

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
ICDR CASE NO. 01-15-0002-9483

DOT SPORT LIMITED
(Claimant)

And

INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS
(Respondent)

INDEX TO DOCUMENTS SUBMITTED WITH ICANN'S SUR-REPLY

<u>Exhibit</u>	<u>Description</u>
Resp. Ex. 12	Recommendation of the Board Governance Committee (BGC) Recommendation for Request 13-5
Resp. Ex. 13	<i>Merck KGaA v. ICANN</i> , ICDR Case No. 01-14-0000-9604, Final Declaration
Resp. Ex. 14	Rationale for NGP Resolution 2013.05.18.NGO4

Resp. Ex. 12

RECOMMENDATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUEST 13-5

1 AUGUST 2013¹

On 7 July 2013, Booking.com B.V. (“Booking.com”), through its counsel, Crowell & Moring, submitted a reconsideration request (“Request”). The Request was revised from Booking.com’s 28 March 2013 submission of a similar reconsideration request, which was put on hold pending the completion of a request pursuant to ICANN’s Documentary Information Disclosure Policy (“DIDP”).

The Request asked the Board to reconsider the ICANN staff action of 26 February 2013, when the results of the String Similarity Panel were posted for the New gTLD Program. Specifically, the Request seeks reconsideration of the placement of the applications for .hotels and .hoteis into a string similarity contention set.

I. Relevant Bylaws

As the Request is deemed filed as of the original 28 March 2013 submission, this Request was submitted and should be evaluated under the Bylaws that were in effect from 20 December 2012 through 10 April 2013. Article IV, Section 2.2 of that version 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:

¹ At its 1 August 2013 meeting, the Board Governance Committee deliberated and reached a decision regarding this Recommendation. During the discussion, however, the BGC noted revisions that were required to the draft Recommendation in order to align with the BGC’s decision. After revision and allowing for the BGC member review, the BGC Recommendation on Request 13-5 was finalized and submitted for posting on 21 August 2013.

(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.

A third criteria was added to the Bylaws effective 11 April 2013, following the Board's adoption of expert recommendations for revisions to the Reconsideration process. That third basis for reconsideration, focusing on Board rather than staff conduct, is "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." (See <http://www.icann.org/en/about/governance/bylaws#IV>.)

When challenging a staff action or inaction, a request must contain, among other things, a detailed explanation of the facts as presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN policy(ies). See Article IV §2.6(g) of the 20 December 2012 version of Bylaws (<http://www.icann.org/en/about/governance/bylaws/bylaws-20dec12-en.htm#IV>) and the current Reconsideration form effective as of 11 April 2013 (<http://www.icann.org/en/groups/board/governance/reconsideration/request-form-11apr13-en.doc>).

Dismissal of a request for reconsideration is appropriate if the Board Governance Committee ("BGC") finds that the requesting party does not have standing because the party failed to satisfy the criteria set forth in the Bylaws. These standing requirements are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge an action with which someone disagrees, but that it is limited to situations where the staff acted in contravention of established policies.

The Request was originally received on 28 March 2013, which makes it timely under the then effective Bylaws.² Bylaws, Art. IV, § 2.5.

II. Background

Within the New gTLD Program, every applied-for string has been subjected to the String Similarity Review set out at Section 2.2.1.1 of the Applicant Guidebook. The String Similarity Review checks each applied-for string against existing TLDs, reserved names and other applied-for TLD strings (among other items) for “visual string similarities that would create a probability of user confusion.” (Applicant Guidebook, Section 2.2.1.1.1.) If applied-for strings are determined to be visually identical or similar to each other, the strings will be placed in a contention set, which is then resolved pursuant to the contention resolution processes in Module 4 of the Applicant Guidebook. If a contention set is created, only one of the strings within that contention set may ultimately be approved for delegation.

After issuing a request for proposals, ICANN selected InterConnect Communications (“ICC”) to perform the string similarity review called for in the Applicant Guidebook. On 26 February 2013, ICANN posted ICC’s report, which included two non-exact match contention sets (.hotels/.hoteis and .unicorn/.unicom) as well as 230 exact match contention sets. <http://www.icann.org/en/news/announcements/announcement-26feb13-en.htm>. The String Similarity Review was performed in accordance with process documentation posted at <http://newgtlds.icann.org/en/program-status/evaluation-panels/geo-names-similarity-process-07jun13-en.pdf>. As part of ICANN’s acceptance of the ICC’s results, a quality assurance review

² ICANN staff and the requester communicated regarding the holds placed on the Request pending the DIDP Response, and the requester met all agreed-upon deadlines, thereby maintaining the timely status of this Request.

was performed over a random sampling of applications to, among other things, test whether the process referenced above was followed.

Booking.com is an applicant for the .hotels string. As a result of being placed in a contention set, .hotels and .hoteis cannot both proceed to delegation. Booking.com will have to resort to private negotiations with the applicant for .hoteis, or proceed to an auction to resolve the contention issue. Request, page 4.

Although the String Similarity Review was performed by a third party, ICANN has determined that the Reconsideration process can properly be invoked for challenges of the third party's decisions where it can be stated that either the vendor failed to follow its process in reaching the decision, or that ICANN staff failed to follow its process in accepting that decision. Because the basis for the Request is not Board conduct, regardless of whether the 20 December 2012 version, or the 11 April 2013 version, of the Reconsideration Bylaws is operative, the BGC's analysis and recommendation below would not change.

III. Analysis of Booking.com's Request for Reconsideration

Booking.com seeks reconsideration and reversal of the decision to place .hotels and .hoteis in a non-exact match contention set. Alternatively, Booking.com requests that an outcome of the Reconsideration process could be to provide "detailed analysis and reasoning regarding the decision to place .hotels into a non-exact match contention set" so that Booking.com may "respond" before ICANN takes a "final decision." (Request, Page 9.)

A. Booking.com's Arguments of Non-Confusability Do Not Demonstrate Process Violations

The main focus of Booking.com's Request is that .hotels and .hoteis can co-exist in the root zone without concern of confusability. (Request, pages 10 – 12.) To support this assertion, Booking.com cites to the opinion of an independent expert that was not part of the string

similarity review panel (Request, pages 10-11), references the intended uses of the .hotels and .hoteis strings (Request, page 11) and the difference in language populations that is expected to be using .hotels and .hoteis (Request, page 11), references ccTLDs that coexist with interchangeable “i”s and “l”s (Request, page 11), notes the keyboard location of “i”s and “l”s (Request, page 12), and contends that potential users who get to the wrong page would understand the error they made to get there (Request, page 12).

