

ICANN 55 PUBLIC BOARD MEETING

Reference Materials



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ICANN Investment policy

INTRODUCTION

This statement of investment policy has been adopted by the Board of Directors of the Internet Corporation for Assigned Names and Numbers (ICANN) to provide guidelines for the investment of cash on hand (funds).

For the purposes of managing investment risk and to optimize potential returns within acceptable risk parameters, the investment of funds will be divided into two pools of assets.

- The **Operating Fund**, sometimes called the Working Capital Fund, is used to fund day to day operations of ICANN including all items in the ICANN Board approved annual budget. In general, the Operating Fund is set at a level necessary to fund a maximum of three months of expected operating expenses. Amounts in the Operating Fund that exceed this limit shall be transferred to the Reserve Fund.
- The **Reserve Fund** is only used for emergencies. The Reserve Fund is a "rainy day fund." The use of any Reserve Fund is restricted by actions of the Board of Directors. The Board of Directors has delegated to the Board Finance Committee (BFC) the authority to act on behalf of the Board of Directors to release funds from the Reserve Fund to pay for items of an emergency nature.

PURPOSE OF THE ICANN INVESTMENT POLICY

The purpose of the ICANN Investment Policy is to:

1. Describe the philosophy of the Investment Policy that will guide investment management decisions.
2. Define and assign the responsibilities of all involved parties including the ICANN Board of Directors, the ICANN Chief Financial Officer (CFO) and staff, and the Investment Management Company (as defined below).
3. Describe the general investment principles for investment of the funds including the size of the funds, the suggested levels of risk, the expected return on investment, the suggested liquidity level, the expected asset allocation strategy, the expected global focus, and suggested allowable and restricted asset classes.
4. Establish a basis for evaluating and reporting investment results and compliance with the Investment Policy.
5. Clarify the methods by which the Reserve Fund will be funded as well as the process by which the Reserve Fund can be accessed for emergency requirements.

PHILOSOPHY OF THE ICANN INVESTMENT POLICY

The philosophy of the ICANN Investment Policy is to:

- Ensure that funds held by ICANN are invested wisely with due fiduciary care.
- Ensure that funds are safe and held securely to minimize risk of loss to the fullest extent possible.
- Ensure that funds earn appropriate returns commensurate with the level of risk and real rates of return that can offset the effects of inflation as measured by the CPI over a market cycle.

- Ensure that funds remain liquid enough to be accessible to handle the needs of ICANN's operations (Operating Fund) and the needs of ICANN in case of an emergency, if any, (Reserve Fund).
- Ensure clarity on the amounts to be held in the funds.
- Ensure clarity on the method(s) to access the funds for expenditure.

AREAS OF RESPONSIBILITY

Board of Directors

The Board of Directors of ICANN shall direct the ICANN Investment Policy, including:

- Create and approve the ICANN Investment Policy.
- Maintain and update the Investment Policy periodically (at least annually).
- Delegate to the Board Finance Committee (BFC) specific duties and responsibilities related to the monitoring of the Investment Policy, including:
 - Approve of the Investment Management Company.
 - Direct the CFO to monitor the Investment Management Company, monitor the performance of the funds, and the compliance with the Investment Policy.
 - Periodically monitor the performance of the Reserve Fund and Operating Fund.
 - Monitor the compliance with the Investment Policy.
 - Periodically evaluate the current risk tolerances and investment objectives.
 - Periodically report to the full board the compliance with the Investment Policy.
 - Approve disbursements from the Reserve Fund.

ICANN Staff and CFO

ICANN's CFO, with the assistance of ICANN staff, shall oversee the administration of the Investment Policy, including:

- Monitor and direct all activities related to the Operating Fund including funding daily operations.
- Recommend the Investment Management Company.
- Monitor the activities of the Investment Management Company.
- Ensure that any amounts not required for the Operating Fund are transferred to the Reserve Fund.
- Respond to monthly status reports on the performance of the Reserve Fund.
- Periodically report to the Board of Directors on the performance of the Reserve Fund.
- Periodically report to the Board of Directors on compliance with Investment Policy.

The Investment Management Company

The Investment Management Company shall oversee the Reserve Fund including:

- Hold fiduciary responsibility for all assets in the Reserve Fund.
- Comply with all guidelines and limitations set forth in the Investment Policy.
- Manage, analyze and oversee the execution of investment decisions including buying, selling, and holding of individual securities for all asset types in all asset classes.
- Report monthly to the CFO on the performance of the Reserve Fund and compliance with the Investment Policy.
- Communicate any major changes to economic outlook, investment strategy, or any other factors which affect implementation of investment process.
- Be available to report periodically to the Board of Directors on the performance results of the Reserve Fund including comparisons with approved industry benchmarks.

- Be available to report periodically to the Board of Directors on the compliance with the Investment Policy.
- Inform the Board of Directors regarding any significant changes including changes to the investment management company, its financial strength, significant decline in assets under management, SEC investigations, material litigation, changes in portfolio management personnel, ownership structure, investment philosophy, and investment processes.

GENERAL INVESTMENT PRINCIPLES

Pools of Funds

ICANN's investment funds will consist of two pools of funds: the Operating Fund and the Reserve Fund.

The Operating Fund, sometimes called the Working Capital Fund, is the pool of funds that is used for ICANN's day-to-day operations. The Operating Fund will not be Board restricted and will be used to fund operating expenses of ICANN, including payroll and accounts payable. All disbursements at ICANN comply with Board-approved disbursement guidelines and financial controls. The Operating Fund will be replenished by ICANN's revenues, and can also be replenished by the Reserve Fund if the Board determines that there is an emergency requirement.

The Reserve Fund is the pool of funds held by ICANN for "rainy day" emergencies. Disbursements out of the Reserve Fund are restricted by the Board.

Size of Funds

The size of the Operating Fund and the Reserve Fund shall be evaluated and established on an annual basis as part of the budget preparation process.

The Operating Fund shall contain enough funds to cover ICANN's expected expenditures for three months. Periodically, any funds in excess of this will be transferred to the Reserve Fund.

The Reserve Fund shall contain any amounts not contained in the Operating Fund. Any surplus funds will be used to build up the Reserve Fund to a balance sufficient to cover an emergency requirement. The Reserve Fund is expected to reach and maintain a level of funds to maintain a minimum of 12 months of expected expenditures.

Investment Horizon and Objectives

The Operating Fund has a short-term horizon and a principal preservation objective to meet working capital needs. The Reserve Fund has a medium investment horizon and ~~aaa conservative-moderate~~ investment objective to enhance return on assets.

Guidelines: Risk Level of Funds

Although there are many ways to measure risk, this investment policy primarily measures risk as the possibility of losing nominal asset value in a fund over a given period of time. ~~Past results are not a guarantee of future results, but historical performance and volatility measures are~~ ~~is an~~ indicators of its risk profile. A fund with ~~no risk or~~ very little risk would never incur losses as measured over any historical period. A fund with moderately low risk would not incur losses over most historical periods. A fund with greater risk might have incurred losses in certain historical periods.

The Operating Fund will have a conservative risk profile focusing on capital preservation with minimal principal fluctuation.

The Reserve Fund will have a conservative-moderate -risk profile- that is moderately low risk. The historical performance of the fund should have a very low probability of losses over any given five-year period.

Expected Investment Return (%) of Funds

Funds shall be invested in assets that are expected to yield the greatest investment return given the risk profile and other parameters of the fund. Historical performance and volatility measures are indicators of its risk profile and how the fund may perform under different market conditions.

The Operating Fund is expected to earn rates of return commensurate with a principal preservation fund. The three-month US Treasury Bill is therefore considered an appropriate benchmark for a nominal rate of return.

The Reserve Fund is expected to earn rates of return commensurate with a moderately low risk portfolio. The performance objective of the investments is to provide a total investment return in excess of the performance of the agreed upon composite benchmark. A comparison shall be made with relevant market benchmarks as well as the composite returns for other peer groups with similar philosophies. The appropriate benchmark is a function of the asset classification currently in place and may consist of a balanced or weighted average index underlying such asset classes. The total return is expected to rank above the median versus a manager universe with a similar asset mix.

The Reserve Fund should preserve the real (inflation-adjusted) purchasing power of the Reserve Fund's assets while maximizing real income. Real income is defined as the sum of dividends, interest, and realized gains/losses less the inflation rate as measured by CPI (Consumer Price Index) over a market cycle or rolling 10- year period. for the relevant time period.

Guidelines: Liquidity Level of Funds

Liquidity is a measure of whether the assets of the fund can be sold for cash without a significant realized principal loss. A highly liquid fund would not suffer losses even if there were an immediate sale of the assets of the fund. A moderately liquid fund would not suffer significant losses even if the assets were sold over a period of time of less than one year.

The Operating Fund will be highly liquid and only invest in cash, cash equivalents, or money market instruments (including certificates of deposits, commercial paper or SEC 2a-7 money market funds.) All funds are daily valued and can be accessed within 48 hours without any significant loss in value.

The Reserve Fund is suggested to be moderately liquid. Reserve Fund assets do not need to be sold for cash except in an emergency. The Reserve Fund may invest in money market instruments and SEC 2a-7 money market funds. It is suggested that the Reserve Fund be liquid enough to realize one-third of its value without significant loss within 30 days, two-thirds of its value without significant loss within two months, and all of its value without significant loss within six months. A significant loss is defined as more than 15% realized loss. Losses in excess require BFC and Board approval.

Permissible Investment Vehicles

The Investment Management Company may recommend investments in actively managed and/or passive strategies that invest in marketable securities. These strategies may be institutional mutual funds, collective

trusts or commingled funds. The underlying security holdings must be transparent. The strategies must be non-lending portfolios.

Expected Asset Classification/Portfolio Mix and Allocation Constraints of Funds

The asset classification/portfolio mix guides the Investment Management Company to create a portfolio that best reflects the risk posture, expected return, and other investment parameters described in the Investment Policy. The categories of classification described, and the measurements expected to be complied with, in this Investment Policy are a percentage of cash equivalents, a percentage of bonds, and a percentage of equities. In addition, the allocation constraints allow the Investment Manager to rebalance the portfolio within a risk-controlled framework and should avoid market-timing changes. Rebalancing should not incur losses or administrative burdens. Portfolio rebalancing is required at least semi-annually and may be as frequent as quarterly or monthly.

The Operating Fund's asset classification is 100% cash, cash equivalents, ~~or~~ money market instruments or SEC 2a-7 money market fund. The constraint is zero.

The Reserve Fund's Normal Asset Allocation is 65% Global Bonds and 35% Global Equities and Real Estate. The Asset Allocation is a long term asset allocation target. The Investment Management Company will manage a Tactical Asset Allocation Non-Lending Portfolio consistent with the allocations within the Allowable Investment Range. The portfolio will be rebalanced generally to maintain the allocations. The Investment Management Company may also rebalance in response to changes in economic and market conditions, liquidity requirements or provide defensive positioning to improve downside protection. Market timing is not permissible. The table below indicates the asset allocation ranges:

<u>Asset Class</u>	<u>Normal Asset Allocation</u>	<u>Allowable Investment Range</u>
<u>Global Fixed Income</u>	<u>65%</u>	<u>45%-85%</u>
<u>Global Equities & Real Estate</u>	<u>35%</u>	<u>15%-55%</u>

Guidelines: Global Focus of Funds

ICANN's funds are to be invested in well diversified assets that perform well in terms of return on investment and also are invested safely to reduce the risk of loss on the portfolio. Safety and performance are the most important priorities. The ICANN Investment Policy assumes that a well diversified portfolio designed for investment performance and safety should contain a significant amount of investments in non-US assets and are also based in non-US dollar denominated currencies.

The Investment Policy recognizes that ICANN is a US-based company, but it also must recognize that ICANN has a distinctly global focus. The funds that ICANN invests in should reflect the global nature of ICANN. The actual assets allocated to non-US-based assets and non-US dollar denominated investments shall be suggested by the Investment Management Company and approved by the CFO.

The Operating Fund may be denominated in its functional currencies to meet operating needs but does not require a significant global focus.

The Reserve Fund is suggested to have a significant global focus. The Investment Policy enables the Reserve Fund to invest in global assets. Actual allocations are to be monitored by the Board and may be subject to further limitations between developing and emerging foreign markets consistent with ICANN's risk profile.

