

**BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)
RECOMMENDATION ON RECONSIDERATION REQUEST 22-5
21 NOVEMBER 2022**

I. Introduction and Summary

The Requestor, Zydus Lifesciences Ltd., seeks reconsideration of the BAMC’s [summary dismissal of Reconsideration Request 22-3](#), which was also filed by the same Requestor. That prior request sought reconsideration of a decision in a Uniform Domain Name Dispute Resolution Policy (UDRP) proceeding to which the Requestor was a party (UDRP Decision).¹ The BAMC summarily dismissed Request 22-3 after concluding that the request did not satisfy the Bylaws-mandated requirements to maintain a reconsideration request. Specifically, the BAMC concluded that the challenged action was not taken by the ICANN Board or Staff but was instead the action of an independent third party, and thus not within the scope of the reconsideration process.² In Request 22-5, the Requestor alleges that the BAMC’s summary dismissal of Request 22-3, and corresponding inaction in not evaluating Request 22-3 on the merits or providing the relief sought in Request 22-3, violates ICANN’s Bylaws and policies regarding reconsideration requests. Specifically, the Requestor alleges that Request 22-3 should not have been summarily dismissed because it satisfied the requirements under Article 4, Section 4.2 of the ICANN Bylaws to maintain a reconsideration request.³ The Requestor asks that the

¹ Request for Reconsideration 22-3, 10 July 2022, <https://www.icann.org/resources/pages/reconsideration-22-3-zydus-lifesciences-request-2022-07-15-en>, Exhibit A, Administrative Panel Decision, Case No. D2022-0880, § 4 at Pg. 2, <https://www.wipo.int/amc/en/domains/decisions/pdf/2022/d2022-0880.pdf>.

² BAMC Summary Dismissal of Request 22-3, 26 July 2022, <https://www.icann.org/en/system/files/files/reconsideration-22-3-zydus-lifesciences-board-accountability-request-23jul22-en.pdf>.

³ See, e.g., Request for Reconsideration 22-5, 6 August 2022, § 6 at Pg. 3, <https://www.icann.org/en/system/files/files/reconsideration-22-5-zydus-lifesciences-request-redacted-08aug22-en.pdf>.

Board: (i) reverse the summary dismissal, (ii) consider of the merits of Request 22-3, (iii) reverse the decision of the UDRP Panel, and (iv) “forever bar[]” the UDRP Panelists.

Pursuant to the reconsideration process, the Ombudsman has evaluated these claims, and concluded that the summary dismissal of Request 22-3 was correct and that Request 22-5 lacks merit. Specifically, the Ombudsman concluded that the Requestor has presented no evidence demonstrating that the BAMC’s action in dismissing Request 22-3 or its inaction in not providing the relief requested in Request 22-3 contradicted the Bylaws or established policies or that BAMC’s action or inaction were taken without consideration of material information or based on inaccurate information. The Ombudsman further concluded that the Requestor is “dissatisfied with the BAMC’s Summary Dismissal of Request 22-3 and seeks a second bite the apple by now challenging the summary dismissal”⁴ and that the Requestor’s action is a “misuse of the accountability mechanism.”⁵

Based on its review of all relevant materials, the BAMC concludes that the summary dismissal of Request 22-3 did not violate the ICANN org Bylaws and policies on which the Requestor relies. As explained in the summary dismissal of Request 22-3, and as the Ombudsman found, Article 4, Section 4.2 of ICANN’s Bylaws permit reconsideration only of actions or inactions of the ICANN Board or Staff. Because UDRP providers and UDRP panels are not ICANN Board or Staff, the Bylaws do not permit use of the reconsideration mechanism to challenge the results of a UDRP proceeding. Summary dismissal of Request 22-3 was thus fully consistent with the ICANN Bylaws. Accordingly, the BAMC recommends that the Board deny Request 22-5.

