

## **DETERMINATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)**

### **RECONSIDERATION REQUEST 14-2**

**5 FEBRUARY 2014**

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The Requester World Gold Council seeks reconsideration of the Expert Determination dismissing the Requester's community objection to the application for .GOLD.

#### **I. Brief Summary.**

Both the Requester and June Edge applied for .GOLD. The Requester filed a Community Objection to June Edge's application, and its Objection was dismissed. The Requester claims that the actions of the Panel were inconsistent with ICANN policies, which influenced the Panel's decision to dismiss the Objection. Specifically, the Requester contends that the Panel failed to adhere to and apply ICANN processes and policies concerning the standing requirements for making Community Objections as expressed in Section 3.2.2.4 of the gTLD Applicant Guidebook.

The Requester asks ICANN to reverse the Expert Determination and instruct another panel to make an expert determination that applies the standards defined by ICANN. In the event ICANN concludes that the Panel adhered to and applied ICANN processes and policies concerning Community Objections, the Requester asks that ICANN derogate from its procedure because accepting the Expert Determination would create inequitable and disparate treatment without justified cause.

With respect to each claim asserted by the Requester, there is no evidence that the Panel deviated from the standards set forth in Section 3.2.2.4 of the gTLD Applicant Guidebook. The

Requester has failed to demonstrate that the Panel applied the wrong standard in contravention of established policy or procedure. Therefore, the BGC<sup>1</sup> concludes that Request 14-2 be denied.

## **II. Facts.**

### **A. Background Facts.**

Both the Requester, World Gold Council (the “Requester”) and June Edge, LLC (“June Edge”) applied for the gTLD string .GOLD.

On 13 March 2013, the Requester filed a Community Objection (the “Objection”) with the ICC<sup>2</sup> to June Edge’s application. The Requester asserted that there is “substantial opposition” to June Edge’s gTLD application from a significant portion of the community to which the gTLD string may be targeted. (Applicant Guidebook (“Guidebook”), § 3.5.4.)

On 15 May 2013, June Edge responded to the Objection.

On 1 July 2013, the ICC appointed Anibal Sabater as the Chairman of the Expert Panel (“Expert” or “Panel”) to consider the Objection.

On 8 August 2013, the Expert granted leave for the Requester and June Edge to file an additional round of written submissions.

On 18 August 2013, the Requester filed a supplemental written statement.

On 30 August 2013, June Edge responded to the Requester’s supplemental written statement.

On 12 September 2013, the Expert closed the record of the proceedings and referred the matter for determination. Upon closing the record, the Expert submitted his determination in draft form to the ICC for scrutiny as to form before it was signed pursuant to Article 21(b) of the Procedure.

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<sup>1</sup> Board Governance Committee.

<sup>2</sup> International Centre for Expertise of the International Chamber of Commerce.

On 7 January 2014, the ICC issued the Expert Determination dismissing the Objection. Based on the submissions and evidence provided by the parties, the Expert determined that the Requester lacked standing to maintain a Community Objection. (Determination, ¶ 40(a), Pg. 7.) The Panel dismissed the Objection and deemed June Edge the prevailing party. (Determination, ¶ 40(b), Pg. 7.)

On 8 January 2014, the ICC notified the parties of its Determination.

On 23 January 2014, the Requester filed Request 14-2.

### **B. The Requester's Claims.**

The Requester claims that the Expert's decision to dismiss the Objection violates the following ICANN policies:

- Section 3.2.2.4 of the Guidebook, in particular the standards for evaluating whether an objector meets the standing requirements for a Community Objection;
- Article 21(a) of the New gTLD Dispute Resolution Procedure (the "Procedure"), which grants the Expert Panel 45 days (plus, in certain circumstances, a brief extension) to render an expert determination; and
- Section 3.4.4 of the Guidebook, in particular the requirement that a "panel will consist of appropriately qualified experts."

