evaluation (CPE) Guidelines and the Applicant Guidebook (AGB)

The CPE Guidelines are an accompanying document to the AGB, and are meant to provide additional clarity around the process and scoring principles outlined in the AGB. This document does not modify the AGB framework, nor does it change the intent or standards laid out in the AGB. The Economist Intelligence Unit (EIU) is committed to evaluating each applicant under the criteria outlined in the AGB. The CPE Guidelines are intended to increase transparency, fairness and predictability around the assessment process.

Criterion #1: Community Establishment

This section relates to the community as explicitly identified and defined according to statements in the application. (The implicit reach of the applied-for string is not considered here, but taken into account when scoring Criterion #2, “Nexus between Proposed String and Community.”)

Measured by

1-A Delineation

1-B Extension

A maximum of 4 points is possible on the Community Establishment criterion, and each sub-criterion has a maximum of 2 possible points.

1-A Delineation

AGB Criteria	Evaluation Guidelines
Scoring	
<p>2= Clearly delineated, organized, and pre-existing community.</p> <p>1= Clearly delineated and pre-existing community, but not fulfilling the requirements for a score of 2.</p> <p>0= Insufficient delineation and pre-existence for a score of 1.</p>	<p>The following questions must be scored when evaluating the application:</p> <p><i>Is the community clearly delineated?</i></p> <p><i>Is there at least one entity mainly dedicated to the community?</i></p> <p><i>Does the entity (referred to above) have documented evidence of community activities?</i></p> <p><i>Has the community been active since at least September 2007?</i></p>
Definitions	
<p>“Community” - Usage of the expression “community” has evolved considerably from its Latin origin – “communitas” meaning “fellowship” – while still implying more of cohesion than a mere commonality of interest. Notably, as “community” is used throughout the application, there should be: (a) an awareness and recognition of a community among its members; (b) some</p>	<p>The “community,” as it relates to Criterion #1, refers to the stated community in the application.</p> <p>Consider the following:</p> <ul style="list-style-type: none"> • <i>Was the entity established to administer the community?</i> • <i>Does the entity’s mission statement clearly identify the community?</i>

<p>understanding of the community’s existence prior to September 2007 (when the new gTLD policy recommendations were completed); and (c) extended tenure or longevity—non-transience—into the future.</p>	<p>Additional research may need to be performed to establish that there is documented evidence of community activities. Research may include reviewing the entity’s web site, including mission statements, charters, reviewing websites of community members (pertaining to groups), if applicable, etc.</p>
<p>"Delineation" relates to the membership of a community, where a clear and straight-forward membership definition scores high, while an unclear, dispersed or unbound definition scores low.</p>	<p>“Delineation” also refers to the extent to which a community has the requisite awareness and recognition from its members.</p> <p>The following non-exhaustive list denotes elements of straight-forward member definitions: fees, skill and/or accreditation requirements, privileges or benefits entitled to members, certifications aligned with community goals, etc.</p>
<p>"Pre-existing" means that a community has been active as such since before the new gTLD policy recommendations were completed in September 2007.</p>	
<p>"Organized" implies that there is at least one entity mainly dedicated to the community, with documented evidence of community activities.</p>	<p>“Mainly” could imply that the entity administering the community may have additional roles/functions beyond administering the community, but one of the key or primary purposes/functions of the entity is to administer a community or a community organization.</p> <p>Consider the following:</p> <ul style="list-style-type: none"> • <i>Was the entity established to administer the community?</i> • <i>Does the entity’s mission statement clearly identify the community?</i>
<p>Criterion 1-A guidelines</p>	
<p>With respect to “Delineation” and “Extension,” it should be noted that a community can consist of legal entities (for example, an association of suppliers of a particular service), of individuals (for example, a language community) or of a logical alliance of communities (for example, an international federation of national communities of a similar nature). All are viable as such, provided the requisite awareness and recognition of the</p>	<p>With respect to the Community, consider the following:</p> <ul style="list-style-type: none"> • <i>Are community members aware of the existence of the community as defined by the applicant?</i> • <i>Do community members recognize the community as defined by the applicant?</i>

<p>community is at hand among the members. Otherwise the application would be seen as not relating to a real community and score 0 on both “Delineation” and “Extension.”</p> <p>With respect to “Delineation,” if an application satisfactorily demonstrates all three relevant parameters (delineation, pre-existing and organized), then it scores a 2.</p>	<ul style="list-style-type: none"> • <i>Is there clear evidence of such awareness and recognition?</i>
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1-B Extension

AGB Criteria	Evaluation Guidelines
Scoring	
<p>Extension:</p> <p>2=Community of considerable size and longevity</p> <p>1=Community of either considerable size or longevity, but not fulfilling the requirements for a score of 2.</p> <p>0=Community of neither considerable size nor longevity</p>	<p>The following questions must be scored when evaluating the application:</p> <p><i>Is the community of considerable size?</i></p> <p><i>Does the community demonstrate longevity?</i></p>
Definitions	
<p>“Extension” relates to the dimensions of the community, regarding its number of members, geographical reach, and foreseeable activity lifetime, as further explained in the following.</p>	
<p>"Size" relates both to the number of members and the geographical reach of the community, and will be scored depending on the context rather than on absolute numbers - a geographic location community may count millions of members in a limited location, a language community may have a million members with some spread over the globe, a community of service providers may have "only" some hundred members although well spread over the globe, just to mention some examples - all these can be regarded as of "considerable size."</p>	<p>Consider the following:</p> <ul style="list-style-type: none"> • <i>Is the designated community large in terms of membership and/or geographic dispersion?</i>

<p>"Longevity" means that the pursuits of a community are of a lasting, non-transient nature.</p>	<p>Consider the following:</p> <ul style="list-style-type: none"> • <i>Is the community a relatively short-lived congregation (e.g. a group that forms to represent a one-off event)?</i> • <i>Is the community forward-looking (i.e. will it continue to exist in the future)?</i>
<p>Criterion 1-B Guidelines</p>	
<p>With respect to "Delineation" and "Extension," it should be noted that a community can consist of legal entities (for example, an association of suppliers of a particular service), of individuals (for example, a language community) or of a logical alliance of communities (for example, an international federation of national communities of a similar nature). All are viable as such, provided the requisite awareness and recognition of the community is at hand among the members. Otherwise the application would be seen as not relating to a real community and score 0 on both "Delineation" and "Extension."</p> <p>With respect to "Extension," if an application satisfactorily demonstrates both community size and longevity, it scores a 2.</p>	

Criterion #2: Nexus between Proposed String and Community

This section evaluates the relevance of the string to the specific community that it claims to represent.

Measured by

2-A Nexus

2-B Uniqueness

A maximum of 4 points is possible on the Nexus criterion, and with the Nexus sub-criterion having a maximum of 3 possible points, and the Uniqueness sub-criterion having a maximum of 1 possible point.

2-A Nexus

AGB Criteria	Evaluation Guidelines
Scoring	
<p>Nexus:</p> <p>3= The string matches the name of the community or is a well-known short-form or abbreviation of the community</p> <p>2= String identifies the community, but does not qualify for a score of 3</p> <p>0= String nexus does not fulfill the requirements for a score of 2</p>	<p>The following question must be scored when evaluating the application:</p> <p style="text-align: center;"><i>Does the string match the name of the community or is it a well-known short-form or abbreviation of the community name? The name may be, but does not need to be, the name of an organization dedicated to the community.</i></p>
Definitions	
<p>“Name” of the community means the established name by which the community is commonly known by others. It may be, but does not need to be, the name of an organization dedicated to the community.</p>	<p>“Others” refers to individuals outside of the community itself, as well as the most knowledgeable individuals in the wider geographic and language environment of direct relevance. It also refers to recognition from other organization(s), such as quasi-official, publicly recognized institutions, or other peer groups.</p>
<p>“Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.</p>	<p>“Match” is of a higher standard than “identify” and means ‘corresponds to’ or ‘is equal to’.</p> <p>“Identify” does not simply mean ‘describe’, but means ‘closely describes the community’.</p> <p>“Over-reaching substantially” means that the string indicates a wider geographical or thematic remit than the community has.</p>

	<p>Consider the following:</p> <ul style="list-style-type: none"> • <i>Does the string identify a wider or related community of which the applicant is a part, but is not specific to the applicant’s community?</i> • <i>Does the string capture a wider geographical/thematic remit than the community has? The “community” refers to the community as defined by the applicant.</i> • <i>An Internet search should be utilized to help understand whether the string identifies the community and is known by others.</i> • <i>Consider whether the application mission statement, community responses, and websites align.</i>
<p>Criterion 2-A Guidelines</p>	
<p>With respect to “Nexus,” for a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification / name of the community.</p> <p>With respect to “Nexus,” for a score of 2, the applied-for string should closely describe the community or the community members, without over-reaching substantially beyond the community. As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context. If the string appears excessively broad (such as, for example, a globally well-known but local tennis club applying for “.TENNIS”) then it would not qualify for a 2.</p>	

2-B Uniqueness

<p>AGB Criteria</p>	<p>Evaluation Guidelines</p>
<p>Scoring</p>	
<p>Uniqueness: 1=String has no other significant meaning beyond</p>	<p>The following question must be scored when evaluating the application:</p>

<p>identifying the community described in the application. 0=String does not fulfill the requirement for a score of 1.</p>	<p><i>Does the string have any other significant meaning (to the public in general) beyond identifying the community described in the application?</i></p>
<p>Definitions</p>	
<p>“Identify” means that the applied for string closely describes the community or the community members, without over-reaching substantially beyond the community.</p>	<p>“Over-reaching substantially” means that the string indicates a wider geographical or thematic remit than the community has.</p>
<p>“Significant meaning” relates to the public in general, with consideration of the community language context added</p>	<p>Consider the following:</p> <ul style="list-style-type: none"> • <i>Will the public in general immediately think of the applying community when thinking of the applied-for string?</i> • <i>If the string is unfamiliar to the public in general, it may be an indicator of uniqueness.</i> • <i>Is the geography or activity implied by the string?</i> • <i>Is the size and delineation of the community inconsistent with the string?</i> • <i>An internet search should be utilized to find out whether there are repeated and frequent references to legal entities or communities other than the community referenced in the application.</i>
<p>Criterion 2-B Guidelines</p>	
<p>"Uniqueness" will be scored both with regard to the community context and from a general point of view. For example, a string for a particular geographic location community may seem unique from a general perspective, but would not score a 1 for uniqueness if it carries another significant meaning in the common language used in the relevant community location. The phrasing "...beyond identifying the community" in the score of 1 for "uniqueness" implies a requirement that the string does identify the community, i.e. scores</p>	

2 or 3 for "Nexus," in order to be eligible for a score of 1 for "Uniqueness."

It should be noted that "Uniqueness" is only about the meaning of the string - since the evaluation takes place to resolve contention there will obviously be other applications, community-based and/or standard, with identical or confusingly similar strings in the contention set to resolve, so the string will clearly not be "unique" in the sense of "alone."

Criterion #3: Registration Policies

This section evaluates the applicant’s registration policies as indicated in the application. Registration policies are the conditions that the future registry will set for prospective registrants, i.e. those desiring to register second-level domain names under the registry.

Measured by

3-A Eligibility

3-B Name Selection

3-C Content and Use

3-D Enforcement

A maximum of 4 points is possible on the Registration Policies criterion and each sub-criterion has a maximum of 1 possible point.

3-A Eligibility

AGB Criteria	Evaluation Guidelines
Scoring	
Eligibility: 1= Eligibility restricted to community members 0= Largely unrestricted approach to eligibility	The following question must be scored when evaluating the application: <i>Is eligibility for being allowed as a registrant restricted?</i>
Definitions	
“Eligibility” means the qualifications that organizations or individuals must have in order to be allowed as registrants by the registry.	
Criterion 3-A Guidelines	
With respect to “eligibility” the limitation to community “members” can invoke a formal membership but can also be satisfied in other ways, depending on the structure and orientation of the community at hand. For example, for a geographic location community TLD, a limitation to members of the community can be achieved by requiring that the registrant’s physical address be within the boundaries of the location.	

3-B Name Selection

AGB Criteria	Evaluation Guidelines
Scoring	
<p>Name selection: 1= Policies include name selection rules consistent with the articulated community-based purpose of the applied-for TLD 0= Policies do not fulfill the requirements for a score of 1</p>	<p>The following questions must be scored when evaluating the application:</p> <p style="text-align: center;"><i>Do the applicant’s policies include name selection rules?</i></p> <p style="text-align: center;"><i>Are name selection rules consistent with the articulated community-based purpose of the applied-for gTLD?</i></p>
Definitions	
<p>“Name selection” means the conditions that must be fulfilled for any second-level domain name to be deemed acceptable by the registry.</p>	<p>Consider the following:</p> <ul style="list-style-type: none"> • <i>Are the name selection rules consistent with the entity’s mission statement?</i>
Criterion 3-B Guidelines	
<p>With respect to “Name selection,” scoring of applications against these subcriteria will be done from a holistic perspective, with due regard for the particularities of the community explicitly addressed. For example, an application proposing a TLD for a language community may feature strict rules imposing this language for name selection as well as for content and use, scoring 1 on both B and C above. It could nevertheless include forbearance in the enforcement measures for tutorial sites assisting those wishing to learn the language and still score 1 on D. More restrictions do not automatically result in a higher score. The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.</p>	

3-C Content and Use

AGB Criteria	Evaluation Guidelines
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Scoring	
<p>Content and use: 1= Policies include rules for content and use consistent with the articulated community-based purpose of the applied-for TLD 0= Policies do not fulfill the requirements for a score of 1</p>	<p>The following questions must be scored when evaluating the application:</p> <p><i>Do the applicant’s policies include content and use rules?</i></p> <p><i>If yes, are content and use rules consistent with the articulated community-based purpose of the applied-for gTLD?</i></p>
Definitions	
<p>“Content and use” means the restrictions stipulated by the registry as to the content provided in and the use of any second-level domain name in the registry.</p>	<p>Consider the following:</p> <ul style="list-style-type: none"> <i>Are the content and use rules consistent with the applicant’s mission statement?</i>
Criterion 3-C Guidelines	
<p>With respect to “Content and Use,” scoring of applications against these subcriteria will be done from a holistic perspective, with due regard for the particularities of the community explicitly addressed. For example, an application proposing a TLD for a language community may feature strict rules imposing this language for name selection as well as for content and use, scoring 1 on both B and C above. It could nevertheless include forbearance in the enforcement measures for tutorial sites assisting those wishing to learn the language and still score 1 on D. More restrictions do not automatically result in a higher score. The restrictions and corresponding enforcement mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.</p>	

3-D Enforcement

AGB Criteria	Evaluation Guidelines
Scoring	
<p>Enforcement 1= Policies include specific enforcement measures</p>	<p>The following question must be scored when evaluating the application:</p>

<p>(e.g. investigation practices, penalties, takedown procedures) constituting a coherent set with appropriate appeal mechanisms 0= Policies do not fulfill the requirements for a score of 1</p>	<p><i>Do the policies include specific enforcement measures constituting a coherent set with appropriate appeal mechanisms?</i></p>
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Definitions

<p>“Enforcement” means the tools and provisions set out by the registry to prevent and remedy any breaches of the conditions by registrants.</p>	<p>“Coherent set” refers to enforcement measures that ensure continued accountability to the named community, and can include investigation practices, penalties, and takedown procedures with appropriate appeal mechanisms. This includes screening procedures for registrants, and provisions to prevent and remedy any breaches of its terms by registrants.</p> <p>Consider the following: Do the enforcement measures include:</p> <ul style="list-style-type: none"> • <i>Investigation practices</i> • <i>Penalties</i> • <i>Takedown procedures (e.g., removing the string)</i> • <i>Whether such measures are aligned with the community-based purpose of the TLD</i> • <i>Whether such measures demonstrate continuing accountability to the community named in the application</i>
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Criterion 3-D Guidelines

<p>With respect to “Enforcement,” scoring of applications against these subcriteria will be done from a holistic perspective, with due regard for the particularities of the community explicitly addressed. For example, an application proposing a TLD for a language community may feature strict rules imposing this language for name selection as well as for content and use, scoring 1 on both B and C above. It could nevertheless include forbearance in the enforcement measures for tutorial sites assisting those wishing to learn the language and still score 1 on D. More restrictions do not automatically result in a higher score. The restrictions and corresponding enforcement</p>	
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mechanisms proposed by the applicant should show an alignment with the community-based purpose of the TLD and demonstrate continuing accountability to the community named in the application.	
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Criterion #4: Community Endorsement

This section evaluates community support and/or opposition to the application. Support and opposition will be scored in relation to the communities explicitly addressed in the application, with due regard for communities implicitly addressed by the string.

Measured by

4-A Support

4-B Opposition

A maximum of 4 points is possible on the Community Endorsement criterion and each sub-criterion (Support and Opposition) has a maximum of 2 possible points.

4-A Support

AGB Criteria	Evaluation Guidelines
Scoring	
<p>Support:</p> <p>2= Applicant is, or has documented support from, the recognized community institution(s)/member organization(s), or has otherwise documented authority to represent the community</p> <p>1= Documented support from at least one group with relevance, but insufficient support for a score of 2</p> <p>0= Insufficient proof of support for a score of 1</p>	<p>The following questions must be scored when evaluating the application:</p> <p><i>Is the applicant the recognized community institution or member organization?</i></p> <p>To assess this question please consider the following:</p> <p><i>a. Consider whether the community institution or member organization is the clearly recognized representative of the community.</i></p> <p>If the applicant meets this provision, proceed to Letter(s) of support and their verification. If it does not, or if there is more than one recognized community institution or member organization (and the applicant is one of them), consider the following:</p> <p><i>Does the applicant have documented</i></p>

	<p><i>support from the recognized community institution(s)/member organization(s) to represent the community?</i></p> <p>If the applicant meets this provision, proceed to Letter(s) of support and their verification. If not, consider the following:</p> <p><i>Does the applicant have documented authority to represent the community?</i></p> <p>If the applicant meets this provision, proceed to Letter(s) of support and their verification. If not, consider the following:</p> <p><i>Does the applicant have support from at least one group with relevance?</i></p> <p>If the applicant meets this provision, proceed to Letter(s) of support and their verification.</p> <p>➤ Instructions on letter(s) of support requirements are located below, in Letter(s) of support and their verification</p>
Definitions	
<p>“Recognized” means the institution(s)/organization(s) that, through membership or otherwise, are clearly recognized by the community members as representative of that community.</p>	
<p>“Relevance” and “relevant” refer to the communities explicitly and implicitly addressed. This means that opposition from communities not identified in the application but with an association to the applied for string would be considered relevant.</p>	<p>The institution(s)/organization(s) could be deemed relevant when not identified in the application but has an association to the applied-for string.</p>
Criterion 4-A Guidelines	
<p>With respect to “Support,” it follows that documented support from, for example, the only national association relevant to a particular community on a national level would score a 2 if the string is clearly oriented to that national level, but only a 1 if the string implicitly addresses similar communities in other nations.</p>	<p>Letter(s) of support and their verification: Letter(s) of support must be evaluated to determine both the relevance of the organization and the validity of the documentation and must meet the criteria spelled out below. The letter(s) of support is an input used to determine the relevance of the organization and the validity of</p>

<p>Also with respect to “Support,” the plurals in brackets for a score of 2, relate to cases of multiple institutions/organizations. In such cases there must be documented support from institutions/organizations representing a majority of the overall community addressed in order to score 2.</p> <p>The applicant will score a 1 for “Support” if it does not have support from the majority of the recognized community institutions/member organizations, or does not provide full documentation that it has authority to represent the community with its application. A 0 will be scored on “Support” if the applicant fails to provide documentation showing support from recognized community institutions/community member organizations, or does not provide documentation showing that it has the authority to represent the community. It should be noted, however, that documented support from groups or communities that may be seen as implicitly addressed but have completely different orientations compared to the applicant community will not be required for a score of 2 regarding support.</p> <p>To be taken into account as relevant support, such documentation must contain a description of the process and rationale used in arriving at the expression of support. Consideration of support is not based merely on the number of comments or expressions of support received.</p>	<p>the documentation.</p> <p>Consider the following:</p> <p>Are there multiple institutions/organizations supporting the application, with documented support from institutions/organizations representing a majority of the overall community addressed?</p> <p>Does the applicant have support from the majority of the recognized community institution/member organizations?</p> <p>Has the applicant provided full documentation that it has authority to represent the community with its application?</p> <p>A majority of the overall community may be determined by, but not restricted to, considerations such as headcount, the geographic reach of the organizations, or other features such as the degree of power of the organizations.</p> <p><u>Determining relevance and recognition</u></p> <p><i>Is the organization relevant and/or recognized as per the definitions above?</i></p> <p><u>Letter requirements & validity</u></p> <p><i>Does the letter clearly express the organization’s support for the community-based application?</i></p> <p><i>Does the letter demonstrate the organization’s understanding of the string being requested?</i></p> <p><i>Is the documentation submitted by the applicant valid (i.e. the organization exists and the letter is authentic)?</i></p> <p>To be taken into account as relevant support, such documentation must contain a description of the process and rationale used in arriving at the expression of support. Consideration of support is not based merely on the number of comments or</p>
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	expressions of support received.
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4-B Opposition

AGB Criteria	Evaluation Guidelines
Scoring	
<p>Opposition:</p> <p>2= No opposition of relevance</p> <p>1= Relevant opposition from one group of non-negligible size</p> <p>0= Relevant opposition from two or more groups of non-negligible size</p>	<p>The following question must be scored when evaluating the application:</p> <p style="text-align: center;"><i>Does the application have any opposition that is deemed relevant?</i></p>
Definitions	
<p>“Relevance” and “relevant” refer to the communities explicitly and implicitly addressed. This means that opposition from communities not identified in the application but with an association to the applied for string would be considered relevant.</p>	<p>Consider the following:</p> <p>For “non-negligible” size, “relevant” and “relevance” consider:</p> <ul style="list-style-type: none"> • <i>If the application has opposition from communities that are deemed to be relevant.</i> • <i>If a web search may help determine relevance and size of the objecting organization(s).</i> • <i>If there is opposition by some other reputable organization(s), such as a quasi-official, publicly recognized organization(s) or a peer organization(s)?</i> • <i>If there is opposition from a part of the community explicitly or implicitly addressed?</i>
Criterion 4-B Guidelines	
<p>When scoring “Opposition,” previous objections to the application as well as public comments during the same application round will be taken into account and assessed in this context. There will be no presumption that such objections or comments would prevent a score of 2 or lead to any particular score for “Opposition.” To be taken into account as relevant opposition, such objections or</p>	<p>Letter(s) of opposition and their verification: Letter(s) of opposition should be evaluated to determine both the relevance of the organization and the validity of the documentation and should meet the criteria spelled out below.</p> <p><u>Determining relevance and recognition</u> <i>Is the organization relevant and/or</i></p>

<p>comments must be of a reasoned nature. Sources of opposition that are clearly spurious, unsubstantiated, made for a purpose incompatible with competition objectives, or filed for the purpose of obstruction will not be considered relevant.</p>	<p><i>recognized as per the definitions above?</i></p> <p><u>Letter requirements & validity</u></p> <p><i>Does the letter clearly express the organization's opposition to the applicant's application?</i></p> <p><i>Does the letter demonstrate the organization's understanding of the string being requested?</i></p> <p><i>Is the documentation submitted by the organization valid (i.e. the organization exists and the letter is authentic)?</i></p> <p>To be considered relevant opposition, such documentation should contain a description of the process and rationale used in arriving at the expression of opposition. Consideration of opposition is not based merely on the number of comments or expressions of opposition received.</p>
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Verification of letter(s) of support and opposition

Additional information on the verification of letter(s) of support and opposition:

- Changes in governments may result in new leadership at government agencies. As such, the signatory need only have held the position as of the date the letter was signed or sealed.
- A contact name should be provided in the letter(s) of support or opposition.
- The contact must send an email acknowledging that the letter is authentic, as a verbal acknowledgement is not sufficient.
- In cases where the letter was signed or sealed by an individual who is not currently holding that office or a position of authority, the letter is valid only if the individual was the appropriate authority at the time that the letter was signed or sealed.

About the Community Priority Evaluation Panel and its Processes

The Economist Intelligence Unit (EIU) is the business information arm of The Economist Group, publisher of The Economist. Through a global network of more than 900 analysts and contributors, the EIU continuously assesses political, economic, and business conditions in more than 200 countries. As the world's leading provider of country intelligence, the EIU helps executives, governments, and institutions by providing timely, reliable, and impartial analysis.

The EIU was selected as a Panel Firm for the gTLD evaluation process based on a number of criteria, including:

- The panel will be an internationally recognized firm or organization with significant demonstrated expertise in the evaluation and assessment of proposals in which the relationship of the proposal to a defined public or private community plays an important role.
- The provider must be able to convene a linguistically and culturally diverse panel capable, in the aggregate, of evaluating Applications from a wide variety of different communities.
- The panel must be able to exercise consistent and somewhat subjective judgment in making its evaluations in order to reach conclusions that are compelling and defensible, and
- The panel must be able to document the way in which it has done so in each case.

The evaluation process will respect the principles of fairness, transparency, avoiding potential conflicts of interest, and non-discrimination. Consistency of approach in scoring Applications will be of particular importance.

The following principles characterize the EIU evaluation process for gTLD applications:

- All EIU evaluators must ensure that no conflicts of interest exist.
- All EIU evaluators must undergo training and be fully cognizant of all CPE requirements as listed in the Applicant Guidebook. This process will include a pilot testing process.
- EIU evaluators are selected based on their knowledge of specific countries, regions and/or industries, as they pertain to Applications.
- Language skills will also be considered in the selection of evaluators and the assignment of specific Applications.
- All applications will be evaluated and scored, in the first instance by two evaluators, working independently.
- All Applications will subsequently be reviewed by members of the core project team to verify accuracy and compliance with the AGB, and to ensure consistency of approach across all applications.

- The EIU will work closely with ICANN when questions arise and when additional information may be required to evaluate an application.
- The EIU will fully cooperate with ICANN's quality control process.

Reference Material 49.

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

VISTAPRINT LIMITED,) ICDR CASE NO. 01-14-0000-6505
)
 Claimant,)
)
 and)
)
 INTERNET CORPORATION FOR ASSIGNED)
 NAMES AND NUMBERS,)
)
 Respondent.)
_____)

**ICANN'S RESPONSE TO CLAIMANT VISTAPRINT LIMITED'S
ADDITIONAL SUBMISSION IN SUPPORT OF REQUEST FOR INDEPENDENT
REVIEW PROCESS**

Jeffrey A. LeVee
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JONES DAY
Contact Information Redacted

Counsel to Respondent
The Internet Corporation
For Assigned Names and Numbers

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INTRODUCTION

1. The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits its Response to the Additional Submission (“Additional Submission”) submitted by claimant Vistaprint Limited (“Vistaprint”) on 2 March 2015.

2. This Independent Review Process (“IRP”) arises out of Vistaprint’s applications for the .WEBS generic top level domain (“gTLD”).¹ In addition to Vistaprint’s applications to operate .WEBS (“Applications”), several other entities applied to operate a .WEB gTLD. Pursuant to a procedure set forth in ICANN’s New gTLD Applicant Guidebook (“Guidebook”),² one of the applicants for .WEB (“Objector”) filed string confusion objections (“Objections”) to Vistaprint’s .WEBS Applications with an independent dispute resolution provider, the International Dispute Resolution Centre (“ICDR”). The Objections claimed that Vistaprint’s applied-for string, .WEBS, was “confusingly similar” to .WEB.³

3. The expert appointed by the ICDR to hear the Objections (“Expert”) upheld the Objections, rendering a determination (“Expert Determination”) concluding that a .WEBS gTLD would so nearly resemble a .WEB gTLD that “it is likely to deceive or cause confusion,” i.e., “that it is probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user.”⁴ As directed by the procedures set forth in the Guidebook, which was adopted in 2012 in accordance with ICANN’s Bylaws and Articles of Incorporation (“Articles”)

¹ Vistaprint submitted one community-based application for .WEBS and one standard (i.e., not community-based) application.

² The Guidebook provides instructions to new gTLD applicants and forms the basis for ICANN’s evaluation of new gTLD applications. *See* Guidebook, Cl. Ex. RM-5, Preamble. Vistaprint submitted two sets of numbered exhibits with its IRP Request and Additional Submission: (1) “Annexes”; and (2) “Reference Materials”. Citations to “Cl. Ex. Annex-__” refer to exhibits submitted in Claimant Vistaprint’s Annex, citations to “Cl. Ex. RM-__” refer to exhibits submitted in Claimant Vistaprint’s Reference Materials. Citations to “Resp. Ex. __” refer to exhibits submitted by ICANN.

³ Expert Determination, ICDR Case Nos. 50 504 221 13 and 50 504 246 13, Cl. Ex. Annex-24. On 6 May 2013, the ICDR consolidated the two objections.

⁴ *Id.* at 9, 11; *see also* Guidebook, Cl. Ex. RM-5, § 3.5.1.

after years of consideration by, and advice from, the community, Vistaprint's Applications for .WEBS were therefore placed into a contention set with the Objector's application for .WEB.⁵ Notably, this does not mean that Vistaprint's Applications will not proceed. It simply means that the contention between Vistaprint's Applications and the Objector's application for .WEB must be resolved in accordance with the procedures set forth in the Guidebook.⁶

4. Vistaprint disagrees with the conclusion reached by the Expert, and is using this IRP as a means to challenge the merits of the Expert Determination. IRP panels, however, are tasked solely with determining whether ICANN's Board violated ICANN's Articles or Bylaws, and, just like in its initial IRP Request, Vistaprint's Additional Submission fails to identify any such violation. In fact, the sole Board action that Vistaprint has identified in this case is the Board Governance Committee's ("BGC's") rejection of Vistaprint's Reconsideration Request, which sought reconsideration of the Expert Determination. In its response to Vistaprint's IRP Request ("IRP Response"), ICANN discussed the BGC's determination in detail, demonstrating that nothing about the BGC's handling of the Reconsideration Request violated ICANN's Articles or Bylaws.⁷ Vistaprint's Additional Submission does not respond to any of those points.

5. Instead, Vistaprint's Additional Submission presents two new arguments. First, Vistaprint claims that the ICANN Board acted in a discriminatory fashion because it failed to intervene in the Expert Determination on Vistaprint's Applications, but did intervene with respect to several other expert determinations regarding different gTLD application. What Vistaprint does not explain in its Additional Submission, however, is that the ICANN Board only intervened with respect to these other expert determinations because there had been several, independent expert determinations regarding the same strings that were seemingly inconsistent

⁵ Guidebook, Cl. Ex. RM-5, § 4.2.1.

⁶ Guidebook, Cl. Ex. RM-5, § 4.3.

⁷ IRP Response, ¶¶ 45-69.

with one another. That is not the case with respect to Vistaprint's Applications—no other expert determinations were issued regarding the similarity of .WEB and .WEBS. Moreover, Vistaprint's "disparate treatment" argument fails to recognize that in considering Vistaprint's Reconsideration Request, the ICANN Board (via the BGC) did evaluate whether the Expert had followed established policies and procedures with respect to the Expert Determination, and found that he had.

6. Second, Vistaprint argues for the first time in its Additional Submission that the entire string confusion objection procedure is fundamentally flawed. This argument is not only completely unsupported, but also has been time-barred for almost three years. The string confusion objection procedures have been in place since 2012 and were adopted only after extensive discussion with and input from the Internet community. The open, transparent and fair process that gave rise to the Guidebook, including the string confusion objection procedures, are completely consistent with ICANN's Articles and Bylaws. Like other members of the community, Vistaprint had the opportunity to comment on several drafts of the Guidebook and propose modifications, including to the string confusion objection procedures. It did not do so.

7. Finally, Vistaprint's Additional Submission focuses on: (1) arguing the merits of the underlying Expert Determination, and (2) urging the IRP Panel to substitute its judgment for that of ICANN's Board, which determined not to intervene further with respect to Vistaprint's Applications. Neither argument supports independent review. As the IRP Panel in *Booking.com v. ICANN* recently confirmed, IRP panels are expressly limited to "compare[ing] contested actions of the Board to ICANN's Articles [] and Bylaws" and are "neither asked to, nor allowed to, substitute [their] judgment for that of the Board."⁸

⁸ *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247, ("*Booking.com* Final Declaration"), Resp. Ex. 1, ¶¶ 110, 115 (emphasis added).

8. Here, the Board acted in compliance with ICANN's Articles and Bylaws in denying Vistaprint's Reconsideration Request and exercising its independent judgment in determining not to further intervene with respect to Vistaprint's Applications. Vistaprint has demonstrated no basis for independent review, and its request should be denied.

STANDARD OF REVIEW

9. This IRP Panel is tasked only with issuing its opinion as to whether the Board's actions are consistent with ICANN's Articles and Bylaws.⁹ ICANN's Bylaws identify a "defined standard of review" the IRP Panel must apply when evaluating the actions of the ICANN Board, considering:

- a. did the Board act without conflict of interest in taking its decision?;
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?¹⁰

10. This standard of review neither asks nor allows the IRP Panel to substitute its judgment for that of the Board.¹¹ As the IRP panel in *Booking.com v. ICANN* explained

[s]o long as the Board acts without conflict of interest and with due care, it is entitled—indeed, required—to exercise its independent judgment in acting in what it believes to be the best interests of ICANN . . . In other words, in making decisions the Board is required to conduct itself reasonably in what it considers to be ICANN's best interests; where it does so, the only question is whether its actions are or are not consistent with the Articles, Bylaws, and, in this case, with the policies and procedures established by the Guidebook."¹²

⁹ See Bylaws, Cl. Ex. RM-2, Art. IV, §§ 3.2, 3.4. Vistaprint has never disputed that the current version of the Bylaws, which it attached to its IRP Request, apply to this proceeding. See Cl. Ex. RM-2.

¹⁰ *Id.*, Art. IV, § 3.4.

¹¹ See *id.*

¹² *Booking.com* Final Declaration, ¶¶ 108-109.

ARGUMENT

I. ICANN'S BOARD HAD NO "OBLIGATION TO INTERVENE" WITH RESPECT TO THE EXPERT PANEL'S DETERMINATION AND HAS NOT TREATED VISTAPRINT DIFFERENTLY FROM OTHER APPLICANTS.

11. Independent review is available only to a person "materially affected by a decision or action of the [ICANN] Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws."¹³ The IRP is thus limited to challenging ICANN Board conduct, and is not available as a means of challenging the conduct of third parties, such as the expert panel seated by the ICDR.

12. Aware of this limitation, in its IRP Request, Vistaprint argued that the Board breached the Bylaws in "accepting" the Expert Determination. However, as ICANN explained in the IRP Response, there is no Article or Bylaws provision that requires the ICANN Board to substantively review or analyze expert panel determinations; the Board has neither the resources nor the expertise to review thousands such determinations. Instead, the Guidebook specifically provides that when an independent expert upholds a string confusion objection, "the only possible outcome" is for the two strings to be placed into a contention set.¹⁴

13. Given this, Vistaprint has abandoned the argument that the Board improperly "accepted" the Expert Determination, and now argues that the Board had an "obligation to intervene" with respect to that Determination and did not do so.¹⁵ The Guidebook does provide that in "exceptional circumstances," such as when accountability mechanisms like reconsideration or independent review are invoked, "the Board might individually consider an application."¹⁶ *And that is precisely what occurred in this case.* Because Vistaprint sought reconsideration of the Expert Determination, the BGC individually considered Vistaprint's

¹³ Bylaws, Cl. Ex. RM-2, Art. IV, § 3.2.

¹⁴ Response to IRP Request ¶¶ 37-40, (quoting Guidebook, Cl. Ex. RM-5, § 3.2.2.1)).

¹⁵ Additional Submission, ¶¶ 29-32.

¹⁶ Guidebook, Cl. Ex. RM-5, § 5.1.

application to the extent that Vistaprint asked it to assess whether the Expert had violated any established policy or procedure in rendering the Expert Determination. As is detailed in ICANN's IRP Response, the BGC examined each of Vistaprint's contentions regarding the process followed by the Expert and issued a reasoned analysis properly concluding that the Expert had violated no established policy in rendering the Expert Determination.¹⁷ Neither in its IRP Request nor in its Additional Submission does Vistaprint identify any ICANN Article or Bylaws provision that was allegedly violated by the BGC in reviewing Vistaprint's Reconsideration Request.

14. Instead, Vistaprint simply objects to the Board's exercise of its independent judgment in determining not to intervene further with respect to the Expert Determination, as the Board did with respect to expert determinations on string confusion objections regarding the strings (1) .COM/.CAM, (2) .CAR/.CARS, and (3) .SHOP/.通販 (online shopping in Japanese).

15. Contrary to what Vistaprint argues, however, there is no "mystery" regarding why ICANN's Board intervened with respect to those determinations and not with respect to the .WEB/.WEBS Expert Determination. Nor has there been any disparate treatment with these strings. Unlike .WEB/.WEBS, the COM/.CAM, .CAR/.CARS, and .SHOP/.通販 strings were all the subject of several, seemingly *inconsistent* determinations on string confusion objections by different expert panels. So, for example, while one expert upheld a string confusion objection asserting that .CAM was confusingly similar to .COM, another expert overruled a separate string confusion objection asserting precisely the same thing.¹⁸

¹⁷ IRP Response, ¶¶ 45-69; *see also* Bylaws, Cl. Ex. RM-2, Art. IV, § 2.2.

¹⁸ *Compare* Expert Determination, ICDR Case No. 50 504 T 229 13, Cl. Ex. RM-23 *with* Expert Determination, ICDR Case No. 50 504 T 00224 13, Cl. Ex. RM-24.

