

RESP. Ex. 1

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 [or the Board] acted in contravention of established policies.*¹⁰⁶

▪ *Although the String Similarity Review was performed by a third party, ICANN has determined that the Reconsideration process can properly be invoked for challenges of the third party's decisions where it can be stated that either the vendor failed to follow its process in reaching the decision, or that ICANN staff failed to follow its process in accepting that decision.*¹⁰⁷

▪ *Booking.com does not suggest that the process for String Similarity Review set out in the Applicant Guidebook was not followed, or that ICANN staff violated any established ICANN policy in accepting the [SSP] decision on placing .hotels and .hoteis in contention sets. Instead, Booking.com is supplanting what it believes the review*

¹⁰⁶ BGC Recommendation, p. 2.

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

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

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

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

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

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

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

¹⁰⁸ BGC Recommendation, p. 5.

¹⁰⁹ BGC Recommendation, p. 6.

¹¹⁰ BGC Recommendation, p. 6.

¹¹¹ BGC Recommendation, pp. 6-7.

¹¹² BGC Recommendation, p. 7.

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

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

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

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

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.

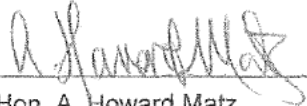
151. The "IRP Provider" is the ICDR, and, in accordance with the ICDR Rules, the costs to be allocated between the parties – what the Bylaws call the "costs of the IRP Provider", and the Supplementary Procedures call the "costs of the proceedings" – include the fees and expenses of the Panel members 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 .hotels, 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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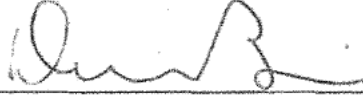
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Stephen L. Drymer

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Hon. A. Howard Matz

Date:

David H. Bernstein

Date:



Stephen L. Drymer,
Chair of the IRP Panel

Date: 3 March 2015

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

Date

Hon. A. Howard Matz

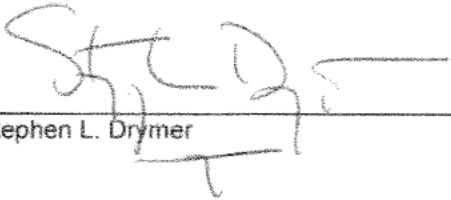
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David H. Bernstein

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3 March 2015
Date



Stephen L. Drymer

Resp. Ex. 2

EXPERTISE RULES





International Chamber of Commerce (ICC)
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EXPERTISE RULES

The Rules contained in this booklet describe three distinct services offered by the International Chamber of Commerce (ICC) to persons who wish to obtain an expert opinion on an issue of a technical, legal, financial or other nature. Those services are the proposal of experts, the appointment of experts and the administration of expertise proceedings.

Each service is intended to respond to a different need. A proposal leaves the requesting party or parties free to decide whether or not to use the services of the expert proposed. An appointment is normally made on the basis of an agreement between parties and obliges them to have recourse to the person appointed. The administration of expertise proceedings covers not only the appointment of an expert but also the definition of the expert's mission, the conduct of the expert's investigations, the drawing up of the expert's report and, if the parties wish, a review of the expert's report by ICC before it is notified to the parties.

The procedures described in these Rules are administered exclusively by the ICC International Centre for Expertise, which forms part of ICC's International Centre for ADR. Created in 1976, the International Centre for Expertise has a strong track record of finding experts to fulfill specialized assignments in an international context. It enjoys the support of a standing committee, itself composed of experts, which contributes to quality assurance.

A request for the proposal of an expert may be made to the Centre at any time, with or without a prior agreement. However, parties wishing to have recourse to the Centre for the appointment of an expert or the administration of expertise proceedings are advised to include an appropriate clause in their contract. For this purpose, ICC proposes model clauses to fit different situations, which can be found at the end of this booklet.

Drafted by specialists from different legal traditions and cultures, and administered by qualified professionals, these Rules provide a structured, institutional framework ensuring transparency, efficiency and fairness while allowing users to exercise their choice over many aspects of the procedure.

For the convenience of users, the Rules are available in several languages, downloadable from the relevant ICC webpages.

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04

EXPERTISE RULES

Rules for Expertise of the
International Chamber of Commerce

In force as from 1 January 2003

ICC EXPERTISE RULES SECTION I: GENERAL PROVISIONS

ARTICLE 1

The International Centre for Expertise

- 1 The International Centre for Expertise (the “Centre”) is a service centre of the International Chamber of Commerce (ICC). The Centre can perform one or more of the following functions in connection with domestic or international business matters:

A) Proposal of experts

Upon the request of any physical or legal person(s) or any court or tribunal (a “Person”), the Centre can provide the name of one or more experts in a particular field of activity, pursuant to Section II of these Rules. The Centre’s role is limited to proposing the name of one or more experts. The Person requesting a proposal may then contact directly the proposed expert(s), and, as the case may be, agree with such expert(s) on the scope of the appropriate mission and fees. There is no obligation to make use of the services of an expert proposed by the Centre. The proposal of an expert may be useful in many different contexts. A person may require an expert in connection with its ongoing business activities or in connection with contractual relations. A party to an arbitration may wish to obtain the name of a potential expert witness. A court or arbitral tribunal which has decided to appoint an expert may seek a proposal from the Centre.

B) Appointment of experts

The Centre will appoint an expert, pursuant to Section III of these Rules, in situations where the parties have agreed to the appointment of an expert and have agreed to use the Centre as the appointing authority or where the Centre is otherwise satisfied that there is a sufficient basis for appointing an expert. In such cases the appointment by the Centre shall be binding on the parties. The Centre’s role is limited to appointing the expert in question.

C) Administration of expertise proceedings

When the parties have agreed upon the administration of expertise proceedings by the Centre or when the Centre is otherwise satisfied that there is a sufficient basis for administering expertise proceedings, the Centre will administer the proceedings pursuant to Section IV of these Rules.

- 2 The Centre consists of a Standing Committee and a Secretariat which is provided by ICC. The statutes of the Standing Committee are set forth in Appendix I.

ICC EXPERTISE RULES SECTION II: PROPOSAL OF EXPERTS

ARTICLE 2

Recourse to the Centre

- 1 Any Person may ask the Centre to propose one or more experts by submitting a request for proposal of experts (the “Request for Proposal”) to the Centre at the ICC International Secretariat in Paris.
- 2 The Request for Proposal shall include:
 - a) the name, address, telephone and facsimile numbers and email address of each Person filing the Request for Proposal;
 - b) a statement that the requesting Person is seeking the proposal of an expert by the Centre;
 - c) a description of the field of activity of the expert to be proposed along with any desired qualifications of the expert, including but not limited to education, language skills and professional experience, and any undesired attributes of the expert;
 - d) a description of any matters which would disqualify a potential expert; and
 - e) a description of the work to be carried out by the expert and the desired time frame for completing such work.
- 3 Unless requested to do so by the person seeking the proposal of an expert, the Centre will not notify any other person of the filing of a Request for Proposal.

ARTICLE 3

The Expert

- 1 Any proposal of an expert by the Centre shall be made by the Centre either through an ICC national committee or otherwise. The Centre's role normally ends on notification of the proposal unless the Centre is asked to appoint the proposed expert and/or administer the procedure pursuant to Sections III and IV.
- 2 Prior to the proposal of an expert, the Centre shall consider in particular the prospective expert's qualifications relevant to the circumstances of the case, and the expert's availability, place of residence, and language skills.
- 3 Before a proposal, a prospective expert shall sign a statement of independence and disclose in writing to the Centre any facts or circumstances which might be of such a nature as to call into question the expert's independence in the eyes of the Person filing the Request for Proposal. The Centre shall provide such information in writing to such Person and shall fix a time limit for any comments from such Person.

ARTICLE 4

Costs for the Proposal of an Expert

- 1 Each Request for Proposal must be accompanied by the non refundable amount specified in Article 1 of Appendix II. This amount represents the total cost for the proposal of one expert by the Centre. No Request for Proposal shall be processed unless accompanied by the requisite payment.
- 2 When the Centre is requested to propose more than one expert, the non refundable amount accompanying the Request for Proposal and to be paid by the requesting Person is the amount specified in the preceding paragraph multiplied by the number of experts requested.

ICC EXPERTISE RULES SECTION III: APPOINTMENT OF EXPERTS

ARTICLE 5

Recourse to the Centre

- 1 Any request for the appointment of an expert (the "Request for Appointment") shall be submitted to the Centre at the ICC International Secretariat in Paris. Any such request shall be processed by the Centre only when it is based upon an agreement between the parties for the appointment of an expert by the Centre or when the Centre is otherwise satisfied that there is a sufficient basis for appointing an expert.
- 2 The date on which the Request for Appointment is received by the Centre shall, for all purposes, be deemed to be the date of the commencement of the agreed or required expertise.
- 3 The Request for Appointment shall include:
 - a) the name, address, telephone and facsimile numbers and email address of each Person filing the Request for Appointment and of any other persons involved in the expertise;
 - b) a statement that the requesting Person is seeking the appointment of an expert by the Centre;
 - c) a description of the field of activity of the expert to be appointed along with any desired qualifications of the expert, including but not limited to education, language skills and professional experience, and any undesired attributes of the expert;
 - d) a description of any matters which would disqualify a potential expert;
 - e) a description of the work to be carried out by the expert and the desired time frame for completing such work; and
 - f) a copy of any agreement for the appointment of an expert by the Centre and/or of any other elements which form the basis for the Request for Appointment.

RESP. Ex. 2

- 4 The Centre shall promptly inform the other party or parties in writing of the Request for Appointment once the Centre has sufficient copies of the Request for Appointment and has received the non refundable amount required under Article 8.
- 5 When the Request for Appointment is not made jointly by all of the parties, and/or when the parties do not agree on the qualifications of the expert, and/or when the parties do not agree on the expert's work, the Centre shall send a copy of the Request for Appointment to the other party or parties who may make observations within a time limit fixed by the Centre.

Observations received shall be communicated by the Centre to the other party or parties for comments within a time limit fixed by the Centre.
- 6 The Centre shall proceed with the Request for Appointment as it sees fit and will inform the parties of how it will proceed.

ARTICLE 6

Written Notifications or Communications

- 1 All written communications submitted to the Centre by any party to the expertise, as well as all documents annexed thereto, shall be supplied in a number of copies sufficient to provide one copy for the Centre, one copy for each party and one copy for each expert.
- 2 All notifications or communications from the Centre shall be made to the last address of the party or its representative for whom the same are intended, as notified by the party in question or by the other party. Such notification may be made by delivery against receipt, registered post, courier, facsimile transmission, telex, telegram or any other means of telecommunication that provides a record of the sending thereof.
- 3 A notification or communication shall be deemed to have been made on the day it was received by the party itself or by its representative, or would have been received if made in accordance with the preceding paragraph.

ICC EXPERTISE RULES SECTION III: APPOINTMENT OF EXPERTS

ARTICLE 7

The Expert

- 1 Any appointment of an expert by the Centre shall be made by the Centre either through an ICC national committee or otherwise.
- 2 Prior to the appointment of an expert, the Centre shall consider in particular the prospective expert's qualifications relevant to the circumstances of the case, the expert's availability, place of residence and relevant language skills, and any observations, comments or requests made by the parties. In appointing the expert the Centre shall apply any agreement of the parties related to the appointment.
- 3 Every expert must be independent of the parties involved in the expertise proceedings, unless otherwise agreed in writing by such parties.
- 4 Before an appointment, a prospective expert shall sign a statement of independence and disclose in writing to the Centre any facts or circumstances which might be of such a nature as to call into question the expert's independence in the eyes of the parties. The Centre shall provide such information to the parties in writing and fix a time limit for any comments from them.

ARTICLE 8

Costs for the Appointment of an Expert

- 1 Each Request for Appointment must be accompanied by the non refundable amount specified in Article 2 of Appendix II. This amount represents the total cost for the appointment of one expert by the Centre. No Request for Appointment shall be processed unless accompanied by the requisite payment.
- 2 When the Centre is requested to appoint more than one expert, the non refundable amount accompanying the Request for Appointment and to be paid by the requesting Person is the amount specified in the preceding paragraph multiplied by the number of experts requested.
- 3 When the Centre is requested to appoint an expert who has already been proposed by the Centre in connection with the same matter, the Centre shall charge half of the non refundable amount specified in Article 2 of Appendix II in addition to the already paid amount specified in Article 1 of Appendix II.

ICC EXPERTISE RULES SECTION IV: ADMINISTRATION OF EXPERTISE PROCEEDINGS

ARTICLE 9

Recourse to the Centre

- 1 Any request for the administration of expertise proceedings (the "Request for Administration") shall be submitted to the Centre at the ICC International Secretariat in Paris. Any such request shall be processed by the Centre only when it is based upon an agreement for the administration of expertise proceedings by the Centre or when the Centre is otherwise satisfied that there is a sufficient basis for administering expertise proceedings.
- 2 The date on which the Request for Administration is received by the Centre shall, for all purposes, be deemed to be the date of the commencement of the expertise proceedings.
- 3 The Request for Administration shall include:
 - a) the name, address, telephone and facsimile numbers and email address of each Person filing the Request for Administration and of any other persons involved in the expertise proceedings;
 - b) a statement that the requesting Person is seeking the administration of expertise proceedings by the Centre;
 - c) a description of the field of activity of the expert along with any desired qualifications of the expert, including but not limited to education, language skills and professional experience, and any undesired attributes of the expert;
 - d) a description of any matters which would disqualify a potential expert;
 - e) a description of the work to be carried out by the expert and the desired time frame for completing such work; and
 - f) a copy of any agreement for the administration of expertise proceedings by the Centre and/or of any other elements which form the basis for the Request for Administration.

- 4 The Centre shall promptly inform the other party or parties in writing of the Request for Administration once the Centre has sufficient copies of the Request for Administration and has received the non refundable amount required under Article 14.
- 5 The administration of the expertise proceedings by the Centre shall consist *inter alia* of:
 - a) coordination between the parties and the expert;
 - b) initiating the appropriate steps to encourage the expeditious completion of the expertise proceedings;
 - c) supervising the financial aspects of the proceedings;
 - d) appointment of an expert using the procedure referred to in Section III or confirmation of an expert agreed to by all of the parties;
 - e) review of the form of the expert's report;
 - f) notification of the expert's final report to the parties; and
 - g) notification of the termination of the expertise proceedings.

ARTICLE 10

Written Notifications or Communications

- 1 All written communications submitted to the Centre by any party to the expertise proceedings, as well as all documents annexed thereto, shall be supplied in a number of copies sufficient to provide one copy for the Centre, one copy for each party and one copy for each expert.
- 2 All notifications or communications from the Centre and the expert shall be made to the last address of the party or its representative for whom the same are intended, as notified either by the party in question or by the other party. Such notification may be made by delivery against receipt, registered post, courier, facsimile transmission, telex, telegram or any other means of telecommunication that provides a record of the sending thereof.

ICC EXPERTISE RULES SECTION IV: ADMINISTRATION OF EXPERTISE PROCEEDINGS

- 3 A notification or communication shall be deemed to have been made on the day it was received by the party itself or by its representative, or would have been received if made in accordance with the preceding paragraph.

ARTICLE 11

Independence of the Expert Replacement of the Expert

- 1 Every expert must remain independent of the parties involved in the expertise proceedings, unless otherwise agreed in writing by such parties.
- 2 An expert appointed by the Centre, who has died or resigned or is unable to carry out the expert's functions, shall be replaced.
- 3 An expert appointed by the Centre shall be replaced upon the written request of all of the parties.
- 4 If any party objects that the expert does not have the necessary qualifications or is not fulfilling the expert's functions in accordance with these Rules or in a timely fashion, the Centre may replace the expert after having considered the observations of the expert and the other party or parties.
- 5 When an expert is to be replaced, the Centre has discretion to decide whether or not to follow the original appointing process.

ARTICLE 12

The Expert's Mission

- 1 The expert, after having consulted the parties, shall set out the expert's mission in a written document. That document shall not be inconsistent with anything in these Rules and shall be communicated to the parties and to the Centre. Such document shall include:
 - a) the names, addresses, telephone and facsimile numbers and email addresses of the parties;
 - b) a list of issues to be treated in the expert's report;

RESP. Ex. 2

- c) the name(s), address(es), telephone and facsimile numbers and email address(es) of the expert or experts;
- d) the procedure to be followed by the expert and the place where the expertise should be conducted; and
- e) a statement indicating the language in which the proceedings will be conducted.

Modifications to the expert's mission may be made by the expert, in writing, only after full consultation with the parties. Any such written modifications shall be communicated to the parties and to the Centre.

- 2 Upon preparing the document setting out the expert's mission, or as soon as possible thereafter, the expert, after having consulted the parties, shall prepare a provisional timetable for the conduct of the expertise proceedings. The timetable shall be communicated to the parties and to the Centre. Any subsequent modifications of the provisional timetable shall be promptly communicated to the parties and to the Centre.
- 3 The expert's main task is to make findings in a written expert's report within the limits set by the expert's mission after giving the parties the opportunity to be heard and/or to make written submissions. Unless otherwise agreed by all of the parties, the findings of the expert shall not be binding upon the parties.
- 4 Unless otherwise agreed by the parties, the expert's report shall be admissible in any judicial or arbitral proceeding in which all of the parties thereto were parties to the expertise proceedings in which such report was prepared.
- 5 Any information given to the expert by the Centre or any party during the course of the expertise shall be used by the expert only for the purposes of the expertise and shall be treated by the expert as confidential.
- 6 The expert's report shall be submitted in draft form to the Centre before it is signed. The Centre may lay down modifications only as to the form of the report. No report shall be communicated to the parties by the expert. No report shall be signed by the expert prior to the Centre's approval of such report.

ICC EXPERTISE RULES
SECTION IV: ADMINISTRATION
OF EXPERTISE PROCEEDINGS

- 7 The Centre may waive the requirements laid down in Article 12(6) if expressly requested to do so in writing by all the parties and if the Centre considers that such a waiver is appropriate under the circumstances of the case.
- 8 The expert's report, after it is signed by the expert, shall be sent to the Centre in as many copies as there are parties plus one for the Centre. Thereafter, the Centre shall notify the expert's report to the party or parties and declare in writing that the expertise proceedings have been terminated.

