

Statement of Bertrand de La Chapelle Regarding the BGC Recommendation on Reconsideration Request 13-3

2 July 2013

The reconsideration procedure established by Article IV Section 2 of the ICANN Bylaws is the primary component of ICANN's accountability framework. Its proper functioning is therefore critical to ensuring ICANN's legitimacy and respect. It behooves the Board to guarantee its proper implementation.

The reconsideration process is in particular the only internal accountability mechanism covering staff actions and establishes (in section 2.2) the criteria for evaluation in that case:

*"one or more staff actions or inactions
that contradict established ICANN policy(ies)"*

Interpreting each term of this provision in too narrow a sense would drastically and unduly limit the overall accountability of ICANN staff, defeating the very purpose of the reconsideration process.

The reconsideration request 13-3 submitted by the NCSG raised in that context important process issues regarding:

- the scope of ICANN's Reconsideration process regarding staff actions
- the conditions for a modification of previously agreed policies
- the balance of responsibilities between community, staff and Board in the occurrence of a dispute regarding the distinction between policy and implementation

For the reasons detailed below, we believe the [recommendation of the BGC on Reconsideration 13-3, adopted on June 25, 2013](#) did not interpret the provisions of Article IV Section 2.2 appropriately in that case and this was the main justification for our objection.

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Recommendation 3 of the 2007 gNSO Policy is not the relevant policy of reference

The Board Governance Committee in its recommendation on Reconsideration Request 13-3 states (p.9) :

"we conclude that the staff action at issue here was an implementation of the ICANN Policy that "Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law."

The quote is from Recommendation 3 of the 2007 gNSO Policy¹ validated by the Board in its 2008 Paris meeting. However, like all recommendations of the 2007 Policy adopted by the gNSO, this provision only refers to "strings" (ie: the top-level domains) and not the second-level registrations.

The TMCH on the contrary is intended to facilitate protection of rights at the second level, "serving as a database to provide information to the new gTLD registries to support pre-launch Sunrise or Trademark Claims Services". The 2007 gNSO Policy cannot therefore be the reference

¹ See: <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>

² See information on the Trademark Clearinghouse at:

<http://newgtlds.icann.org/en/applicants/agb/trademark-clearinghouse-11jan12-en.pdf>

the reconsideration should take into account, as the TMCH itself cannot be an implementation of Recommendation 3.

Should the consequence be that there is no policy at all the staff action should be evaluated against to determine potential contradiction, justifying immediate rejection of the request? This requires a more thorough analysis of the scope of the reconsideration process, and in particular the interpretation of the term "*policy(ies)*" in Article IV Section 2.2 of the Bylaws.

ICANN uses the term policy³ to describe a broad range of principles, norms, rules and sometimes procedures, adopted through various methods, many of which involve extensive community consultations. They collectively represent the body of rules that staff action should be evaluated against, and this includes the provisions of the Bylaws.

Any restriction on the contrary of the term "policy(es)" in section 2.2 to only cover Policies produced by a formal Policy Development Process (PDP) by a Supporting Organization would automatically place outside of the scope of reconsideration numerous actions of staff even if they contradicted community-developed and consensually endorsed decisions, or even the Bylaws.

Regarding the new gTLD Program, this would have the unacceptable consequence to exclude from any possible reconsideration all staff decisions taken after the adoption of the 2007 Policy. An extensive interpretation of the term "*policy(ies)*" is a guarantee of staff accountability.

In the particular case of Reconsideration 13-3, the decision to create a Trademark Clearinghouse and several of its key operational modalities resulted from extensive and iterative community interactions. They included the setting up of the dedicated Implementation Recommendation Team (IRT) composed of members of the IP constituency and the subsequent creation of the Special Trademark Issues Review Team (STI), the reports of both being subjected to extensive public comment periods.

In particular, both groups have extensively discussed the possibility to include more than exact marks. However, the final report of the STI established rough consensus on this limited approach and suggested that the TCMH database "*should be structured to report to registries strings that are considered an "identical match" with the validated trademarks*⁴". These recommendations were later adopted unanimously by the gNSO Council, incorporated in the Applicant Guidebook and finally validated by the Board in Singapore.

The fact that such concepts were not elaborated through the formal procedure of a gNSO PDP cannot reduce the policy nature of both the creation of the TMCH and the establishment of the "identical match" limited criteria. This was indeed the approach of the NCSG in its Request for Reconsideration 13-3.

The Board Governance Committee Recommendation therefore in our view incorrectly states (p.12) that "*the NCSG has not identified any other applicable policy*" against which staff action should be evaluated. The initial conception and parameters of the TMCH are the relevant policy reference here, not Recommendation 3 of the gNSO in 2007.

The TMCH+50 is a substantive modification of the provisions of the Applicant Guidebook

The ICANN Bylaws require evaluation of a "*contradiction*" of staff action or inaction with established ICANN policies.

³ Cf. the document « Policy vs Implementation – Draft Framework for Discussion ». See:

<http://gns0.icann.org/en/correspondence/policy-implementation-framework-08jan13-en.pdf>

⁴ See STI Report Para 4.3 p.9 in : <http://gns0.icann.org/issues/sti/sti-wt-recommendations-11dec09-en.pdf>

In the case at hand, the introduction of the registration of up to 50 previously abusively registered names for each trademark included in the TMCH did not contradict the overall purpose of the TMCH (protection of rights) nor altered in any major way its intended architecture or operations. Is this sufficient however to decide that it therefore did not contradict the policy that established it? We believe it is not.