(Request, Section 10, Pgs. 10-17.) Specifically, the Requester claims that:

1. The Expert mistakenly concluded that the Requester failed to prove the existence of a clearly delineated community for purposes of meeting the standing requirement;
2. The Expert Determination was untimely; and
3. The ICC failed to designate an appropriately qualified expert.

(Request, Section 10, Pgs. 10-17.)

### **C. Relief Requested.**

The Requester asks ICANN to reverse the Expert Determination and instruct another panel to make an expert determination that applies the standards defined by ICANN, including,

specifically, the standards for determining whether a community objector has standing to assert an objection. In the event ICANN concludes that the Panel adhered to and applied ICANN processes and policies concerning Community Objections, the Requester asks that ICANN derogate from its Procedure because accepting the Expert Determination would create inequitable and disparate treatment without justified cause.

### **III. Issues.**

In view of the claims set forth in Request 14-2, the issues for reconsideration are whether the Expert incorrectly applied the standards for evaluating whether an objector has standing to bring a Community Objection.

Specifically, the issues are:

- A. Whether the Expert incorrectly applied the Guidebook’s standing requirement for Community Objections, and specifically the requirement that an objector be an “established institution” with “an ongoing relationship with a clearly delineated community”;
- B. Whether the Expert rendered its Expert Determination in an untimely manner; and
- C. Whether the Expert was “appropriately qualified.”

### **IV. The Relevant Standards for Evaluating Reconsideration Requests and Community Objections.**

ICANN’s Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.<sup>3</sup> (Bylaws, Art. IV, § 2.) Dismissal of a request for

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<sup>3</sup> Article IV, Section 2.2 of ICANN’s Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

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

reconsideration of staff action or inaction is appropriate if the BGC concludes, or if the Board or the New gTLD Program Committee (NGPC) agrees to the extent that the BGC deems that further consideration is necessary, that the requesting party does not have standing because the party failed to satisfy the reconsideration criteria set forth in the Bylaws. ICANN has previously determined that the reconsideration process can properly be invoked for challenges to expert determinations rendered by panels formed by third party dispute resolution service providers, such as the ICC, where it can be stated that the Panel failed to follow the established policies or processes in reaching the expert determination, or that staff failed to follow its policies or processes in accepting that determination.<sup>4</sup>

In the context of the New gTLD Program, the reconsideration process does not call for the BGC to perform a substantive review of expert determinations. Rather, the BGC's review is limited to whether the Panel violated any established policy or process, which the Requester suggests the Panel did when it incorrectly applied the standard by which a community objector has standing to make a community objection.

(Request, Section 10, Pgs. 10-17.)

The standards for evaluating whether an objector has standing to make a Community Objection are set forth in Section 3.2.2.4 of the Guidebook. Pursuant to Section 3.2.2.4 of the Guidebook, an objector that files a Community Objection has standing when it "is an established institution" and "has an ongoing relationship with a clearly delineated community."

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(continued...)

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

<sup>4</sup> See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-booking-01aug13-en.doc>, BGC Recommendation on Reconsideration Request 13-5.

Regarding the first element of standing, the Guidebook identifies the following non-exhaustive list of factors relevant to determining whether the objector is “an established institution”:

- Level of global recognition of the institution;
- Length of time the institution has been in existence; and
- Public historical evidence of its existence, such as the presence of a formal charter or national or international registration, or validation by a government, inter-governmental organization, or treaty.

(Guidebook, § 3.2.2.4.)

Regarding the second element of standing, the Guidebook identifies the following list of non-exhaustive factors relevant to determining whether a clearly delineated community exists and whether there is an ongoing relationship between the objector and that community:

- The presence of mechanisms for participation in activities, membership, and leadership;
- Institutional purpose related to the benefit of the associated community;
- Performance of regular activities that benefit the associated community; and
- The level of formal boundaries around the community.

(Guidebook, § 3.2.2.4.)