ARTICLE 13

Duties and Responsibilities of the Parties

- 1 The non participation of a party in the expertise proceedings does not deprive the expert of the power to make findings and render the expert's report, provided that such party has been given the opportunity to participate.
- 2 In agreeing to the application of these Rules the parties undertake to provide the expert with all facilities in order to implement the expert's mission and, in particular, to make available all documents the expert may consider necessary and also to grant the expert free access to any place where the expert may be required to go for the proper completion of the expert's mission.

ARTICLE 14

Costs for the Administration of Expertise Proceedings

- 1 Each Request for Administration must be accompanied by the non refundable amount specified in Article 3 of Appendix II. This amount will be credited to the requesting party's or parties' portion of the deposit pursuant to Article 14(3).
- 2 When the Centre is requested to administer expertise proceedings where the expert has already been proposed or appointed by the Centre in connection with the same matter, the non refundable amount specified in Article 3 of Appendix II shall not be paid in addition to the non refundable amounts paid for the proposal or the appointment of an expert and specified in Articles 1 and 2 of Appendix II.
- 3 Following the receipt of a Request for Administration, the Centre shall request the parties to pay a deposit in an amount likely to cover the administrative costs of the Centre and the fees and expenses of the expert for the expertise proceedings, as set out in Article 3, paragraphs (2) and (3), of Appendix II. The expertise proceedings shall not go forward until payment of such deposit has been received by the Centre.
- 4 In any case where the Centre considers that the deposit is not likely to cover the total costs of the expertise proceedings, the amount of such deposit may be subject to readjustment. When the request for the corresponding payments has not been complied with, the Centre may suspend the expertise proceedings and set a time limit, on the expiry of which the expertise proceedings may be considered withdrawn.
- 5 Upon termination of administered expertise proceedings, the Centre shall settle the total costs of the proceedings and shall, as the case may be, reimburse the party or parties for any excess payment or bill the party or parties for any balance required pursuant to these Rules. The balance, if any, shall be payable before the notification of the final expert's report to the party or parties.
- 6 All above deposits and costs shall be borne in equal shares by the parties, unless they agree otherwise in writing. However, any party shall be free to pay the unpaid balance of such deposits and costs should the other party or parties fail to pay its or their share.

ICC EXPERTISE RULES SECTION V: MISCELLANEOUS

ARTICLE 15

Waiver

A party which proceeds with the expertise proceedings without raising an objection to a failure to comply with any provision of these Rules, any direction given by the Centre or by the expert, or any requirement of the expert's mission, or any requirement relating to the appointment of an expert or to the conduct of the expertise proceedings, shall be deemed to have waived its right to object.

ARTICLE 16

Exclusion of Liability

Neither the experts, nor the Centre, nor ICC and its employees, nor the ICC national committees shall be liable to any person for any act or omission in connection with the expertise procedure.

ARTICLE 17

General Rule

In all matters not expressly provided for in these Rules, the Centre and the experts shall act in the spirit of these Rules.

ICC EXPERTISE RULES
APPENDIX I STATUTES OF THE STANDING
COMMITTEE OF THE ICC INTERNATIONAL
CENTRE FOR EXPERTISE

ARTICLE 1

Composition of the Standing Committee

The Standing Committee is composed of a maximum of eleven members (a chairman, two vice chairmen and up to eight members) appointed by ICC for a three year renewable term.

ARTICLE 2

Meetings

A meeting of the Standing Committee shall be convened by its chairman whenever necessary.

ARTICLE 3

Function and Duties of the Standing Committee

- 1 The function of the Standing Committee is to assist the Secretariat in reviewing the qualifications of the experts to be proposed and/or appointed by the ICC International Centre for Expertise. The Standing Committee shall advise the Secretariat concerning all aspects of expertise to help to assure the quality of the Centre.
- 2 In the absence of the chairman, or otherwise at the chairman's request, one of the two vice chairmen shall be appointed by the chairman or by the Secretariat in the absence of an appointment by the chairman to fulfil the tasks of the chairman, including taking decisions pursuant to these statutes.
- 3 The Secretariat shall inform the members of the Standing Committee about all Requests for Proposal and Requests for Appointment and ask the members for their advice.

The chairman of the Standing Committee shall make the final decision on the proposal or appointment of the expert.

ICC EXPERTISE RULES

APPENDIX I STATUTES OF THE STANDING COMMITTEE OF THE ICC INTERNATIONAL CENTRE FOR EXPERTISE

- 4 In the case of a Request for Administration pursuant to Section IV:
- A) the Standing Committee shall be informed of the death or resignation of an expert as well as of any objection by the party or parties or the Centre concerning an expert, or of any other matter requiring the replacement of the expert. It shall advise the Secretariat whether the objection of the party or parties pursuant to Article 11(3) or of the Centre pursuant to Article 11(4) of the Rules for Expertise is justified and make recommendations to the chairman. The chairman shall decide on the justification of any objection and/or on the manner in which the replacement will be made;
 - B) the chairman shall fix the expert's or experts' fees and expenses in accordance with Article 3(3) of Appendix II to the Rules for Expertise; and
 - C) upon the premature termination of the expertise, the chairman shall fix the costs of the expertise pursuant to Article 3(4) of Appendix II to the Rules for Expertise.

ARTICLE 4

Confidentiality

The work of the Standing Committee and the Secretariat is of a confidential nature which must be respected by everyone who participates in that work in whatever capacity.

ICC EXPERTISE RULES

APPENDIX II SCHEDULE OF EXPERTISE COSTS

ARTICLE 1

Costs for Proposal

The non refundable amount for the proposal of an expert pursuant to the Rules for Expertise is US\$ 2,500, provided, however, that the proposal of an expert made at the request of an arbitral tribunal acting pursuant to the ICC Rules of Arbitration shall be free of charge. The non refundable amount is payable by the requesting Person(s). No request shall be processed unless accompanied by the requisite payment.

ARTICLE 2

Costs for Appointment

The non refundable amount for the appointment of an expert pursuant to the Rules for Expertise is US\$ 2,500. This amount is payable by the requesting Person(s). No request shall be processed unless accompanied by the requisite payment.

ICC EXPERTISE RULES

APPENDIX II SCHEDULE OF EXPERTISE COSTS

ARTICLE 3

Costs for Administration

- 1 The non refundable amount for sole administration of the expertise proceedings pursuant to the Rules for Expertise is US\$ 2,500. This amount is payable by the requesting Person(s). No request shall be processed unless accompanied by the requisite payment.
- 2 The administrative expenses of the Centre for the expertise proceedings shall be fixed at the Centre's discretion depending on the tasks carried out by the Centre. They shall not exceed 15% of the total expert's fees and not be less than US\$ 2,500.
- 3 The fees of the expert shall be calculated on the basis of the time reasonably spent by the expert in the expertise proceedings, at a daily rate fixed for such proceedings by the Centre in consultation with the expert and the party or parties. Such daily rate shall be reasonable in amount and shall be determined in light of the complexity of the dispute and any other relevant circumstances. The amount of reasonable expenses of the expert shall be fixed by the Centre.
- 4 If an expertise terminates before the notification of the final report, the Centre shall fix the costs of the expertise at its discretion, taking into account the stage attained by the expertise proceedings and any other relevant circumstances.
- 5 Amounts paid to the expert do not include any possible value added taxes (VAT) or other taxes or charges and imposts applicable to the expert's fees. Parties have a duty to pay any such taxes or charges; however, the recovery of any such charges or taxes is a matter solely between the expert and the party or parties.

SUGGESTED CLAUSES

SUGGESTED CLAUSES

Below are suggested clauses for use by parties who wish to have recourse to ICC expertise services under the foregoing Rules.

Optional expertise

The parties may at any time, without prejudice to any other proceedings, agree to submit any dispute arising out of or in connection with clause [X] of the present contract to administered expertise proceedings in accordance with the Rules for Expertise of the International Chamber of Commerce.

Obligation to submit dispute to expertise

In the event of any dispute arising out of or in connection with clause [X] of the present contract, the parties agree to submit the matter to administered expertise proceedings in accordance with the Rules for Expertise of the International Chamber of Commerce. [The findings of the expert shall be binding upon the parties.]

Obligation to submit dispute to expertise, followed by arbitration if required

In the event of any dispute arising out of or in connection with clause [X] of the present contract, the parties agree to submit the matter, in the first instance, to administered expertise proceedings in accordance with the Rules for Expertise of the International Chamber of Commerce. If the dispute has not been resolved through such administered expertise proceedings it shall, after the Centre's notification of the termination of the expertise proceedings, be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules of Arbitration.

ICC as appointing authority in party administered expertise

In the event of any dispute arising out of or in connection with clause [X] of the present contract, the parties agree to submit the matter to an expertise as defined in clause [Y] of the present contract. The expert shall be appointed by the International Centre for Expertise in accordance with the provisions for the appointment of experts under the Rules for Expertise of the International Chamber of Commerce.

How to use these clauses

The above are suggested clauses covering different situations. Parties should use whichever corresponds to their needs. It may be necessary or desirable for them to adapt the chosen clause to their particular circumstances.

The clauses listed above should not be considered as exhaustive. Depending on the nature of their contract and their relationship, parties may have an interest in providing for other combinations of services in their dispute resolution clause. For instance, parties who opt for ICC arbitration may wish to provide for recourse to the ICC International Centre for Expertise for the proposal of an expert, if an expert opinion is required in the course of the arbitration. It may be noted that the proposal of an expert at the request of an arbitral tribunal acting under the ICC Rules of Arbitration is free of charge.

At all times, care must be taken to avoid any risk of ambiguity in the drafting of the clause. Unclear wording causes uncertainty and delay and can hinder or even compromise the dispute resolution process.

When incorporating any of the above clauses in their contracts, parties are advised to take account of any factors, such as mandatory requirements, that may affect their enforceability under applicable law.

The inclusion of one of the above clauses in a contract is likely to facilitate dispute management. However, it is also possible for parties to file requests under the ICC Rules for Expertise at any time, even after a dispute has arisen or in the course of other dispute resolution proceedings.

Translations of the above clauses and clauses providing for other procedures and combinations of procedures can be found at www.iccexpertise.org.

ICC International Centre for ADR
www.iccexpertise.org
Contact Information Redacted



Resp. Ex. 3



International Chamber of Commerce

The world business organization

International Centre for Expertise • Centre international d'expertise

ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure

The ICC International Centre for Expertise (“Centre”), named as Dispute Resolution Service Provider (“DRSP”) in the New gTLD Dispute Resolution Procedure¹ (“Procedure”), has accepted ICANN’s invitation to be one of the DRSPs administering cases pursuant to the Procedure.

The Centre will administer these proceedings pursuant to the Procedure and the Rules for Expertise of the ICC² (“ICC Rules”), including Article 17, which shall be interpreted in accordance with this Practice Note on the Administration of Cases under the Procedure (“Practice Note”).

This Practice Note shall be considered as a supplement to the ICC Rules as mentioned by Article 4 of the Procedure.

In accordance with Article 1(d) of the Procedure, anyone filing an application for a new gTLD with ICANN has accepted the application of the ICC Rules and the Practice Note.

1. All documents and notifications shall be submitted by e-mail only to expertise@iccwbo.org, unless decided otherwise by the Centre or the expert(s);
2. Hardcopies of documents may be submitted only, when a party is explicitly invited by the Centre or the expert(s) to do so (Article 10 ICC Rules);
3. For the purpose of determining time limits, a document shall be deemed to have been submitted or a notification shall be deemed to have been made on the day it was transmitted pursuant to Article 6(c) of the Procedure (Article 10(3) ICC Rules);
4. A party wishing to file an objection shall use the model form provided by the Centre on its webpage (Article 9(3) ICC Rules);
5. A party wishing to file a response shall use the model form provided by the Centre on its webpage;

¹ Version 2012-01-11

² In force as from 1 January 2003

ICC International Centre for ADR • Centre international d'ADR de la CCI

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6. By accepting the process as defined in Article 1(d) of the Procedure, parties are deemed to have waived the requirements for the expert mission as set out in Article 12(1) of the ICC Rules;
7. The Centre shall not be required to state reasons for its procedural decisions;
8. By accepting the process as defined in Article 1(d) of the Procedure, parties are deemed to have agreed that the expert determination shall be binding upon the parties (Article 12(3) ICC Rules);
9. Challenges and replacements of an expert shall be dealt with in accordance with Article 11(4) of the ICC Rules. They must be filed within five (5) days from the notification of the appointment of the expert or from the date when the party making the challenge was informed of the facts or circumstances on which the challenge is based;
10. Pursuant to Article 13(b)(iii) of the Procedure three experts shall be appointed in proceedings involving a Limited Public Interest Objection. One expert shall act as president, the two others as co-experts;
11. Unless otherwise agreed by the parties, the ICC ADR Rules shall apply to any request for mediation made by any of the parties;
12. Unless otherwise agreed by the parties and the Centre, the expert report shall be submitted to the parties by e-mail only;
13. For the purpose of administering proceedings pursuant to the Procedure, Article 3 of Appendix II referred to in Article 14 of the ICC Rules is modified as set out in Appendix III to the Rules;
14. The non-refundable amount payable pursuant to Article 14 of the ICC Rules, shall be considered as the filing fee pursuant to Articles 7 and 11 of the Procedure. If considered appropriate to do so, the Centre can refund this amount to a party.

Resp. Ex. 4

ICC International Centre for Expertise

38 Cours Albert 1er 75008 Paris France

27 March 2014

Dear Sirs

CASE No. EXP/471/ICANN/88 SPORTACCORD (SWITZERLAND) vs/ DOT SPORT LIMITED - panellist Guido Tawil

We wrote to you respectively on 15 and 31 January requesting your assistance requiring that Dr. Guido Tawil provide details of his interest, or the interest of any member of his firm (M & M Bomchil Abogados) in the subject of commercialization of the Olympics and/or sporting arbitration cases. In particular, we requested that he disclose any links or commercial dealings he or his firm has or has had or has at any time applied for with Sport Accord or any of its member federations (including in particular the International Olympic Committee).

You declined to assist in your respective responses of 21 January and 6 February.

We conducted further investigations of our own, and draw your attention to our findings of 26 March, attached as Annex 1.

As you can see in the Annex, SportAccord and the IOC are inextricably linked. SportAccord is one of only four sports associations on the IOC website officially recognised by the IOC. Six of the eight SportAccord council members are appointed by and members of the other three officially recognised IOC sports federations. Two of the same SportAccord council members are also simultaneously members of the IOC. For over a decade, two of the Dr. Tawil's and M&M Bomchil's major clients in his professional capacity (Direc TV and TyC) benefited directly from the negotiation and acquisition of multi-million dollar Olympic broadcasting rights. On 7 February 2014, just three months after the decision in favour of SportAccord, Direc TV closed another deal to broadcast the Sochi and Rio games. An M&M Bomchil Senior Partner is the president of TyC and has a direct commercial interest in the TyC Olympic broadcast rights. All of these amount to a conflict of interest.

Based on our findings, there is little question in our mind that Dr. Tawil provided false and/or information in respect of his declaration of impartiality. He should have either recused himself or disclosed his material interests in companies in licensing agreements with the IOC. We bring to your notice our intention to write to ICANN with a Reconsideration Request, that the appointment of the Expert was made on the basis of misleading or false information.

To that extent, it is now essential that we establish how exactly the resume of Dr. Guido Tawil was selected as a panellist in respect of this matter, after the recusal of Jonathan Taylor. We find it highly unusual that a person who presented such a direct conflict of interest was selected by ICC as a suitable candidate in accordance with your rules. We would like to know the specific steps leading to

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W: www.famousfourmedia.com

the selection and the appointment of Dr. Guido Tawil by the relevant ICC Standing Committee, including but not limited to any correspondence, minutes and the CVs of other potential candidates who may have been suggested.

This is relevant of course, because the Board of ICANN still has discretion as to whether or not to accept the decision of the Expert.

Due to the gravity of the matter, we look forward to your urgent response which we would be grateful to receive within the next 24 hours.

Yours faithfully



Peter Young

Chief Legal Officer, Famous Four Media Limited



PRESS RELEASE

Famous Four Media: Statement concerning .Sport

Wednesday, 26 March 2014, Gibraltar:

Background

On 31 October 2013, Famous Four Media reported on its surprise at the decision of the Panellist Professor Dr. Guido Tawil, partner in M&M Bomchil abogados, appointed by the International Centre for Expertise, in the case of SportAccord v dot Sport Limited EXP 471/ICANN/88, being a community objection by SportAccord (a rival applicant) to the gTLD registry application of dot Sport Limited (represented by Famous Four Media).

Famous Four Media was not alone in finding the determination irregular in a number of respects. For example, Dr. Tawil re-interpreted a key ICANN standard, inexplicably turning the ordinary meaning of the term "likelihood" to "possible" in the context of deciding the 'likelihood of material detriment' to the community in question. Famous Four Media submitted a Reconsideration Request with ICANN on 8 November 2013 in which, amongst other matters, we raised the question of Dr. Guido Tawil's alignment with Sport Accord interests.

Requests for checks of appointment of Guido Tawil

Furthermore, we requested that ICANN ask the relevant Dispute Resolution Service Provider, the International Chamber of Commerce (ICC), to review its appointment of Dr. Tawil. ICANN rejected the Reconsideration Request on 8 January 2014.

Famous Four Media wrote to the ICC to question Guido Tawil directly about his links with SportAccord or the International Olympic Committee ("IOC"). The ICC declined to do so.

