

GNSO2 Review  
Implementation  
Final Report

July 2018

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## Executive Summary

This is the *GNSO2 Review Implementation Final Report* of the GNSO Review Working Group that is executing and overseeing the implementation of the GNSO2 Review (GNSO2) recommendations. This Final Report is a required deliverable for approval by the Generic Names Supporting Organization (GNSO) Council and the Operational Effectiveness Committee (OEC) of the ICANN Board of Directors. The Working Group was initiated on 15 March 2017 and has been meeting bi-weekly. The Working Group has agreed by full consensus as of 21 June 2018 that all of the GNSO2 Review recommendations have been implemented.

### Status Summary:

There were a total of 34 recommendations.<sup>1</sup>

Phase 1: The Working Group agreed by full consensus that all 13 Phase 1 recommendations had already been implemented via previous work.

Phases 2 and 3:

The Working Group has agreed by full consensus that 21 recommendations have been implemented under current processes and procedures.

See the [GNSO Review Working Group Wiki](#) for an implementation summary.

### Timeline:

The Working Group agreed to the implementation of all of the recommendations ahead of the original timeline, which was September 2018. The implementation will be deemed to be completed upon approval of the GNSO Council and the OEC.

### Next Steps:

The GNSO Review Working Group hereby submits its GNSO2 Review Implementation Final Report for consideration by the GNSO Council. If the Report is approved by the GNSO Council, it will be provided to the OEC for consideration.

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<sup>1</sup> Note that although there were originally 36 recommendations, the GNSO Council agreed with the GNSO Review Work Party to not adopt recommendations 23 and 32 that were rated as not feasible in the GNSO Review Recommendations Feasibility and Prioritization Analysis, although it did agree to adopt recommendation 21.

Implementation Status (Final):

Phase 1: Work Already Underway and Phase 2: High Priority Recommendations

REPORTS TO OEC AND GNSO COUNCIL: ICANN60 28 October – 03 November 2017; ICANN62 25-28 June 2018

PHASE 1: WORK ALREADY UNDERWAY



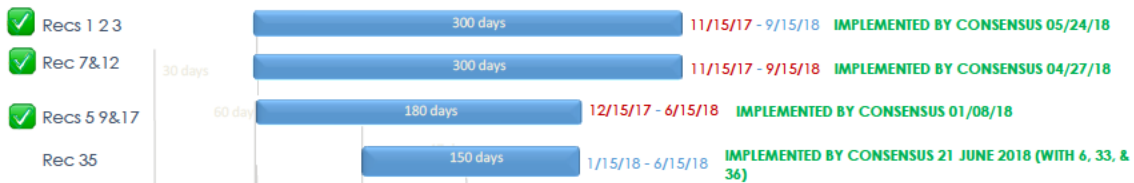
PHASE 2: HIGH PRIORITY RECOMMENDATIONS



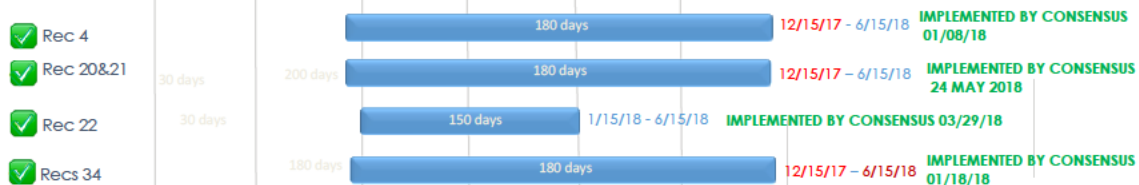
Phase 3: Medium and Low Priority Recommendations

RED DATE = ADJUSTED SCHEDULE

Medium



Low





## Background

The most recent GNSO review (GNSO2) was initiated in July 2014 by ICANN with the assistance of the GNSO Review Working Party, which was comprised of 21 GNSO community members in accordance with ICANN's Bylaws. The OEC -- formerly the Structural Improvements Committee (SIC) -- of the ICANN Board is responsible for review and oversight of policies relating to ICANN's ongoing organizational review process, as mandated by ICANN's Bylaws. The ICANN Board appointed Westlake Governance as the independent examiner for the GNSO review.

Each GNSO Stakeholder Group and Constituency appointed representatives to serve on the Working Party. The GNSO Review Working Party provided input on the review criteria, 360 assessment, and served as a conduit for input from GNSO Stakeholder Groups, Constituencies as well as the GNSO Council. The GNSO Review Working Party offered guidance to the independent examiner to ensure the draft report accurately reflected the GNSO structure, scope and dynamics.