Section 3.2.2.4 also states that the panel will “perform a balancing of the factors listed above, as well as other relevant information, in making its determination.” (*Id.*) The factors relevant to the Requester’s claims are discussed in detail below.

**V. Analysis and Rationale.**

**A. The Requester Failed To Demonstrate That The Panel Applied The Wrong Standards In Contravention Of Established Policy or Process.**

The Requester contends that the Expert failed to follow the Guidebook’s substantive objection standards for evaluating whether an objector has standing to make a Community Objection. Specifically, the Requester claims that the Expert “mistakenly jumped to the conclusion that the Requester failed to prove the existence of a clearly delineated community for purposes of meeting the standing requirement.” (Request, Section 10, Pg. 12.) The Requester also claims that the Expert failed to render an expert determination in a timely manner and that the Expert was not appropriately qualified. (*Id.* at Pgs. 16-17.)

As noted above, to have standing to make a community objection, an objector must demonstrate both: (1) it is an established institution; and (2) it has an ongoing relationship with a clearly delineated community. (Guidebook, § 3.2.2.4.) The Expert Determination was based on the second factor: “the gold industry community is not deemed to be clearly delineated within the meaning of § 3.2.2.4 of the Guidebook.” (Determination, § 38, Pg. 7.) As discussed in detail below, there is no support for Requester’s contention that the Expert incorrectly applied any of these standards in contravention of established policy or process.

**1. The Expert Did Not Incorrectly Apply The Standards For Determining The Existence Of A Clearly Delineated Community.**

The Requester claims that the Expert incorrectly applied ICANN standards and processes when it concluded that the “Requester failed to prove the existence of a clearly delineated community for purposes of meeting the standing requirement.” (Request, Pg. 12.) According to the Expert Determination and the Requester’s Objection, “World Gold Council asserts that the clearly delineated community underlying its objection is the gold industry.” (Determination, ¶ 32, Pg. 5; *see also id.* at ¶ 36, Pg. 6 (“World Gold Council’s community objection ... refers to

the gold industry in general ...."); *see also* Objection, Pg. 5 ("The World Gold Council is globally recognized as representative of the gold industry...."); *id.* ("The World Gold Council's daily activities are focused on benefitting the gold industry...."); *id.* at Pg. 6 ("The community to which the World Gold Council is related can be defined as the gold industry....").) Thus, in assessing whether the Requester had standing to assert a Community Objection, the Expert was required to evaluate whether the "gold industry"—*i.e.*, the community underlying the objection—is a clearly delineated community.

According to the Expert Determination, and as recognized by the Requester, one factor that may be considered in evaluating whether a clearly delineated community exists is "[t]he presence of mechanisms for participation in ... membership." (Determination, ¶ 31, Pg. 5; Request, Section 10, Pg. 10.) A second factor that may be considered is "[t]he level of formal boundaries around the community." (*Id.*) It logically follows from these factors that an objector must demonstrate that the community's membership is clearly defined. Section 3.2.2.4 of the Guidebook also provides that "other relevant information" may be considered in evaluating the standing requirements for community objections. Adhering to the foregoing factors articulated in the Guidebook, the Expert thereafter assessed whether the membership of the community on whose behalf the Requester was purportedly objecting – *i.e.*, the gold industry – was clearly delineated.

Specifically, the Expert considered the following non-exhaustive list of potential members in attempting to discern the constructs of membership in the "gold industry": (i) transportation companies that ship and deliver gold; (ii) retailers that sell gold exclusively, primarily, or as a small fraction of their trade; (iii) gold ore processing companies; (iv) companies that manufacture products that contain gold; and (v) companies specializing in

the management and safekeeping of investments in precious metals, such as gold.