16. Given what were viewed by some as *inconsistent* determinations, the BGC requested that ICANN staff draft a report for the ICANN Board’s New gTLD Program Committee (“NGPC”), “setting out options for dealing . . . [with] differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes. . . .”¹⁹ The NGPC subsequently considered potential approaches to addressing perceived inconsistent determinations on string confusion objections, including possibly implementing a new review mechanism.²⁰ ICANN staff initiated a public comment period regarding framework principles of a potential such review mechanism.²¹ Ultimately, having considered the report drafted by ICANN staff, the public comments received, and the string confusion objection process set forth in the Guidebook, the NGPC determined that the inconsistent expert determinations regarding .COM/.CAM and .SHOP/.通販 were “not [] in the best interest of the New gTLD Program and the Internet community” and directed ICANN staff to establish a process whereby the ICDR would appoint a three-member panel to re-evaluate those expert determinations.²²

17. Vistaprint has identified no Article or Bylaws provision violated by the ICANN Board in exercising its independent judgment to intervene with respect to inconsistent determinations on string confusion objections, but not with respect to the single Expert Determination regarding .WEB/.WEBS. As the *Booking.com* IRP Panel found, “the fact that the ICANN Board enjoys [the] discretion [to individually consider an application for a New gTLD]

¹⁹ See BGC Recommendation on Reconsideration Request 13-10, Resp. Ex. 2, at 11.

²⁰ See Rationale for NGPC Resolution 2014.02.05.NG02, Resp. Ex. 3, also available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en>.

²¹ See <https://www.icann.org/public-comments/sco-framework-principles-2014-02-11-en>.

²² NGPC Resolution 2014.10.12.NG02, Resp. Ex 4, also available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b>. The expert determinations reached with respect to .CAR/.CARS were not at issue by this time, because two of the applicants for .CARS had withdrawn their applications and the contention set was resolved.

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 [a claimant].”²³

18. In addition, and contrary to Vistaprint’s claims of disparate treatment, the ICANN Board was justified in exercising its discretion to intervene with respect to the inconsistent expert determinations regarding .COM/.CAM, .CAR/.CARS and .SHOP/.通販—the Board acted to bring certainty to multiple and differing expert determinations on string confusion objections regarding the same strings. That justification simply was not present with respect to the single .WEB/.WEBS Expert Determination at issue here. Accordingly, Vistaprint was not treated differently than other, similarly-situated applicants; the applicants referenced above were not similarly-situated to Vistaprint.

II. VISTAPRINT’S WHOLESALE CHALLENGE TO THE GUIDEBOOK’S OBJECTION PROCEDURES ARE UNSUPPORTED AND TIME BARRED.

19. In its Additional Submission, Vistaprint argues for the first time that the string confusion objection procedures in the Guidebook are inherently flawed. But this new claim is wholly unsupported, and the time for Vistaprint to assert such an argument has long passed.

20. As detailed in the Board’s Rationales for the Approval of the Launch of the New gTLD Program, issued in June 2011, the dispute resolution procedures, including the string confusion objection procedures, were adopted by the ICANN Board only after years of rigorous policy development and implementation that included extensive review and analysis by ICANN, as well as input and comment from legal and arbitration experts from various jurisdictions,

²³ *Booking.com* Final Determination, Resp. Ex. 1, ¶ 138.

numerous ICANN committees and Internet stakeholders, and community members from around the world, all in compliance with ICANN's Articles and Bylaws.²⁴

21. Specifically, in 2005, ICANN's Generic Names Supporting Organization ("GNSO"), which is the ICANN body designated by the Bylaws as "responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains,"²⁵ began a policy development process to consider the introduction of new gTLDs. Two years later, again in accordance with the ICANN Bylaws, the GNSO issued a set of policy recommendations regarding the New gTLD Program, which included recommendations that "[d]ispute resolution and challenge processes . . . must be established prior to the start of" the gTLD program and should utilize independent dispute resolution providers.²⁶

22. Between 2007 and 2008, based on the GNSO's recommendations and in consultation with various Internet stakeholders and legal experts, ICANN outlined an application objection process that would permit four types of objections, including an objection relating to string confusion.²⁷ In this same time frame, ICANN evaluated and selected independent dispute resolution providers to evaluate objections to gTLD applications and conducted public consultations with legal experts and Internet stakeholders to help define the standing requirements and standards to be used by dispute resolution panels to resolve disputes on the various objection grounds.²⁸

23. In June 2008, the ICANN Board approved the GNSO's policy recommendations on the gTLD program, including the need for dispute resolution procedures, as the Board is

²⁴ ICANN Board Rationales for the Approval of the Launch of the New gTLD Program ("ICANN Board Rationales"), Resp. Ex. 5, at 66-67.

²⁵ Bylaws, Cl. Ex. RM-2, Art. X, § 1.

²⁶ ICANN Board Rationales, Resp. Ex 5, at 66.

²⁷ *Id.*

²⁸ *Id.* at 67.

required to do under the Bylaws unless a supermajority of the Board believes that the recommendations are not in the best interests of the ICANN community or ICANN.²⁹ Between October 2008, when ICANN issued its first version of the Guidebook with its dispute resolution procedures, and June 2012, when the current version of the Guidebook was issued, ICANN engaged with various legal and arbitration experts, held numerous public comment sessions, considered and took advice from ICANN supporting organizations and advisory committees, and issued scores of papers and documents discussing the dispute resolution procedures contained in the Guidebook.³⁰

24. Ultimately, the Board approved the dispute resolution procedures contained in the Guidebook based on the Board's detailed findings that procedures were "designed to protect certain interests and rights . . . identified by the GNSO in their policy recommendations;" they were "more cost effective and efficient than judicial proceedings;" and they were as "independent as possible so that the applicants, the community and ICANN have the benefit of neutral expert opinion," among other reasons.³¹

25. All of this policy development work, implementation, and decision making, which culminated in the current version of the Guidebook, was open, fair and transparent and led to clear and predictable procedures. Indeed, the Guidebook provides for the ICDR to administer string confusion objections in accordance with the ICDR's Supplementary Procedures for ICANN's New gTLD Program, and the Guidebook sets forth specific standards to be applied by the expert panels seated by the ICDR, as the GNSO's original recommendations mandated.³²

All of this work and the results of this work are fully consistent with ICANN Articles and

²⁹ Bylaws, Cl. Ex. RM-2, Annex A, § 9(a).

³⁰ ICANN Board Rationales, Resp. Ex. 5, at 66-71, 72-75.

³¹ *Id.* at 75-77.

³² Guidebook, Cl. Ex. RM-5, § 3.2.3; *id.*, Attachment to Module 3, New gTLD Dispute Resolution Procedure, Art. 4(b)(i).

Bylaws. This is presumably why Vistaprint failed to identify any Article or Bylaw provision that is even arguably inconsistent with the string confusion objection procedures set forth in the Guidebook.

26. Rather than pointing to an Article or Bylaw provision that the Board violated with respect to the adoption of the process set forth in the Guidebook, Vistaprint relies on a witness statement from Kurt Pritz, a former ICANN employee, to argue that the string confusion objection program is flawed. This statement, however, does not support Vistaprint's claim. First, Mr. Pritz's witness statement, which was submitted in a *different* IRP proceeding relating to community objections, rather than string confusion objections, focuses on the perceived problems that arise from multiple, inconsistent expert determinations, such as those at issue in .COM/.CAM, .CAR/.CARS and .SHOP/.通販 (online shopping in Japanese). Second, these are exactly the same perceived problems that the ICANN Board recognized when it took steps to address the inconsistent determinations in .COM/.CAM, .CAR/.CARS and .SHOP/.通販. Third, the concerns Mr. Pritz raises do not apply to a single expert determination regarding string confusion, which is at issue here. Finally, Mr. Pritz's after-the-fact critique—in an adversarial proceeding—of the work he and his now former ICANN colleagues performed years ago should be seen for precisely what it is and be given no weight.

27. Vistaprint's wholesale attack on the string confusion objection procedures is also deficient because the current version of the Guidebook was published on 4 June 2012 following an extensive review process, including public comment on multiple drafts, as set forth above.³³ Despite having ample opportunity to do so, Vistaprint did not object to these aspects of the Guidebook at the time the Guidebook was implemented. If Vistaprint had concerns related to

³³ See Guidebook, Cl. Ex. RM-5, Preamble.

these issues, it should have pursued them at the time, not years later, and only after receiving an Expert Determination with which it disagreed.³⁴

28. As the IRP Panel in *Booking.com v. ICANN* found, “the time has long since passed for Booking.com or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to the establishment of the string similarity review process, including Booking.com’s claims that specific elements of the process and the Board decisions to implement those elements are inconsistent with ICANN’s Articles and Bylaws. Any such claims, even if they had any merit, are long since time-barred by the 30-day limitation period set out in Article IV, Section 3(3) of the Bylaws.”³⁵ While the Guidebook process at issue in this case is different—the string confusion objection process rather than the string similarity review process—the *Booking.com* Panel’s reasoning applies equally. Because both processes were developed years ago, as part of the development of the Guidebook, challenges to both are time-barred.

29. The Guidebook and its string confusion objection procedures were developed and approved by the Board in strict compliance with ICANN’s Articles and Bylaws, and only after the consideration of numerous versions, which were revised in light of the thousands of comments received from members of the Internet community. The Guidebook was developed in conjunction with the community in an open and transparent manner, and there simply is nothing about the Guidebook that violates ICANN’s Articles or Bylaws. Moreover, the time for Vistaprint to object to the string confusion objection procedures has long since passed.

³⁴ Bylaws, Art. IV, Cl Ex. RM-2, § 3.3 (30-day limitation period for IRP claims).

³⁵ *Booking.com.com* Final Declaration, Resp. Ex. 1, ¶ 129

III. VISTAPRINT'S DISAGREEMENT WITH THE MERITS OF THE EXPERT DETERMINATION IS NOT A BASIS FOR AN IRP.

30. Vistaprint's Additional Submission, like its IRP Request, is at base an attack on the merits of an Expert Determination with which it disagrees. However, Vistaprint's substantive disagreement with the determination of an independent expert is not a proper basis for an IRP. In support of its argument, Vistaprint argues, without supporting evidence, that "www.web.com" and "www.webs.com" have coexisted for many years without issues.³⁶ Vistaprint also attaches a letter from Prof. Dr. Piet Desmet, a professor of linguistics who explains why, in his opinion, there is unlikely to be confusion between .WEB and .WEBS.³⁷ Professor Desmet's opinion is based on his own application of various technical linguistic and psychological principles. As the BGC noted in denying Vistaprint's Reconsideration Request, the Expert "extensively detailed the support for its conclusion that the .WEBS string so nearly resembles .WEB—visually, aurally and in meaning—that it is likely to cause confusion."³⁸ Professor Desmet's disagreement with the Expert's conclusion does not demonstrate that the Expert erred, and definitely does not demonstrate that *ICANN's Board* violated its Bylaws in determining that the Expert had properly applied the Guidebook standard in upholding the Objections to Vistaprint's Applications.

31. Neither ICANN's Board nor this IRP Panel is tasked with determining—or competent to determine—who should prevail in a battle of linguistic experts. Again, this IRP Panel is tasked solely with declaring its opinion as to whether the Board acted "without conflict of interest and with due care" and in a manner "consistent with the Articles of Incorporation or Bylaws [or] the Guidebook."³⁹ The Board did just that in carefully considering the arguments

³⁶ Additional Submission, ¶ 21.

³⁷ Letter from Prof. Desmet, Cl. Annex 32; *see also* Additional Submission, ¶¶ 19-20

³⁸ BGC Determination on Request 14-5, Cl. Ex. Annex-26, at 15.

³⁹ *Booking.com* Final Declaration, Resp. Ex. 1, ¶ 108; *see also* Bylaws, Cl. Ex. RM-2, Art. IV, § 3.4.

Vistaprint raised regarding the standard applied by the Expert and issuing a reasoned determination denying Vistaprint's Reconsideration Request.

IV. THIS PANEL DOES NOT HAVE THE AUTHORITY TO GRANT AFFIRMATIVE RELIEF.

32. Vistaprint renews its request that this IRP Panel issue a declaration “[r]equiring that ICANN reject the determination that .WEBS and .WEB are confusingly similar and disregard the resulting contention set” and “[r]equiring that ICANN organize[] a new independent and impartial string confusion objection procedure between Vistaprint and [Objector] Web.com.”⁴⁰

33. As ICANN has explained, any request that the IRP Panel grant affirmative relief goes well beyond the IRP Panel's authority. An IRP panel is limited to “declaring whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” and recommending that the Board stay any action or decision or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP Panel.⁴¹ This IRP Panel simply does not have the authority to award affirmative relief or to require ICANN to undertake specific conduct.⁴²

V. THE PANEL'S DECLARATION IS NOT BINDING ON ICANN.

34. Vistaprint is incorrect in arguing that this IRP Panel's declaration is binding on ICANN's Board.⁴³ The plain language of the IRP provisions set forth in Article IV, section 3 of

⁴⁰ See IRP Request, ¶ 84.

⁴¹ Bylaws, Cl. Ex. RM-2, at Art. IV, § 3.4 and § 3.11(c) (emphasis added).

⁴² Indeed, the IRP Panel in the first IRP ever constituted under ICANN's Bylaws found that “[t]he IRP cannot ‘order’ interim measures but do no more than ‘recommend’ them, and this until the Board ‘reviews’ and ‘acts upon the opinion’ of the IRP.” See Advisory Declaration of IRP Panel, *ICM Registry, LLC v. ICANN*, ICDR Case No. 50 117 T 00224 08, (“*ICM IRP Panel Declaration*”), Cl. Ex. RM-21, ¶ 133.; see also *Booking.com* Final Declaration, Resp. Ex. 1, ¶ 104 (“The jurisdiction and authority of an IRP panel is expressly prescribed—and expressly limited—by the ICANN Bylaws.”)

⁴³ Additional Submission, ¶ 37.

ICANN's Bylaws, as well as the drafting history of the development of the IRP provisions, make clear that IRP panel declarations are not binding on ICANN.

35. First, the Bylaws charge an IRP panel with “comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.”⁴⁴ The Board is then obligated to “review[]”⁴⁵ and “consider” an IRP panel’s declaration at the Board’s next meeting “where feasible.”⁴⁶ The direction to “review” and “consider” an IRP panel’s declaration means that the Board has discretion as to whether it should adopt that declaration and whether it should take any action in response to that declaration; if the declaration were binding, there would be nothing to review or consider, only a binding order to implement.

36. Second, the lengthy drafting history of ICANN’s independent review process confirms that IRP panel declarations are not binding. Specifically, the Draft Principles for Independent Review, drafted in 1999, state that “the ICANN Board should retain ultimate authority over ICANN’s affairs – after all, it is the Board ... that will be chosen by (and is directly accountable to) the membership and supporting organizations.”⁴⁷ And when, in 2001, the Committee on ICANN Evolution and Reform (ERC) recommended the creation of an independent review process, it called for the creation of “a process to require non-binding arbitration by an international arbitration body to review any allegation that the Board has acted

⁴⁴ Bylaws, Art. IV, § 3.4 (emphasis added). The IRP Panel has questioned whether the selection of the word “declare” suggests binding force. This term, standing alone, cannot conceivably be read to require a binding decision, particularly in the face of the voluminous evidence in the drafting history showing that the contrary was presupposed.

⁴⁵ Bylaws, Art. IV, § 3.11.d.

⁴⁶ *Id.* at Art. IV, § 3.21. Moreover, for the period during which the Board is reviewing and considering the IRP Panel’s declaration, the Panel may merely “recommend,” as opposed to “order,” that the Board stay any action or decision “until such time as the Board reviews and acts upon the opinion of the IRP.” *Id.* at Art. IV, § 3.11.d.

⁴⁷ Draft Principles for Independent Review, Interim report of the Advisory Committee on Independent Review With Addendum, available at <http://cyber.law.harvard.edu/icann/berlin/archive/IRdraft.html>.

in conflict with ICANN's Bylaws."⁴⁸ The individuals who actively participated in the process also agreed that the review process would not be binding. As one participant stated: IRP "decisions will be nonbinding, because the Board will retain final decision-making authority."⁴⁹

37. In February 2010, the first IRP panel to issue a final declaration, the *ICM* IRP Panel, unanimously rejected the assertion that IRP panel declarations are binding⁵⁰ and recognized that an IRP panel's declaration "is not binding, but rather advisory in effect."⁵¹ Nothing has occurred since the issuance of the *ICM* IRP Panel's declaration that changes the fact that IRP panel declarations are not binding. To the contrary, in April 2013, following the *ICM* IRP, in order to clarify even further that IRPs are not binding, all references in the Bylaws to the term "arbitration" were removed as part of the Bylaws revisions. *ICM* had argued in the IRP that the use of the word "arbitration" in the portion of the Bylaws related to Independent Review indicated that IRPs were binding, and while the *ICM* IRP Panel rejected that argument, to avoid any lingering doubt, ICANN removed the word "arbitration" in conjunction with the amendments to the Bylaws.

38. The amendments to the Bylaws, which occurred following a community process on proposed IRP revisions, added, among other things, a sentence stating that "declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value."⁵² *Vistaprint* argues that this new language, which does not actually use the word "binding," nevertheless provides that IRP panel declarations are binding, trumping years of

⁴⁸ ICANN: A Blueprint for Reform (June 20, 2002), available at <http://www.icann.org/en/committees/evol-reform/blueprint-20jun02.htm>.

⁴⁹ Becky Burr, Recommendations Regarding Accountability at II (August 23, 2002), available at <http://www.icann.org/en/committees/evol-reform/afap-report-23aug02.htm>.

⁵⁰ The *ICM* IRP Panel specifically rejected the claimant's contention that use of the word "arbitration" in the then-existing Bylaws was determinative of an arbitral process that produces a binding award. *ICM* IRP Panel Declaration, Cl. Ex. RM-21, ¶ 133.

⁵¹ *ICM* IRP Panel Declaration, Cl. Ex. RM-21, ¶ 134.

⁵² Bylaws, Cl. Ex. RM-2, Art. IV, § 3.21.

drafting history, the sworn testimony of those who participated in the drafting process,⁵³ and the plain text of the Bylaws. This argument is meritless.

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

In the United States . . . [w]hen the prior court is the same as the subsequent court, the general rule is that precedent is not binding, even though a court may give great weight to its own prior decisions. If the prior court is at the same level as the subsequent court but the two courts are coordinate rather than identical, as in the case of two district courts in the federal system, then stare decisis is not binding on the subsequent court.”⁵⁴

40. Second, the language Vistaprint references was added to ICANN’s Bylaws to meet recommendations made by ICANN’s Accountability Structures Expert Panel (ASEP). The ASEP was comprised of three world-renowned experts on issues of corporate governance, accountability, and international dispute resolution, and was charged with evaluating ICANN’s accountability mechanisms, including the Independent Review process.⁵⁵ The ASEP recommended, among other things, that an IRP should not be permitted to proceed on the same

⁵³ Vint Cerf, the former Chair of ICANN’s Board, testified in the *ICM* IRP that the independent review panel “is an advisory panel. It makes recommendations to the board but the board has the ultimate responsibility for deciding policy for ICANN.” *ICM v. ICANN*, Hearing Transcript, September 23, 2009, at 592:7-11; *see also id.* at 585:3-5, 591:16-594:13, available at <http://www.icann.org/en/news/irp/icm-v-icann/transcript-testimony-icm-independent-review-proceeding-23sep09-en.pdf>. Alejandro Pisanty, the Chair of the ERC, testified in the *ICM* IRP that “[i]t was decided to make this arbitration nonbinding in the thought that the liabilities and responsibilities for anything that’s done should lie on the board.” *ICM v. ICANN*, Hearing Transcript, September 24, 2009, at 807, 813:17-20; *see also id.* 810:15-818:18, available at <http://www.icann.org/en/news/irp/icm-v-icann/redacted-transcript-testimony-icm-independent-review-proceeding-24sep09-en.pdf>.

⁵⁴ 18 James Wm. Moore et al, *Moore’s Federal Practice* § 134.02; *see also In re Silverman*, 616 F.3d 1001, 1004-05 (9th Cir. 2010) (affirming a bankruptcy court’s holding that a district court decision from another district constituted “non-binding precedent”); *Kuhns v. City of Allentown*, 636 F. Supp. 2d 418, 437 (E.D. Pa. 2009) (“the Opinions of other district courts are persuasive but not binding authority on this Court”); *McNamara v. Royal Bank of Scotland Group, PLC*, No. 11-cv-2137-L(WVG), 2013 U.S. Dist. LEXIS 66516, at *8 (S.D. Cal. May 8, 2013) (defining “persuasive authority” as “[a] precedent that is not binding on a court, but that is entitled respect and careful consideration”).

⁵⁵ ICANN convened the ASEP in April 2012, following the recommendation of the Accountability and Transparency Review Team 1 (“ATRT1”). *See* ATRT1 Recommendations, available at <https://www.icann.org/en/about/aoc-review/atrt/final-recommendations-31dec10-en.pdf>. The ATRT1 was itself convened in accordance with ICANN’s Affirmation of Commitments (AoC) with the Department of Commerce, in which ICANN committed to “maintain and improve robust mechanisms for public input, accountability, and transparency,” and “organize a review of its execution of [those] commitments” at least once every three years. *See* ICANN AoC, available at <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>. Like the ASEP after it, the ATRT1 solicited community involvement and comment as part of its review process. *See* <https://www.icann.org/resources/pages/1-2012-11-14-en>.

issues as presented in a prior IRP. The ASEP's recommendations in this regard were raised in light of the second IRP constituted under ICANN's Bylaws, where the claimant presented claims that would have required the IRP Panel to reevaluate the declaration of the IRP Panel in the *ICM* IRP. To prevent claimants from challenging Board action taken in direct response to a prior IRP panel declaration, the ASEP recommended that "[t]he declarations of the IRP, and ICANN's subsequent actions on those declarations, should have precedential value."⁵⁶

41. The ASEP's recommendations in this regard did not convert IRP panel declarations into binding decisions.⁵⁷ One of the important considerations underlying the ASEP's work was the fact that ICANN, while it operates internationally, is a California non-profit public benefit corporation subject to the statutory law of California as determined by United States courts. As Graham McDonald, one of the three ASEP experts, explained, because California law requires that the board "retain responsibility for decision-making," the Board has "final word" on "any recommendation that . . . arises out of [an IRP]."⁵⁸ The ASEP's recommendations were therefore premised on the understanding that the declaration of an IRP panel is not "binding" on the Board.

CONCLUSION

42. ICANN's conduct with respect to Vistaprint's Applications for .WEBS was fully consistent with ICANN's Articles and Bylaws. ICANN's Board followed the procedures in the

⁵⁶ ASEP Report, October 2012, available at <http://www.icann.org/en/news/in-focus/accountability/asep/report-26oct12-en.pdf>.

⁵⁷ The ASEP confirmed the non-binding nature of the IRP on 17 October 2012 at a public session where community members were able to "give feedback [and] hear from the panel on the work that they [had] been doing so far." See Transcript of 17 Oct. 2012 Public Session with ASEP Panel, available at <http://toronto45.icann.org/meetings/toronto2012/transcript-asep-17oct12-en.pdf>.

⁵⁸ See *id.* at 5 ("As you would be aware, ICANN is an incorporated not-for-profit Californian company, and the corporations law of California applies, and as part of that law, the board has to retain responsibility for decision-making, so that in any recommendation that is made for -- or that arises out of a review, the board still has the final word on."); see also Cal. Corp. Code § 5210 ("[T]he activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.").

Guidebook and the Bylaws, and exercised its best judgment in evaluating Vistaprint's Reconsideration Request and in declining to intervene with respect to the Expert Determination. The fact that Vistaprint disagrees with the Expert Determination and would prefer not to be in a contention set with .WEB does not implicate Board action and cannot give rise to an IRP. Vistaprint's IRP Request should be denied.

Respectfully submitted,

JONES DAY

Dated: April 2, 2015

By: Eric P. Enson / RHZ
Eric P. Enson

Counsel for Respondent ICANN

Reference Material 50.

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

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

FINAL DECLARATION OF THE INDEPENDENT REVIEW PANEL

IRP Panel:

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

I. Introduction

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

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

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

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

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

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

⁶ Request, ¶ 14.

introducing additional new gTLDs.⁷ Following further work, ICANN's Board in June 2011 approved the "New gTLD Program" and a corresponding set of guidelines for implementing the Program – the gTLD Applicant Guidebook ("Guidebook").⁸ ICANN states that "[t]he New gTLD Program constitutes by far ICANN's most ambitious expansion of the Internet's naming system."⁹ The Guidebook is a foundational document providing the terms and conditions for new gTLD applicants, as well as step-by-step instructions and setting out the basis for ICANN's evaluation of these gTLD applications.¹⁰ As described below, it also provides dispute resolution processes for objections relating to new gTLD applications, including the String Confusion Objection procedure ("String Confusion Objection" or "SCO").¹¹ The window for submitting new gTLD applications opened on January 12, 2012 and closed on May 30, 2012, with ICANN receiving 1930 new gTLD applications.¹² The final version of the Guidebook was made available on June 4, 2012.¹³

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

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

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

⁹ Response, ¶ 16.

¹⁰ Response, ¶ 16.

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

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

¹³ gTLD Applicant Guidebook, Version 2012-06-04.

¹⁴ Affirmation of Commitments.

¹⁵ Request, ¶ 58; Vistaprint's First Additional Submission, ¶ 34.

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

- In the alternative, require that ICANN reject the *Vistaprint SCO* determination and organize a new independent and impartial SCO procedure, according to which a three-member panel re-evaluates the Expert Determination in the *Vistaprint SCO* taking into account (i) the ICANN Board’s resolutions on singular and plural gTLDs¹⁷, as well as the Board’s resolutions on the DERCars SCO Determination, the United TLD Determination, and the Onlineshopping SCO Determination¹⁸, and (ii) ICANN’s decisions to delegate the .CAR and .CARS gTLDs, the .AUTO and .AUTOS gTLDs, the .ACCOUNTANT and ACCOUNTANTS gTLDs, the .FAN and .FANS gTLDs, the .GIFT and .GIFTS gTLDs, the .LOAN and .LOANS gTLDs, the .NEW and .NEWS gTLDs and the .WORK and .WORKS gTLDs;
 - Award Vistaprint its costs in this proceeding; and
 - Award such other relief as the Panel may find appropriate or Vistaprint may request.
7. ICANN, on the other hand, contends that it followed its policies and processes at every turn in regards to Vistaprint’s .WEBS gTLD applications, which is all that it is required to do. ICANN states its conduct with respect to Vistaprint’s applications was fully consistent with ICANN’s Articles and Bylaws, and it also followed the procedures in the Guidebook. ICANN stresses that Vistaprint’s IRP Request should be denied.

II. Factual and Procedural Background

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

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

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

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

¹⁷ ICANN Board Resolution 2013.06.25.NG07.

¹⁸ ICANN Board Resolution 2014.10.12.NG02.

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

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

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

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

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

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

In filing an application for a gTLD, the applicant agrees to accept the applicability of this gTLD dispute resolution process. Similarly, an objector accepts the applicability of this gTLD dispute resolution process by filing its objection.

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

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

²⁰ Request, ¶ 5.

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

²² Request, ¶ 5.

²³ Request, ¶ 32.

²⁴ Request, ¶ 32.

²⁵ Request, ¶ 80.

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

²⁷ Guidebook, Module 3, p. 3-2.

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

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

3.5.1 String Confusion Objection

A DRSP panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.
16. On May 23, 2013, Vistaprint filed its responses to the Objector’s String Confusion Objections.
17. On June 28, 2013, the ICDR appointed Steve Y. Koh as the expert to consider the Objections (the “First Expert”). In this IRP Vistaprint objects that this appointment was untimely.³²
18. On 19 July 2013, the Objector submitted an unsolicited supplemental filing replying to Vistaprint’s response, to which Vistaprint objected.³³ Vistaprint claims that the supplemental submission should not have been accepted by the First Expert as it did not comply the New gTLD Objections Procedure.³⁴ The First Expert accepted the Objector’s submission and permitted Vistaprint to submit a sur-reply, which Vistaprint claims was subject to unfair conditions imposed by the First Expert.³⁵ Vistaprint filed its sur-reply on

²⁸ Guidebook, § 3.2.1.

²⁹ Guidebook, § 3.2.3.

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

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

³² Request, ¶ 33.

³³ Response, ¶ 26.

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

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

August 29, 2013.

19. On September 18, 2013 the ICDR informed the parties that the expert determination for the SCO case would be issued on or about October 4, 2013.³⁶ Vistaprint claims that this extension imposed an unjustified delay beyond the 45-day deadline for rendering a determination.³⁷
20. On October 1, 2013, the ICDR removed the First Expert due to a conflict that arose. On October 14, 2013, the ICDR appointed Bruce W. Belding as the new expert (the “Second Expert”).³⁸ Vistaprint claims that the New gTLD Objections Procedure was violated when the First Expert did not maintain his independence and impartiality and the ICDR failed to react to Vistaprint’s concerns in this regard.³⁹
21. On October 24, 2013, the Objector challenged the appointment of the Second Expert, to which Vistaprint responded on October 30, 2013. The challenge was based on the fact that the Second Expert had served as the expert in an unrelated prior string confusion objection, which Vistaprint maintained was not a reason for doubting the impartiality or independence of the Second Expert or accepting the challenge his appointment.⁴⁰ On November 4, 2013, the ICDR removed the Second Expert in response to the Objector’s challenge.⁴¹ On November 5, 2013, Vistaprint requested that the ICDR reconsider its decision to accept the challenge to the appointment of the Second Expert. On November 8, 2013, the ICDR denied this request.⁴² Vistaprint claims that the unfounded acceptance of the challenge to the Second Expert was a violation of the New gTLD Objections Procedure and the ICDR’s rules. The challenge was either unfounded and the ICDR should have rejected it, or it was founded, which would mean that the ICDR appointed the Second Expert knowing that justifiable doubts existed as to the Expert’s impartiality and independence.⁴³
22. On November 20, 2013, the ICDR appointed Professor Ilhyung Lee to serve as the expert (the “Third Expert”) to consider the Objector’s string confusion objection. No party objected to the appointment of Professor Lee.⁴⁴

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

³⁶ Request, Annex 14.

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

³⁸ Response, ¶ 27; Request, Annexes 15 and 16.

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

⁴⁰ Request, ¶ 37.

⁴¹ Response, ¶ 28; Request, ¶ 39, Annex 19.

⁴² Request, ¶ 39, Annex 21.

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

⁴⁴ Response, ¶ 28; Request, ¶ 39, Annex 22.

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

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

24. Moreover, the Expert found that

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

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

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

27. The Guidebook § 3.4.6 provides that:

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

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

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

⁴⁶ Request, Annex 24, p. 10.

⁴⁷ Request, Annex 24, p. 11.

⁴⁸ Request, ¶¶ 44-49.

⁴⁹ Vistaprint’s First Additional Submission, ¶¶ 1-2.

⁵⁰ Request, ¶ 49.

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

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

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

giving any rationale for doing so.⁵³

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

ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result ... the use of an ICANN accountability mechanism.⁵⁵

[Underlining added]

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

*In the case where a gTLD applicant successfully asserts string confusion with another applicant, the only possible outcome is for both applicants to be placed in a contention set and to be referred to a contention resolution procedure (refer to Module 4, String Contention Procedures). If an objection by one gTLD applicant to another gTLD application is unsuccessful, the applicants may both move forward in the process without being considered in direct contention with one another.*⁵⁶

B. Request for Reconsideration and Cooperative Engagement Process

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

⁵³ Request, ¶ 50.

⁵⁴ Vistaprint’s First Additional Submission, ¶¶ 29-30.

⁵⁵ Guidebook, § 5.1.

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

⁵⁷ Request, Annex 25.

⁵⁸ Response, ¶ 29; Bylaws, Art. IV, § 2.

⁵⁹ Bylaws, Art. IV, § 2.2.a.

consideration and action:

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

33. ICANN has determined that the reconsideration process can be invoked for challenges to expert determinations rendered by panels formed by third party dispute resolution service providers, such as the ICDR, where it can be stated that the panel failed to follow the established policies or processes in reaching the expert determination, or that staff failed to follow its policies or processes in accepting that determination.⁶⁰
34. In its RFR, Vistaprint asked ICANN to reject the Third Expert's decision and to instruct a new expert panel to issue a new decision "that applies the standards defined by ICANN."⁶¹ Vistaprint sought reconsideration of the "various actions and inactions of ICANN staff related to the Expert Determination," claiming that "the decision fails to follow ICANN process for determining string confusion in many aspects."⁶² In particular, Vistaprint asserted that the ICDR and the Third Expert violated the applicable New gTLD Objection Procedures concerning:
 - (i) the timely appointment of an expert panel;
 - (ii) the acceptance of additional written submissions;
 - (iii) the timely issuance of an expert determination;
 - (iv) an expert's duty to remain impartial and independent;
 - (v) challenges to experts;
 - (vi) the Objector's burden of proof; and
 - (vii) the standards governing the evaluation of a String Confusion Objection.
35. Vistaprint also argued that the decision was unfair, and accepting it creates disparate treatment without justified cause.⁶³
36. The Bylaws provide in Article IV, § 2.3, that the BGC "shall have the authority to":
 - a. evaluate requests for review or reconsideration;
 - b. summarily dismiss insufficient requests;
 - c. evaluate requests for urgent consideration;
 - d. conduct whatever factual investigation is deemed appropriate;
 - e. request additional written submissions from the affected party, or from other parties;
 - f. make a final determination on Reconsideration Requests regarding staff action or inaction, without

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

⁶¹ Request, ¶ 51; Annex 25, p.7.

⁶² Request, Annex 25, p.2.

⁶³ Request, Annex 25, p.6.

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

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

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

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

*In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of expert determinations. Accordingly, the BGC is not to evaluate the Panel’s substantive conclusion that the Requester’s applications for .WEBS are confusingly similar to the Requester’s application for .WEB. Rather, the BGC’s review is limited to whether the Panel violated any established policy or process in reaching that Determination.*⁶⁶

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

*In accordance with Article IV, Section 2.15 of the Bylaws, the BGC’s determination on Request 14-5 shall be final and does not require Board (or NGPC⁶⁷) consideration. The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that the BGC’s determination on such matters is final. (Bylaws, Art. IV, § 2.15.) As discussed above, Request 14-5 seeks reconsideration of a staff action or inaction. After consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.*⁶⁸

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

⁶⁴ BGC Determination, p. 18, Request, Annex 26.

⁶⁵ BGC Determination, p. 2, Request, Annex 26.

⁶⁶ BGC Determination, p. 7, Request, Annex 26.

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

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

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

(“CEP”) with ICANN.⁶⁹ Vistaprint stated in its letter:

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

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

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

C. Procedures in this Case

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

⁶⁹ Request, Annex 27.

⁷⁰ Request, Annex 27.

⁷¹ Guidebook, § 6.6.

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

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

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

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

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

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

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

A. Articles of Incorporation

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

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

[Underlining added]

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

B. Bylaws

a. Directives to ICANN and its Board

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

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

⁷⁶ Request, ¶ 55. Vistaprint also states that “U.S. and California law, like almost all jurisdictions, recognize obligations to act in good faith and ensure procedural fairness. The requirement of procedural fairness has been an established part of the California common law since before the turn of the 19th century.” Request, ¶ 60, n.8.

⁷⁷ Request, ¶ 59.

⁷⁸ Request, ¶ 60.

⁷⁹ Request, ¶ 66.

Articles or Bylaws:

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

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

Section 2. Core Values

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

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

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

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

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

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

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

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

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

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.

⁸⁰ Vistaprint states that “[t]his requirement is also found in applicable California law, which requires that decisions be made according to procedures that are ‘fair and applied uniformly’, and not in an ‘arbitrary and capricious manner.’” Request, ¶ 62, n.9.

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

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

[Underlining added]

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

Section 3 (Non-Discriminatory Treatment)

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

[Underlining added]

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

Section 1. PURPOSE

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

[Underlining added]

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

In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws.

[Underlining added]

b. Directives for the IRP Panel

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

ICANN's structure and procedures.⁸¹

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

The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III and the Board and other selection mechanisms set forth throughout these Bylaws.

[Underlining added]

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

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

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

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

Requests for such independent review shall be referred to an Independent Review Process Panel (“IRP Panel”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.⁸⁵

[Underlining added]

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

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

⁸² Request, ¶ 57.

⁸³ Response, ¶ 33.

⁸⁴ Response, ¶ 4.

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

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

“must apply a defined standard of review to the IRP request, focusing on:

- a. did the Board act without conflict of interest in taking its decision?;
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?⁸⁶

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

The IRP Panel shall have the authority to:

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

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

“[t]he IRP Panel shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party.”⁸⁸

[Underlining added]

66. The Bylaws address the steps to be taken after the Panel issues a determination in the IRP. Article IV, § 3.21⁸⁹ states that “declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value”:

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

[Underlining added]

C. Affirmation of Commitments

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

⁸⁶ Bylaws, Art. IV, § 3.4.

⁸⁷ Bylaws, Art. IV, § 3.11.

⁸⁸ Bylaws, Art. IV, § 3.18.

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

3. This document affirms key commitments by DOC and ICANN, including commitments to: (a) ensure that decisions made related to the global technical coordination of the DNS are made in the public interest and are accountable and transparent; (b) preserve the security, stability and resiliency of the DNS; (c) promote competition, consumer trust, and consumer choice in the DNS marketplace; and (d) facilitate international participation in DNS technical coordination.

* * * *

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

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

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

* * * *

9.3 Promoting competition, consumer trust, and consumer choice: ICANN will ensure that as it contemplates expanding the top-level domain space, the various issues that are involved (including competition, consumer protection, security, stability and resiliency, malicious abuse issues, sovereignty concerns, and rights protection) will be adequately addressed prior to implementation. If and when new gTLDs (whether in ASCII or other language character sets) have been in operation for one year, ICANN will organize a review that will examine the extent to which the introduction or expansion of gTLDs has promoted competition, consumer trust and consumer choice, as well as effectiveness of (a) the application and evaluation process, and (b) safeguards put in place to mitigate issues involved in the introduction or expansion. ICANN will organize a further review of its execution of the above commitments two years after the first review, and then no less frequently than every four years.... Resulting recommendations of the reviews will be provided to the Board and posted for public comment. The Board will take action within six months of receipt of the recommendations.