The **scope of the GNSO review** was to assess the extent to which the improvements resulting from the 2008 review have been implemented and whether they successfully addressed the concerns that led to the review, and to consider whether the GNSO, as it is currently constituted, can respond to its changing environment. The independent examiner was not asked to assess various options and alternatives pertaining to the structure of the GNSO, but its inquiry into the effectiveness of GNSO operations led to structural considerations. The Draft Report was put out for [public comment](#) on 01 June 2015, and subsequently Westlake published its [Final Report](#) on 15 September 2015, with a [correction](#) to Recommendation 1 issued on 5 October 2015, with 36 recommendations. The recommendations were organized into the following themes:

1. Participation & Representation;
2. Continuous Development;
3. Transparency; and
4. Alignment with ICANN's future.

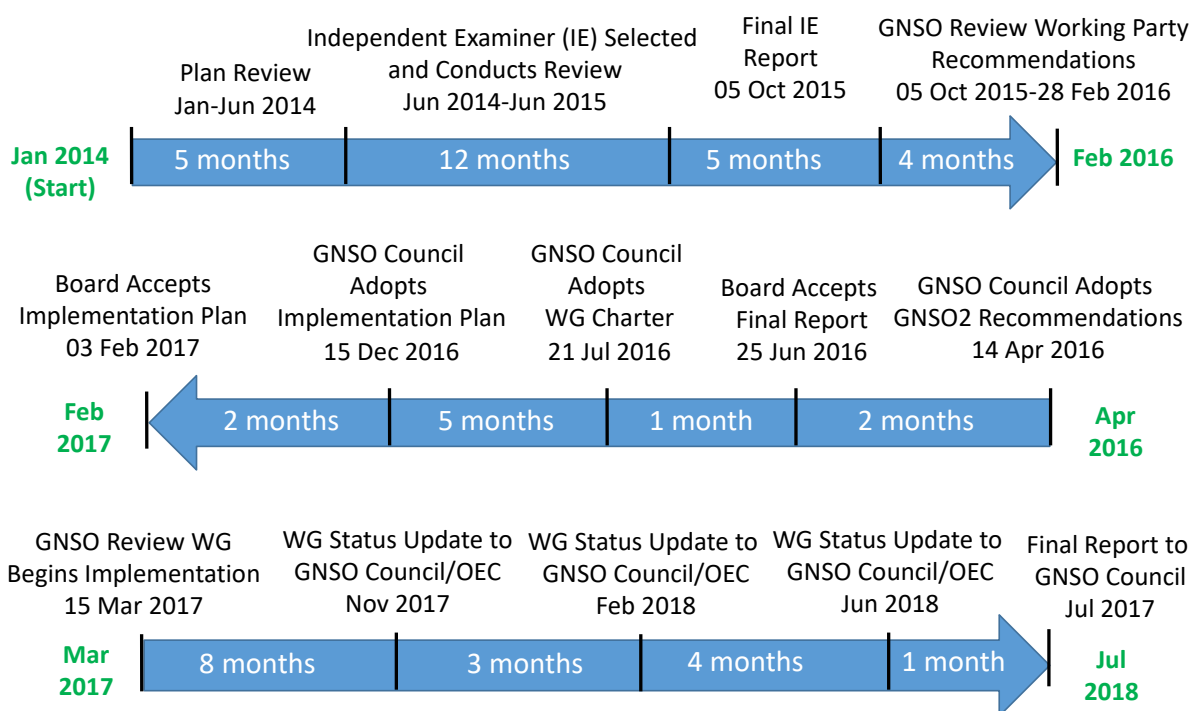
The GNSO Review Working Party reviewed the recommendations and conducted a [Feasibility and Prioritization Analysis](#), which it submitted to the GNSO Council on 28 February 2016. In its analysis document, the Working Party recommended to adopt all but three recommendations (21, 23, 32).

On 14 April 2016 the GNSO Council approved a [motion](#) to adopt the [GNSO Review Recommendations Feasibility and Prioritization Analysis](#). The ICANN Board of Directors [adopted](#) the [GNSO Review recommendations](#) on 25 June 2016. In its resolution the ICANN Board requested that the GNSO Council convene a group to oversee the implementation of the recommendations.

The Board further requested that an implementation plan, containing a realistic timeline, definition of desired outcomes, and a way to measure current state as well as progress toward the desired outcome, be submitted to the Board no later than six months after the adoption of the Board's resolution, and the GNSO Council should subsequently provide a regular report on the progress of the implementation effort (see <https://www.icann.org/resources/board-material/resolutions-2016-06-25-en#2.e>).

The GNSO Council adopted the [Charter](#) of the GNSO Review Working Group during its meeting on 21 July 2016. This Working Group was tasked to develop an implementation plan for the [GNSO Review recommendations](#) which were [adopted](#) by the ICANN Board in June 2016. The [implementation plan](#) was [adopted](#) by the GNSO Council via a motion passed on 15 December 2016. On 03 February 2017 the ICANN OEC of the Board of Directors [adopted](#) the plan.