Guidelines: Asset Classes of Funds

The Investment Policy requires the Investment Management Company to recommend particular active and/or index fund managers, institutional mutual funds, [collective trusts](#) or commingled funds, categories of investments, etc., that comply with the Investment Policy principles and guidelines.

Operating Fund Allowable Assets

Cash, Cash Equivalents, and Money Market Instruments

- Checking accounts in acceptable investment grade financial institutions
- Certificates of Deposit – issued by acceptable investment grade financial institutions
- US Government Treasury securities
- US Agency securities – obligations issued or guaranteed by an agency of the US government
- Commercial Paper – issued by corporations possessing the highest rating issued by Moody's or Standard & Poor's (A1/P1)
- [Money market funds – SEC 2a-7 money funds](#)

Reserve Fund Allowable Assets

Investment Grade Fixed Income Securities

- US Government and Agency Securities (e.g., GNMA and FNMA)
- Corporate Notes and Bonds
- Mortgage Backed Bonds
- Asset Backed Securities (e.g., Auto and Credit Card)
- Sovereign Governments, Agencies and Supranationals
- Local Authorities
- Institutional mutual funds or commingled funds which invest in fixed income securities
- [Money market instruments, and SEC 2a-7 money market funds](#)

Investments shall be made in fixed income securities that are liquid, marketable and may include notes, bonds, 144A, fixed rate and floating rate securities with minimum investment grade ratings as defined by Moody's (Baa3), Standard & Poor's (BBB-), [Fitch \(BBB-\) or DBRS \(BBB Low\)](#).

Non-Investment Grade Fixed Income Securities

No more than 10% of the total portfolio may consist of US marketable securities rated below investment grade ([limited to BB and B rated](#)), and may include high yield, notes, bonds, 144A, fixed rate and floating rate securities. In the event that registered mutual funds, [collective trusts](#) or commingled funds hold fixed income securities below investment grade, the Investment Management Company and CFO will monitor the percentage holdings and take the appropriate action to reduce exposures consistent with ICANN's moderately low risk profile.

Average Portfolio Credit Quality

The minimum weighted average credit quality of the portfolio shall be A2/A.

Equity Securities

- Common Stocks
- Preferred Stocks
- Convertible Notes and Bonds
- Convertible Preferred Stocks
- Stocks of Non-US Companies (Ordinary Shares)
- Stocks of REITs
- Non-Lending Institutional Mutual Funds, Collective Trusts or Commingled Funds which invest in securities as allowed in this statement

There shall be no direct investments in non-marketable securities.

Prohibited Assets and Transactions

- Exchange traded or OTC Commodities and Futures Contracts Private Placements
- Private Placements
- Credit default, interest rate and commodity swaps
- Exchange traded or OTC Options
- Limited Partnerships
- Venture-Capital Investments
- Real Estate Properties
- Derivative Investments
- Hedge funds
- Short Selling
- Margin Transactions
- Commodities

In certain circumstances, institutional mutual fund, collective trusts or commingled fund investments may engage in transactions that include prohibited transactions for the purpose of hedging operations to minimize transaction costs, rebalancing and replicating the benchmark.

In the event that institutional mutual funds or commingled funds hold prohibited assets defined above, the Investment Management Company and CFO will monitor the holdings and take the appropriate action to reduce exposures consistent with ICANN's moderately low risk profile.

Securities Lending

This policy prohibits ICANN from undertaking a Securities Lending Program. The institutional mutual funds, collective trusts or commingled funds must be non-lending portfolios.

Fair Value of Investments

The Investment Management Company must make all investments in securities and funds that have readily determinable fair values. All fair value measurements must be consistent with ASC 820 (FAS 157) -which defines fair value and establishes a framework for measuring fair value (market value).

Ethics and Conflicts of Interest

All Board Members, the CFO, and the Investment Management Company staff shall comply with all applicable conflicts of interest policies and otherwise refrain from personal business activity that could

conflict with the proper execution and management of the investment program, or that could impair their ability to make impartial decisions. Any known or suspected violations must be disclosed to ICANN's General Counsel.

APPROVAL OF DISBURSEMENTS FROM THE RESERVE FUND

The Reserve Fund is the pool of investments held by ICANN that is restricted for use for "rainy day" emergencies only. The Reserve Fund is funded by any assets not required for use by ICANN's Operating Fund. Use of any funds from the Reserve Fund is restricted by action of the Board of Directors of ICANN. The Board at its sole discretion and judgment shall determine whether an emergency exists for purposes of releasing funds from the Reserve Fund. Here are some possible scenarios that may be considered by the Board as a qualified emergency:

- Urgent infrastructure investment required to address a new threat to the DNS.
- Major investment requirement to strengthen the infrastructure from a security point of view—in advance of increasing the revenue collection in the following financial year to pay for that investment.
- Loss (or slow payment) of revenue stream from a major customer or a number of other customers.
- Major unexpected unbudgeted operating expense such as a large legal settlement or a large uninsurable claim.

Due to the nature of an emergency requirement to release funds from the Reserve Fund, it may be necessary to make a rapid decision. For this reason, the Board of Directors has delegated to the Board Finance Committee (BFC) the authority to act on behalf of the Board of Directors of ICANN as it related to the disbursement of funds up to \$5 million for emergency purposes from the Reserve Fund. Any such action by the BFC will be communicated to the full Board of Directors within seven days of any decision.

PERIODIC REVIEW/APPROVAL OF POLICY AND EXCEPTIONS

This policy will be subject to periodic review (at least annually) by the CFO and BFC. Specific elements to be reviewed include:

1. Appropriate operating fund limits (currently three months' operating expenses)
2. ICANN's investment objectives and risk tolerances
3. Allowable and permitted investments
4. Portfolio asset allocation and mix
5. Portfolio benchmarks
6. Portfolio rebalancing

Exceptions to this policy require BFC and Board approval as necessary. All exceptions should be communicated by the CFO to the BFC within a 48 hour period, or as soon thereafter as is practicable, including details of appropriate action to be taken.

REFERENCE MATERIALS - BOARD PAPER NO. 2016.03.10.1f

TITLE: **Board Mentorship Programme**

Background:

On 26 June 2014, the Board approved the ATRT2 recommendations ([Final Report](#)) among which Recommendations 1, 2 & 3 directly related to the Board's performance and improvement efforts.

In addition to the above, prior to the approval of the ATRT2 recommendations and in line with its charter, the BGC recommended that the Board encourage and support training and development efforts ([BGC recommendation of 23 March 2014](#)). The Board approved this recommendation from the BGC on [30 April 2014](#).

On 3 February 2016, the Board approved the initial set of key performance indicators (KPIs) to measure the Board performance and improvement efforts as per the above-mentioned ATRT2 recommendations.

Among this initial set of KPIs, the Board approved to measure the effectiveness and success of a new Board Mentorship Programme aiming at providing guidance, support and a specifically assigned Board mentor or mentors for all new Board members during their first year of service.

Implementation Actions Taken to Date:

As a result of the above-mentioned Board resolutions and the ATRT2 recommendations, the following items have already been developed or completed:

- A full on-boarding Training Programme has been developed encompassing governance principles/best practices, basic finance & budget fiduciary responsibilities, history of ICANN, structure and role of the Supporting Organizations and Advisory Committees, and law & regulation and tool.
- A post-training survey to measure satisfaction and training effectiveness has been created.
- An online Board training platform was put in place in cooperation with ICANN-Learn (<http://learn.icann.org/courses/onboarding-icann-board>) to allow Board members to make use of online development training.

- Board members completed self-assessment forms describing their experience that will serve as a basis for the development of individual training plans specialized for each Board member.
- An exit questionnaire is now in use for Board members leaving the Board to help learn from their experience as ICANN Board members.
- Training material provided by third parties have been published, to the extent that ICANN has had the right to do so (<https://www.icann.org/resources/pages/training-materials-2015-06-09-en>).
- On 24 April 2015, the Board completed the “On-Boarding” training modules on governance/best practices and basic finance and budget fiduciary responsibilities. The new Board members since that time have also completed the on-boarding programme. As of the date of this document, the full Board has completed the modules, which allows the Board to establish a common baseline against which to measure improvements over time.
- With regards to Rec. 3, the process for benchmarking Directors’ compensation has been operationalized for several years. The commitment is to review Board member compensation regularly, and the current plan anticipates every two years, if feasible and practical. The most recent benchmarking of Board member compensation took place during the first half of 2014, as identified in the July 2014 resolution on Board compensation (see <https://www.icann.org/resources/board-material/resolutions-2014-07-30-en#2.b>). The independent valuation report on Board compensation that lead to this resolution was posted for public comment on 30 April 2014. (See <https://www.icann.org/en/system/files/files/board-compensation-considerations-30apr14-en.pdf>.)
- An initial set of KPIs has been developed and is being implemented to measure the Board performance and improvement efforts

Implementation Action Taken Here and Going Forward:

As an additional action taken to thoroughly address the ATRT 2 recommendations 1, 2 and 3, BGC has been working on the development of the new Board Mentorship Programme attached to these Reference Materials as Attachment A.

This Board Mentorship Programme aligns both with ICANN's Board specific needs and with the standards of such programmes across international non profit organizations.

It is designed to be complementary to the on-boarding training programme and is proposed as a voluntary basis to newcomers to the Board in order to facilitate their settlement into the ICANN Board and the Community.

It will be assessed, evaluated and revised as circumstances dictate.

Document/Background Links

Attachment A is the Board Mentorship Programme being approved by the Board today.

Submitted by:	Melissa King / Vinciane Koenigsfeld
Position:	VP Board Operations / Board Operations Content Manager
Date Noted:	25 February 2016
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NEW BOARD MEMBER MENTORSHIP PROGRAMME

Objective:

The New Board Member Mentorship Programme will provide guidance, support and a specifically assigned Board connection for all new Board members during their first year of service. We will assign one experienced Board member to act as a mentor for each new Board member each year, and that mentor will be responsible for helping Board Operations ensure the new Board member is properly on-boarded and completing on-boarding tasks and training sessions. This programme is **voluntary** for both new Board members and potential mentors. It will be proposed during the on-boarding programme and will be initiated upon request from the new Board member to the Board Governance Committee (BGC) Chair.

In addition to a specifically assigned Board mentor, we will maintain a list of Board-member subject matter experts on various aspects of ICANN's ecosystem (e.g., technical matters, the multistakeholder model, etc.). These Board members will have agreed to be available for questions from new Board members during their first year and beyond as needed.

In parallel to the formal Board Mentorship Programme, newcomers to the Board are encouraged to establish informal relationships ("buddies") with fellow Board members to provide them with go-to sources of insight and help with everyday Board member topics.

The combination of formal training programmes (on-boarding and development), Board mentors and or buddies and access to the list of topic experts should enable newcomers to the Board to rapidly gain the necessary insight to fulfill their role.

Board member effectiveness and understanding is evaluated through the 360 review overseen by the BGC.

The Board Mentorship Programme focuses on:

- Fully integrating the new Board members by helping them understand their responsibilities within ICANN's environment and "who does what" within ICANN and ICANN's Community.
- Helping new Board members to learn and understand Board procedures.
- Helping the new Board members understand how they can contribute to the Board based on their knowledge and skill sets.

The Programme will accomplish these objectives by:

- More fully engaging new Board members, helping them feel comfortable and welcomed via one-on-one Board member connections.

- Helping new Board members to fully understand ICANN’s strategic priorities and direction, and how best to contribute to ICANN and Board related initiatives.
- Providing knowledge and perspectives about ICANN Board culture, Board and Committees meetings format, Board structure and how things get done at Board/Committee level.
- Providing an overview of the Board members, Board roles and responsibilities, and expectations for Board members meeting preparation and attendance.
- Providing experts on the Board who can answer specific, in depth questions in specific subject areas.

The Board Operations team will assist the designated Board mentors, in particular with the Board procedures explanations and with logistical support required to help new Board members get up to speed.

The Board Mentorship Programme is a voluntary add-on to the mandatory On-Boarding Training program.

Mentors’ pool:

In order to maximize the efficiency of the Board Mentorship Programme, the new Board members will be paired with volunteers from the Board who have been on the ICANN Board for a minimum of two years.