{Underlining added}

IV. Summary of Parties' Contentions

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

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

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

A. Vistaprint's Position

a. IRP Panel's Authority

71. Standard of review: Vistaprint emphasizes that ICANN is accountable to the community for operating in a manner that is consistent with the Article and Bylaws, and with due regard for the core values set forth in Article I of the Bylaws. To achieve this required accountability, the IRP Panel is "charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws."⁹⁰ Vistaprint states that the IRP Panel's fulfillment of this core obligation is crucial to ICANN's commitment to accountability. The IRP is the only method established by ICANN for holding itself accountable through third-party review of its decisions.⁹¹
72. Vistaprint contends that ICANN is wrong in stating (in its Response⁹²) that a deferential standard of review applies in this case.⁹³ No such specification is made in ICANN's Bylaws or elsewhere, and a restrictive interpretation of the standard of review would be inappropriate. It would fail to ensure accountability on the part of ICANN and would be incompatible with ICANN's commitment to maintain and improve robust mechanisms for accountability, as required by Article 9.1 of ICANN's Affirmation of Commitments and ICANN's core values, which require ICANN to "remain accountable to the Internet community through mechanisms that enhance ICANN's effectiveness".⁹⁴
73. Vistaprint states further that the most recent version of ICANN's Bylaws, amended on

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

⁹¹ Request, ¶ 57.

⁹² Response, ¶ 33.

⁹³ Vistaprint's First Additional Submission, ¶ 36.

⁹⁴ Vistaprint's First Additional Submission, ¶¶ 36-37; Request, ¶ 57.

April 11, 2013, require that the IRP Panel focus on whether ICANN's Board was free from conflicts of interest and exercised an appropriate level of due diligence and independent judgment in its decision making.⁹⁵ Vistaprint asserts, however, that these issues are mentioned by way of example only. The Bylaws do not restrict the IRP Panel's remit to these issues alone, as the Panel's fundamental task is to determine whether the Board has acted consistently with the Articles and Bylaws⁹⁶

74. IRP declaration binding or non-binding: Vistaprint contends that the outcome of this IRP is binding on ICANN and that any other outcome "would be incompatible with ICANN's obligation to maintain and improve robust mechanisms for accountability."⁹⁷
75. Vistaprint states that since ICANN's amendment of its Bylaws, IRP declarations have precedential value.⁹⁸ Vistaprint asserts the precedential value – and binding force – of IRP declarations was confirmed in a recent IRP panel declaration,⁹⁹ which itself has precedential value for this case. Vistaprint argues that any other outcome would effectively grant the ICANN Board arbitrary and unfettered discretion, something which was never intended and would be incompatible with ICANN's obligation to maintain and improve robust mechanisms for accountability.¹⁰⁰
76. Vistaprint contends that the IRP is not a mere "corporate accountability mechanism" aimed at ICANN's internal stakeholders.¹⁰¹ The IRP is open to any person materially affected by a decision or action of the Board¹⁰² and is specifically available to new gTLD applicants, as stated in the Guidebook, Module 6.4. Vistaprint claims that *internally*, towards its stakeholders, ICANN might be able to argue that its Board retains ultimate decision-making power, subject to its governing principles. *Externally*, however, the ICANN Board's discretionary power is limited, and ICANN and its Board must offer redress when its decisions or actions harm third parties.¹⁰³
77. Vistaprint argues further that the IRP has all the characteristics of an international arbitration.¹⁰⁴ The IRP is conducted pursuant to a set of independently developed

⁹⁵ Bylaws, Article IV, § 3.4.

⁹⁶ Vistaprint's First Additional submission, ¶ 35.

⁹⁷ Vistaprint's First Additional Submission, ¶ 37.

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

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

¹⁰⁰ Vistaprint's First Additional Submission, ¶ 37.

¹⁰¹ Vistaprint's Second Additional Submission, ¶ 29.

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

¹⁰³ Vistaprint's Second Additional Submission, ¶ 15.

¹⁰⁴ Vistaprint's Second Additional Submission, ¶ 27.

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

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

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

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

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

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

¹⁰⁵ Citing *DCA Third Declaration on IRP Procedure*, ¶ 98.

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

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

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

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

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

b. SCO Proceedings Claim

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

¹⁰⁶ *DCA Third Declaration on IRP Procedure*, ¶ 40.

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

¹⁰⁸ Vistaprint's Second Additional Submission, ¶ 24.

¹⁰⁹ Request, ¶ 4.

¹¹⁰ Request, ¶ 71.

84. Although Vistaprint challenged the SCO decision through ICANN’s Request for Reconsideration process, ICANN refused to reconsider the substance of the challenged decision, or to take any action to remedy the lack of due process. In doing so, Vistaprint claims ICANN failed to act in a fair and non-arbitrary manner, with good faith, accountability, due diligence and independent judgment, as required by ICANN’s Bylaws and Articles.¹¹¹ ICANN’s acceptance of the SCO determination and refusal to reverse this decision was an abdication of responsibility and contrary to the evaluation policies ICANN had established in the Guidebook.¹¹²
85. A number of Vistaprint’s contentions regarding the alleged violations of process and substance in SCO proceedings are described in part II.A above addressing Vistaprint’s .WEBS applications and the SCO proceedings. Vistaprint’s alleges as follows:
- (i) ICDR’s appointment of the First Expert was untimely, in violation of Article 13(a) of the New gTLD Objections Procedure¹¹³;
 - (ii) the First Expert (and Third Expert) improperly accepted and considered unsolicited supplemental filings, violating Articles 17 and 18 of the New gTLD Objections Procedure¹¹⁴;
 - (iii) ICDR violated Article 21 of the New gTLD Objections Procedure¹¹⁵ by failing to ensure the timely issuance of an expert determination in the SCO;
 - (iv) the First Expert failed to maintain independence and impartiality, in violation of Article 13(c) of the New gTLD Objections Procedure¹¹⁶;
 - (v) ICDR unjustifiably accepted a challenge to the Second Expert (or created the circumstances for such a challenge), in violation of Article 2 of the ICDR’s Supplementary Procedures for String Confusion Objections (Rules);
 - (vi) the Determination of the Third Expert was untimely, in violation of Article 21(a) of the New gTLD Objections Procedure;
 - (vii) the Third Expert incorrectly applied the Objector’s burden of proof, in violation of section 3.5 of the Guidebook and Article 20(c) of the New gTLD Objections Procedure, which place the burden of proof on the Objector; and

¹¹¹ Request, ¶ 71.

¹¹² Request, ¶ 8.

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

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

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

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

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

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

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

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

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

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

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

¹¹⁷ Request, ¶ 49.

¹¹⁸ Request, ¶ 6.

¹¹⁹ Request, ¶ 6.

¹²⁰ Request, ¶¶ 69-71.

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

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

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

¹²¹ Request, ¶ 72.

¹²² Request, Annex 10.

¹²³ Request, ¶ 73.

¹²⁴ Request, ¶¶ 52 and 77.

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

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

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

c. Disparate Treatment Claim

¹²⁵ Request, ¶¶ 52.

¹²⁶ Request, ¶¶ 78-79.

¹²⁷ Request, ¶ 80.

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

¹²⁸ Vistaprint’s Second Additional Submission, ¶ 20-21.

¹²⁹ Request, ¶ 52.

¹³⁰ Request, ¶ 52 (referencing NGPC Resolution 2014.02.05.NG02).

¹³¹ Request, ¶ 52.

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

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

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

* * * *

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

* * * *

31. When the ICANN Board individually considers an application, it must make sure that it does not treat applicants inequitably and that it does not discriminate among applicants. Article II, Section 3 of ICANN’s Bylaws provides that “ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition”. However, with regard to the SCO proceedings, the ICANN Board has done the exact opposite. It created the opportunity for some aggrieved applicants to participate in an appeals process, while denying others.

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

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

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

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

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

¹³² Vistaprint’s First Additional Submission, ¶ 12.

¹³³ Vistaprint’s Second Additional Submission, ¶¶ 8-12.

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

B. ICANN's Position

a. IRP Panel's Authority

96. Standard of review: ICANN describes the IRP as a unique mechanism available under ICANN's Bylaws.¹³⁵ The IRP Panel is tasked with determining whether the Board's actions are consistent with ICANN's Articles and Bylaws. ICANN states that its Bylaws specifically identify a deferential standard of review that the IRP Panel must apply when evaluating the actions of the ICANN Board, and the rules are clear that the IRP Panel is neither asked to, nor allowed to, substitute its judgment for that of the Board.¹³⁶ In particular, ICANN cites to Article IV, § 3.4 of the Bylaws indicating the IRP Panel is to apply a defined standard of review to the IRP Request, focusing on:
- a. did the Board act without conflict of interest in taking its decision?;
 - b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
 - c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?
97. Further, ICANN states that the IRP addresses challenges to conduct undertaken by ICANN's Board of Directors; it is not a mechanism to challenge the actions or inactions of ICANN staff or third parties that may be involved with ICANN's activities.¹³⁷ The IRP is also not an appropriate forum to challenge the BGC's ruling on a Reconsideration Request in the absence of some violation by the BGC of ICANN's Articles or Bylaws.¹³⁸
98. IRP Declaration binding or non-binding: ICANN states that the IRP "is conducted pursuant to Article IV, section 3 of ICANN's Bylaws, which creates a non-binding method

¹³⁴ ICANN's First Additional Response, ¶¶ 28-29.

¹³⁵ Response, ¶ 32.

¹³⁶ Response, ¶ 33; ICANN's First Additional Response, ¶ 10.

¹³⁷ Response, ¶ 4.

¹³⁸ Response, ¶ 12.

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

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

35. First, the Bylaws charge an IRP panel with "comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws." The Board is then obligated to "review[]"¹⁴² and "consider" an IRP panel's declaration at the Board's next meeting "where feasible."¹⁴³ The direction to "review" and "consider" an IRP panel's declaration means that the Board has discretion as to whether it should adopt that declaration and whether it should take any action in response to that declaration; if the declaration were binding, there would be nothing to review or consider, only a binding order to implement.

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

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

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

¹³⁹ Response, ¶ 2.

¹⁴⁰ Response, ¶ 2 (quoting Bylaws, Art. IV, § 3.4).

¹⁴¹ ICANN's First Additional Response, ¶ 34.

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

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

¹⁴⁴ Response, ¶ 35.

¹⁴⁵ Response, ¶ 35 (quoting Bylaws, Art. IV, § 3.21).

37. In February 2010, the first IRP panel to issue a final declaration, the ICM IRP Panel, unanimously rejected the assertion that IRP panel declarations are binding¹⁴⁶ and recognized that an IRP panel's declaration "is not binding, but rather advisory in effect." Nothing has occurred since the issuance of the ICM IRP Panel's declaration that changes the fact that IRP panel declarations are not binding. To the contrary, in April 2013, following the ICM IRP, in order to clarify even further that IRPs are not binding, all references in the Bylaws to the term "arbitration" were removed as part of the Bylaws revisions. ICM had argued in the IRP that the use of the word "arbitration" in the portion of the Bylaws related to Independent Review indicated that IRPs were binding, and while the ICM IRP Panel rejected that argument, to avoid any lingering doubt, ICANN removed the word "arbitration" in conjunction with the amendments to the Bylaws.

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

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

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

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

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

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

¹⁴⁷ Response, ¶ 78.

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

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

b. SCO Proceedings Claim

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

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

104. ICANN states that the IRP Panel has one chief responsibility – to “determine whether the Board has acted consistently with the provisions of [ICANN’s] Articles of Incorporation and Bylaws.”¹⁵¹ With respect to Vistaprint’s claim that ICANN’s Board violated its Articles and Bylaws by “blindly accepting” the Third Expert’s SCO determination without reviewing its analysis or result, ICANN responds that there is no requirement for the Board to conduct such an analysis. “Accepting” or “reviewing” the Expert’s determination is not something the Board was tasked with doing or not doing. Per the Guidebook, the “findings of the panel will be considered an expert determination and advice that ICANN will accept within the dispute resolution process.”¹⁵² The Guidebook further provides that “[i]n a case where a gTLD applicant successfully asserts string confusion with another applicant, the only possible outcome is for both applicants to be placed in a contention set and to be referred to a contention resolution procedure (refer to Module 4, String Contention Procedures).”¹⁵³ This step is a result not of any ICANN Board action, but a straightforward application of Guidebook provisions for SCO determinations.

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

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

¹⁴⁹ *ICM Registry Final Declaration*, ¶ 133.

¹⁵⁰ Response, ¶ 12; ICANN’s First Additional submission, ¶ 4.

¹⁵¹ Response, ¶ 2 (citing Bylaws, Art. IV, § 3.4).

¹⁵² Response, ¶ 9 (citing Guidebook, § 3.4.6).

¹⁵³ Response, ¶ 9 (citing Guidebook, § 3.2.2.1).

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

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

¹⁵⁴ ICANN’s First Additional Submission, ¶ 4.

¹⁵⁵ Response, ¶ 43.

¹⁵⁶ Response, ¶ 44 (citing Bylaws, Art. IV, § 2.3(f)).

¹⁵⁷ Response, ¶ 11.

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

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

¹⁵⁸ Response, ¶ 50.

¹⁵⁹ New gTLD Objections Procedure, Art. 17.

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

¹⁶¹ Response, ¶¶ 54-56.

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

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

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

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

“[f]or the likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user.”

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

¹⁶³ Response, ¶¶ 61-62.

¹⁶⁴ Response, ¶¶ 63-64.

¹⁶⁵ Response, ¶¶ 65-68.

¹⁶⁶ Request, ¶ 47.

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

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

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

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

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

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

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

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

¹⁶⁷ Response, ¶ 69.

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

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

c. Disparate Treatment Claim

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

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

¹⁶⁸ ICANN’s First Additional Submission, ¶ 14.

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

¹⁷⁰ ICANN’s First Additional Submission, ¶ 5.

¹⁷¹ ICANN’s First Additional Submission, ¶ 15.

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

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

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

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

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

¹⁷² See BGC Determination on Reconsideration Request 13-10, at 11.

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

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

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

¹⁷⁶ ICANN's First Additional Submission, ¶ 18.

¹⁷⁷ ICANN's First Additional Response, ¶ 27.

¹⁷⁸ *Booking.com final Declaration*, ¶ 129.

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

V. Analysis and Findings

a. IRP Panel's Authority

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

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

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

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

The provisions of this Article, creating processes for reconsideration and independent review of ICANN actions and periodic review of ICANN's structure and procedures, are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws.

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

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

- a. did the Board act without conflict of interest in taking its decision?;*
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*

¹⁷⁹ ICANN's First Additional Submission, ¶ 28.

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

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

[Underlining added]

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

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

8. Standard of Review

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

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

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

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

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

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

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

¹⁸³ *ICM Registry Final Declaration*, ¶ 136.

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

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

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

- a. evaluate requests for review or reconsideration;
- b. summarily dismiss insufficient requests;
- c. evaluate requests for urgent consideration;
- d. conduct whatever factual investigation is deemed appropriate;
- e. request additional written submissions from the affected party, or from other parties;
- f. make a final determination on Reconsideration Requests regarding staff action or inaction, without reference to the Board of Directors; and
- g. make a recommendation to the Board of Directors on the merits of the request, as necessary.

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

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

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

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

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

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

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

which shall implement and be consistent with this Section 3.

[Underlining added]

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

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

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

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

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

¹⁸⁷ *ICM Registry Final Declaration*, ¶ 133.

¹⁸⁸ Cambridge English Online Dictionary (United States version).

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

The IRP Panel shall have the authority to:

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

[Underlining added]¹⁸⁹

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

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

¹⁸⁹ Bylaws, Art. IV, § 3.11.

¹⁹⁰ Supplementary Rule 6 provides similarly that:

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

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

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

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

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

(Continued...)

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

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

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

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

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

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

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

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

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

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

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

¹⁹³ *ICM Registry Final Declaration*, ¶ 133.

¹⁹⁴ ICANN’s First Additional Submission, ¶ 39.

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

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

144. Finally, in view of Article IV, § 3.21 providing that the declarations of IRP panels are final and *have precedential value*, the IRP Panel here recognizes that, in addition to the *ICM Registry Final Declaration*, two other IRP panels have considered the question of the IRP panel's authority. In the *Booking.com Final Declaration*, the IRP panel focused on the independent and objective standard of review to be applied to the panel's core task of assessing whether the Board's actions were consistent with the Articles, Bylaws and Guidebook.¹⁹⁶ However, the IRP panel in *Booking.com*, as ICANN acknowledges in its Second Additional Response, did not directly address whether an IRP panel may issue a binding declaration (although ICANN contends that the panel implicitly acknowledged that it cannot).¹⁹⁷
145. In the *DCA Final Declaration*, the IRP panel addressed directly the question of whether or not the panel's declaration was binding. The panel ruled that its declarations, both as to the procedure and the merits of the case, were binding. The IRP panel in that case raised some of the same concerns that Vistaprint has raised here¹⁹⁸:

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

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

[...]

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

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

¹⁹⁶ *Booking.com Final Declaration*, ¶¶ 104-115.

¹⁹⁷ ICANN's Second Additional Response, ¶ 29.

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

and therefore the IRP serves as the ultimate accountability mechanism for them:¹⁹⁹

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

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

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

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

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

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

b. SCO Proceedings Claim

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

²⁰⁰ Article IV, §2.15 of ICANN’s Bylaws provides that:

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

²⁰¹ Request, ¶ 6.

²⁰² Request, ¶ 6.

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

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

[Underlining added]

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

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

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

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

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

*ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result ... the use of an ICANN accountability mechanism.*²⁰⁵

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

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

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

²⁰⁴ Guidebook, § 6.6.

²⁰⁵ Guidebook, § 5.1.

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

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

*In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of expert determinations. Accordingly, the BGC is not to evaluate the Panel’s substantive conclusion that the Requester’s applications for .WEBS are confusingly similar to the Requester’s application for .WEB. Rather, the BGC’s review is limited to whether the Panel violated any established policy or process in reaching that Determination.*²⁰⁶

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

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

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

²⁰⁶ BGC Determination, p. 7, Request, Annex 26.

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

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

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

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

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

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

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

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

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

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

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

²⁰⁸ BGC Determination, p. 12, Request, Annex 26.

²⁰⁹ Request, ¶ 77.

²¹⁰ BGC Determination, p. 12, Request, Annex 26.

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

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

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

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

3.5.1 String Confusion Objection

A DRSP panel hearing a string confusion objection will consider whether the applied-for gTLD string is likely to result in string confusion. String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

168. Vistaprint in its Request emphasized that ICANN has indicated that the SCO test sets a high bar²¹³:

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

- “[T]he standard indicates that confusion must be probable, not merely possible, in order for this sort of harm to arise. Consumers also benefit from competition. For new gTLDs, the similarity test is a high bar, as indicated by the wording of the standard.[...] Therefore, while the objection and dispute resolution process is intended to address all types of similarity, the process is not intended to hobble competition or reserve a broad set of string [sic] for a first mover.” (fn. omitted)

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

²¹¹ BGC Recommendation, pp. 15-18, Request, Annex 26.

²¹² BGC Determination, p. 17, Request, Annex 26.

²¹³ Request, ¶¶ 22-23.

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

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

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

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

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

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

String confusion exists where a string so nearly resembles another that it is likely to deceive or cause confusion. For a likelihood of confusion to exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion.

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

²¹⁴ Request, ¶ 24.

172. ICANN has argued that the time for Vistaprint to have objected to the Guidebook and its SCO policy has long since passed. Vistaprint has responded that it contests the *implementation* of the Guidebook and its *policies*, not just the policies themselves. Even assuming that the Guidebook's policies could be challenged at this point, the IRP Panel finds that the relevant policies, such as the standard for evaluating String Confusion Objections, do not violate any of ICANN's Articles or Bylaws reflecting principles such as good faith, fairness, transparency and accountability. However, the Panel does agree with ICANN that the time for challenging the Guidebook's standard for evaluating String Confusion Objections – which was developed in an open process and with extensive input – has passed.
173. Vistaprint has also complained that it was not provided with the opportunity to appeal the Third Expert's decision on the merits, such that the BGC or some other entity would re-evaluate the Expert's string confusion determination. As noted above, the BGC's review focused on whether the ICDR and the Third Expert properly applied the relevant rules and policies, not on whether the BGC, if it had considered the matter *de novo*, would have found string confusion as between the .WEBS and .WEB strings.
174. The IRP Panel finds that the lack of an appeal mechanism to contest the merits of the Third Expert's SCO determination is not, in itself, a violation of ICANN's Articles or Bylaws. ICANN's commitment through its Articles and Bylaws to act in good faith and with accountability and transparency, and to apply documented policies neutrally, objectively and fairly, does not require that it must have designed the SCO mechanism so that the result of a string confusion determination would be subject to a right of appeal. Other significant dispute resolution systems – such as the international legal regime for commercial arbitration regarding awards as final and binding²¹⁵ – do not normally provide for a right of appeal on the merits.
175. In respect of Vistaprint's *SCO Proceedings Claim*, the IRP Panel denies each of Vistaprint's claims concerning ICANN's alleged breaches of obligations under the Articles, Bylaws and Affirmation of Commitments, as follows:
- (1) Vistaprint claims that ICANN failed to comply with its obligation under Article 4 of the Articles and IV § 3.4 of the Bylaws to act in good faith with due diligence and independent judgment by failing to provide due process to Vistaprint's .WEBS applications.²¹⁶ The IRP Panel denies Vistaprint's claim that Vistaprint was not given a fair opportunity to present its case; was deprived of procedural fairness and the opportunity to be heard by an independent panel applying the appropriate rules; and was not given any meaningful opportunity for remedy or redress once the SCO determination was made, even in the RFR procedure.
 - (2) Vistaprint claims ICANN failed to comply with its obligation under Article I § 2.8 to neutrally, objectively and fairly apply documented policies as established in the

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

²¹⁶ Request, ¶¶ 69-71.

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

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

²¹⁷ Request, ¶ 72.

²¹⁸ Request, ¶ 73.

²¹⁹ Request, ¶¶ 52 and 77.

²²⁰ Request, ¶¶ 78-79.

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

c. Disparate Treatment Claim

176. Vistaprint's final claim is one that raises a close question for this IRP Panel. Vistaprint contends that ICANN's Board discriminated against Vistaprint through the Board's (and the BGC's) acceptance of the Third Expert's determination in the *Vistaprint SCO*, while allowing other gTLD applications with equally serious string similarity concerns to proceed to delegation²²², or permitting still other applications that were subject to an adverse SCO determination to go through a separate additional review mechanism.

177. The IRP Panel agrees with Vistaprint's statement that the "IRP Panel's mandate includes a review as to whether or not ICANN's Board discriminates in its interventions on SCO expert determinations."²²³ As discussed above, in the Guidebook, § 5.1, ICANN has reserved the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community:

*....The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application....*²²⁴

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

Section 3 (Non-Discriminatory Treatment)

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

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

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

²²¹ Request, ¶ 80.

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

²²³ Vistaprint's Second Additional Submission, ¶ 20.

²²⁴ Guidebook, § 5.1.

²²⁵ Vistaprint's First Additional Submission, ¶ 31.

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

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

* * * *

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

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

[Underlining added]

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

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

Whereas, on 10 October 2013 the Board Governance Committee (BGC) requested staff to draft a report for the NGPC on String Confusion Objections "setting out options for dealing with the situation raised within this Request, namely the differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes involving Amazon's Applied-for String and TLDH's Applied-for String."

Whereas, the NGPC is considering potential paths forward to address the perceived inconsistent Expert Determinations from the New gTLD Program String Confusion Objections process, including implementing a review mechanism. The review will be limited to the String Confusion Objection Expert Determinations for .CAR/.CARS and .CAM/.COM.

Whereas, the proposed review mechanism, if implemented, would constitute a change to the current String Confusion Objection process in the New gTLD Applicant Guidebook.

Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the

Board on 10 April 2012, to exercise the ICANN Board's authority for any and all issues that may arise relating to the New gTLD Program.

Resolved (2014.02.05.NG02), the NGPC directs the President and CEO, or his designee, to publish for public comment the proposed review mechanism for addressing perceived inconsistent Expert Determinations from the New gTLD Program String Confusion Objections process.

[Underlining added]

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

The NGPC also considered whether there was a reasonable basis for certain perceived inconsistent Expert Determinations to exist, and particularly why the identified Expert Determinations should be sent back to the ICDR while other Expert Determinations should not. The NGPC notes that while on their face some of the Expert Determinations may appear inconsistent, including other SCO Expert Determinations, and Expert Determinations of the Limited Public Interest and Community Objection processes, there are reasonable explanations for these seeming discrepancies, both procedurally and substantively.

First, on a procedural level, each expert panel generally rests its Expert Determination on materials presented to it by the parties to that particular objection, and the objector bears the burden of proof. Two panels confronting identical issues could – and if appropriate should – reach different determinations, based on the strength of the materials presented.

Second, on a substantive level, certain Expert Determinations highlighted by the community that purportedly resulted in "inconsistent" or "unreasonable" results, presented nuanced distinctions

²²⁶ Request, ¶ 52.

²²⁷ BGC Recommendation, p. 19, Request, Annex 26.

relevant to the particular objection. These nuances should not be ignored simply because a party to the dispute disagrees with the end result. Further, the standard guiding the expert panels involves some degree of subjectivity, and thus independent expert panels would not be expected to reach the same conclusions on every occasion. However, for the identified Expert Determinations, a reasonable explanation for the seeming discrepancies is not as apparent, even taking into account all of the previous explanations about why reasonably "discrepancies" may exist. To allow these Expert Determinations to stand would not be in the best interests of the Internet community.

The NGPC considered whether it was appropriate, as suggested by some commenters, to expand the scope of the proposed review mechanism to include other Expert Determinations, such as some resulting from Community and Limited Public Objections, as well as other String Confusion Objection Expert Determinations, and possibly singular and plural versions of the same string. The NGPC determined that to promote the goals of predictability and fairness, establishing a review mechanism more broadly may be more appropriate as part of future community discussions about subsequent rounds of the New gTLD Program. Applicants have already taken action in reliance on many of the Expert Determinations, including signing Registry Agreements, transitioning to delegation, withdrawing their applications, and requesting refunds. Allowing these actions to be undone now would not only delay consideration of all applications, but would raise issues of unfairness for those that have already acted in reliance on the Applicant Guidebook.

It should also be noted that in response to advice from the Governmental Advisory Committee (GAC), the NGPC previously considered the question of whether consumer confusion may result from allowing singular and plural versions of the same strings. On 25 June 2013, the NGPC adopted a resolution resolving "that no changes [were] needed to the existing mechanisms in the Applicant Guidebook to address potential consumer confusion resulting from allowing singular and plural versions of the same string" <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm#2.d>. The NGPC again notes that the topic of singular and plural versions of the same string also may be the subject of further community discussion as it relates to future rounds of the New gTLD Program.

The NGPC considered community correspondence on this issue in addition to comments from the community expressed at the ICANN meetings. The concerns raised in the ICANN meetings and in correspondence have been factored into the deliberations on this matter.

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

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

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

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

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

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

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

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

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

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

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

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

/.shop.

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

²²⁸ ICANN's First Additional Submission, ¶ 5.

²²⁹ ICANN's First Additional Submission, ¶ 18.

²³⁰ ICANN's Second Additional submission, ¶ 21.

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

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

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

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

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

(Continued...)

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

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

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

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

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

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

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

VI. Prevailing Party; Costs

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

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

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

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

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

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

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

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

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

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

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

FOR THE FOREGOING REASONS, the IRP Panel hereby:

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

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

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

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

Siegfried H. Elsing
Date:

Geert Glas
Date:



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

Reference Material 51.

Syllabus

BROWN, SECRETARY OF VETERANS AFFAIRS *v.*
GARDNERCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT

No. 93–1128. Argued October 31, 1994—Decided December 12, 1994

After respondent veteran had back surgery in a Department of Veterans Affairs facility for a condition unrelated to his military service, he developed pain and weakness in his left leg, which he alleged was the result of the surgery. He claimed disability benefits under 38 U. S. C. § 1151, which requires the VA to compensate for “an injury, or an aggravation of an injury,” that occurs “as the result of” VA treatment. The VA and the Board of Veterans’ Appeals denied the claim on the ground that § 1151, as interpreted by 38 CFR § 3.358(c)(3), only covers an injury if it resulted from negligent treatment by the VA or an accident occurring during treatment. The Court of Veterans Appeals reversed, holding that § 1151 neither imposes nor authorizes adoption of § 3.358(c)(3)’s fault-or-accident requirement. The Court of Appeals for the Federal Circuit affirmed.

Held: Section 3.358(c)(3) is not consistent with the plain language of § 1151, which contains not a word about fault-or-accident. The statutory text and reasonable inferences from it give a clear answer against the Government’s arguments that a fault requirement is implicit in the terms “injury” and “as a result of.” This clear textually grounded conclusion is also fatal to the Government’s remaining principal arguments: that Congress ratified the VA’s practice of requiring a showing of fault when it reenacted the predecessor of § 1151 in 1934, or, alternatively, that the post-1934 legislative silence serves as an implicit endorsement of the fault-based policy; and that the policy deserves judicial deference due to its undisturbed endurance. Pp. 117–122.

5 F. 3d 1456, affirmed.

SOUTER, J., delivered the opinion for a unanimous Court.

Edward C. DuMont argued the cause for petitioner. With him on the briefs were *Solicitor General Days*, *Deputy Solicitor General Bender*, and *Tresa M. Schlecht*.

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Joseph M. Hannon, Jr., argued the cause for respondent. With him on the briefs was *William S. Mailander*.*

JUSTICE SOUTER delivered the opinion of the Court.

In this case we decide whether a regulation of the Department of Veterans Affairs, 38 CFR § 3.358(c)(3) (1993), requiring a claimant for certain veterans' benefits to prove that disability resulted from negligent treatment by the VA or an accident occurring during treatment, is consistent with the controlling statute, 38 U.S.C. § 1151 (1988 ed., Supp. V). We hold that it is not.

I

Fred P. Gardner, a veteran of the Korean conflict, received surgical treatment in a VA facility for a herniated disc unrelated to his prior military service. Gardner then had pain and weakness in his left calf, ankle, and foot, which he alleged was the result of the surgery. He claimed disability benefits under § 1151,¹ which provides that the VA will compensate for “an injury, or an aggravation of an injury,” that occurs “as the result of hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation” provided under any of the laws administered by the VA, so long as the injury was “not the result of such veteran’s own willful misconduct” The VA and the Board

*Briefs of *amici curiae* urging affirmance were filed for the State of Texas by *Dan Morales*, Attorney General, and *Jorge Vega*, First Assistant Attorney General; for the National Veterans Legal Services Project by *Ronald S. Flagg* and *Gershon M. Ratner*; and for the Paralyzed Veterans of America et al. by *Robert L. Nelson*, *Lawrence B. Hagel*, and *Irving R. M. Panzer*.

¹Section 1151 is invoked typically to provide benefits to veterans for nonservice related disabilities, although it is not so limited by its terms. See Pet. for Cert. 6, n. 3. The statute’s history begins in 1924 when Congress enacted § 213 of the World War Veterans’ Act, 1924, ch. 320, 43 Stat. 623. Section 213 was repealed in 1933, as part of the Economy Act of 1933, ch. 3, Tit. I, § 17, 48 Stat. 11–12, and reenacted in nearly the same form in 1934, Act of Mar. 28, 1934, ch. 102, Tit. III, § 31, 48 Stat. 526.

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of Veterans' Appeals denied Gardner's claim for benefits, on the ground that § 1151, as interpreted by 38 CFR § 3.358(c)(3) (1993), only covers an injury if it "proximately resulted [from] carelessness, negligence, lack of proper skill, error in judgment, or similar instances of indicated fault" on the part of the VA, or from the occurrence during treatment or rehabilitation of an "accident," defined as an "unforeseen, untoward" event. The Court of Veterans Appeals reversed, holding that § 1151 neither imposes nor authorizes adoption of the fault-or-accident requirement set out in § 3.358(c)(3), *Gardner v. Derwinski*, 1 Vet. App. 584 (1991), and the Court of Appeals for the Federal Circuit affirmed, 5 F. 3d 1456 (1993). We granted certiorari, 511 U. S. 1017, and now affirm.

II

Despite the absence from the statutory language of so much as a word about fault² on the part of the VA, the Government proposes two interpretations in attempting to reveal a fault requirement implicit in the text of § 1151, the first being that fault inheres in the concept of compensable "injury." We think that no such inference can be drawn in this instance, however. Even though "injury" can of course carry a fault connotation, see Webster's New International Dictionary 1280 (2d ed. 1957) (an "actionable wrong"), it just as certainly need not do so, see *ibid.* ("[d]amage or hurt done to or suffered by a person or thing"). The most, then, that the Government could claim on the basis of this term is the existence of an ambiguity to be resolved in favor of a fault requirement (assuming that such a resolution would be possi-

²"Fault" is shorthand for fault-or-accident, the test imposed by the regulation. Section 3.358(c)(3) leaves the additional burden imposed by the "accident" requirement unclear, defining the term to mean simply an "unforeseen, untoward" event. Although the appropriate scope of the "accident" requirement is not before us, on one plausible reading of the regulation some burden additional to the statutory obligation would be imposed as an alternative to fault.

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ble after applying the rule that interpretive doubt is to be resolved in the veteran's favor, see *King v. St. Vincent's Hospital*, 502 U. S. 215, 220–221, n. 9 (1991)). But the Government cannot plausibly make even this claim here. Ambiguity is a creature not of definitional possibilities but of statutory context, see *id.*, at 221 (“[T]he meaning of statutory language, plain or not, depends on context”), and this context negates a fault reading. Section 1151 provides compensability not only for an “injury,” but for an “aggravation of an injury” as well. “Injury” as used in this latter phrase refers to a condition prior to the treatment in question, and hence cannot carry with it any suggestion of fault attributable to the VA in causing it. Since there is a presumption that a given term is used to mean the same thing throughout a statute, *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U. S. 427, 433 (1932), a presumption surely at its most vigorous when a term is repeated within a given sentence, it is virtually impossible to read “injury” as laden with fault in the sentence quoted.

Textual cross-reference confirms this conclusion. “Injury” is employed elsewhere in the veterans’ benefits statutes as an instance of the neutral term “disability,” appearing within a series whose other terms exemplify debility free from any fault connotation. See 38 U. S. C. § 1701(1) (1988 ed., Supp. V) (“The term ‘disability’ means a disease, injury, or other physical or mental defect”). The serial treatment thus indicates that the same fault-free sense should be attributed to the term “injury” itself. *Jarecki v. G. D. Searle & Co.*, 367 U. S. 303, 307 (1961) (“[A] word is known by the company it keeps”). Moreover, in analogous statutes dealing with service-connected injuries the term “injury” is again used without any suggestion of fault, as the administrative regulation applicable to these statutes confirms by its failure to impose any fault requirement. Compare 38 U. S. C. § 1110 (1988 ed., Supp. V) (“disability resulting from personal injury suffered or disease contracted in line of duty,

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or for aggravation of a preexisting injury suffered or disease contracted in line of duty, . . . during a period of war,” is compensable) and 38 U. S. C. § 1131 (1988 ed., Supp. V) (“disability resulting from personal injury suffered or disease contracted in line of duty, or for aggravation of a preexisting injury suffered or disease contracted in line of duty, . . . during other than a period of war,” is compensable) with 38 CFR § 3.310(a) (1993) (“Disability which is proximately due to or the result of a service-connected disease or injury shall be service connected. When service connection is thus established for a secondary condition, the secondary condition shall be considered a part of the original condition”).

In a second attempt to impose a VA-fault requirement, the Government suggests that the “as a result of” language of § 1151 signifies a proximate cause requirement that incorporates a fault test. Once again, we find the suggestion implausible. This language is naturally read simply to impose the requirement of a causal connection between the “injury” or “aggravation of an injury” and “hospitalization, medical or surgical treatment, or the pursuit of a course of vocational rehabilitation.” Assuming that the connection is limited to proximate causation so as to narrow the class of compensable cases, that narrowing occurs by eliminating remote consequences, not by requiring a demonstration of fault.³ See generally W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 42 (5th ed. 1984). The eccentricity of reading a fault requirement into the “result

³ We do not, of course, intend to cast any doubt on the regulations insofar as they exclude coverage for incidents of a disease’s or injury’s natural progression, occurring after the date of treatment. See 38 CFR § 3.358(b)(2) (1993). VA action is not the cause of the disability in these situations. Nor do we intend to exclude application of the doctrine *volenti non fit injuria*. See generally M. Bigelow, *Law of Torts* 39–43 (8th ed. 1907). It would be unreasonable, for example, to believe that Congress intended to compensate veterans for the necessary consequences of treatment to which they consented (*i. e.*, compensating a veteran who consents to the amputation of a gangrenous limb for the loss of the limb).

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of” language is underscored by the incongruity of applying it to the fourth category for which compensation is available under § 1151, cases of injury resulting from a veteran’s “pursuit of vocational rehabilitation.” If Congress had meant to require a showing of VA fault, it would have been odd to refer to “the pursuit [by the veteran] of vocational rehabilitation” rather than to “the provision [by the VA] of vocational rehabilitation.”

The poor fit of this language with any implicit requirement of VA fault is made all the more obvious by the statute’s express treatment of a claimant’s fault. The same sentence of § 1151 that contains the terms “injury” and “as a result of” restricts compensation to those whose additional disability was not the result of their “own willful misconduct.” This reference to claimant’s fault in a statute keeping silent about any fault on the VA’s part invokes the rule that “[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *Russello v. United States*, 464 U. S. 16, 23 (1983) (internal quotation marks omitted). Without some mention of the VA’s fault, it would be unreasonable to read the text of § 1151 as imposing a burden of demonstrating it upon seeking compensation for a further disability.

In sum, the text and reasonable inferences from it give a clear answer against the Government, and that, as we have said, is “‘the end of the matter.’” *Good Samaritan Hospital v. Shalala*, 508 U. S. 402, 409 (1993) (quoting *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842 (1984)). Thus this clear textually grounded conclusion in Gardner’s favor is fatal to the remaining principal arguments advanced against it.