Booking.com does not suggest that the process for String Similarity Review set out in the Applicant Guidebook was not followed, or that ICANN staff violated any established ICANN policy in accepting the String Similarity Review Panel (“Panel”) decision on placing .hotels and .hoteis in contention sets. Instead, Booking.com is supplanting what it believes the review methodology for assessing visual similarity should have been, as opposed to the methodology set out at Section 2.2.1.1.2 of the Applicant Guidebook. In asserting a new review methodology, Booking.com is asking the BGC (and the Board through the New gTLD Program Committee (NGPC)) to make a substantive evaluation of the confusability of the strings and to reverse the decision. In the context of the New gTLD Program, the Reconsideration process is not however intended for the Board to perform a substantive review of Panel decisions.. While Booking.com may have multiple reasons as to why it believes that its application for .hotels should not be in contention set with .hoteis, Reconsideration is not available as a mechanism to re-try the decisions of the evaluation panels.³

³ Notably, Booking.com fails to reference one of the key components of the documented String Similarity Review, the use of the SWORD Algorithm, which is part of what informs the Panel in assessing the visual similarity of strings. .hotels and .hoteis score a 99% on the publicly available SWORD algorithm for visual similarity. See <https://icann.sword-group.com/algorithm/>.

Booking.com also claims that its assertions regarding the non-confusability of the .hotels and .hoteis strings demonstrate that “it is contrary to ICANN policy⁴ to put them in a contention set.” (Request, pages 6-7.) This is just a differently worded attempt to reverse the decision of the Panel. No actual policy or process is cited by Booking.com, only the suggestion that – according to Booking.com – the standards within the Applicant Guidebook on visual similarity should have resulted in a different outcome for the .hotels string. This is not enough for Reconsideration.

Booking.com argues that the contention set decision was taken without material information, including Booking.com’s linguistic expert’s opinion, or other “information that would refute the mistaken contention that there is likely to be consumer confusion between ‘.hotels’ and ‘.hoteis.’” (Request, page 7.) However, there is *no* process point in the String Similarity Review for applicants to submit additional information. This is in stark contrast to the reviews set out in Section 2.2.2 of the Applicant Guidebook, including the Technical/Operational review and the Financial Review, which allow for the evaluators to seek clarification or additional information through the issuance of clarifying questions. (AGB, Section 2.2.2.3 (Evaluation Methodology).) As ICANN has explained to Booking.com in response to its DIDP requests for documentation regarding the String Similarity Review, the Review was based upon the methodology in the Applicant Guidebook, supplemented by the Panel’s process documentation; the process does not allow for additional inputs.

Just as the process does not call for additional applicant inputs into the visual similarity review, Booking.com’s call for further information on the decision to place .hotels and .hoteis in

⁴ It is clear that when referring to “policy”, Booking.com is referring to the process followed by the String Similarity Review.

a contention set “to give the Requester the opportunity to respond to this, before taking a final decision” is similarly not rooted in any established ICANN process at issue. (Request, page 9.) First, upon notification to the applicants and the posting of the String Similarity Review Panel report of contention sets, the decision was already final. While applicants may avail themselves of accountability mechanism to challenge decisions, the use of an accountability mechanism when there is no proper ground to bring a request for review under the selected mechanism does not then provide opportunity for additional substantive review of decisions already taken.

Second, while we understand the impact that Booking.com faces by being put in a contention set, and that it wishes for more narrative information regarding the Panel’s decision, no such narrative is called for in the process. The Applicant Guidebook sets out the methodology used when evaluating visual similarity of strings. The process documentation provided by the String Similarity Review Panel describes the steps followed by the Panel in applying the methodology set out in the Applicant Guidebook. ICANN then coordinates a quality assurance review over a random selection of Panel’s reviews to gain confidence that the methodology and process were followed. That is the process used for a making and assessing a determination of visual similarity. Booking.com’s disagreement as to whether the methodology should have resulted in a finding of visual similarity does not mean that ICANN (including the third party vendors performing String Similarity Review) violated any policy in reaching the decision (nor does it support a conclusion that the decision was actually wrong).⁵

⁵ In trying to bring forward this Request, Booking.com submitted requests to ICANN under the Documentary Information Disclosure Policy (DIDP). As of 25 July 2013, all requests had been responded to, including the release of the Panel process documentation as requested. See Request 20130238-1 at <http://www.icann.org/en/about/transparency>. Booking.com describes the information it sought through the DIDP at Pages 8 – 9 of its Request. The discussion of those requests, however, has no bearing on the outcome of this Reconsideration.

B. Booking.com’s Suggestion of the “Advisory Status” of the String Similarity Panel Decision Does Not Support Reconsideration

In its Request, Booking.com suggests that the Board has the ability to overturn the Panel’s decision on .hotels/.hoteis because the Panel merely provided “advice to ICANN” and ICANN made the ultimate decision to accept that advice. Booking.com then suggests that the NGPC’s acceptance of GAC advice relating to consideration of allowing singular and plural versions of strings in the New gTLD Program, as well as the NGPC’s later determination that no changes were needed to the Applicant Guidebook regarding the singular/plural issue, shows the ability of the NGPC to override the Panel determinations. (Request, pages 5-6.) Booking.com’s conclusions in these respects are not accurate and do not support Reconsideration.

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

The subsequent receipt and consideration of GAC advice on singular and plural strings does not change the established process for the development of contention sets based on visual

similarity. The ICANN Bylaws require the ICANN Board to consider GAC advice on issues of public policy (ICANN Bylaws, Art. XI, Sec. 2.1.j); therefore the Board, through the NGPC, was obligated to respond to the GAC advice on singular and plural strings. Ultimately, the NGPC determined that no changes were needed to the Guidebook on this issue. (Resolution 2013.06.25.NG07, at <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm#2.d>.) Notably, neither the GAC advice nor the NGPC resolution focused on the issue of visual similarity (which the String Similarity Review Panel was evaluating), but instead the issue was potential consumer confusion from having singular and plural versions of the same word in the root zone. It is unclear how the NGPC's decision on a separate topic – and a decision that did not in any way alter or amend the work of an evaluation panel – supports reconsideration of the development of the .hotels/.hoteis contention set.

VIII. Recommendation And Conclusion

Based on the foregoing, the BGC concludes that Booking.com has not stated proper grounds for reconsideration and we therefore recommend that Booking.com's request be denied without further consideration. This Request challenges a substantive decision taken by a panel in the New gTLD Program and not the process by which that decision was taken. As stated in our Recommendation on Request 13-2, Reconsideration is not a mechanism for direct, de novo appeal of staff or panel decisions with which the requester disagrees, and seeking such relief is, in fact, in contravention of the established processes within ICANN. See <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-nameshop-01may13-en.pdf>.

The BGC appreciates the impact to an applicant when placed in a contention set and does not take this recommendation lightly. It is important to recall that the applicant still has the

opportunity to proceed through the New gTLD Program subject to the processes set out in the Applicant Guidebook on contention. We further appreciate that applicants, with so much invested and so much at stake within the evaluation process, are interested in seeking any avenue that will allow their applications to proceed easily through evaluation. However, particularly on an issue such as visual similarity, which is related to the security and stability of the domain name system, there is not – nor is it desirable to have – a process for the BGC or the Board (through the NGPC) to supplant its own determination as to the visual similarity of strings over the guidance of an expert panel formed for that particular purpose. As there is no indication that either the Panel or ICANN staff violated any established ICANN policy in reaching or accepting the decision on the placement of .hotels and .hoteis in a non-exact contention set, this Request should not proceed.