The Board Operations team will maintain a pool of potential Board mentors and will ensure that the pool of potential mentors is regularly updated and indicates the mentorships already provided by each mentor.

A survey on the Board Mentorship Programme’s efficiency (both for the mentor and the mentee) will be carried out at the end of the year of mentorship; results of that survey will be taken into consideration when updating the pool of potential mentors.

Mentoring Process Overview:

1. The mentoring process will last approximately twelve months. It will begin soon after the official appointment of the newcomer and upon request of the newcomer to the BGC Chair.
2. Once a new Board member is selected, the BGC will identify a Board member among the mentors’ pool to serve as mentor during the new Board member’s first year. If that Board member is able to serve in this capacity and agrees, the assignment is made. If not, the BGC will make another suggestion for a Board mentor.
3. Each designated mentor will receive the CV of the new Board member as background information.

Successful Mentor Attributes:

- Having a special interest in helping new Board members develop and empower them to make meaningful contributions.
- Ability to provide specific feedback as well as technical/operational expertise.
- Willingness to share knowledge and insights about their experience as ICANN Directors and what they have learned through ICANN Board leadership.
- Propensity to be a good listener, good observer, and good problem solver.
- Approachability and accessibility throughout the mentoring process.
- Ability to work with other Board members to get their feedback on how to mentor, what information to provide to mentees, etc.

Mentor Expectations and Tasks:

- Contact new Board member to provide an overview of the Board culture, the Board roles and its committees, how to prepare for the meetings (including an explanation of the ICANN Public meetings) and what to expect at the meeting(s).
- Provide the new Board member with an overview of the Operational and Strategic Plan and priorities.
- Provide information on their personal experience as an ICANN Board member (what they have learned in the course of their term, including difficulties/challenges encountered).
- Encourage the new Board member to be engaged and provide feedback on Board/Committees meetings processes.
- Check for understanding of issues and be ready to answer questions.
- Ask the new Board member where he could see himself contributing to an initiative, committee, or to Board work.
- Ask for feedback from his/her mentee on the mentoring experience and how it might evolve to serve new Board members' ongoing needs as the ICANN ecosystem evolves.

The mentor will be supported in this role by the Board Operations team.

REFERENCE MATERIALS – BOARD SUBMISSION NO. 2016.03.10.2a

TITLE: **Consideration of Independent Review Panel’s Final Declaration in the .ECO and .HOTEL IRPs**

Summary Background:

On 12 February 2016, the Independent Review Process (IRP) Panel (Panel) issued its Final Declaration in the consolidated IRPs relating to .HOTEL and .ECO (*see* [Final Declaration](#), Attachment A to Reference Materials). Both IRPs challenged the Community Priority Evaluation (CPE) Panel Reports finding that the community applications for those strings prevailed in CPE and challenged the BGC’s denial of the Reconsideration Requests submitted by the IRP claimants (Requests 14-34, 14-39, and 14-46).

In a unanimous decision, the Panel “concluded that ICANN is the prevailing party, both in respect of the .hotel IRP and the .eco IRP.” (*Id.* at ¶ 154.) The Panel declared that “the BGC acted consistently with the provisions of ICANN’s Articles of Incorporation and Bylaws, and that the Claimants’ complaints have not been made out.” (*Id.* at ¶ 151.)

Although the Panel ruled in ICANN’s favor and denied the .ECO and .HOTEL IRPs, the Panel did make some important observations and suggestions for the Board’s consideration. In particular, while recognizing that the New gTLD Program is near its end “and there is little or nothing that ICANN can do now,” the Panel suggested that a system be put in place to ensure that CPE evaluations are conducted “on a consistent and predictable basis by different individual evaluators,” and to ensure that ICANN’s core values “flow through...to entities such as the EIU.” (*Id.* at ¶¶ 147, 150.) The Panel also noted that ICANN staff could have better explained its determination that certain requested documents were subject to the Defined Conditions for Nondisclosure in the Documentary Information Disclosure Policy (DIDP). (*See id.* at ¶ 110.) The Panel also suggested that, to the extent possible, and depending on the circumstances in making a decision (*see id.* at ¶ 145), the Board affirm that ICANN carries out its activities “through open and transparent processes” pursuant to Article IV of ICANN’s Articles of

Incorporation. In addition, the Panel encouraged ICANN to respond to a letter from the claimants in the .HOTEL IRP regarding the portal configuration issue as soon as feasible. (*Id.* at ¶ 134.)

As required, the Board considered the Final Declaration and, for the reasons set forth in the Resolution and Rationale, accepted the findings in the Panel’s Final Declaration.

Document/Background Links

The following attachment is relevant to the Board’s consideration of the Panel’s Final Declaration in the .ECO and .HOTEL IRPs:

- Attachment A is the Panel’s [Final Declaration](#), issued on 12 February 2016.

Other Relevant Materials

The documents submitted during the course of the .ECO and .HOTEL IRPs are available at: <https://www.icann.org/resources/pages/various-v-icann-eco-hotel-2015-09-02-en>.

Reconsideration Request 14-34 and the BGC’s Determination on Reconsideration Request 14-34 are available at: <https://www.icann.org/resources/pages/14-34-2014-07-01-en>.

Reconsideration Request 14-39 and the BGC’s Determination on Reconsideration Request 14-39 are available at: <https://www.icann.org/resources/pages/14-39-2014-09-23-en>.

Reconsideration Request 14-46 and the BGC’s Determination on Reconsideration Request 14-46 are available at: <https://www.icann.org/resources/pages/14-46-2014-10-22-en>.

Submitted by: Amy A. Stathos, Deputy General Counsel
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INDEPENDENT REVIEW PROCESS (IRP)
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 01-15-0002-8061

Despegar Online SRL

Donuts, Inc.

Famous Four Media Limited

Fegistry, LLC

Radix FZC

-vs-

ICANN

-vs-

Little Birch, LLC

Minds + Machines Group Limited

Final Declaration

IRP Panel

Thomas H. Webster

Dirk P. Tirez

Peter J. Rees QC (Chair)

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A. Introduction and Procedural History

1. This Final Declaration is issued by this Independent Review Process (“IRP”) Panel pursuant to the Bylaws of the Internet Corporation for Assigned Names and Numbers (“ICANN”). This IRP has been administered under the International Centre for Dispute Resolution (“ICDR”) International Dispute Resolution Procedures as amended and in effect as of 1 June 2014 along with ICANN’s Supplementary Procedures.
2. On 4 March 2015, following a failed Cooperative Engagement Process with ICANN, Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC submitted a Request for IRP in relation to ICANN’s treatment of the generic top-level domain (“gTLD”) string .hotel (“the .hotel IRP”).
3. On 17 April 2015, ICANN submitted its Response to this Request.
4. On 15 March 2015, following a failed Cooperative Engagement Process with ICANN, Little Birch, LLC and Minds + Machines Group Limited submitted a Request for IRP in relation to ICANN’s treatment of the gTLD string .eco (“the .eco IRP”).
5. On 27 April 2015, ICANN submitted its Response to this Request.
6. On 12 May 2015, the ICDR confirmed to the parties that the cases regarding .hotel IRP and .eco IRP would be merged and the parties agreed to keep written submissions separate but recognized that the issues presented by the two cases were closely linked and that the parties’ interests in the proceedings were so similar that both should be dealt with during a single hearing.
7. Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, Radix FZC, Little Birch, LLC and Minds + Machines Group Limited are all represented by Flip Petillion and Jan Janssen of Crowell & Moring LLP and ICANN is represented by Jeffrey A. LeVee and Rachel Zernik of Jones Day.
8. The IRP Panel consisting of Thomas H. Webster, Dirk P. Tirez and Peter J. Rees QC (Chair) (“Panel”), having been duly constituted to consider these two Requests, conducted a preparatory conference with the party representatives on 25 August 2015 at which, and following consultation with the party representatives, the procedure was fixed by the Panel for the further conduct of the IRP.

9. On 7 October 2015, the Panel received a letter from Fasken Martineau seeking to make submissions to the Panel on behalf of Big Room Inc. (“Big Room”) whilst acknowledging that Big Room was not a party to the IRP.
10. On 19 October 2015, Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, Radix FZC, and Minds + Machines Group Limited submitted a Reply to ICANN’s Response in the .hotel IRP matter, and Little Birch, LLC and Minds + Machines Group Limited submitted a Reply to ICANN’s Response in the .eco IRP matter.
11. On 10 November 2015, ICANN submitted its Sur-Replies in both the .hotel IRP and the .eco IRP matters.
12. On 20 November 2015, the Panel received an e-mail from HOTREC seeking to make submissions to the Panel whilst acknowledging that HOTREC was not a party to the IRP.
13. On 2 December 2015, in advance of the telephone hearing due to take place on 7 December 2015, the Panel sent an e-mail to the representatives of the parties asking a number of questions.
14. On 4 December 2015, the parties responded in writing to the Panel’s questions.
15. On 7 December 2015, a telephone hearing took place at which the representatives of all the parties made their submissions to the Panel.

B. Factual Background - General

16. In 2005, ICANN’s Generic Names Supporting Organization (“GNSO”) began a policy development process to consider the introduction of new gTLDs. As part of this process the New gTLD Applicant Guidebook (“Guidebook”) was developed and was approved by the Board of ICANN in June 2011 and the New gTLD Program was launched.
17. The final version of the Guidebook was published on 4 June 2012. It provides detailed instructions to gTLD applicants and sets out the procedures for evaluating new gTLD applications. The Guidebook provides that new gTLD applicants may designate their applications as either standard or community based, the latter to be “operated for the benefit of a clearly delineated community” (Guidebook § 1.2.3.1).
18. If more than one standard application was made for the same gTLD applicants were asked to try and achieve an amicable agreement under which one or more

of them withdrew their applications. If no amicable solution could be found, applicants in contention for the same gTLD would be invited to participate in an auction for the gTLD.

19. If a community based application was made for a gTLD for which other applicants had made standard applications, the community based applicant was invited to elect to proceed to Community Priority Evaluation (“CPE”) whereby its application would be evaluated by a CPE Panel in order to establish whether the application met the CPE criteria. The CPE Panel could award up to a maximum of 16 points to the application on the basis of the CPE criteria. If an application received 14 or more points the applicant would be considered to have prevailed in CPE (Guidebook § 4.2.2). The four CPE criteria are: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. Each criterion is worth a maximum of 4 points (Guidebook § 4.2.3).
20. If an applicant prevails in CPE, it will proceed to the next stage of evaluation and other standard applications for the same gTLD will not proceed because the community based application will be considered to have achieved priority (Guidebook § 4.2.2).
21. ICANN appointed an external provider, the Economic Intelligence Unit (“EIU”) to constitute the CPE Panel.
22. ICANN has a Documentary Information Disclosure Policy (“DIDP”), which permits requests to be made to ICANN to make public documents “concerning ICANN’s operational activities, and within ICANN’s possession, custody or control”.
23. ICANN also has 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 of ICANN (“Reconsideration Request”) (Art IV.2 of ICANN’s Bylaws).
24. ICANN also has in place a process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws of ICANN (Art IV.3 of ICANN’s Bylaws), namely the IRP Process.
25. Article IV.3.4 of ICANN’s Bylaws provides:

“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?"*

C. Factual Background - Specific

26. Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC each submitted standard applications for .hotel. HOTEL Top-Level-Domain s.a.r.l. ("HTLD") submitted a community based application for .hotel.
27. Little Birch, LLC and Minds + Machines Group Limited each submitted standard applications for .eco. Big Room submitted a community based application for .eco.
28. On 19 February 2014, HTLD was invited to elect to proceed to CPE, which it did, and its application was forwarded to the EIU for evaluation.
29. On 12 March 2014, Big Room was invited to elect to proceed to CPE, which it did, and its application was forwarded to the EIU for evaluation.
30. On 11 June 2014, the CPE Panel from EIU issued its report, which determined that HTLD's application should receive 15 points on the CPE criteria, thereby prevailing in CPE with the consequence that the standard applications for .hotel would not proceed.
31. On 28 June 2014, Despegar Online SRL, DotHotel Inc., dot Hotel Limited, Fegistry LLC, Spring McCook LLC and Top Level Domain Holdings Limited submitted a Reconsideration Request *"to have that decision by the Community Priority Evaluation panel reconsidered"*, and, on 4 August 2014, Donuts Inc., Fair Winds Partners, LLC, Famous Four Media Limited, Minds + Machines Group Limited and Radix FZC submitted a request to ICANN pursuant to its DIDP for certain documents related to the decision of the CPE Panel.
32. On 22 August 2014, the Board Governance Committee ("BGC") of ICANN denied the Reconsideration Request to have the CPE Panel decision reconsidered and, on 3 September 2014, ICANN responded to the DIDP request

by referring to certain correspondence that was publicly available, but not providing any other documentation sought in the DIDP request.