SportAccord and IOC

The IOC and SportAccord are inextricably linked. Three of the members of SportAccord's Executive Council are designated by the Association of Olympic Federations (Gian Franco Kasper, Pat McQuaid and Marisol Casado). On its own website Sport Accord states that it enjoys "a close collaborative relationship with the IOC. SportAccord fully recognises the IOC and the Olympic Movement's



authority; it is and will remain a loyal partner in the achievements of the Olympic Movement objectives" - see more at: <http://www.sportaccord.com/en/what-we-do/dfsu/?idContent=16323#sthash.G6CFf0Wu.dpuf>. The IOC plays a key supporting role to several project areas of SportAccord. The sharing of values and knowledge allows for a more complex approach in addressing a wide range of topics such as anti-doping, illegal betting, match-fixing, sustainable sports events, sports for all and IF recognition¹

Commercial relationship between Guido Tawil and the IOC

Famous Four Media can now reveal that it has evidence of direct commercial relationships between Guido Tawil, the M&M Bomchil law firm and the IOC. Guido Tawil is a Senior Partner of the law firm M&M Bomchil.

1. Guido Tawil, DirectTV and IOC broadcasting rights

One of Guido Tawil's 'significant clients' (according to the Chambers & Partners law directory) is DirecTV (<http://www.chambersandpartners.com/19/572/editorial/9/1>).

On 7 February 2014, just 3 months after having provided his decision in *SportAccord v dot Sport Limited EXP 471/ICANN/88* DirecTV secured a rights deal covering Latin America for the 2014 winter Olympic Games in Sochi, Russia and the 2016 summer Olympics in Rio de Janeiro, Brazil. DirecTV will broadcast the Olympics in Argentina, Chile, Colombia, Ecuador, Peru, Uruguay and Venezuela. The deal covers television, online and mobile platforms.²

2. DirectTV, Torneos y Competencias S.A. and Guido Tawil

DirectTV Latin America is the principal shareholder in **Torneos y Competencias S.A. (TyC)**, also referred as "**Torneos**"). TyC is another sports communications firm in the Latin American region and is headquartered in Buenos Aires. (http://en.wikipedia.org/wiki/Torneos_y_Competencias)

TyC is also a major client of M&M Bomchil law firm. What is more, the President of TyC is Marcelo Bombau, who is also a Senior Partner in M&M Bomchil and is therefore a business partner of Guido

¹ <http://www.sportaccord.com/en/what-we-do/dfsu/?idContent=16323>

² <http://www.sportbusiness.com/tv-sports-markets/directv-seals-olympics-deal-latin-america>



Tawil. (Source: m.chambersandpartners.com/firm/2373/9; see also http://en.wikipedia.org/wiki/Torneos_y_Competencias page last modified on 8 February 2014.)

In the M. & M. Bomchil Attorneys Firm Brochure from 2008, the Executive Director of TyC, Luis Nofal, endorses M&M Bomchil. Marcelo Bombau is also a Board Member of the Fundacion Torneos y Competencias along with the son and daughter of the Founder, Luis Nofal. TyC shareholders include DirecTV Latin America (33.2%) and Luis Nofal Sports Holding SA (by Luis Nofal, 23.53%).

3. TyC and IOC broadcasting rights

TyC has a long standing business relationship with IOC having secured broadcasting rights for the Olympics on 5 consecutive occasions since the Atlanta Games in 1996. It most recently won the Argentinian television rights for the Vancouver 2010 Winter Olympics and London 2012 Olympic Games http://www.sportspromedia.com/news/new_broadcast_deals_for_tyc.

Despite a professional career and M&M Bomchil's close personal and commercial links built with companies that have secured the highly sought after rights to broadcast the Olympics, Dr. Tawil declared no conflict of interest prior to accepting his appointment as independent arbitrator.

In the context of the foregoing research, there is no question that Dr. Guido Tawil should have declared his conflict prior to accepting the appointment and recused himself.

Famous Four Media is considering all options open to it in the light of this new evidence. In addition, Famous Four Media intends to press for greater transparency surrounding the appointment of Dr. Tawil and the rationale for his decision.

Contact

Peter Young, Chief Legal Officer

Contact Information Redacted

About Famous Four Media

Famous Four Media Limited was set up in 2011 by a small group of recognized domain name experts and successful financiers to actively provide products and services to TLD Registry operators under ICANN's new generic Top Level Domains ("gTLD") program. Drawing on the best from both Registries and Registrars, Famous Four Media's management team has extensive experience in the domain



name industry having successfully launched, operated, marketed and run generic TLDs under previous rounds and having managed some of the largest corporate and retail domain name registrars in the world. The 59 gTLD applications, that are currently under Famous Four Media Limited management, include some of the most interesting and valuable domain suffixes, such as .accountant, .BID, .DATE, .DOWNLOAD, .FAITH, .LOAN, .MEN, .REVIEW, .SCIENCE, .TRADE, .WEBCAM and .WIN

Resp. Ex. 5



INTERNATIONAL COURT OF ARBITRATION® | INTERNATIONAL CENTRE FOR ADR | LEADING DISPUTE RESOLUTION WORLDWIDE

FAMOUR FOUR MEDIA LIMITED
Mr. Peter Young
Contact Information Redacted

By email: Contact Information Redacted

29 March 2014

Dear Sir,

The Centre acknowledges receipt of your letter dated 27 March 2014, sent on behalf of DOT SPORT LIMITED, a copy of which was sent to Fadi Chehadé, Cherine Chelaby, Christine Willett from ICANN, as well as Chris LaHatte, the ICANN Ombudsman.

The Centre has taken note of the comments provided in your letter. In particular, we have taken note of your indication that further investigation with regards to the appointed Expert was conducted and your request to be informed about “*the specific steps leading to the selection of the appointment of Dr. Guido Tawil*”, who acted as the Expert in the above-mentioned matter. We have also taken note of your indication that you will “*write to ICANN with a Reconsideration Request, that the appointment of the Expert was made on the basis of misleading or false information*”.

Closure of Case

As per the Centre’s letters dated 21 January and 26 February 2014, we confirm that case EXP/471/ICANN/88 had been closed.

Basis for Challenge or Reopening

With reference to the above mentioned letters, we confirm further that neither the Procedure nor the Rules provide a basis for a reopening of the matter or a challenge of the Expert after closure of the matter.

Procedural Decisions

Further, we would like to remind you that pursuant to Point 7 of the ICC Practice Note on the Administration of Cases under New gTLD Dispute Resolution Procedure (“Practice Note”) the Centre is not required to state reasons for its procedural decisions.

Information regarding Appointment of Expert

With regard to your request to be provided with information regarding the specific steps the Centre took prior to the Expert’s appointment, we would like to provide you with the following information.

The main criteria the Centre took into account when appointing Experts in the new gTLD procedures were the candidates’ independence, impartiality and availability, as well as their procedural experience, knowledge of specific areas of law, knowledge of the English language and nationality.

.../...

INTERNATIONAL CHAMBER OF COMMERCE (ICC)
INTERNATIONAL CENTRE FOR ADR

Contact Information Redacted

Prior to the appointments in the cases related to the new gTLD, the Centre conducted a research of possible candidates. Candidates willing and available to act as Expert within the time frame set by the Procedure were invited to complete specific model documents, including a *Curriculum Vitae* (“CV”). The information requested in the CV regarded their training, qualifications, specific experience and knowledge of specific areas of law.

Based on the information provided in the CV, the Centre would then decide which candidate would be invited to submit a candidacy in a specific case.

Such candidate would then be given the information necessary to conduct a conflict check and to complete ICC’s standard Declaration of Acceptance and Statement of Independence (“DASI”). The information given to the candidate to conduct such conflict check included the information provided by the parties in the Objection and the Response with regard to the parties, their representatives and the related entities, if any.

Based on the information received from the candidates, the Centre then made a proposal to the Standing Committee with regard to the appointment of an Expert in a specific case. Together with the proposal, the Expert’s CV and DASI would be communicated to the Standing Committee.

Following the appointment, the Expert’s CV and DASI were sent to the parties. In this regard, we refer you to the Centre’s letter in case EXP/471/ICANN/88 dated 30 July 2013.

In cases where the candidate signaled in the DASI any circumstances which in the eyes of the parties might put into question his or her independence, the Centre either didn’t proceed with the appointment process of this candidate or invited the parties’ comments on the specific candidate’s DASI prior to finalizing the appointment. In the latter case, the parties were invited to submit their comments, if any, pursuant to Article 7(4) of the Rules.

Pursuant to Article 11(4) of the Rules, a party also had the possibility to object to the appointment of an Expert should it find that the Expert did not have the necessary qualifications or is not fulfilling the expert's functions in accordance with these Rules or in a timely fashion. In this regard the Practice Note set a specific time limit for such objections.

Considerations with Regard to Case EXP/471/ICANN/88

As you are aware, the Dr. Tawil submitted his DASI in which he declared “*Nothing to disclose: I am impartial and independent and intend to remain so. To the best of my knowledge, and having made due enquiry, there are no facts or circumstances, past or present, that I should disclose because they might be of such a nature as to call into question my independence in the eyes of any of the parties and no circumstances that could give rise to reasonable doubts as to my impartiality*”.

The Centre and the Standing Committee have acted accordingly. Further, while this matter was open, none of the parties objected to the appointment of the Expert.

Finally, the Centre and the Standing Committee acted in accordance with the Rules and the Procedure, as well as all other relevant requirements in this process.

Should you have any further questions, please do not hesitate to contact us.

Yours faithfully,



Hannah Tümpel
Senior Counsel and Manager
ICC International Centre for Expertise

Resp. Ex. 6



INTERNATIONAL COURT OF ARBITRATION® | INTERNATIONAL CENTRE FOR ADR | LEADING DISPUTE RESOLUTION WORLDWIDE

Ms. Christine A. Willett
Vice President, gTLD Operations
ICANN
12025 Waterfront Drive, Suite 300
Los Angeles, CA 90094-2536
USA

By e-mail: Christine.willett@icann.org

1 April 2014

Dear Ms. Willett,

The International Centre for Expertise (“Centre”) of the International Chamber of Commerce (“ICC”) writes to you with regard to Mr. LaHatte’s letter dated 31 March 2014, addressed to Mr. Cherine Chalaby, Mr. Akram Atallah and yourself, a copy of which was directly sent to the Centre.

The Centre has taken note of Mr. LaHatte’s comments concerning case EXP/471/ICANN/88 which has been administered by the Centre pursuant to the New gTLD Dispute Resolution Procedure as per the Attachment to Module 3 of ICANN’s new gTLD Applicant Guidebook (“Procedure”), as well as the ICC Rules for Expertise (“Rules”).

In particular, we have taken note of Mr. LaHatte’s “*recommendation*” to the ICANN board that “*there should be a rehearing of the objection with a different expert appointed*” (“Recommendation”).

ICC does not intend to comment on the ICANN Ombudsman’s jurisdiction on the question at stake under ICANN bylaws or on the ICANN Board’s authority to revise an individual procedural decision taken by an independent dispute resolution provider (“DRSP”). Therefore, we don’t wish to comment on whether the ICANN Board can order a DRSP such as ICC acting under the Procedure to reopen a case which has been closed or to allow the possibility to have a second Expert Determination rendered in the same matter by a second Expert.

.../...

INTERNATIONAL CHAMBER OF COMMERCE (ICC)
INTERNATIONAL CENTRE FOR ADR

Contact Information Redacted

Contact Information Redacted www.iccadr.org

This letter should therefore not be construed as an acceptance of the ICANN's Board jurisdiction to direct the Centre in an individual matter.

ICC wishes, however, to emphasize that the independence of the DRSPs is recognised by the gTLD Applicant's Guidebook and the Procedure, which clearly say that the DRSPs have to administer an independent dispute resolution process in accordance with the Procedure and the applicable DRSP Rules (Article 1(c) of the Procedure). We therefore believe that the independence of the process is in the interest of both ICANN and the parties involved.

That being said, Mr. LaHatte's letter raises several issues that are of particular concern to the Centre.

First, Mr. LaHatte has not contacted the Centre with regard to the question of the Expert's independence and impartiality in case EXP/471/ICANN/88. His letter of 31 March 2014 addressed to the ICANN Board is the first letter the Centre received from the Ombudsman with regard to the raised allegations of a lack of independence and impartiality of the Expert in this matter. Therefore, the Centre was not given the opportunity to provide Mr. LaHatte with information relevant to the issues raised in his letter or to request additional comments from the concerned Expert, Mr. Guido Tawil, prior to the issuing of the Recommendation.

Second, basic principles of due process seem not to have been adequately taken into consideration in this matter. While we note that Mr. LaHatte was in touch with one party, specifically the Applicant in this matter, no correspondence between him and the other party, *i.e.* the Objector has been brought to our attention. Obviously, all parties should have an equal opportunity to express their views on every procedural and substantive aspect before the relevant decisions are made. This is particularly relevant in a case such as the present one, where, should the Recommendation be accepted, the consequences for the parties' rights would be abnormal. We would therefore ask you to clarify whether both parties had the chance to provide their comments and were both informed of Mr. LaHatte's letter to the ICANN Board. We urge ICANN to give the Objector an opportunity to participate in this process before any decision is taken.

Third, neither the Guidebook including the Procedure nor the Rules provide for the possibility for the Centre to reopen a matter in which an Expert Determination has been rendered. In our understanding, ICANN had taken a deliberate choice to seek a one-tiered and final dispute resolution mechanism. Should ICANN decide to change the Procedure and to allow the re-opening of cases, it can easily be anticipated that the same request would be filed in other cases by the parties which did not prevail.

In light of the above, and in order to preserve the integrity of the proceedings conducted pursuant to the Rules and the Procedure, we urge the ICANN Board to carefully consider how to proceed in this matter and we reserve all comments on the content of Mr. LaHatte's Recommendation until after the ICANN Board will have decided how to proceed.

We remain at your disposal for any additional question you might have in this regard or a telephone conference should you think it is appropriate to further discuss the above-outlined issues.

.../...

Yours sincerely,



Hannah Tümpel
Senior Counsel and Manager
ICC International Centre for Expertise

c.c.:

- Mr. Akram Atallah
- Mr. Cherine Chalaby
- Mr. Chris LaHatte
- Ms. Amy Stathos
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Resp. Ex. 7

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

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These procedures supplement the International Centre for Dispute Resolution's International Arbitration Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws.

1. Definitions

In these Supplementary Procedures:

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

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

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

INDEPENDENT REVIEW or IRP refers to the procedure that takes place upon the filing of a request to review ICANN Board actions or inactions alleged to be inconsistent with ICANN's Bylaws or Articles of Incorporation

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

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

2. Scope

The ICDR will apply these Supplementary Procedures, in addition to the INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, in all cases submitted to the ICDR in connection with the Article IV, Section 3(4) of the ICANN Bylaws. In the event there is any inconsistency between these Supplementary Procedures and the RULES, these Supplementary Procedures will govern. These Supplementary Procedures and any amendment of them shall apply in the form in effect at the time the request for an INDEPENDENT REVIEW is received by the ICDR.

3. Number of Independent Review Panelists

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

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

4. Conduct of the Independent Review

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

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

5. Written Statements

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

6. Summary Dismissal

An IRP PANEL may summarily dismiss any request for INDEPENDENT REVIEW where the requestor has not demonstrated that it meets the standing requirements for initiating the INDEPENDENT REVIEW.

Summary dismissal of a request for INDEPENDENT REVIEW is also appropriate where a prior IRP on the same issue has concluded through DECLARATION.

An IRP PANEL may also dismiss a querulous, frivolous or vexatious request for INDEPENDENT REVIEW.

7. Interim Measures of Protection

An IRP PANEL may recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the IRP declaration. Where the IRP PANEL is not yet comprised, the Chair of the standing panel may provide a recommendation on the stay of any action or decision.

8. Standard of Review

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

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

9. Declarations

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

10. Form and Effect of an IRP Declaration

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

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

11. Costs

The IRP PANEL shall fix costs in its DECLARATION. The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest.

In the event the Requestor has not availed itself, in good faith, of the cooperative engagement or conciliation process, and the requestor is not successful in the Independent Review, the IRPPANEL must award ICANN all reasonable fees and costs incurred by ICANN in the IRP, including legal fees.

12. Emergency Measures of Protection

Article 37 of the RULES will not apply.

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Resp. Ex. 8



IBA Guidelines on Conflicts of Interest in International Arbitration

Approved on 22 May 2004 by the Council of the
International Bar Association

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Introduction

1. Problems of conflicts of interest increasingly challenge international arbitration. Arbitrators are often unsure about what facts need to be disclosed, and they may make different choices about disclosures than other arbitrators in the same situation. The growth of international business and the manner in which it is conducted, including interlocking corporate relationships and larger international law firms, have caused more disclosures and have created more difficult conflict of interest issues to determine. Reluctant parties have more opportunities to use challenges of arbitrators to delay arbitrations or to deny the opposing party the arbitrator of its choice. Disclosure of any relationship, no matter how minor or serious, has too often led to objections, challenge and withdrawal or removal of the arbitrator.
2. Thus, parties, arbitrators, institutions and courts face complex decisions about what to disclose and what standards to apply. In addition, institutions and courts face difficult decisions if an objection or a challenge is made after a disclosure. There is a tension between, on the one hand, the parties' right to disclosure of situations that may reasonably call into question an arbitrator's impartiality or independence and their right to a fair hearing and, on the other hand, the parties' right to select arbitrators of their choosing. Even though laws and arbitration rules provide some standards, there is a lack of detail in their guidance and of uniformity in their application. As a result, quite often members of the international arbitration community apply different standards in making decisions concerning disclosure, objections and challenges.
3. It is in the interest of everyone in the international arbitration community that international arbitration proceedings not be hindered by these growing conflicts of interest issues. The Committee on Arbitration and ADR of the International Bar Association appointed a Working Group of 19 experts¹ in international arbitration from 14 countries to study, with the intent of helping this decision-making process, national laws, judicial decisions, arbitration rules and practical considerations and applications regarding impartiality

and independence and disclosure in international arbitration. The Working Group has determined that existing standards lack sufficient clarity and uniformity in their application. It has therefore prepared these Guidelines, which set forth some General Standards and Explanatory Notes on the Standards. Moreover, the Working Group believes that greater consistency and fewer unnecessary challenges and arbitrator withdrawals and removals could be achieved by providing lists of specific situations that, in the view of the Working Group, do or do not warrant disclosure or disqualification of an arbitrator. Such lists – designated Red, Orange and Green (the ‘Application Lists’) – appear at the end of these Guidelines.²

4. The Guidelines reflect the Working Group’s understanding of the best current international practice firmly rooted in the principles expressed in the General Standards. The Working Group has based the General Standards and the Application Lists upon statutes and case law in jurisdictions and upon the judgment and experience of members of the Working Group and others involved in international commercial arbitration. The Working Group has attempted to balance the various interests of parties, representatives, arbitrators and arbitration institutions, all of whom have a responsibility for ensuring the integrity, reputation and efficiency of international commercial arbitration. In particular, the Working Group has sought and considered the views of many leading arbitration institutions, as well as corporate counsel and other persons involved in international arbitration. The Working Group also published drafts of the Guidelines and sought comments at two annual meetings of the International Bar Association and other meetings of arbitrators. While the comments received by the Working Group varied, and included some points of criticisms, the arbitration community generally supported and encouraged these efforts to help reduce the growing problems of conflicts of interests. The Working Group has studied all the comments received and has adopted many of the proposals that it has received. The Working Group is very grateful indeed for the serious considerations given to its proposals by so many institutions and individuals all over the globe and for the comments and proposals received.