If Booking.com thinks that it has been treated *unfairly* in the new gTLD evaluation process, and the NGPC adopts this Recommendation, Booking.com is free to ask the Ombudsman to review this matter. (See ICANN Bylaws the Ombudsman shall “have the right to have access to (but not to publish if otherwise confidential) all necessary information and records from ICANN staff and constituent bodies to enable an informed evaluation of the complaint and to assist in dispute resolution where feasible (subject only to such confidentiality obligations as are imposed by the complainant or any generally applicable confidentiality policies adopted by ICANN)”.)

Resp. Ex. 13

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

INDEPENDENT REVIEW PROCESS

Case No. 01-14-0000-9604

MERCK KGaA
(Claimant)

-v-

Internet Corporation for Assigned Names and Numbers
(Respondent)

**FINAL DECLARATION OF THE INDEPENDENT REVIEW PROCESS
PANEL**

Section I – Procedural History

1. The Claimant, Merck KGaA (“Merck”), of Frankfurter Straße 250 64293 Darmstadt, Germany, is represented in this matter by Bettinger Schneider Schramm, Cuvilliesstraße 14, 81679 Munich, Germany.
2. The Respondent, Internet Corporation for Assigned Names and Numbers (“ICANN”), of Suite 300 12025 E. Waterfront Dr., Los Angeles, CA 90094, USA, is represented in this matter by Jones Day, 555 South Flower Street Fiftieth Floor Los Angeles, CA 90071, USA.
3. A Notice of Independent Review dated July 17, 2014 was filed by Merck with the International Centre for Dispute Resolution, together with its Request.
4. ICANN filed its Response on August 29, 2014.
5. The Panel held a preliminary hearing call on April 1, 2015 and issued the following direction by email thereafter:

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The Preliminary Hearing Call in this matter took place at 9am, Pacific Time, on April 1, 2015, and was duly notified and convened. Counsel (Bettinger, with Gray, for Merck KGaA; LeVee for ICANN) for both parties made observations on the procedure to be adopted in this Independent Review Process. At the conclusion of the Preliminary Hearing Call the parties were asked whether there was anything further they wished to raise, and the answer from each side was no.

*The Panel (Dimwoodie, Matz, and Reichert) now, bearing these observations in mind together with the materials already filed by the parties to date, **issues the following directions:***

- 1. Merck KGaA shall file its Reply Submission on May 20, 2015.*
- 2. ICANN shall file its Rejoinder Submission on July 8, 2015.*
- 3. A page limit of 20 pages applies to both Submissions (the page limit does not apply to matters such as tables of contents).*

4. The Submissions should only attach any additional evidentiary exhibit which is strictly necessary for the purpose of reply/rejoinder. Also, the parties must focus their Submissions on matters which are strictly for the purposes of reply/rejoinder, and not seek to reformulate the case as already presented.

5. If there is any dispute as to acronyms or other defined terms, the Submissions should clearly flag these in order that there is no misunderstanding.

6. As soon as possible after July 8, 2015, the Panel will communicate with the parties as to the next stages of this Independent Review Process.

As noted on the Preliminary Hearing Call by the ICDR representative, communications will now take place directly between the Panel and the parties, with a copy at all times to the ICDR.

For and on behalf of the Panel.

Klaus Reichert SC

6. On May 20, 2015, Merck filed its Reply.
7. On July 9, 2015, ICANN filed its Rejoinder.
8. On July 12, 2015, the Panel issued the following direction by email:

Dear Counsel,

The Panel has considered the submissions received.

Having considered the submissions made to date, do the parties wish to have an oral hearing? If the answer from a party is yes, we would like to know the likely duration of such a hearing, and whether there is a preference for it to be conducted in person, or by telephone.

Once we have received your responses to the foregoing we will consider the future conduct of this matter and revert to the parties.

We do not set a particular deadline for your responses, rather we ask that you reply as soon as possible.

Klaus Reichert

9. On July 14, 2015, ICANN indicated that it believed that a hearing by telephone would be useful.
10. On July 21, 2015, Merck indicated that a hearing would be unnecessary.
11. On July 21, 2015, the Panel issued the following direction by email:

Dear Counsel,

Noting Article 4 of the Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process ("the Procedures"), the Panel has determined that a telephone hearing will not be necessary.

Noting Article 11 of the Procedures, we invite each side to submit their respective claims for costs by July 29, 2015. Thereafter an opportunity will be afforded to each side to comment on the claim for costs of the other.

Klaus Reichert

12. On July 28, 2015, Merck stated that ICANN should be held responsible for (a) the fees and expenses of the panelists, and, (b) the fees and expenses of the administrator, the ICDR.
13. On July 28, 2015, ICANN stated that Merck should be held responsible for costs (identifying the same headings as those identified by Merck).
14. On July 28, 2015, the Panel issued the following direction by email:

Dear Parties,

Thank you both for your letters on costs.

We now ask each side for any final observations they might wish to make on costs in light of the letters received today. The deadline is 4 August 2015.

Klaus Reichert

15. On July 31, 2015, Merck stated that it had no comment on ICANN's letter regarding costs. ICANN did not make any final observations on costs.

Section II – The Panel's Authority

16. The Panel's authority and mandate is as follows (from Article IV, Section 3.4 of ICANN's Articles of Incorporation and Bylaws):

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?*
17. The analysis which the Panel is mandated to undertake is one of comparison. More particularly, a contested action¹ of the Board is compared to the Articles of Incorporation and Bylaws in order to ascertain whether there is consistency. The analysis required for a comparison exercise requires careful assessment of the action itself, rather than its characterization by either the complainant or ICANN. The Panel, of course, does take careful note of the characterizations that are advanced by the Claimant and ICANN.
18. As regards the substantive object of the comparison exercise, namely, whether there was consistency as between the action and the Articles of Incorporation and Bylaws, the parameters of the evaluation for consistency are informed by the final part of Article IV, Section 3.4, which is explicit

¹ The Panel is of the view that inaction, depending upon the circumstances, may constitute an action within the meaning of Article IV, Section 3.4.

in focusing on three specific elements. The phrase “defined standard of review” undoubtedly relates to the exercise of comparison for consistency, and informs the meaning of the word “consistent” as used in Article IV, Section 3.4. The mandatory focus on the three elements (a-c) further informs the exercise of comparison.

19. The parties dwell in various ways on whether the Panel’s approach is deferential or *de novo*. The Panel does not find this debate to be of assistance as it diverts attention from the precise parameters of its authority, namely, to do exactly what it is mandated to do by Article IV, Section 3.4.
20. Nothing in the language of Article IV, Section 3.4, suggests that there be any deference afforded to the contested action. Either the action was consistent with the Articles of Incorporation and Bylaws, or it was not.
21. Discussion as regards whether the Panel should engage in a *de novo* standard of review is also apt to mislead. However, it is clear that the Panel may not substitute its own view of the merits of the underlying dispute.
22. In summary, the Independent Review Process is a bespoke process, precisely circumscribed. The precise language used in Article IV, Section 3.4 requires the party seeking to contest an action of the Board to identify exactly such action, and also identify exactly how such action is not consistent with the Articles of Incorporation and Bylaws. Thus, a panel is required to consider only the precise actions contested. Such a contesting party also bears the burden of persuasion.