### GNSO2 Review Overall Timeline:



#### Notes:

GNSO Review Working Party – 21 Members, 6 core participants;  
 GNSO Review Working Group (WG) – 14 members, 8 core participants;  
 Total Review duration: 4 years and 8 months (if GNSO Council approves Aug 2018);  
 Total implementation: 15 months.

## Implementation Details

Recommendations # 1, # 2, and # 3	
<b>Recommendation Description</b>	<p><u>Recommendation 1</u>: That the GNSO develop and monitor metrics to evaluate the ongoing effectiveness of current outreach strategies and pilot programs with regard to GNSO Working Groups.</p> <p><u>Recommendation 2</u>: That the GNSO develop and fund more targeted programs to recruit volunteers and broaden participation in PDP Working Groups, given the vital role volunteers play in Working Groups and policy development.</p> <p><u>Recommendation 3</u>: That the GNSO Council reduce or remove cost barriers to volunteer participation in Working Groups.</p>
<b>Was Implementation Completed As Originally Planned? If not, Why Not?</b>	The implementation was completed as originally planned.
<b>If Material Issues Or Difficulties Were Encountered During The Implementation, How Did You Resolve Them And What Impact Did They Have On The Outcome Of Implementation?</b>	No material issues or difficulties were encountered.
<b>Prioritization</b>	Low
<b>Implementation Timeline</b> (Was implementation done on time? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	The Working Group deemed that these recommendations are implemented under current processes and procedures.
<b>Implementation Cost</b> (Did the cost of Implementation fall within budget? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	There were no implementation costs.
<b>Additional Comments</b>	None

<p><b>Implementation Steps</b> (Include links to reports, actions or other documentation that provides evidence of implementation steps.)</p>	<p><i><u>Recommendation 1:</u> That the GNSO develop and monitor metrics to evaluate the ongoing effectiveness of current outreach strategies and pilot programs with regard to GNSO Working Groups.</i></p> <p>The GNSO Review Working Group has reviewed existing metrics and determined that these are sufficient to evaluate the ongoing effectiveness of current outreach strategies and pilot programs with regard to GNSO Working Groups.</p> <p><i><u>Recommendation 2:</u> That the GNSO develop and fund more targeted programs to recruit volunteers and broaden participation in PDP Working Groups, given the vital role volunteers play in Working Groups and policy development.</i></p> <p>The GNSO Review Working Group evaluated the current programs and determined that these are sufficient to recruit volunteers and broaden participation in PDP Working Groups, while noting that the Fellowship Community Process Review will likely result in improvements to that program and additional metrics to measure effectiveness.</p> <p><i><u>Recommendation 3:</u> That the GNSO Council reduce or remove cost barriers to volunteer participation in Working Groups.</i></p> <p>The GNSO Review Working Group notes that participation in Working Groups is already a low-cost, or no-cost, option for members and observers. All meetings are accessible via remote participation and there are recordings and transcripts. For meetings at ICANN meetings real time transcription (RTT) and translation of transcripts often are provided. Newcomers may be eligible for travel funding for ICANN meetings via the NextGEN and Fellowship programs, although face-to-face participation is not a requisite for effective participation in the policy making process. Furthermore, the Working Group notes that a traditional RTT solution typically includes professional translators. Understanding that the costs for such translators may be prohibitive for some uses, other solutions may include automated services, volunteers or translations of executive summaries of transcripts after public meetings.</p> <p>Based on its evaluation concerning the three recommendations, the GNSO Review Working Group agreed by full consensus on 24 May 2018 that the recommendations have been implemented based on current processes and programs, and that no further action is required.</p> <p>See the completed implementation charter at: <a href="#">IMPLEMENTED-GNSO Review Charter Recs 1-2-3 24 May 2018.pdf</a></p>
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<b>Recommendation # 4</b>	
<b>Recommendation Description</b>	That the GNSO Council introduce non-financial rewards and recognition for volunteers.
<b>Was Implementation Completed As Originally Planned? If not, Why Not?</b>	The implementation was completed as originally planned.
<b>If Material Issues Or Difficulties Were Encountered During The Implementation, How Did You Resolve Them And What Impact Did They Have On The Outcome Of Implementation?</b>	No material issues or difficulties were encountered.
<b>Prioritization</b>	Low
<b>Implementation Timeline</b> (Was implementation done on time? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	The Working Group deemed that this recommendation was completed under current procedures and processes.
<b>Implementation Cost</b> (Did the cost of Implementation fall within budget? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	There were no implementation costs.
<b>Additional Comments</b>	None
<b>Implementation Steps</b> (Include links to reports, actions or other documentation that provides evidence of implementation steps.)	The Working Group has reviewed the existing non-financial rewards and agreed by full consensus on 08 January 2018 that recognition for volunteers addresses the recommendation that there should be such programs.  See the completed implementation charter at: <a href="#">IMPLEMENTED-GNSO Review Charter Rec 4 08 January 2018.pdf</a>