The Government contends that Congress ratified the VA’s practice of requiring a showing of fault when it reenacted the predecessor of § 1151 in 1934, or, alternatively, that Con-

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gress's legislative silence as to the VA's regulatory practice over the last 60 years serves as an implicit endorsement of its fault-based policy. There is an obvious trump to the reenactment argument, however, in the rule that "[w]here the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction." *Demarest v. Manspeaker*, 498 U. S. 184, 190 (1991). See also *Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States*, 377 U. S. 235, 241–242 (1964) (congressional reenactment has no interpretive effect where regulations clearly contradict requirements of statute). But even without this sensible rule, the reenactment would not carry the day. Setting aside the disputed question whether the VA used a fault rule in 1934,⁴ the record of congressional discussion preceding reenactment makes no reference to the VA regulation, and there is no other evidence to suggest that Congress was even aware of the VA's interpretive position. "In such circumstances we consider the . . . re-enactment to be without significance." *United States v. Calamaro*, 354 U. S. 351, 359 (1957).

Congress's post-1934 legislative silence on the VA's fault approach to § 1151 is likewise unavailing to the Government. As we have recently made clear, congressional silence "lacks persuasive significance," *Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A.*, 511 U. S. 164, 187 (1994) (quoting *Pension Benefit Guaranty Corporation v. LTV Corp.*, 496 U. S. 633, 650 (1990)), particularly where administrative regulations are inconsistent with the controlling statute, see *Patterson v. McLean Credit Union*, 491 U. S. 164, 175, n. 1 (1989) ("Congressional inaction cannot amend a duly enacted statute"). See also *Zuber v. Allen*, 396 U. S. 168, 185–186, n. 21 (1969) ("The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is

⁴ At the time of the 1934 reenactment, the regulation in effect precluded compensation for the "usual after[-]results of approved medical care and treatment properly administered.'" See Brief for Respondent 31.

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otherwise impermissible. . . . Congressional inaction frequently betokens unawareness, preoccupation, or paralysis”).

Finally, we dispose of the Government’s argument that the VA’s regulatory interpretation of § 1151 deserves judicial deference due to its undisturbed endurance for 60 years. A regulation’s age is no antidote to clear inconsistency with a statute, and the fact, again, that § 3.358(c)(3) flies against the plain language of the statutory text exempts courts from any obligation to defer to it. *Dole v. Steelworkers*, 494 U. S. 26, 42–43 (1990); *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, *supra*, at 842–843. But even if this were a close case, where consistent application and age can enhance the force of administrative interpretation, see *Zenith Radio Corp. v. United States*, 437 U. S. 443, 450 (1978), the Government’s position would suffer from the further factual embarrassment that Congress established no judicial review for VA decisions until 1988, only then removing the VA from what one congressional Report spoke of as the agency’s “splendid isolation.” H. R. Rep. No. 100–963, pt. 1, p. 10 (1988). As the Court of Appeals for the Federal Circuit aptly stated: “Many VA regulations have aged nicely simply because Congress took so long to provide for judicial review. The length of such regulations’ unscrutinized and unscrutinizable existence” could not alone, therefore, enhance any claim to deference. 5 F. 3d, at 1463–1464.

III

Accordingly, the judgment of the Court of Appeals is affirmed.

It is so ordered.

Reference Material 52.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

RAPANOS ET UX., ET AL. *v.* UNITED STATESCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE SIXTH CIRCUIT

No. 04–1034. Argued February 21, 2006—Decided June 19, 2006*

As relevant here, the Clean Water Act (CWA or Act) makes it unlawful to discharge dredged or fill material into “navigable waters” without a permit, 33 U. S. C. §§1311(a), 1342(a), and defines “navigable waters” as “the waters of the United States, including the territorial seas,” §1362(7). The Army Corps of Engineers (Corps), which issues permits for the discharge of dredged or fill material into navigable waters, interprets “the waters of the United States” expansively to include not only traditional navigable waters, 33 CFR §328.3(a)(1), but also other defined waters, §328.3(a)(2), (3); “[t]ributaries” of such waters, §328.3(a)(5); and wetlands “adjacent” to such waters and tributaries, §328.3(a)(7). “[A]djacent” wetlands include those “bordering, contiguous [to], or neighboring” waters of the United States even when they are “separated from [such] waters . . . by man-made dikes . . . and the like.” §328.3(c).

These cases involve four Michigan wetlands lying near ditches or man-made drains that eventually empty into traditional navigable waters. In No. 04–1034, the United States brought civil enforcement proceedings against the Rapanos petitioners, who had backfilled three of the areas without a permit. The District Court found federal jurisdiction over the wetlands because they were adjacent to “waters of the United States” and held petitioners liable for CWA violations. Affirming, the Sixth Circuit found federal jurisdiction based on the sites’ hydrologic connections to the nearby ditches or drains, or to more remote navigable waters. In No. 04–1384, the Carabell petitioners were denied a permit to deposit fill in a wetland that was

*Together with No. 04–1384, *Carabell et al. v. United States Army Corps of Engineers et al.*, also on certiorari to the same court.

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separated from a drainage ditch by an impermeable berm. The Carabells sued, but the District Court found federal jurisdiction over the site. Affirming, the Sixth Circuit held that the wetland was adjacent to navigable waters.

Held: The judgments are vacated, and the cases are remanded.

No. 04–1034, 376 F. 3d 629, and No. 04–1384, 391 F. 3d 704, vacated and remanded.

JUSTICE SCALIA, joined by THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO, concluded:

1. The phrase “the waters of the United States” includes only those relatively permanent, standing or continuously flowing bodies of water “forming geographic features” that are described in ordinary parlance as “streams,” “oceans, rivers, [and] lakes,” Webster’s New International Dictionary 2882 (2d ed.), and does not include channels through which water flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps’ expansive interpretation of that phrase is thus not “based on a permissible construction of the statute.” *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843. Pp. 12–21.

(a) While the meaning of “navigable waters” in the CWA is broader than the traditional definition found in *The Daniel Ball*, 10 Wall. 557, see *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U. S. 159, 167 (*SWANCC*); *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121, 133, the CWA authorizes federal jurisdiction only over “waters.” The use of the definite article “the” and the plural number “waters” show plainly that §1362(7) does not refer to water in general, but more narrowly to water “[a]s found in streams,” “oceans, rivers, [and] lakes,” Webster’s New International Dictionary 2882 (2d ed.). Those terms all connote relatively permanent bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Pp. 12–15.

(b) The Act’s use of the traditional phrase “navigable waters” further confirms that the CWA confers jurisdiction only over relatively permanent bodies of water. Traditionally, such “waters” included only discrete bodies of water, and the term still carries some of its original substance, *SWANCC*, *supra*, at 172. This Court’s subsequent interpretation of “the waters of the United States” in the CWA likewise confirms this limitation. See, e.g., *Riverside Bayview*, *supra*, at 131. And the CWA itself categorizes the channels and conduits that typically carry intermittent flows of water separately from “navigable waters,” including them in the definition of “‘point sources,’” 33 U. S. C. §1362(14). Moreover, only the foregoing definition of “waters” is consistent with CWA’s stated policy “to recognize, preserve,

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and protect the primary responsibilities and rights of the States . . . to plan the development and use . . . of land and water resources . . .” §1251(b). In addition, “the waters of the United States” hardly qualifies as the clear and manifest statement from Congress needed to authorize intrusion into such an area of traditional state authority as land-use regulation; and to authorize federal action that stretches the limits of Congress’s commerce power. See *SWANCC*, *supra*, at 173. Pp. 15–21.

2. A wetland may not be considered “adjacent to” remote “waters of the United States” based on a mere hydrologic connection. *Riverside Bayview* rested on an inherent ambiguity in defining where the “water” ends and its abutting (“adjacent”) wetlands begin, permitting the Corps to rely on ecological considerations only to resolve that ambiguity in favor of treating all abutting wetlands as waters. Isolated ponds are not “waters of the United States” in their own right, see *SWANCC*, *supra*, at 167, 171, and present no boundary-drawing problem justifying the invocation of such ecological factors. Thus, only those wetlands with a continuous surface connection to bodies that are “waters of the United States” in their own right, so that there is no clear demarcation between the two, are “adjacent” to such waters and covered by the Act. Establishing coverage of the Rapanos and Carabell sites requires finding that the adjacent channel contains a relatively permanent “wate[r] of the United States,” and that each wetland has a continuous surface connection to that water, making it difficult to determine where the water ends and the wetland begins. Pp. 21–24.

3. Because the Sixth Circuit applied an incorrect standard to determine whether the wetlands at issue are covered “waters,” and because of the paucity of the record, the cases are remanded for further proceedings. P. 39.

JUSTICE KENNEDY concluded that the Sixth Circuit correctly recognized that a water or wetland constitutes “navigable waters” under the Act if it possesses a “significant nexus” to waters that are navigable in fact or that could reasonably be so made, *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U. S. 159, 167, 172 (*SWANCC*), but did not consider all the factors necessary to determine that the lands in question had, or did not have, the requisite nexus. *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121, and *SWANCC* establish the framework for the inquiry here. The nexus required must be assessed in terms of the Act’s goals and purposes. Congress enacted the law to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U. S. C. §1251(a), and it pursued that objective by restricting dumping and filling in “waters of the United States,” §§1311(a), 1362(12).

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The rationale for the Act’s wetlands regulation, as the Corps has recognized, is that wetlands can perform critical functions related to the integrity of other waters—such as pollutant trapping, flood control, and runoff storage. 33 C. F. R. §320.4(b)(2). Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase “navigable waters,” if the wetlands, alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters understood as navigable in the traditional sense. When, in contrast, their effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the term “navigable waters.” Because the Corps’ theory of jurisdiction in these cases—adjacency to tributaries, however remote and insubstantial—goes beyond the *Riverside Bayview* holding, its assertion of jurisdiction cannot rest on that case. The breadth of the Corps’ existing standard for tributaries—which seems to leave room for regulating drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes toward it—precludes that standard’s adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Absent more specific regulations, the Corps must establish a significant nexus on a case-by-case basis when seeking to regulate wetlands based on adjacency to nonnavigable tributaries, in order to avoid unreasonable applications of the Act. In the instant cases the record contains evidence pointing to a possible significant nexus, but neither the agency nor the reviewing courts considered the issue in these terms. Thus, the cases should be remanded for further proceedings. Pp. 1–30.

SCALIA, J., announced the judgment of the Court, and delivered an opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined. ROBERTS, C. J., filed a concurring opinion. KENNEDY, J., filed an opinion concurring in the judgment. STEVENS, J., filed a dissenting opinion, in which SOUTER, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a dissenting opinion.

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 04–1034 and 04–1384

JOHN A. RAPANOS, ET UX., ET AL., PETITIONERS
04–1034 *v.*
UNITED STATES

JUNE CARABELL ET AL., PETITIONERS
04–1384 *v.*
UNITED STATES ARMY CORPS OF ENGINEERS ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[June 19, 2006]

JUSTICE SCALIA announced the judgment of the Court, and delivered an opinion, in which THE CHIEF JUSTICE, JUSTICE THOMAS, and JUSTICE ALITO join.

In April 1989, petitioner John A. Rapanos backfilled wetlands on a parcel of land in Michigan that he owned and sought to develop. This parcel included 54 acres of land with sometimes-saturated soil conditions. The nearest body of navigable water was 11 to 20 miles away. 339 F. 3d 447, 449 (CA6 2003) (*Rapanos I*). Regulators had informed Mr. Rapanos that his saturated fields were “waters of the United States,” 33 U. S. C. §1362(7), that could not be filled without a permit. Twelve years of criminal and civil litigation ensued.

The burden of federal regulation on those who would deposit fill material in locations denominated “waters of the United States” is not trivial. In deciding whether to

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grant or deny a permit, the U. S. Army Corps of Engineers (Corps) exercises the discretion of an enlightened despot, relying on such factors as “economics,” “aesthetics,” “recreation,” and “in general, the needs and welfare of the people,” 33 CFR §320.4(a) (2004).¹ The average applicant for an individual permit spends 788 days and \$271,596 in completing the process, and the average applicant for a nationwide permit spends 313 days and \$28,915—not counting costs of mitigation or design changes. Sunding & Zilberman, *The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process*, 42 *Natural Resources J.* 59, 74–76 (2002). “[O]ver \$1.7 billion is spent each year by the private and public sectors obtaining wetlands permits.” *Id.*, at 81. These costs cannot be avoided, because the Clean Water Act “impose[s] criminal liability,” as well as steep civil fines, “on a broad range of ordinary industrial and commercial activities.” *Hanousek v. United States*, 528 U. S. 1102, 1103 (2000) (THOMAS, J., dissenting from denial of certiorari). In this litigation, for example, for backfilling his own wet fields, Mr. Rapanos faced 63 months in prison and hundreds of thousands of dollars in criminal and civil fines. See *United States v. Rapanos*, 235 F. 3d 256, 260 (CA6 2000).

The enforcement proceedings against Mr. Rapanos are a small part of the immense expansion of federal regulation of land use that has occurred under the Clean Water Act—

¹In issuing permits, the Corps directs that “[a]ll factors which may be relevant to the proposal must be considered including the cumulative effects thereof: among those are conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people.” §320.4(a).

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without any change in the governing statute—during the past five Presidential administrations. In the last three decades, the Corps and the Environmental Protection Agency (EPA) have interpreted their jurisdiction over “the waters of the United States” to cover 270-to-300 million acres of swampy lands in the United States—including half of Alaska and an area the size of California in the lower 48 States. And that was just the beginning. The Corps has also asserted jurisdiction over virtually any parcel of land containing a channel or conduit—whether man-made or natural, broad or narrow, permanent or ephemeral—through which rainwater or drainage may occasionally or intermittently flow. On this view, the federally regulated “waters of the United States” include storm drains, roadside ditches, ripples of sand in the desert that may contain water once a year, and lands that are covered by floodwaters once every 100 years. Because they include the land containing storm sewers and desert washes, the statutory “waters of the United States” engulf entire cities and immense arid wastelands. In fact, the entire land area of the United States lies in some drainage basin, and an endless network of visible channels furrows the entire surface, containing water ephemerally wherever the rain falls. Any plot of land containing such a channel may potentially be regulated as a “water of the United States.”

I

Congress passed the Clean Water Act (CWA or Act) in 1972. The Act’s stated objective is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 86 Stat. 816, 33 U. S. C. §1251(a). The Act also states that “[i]t is the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and

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water resources, and to consult with the Administrator in the exercise of his authority under this chapter.” §1251(b).

One of the statute’s principal provisions is 33 U. S. C. §1311(a), which provides that “the discharge of any pollutant by any person shall be unlawful.” “The discharge of a pollutant” is defined broadly to include “any addition of any pollutant to navigable waters from any point source,” §1362(12), and “pollutant” is defined broadly to include not only traditional contaminants but also solids such as “dredged spoil, . . . rock, sand, [and] cellar dirt,” §1362(6). And, most relevant here, the CWA defines “navigable waters” as “the waters of the United States, including the territorial seas.” §1362(7).

The Act also provides certain exceptions to its prohibition of “the discharge of any pollutant by any person.” §1311(a). Section 1342(a) authorizes the Administrator of the EPA to “issue a permit for the discharge of any pollutant, . . . notwithstanding section 1311(a) of this title.” Section 1344 authorizes the Secretary of the Army, acting through the Corps, to “issue permits . . . for the discharge of dredged or fill material into the navigable waters at specified disposal sites.” §1344(a), (d). It is the discharge of “dredged or fill material”—which, unlike traditional water pollutants, are solids that do not readily wash downstream—that we consider today.

For a century prior to the CWA, we had interpreted the phrase “navigable waters of the United States” in the Act’s predecessor statutes to refer to interstate waters that are “navigable in fact” or readily susceptible of being rendered so. *The Daniel Ball*, 10 Wall. 557, 563 (1871); see also *United States v. Appalachian Elec. Power Co.*, 311 U. S. 377, 406 (1940). After passage of the CWA, the Corps initially adopted this traditional judicial definition for the Act’s term “navigable waters.” See 39 Fed. Reg. 12119, codified at 33 CFR §209.120(d)(1) (1974); see also *Solid Waste Agency of Northern Cook Cty. v. Army Corps of*

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Engineers, 531 U. S. 159, 168 (2001) (*SWANCC*). After a District Court enjoined these regulations as too narrow, *Natural Resources Defense Council, Inc. v. Callaway*, 392 F. Supp. 685, 686 (DC 1975), the Corps adopted a far broader definition. See 40 Fed. Reg. 31324–31325 (1975); 42 Fed. Reg. 37144 (1977). The Corps’ new regulations deliberately sought to extend the definition of “the waters of the United States” to the outer limits of Congress’s commerce power. See *id.*, at 37144, n. 2.

The Corps’ current regulations interpret “the waters of the United States” to include, in addition to traditional interstate navigable waters, 33 CFR §328.3(a)(1) (2004), “[a]ll interstate waters including interstate wetlands,” §328.3(a)(2); “[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce,” §328.3(a)(3); “[t]ributaries of [such] waters,” §328.3(a)(5); and “[w]etlands adjacent to [such] waters [and tributaries] (other than waters that are themselves wetlands),” §328.3(a)(7). The regulation defines “adjacent” wetlands as those “bordering, contiguous [to], or neighboring” waters of the United States. §328.3(c). It specifically provides that “[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands.’” *Ibid.*

We first addressed the proper interpretation of 33 U. S. C. §1362(7)’s phrase “the waters of the United States” in *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121 (1985). That case concerned a wetland that “was adjacent to a body of navigable water,” because “the area characterized by saturated soil conditions and wetland vegetation extended beyond the boundary of respondent’s property to . . . a navigable waterway.” *Id.*, at 131;

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see also 33 CFR §328.3(b) (2004). Noting that “the transition from water to solid ground is not necessarily or even typically an abrupt one,” and that “the Corps must necessarily choose some point at which water ends and land begins,” 474 U. S., at 132, we upheld the Corps’ interpretation of “the waters of the United States” to include wetlands that “actually abut[ted] on” traditional navigable waters. *Id.*, at 135.

Following our decision in *Riverside Bayview*, the Corps adopted increasingly broad interpretations of its own regulations under the Act. For example, in 1986, to “clarify” the reach of its jurisdiction, the Corps announced the so-called “Migratory Bird Rule,” which purported to extend its jurisdiction to any intrastate waters “[w]hich are or would be used as habitat” by migratory birds. 51 Fed. Reg. 41217; see also *SWANCC*, *supra*, at 163–164. In addition, the Corps interpreted its own regulations to include “ephemeral streams” and “drainage ditches” as “tributaries” that are part of the “waters of the United States,” see 33 CFR §328.3(a)(5), provided that they have a perceptible “ordinary high water mark” as defined in §328.3(e). 65 Fed. Reg. 12823 (2000). This interpretation extended “the waters of the United States” to virtually any land feature over which rainwater or drainage passes and leaves a visible mark—even if only “the presence of litter and debris.” 33 CFR §328.3(e). See also U. S. General Accounting Office, Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulating Affairs, Committee on Government Reform, House of Representatives, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO–04–297, pp. 20–22 (Feb. 2004) (hereinafter GAO Report), <http://www.gao.gov/new.items/d04297.pdf> (all Internet materials as visited June 9, 2006, and available in Clerk of Court’s case file). Prior to our decision in *SWANCC*, lower courts upheld the application of this

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expansive definition of “tributaries” to such entities as storm sewers that contained flow to covered waters during heavy rainfall, *United States v. Eidson*, 108 F. 3d 1336, 1340–1342 (CA11 1997), and dry arroyos connected to remote waters through the flow of groundwater over “centuries,” *Quivira Mining Co. v. EPA*, 765 F. 2d 126, 129 (CA10 1985).

In *SWANCC*, we considered the application of the Corps’ “Migratory Bird Rule” to “an abandoned sand and gravel pit in northern Illinois.” 531 U. S., at 162. Observing that “[i]t was the *significant nexus* between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview*,” *id.*, at 167 (emphasis added), we held that *Riverside Bayview* did not establish “that the jurisdiction of the Corps extends to ponds that are not adjacent to open water.” 531 U. S., at 168 (emphasis deleted). On the contrary, we held that “nonnavigable, isolated, intrastate waters,” *id.*, at 171—which, unlike the wetlands at issue in *Riverside Bayview*, did not “actually abut on a navigable waterway,” 531 U. S., at 167—were not included as “waters of the United States.”

Following our decision in *SWANCC*, the Corps did not significantly revise its theory of federal jurisdiction under §1344(a). The Corps provided notice of a proposed rulemaking in light of *SWANCC*, 68 Fed. Reg. 1991 (2003), but ultimately did not amend its published regulations. Because *SWANCC* did not directly address tributaries, the Corps notified its field staff that they “should continue to assert jurisdiction over traditional navigable waters . . . and, generally speaking, their tributary systems (and adjacent wetlands).” 68 Fed. Reg. 1998. In addition, because *SWANCC* did not overrule *Riverside Bayview*, the Corps continues to assert jurisdiction over waters “‘neighboring’” traditional navigable waters and their tributaries. 68 Fed. Reg. 1997 (quoting 33 CFR §328.3(c) (2003)).

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Even after *SWANCC*, the lower courts have continued to uphold the Corps' sweeping assertions of jurisdiction over ephemeral channels and drains as "tributaries." For example, courts have held that jurisdictional "tributaries" include the "intermittent flow of surface water through approximately 2.4 miles of natural streams and manmade ditches (paralleling and crossing under I-64)," *Treacy v. Newdunn Assoc.*, 344 F. 3d 407, 410 (CA4 2003); a "road-side ditch" whose water took "a winding, thirty-two-mile path to the Chesapeake Bay," *United States v. Deaton*, 332 F. 3d 698, 702 (CA4 2003); irrigation ditches and drains that intermittently connect to covered waters, *Community Assn. for Restoration of Environment v. Henry Bosma Dairy*, 305 F. 3d 943, 954–955 (CA9 2002); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F. 3d 526, 534 (CA9 2001); and (most implausibly of all) the "washes and arroyos" of an "arid development site," located in the middle of the desert, through which "water courses . . . during periods of heavy rain," *Save Our Sonoran, Inc. v. Flowers*, 408 F. 3d 1113, 1118 (CA9 2005).²

These judicial constructions of "tributaries" are not outliers. Rather, they reflect the breadth of the Corps' determinations in the field. The Corps' enforcement practices vary somewhat from district to district because "the definitions used to make jurisdictional determinations" are deliberately left "vague." GAO Report 26; see also *id.*, at 22. But district offices of the Corps have treated, as

²We are indebted to the *Sonoran* court for a famous exchange, from the movie *Casablanca* (Warner Bros. 1942), which portrays most vividly the absurdity of finding the desert filled with waters:

"Captain Renault [Claude Rains]: "What in heaven's name brought you to Casablanca?"

"Rick [Humphrey Bogart]: "My health. I came to Casablanca for the waters."

"Captain Renault: "The waters? What waters? We're in the desert."

"Rick: "I was misinformed.'" 408 F. 3d, at 1117.

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“waters of the United States,” such typically dry land features as “arroyos, coulees, and washes,” as well as other “channels that might have little water flow in a given year.” *Id.*, at 20–21. They have also applied that definition to such manmade, intermittently flowing features as “drain tiles, storm drains systems, and culverts.” *Id.*, at 24 (footnote omitted).

In addition to “tributaries,” the Corps and the lower courts have also continued to define “adjacent” wetlands broadly after *SWANCC*. For example, some of the Corps’ district offices have concluded that wetlands are “adjacent” to covered waters if they are hydrologically connected “through directional sheet flow during storm events,” GAO Report 18, or if they lie within the “100-year floodplain” of a body of water—that is, they are connected to the navigable water by flooding, on average, once every 100 years, *id.*, at 17, and n. 16. Others have concluded that presence within 200 feet of a tributary automatically renders a wetland “adjacent” and jurisdictional. *Id.*, at 19. And the Corps has successfully defended such theories of “adjacency” in the courts, even after *SWANCC*’s excision of “isolated” waters and wetlands from the Act’s coverage. One court has held since *SWANCC* that wetlands separated from flood control channels by 70-foot-wide berms, atop which ran maintenance roads, had a “significant nexus” to covered waters because, *inter alia*, they lay “within the 100 year floodplain of tidal waters.” *Baccarat Fremont Developers, LLC v. Army Corps of Engineers*, 425 F. 3d 1150, 1152, 1157 (CA9 2005). In one of the cases before us today, the Sixth Circuit held, in agreement with “[t]he majority of courts,” that “while a hydrological connection between the non-navigable and navigable waters is required, there is no ‘direct abutment’ requirement” under *SWANCC* for “‘adjacency.’” 376 F. 3d 629, 639 (2004) (*Rapanos II*). And even the most insubstantial hydrologic connection may be held to constitute a “signifi-

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cant nexus.” One court distinguished *SWANCC* on the ground that “a molecule of water residing in one of these pits or ponds [in *SWANCC*] could not mix with molecules from other bodies of water”—whereas, in the case before it, “water molecules currently present in the wetlands will inevitably flow towards and mix with water from connecting bodies,” and “[a] drop of rainwater landing in the Site is certain to intermingle with water from the [nearby river].” *United States v. Rueth Development Co.*, 189 F. Supp. 2d 874, 877–878 (ND Ind. 2002).

II

In these consolidated cases, we consider whether four Michigan wetlands, which lie near ditches or man-made drains that eventually empty into traditional navigable waters, constitute “waters of the United States” within the meaning of the Act. Petitioners in No. 04–1034, the Rapanos and their affiliated businesses, deposited fill material without a permit into wetlands on three sites near Midland, Michigan: the “Salzburg site,” the “Hines Road site,” and the “Pine River site.” The wetlands at the Salzburg site are connected to a man-made drain, which drains into Hoppler Creek, which flows into the Kawkawlin River, which empties into Saginaw Bay and Lake Huron. See Brief for United States in No. 04–1034, p. 11; 339 F. 3d, at 449. The wetlands at the Hines Road site are connected to something called the “Rose Drain,” which has a surface connection to the Tittabawassee River. App. to Pet. for Cert. in No. 04–1034, pp. A23, B20. And the wetlands at the Pine River site have a surface connection to the Pine River, which flows into Lake Huron. *Id.*, at A23–A24, B26. It is not clear whether the connections between these wetlands and the nearby drains and ditches are continuous or intermittent, or whether the nearby drains and ditches contain continuous or merely occasional flows of water.

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The United States brought civil enforcement proceedings against the Rapanos petitioners. The District Court found that the three described wetlands were “within federal jurisdiction” because they were “adjacent to other waters of the United States,” and held petitioners liable for violations of the CWA at those sites. *Id.*, at B32–B35. On appeal, the United States Court of Appeals for the Sixth Circuit affirmed, holding that there was federal jurisdiction over the wetlands at all three sites because “there were hydrological connections between all three sites and corresponding adjacent tributaries of navigable waters.” 376 F. 3d, at 643.

Petitioners in No. 04–1384, the Carabells, were denied a permit to deposit fill material in a wetland located on a triangular parcel of land about one mile from Lake St. Clair. A man-made drainage ditch runs along one side of the wetland, separated from it by a 4-foot-wide man-made berm. The berm is largely or entirely impermeable to water and blocks drainage from the wetland, though it may permit occasional overflow to the ditch. The ditch empties into another ditch or a drain, which connects to Auvase Creek, which empties into Lake St. Clair. See App. to Pet. for Cert. in No. 04–1384, pp. 2a–3a.

After exhausting administrative appeals, the Carabell petitioners filed suit in the District Court, challenging the exercise of federal regulatory jurisdiction over their site. The District Court ruled that there was federal jurisdiction because the wetland “is adjacent to neighboring tributaries of navigable waters and has a significant nexus to ‘waters of the United States.’” *Id.*, at 49a. Again the Sixth Circuit affirmed, holding that the Carabell wetland was “adjacent” to navigable waters. 391 F. 3d 704, 708 (2004) (*Carabell*).

We granted certiorari and consolidated the cases, 546 U. S. ____ (2005), to decide whether these wetlands constitute “waters of the United States” under the Act, and if so,

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whether the Act is constitutional.

III

The Rapanos petitioners contend that the terms “navigable waters” and “waters of the United States” in the Act must be limited to the traditional definition of *The Daniel Ball*, which required that the “waters” be navigable in fact, or susceptible of being rendered so. See 10 Wall., at 563. But this definition cannot be applied wholesale to the CWA. The Act uses the phrase “navigable waters” as a *defined* term, and the definition is simply “the waters of the United States.” 33 U. S. C. §1362(7). Moreover, the Act provides, in certain circumstances, for the substitution of state for federal jurisdiction over “navigable waters . . . *other than* those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce . . . including wetlands adjacent thereto.” §1344(g)(1) (emphasis added). This provision shows that the Act’s term “navigable waters” includes something more than traditional navigable waters. We have twice stated that the meaning of “navigable waters” in the Act is broader than the traditional understanding of that term, *SWANCC*, 531 U. S., at 167; *Riverside Bayview*, 474 U. S., at 133.³ We have also emphasized, however,

³One possibility, which we ultimately find unsatisfactory, is that the “other” waters covered by 33 U. S. C. §1344(g)(1) are strictly *intrastate* waters that are traditionally navigable. But it would be unreasonable to interpret “the waters of the United States” to include all and only traditional navigable waters, both interstate and intrastate. This would preserve the traditional import of the qualifier “navigable” in the *defined* term “navigable waters,” at the cost of depriving the qualifier “of the United States” *in the definition* of all meaning. As traditionally understood, the latter qualifier excludes intrastate waters, whether navigable or not. See *The Daniel Ball*, 10 Wall. 557, 563 (1871). In *SWANCC*, we held that “navigable” retained something of its traditional import. 531 U. S., at 172. *A fortiori*, the phrase “of the United

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that the qualifier “navigable” is not devoid of significance, *SWANCC*, *supra*, at 172.

We need not decide the precise extent to which the qualifiers “navigable” and “of the United States” restrict the coverage of the Act. Whatever the scope of these qualifiers, the CWA authorizes federal jurisdiction only over “waters.” 33 U. S. C. §1362(7). The only natural definition of the term “waters,” our prior and subsequent judicial constructions of it, clear evidence from other provisions of the statute, and this Court’s canons of construction all confirm that “the waters of the United States” in §1362(7) cannot bear the expansive meaning that the Corps would give it.

The Corps’ expansive approach might be arguable if the CSA defined “navigable waters” as “water of the United States.” But “the waters of the United States” is something else. The use of the definite article (“the”) and the plural number (“waters”) show plainly that §1362(7) does not refer to water in general. In this form, “the waters” refers more narrowly to water “[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,” or “the flowing or moving masses, as of waves or floods, making up such streams or bodies.” Webster’s New International Dictionary 2882 (2d ed. 1954) (hereinafter Webster’s Second).⁴ On this definition, “the waters of the United States” include only relatively

States” in the definition retains some of its traditional meaning.

⁴JUSTICE KENNEDY observes, *post*, at 13 (opinion concurring in judgment), that the dictionary approves an alternative, somewhat poetic usage of “waters” as connoting “[a] flood or inundation; as the *waters* have fallen. ‘The peril of *waters*, wind, and rocks.’ *Shak.*” Webster’s Second 2882. It seems to us wholly unreasonable to interpret the statute as regulating only “floods” and “inundations” rather than traditional waterways—and strange to suppose that Congress had waxed Shakespearean in the definition section of an otherwise prosaic, indeed downright tedious, statute. The duller and more commonplace meaning is obviously intended.

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permanent, standing or flowing bodies of water.⁵ The definition refers to water as found in “streams,” “oceans,” “rivers,” “lakes,” and “bodies” of water “forming geographical features.” *Ibid.* All of these terms connote continuously present, fixed bodies of water, as opposed to ordinarily dry channels through which water occasionally or intermittently flows. Even the least substantial of the definition’s terms, namely “streams,” connotes a continuous flow of water in a permanent channel—especially when used in company with other terms such as “rivers,” “lakes,” and “oceans.”⁶ None of these terms encompasses

⁵ By describing “waters” as “relatively permanent,” we do not necessarily exclude streams, rivers, or lakes that might dry up in extraordinary circumstances, such as drought. We also do not necessarily exclude *seasonal* rivers, which contain continuous flow during some months of the year but no flow during dry months—such as the 290-day, continuously flowing stream postulated by JUSTICE STEVENS’ dissent (hereinafter the dissent), *post*, at 15. Common sense and common usage distinguish between a wash and seasonal river.

Though scientifically precise distinctions between “perennial” and “intermittent” flows are no doubt available, see, *e.g.*, Dept. of Interior, U. S. Geological Survey, E. Hedman & W. Osterkamp, *Streamflow Characteristics Related to Channel Geometry of Streams in Western United States* 15 (1982) (Water-Supply Paper 2193), we have no occasion in this litigation to decide exactly when the drying-up of a stream bed is continuous and frequent enough to disqualify the channel as a “wate[r] of the United States.” It suffices for present purposes that channels containing permanent flow are plainly within the definition, and that the dissent’s “intermittent” and “ephemeral” streams, *post*, at 16 (opinion of STEVENS, J.)—that is, streams whose flow is “[c]oming and going at intervals . . . [b]roken, fitful,” Webster’s Second 1296, or “existing only, or no longer than, a day; diurnal . . . short-lived,” *id.*, at 857—are not.

⁶The principal definition of “stream” likewise includes reference to such permanent, geographically fixed bodies of water: “[a] current or course of water or other fluid, flowing on the earth, as a *river, brook, etc.*” *Id.*, at 2493 (emphasis added). The other definitions of “stream” repeatedly emphasize the requirement of *continuous* flow: “[a] *steady flow*, as of water, air, gas, or the like”; “[a]nything issuing or moving with *continued succession* of parts”; “[a] *continued current* or course;

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transitory puddles or ephemeral flows of water.

The restriction of “the waters of the United States” to exclude channels containing merely intermittent or ephemeral flow also accords with the commonsense understanding of the term. In applying the definition to “ephemeral streams,” “wet meadows,” storm sewers and culverts, “directional sheet flow during storm events,” drain tiles, man-made drainage ditches, and dry arroyos in the middle of the desert, the Corps has stretched the term “waters of the United States” beyond parody. The plain language of the statute simply does not authorize this “Land Is Waters” approach to federal jurisdiction.

In addition, the Act’s use of the traditional phrase “navigable waters” (the defined term) further confirms that it confers jurisdiction only over relatively *permanent* bodies of water. The Act adopted that traditional term from its predecessor statutes. See *SWANCC*, 531 U. S., at 180 (STEVENS, J., dissenting). On the traditional understanding, “navigable waters” included only discrete *bodies* of water. For example, in *The Daniel Ball*, we used the terms “waters” and “rivers” interchangeably. 10 Wall., at 563. And in *Appalachian Electric*, we consistently referred to

current; drift.” *Ibid.* (emphases added). The definition of the verb form of “stream” contains a similar emphasis on continuity: “[t]o issue or flow in a stream; to issue freely or move in a *continuous flow or course.*” *Ibid.* (emphasis added). On these definitions, therefore, the Corps’ phrases “intermittent streams,” 33 CFR §328.3(a)(3) (2004), and “ephemeral streams,” 65 Fed. Reg. 12823 (2000), are—like Senator Bentsen’s “flowing gullies,” *post*, at 16, n. 11 (opinion of STEVENS, J.)—useful oxymora. Properly speaking, such entities constitute extant “streams” only while they are “continuous[ly] flow[ing]”; and the usually dry channels that contain them are never “streams.” JUSTICE KENNEDY apparently concedes that “an intermittent flow can constitute a stream” only “*while it is flowing,*” *post*, at 13 (emphasis added)—which would mean that the channel is a “water” covered by the Act only during those times when water flow actually occurs. But no one contends that federal jurisdiction appears and evaporates along with the water in such regularly dry channels.

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the “navigable waters” as “waterways.” 311 U. S., at 407–409. Plainly, because such “waters” had to be navigable in fact or susceptible of being rendered so, the term did not include ephemeral flows. As we noted in *SWANCC*, the traditional term “navigable waters”—even though defined as “the waters of the United States”—carries *some* of its original substance: “[I]t is one thing to give a word limited effect and quite another to give it no effect whatever.” 531 U. S., at 172. That limited effect includes, at bare minimum, the ordinary presence of water.

Our subsequent interpretation of the phrase “the waters of the United States” in the CWA likewise confirms this limitation of its scope. In *Riverside Bayview*, we stated that the phrase in the Act referred primarily to “rivers, streams, and other *hydrographic features more conventionally identifiable as ‘waters’*” than the wetlands adjacent to such features. 474 U. S., at 131 (emphasis added). We thus echoed the dictionary definition of “waters” as referring to “streams and bodies *forming geographical features* such as oceans, rivers, [and] lakes.” Webster’s Second 2882 (emphasis added). Though we upheld in that case the inclusion of wetlands abutting such a “hydrographic featur[e]”—principally due to the difficulty of drawing any clear boundary between the two, see 474 U. S., at 132; Part IV, *infra*—nowhere did we suggest that “the waters of the United States” should be expanded to include, in their own right, entities other than “hydrographic features more conventionally identifiable as ‘waters.’” Likewise, in both *Riverside Bayview* and *SWANCC*, we repeatedly described the “navigable waters” covered by the Act as “open water” and “open waters.” See *Riverside Bayview, supra*, at 132, and n. 8, 134; *SWANCC, supra*, at 167, 172. Under no rational interpretation are typically dry channels described as “*open waters*.”