Section III – Analysis

23. The first contested action, as characterized and raised by Merck in paragraph 46 of the Request is:

The ICANN Board has accepted three expert determinations which suffer from palpable mistakes and manifest disregard of its own LRO standards, without due diligence and care to prevent the acceptance of such determinations, resulting in fundamental unfairness and a failure of due process for the Claimant.

24. Merck says that this is a violation of ICANN’s Articles of Incorporation and Bylaws, Article I, Section 2.8, which provide as follows:

In performing its mission, the following core values should guide the decisions and actions of ICANN..... 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

25. The Panel will first describe, based on its appreciation of the materials put before it, the background leading up to the initiation of this Independent Review Process.
26. Merck is a long-established pharmaceutical and chemical business in Germany. In 1917 its then American business (now Merck & Co., Inc. (“MSD”)) was separated from it by the Trading with the Enemy Act arising from the entry of the United States as a belligerent into World War I. The co-existence of Merck and MSD has been the subject of a number of formal agreements over the years, and also a number of disputes.
27. Merck and MSD each filed applications with ICANN for new gTLDs incorporating the word “Merck”. As a result, Merck and MSD then filed a number of Legal Rights Objections (“LROs”) against each other with the WIPO Arbitration and Mediation Centre in accordance with the New gTLD Dispute Resolution Procedure. At the heart of Merck’s complaint was the point that MSD apparently was not intending to limit, through

geo-targeting, the potential global reach of its applied-for domains. In contrast, Merck made explicit its intention to use geo-targeting.

28. By Determinations issued in July and September 2013, the Sole Panel Expert rejected the LROs. The following extract from LRO2013-0068 is reflective of the reasoning common to all:

The starting point of this case is that Objector and Applicant are both bona fide users of the MERCK trademark, albeit for different territories.

The question is whether a bona fide trademark owner that owns trademark rights in certain countries but does not have rights to a certain trademark in all countries of the world, should for that reason be prevented from obtaining a gTLD. In the view of the Panel, such a proposition does not make sense. If the opposite view would be accepted, it would be expected from any trademark owner interested in a gTLD to have trademark registrations in all countries of the world as otherwise another party could register one trademark in an "uncovered" country and thus prevent the first trademark owner from applying for and using its own gTLD.

In essence there should not be a significant difference between the criteria for the legal rights objection as included in the Guidebook on the one hand and the provisions included in the Uniform Domain Name Dispute Resolution Policy ("UDRP"). If the applicant for a new gTLD is bona fide, it will not be likely that one of the three criteria will be met. It might be that advantage of the distinctive character or the reputation of the objector's registered trademark is taken, but it is then likely not unfair. It might be that the distinctive character or reputation of the objector's registered trademark is being impaired, but it is likely justified. It might be that a likelihood of confusion between the Disputed gTLD String and the objector's mark is created, but it is not necessarily impermissible.

Of course a rejection of the Objection does not preclude Objector from taking regular legal action should the use of the Disputed gTLD String by Applicant be infringing. It is, however, not for this Panel to anticipate on all the possible types of use Applicant could make of the Disputed gTLD.

It is also not for this Panel to interpret the existing coexistence agreements and arrangements between the Parties. Should the application of a new gTLD allegedly violate any such agreement or arrangement, it will be for the Parties to settle their dispute by means of the dispute resolution provisions of the contracts governing their relationship or as provided under applicable law.

For the aforementioned reasons the Panel rejects the Objection.

In reaching the above conclusion, the Panel has considered the following non-exclusive list of eight factors.

The Panel addresses each of them in turn:

i. Whether the applied-for gTLD is identical or similar, including in appearance, phonetic sound, or meaning, to Objector's existing mark.

[Sole Panel Expert analysis follows]

ii. Whether Objector's acquisition and use of rights in the mark has been bona fide.

[Sole Panel Expert analysis follows]

iii. Whether and to what extent there is recognition in the relevant sector of the public of the sign corresponding to the gTLD, as the mark of Objector, of Applicant or of a third party.

[Sole Panel Expert analysis follows]

iv. Applicant's intent in applying for the gTLD, including whether Applicant, at the time of application for the gTLD, had knowledge of Objector's mark, or could not have reasonably been unaware of that mark, and including whether Applicant has engaged in a pattern of conduct whereby it applied for or operates TLDs or registrations in TLDs which are identical or confusingly similar to the marks of others.

[Sole Panel Expert analysis follows]

v. Whether and to what extent Applicant has used, or has made demonstrable preparations to use, the sign corresponding to the gTLD in connection with a bona fide offering of goods or services or a bona fide provision of information in a way that does not interfere with the legitimate exercise by Objector of its mark rights.

[Sole Panel Expert stated that this factor would be discussed together with the factor mentioned under vi.]

vi. Whether Applicant has marks or other intellectual property rights in the sign corresponding to the gTLD, and, if so, whether any acquisition of such a right in the sign, and use of the sign, has been bona fide, and whether the purported or likely use of the gTLD by Applicant is consistent with such acquisition or use.

[Sole Panel Expert analysis follows]

vii. *Whether and to what extent Applicant has been commonly known by the sign corresponding to the gTLD, and if so, whether any purported or likely use of the gTLD by Applicant is consistent therewith and bona fide.*

[Sole Panel Expert analysis follows]

viii. *Whether Applicant's intended use of the gTLD would create a likelihood of confusion with Objector's mark as to the source, sponsorship, affiliation, or endorsement of the gTLD.*

[Sole Panel Expert analysis follows]

29. On September 23, 2013, Merck raised with WIPO a number of points of its concern with the contents of three of the Determinations. First, Merck noted that the Sole Panel Expert referenced intended geo-targeting by MSD, when in fact it was Merck which was intending to do so. Secondly, Merck stated that the Sole Panel Expert did not consider the three elements of the LRO Policy but rather those contained in the UDRP. In addition, Merck stated the following:

There is no appeals process for incorrect decisions under the LRO procedure, and accordingly there is no clear way in which my client (Merck KgaA) can rectify the damage done by an inattentive Panel. No court can review these decisions, and indeed even ICANN likely has limited powers to overturn a decision, even where it has been entered based on a wholly erroneous review of the submitted facts and evidence.

30. The Sole Panel Expert issued an Addendum dated September 24, 2013. As regards geo-targeting, he stated:

It is correct that the Expert Determinations under 6. (Discussion and Findings) under the heading Trademark Infringement, under non-exclusive factor viii, should not have included the following sentence:

"Applicant has made it clear that it will take all necessary measures, including geo-targeting, to avoid that Internet users in the territories in which Objector has trademark rights, will be able to visit websites that use the Disputed gTLD String."

.....

Having noted this, the Panelist should make clear that, in reviewing LRO2013-0009, LRO2013-0010 and LRO2013-0011, he was in fact aware of the distinction in this regard, as reflected in the pleadings as cited and summarized in the Expert Determinations, between the latter three cases and cases LRO2013-0068 and LRO2013-0069 in relation to the competing applications at stake.