Recommendations # 5, #9, and #17	
<b>Recommendation Description</b>	<p><u>Recommendation 5</u>: That, during each Working Group self-assessment, new members be asked how their input has been solicited and considered.</p> <p><u>Recommendation 9</u>: That a formal Working Group leadership assessment program be developed as part of the overall training and development program.</p> <p><u>Recommendation 17</u>: That the practice of Working Group self-evaluation be incorporated into the PDP; and that these evaluations should be published and used as a basis for continual process improvement in the PDP.</p>
<b>Was Implementation Completed As Originally Planned? If not, Why Not?</b>	The implementation was completed as originally planned.
<b>If Material Issues Or Difficulties Were Encountered During The Implementation, How Did You Resolve Them And What Impact Did They Have On The Outcome Of Implementation?"</b>	No material issues or difficulties were encountered.
<b>Prioritization</b>	Medium
<b>Implementation Timeline</b> (Was implementation done on time? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	The Working Group deemed that this recommendation was completed under current procedures and processes.
<b>Implementation Cost</b> (Did the cost of Implementation fall within budget? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	There were no implementation costs.
<b>Additional Comments</b>	None
<b>Implementation Steps</b> (Include links to reports, actions or other documentation that provides evidence of implementation steps.)	<p>The Working Group has reviewed the suggested changes to the Working Group Self-Assessment questionnaire addressing recommendations 5, 7 and 17 and agreed by full consensus on 08 January 2018 that with these changes it deems the recommendations to be implemented.</p> <p>See the completed implementation charter at:  <a href="#">IMPLEMENTED-GNSO Review Charter Recs 5-9-17 08 January 2018.pdf</a></p>

<b>Recommendations # 6, #33, # 35, and #36</b>	
<b>Recommendation Description</b>	<p><u>Recommendation 6:</u> That the GNSO record and regularly publish statistics on Working Group participation (including diversity statistics).</p> <p><u>Recommendation 33:</u> That Stakeholder Groups, Constituencies, and the Nominating Committee, in selecting their candidates for appointment to the GNSO Council, should aim to increase the geographic, gender and cultural diversity of its participants, as defined in ICANN Core Value 4 [now Core Value 2].</p> <p><u>Recommendation 35:</u> That the GNSO Council establish a Working Group, whose membership specifically reflects the demographic, cultural, gender and age diversity of the Internet as a whole, to recommend to Council ways to reduce barriers to participation in the GNSO by non- English speakers and those with limited command of English.</p> <p><u>Recommendation 36:</u> That, when approving the formation of a PDP Working Group, the GNSO Council requires that its membership represent as far as reasonably practicable the geographic, cultural and gender diversity of the Internet as a whole. Additionally, that when approving GNSO Policy, the ICANN Board explicitly satisfy itself that the GNSO Council undertook these actions when approving the formation of a PDP Working Group.</p>
<b>Was Implementation Completed As Originally Planned? If not, Why Not?</b>	The implementation was completed as originally planned.
<b>If Material Issues Or Difficulties Were Encountered During The Implementation, How Did You Resolve Them And What Impact Did They Have On The Outcome Of Implementation?</b>	No material issues or difficulties were encountered.
<b>Prioritization</b>	High and Medium
<b>Implementation Timeline</b> (Was implementation done on time? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	The Working Group deemed that these recommendations were completed under current procedures and processes.
<b>Implementation Cost</b> (Did the cost of Implementation fall within budget? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	There were no implementation costs.
<b>Additional Comments</b>	None



