

RECOMMENDATION OF THE BOARD GOVERNANCE COMMITTEE (BGC)

RECONSIDERATION REQUEST 13-19

21 JANUARY 2014

The Requester seeks reconsideration of the NGPC's¹ alleged failure (inaction) to stay the Requester's community objection to the application for the .HOTELS gTLD following the NGPC's 25 June 2013 resolution deferring the contracting process for the .HOTELS string pending a dialogue with the GAC².

I. Brief Summary.

Booking.com applied for .HOTELS, indicating that the string will be operated as a "closed" or "exclusive access" registry. The Requester filed a Community Objection against Booking.com's application, and lost. The Requester claims that the NGPC's failure to stay the Requester's Objection following the NGPC's resolution deferring the contracting process for "closed generic" TLDs (which includes .HOTELS) violated Article 4 of ICANN's Articles of Incorporation and Article 1, Sections 2, 7, 8 and 9 of ICANN's Bylaws, and caused a breach of due process.

The Requester's arguments do not support reconsideration. First, the stated grounds are improper bases for reconsideration under ICANN's Bylaws. The Requester seeks reconsideration on the grounds that the NGPC's failure to stay the Requester's Objection following the 25 June 2013 Resolution violated ICANN's Articles of Incorporation and ICANN's Bylaws. The Board's purported violations of ICANN policy or procedure is not

¹ New gTLD Program Committee.

² Governmental Advisory Committee.

grounds for reconsideration. Requester makes no argument and provides no evidence that the NGPC took an action or inaction without considering material information or as a result of reliance on false or inaccurate material information, which are the grounds for challenging Board conduct under the reconsideration process.

Second, even if these were proper bases for reconsideration, the stated grounds do not support reconsideration because there is no policy or process that requires the NGPC to stay objection proceedings while ICANN considers and/or communicates with the GAC regarding advice on new gTLDs. Further, the Requester raised the purported implications of the 25 June 2013 Resolution with the Expert Panel for the Objection and was granted leave to file an additional submission following both the Resolution and the NGPC's approval of the revised New gTLD Agreement to include a provision prohibiting registry operators from limiting registrations in "generic term" registries exclusively to "a single person or entity and/or that person's or entity's 'Affiliates.'" And, based on the submissions and evidence provided by the parties, the Expert Panel determined that the Requester was unable to satisfy its burden of proving a likelihood of material detriment to prevail on its Objection.

Therefore, the BGC recommends that Request 13-19 be denied.

II. Facts.

A. Relevant Background Facts.

Booking.com B.V. ("Booking.com") filed an application for .HOTELS, indicating that the string will be operated as a "closed" or "exclusive access" registry.

On 13 March 2013, Requester HOTREC ("Requester") filed a Community Objection

with the ICC³ to Booking.com’s application asserting that there is “substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.” (Applicant Guidebook (“Guidebook”), § 3.2.1; New gTLD Dispute Resolution Procedure (“Procedure”), Art. 2(e).)

On 11 April 2013, the GAC issued its Beijing Communiqué. Among other advice, the GAC advised that “[f]or strings representing generic terms, exclusive registry access should serve a public interest goal.” (Beijing Communiqué, Annex I, Pg. 11 available at <http://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf>.) The GAC identified .HOTELS, among others, as a string that it considers to be a generic term and for which the applicant is currently proposing to provide exclusive registry access.⁴ (*See id.*)

On 25 April 2013, the ICC consolidated the Requester’s Objection with another objection to Booking.com’s application for .HOTELS. .

On 25 June 2013, the NGPC accepted the GAC’s advice about applicants seeking to impose exclusive registry access for strings the GAC deemed as generic terms, and directed staff to defer contracting with such applicants “pending a dialogue with the GAC” regarding an appropriate definition of “public interest goal” (“25 June 2013 Resolution”). (*See* <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-25jun13-en.htm>; *see also* ICANN NGPC Paper No. 2013-06-25-2b: GAC Advice in Beijing Communiqué regarding Safeguard Advice Applicable to Category 2 Strings, Briefing Materials 1, Pgs. 25-31, available

³ International Centre for Expertise of the International Chamber of Commerce.

⁴ The ICANN Bylaws require the Board to take into account the GAC’s advice on public policy matters in the formulation and adoption of policies. (Bylaws, Art. XI, § 2.1.j.) In the context of the New gTLD Program, there are also specific procedures pursuant to which the GAC may provide advice to ICANN on new gTLDs. (Guidebook, Section 3.1.)

at <http://www.icann.org/en/groups/board/documents/briefing-materials-1-25jun13-en.pdf>.)