In any event, the Panelist considers it important to confirm that the above-mentioned sentence as such is immaterial to the conclusion which the Panelist reached in rejecting the Objections.

31. As regards his application of UDRP or LRO Policy, the Sole Panel Expert was of the view that, UDRP comparisons notwithstanding, he had applied the specific LRO criteria.
32. On February 27, 2014, ICANN informed Merck that it had updated the LRO Determinations together with the Sole Panel Expert's Addenda.
33. On March 13, 2014, Merck filed a Request for Reconsideration. It requested ICANN to reject the advice recorded in the Sole Panel Expert's Determinations, and "instruct a panel to make an expert determination that applies the standards defined by ICANN".
34. Merck's grounds for its Request for Reconsideration were summarized as follows:

In this case, the Expert Panel failed to take reasonable care in evaluating the parties' respective evidence and to make a correct application of the LRO standard developed by ICANN in the Applicant Guidebook, resulting in a denial of due process to the Requester in the context of its three LRO disputes.

35. On April 29, 2014, the Board Governance Committee of ICANN ("BGC") made its Determination dismissing the Request for Reconsideration. The initial part of that Determination summarized the reasons:

Merck Registry Holdings, Inc. applied for .MERCK and MSD Registry Holdings, Inc. applied for .MERCKMSD. The Requester, who also applied for .MERCK, objected to these applications and lost. The Requester claims that the Panel failed to comply with ICANN policies

and processes in reaching its determinations. Specifically, the Requester contends that the Panel:

(i) improperly interpreted the factors governing legal rights objections in light of “wholly inapplicable” Uniform Domain Name Dispute Resolution Policy (“UDRP”) standards; and

(ii) failed to “accurately assess critical facts concerning the Parties’ pleadings, leading to mis-attribution of party intent [concerning geo-targeting commitments] and a material misrepresentation of the parties’ respective positions.” (Request, §§ 6, 8, Pgs. 6, 18.)

With respect to the claims submitted by the Requester, there is no evidence that the Panel either applied the improper standard or failed to properly evaluate the parties’ evidence. First, the Panel correctly referenced and analyzed the eight factors set out in the Applicant Guidebook relevant to legal rights objections and considered the UDRP only as a means to further provide context to one of the eight factors. The Requester does not identify any policy or process that was violated in this regard. Second, after the Requester brought the Panel’s mis-attribution of geo-targeting commitments to the attention of WIPO, the Panel issued an Addendum to the Determinations, confirming that the misstatement was “inadvertent,” that the Panel “was in fact aware of the distinction,” and that the misstatement was not material to the Determinations in all events. Because the Requester has failed to demonstrate that the Panel acted in contravention of established policy or procedure, the BGC concludes that Request 14-9 be denied.

36. On April 29, 2014, the BGC held a meeting and the minutes note the following:

Reconsideration Request 14-9— Ram Mohan abstained from participation of this matter noting conflicts. Staff briefed the BGC regarding Merck KGaA’s Request seeking reconsideration of the Expert Determinations, and ICANN’s acceptance of those Determinations, dismissing Merck KGaA’s legal rights objections to Merck Registry Holdings, Inc.’s application for .MERCK and MSD Registry Holdings, Inc.’s application for .MERCCKMSD. After discussion and consideration of the Request, the BGC concluded that the Requester has not stated proper grounds for reconsideration because the Request failed to demonstrate that the expert panel acted in contravention of established policy or procedure. The Bylaws authorize the BGC to make a final determination on Reconsideration Requests brought regarding staff action or inaction; the BGC still has the discretion, but is not required, to recommend the matter to the Board for consideration. Accordingly, the BGC concluded that its determination on Request 14-9 is final; no consideration by the NGPC is warranted. □

37. In light of the foregoing, this Panel now analyses the first contested action for the purposes of the comparison exercise. Although in paragraph 48 of its Request Merck characterizes the challenged action as the “acceptance” of by the Board of the BGC determination, it is clear from the Request as a whole that the focus of the complaint is the decision of the BGC. While this Panel’s focus is on the first contested action precisely as advanced by Merck (namely, “acceptance”), concomitant with that exercise will be an analysis (within the confines of this Panel’s jurisdiction) of the BGC’s Determination (noting ICANN’s Articles of Incorporation and Bylaws, Article I, Section 2.3(f)).
38. The question now arises as to whether the first contested action was consistent with Article I, Section 2.8, namely, was there a neutral and objective application, with integrity and fairness, by the Board of documented policies.
39. Assistance for this Panel is derived from the three elements defining the focus of the review in Article IV, Section 3.4, 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?*
40. The Panel takes each of the three factors, a-c, in turn.
41. Factor (a): Did the Board act without conflict of interest in taking its decision? The Panel finds that there is no evidence whatsoever to suggest that there was any conflict of interest. Merck suggests that ICANN had a conflict of interest due to the potential for a financial windfall in the event of there being an Auction of Last Resort. This is a submission made without evidence, is speculative, and is unfounded. Moreover, this Panel

does not consider that this Independent Review was initiated (or capable of being initiated) to challenge, in substance, the policy decision of ICANN in 2012 to include the Auction of Last Resort.

42. The Panel finds that the answer to question “a” is yes.
43. Factor (b): Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them? In the Panel’s assessment of the materials and arguments put before it, this appears to be at the heart of Merck’s complaints.
44. Merck criticizes severely the manner by which the Sole Panel Expert dealt with the issue of geo-targeting. Merck also takes particular issue with the application (or otherwise, as it suggests) by the Sole Panel Expert of LRO standards. It claims that these failings caused a denial of due process. Put another way, Merck is contending that the Sole Panel Expert got it so badly wrong, the process should be run again.
45. Merck’s criticisms of the Sole Panel Expert flow through into its complaints directed at the BGC.
46. Merck wanted the BGC to “reject the advice set forth in the Decisions, and instruct a panel to make an expert determination that applies the standards defined by ICANN”. Merck effectively wanted the BGC to overturn the Sole Panel Expert’s decisions and have the process re-run (which is what it, in substance, wants from this Panel). Its reasons for making that request of the BGC were that the Sole Panel Expert failed to decide the case on the basis of the correct and applicable LRO Standard, and moreover failed to decide the case on the basis of the true and accurate factual record which was presented to him in the course of the dispute. Merck then concludes from those points that it had “been denied fundamental due process, as its pleadings were not meaningfully taken into account in the course of the panel’s deliberations, and the panel elected to decide the case on inapplicable grounds”.

47. However, this basis for requesting relief does not sit easily with Merck's own stated position on September 23, 2013, noted above, and repeated here for emphasis:

There is no appeals process for incorrect decisions under the LRO procedure, and accordingly there is no clear way in which my client (Merck KgaA) can rectify the damage done by an inattentive Panel....