<p><b>Implementation Steps</b> (Include links to reports, actions or other documentation that provides evidence of implementation steps.)</p>	<p><b>Recommendation 6:</b> The Working Group notes that until Recommendation 8 of the CCWG Accountability Work Stream 2 is approved, GNSO Support staff already gather and publish on the Working Group wikis the membership data. This data could be expanded to include statistics on diversity for each Working Group if the CCWG recommendations are approved, and this data could be linked to a Diversity section of the ICANN Website. Staff notes that publication of these diversity statistics may be subject to compliance with the General Data Protection Regulation (GDPR), such as via direction to a privacy notice and the purpose of the data collection. For an example, see the GNSO Statements of Interest wiki at: <a href="https://community.icann.org/display/gnsosoi">https://community.icann.org/display/gnsosoi</a>.</p> <p><b>Recommendations 33 and 36:</b> The GNSO Review Working group notes that Recommendations 2-5 of the Cross Community Working Group Accountability Work Stream 2 Sub Group on Diversity broadly address GNSO2 Review Recommendations 33 and 36. The Working Group agrees that both Recommendations 33 and 36 are considered to be implemented for the following reasons: First, there are already procedures that address diversity. With respect to GNSO Council membership, the Bylaws state, “Stakeholder Groups should, in their charters, ensure their representation on the GNSO Council is as diverse as possible and practicable, including considerations of geography, GNSO Constituency, sector, ability and gender.” Accordingly, the charters of the Stakeholder Groups and Constituencies contain requirements relating at least some aspects of diversity. Second, the GNSO Working Group Guidelines require that the Call for Volunteers for a PDP Working Group should elicit a broad response. Third, both Recommendations 33 and 36 allow flexibility for implementation. Recommendation 33 states that Stakeholder Groups, Constituencies, and the Nominating Committee “should <i>aim to</i> [emphasis added] increase the geographic, gender and cultural diversity of its participants, as defined in ICANN Core Value 4 [now Core Value 2]. Recommendation 36 states that, “The GNSO Council requires that its membership represent as far as reasonably practicable the geographic, cultural and gender diversity of the Internet as a whole.” The phrases “aim to” and “as far as reasonably practicable” allow the GNSO Council the flexibility to determine the feasibility of requiring diversity. With this flexibility the Working Group agrees that the current processes and procedures fulfill the recommendations, but also do not create conflicts if the CCWG Recommendations are implemented.</p>
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<p><b>Implementation Steps (Cont.)</b> (Include links to reports, actions or other documentation that provides evidence of implementation steps.)</p>	<p>With respect to the applicability of Recommendation 33 to the Nominating Committee, while the Working Group agrees that it is out of scope for the GNSO2 Review recommendations to mandate actions by the Nominating Committee, the Working Group agreed that the GNSO Council could provide guidance or suggestions to the Nominating Committee concerning candidate attributes, such as relating to diversity, following the standard practice.</p> <p>However, the Working Group agrees that the following statement in Recommendation 36 is out of scope in the GNSO2 Review: “Additionally, that when approving GNSO Policy, the ICANN Board explicitly satisfy itself that the GNSO Council undertook these actions when approving the formation of a PDP Working Group.” The Working Group agrees that the GNSO cannot mandate what steps the ICANN Board should take. Instead, the Working Group agrees that it is sufficient for the GNSO Council to assert that it has undertaken these actions when forming a PDP Working Group.</p> <p><b>Recommendation 35:</b> With respect to Recommendation 35, The CCWG Accountability Work Stream 2 established a Sub Group on Diversity, the membership of which itself broad and diverse with 54 active participants and 45 observers. See: <a href="https://community.icann.org/display/WEIA/Diversity">https://community.icann.org/display/WEIA/Diversity</a>. In its <a href="#">report</a>, the Sub Group stated, “This report presents a discussion of diversity at ICANN and identifies a number of diversity elements by which diversity may be characterized, measured and reported. It provides a summary of diversity provisions in the new ICANN Bylaws, and is informed by feedback from ICANN SO/AC/groups through a Diversity Questionnaire. Finally, it proposes a number of recommendations by which ICANN may define, measure, report, support and promote diversity.” The Working Group agrees that the thorough and diligent work of this Sub Group fulfills the requirement for the establishment of a “Working Group” in Recommendation 35.</p>
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<p><b>Implementation Steps (Cont.)</b> (Include links to reports, actions or other documentation that provides evidence of implementation steps.)</p>	<p><b>Conclusion:</b> The Working Group noted that there is significant overlap between the GNSO2 Review recommendations on diversity and the recommendations from the CCWG Accountability Work Stream 2 recommendations on diversity. See: <a href="https://www.icann.org/en/system/files/files/ccwg-acctws2-annex-1-diversity-final-recs-27mar18-en.pdf">https://www.icann.org/en/system/files/files/ccwg-acctws2-annex-1-diversity-final-recs-27mar18-en.pdf</a>. The Working Group notes that the timeframe for the implementation of the CCWG Accountability recommendations on diversity is unknown. The GNSO Review Working group agreed that the GNSO2 Review recommendations may be considered to be laying the groundwork for the implementation of the CCWG Accountability Work Stream 2 recommendations on diversity. It emphasized that this is a common challenge in ICANN that efforts overlap because the timeframe for projects may be lengthy and could result in duplication of efforts. The Working Group agreed that it would seem redundant or even possibly inconsistent to do an implementation of a few specific elements when the CCWG Accountability recommendations will address broader diversity issues in a more comprehensive way. The Working Group agreed that at this time the GNSO2 Review recommendations could be considered implemented in a way that is consistent with the CCWG Accountability recommendations, and that the GNSO2 Review recommendations will be augmented once the CCWG Accountability recommendations are approved. Based on its evaluation concerning the four GNSO2 Review recommendations, the GNSO Review Working Group determines that the recommendations have been implemented based on current processes and programs, and that no further action is required.</p> <p>See the completed implementation charter at: <a href="#">IMPLEMENTED-GNSO Review Charter Recs 6-33-35-36 21 June 2018.pdf</a></p>
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<b>Recommendations # 7 and #12</b>	
<b>Recommendation Description</b>	<p><u>Recommendation 7</u>: That Stakeholder Groups and Constituencies engage more deeply with community members whose first language is other than English, as a means to overcoming language barriers.</p> <p><u>Recommendation 12</u>: That ICANN assess the feasibility of providing a real-time transcription service in audio conferences for Working Group meetings.</p>
<b>Was Implementation Completed As Originally Planned? If not, Why Not?</b>	The implementation was completed as originally planned.
<b>If Material Issues Or Difficulties Were Encountered During The Implementation, How Did You Resolve Them And What Impact Did They Have On The Outcome Of Implementation?</b>	No material issues or difficulties were encountered.
<b>Prioritization</b>	High
<b>Implementation Timeline</b> (Was implementation done on time? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	The Working Group deemed that this recommendation was implemented under current processes and procedures.
<b>Implementation Cost</b> (Did the cost of Implementation fall within budget? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	The GNSO Review Working Group determined that if a PDP Working Group requested services that could have a budgetary affect such a request would have to be reviewed by the GNSO Council.
<b>Additional Comments</b>	None