On 1 July 2013, the Requester, citing the 25 June 2013 Resolution, asked the ICC to stay the Community Objection proceedings; Booking.com opposed the request for a stay.

On 2 July 2013, the NGPC approved revisions to the New gTLD Registry Agreement including a provision prohibiting registry operators from limiting registrations in “generic term” registries exclusively to “a single person or entity and/or that person’s or entity’s ‘Affiliates.’” (<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-02jul13-en.htm#1.d>; *see also* <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-item-1d-02jul13-en.pdf>, Annex I, New gTLD Agreement.)

On 22 July 2013, the Requester sought leave from the ICC to file an additional submission in reply to Booking.com’s Response; Booking.com opposed the request.

On 13 August 2013, the Panel denied the Requester’s request for a stay and granted the request to file an additional submission.

On 19 August 2013, ICANN inquired with applicants (including Booking.com) that applied for strings the GAC identified as generic terms, as to whether they still intended to operate the string as an exclusive access registry.

On 20 August 2013, the Requester filed its additional submission with the Panel, noting the 25 June 2013 Resolution; Booking.com responded.

On 3 and 4 September 2013, Booking.com and the Requester, respectively, confirmed with the Panel that they had no objection to the way the objection proceedings were conducted and agreed that they had been treated with equality and a reasonable opportunity to present their positions.

On 4 September 2013, Booking.com informed ICANN that, although its application

currently states that .HOTELS will be operated as an exclusive access registry, Booking.com will not operate .HOTELS as an exclusive access registry.

(<http://newgtlds.icann.org/sites/default/files/applicants/09oct13/gac-advice-response-1-1181-77853-en.pdf>.)⁵

On 28 September 2013, the NGPC adopted a resolution that allows applicants that do not plan to operate as an exclusive access registry, and that are prepared to enter into the Registry Agreement as approved (which prohibits exclusive registry access for generic strings), to move forward with the contracting process (“28 September 2013 Resolution”).

(<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-28sep13-en.htm#2.a.rationale>; *see also* Annex 1 to Resolution available at <http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-annex-1-28sep13-en.pdf>.)

On 9 October 2013, ICANN announced that, based on the 28 September 2013 Resolution, applicants that have confirmed they no longer intend to operate the applied-for string as an exclusive access registry (which includes .HOTELS) will be asked to submit a change request to align their applications and intent. Once the application change request has been approved by ICANN and the application becomes eligible, the applicants will be invited to the contracting process in order of priority number. (<http://newgtlds.icann.org/en/announcements-and-media/announcement-4-09oct13-en>.)

On 19 November 2013, the Panel rendered an “Expert Determination” in favor of Booking.com. Based on the submissions and evidence provided by the parties, the Panel determined that Requester failed to prove that Booking.com’s application “creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the Hotel

⁵ Booking.com’s response to ICANN was published on 9 October 2013.

Community” (Determination, Pg. 25, ¶ 8.52) and deemed Booking.com the prevailing party. (Determination, Pg. 26, ¶ 10.)

On 4 December 2013, the Requester filed Request 13-19.

B. The Requester’s Claims.

The Requester claims that the NGPC improperly failed to stay the Requester’s Objection to Booking.com’s application following the 25 June 2013 Resolution. Specifically, the Requester contends that the NGPC violated Article 4 of ICANN’s Articles of Incorporation and Article 1, Sections 2, 7, 8 and 9 of ICANN’s Bylaws by not complying with the following principles of international law:

1. The right to adversarial proceedings. (Request, Section 10.1, Pg. 16.)
2. The right to equality of arms. (Request, Section 10.2, Pg. 17; *see also* Request, Section 6, Pg. 6.)
3. The right to fairness in the proceedings by way of the administration of evidence. (Request, Section 10.3, Pgs. 17-18.)

C. Relief Requested.

The Requester asks that the NGPC reinstate new Community Objection proceedings for all strings identified in the GAC’s advice relating to exclusive registry access after the applicants, including Booking.com, submit change requests to reflect their intent to no longer operate the proposed string as an exclusive access registry. The Requester also asks that it be reimbursed for all of its expenses (administrative fees, expert fees, and attorney fees) relating to its Objection. If no reimbursement is provided, the Requester asks that the NGPC ensure that the new Objection proceedings be available to the Requester at no cost. (Request, Section 9, Pg. 14.)