⁴ Substantive Evaluation by ICANN Ombudsman of Request for Reconsideration 22-5, at Pg. 5, <https://www.icann.org/en/system/files/files/reconsideration-22-5-substantive-evaluation-ombudsman-redacted-15oct22-en.pdf>.

⁵ *Id.* at Pgs. 4–5.

II. Factual Background

The Requestor owns numerous trademarks which comprise or include the word “zydus.”⁶

On 14 March 2022, the Requestor filed a Complaint under the UDRP.⁷ Trademark owners who allege that a domain name was abusively registered can file a complaint with an ICANN-approved dispute-resolution service provider. The Requestor filed its complaint with WIPO,⁸ one of six providers currently approved for handling UDRP disputes.⁹ The UDRP Rules do not provide any role for ICANN in disputes subject to the UDRP.¹⁰ Accordingly, neither the ICANN Board nor Staff was a party to the Zydus UDRP proceeding, nor was ICANN in any way involved in that proceeding.

In a 24 June 2022 decision, the UDRP Panel denied the Requestor’s Complaint.¹¹ The UDRP Panel further determined that the Complaint was filed in bad faith and constituted an abuse of the administrative proceeding.¹²

On 10 July 2022, the Requestor submitted to ICANN a request for reconsideration of the UDRP Decision (Request 22-3), asserting that it contradicted ICANN’s Bylaws concerning non-discriminatory treatment and openness and transparency, and that the Requestor was harmed because the decision allowed the registrant to maintain its registration of <zydus.com>.¹³ The BAMC summarily dismissed Request 22-3 on 23 July 2022. As the summary dismissal explained, Article 4, Section 4.2(c) of the ICANN Bylaws permits reconsideration requests based

⁶ Request 22-3, Exhibit A, Administrative Panel Decision, Case No. D2022-0880, § 4 at Pg. 2, <https://www.wipo.int/amc/en/domains/decisions/pdf/2022/d2022-0880.pdf>;

⁷ *Id.* § 3 at Pg. 1.

⁸ *Id.*

⁹ <https://www.icann.org/resources/pages/providers-6d-2012-02-25-en>.

¹⁰ *See* Rules for Uniform Domain Name Dispute Resolution, <https://www.icann.org/resources/pages/udrp-rules-2015-03-11-en>.

¹¹ Request 22-3, Exhibit A, Administrative Panel Decision, Case No. D2022-0880, § 8 at Pg. 7, <https://www.wipo.int/amc/en/domains/decisions/pdf/2022/d2022-0880.pdf>.

¹² *Id.*

¹³ Request 22-3, § 6 at Pg. 3–4.

only on ICANN Board or Staff action or inaction. Because neither WIPO nor the UDRP Panel are members of the ICANN Board or ICANN Staff, the UDRP Panel's decision is the action of a third party, not ICANN Board or Staff action, and cannot be challenged through the reconsideration process.

On 8 August 2022, the Requestor submitted a second request (Request 22-5), seeking reconsideration of the BAMC's action in summarily dismissing Request 22-3 and the BAMC's corresponding inaction insofar as it did not address Request 22-3 on the merits or provide the relief requested. The Requestor asserts that the "WIPO panel is part and parcel of ICANN as it is accredited by ICANN," and therefore the BAMC erred by summarily dismissing the Requestor's request for reconsideration of the UDRP panel's decision.¹⁴ On 13 September 2022, the BAMC determined that Request 22-5 is sufficiently stated and therefore satisfies the procedural evaluation required by Article 4, Section 4.2(k) of the Bylaws.¹⁵

Pursuant to Article 4, Section 4.2(l) of the Bylaws, ICANN org transmitted Request 22-5 to the Ombudsman for consideration, and the Ombudsman accepted consideration of the request.¹⁶ The Ombudsman concluded that (1) "the WIPO Panel is not ICANN Staff (or Board)," (2) "reconsideration of WIPO Panel Decisions are not within [BAMC's] 'jurisdiction,'" and (3) "BAMC wasn't wrong in summarily dismissing [Request] 22-3 as insufficiently stated."¹⁷ The Ombudsman further found that Request 22-5 to be "[a] clear attempt by the requestor to appeal the decision in 22-3," which "amounts to misuse of this accountability

¹⁴ Request 22-5, § 10 at Pg. 8.