33. On 22 September 2014, Despegar Online SRL, Radix FZC, Famous Four Media Limited, Fegistry LLC, Donuts Inc., and Minds + Machines Group Limited submitted a Reconsideration Request to “*seek reconsideration of ICANN staff’s response to the Requesters’ request for documents pursuant to ICANN’s Document Information Disclosure Policy (“DIDP”)*”, and, on 11 October 2014, the BGC of ICANN denied that Reconsideration Request.
34. On 6 October 2014, the CPE Panel from EIU issued its report, which determined that Big Room’s application should receive 14 points on the CPE criteria, thereby prevailing in CPE with the consequence that the standard applications for .eco would not proceed.
35. On 22 October 2014, Little Birch, LLC and Minds + Machines Group Limited submitted a Reconsideration Request seeking “*the reconsideration of ICANN’s Community Priority Evaluation Panel’s determination whereby [Big Room’s application] prevailed in Community Priority Evaluation*”, They also submitted a request to ICANN pursuant to its DIDP for certain documents related to the decision of the CPE Panel.
36. On 31 October 2014, ICANN responded to the DIDP request by referring to certain correspondence that was publicly available, but not providing any other documentation sought in the DIDP request, and, on 18 November 2014, the BGC of ICANN denied the Reconsideration Request to have the CPE Panel decision reconsidered.
37. On 27 February 2015, ICANN staff became aware of a configuration issue with ICANN’s online New gTLD Applicant and Global Domains Division (“GDD”) portals. It appears that, between 17 March 2014 and 27 February 2015, user credentials were used to obtain sensitive and confidential business information concerning several of the .hotel applicants.
38. On 5 June 2015, Crowell & Moring LLP wrote to the ICANN Board and the President of ICANN’s GDD “*on behalf of Travel Reservations SRL (formerly, Despegar Online SRL), Donuts Inc. (and its subsidiary applicant Spring McCook, LLC), Famous Four Media Limited (and its subsidiary applicant dot Hotel limited), Fegistry LLC, Minds + Machines Group Limited (formerly Top Level Domain Holdings Limited), and Radix FZC (and its subsidiary applicant DotHotel Inc.)*”. The letter requested “*full information concerning this data exposure issue and the actions that have been taken by ICANN to limit damages for the affected parties*” and set out a list of information sought.

39. On 5 July 2015, ICANN responded to the letter of 5 June 2015 under the heading “*Response to Documentary Information Disclosure Policy Request*”. ICANN provided further information concerning the issue and referred to certain information that was publicly available, but did not provide any other documentation.
40. Neither the Board of ICANN nor the President of ICANN’s GDD has responded to the letter of 5 June 2015.

D. Relief Requested

41. The relief requested by the Claimants in both the .hotel and .eco Requests for IRP was, essentially, the same, namely:
- Declare that ICANN breached its Articles of Incorporation, its Bylaws, and or the gTLD Guidebook;
 - Declare that ICANN must reject the determination that HTLD’s application for .hotel and Big Room’s application for .eco be granted community priority;
 - Award Claimants their costs in this proceeding; and
 - Award such other relief as the Panel may find appropriate in order to ensure that the ICANN Board follow its Bylaws, Articles of Incorporation, or other policies, or other relief that Claimants may request after further briefing or argument.
42. In the Reply to ICANN’s Response in the .hotel IRP a further request for relief was added, namely:
- Declare that ICANN must reject HTLD’s application for .hotel.
43. In response to the questions raised by the Panel on 2 December 2015, the Claimants’ representative also asked for the following relief:
- i. That the Panel consider declaring that ICANN continues to act inconsistently with its Articles of Incorporation, its Bylaws, and or the Guidebook by:
 - upholding the determination that HTLD’s application for .hotel be granted community priority;
 - upholding HTLD’s application for .hotel; and
 - upholding the determination that Big Room’s application for .eco be granted community priority.
 - ii. That the Panel declare that ICANN has breached and continues to breach its Articles of Incorporation and/or Bylaws by upholding the

provisions of the gTLD Applicant Guidebook or of the new gTLD policy which are in violation of the Articles of Incorporation and/or Bylaws.

- iii. That the Panel examine the consistency with ICANN's Articles of Incorporation and Bylaws of:
 - the contents of the Guidebook
 - the CPE process itself
 - the selection and appointment process of the EIU as the CPE Panel, and
 - the implementation of the CPE process that has led to ICANN accepting community priority for .hotel and .eco.

E. Claimants' Submissions

44. In their submissions, the Claimants, in both the .hotel and .eco IRPs matters, criticise the CPE process as a whole and complain that the ICANN Board failed to establish, implement and supervise a fair and transparent CPE process in the selection of the CPE Panel. They also complain that the CPE process is unfair, non-transparent and discriminatory due to the use of anonymous evaluators, and that no quality review process exists for CPE Panel decisions.
45. In relation to the CPE process as a whole, the Claimants also argue that, as no opportunity is given for applicants to be heard on the substance of a CPE determination (by either the CPE Panel itself, or by ICANN upon receiving the Panel's decision), CPE determinations are made without due process.
46. However, relief in respect of these wider issues was not requested by the Claimants in either the .hotel or .eco Requests, and, although such relief was referred to by the Claimants in their response to the Panel's questions of 2 December 2015, it was confirmed by the Claimants at the hearing on 7 December 2015 that the Claimants were not, in fact, asking the Panel to make a declaration as to the selection process of the CPE Panel by ICANN, nor any declaration as to the CPE process as a whole, nor whether that process breaches ICANN's Articles of Incorporation or Bylaws, nor whether the Guidebook breaches ICANN's Articles of Incorporation or Bylaws.
47. Accordingly, for the purposes of this IRP, it is the submissions made by the Claimants which address the specific relief sought by the Claimants in relation to the granting of CPE in the .hotel and .eco applications that are relevant for the Panel.
48. In the .hotel and .eco Requests and Replies, the Claimants make the following submissions in relation to the CPE Panel's determinations on CPE:

- i. *“By accepting a third-party determination that is contrary to its policies, ICANN has failed to act with due diligence and failed to exercise independent judgment” (.hotel Request § 9, .eco Request § 9)*
- ii. *“The extraordinary outcomes for Big Room’s application for .eco and HTLD’s application for .hotel were only possible due to a completely different and clearly erroneous application of the evaluation criteria in the .eco and .hotel CPE” (.eco Request § 48)*
- iii. *“If the CPE Panel used the same standard as, e.g., in the .gay, .immo and .taxi CPEs, it would never have decided that the requirements for nexus were met” (.hotel Request § 52, .eco Request § 50)*
- iv. *“The abovementioned examples of disparate treatment in the CPE process also show that the CPE process was performed in violation of ICANN’s CPE policy” (.hotel Request § 53, .eco Request § 51)*
- v. *“the CPE Panel in the .hotel CPE committed several additional policy violations. It did not analyze whether there was a ‘community’ within the definition of that term under the rules of the Applicant Guidebook” (.hotel Request § 53)*
- vi. *“the CPE Panel in the .eco CPE committed several additional policy violations. It did not analyze whether there was a ‘community’ within the definition of that term under the rules of the Applicant Guidebook” (.eco Request § 51)*
- vii. *“The requirement of a pre-existing community and the suspicious date of incorporation of Big Room have never been examined by the CPE Panel” (.eco Request § 53)*
- viii. *“The CPE Panel also did not provide meaningful reasoning for its decision. It even went as far as inventing facts” (.hotel Request § 55)*
- ix. *“The CPE Panel also did not provide meaningful reasoning for its decision. It even went as far as neglecting obvious facts” (.eco Request § 56)*
- x. *“However, the CPE Panel’s reliance on the support of a distinct, yet undefined, community shows that the support for the .hotel gTLD came from a ‘community’ other than the one that was defined by the applicant. The need to introduce a distinct and undefined community goes against the exact purpose of the CPE policy, requiring support of the community targeted by the string. It is at odds with the CPE Panel’s findings on organization and nexus between the proposed string and the ‘community.’” (.hotel Request § 56)*
- xi. *“the CPE Panel disregarded the obvious point that the .eco string does not identify a community and that it has numerous other meanings beyond the definitions in the OED.....Big Room would not have qualified for community priority if the CPE Panel had not granted the maximum score for uniqueness of the string.” (.eco Request § 58)*
- xii. *“The CPE Panel has never considered the appropriateness of [Big Room’s] appeal process. In contrast, however, the CPE Panel did investigate the*

- appropriateness of proposed appeal processes in other CPEs requiring that the appeals processes be clearly described, failing which the application would score zero on the enforcement requirement.” (.eco Request § 59)*
- xiii. *“The Applicant Guidebook explicitly calls on the Board to individually consider an application under an ICANN accountability mechanism...such as a Request for Reconsideration” (.hotel Request § 64, .eco Request § 67) NB the Panel notes that this is not actually what the Guidebook says. It says that the “Board reserves the right to individually consider an application for a new gTLD....under exceptional circumstances”*
 - xiv. *“Claimants showed that the CPE Panel manifestly misapplied ICANN’s defined standards in the CPE. It is unclear how else to interpret such a fundamental misapplication other than as an obvious policy violation” (.eco Request § 69)*
 - xv. *“Claimants were merely asking that ICANN comply with its own policies and fundamental obligations in relation to the performance of the CPE process” (.hotel Request § 66, .eco Request § 69)*
 - xvi. *“The IRP Panel’s task is to look at whether ICANN’s unquestioning acceptance of the CPE Panel’s advice and ICANN’s refusal to review the issue raised by Claimants are compatible with ICANN’s fundamental obligations” (.hotel Reply § 4, .eco Reply § 3)*
 - xvii. *“ICANN’s reasoning would logically result in any review of the CPE being denied, no matter how arbitrary the original evaluation may be” (.hotel Reply § 4, .eco Reply § 8)*
 - xviii. *“the ICANN Board decided not to check whether or not the evaluation process had been implemented in compliance with principles of fairness, transparency, avoiding conflicts of interest and non-discrimination.” (.hotel Reply § 34, .eco Reply § 33)*
 - xix. *“One cannot investigate whether a standard was applied fairly and correctly without looking into how the standard was applied.....the ICANN Board deliberately refused to examine whether the standard was applied correctly, fairly, equitably and in a non-discriminatory manner” (.hotel Reply § 39, .eco Reply § 38)*
 - xx. *“As the IRP Panel’s task includes a review as to whether ICANN discriminated in the application of its policies and standards, the IRP Panel is obliged to consider how the standards were applied in different cases” (.hotel Reply § 45, .eco Reply § 44)*

49. In the .hotel Reply, the Claimants also make the following submissions in relation to the declaration they are seeking that ICANN must reject HTLD’s application for .hotel:

- i. *“The IRP Panel is also requested to assess ICANN’s refusal to take appropriate action to offer redress to parties affected by the data exposure issue. In coming to its conclusion, the IRP Panel may examine all the*

- relevant information that was available to ICANN in relation to the question of taking action” (.hotel Reply § 4)*
- ii. *“ICANN never showed any willingness to take appropriate measures” (.hotel Reply § 49)*
 - iii. *“In this case a crime was committed seemingly with the specific purpose of obtaining a better position within the new gTLD program, and the crime was made possible due to misuse of user credentials for which HTLD (or an individual associated to HTLD) was responsible....It would indeed not be in the public interest to allocate a critical Internet resource to an entity that is closely linked with individuals who have misused, or who have permitted the misuse of, their user credentials” (.hotel Reply § 50)*