5. Originally, the Working Group developed the Guidelines for international commercial arbitration. However, in the light of comments received, it realized that the Guidelines should equally apply to other types of arbitration, such as investment arbitrations (insofar as these may not be considered as commercial arbitrations).³
6. These Guidelines are not legal provisions and do not override any applicable national law or arbitral rules chosen by the parties. However, the Working Group hopes that these Guidelines will find general acceptance within the international arbitration community (as was the case with the IBA Rules on the Taking of Evidence in International Commercial Arbitration) and that they thus will help parties, practitioners, arbitrators, institutions and the courts in their decision-making process on these very important questions of impartiality, independence, disclosure, objections and challenges made in that connection. The Working Group trusts that the Guidelines will be applied with robust common sense and without pedantic and unduly formalistic interpretation. The Working Group is also publishing a Background and History, which describes the studies made by the Working Group and may be helpful in interpreting the Guidelines.
7. The IBA and the Working Group view these Guidelines as a beginning, rather than an end, of the process. The Application Lists cover many of the varied situations that commonly arise in practice, but they do not purport to be comprehensive, nor could they be. Nevertheless, the Working Group is confident that the Application Lists provide better concrete guidance than the General Standards (and certainly more than existing standards). The IBA and the Working Group seek comments on the actual use of the Guidelines, and they plan to supplement, revise and refine the Guidelines based on that practical experience.
8. In 1987, the IBA published Rules of Ethics for International Arbitrators. Those Rules cover more topics than these Guidelines, and they remain in effect as to subjects that are not discussed in the Guidelines. The Guidelines supersede the Rules of Ethics as to the matters treated here.

RESP. Ex. 8

Notes

- 1 The members of the Working Group are: (1) Henri Alvarez, Canada; (2) John Beechey, England; (3) Jim Carter, United States; (4) Emmanuel Gaillard, France; (5) Emilio Gonzales de Castilla, Mexico; (6) Bernard Hanotiau, Belgium; (7) Michael Hwang, Singapore; (8) Albert Jan van den Berg, Belgium; (9) Doug Jones, Australia; (10) Gabrielle Kaufmann-Kohler, Switzerland; (11) Arthur Marriott, England; (12) Tore Wiwen Nilsson, Sweden; (13) Hilmar Raeschke-Kessler, Germany; (14) David W. Rivkin, United States; (15) Klaus Sachs, Germany; (16) Nathalie Voser, Switzerland (Rapporteur); (17) David Williams, New Zealand; (18) Des Williams, South Africa; (19); Otto de Witt Wijnen, The Netherlands (Chair).
- 2 Detailed Background Information to the Guidelines has been published in *Business Law International* at BLI Vol 5, No 3, September 2004, pp 433-458 and is available at the IBA website www.ibanet.org
- 3 Similarly, the Working Group is of the opinion that these Guidelines should apply by analogy to civil servants and government officers who are appointed as arbitrators by States or State entities that are parties to arbitration proceedings.

Part I: General Standards Regarding Impartiality, Independence And Disclosure

(1) General Principle

Every arbitrator shall be impartial and independent of the parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated.

Explanation to General Standard 1:

The Working Group is guided by the fundamental principle in international arbitration that each arbitrator must be impartial and independent of the parties at the time he or she accepts an appointment to act as arbitrator and must remain so during the entire course of the arbitration proceedings. The Working Group considered whether this obligation should extend even during the period that the award may be challenged but has decided against this. The Working Group takes the view that the arbitrator's duty ends when the Arbitral Tribunal has rendered the final award or the proceedings have otherwise been finally terminated (eg, because of a settlement). If, after setting aside or other proceedings, the dispute is referred back to the same arbitrator, a fresh round of disclosure may be necessary.

(2) Conflicts of Interest

- (a) *An arbitrator shall decline to accept an appointment or, if the arbitration has already been commenced, refuse to continue to act as an arbitrator if he or she has any doubts as to his or her ability to be impartial or independent.*
- (b) *The same principle applies if facts or circumstances exist, or have arisen since the appointment, that, from a reasonable third person's point of view having knowledge of the relevant facts, give rise to justifiable doubts as to the arbitrator's impartiality or*

independence, unless the parties have accepted the arbitrator in accordance with the requirements set out in General Standard (4).

- (c) *Doubts are justifiable if a reasonable and informed third party would reach the conclusion that there was a likelihood that the arbitrator may be influenced by factors other than the merits of the case as presented by the parties in reaching his or her decision.*
- (d) *Justifiable doubts necessarily exist as to the arbitrator's impartiality or independence if there is an identity between a party and the arbitrator, if the arbitrator is a legal representative of a legal entity that is a party in the arbitration, or if the arbitrator has a significant financial or personal interest in the matter at stake.*

Explanation to General Standard 2:

- (a) It is the main ethical guiding principle of every arbitrator that actual bias from the arbitrator's own point of view must lead to that arbitrator declining his or her appointment. This standard should apply regardless of the stage of the proceedings. This principle is so self-evident that many national laws do not explicitly say so. See eg Article 12, UNCITRAL Model Law. The Working Group, however, has included it in the General Standards because explicit expression in these Guidelines helps to avoid confusion and to create confidence in procedures before arbitral tribunals. In addition, the Working Group believes that the broad standard of 'any doubts as to an ability to be impartial and independent' should lead to the arbitrator declining the appointment.
- (b) In order for standards to be applied as consistently as possible, the Working Group believes that the test for disqualification should be an objective one. The Working Group uses the wording 'impartiality or independence' derived from the broadly adopted Article 12 of the UNCITRAL Model Law, and the use of an appearance test, based on justifiable doubts as to the impartiality or independence of the arbitrator, as provided in Article 12(2) of the UNCITRAL Model Law, to be applied objectively (a 'reasonable third person test'). As described in the Explanation to General Standard 3(d), this standard should apply regardless of the stage of the proceedings.

- (c) Most laws and rules that apply the standard of justifiable doubts do not further define that standard. The Working Group believes that this General Standard provides some context for making this determination.
- (d) The Working Group supports the view that no one is allowed to be his or her own judge; ie, there cannot be identity between an arbitrator and a party. The Working Group believes that this situation cannot be waived by the parties. The same principle should apply to persons who are legal representatives of a legal entity that is a party in the arbitration, like board members, or who have a significant economic interest in the matter at stake. Because of the importance of this principle, this non-waivable situation is made a General Standard, and examples are provided in the non-waivable Red List.

The General Standard purposely uses the terms ‘identity’ and ‘legal representatives.’ In the light of comments received, the Working Group considered whether these terms should be extended or further defined, but decided against doing so. It realizes that there are situations in which an employee of a party or a civil servant can be in a position similar, if not identical, to the position of an official legal representative. The Working Group decided that it should suffice to state the principle.

(3) Disclosure by the Arbitrator

- (a) *If facts or circumstances exist that may, in the eyes of the parties, give rise to doubts as to the arbitrator’s impartiality or independence, the arbitrator shall disclose such facts or circumstances to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and to the co-arbitrators, if any, prior to accepting his or her appointment or, if thereafter, as soon as he or she learns about them.*
- (b) *It follows from General Standards 1 and 2(a) that an arbitrator who has made a disclosure considers himself or herself to be impartial and independent of the parties despite the disclosed facts and therefore capable of performing his or her duties as arbitrator. Otherwise, he or she would have declined the nomination or appointment at the outset or resigned.*
- (c) *Any doubt as to whether an arbitrator should disclose certain facts or circumstances should be resolved in favour of disclosure.*

- (d) *When considering whether or not facts or circumstances exist that should be disclosed, the arbitrator shall not take into account whether the arbitration proceeding is at the beginning or at a later stage.*

Explanation to General Standard 3:

- (a) General Standard 2(b) above sets out an objective test for disqualification of an arbitrator. However, because of varying considerations with respect to disclosure, the proper standard for disclosure may be different. A purely objective test for disclosure exists in the majority of the jurisdictions analyzed and in the UNCITRAL Model Law. Nevertheless, the Working Group recognizes that the parties have an interest in being fully informed about any circumstances that may be relevant in their view. Because of the strongly held views of many arbitration institutions (as reflected in their rules and as stated to the Working Group) that the disclosure test should reflect the perspectives of the parties, the Working Group in principle accepted, after much debate, a subjective approach for disclosure. The Working Group has adapted the language of Article 7(2) of the ICC Rules for this standard.

However, the Working Group believes that this principle should not be applied without limitations. Because some situations should never lead to disqualification under the objective test, such situations need not be disclosed, regardless of the parties' perspective. These limitations to the subjective test are reflected in the Green List, which lists some situations in which disclosure is not required. Similarly, the Working Group emphasizes that the two tests (objective test for disqualification and subjective test for disclosure) are clearly distinct from each other, and that a disclosure shall not automatically lead to disqualification, as reflected in General Standard 3(b). In determining what facts should be disclosed, an arbitrator should take into account all circumstances known to him or her, including to the extent known the culture and the customs of the country of which the parties are domiciled or nationals.

- (b) Disclosure is not an admission of a conflict of interest. An arbitrator who has made a disclosure to the parties considers himself or herself to be impartial and

independent of the parties, despite the disclosed facts, or else he or she would have declined the nomination or resigned. An arbitrator making disclosure thus feels capable of performing his or her duties. It is the purpose of disclosure to allow the parties to judge whether or not they agree with the evaluation of the arbitrator and, if they so wish, to explore the situation further. The Working Group hopes that the promulgation of this General Standard will eliminate the misunderstanding that disclosure demonstrates doubts sufficient to disqualify the arbitrator. Instead, any challenge should be successful only if an objective test, as set forth above, is met.

- (c) Unnecessary disclosure sometimes raises an incorrect implication in the minds of the parties that the disclosed circumstances would affect his or her impartiality or independence. Excessive disclosures thus unnecessarily undermine the parties' confidence in the process. Nevertheless, after some debate, the Working Group believes it important to provide expressly in the General Standards that in case of doubt the arbitrator should disclose. If the arbitrator feels that he or she should disclose but that professional secrecy rules or other rules of practice prevent such disclosure, he or she should not accept the appointment or should resign.
- (d) The Working Group has concluded that disclosure or disqualification (as set out in General Standard 2) should not depend on the particular stage of the arbitration. In order to determine whether the arbitrator should disclose, decline the appointment or refuse to continue to act or whether a challenge by a party should be successful, the facts and circumstances alone are relevant and not the current stage of the procedure or the consequences of the withdrawal. As a practical matter, institutions make a distinction between the commencement of an arbitration proceeding and a later stage. Also, courts tend to apply different standards. Nevertheless, the Working Group believes it important to clarify that no distinction should be made regarding the stage of the arbitral procedure. While there are practical concerns if an arbitrator must withdraw after an arbitration has commenced, a distinction based on the stage of arbitration would be inconsistent with the General Standards.

(4) Waiver by the Parties

- (a) *If, within 30 days after the receipt of any disclosure by the arbitrator or after a party learns of facts or circumstances that could constitute a potential conflict of interest for an arbitrator, a party does not raise an express objection with regard to that arbitrator, subject to paragraphs (b) and (c) of this General Standard, the party is deemed to have waived any potential conflict of interest by the arbitrator based on such facts or circumstances and may not raise any objection to such facts or circumstances at a later stage.*
- (b) *However, if facts or circumstances exist as described in General Standard 2(d), any waiver by a party or any agreement by the parties to have such a person serve as arbitrator shall be regarded as invalid.*
- (c) *A person should not serve as an arbitrator when a conflict of interest, such as those exemplified in the waivable Red List, exists. Nevertheless, such a person may accept appointment as arbitrator or continue to act as an arbitrator, if the following conditions are met:*
- (i) *All parties, all arbitrators and the arbitration institution or other appointing authority (if any) must have full knowledge of the conflict of interest; and*
 - (ii) *All parties must expressly agree that such person may serve as arbitrator despite the conflict of interest.*
- (d) *An arbitrator may assist the parties in reaching a settlement of the dispute at any stage of the proceedings. However, before doing so, the arbitrator should receive an express agreement by the parties that acting in such a manner shall not disqualify the arbitrator from continuing to serve as arbitrator. Such express agreement shall be considered to be an effective waiver of any potential conflict of interest that may arise from the arbitrator's participation in such process or from information that the arbitrator may learn in the process. If the assistance by the arbitrator does not lead to final settlement of the case, the parties remain bound by their waiver. However, consistent with General Standard 2(a) and notwithstanding such agreement, the arbitrator shall resign if, as a consequence of his or her involvement in the settlement process, the arbitrator develops doubts as to his or her ability to remain impartial or independent in the future course of the arbitration proceedings.*

Explanation to General Standard 4:

- (a) The Working Group suggests a requirement of an explicit objection by the parties within a certain time limit. In the view of the Working Group, this time limit should also apply to a party who refuses to be involved.
- (b) This General Standard is included to make General Standard 4(a) consistent with the non-waivable provisions of General Standard 2(d). Examples of such circumstances are described in the non-waivable Red List.
- (c) In a serious conflict of interest, such as those that are described by way of example in the waivable Red List, the parties may nevertheless wish to use such a person as an arbitrator. Here, party autonomy and the desire to have only impartial and independent arbitrators must be balanced. The Working Group believes persons with such a serious conflict of interests may serve as arbitrators only if the parties make fully informed, explicit waivers.
- (d) The concept of the Arbitral Tribunal assisting the parties in reaching a settlement of their dispute in the course of the arbitration proceedings is well established in some jurisdictions but not in others. Informed consent by the parties to such a process prior to its beginning should be regarded as effective waiver of a potential conflict of interest. Express consent is generally sufficient, as opposed to a consent made in writing which in certain jurisdictions requires signature. In practice, the requirement of an express waiver allows such consent to be made in the minutes or transcript of a hearing. In addition, in order to avoid parties using an arbitrator as mediator as a means of disqualifying the arbitrator, the General Standard makes clear that the waiver should remain effective if the mediation is unsuccessful. Thus, parties assume the risk of what the arbitrator may learn in the settlement process. In giving their express consent, the parties should realize the consequences of the arbitrator assisting the parties in a settlement process and agree on regulating this special position further where appropriate.

(5) Scope

These Guidelines apply equally to tribunal chairs, sole arbitrators and party-appointed arbitrators. These Guidelines do not apply to non-neutral arbitrators, who do not have an obligation to be independent and impartial, as may be permitted by some arbitration rules or national laws.

Explanation to General Standard 5:

Because each member of an Arbitral Tribunal has an obligation to be impartial and independent, the General Standards should not distinguish among sole arbitrators, party-appointed arbitrators and tribunal chairs. With regard to secretaries of Arbitral Tribunals, the Working Group takes the view that it is the responsibility of the arbitrator to ensure that the secretary is and remains impartial and independent.

Some arbitration rules and domestic laws permit party-appointed arbitrators to be non-neutral. When an arbitrator is serving in such a role, these Guidelines should not apply to him or her, since their purpose is to protect impartiality and independence.

(6) Relationships

- (a) *When considering the relevance of facts or circumstances to determine whether a potential conflict of interest exists or whether disclosure should be made, the activities of an arbitrator's law firm, if any, should be reasonably considered in each individual case. Therefore, the fact that the activities of the arbitrator's firm involve one of the parties shall not automatically constitute a source of such conflict or a reason for disclosure.*
- (b) *Similarly, if one of the parties is a legal entity which is a member of a group with which the arbitrator's firm has an involvement, such facts or circumstances should be reasonably considered in each individual case. Therefore, this fact alone shall not automatically constitute a source of a conflict of interest or a reason for disclosure.*
- (c) *If one of the parties is a legal entity, the managers, directors and members of a supervisory board of such legal entity and any person having a similar controlling influence on the legal entity shall be considered to be the equivalent of the legal entity.*

Explanation to General Standard 6:

- (a) The growing size of law firms should be taken into account as part of today's reality in international arbitration. There is a need to balance the interests of a party to use the arbitrator of its choice and the importance of maintaining confidence in the impartiality and independence of international arbitration. In the opinion of the Working Group, the arbitrator must in principle be considered as identical to his or her law firm, but nevertheless the activities of the arbitrator's firm should not automatically constitute a conflict of interest. The relevance of such activities, such as the nature, timing and scope of the work by the law firm, should be reasonably considered in each individual case. The Working Group uses the term 'involvement' rather than 'acting for' because a law firm's relevant connections with a party may include activities other than representation on a legal matter.
- (b) When a party to an arbitration is a member of a group of companies, special questions regarding conflict of interest arise. As in the prior paragraph, the Working Group believes that because individual corporate structure arrangements vary so widely an automatic rule is not appropriate. Instead, the particular circumstances of an affiliation with another entity within the same group of companies should be reasonably considered in each individual case.
- (c) The party in international arbitration is usually a legal entity. Therefore, this General Standard clarifies which individuals should be considered effectively to be that party.