Most significant of all, the CWA itself categorizes the channels and conduits that typically carry intermittent

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flows of water separately from “navigable waters,” by including them in the definition of “point source.” The Act defines “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U. S. C. §1362(14). It also defines “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.” §1362(12)(A) (emphases added). The definitions thus conceive of “point sources” and “navigable waters” as separate and distinct categories. The definition of “discharge” would make little sense if the two categories were significantly overlapping. The separate classification of “ditch[es], channel[s], and conduit[s]”—which are terms ordinarily used to describe the watercourses through which *intermittent* waters typically flow—shows that these are, by and large, *not* “waters of the United States.”⁷

⁷It is of course true, as the dissent and JUSTICE KENNEDY both observe, that ditches, channels, conduits and the like “can all hold water permanently as well as intermittently,” *post*, at 17 (opinion of STEVENS, J.); see also *post*, at 14–15 (opinion of KENNEDY, J.). But when they do, we usually refer to them as “rivers,” “creeks,” or “streams.” A permanently flooded ditch around a castle is technically a “ditch,” but (because it is permanently filled with water) we normally describe it as a “moat.” See Webster’s Second 1575. And a permanently flooded man-made ditch used for navigation is normally described, not as a “ditch,” but as a “canal.” See *id.*, at 388. Likewise, an open channel through which water permanently flows is ordinarily described as a “stream,” not as a “channel,” because of the continuous presence of water. This distinction is particularly apt in the context of a statute regulating *water* quality, rather than (for example) the shape of stream beds. Cf. *Jennison v. Kirk*, 98 U. S. 453, 454–456 (1879) (referring to man-made channels as “ditches” when the alleged injury arose from physical damage to the *banks* of the ditch); *PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology*, 511 U. S. 700, 709 (1994) (referring to a water-filled tube as a “tunnel” in order to describe the *shape* of the

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Moreover, only the foregoing definition of “waters” is consistent with the CWA’s stated “policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution, [and] to plan the development and use (including restoration, preservation, and enhancement) of land and water resources” §1251(b). This statement of policy was included in the Act as enacted in 1972, see 86 Stat. 816, prior to the addition of the optional state administration program in the 1977 amendments, see 91 Stat. 1601. Thus the policy plainly referred to something beyond the subsequently added state administration program of 33 U. S. C. §1344(g)–(l). But the expansive theory advanced by the Corps, rather than “preserv[ing] the primary rights and responsibilities of the States,” would have brought virtually all “plan[n]ing of] the development and use . . . of land and water resources” by the States under federal control. It is therefore an unlikely

conveyance, not the fact that it was water-filled), both cited *post*, at 17, n. 12 (opinion of STEVENS, J.). On its only natural reading, such a statute that treats “waters” separately from “ditch[es], channel[s], tunnel[s], and conduit[s],” thereby distinguishes between continuously flowing “waters” and channels containing only an occasional or intermittent flow.

It is also true that highly artificial, manufactured, enclosed conveyance systems—such as “sewage treatment plants,” *post*, at 15 (opinion of KENNEDY, J.), and the “mains, pipes, hydrants, machinery, buildings, and other appurtenances and incidents” of the city of Knoxville’s “system of waterworks,” *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 27 (1906), cited *post*, at 17, n. 12 (opinion of STEVENS, J.)—likely do not qualify as “waters of the United States,” despite the fact that they may contain continuous flows of water. See *post*, at 15 (opinion of KENNEDY, J.); *post*, at 17, n. 12 (opinion of STEVENS, J.). But this does not contradict our interpretation, which asserts that relatively continuous flow is a *necessary* condition for qualification as a “water,” not an *adequate* condition. Just as ordinary usage does not treat typically dry beds as “waters,” so also it does not treat such elaborate, man-made, enclosed systems as “waters” on a par with “streams,” “rivers,” and “oceans.”

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reading of the phrase “the waters of the United States.”⁸

Even if the phrase “the waters of the United States” were ambiguous as applied to intermittent flows, our own canons of construction would establish that the Corps’ interpretation of the statute is impermissible. As we noted in *SWANCC*, the Government’s expansive interpretation would “result in a significant impingement of the States’ traditional and primary power over land and water use.” 531 U. S., at 174. Regulation of land use, as through the issuance of the development permits sought by petitioners in both of these cases, is a quintessential state and local power. See *FERC v. Mississippi*, 456 U. S. 742, 768, n. 30 (1982); *Hess v. Port Authority Trans-Hudson Corporation*, 513 U. S. 30, 44 (1994). The extensive federal jurisdiction urged by the Government would authorize the Corps to function as a *de facto* regulator of immense stretches of intrastate land—an authority the agency has shown its willingness to exercise with the scope of discretion that would befit a local zoning board. See 33 CFR §320.4(a)(1) (2004). We ordinarily expect a “clear and manifest” statement from Congress to authorize an unprecedented intrusion into traditional state authority. See *BFP v. Resolution Trust Corporation*, 511 U. S. 531, 544 (1994). The phrase “the waters of the United States” hardly qualifies.

Likewise, just as we noted in *SWANCC*, the Corps’

⁸JUSTICE KENNEDY contends that the Corps’ preservation of the “responsibilities and rights” of the States is adequately demonstrated by the fact that “33 States and the District of Columbia have filed an *amici* brief in this litigation” in favor of the Corps’ interpretation, *post*, at 20. But it makes no difference to the *statute*’s stated purpose of preserving States’ “rights and responsibilities,” §1251(b), that some States wish to unburden themselves of them. Legislative and executive officers of the States may be content to leave “responsibilit[y]” with the Corps because it is attractive to shift to another entity controversial decisions disputed between politically powerful, rival interests. That, however, is not what the statute provides.

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interpretation stretches the outer limits of Congress’s commerce power and raises difficult questions about the ultimate scope of that power. See 531 U. S., at 173. (In developing the current regulations, the Corps consciously sought to extend its authority to the farthest reaches of the commerce power. See 42 Fed. Reg. 37127 (1977).) Even if the term “the waters of the United States” were ambiguous as applied to channels that sometimes host ephemeral flows of water (which it is not), we would expect a clearer statement from Congress to authorize an agency theory of jurisdiction that presses the envelope of constitutional validity. See *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U. S. 568, 575 (1988).⁹

In sum, on its only plausible interpretation, the phrase “the waters of the United States” includes only those relatively permanent, standing or continuously flowing bodies of water “forming geographic features” that are described in ordinary parlance as “streams[,] . . . oceans, rivers, [and] lakes.” See Webster’s Second 2882. The phrase does not include channels through which water

⁹JUSTICE KENNEDY objects that our reliance on these two clear-statement rules is inappropriate because “the plurality’s interpretation does not fit the avoidance concerns that it raises,” *post*, at 19—that is, because our resolution both eliminates some jurisdiction that is clearly constitutional and traditionally federal, and retains some that is questionably constitutional and traditionally local. But a clear-statement rule can carry one only so far as the statutory text permits. Our resolution, unlike JUSTICE KENNEDY’s, keeps both the overinclusion and the underinclusion to the minimum consistent with the statutory text. JUSTICE KENNEDY’s reading—despite disregarding the text—fares no better than ours as a precise “fit” for the “avoidance concerns” that he also acknowledges. He admits, *post*, at 25, that “the significant nexus requirement may not align perfectly with the traditional extent of federal authority” over navigable waters—an admission that “tests the limits of understatement,” *Gonzales v. Oregon*, 126 S. Ct. 904, 932 (2005) (SCALIA, J., dissenting)—and it aligns even worse with the preservation of traditional state land-use regulation.

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flows intermittently or ephemerally, or channels that periodically provide drainage for rainfall. The Corps' expansive interpretation of the "the waters of the United States" is thus not "based on a permissible construction of the statute." *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984).

IV

In *Carabell*, the Sixth Circuit held that the nearby ditch constituted a "tributary" and thus a "water of the United States" under 33 CFR §328.3(a)(5) (2004). See 391 F. 3d, at 708–709. Likewise in *Rapanos*, the Sixth Circuit held that the nearby ditches were "tributaries" under §328(a)(5). 376 F. 3d, at 643. But *Rapanos II* also stated that, even if the ditches were not "waters of the United States," the wetlands were "adjacent" to *remote* traditional navigable waters in virtue of the wetlands' "hydrological connection" to them. See *id.*, at 639–640. This statement reflects the practice of the Corps' district offices, which may "assert jurisdiction over a wetland without regulating the ditch connecting it to a water of the United States." GAO Report 23. We therefore address in this Part whether a wetland may be considered "adjacent to" remote "waters of the United States," because of a mere hydrologic connection to them.

In *Riverside Bayview*, we noted the textual difficulty in including "wetlands" as a subset of "waters": "On a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.'" 474 U. S., at 132. We acknowledged, however, that there was an inherent ambiguity in drawing the boundaries of any "waters":

"[T]he Corps must necessarily choose some point at which water ends and land begins. Our common experience tells us that this is often no easy task: the transition from water to solid ground is not necessarily or even typically an abrupt one. Rather, between

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open waters and dry land may lie shallows, marshes, mudflats, swamps, bogs—in short, a huge array of areas that are not wholly aquatic but nevertheless fall far short of being dry land. Where on this continuum to find the limit of ‘waters’ is far from obvious.” *Ibid.*

Because of this inherent ambiguity, we deferred to the agency’s inclusion of wetlands “actually abut[ting]” traditional navigable waters: “Faced with such a problem of defining the bounds of its regulatory authority,” we held, the agency could reasonably conclude that a wetland that “adjoin[ed]” waters of the United States is itself a part of those waters. *Id.*, at 132, 135, and n. 9. The difficulty of delineating the boundary between water and land was central to our reasoning in the case: “In view of the breadth of federal regulatory authority contemplated by the Act itself and *the inherent difficulties of defining precise bounds to regulable waters*, the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act.” *Id.*, at 134 (emphasis added).¹⁰

¹⁰Since the wetlands at issue in *Riverside Bayview* actually abutted waters of the United States, the case could not possibly have held that merely “neighboring” wetlands came within the Corps’ jurisdiction. *Obiter* approval of that proposition might be inferred, however, from the opinion’s quotation without comment of a statement by the Corps describing covered “adjacent” wetlands as those “‘that form the border of or are in reasonable proximity to other waters of the United States.’” 474 U. S., at 134 (quoting 42 Fed. Reg. 37128 (1977); emphasis added). The opinion immediately reiterated, however, that adjacent wetlands could be regarded as “the waters of the United States” in view of “the inherent difficulties of defining precise bounds to regulable waters,” 474 U. S., at 134—a rationale that would have no application to physically separated “neighboring” wetlands. Given that the wetlands at issue in *Riverside Bayview* themselves “actually abut[ted] on a navigable waterway,” *id.*, at 135; given that our opinion recognized that unconnected wetlands could not naturally be characterized as “‘waters’” at

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When we characterized the holding of *Riverside Bayview* in *SWANCC*, we referred to the close connection between waters and the wetlands that they gradually blend into: “It was the *significant nexus* between the wetlands and ‘navigable waters’ that informed our reading of the CWA in *Riverside Bayview Homes*.” 531 U. S., at 167 (emphasis added). In particular, *SWANCC* rejected the notion that the ecological considerations upon which the Corps relied in *Riverside Bayview*—and upon which the dissent repeatedly relies today, see *post*, at 10–11, 12, 13–14, 15, 18–19, 21–22, 24–25—provided an *independent* basis for including entities like “wetlands” (or “ephemeral streams”) within the phrase “the waters of the United States.” *SWANCC* found such ecological considerations irrelevant to the question whether physically isolated waters come within the Corps’ jurisdiction. It thus confirmed that *Riverside Bayview* rested upon the inherent ambiguity in defining where water ends and abutting (“adjacent”) wetlands begin, permitting the Corps’ reliance on ecological considerations *only to resolve that ambiguity* in favor of treating all abutting wetlands as waters. Isolated ponds were not “waters of the United States” in their own right, see 531 U. S., at 167, 171, and presented no boundary-drawing problem that would have justified the invocation of ecological factors to treat them as such.

Therefore, *only* those wetlands with a continuous surface connection to bodies that are “waters of the United States” in their own right, so that there is no clear demarcation between “waters” and wetlands, are “adjacent to”

all, *id.*, at 132; and given the repeated reference to the difficulty of determining where waters end and wetlands begin; the most natural reading of the opinion is that a wetlands’ mere “reasonable proximity” to waters of the United States is not enough to confer Corps jurisdiction. In any event, as discussed in our immediately following text, any possible ambiguity has been eliminated by *SWANCC*, 531 U. S. 159 (2001).

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such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to “waters of the United States” do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a “significant nexus” in *SWANCC*. 531 U. S., at 167. Thus, establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires two findings: First, that the adjacent channel contains a “wate[r] of the United States,” (*i.e.*, a relatively permanent body of water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the “water” ends and the “wetland” begins.

V

Respondents and their *amici* urge that such restrictions on the scope of “navigable waters” will frustrate enforcement against traditional water polluters under 33 U. S. C. §§1311 and 1342. Because the same definition of “navigable waters” applies to the entire statute, respondents contend that water polluters will be able to evade the permitting requirement of §1342(a) simply by discharging their pollutants into noncovered intermittent watercourses that lie upstream of covered waters. See Tr. of Oral Arg. 74–75.

That is not so. Though we do not decide this issue, there is no reason to suppose that our construction today significantly affects the enforcement of §1342, inasmuch as lower courts applying §1342 have not characterized intermittent channels as “waters of the United States.” The Act does not forbid the “addition of any pollutant *directly* to navigable waters from any point source,” but rather the “addition of any pollutant *to* navigable waters.” §1362(12)(A) (emphasis added); §1311(a). Thus, from the time of the CWA’s enactment, lower courts have held that the dis-

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charge into intermittent channels of any pollutant *that naturally washes downstream* likely violates §1311(a), even if the pollutants discharged from a point source do not emit “directly into” covered waters, but pass “through conveyances” in between. *United States v. Velsicol Chemical Corp.*, 438 F. Supp. 945, 946–947 (WD Tenn. 1976) (a municipal sewer system separated the “point source” and covered navigable waters). See also *Sierra Club v. El Paso Gold Mines, Inc.*, 421 F. 3d 1133, 1137, 1141 (CA10 2005) (2.5 miles of tunnel separated the “point source” and “navigable waters”).

In fact, many courts have held that such upstream, intermittently flowing channels themselves constitute “point sources” under the Act. The definition of “point source” includes “any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U. S. C. §1362(14). We have held that the Act “makes plain that a point source need not be the original source of the pollutant; it need only convey the pollutant to ‘navigable waters.’” *South Fla. Water Management Dist. v. Miccosukee Tribe*, 541 U. S. 95, 105 (2004). Cases holding the intervening channel to be a point source include *United States v. Ortiz*, 427 F. 3d 1278, 1281 (CA10 2005) (a storm drain that carried flushed chemicals from a toilet to the Colorado River was a “point source”), and *Dague v. Burlington*, 935 F. 2d 1343, 1354–1355 (CA2 1991) (a culvert connecting two bodies of navigable water was a “point source”), rev’d on other grounds, 505 U. S. 557 (1992). Some courts have even adopted both the “indirect discharge” rationale and the “point source” rationale in the alternative, applied to the same facts. See, e.g., *Concerned Area Residents for Environment v. Southview Farm*, 34 F. 3d 114, 118–119 (CA2 1994). On either view, however, the lower courts have seen no need to classify the inter-

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vening conduits as “waters of the United States.”

In contrast to the pollutants normally covered by the permitting requirement of §1342(a), “dredged or fill material,” which is typically deposited for the sole purpose of staying put, does not normally wash downstream,¹¹ and thus does not normally constitute an “addition . . . to navigable waters” when deposited in upstream isolated wetlands. §§1344(a), 1362(12). The Act recognizes this distinction by providing a separate permitting program for such discharges in §1344(a). It does not appear, therefore, that the interpretation we adopt today significantly reduces the scope of §1342 of the Act.

Respondents also urge that the narrower interpretation of “waters” will impose a more difficult burden of proof in enforcement proceedings under §§1311(a) and 1342(a), by requiring the agency to demonstrate the downstream flow of the pollutant along the intermittent channel to tradi-

¹¹The dissent argues that “the very existence of words like ‘alluvium’ and ‘silt’ in our language suggests that at least some [dredged or fill material] makes its way downstream,” *post*, at 22 (citation omitted). See also *post*, at 17 (opinion of KENNEDY, J.). By contrast, *amici* cite multiple empirical analyses that contradict the dissent’s philological approach to sediment erosion—including one which concludes that “[t]he idea that the discharge of dredged or fill material into isolated waters, ephemeral drains or non-tidal ditches will pollute navigable waters located any appreciable distance from them lacks credibility.” R. Pierce, Technical Principles Related to Establishing the Limits of Jurisdiction for Section 404 of the Clean Water Act 34–40 (Apr. 2003), available at www.wetlandtraining.com/tpreljswa.pdf, cited in Brief for International Council of Shopping Centers et al. as *Amici Curiae* 26–27; Brief for Pulte Homes, Inc., et al. as *Amici Curiae* 20–21; Brief for Foundation for Environmental and Economic Progress et al. as *Amici Curiae* 29, and n. 53 (“Fill material does not migrate”). Such scientific analysis is entirely unnecessary, however, to reach the unremarkable conclusion that the deposit of *mobile* pollutants into upstream ephemeral channels is naturally described as an “addition . . . to navigable waters,” 33 U.S.C. §1362(12), while the deposit of *stationary* fill material generally is not.

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tional “waters.” See Tr. of Oral Arg. 57. But, as noted above, the lower courts do not generally rely on characterization of intervening channels as “waters of the United States” in applying §1311 to the traditional pollutants subject to §1342. Moreover, the proof of downstream flow of pollutants required under §1342 appears substantially similar, if not identical, to the proof of a hydrologic connection that would be required, on the Sixth Circuit’s theory of jurisdiction, to prove that an upstream channel or wetland is a “wate[r] of the United States.” See *Rapanos II*, 376 F. 3d, at 639. Compare, e.g., App. to Pet. for Cert. in No. 04–1034, at B11, B20, B26 (testimony of hydrologic connections based on observation of surface water connections), with *Southview Farm*, *supra*, at 118–121 (testimony of discharges based on observation of the flow of polluted water). In either case, the agency must prove that the contaminant-laden waters ultimately reach covered waters.

Finally, respondents and many *amici* admonish that narrowing the definition of “the waters of the United States” will hamper federal efforts to preserve the Nation’s wetlands. It is not clear that the state and local conservation efforts that the CWA explicitly calls for, see 33 U. S. C. §1251(b), are in any way inadequate for the goal of preservation. In any event, a Comprehensive National Wetlands Protection Act is not before us, and the “wis[dom]” of such a statute, *post*, at 19 (opinion of STEVENS, J.), is beyond our ken. What is clear, however, is that Congress did not enact one when it granted the Corps jurisdiction over only “the *waters* of the United States.”

VI

In an opinion long on praise of environmental protection and notably short on analysis of the statutory text and structure, the dissent would hold that “the waters of the United States” include any wetlands “adjacent” (no matter

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how broadly defined) to “tributaries” (again, no matter how broadly defined) of traditional navigable waters. For legal support of its policy-laden conclusion, the dissent relies exclusively on two sources: “[o]ur unanimous opinion in *Riverside Bayview*,” *post*, at 6; and “Congress’ deliberate acquiescence in the Corps’ regulations in 1977,” *post*, at 11. Each of these is demonstrably inadequate to support the apparently limitless scope that the dissent would permit the Corps to give to the Act.

A

The dissent’s assertion that *Riverside Bayview* “squarely controls these cases,” *post*, at 6, is wholly implausible. First, *Riverside Bayview* could not possibly support the dissent’s acceptance of the Corps’ inclusion of dry beds as “tributaries,” *post*, at 19, because the definition of tributaries was not at issue in that case. *Riverside Bayview* addressed only the Act’s inclusion of wetlands abutting navigable-in-fact waters, and said nothing at all about what non-navigable tributaries the Act might also cover.

Riverside Bayview likewise provides no support for the dissent’s complacent acceptance of the Corps’ definition of “adjacent,” which (as noted above) has been extended beyond reason to include, *inter alia*, the 100-year floodplain of covered waters. See *supra*, at 9. The dissent notes that *Riverside Bayview* quoted without comment the Corps’ description of “adjacent” wetlands as those “that form the border of or are in reasonable proximity to other waters of the United States.” *Post*, at 8 (citing 474 U. S., at 134 (quoting 42 Fed. Reg. 37128)). As we have already discussed, this quotation provides no support for the inclusion of physically unconnected wetlands as covered “waters.” See *supra*, at 22–23, n. 10. The dissent relies principally on a footnote in *Riverside Bayview* recognizing that “not every adjacent wetland is of great importance to the environment of adjoining bodies of water,” and that all

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“‘adjacent’” wetlands are nevertheless covered by the Act, *post*, at 8 (quoting 474 U. S., at 135, n. 9). Of course, this footnote says *nothing* to support the dissent’s broad definition of “adjacent”—quite the contrary, the quoted sentence uses “adjacent” and “adjoining” *interchangeably*, and the footnote qualifies a sentence holding that the wetland was covered “[b]ecause” it “actually abut[ted] on a navigable waterway.” *Id.*, at 135 (emphasis added). Moreover, that footnote’s assertion that the Act may be interpreted to include even those adjoining wetlands that are “lacking in importance to the aquatic environment,” *id.*, at 135, n. 9, confirms that the scope of ambiguity of “the waters of the United States” is determined by a wetland’s *physical connection* to covered waters, *not* its ecological relationship thereto.

The dissent reasons (1) that *Riverside Bayview* held that “the waters of the United States” include “adjacent wetlands,” and (2) we must defer to the Corps’ interpretation of the ambiguous word “adjacent.” *Post*, at 20–21. But this is mere legerdemain. The phrase “adjacent wetlands” is not part of the statutory definition that the Corps is authorized to interpret, which refers only to “the waters of the United States,” 33 U. S. C. §1362(7).¹² In expounding the term “adjacent” as used in *Riverside Bayview*, we are explaining *our own* prior use of that word to interpret the definitional phrase “the waters of the United States.”

¹²Nor does the passing reference to “wetlands adjacent thereto” in §1344(g)(1) purport to expand that statutory definition. As the dissent concedes, *post*, at 20, that reference merely confirms that the statutory definition can be read to include *some* wetlands—namely, those that directly “abut” covered waters. *Riverside Bayview* explicitly acknowledged that §1344(g)(1) “does not conclusively determine the construction to be placed on the use of the term ‘waters’ elsewhere in the Act (particularly in [§1362(7)], which contains the relevant definition of ‘navigable waters’); however, . . . it does at least suggest strongly that the term ‘waters’ as used in the Act *does not necessarily exclude* ‘wetlands.’” 474 U. S., at 138, n. 11 (emphases added).

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However ambiguous the term may be in the abstract, as we have explained earlier, “adjacent” as used in *Riverside Bayview* is not ambiguous between “physically abutting” and merely “nearby.” See *supra*, at 21–23.

The dissent would distinguish *SWANCC* on the ground that it “had nothing to say about wetlands,” *post*, at 9—*i.e.*, it concerned “isolated ponds” rather than isolated *wetlands*. This is the ultimate distinction without a difference. If isolated “permanent and seasonal ponds of varying size . . . and depth,” 531 U. S., at 163—which, after all, might at least be described as “waters” in their own right—did not constitute “waters of the United States,” *a fortiori*, isolated swampy *lands* do not constitute “waters of the United States.” See also 474 U. S., at 132. As the author of today’s dissent has written, “[i]f, as I believe, actually navigable waters lie at the very heart of Congress’ commerce power and ‘isolated,’ nonnavigable waters lie closer to . . . the margin, ‘isolated wetlands,’ which are themselves only marginally ‘waters,’ are the most marginal category of ‘waters of the United States’ potentially covered by the statute.” 531 U. S., at 187, n. 13 (STEVENS, J., dissenting).

The only other ground that the dissent offers to distinguish *SWANCC* is that, unlike the ponds in *SWANCC*, the wetlands in these cases are “adjacent to navigable bodies of water and their tributaries”—where “adjacent” may be interpreted who-knows-how broadly. It is not clear why roughly defined physical proximity should make such a difference—without actual abutment, it raises no boundary-drawing ambiguity, and it is undoubtedly a poor proxy for ecological significance. In fact, though the dissent is careful to restrict its discussion to wetlands “adjacent” to tributaries, its *reasons* for including those wetlands are strictly ecological—such wetlands would be included because they “serve . . . important water quality roles,” *post*, at 11, and “play important roles in the watershed,” *post*, at

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18–19. This reasoning would swiftly overwhelm *SWANCC* altogether; after all, the ponds at issue in *SWANCC* could, no less than the wetlands in these cases, “offer ‘nesting, spawning, rearing and resting sites for aquatic or land species,’” and “‘serve as valuable storage areas for storm and flood waters,’” *post*, at 9–10. The dissent’s exclusive focus on ecological factors, combined with its total deference to the Corps’ ecological judgments, would permit the Corps to regulate the entire country as “waters of the United States.”

B

Absent a plausible ground in our case law for its sweeping position, the dissent relies heavily on “Congress’ deliberate acquiescence in the Corps’ regulations in 1977,” *post*, at 11—noting that “[w]e found [this acquiescence] significant in *Riverside Bayview*,” and even “acknowledged in *SWANCC*” that we had done so, *post*, at 12. *SWANCC* “acknowledged” that *Riverside Bayview* had relied on congressional acquiescence only to criticize that reliance. It reasserted in no uncertain terms our oft-expressed skepticism towards reading the tea leaves of congressional inaction:

“Although we have recognized congressional acquiescence to administrative interpretations of a statute in some situations, we have done so with extreme care. Failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute. . . . The relationship between the actions and inactions of the 95th Congress and the intent of the 92d Congress in passing [§1344(a)] is also considerably attenuated. Because subsequent history is less illuminating than the contemporaneous evidence, respondents face a difficult task in overcoming the plain text and import of [§1344(a)].” 531 U. S., at 169 (citations, internal quotation marks, and footnote omitted).

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Congress takes no governmental action except by legislation. What the dissent refers to as “Congress’ deliberate acquiescence” should more appropriately be called Congress’s failure to express any opinion. We have no idea whether the Members’ failure to act in 1977 was attributable to their belief that the Corps’ regulations were correct, or rather to their belief that the courts would eliminate any excesses, or indeed simply to their unwillingness to confront the environmental lobby. To be sure, we have sometimes relied on congressional acquiescence when there is evidence that Congress considered and rejected the “*precise issue*” presented before the Court, *Bob Jones Univ. v. United States*, 461 U. S. 574, 600 (1983) (emphasis added). However, “[a]bsent such *overwhelming evidence* of acquiescence, we are loath to replace the plain text and original understanding of a statute with an amended agency interpretation.” *SWANCC, supra*, at 169, n. 5 (emphasis added).

The dissent falls far short of producing “overwhelming evidence” that Congress considered and failed to act upon the “*precise issue*” before the Court today—namely, what constitutes an “adjacent” wetland covered by the Act. Citing *Riverside Bayview’s* account of the 1977 debates, the dissent claims nothing more than that Congress “conducted extensive debates about the Corps’ regulatory jurisdiction over wetlands [and] rejected efforts to limit that jurisdiction . . .” *Post*, at 11. In fact, even that vague description goes too far. As recounted in *Riverside Bayview*, the 1977 debates concerned a proposal to “limi[t] the Corps’ authority under [§1344] to waters navigable in fact and their adjacent wetlands (defined as wetlands periodically inundated by contiguous navigable waters),” 474 U. S., at 136. In rejecting this proposal, Congress merely failed to enact a limitation of “waters” to include only navigable-in-fact waters—an interpretation we affirmatively reject today, see *supra*, at 12—and a definition

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of wetlands based on “periodi[c] inundat[ion]” that appears almost nowhere in the briefs or opinions of these cases.¹³ No plausible interpretation of this legislative inaction can construe it as an implied endorsement of every jot and tittle of the Corps’ 1977 regulations. In fact, *Riverside Bayview* itself relied on this legislative inaction only as “at least some evidence of the reasonableness” of the agency’s inclusion of adjacent wetlands under the Act, 474 U. S., at 137, and for the observation that “even those who would have restricted the reach of the Corps’ jurisdiction” would not have excised adjacent wetlands, *ibid.* Both of these

¹³The sole exception is in JUSTICE KENNEDY’s opinion, which argues that *Riverside Bayview* rejected our physical-connection requirement by accepting as a given that *any* wetland formed by inundation from covered waters (whether or not continuously connected to them) is covered by the Act: “The Court in *Riverside Bayview* . . . did not suggest that a flood-based origin would not support jurisdiction; indeed, it presumed the opposite. See 474 U. S., at 134 (noting that the Corps’ view was valid ‘*even* for wetlands that are not the result of flooding or permeation’ (emphasis added)).” *Post*, at 16. Of course JUSTICE KENNEDY himself fails to observe this supposed presumption, since his “significant nexus” test makes no exception for wetlands created by inundation. In any event, the language from *Riverside Bayview* in JUSTICE KENNEDY’s parenthetical is wrenched out of context. The sentence which JUSTICE KENNEDY quotes in part immediately followed the Court’s conclusion that “adjacent” wetlands are included because of “the inherent difficulties of defining precise bounds to regulable waters,” 474 U. S., at 134. And the full sentence reads as follows: “This holds true even for wetlands that are not the result of flooding or permeation by water having its source in *adjacent* bodies of open water,” *ibid.* (emphasis added). Clearly, the “wetlands” referred to in the sentence are only “adjacent” wetlands—namely, those with the continuous physical connection that the rest of the *Riverside Bayview* opinion required, see *supra*, at 21–23. Thus, it is evident that the quoted language was not at all a rejection of the physical-connection requirement, but rather a rejection of the alternative position (which had been adopted by the lower court in that case, see *id.*, at 125) that the *only* covered wetlands are those created by inundation. As long as the wetland is “adjacent” to covered waters, said *Riverside Bayview*, its creation *vel non* by inundation is irrelevant.

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conclusions are perfectly consistent with our interpretation, and neither illuminates the disputed question of what constitutes an “adjacent” wetland.

C

In a curious appeal to entrenched Executive error, the dissent contends that “the appropriateness of the Corps’ 30-year implementation of the Clean Water Act should be addressed to Congress or the Corps rather than to the Judiciary.” *Post*, at 14; see also *post*, at 2, 22. Surely this is a novel principle of administrative law—a sort of 30-year adverse possession that insulates disregard of statutory text from judicial review. It deservedly has no precedent in our jurisprudence. We did not invoke such a principle in *SWANCC*, when we invalidated one aspect of the Corps’ implementation.

The dissent contends that “[b]ecause there is ambiguity in the phrase ‘waters of the United States’ and because interpreting it broadly to cover such ditches and streams advances the purpose of the Act, the Corps’ approach should command our deference.” *Post*, at 19. Two defects in a single sentence: “[W]aters of the United States” is in *some* respects ambiguous. The *scope* of that ambiguity, however, does not conceivably extend to whether storm drains and dry ditches are “waters,” and hence does not support the Corps’ interpretation. And as for advancing “the purpose of the Act”: We have often criticized that last resort of extravagant interpretation, noting that no law pursues its purpose at all costs, and that the textual limitations upon a law’s scope are no less a part of its “purpose” than its substantive authorizations. See, e.g., *Director, Office of Workers’ Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U. S. 122, 135–136 (1995).

Finally, we could not agree more with the dissent’s statement, *post*, at 14, that “[w]hether the benefits of

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particular conservation measures outweigh their costs is a classic question of public policy that should not be answered by appointed judges.” Neither, however, should it be answered by appointed officers of the Corps of Engineers in contradiction of congressional direction. It is the dissent’s opinion, and not ours, which appeals not to a reasonable interpretation of enacted text, but to the great environmental benefits that a patently unreasonable interpretation can achieve. We have begun our discussion by mentioning, to be sure, the high costs imposed by that interpretation—but they are in no way the basis for our decision, which rests, plainly and simply, upon the limited meaning that can be borne by the phrase “waters of the United States.”

VII

JUSTICE KENNEDY’s opinion concludes that our reading of the Act “is inconsistent with its text, structure, and purpose.” *Post*, at 19. His own opinion, however, leaves the Act’s “text” and “structure” virtually unaddressed, and rests its case upon an interpretation of the phrase “significant nexus,” *ibid.*, which appears in one of our opinions.

To begin with, JUSTICE KENNEDY’s reading of “significant nexus” bears no easily recognizable relation to either the case that used it (*SWANCC*) or to the earlier case that that case purported to be interpreting (*Riverside Bayview*). To establish a “significant nexus,” JUSTICE KENNEDY would require the Corps to “establish . . . on a case-by-case basis” that wetlands adjacent to nonnavigable tributaries “significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’” *Post*, at 25, 23. This standard certainly does not come from *Riverside Bayview*, which explicitly rejected such case-by-case determinations of ecological significance for the *jurisdictional* question whether a wetland is covered, holding instead that *all* physically

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connected wetlands are covered. 474 U. S., at 135, n. 9. It is true enough that one reason for accepting that physical-connection criterion was the likelihood that a physically connected wetland would have an ecological effect upon the adjacent waters. But case-by-case determination of ecological effect *was not the test*. Likewise, that test cannot be derived from SWANCC's characterization of *Riverside Bayview*, which emphasized that the wetlands which possessed a "significant nexus" in that earlier case "actually abutted on a navigable waterway," 531 U. S., at 167, and which *specifically rejected* the argument that physically unconnected ponds could be included based on their ecological connection to covered waters. In fact, JUSTICE KENNEDY acknowledges that neither *Riverside Bayview* nor SWANCC required, for wetlands abutting navigable-in-fact waters, the case-by-case ecological determination that he proposes for wetlands that neighbor nonnavigable tributaries. See *post*, at 23. Thus, JUSTICE KENNEDY misreads SWANCC's "significant nexus" statement as mischaracterizing *Riverside Bayview* to adopt a case-by-case test of ecological significance; and then transfers that standard to a context that *Riverside Bayview* expressly declined to address (namely, wetlands nearby non-navigable tributaries); while all the time *conceding* that this standard does not apply in the context that *Riverside Bayview did* address (wetlands abutting navigable waterways). Truly, this is "turtles all the way down."¹⁴

¹⁴The allusion is to a classic story told in different forms and attributed to various authors. See, *e.g.*, Geertz, Thick Description: Toward an Interpretive Theory of Culture, in *The Interpretation of Cultures* 28–29 (1973). In our favored version, an Eastern guru affirms that the earth is supported on the back of a tiger. When asked what supports the tiger, he says it stands upon an elephant; and when asked what supports the elephant he says it is a giant turtle. When asked, finally, what supports the giant turtle, he is briefly taken aback, but quickly replies "Ah, after that it is turtles all the way down."

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But misreading our prior decisions is not the principal problem. The principal problem is reading them in utter isolation from the text of the Act. One would think, after reading JUSTICE KENNEDY's exegesis, that the crucial provision of the text of the CWA was a jurisdictional requirement of "significant nexus" between wetlands and navigable waters. In fact, however, that phrase appears nowhere in the Act, but is taken from *SWANCC*'s cryptic characterization of the holding of *Riverside Bayview*. Our interpretation of the phrase is both consistent with those opinions *and* compatible with what the Act *does* establish as the jurisdictional criterion: "waters of the United States." Wetlands are "waters of the United States" if they bear the "significant nexus" of physical connection, which makes them as a practical matter *indistinguishable* from waters of the United States. What other nexus could *conceivably* cause them to *be* "waters of the United States"? JUSTICE KENNEDY's test is that they, "either alone or in combination with similarly situated lands in the region, significantly *affect* the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable,'" *post*, at 23 (emphasis added). But what possible linguistic usage would accept that whatever (alone or in combination) *affects* waters of the United States *is* waters of the United States?

Only by ignoring the text of the statute and by assuming that the phrase of *SWANCC* ("significant nexus") can properly be interpreted in isolation from that text does JUSTICE KENNEDY reach the conclusion he has arrived at. Instead of limiting its meaning by reference to the text it was applying, he purports to do so by reference to what he calls the "purpose" of the statute. Its purpose is to clean up the waters of the United States, and therefore anything that might "significantly affect" the purity of those waters bears a "significant nexus" to those waters, and thus (he never says this, but the text of the statute demands that

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he mean it) *is* those waters. This is the familiar tactic of substituting the purpose of the statute for its text, freeing the Court to write a different statute that achieves the same purpose. To begin with, as we have discussed earlier, clean water is not the *only* purpose of the statute. So is the preservation of primary state responsibility for ordinary land-use decisions. 33 U.S.C. §1251(b). JUSTICE KENNEDY's test takes no account of this purpose. More fundamentally, however, the test simply rewrites the statute, using for that purpose the gimmick of "significant nexus." It would have been an easy matter for Congress to give the Corps jurisdiction over all wetlands (or, for that matter, all dry lands) that "significantly affect the chemical, physical, and biological integrity of" waters of the United States. It did not do that, but instead explicitly limited jurisdiction to "waters of the United States."

JUSTICE KENNEDY's disposition would disallow some of the Corps' excesses, and in that respect is a more moderate flouting of statutory command than JUSTICE STEVENS'.¹⁵ In another respect, however, it is more extreme. At least JUSTICE STEVENS can blame his implausible reading of the statute upon the Corps. His error con-

¹⁵It is unclear *how much* more moderate the flouting is, since JUSTICE KENNEDY's "significant nexus" standard is perfectly opaque. When, exactly, does a wetland "significantly affect" covered waters, and when are its effects "in contrast . . . speculative or insubstantial"? *Post*, at 23. JUSTICE KENNEDY does not tell us clearly—except to suggest, *post*, at 25, that "'isolated" is generally a matter of degree'" (quoting Leibowitz & Nadeau, *Isolated Wetlands: State-of-the-Science and Future Directions*, 23 *Wetlands* 663, 669 (2003)). As the dissent hopefully observes, *post*, at 24, such an unverifiable standard is not likely to constrain an agency whose disregard for the statutory language has been so long manifested. In fact, by stating that "[i]n both the consolidated cases before the Court the record contains evidence suggesting the possible existence of a significant nexus according to the principles outlined above," *post*, at 26, JUSTICE KENNEDY tips a wink at the agency, inviting it to try its same expansive reading again.

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sists of giving that agency more deference than reason permits. JUSTICE KENNEDY, however, has devised his new statute all on his own. It purports to be, not a grudging acceptance of an agency’s close-to-the-edge expansion of its own powers, but rather *the* most reasonable interpretation of the law. It is far from that, unless whatever affects waters is waters.

VIII

Because the Sixth Circuit applied the wrong standard to determine if these wetlands are covered “waters of the United States,” and because of the paucity of the record in both of these cases, the lower courts should determine, in the first instance, whether the ditches or drains near each wetland are “waters” in the ordinary sense of containing a relatively permanent flow; and (if they are) whether the wetlands in question are “adjacent” to these “waters” in the sense of possessing a continuous surface connection that creates the boundary-drawing problem we addressed in *Riverside Bayview*.

* * *

We vacate the judgments of the Sixth Circuit in both No. 04–1034 and No. 04–1384, and remand both cases for further proceedings.