50. Also in the .hotel Reply the Claimants submit:

“Second Claimant in the .eco case, Minds + Machines Group Limited (Minds + Machines), also applied for the .hotel gTLD. Minds + Machines fully supports the claim initiated by Claimants in this case and joins their request. That Minds + Machines join the proceedings is accepted by all Claimants” (.hotel Reply § 2)

F. ICANN’s Submissions

51. In the .hotel and .eco Responses and Sur-Replies, ICANN makes the following submissions in relation to the CPE Panel’s determinations on CPE:

- i. *“Claimants did not state a proper basis for reconsideration as defined in ICANN’s Bylaws” (.hotel Response § 4, .eco Response § 4)*
- ii. *“ICANN’s Board....has no obligation to review (substantively or otherwise) any such report” (.hotel Response § 9, .eco Response § 9)*
- iii. *“nothing in the Articles or Bylaws requires the Board [to conduct a substantive review” (.hotel Response § 9, .eco Response § 10)*
- iv. *“neither the creation nor the acceptance of the CPE Panel’s Report regarding HTLD’s Application for .HOTEL constitutes Board action” (.hotel Response § 12)*
- v. *“neither the creation nor the acceptance of the CPE Panel’s Report regarding Big Room’s Application for .ECO constitutes Board action” (.eco Response § 13)*
- vi. *“in making those decisions [acceptance of the Guidebook and the decisions by the Board to reject Claimants’ Reconsideration Request], the Board followed ICANN’s Articles and Bylaws” (.hotel Response § 13, .eco Response § 14)*
- vii. *“BGC denied Claimants’ Reconsideration Request finding that Claimants had ‘failed to demonstrate that the CPE Panel acted in contravention of*

- established policy or procedure' in rendering the Report" (.eco Response § 29)*
- viii. *"BGC denied Claimants' Reconsideration Request [in respect of the DIDP Request] finding that the Claimants had 'failed to demonstrate that ICANN staff acted in contravention of established policy or procedure' in responding to the DIDP Request" (.hotel Response § 28)*
 - ix. *"the reconsideration process does not call for the BGC to perform a substantive review of CPE Reports" (.hotel Response § 49, .eco Response § 49)*
 - x. *"Claimants do not identify any ICANN Article or Bylaws provision that the BGC allegedly violated in reviewing their Reconsideration Request" (.hotel Response § 51, .eco Response § 50)*
 - xi. *"It is not the role of the BGC (or, for that matter, this IRP Panel) to second-guess the substantive determinations of independent, third-party evaluators." (.hotel Response § 53, .eco Response § 52)*
 - xii. *"Claimants' only evidence that the CPE Panel in fact erred is the bare allegation that because certain other, completely separate, applications for entirely different strings did not prevail in CPE then .HOTEL TLD's application also should not have prevailed. Claimants' argument is baseless. The outcome of completely unrelated CPEs does not, and should nor, have any bearing on the outcome of the CPE regarding .HOTEL TLD's Application" (.hotel Response § 55)*
 - xiii. *"Claimants' only evidence that the CPE Panel in fact erred is the bare allegation that because certain other, completely separate, applications for entirely different strings did not prevail in CPE, Big Room's application also should not have prevailed. Claimants' argument is baseless. The outcome of completely unrelated CPEs does not, and should nor, have any bearing on the outcome of the CPE regarding Big Room's Application" (.eco Response § 54)*
 - xiv. *"there is not – nor is it desirable to have – a process for the BGC or the Board (through the NGPC) to supplant its own determinationover the guidance of an expert panel formed for that particular purpose" (.hotel Sur-Reply § 11, .eco Sur-Reply § 10)*

52. In the .hotel Sur-Reply, ICANN also makes the following submissions in relation to the declaration the Claimants are seeking that ICANN must reject HTLD's application for .hotel:

- i. *"Claimants argue that the Portal Configuration is relevant to this IRP, but they have not identified any Board action or inaction with respect to this issue that violates ICANN's Articles or Bylaws such that it is subject to independent review, now or ever" (.hotel Sur-Reply § 23)*

- ii. *“The ICANN Board took no action (and was not required to take action under either the ICANN Articles or Bylaws) with respect to Claimant’s letter and DIDP request” (.hotel Sur-Reply § 24)*
- iii. *“Claimants have failed to demonstrate that the Board has a duty to act with respect to Claimants’ belief as to what the Board should do. Again Claimants have also failed to show that the Board’s conduct in this regard has in any way violated ICANN’s Articles or Bylaws” (.hotel Sur-Reply § 25)*

53. Also in the .hotel Sur-Reply ICANN submits:

*“Minds + Machines Limited (“Minds + Machines”) is not a Claimant in this proceeding but, nevertheless signed the Reply and now seeks to join as an additional claimant. Article 7 of the International Center for Dispute Resolution’s International Dispute Resolution Procedures explicitly provides that “[n]o additional party may be joined after the appointment of any [neutral], unless **all parties**, including the additional party, otherwise agree” (ICDR International Dispute Resolution Procedures, Art. VII (emphasis added)). ICANN does not consent to the joinder of Minds + Machines because any claims Minds + Machines may have with respect to the CPE Report or ICANN’s response to that Report are time-barred (Bylaws, Art. IV, § 3.3 (30 day deadline to file IRP request)” (.hotel Sur-Reply § 35)*

G. The Issues

54. As has already been stated, Article IV.3.4 of ICANN’s Bylaws provides:

“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?”*

55. Given that the wider issues of the CPE process as a whole, the appointment of EIU and the provisions of Guidebook are not being pursued, the Panel has concluded that the contested actions of the Board of ICANN in this IRP are:
- i. The denial by the BGC on 22 August 2014, of the Reconsideration Request to have the CPE Panel decision in .hotel reconsidered.
 - ii. The denial by the BGC on 11 October 2014 of the Reconsideration Request to seek reconsideration of ICANN staff's response to the DIDP request in relation to the .hotel CPE decision.
 - iii. The denial by the BGC on 18 November 2014, of the Reconsideration Request to have the CPE Panel decision in .eco reconsidered.
 - iv. The continued upholding of HTLD's application for .hotel in the light of the matters raised in Crowell & Moring's letter of 5 June 2015.
56. In addition, the Panel has the procedural issue to deal with of the attempt by Minds + Machines Group Limited to join the .hotel IRP.

H. Analysis - General

57. Before turning to the specific analysis of each of the issues stated above, there are some general points which the Panel wishes to highlight, which have application to one or more of the issues in question.
58. The analysis, which the Panel is charged with carrying out in this IRP, is one of comparing the actions of the Board with the Articles of Incorporation and Bylaws, and declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The Panel has identified the following relevant provisions of the Articles of Incorporation and Bylaws against which the actions, or inactions, of the Board should be compared.

Articles of Incorporation

Article 4

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

Bylaws

Article I.2

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 II.3

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

Article III.1

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.1

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.

Article IV.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.*

59. In response to the questions posed by the Panel on 2 December 2015, ICANN confirmed its position as follows:

- i. The EIU's determinations are presumptively final. The Board's review on reconsideration is not substantive, but rather is limited to whether the EIU followed established policy or procedure.
- ii. ICANN has an obligation to adhere to all of its obligations under its Articles of Incorporation and its Bylaws.
- iii. The Bylaws, and the BGC's determinations on prior Reconsideration Requests, have established a specific standard for when it is appropriate to reconsider CPE determinations (i.e., when the CPE Panel violated established policy or procedure).
- iv. When considering the Reconsideration Requests in the .eco and .hotel matters, the BGC had before it the EIU's determination and the "facts" that the Claimants had submitted with their Reconsideration Requests. The BGC also considered the Guidebook as well as other published CPE procedures. This was all the information required for the BGC to determine that the EIU had followed established policy and procedure in rendering the CPE determinations.
- v. The Board is not aware (whether through the BGC or otherwise) as to whether EIU makes any comparative analysis of other CPE determinations it has made when considering individual community priority applications.

60. During the hearing on 7 December 2015, ICANN further confirmed its position as follows:

- i. The Claimants (save for Minds + Machines Group Limited in the .hotel IRP) are not time-barred from seeking IRP of:
 - a. The denial by the BGC on 22 August 2014 of the Reconsideration Request to have the CPE Panel decision in .hotel reconsidered.
 - b. The denial by the BGC on 11 October 2014 of the Reconsideration Request to seek reconsideration of ICANN staff's response to the DIDP request in relation to the .hotel CPE decision.
 - c. The denial by the BGC on 18 November 2014 of the Reconsideration Request to have the CPE Panel decision in the .eco matter reconsidered.
- ii. There is no ICANN quality review or control process, which compares the determinations of the EIU on the various CPE applications.

- iii. The core values, which apply to ICANN by virtue of its Bylaws, have not been imposed contractually on the EIU, and the EIU are not, in consequence, subject to them.
- iv. The CPE process operated by the EIU involves 5 core EIU staff and 2 independent evaluators. The independent evaluators separately score each CPE application and submit their separate scores to the EIU core staff. The independent evaluators do not confer on the scoring. The independent evaluators are not the same for each CPE application; sometimes both are different and sometimes one is different.
- v. ICANN considers there is nothing in its Articles of Incorporation or Bylaws, which requires ICANN to comply with due process.
- vi. ICANN does not believe that it is subject to any general international law principle requiring it to comply with due process.
- vii. Upon receipt of a Reconsideration Request, ICANN expects the BGC to carry out a procedural review of the CPE determination, not a substantive review and that this procedural review should look at whether the EIU had followed the correct procedure and had correctly applied ICANN policies.

61. In the light of the relevant provisions of the Articles of Incorporation and Bylaws identified above, and the clarifications provided by ICANN as to its position in relation to CPE applications and Reconsideration Requests made in respect of them, the Panel will now consider each of the contested actions of the Board of ICANN in this IRP. In doing so, the Panel has taken into account, where relevant, all the submissions of the parties, including, without limitation, those specifically set out in sections E. and F. above.

62. Given the confirmation by ICANN, that a time bar is not being raised in relation to the substantive issues in this IRP, the Panel does not have to discuss this question save for when it considers Minds + Machines Group Limited's attempt to join in the .hotel IRP.

I. Analysis – Specific

1. The denial by the BGC, on 22 August 2014, of the Reconsideration Request to have the CPE Panel decision in .hotel reconsidered.

63. In conducting this analysis, the Panel have carefully considered the CPE report dated 11 June 2014, which determined that HTLD's community based application had prevailed, the Reconsideration Request dated 28 June 2014 and the BGC denial of the Reconsideration Request dated 22 August 2014. In doing so, the Panel has considered whether the Board (through the BGC) has acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws.

64. The Panel is clear that, in doing so, it is required by ICANN's Bylaws to apply a defined standard of review focusing on:

- a. whether the BGC acted without conflict of interest in taking its decision?
- b. whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them?; and
- c. whether the BGC exercised independent judgment in taking the decision, believed to be in the best interests of the company?

65. No allegation of conflict of interest has been made by the Claimants and the Panel has no information or documentation upon which it could reach any view as to whether a conflict of interest existed or not. In conclusion, so far as that requirement is concerned, the Panel can make no finding.

66. As to the requirements of due diligence and care, and the exercise of independent judgment, ICANN's position is that the review undertaken by the BGC should be a procedural review of the CPE determination, not a substantive review, and that this procedural review should look at whether the EIU had followed the correct procedure and had correctly applied ICANN policies.

67. That appears to the Panel to be correct, but what is of critical importance is the manner in which the review of whether the EIU has followed the correct procedure and has correctly applied ICANN's policies is conducted.

68. In their Reply in the .hotel IRP at §39 the Claimants submit:

"One cannot investigate whether a standard was applied fairly and correctly without looking into how the standard was applied....The ICANN Board instead limited its review to the question of whether the CPE Panel had made mention of the applicable standard. Such a limited review is not a meaningful one."

69. The Panel agrees that if the BGC is charged with considering whether the EIU correctly applied ICANN policies (which ICANN accepts it is), then it needs to look into how the standard was applied. It is not sufficient to limit the review to the question of whether mention was made of the relevant policy. The BGC needs to have a reasonable degree of assurance that the EIU has correctly applied the policy.

70. This is particularly so given that the EIU is not subject to ICANN's core values, the EIU independent evaluators are not the same for each CPE application, there is no ICANN quality review or control process which compares the

determinations of the EIU on the various CPE applications and ICANN is not aware as to whether EIU makes any comparative analysis of other CPE determinations it has made when considering individual community priority applications.