(7) Duty of Arbitrator and Parties

- (a) *A party shall inform an arbitrator, the Arbitral Tribunal, the other parties and the arbitration institution or other appointing authority (if any) about any direct or indirect relationship between it (or another company of the same group of companies) and the arbitrator. The party shall do so on its own initiative before the beginning of the proceeding or as soon as it becomes aware of such relationship.*
- (b) *In order to comply with General Standard 7(a), a party shall provide any information already available to it and shall*

- perform a reasonable search of publicly available information.*
- (c) *An arbitrator is under a duty to make reasonable enquiries to investigate any potential conflict of interest, as well as any facts or circumstances that may cause his or her impartiality or independence to be questioned. Failure to disclose a potential conflict is not excused by lack of knowledge if the arbitrator makes no reasonable attempt to investigate.*

Explanation to General Standard 7:

To reduce the risk of abuse by unmeritorious challenge of an arbitrator's impartiality or independence, it is necessary that the parties disclose any relevant relationship with the arbitrator. In addition, any party or potential party to an arbitration is, at the outset, required to make a reasonable effort to ascertain and to disclose publicly available information that, applying the general standard, might affect the arbitrator's impartiality and independence. It is the arbitrator or putative arbitrator's obligation to make similar enquiries and to disclose any information that may cause his or her impartiality or independence to be called into question.

PART II: Practical Application of the General Standards

1. The Working Group believes that if the Guidelines are to have an important practical influence, they should reflect situations that are likely to occur in today's arbitration practice. The Guidelines should provide specific guidance to arbitrators, parties, institutions and courts as to what situations do or do not constitute conflicts of interest or should be disclosed.

For this purpose, the members of the Working Group analyzed their respective case law and categorized situations that can occur in the following Application Lists. These lists obviously cannot contain every situation, but they provide guidance in many circumstances, and the Working Group has sought to make them as comprehensive as possible. In all cases, the General Standards should control.

2. The Red List consists of two parts: 'a non-waivable Red List' (see General Standards 2(c) and 4(b)) and 'a waivable Red List' (see General Standard 4(c)). These lists are a non-exhaustive enumeration of specific situations which, depending on the facts of a given case, give rise to justifiable doubts as to the arbitrator's impartiality and independence; ie, in these circumstances an objective conflict of interest exists from the point of view of a reasonable third person having knowledge of the relevant facts (*see* General Standard 2(b)). The non-waivable Red List includes situations deriving from the overriding principle that no person can be his or her own judge. Therefore, disclosure of such a situation cannot cure the conflict. The waivable Red List encompasses situations that are serious but not as severe. Because of their seriousness, unlike circumstances described in the Orange List, these situations should be considered waivable only if and when the parties, being aware of the conflict of interest situation, nevertheless expressly state their willingness to have such a person act as arbitrator, as set forth in General Standard 4(c).

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3. The Orange List is a non-exhaustive enumeration of specific situations which (depending on the facts of a given case) in the eyes of the parties may give rise to justifiable doubts as to the arbitrator's impartiality or independence. The Orange List thus reflects situations that would fall under General Standard 3(a), so that the arbitrator has a duty to disclose such situations. In all these situations, the parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made. (General Standard 4(a)).
4. It should be stressed that, as stated above, such disclosure should not automatically result in a disqualification of the arbitrator; no presumption regarding disqualification should arise from a disclosure. The purpose of the disclosure is to inform the parties of a situation that they may wish to explore further in order to determine whether objectively — ie, from a reasonable third person's point of view having knowledge of the relevant facts — there is a justifiable doubt as to the arbitrator's impartiality or independence. If the conclusion is that there is no justifiable doubt, the arbitrator can act. He or she can also act if there is no timely objection by the parties or, in situations covered by the waivable Red List, a specific acceptance by the parties in accordance with General Standard 4(c). Of course, if a party challenges the appointment of the arbitrator, he or she can nevertheless act if the authority that has to rule on the challenge decides that the challenge does not meet the objective test for disqualification.
5. In addition, a later challenge based on the fact that an arbitrator did not disclose such facts or circumstances should not result automatically in either non-appointment, later disqualification or a successful challenge to any award. In the view of the Working Group, non-disclosure cannot make an arbitrator partial or lacking independence; only the facts or circumstances that he or she did not disclose can do so.
6. The Green List contains a non-exhaustive enumeration of specific situations where no appearance of, and no actual, conflict of interest exists from the relevant objective point of view. Thus, the arbitrator has no duty to disclose situations falling within the Green List. In the opinion of the Working Group, as already expressed in the Explanation to General Standard 3(a), there should be a

limit to disclosure, based on reasonableness; in some situations, an objective test should prevail over the purely subjective test of ‘the eyes of the parties.’

7. Situations falling outside the time limit used in some of the Orange List situations should generally be considered as falling in the Green List, even though they are not specifically stated. An arbitrator may nevertheless wish to make disclosure if, under the General Standards, he or she believes it to be appropriate. While there has been much debate with respect to the time limits used in the Lists, the Working Group has concluded that the limits indicated are appropriate and provide guidance where none exists now. For example, the three-year period in Orange List 3.1 may be too long in certain circumstances and too short in others, but the Working Group believes that the period is an appropriate general criterion, subject to the special circumstances of any case.
8. The borderline between the situations indicated is often thin. It can be debated whether a certain situation should be on one List of instead of another. Also, the Lists contain, for various situations, open norms like ‘significant’. The Working Group has extensively and repeatedly discussed both of these issues, in the light of comments received. It believes that the decisions reflected in the Lists reflect international principles to the best extent possible and that further definition of the norms, which should be interpreted reasonably in light of the facts and circumstances in each case, would be counter-productive.
9. There has been much debate as to whether there should be a Green List at all and also, with respect to the Red List, whether the situations on the Non-Waivable Red List should be waivable in light of party autonomy. With respect to the first question, the Working Group has maintained its decision that the subjective test for disclosure should not be the absolute criterion but that some objective thresholds should be added. With respect to the second question, the conclusion of the Working Group was that party autonomy, in this respect, has its limits.

1. Non-Waivable Red List

- 1.1. There is an identity between a party and the arbitrator, or the arbitrator is a legal representative of an entity that is a party in the arbitration.
- 1.2. The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence in one of the parties.
- 1.3. The arbitrator has a significant financial interest in one of the parties or the outcome of the case.
- 1.4. The arbitrator regularly advises the appointing party or an affiliate of the appointing party, and the arbitrator or his or her firm derives a significant financial income therefrom.

2. Waivable Red List

- 2.1. Relationship of the arbitrator to the dispute
 - 2.1.1 The arbitrator has given legal advice or provided an expert opinion on the dispute to a party or an affiliate of one of the parties.
 - 2.1.2 The arbitrator has previous involvement in the case.
- 2.2. Arbitrator's direct or indirect interest in the dispute
 - 2.2.1 The arbitrator holds shares, either directly or indirectly, in one of the parties or an affiliate of one of the parties that is privately held.
 - 2.2.2 A close family member⁴ of the arbitrator has a significant financial interest in the outcome of the dispute.
 - 2.2.3 The arbitrator or a close family member of the arbitrator has a close relationship with a third party who may be liable to recourse on the part of the unsuccessful party in the dispute.
- 2.3. Arbitrator's relationship with the parties or counsel
 - 2.3.1 The arbitrator currently represents or advises one of the parties or an affiliate of one of the parties.
 - 2.3.2 The arbitrator currently represents the lawyer or law firm acting as counsel for one of the parties.
 - 2.3.3 The arbitrator is a lawyer in the same law firm as the counsel to one of the parties.
 - 2.3.4 The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence, in an affiliate⁵ of one of the parties if

the affiliate is directly involved in the matters in dispute in the arbitration.

- 2.3.5 The arbitrator's law firm had a previous but terminated involvement in the case without the arbitrator being involved himself or herself.
- 2.3.6 The arbitrator's law firm currently has a significant commercial relationship with one of the parties or an affiliate of one of the parties.
- 2.3.7 The arbitrator regularly advises the appointing party or an affiliate of the appointing party, but neither the arbitrator nor his or her firm derives a significant financial income therefrom.
- 2.3.8 The arbitrator has a close family relationship with one of the parties or with a manager, director or member of the supervisory board or any person having a similar controlling influence in one of the parties or an affiliate of one of the parties or with a counsel representing a party.
- 2.3.9 A close family member of the arbitrator has a significant financial interest in one of the parties or an affiliate of one of the parties.

3. Orange List

- 3.1. Previous services for one of the parties or other involvement in the case
 - 3.1.1 The arbitrator has within the past three years served as counsel for one of the parties or an affiliate of one of the parties or has previously advised or been consulted by the party or an affiliate of the party making the appointment in an unrelated matter, but the arbitrator and the party or the affiliate of the party have no ongoing relationship.
 - 3.1.2 The arbitrator has within the past three years served as counsel against one of the parties or an affiliate of one of the parties in an unrelated matter.
 - 3.1.3 The arbitrator has within the past three years been appointed as arbitrator on two or more occasions by one of the parties or an affiliate of one of the parties.⁶
 - 3.1.4 The arbitrator's law firm has within the past three years acted for one of the parties or an affiliate of

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- one of the parties in an unrelated matter without the involvement of the arbitrator.
- 3.1.5 The arbitrator currently serves, or has served within the past three years, as arbitrator in another arbitration on a related issue involving one of the parties or an affiliate of one of the parties.
- 3.2. Current services for one of the parties
- 3.2.1 The arbitrator's law firm is currently rendering services to one of the parties or to an affiliate of one of the parties without creating a significant commercial relationship and without the involvement of the arbitrator.
- 3.2.2 A law firm that shares revenues or fees with the arbitrator's law firm renders services to one of the parties or an affiliate of one of the parties before the arbitral tribunal.
- 3.2.3 The arbitrator or his or her firm represents a party or an affiliate to the arbitration on a regular basis but is not involved in the current dispute.
- 3.3. Relationship between an arbitrator and another arbitrator or counsel.
- 3.3.1 The arbitrator and another arbitrator are lawyers in the same law firm.
- 3.3.2 The arbitrator and another arbitrator or the counsel for one of the parties are members of the same barristers' chambers.⁷
- 3.3.3 The arbitrator was within the past three years a partner of, or otherwise affiliated with, another arbitrator or any of the counsel in the same arbitration.
- 3.3.4 A lawyer in the arbitrator's law firm is an arbitrator in another dispute involving the same party or parties or an affiliate of one of the parties.
- 3.3.5 A close family member of the arbitrator is a partner or employee of the law firm representing one of the parties, but is not assisting with the dispute.
- 3.3.6 A close personal friendship exists between an arbitrator and a counsel of one party, as demonstrated by the fact that the arbitrator and the counsel regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organizations.

- 3.3.7 The arbitrator has within the past three years received more than three appointments by the same counsel or the same law firm.
- 3.4. Relationship between arbitrator and party and others involved in the arbitration
- 3.4.1 The arbitrator's law firm is currently acting adverse to one of the parties or an affiliate of one of the parties.
- 3.4.2 The arbitrator had been associated within the past three years with a party or an affiliate of one of the parties in a professional capacity, such as a former employee or partner.
- 3.4.3 A close personal friendship exists between an arbitrator and a manager or director or a member of the supervisory board or any person having a similar controlling influence in one of the parties or an affiliate of one of the parties or a witness or expert, as demonstrated by the fact that the arbitrator and such director, manager, other person, witness or expert regularly spend considerable time together unrelated to professional work commitments or the activities of professional associations or social organizations.
- 3.4.4 If the arbitrator is a former judge, he or she has within the past three years heard a significant case involving one of the parties.
- 3.5. Other circumstances
- 3.5.1 The arbitrator holds shares, either directly or indirectly, which by reason of number or denomination constitute a material holding in one of the parties or an affiliate of one of the parties that is publicly listed.
- 3.5.2 The arbitrator has publicly advocated a specific position regarding the case that is being arbitrated, whether in a published paper or speech or otherwise.
- 3.5.3 The arbitrator holds one position in an arbitration institution with appointing authority over the dispute.
- 3.5.4 The arbitrator is a manager, director or member of the supervisory board, or has a similar controlling influence, in an affiliate of one of the parties, where the affiliate is not directly involved in the matters in dispute in the arbitration.

4. Green List

4.1. Previously expressed legal opinions

4.1.1 The arbitrator has previously published a general opinion (such as in a law review article or public lecture) concerning an issue which also arises in the arbitration (but this opinion is not focused on the case that is being arbitrated).

4.2. Previous services against one party

4.2.1 The arbitrator's law firm has acted against one of the parties or an affiliate of one of the parties in an unrelated matter without the involvement of the arbitrator.

4.3. Current services for one of the parties

4.3.1 A firm in association or in alliance with the arbitrator's law firm, but which does not share fees or other revenues with the arbitrator's law firm, renders services to one of the parties or an affiliate of one of the parties in an unrelated matter.

4.4. Contacts with another arbitrator or with counsel for one of the parties

4.4.1 The arbitrator has a relationship with another arbitrator or with the counsel for one of the parties through membership in the same professional association or social organization.

4.4.2 The arbitrator and counsel for one of the parties or another arbitrator have previously served together as arbitrators or as co-counsel.

4.5. Contacts between the arbitrator and one of the parties

4.5.1 The arbitrator has had an initial contact with the appointing party or an affiliate of the appointing party (or the respective counsels) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve or to the names of possible candidates for a chairperson and did not address the merits or procedural aspects of the dispute.

4.5.2 The arbitrator holds an insignificant amount of shares in one of the parties or an affiliate of one of the parties, which is publicly listed.

4.5.3 The arbitrator and a manager, director or member of the supervisory board, or any person having a similar controlling influence, in one of the parties or an affiliate of one of the parties, have worked

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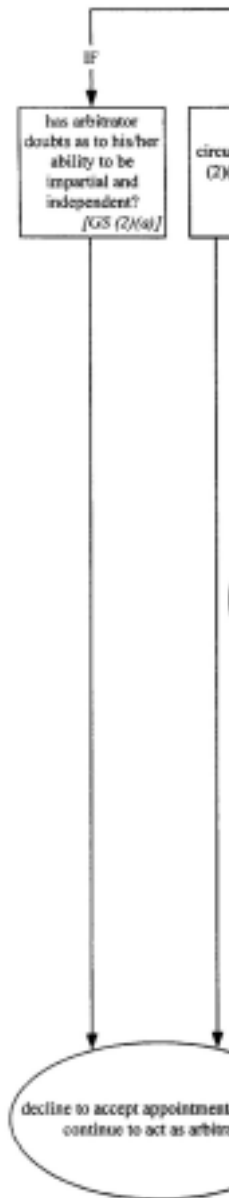
together as joint experts or in another professional capacity, including as arbitrators in the same case.

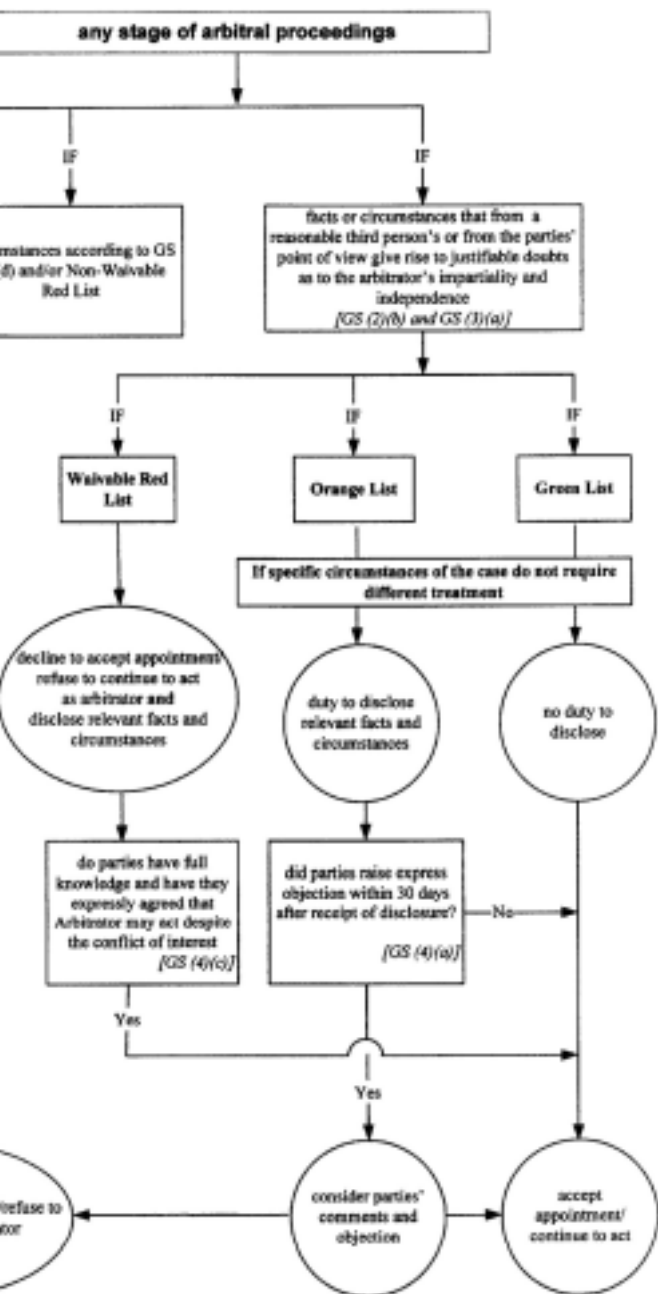
A flow chart is attached to these Guidelines for easy reference to the application of the Lists. However, it should be stressed that this is only a schematic reflection of the very complex reality. Always, the specific circumstances of the case prevail.