It is so ordered.

ROBERTS, C. J., concurring

SUPREME COURT OF THE UNITED STATES

Nos. 04–1034 and 04–1384

JOHN A. RAPANOS, ET UX., ET AL., PETITIONERS
04–1034 *v.*
UNITED STATES

JUNE CARABELL ET AL., PETITIONERS
04–1384 *v.*
UNITED STATES ARMY CORPS OF ENGINEERS ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[June 19, 2006]

CHIEF JUSTICE ROBERTS, concurring.

Five years ago, this Court rejected the position of the Army Corps of Engineers on the scope of its authority to regulate wetlands under the Clean Water Act, 86 Stat. 816, as amended, 33 U. S. C. §1251 *et seq.* *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U. S. 159 (2001) (*SWANCC*). The Corps had taken the view that its authority was essentially limitless; this Court explained that such a boundless view was inconsistent with the limiting terms Congress had used in the Act. *Id.*, at 167–174.

In response to the *SWANCC* decision, the Corps and the Environmental Protection Agency (EPA) initiated a rulemaking to consider “issues associated with the scope of waters that are subject to the Clean Water Act (CWA), in light of the U. S. Supreme Court decision in [*SWANCC*].” 68 Fed. Reg. 1991 (2003). The “goal of the agencies” was “to develop proposed regulations that will further the public interest by clarifying what waters are subject to

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CWA jurisdiction and affording full protection to these waters through an appropriate focus of Federal and State resources consistent with the CWA.” *Ibid.*

Agencies delegated rulemaking authority under a statute such as the Clean Water Act are afforded generous leeway by the courts in interpreting the statute they are entrusted to administer. See *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–845 (1984). Given the broad, somewhat ambiguous, but nonetheless clearly limiting terms Congress employed in the Clean Water Act, the Corps and the EPA would have enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority.

The proposed rulemaking went nowhere. Rather than refining its view of its authority in light of our decision in *SWANCC*, and providing guidance meriting deference under our generous standards, the Corps chose to adhere to its essentially boundless view of the scope of its power. The upshot today is another defeat for the agency.

It is unfortunate that no opinion commands a majority of the Court on precisely how to read Congress’ limits on the reach of the Clean Water Act. Lower courts and regulated entities will now have to feel their way on a case-by-case basis. This situation is certainly not unprecedented. See *Grutter v. Bollinger*, 539 U. S. 306, 325 (2003) (discussing *Marks v. United States*, 430 U. S. 188 (1977)). What is unusual in this instance, perhaps, is how readily the situation could have been avoided.*

*The scope of the proposed rulemaking was not as narrow as JUSTICE STEVENS suggests, *post*, at 10, n. 4 (dissenting opinion). See 68 Fed. Reg. 1994 (2003) (“Additionally, we invite your views as to whether any other revisions are needed to the existing regulations on which waters are jurisdictional under the CWA”); *id.*, at 1992 (“Today’s [notice of proposed rulemaking] seeks public input on what, if any, revisions in light of *SWANCC* might be appropriate to the regulations that define ‘waters of the U. S.’, and today’s [notice] thus would be of interest to *all*

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entities discharging to, or regulating, *such waters*” (emphases added). The agencies can decide for themselves whether, as the *SWANCC* dissenter suggests, it was wise for them to take no action in response to *SWANCC*.

KENNEDY, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

Nos. 04–1034 and 04–1384

JOHN A. RAPANOS, ET UX., ET AL., PETITIONERS
04–1034 *v.*
UNITED STATES

JUNE CARABELL ET AL., PETITIONERS
04–1384 *v.*
UNITED STATES ARMY CORPS OF ENGINEERS ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[June 19, 2006]

JUSTICE KENNEDY, concurring in the judgment.

These consolidated cases require the Court to decide whether the term “navigable waters” in the Clean Water Act extends to wetlands that do not contain and are not adjacent to waters that are navigable in fact. In *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Court held, under the circumstances presented there, that to constitute “navigable waters” under the Act, a water or wetland must possess a “significant nexus” to waters that are or were navigable in fact or that could reasonably be so made. *Id.*, at 167, 172. In the instant cases neither the plurality opinion nor the dissent by JUSTICE STEVENS chooses to apply this test; and though the Court of Appeals recognized the test’s applicability, it did not consider all the factors necessary to determine whether the lands in

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question had, or did not have, the requisite nexus. In my view the cases ought to be remanded to the Court of Appeals for proper consideration of the nexus requirement.

I

Although both the plurality opinion and the dissent by JUSTICE STEVENS (hereinafter the dissent) discuss the background of these cases in some detail, a further discussion of the relevant statutes, regulations, and facts may clarify the analysis suggested here.

A

The “objective” of the Clean Water Act (Act), is “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U. S. C. §1251(a). To that end, the statute, among other things, prohibits “the discharge of any pollutant by any person” except as provided in the Act. §1311(a). As relevant here, the term “discharge of a pollutant” means “any addition of any pollutant to navigable waters from any point source.” §1362(12). The term “pollutant” is defined as “dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.” §1362(6). The Secretary of the Army, acting through the Chief of Engineers of the Army Corps of Engineers, may issue permits for “discharge of dredged or fill material into the navigable waters at specified disposal sites.” §§1344(a), (c), (d); but see §1344(f) (categorically exempting certain forms of “discharge of dredged or fill material” from regulation under §1311(a)). Pursuant to §1344(g), States with qualifying programs may assume certain aspects of the Corps’ permitting responsibility. Apart from dredged or fill material, pollutant discharges require a permit from the Environmental Protec-

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tion Agency (EPA), which also oversees the Corps' (and qualifying States') permitting decisions. See §§1311(a), 1342(a), 1344(c). Discharge of pollutants without an appropriate permit may result in civil or criminal liability. See §1319.

The statutory term to be interpreted and applied in the two instant cases is the term “navigable waters.” The outcome turns on whether that phrase reasonably describes certain Michigan wetlands the Corps seeks to regulate. Under the Act “[t]he term ‘navigable waters’ means the waters of the United States, including the territorial seas.” §1362(7). In a regulation the Corps has construed the term “waters of the United States” to include not only waters susceptible to use in interstate commerce—the traditional understanding of the term “navigable waters of the United States,” see, e.g., *United States v. Appalachian Elec. Power Co.*, 311 U. S. 377, 406–408 (1940); *The Daniel Ball*, 10 Wall. 557, 563–564 (1871)—but also tributaries of those waters and, of particular relevance here, wetlands adjacent to those waters or their tributaries. 33 CFR §§328.3(a)(1), (5), (7) (2005). The Corps views tributaries as within its jurisdiction if they carry a perceptible “ordinary high water mark.” §328.4(c); 65 Fed. Reg. 12823 (2000). An ordinary high-water mark is a “line on the shore established by the fluctuations of water and indicated by physical characteristics such as clear, natural line impressed on the bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas.” 33 CFR §328.3(e).

Contrary to the plurality’s description, *ante*, at 2–3, 15, wetlands are not simply moist patches of earth. They are defined as “those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do

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support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.” §328.3(b). The Corps’ Wetlands Delineation Manual, including over 100 pages of technical guidance for Corps officers, interprets this definition of wetlands to require: (1) prevalence of plant species typically adapted to saturated soil conditions, determined in accordance with the United States Fish and Wildlife Service’s National List of Plant Species that Occur in Wetlands; (2) hydric soil, meaning soil that is saturated, flooded, or ponded for sufficient time during the growing season to become anaerobic, or lacking in oxygen, in the upper part; and (3) wetland hydrology, a term generally requiring continuous inundation or saturation to the surface during at least five percent of the growing season in most years. See Wetlands Research Program Technical Report Y–87–1 (on-line edition), pp. 12–34 (Jan. 1987), <http://www.saj.usace.army.mil/permit/documents/87manual.pdf> (all Internet material as visited June 16, 2006, and available in Clerk of Court’s case file). Under the Corps’ regulations, wetlands are adjacent to tributaries, and thus covered by the Act, even if they are “separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like.” §328.3(c).

B

The first consolidated case before the Court, *Rapanos v. United States*, No. 04–1034, relates to a civil enforcement action initiated by the United States in the United States District Court for the Eastern District of Michigan against the owners of three land parcels near Midland, Michigan. The first parcel, known as the Salzburg site, consists of roughly 230 acres. The District Court, applying the Corps’ definition of wetlands, found based on expert testimony that the Salzburg site included 28 acres of wetlands. The District Court further found that “the Salzburg wetlands

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have a surface water connection to tributaries of the Kawkawlin River which, in turn, flows into the Saginaw River and ultimately into Lake Huron.” App. to Pet. for Cert. B11. Water from the site evidently spills into the Hoppler Drain, located just north of the property, which carries water into the Hoppler Creek and thence into the Kawkawlin River, which is navigable. A state official testified that he observed carp spawning in a ditch just north of the property, indicating a direct surface-water connection from the ditch to the Saginaw Bay of Lake Huron.

The second parcel, known as the Hines Road site, consists of 275 acres, which the District Court found included 64 acres of wetlands. The court found that the wetlands have a surface-water connection to the Rose Drain, which carries water into the Tittabawassee River, a navigable waterway. The final parcel, called the Pine River site, consists of some 200 acres. The District Court found that 49 acres were wetlands and that a surface water connection linked the wetlands to the nearby Pine River, which flows into Lake Huron.

At all relevant times, John Rapanos owned the Salzburg site; a company he controlled owned the Hines Road site; and Rapanos’ wife and a company she controlled (possibly in connection with another entity) owned the Pine River site. All these parties are petitioners here. In December 1988, Mr. Rapanos, hoping to construct a shopping center, asked the Michigan Department of Natural Resources to inspect the Salzburg site. A state official informed Rapanos that while the site likely included regulated wetlands, Rapanos could proceed with the project if the wetlands were delineated (that is, identified and preserved) or if a permit were obtained. Pursuing the delineation option, Rapanos hired a wetlands consultant to survey the property. The results evidently displeased Rapanos: Informed that the site included between 48 and 58 acres of

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wetlands, Rapanos allegedly threatened to “destroy” the consultant unless he eradicated all traces of his report. Rapanos then ordered \$350,000-worth of earthmoving and landclearing work that filled in 22 of the 64 wetlands acres on the Salzburg site. He did so without a permit and despite receiving cease-and-desist orders from state officials and the EPA. At the Hines Road and Pine River sites, construction work—again conducted in violation of state and federal compliance orders—altered an additional 17 and 15 wetlands acres, respectively.

The Federal Government brought criminal charges against Rapanos. In the suit at issue here, however, the United States alleged civil violations of the Clean Water Act against all the *Rapanos* petitioners. Specifically, the Government claimed that petitioners discharged fill into jurisdictional wetlands, failed to respond to requests for information, and ignored administrative compliance orders. See 33 U. S. C. §§1311(a), 1318(a), 1319(a). After a 13-day bench trial, the District Court made the findings noted earlier and, on that basis, upheld the Corps’ jurisdiction over wetlands on the three parcels. On the merits the court ruled in the Government’s favor, finding that violations occurred at all three sites. As to two other sites, however, the court rejected the Corps’ claim to jurisdiction, holding that the Government had failed to carry its burden of proving the existence of wetlands under the three-part regulatory definition. (These two parcels are no longer at issue.) The United States Court of Appeals for the Sixth Circuit affirmed. 376 F. 3d 629, 634 (2004). This Court granted certiorari to consider the Corps’ jurisdiction over wetlands on the Salzburg, Hines Road, and Pine River sites. 546 U. S. ___ (2005).

The second consolidated case, *Carabell*, No. 04–1384, involves a parcel shaped like a right triangle and consisting of some 19.6 acres, 15.9 of which are forested wetlands. 257 F. Supp. 2d 917, 923 (ED Mich. 2003). The

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property is located roughly one mile from Lake St. Clair, a 430-square-mile lake located between Michigan and Canada that is popular for boating and fishing and produces some 48 percent of the sport fish caught in the Great Lakes, see Brief for Macomb County, Michigan as *Amicus Curiae* 2. The right-angle corner of the property is located to the northwest. The hypotenuse, which runs from northeast to southwest, lies alongside a man-made berm that separates the property from a ditch. At least under current conditions—that is, without the deposit of fill in the wetlands that the landowners propose—the berm ordinarily, if not always, blocks surface-water flow from the wetlands into the ditch. But cf. App. 186a (administrative hearing testimony by consultant for Carabells indicating “you would start seeing some overflow” in a “ten year storm”). Near the northeast corner of the property, the ditch connects with the Sutherland-Oemig Drain, which carries water continuously throughout the year and empties into Auvase Creek. The creek in turn empties into Lake St. Clair. At its southwest end, the ditch connects to other ditches that empty into the Auvase Creek and thence into Lake St. Clair.

In 1993 petitioners Keith and June Carabell sought a permit from the Michigan Department of Environmental Quality (MDEQ), which has assumed permitting functions of the Corps pursuant to §1344(g). Petitioners hoped to fill in the wetlands and construct 130 condominium units. Although the MDEQ denied the permit, a State Administrative Law Judge directed the agency to approve an alternative plan, proposed by the Carabells, that involved the construction of 112 units. This proposal called for filling in 12.2 acres of the property while creating retention ponds on 3.74 acres. Because the EPA had objected to the permit, jurisdiction over the case transferred to the Corps. See §1344(j).

The Corps’ district office concluded that the Carabells’

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property “provides water storage functions that, if destroyed, could result in an increased risk of erosion and degradation of water quality in the Sutherland-Oemig Drain, Auvase Creek, and Lake St. Clair.” *Id.*, at 127a. The district office denied the permit, and the Corps upheld the denial in an administrative appeal. The Carabells, challenging both the Corps’ jurisdiction and the merits of the permit denial, sought judicial review pursuant to the Administrative Procedure Act, 5 U. S. C. §706(2)(A). The United States District Court for the Eastern District of Michigan granted summary judgment to the Corps, 257 F. Supp. 2d 917, and the United States Court of Appeals for the Sixth Circuit affirmed, 391 F. 3d 704 (2005). This Court granted certiorari to consider the jurisdictional question. 546 U. S. ___ (2005).

II

Twice before the Court has construed the term “navigable waters” in the Clean Water Act. In *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121 (1985), the Court upheld the Corps’ jurisdiction over wetlands adjacent to navigable-in-fact waterways. *Id.*, at 139. The property in *Riverside Bayview*, like the wetlands in the *Carabell* case now before the Court, was located roughly one mile from Lake St. Clair, see *United States v. Riverside Bayview Homes, Inc.*, 729 F. 2d 391, 392 (CA6 1984) (decision on review in *Riverside Bayview*), though in that case, unlike *Carabell*, the lands at issue formed part of a wetland that directly abutted a navigable-in-fact creek, 474 U. S., at 131. In regulatory provisions that remain in effect, the Corps had concluded that wetlands perform important functions such as filtering and purifying water draining into adjacent water bodies, 33 CFR §320.4(b)(2)(vii), slowing the flow of runoff into lakes, rivers, and streams so as to prevent flooding and erosion, §§320.4(b)(2)(iv), (v), and providing critical habitat for aquatic animal species, §320.4(b)(2)(i). 474

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U. S., at 134–135. Recognizing that “[a]n agency’s construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress,” *id.*, at 131 (citing *Chemical Mfrs. Assn. v. Natural Resources Defense Council, Inc.*, 470 U. S. 116, 125 (1985), and *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–845 (1984)), the Court held that “the Corps’ ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act,” 474 U. S., at 134. The Court reserved, however, the question of the Corps’ authority to regulate wetlands other than those adjacent to open waters. See *id.*, at 131–132, n. 8.

In *SWANCC*, the Court considered the validity of the Corps’ jurisdiction over ponds and mudflats that were isolated in the sense of being unconnected to other waters covered by the Act. 531 U. S., at 171. The property at issue was an abandoned sand and gravel pit mining operation where “remnant excavation trenches” had “evolv[ed] into a scattering of permanent and seasonal ponds.” *Id.*, at 163. Asserting jurisdiction pursuant to a regulation called the “Migratory Bird Rule,” the Corps argued that these isolated ponds were “waters of the United States” (and thus “navigable waters” under the Act) because they were used as habitat by migratory birds. *Id.*, at 164–165. The Court rejected this theory. “It was the significant nexus between wetlands and ‘navigable waters,’” the Court held, “that informed our reading of the [Act] in *Riverside Bayview Homes.*” *Id.*, at 167. Because such a nexus was lacking with respect to isolated ponds, the Court held that the plain text of the statute did not permit the Corps’ action. *Id.*, at 172.

Riverside Bayview and *SWANCC* establish the framework for the inquiry in the cases now before the Court: Do

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the Corps' regulations, as applied to the wetlands in *Cara-bell* and the three wetlands parcels in *Rapanos*, constitute a reasonable interpretation of "navigable waters" as in *Riverside Bayview* or an invalid construction as in *SWANCC*? Taken together these cases establish that in some instances, as exemplified by *Riverside Bayview*, the connection between a nonnavigable water or wetland and a navigable water may be so close, or potentially so close, that the Corps may deem the water or wetland a "navigable water" under the Act. In other instances, as exemplified by *SWANCC*, there may be little or no connection. Absent a significant nexus, jurisdiction under the Act is lacking. Because neither the plurality nor the dissent addresses the nexus requirement, this separate opinion, in my respectful view, is necessary.

A

The plurality's opinion begins from a correct premise. As the plurality points out, and as *Riverside Bayview* holds, in enacting the Clean Water Act Congress intended to regulate at least some waters that are not navigable in the traditional sense. *Ante*, at 12; *Riverside Bayview*, 474 U. S., at 133; see also *SWANCC*, *supra*, at 167. This conclusion is supported by "the evident breadth of congressional concern for protection of water quality and aquatic ecosystems." *Riverside Bayview*, *supra*, at 133; see also *Milwaukee v. Illinois*, 451 U. S. 304, 318 (1981) (describing the Act as "an all-encompassing program of water pollution regulation"). It is further compelled by statutory text, for the text is explicit in extending the coverage of the Act to some nonnavigable waters. In a provision allowing States to assume some regulatory functions of the Corps (an option Michigan has exercised), the Act limits States to issuing permits for:

"the discharge of dredged or fill material into the navigable waters (other than those waters which are

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presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their ordinary high water mark, or mean higher high water mark on the west coast, including wetlands adjacent thereto) within its jurisdiction.” 33 U. S. C. §1344(g)(1).

Were there no Clean Water Act “navigable waters” apart from waters “presently used” or “susceptible to use” in interstate commerce, the “other than” clause, which begins the long parenthetical statement, would overtake the delegation of authority the provision makes at the outset. Congress, it follows, must have intended a broader meaning for navigable waters. The mention of wetlands in the “other than” clause, moreover, makes plain that at least some wetlands fall within the scope of the term “navigable waters.” See *Riverside Bayview, supra*, at 138–139, and n. 11.

From this reasonable beginning the plurality proceeds to impose two limitations on the Act; but these limitations, it is here submitted, are without support in the language and purposes of the Act or in our cases interpreting it. First, because the dictionary defines “waters” to mean “water ‘[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,’ or ‘the flowing or moving masses, as of waves or floods, making up such streams or bodies,” *ante*, at 13 (quoting Webster’s New International Dictionary 2882 (2d ed. 1954) (hereinafter Webster’s Second)), the plurality would conclude that the phrase “navigable waters” permits Corps and EPA jurisdiction only over “relatively permanent, standing or flowing bodies of water,” *ante*, at 13–14—a category that in the plurality’s view includes “seasonal” rivers, that is, rivers that carry water continuously except

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during “dry months,” but not intermittent or ephemeral streams, *ante*, at 13–15, and n. 5. Second, the plurality asserts that wetlands fall within the Act only if they bear “a continuous surface connection to bodies that are ‘waters of the United States’ in their own right”—waters, that is, that satisfy the plurality’s requirement of permanent standing water or continuous flow. *Ante*, at 23–24.

The plurality’s first requirement—permanent standing water or continuous flow, at least for a period of “some months,” *ante*, at 13–14, and n. 5—makes little practical sense in a statute concerned with downstream water quality. The merest trickle, if continuous, would count as a “water” subject to federal regulation, while torrents thundering at irregular intervals through otherwise dry channels would not. Though the plurality seems to presume that such irregular flows are too insignificant to be of concern in a statute focused on “waters,” that may not always be true. Areas in the western parts of the Nation provide some examples. The Los Angeles River, for instance, ordinarily carries only a trickle of water and often looks more like a dry roadway than a river. See, e.g., B. Gumprecht, *The Los Angeles River: Its Life, Death, and Possible Rebirth* 1–2 (1999); Martinez, *City of Angels’ Signature River Tapped for Rebirth*, *Chicago Tribune*, Apr. 10, 2005, section 1, p. 8. Yet it periodically releases water-volumes so powerful and destructive that it has been encased in concrete and steel over a length of some 50 miles. See Gumprecht, *supra*, at 227. Though this particular waterway might satisfy the plurality’s test, it is illustrative of what often-dry watercourses can become when rain waters flow. See, e.g., County of Los Angeles Dept. of Public Works, *Water Resources Division: 2002–2003 Hydrologic Report, Runoff, Daily Discharge, F377–R BOUQUET CANYON CREEK at Urbandale Avenue 11107860 Bouquet Creek Near Saugus, CA*, <http://ladpw.org/wrd/report/0203/runoff/discharge.cfm>

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(indicating creek carried no flow for much of the year but carried 122 cubic feet per second on Feb. 12, 2003).

To be sure, Congress could draw a line to exclude irregular waterways, but nothing in the statute suggests it has done so. Quite the opposite, a full reading of the dictionary definition precludes the plurality's emphasis on permanence: The term "waters" may mean "flood or inundation," Webster's Second 2882, events that are impermanent by definition. Thus, although of course the Act's use of the adjective "navigable" indicates a focus on waterways rather than floods, Congress' use of "waters" instead of "water," *ante*, at 13, does not necessarily carry the connotation of "relatively permanent, standing or flowing bodies of water," *ante*, at 13–14. (And contrary to the plurality's suggestion, *ante*, at 13, n. 4, there is no indication in the dictionary that the "flood or inundation" definition is limited to poetry.) In any event, even granting the plurality's preferred definition—that "waters" means "water '[a]s found in streams and bodies forming geographical features such as oceans, rivers, [and] lakes,'" *ante*, at 13 (quoting Webster's Second 2882)—the dissent is correct to observe that an intermittent flow can constitute a stream, in the sense of "'a current or course of water or other fluid, flowing on the earth,'" *ante*, at 14, n. 6 (quoting Webster's Second 2493), while it is flowing. See *post*, at 15–16 (STEVENS, J., dissenting) (also noting Court's use of the phrase "intermittent stream" in *Harrisonville v. W. S. Dickey Clay Mfg. Co.*, 289 U. S. 334, 335 (1933)). It follows that the Corps can reasonably interpret the Act to cover the paths of such impermanent streams.

Apart from the dictionary, the plurality invokes *Riverside Bayview* to support its interpretation that the term "waters" is so confined, but this reliance is misplaced. To be sure, the Court there compared wetlands to "rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'" 474 U. S., at 131. It is

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quite a stretch to claim, however, that this mention of hydrographic features “echoe[s]” the dictionary’s reference to “*geographical features* such as oceans, rivers, [and] lakes.” *Ante*, at 16 (quoting Webster’s Second 2882). In fact the *Riverside Bayview* opinion does not cite the dictionary definition on which the plurality relies, and the phrase “hydrographic features” could just as well refer to intermittent streams carrying substantial flow to navigable waters. See Webster’s Second 1221 (defining “hydrography” as “[t]he description and study of seas, lakes, rivers, and other waters; specif[ically] . . . [t]he measurement of flow and investigation of the behavior of streams, esp[ecially] with reference to the control or utilization of their waters”).

Also incorrect is the plurality’s attempt to draw support from the statutory definition of “point source” as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.” 33 U. S. C. §1362(14). This definition is central to the Act’s regulatory structure, for the term “discharge of a pollutant” is defined in relevant part to mean “any addition of any pollutant to navigable waters from any point source,” §1362(12). Interpreting the point-source definition, the plurality presumes, first, that the point-source examples describe “watercourses through which *intermittent* waters typically flow,” and second, that point sources and navigable waters are “separate and distinct categories.” *Ante*, at 17. From this the plurality concludes, by a sort of negative inference, that navigable waters may not be intermittent. The conclusion is unsound. Nothing in the point-source definition requires an intermittent flow. Polluted water could flow night and day from a pipe, channel, or conduit and yet still qualify as a point source; any con-

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trary conclusion would likely exclude, among other things, effluent streams from sewage treatment plants. As a result, even were the statute read to require continuity of flow for navigable waters, certain water-bodies could conceivably constitute both a point source and a water. At any rate, as the dissent observes, the fact that point sources may carry continuous flow undermines the plurality's conclusion that covered "waters" under the Act may not be discontinuous. See *post*, at 17.

The plurality's second limitation—exclusion of wetlands lacking a continuous surface connection to other jurisdictional waters—is also unpersuasive. To begin with, the plurality is wrong to suggest that wetlands are "*indistinguishable*" from waters to which they bear a surface connection. *Ante*, at 37. Even if the precise boundary may be imprecise, a bog or swamp is different from a river. The question is what circumstances permit a bog, swamp, or other nonnavigable wetland to constitute a "navigable water" under the Act—as §1344(g)(1), if nothing else, indicates is sometimes possible, see *supra*, at 10–11. *Riverside Bayview* addressed that question and its answer is inconsistent with the plurality's theory. There, in upholding the Corps' authority to regulate "wetlands adjacent to other bodies of water over which the Corps has jurisdiction," the Court deemed it irrelevant whether "the moisture creating the wetlands . . . find[s] its source in the adjacent bodies of water." 474 U. S., at 135. The Court further observed that adjacency could serve as a valid basis for regulation even as to "wetlands that are not significantly intertwined with the ecosystem of adjacent waterways." *Id.*, at 135, n. 9. "If it is reasonable," the Court explained, "for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the aquatic ecosystem, its definition can stand." *Ibid.*

The Court in *Riverside Bayview* did note, it is true, the

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difficulty of defining where “water ends and land begins,” *id.*, at 132, and the Court cited that problem as one reason for deferring to the Corps’ view that adjacent wetlands could constitute waters. Given, however, the further recognition in *Riverside Bayview* that an overinclusive definition is permissible even when it reaches wetlands holding moisture disconnected from adjacent water-bodies, *id.*, at 135, and n. 9, *Riverside Bayview*’s observations about the difficulty of defining the water’s edge cannot be taken to establish that when a clear boundary is evident, wetlands beyond the boundary fall outside the Corps’ jurisdiction.

For the same reason *Riverside Bayview* also cannot be read as rejecting only the proposition, accepted by the Court of Appeals in that case, that wetlands covered by the Act must contain moisture originating in neighboring waterways. See *id.*, at 125, 134. Since the Court of Appeals had accepted that theory, the Court naturally addressed it. Yet to view the decision’s reasoning as limited to that issue—an interpretation the plurality urges here, *ante*, at 33, n. 13—would again overlook the opinion’s broader focus on wetlands’ “significant effects on water quality and the aquatic ecosystem,” 474 U. S., at 135, n. 9. In any event, even were this reading of *Riverside Bayview* correct, it would offer no support for the plurality’s proposed requirement of a “continuous surface connection,” *ante*, at 23. The Court in *Riverside Bayview* rejected the proposition that origination in flooding was necessary for jurisdiction over wetlands. It did not suggest that a flood-based origin would not support jurisdiction; indeed, it presumed the opposite. See 474 U. S., at 134 (noting that the Corps’ view was valid “*even* for wetlands that are not the result of flooding or permeation” (emphasis added)). Needless to say, a continuous connection is not necessary for moisture in wetlands to result from flooding—the connection might well exist only during floods.

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SWANCC, likewise, does not support the plurality's surface-connection requirement. *SWANCC*'s holding that "nonnavigable, isolated, intrastate waters," 531 U. S., at 171, are not "navigable waters" is not an explicit or implicit overruling of *Riverside Bayview*'s approval of adjacency as a factor in determining the Corps' jurisdiction. In rejecting the Corps' claimed authority over the isolated ponds in *SWANCC*, the Court distinguished adjacent nonnavigable waters such as the wetlands addressed in *Riverside Bayview*. 531 U. S., at 167, 170–171.

As *Riverside Bayview* recognizes, the Corps' adjacency standard is reasonable in some of its applications. Indeed, the Corps' view draws support from the structure of the Act, while the plurality's surface-water-connection requirement does not.

As discussed above, the Act's prohibition on the discharge of pollutants into navigable waters, 33 U. S. C. §1311(a), covers both the discharge of toxic materials such as sewage, chemical waste, biological material, and radioactive material and the discharge of dredged spoil, rock, sand, cellar dirt, and the like. All these substances are defined as pollutants whose discharge into navigable waters violates the Act. §§1311(a), 1362(6), (12). One reason for the parallel treatment may be that the discharge of fill material can impair downstream water quality. The plurality argues otherwise, asserting that dredged or fill material "does not normally wash downstream." *Ante*, at 26. As the dissent points out, this proposition seems questionable as an empirical matter. See *post*, at 22. It seems plausible that new or loose fill, not anchored by grass or roots from other vegetation, could travel downstream through waterways adjacent to a wetland; at the least this is a factual possibility that the Corps' experts can better assess than can the plurality. Silt, whether from natural or human sources, is a major factor in aquatic environments, and it may clog water-

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ways, alter ecosystems, and limit the useful life of dams. See, *e.g.*, Fountain, Unloved, But Not Unbuilt, N. Y. Times, June 5, 2005 section 4, p. 3, col. 1; DePalma, Dam to Be Demolished to Save an Endangered Species, N. Y. Times, Apr. 26, 2004, section B, p. 1, col. 2; MacDougall, Damage Can Be Irreversible, Los Angeles Times, June 19, 1987, pt. 1, p. 10, col. 4.

Even granting, however, the plurality's assumption that fill material will stay put, Congress' parallel treatment of fill material and toxic pollution may serve another purpose. As the Court noted in *Riverside Bayview*, "the Corps has concluded that wetlands may serve to filter and purify water draining into adjacent bodies of water, 33 CFR §320.4(b)(2)(vii) (1985), and to slow the flow of surface runoff into lakes, rivers, and streams and thus prevent flooding and erosion, see §§320.4(b)(2)(iv) and (v)." 474 U. S., at 134. Where wetlands perform these filtering and runoff-control functions, filling them may increase downstream pollution, much as a discharge of toxic pollutants would. Not only will dirty water no longer be stored and filtered but also the act of filling and draining itself may cause the release of nutrients, toxins, and pathogens that were trapped, neutralized, and perhaps amenable to filtering or detoxification in the wetlands. See U. S. Congress, Office of Technology Assessment, *Wetlands: Their Use and Regulation*, OTA-O-206 pp. 43, 48-52 (Mar. 1984), http://govinfo.library.unt.edu/ota/OTA_4/DATA/1984/8433.pdf (hereinafter OTA). In many cases, moreover, filling in wetlands separated from another water by a berm can mean that flood water, impurities, or runoff that would have been stored or contained in the wetlands will instead flow out to major waterways. With these concerns in mind, the Corps' definition of adjacency is a reasonable one, for it may be the absence of an interchange of waters prior to the dredge and fill activity that makes protection of the wetlands critical to the statutory scheme.

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In sum the plurality's opinion is inconsistent with the Act's text, structure, and purpose. As a fallback the plurality suggests that avoidance canons would compel its reading even if the text were unclear. *Ante*, at 18–20. In *SWANCC*, as one reason for rejecting the Corps' assertion of jurisdiction over the isolated ponds at issue there, the Court observed that this "application of [the Corps'] regulations" would raise significant questions of Commerce Clause authority and encroach on traditional state land-use regulation. 531 U. S., at 174. As *SWANCC* observed, *ibid.*, and as the plurality points out here, *ante*, at 18, the Act states that "[i]t is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources," 33 U. S. C. §1251(b). The Court in *SWANCC* cited this provision as evidence that a clear statement supporting jurisdiction in applications raising constitutional and federalism difficulties was lacking. 531 U. S., at 174.

The concerns addressed in *SWANCC* do not support the plurality's interpretation of the Act. In *SWANCC*, by interpreting the Act to require a significant nexus with navigable waters, the Court avoided applications—those involving waters without a significant nexus—that appeared likely, as a category, to raise constitutional difficulties and federalism concerns. Here, in contrast, the plurality's interpretation does not fit the avoidance concerns it raises. On the one hand, when a surface-water connection is lacking, the plurality forecloses jurisdiction over wetlands that abut navigable-in-fact waters—even though such navigable waters were traditionally subject to federal authority. On the other hand, by saying the Act covers wetlands (however remote) possessing a surface-water connection with a continuously flowing stream (however small), the plurality's reading would permit applications of the statute as far from traditional federal authority as are

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the waters it deems beyond the statute's reach. Even assuming, then, that federal regulation of remote wetlands and nonnavigable waterways would raise a difficult Commerce Clause issue notwithstanding those waters' aggregate effects on national water quality, but cf. *Wickard v. Filburn*, 317 U. S. 111 (1942); see also *infra*, at 25–26, the plurality's reading is not responsive to this concern. As for States' "responsibilities and rights," §1251(b), it is noteworthy that 33 States plus the District of Columbia have filed an *amici* brief in this litigation asserting that the Clean Water Act is important to their own water policies. See Brief for States of New York et al. 1–3. These *amici* note, among other things, that the Act protects downstream States from out-of-state pollution that they cannot themselves regulate. *Ibid.*

It bears mention also that the plurality's overall tone and approach—from the characterization of acres of wetlands destruction as "backfilling . . . wet fields," *ante*, at 2, to the rejection of Corps authority over "man-made drainage ditches" and "dry arroyos" without regard to how much water they periodically carry, *ante*, at 15, to the suggestion, seemingly contrary to Congress' judgment, that discharge of fill material is inconsequential for adjacent waterways, *ante*, at 26, and n. 11—seems unduly dismissive of the interests asserted by the United States in these cases. Important public interests are served by the Clean Water Act in general and by the protection of wetlands in particular. To give just one example, *amici* here have noted that nutrient-rich runoff from the Mississippi River has created a hypoxic, or oxygen-depleted, "dead zone" in the Gulf of Mexico that at times approaches the size of Massachusetts and New Jersey. Brief for Association of State Wetland Managers et al. 21–23; Brief for Environmental Law Institute 23. Scientific evidence indicates that wetlands play a critical role in controlling and filtering runoff. See, e.g., OTA 43, 48–52; R. Tiner, In

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Search of Swampland: A Wetland Sourcebook and Field Guide 93–95 (2d ed. 2005); Whitmire & Hamilton, Rapid Removal of Nitrate and Sulfate in Freshwater Wetland Sediments, 34 J. Env. Quality 2062 (2005). It is true, as the plurality indicates, that environmental concerns provide no reason to disregard limits in the statutory text, *ante*, at 27, but in my view the plurality’s opinion is not a correct reading of the text. The limits the plurality would impose, moreover, give insufficient deference to Congress’ purposes in enacting the Clean Water Act and to the authority of the Executive to implement that statutory mandate.

Finally, it should go without saying that because the plurality presents its interpretation of the Act as the only permissible reading of the plain text, *ante*, at 20, 23–24, the Corps would lack discretion, under the plurality’s theory, to adopt contrary regulations. THE CHIEF JUSTICE suggests that if the Corps and EPA had issued new regulations after *SWANCC* they would have “enjoyed plenty of room to operate in developing *some* notion of an outer bound to the reach of their authority” and thus could have avoided litigation of the issues we address today. *Ante*, at 2. That would not necessarily be true under the opinion THE CHIEF JUSTICE has joined. New rulemaking could have averted the disagreement here only if the Corps had anticipated the unprecedented reading of the Act that the plurality advances.

B

While the plurality reads nonexistent requirements into the Act, the dissent reads a central requirement out—namely, the requirement that the word “navigable” in “navigable waters” be given some importance. Although the Court has held that the statute’s language invokes Congress’ traditional authority over waters navigable in fact or susceptible of being made so, *SWANCC*, 531 U. S.,

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at 172 (citing *Appalachian Power*, 311 U. S., at 407–408), the dissent would permit federal regulation whenever wetlands lie alongside a ditch or drain, however remote and insubstantial, that eventually may flow into traditional navigable waters. The deference owed to the Corps’ interpretation of the statute does not extend so far.

Congress’ choice of words creates difficulties, for the Act contemplates regulation of certain “navigable waters” that are not in fact navigable. *Supra*, at 10–11. Nevertheless, the word “navigable” in the Act must be given some effect. See *SWANCC*, *supra*, at 172. Thus, in *SWANCC* the Court rejected the Corps’ assertion of jurisdiction over isolated ponds and mudflats bearing no evident connection to navigable-in-fact waters. And in *Riverside Bayview*, while the Court indicated that “the term ‘navigable’ as used in the Act is of limited import,” 474 U. S., at 133, it relied, in upholding jurisdiction, on the Corps’ judgment that “wetlands adjacent to lakes, rivers, streams, and other bodies of water may function as integral parts of the aquatic environment even when the moisture creating the wetlands does not find its source in the adjacent bodies of water,” *id.*, at 135. The implication, of course, was that wetlands’ status as “integral parts of the aquatic environment”—that is, their significant nexus with navigable waters—was what established the Corps’ jurisdiction over them as waters of the United States.

Consistent with *SWANCC* and *Riverside Bayview* and with the need to give the term “navigable” some meaning, the Corps’ jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense. The required nexus must be assessed in terms of the statute’s goals and purposes. Congress enacted the law to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U. S. C. §1251(a), and it pursued that objective by restricting dumping and

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filling in “navigable waters,” §§1311(a), 1362(12). With respect to wetlands, the rationale for Clean Water Act regulation is, as the Corps has recognized, that wetlands can perform critical functions related to the integrity of other waters—functions such as pollutant trapping, flood control, and runoff storage. 33 CFR §320.4(b)(2). Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase “navigable waters,” if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as “navigable.” When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term “navigable waters.”