Merck plainly recognized that the sole recourse was by means of the Request for Reconsideration process (which Merck itself invoked). That process is of limited scope, with Article IV, Section 2.2, delineating that jurisdiction:

Any person or entity may submit a request for reconsideration or review of an ICANN action or inaction ("Reconsideration Request") to the extent that he, she, or it have been adversely affected by:

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

None of these three bases for the Request for Reconsideration process requires or even permits this Panel to provide for a substitute process for exploring a different conclusion on the merits.

48. The BGC recognized in its Determination that the Sole Panel Expert, in his Addenda, specifically noted the correct position as regards geo-targeting, and also that he further considered that his conclusions remained the same. In light of the Addenda, there is nothing to suggest that the Sole Panel Expert made his decision on the basis of incorrect facts. More importantly

for the purposes of this Review, the BGC analyzed whether he had done so.

49. Moreover, Merck's complaints about the Sole Panel Expert's application, or in its view, non-application of the LRO Standards lack merit. The BGC determined that the Sole Panel Expert did not apply the wrong standards. That is a determination which this Panel does not, because of the precise and limited jurisdiction we have, have the power to second guess. Rather, the critical question for this Panel is whether the BGC exercised due diligence and care in having a reasonable amount of facts in front of them. Merck complains that the BGC did not have "sufficient and accurate facts", and that Merck was thus deprived of an "accurate review of its complaints". These formulations miss the point, and indeed misstate the applicable test in proceedings such as these. The BGC had to have a reasonable amount of facts in front of it, and to exercise due diligence and care in ensuring that it did so. There is no evidence that the BGC did not have a reasonable amount of facts in front of it or consider them fully. It plainly had everything which was before the Sole Panel Expert. Nothing seems to have been withheld from the BGC.
50. Merck's complaints are, in short, not focused upon the applicable test by which this Panel is to review Board action, but rather are focused on the correctness of the conclusion of the Sole Panel Expert. Because this is not a basis for action by this Panel, the Panel answers question "b" with "yes".
51. Factor (c): Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company? The Panel does not see that Merck has mounted any attack through this route other than inferentially by vague references to the auction process. As regards that particular decision, there is no evidence (or indeed any concrete allegation) that the BGC or Board members did not exercise independent judgment.

52. In summary, therefore, the Claimant's first contested action complaint is dismissed.

53. The second contested action as characterized and raised by the Claimant in paragraph 46 of the Request is:

The ICANN Board improperly disposed of the Claimant's RFR as the BGC violated its competency and independence in its evaluation of the application of the LRO standard. Further, its assessment was incorrect and failed to take into account the global use of the gTLD by Merck & Co. Additionally, the ICANN Board has provided the possibility for third-party review of some prima facie erroneous expert determinations while denying the same to other, similarly situated parties, including the Claimant. This results in discrimination and unfairness to, and failure of due process for, the Claimant.

54. The Claimant says that this is a violation of ICANN's Articles of Incorporation and Bylaws, Article I, Section 2.8, which provide as follows:

In performing its mission, the following core values should guide the decisions and actions of ICANN..... 8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

55. The action of the Board, as precisely contested by Merck, is set out in paragraph 53 above. This particular action of the Board is developed by Merck as follows at paragraph 79 of the Request:

The BGC did not address the Claimant's concerns (i) competently, (ii) independently, and (iii) substantively on the basis of the Claimant's legal argument.

56. Incompetence: Merck asserts, at paragraph 82 of the Request that the BGC was incompetent because it had no alternative but to engage "in impermissible substantive analysis and interpretation". Merck then states that the BGC should have taken steps to address its concerns by, citing prior ICANN examples, appointing an independent legal advisor, or "recommending that the ICANN Board take appropriate measures that the

BGC is incompetent to make”. Drawing on these, Merck criticizes the fact that in some instances where there has been a prima facie erroneous determination ICANN provides for a review, whereas in others it does not. It says that this is a violation of the requirements of neutrality and fairness.

57. The Panel’s attention is drawn by Merck to a document recording the Resolutions of the Meeting of the New gTLD Program Committee (“NGPC”) on March 22, 2014, which notes that:

...the Board may wish to seek a clear understanding of the legally complex and politically sensitive background on its advice regarding .WINE and .VIN in order to consider the appropriate next steps of delegating the two strings.

58. A professor of law in Paris was commissioned to provide advice, and this was incorporated into the decision of the NGPC.

59. The Panel’s attention is also drawn to the Recommendation in relation to the Reconsideration Request 13-9 of October 10, 2013, made by the BGC. At the end of the Recommendation, the following is stated:

Though there are no grounds for reconsideration presented in this matter, following additional discussion of the matter the BGC recommended that staff provide a report to the NGPC, for delivery in 30 days, setting out options for dealing with the situation raised within this Request, namely the differing outcomes of the String Confusion Objection Dispute Resolution process in similar disputes involving Amazon’s Applied-for String and TLDH’s Applied-for String. In addition, the BGC suggested that the strings not proceed to contracting prior to staff’s report being produced and considered by the NGPC.

A proposed review mechanism is outlined thereafter.

60. Merck’s arguments are unavailing. If this Panel were to find that the BGC and Board are incompetent to assess the propriety of a Panel determination under the LRO this would effectively require a referral or appeal process for LRO decisions. Such a mechanism was not included in the delegation,

challenge and dispute resolution process adopted by ICANN and it is not open to this Panel to create it.

61. As to the claim of discrimination, this Panel finds that it was within the discretion of the BGC and Board, once the Sole Expert had revised his original determination to reflect his complete basis for the decision, to conclude that the Sole Expert had applied the correct legal standard to the correctly found set of facts. Of course, in different cases, the BGC and Board are entitled to pursue different options depending upon the nature of the cases at issue. It is insufficient to ground an argument of discrimination simply to note that on different occasions the Board has pursued different options among those available to it.
62. In conclusion, Merck was not discriminated against. These two examples, properly and fairly assessed, do not provide it with support for an allegation of discrimination.
63. Independence: Merck's complaint as to the lack of independence relies on the "Auction of Last Resort" argument which imputes to ICANN a financial interest, insinuating something improper. This is the same point, in substance, which was rejected by this Panel in paragraph 42 above. It is an argument which is speculative, and made without evidence to support it. In light of its dismissal above, it is also dismissed at this point.
64. Mischaracterization: Merck complains that the BGC mischaracterized its arguments. Merck describes its core concern as presented to the BGC as follows (paragraph 89 of the Request):

...did the LRO Panel fail to decide the case on the basis of the correct and applicable LRO Standard, which requires it to consider the potential use of the applied-for gTLD
65. This complaint is identical in substance to the matters already addressed by the Panel in paragraphs 43-50 above. In effect, Merck is running the same argument here as before, and it is therefore dismissed.

66. In summary, therefore, the Claimant's challenge to the second contested action complaint is dismissed.

67. The third contested action raised by Merck in paragraph 46 of the Request:

As the result of the prior two violations, the ICANN Board has accepted without due diligence and care, a dysfunctional expert determination procedure within the New gTLD Program which has not provided for the possibility to review or overturn determinations on the basis of substantial errors or manifest disregard of the LRO Standards, despite the foreseeable and forewarned possibility of such, resulting in fundamental unfairness and a failure of due process for the Claimant.