71. In their Reconsideration Request of 28 June 2014, at page 5, the Claimants say:

“In this case, however, there are 3 instances where the Panel has not followed the [Guidebook] policy and processes for conducting CPE. Further, the Panel, and ICANN staff have breached more general ICANN policies and procedures in the conduct of this CPE.”

72. The three instances of failure to follow the Guidebook policy alleged by the Claimants are:

1. Failure to identify a “Community”;
2. Failure to consider self-awareness and recognition of the community; and
3. Failure to apply the test for Uniqueness.

73. In their Reconsideration Request, the Claimants then go into significant detail as to the ways in which they allege the EIU failed to follow the Guidebook policy. However, in the BGC denial of 22 August 2014, the BGC state:

“...while the Request is couched in terms of the Panel’s purported violations of various procedural requirements, the Requesters do not identify any misapplication of a policy or procedure, but instead challenge the merits of the Panel’s Report, which is not a basis for reconsideration”

74. The BGC’s comment quoted above is plainly wrong as any detailed reading of the Reconsideration Request shows. It is unfortunate that the BGC should have included such comments in its determination as, in the Panel’s view, this has contributed to this IRP and the clear feeling, on the part of the Claimants, that their Reconsideration Request was not treated appropriately by the BGC.

75. In their Reconsideration Request, the Claimants argue that the first question to be asked by the EIU in following the policy and procedure in the Guidebook is whether there is a community that meets the definition of a community under the Guidebook. They say:

“The Panel did not attempt this analysis, in breach of the requirements of the policy and process for CPE.... This is not a disagreement about a finding by the Panel on this topic; the Panel did not consider this definition, nor apply the test for “community” required.... Had it

considered the matter, it would have appreciated that the applicants definition, rather than showing cohesion, depended instead on coercion.”

76. In dealing with this allegation the BGC gave consideration to the definition of community in the Guidebook and stated:

“However, the Requesters point to no obligation to conduct any inquiry as to the definition of community other than those expressed in section 4.2.3 of the Guidebook.....As such, the Requesters fault the Panel for adhering to the Guidebook’s definition of a “community” when evaluating the Application. Given that the Panel must adhere to the standards laid out in the Guidebook, this ground for reconsideration fails.

The Requesters also contend the Applicant’s proposed community, i.e., the “Hotel Community” does not qualify as a community for CPE purposes because “rather than showing cohesion, [it] depend[s] on coercion....But the Panel reached the contrary conclusion... As even the Requesters note, a request for reconsideration cannot challenge the substance of the Panel’s conclusions, but only its adherence to the applicable policies and procedures”

77. In their Reconsideration Request, the Claimants argue that the second question to be asked by the EIU in following the policy and procedure in the Guidebook is whether there was a failure to consider self-awareness and recognition of the community. They say:

“...the Panel has imported the test for determining whether there is a “community” – self-awareness that the group is a community- into the test for “delineation”. With respect, that is an error of process that further invalidates the findings.

Even if it were not, and self-awareness and recognition are considered with Delineation, the actual response given under that enquiry about “self-awareness and recognition” shows that the Panel does not understand the test that is to be applied....

What is required is a showing by evidence that the members of the alleged community regard themselves as members of a defined community, which is recognised as such by the members, and by people outside the community.

It is important to note that the Panel finds that the alleged community is clearly delineated, because there is an ISO definition of “hotel”, and because every hotel is a member of the alleged community....

The Panel then proceeds through the proper requirements of delineation, which it names accurately – organisation and existence before 2007.”

78. In dealing with this allegation, the BGC gave consideration to the definition of delineation in the Guidebook and stated:

“The Panel began its assessment of the test for delineation by noting: “Two conditions must be met to fulfil the requirements for delineation; there must be a clear, straightforward membership definition, and there must be awareness and recognition of a community (as defined by the applicant) among its members” (Report, Pg. 1.) As the Requesters admit, the Panel then “proceeds through the proper requirements of Delineation, which it names accurately....The Requesters thus defeat their own argument, as they squarely concede the Panel assessed the “proper requirements” of the test for delineation.

Again the Requesters dispute the Panel’s allusion to the “awareness and recognition” of the Hotel Community’s members not because that reference constitutes any procedural violation, but because the Requesters simply disagree whether there is any such recognition amongst the Hotel Community’s members.....Disagreement with the Panel’s substantive conclusions, however, is not a proper basis for reconsideration”

79. In their Reconsideration Request, the Claimants argue that the third question to be asked by the EIU in following the policy and procedure in the Guidebook is whether there was a failure properly to apply the test for Uniqueness. They say:

“The Panel has not followed ICANN policy or process in arriving at the conclusion that the string has “no other significant meaning beyond identifying the community” because it has itself cited a significant other meaning and relied on that other meaning (that the word means “an establishment with services and additional facilities where accommodation and in most cases meals are available”) in order to measure and find Delineation.

This is not a disagreement about a conclusion – this is a demonstration of a failure of process by the Panel. It cannot use the significant meaning of “hotel” under an ISO definition for one purpose (a finding under delineation), then deny that meaning and say there is “no other significant meaning” for the purpose of finding Uniqueness....

The word “hotel” means to most of the world what the ISO definition says it means – a place for lodging and meals. To assert that it means to most

people the association of business enterprises that run the hotels is unsubstantiated and absurd.”

80. In dealing with this allegation the BGC gave consideration to the definition of uniqueness in the Guidebook and stated:

“The Requesters have identified no procedural deficiency in the Panel’s determination that the uniqueness requirement was met. The Requesters concede that “HOTEL” has the significant meaning of a place for lodging and meals, and common sense dictates that the Hotel Community consists of those engaged in providing those services. The attempt to distinguish between those who run hotels and hotels themselves is merely a semantic distinction. Again, while the Requesters may disagree with the Panel’s substantive conclusion, that is not a proper basis for reconsideration.

81. As for the alleged breaches of more general ICANN policies and procedures in the conduct of the .hotel CPE, the Claimants refer to Article 7 of ICANN’s Affirmation of Commitments and Articles I.2.8, III.1 and IV.2.20 of ICANN’s Bylaws and say:

“Requestor submits that various aspects of the CPE process breach, or risk breaching, these fundamental provisions...there are a number of features which are prejudicial to standard applicants, including:

(a) Insufficient material was made available to them as to who the Panelist was, and their qualifications....

(b) There is no publication of materials to be examined by the Panel....

(c) Insufficient analysis and reasons were given on how the Panelist reached their CPE report....”

82. In dealing with this allegation the BGC stated:

“None of these concerns represent a policy or procedure violation for the purposes of reconsideration under ICANN’s Bylaws. The Guidebook does not provide for any of the benefits that the Requesters claim they did not receive during CPE of the Application. In essence, the Requesters argue that because the Guidebook’s CPE provisions do not include Requester’s “wish list” of procedural requirements, the Panel’s adherence to the Guidebook violates the broadly-phrased fairness principles embodied in ICANN’s foundational documents. Were this a proper ground for reconsideration, every standard applicant would have the ability to rewrite the Guidebook via a reconsideration request.”

- 83.** In considering the original CPE report of 11 June 2014, the Reconsideration Request dated 28 June 2014 and the BGC denial of the Reconsideration request dated 22 August 2014, the Panel have looked closely at whether the BGC simply undertook an administrative “box ticking” exercise to see whether mention was made of the relevant policy or procedure in denying the Reconsideration Request, or whether, as the Panel considers the BGC is required to do, it looked into how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.
- 84.** Taking, first of all, the three instances of failure to follow the Guidebook policy alleged by the Claimants, it is clear from the BGC determination document of 22 August 2014 as a whole and, particularly, from those extracts quoted above that each one was carefully considered by the BGC in its determination, and that the BGC did properly consider how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.
- 85.** In doing so, the Panel is satisfied that the BGC acted consistently with the provisions of ICANN’s Articles of Incorporation and Bylaws and that the Claimants complaints in this regard are not made out.
- 86.** As for the alleged breaches of more general ICANN policies and procedures in the conduct of the .hotel CPE claimed by the Claimants in the Reconsideration Request, it is clear from the face of these allegations that these are complaints about the CPE process as a whole and are not specific to the .hotel CPE. In consequence of the Claimants’ confirmation at the hearing on 2 December 2015, that relief in respect of the CPE process as a whole is not being pursued, it is not strictly necessary for the Panel to consider this further. However, the Panel wishes to put on record that it considers that the BGC, in denying the Claimants’ Reconsideration Request, acted consistently with the provisions of ICANN’s Articles of Incorporation and Bylaws and that the Claimants’ complaints in this regard are also not made out.

2. The denial by the BGC, on 11 October 2014, of the Reconsideration Request to seek reconsideration of ICANN staff’s response to the DIDP request in relation to the .hotel CPE decision.

- 87.** In conducting this analysis, the Panel has carefully considered the DIDP Request dated 4 August 2014, the Response from ICANN of 3 September 2014, the Reconsideration Request dated 19 September 2014 and the BGC denial of the Reconsideration Request dated 11 October 2014. In doing so, the Panel has

considered whether the Board (through the BGC) has acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws.

- 88.** The Panel knows that, in doing so, it is required by ICANN's Bylaws to apply a defined standard of review focusing on:
- a. whether the BGC acted without conflict of interest in taking its decision?
 - b. whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them?; and
 - c. whether the BGC exercised independent judgment in taking the decision, believed to be in the best interests of the company?
- 89.** As with the previous issue, no allegation of conflict of interest has been made by the Claimants and the Panel has no information or documentation upon which it could reach any view as to whether a conflict of interest existed or not. In conclusion, so far as that requirement is concerned, the Panel can make no finding.
- 90.** In line with the approach taken in the previous issue, the Panel consider that the review undertaken by the BGC should look at whether the ICANN staff, in responding to the DIDP Request, followed the correct procedure and correctly applied ICANN policies, and that, in doing so, the BGC needs to look into how the procedure was followed and how policy was applied so that the BGC has a reasonable degree of assurance that the ICANN staff correctly followed the requisite procedure and correctly applied ICANN policies.
- 91.** In their DIDP Request of 4 August 2014, the Claimants asked for four categories of documents, namely:
- 1) *“All correspondence, reports, documents, agreements, contracts, emails, or any other forms of communication (“Communications”) between individual member of ICANN’s Board or any member of ICANN Staff and the [EIU] or any other organisation or third party involved in the selection or organisation of the CPE Panel for the Report, relating to the appointment of the Panel that produced the Report, and dated within the 12 month period preceding the date of the Report;*
 - 2) *The curriculum vitaees (“CVs”) of the members appointed to the CPE Panel;*
 - 3) *All Communications (as defined above) between individual members of the CPE Panel and/or ICANN, directly relating to the creation of the Report; and*
 - 4) *All Communications (as defined above) between the CPE Panel and/or Hotel TLD or any other party prior with a material bearing on the creation of the Report.”*

92. In ICANN's Response of 3 September 2014 it was explained that ICANN, whether at Board or staff level, is not involved with the selection to the CPE Panel of the two individual evaluators that perform the scoring in the CPE process and that ICANN is not provided with information about who the evaluators on any individual CPE Panel may be. As this is all done within the EIU, ICANN, it was stated, did neither have the documentation sought in numbered request 1) above, nor did it have the CVs sought in numbered request 2) above. These are clear statements that no such documentation exists.
93. However, the Response goes on to say that to *"the extent that ICANN has documentation with the EIU for the performance of its role as the coordinating firm as it relates to the .HOTEL CPE, those documents are subject to certain of the Defined Conditions of Non-Disclosure set forth in the DIDP."* It then goes on to state the defined Conditions for Nondisclosure upon which ICANN is relying to justify nondisclosure. Five separate Conditions for Nondisclosure are listed.
94. The Response does not give any more detail as to what documents it actually has *"for the performance of its role as the coordinating firm"*, nor which specific Conditions for Nondisclosure apply to which specific documents or category of documents it actually has, and, in consequence, it is not possible to judge whether the policy for nondisclosure has been correctly applied.
95. In dealing with the documentation sought in numbered request 3) above, the Response states *"Because of the EIU's role as the panel firm, ICANN does not have any communications (nor does it maintain any communications) with the evaluators that identify the scoring for any individual CPE. As a result, ICANN does not have documents of this type."* That is a clear and comprehensive statement that such documentation does not exist.
96. However, the Response goes on to say that to *"the extent that ICANN has communications with persons from EIU who are not involved in the scoring of a CPE, but otherwise assist in a particular CPE, (as anticipated in the CPE Panel Process Document), those documents are subject to the following Defined Conditions of Nondisclosure set forth in the DIDP"*. It then goes on to state the defined Conditions for Nondisclosure upon which ICANN is relying to justify nondisclosure. Four separate Conditions for Nondisclosure are listed.
97. The Response does not give any more detail as to what *"communications with persons from EIU who are not involved in the scoring of a CPE"*, nor which specific Conditions for Nondisclosure apply to which specific documents or category of documents it actually has and, in consequence, it is not possible to judge whether the policy for nondisclosure has been correctly applied.