<p><b>Implementation Steps</b> (Include links to reports, actions or other documentation that provides evidence of implementation steps.)</p>	<p><i><u>Recommendation 7:</u> That Stakeholder Groups and Constituencies engage more deeply with community members whose first language is other than English, as a means to overcoming language barriers.</i> The Working Group determined that the recommendation may be addressed by Stakeholder Groups and Constituencies requesting via ICANN Language Services for key documents relating to policy and outreach to be translated within the parameters of ICANN's Annual Budget.</p> <p><i><u>Recommendation 12:</u> That ICANN assess the feasibility of providing a real-time transcription service (RTT) in audio conferences for Working Group meetings.</i> The Working Group has assessed the feasibility of providing RTT services in audio conferences for Working Group meetings to be both expensive as well as inadequate for addressing engagement as RTT is only provided in English. Instead, Working Groups should be allowed the option of teleconference interpretation, but with the understanding that the goal would be to use these services for those Working Groups where there is a clear demand for interpretation. The demand may depend on the composition of the active WG membership and should clearly been defined with a rationale by the WG leadership. The WG leadership team will channel any such requests that have budget implications to the GNSO Council for consideration. The Working Group notes that a traditional RTT solution typically includes professional translators. Understanding that the costs for such translators may be prohibitive for some uses, other solutions may include automated services, volunteers or translations of executive summaries of transcripts after public meetings. In addition, Working Groups should consider translating transcripts, again only if there is an identified demand for this service.</p> <p>The Working Group agreed by full consensus on 27 April 2018 that the available services and options are sufficient to fulfill these recommendations recognizing that demand and justification is required as budget constraints apply.</p> <p>See the completed implementation charter at: <a href="#">IMPLEMENTED-GNSO Review Implementation Charter Recs 7&amp;12 27 April 2018.pdf</a></p>
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<b>Recommendation # 8</b>	
<b>Recommendation Description</b>	That Working Groups should have an explicit role in responding to implementation issues related to policy they have developed.
<b>Was Implementation Completed As Originally Planned? If not, Why Not?</b>	The implementation was completed as originally planned.
<b>If Material Issues Or Difficulties Were Encountered During The Implementation, How Did You Resolve Them And What Impact Did They Have On The Outcome Of Implementation?</b>	No material issues or difficulties were encountered.
<b>Prioritization</b>	High
<b>Implementation Timeline</b> (Was implementation done on time? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	The Working Group deemed that this recommendation, as being part of Phase 1, was completed as work that was already underway.
<b>Implementation Cost</b> (Did the cost of Implementation fall within budget? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	There were no implementation costs.
<b>Additional Comments</b>	None
<b>Implementation Steps</b> (Include links to reports, actions or other documentation that provides evidence of implementation steps.)	The Working Group agreed by full consensus on 04 May 2017 that the revisions to the GNSO Operating Procedures including the change to the PDP Manual that were published on 24 June 2015 as version 3.0 constitute the implementation of the recommendation that an explicit role for Working Groups in responding to implementation issues related to policy they have developed.  See the completed implementation charter at: <a href="#">IMPLEMENTED-GNSO Review Charter Rec 8 04 May 2017.pdf</a>