As previously mentioned, too strict an interpretation of the terms of Article IV Section 2.2 should not lead to a diminution of the overall accountability of ICANN staff. In particular, although direct contradiction between a staff action and established policies is the obvious ground for reconsideration, any staff action that substantially modifies a critical element of a community-developed agreement should also be evaluated for its coherence with it.

Were it not the case, this would potentially allow staff to overrule ex post the balanced outcome of extensive consultations and detrimentally affect the very mechanisms of the bottom-up multi-stakeholder decision-making. Reducing the incentive to reach agreement within the community, this would also prevent closure through constant attempts at reopening agreed compromises, submitting the staff itself to increased lobbying by individual segments of the community.

In this regard, the introduction of the so-called TMCH+50 represents a significant modification and cannot reasonably be considered an implementation of the “identical match” established by the Applicant Guidebook. However, this latter provision was a critical component of the policy establishing the TMCH and of the degree of consensus achieved in its development, as illustrated by the fact that both the IRT and STI had extensively discussed the opportunity to include more than exact marks and decided against it. The proposal is therefore in contradiction with the previously agreed policy.

Staff rightly argues that the development of the strawman proposal followed for a large part established ICANN procedures, including a public consultation, simply developing it in a more expedite process than a long PDP. To some extent, the process was somewhat parallel to the one that initially established the TMCH. However, it did not go through the same ultimate validation by the gNSO Council and the Board. Furthermore, and irrespective of the critics regarding the initial composition of the group, the result of the public consultation on the specific TMCH+50 proposal showed a strong objection from significant parts of the community and a consensus level apparently inferior to the one achieved around the establishment of the TMCH itself.

While reopening a previously agreed provision could be deemed appropriate when it presents the opportunity to improve upon an established policy, the revised proposal should at least obtain the same level of support as the initial one, and be subject to the same ultimate validation. This was not the case here.

In view of the above, in arguing that the TMCH+50 was a mere implementation of established policy, the BGC Recommendation incorrectly discards the fact that the proposal represented a substantive modification of a critical element of the relevant policy (the introduction of the TMCH and not the 2007 Recommendation 3) and was in contradiction with it.

Staff cannot be the ultimate arbiter of whether an issue is a policy or implementation matter

Finally, even if the arguments above were not retained, Reconsideration Request 13-3 raised other questions related to who should set the distinction between policy and implementation.

While staff considered that the introduction of the TMCH+50 provision was a mere implementation of existing policy and therefore within its purview, NCSG in its Reconsideration Request argued otherwise.

It quoted in particular several statements made by staff in that regard, including:

- the November 29, 2012 ICANN document entitled “Trademark Clearinghouse: Strawman Solution”, and a November 26, 2012 blog post by ICANN CEO Fadi Chehade, both stating that the TMCH+50 “*can be considered a policy matter ...*”
- the request made by ICANN CEO to the gNSO Chair asking for “*policy guidance*” on the portion of the Strawman model pertaining to “the scope of trademark claims”

In response to this last request, the Chair of the gNSO indicated that: “*the majority of the Council feels that this proposal is best addressed as a policy concern, where the interests of all stakeholders can be considered*”. This was later acknowledged by staff in the March 20, 2013 Memorandum on the Trademark Clearinghouse “Strawman Proposal”, which stated that: “*The gNSO advises that this should be a policy discussion rather than an implementation change*”.

Staff however confirmed its interpretation that “*(the) proposal appears to be a reasonable add to an existing service, rather than a proposed new service*”, ie: a mere implementation matter.

The question of the delimitation between policy and implementation has been an ongoing debate within ICANN for a long time as precise criteria to determine the frontier are hard to establish. A community consultation process is currently under way on this very issue⁵. The existence of such a process does not preclude the Board from making whatever determination it deems necessary in specific cases such as the one under consideration here, as the BGC Recommendation does.

However, the existence of a request from ICANN CEO for “policy guidance” and the response of the gNSO Council raise in this case an overarching process question that needs to be addressed irrespective of the substance: what procedure should be followed when the gNSO and staff disagree on whether some particular decision is a matter of policy or implementation? This question touches upon the general distribution of responsibilities between community, staff and the Board, and therefore the overall balance of the ICANN model.

As a matter of principle, staff cannot be the ultimate arbiter of such a dispute in which it is a party. Deciding otherwise would dramatically alter the balance of responsibilities between ICANN staff and one of the Supporting Organizations primary responsible for the development of policy, the respect of whose authority is essential to the bottom-up multi-stakeholder model.

Absent any consensual resolution of the dispute, the proper course of action for the staff should thus have been to refer the issue to the Board for determination.

Therefore, even if the TMCH+50 were to be ultimately determined to be a mere implementation of policy, by making this determination unilaterally in lieu of the Board, after the gNSO had explicitly expressed its position to the contrary, ICANN staff has overstepped its authority. This argument alone should justify accepting the Reconsideration Request 13-3 presented by the NCSG.

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⁵ Cf. : <http://gnso.icann.org/en/correspondence/policy-implementation-framework-08jan13-en.pdf>