III. Issues.

The apparent issue for reconsideration is whether the NGPC’s purported failure to take

appropriate action by not staying the Requester's Objection to Booking.com's application following the 25 June 2013 Resolution supports reconsideration.

IV. The Relevant Standards for Evaluating Reconsideration Requests.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with the criteria specified in Article IV, Section 2.2 of the Bylaws.⁶ (Bylaws, Art. IV, § 2.) Requester is challenging a Board action or inaction. Dismissal of a request for reconsideration is appropriate if the BGC⁷ recommends, and in this case the NGPC agrees, that the requesting party does not have standing because the party failed to satisfy the criteria set forth in the Bylaws for challenges of a Board action or inaction. (Bylaws, Art. IV, § 2.9.)

V. Analysis and Rationale.

A. The NGPC's Failure to Stay the Requester's Objection Does Not Support Reconsideration of a Board Action or Inaction.

A challenge of a Board action or inaction must be based upon the Board taking an action or inaction without consideration of material information or as a result of the Board's reliance on false or inaccurate material information.⁸ (Bylaws, Art. IV, § 2.2.) Purported violations of

⁶ 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
- (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.

⁷ Board Governance Committee.

⁸ The Requester is not challenging a staff action. (Request, Section 2, Pg. 3.) To challenge a staff action, Requester would need to demonstrate that the staff action violated an established policy or process.

ICANN policy or procedure are not proper grounds for challenging Board action or inaction.

As discussed above, the Requester seeks reconsideration on the grounds that the NGPC's failure to stay the Requester's Objection following the 25 June 2013 Resolution violated ICANN's Articles of Incorporation and ICANN's Bylaws. The stated grounds are improper bases for reconsideration under ICANN's Bylaws and will therefore not be considered.

Requester makes no argument and provides no evidence that the NGPC took an action or inaction without considering material information or as a result of reliance on false or inaccurate material information.

Even if the Requester's claims were proper bases for reconsideration, the stated grounds are not well founded in that there is no policy or process that requires the NGPC to stay objection proceedings while ICANN considers and/or communicates with the GAC regarding advice on new gTLDs. The Guidebook provides that the "receipt of GAC advice will not toll the processing of any application (*i.e.*, an application will not be suspended but will continue through the stages of the application process)." (Guidebook, Section 3.1.) The NGPC's 25 June 2013 Resolution directed staff to defer moving forward with the contracting process for applicants seeking to operate exclusive access registries with strings representing generic terms (such as .HOTELS) pending further communication with the GAC. (25 June 2013 Resolution).

There is also no support for the Requester's claim that its due process rights were somehow violated by the NGPC's failure to stay the objection proceedings. The Requester claims that it was not given the opportunity to object to Booking.com's application in its final

(continued...)

(Bylaws, Art. IV, § 2.2.) While the Requester asserts that the Panel improperly considered and relied upon hypothetical or future events in its Determination, the Request is not based on these claims.

version as a result of the NGPC’s purported inaction. (Request, Section 10, Pg. 16.) The Requester also claims that the NGPC’s “actions/inaction related to ‘closed-generic’ TLD Applications misled the Expert in rendering her determination and led to an unfair determination.” (Request, Section 10, Pg. 20.)

The Panel dismissed the Requester’s Objection on the grounds that the Requester failed to prove that Booking.com’s application “creates a likelihood of material detriment to the rights or legitimate interests of a significant portion of the Hotel Community.”⁹ (Determination, Pg. 25, ¶ 8.52.) The Requester asserted two reasons for why Booking.com’s application creates a likelihood of material detriment. The first reason related to concerns over intellectual property infringement, and only the second reason related to concerns about Booking.com’s intent to operate the string as a closed gTLD. (Determination, Pg. 18, ¶ 8.36.)

With respect the Requester’s first concern, the Requester argued that “if the gTLD ‘HOTELS’ is delegated to anyone, it would create an increase in cybersquatting.” (Determination, Pg. 19, ¶ 8.37 (emphasis added).) The Panel rejected this notion, concluding that this concern related to ICANN’s new gTLD program in general, rather than Booking.com’s application in particular, and that the community objection process was not the avenue to address such a concern.¹⁰ (Determination, Pg. 22, ¶ 8.46.) The Requester therefore asserted grounds in its Objection that had nothing to do with Booking.com’s intent to operate a closed gTLD, and

⁹ The standards for evaluating community objections include a four-part test to help the expert panel determine whether there is a substantial opposition from a significant portion of the community to which the string may be targeted. The fourth prong of the test requires the objector to prove that the “application creates a likelihood of material detriment to the rights or legitimate interest of a significant portion of the community to which the string may be explicitly or implicitly targeted.” (Guidebook, Section 3.5.4.)