(Determination, ¶ 37, Pg. 6.) In considering these examples, the Expert noted that “there is a significantly larger cast of characters involved with gold who are not clearly classifiable as belonging to the gold industry or not.” (*Id.*) As a result, the Panel concluded that “it cannot always be established who is a member of the gold industry and who is not.” (Determination, ¶ 37, Pg. 6.) Further, the Expert found that “it is difficult to discern where the gold industry community starts or ends, who or what can genuinely claim to be part of it, and what its membership criteria and formal boundaries are.” (*Id.*) In this regard, the Expert’s determination that “the gold industry is not deemed to be clearly delineated” (Determination, ¶ 38, Pg. 7), was based on the factors expressly articulated in Section 3.2.2.4 of the Guidebook and was consistent with ICANN policy and process.

The Requester also claims that, to meet the standing requirements, it was sufficient for the Requester to establish the existence of a “gold mining industry,” as compared to the more broadly articulated “gold industry.” (Request, Section 10, Pgs. 12-16.) To support this assertion, the Requester relies on the following Panel statement:

Considering World Gold Council’s allegations and evidence, there is certainly a case for asserting that the gold mining industry is sufficiently delineated as a community.

(Determination, ¶ 36, Pg. 6.) The Requester, however, fails to note that the Expert continued its point by stating: “World Gold Council’s community objection, however, refers to the gold industry in general and not to the gold mining industry in particular.” (*Id.*) And as stated in the Guidebook, for a Community Objection to be successful, the objector must prove, among other things, that “*the community invoked by the objector* is a clearly delineated community.”

(Guidebook, § 3.5.4; *see also id.* (“The objector must prove that *the community expressing opposition* can be regarded as a clearly delineated community.”) (emphasis added).) Thus,

because here the Requester invoked the objection on behalf of the “gold industry” and not the “gold mining industry,” the Expert correctly evaluated standing as to more broadly articulated “gold industry.”<sup>5</sup>

That the Expert used the “gold mining industry” as an example of a clearly delineated community is irrelevant for purposes of determining whether the community that was actually invoked by the objector—the gold industry—is a clearly delineated community. (*See* Guidebook, § 3.5.4 (“If opposition by a number of people/entities is found, but *the group represented by the objector* is not determined to be a clearly delineated community, the objection will fail.”) (emphasis added).) As the Expert determined, “[b]y the World Gold Council’s own admission, the gold industry is larger than the gold mining or gold production industry—and it is precisely in this very broadness that serious problems with the delineation of the gold industry community arise.” (Determination, ¶ 37, Pg. 6.)

In summary, the Expert Determination reveals that the Expert evaluated whether the gold industry was a clearly delineated community by assessing the factors set forth in Section 3.2.2.4 of the Guidebook, as well as “other relevant information,” as expressly permitted by the Guidebook. (*Id.*)

## **2. The Expert Determination Was Not Untimely.**

The Requester claims that the Expert Determination was untimely. (Request, Section 10, Pgs. 16-17.) As acknowledged by the Requester and as stated in the Determination, “Article 21(a) of the Procedure provides that the Centre and the Expert shall make reasonable efforts to ensure that the Expert renders his decision within 45 days of the ‘constitution of the Panel.’”

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<sup>5</sup> While the Requester states that it “expressly referred to the gold mining industry” in its Objection (*see* Request, Section 10, Pg. 13), the Requester does not dispute that its Objection was invoked on behalf of the “gold industry.”

(Determination, ¶ 17, Pg. 2; Request, Section 10, Pg. 16.) Pursuant to Article 21(b) of the Procedure, “[t]he Panel shall submit its Expert Determination in draft form to the DRSP’s scrutiny as to form before it is signed, unless such scrutiny is specifically excluded by the applicable DRSP rules.”

Here, the Panel was constituted on 30 July 2013. Thus, under the applicable Procedure, as recognized by the Requester, “the Expert Determination was due on or before 13 September 2013.” (Request, Section 10, Pg. 16.) On 12 September 2013, the Expert closed the record of this proceeding and referred the matter for determination. (Determination, ¶ 16, Pg. 2.) That same day – 12 September 2013 – the Expert “submitted ... his determination in draft form to the Centre for scrutiny as to form before it was signed.” (*Id.* at ¶ 17, Pgs. 2-3.) Indeed, the Expert’s submission of the Determination occurred one day *before* the 13 September 2013 deadline and therefore was in compliance with the applicable Procedure. As such, there is no basis for the Requester’s claim that the Expert Determination was untimely.