¹⁵ <https://www.icann.org/en/system/files/files/reconsideration-requests-status-2022-15nov22-en.pdf>.

¹⁶ <https://www.icann.org/en/system/files/files/reconsideration-22-5-zydus-lifesciences-ombudsman-action-request-redacted-03oct22-en.pdf>.

¹⁷ Substantive Evaluation by ICANN Ombudsman of Request for Reconsideration 22-5, at Pg. 7, <https://www.icann.org/en/system/files/files/reconsideration-22-5-substantive-evaluation-ombudsman-redacted-15oct22-en.pdf>.

mechanism,” particularly “because the conclusion is a foregone one—no relief can or should be given to the Requestor here.”¹⁸ Thus, the Ombudsman recommended that “BAMC and the Board should not grant relief and should dismiss Zydus’s latest request.”¹⁹

III. Standard of Review.

Article 4, Sections 4.2(a) and (c) of ICANN’s Bylaws provide, in relevant part, that “any person or entity materially affected by an action or inaction of the ICANN Board or Staff . . . may submit a request for reconsideration or review of an ICANN action or inaction . . . to the extent the Requestor has been adversely affected by:

- (i) One or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies);
- (ii) One or more actions or inactions of the Board or Staff that have been taken or refused to be taken without consideration of material information, except where the Requestor could have submitted, but did not submit, the information for the Board’s or Staff’s consideration at the time of action or refusal to act; or
- (iii) One or more actions or inactions of the Board or Staff that are taken as a result of the Board’s or Staff’s reliance on false or inaccurate relevant information.”²⁰

Request 22-5 seeks reconsideration of ICANN Board action or inaction insofar as it summarily dismissed Request 22-3 and did not evaluate Request 22-3 on the merits or provide the requested relief. The BAMC reviews each reconsideration request upon its receipt to determine if it is sufficiently stated.²¹ Because the BAMC determined that Request 22-5 is sufficiently stated, the BAMC now reviews this request on the merits and provides a recommendation to the Board.²² Denial of a reconsideration request is appropriate if the BAMC recommends and the Board determines that the requestor has not satisfied the reconsideration

¹⁸ *Id.* at Pgs. 7–8.

¹⁹ *Id.* at Pg. 8.

²⁰ ICANN Bylaws, 2 June 2022, Art. 4, §§ 4.2(a) and (c).

²¹ *Id.* § 4.2(k).

²² *See id.* § 4.2(e).

criteria set forth in the Bylaws.²³ Here, Request 22-5 should be denied if the Requestor has not established that the summary dismissal of Request 22-3 was either improper under established ICANN policies or was based on incomplete or inaccurate information.

IV. Analysis and Rationale.

Request 22-3 was summarily dismissed based on the BAMC's conclusion that it was not sufficiently stated under Article 4, Section 4.2(a) and (c) of ICANN's Bylaws. In evaluating whether a reconsideration request is sufficiently stated, the BAMC considers whether the reconsideration request is timely and whether the requestor meets the requirements for bringing a reconsideration request. The BAMC correctly concluded that Request 22-3 did not satisfy the criteria for maintaining a reconsideration request. Although it would have been timely filed if it had been a proper request, Request 22-3 did not identify any ICANN Staff or Board action or inaction that allegedly violated a Bylaws provision or established ICANN policy, which is a threshold requirement for a reconsideration request.²⁴ The sole action the Requestor sought to have reconsidered in Request 22-3 was the "Administrative Panel Decision" in WIPO UDRP Case No. D2022-0880.²⁵ As the BAMC noted in its summary dismissal of Request 22-3, neither the ICANN Board nor the ICANN Staff was involved in the UDRP Decision the Requestor sought in Request 22-3 to challenge. Because the UDRP Decision was not an action by the ICANN Staff or ICANN Board, the BAMC correctly concluded that it cannot serve as a basis for a reconsideration request.