68. In light of the resolution of the first two contested actions against Merck, the Panel finds that this third contested action must also be dismissed. It is predicated for success upon the first two by use of the language “[A]s the result of the prior two violations”.

Section IV – Costs

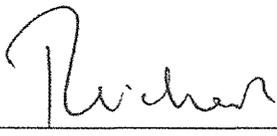
69. As ICANN is the prevailing party, Merck is held responsible for costs. Therefore the administrative fees and expenses of the International Centre for Dispute Resolution (ICDR) totaling US\$3,350.00 shall be borne by entirely by Merck KGaA, and the compensation and expenses of the Panelists totaling US\$97,177.08 shall be borne by entirely by Merck KGaA. Therefore, Merck KGaA shall reimburse ICANN the sum of US\$48,588.54, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by ICANN.

Section V – Declaration

1. Merck has not succeeded in this Independent Review Process. ICANN is the prevailing party. As per paragraph 69, Merck must pay ICANN costs in the amount of USD \$48,588.54.

This Final Declaration of the Independent Review Process Panel may be executed in any number of counterparts, each of which shall be deemed an original, and all of which shall constitute together one and the same instrument.

December 10, 2015
Date



Klaus Reichert, Panelist/ Chair

Date

A. Howard Matz, Panelist

Date

Graeme Dinwoodie, Panelist

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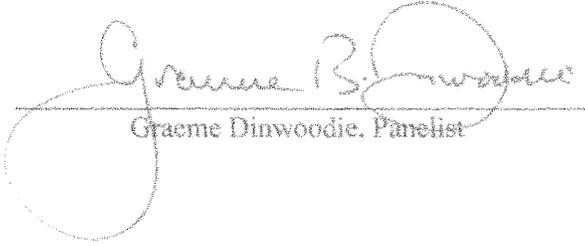
Klaus Reichert, Panelist/ Chair

Date

A. Howard Matz, Panelist

December 10, 2015

Date



Graeme Dinwoodie, Panelist

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Minutes | [New gTLD Program Committee](#)

18 May 2013

Note: On 10 April 2012, the Board established the [New gTLD Program Committee](#), comprised of all voting members of the Board that are not conflicted with respect to the [New gTLD Program](#). The Committee was granted all of the powers of the Board (subject to the limitations set forth by law, the Articles of incorporation, Bylaws or [ICANN's Conflicts of Interest Policy](#)) to exercise Board-level authority for any and all issues that may arise relating to the [New gTLD Program](#). The full scope of the Committee's authority is set forth in its charter at <http://www.icann.org/en/groups/board/new-gTLD>.

A Regular Meeting of the [New gTLD Program Committee](#) of the [ICANN Board of Directors](#) was held in Amsterdam, The Netherlands on 18 May 2013 at 17:00 local time.

Committee Chairman Cherine Chalaby promptly called the meeting to order.

In addition to the Chair the following Directors participated in all or part of the meeting: Fadi Chehadé (President and CEO), Chris Disspain, Bill Graham, Olga Madruga-Forti, Erika Mann, Gonzalo Navarro, Ray Plzak, George Sadowsky, Mike Silber, Judith Vazquez, and Kuo-Wei Wu.

Thomas Narten, [IETF Liaison](#) and Francisco da Silva, [TLG Liaison](#), were in attendance as non-voting liaisons to the committee. Heather Dryden,

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1. **Consent Agenda**
 - a. [Approval of Board Meeting Minutes](#)
 - b. [BGC Recommendation on Reconsideration Request 13-1 Rationale for Resolutions 2013.05.18.NG02 – 2013.05.18.NG03](#)
 - c. [BGC Recommendation on Reconsideration Request 13-2 Rationale for Resolution 2013.05.18.NG04](#)
2. **Main Agenda**
 - a. [Addressing GAC Advice from Beijing Communiqué](#)

The Chair introduced the agenda, noting that there are items on the consent agenda and then the Committee would be discussing the GAC advice received in Beijing.

1. Consent Agenda

The Chair introduced the items on the consent agenda and called for a vote. The Committee then took the following action:

Resolved, the following resolutions in this Consent Agenda are approved:

a. Approval of Board Meeting Minutes

Resolved (2013.05.18.NG01), the New gTLD Program Committee approves the minutes of the 26 March 2013, 5 April 2013 and 11 April 2013 Meetings of the New gTLD Program Committee.

b. BGC Recommendation on Reconsideration Request 13-1

Whereas, Ummah's Digital, Ltd.'s ("Ummah") Reconsideration Request, Request 13-1, sought reconsideration of the staff conclusion that the Ummah gTLD application "is ineligible for further review under the New gTLD Program," which was based on the Support Applicant Review Panel (SARP) determination that Ummah's application did not meet the criteria for financial assistance.

Whereas, the BGC recommended that Reconsideration Request 13-1 be denied because Ummah has not stated proper grounds for reconsideration, and Ummah's stay request fails to satisfy the Bylaws' requirements for a stay.

Whereas, the BGC noted that "Ummah raises some interesting issues in its Request and suggests that the Board direct that the concerns raised in Ummah's Request be included in a review of the Applicant Support Program so that the design of future mechanisms to provide financial assistance and support in the New gTLD Program can benefit from the experiences within this first round."

Resolved (2013.05.18.NG02), the New gTLD Program Committee adopts the recommendation of the BGC that Reconsideration Request 13-1 be denied on the basis that Ummah has not stated proper grounds for reconsideration and that Ummah's stay request fails to satisfy the Bylaws' requirements for a stay.

Resolved (2013.05.18.NG03), the Board directs the President and CEO to include the concerns raised in Ummah's Reconsideration Request in the review of the Applicant Support Program so that the design of future mechanisms to provide financial assistance and support in the New gTLD Program can benefit from the experiences within this first round.

Rationale for Resolutions 2013.05.18.NG02 – 2013.05.18.NG03

In July 2009, as part of the comprehensive [GNSO Improvements](#) program, the [ICANN Board](#) approved the formal Charters of four new [GNSO Stakeholder Groups](#) (see [ICANN Board Resolution 2009.30.07.09](#)).

[ICANN's Bylaws](#) at the time Reconsideration Request 13-1 was filed, called for the Board Governance Committee to evaluate and make recommendations to the Board with respect to Reconsideration Requests. See Article IV, section 3 of the Bylaws. The New gTLD Program Committee, bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC's recommendation with respect to Reconsideration Request 13-1 and finds the analysis sound. The full BGC Recommendation, which includes the reasons for

recommending that the Reconsideration Request be denied
can be found at:

<http://www.icann.org/en/groups/board/governance/reconsideration>

Having a Reconsideration process set out in ICANN's Bylaws positively affects ICANN's transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, Bylaws and Articles of Incorporation.

To assure that ICANN continues to serve the global public interest by ensuring worldwide accessibility to the Internet and opportunities for operating a registry, ICANN will include the issues raised in Ummah's Request in its review of the Program so that the design of future mechanisms to provide financial assistance and support in the New gTLD Program can benefit from the experiences within this first round.