Notes

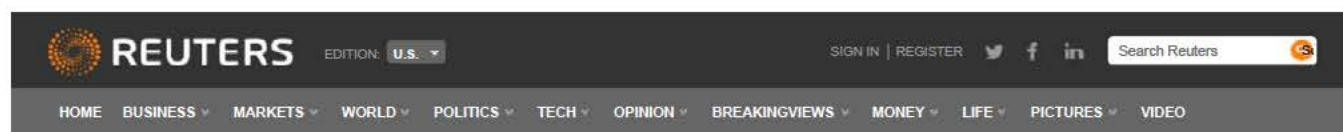
- 4 Throughout the Application Lists, the term 'close family member' refers to a spouse, sibling, child, parent or life partner.
- 5 Throughout the Application Lists, the term 'affiliate' encompasses all companies in one group of companies including the parent company.
- 6 It may be the practice in certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, no disclosure of this fact is required where all parties in the arbitration should be familiar with such custom and practice.
- 7 Issues concerning special considerations involving barristers in England are discussed in the Background Information issued by the Working Group.

Flow chart IBA Guidelines on Conflicts of Interest in International Arbitration





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Sports | Mon Apr 20, 2015 11 07am EDT

Related: SPORTS

SportAccord chief launches scathing attack on IOC

BY KAROLOS GROHMANN



The International Olympic Committee (IOC) is not transparent enough and blocks attempts for other multi-sports events, SportAccord President Marius Vizer said on Monday in a scathing attack on the IOC.

International judo federation president Vizer, whose SportAccord organization represents close to 100 Olympic and non-Olympic sports federations and organizers of multi-sports games, said IOC President Thomas Bach interfered with the autonomy of sporting bodies.

But his speech triggered instant reaction with the world athletics federation IAAF withdrawing its SportAccord membership and 15 federations, including soccer's FIFA and IAAF, signing a letter opposing the comments.

"I always tried to develop a constructive collaboration with the IOC and with President Bach," Vizer said at the opening of the SportAccord convention in Russia's Sochi.

"Unfortunately, it never became reality," he said.

"Mr President, stop blocking the SportAccord strategy in its mission to identify and organize conventions and multi-sport games. Do not try to create a theory around which sports are and are not eligible for multi-sport games," he said.

"The IOC system is expired, outdated, wrong, unfair and not at all transparent."

The IOC has had an uneasy relationship with Vizer, who took over SportAccord in 2013 and unsuccessfully attempted to set up his own international multi-sports event, the United World Games.

The IAAF said it was withdrawing its membership in protest about Vizer's remarks.

"The reason is that we are unable to agree with the contents and tone contained in the speech of the SportAccord President Mr Vizer at the opening this morning," IAAF spokesman Nick Davies said.

"So this resignation is a protest against the position taken by Mr Vizer against the IOC and his statements about the position of the international federations vis-a-vis the IOC which the IAAF cannot accept."

The IOC, which usually holds an executive board meeting during SportAccord, has scrapped it this time round.

It has also stopped bid cities for the 2022 winter Olympics from attending the event, robbing it of another attraction.

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Vizer also rejected the IOC's Agenda 2020, a set of reforms approved in December, to make the Games more attractive and relevant to fans, bid cities and sponsors. The Agenda 2020 is the brainchild of Bach.

"My impression is your opinion you have exclusively for you," German Bach said after Vizer's speech, before getting the backing of more than a dozen major federations. "We the undersigned....are expressing our disagreement on the opinions expressed this morning by the SportAccord President during the opening speech which do not reflect the views of the international federations," they said in a letter.

The federations, including football, swimming, athletics, sailing, hockey, badminton, shooting and triathlon among other, also backed Bach and his Agenda 2020 reforms.

(Editing by [Ed Osmond](#))



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Friday, May 31, 2013

Marius Vizer voted SportAccord chief

Associated Press

ST. PETERSBURG, Russia -- In a potential direct challenge to the IOC and the Olympics, judo federation chief Marius Vizer plans to organize a global world championships every four years for all international sports federations.

Vizer was elected Friday as president of SportAccord, an umbrella body representing Olympic and non-Olympic sports federations. He defeated International Rugby Board chairman Bernard Lapasset of France 52-37 on the final day of the SportAccord convention in St. Petersburg.

The 56-year-old Vizer, a Romanian-born Hungarian, succeeds former cycling federation president Hein Verbruggen, who led the umbrella organization since 2004.

Vizer won on a platform of transforming SportAccord into a more powerful and lucrative body. The centerpiece of his project is to stage a "United World Championships" every four years for Olympic and non-Olympic sports.

Vizer said he plans to organize the first event in 2017 and hopes all 91 member federations take part.

"The event will be organized in a country and events divided in different cities and different regions according to the infrastructure and different facilities necessary to every sport," Vizer said. "And, of course, in a period convenient for all international federations."

The location of the first championships hasn't been determined.

"I have the intention to establish offices worldwide and one of the countries which is part of this program can also be the first organizer," Vizer said.

Vizer's event would seem to pose a threat to the International Olympic Committee and the Olympic Games. It could also conflict with existing world championships in high-profile sports such as track and field and swimming.

But Vizer, who has been president of the International Judo Federation since 2007, sought to downplay any rivalry with the IOC.

"I don't think they have to be worried because it's a different event with a different background, a different strategy," he said. "And of course we will do everything in partnership, agreement with all international sports organizations."

Vizer said he has not discussed the plans with IOC President Jacques Rogge, who steps down in September after 12 years in the job.

Rogge told reporters that Vizer's proposal goes against the position of the Association of Summer Olympic International Federations, an umbrella body of the 28 sports in the games.

"ASOIF not later than 10 days ago came up with a declaration that the international program is already too congested and that there are too many events," Rogge said. "So this is something that has to be discussed not only between the IOC and SportAccord, but also within SportAccord itself."

Rogge said he expects Vizer to meet with his successor after September's election to discuss collaboration.

Vizer described his proposed championships as a "commercial" venture to support national federations and dispelled the notion it would compete with the Olympics.

"The Olympics are something very different and special," he said. "They are the highest value which we have today in sport."

Vizer said he has been in touch with sponsors and broadcasters about the project but declined to give details.

Resp. Ex. 11

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/486/ICANN/103

SPORTACCORD

(SWITZERLAND)

vs/

STEEL EDGE LLC

(USA)

This document is an original of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

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**EXPERT DETERMINATION OF A COMMUNITY OBJECTION TO AN APPLICATION FOR A NEW
GENERIC TOP-LEVEL DOMAIN NAME (<SPORTS>)**

The undersigned Expert, appointed by the International Centre for Expertise of the ICC to sit alone as the Expert Panel in the above-referenced matter, hereby issues the following Expert Determination resolving the above-referenced objection:

A PARTIES

1. This dispute arises under the programme established by the Internet Corporation for Assigned Names and Numbers ('ICANN') for the acquisition and operation of new generic top-level domain names ('gTLD'). Background information about that programme can be found in the ICANN Generic Names Supporting Organisation, Final Report, Introduction of New Generic Top-Level Domains, 8 August 2007 (the '**GNSO Final Report**').
2. Steel Edge LLC of Contact Information Redacted (the '**Applicant**'), represented by John M. Genga and Don C. Moody of The IP & Technology Legal Group, P.C., Contact Information Redacted, is a subsidiary of Donuts Inc., which has applied, directly or through its affiliated enterprises (including the Applicant), for more than 300 new gTLDs. The Applicant submitted a New gTLD Application to ICANN for the string <SPORTS> on 13 June 2012 (Application No. 1-1614-27785: the '**Application**').
3. SportAccord, of Contact Information Redacted (the '**Objector**'), is a Swiss association representing Olympic and non-Olympic international sports federations and organisers of international sports events. On 13 March 2013 the Objector filed a 'Community Objection' to the Application, i.e., it objected to the Application on the basis that '**there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted**'. It is that Community Objection (the '**Objection**') that is being resolved in these proceedings.
4. The Objector has also applied in the same g-TLD application round for the gTLD <SPORT>, and had a 'String Confusion Objection' against the Application sustained by a different expert on 20 August 2013, on the basis that the string <SPORTS> is confusingly similar to the string <SPORT>. As a result, the Expert's understanding is that if this Objection is not upheld, then (absent agreement between them) the Applicant's application for <SPORTS> and the Objector's application for <SPORT> will be resolved by the separate 'string contention procedure' established as part of the new gTLD programme.

B. APPLICABLE RULES AND PROCEDURAL HISTORY

5. The rules applicable to this matter are (1) the ICANN's gTLD Applicant Guidebook (v. 2012-06-04) (the '**Guidebook**'); (2) in particular, the New gTLD Dispute Resolution Procedure attached to Module 3 of the Guidebook (the '**Procedure**'); and (3) the Rules for Expertise of the ICC (the '**Rules**'), as supplemented by (4) the ICC Practice Note on the Administration of Cases under the New gTLD Dispute Resolution Procedure.
6. Under Article 3(d) of the Procedure, Community Objections are administered by the International Centre for Expertise of the ICC (the '**Centre**'). On 5 April 2013, the Centre completed its administrative review of the Objection. The Centre determined that the Objection complied with all relevant requirements, and therefore notified the Applicant of the Objection. The Applicant filed a response to the Objection on 22 May 2013 (the '**Response**').
7. Pursuant to Article 13 of the Procedure and Article 3(3) of Appendix I to the Rules, on 25 June 2013 the Centre notified the parties that the Chairman of the ICC Standing Committee had appointed on 20 June 2013 the undersigned, Jonathan Taylor (of Bird & Bird LLP, 15 Fetter Lane, London, UK) to sit alone as the Expert determining this matter, and provided them with the Expert's statement of independence and impartiality. Neither party objected to the undersigned's appointment as Expert. Further to the parties' advance payment of costs in full, the Centre confirmed that appointment on 16 July 2013 and on 26 July 2013 transferred the file to the Expert. All subsequent communications between the Parties, the Expert and the Centre were submitted electronically pursuant to Article 6(a) of the Procedure. The language of all submissions and proceedings was English pursuant to Article 5(a) of the Procedure.
8. Article 21(a) of the Procedure provides that the Centre and the Expert shall make reasonable efforts to ensure that the Expert renders his decision within 45 days of '[the constitution of the Panel](#)'. The Centre considers that the Panel is constituted when the Expert is appointed, the Parties have paid their respective advances on costs in full and the file is transmitted to the Expert. In this case, the Panel was constituted on 26 July 2013. The Centre and the Expert were accordingly to make reasonable efforts to ensure that his determination was rendered no later than 9 September 2013 (as calculated in accordance with Articles 6(e) and 6(f) of the Procedure). Pursuant to Article 21(b) of the Procedure, the Expert submitted his determination in draft form to the Centre for scrutiny as to form before it was signed.
9. Article 20 of the Procedure states that for each category of objection to applications for new gTLDs, '[\(a\) ... the Panel shall apply the standards that have been defined by ICANN. \(b\) In addition, the Panel may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable](#)'. The standards defined by ICANN as applicable to Community Objections to new g-TLD applications are set out in Module 3 of the Guidebook, and the most relevant parts are quoted below.

10. The Expert has considered carefully all of the submissions made and the materials put forward by the parties, in the Application, the Objection, and the Response, and the annexes to each of them, to determine whether the Objection meets the standards defined by ICANN. His findings are set out below, first in relation to standing and then in relation to the substantive requirements.

C. FINDINGS IN RELATION TO STANDING (SECTION 3.2.2 OF THE GUIDEBOOK)

11. A party raising a Community Objection to an application for a new gTLD must have sufficient standing to make such an objection. (Guidebook, section 3.2.2). To demonstrate that standing, it must show that it is an 'established institution associated with a clearly delineated community' that is 'strongly associated with the applied-for gTLD string'. (Guidebook, section 3.2.2 and section 3.2.2.4).
12. The Expert must therefore determine whether the Objector is (i) an established institution (ii) associated with (iii) a clearly delineated community (iv) that is strongly associated with the string <.SPORTS>. The Guidebook identifies factors that may be considered in determining these issues, and they are quoted below; but the Guidebook also explains (at section 3.2.2.4) that the Expert 'will perform a balancing of the factors listed above, as well as other relevant information, in making its determination. It is not expected that an objector must demonstrate satisfaction of each and every factor considered in order to satisfy the standing requirements'.
13. First, then, is the Objector 'an established institution'?
- 13.1 According to the Guidebook (at p.3-8), '[f]actors that may be considered in making this determination include, but are not limited to, level of global recognition of the institution; length of time the institution has been in existence; and public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty. The institution must not have been established solely in conjunction with the gTLD application process'.
- 13.2 The Objector is a not-for-profit association that has been in existence since 1967, originally under the name 'General Association of International Sports Federations' and (since 2009) under the name 'SportAccord'. (Objection Annex 8). Constituted in accordance with and registered as an association under Articles 60-79 of the Swiss Civil Code, it functions as an umbrella organisation and representative body for its members, which are international sports federations and the organisers of international sports events, recognised as such by the International Olympic Committee, the body that heads the international sports movement. (Objection Annex 7, p.2). It started with 26 members and today it has 107 members, of which 91 are international sports federations and the

other 16 are organisers of international sports events (such as the Commonwealth Games Federation). (See Objection Annex 2).

- 13.3 The Applicant does not challenge the accuracy of any of these facts. Instead, it simply asserts that 'independent evidence' of the existence of the Objector is required, and that copies of its Statutes and a membership list that the Objector drafted itself do not satisfy this requirement. (Response p.6).
- 13.4 The Applicant does not cite any authority for this proposed requirement, and in fact as far as the Expert is aware there is not such requirement. To the contrary, according to the Guidebook, an institution's existence 'may' be demonstrated by 'public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty'. (Guidebook, section 3.2.2.4). The 'may' indicates that this is optional, not mandatory, i.e., other evidence may suffice. The Objector has provided not only a copy of its Statutes (a formal legal document constituting it as an association under Swiss law) but also details of its registration as an association under Swiss law (see Objection Annex 9). More importantly, however, looking beyond the form to the substance, the Applicant has not actually disputed the Objector's account of its creation, its history, and its current membership. As a result, it is more than clear, in the Expert's view, that the Objector's existence as an established institution has been sufficiently evidenced.
14. Next, is the community on behalf of which the Objector claims to bring the objection 'a clearly delineated community'?:
- 14.1 According to the GNSO Final Report, the term 'community' 'should be interpreted broadly and will include, for example, an economic sector, a cultural community, or a linguistic community. It may be a closely related community which believes it is impacted'. (GNSO Final Report, Implementation Guideline P). According to the Guidebook, factors that may be considered in determining whether the 'community' identified by the objector is a clearly delineated community 'include, but are not limited to, ... the level of formal boundaries around the community'.
- 14.2 The Objector says that it represents 'the Sport community' (Objection p.6), i.e., 'the community of individuals and organizations who associate themselves with Sport. Sport is activity by individuals or teams of individuals, aimed at healthy exertion, improvement in performance, perfection of skill, fair competition and desirable shared experience between practitioners as well as organizers, supporters and audience'. (Objection p.8). It asserts that this community is 'highly organized on local, national and international level. It is clearly delineated by way of its organizational structures and its values'. (Objection p.6). It explains: 'At the base level, the Sport community is structured into local clubs and event organizers. At higher levels, Sport community governance is by

regional, national, and international Sport federations. The Federations collaborate at the local, national and international levels in Sport events or with event organizers, governments, the various bodies of the Olympic Movement, and within associations of federations. SportAccord itself, the Objector, is an association comprising 107 International Sport Federations. Individual practitioners of sport, sport spectators, sport fans and sport sponsors are part of the Sport community and share its values and objectives. Above all, all members of the Sport community accept the organizational principles and rules of the Sport community and the specific group or sport discipline they associate themselves with'. (Objection pp.8-9).

- 14.3 The Applicant asserts that the Objector has 'failed to identify what comprises [the community of individuals and organizations who associate themselves with Sport] or what "boundaries" surround it', and instead is holding itself out as representing a 'boundlessly wide group'. (Response p.6). That group is 'too broad, diverse and wide-ranging in interests to be "clearly delineated".' (Response p.7). The Applicant also notes that there are various parties involved in 'the world of sport' that are not affiliated to the community identified by the Objector (such as spectators, enthusiasts, and commentators, and all those connected with sports whose international federations are not in membership of the Objector), i.e., even if the 'Sport community' identified by the Objector is a valid community, it does not cover everyone in 'the world of sport'. (Response p.6).
- 14.4 The Expert agrees that 'the community of individuals and organizations who associate themselves with Sport', on its face, is a very broad group with no clearly delineated boundaries. If the Objector had stopped there, then the Expert considers that the Applicant would be right that the Objector had failed to satisfy this requirement. However, the Objector does go on to make clear (in the passages quoted at paragraph 14.2, above) that it is referring to the individuals and organisations who associate themselves with organised sport, i.e., sport that is sanctioned and conducted in accordance with a common set of rules that are applied and enforced throughout the sport through a pyramid system of governance and control that has the IOC and the international federations at its apex, member regional federations below them, member national federations below them, and regional, league, club and individual members below them.
- 14.5 In the Expert's view, this is a 'clearly delineated' community (or, as the Applicant has put it [Application p.7], a 'well-established and closely connected group of people or organizations'). Either you participate in official, sanctioned forms of the sport, thereby submitting yourself to be bound by and to comply with the uniformly applicable rules and regulations of that sport (either by becoming a member yourself, or by playing for a member team or in a sanctioned competition), or you participate in informal,

unsanctioned and unofficial forms of sport. Either you follow these official, organised forms of sport (because you are attracted by their adherence to a uniform set of rules) or you follow other (unsanctioned and unofficial) forms of sport. This is the clear distinguishing feature of members of the community identified by the Objector. As the Objector puts it, '[a]bove all, all members of the Sport community accept the organizational principles and rules of the Sport community and the specific group or sport discipline they associate themselves with'. (Objection p.9). To make the distinction clear, this 'Sport community' that the Objector refers to (i.e., individuals and organisations who have committed themselves to a common enterprise of officially-sanctioned sport, governed and regulated by international federations and their members who are recognised by the International Olympic Committee as the sole and authoritative governing bodies of their respective sports) may be more accurately referred to as the 'Organised Sports Movement'. That is how the Expert will refer to it below; and references by the Objector to the 'Sport community' are to be taken to be references to this 'Organised Sports Movement'.