Although the dissent acknowledges that wetlands’ ecological functions vis-à-vis other covered waters are the basis for the Corps’ regulation of them, *post*, at 10–11, it concludes that the ambiguity in the phrase “navigable waters” allows the Corps to construe the statute as reaching all “non-isolated wetlands,” just as it construed the Act to reach the wetlands adjacent to navigable-in-fact waters in *Riverside Bayview*, see *post*, at 11. This, though, seems incorrect. The Corps’ theory of jurisdiction in these consolidated cases—adjacency to tributaries, however remote and insubstantial—raises concerns that go beyond the holding of *Riverside Bayview*; and so the Corps’ assertion of jurisdiction cannot rest on that case.

As applied to wetlands adjacent to navigable-in-fact waters, the Corps’ conclusive standard for jurisdiction rests upon a reasonable inference of ecologic interconnection, and the assertion of jurisdiction for those wetlands is sustainable under the Act by showing adjacency alone. That is the holding of *Riverside Bayview*. Furthermore, although the *Riverside Bayview* Court reserved the question of the Corps’ authority over “wetlands that are not

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adjacent to bodies of open water,” 474 U. S., at 131–132, n. 8, and in any event addressed no factual situation other than wetlands adjacent to navigable-in-fact waters, it may well be the case that *Riverside Bayview’s* reasoning—supporting jurisdiction without any inquiry beyond adjacency—could apply equally to wetlands adjacent to certain major tributaries. Through regulations or adjudication, the Corps may choose to identify categories of tributaries that, due to their volume of flow (either annually or on average), their proximity to navigable waters, or other relevant considerations, are significant enough that wetlands adjacent to them are likely, in the majority of cases, to perform important functions for an aquatic system incorporating navigable waters.

The Corps’ existing standard for tributaries, however, provides no such assurance. As noted earlier, the Corps deems a water a tributary if it feeds into a traditional navigable water (or a tributary thereof) and possesses an ordinary high-water mark, defined as a “line on the shore established by the fluctuations of water and indicated by [certain] physical characteristics,” §328.3(e). See *supra*, at 3. This standard presumably provides a rough measure of the volume and regularity of flow. Assuming it is subject to reasonably consistent application, but see U. S. General Accounting Office, Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulating Affairs, Committee on Reform, House of Representatives, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO–04–297 pp. 3–4 (Feb. 2004), <http://www.gao.gov/new.items/d04297.pdf> (noting variation in results among Corps district offices), it may well provide a reasonable measure of whether specific minor tributaries bear a sufficient nexus with other regulated waters to constitute “navigable waters” under the Act. Yet the breadth of this standard—which seems to

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leave wide room for regulation of drains, ditches, and streams remote from any navigable-in-fact water and carrying only minor water-volumes towards it—precludes its adoption as the determinative measure of whether adjacent wetlands are likely to play an important role in the integrity of an aquatic system comprising navigable waters as traditionally understood. Indeed, in many cases wetlands adjacent to tributaries covered by this standard might appear little more related to navigable-in-fact waters than were the isolated ponds held to fall beyond the Act’s scope in *SWANCC*. Cf. Leibowitz & Nadeau, *Isolated Wetlands: State-of-the-Science and Future Directions*, 23 *Wetlands* 663, 669 (2003) (noting that “‘isolated’ is generally a matter of degree”).

When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries. Given the potential overbreadth of the Corps’ regulations, this showing is necessary to avoid unreasonable applications of the statute. Where an adequate nexus is established for a particular wetland, it may be permissible, as a matter of administrative convenience or necessity, to presume covered status for other comparable wetlands in the region. That issue, however, is neither raised by these facts nor addressed by any agency regulation that accommodates the nexus requirement outlined here.

This interpretation of the Act does not raise federalism or Commerce Clause concerns sufficient to support a presumption against its adoption. To be sure, the significant nexus requirement may not align perfectly with the traditional extent of federal authority. Yet in most cases regulation of wetlands that are adjacent to tributaries and possess a significant nexus with navigable waters will

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raise no serious constitutional or federalism difficulty. Cf. *Pierce County v. Guillen*, 537 U. S. 129, 147 (2003) (upholding federal legislation “aimed at improving safety in the channels of commerce”); *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U. S. 508, 524–525 (1941) (“[J]ust as control over the non-navigable parts of a river may be essential or desirable in the interests of the navigable portions, so may the key to flood control on a navigable stream be found in whole or in part in flood control on its tributaries [T]he exercise of the granted power of Congress to regulate interstate commerce may be aided by appropriate and needful control of activities and agencies which, though intrastate, affect that commerce”). As explained earlier, moreover, and as exemplified by *SWANCC*, the significant-nexus test itself prevents problematic applications of the statute. See *supra*, at 19–20; 531 U. S., at 174. The possibility of legitimate Commerce Clause and federalism concerns in some circumstances does not require the adoption of an interpretation that departs in all cases from the Act’s text and structure. See *Gonzales v. Raich*, 545 U. S. 1, __ (2005) (slip op., at 14) (“[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence” (internal quotation marks omitted)).

III

In both the consolidated cases before the Court the record contains evidence suggesting the possible existence of a significant nexus according to the principles outlined above. Thus the end result in these cases and many others to be considered by the Corps may be the same as that suggested by the dissent, namely, that the Corps’ assertion of jurisdiction is valid. Given, however, that neither the agency nor the reviewing courts properly considered the issue, a remand is appropriate, in my view, for appli-

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cation of the controlling legal standard.

Rapanos

As the dissent points out, in *Rapanos*, No. 04–1034, an expert whom the District Court found “eminently qualified” and “highly credible,” App. to Pet. for Cert. B7, testified that the wetlands were providing “habitat, sediment trapping, nutrient recycling, and flood peak diminution, reduction flow water augmentation.” 4 Tr. 96 (Apr. 5, 1999). Although the expert had “not studied the upstream drainage of these sites” and thus could not assert that the wetlands were performing important pollutant-trapping functions, *ibid.*, he did observe:

“we have a situation in which the flood water attenuation in that water is held on the site in the wetland . . . such that it does not add to flood peak. By the same token it would have some additional water flowing into the rivers during the drier periods, thus, increasing the low water flow. . . . By the same token on all of the sites to the extent that they slow the flow of water off of the site they will also accumulate sediment and thus trap sediment and hold nutrients for use in those wetlands systems later in the season as well.” *Id.*, at 95–96.

In addition, in assessing the hydrology prong of the three-part wetlands test, see *supra*, at 3–4, the District Court made extensive findings regarding water tables and drainage on the parcels at issue. In applying the Corps’ jurisdictional regulations, the District Court found that each of the wetlands bore surface water connections to tributaries of navigable-in-fact waters.

Much the same evidence should permit the establishment of a significant nexus with navigable-in-fact waters, particularly if supplemented by further evidence about the significance of the tributaries to which the wetlands are

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connected. The Court of Appeals, however, though recognizing that under *SWANCC* such a nexus was required for jurisdiction, held that a significant nexus “can be satisfied by the presence of a hydrologic connection.” 376 F. 3d, at 639. Absent some measure of the significance of the connection for downstream water quality, this standard was too uncertain. Under the analysis described earlier, *supra*, at 22–23, 25, mere hydrologic connection should not suffice in all cases; the connection may be too insubstantial for the hydrologic linkage to establish the required nexus with navigable waters as traditionally understood. In my view this case should be remanded so that the District Court may reconsider the evidence in light of the appropriate standard. See, e.g., *Pullman-Standard v. Swint*, 456 U. S. 273, 291 (1982) (“When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings”).

Carabell

In *Carabell*, No. 04–1384, the record also contains evidence bearing on the jurisdictional inquiry. The Corps noted in deciding the administrative appeal that “[b]esides the effects on wildlife habitat and water quality, the [district office] also noted that the project would have a major, long-term detrimental effect on wetlands, flood retention, recreation and conservation and overall ecology,” App. 218a. Similarly, in the district office’s permit evaluation, Corps officers observed:

“The proposed work would destroy/adversely impact an area that retains rainfall and forest nutrients and would replace it with a new source area for runoff pollutants. Pollutants from this area may include lawn fertilizers, herbicides, pesticides, road salt, oil, and grease. These pollutants would then runoff directly

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into the waterway. . . . Overall, the operation and use of the proposed activity would have a major, long term, negative impact on water quality. The cumulative impacts of numerous such projects would be major and negative as the few remaining wetlands in the area are developed.” *Id.*, at 97a–98a.

The Corps’ evaluation further noted that by “eliminat[ing] the potential ability of the wetland to act as a sediment catch basin,” the proposed project “would contribute to increased runoff and accretion . . . along the drain and further downstream in Auvase Creek.” *Id.*, at 98a. And it observed that increased runoff from the site would likely cause downstream areas to “see an increase in possible flooding magnitude and frequency.” *Id.*, at 99a.

The conditional language in these assessments—“potential ability,” “possible flooding”—could suggest an undue degree of speculation, and a reviewing court must identify substantial evidence supporting the Corps’ claims, see 5 U. S. C. §706(2)(E). Nevertheless, the record does show that factors relevant to the jurisdictional inquiry have already been noted and considered. As in *Rapanos*, though, the record gives little indication of the quantity and regularity of flow in the adjacent tributaries—a consideration that may be important in assessing the nexus. Also, as in *Rapanos*, the legal standard applied to the facts was imprecise.

The Court of Appeals, considering the *Carabell* case after its *Rapanos* decision, framed the inquiry in terms of whether hydrologic connection is required to establish a significant nexus. The court held that it is not, and that much of its holding is correct. Given the role wetlands play in pollutant filtering, flood control, and runoff storage, it may well be the absence of hydrologic connection (in the sense of interchange of waters) that shows the wetlands’ significance for the aquatic system. In the adminis-

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trative decision under review, however, the Corps based its jurisdiction solely on the wetlands' adjacency to the ditch opposite the berm on the property's edge. As explained earlier, mere adjacency to a tributary of this sort is insufficient; a similar ditch could just as well be located many miles from any navigable-in-fact water and carry only insubstantial flow towards it. A more specific inquiry, based on the significant nexus standard, is therefore necessary. Thus, a remand is again required to permit application of the appropriate legal standard. See, e.g., *INS v. Orlando Ventura*, 537 U. S. 12, 16 (2002) (*per curiam*) ("Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands").

* * *

In these consolidated cases I would vacate the judgments of the Court of Appeals and remand for consideration whether the specific wetlands at issue possess a significant nexus with navigable waters.

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SUPREME COURT OF THE UNITED STATES

Nos. 04–1034 and 04–1384

JOHN A. RAPANOS, ET UX., ET AL., PETITIONERS
04–1034 *v.*
UNITED STATES

JUNE CARABELL ET AL., PETITIONERS
04–1384 *v.*
UNITED STATES ARMY CORPS OF ENGINEERS ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[June 19, 2006]

JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE
GINSBURG, and JUSTICE BREYER join, dissenting.

In 1972, Congress decided to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters” by passing what we now call the Clean Water Act. 86 Stat. 816, as amended, 33 U. S. C. §1251 *et seq.* The costs of achieving the Herculean goal of ending water pollution by 1985, see §1251(a), persuaded President Nixon to veto its enactment, but both Houses of Congress voted to override that veto by overwhelming margins. To achieve its goal, Congress prohibited “the discharge of any pollutant”—defined to include “any addition of any pollutant to navigable waters from any point source”—without a permit issued by the Army Corps of Engineers (Army Corps or Corps) or the Environmental Protection Agency (EPA). §§1311(a), 1362(12)(A). Congress further defined “navigable waters” to mean “the waters of the United States.” §1362(7).

The narrow question presented in No. 04–1034 is

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whether wetlands adjacent to tributaries of traditionally navigable waters are “waters of the United States” subject to the jurisdiction of the Army Corps; the question in No. 04–1384 is whether a manmade berm separating a wetland from the adjacent tributary makes a difference. The broader question is whether regulations that have protected the quality of our waters for decades, that were implicitly approved by Congress, and that have been repeatedly enforced in case after case, must now be revised in light of the creative criticisms voiced by the plurality and JUSTICE KENNEDY today. Rejecting more than 30 years of practice by the Army Corps, the plurality disregards the nature of the congressional delegation to the agency and the technical and complex character of the issues at stake. JUSTICE KENNEDY similarly fails to defer sufficiently to the Corps, though his approach is far more faithful to our precedents and to principles of statutory interpretation than is the plurality’s.

In my view, the proper analysis is straightforward. The Army Corps has determined that wetlands adjacent to tributaries of traditionally navigable waters preserve the quality of our Nation’s waters by, among other things, providing habitat for aquatic animals, keeping excessive sediment and toxic pollutants out of adjacent waters, and reducing downstream flooding by absorbing water at times of high flow. The Corps’ resulting decision to treat these wetlands as encompassed within the term “waters of the United States” is a quintessential example of the Executive’s reasonable interpretation of a statutory provision. See *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–845 (1984).

Our unanimous decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U. S. 121 (1985), was faithful to our duty to respect the work product of the Legislative and Executive Branches of our Government. Today’s judicial amendment of the Clean Water Act is not.

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I

At each of the three sites at issue in No. 04–1034, the petitioners filled large areas of wetlands without permits, despite being on full notice of the Corps’ regulatory requirements. Because the plurality gives short shrift to the facts of this case—as well as to those of No. 04–1384—I shall discuss them at some length.

The facts related to the 230-acre Salzburg site are illustrative. In 1988, John Rapanos asked the Michigan Department of Natural Resources (MDNR) to inspect the site “in order to discuss with him the feasibility of building a shopping center there.” App. to Pet. for Cert. in No. 04–1034, p. B15. An MDNR inspector informed Rapanos that the land probably included wetlands that were “waters of the United States” and sent him an application for a permit under §404 of the Act.¹ Rapanos then hired a wetland consultant, Dr. Frederick Goff. After Dr. Goff concluded that the land did in fact contain many acres of wetlands, “Rapanos threatened to ‘destroy’ Dr. Goff if he did not destroy the wetland report, and refused to pay Dr. Goff unless and until he complied.” *Ibid.* In the meantime, without applying for a permit, Rapanos hired construction companies to do \$350,000 worth of work clearing the land, filling in low spots, and draining subsurface water. After Rapanos prevented MDNR inspectors from visiting the site, ignored an MDNR cease-and-desist letter, and refused to obey an administrative compliance order issued by the EPA, the matter was referred to the Department of Justice. In the civil case now before us, the District Court found that Rapanos unlawfully filled 22 acres of wetlands.

Rapanos and his wife engaged in similar behavior at the Hines Road and Pine River sites. Without applying for §404 permits, they hired construction companies to per-

¹Pursuant to 33 U. S. C. §§1344(g)–(h), Michigan operates its own §404 permitting program, subject to supervision from the Army Corps.

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form extensive clearing and filling activities. They continued these activities even after receiving EPA administrative compliance orders directing them to cease the work immediately. They ultimately spent \$158,000 at the 275-acre Hines Road site, filling 17 of its existing 64 acres of wetlands. At the 200-acre Pine River site, they spent \$463,000 and filled 15 of its 49 acres of wetlands.

Prior to their destruction, the wetlands at all three sites had surface connections to tributaries of traditionally navigable waters. The Salzburg wetlands connected to a drain that flows into a creek that flows into the navigable Kawkawlin River. The Hines Road wetlands connected to a drain that flows into the navigable Tittabawassee River. And the Pine River wetlands connected with the Pine River, which flows into Lake Huron.

At trial, the Government put on a wetland expert, Dr. Daniel Willard, whom the trial court found “eminently qualified” and “highly credible.” *Id.*, at B7. Dr. Willard testified that the wetlands at these three sites provided ecological functions in terms of “habitat, sediment trapping, nutrient recycling, and flood peak diminution.” 4 Tr. 96 (Apr. 5, 1999).² He explained:

“[G]enerally for all of the . . . sites we have a situation in which the flood water attenuation in that water is held on the site in the wetland . . . such that it does not add to flood peak. By the same token it would have some additional water flowing into the rivers during the drier periods, thus, increasing low water flow.

“By the same token on all of the sites to the extent

²Dr. Willard did not “stud[y] the upstream drainage of these sites . . . well enough to make a statement” about whether they also performed pollutant-trapping functions. 4 Tr. 96.

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that they slow the flow of water of the site they will also accumulate sediment and thus trap sediment and hold nutrients for use in those wetland systems later in the season as well.” *Id.*, at 95–96.

The District Court found that the wetlands at all three sites were covered by the Clean Water Act and that the Rapanoses had violated the Act by destroying them without permits. The Sixth Circuit unanimously affirmed. 376 F. 3d 629 (2004).

The facts of No. 04–1384 are less dramatic. The petitioners in that case own a 20-acre tract of land, of which 16 acres are wetlands, located in Macomb County a mile from Lake St. Clair. These wetlands border a ditch that flows into a drain that flows into a creek that flows into Lake St. Clair. A 4-foot-wide manmade berm separates the wetlands from the ditch; thus water rarely if ever passes from wetlands to ditch or vice versa.

Petitioners applied for a permit to fill most of these wetlands with 57,500 cubic yards of material. They intended to build a 112-unit condominium development on the site. After inspecting the site and considering comments from, among others, the Water Quality Unit of the Macomb County Prosecutor’s Office (which urged the Corps to deny the permit because “[t]he loss of this high quality wetland area would have an unacceptable adverse effect on wildlife, water quality, and conservation of wetlands resources,” App. in No. 04–1384, p. 79a), the Corps denied the permit. *Id.*, at 84a–126a. As summarized in a letter sent to petitioners, reasons for denial included:

“Your parcel is primarily a forested wetland that provides valuable seasonal habitat for aquatic organisms and year round habitat for terrestrial organisms. Additionally, the site provides water storage functions that, if destroyed, could result in an increased risk of erosion and degradation of water quality in the Suth-

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erland-Oemig Drain, Auvase Creek, and Lake St. Clair. The minimization of impacts to these wetlands is important for conservation and the overall ecology of the region. Because the project development area is a forested wetland, the proposed project would destroy the resources in such a manner that they would not soon recover from impacts of the discharges. The extent of impacts in the project area when considered both individually and cumulatively would be unacceptable and contrary to the public interest.” *Id.*, at 127a–128a.

As in No. 04–1034, the unanimous judgment of the District and Circuit Judges was that the Corps has jurisdiction over this wetland because it is adjacent to a tributary of traditionally navigable waters. 391 F. 3d 704 (CA6 2004). The Solicitor General defends both judgments.

II

Our unanimous opinion in *Riverside Bayview* squarely controls these cases. There, we evaluated the validity of the very same regulations at issue today. These regulations interpret “waters of the United States” to cover all traditionally navigable waters; tributaries of these waters; and wetlands adjacent to traditionally navigable waters or their tributaries. 33 CFR §§328.3(a)(1), (5), and (7) (2005); §§323.2(a)(1), (5), and (7) (1985). Although the particular wetland at issue in *Riverside Bayview* abutted a navigable creek, we framed the question presented as whether the Clean Water Act “authorizes the Corps to require landowners to obtain permits from the Corps before discharging fill material into wetlands adjacent to navigable bodies of water *and their tributaries.*” 474 U. S., at 123 (emphasis added).³

³By contrast, we “d[id] not express any opinion” on the Corps’ additional assertion of jurisdiction over “wetlands that are not adjacent to

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We held that, pursuant to our decision in *Chevron*,

“our review is limited to the question whether it is reasonable, in light of the language, policies, and legislative history of the Act for the Corps to exercise jurisdiction over wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as ‘waters.’” 474 U. S., at 131.

Applying this standard, we held that the Corps’ decision to interpret “waters of the United States” as encompassing such wetlands was permissible. We recognized the practical difficulties in drawing clean lines between land and water, *id.*, at 132, and deferred to the Corps’ judgment that treating adjacent wetlands as “waters” would advance the “congressional concern for protection of water quality and aquatic ecosystems,” *id.*, at 133.

bodies of open water, see 33 CFR §323.2(a)(2) and (3) (1985).” 474 U. S., at 131–132, n. 8; see also *id.*, at 124, n. 2 (making the same reservation). Contrary to JUSTICE KENNEDY’s reading, *ante*, at 23–24 (opinion concurring in judgment), we were not reserving the issue of the Corps’ jurisdiction over wetlands adjacent to tributaries, but only reserving the issue of the Corps’ jurisdiction over truly isolated waters. A glance at the cited regulation makes this clear. Section 323.2(a)(2) refers to “[a]ll interstate waters including interstate wetlands” and §323.2(a)(3) covers “[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters.” See also *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U. S. 159, 163–164 (2001) (considering the validity of an application of §328.3(a)(3) (1999), which is substantively identical to §323.2(a)(3) (1985) and to §323.2(a)(5) (1978)). Wetlands adjacent to tributaries of traditionally navigable waters were covered in the 1985 regulation by other provisions of the regulation, namely a combination of §§323.2(a)(1) (covering traditionally navigable waters), (4) (covering tributaries of subsection (a)(1) waters), and (7) (covering wetlands adjacent to subsection (a)(4) waters).

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Contrary to the plurality's revisionist reading today, *ante*, at 21–24, 28–29, *Riverside Bayview* nowhere implied that our approval of “adjacent” wetlands was contingent upon an understanding that “adjacent” means having a “continuous surface connection” between the wetland and its neighboring creek, *ante*, at 23. Instead, we acknowledged that the Corps defined “adjacent” as including wetlands “that form the border of or are in reasonable proximity to other waters” and found that the Corps reasonably concluded that adjacent wetlands are part of the waters of the United States. 474 U. S., at 134 (quoting 42 Fed. Reg. 37128 (1977)). Indeed, we explicitly acknowledged that the Corps' jurisdictional determination was reasonable even though

“not every adjacent wetland is of great importance to the environment of adjoining bodies of water. . . . If it is reasonable for the Corps to conclude that in the majority of cases, adjacent wetlands have significant effects on water quality and the ecosystem, its definition can stand. That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment . . . the Corps may always allow development of the wetland for other uses simply by issuing a permit.” 474 U. S., at 135, n. 9.

In closing, we emphasized that the scope of the Corps' asserted jurisdiction over wetlands had been specifically brought to Congress' attention in 1977, that Congress had rejected an amendment that would have narrowed that jurisdiction, and that even proponents of the amendment would not have removed wetlands altogether from the definition of “waters of the United States.” *Id.*, at 135–139.

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Disregarding the importance of *Riverside Bayview*, the plurality relies heavily on the Court's subsequent opinion in *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U. S. 159 (2001) (*SWANCC*). In stark contrast to *Riverside Bayview*, however, *SWANCC* had nothing to say about wetlands, let alone about wetlands adjacent to traditionally navigable waters or their tributaries. Instead, *SWANCC* dealt with a question specifically reserved by *Riverside Bayview*, see n. 3, *supra*, namely, the Corps' jurisdiction over isolated waters—"waters that are *not* part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." 531 U. S., at 168–169 (quoting 33 CFR §323.2(a)(5) (1978); emphasis added); see also 531 U. S., at 163 (citing 33 CFR §328.2(a)(3) (1999), which is the later regulatory equivalent to §323.2(a)(5) (1978)). At issue in *SWANCC* was "an abandoned sand and gravel pit . . . which provide[d] habitat for migratory birds" and contained a few pools of "nonnavigable, isolated, intrastate waters." 531 U. S., at 162, 166. The Corps had asserted jurisdiction over the gravel pit under its 1986 Migratory Bird Rule, which treated isolated waters as within its jurisdiction if migratory birds depended upon these waters. The Court rejected this jurisdictional basis since these isolated pools, unlike the wetlands at issue in *Riverside Bayview*, had no "significant nexus" to traditionally navigable waters. 531 U. S., at 167. In the process, the Court distinguished *Riverside Bayview*'s reliance on Congress' decision to leave the Corps' regulations alone when it amended the Act in 1977, since "[i]n both Chambers, debate on the proposals to narrow the definition of navigable waters centered largely on the issue of wetlands preservation" rather than on the Corps' jurisdiction over

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truly isolated waters. 531 U. S., at 170 (quoting 474 U. S., at 136).⁴

Unlike *SWANCC* and like *Riverside Bayview*, the cases before us today concern wetlands that are adjacent to “navigable bodies of water [or] their tributaries,” 474 U. S., at 123. Specifically, these wetlands abut tributaries of traditionally navigable waters. As we recognized in *Riverside Bayview*, the Corps has concluded that such wetlands play important roles in maintaining the quality of their adjacent waters, see *id.*, at 134–135, and consequently in the waters downstream. Among other things, wetlands can offer “nesting, spawning, rearing and resting sites for aquatic or land species”; “serve as valuable stor-

⁴As THE CHIEF JUSTICE observes, the Corps and the EPA initially considered revising their regulations in response to *SWANCC*. *Ante*, at 1–2 (concurring opinion). THE CHIEF JUSTICE neglects to mention, however, that almost all of the 43 States to submit comments opposed any significant narrowing of the Corps’ jurisdiction—as did roughly 99% of the 133,000 other comment submitters. See U. S. General Accounting Office, Report to the Chairman, Subcommittee on Energy Policy, Natural Resources and Regulating Affairs, Committee on Government Reform, House of Representatives, *Waters and Wetlands: Corps of Engineers Needs to Evaluate Its District Office Practices in Determining Jurisdiction*, GAO–04–297, pp. 14–15 (Feb. 2004), <http://www.gao.gov/new.items/d04297.pdf> (hereinafter GAO Report) (all Internet materials as visited June 14, 2006, and available in Clerk of Court’s case file); Brief for Association of State and Interstate Water Pollution Control Administrators as *Amicus Curiae*. In any event, the agencies’ decision to abandon their rulemaking is hardly responsible for the cases at hand. The proposed rulemaking focused on isolated waters, which are covered by 33 CFR §328.3(a)(3) (1999) and which were called into question by *SWANCC*, rather than on wetlands adjacent to tributaries of navigable waters, which are covered by a combination of §§328.3(a)(1), (5), and (7) and which (until now) seemed obviously within the agencies’ jurisdiction in light of *Riverside Bayview*. See 68 Fed. Reg. 1994 (2003) (“The agencies seek comment on the use of the factors in 33 CFR 328.3(a)(3)(i)–(iii) . . . in determining [Clean Water Act] jurisdiction over isolated, intrastate, non-navigable waters”).

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age areas for storm and flood waters”; and provide “significant water purification functions.” 33 CFR §320.4(b)(2) (2005); 474 U. S., at 134–135. These values are hardly “*independent*” ecological considerations as the plurality would have it, *ante*, at 23—instead, they are integral to the “chemical, physical, and biological integrity of the Nation’s waters,” 33 U. S. C. §1251(a). Given that wetlands serve these important water quality roles and given the ambiguity inherent in the phrase “waters of the United States,” the Corps has reasonably interpreted its jurisdiction to cover non-isolated wetlands. See 474 U. S., at 131–135.⁵

This conclusion is further confirmed by Congress’ deliberate acquiescence in the Corps’ regulations in 1977. *Id.*, at 136. Both Chambers conducted extensive debates about the Corps’ regulatory jurisdiction over wetlands, rejected efforts to limit this jurisdiction, and appropriated

⁵Unsurprisingly, most Courts of Appeals to consider the scope of the Corps’ jurisdiction after *SWANCC* have unhesitatingly concluded that this jurisdiction covers intermittent tributaries and wetlands adjacent—in the normal sense of the word—to traditionally navigable waters and their tributaries. *E.g.*, *United States v. Deaton*, 332 F. 3d 698 (CA4 2003) (upholding the Corps’ jurisdiction over wetlands adjacent to a ditch that might not contain consistently flowing water but did drain into another ditch that drained into a creek that drained into a navigable waterway); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F. 3d 526 (CA9 2001) (treating as “waters of the United States” canals that held water intermittently and connected to other tributaries of navigable waters); *United States v. Rueth Development Co.*, 335 F. 3d 598, 604 (CA7 2003) (observing “it is clear that *SWANCC* did not affect the law regarding . . . adjacency” in upholding the Corps’ jurisdiction over a wetland without finding that this wetland had a continuous surface connection to its adjacent tributary); *Baccarat Fremont v. U. S. Army Corps of Engineers*, 425 F. 3d 1150, 1156 (CA9 2005) (upholding the Corps’ jurisdiction over wetlands separated by berms from traditionally navigable channels and observing that “*SWANCC* simply did not address the issue of jurisdiction over adjacent wetlands”); but see *In re Needham*, 354 F. 3d 340 (CA5 2003) (reading “waters of the United States” narrowly as used in the Oil Pollution Act of 1990).

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funds for a “National Wetlands Inventory” to help the States “in the development and operation of programs under this Act.” *Id.*, at 135–139 (quoting 33 U.S.C. §1288(i)(2)). We found these facts significant in *Riverside Bayview*, see 474 U.S., at 135–139, as we acknowledged in *SWANCC*. See 531 U.S., at 170–171 (noting that “[b]eyond Congress’ desire to regulate wetlands adjacent to ‘navigable waters,’ respondents point us to no persuasive evidence” of congressional acquiescence (emphasis added)).

The Corps’ exercise of jurisdiction is reasonable even though not every wetland adjacent to a traditionally navigable water or its tributary will perform all (or perhaps any) of the water quality functions generally associated with wetlands. *Riverside Bayview* made clear that jurisdiction does not depend on a wetland-by-wetland inquiry. 474 U.S., at 135, n. 9. Instead, it is enough that wetlands adjacent to tributaries generally have a significant nexus to the watershed’s water quality. If a particular wetland is “not significantly intertwined with the ecosystem of adjacent waterways,” then the Corps may allow its development “simply by issuing a permit.” *Ibid.*⁶ Accordingly, for purposes of the Corps’ jurisdiction it is of no significance that the wetlands in No. 04–1034 serve flood control and sediment sink functions, but may not do much to trap other pollutants, *supra*, at 4–5, and n. 2, or that the wetland in No. 04–1328 keeps excess water from Lake St. Clair but may not trap sediment, see *supra*, at 5–6.

Seemingly alarmed by the costs involved, the plurality shies away from *Riverside Bayview*’s recognition that jurisdiction is not a case-by-case affair. I do not agree with the plurality’s assumption that the costs of preserving wetlands are unduly high. It is true that the cost of

⁶Indeed, “[t]he Corps approves virtually all section 404 permit[s],” though often requiring applicants to avoid or mitigate impacts to wetlands and other waters. GAO Report 8.

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§404 permits are high for those who must obtain them⁷—but these costs amount to only a small fraction of 1% of the \$760 billion spent each year on private and public construction and development activity. Sunding & Zilberman 80. More significant than the plurality’s exaggerated concern about costs, however, is the fact that its omission of any discussion of the benefits that the regulations at issue have produced sheds a revelatory light on the quality (and indeed the impartiality) of its cost-benefit analysis.⁸ The importance of wetlands for water quality is hard to overstate. See, *e.g.*, U. S. Congress, Office

⁷According to the Sunding and Zilberman article cited by the plurality, *ante*, at 2, for 80% of permits the mean cost is about \$29,000 (with a median cost of about \$12,000). The Economics of Environmental Regulation by Licensing: An Assessment of Recent Changes to the Wetland Permitting Process, 42 *Natural Resources J.* 59, 63, 74 (2002) (hereinafter Sunding & Zilberman). Only for less than 20% of the permits—those for projects with the most significant impacts on wetlands—is the mean cost around \$272,000 (and the median cost is \$155,000). *Ibid.*

Of course, not every placement of fill or dredged material into the waters of the United States requires a §404 permit. Only when such fill comes from point sources—“discernible, confined and discrete conveyance[s]”—is a §404 permit needed. 33 U. S. C. §§1362(12), (14). Moreover, permits are not required for discharges from point sources engaged in, among other things, normal farming activities; maintenance of transportation structures; and construction of irrigation ditches, farm roads, forest roads, and temporary mining roads. §1344(f).

⁸Rather than defending its own antagonism to environmentalism, the plurality counters by claiming that my dissent is “policy-laden.” *Ante*, at 28. The policy considerations that have influenced my thinking are Congress’ rather than my own. In considering whether the Corps’ interpretation of its jurisdiction is reasonable, I am admittedly taking into account the congressional purpose of protecting the physical, chemical, and biological integrity of our waters. See 33 U. S. C. §1251(a); see also *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 833, 837 (1984) (considering whether the agency regulation was consistent with “the policy concerns that motivated the [Clean Air Act’s] enactment”).

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of Technology Assessment, *Wetlands: Their Use and Regulation*, OTA-206, pp. 43–61 (Mar. 1984), http://govinfo.library.unt.edu/ota/Ota_4/DATA/1984/8433.PDF (hereinafter OTA) (describing wetlands’ role in floodpeak reduction, shoreline protection, ground water recharge, trapping of suspended sediment, filtering of toxic pollutants, and protection of fish and wildlife). See also *ante*, at 20 (KENNEDY, J., concurring in judgment). Unsurprisingly, the Corps’ approach has the overwhelming endorsement of numerous *amici curiae*, including 33 States and the county in which the property in No. 04–1384 is located.

In final analysis, however, concerns about the appropriateness of the Corps’ 30-year implementation of the Clean Water Act should be addressed to Congress or the Corps rather than to the Judiciary. Whether the benefits of particular conservation measures outweigh their costs is a classic question of public policy that should not be answered by appointed judges. The fact that large investments are required to finance large developments merely means that those who are most adversely affected by the Corps’ permitting decisions are persons who have the ability to communicate effectively with their representatives. Unless and until they succeed in convincing Congress (or the Corps) that clean water is less important today than it was in the 1970’s, we continue to owe deference to regulations satisfying the “evident breadth of congressional concern for protection of water quality and aquatic ecosystems” that all of the Justices on the Court in 1985 recognized in *Riverside Bayview*, 474 U. S., at 133.

III

Even setting aside the plurality’s dramatic departure from our reasoning and holding in *Riverside Bayview*, its creative opinion is utterly unpersuasive. The plurality imposes two novel conditions on the exercise of the Corps’

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jurisdiction that can only muddy the jurisdictional waters. As JUSTICE KENNEDY observes, “these limitations . . . are without support in the language and purposes of the Act or in our cases interpreting it.” *Ante*, at 11 (opinion concurring in judgment). The impropriety of crafting these new conditions is highlighted by the fact that *no* party or *amicus* has suggested either of them.⁹

First, ignoring the importance of preserving jurisdiction over water beds that are periodically dry, the plurality imposes a requirement that only tributaries with the “relatively permanent” presence of water fall within the Corps’ jurisdiction. *Ante*, at 13–14. Under the plurality’s view, then, the Corps can regulate polluters who dump dredge into a stream that flows year round but may not be able to regulate polluters who dump into a neighboring stream that flows for only 290 days of the year—even if the dredge in this second stream would have the same effect on downstream waters as the dredge in the year-round one. *Ante*, at 14, n. 5.¹⁰

To find this arbitrary distinction compelled by the statute, the plurality cites a dictionary for a proposition that it does not contain. The dictionary treats “streams” as “wa-

⁹Only 3 of the 21 *amici* briefs filed on petitioners’ behalf come even close to asking for one of the plurality’s two conditions. These briefs half-argue that intermittent streams should fall outside the Corps’ jurisdiction—though not for the reasons given by the plurality. See Brief for National Stone, Sand and Gravel Assn. et al. 20, n. 7; Brief for Foundation for Environmental and Economic Progress et al. 22–23; Brief for Western Coalition of Arid States 10.

¹⁰The plurality does suggest that “*seasonal* rivers” are not “necessarily exclude[d]” from the Corps’ jurisdiction—and then further suggests that “streams” are “rivers.” *Ante*, at 14, n. 5. I will not explore the semantic issues posed by the latter point. On the former point, I have difficulty understanding how a “seasonal” river could meet the plurality’s test of having water present “relatively permanent[ly].” By failing to explain itself, the plurality leaves litigants without guidance as to where the line it draws between “relatively permanent” and “intermittent” lies.

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ters” but has nothing to say about whether streams must contain water year round to qualify as “streams.” *Ante*, at 13–14, and n. 6 (citing Webster’s New International Dictionary 2493 (2d ed. 1954) (hereinafter Webster’s Second), as defining stream as a “current or course of water or other fluid, flowing on the earth”). From this, the plurality somehow deduces that streams can never be intermittent or ephemeral (*i.e.*, flowing for only part of the year). *Ante*, at 13–15, and nn. 5–6. But common sense and common usage demonstrate that intermittent streams, like perennial streams, are still streams.¹¹ See, *e.g.*, U. S. Dept. of Interior, U. S. Geological Survey, Topographic Map Symbols 3 (2005), <http://erg.usgs.gov/isb/pubs/booklets/symbols/> (identifying symbols for “[p]erennial stream” and “[i]ntermittent stream,” as well as for “[p]erennial river” and “[i]ntermittent river”). This was true well before the passage of the Act in 1972. *E.g.*, Webster’s Third New International Dictionary 1180 (1961) (hereinafter Webster’s Third) (linking “intermittent” with “stream”). Indeed, we ourselves have used the term “intermittent stream” as far back as 1932. *Harrisonville v. W. S. Dickey Clay Mfg. Co.*, 289 U. S. 334, 335 (1933). Needless to say, Justice Brandeis’ use of the term in a unanimous opinion should not be dismissed as merely a “useful oxymor[on],” *ante*, at 15, n. 6 (plurality opinion).

The plurality attempts to bolster its arbitrary jurisdictional line by citing two tangential statutory provisions

¹¹Indeed, in the 1977 debate over whether to restrict the scope of the Corps’ regulatory power, Senator Bentsen recognized that the Corps’ jurisdiction “cover[s] all waters of the United States, including small streams, ponds, isolated marshes, and intermittently flowing gullies.” 4 Legislative History of the Clean Water Act of 1977 (Committee Print compiled for the Senate Committee on Environment and Public Works by the Library of Congress), Ser. No. 95–14, p. 903 (1978). His proposed amendment to restrict this jurisdiction failed. *Id.*, at 947.

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and two inapplicable canons of construction. None comes close to showing that Congress directly spoke to whether “waters” requires the relatively permanent presence of water.