¹⁰ The Panel also rejected the Requester’s notion that Booking.com would increase cybersquatting, concluding there was no evidence to suggest that Booking.com “considers it can infringe the intellectual property rights of third parties or has any intention of doing so.” (Determination, Pg. 22, ¶ 8.46.)

thus, would not have been impacted by a subsequent change to Booking.com's application.

Turning to the Requester's second concern flowing from Booking.com's intent to operate the string as a closed gTLD, the Panel likewise rejected the Requester's argument. The Requester asserted that Booking.com's application would harm consumers if it were allowed to operate as a closed gTLD because hotels that are not affiliated with Booking.com would be unable to register domain names in the .HOTELS gTLD. The Requester argued that this would allow Booking.com, a single stakeholder, to "control and prevent others from registering domain names within a string representing their own economic section, thus leading to a monopoly." (Determination, Pg. 20, ¶ 8.41.) The Requester also argued that even if Booking.com "one day decided to operate 'HOTELS' as an open gTLD, it would not act 'in the consumer interests' as 'neutral party', but rather link registration of domain names in 'HOTELS' to [Booking.com's] services." (Determination, Pg. 21, ¶ 8.43.)

Notably, the Requester raised the purported implications of the 25 June 2013 Resolution on the Requester's Objection with the Panel and was granted leave to file an additional submission with the Panel following the Resolution and the NGPC's approval of the revised New gTLD Agreement. The Requester noted that Specification 11 of the revised agreement prohibited strings representing generic terms from imposing eligibility criteria for registering names in the gTLD that limit registrations exclusively to "a single person or entity and/or that person's or entity's 'Affiliates.'" (Determination, Pgs. 23-24, ¶ 8.48.) The Requester suggested to the Panel that the revisions "cast considerable doubt" on whether Booking.com will be able to operate .HOTELS as a closed gTLD. (*Id.*)

Based on the Requester's assertions, the Panel determined:

It is accordingly far from certain that [Booking.com] would be able to exclude members of the Hotel Community from registering domain names in ‘.HOTELS’ and cause the alleged detriment the Objector foresees.

(*Id.*) The Requester now claims in its Request that, as a result of the NGPC’s failure to stay the proceedings, the Panel improperly based its decisions on hypothetical and future facts. (Request, Section 8, Pg. 13.) The Requester’s contentions are surprising and unsupported in that it was Requester’s representations upon which the Panel relied. The Procedure makes clear that, in addition to applying the standards that have been defined by ICANN, the Panel “may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable.” (Procedure, Art. 20(b).)

Moreover, the Panel further determined that even if Booking.com’s application for .HOTELS was permitted to operate as a closed gTLD, the Requester still failed to prove any material detriment to the hotel community. (Determination, Pg. 24, ¶ 8.49.) In the end, the Panel concluded:

[T]he lack of evidence to support the Objector’s allegations of material detriment is striking, particularly in light of the gravity of its allegations and the volume of its submissions. The Objector submitted well over 100 exhibits in this case. Of these, it refers to only nine in its section on material detriment. And of these nine, most are not documentary evidence. ... The only four pieces of documentary evidence on which the Objector relies to support its allegations with respect to material detriment are (1) the Application itself, (2) a study Google commissioned on the role travel plays in the lives of Americans, (3) internet travel hotel booking statistics on statisticbrain.com, and (4) the results of an online survey on hotel distribution in Germany, Austria and Switzerland. [Citation omitted.] These materials are insufficient to substantiate the allegations the Objector makes.

(Determination, Pgs. 24-25, ¶ 8.51.) Thus, there is no support for the Requester’s claim that its due process rights were violated by the NGPC’s failure to stay the objection proceedings.

Regardless of whether Booking.com’s application for .HOTELS proceeded as a closed gTLD,

the Panel determined that the Requester was simply unable to satisfy its burden of proving a likelihood of material detriment to prevail on its Objection.

VI. Decision.

Based on the foregoing, the BGC concludes that the Requester has not stated proper grounds for reconsideration, and we therefore recommend that the Request be denied without further consideration.