- 14.6 The Applicant also asserts that the word 'sport' has an 'infinite number and variety of meanings and perceptions', which means it is impossible to delineate any community meaningfully as a 'sport' community. (Response p.5). It insists that '[s]ports is too broad a term for any person or organization to claim what would amount to ownership over it'. (Response p.6). The Expert agrees that 'the world of sport' encompasses not only the Organised Sport Movement but also individuals and organisation that prefer informal, unsanctioned and unofficial forms of sport. But that does not mean that those who prefer formal, sanctioned official forms of sport do not form a clearly delineated community. Properly understood, this is not an argument that the 'Organised Sports Movement' identified by the Objector is not clearly delineated. Rather it is a separate and distinct argument that the Organised Sports Movement is not synonymous with the gTLD in issue (<.SPORTS>). That argument is addressed at paragraph 15 below.
15. Next, is the Objector 'associated with' the Organised Sports Movement?
- 15.1 According to the Guidebook, factors that may be considered in determining whether the objector is associated with the community in question 'include, but are not limited to, the presence of mechanisms for participation in activities, membership, and leadership; institutional purpose related to the benefit of the associated community; performance of regular activities that benefit the associated community; ...'. (Guidebook p.3-8).
- 15.2 The Objector explains that its Statutes create clear mechanisms for international sports bodies to become members of its General Assembly and for individuals from those bodies to be appointed to its governing Council. (Objection p.7). It notes that 91 international federations have become members, as well as 16 organisers of international sports events. It explains that its mission and its activities include helping

its members to govern and regulate their sports more effectively by addressing issues of common interest and concern to them, including establishing permanent liaisons between the international federations, defending their common goals and objectives, preserving their autonomy, and administering programmes for good sports governance, social responsibility, doping-free sport, and the fight against match-fixing and illegal betting. (Article 2 of the SportAccord Statutes, Objection Annex 1).

15.3 The Applicant does not dispute any of the above. Therefore its assertion that the Objector 'lacks any significant relationship with a substantial portion of the community it claims to represent' (Application p.7) must be based on the premise that the Objector is claiming to represent not just the Organised Sports Movement but rather 'the [whole] world of sport'. Once it is clarified that the community that the Objector claims to represent is the Organised Sports Movement, this argument falls away: it is clear that the Objector, with its 91 international federation members, has a significant relationship with the Organised Sports Movement. Indeed, one of its functions is to represent them in matters of common interest, such as this Community Objection.

16. Finally, is the Organised Sports Movement strongly associated with the string <.SPORTS>?

16.1 This seems to the Expert to be self-evident. While there are people who prefer to participate in or follow unofficial, informal and unsanctioned forms of sport, the vast majority prefer to participate in or follow sports that are official and sanctioned by IOC-recognised international federations and their members, and so are played in accordance with their system of uniform rules and regulations. The Objector notes that it has 91 international sports federations in membership, between them those international federations have an estimated 15,000 member national federations, who have an estimated 5 million club members, and (between them) tens or hundreds of millions of individual athletes participating in their respective sports. Many million more members of this community do not participate themselves but follow their sports as fans or as commercial partners (such as sponsors) who seek to associate themselves with those sports. Therefore, although the Organised Sports Movement may not encompass the whole of 'the world of sport', it encompasses the vast majority of it. The Expert accepts the Objector's assertion (Objection p.10) that when that vast majority (many millions of organisations and individuals around the world) think of sports, they must obviously think predominantly (if not exclusively) of official, sanctioned forms of sport that are governed and regulated by means of the pyramid model described above.

16.2 The Applicant asserts that this requirement (proof that the community is 'strongly associated with the applied-for gTLD') means 'in other words' that 'the word "sports" must readily and essentially solely bring Objector's organization to mind. Merely stating that proposition reveals its folly'. (Response p.6). First, however, the 'Objector's organization' may not be the same as the 'community' that the Objector claims to

represent. But even if one reads 'Objector's community' in place of 'Objector's organization', the Expert does not agree that that is an appropriate reformulation of the requirement: 'strongly associated with' is not the same as 'readily and essentially solely brings to mind'. The word 'sports' may not 'solely bring to mind' the Organised Sports Movement, but it is 'strongly associated with' that movement.

- 16.3 Alternatively, the Applicant says the Objector must show that the applied-for gTLD is 'uniquely or nearly uniquely' identified with the community the Objector is representing. The Applicant says that the Objector does not meet this requirement, because there are people who are not in the community that the Objector purports to represent who could nevertheless be identified with 'sports'. (Response pp.6-7).
- 16.4 The Expert agrees that the Objector does not meet this alleged requirement: there are people in 'the world of sport' who are not adherents to the Organised Sports Movement. But is it actually a requirement? In support of this alleged requirement, the Applicant asserts that 'ICANN designed the community objection ... "to prevent the misappropriation of a string that uniquely or nearly uniquely identifies a well-established and closely connected group of people"' (Response at p.6), and (again) that 'ICANN envisioned' that the community on whose behalf an objection was brought would be "'uniquely or nearly uniquely" identified' by the applied-for gTLD. (Ibid. p.7). The Expert interprets these remarks as a suggestion that ICANN has said that an objector on behalf of a community must show that the applied-for gTLD must be 'uniquely or nearly uniquely' identified with the community represented by the objector. However, the quote does not come from the Guidebook; and upon inspection of the document from which the Applicant has taken the quote (ICANN's 'New gTLD Program - Summary Report and Analysis of Public Comment – Applicant Guidebook Excerpts and Explanatory Memoranda'), it transpires that the words quoted are not the words of ICANN, but rather the words of a private company called eNOM, asserting (as part of its comments on the July 2009 draft of the Guidebook) what it contends the objective of the Community Objection is (or should be). In its 'Commentary and Proposed Position' on the comments on that section of the Guidebook, ICANN does not endorse the eNOM comment, instead simply saying that 'the established criteria' (i.e., those set out in the draft Guidebook) should be used. And (as already noted) eNOM's proposed gloss on the Community Objection criteria did not make its way into the final version of the Guidebook issued in June 2012.
- 16.5 As a result, the Expert considers this submission by the Applicant, which is clearly intended to induce the Expert to reject the Objection, to be extremely misleading. This is (at the very least) unfortunate. In any event, contriving an argument to support a particular position (here, that the Objection should be rejected) creates a strong

inference that there is no valid argument for that position. More generally, it does nothing for the Applicant's credibility.

16.6 As a result, the Expert rejects the suggestion that the Objector must show that <.SPORTS> uniquely or nearly uniquely identifies the Organised Sports Movement. The fact that not every single person who participates in or 'consumes' sport in one way or another is a member of the Organised Sports Movement does not mean that the Objector does not meet the standing requirements, properly construed.

17. Based on the foregoing, the Expert determines that the Objector meets all of the standing requirements set out in the Guidebook, and therefore has standing to object to the Application.

D. FINDINGS IN RELATION TO THE SUBSTANTIVE REQUIREMENTS FOR A COMMUNITY OBJECTION (SECTION 3.5.4 OF THE GUIDEBOOK)

18. There is a presumption in favour of granting new gTLDs, and therefore a corresponding burden on those who object to an application for a new gTLD to show why the application should not be granted. (See Guidebook, section 3.5). To sustain a Community Objection, the objector must show that 'there is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted'. (Ibid., section 3.2.1). According to section 3.5.4 of the Guidebook, in order to do that, the Objector must satisfy each of the following four substantive requirements. If it does so, it has made the requisite showing; if it does not, then it has not.

D.1 The Objector must prove that the community it invokes is 'a clearly delineated community'

19. The Guidebook states: 'The objector must prove that the community expressing opposition can be regarded as a clearly delineated community. A panel could balance a number of factors to determine this, including but not limited to: the level of public recognition of the group as a community at a local and/or global level; the level of formal boundaries around the community and what persons or entities are considered to form the community; the length of time the community has been in existence; the global distribution of the community ...; and the number of people or entities that make up the community. If opposition by a number of people/entities is found, but the group represented by the objector is not determined to be a clearly delineated community, the objection will fail'.

20. The Objection proceeds on the basis that this requirement – proof that the community invoked by the Objector is a 'clearly delineated community' – is the same as the second of the standing requirements (that the Objector shows that that the community that it claims to be associated with is 'a clearly delineated community').

21. The Applicant in contrast asserts that the test here must be 'more stringent' than the test applied in the context of standing, because 'ICANN would have no reason to make "clearly delineated" a substantive element of objection if it meant nothing more than the criterion for standing. Rules "should be interpreted so as not to render one part inoperative".' (Response p.7). It therefore proposes the following test: 'Objector must show that the string itself describes a clearly delineated community', and then notes that 'sports' means many different things, and therefore does not meet that test. (Ibid. pp.7-8).
22. The Applicant's argument is superficially attractive. The Expert does not accept it, however, for the following reasons:
 - 22.1 Where a set of rules uses a specific phrase ('clearly delineated community') twice, it would be strange to interpret that phrase one way the first time it appears and another way the second time it appears. It is so counter-intuitive that absolutely compelling grounds would be required to adopt that approach.
 - 22.2 Without wishing to split hairs, technically speaking, interpreting the phrase in the same way each time it appears does not render the second requirement 'inoperative' (as the Applicant suggests) – the Objector has to show that he meets it. Rather, it renders the second requirement redundant (because it does not add anything to what has gone before). Redundancy is never ideal, but the Expert does not consider it to be a compelling reason to construe the same phrase differently in two parts of the same rule.
 - 22.3 The fact that the Applicant suggests that 'clearly delineated community' as it appears in the first substantive requirement should be construed to mean that 'Objector must show that the string itself describes a clearly delineated community' is both ironic (because the Applicant has also suggested that that is how the second standing requirement should be construed, i.e., it proposes the same redundancy that it says the Expert should avoid) and unhelpful to the Applicant (because it is a repeat of the requirement that the Applicant suggested – wrongly – was an ICANN requirement). (See paragraph 16.4 above).
 - 22.4 While there is no system of binding precedent in an expert determination, the Expert does place reliance on the fact that another expert, construing exactly the same rules, has found that the first substantive requirement adds nothing beyond what is required by the second standing requirement: see Expert Determination dated 3 September 2013 (<FLY>), Case No. EXP/493/ICANN/110, para 13.

23. As a result, since the Expert has already found (in the context of the second standing requirement) that the community that the Objector invokes in the Objection (i.e., the Organised Sports Movement) is a clearly delineated community, it follows that the Objector has also satisfied this first substantive requirement.

D.2 The Objector must prove that the opposition to the Application by the community invoked by the Objector is substantial

24. The Guidebook states (at section 3.5.4, p.3-23): 'The objector must prove substantial opposition within the community it has identified itself as representing. A panel could balance a number of factors to determine whether there is substantial opposition, including but not limited to: number of expressions of opposition relative to the composition of the community; the representative nature of entities expressing opposition; level of recognised stature or weight among sources of opposition; diversity amongst sources of expressions of opposition, including regional, subsectors of community, leadership of community, membership of community; historical defence of the community in other contexts; and costs incurred by objector in expressing opposition, including other channels the objector may have used to convey opposition. If some opposition within the community is determined, but it does not meet the standard of substantial opposition, the objection will fail'. The Applicant suggests that the Objector must establish each of these factors (Response p.8), but in fact the words quoted make it clear that these factors are not an exhaustive list of potentially relevant factors, and that therefore the Objector may meet its burden by establishing all of them, or some of them, or even none of them, provided that it establishes enough relevant factors (which may or may not be factors listed in the Guidebook) to outweigh any countervailing factors established by the Applicant.
25. The Objector states that it has received 'not just significant, but overwhelming' support for the Objection from the community it represents (i.e., the Organised Sports Movement). (Objection p.10). It notes that its Executive Committee, on whose authority the Objection has been filed, speaks for its entire membership, i.e., the 107 international sports federations/event organisers listed at Annex 2 to the Objection. It also submits with the Objection individual statements of support for the Objection from 55 of those members, as well as further statements of support from the International Olympic Committee (the body at the apex of the Olympic Movement) and the World Anti-Doping Agency (a foundation made up of representatives of both the Olympic Movement and public authorities). (Objection Annexes 3 and 4).
26. The Applicant's contention that this does not represent a 'meaningful number of expressions of opposition' from the community in question appears to be premised on that community being anyone with any interest in any form of sport. Once it is clarified that the 'Sport community' to which the Objector refers is actually the Organised Sports Movement, that contention falls away: the IOC and 55 international federations, as well as WADA, are a meaningful portion of the Organised Sports Movement by anyone's reckoning.

27. The Applicant's challenge to the 'stature of those ostensibly voicing opposition' is also rejected: the IOC, WADA and the international federations in membership of the Objector are the ultimate governing bodies of organised sport; there is no higher authority than them.
28. Accordingly, the Expert finds that the Objector has also satisfied this second substantive requirement.

D.3 The Objector must prove that there is a strong association between the community it represents and the applied-for gTLD string

29. The Guidebook states (at section 3.5.4): 'Targeting. The objector must prove a strong association between the applied-for gTLD string and the community represented by the objector. Factors that could be balanced by a panel to determine this include but are not limited to: statements contained in application; other public statements by the applicant; and associations by the public. If opposition by a community is determined, but there is no strong association between the community and the applied-for gTLD string, the objection will fail'.
30. Once again, this appears to be a repeat of one of the standing requirements, namely the third requirement that the community with which the objector is associated is itself 'strongly associated with the applied-for gTLD string in the application that is the subject of the objection'. (See paragraph 16 above). Given the identical wording, the Expert considers that, absent compelling reason, they must mean the same thing in both contexts, and therefore satisfaction of the standing requirement inevitably means satisfaction of the third substantive requirement as well. Once again, the Expert draws support for that conclusion from the fact that the expert in Expert Determination dated 3 September 2013 (<.FLY>), Case No. EXP/493/ICANN/110, para 13, took the same approach.
31. Is there anything in the submissions that the parties make on this point that compels a different conclusion in this context? The only new elements are the concepts of 'explicit targeting' and 'implicit targeting', which the parties deploy to show (or to refute) the required association between the Organised Sports Movement and <.SPORTS>. This is presumably because the relevant sub-paragraph in section 3.5.4 (quoted at paragraph 29 above) is headed 'Targeting', but then no mention is made of those concepts as factors of possible relevance to this third substantive requirement. Instead, the concepts are only specifically mentioned in the context of the fourth substantive requirement. (See paragraph 38 below). This is slightly strange, but the Expert is content to review the submissions on 'explicit targeting' and 'implicit targeting' at this stage to see if anything in them compels him to depart from the conclusion previously reached (in the context of the standing requirements) that the Organised Sports Movement is strongly associated with the <.SPORTS> gTLD.
32. According to the GNSO Final Report, 'explicit targeting means there is a description of the intended use of the TLD in the application'. This must mean 'a description of the intended use of the TLD in the application that reveals that it is targeted at' the community in question. The

Objector argues that it must be found that the Application explicitly targets the Sport community the Objector represents, because if 'there is an ICANN community, it would be contradictory to pretend that there is no such thing as a Sport community'. (Objection p.10). With respect, the Expert finds this argument very difficult to follow. In response, the Applicant states that the express purpose of applying for this gTLD is 'maximising Internet participation', to which end it will 'encourage inclusiveness in the registration policies'. It says: 'This TLD is a generic term and its second level names will be attractive to a variety of Internet users. No entity, or group of entities, has exclusive rights to own or register second level names in this TLD.' In other words, the intended use of the TLD is 'open and the string itself is not tied to a specific community'. Therefore it is not targeted at any specific community. (Application p.9). However, the Expert does not believe that it follows that because the <.SPORTS> TLD will be made available to anyone, whether they are a member of the Organised Sports Movement or not, therefore use of that TLD cannot be targeted at that community. This factor seems neutral at best.

33. According to the GNSO Final Report, 'implicitly targeting means that the objector makes an assumption of targeting or that the objector believes there may be confusion by users over its intended use'. On its face, this looks like a subjective test (i.e., does the Objector actually make such assumption/hold such belief?) rather than an objective test (is the assumption/belief reasonable?), which is slightly unusual (usually an objective approach is taken), although not unheard of. However, the Expert would normally want any subjective assumption or belief to be shown to be objectively reasonable.
34. The Objector certainly states a subjective assumption and belief that the intent and/or the effect of the use of the <.SPORTS> gTLD will be a targeting of the Organised Sports Movement. It asserts that 'modern usage' of the word 'sport' is almost exclusively associated with organised sport (i.e., what the Expert has termed the Organised Sports Movement) and thus the gTLD <.SPORTS> is clearly targeted at organised sport. (Objection p.10). It also asserts a belief that the gTLD will give associated websites 'a false sense of official sanction' that could confuse users into thinking their content is issued by or endorsed by the Organised Sports Movement. (Ibid).
35. The Applicant's response is (i) to deny that the word 'sports' mainly calls to mind organised sports (rather, it 'represents a generic form of activity and expression'); (ii) to insist that therefore <.SPORTS> is not targeted exclusively at organised sports; and (iii) to assert that the Objector has not provided any evidence to support its belief that use of the gTLD may cause confusion among Internet users as to whether or not content on the associated <.SPORTS> websites is endorsed by the Organised Sports Movement. (Application p.9).
36. The Expert has already rejected the first two of these contentions in the context of the standing requirements, including pointing out that there is no requirement that the .SPORTS gTLD must only call to mind the organised sports movement. (See paragraph 16 above). The Expert also

considers the Objector's belief that use of the gTLD may cause confusion among Internet users as to whether or not content on the associated <.SPORTS> websites is endorsed by the Organised Sports Movement to be a reasonable belief. (See paragraph 43.3, below).

37. As a result, the Expert sees no compelling reason to depart from his conclusion (in the context of the standing requirements: see paragraph 16 above) that there is 'a strong association' between the <.SPORTS> gTLD and the Organised Sports Movement.

D.4 The Objector must prove that the Application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted

38. Finally, the Guidebook states (at page 3-24): 'The objector must prove that the application creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the community to which the string may be explicitly or implicitly targeted'.