²³ *Id.*

²⁴ *Id.* § 4.2(a), (c).

²⁵ Request 22-3, § 3 at Pg. 1.

In Request 22-5, the Requestor argues that this conclusion was wrong, and that Request 22-3 sought reconsideration of ICANN Staff action, on two primary grounds. Neither justifies reconsideration.

A. UDRP providers and panelists are not ICANN Staff.

The Requestor asserts that the “WIPO Centre and the WIPO Domain Name Panelists are both ICANN accredited and approved.”²⁶ The Requestor thus contends that “ICANN accredited and approved dispute resolution service providers and Panelists must fall under the purview of ‘Staff.’”²⁷ This argument is unpersuasive, as it relies on an incorrect reading of the ICANN Bylaws and a misunderstanding of the relationship between ICANN and the UDRP dispute resolution providers.

ICANN Staff is defined in the Bylaws as “employees and individual long-term paid contractors serving in locations where ICANN does not have the mechanisms to employ such contractors directly.”²⁸ UDRP providers are neither “employees” nor “long-term paid contractors” of ICANN. “Employment” generally involves “service performed for wages or under a contract of hire.” *Tieberg v. Unemployment Ins. App. Bd.*, 471 P.2d 975, 977 (Cal. 1970). “The principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired.” *Id.* ICANN provides no wages to the staff or panelists of UDRP providers, and lacks the right to control the manner or means by which these individuals perform their tasks. They are therefore not ICANN employees. Further, because ICANN does not pay UDRP provider staff or panelists and lacks any contract with them, they cannot be considered “long-term paid contractors.”

²⁶ Request 22-5, § 8 at Pg. 4–5 (citing WIPO sources referencing “accredited dispute resolution service providers” and ICANN sources referencing “approved” providers).

²⁷ *Id.* at Pg. 6.

²⁸ ICANN Bylaws, 2 June 2022, Art. 4, § 4.2(a).

The Requestor also suggests that UDRP panelists must qualify as ICANN Staff because “WIPO panel is part and parcel of ICANN.”²⁹ ICANN and WIPO are separately organized, independent organizations: ICANN is a nonprofit public benefit corporation organized under the laws of the State of California.³⁰ WIPO is an intergovernmental organization created by treaty as an agency of the United Nations.³¹ Each organization has its own governing documents, and neither organization’s governing documents reference the other.³² Under California law, the employees of one organization may also be considered the employees of another organization in certain limited circumstances, but those circumstances are not presented here: There is no basis for considering either ICANN or WIPO alter egos of each other. *See, e.g., Toho-Towa Co. v. Morgan Creek Prods., Inc.*, 217 Cal. App. 4th 1096, 1107, 159 Cal. Rptr. 3d 469, 479 (2013) (explaining that courts may “disregard the corporate form” only in narrow circumstances where one corporation “is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality, agency, conduit, or adjunct of another corporation”). Nor is there any basis for treating WIPO and ICANN as “co-employers,” which occurs where more than one organization “employs or exercises control over the wages, hours, or working conditions of any person,” such as “when one entity . . . hires and pays a worker, and another entity supervises the work.” *Martinez v. Combs*, 49 Cal. 4th 35, 76, 231 P.3d 259, 286 (2010), *as modified* (June 9, 2010). As noted above, ICANN does not pay WIPO staff or panelists and lacks any control over how they perform their work. ICANN therefore is not their employer.

²⁹ Request 22-5, § 10 at Pg. 8.

³⁰ *See* Article of Incorporation of Internet Corporation for Assigned Names and Numbers, <https://www.icann.org/resources/pages/articles-2012-02-25-en>.

³¹ *See* What is WIPO?, <https://www.wipo.int/about-wipo/en/>.