98. In dealing with the documentation sought in numbered request 4) above, the Response states:

“In order to maintain the independence and neutrality of the CPE Panels as coordinated by the EIU, ICANN has limited the ability for requesters or other interested parties to initiate direct contact with the panels – the CPE Panel goes through a validation process regarding letters of support or opposition (as described in the CPE Panel Process document) but that is the extent of direct communications that the CPE Panel is expected to have. For process control purposes, from time to time ICANN is cc’d on the CPE Panel’s verification emails. These emails are not appropriate for disclosure pursuant to the following Defined Conditions of Nondisclosure set forth in the DIDP”.

It then goes on to state the single defined Condition for Nondisclosure upon which ICANN is relying to justify nondisclosure.

99. In this instance, unlike those for numbered requests 1), 2) and 3) above, ICANN has described a single category of documents and the single Condition for Nondisclosure upon which it relies, thus making it possible to judge whether the policy for nondisclosure has been correctly applied.

100. In the Panel’s view, it is unfortunate that the ICANN staff did not adopt the same approach to dealing with documents which ICANN was not prepared to disclose when responding to numbered requests 1), 2) and 3) as was adopted with numbered request 4). Simply to say that “*to the extent*” ICANN has documents which fall within the categories requested in numbered requests 1), 2) and 3) such documents are not disclosable, for a variety of reasons, without making any attempt to link categories of document to particular Conditions for Nondisclosure, gives the impression of a process not properly conducted.

101. Such an approach does not provide the confidence that those requesting disclosure of documents are entitled to have, namely that a collection of potentially responsive documents has taken place and a review has actually been conducted by the ICANN staff as to whether any of the documents identified as responsive to the request are subject to any of the Conditions of Nondisclosure, as is required by ICANN’s published policy for responding to DIDP requests. If the ICANN staff had made this clear in the response it could well have provided the Claimants with the reassurance that both procedure and policy had been followed and applied.

102. In the Reconsideration Request of 19 September 2014, the Claimants say:

“ICANN should not interpose such obstacles to access without providing a factual basis to determine if its claimed privileges have any merit. At

minimum, the BGC should review the asserted protections and independently determine if they have any supportable grounds”.

103. Such a request is understandable in the circumstances. Article 4 of ICANN’s Articles of Incorporation require it to carry out its activities *“through open and transparent processes”*. Its Core Values include:

“Making decisions by applying documented policies neutrally and objectively, with integrity and fairness”, its Bylaws include the requirement to “operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness”.

104. The Panel is, of course, charged with reviewing the action of ICANN’s Board, rather than its staff, but the Panel wishes to make clear that, in carrying out its activities, the Board should seek to ensure that ICANN’s staff comply with the Articles of Incorporation and Bylaws of ICANN, and that a failure of the Board to ensure such compliance is a failure of the Board itself.

105. Although the Reconsideration Request said that *“the BGC should review the asserted protections and independently determine if they have any supportable grounds”*, it is the view of the Panel that this should not have been the starting point for the BGC in looking at the actions of the ICANN staff in dealing with the DIDP Request. As has already been said, the BGC does need to have a reasonable degree of assurance that the ICANN staff has correctly followed the requisite procedure and correctly applied ICANN policies. If the BGC considers it has that assurance, the Panel does not consider the BGC is required to conduct any form of independent determination as to the decisions made by the ICANN staff. The BGC would only need to go that far if it came to the conclusion that the ICANN staff had not followed the requisite procedure and/or had not correctly applied ICANN policies.

106. It is obvious, from the face of the denial of the Reconsideration Request issued by the BGC on 11 October 2014, that such an independent determination did not take place, and it appears that the BGC were satisfied that the ICANN staff had correctly followed procedure and applied policy. In the denial the BGC quite correctly state:

“It is ICANN’s responsibility to determine whether requested documents fall within those Nondisclosure Conditions. Specifically, pursuant to the DIDP process “a review is conducted as to whether the documents identified as responsive to the Request are subject to any of the [Nondisclosure Conditions]...Here, in finding that certain requested

documents were subject to Nondisclosure Conditions, ICANN adhered to the DIDP process.

- 107.** Whilst the BGC does not explicitly say that a collection process occurred, it is implicit in the BGC denial that the BGC does believe that process was followed. In dealing specifically with numbered requests 1), 2) and 3), the denial says:

“Here, in finding that certain requested documents were subject to Nondisclosure Conditions, ICANN adhered to the DIDP process. Specifically, as to “documentation with the EIU for the performance of its role” and “communications with persons from EIU who are not involved in the scoring of a CPE,” ICANN analysed the Requesters’ requests in view of the DIDP Nondisclosure Conditions, including those covering “information exchanged, prepared for, or derived from the deliberative and decision-making processes” and “confidential business information and/or internal policies and procedures.”

- 108.** The denial quotes from the DIDP response as follows:

“ICANN must independently undertake the analysis of each Condition as it applies to the documentation at issue, and make the final determination as to whether any Nondisclosure Conditions apply”

The denial then goes on to say:

In conformance with the publicly posted DIDP process.... ICANN undertook such analysis, as noted above, and articulated its conclusions in the DIDP Response. While the Requesters may not agree with ICANN’s determination that certain Nondisclosure Conditions apply here, the requesters identify no policy or procedure that ICANN staff violated in making its determination, and the Requesters’ substantive disagreement with that determination is not a basis for reconsideration.”

- 109.** The denial also reaches a similar conclusion as to the adherence by the ICANN staff to the DIDP process in determining that the potential harm caused by disclosure outweighed the public interest in disclosure.

- 110.** Whilst the Panel considers that the ICANN staff could, and should, have been more explicit as to the process they had followed in refusing disclosure, the BGC determination document of 11 October 2014 provides the requisite degree of confirmation that the correct procedure was actually followed, that the BGC did, properly, consider whether the relevant policy or procedure was actually applied by the ICANN staff and whether, in doing so, the BGC could have a reasonable degree of assurance that the ICANN staff had correctly the applied the policy or procedure.

111. In doing so, the Panel is satisfied that the BGC acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws and that the Claimants complaints in this regard are not made out.

3. The denial by the BGC, on 18 November 2014, of the Reconsideration Request to have the CPE Panel decision in .eco reconsidered.

112. In conducting this analysis, the Panel has carefully considered the CPE report dated 6 October 2014, which determined that Big Room's community based application had prevailed, the Reconsideration Request dated 22 October 2014 and the BGC denial of the Reconsideration request dated 18 November 2014. In doing so, the Panel has considered whether the Board (through the BGC) has acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws.

113. The Panel is clear that, in doing so, it is required by ICANN's Bylaws to apply a defined standard of review focusing on:

- a. whether the BGC acted without conflict of interest in taking its decision?
- b. whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them?; and
- c. whether the BGC exercised independent judgment in taking the decision, believed to be in the best interests of the company?

114. As with the previous two issues, no allegation of conflict of interest has been made by the Claimants and the Panel has no information or documentation upon which it could reach any view as to whether a conflict of interest existed or not. In conclusion, so far as that requirement is concerned, the Panel can make no finding.

115. As it did in considering the first issue, and for the reasons stated there, the Panel considers that if the BGC is charged with considering whether the EIU correctly applied ICANN policies (which ICANN accepts it is), then it needs to look into how the standard was applied. It is not sufficient to limit the review to the question of whether mention was made of the relevant policy. The BGC needs to have a reasonable degree of assurance that the EIU has correctly applied the policy.

116. In their Reconsideration Request of 22 October 2014, at page 10, the Claimants say:

“Requester therefore requests ICANN in accordance with its Reconsideration Request process to:

- Reconsider the Determination, and in particular not award a passing score in view of the [CPE] criteria set out in the [Guidebook] for the reasons expressed in this Reconsideration Request and any reasons, arguments and information to be supplemented to this Request or forming part of a new Reconsideration Request in the future;*
- Reconsider ICANN’s decision that the Requester’s application for the .eco gTLD “Will not Proceed” to contracting; and*
- Restore the “Application Status” of the Requester’s application and the Application submitted by the Applicant to “Evaluation Complete”, their respective “Contention Resolution Statuses” to “Active”, and their “Contention Resolution Result” to “In Contention”.*

117. Earlier in the Reconsideration Request (at pages 2 and 3), the Claimants argue that the concept “eco” is much broader than the community definition provided by Big Room in its community based application and say:

“the community definition contained in the Application...- in Requester’s opinion – does not meet the criteria for community-based gTLDs that have been set out in ICANN’s Applicant Guidebook”

118. The Reconsideration Request goes on to give the reasons for this assertion, which can be summarised as:

- there is no clear and unambiguous definition of the community that Big Room’s community based application is intended to serve;
- the string .eco does not closely describe the community or the community members and over-reaches substantially beyond the community referred to in the application;
- the term .eco has various meanings that are completely unrelated to the community determined in Big Room’s application; and
- the CPE Panel failed to detail the letters of opposition received.

119. The BGC’s denial states:

“The Requesters do not identify any misapplication of any policy or procedure by ICANN or the CPE Panel. Rather the Requesters simply disagree with the CPE Panel’s determination and scoring of the Application, and challenge the substantive merits of the CPE Panel’s Report. Specifically, the Requesters contend that the CPE Panel improperly applied the first, second and fourth CPE criteria set forth in the [Guidebook].

Substantive disagreement with the CPE Panel's Report, however, is not a basis for reconsideration. Since the Requesters have failed to demonstrate that the CPE Panel acted in contravention of any established policy or procedure in rendering the Report, the BGC concludes that [the Reconsideration Request] be denied"

120. The BGC denial then goes on to examine whether the EIU properly applied the Guidebook scoring guidelines and CPE Guidelines in respect of each of the items raised by the Claimants and concludes, in respect of each one, that *"the CPE Panel accurately described and applied the Guidebook scoring guidelines and CPE Guidelines"*.
121. In considering the original CPE report of 6 October 2014, the Reconsideration Request dated 22 October 2014 and the BGC denial of the Reconsideration Request dated 18 November 2014, the Panel has looked closely at whether the BGC simply undertook an administrative "box ticking" exercise to see whether mention was made of the relevant policy or procedure in denying the Reconsideration Request, or whether, as the Panel considers the BGC is required to do, it looked into how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.
122. Unlike the Reconsideration Request in respect of the .hotel CPE determination, this Reconsideration Request does not raise questions as to whether the EIU followed ICANN policy and procedure. It is, indeed, correctly categorised by the BGC in its denial as a statement of substantive disagreement with the EIU's determination. Nevertheless, it is clear from the BGC determination document of 18 November 2014 as a whole that the BGC did, properly, consider how the relevant policy or procedure was actually applied by the EIU, and whether, in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly the applied the policy or procedure.
123. In doing so, the Panel is satisfied that the BGC acted consistently with the provisions of ICANN's Articles of Incorporation and Bylaws and that the Claimants complaints in this regard are not made out.

4. The continued upholding of HTLD's application for .hotel in the light of the matters raised in Crowell & Moring's letter of 5 June 2015.