Adopting the BGC's recommendation has no financial impact on ICANN and will not negatively impact the systemic security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function not requiring public comment.

c. BGC Recommendation on Reconsideration Request 13-2

Whereas, Reconsideration Request 13-2, sought reconsideration of: (1) Staff and Board inaction on the consideration of Nameshop's letter of "appeal" sent after denial of Nameshop's change request to change its applied-for string in the New gTLD Program from .IDN to .INTERNET (the "Change Request"); and (ii) the decision of the Support Applicant Review Panel ("SARP") that Nameshop did not meet the criteria to be eligible for financial assistance under ICANN's Applicant Support Program.

Whereas, the BGC recommended that Reconsideration Request 13-2 be denied because Nameshop has not stated proper grounds for reconsideration.

Whereas, the BGC concluded that the Reconsideration Request 13-2 challenges: (i) an "appeal" process that does not exist; and (i) the substantive decisions taken within the New gTLD

Program on a specific application, not the processes by which those decisions were taken and that the reconsideration process is not, and has never been, a tool for requestors to seek the reevaluation of decisions.

Resolved (2013.05.18.NG04), the New gTLD Program Committee adopts the BGC's recommendation that Reconsideration Request 13-2 be denied on the basis that Nameshop has not stated proper ground for reconsideration.

Rationale for Resolution 2013.05.18.NG04

ICANN's Bylaws at the time Reconsideration Request 13-2 was filed, called for the Board Governance Committee to evaluate and make recommendations to the Board with respect to Reconsideration Requests. See Article IV, section 3 of the Bylaws. The New gTLD Program Committee, bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC's recommendation with respect to Reconsideration Request 13-2 and finds the analysis sound. The full BGC Recommendation, which includes the reasons for recommending that the Reconsideration Request be denied can be found at:

<http://www.icann.org/en/groups/board/governance/reconsideration>.

Having a Reconsideration process set out in ICANN's Bylaws positively affects ICANN's transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, Bylaws and Articles of Incorporation.

Request 13-2 challenges an "appeal" process that does not exist, and challenges the substantive decisions taken in implementation of the New gTLD Program on a specific application and not the processes by which those decisions were taken. Reconsideration is not, and has never been, a tool for requestors to seek the reevaluation of substantive decisions. This is an essential time to recognize and advise the ICANN community that the Board is not a mechanism for direct, de novo appeal of staff (or evaluation panel) decisions with which the requester disagrees. Seeking such relief from the Board is, in itself, in contravention of established processes and policies within ICANN.

Adopting the BGC's recommendation has no financial impact on ICANN and will not negatively impact the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function not requiring public comment.

All members of the Committee voted in favor of Resolutions 2013.05.18.NG01, 2013.05.18.NG02, 2013.05.18.NG03, and 2013.05.18.NG04. The Resolutions carried.

2. Main Agenda

a. Addressing GAC Advice from Beijing Communiqué

Chris Disspain led the Committee in a discussion regarding the GAC Advice from the Beijing Communiqué, stressing that the Committee is not being asked to take any decisions today. Rather, there are goals to understand the timing of decisions to be taken in the future, with particular focus on those items that the Committee is likely to accept.

Akram Atallah provided an overview of a timeline for proposed action, focusing on those items of advice that are applicable across all strings, and noting that it is a priority to deal with those items first. The next in priority are the items that affect strings in related categories. The public comment is still open on the safeguard advice, and there will be time needed to provide the Board with a summary of those comments. A decision will be needed soon after to keep the Program on track.

The Chair summarized his understanding of the items that needed to be ready for decision soon after the close of the comment period: The safeguards applicable to all new gTLDs; IGO protections; the Registry Agreement; the GAC WHOIS principle; IOC/RC protections; and the category of safeguards for restricted access policies. While many on the Committee are eager to discuss the singular/plural issue and .Africa and .GCC, those decisions are not essential for moving forward with the Program.

Chris confirmed that there is a plan to deal with the individual

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issues as well as the general issues. For the .Africa and .GCC pieces of advice, the Committee first has to consider the applicant input, as well as for .Islam and .Halal. Applicant comments also have to be considered on the groups of strings identified in the Communiqué. The advice on singular/plural and IGO protections are on track to be dealt with separately, and there is ongoing work for all other portions of the advice.

Thomas Narten pointed out that there could be a need for further public comment in the event that the NGPC takes a decision that requires further input.

Olga Madruga-Forti and Tarek Kamel both noted that it is important for the Committee to take the GAC Advice seriously and respond in a timely manner, and not to solely focus on the process that is not as well understood among all of the governments of the world. In addition, some of the focus on the issues raised in the Communiqué has gone beyond the governments.

Gonzalo Navarro agreed and urged the Committee to be proactive in its responses.

Heather Dryden confirmed that the members of the GAC worked carefully to create this Communiqué.

The President and CEO urged the Committee that, when appropriate, even if formal action or decision is not ripe, the Committee should indicate the direction in which it is leaning on some of the more sensitive areas of advice.

Chris confirmed that particularly in regards to the portion of Communiqué where the GAC indicated it needed further time for discussion, the progress on this will in part be based upon the outcomes of that further discussion. However, for some of the names identified, there are already objection processes underway and so the results of those objections may remove the need for GAC action. However, it is possible for the Committee to telegraph how it anticipates acting in regards to these items, particularly when provided along with a clear statement of the Committee's understanding of the GAC's position.

Olga agreed with Chris' suggestion.

Heather stressed the import of being responsive to the GAC while still allowing the objection processes to run.

Gonzalo Navarro shared his expectation that we will see heightened government participation at the Durban meeting as a result of the Communiqué, and the messaging within the GAC and the Committee will be very important.

Bill Graham agreed with Heather that it is important to proceed with caution, and to not signal potential action by the Committee that may not be feasible if the GAC or objection process leads to a change in course.

Chris then walked the Committee through proposed responses for inclusion in Scorecard and the Committee suggested modifications throughout the document. While discussing the Scorecard, Chris confirmed that the Committee would have further discussion on the singular/plural issue at a future call of the Committee, as a decision on this point could have great impact regarding future rounds of the program. For the IGOs, the Committee will be going into consultation with the GAC, and a letter will be sent to the GAC thanking it for its willingness to engage. The Committee had previously stated to the GAC that the deadline for addressing the IGO acronym issue is in Durban, to allow the Committee to take a resolution as soon after Durban as possible. Chris also noted that addressing the GAC advice on RAA, the GAC Whois Principles and the IOC/Red Cross should be very straightforward. For the safeguard advice applicable to all strings, Chris briefly led the Committee through some proposed Scorecard language, and requested that staff provide the Committee with additional information and explanations for the proposed suggestions of how to address the GAC Advice. As it related to the safeguard advice for particular categories of strings, Chris noted that due to lack of time, it made sense to postpone a review of these items.

Chris then confirmed that the topic for the Committee's next call should be to address those areas that will have a 1A on the Scorecard, so that the Committee can take further action. He also agreed that the staff should provide an update to the community on the Committee's progress.

The Chair then called the meeting to a close.

Published on 19 June 2013



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