Recommendations # 10 and # 11	
<b>Recommendation Description</b>	<p><b>Recommendation 10:</b> That the GNSO Council develop criteria for Working Groups to engage a professional facilitator/moderator in certain situations.</p> <p><b>Recommendation 11:</b> That the face-to-face PDP Working Group pilot project be assessed when completed. If the results are beneficial, guidelines should be developed and support funding made available.</p>
<b>Was Implementation Completed As Originally Planned? If not, Why Not?</b>	The implementation was completed as originally planned.
<b>If Material Issues Or Difficulties Were Encountered During The Implementation, How Did You Resolve Them And What Impact Did They Have On The Outcome Of Implementation?</b>	No material issues or difficulties were encountered.
<b>Prioritization</b>	Medium
<b>Implementation Timeline</b> (Was implementation done on time? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	The Working Group deemed that this recommendation, as being part of Phase 1, was completed as work that was already underway.
<b>Implementation Cost</b> (Did the cost of Implementation fall within budget? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	There were no implementation costs.
<b>Additional Comments</b>	None
<b>Implementation Steps</b> (Include links to reports, actions or other documentation that provides evidence of implementation steps.)	<p>The GNSO Review Working Group agreed by full consensus on 09 November 2017 that the current process for the provision of ad hoc funding and facilitation support is sufficient and has proven to work, both in the analysis of the face-to-face PDP Working Group pilot project and the recent PDP Working Group facilitated sessions. Thus, the Working Group determined that it is not necessary to develop criteria for Working Groups to engage a professional facilitator/moderator in certain situations, and the current Working Group Guidelines provide guidance on how to address divergence and do not prevent Working Groups from seeking to use facilitation. However, the Working Group agrees that this determination does not preclude ICANN staff from providing guidance as a resource in the future.</p> <p>See the completed implementation charter at:  <a href="#">IMPLEMENTED-GNSO Review Charter Rec 10-11 09 November 2017.pdf</a></p>



<b>Recommendation # 13</b>	
<b>Recommendation Description</b>	That the GNSO Council evaluate and, if appropriate, pilot a technology solution (such as Loomio or similar) to facilitate wider participation in Working Group consensus-based decision making.
<b>Was Implementation Completed As Originally Planned? If not, Why Not?</b>	The implementation was completed as originally planned.
<b>If Material Issues Or Difficulties Were Encountered During The Implementation, How Did You Resolve Them And What Impact Did They Have On The Outcome Of Implementation?</b>	No material issues or difficulties were encountered.
<b>Prioritization</b>	Medium
<b>Implementation Timeline</b> (Was implementation done on time? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	The Working Group deemed that this recommendation, as being part of Phase 1, was completed as work that was already underway.
<b>Implementation Cost</b> (Did the cost of Implementation fall within budget? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	There were no implementation costs.
<b>Additional Comments</b>	None
<b>Implementation Steps</b> (Include links to reports, actions or other documentation that provides evidence of implementation steps.)	The Working Group agreed by full consensus on 27 July 2017 that the recommendation had already been implemented as there currently are technology solutions available and in use (Microsoft Word and Google Drive) to facilitate wider participation in Working Group consensus-based decision making.  See the completed implementation charter at: <a href="#">IMPLEMENTED-GNSO Review Charter Rec 13 27 July 2017.pdf</a>

<b>Recommendations # 14 and # 15</b>	
<b>Recommendation Description</b>	<p><b>Recommendation 14:</b> That the GNSO further explores PDP 'chunking' and examines each potential PDP as to its feasibility for breaking into discrete stages.</p> <p><b>Recommendation 15:</b> That the GNSO continues current PDP Improvements Project initiatives to address timeliness of the PDP.</p>
<b>Was Implementation Completed As Originally Planned? If not, Why Not?</b>	The implementation was completed as originally planned.
<b>If Material Issues Or Difficulties Were Encountered During The Implementation, How Did You Resolve Them And What Impact Did They Have On The Outcome Of Implementation?</b>	No material issues or difficulties were encountered.
<b>Prioritization</b>	Medium (14) and High (15)
<b>Implementation Timeline</b> (Was implementation done on time? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	The Working Group deemed that these recommendations, as being part of Phase 1, were completed as work that was already underway.
<b>Implementation Cost</b> (Did the cost of Implementation fall within budget? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	There were no implementation costs.
<b>Additional Comments</b>	None
<b>Implementation Steps</b> (Include links to reports, actions or other documentation that provides evidence of implementation steps.)	<p>The Working Group agreed by full consensus on 04 May 2017 that the additional GNSO processes adopted on 24 June 2015, along with the current Working Group Guidelines and established practice constitute implementation of recommendation 14 on PDP 'chunking' and 15 on the timeliness of the PDP.</p> <p>See the completed implementation charter at:  <a href="#">IMPLEMENTED-GNSO Review Charter Recs 14&amp;15 04 May 2017.pdf</a></p>