Nor is there any basis for the Requester’s apparent claim that the ICC was untimely in its subsequent scrutiny of the draft form of the Expert Determination. Following the 12 September 2013 submission of the Determination, on 7 January 2014, the ICC issued the Expert Determination dismissing the Requester’s Objection. The Requester does not identify any ICANN process or policy that was contravened in this regard. To the contrary, the ICC complied with the Procedure’s provision requiring that, following the ICC’s scrutiny of the Expert Determination, “[t]he signed Expert Determination shall be communicated to the DSRP, which in turn will communicate that Expert Determination to the Parties and ICANN.” (Procedure, Art. 21(b).)

### **3. The Alleged Failure Of the ICC To Appoint An Appropriately Qualified Expert Does Not Support Reconsideration.**

The Requester claims that “the DSRP must have failed to designate an appropriately qualified expert.” (Request, Section 10, Pg. 17.) In support of this assertion, the Requester states that “the appointed Panel failed to apply correctly the community objection standing requirements,” which, in the Requester’s view, “shows that the Panel was unfamiliar with ICANN’s standards and processes.” (*Id.*)

The Requester is challenging an alleged inaction – *i.e.*, the ICC’s purported failure to appoint appropriately qualified experts to decide Community Objections. Specifically, the Requester contends that the ICC’s failure to appoint an appropriately qualified expert constituted a violation of Section 3.4.4 of the Guidebook. (Request, Section 10, Pg. 17.) To support its argument, Requester offers the Expert’s determination on Requester’s lack of standing as evidence of that the Expert was not appropriately qualified.

The Requester’s claim must be rejected. As set forth above, there is no support for the Requester’s claim that the Expert failed to apply correctly the Community Objection standing requirements. The fact that the Requester disagreed with the Expert’s finding is not evidence that the Expert was not appropriately qualified. There is no support for the Requester’s contention that the Expert Determination should be voided due to the ICC’s alleged failure to appoint an appropriately qualified expert.

Furthermore, there is no support for the Requester’s claim that the Expert was somehow “unfamiliar with ICANN’s standards and processes.” The standards for evaluating the merits of a Community Objection are set out in the Guidebook, and the Expert’s knowledge and familiarity with these standards was evidenced in the Expert Determination. Specifically, in rendering its Determination, the Expert expressly noted that “ICANN has set out standards

applicable to the present dispute in its Guidebook, on which both parties rely.” (Determination, ¶ 6, Pg. 1.) The Expert thus found that “this determination shall be based on the ICANN standards.” (Determination, ¶ 7, Pg. 1.) The Determination is replete with references and supporting citations to the Guidebook and applicable Procedure. There is thus no support for the Requester’s claim that the Expert was somehow “unfamiliar” with ICANN’s standards and processes.

## **VI. Decision**

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and therefore denies World Gold Council’s Reconsideration Request. As there is no indication that the Panel violated any policy or process in reaching the Determination, this Request should not proceed. If the Requester believes that it has somehow been treated unfairly in the process, the Requester is free to ask the Ombudsman to review this matter.

In accordance with Article IV, Section 2.15 of the Bylaws, the BGC’s determination on Request 14-2 shall be final and does not require Board consideration. The Bylaws provide that the BGC is authorized to make a final determination for all Reconsideration Requests brought regarding staff action or inaction and that the BGC’s determination on such matters is final. (Bylaws, Art. IV, § 2.15.) As discussed above, Request 14-2 seeks reconsideration of a staff action or inaction. After consideration of this Request, the BGC concludes that this determination is final and that no further consideration by the Board is warranted.