

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ASIA GREEN IT SYSTEM
BILGISAYAR SAN. VE TIC. LTD. STI.,) ICDR CASE NO. 01-15-0005-9838
)
Claimant,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)

**ICANN'S OBSERVATIONS AS TO SCOPE OF PANEL AUTHORITY IN THE
CONTEXT OF SECTION II OF THE *MERCK KGaA v. ICANN* IRP
FINAL DECLARATION**

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Pursuant to the Panel’s 24 May 2016 email, the Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits its observations concerning the scope of the Panel’s authority in the context of Section II of the final declaration issued by the independent review process (“IRP”) panel in the *Merck KGaA v. ICANN* proceeding (“*Merck Final Declaration*”). For the reasons discussed herein, Section II of the *Merck Final Declaration* shows that claimant Asia Green IT System Bilgisayar San. ve Tic. Ltd. Sti. (“AGIT”) cannot meet its burden of showing that any IRP is warranted here.

INTRODUCTION

1. An IRP panel’s authority is limited to “declaring whether the Board has acted consistently with the provisions of [ICANN’s] Articles of Incorporation and Bylaws.”¹ The *Merck Final Declaration* emphasized the limited mandate of IRP panels, explaining: “The analysis which the Panel is mandated to undertake is one of comparison. More particularly, a contested action [or inaction] of the Board is compared to the Articles of Incorporation and Bylaws in order to ascertain whether there is consistency.”² The parties are in agreement as to this starting point, as AGIT acknowledges in its IRP Request that an IRP is only warranted where Board conduct is found to have violated ICANN’s Articles or Bylaws.³

2. Proceeding from that common ground, the *Merck Final Declaration* offers four points regarding the scope of an IRP panel’s authority that show why ICANN should prevail here. First, the *Merck Final Declaration* made clear that the Panel must compare the contested action with the Articles of Incorporation (“Articles”) and Bylaws by conducting a “careful assessment of the action itself, *rather than its characterization* by either the complainant or

¹ Bylaws, Art. IV, § 3.4.

² *Merck Final Decl.* ¶ 17 (footnote omitted).

³ See IRP Req. at 15.

ICANN.”⁴ Second, the *Merck* Final Declaration noted that “the parameters of the evaluation for consistency” between the contested action and the Articles and Bylaws are the “three specific elements” laid out in Article IV, section 3.4 of the Bylaws.⁵ Third, the *Merck* Final Declaration recognized that “the Panel may not substitute its own view of the merits of the underlying dispute.”⁶ Fourth, the *Merck* Final Declaration made clear that the claimant bears the “burden of persuasion” in an IRP.⁷ Each of these principles, when applied to AGIT’s IRP Request, confirms that no IRP is warranted.

ARGUMENT

3. First, the *Merck* Final Declaration makes clear that a claimant’s “characterization” of a Board action is irrelevant to the critical inquiry as to whether the identified action violates ICANN’s Articles or Bylaws.⁸ AGIT’s brief repeatedly characterizes the Board’s treatment of its applications for .HALAL and .ISLAM (“Applications”) in an ominous and hyperbolic manner, in an attempt to mask the fact that the Board did comply with the Articles and Bylaws. For example, AGIT mischaracterizes the New gTLD Program Committee’s (“NGPC’s”) determination that it “will not address the applications further until such time as the noted conflicts have been resolved” by claiming that it was a “veto” of the Applications, when in fact the Applications are currently on hold until AGIT addresses the objectors’ concerns.⁹ Similarly, AGIT complains of “secret” meetings between ICANN and the GAC (and between ICANN and objectors to the Applications), but the facts belie this characterization.¹⁰ In fact, AGIT’s current Chief Operating Officer attended one such meeting – namely, an 18 July 2013 meeting between

⁴ *Merck* Final Declaration ¶ 17 (emphasis added).

⁵ *Id.* ¶ 18; Bylaws, Art. IV, § 3.4.

⁶ *Id.* ¶ 21.

⁷ *Id.* ¶ 22.

⁸ *Id.* ¶ 17.

⁹ AGIT’s IRP Req. at 19-23.

¹⁰ *Id.* at 10, 14-18, 23.

ICANN Board members and relevant GAC members during which the scope of the GAC's concerns regarding the Applications was specifically discussed. As such, portraying such meetings as "secret" is simply inaccurate, as ICANN anticipates the documents it requested that AGIT produce will confirm. The *Merck* Final Declaration provides a useful reminder that the Panel's analysis must consist only of a comparison between the contested Board conduct and ICANN's Articles and Bylaws, without regard to AGIT's self-serving descriptions of that conduct.