124. Crowell & Moring's letter of 5 June 2015 is addressed for the attention of the Members of the ICANN Board and to Mr Akram Atallah, the President of ICANN's GDD. It makes a number of serious allegations arising from a portal

configuration issue, which ICANN has admitted occurred, and which can be summarised as follows:

- The user credentials of someone called D. Krischenowski were used to conduct over 60 searches resulting in over 200 unauthorized access incidents across an unknown number of gTLDs;
- these searches resulted in the obtaining of sensitive and confidential business information concerning several of the .hotel applicants;
- D. Krischenowski is associated with HTLD; and
- the user of those credentials was deliberately looking for sensitive and confidential business information concerning competing applicants.

125. The letter then goes on to ask for certain information in relation to the portal configuration issue.

126. The letter is clearly addressed to the Members of the Board of ICANN and its President of GDD and asks, largely, for information and not documentation. It appears that the letter was also submitted through ICANN's DIDP and, in consequence, ICANN appears solely to have treated the letter as a DIDP request. Accordingly, on 5 July 2015, the ICANN staff responded in a document entitled "*Response to Documentary Information Disclosure Policy Request*" and stated:

"ICANN's DIDP is limited to requests for documentary information already in existence within ICANN that is not publicly available. Simple requests for non-documentary information are not appropriate DIDP requests".

127. As is clear from the face of the letter itself, it is not simply a DIDP request. The attempt by ICANN to treat it solely as such represents, at best, a basic error on its part and, at worst, an attempt by the Board to avoid dealing with what is clearly a serious and sensitive issue, which goes to the integrity of the application process for the .hotel gTLD.

128. To be fair, the DIDP Response goes on to provide much detail as to what ICANN has done in the way of forensic investigation and what that has revealed. It does not, however, state whether any consideration has been given as to the impact on the integrity of the application process for the .hotel gTLD.

129. In the Reply in the .hotel IRP, the Claimants have argued that, in the circumstances, HTLD's application for .hotel must be denied and have asked the Panel to declare that ICANN must reject HTLD's application.

130. In its Sur-Reply, ICANN argues that the Claimants have failed to identify any Board action or inaction in this regard that violates any of ICANN's Articles of Incorporation or Bylaws. ICANN states in the Sur-Reply that:

"The only Board action (or inaction) that the Claimants vaguely allude to in their Reply is that the Board did not directly respond to a letter addressed to both ICANN Board and staff requesting disclosure of information regarding the Portal Configuration issue. But, it was not the Board's responsibility to do so, and ICANN's Articles and Bylaws do not mandate that the Board reply to every letter it receives".

131. In the context of the clear problems caused by ICANN's portal configuration problem, and the serious allegations contained in the letter of 5 June 2015, this is, in the view of the Panel, a specious argument.

132. In its Sur-Reply, ICANN goes on to say:

"Although Claimants Argue that [HTLD] "is closely linked with individuals who have misused, or have permitted the misuse of, their user credentials...this argument is unsupported and asserts no conduct by the ICANN Board. Claimants have failed to demonstrate that the Board has a duty to act with respect to Claimants' beliefs as to what the Board should do."

133. Article III.1 of ICANN's Bylaws provides that *"ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."*

134. The approach taken by the ICANN Board so far in relation to this issue does not, in the view of the Panel, comply with this Bylaw. It is not clear if ICANN has properly investigated the allegation of association between HTLD and D. Krischenowski and, if it has, what conclusions it has reached. Openness and transparency, in the light of such serious allegations, require that it should, and that it should make public the fact of the investigation and the result thereof.

135. The fact that no such investigation has taken place, or if it has the results have not been published, could, in the view of the Panel, amount to Board inaction and fall within the remit of the Panel. However, at the hearing, the Panel was assured by ICANN's representative, that the matter was still under consideration by the Board and that the Panel should not view a failure to act, as at the date of the hearing, as inaction on the part of the Board.

136. In view of the fact that this issue was raised on 5 June 2015 by the Claimants, the Panel is of the view that it cannot remain under consideration by the Board

of ICANN for much longer and that, if no further, appropriate action has been taken by the date of this Declaration, the failure of the Board to act could well amount to inaction on its part.

137. This issue was raised after this IRP process had commenced and has only been the subject of relatively brief argument by the Claimants in their Reply and by ICANN in its Sur-Reply. At the hearing, not only did ICANN's representative inform the Panel that the issue was still under consideration by the Board of ICANN, but he also gave an undertaking on behalf of ICANN that if a subsequent IRP was brought in relation to this issue, ICANN would not seek to argue that it had already been adjudicated upon by this Panel.

138. In all the circumstances, the Panel has concluded it should not make a declaration on this issue in this IRP, but that it should remain open to be considered at a future IRP should one be commenced in respect of this issue.

5. The attempt by Minds + Machines Group Limited to join in the .hotel IRP.

139. As has already been stated, in the Claimants' Reply in the .hotel IRP, Minds + Machines Group Limited stated it wished to join in the proceedings and, in its Sur-Reply, ICANN objected, relying on Article 7 of the ICDR International Dispute Resolution Procedures.

140. Article 7 provides that "[n]o *additional party may be joined after the appointment of any arbitrator, unless all parties, including the additional party, otherwise agree*". There is nothing in the ICANN Supplementary Procedures that is inconsistent with this provision and, accordingly, it governs the procedure of this IRP.

141. Minds + Machines Group Limited applied for the .hotel gTLD and there does not appear to be any reason why, should it have so wished, it could not have joined with the Claimants in bringing the .hotel IRP. It did not do so and no reason has been given for its failure to do so. Accordingly, pursuant to Article IV.3.3 of ICANN's Bylaws, it is now time-barred from doing so.

142. In all the circumstances, the Panel rejects the request of Minds + Machines Group Limited to join this IRP.

J. Conclusion

143. Many general complaints were made by the Claimants as to ICANN's selection process in appointing EIU as the CPE Panel, the process actually followed by

EIU in considering community based applications, and the provisions of the Guidebook. However, the Claimants, sensibly, agreed at the hearing on 7 December 2015 that relief was not being sought in respect of these issues.

144. Nevertheless, a number of the more general issues raised by the Claimants and, indeed, some of the statements made by ICANN at the hearing, give the Panel cause for concern, which it wishes to record here and to which it trusts the ICANN Board will give due consideration.
145. At the hearing, ICANN submitted that it was not subject to a due process obligation neither pursuant to its Articles of Incorporation and Bylaws, nor pursuant to general international legal principles, notwithstanding Article 4 of its Articles of Incorporation. If this was intended as a general statement, the Panel finds this most surprising in the context of the role ICANN fulfils and the language of Article 4 itself. ICANN is a California non-profit corporation but Article 4 of the Articles of Incorporation refers to the principles of international law and local law and to the use of open and transparent processes to enable competition and open entry in Internet markets. The Panel understands the importance of administrative procedures, such as the CPE discussed below. The Panel also understands that the EIU and the BGC themselves are not adjudicatory but administrative bodies. Nevertheless, the Panel invites the Board to affirm that, to the extent possible, and compatible with the circumstances and the objects to be achieved by ICANN, transparency and administrative due process should be applicable.
146. Also, at the hearing, ICANN confirmed that, notwithstanding that different individual evaluators can be used to consider different CPE applications, the EIU has no process for comparing the outcome of one CPE evaluation with another in order to ensure consistency. It further confirmed that ICANN itself has no quality review or control process, which compares the determinations of the EIU on CPE applications. Much was made in this IRP of the inconsistencies, or at least apparent inconsistencies, between the outcomes of different CPE evaluations by the EIU, some of which, on the basis solely of the arguments provided by the Claimants, have some merit.
147. The CPE process for this round of gTLDs is almost at an end, so there is little or nothing that ICANN can do now, but the Panel feels strongly that there needs to be a consistency of approach in making CPE evaluations and if different applications are being evaluated by different individual evaluators, some form of outcome comparison, quality review or quality control procedure needs to be in place to ensure consistency, both of approach and marking, by evaluators. As was seen in the .eco evaluation, where a single mark is the difference between prevailing at CPE and not, there needs to be a system in

place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators.

148. Further, as has already been stated:

- In its letter of 4 December 2015, ICANN confirmed that the EIU’s determinations are presumptively final, and the Board’s review on reconsideration is not substantive, but rather is limited to whether the EIU followed established policy or procedure.
- At the hearing on 7 December 2015, ICANN confirmed that the core values, which apply to ICANN by virtue of its Bylaws, have not been imposed contractually on the EIU, and the EIU are not, in consequence, subject to them.

149. The combination of these statements gives cause for concern to the Panel. As has already been noted, Article I.2 of the Bylaws states:

“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.”

150. The Panel fails to see why the EIU is not mandated to apply ICANN’s core values in making its determinations whilst, obviously, taking into account the limits on direct application of all the core values as reflected in that paragraph of the Bylaws. Accordingly, the Panel suggests that the ICANN Board should ensure that there is a flow through of the application of ICANN’s core values to entities such as the EIU.

151. Having expressed the Panel’s concern at these general issues, the Panel now turns to the specific issues which, ultimately, it was asked to consider in this IRP. The Panel has found, in relation to each of the specific issues raised in the .hotel and .eco IRPs that it is satisfied that the BGC acted consistently with the provisions of ICANN’s Articles of Incorporation and Bylaws, and that the Claimants’ complaints have not been made out.

152. In consequence, the Panel will not be making any of the declarations sought by the Claimants.

K. The Prevailing Party and Costs

153. Article IV.3.18 of the Bylaws states:

“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 the 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 shall bear its own expenses.”

154. The Panel confirms that it makes its declaration based solely on the documentation, supporting materials and arguments submitted by the parties and that on the basis of that documentation, supporting material and arguments, has concluded that ICANN is the prevailing party, both in respect of the .hotel IRP and the .eco IRP.

155. Although the Claimants have raised some general issues of concern as to the CPE process, the IRP in relation to the .hotel CPE evaluation was always going to fail given the clear and thorough reasoning adopted by the BGC in its denial of the Reconsideration Request and, although the ICANN staff could have responded in a way that made it explicitly clear that they had followed the DIDP Process in rejecting the Claimants’ DIDP request in the .hotel IRP, again the IRP in relation to that rejection was always going to fail given the clarification by the BGC, in its denial of the Reconsideration Request, of the process that was followed.

156. As for the .eco IRP, it is clear that the Reconsideration Request was misconceived and was little more than an attempt to appeal the CPE decision. Again, therefore, the .eco IRP was always going to fail.

157. Finally, although the letter from Crowell & Moring of 5 June 2015 raises some very serious issues, which the Panel considers the ICANN Board needs to address, in the end, the Panel has not had to adjudicate on this issue.

158. In conclusion, therefore, whilst the Panel has declared ICANN to be the prevailing party, the Claimants in this IRP have raised a number of serious issues which give cause for concern and which the Panel considers the Board need to address. In the circumstances, the Panel considers that the Claimants’

contribution to the public interest merits ICANN bearing half of the costs of the IRP Provider, which is the ICDR.

159. Article IV.3.18 provides that “[e]ach party to the IRP shall bear its own expenses”. Rule 11 of ICANN’s Supplementary Procedures provides:

“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”

160. ICANN has not sought to argue that any of the Claimants failed to enter into the Cooperative Engagement Process in good faith, and there is no evidence of this in the materials before the Panel. In consequence, the panel considers that, in accordance with Article IV.3.18 of the Bylaws, each side shall bear their own expenses including legal fees.

FOR THE FORGOING REASONS, the Panel hereby:

- (1) Declares that the IRP Request made in relation to the .hotel gTLD by Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC is denied;
- (2) Designates ICANN as the prevailing party in the .hotel IRP;
- (3) Declares that the IRP Request made in relation to .eco gTLD by Little Birch, LLC and Minds + Machines Group Limited is denied;
- (4) Designates ICANN as the prevailing party in the .eco IRP;
- (5) Declares that the fees and expenses of the IRP Panel members, totalling US\$113,351.52, and the fees and expenses of the ICDR, totalling US\$11,500.00, shall be born as to half by ICANN, and as to the other half collectively by Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC, Radix FZC, Little Birch, LLC and Minds +Machines Group Limited (“Applicants”). Therefore, ICANN shall reimburse the Applicants collectively the sum of \$5,750.00 representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by the Applicants; and
- (6) 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.



Dirk P. Tirez
Date: 11 FEBRUARY 2016



Thomas H. Webster
Date: 11 FEBRUARY 2016



Peter J. Rees QC
Chair of the IRP Panel
Date: 11 FEBRUARY 2016