The first provision relied on by the plurality—the definition of “point source” in 33 U. S. C. §1362(14)—has no conceivable bearing on whether permanent tributaries should be treated differently from intermittent ones, since “pipe[s], ditch[es], channel[s], tunnel[s], conduit[s], [and] well[s]” can all hold water permanently as well as intermittently.¹² The second provision is §1251(b), which announces a congressional policy to “recognize, preserve, and protect the primary responsibilities and rights of States” to prevent pollution, to plan development, and to consult with the EPA. Under statutory additions made in 1977 when Congress considered and declined to alter the Corps’

¹²The plurality’s reasoning to the contrary is mystifying. The plurality emphasizes that a ditch around a castle is also called a “moat” and that a navigable manmade channel is called a “canal.” See *ante*, at 17, n. 7. On their face (and even after much head-scratching), these points have nothing to do with whether we use the word “stream” rather than “ditch” where permanently present water is concerned. Indeed, under the plurality’s reasoning, we would call a “canal” a “stream” or a “river” rather than a “canal.”

Moreover, we do use words like “ditch” without regard to whether water is present relatively permanently. In *Jennison v. Kirk*, 98 U. S. 453 (1879), for example, Justice Field used the term “ditch”—not “stream”—in describing a manmade structure that carried water year round. See also, *e.g.*, *Knoxville Water Co. v. Knoxville*, 200 U. S. 22, 27 (1906) (opinion for the Court by Harlan, J.) (describing “pipes” that would continuously carry water); *ante*, at 20, 24 (plurality opinion) (using “channel” with reference to both intermittent and relatively permanent waters); *PUD No. 1 of Jefferson Cty. v. Washington Dept. of Ecology*, 511 U. S. 700, 709 (1994) (describing a “tunnel” that would carry water year round); *New Orleans Water-Works Co. v. Rivers*, 115 U. S. 674, 683 (1885) (opinion for the Court by Harlan, J.) (describing “conduits” that would supply water for a hotel). The plurality’s attempt to achieve its desired outcome by redefining terms does no credit to lexicography—let alone to justice.

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interpretation of its broad regulatory jurisdiction, the States may run their own §404 programs. §§1344(g)–(h). As modified, §1251(b) specifically recognizes this role for the States as part of their primary responsibility for preventing water pollution. Even focusing only on the Act as it stood between 1972 and 1977, but see *International Paper Co. v. Ouellette*, 479 U. S. 481, 489–490 (1987) (interpreting §1251(b) in light of the 1977 additions), broad exercise of jurisdiction by the Corps still left the States with ample rights and responsibilities. See *S. D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U. S. ___, __ (2006) (slip op., at 14–15). States had the power to impose tougher water pollution standards than required by the Act, §1370, and to prevent the Corps and the EPA from issuing permits, §1341(a)(1)—not to mention nearly exclusive responsibility for containing pollution from nonpoint sources.

The two canons of construction relied on by the plurality similarly fail to overcome the deference owed to the Corps. First, the plurality claims that concerns about intruding on state power to regulate land use compel the conclusion that the phrase “waters of the United States” does not cover intermittent streams. As we have recognized, however, Congress found it “essential that discharge of pollutants be controlled at the source,” *Riverside Bayview*, 474 U. S., at 133 (quoting S. Rep. No. 92–414, p. 77 (1972)), and the Corps can define “waters” broadly to accomplish this aim. Second, the plurality suggests that the canon of constitutional avoidance applies because the Corps’ approach might exceed the limits of our Commerce Clause authority. Setting aside whether such a concern was proper in *SWANCC*, 531 U. S., at 173; but see *id.*, at 192–196 (STEVENS, J., dissenting), it is plainly not warranted here. The wetlands in these cases are not “isolated” but instead are adjacent to tributaries of traditionally navigable waters and play important roles in the

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watershed, such as keeping water out of the tributaries or absorbing water from the tributaries. “There is no constitutional reason why Congress cannot, under the commerce power, treat the watersheds as a key to flood control on navigable streams and their tributaries.” *Oklahoma ex rel. Phillips v. Guy F. Atkinson Co.*, 313 U. S. 508, 525 (1941).

Most importantly, the plurality disregards the fundamental significance of the Clean Water Act. As then-Justice Rehnquist explained when writing for the Court in 1981, the Act was “not merely another law” but rather was “viewed by Congress as a ‘total restructuring’ and ‘complete rewriting’ of the existing water pollution legislation.” *Milwaukee v. Illinois*, 451 U. S. 304, 317. “Congress’ intent in enacting the [Act] was clearly to establish an all-encompassing program of water pollution regulation,” and “the most casual perusal of the legislative history demonstrates that . . . views on the comprehensive nature of the legislation were practically universal.” *Id.*, at 318, and n. 12; see also 531 U. S., at 177–181 (STEVENS, J., dissenting). The Corps has concluded that it must regulate pollutants at the time they enter ditches or streams with ordinary high-water marks—whether perennial, intermittent, or ephemeral—in order to properly control water pollution. 65 Fed. Reg. 12823 (2000). Because there is ambiguity in the phrase “waters of the United States” and because interpreting it broadly to cover such ditches and streams advances the purpose of the Act, the Corps’ approach should command our deference. Intermittent streams can carry pollutants just as perennial streams can, and their regulation may prove as important for flood control purposes. The inclusion of all identifiable tributaries that ultimately drain into large bodies of water within the mantle of federal protection is surely wise.

The plurality’s second statutory invention is as arbitrary as its first. Trivializing the significance of changing conditions in wetlands environments, the plurality im-

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poses a separate requirement that “the wetland has a continuous surface connection” with its abutting waterway such that it is “difficult to determine where the ‘water’ ends and the ‘wetland’ begins.” *Ante*, at 24. An “intermittent, physically remote hydrologic connection” between the wetland and other waters is not enough. *Ibid.* Under this view, wetlands that border traditionally navigable waters or their tributaries and perform the essential function of soaking up overflow waters during hurricane season—thus reducing flooding downstream—can be filled in by developers with impunity, as long as the wetlands lack a surface connection with the adjacent waterway the rest of the year.

The plurality begins reasonably enough by recognizing that the Corps may appropriately regulate all wetlands “‘adjacent to’” other waters. *Ante*, at 21. This recognition is wise, since the statutory text clearly accepts this standard. Title 33 U. S. C. §1344(g)(1), added in 1977, includes “adjacent wetlands” in its description of “waters” and thus “expressly stated that the term ‘waters’ included adjacent wetlands.” *Riverside Bayview*, 474 U. S., at 138. While this may not “conclusively determine the construction to be placed on the use of the term ‘waters’ elsewhere in the Act . . . , in light of the fact that the various provisions of the Act should be read *in pari materia*, it does at least suggest strongly that the term ‘waters’ as used in the Act does not necessarily exclude ‘wetlands.’” *Id.*, at 138, n. 11.

The plurality goes on, however, to define “‘adjacent to’” as meaning “with a continuous surface connection to” other water. *Ante*, at 21–24. It is unclear how the plurality reached this conclusion, though it plainly neglected to consult a dictionary. Even its preferred Webster’s Second defines the term as “[l]ying near, close, *or* contiguous; neighboring; bordering on” and acknowledges that “[o]bjects are ADJACENT when they lie close to each other,

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but *not necessarily in actual contact*.” Webster’s Second 32 (emphasis added); see also Webster’s Third 26. In any event, the proper question is not how the plurality would define “adjacent,” but whether the Corps’ definition is reasonable.

The Corps defines “adjacent” as “bordering, contiguous, or neighboring,” and specifies that “[w]etlands separated from other waters of the United States by man-made dikes or barriers, natural river berms, beach dunes and the like are ‘adjacent wetlands.’” 33 CFR §328.3(c) (2005). This definition is plainly reasonable, both on its face and in terms of the purposes of the Act. While wetlands that are physically separated from other waters may perform less valuable functions, this is a matter for the Corps to evaluate in its permitting decisions. We made this clear in *Riverside Bayview*, 474 U. S., at 135, n. 9—which did not impose the plurality’s new requirement despite an absence of evidence that the wetland at issue had the sort of continuous surface connection required by the plurality today. See *supra*, at 7; see also *ante*, at 15–17 (KENNEDY, J., concurring in judgment) (observing that the plurality’s requirement is inconsistent with *Riverside Bayview*). And as the facts of No. 04–1384 demonstrate, wetland separated by a berm from adjacent tributaries may still prove important to downstream water quality. Moreover, Congress was on notice of the Corps’ definition of “adjacent” when it amended the Act in 1977 and added 33 U. S. C. §1344(g)(1). See 42 Fed. Reg. 37129 (1977).

Finally, implicitly recognizing that its approach endangers the quality of waters which Congress sought to protect, the plurality suggests that the EPA can regulate pollutants before they actually enter the “waters of the United States.” *Ante*, at 24–27. I express no view on the merits of the plurality’s reasoning, which relies heavily on a respect for lower court judgments that is conspicuously lacking earlier in its opinion, *ante*, at 8–10.

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I do fail to understand, however, why the plurality would not similarly apply this logic to dredged and fill material. The EPA's authority over pollutants (other than dredged and fill materials) stems from the identical statutory language that gives rise to the Corps' §404 jurisdiction. The plurality claims that there is a practical difference, asserting that dredged and fill material "does not normally wash downstream." *Ante*, at 26. While more of this material will probably stay put than is true of soluble pollutants, the very existence of words like "alluvium" and "silt" in our language, see Webster's Third 59, 2119, suggests that at least some fill makes its way downstream. See also, *e.g.*, *United States v. Deaton*, 332 F. 3d 698, 707 (CA4 2003) ("Any pollutant or fill material that degrades water quality in a tributary has the potential to move downstream and degrade the quality of the navigable waters themselves"). Moreover, such fill can harm the biological integrity of downstream waters even if it largely stays put upstream. The Act's purpose of protecting fish, see 33 U. S. C. §1251(a)(2); *S. D. Warren Co.*, 547 U. S., at ___ (slip op., at 13–14), could be seriously impaired by sediment in upstream waters where fish spawn, since excessive sediment can "smother bottom-dwelling invertebrates and impair fish spawning," OTA 48. See also, *e.g.*, Erman & Hawthorne, The Quantitative Importance of an Intermittent Stream in the Spawning of Rainbow Trout, 105 Transactions of the American Fisheries Society 675–681 (1976); Brief for American Rivers et al. as *Amici Curiae* 14 (observing that anadromous salmon often spawn in small, intermittent streams).

IV

While I generally agree with Parts I and II–A of JUSTICE KENNEDY's opinion, I do not share his view that we should replace regulatory standards that have been in place for over 30 years with a judicially crafted rule dis-

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titled from the term “significant nexus” as used in *SWANCC*. To the extent that our passing use of this term has become a statutory requirement, it is categorically satisfied as to wetlands adjacent to navigable waters or their tributaries. *Riverside Bayview* and *SWANCC* together make this clear. *SWANCC*’s only use of the term comes in the sentence: “It was the significant nexus between the wetlands and ‘navigable waters’ that informed our reading of the [Clean Water Act] in *Riverside Bayview*.” 531 U. S., at 167. Because *Riverside Bayview* was written to encompass “wetlands adjacent to navigable waters and their tributaries,” 474 U. S., at 123, and reserved only the question of isolated waters, see *id.*, at 131–132, n. 8; see also n. 3, *supra*, its determination of the Corps’ jurisdiction applies to the wetlands at issue in these cases.

Even setting aside the apparent applicability of *Riverside Bayview*. I think it clear that wetlands adjacent to tributaries of navigable waters generally have a “significant nexus” with the traditionally navigable waters downstream. Unlike the “nonnavigable, isolated, intrastate waters” in *SWANCC*, 531 U. S., at 171, these wetlands can obviously have a cumulative effect on downstream water flow by releasing waters at times of low flow or by keeping waters back at times of high flow. This logical connection alone gives the wetlands the “limited” connection to traditionally navigable waters that is all the statute requires, see *id.*, at 172; 474 U. S., at 133—and disproves JUSTICE KENNEDY’s claim that my approach gives no meaning to the word “navigable,” *ante*, at 21 (opinion concurring in judgment). Similarly, these wetlands can preserve downstream water quality by trapping sediment, filtering toxic pollutants, protecting fish-spawning grounds, and so forth. While there may exist categories of wetlands adjacent to tributaries of traditionally navigable waters that, taken cumulatively, have no plausibly discernable relationship

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to any aspect of downstream water quality, I am skeptical. And even given JUSTICE KENNEDY’s “significant nexus” test, in the absence of compelling evidence that many such categories do exist I see no reason to conclude that the Corps’ longstanding regulations are overbroad.

JUSTICE KENNEDY’s “significant nexus” test will probably not do much to diminish the number of wetlands covered by the Act in the long run. JUSTICE KENNEDY himself recognizes that the records in both cases contain evidence that “should permit the establishment of a significant nexus,” *ante*, at 27, see also *ante*, at 26, and it seems likely that evidence would support similar findings as to most (if not all) wetlands adjacent to tributaries of navigable waters. But JUSTICE KENNEDY’s approach will have the effect of creating additional work for all concerned parties. Developers wishing to fill wetlands adjacent to ephemeral or intermittent tributaries of traditionally navigable waters will have no certain way of knowing whether they need to get §404 permits or not. And the Corps will have to make case-by-case (or category-by-category) jurisdictional determinations, which will inevitably increase the time and resources spent processing permit applications. These problems are precisely the ones that *Riverside Bayview*’s deferential approach avoided. See 474 U. S., at 135, n. 9 (noting that it “is of little moment” if the Corps’ jurisdiction encompasses some wetlands “not significantly intertwined” with other waters of the United States). Unlike JUSTICE KENNEDY, I see no reason to change *Riverside Bayview*’s approach—and every reason to continue to defer to the Executive’s sensible, bright-line rule.

V

As I explained in *SWANCC*, Congress passed the Clean Water Act in response to wide-spread recognition—based on events like the 1969 burning of the Cuyahoga River in

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Cleveland—that our waters had become appallingly polluted. 531 U. S., at 174–175 (dissenting opinion). The Act has largely succeeded in restoring the quality of our Nation’s waters. Where the Cuyahoga River was once coated with industrial waste, “[t]oday, that location is lined with restaurants and pleasure boat slips.” EPA, A Benefits Assessment of the Water Pollution Control Programs Since 1972, p. 1–2 (Jan. 2000), <http://www.epa.gov/ost/economics/assessment.pdf>. By curtailing the Corps’ jurisdiction of more than 30 years, the plurality needlessly jeopardizes the quality of our waters. In doing so, the plurality disregards the deference it owes the Executive, the congressional acquiescence in the Executive’s position that we recognized in *Riverside Bayview*, and its own obligation to interpret laws rather than to make them. While JUSTICE KENNEDY’s approach has far fewer faults, nonetheless it also fails to give proper deference to the agencies entrusted by Congress to implement the Clean Water Act.

I would affirm the judgments in both cases, and respectfully dissent from the decision of five Members of this Court to vacate and remand. I close, however, by noting an unusual feature of the Court’s judgments in these cases. It has been our practice in a case coming to us from a lower federal court to enter a judgment commanding that court to conduct any further proceedings pursuant to a specific mandate. That prior practice has, on occasion, made it necessary for Justices to join a judgment that did not conform to their own views.¹³ In these cases, however, while both the plurality and JUSTICE KENNEDY agree that

¹³See, e.g., *Screws v. United States*, 325 U. S. 91, 131–134 (1945) (Rutledge, J., concurring in result); *Turner Broadcasting System, Inc. v. FCC*, 512 U. S. 622, 674 (1994) (STEVENS, J., concurring in part and concurring in judgment); *Hamdi v. Rumsfeld*, 542 U. S. 507, 553–554 (2004) (SOUTER, J., concurring in part, dissenting in part, and concurring in judgment).

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there must be a remand for further proceedings, their respective opinions define different tests to be applied on remand. Given that all four Justices who have joined this opinion would uphold the Corps' jurisdiction in both of these cases—and in all other cases in which either the plurality's or JUSTICE KENNEDY's test is satisfied—on remand each of the judgments should be reinstated if *either* of those tests is met.¹⁴

¹⁴I assume that JUSTICE KENNEDY's approach will be controlling in most cases because it treats more of the Nation's waters as within the Corps' jurisdiction, but in the unlikely event that the plurality's test is met but JUSTICE KENNEDY's is not, courts should also uphold the Corps' jurisdiction. In sum, in these and future cases the United States may elect to prove jurisdiction under either test.

BREYER, J., dissenting

SUPREME COURT OF THE UNITED STATES

Nos. 04–1034 and 04–1384

JOHN A. RAPANOS, ET UX., ET AL., PETITIONERS
04–1034 *v.*
UNITED STATES

JUNE CARABELL ET AL., PETITIONERS
04–1384 *v.*
UNITED STATES ARMY CORPS OF ENGINEERS ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[June 19, 2006]

JUSTICE BREYER, dissenting.

In my view, the authority of the Army Corps of Engineers under the Clean Water Act extends to the limits of congressional power to regulate interstate commerce. See *Solid Waste Agency of Northern Cook Cty. v. Army Corps of Engineers*, 531 U. S. 159, 181–182 (2001) (SWANCC) (STEVENS, J., dissenting). I therefore have no difficulty finding that the wetlands at issue in these cases are within the Corps’ jurisdiction, and I join JUSTICE STEVENS’ dissenting opinion.

My view of the statute rests in part upon the nature of the problem. The statute seeks to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U. S. C. §1251(a). Those waters are so various and so intricately interconnected that Congress might well have decided the only way to achieve this goal is to write a statute that defines “waters” broadly and to leave the enforcing agency with the task of restricting the scope of that definition, either wholesale through regulation or

BREYER, J., dissenting

retail through development permissions. That is why I believe that Congress, in using the term “waters of the United States,” §1362(7), intended fully to exercise its relevant Commerce Clause powers.

I mention this because the Court, contrary to my view, has written a “nexus” requirement into the statute. *SWANCC*, *supra*, at 167; *ante*, at 22 (opinion of KENNEDY, J.) (“[T]he Corps’ jurisdiction over wetlands depends upon the existence of a significant nexus between the wetlands in question and navigable waters in the traditional sense”). But it has left the administrative powers of the Army Corps of Engineers untouched. That agency may write regulations defining the term—something that it has not yet done. And the courts must give those regulations appropriate deference. *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (1984).

If one thing is clear, it is that Congress intended the Army Corps of Engineers to make the complex technical judgments that lie at the heart of the present cases (subject to deferential judicial review). In the absence of updated regulations, courts will have to make ad hoc determinations that run the risk of transforming scientific questions into matters of law. That is not the system Congress intended. Hence I believe that today’s opinions, taken together, call for the Army Corps of Engineers to write new regulations, and speedily so.

Reference Material 53.

Weaver v. Fed. Motor Carrier Safety Admin.

United States Court of Appeals for the District of Columbia Circuit

December 5, 2013, Argued; February 28, 2014, Decided

No. 13-1172

Reporter

744 F.3d 142; 408 U.S. App. D.C. 361; 2014 U.S. App. LEXIS 3810; 2014 WL 775466

FRED WEAVER, JR. AND OWNER-OPERATOR INDEPENDENT DRIVERS ASSN., INC., PETITIONERS v. FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION, ET AL., RESPONDENTS

Counsel: [***1] Paul D. Cullen, Sr. argued the cause for petitioners. With him on the briefs were David A. Cohen, Joyce E. Mayers, and Paul D. Cullen, Jr.

Mark W. Pennak, Attorney, U.S. Department of Justice, argued the cause for respondents. With him on the brief were Stuart Delery, Assistant Attorney General, Matthew Collette, Attorney, Paul M. Geier, Assistant General Counsel, U.S. Department of Transportation, and Peter J. Plocki, Deputy Assistant General Counsel.

Judges: Before: BROWN, Circuit Judge, and WILLIAMS AND SENTELLE, Senior Circuit Judges. Opinion for the Court filed by Senior Circuit Judge WILLIAMS.

Opinion by: WILLIAMS

Opinion

[*142] [**361] On Petition for Review of Final Agency Action of the Federal Motor Carrier Safety Administration

WILLIAMS, *Senior Circuit Judge*: This is a case about a minor traffic violation and its persistence in a database administered by the federal government. The petitioner, Fred Weaver, Jr., received a citation for failing to obey a Montana traffic ordinance. A record of the citation made its way into a database administered by the Federal Motor Carrier Safety Administration [*143] [**362] ("FMCSA"). Much of the information in this database is, like Weaver's citation, the product of state authorities. And under a [***2] rule adopted by FMCSA, *Privacy Act of 1974; Department of Transportation, Federal Motor Carrier Safety Administration (FMCSA) 007 Pre-Employment Screening Program, 77 Fed. Reg. 42,548, 42,551/3 (2012)* ("FMCSA Systems of Record Notice"), state officials also decide how to respond

when a driver challenges a citation's inclusion in the database, as Weaver has here.

The crux of Weaver's complaint is that, in maintaining this record of the citation, FMCSA has violated the statute authorizing the Secretary of Transportation to maintain the database. He points particularly (though not exclusively) to its requirements that the Secretary "ensure, to the maximum extent practical, [that] all the data is complete, timely, and accurate," [49 U.S.C. § 31106\(a\)\(3\)\(F\)](#), "provide for review and correction" of information in the database, *id.* [§ 31106\(e\)\(1\)](#), and, before releasing any information from the system, both comply with certain standards of accuracy and (again) "provide a procedure for the operator-applicant to correct inaccurate information in the System in a timely manner," *id.* [§ 31150\(b\)\(1\), \(4\)](#).

Though the parties disagree energetically on the merits, they agree that Weaver's action does not [***3] lie in this court. Weaver frankly acknowledges that he filed this suit as a precaution, lest the district court dismiss a related suit filed there on the grounds that it should have been filed here, but only after the time to file here has expired. We agree that we lack jurisdiction. Because the parties disagree as to the reasons, and those reasons are critical to the parties' dispute, we explain them below, and end by transferring the case to the district court.

* * *

In June 2011 Weaver received a misdemeanor citation for failing to stop his truck at a weigh station as required by Montana law. Weaver challenged the citation in Montana court and it was dismissed "without prejudice"; there is some dispute whether the court found Weaver not guilty or dismissed his action as part of a deferred prosecution arrangement.

That might have been the end of it, except that a record of Weaver's citation was included in a database administered by FMCSA. This database, known as the Motor Carrier Management Information System

("MCMIS"), contains information on commercial truck drivers' safety records, such as accident reports and other safety violations. Potential employers in the motor carrier industry [***4] may, with the written permission of the driver, receive access to the data in order to screen potential employees. [49 U.S.C. § 31150\(a\)](#). (The record does not disclose the employment fortunes of drivers who withhold permission.)

To meet the statutory mandate of providing a correction mechanism, FMCSA established "DataQs," a web-based dispute resolution procedure that allows "an individual to challenge data maintained by FMCSA." FMCSA Systems of Record Notice, 77 Fed. Reg. at 42,551/3. Although MCMIS is mandated by federal law and administered by a federal agency, much of its data comes from the states, which are responsible for enforcing many FMCSA regulations, see [National Tank Truck Carriers, Inc. v. FHA of the United States DOT., 170 F.3d 203, 205, 335 U.S. App. D.C. 166 \(D.C. Cir. 1999\)](#). The rule leaves to the states most critical decisions on what data to submit to FMCSA and gives states the last word on whether to amend the data in response to a DataQs request: "FMCSA is not authorized to direct a State to change or alter MCMIS data for violations or [*144] [**363] inspections originating within a particular State(s). Once a State office makes a determination on the validity of a challenge, FMCSA considers [***5] that decision as the final resolution of the challenge." [77 Fed. Reg. at 42,551/3](#).

In March 2013 petitioner Owner-Operator Independent Drivers Association filed a DataQs request on Weaver's behalf, seeking to have the citation removed from his MCMIS profile. The request was routed to the Montana Department of Transportation, which denied it. The Association then challenged the denial in DataQs, reasoning that because the Montana court had dismissed the charges without prejudice, FMCSA's maintenance of a MCMIS record of the citation was incorrect and in violation of the statute.

The Montana authorities would have none of it. Colonel Dan Moore of the Montana Department of Transportation replied: "You are obviously confused I will explain the differences and the matter will be closed. Our decision is our decision and any further argument will be turned over [to] the FMCSA as a violation of the DQ process." J.A. 12. Understandably dissatisfied with Colonel Moore's rebuff-cum-threat, the Association filed this petition seeking to enjoin FMCSA

from disseminating citations that have been overturned or dismissed.

Before proceeding to the parties' jurisdictional arguments, we pause to describe [***6] the related action in the district court. On facts similar to those just described, the Association and four truck drivers have sought a declaratory judgment seeking essentially the same relief as *Weaver*. *Owner-Operator Independent Driver Ass'n v. Ferro*, No. 12-1158 (D.D.C.). The principal difference between the cases is that there at least three of the plaintiff drivers not only filed protests in DataQs but followed up with letters directly to the FMCSA Administrator, requesting that she remove the violation from MCMIS. (One plaintiff driver proceeded to her directly.) The agency declined to remove the violations itself and passed the requests on to the relevant states. Complaint, *Owner-Operator Independent Driver Ass'n*, No. 12-1158, at 10-18 (D.D.C. July 7, 2012) (Dkt #1). A few months later the Administrator sent a follow-up letter, telling the Association that the states had declined to purge the violations from the database. *Id.* at 18. The Association then brought suit in the district court, arguing that FMCSA's second letter constituted final agency action. *Id.*; [5 U.S.C. § 704](#) (providing generally for review of final agency actions).

The government moved to dismiss on jurisdictional [***7] grounds, arguing that the Hobbs Act, [28 U.S.C. § 2342\(3\)](#), vests exclusive jurisdiction in our court. Motion to Dismiss, *Owner-Operator Independent Driver Ass'n*, No. 12-1158, at 5-8 (D.D.C. Sept. 17, 2012) (Dkt #8). The government argued that since the challenge might address the agency's "interpretation" of its regulations, it must be brought in the court of appeals. *Id.* at 7 (citing [Daniels v. Union Pac. R. Co., 530 F.3d 936, 382 U.S. App. D.C. 23 \(D.C. Cir. 2008\)](#)). The case is stayed pending the outcome of this case.

* * *

The Hobbs Act, specifically [28 U.S.C. § 2342\(3\)\(A\)](#), provides for review in the court of appeals of all "rules, regulations, and final orders" of the Secretary of Transportation issued under specified statutes. (It is not disputed that if, pursuant to those statutes, FMCSA issued a rule, etc., it would be covered. The statute in question here is part of subchapter III of chapter 311.) But both sides agree that FMCSA's activity (or inactivity) vis-à-vis Weaver does not qualify as a rule, regulation or final order reviewable under [*145] [**364] [§ 2342\(3\)](#), and that therefore we lack jurisdiction.

But they disagree, of course, over what follows from that conclusion. Weaver argues that FMCSA's action (the [***8] exact nature of which we'll consider shortly) constituted final agency action, although not the type for which the Hobbs Act vests exclusive jurisdiction in the court of appeals. Therefore, he asks that we transfer the case to the district court, the proper site for initial review of final agency actions for which no statute has provided an alternative. *Int'l Bhd. of Teamsters v. Pena*, 17 F.3d 1478, 1481, 305 U.S. App. D.C. 125 (D.C. Cir. 1994); 5 U.S.C. §§ 703, 704.

The government argues that there has been no agency action relating to Weaver, and that his claim amounts to an out-of-time attack on an earlier rule—the FMCSA Systems of Record Notice. Weaver has disguised the true nature of his attack on the rule, it says, by purporting to attack the government's inaction in the face of Montana's refusal to correct the database error that Weaver alleges, an attack that it says depends on claims against the rule and on FMCSA's interpretation. Because Weaver's claim is in reality an attack on the rule, it argues, his claim is barred by the Hobbs Act's 60-day limit for seeking judicial review, which we have held is jurisdictional. *Natural Res. Def. Council v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602, 215 U.S. App. D.C. 32 (D.C. Cir. 1981). [***9] Finally, the government acknowledges that someone who is injured by a rule that he has failed to attack within the time limit may still challenge that rule, but *only* as a defense in an "enforcement action" initiated by the Secretary. FMCSA Br. 24-26; FMCSA Post-Argument Letter, No. 13-1172, at 2 (Dec. 9, 2013).

The government is mistaken in its idea that a person in Weaver's position (affected by a rule that he has failed to timely challenge) can draw the validity of the rule in question only as a defense to an enforcement action. Where Congress imposes a statute of limitations on challenges to a regulation, running from a regulation's issuance, facial challenges to the rule or the procedures by which it was promulgated are barred. *Natural Res. Def. Council*, 666 F.2d at 602. But when an agency seeks to apply the rule, those affected may challenge that application on the grounds that it "conflicts with the statute from which its authority derives," *Nat'l Air Transp. Ass'n v. McArtor*, 866 F.2d 483, 487, 275 U.S. App. D.C. 282 (D.C. Cir. 1989) (emphasis removed) (quoting *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546, 107 U.S. App. D.C. 34 (D.C. Cir. 1958)); *Murphy Exploration & Prod. Co. v. Dep't of Interior*, 270 F.3d 957, 958-59, 348 U.S. App. D.C. 133 (D.C. Cir. 2001); [***10] *Graceba*

Total Commc'ns, Inc. v. FCC, 115 F.3d 1038, 1040-41, 325 U.S. App. D.C. 135 (D.C. Cir. 1997); *Am. Tel. & Tel. Co. v. FCC*, 978 F.2d 727, 734, 298 U.S. App. D.C. 230 (D.C. Cir. 1992); *NLRB Union v. Fed. Labor Relations Auth.*, 834 F.2d 191, 196, 266 U.S. App. D.C. 165 (D.C. Cir. 1987); *Geller v. FCC*, 610 F.2d 973, 978, 198 U.S. App. D.C. 31 (D.C. Cir. 1979); see *Arch Mineral Corp. v. Babbitt*, 104 F.3d 660, 664 (4th Cir. 1997), at least where the statute does not expressly preclude such a challenge, *Am. Rd. & Transp. Builders Ass'n v. EPA*, 588 F.3d 1109, 1113, 388 U.S. App. D.C. 435 (D.C. Cir. 2009).

Contrary to the government's claim (from which it somewhat retreated in its post-argument letter of December 9, 2013), the sort of "application" that opens a rule to such a challenge is not limited to formal "enforcement actions." We have, for example, despite want of a prior timely attack, considered the validity of rules that an agency applied in an order imposing certain limitations on a broadcast licensee, *Functional Music*, 274 F.2d at 547-48, in an order rejecting challenges to auction procedures to which a bidder objected, *Graceba*, 115 F.3d at 1040-41, in an order dismissing a complaint based on the FCC's [*146] [**365] tariff-filing requirements, *Am. Tel. & Tel. Co.*, 978 F.2d at 734, and in an order denying [***11] a mineral lessee's claim to certain royalty reimbursements, *Murphy Exploration*, 270 F.3d at 957-59.

Thus, to the extent that Weaver has alleged an agency action that (1) qualifies as a rule, regulation or order within the meaning of Hobbs Act § 2342(3), (2) applied the FMCSA Systems of Record Notice, and (3) occurred within 60 days of Weaver's filing, we would have jurisdiction. It is the first criterion that we find to exclude the case from our jurisdiction.

The government appears to contend that any activity of the Secretary (under the named statutes) that qualifies as a "final agency action" under 5 U.S.C. § 704 also constitutes a "final order" (if it is not a "rule" or "regulation") under § 2342(3). See FMCSA Post-Argument Letter, No. 13-1172, at 2 (Dec. 9, 2013). But the cases it cites do not confront the structure of the Hobbs Act; instead they address only the question whether such actions are equivalent for the purposes of being final and therefore permitting judicial review. Being equivalent for the purposes of finality, however, does not make them equivalent in all respects.

Indeed, the structure of the Hobbs Act runs against the government's theory. The Act contains seven

subsections [***12] that provide for initial review in the court of appeals for agency actions of specified types, varying across subsections. One subsection vests the courts of appeals with jurisdiction over "all final agency actions," § 2342(7), whereas the provision here, § 2342(3), covers "rules, regulations, or final orders." These distinctions call into play the general notion that Congress is likely to have attached importance to variations of terminology in parallel contexts in a single statute. E.g., *Barnhart v. Sigmon Coal Co., Inc.*, 534 U.S. 438, 452, 454, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002); *Corley v. United States*, 556 U.S. 303, 314, 129 S. Ct. 1558, 173 L. Ed. 2d 443 (2009); *Nat'l Min. Ass'n v. Dep't of Labor*, 292 F.3d 849, 856, 352 U.S. App. D.C. 145 (D.C. Cir. 2002). Thus, the Act appears to contemplate "actions" of the Secretary under the named statutes that are *not* rules, regulations or final orders, i.e., a residue of agency activity subject to initial review in the district court.

But even though § 2342(3) seems to contemplate such a residue, there remains the question of classifying FMCSA's action (assuming there is one): is it a rule, regulation or order, or does it fit in the residue assigned to review in the district court? To address that we must look to Weaver's claims [***13] of how FMCSA acted.

Weaver insists that although FMCSA has not performed any of the actions enumerated in § 2342(3), the agency has nonetheless taken reviewable action, and that the district court has jurisdiction under § 703. He suggests three possible theories for what constituted this action. First, although it was Colonel Moore who refused to remove the citation, FMCSA's policy of not altering the information submitted by the states converts Moore's decision into federal action. Second, FMCSA "acted" by failing to meet its statutory obligation to ensure the accuracy of the MCMIS data that Weaver disputes. A third possibility, discussed at length at oral argument, is that the FMCSA Administrator's letter to the Association, alleged in the district court case, was final agency action. But without an allegation linking the letter to Weaver himself, this third theory appears irrelevant, at least for this case. Weaver's first two theories add up to the proposition that FMCSA violated a statutory duty by failing, both itself and through what Weaver sees as its Montana puppet, to make a correction to which Weaver says he is statutorily entitled. Inaction, [*147] [**366] of course, can qualify as a form [***14] of agency action. See 5 U.S.C. §§ 551(13), 706(1); *Telecommunications Research & Action Ctr. v. FCC*, 750 F.2d 70, 77, 242 U.S. App. D.C. 222 (D.C. Cir. 1984); see generally

Norton v. Southern Utah Wilderness Alliance, 542 U.S. 55, 61-65, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (2004).

Without finally resolving the status of the FMCSA activity, we feel confident in assigning challenges to that activity to the district court. FMCSA's alleged action was plainly not a rule—i.e., a statement of "general or particular applicability and future effect," 5 U.S.C. § 551(4), and the terms "rule" and "regulation" are generally used interchangeably, *Nat'l Treasury Employees Union v. Weise*, 100 F.3d 157, 160, 321 U.S. App. D.C. 341 (D.C. Cir. 1996). But that does not necessarily make it an "order." The APA's architects may have considered "agency action" to consist exclusively of orders and rules, see H.R. Rep. No. 79-1980, at 20-21 (1946), a premise seemingly embodied in the APA's definitions of "order," 5 U.S.C. § 551(6) (a "final disposition . . . in a matter other than rule making") and "adjudication," *id.* § 551(7) ("agency process for the formulation of an order"). But "rule" and "order" do not in fact exhaust the field, at least when we move beyond the APA itself. In *Watts v. SEC*, 482 F.3d 501, 375 U.S. App. D.C. 409 (D.C. Cir. 2007), [***15] for example, we declined to treat an SEC refusal to let its employees testify in response to a subpoena as an "order" under § 25 of the Securities Exchange Act of 1934, 15 U.S.C. § 78y, providing for court of appeals review of "orders," pointing out among other things that the process of a decision on "whether to comply with a judicial subpoena is not typically or comfortably described as an 'adjudication' (even given the broad scope of formal and informal adjudications under the APA)." 482 F.3d at 506. This seems equally true of any "action" that may inhere in FMCSA's alleged failure to carry out its statutory duty.

The complicated history of this court's interpretation of agency review statutes also favors treating the "action" here as something other than a rule, regulation or final order. In considering the Natural Gas Act's provision for review of "orders" of the Federal Power Commission, we initially thought it to exclude review of a rule adopted through informal rulemaking, on the ground that the Commission's decision hadn't emerged from a "quasi-judicial" procedure. *United Gas Pipe Line Co. v. FPC*, 181 F.2d 796, 86 U.S. App. D.C. 314 (D.C. Cir. 1950). But the opinion was ambiguous, and ultimately [***16] we explained it on grounds of its language about the absence of an evidentiary record, and we found the products of informal FPC rulemaking to be reviewable as "orders." *City of Chicago, Ill. v. FPC*, 458 F.2d 731, 740-41, 147 U.S. App. D.C. 312 (D.C. Cir. 1971). As we said of another statute assigning review of "orders" to

the court of appeals, "It is the availability of a record for review and not the holding of a quasi judicial hearing which is now the jurisdictional touchstone." [Investment Company Inst. v. Bd. of Governors of the Fed. Reserve Sys.](#), 551 F.2d 1270, 1277, 179 U.S. App. D.C. 311 (D.C. Cir. 1977) (internal quotation marks omitted); see also [Florida Power & Light Co. v. Lorion](#), 470 U.S. 729, 744-45, 105 S. Ct. 1598, 84 L. Ed. 2d 643 (1985) (relying in part on absence of need for any factfinding in interpreting statute to assign review to the court of appeals).

Here the "touchstone" referred to in *Investment Company Institute* calls for placing initial review in the district court. FMCSA has not compiled a record with an eye toward judicial review—indeed it has insisted that it has no role to play in the MCMIS process. And while district courts generally cannot conduct de novo review of agency action, [Camp v. Pitts](#), 411 U.S. 138, 141-42, 93 S. Ct. 1241, 36 L. Ed. 2d [*148] [**367] 106 (1973);

[Citizens To Preserve Overton Park, Inc. v. Volpe](#), 401 U.S. 402, 415, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971), [***17] there is a narrow exception where "the record is so bare that it prevents effective judicial review," [Commercial Drapery Contractors, Inc. v. United States](#), 133 F.3d 1, 7, 328 U.S. App. D.C. 138 (D.C. Cir. 1998) (citing [Overton Park](#), 401 U.S. at 420)—a circumstance that might well prove true here.

* * *

Because we conclude that FMCSA's action falls short of being a rule, regulation or final order within the meaning of [28 U.S.C. § 2342\(3\)](#), we lack jurisdiction under that provision and we transfer the case to the district court pursuant to [28 U.S.C. § 1631](#).

So ordered.