4. Second, the *Merck* Final Declaration noted that the Panel must employ a "mandatory focus" on the standard of review laid out in Bylaws, Art. IV, § 3.4,¹¹ namely: (a) did the Board act without conflict of interest in taking its decision?; (b) did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and (c) did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?¹² AGIT has conceded that its IRP Request does not allege any conflict of interest.¹³ Therefore, the Panel's task is limited to applying the latter two prongs of this standard to the contested Board conduct.

5. As for the second prong, the Board was informed by a reasonable amount of facts and exercised due diligence in reaching its conclusion that the Applications should not proceed until AGIT addresses the objectors' concerns. ICANN has detailed the significant effort the Board underwent to comprehend the nature of the objections and determine the appropriate course of action regarding the Applications. This included meeting with GAC representatives, reviewing correspondence from the objectors, and communicating its reasoning regarding the

¹¹ *Merck* Final Declaration ¶ 18.

¹² Bylaws, Art. IV, § 3.4.

¹³ AGIT's counsel conceded this point on a recent administrative conference call.

Applications to AGIT.¹⁴ These actions go above and beyond the Guidebook’s requirement that the Board only “enter into dialogue to understand the scope of the [GAC’s] concerns.”¹⁵ The Board’s conduct here was both informed and diligent, and therefore meets the second prong of the standard of review laid out in Bylaws, Art. IV, § 3.4. AGIT has not presented any facts to the contrary.

6. As for the third prong, which asks whether the Board exercised independent judgment, AGIT vaguely asserts that the Board “has kowtowed to the Objectors’ ‘concerns’ – allowing them to effectively decide if, when and under what conditions AGIT will operate these TLDs.”¹⁶ Yet AGIT ignores the fact that the Guidebook confers discretion upon the Board to intervene with respect to individual applications.¹⁷ AGIT points to no Article or Bylaws provision inconsistent with this Guidebook provision. Moreover, AGIT has failed to present any evidence that it has addressed the concerns raised by objectors such as the Organisation of Islamic Cooperation (“OIC”), which AGIT itself has recognized is “the collective voice of the Muslim world” and therefore an important entity to ensuring community support for the Applications.¹⁸ In fact, AGIT has not presented evidence that *any* objector’s concerns have been redressed. In short, the Board has exercised its independent judgment in taking these objectors’ concerns seriously. The Board’s treatment of the Applications therefore meets the third prong of the standard of review laid out in Bylaws, Art. IV, § 3.4.

7. Third, AGIT’s claims run headlong into the *Merck* Final Declaration’s caution

¹⁴ ICANN’s Response to IRP Req. ¶¶ 46-53.

¹⁵ Guidebook § 3.1(I).

¹⁶ AGIT’s IRP Req. at 21.

¹⁷ Guidebook § 5.1.

¹⁸ Cl. Annex 6; *see also* Cl. Annex 4 (noting it approached the OIC for sponsorship and formulated an “OIC Plan” and that it would “do its outmost [*sic*] to include OIC into governance of .islam gTLD”).

that an IRP “Panel may not substitute its own view of the merits of the underlying dispute.”¹⁹

Here, the Board exercised its discretion to place the Applications on hold because AGIT failed to provide any evidence that it had assuaged the concerns raised in objections to the Applications.²⁰

By its IRP Request, AGIT squarely asks the Panel to overrule that discretionary decision, without identifying any Article or Bylaws provision that the Board’s action contravenes. Such a claim cannot support an IRP Request, as the *Merck* Final Declaration made clear.

8. Fourth, the *Merck* Final Declaration noted that the claimant bears the “burden of persuasion” in an IRP.²¹ AGIT seeks to evade this burden, arguing that “[t]he Board has not provided any substantial or reasonable cause for infinitely delaying only AGIT’s two applications[.]”²² In fact, the Board did provide a rationale for its decision to place the Applications on hold, as the 7 February 2014 letter made clear that AGIT must show that it has addressed the objectors’ concerns before the Applications may proceed. Moreover, as the *Merck* Final Declaration made clear, the claimant in an IRP must “identify exactly” the Board action, and also “identify exactly how such action is not consistent with the Articles of Incorporation and Bylaws,” and “bears the burden of persuasion.”²³ AGIT has failed to meet each of these requirements that the *Merck* panel set out in its Final Declaration.

CONCLUSION

9. The *Merck* Final Declaration confirms the limited mandate of this Panel, and shows that AGIT will be unable to meet its burden to show that an IRP is warranted.

¹⁹ *Merck* Final Declaration ¶ 21.

²⁰ *See* Guidebook § 5.1.

²¹ *Merck* Final Declaration ¶ 22.

²² AGIT’s IRP Req. at 22.

²³ *Merck* Final Declaration ¶ 22.

Respectfully submitted,

JONES DAY

Dated: June 6, 2016

By: /s/ Eric P. Enson

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