39. The Expert does not consider that the reference to 'the community to which the string may be explicitly or implicitly targeted' adds anything material to the already-discussed requirement of proof that the community that the objector is associated with is itself 'strongly associated with the applied-for gTLD string in the application that is the subject of the objection' for purposes of standing (see paragraph 16 above) and of proof of 'a strong association between the applied-for gTLD string and the community represented by the objector' in the context of the third substantive requirement (see paragraphs 29-37 above). Since the Expert has already found that those requirements are satisfied, including finding it reasonable to believe that websites using the string <.SPORTS> will be at least implicitly targeting the Organised Sports Movement (see paragraph 29 above), it follows that this part of the fourth substantive requirement is also met.

40. That leaves the question of whether the Applicant's proposed operation of the string 'creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of' the Organised Sports Movement. The Guidebook provides the following guidance on this issue (at page 3-24): 'An allegation of detriment that consists only of the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment. Factors that could be used by a panel in making this determination include but are not limited to: nature and extent of damage to the reputation of the community represented by the objector that would result from the applicant's operation of the applied-for gTLD string; evidence that the applicant is not acting or does not intend to act in accordance with the interests of the community or of users more widely, including evidence that the applicant has not proposed or does not intend to institute effective security protection for user interests; interference with the core activities of the community that would result from the applicant's operation of the applied-for gTLD string; dependence of the community on the DNS [domain name system] for its core activities; nature and extent of concrete or economic damage to the community represented by

the objector that would result from the applicant's operation of the applied-for gTLD; and level of certainty that alleged detrimental outcomes would occur'. Again, the Objector does not have to establish that each of these factors is present in order to sustain its burden. It can invoke some of these factors (and/or other factors that it can show are relevant), and those factors are then balanced against any countervailing factors established by the Applicant. However, since the Objector has the burden on this point as well, the factors it invokes must outweigh any factors invoked by the Applicant, or else the Objection must be rejected.

41. The Objector's submissions on this point (Objection pp. 11-18 and related annexes) can be summarised as follows:

41.1 First, the Objector contends that the Organised Sports Movement would suffer both economic and reputational damage from the Applicant's operation of the <.SPORTS> gTLD, because the Applicant's intended operation of the gTLD would 'disrupt Sport community policies, promote ambush marketing, increase cybersquatting and abet abuse in a way that specifically targets the Sport community'. This argument runs as follows:

41.1.1 The Organised Sports Movement already suffers serious detriment from users' abuse of the 22 existing TLDs to target and exploit the reputation and goodwill of the Sport community, including ambush marketing and brand jacking, cybersquatting and typo-squatting. (For example, the IOC alone already has to deal each year with between 5,000 and 10,000 domain name registrations that infringe its rights [Objection Annex 11], and approximately 4,500 Olympic-related domains are removed from major domain auction services each year; while the IOC has been forced to register and maintain 'hundreds of defensive registrations in many existing TLDs'). Another well-established type of abuse is the misuse of sports themes for pornography (e.g., Olympicporn.com).

41.1.2 The <.SPORTS> gTLD will be an even more effective means for abusers to target and exploit the reputation and goodwill of the Organised Sports Movement, because that TLD 'convey[s] implicit credibility' and will give the related websites 'a false sense of official sanction'. The Objector asserts that this 'would inevitably erode consumer trust by misleading individuals through unofficial content'. For example, if users were to use the 'false sense of official sanction' arising from the <.SPORTS> gTLD to give credibility to websites selling tickets to sports events that they do not have and/or do not have the right to re-sell, so that the purchaser is defrauded out of his or her money, which would 'destroy consumer confidence and trust in the respective organizers and jeopardise events'.

41.2 The Objector also contends that the Applicant's proposed operation of the <.SPORTS> gTLD would interfere with the Organised Sports Movement's use of the Internet to promote the integrity of organised sport and to promote public confidence in the ability of the Organised Sports Movement to preserve that integrity. This argument runs as follows:

41.2.1 The Organised Sports Movement relies on mass communication via the Internet on issues such as anti-doping, anti-drug, anti-racism, ticket scalping and gambling to protect public confidence in the integrity of sport and in the ability of sports governing bodies to protect that integrity.

41.2.2 The Objector notes that the Applicant's policy of unrestricted access would inevitably mean that 'a large number of the .sport(s) domain holders in such a regime would be outside of the sport community', using the gTLD not only to exploit improperly the goodwill and other assets of the Organised Sports Movement, but also in ways that will distort and contradict the messages that the Organised Sports Movement is seeking to send about the integrity and values of (organised) sport.

41.2.3 Visitors to <.SPORTS> websites may perceive, because of that TLD, that the content of those sites is linked to, and even sanctioned by, the Organised Sports Movement. Unscrupulous users may take advantage of this to suggest, for example, that doping products (e.g., supplements) or gambling products that they are selling are connected officially to/endorsed by the Organised Sports Movement. This may cause athletes to believe that substances such as steroids are officially sanctioned when their use is in fact prohibited; and/or may lead followers of a sport to believe that its governing bodies are not in fact firmly opposed to activities that have the potential to corrupt that sport (such as certain inappropriate or illegal gambling activities), and so to lose confidence in the strength and commitment to integrity of the Organised Sports Movement.

41.2.4 The Objector asserts that the sheer number of existing domain names containing doping-related keywords (Objection Annex 15) illustrates the risk to the credibility of sport that a sports-specific gTLD would present.

41.2.5 The Objector also highlights the risk of racist content or innuendo appearing with a 'false aura of official sanction', and the difficulty in ensuring removal of such content due to a lack of legal mechanisms and practical access. It is also concerned about 'content inducing dangerous and violent behaviour'.

- 41.3 The Objector asserts that sports bodies 'would have considerable difficulties in getting such content removed because of a lack of legal instruments and practical access', i.e., because the existing ICANN anti-abuse policies are of limited effectiveness, being expensive, burdensome, and impracticable in many respects. For example, 'IOC has filed numerous UDRP complaints. However, UDRP proceedings are too costly for systematic use'. It is therefore concerned about creating many further opportunities for abuse (indeed, more targeted abuse) through the <.SPORTS> gTLD. It says the only way to prevent abuse of the kind it has identified would be to submit the gTLD operator to 'a sport-specific acceptable use policy covering general sports values and sport-related economic interests, such as safeguards against ambush marketing', and to make it accountable to the Sport community for compliance with that policy, by means of 'direct oversight before and after domain registration, as well as a path for rapid corrective or disciplinary action ... '. Otherwise, for example, 'an unaccountable operator of a .sport TLD will not be willing or able to monitor its name space with respect to doping-abetting content' and is therefore 'certain to encumber community efforts against doping'.
- 41.4 The Objector notes that the Applicant 'lack[s] accountability to the Sport community' and that 'the TLD policies described in [the Application] are devoid of any oversight mechanism specific to the Sport community'. It asserts that, rather than having an interest in 'protecting the official message and image of the [Organised Sport Movement]', the Applicant 'has a pecuniary interest in maximising the registration of second-level domain names, including unauthorized registrations of community stakeholders' names, variants of those names, and misspellings of those names'. It notes in this regard that Donuts (the Applicant's parent company) is closely associated with Demand Media Group (Response Exhibit 1, Q.23), which has had 22 rulings against it since September 2008 for bad faith domain name registrations, typo-squatting, and cyber-squatting. (Objection Annex 12, email dated 28.07.12, para 7). It notes that Demand Media Group has an option to 107 of the gTLDs for which Donuts and its affiliates have applied. (Objection p.26).
- 41.5 The Objector asserts that, as a result of the above, the Olympic Sports Movement will suffer substantial monetary damage, but also reputational damage, and damage to the values and image of sport (Objection p.17, and Annex 13); ICANN and internet governance capabilities will be overloaded; and society will lose the benefits that could have been achieved through responsible management, as well as an opportunity to create a 'powerful organizational tool' (just as the .edu TLD was harnessed in the US for educational benefits rather than monetised). The Objector asserts that these effects will be 'largely irreversible', in that they will 'destroy the image of the domain', and 'it will not be possible to clean it up and get the public to "unlearn" the perception of abuse and chaos'.

42. In response, the Appellant makes the following submissions:
- 42.1 The Applicant acknowledges the risks of cyber-squatting and similar forms of abuse, but asserts that it is 'committed to safeguards that surpass ICANN's requirements for the new TLDs' that will 'reduce the extent of bad behaviour seen in large registries now'. (Response Annex 10). It asserts that the Objector 'tenders not a shred of evidence that Applicant's proposed string would create any greater or different harm to the sport "community" than it apparently experiences under the existing regime'. (Response p.10). In other words, if harm arises, it will not have been caused by the <.SPORTS> gTLD. (Ibid.).
- 42.2 The Applicant openly acknowledges and indeed seeks to make a virtue out of the fact that it 'will not limit eligibility or otherwise exclude legitimate registrants in second level names'. (Response Annex 3 p.12). For example, it says that it would give access to the <.SPORTS> gTLD to 'bloggers, athletes, enthusiasts, and even those not specifically identified with the term'. (Response p.4). However, the Applicant disagrees with the Objector that this will cause material detriment to the Organised Sports Movement. In particular, it says that it will put in place registration policies that include the 14 mechanisms required by ICANN for the new gTLDs, but also 'eight innovative and forceful mechanisms and resources that far exceed [those] already powerful protections', to 'address the exact type of concerns raised by Objector'. (Response tab 3, Exh 1). It asserts that these mechanisms 'protect and eradicate abuse, rather than attempting to do so by limiting registrant eligibility'. (Response tab 3 Exhibit 1, p.11).
- 42.3 The Applicant acknowledges these policies will not prevent the Olympic Sports Movement losing domain names corresponding to non-trademark protected individuals, events and organisations to speculators, but contends that this is a 'reasonable consequence rather than a detriment' within the meaning of the Guidebook. (Response p.12). It argues that it would be improper to give recognition in this context to anything that is not already protected by intellectual property law, and that imposing registration restrictions as suggested by the Objector would 'hinder free speech, competition and innovation in the namespace', which would be contrary to the objectives of ICANN. (Response p.11).
- 42.4 In summary, the Applicant contends that 'the world of sport has not collapsed as a result of the Internet, and will not do so with a new gTLD that provides greater protections than cyberspace has ever known'. (Response p.13). It also asserts: 'In essence, the Objection contends that harm will result unless Objector runs the domain. That notion stands for the one proposition that ICANN has expressly stated cannot form the basis for a finding of detriment: "An allegation of detriment that consist of only the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment"'. (Response p.5).

43. The Expert's analysis of the foregoing factors identified by the parties is as follows:

43.1 The Applicant does not dispute that use of current TLDs includes abusive use that unfairly prejudices the intellectual property rights of members of the Organised Sports Movement. It simply says that there is no evidence that such abuse will be 'any greater or different' if the Applicant is delegated the <.SPORTS> gTLD. That does not seem to the Expert to be a very attractive argument. The test is whether the Objector can show any detriment from the proposed use of the new gTLD; there is nothing to suggest that detriment of the type that it already suffers from abuse of the existing TLDs should be excluded for these purposes. And in any event, the creation of the new TLD would at the very least create many more opportunities for such abuse (and a concomitantly increased burden on the Organised Sports Movement to identify and try to take action against such abuse). And if it is correct that the new gTLD risks giving new sites and their content an aura of official sanction (which the Expert finds to be a reasonable assertion: see paragraph 43.3 below), then not only are there more opportunities for abuse, but the risk of detriment is greater from them. As a result, the Expert considers that this factor tips in favour of the Objector.

43.2 Furthermore, the Applicant openly acknowledges that it will grant use of domain names corresponding to non-trademark protected individuals, events and organisations to speculators. It simply says that this is not a detriment but a 'reasonable consequence' of the freedoms contemplated by the new gTLD programme. This seems to the Expert to boil down to the following question: assuming that such conduct does not infringe a formal legal 'right' of those members of the Organised Sports Movement, does the Organised Sports Movement nevertheless have a 'legitimate interest' in preventing speculators creating and exploiting an unauthorised association between their websites and the individuals, events and organisations in question for their own commercial and other purposes, and to the detriment of those individuals, events and organisations? The Expert sees no reason why this should not be recognised as a 'legitimate interest' in this context. The Applicant's assertion that doing so would 'hinder free speech, competition and innovation in the namespace' seems to the Expert to beg the question. The purpose of the new gTLD programme is indeed stated to be to promote free speech, competition and innovation. However, the creation of the 'Community Objection' mechanism reflects an acknowledgement that those are not absolute values, but instead can and should be subject to proportionate restrictions where necessary to avoid detriment to the rights and legitimate interests of a community. The balance is struck by putting the burden of proof on the party making the objection on behalf of the community to satisfy each of the elements of the Community Objection. Therefore, it adds nothing to say that the Objector's stance would 'hinder free speech, competition and innovation in the namespace'. The only question is whether the required likelihood of detriment to the rights or legitimate interests of the Organised Sports Movement has

been shown. If so, then any hindrance of free speech, competition and innovation that follows is necessarily justified, and so not a reason to reject the objection.

43.3 The Expert also considers that the Organised Sports Movement has a 'legitimate interest' in preserving the integrity of sport and the authenticity of results, and in ensuring the public has confidence in its readiness, willingness and ability to do so. Indeed, unless sport is not only 'straight' but seen to be 'straight', then the public's confidence in uncertainty of outcome – the very essence of sport – will be compromised, which would be nothing short of disastrous for the Organised Sports Movement. Furthermore, the Expert agrees with the Objector that users of current TLDs (particularly supplement companies) often do seek to suggest that the content of their sites and/or the products they are selling are officially endorsed by the Organised Sports Movement. (See, e.g., Kendrick v. ITE, CAS 2011/A/2518, award dated 10 November 2011, where an athlete was misled into taking a supplement that contained a prohibited substance by the false claim on the manufacturer's website that the supplement had been 'approved' by the 'World Anti-Doping Association' [sic]). Therefore, if the Objector is correct that the <.SPORTS> gTLD 'convey[s] implicit credibility' and will give the related websites 'a false sense of official sanction', the Expert would agree that a likelihood of detriment to the legitimate interests of the Organised Sports Movement has been established. The Expert has already found that there is a 'strong association' between the <.SPORTS> gTLD and the Organised Sports Movement, in that 'when that vast majority (many millions of organisations and individuals around the world) think of sports, they think of official, sanctioned forms of sport that are governed and regulated by means of the pyramid model described above'. (See paragraph 16.1 above). That does not automatically mean that they would assume that sites (or content on sites) with that string in their domain name would necessarily be 'official' or 'sanctioned' content, but it is clearly reasonable to think there is a risk that they might. For example, it is easy to see that a website with the domain name 'olympic.sports' might be perceived by Internet users as having an aura of authenticity and official association with the International Olympic Committee and/or the Olympic Games. As a result, this is also a factor that tilts in favour of finding the detriment requirement met.

43.4 The Applicant does not make good its assertion that its intended registration policies will 'address the exact type of concerns raised by Objector'. In fact, the 'abuse' that the Applicant seeks to prevent in its policies appears to be confined to infringements of intellectual property rights and 'fraudulent activity' such as distribution of malware, phishing, DNS hijacking or poisoning and spam. (Response p.10 and Exh. 1 Q28.3 [TLD Anti-Abuse Policy]). As noted above, the Applicant openly says it would not prevent ambush marketing through unauthorised use of famous names (because it does not regard that as abusive). (See paragraph 42.3 above). Similarly, there is

nothing in the Applicant's policies that would prevent users from operating their sites and/or putting content on them in a manner that falsely suggested an association with or endorsement by the Organised Sports Movement. The Expert therefore accepts the Objector's submission that the Applicant 'will not be willing or able to monitor its name space with respect to doping-abetting content', thereby undermining the Organised Sports Movement's ability to fight against doping in sport. It is also relevant in this regard that ICANN has said that '[w]hile ICANN will enforce obligations undertaken by the registry operator in its agreement with ICANN, it is not ICANN's duty to supervise the operation of new gTLDs and to ensure that communities are not hurt by those gTLDs'. (ICANN's 'New gTLD Program - Summary Report and Analysis of Public Comment – Applicant Guidebook Excerpts and Explanatory Memoranda', p.21).

- 43.5 The Expert agrees with the Applicant that the Objector's assessment of economic and other losses (including opportunity costs) is not particularly compelling. In particular, the Objector has not been able to come up with a meaningful estimate of the economic damage it would suffer if the Application were granted. That is not surprising, however, given the nature of the potential detriment identified by the Objector. Furthermore, and in any event, the detriment test under section 3.5.4 of the Guidebook is that of 'a likelihood of material detriment', not an actual, quantified damage. The Expert does not regard this as a sufficiently strong negative factor to outweigh the factors set out above.
- 43.6 Finally, the Applicant is correct that the Guidebook states '[a]n allegation of detriment that consists of only the applicant being delegated the string instead of the objector will not be sufficient for a finding of material detriment'. However, as far as the Expert is aware, the Objector has not applied to have the gTLD <.SPORTS> delegated to it (only <.SPORT>). (Objection p.10). And in any event, the sorts of protections that the Objector says would be required in connection with the exploitation of the <.SPORTS> gTLD (i.e., a sports-specific acceptable use policy and a mechanism for making the operator of the gTLD accountable to the Organised Sports Movement for enforcing that policy) seem to the Expert to be measures that could be put in place by any entity, not only an entity that was part of the Organised Sports Movement. As the Expert reads the Objection, the Objector does not suggest otherwise.
44. Balancing all of these factors, the Expert considers that the factors of detriment to the rights and legitimate interests of the Organised Sports Movement that have been established by the Objector outweigh the contrary factors cited by the Applicant, and therefore the Objector has met its burden of proof on this issue as well.

E. DETERMINATION

45. For the reasons set out above, and in accordance with Article 21(d) of the Procedure, the Expert renders the following Expert Determination:

- i. The objection is successful and therefore the Objector is the prevailing party.
- ii. The Centre shall refund the Objector's advance payment of costs to the Objector in accordance with Article 14(e) of the Procedure.



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Jonathan Taylor, Expert

Dated: 21 January 2014