³² *See* Convention Establishing the World Intellectual Property Organization, <https://wipolex.wipo.int/en/text/283854>; Articles of Incorporation of Internet Corporation for Assigned Names and Numbers, <https://www.icann.org/resources/pages/articles-2012-02-25-en>; Bylaws for Internet Corporation for Assigned Names and Numbers, <https://www.icann.org/resources/pages/governance/bylaws-en>.

The Requestor finally suggests that, regardless of the actual relationship between ICANN and UDRP providers, UDRP panelists must be ICANN Staff because “they function as per the guidelines of ICANN which does not have a mechanism to employ such personnel directly.”³³ While the ICANN Bylaws do acknowledge that ICANN Staff might “serv[e] in locations where ICANN does not have the mechanisms to employ such contractors directly,” such Staff still must be “long-term paid contractors.” As explained above, UDRP panelists are not paid by ICANN and have no contract with ICANN. They therefore are not ICANN Staff, and their actions cannot be the subject of a proper reconsideration request. The BAMC’s summary dismissal of Request 22-3 was therefore proper, and there is no basis for reconsidering that decision as requested by Request 22-5.

B. Registrars are not ICANN Staff.

The Requestor also alleges that “the eventual implementation of the Administrati[ve] Panel’s Decision is to be done by the Registrar,” that “the said Registrar is also accredited by ICANN,” and therefore that “implementation of a biased Administration Panel’s Decision by the Registrar . . . would b[e] a proposed ‘inaction’ by the Board and Staff of ICANN.”³⁴ To begin, the Requestor did not challenge any action or inaction of the registrar in Request 22-3,³⁵ and complaints about the registrar therefore could not justify reconsidering the summary dismissal of Request 22-3. In any event, although ICANN does accredit registrars, registrars still do not qualify as ICANN Staff. Indeed, the Bylaws expressly prohibit ICANN from acting as a registrar, ensuring that all registrars are independent of ICANN, and foreclosing the possibility

³³ Request 22-5, § 8 at Pg. 6.

³⁴ *Id.* at Pg. 7.

³⁵ See Request 22-3, § 3 at Pg. 1 (identifying the specific action subject to the reconsideration request as the UDRP Decision).

that ICANN Staff could run a registrar.³⁶ Moreover, per the ICANN Bylaws, as explained above, the ICANN Staff consists of ICANN’s “*employees* and individual long-term *paid contractors*.”³⁷ ICANN lacks the authority to control the day-to-day operators of registrars or their employees, so ICANN does not have an employment relationship with these organizations. And ICANN does not pay registrars or their employees, so they cannot be classified as paid contractors. Registrars thus cannot qualify as ICANN Staff under the Bylaws.

Even if registrars could qualify as ICANN Staff, though, the Requestor has asserted no basis for challenging any action by the registrar aside from its underlying complaints about the UDRP Decision. The Requestor has not asserted, and could not plausibly allege, that the registrar would violate any Bylaws provision or established ICANN policy by implementing a duly issued UDRP Decision. For this reason, too, the registrar’s implementation of the UDRP Decision would not be a proper basis for a reconsideration request. The BAMC’s summary dismissal of Request 22-3 was therefore proper, and there is no basis for reconsidering that decision as requested by Request 22-5.

V. Recommendation.

The BAMC has considered the merits of Request 22-5 as well as all relevant information provided and the Ombudsman’s Evaluation, and, based on the foregoing, concludes that ICANN did not violate ICANN’s Commitments, Core Values, or established ICANN policy(ies) through its action of summarily dismissing Request 22-3 or through its corresponding inaction insofar as the BAMC did not consider Request 22-3 on the merits or provide the relief sought in the request. Accordingly, the BAMC recommends that the Board deny Request 22-5.

³⁶ ICANN Bylaws, 2 June 2022, Art. 2, § 2.2 (“ICANN shall not act as a Domain Name System Registry or Registrar or Internet Protocol Address Registry in competition with entities affected by the policies of ICANN.”).

³⁷ *Id.*, Art. 4, § 4.2(a) (emphasis added).