<b>Recommendation # 16</b>	
<b>Recommendation Description</b>	That a policy impact assessment (PIA) be included as a standard part of any policy process.
<b>Was Implementation Completed As Originally Planned? If not, Why Not?</b>	The implementation was completed as originally planned.
<b>If Material Issues Or Difficulties Were Encountered During The Implementation, How Did You Resolve Them And What Impact Did They Have On The Outcome Of Implementation?</b>	No material issues or difficulties were encountered.
<b>Prioritization</b>	High
<b>Implementation Timeline</b> (Was implementation done on time? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	The Working Group deemed that this recommendation, as being part of Phase 1, was completed as work that was already underway.
<b>Implementation Cost</b> (Did the cost of Implementation fall within budget? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	There were no implementation costs.
<b>Additional Comments</b>	None
<b>Implementation Steps</b> (Include links to reports, actions or other documentation that provides evidence of implementation steps.)	The Working Group agreed by full consensus on 29 May 2017 that the revised GNSO Operating Procedures v3.1, published on 16 February 2016, complete the implementation of recommendation 16.  See the completed implementation charter at: <a href="#">IMPLEMENTED-GNSO Review Charter Rec 16 29 May 2017.pdf</a>

Recommendation # 18	
<b>Recommendation Description</b>	That the GNSO Council evaluate post implementation policy effectiveness on an ongoing basis (rather than periodically as stated in the current GNSO Operating Procedures), and that these evaluations are analyzed by the GNSO Council to monitor and improve the drafting and scope of future PDP Charters and facilitate the effectiveness of GNSO policy outcomes over time.
<b>Was Implementation Completed As Originally Planned? If not, Why Not?</b>	The implementation was completed as originally planned.
<b>If Material Issues Or Difficulties Were Encountered During The Implementation, How Did You Resolve Them And What Impact Did They Have On The Outcome Of Implementation?</b>	No material issues or difficulties were encountered.
<b>Prioritization</b>	High
<b>Implementation Timeline</b> (Was implementation done on time? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	The Working Group deemed that this recommendation, as being part of Phase 1, was completed as work that was already underway.
<b>Implementation Cost</b> (Did the cost of Implementation fall within budget? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	There were no implementation costs.
<b>Additional Comments</b>	None
<b>Implementation Steps</b> (Include links to reports, actions or other documentation that provides evidence of implementation steps.)	<p>The Working Group agreed by full consensus on 09 November 2017 that the GDD Consensus Policy Implementation Framework of 31 May 2015 completes the implementation of the recommendation that post implementation policy effectiveness evaluations are analyzed by the GNSO Council to monitor and improve the drafting and scope of future PDP Charters and facilitate the effectiveness of GNSO policy outcomes over time. The Working Group further determined that it is not feasible to evaluate post implementation policy effectiveness <b>“on an ongoing basis”</b> (rather than periodically as stated in the current GNSO Operating Procedures) it is not feasible to implement this aspect of the recommendation.</p> <p>See the completed implementation charter at:  <a href="#">IMPLEMENTED-GNSO Review Charter Rec 18 09 November 2017.pdf</a></p>

<b>Recommendation # 19</b>	
<b>Recommendation Description</b>	As strategic manager rather than a policy body the GNSO Council should continue to focus on ensuring that a Working Group has been properly constituted, has thoroughly fulfilled the terms of its charter and has followed due process.
<b>Was Implementation Completed As Originally Planned? If not, Why Not?</b>	The implementation was completed as originally planned.
<b>If Material Issues Or Difficulties Were Encountered During The Implementation, How Did You Resolve Them And What Impact Did They Have On The Outcome Of Implementation?</b>	No material issues or difficulties were encountered.
<b>Prioritization</b>	Low
<b>Implementation Timeline</b> (Was implementation done on time? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	The Working Group deemed that this recommendation, as being part of Phase 1, was completed as work that was already underway.
<b>Implementation Cost</b> (Did the cost of Implementation fall within budget? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	There were no implementation costs.
<b>Additional Comments</b>	None
<b>Implementation Steps</b> (Include links to reports, actions or other documentation that provides evidence of implementation steps.)	<p>The Working Group agreed by full consensus on 21 August 2017 that this recommendation has been implemented as there are comprehensive and clear existing guidelines to ensure that a Working Group has been properly constituted, has thoroughly fulfilled the terms of its charter and has followed due process.</p> <p>See the completed implementation charter at:  <a href="#">IMPLEMENTED-GNSO Review Charter Rec 19 21 August 2017.pdf</a></p>

<b>Recommendations # 20 and # 21</b>	
<b>Recommendation Description</b>	<p><u>Recommendation 20</u>: That the GNSO Council should review annually ICANN's Strategic Objectives with a view to planning future policy development that strikes a balance between ICANN's Strategic Objectives and the GNSO resources available for policy development.</p> <p><u>Recommendation 21</u>: That the GNSO Council should regularly undertake or commission analysis of trends in gTLDs in order to forecast likely requirements for policy and to ensure those affected are well- represented in the policy-making process.</p>
<b>Was Implementation Completed As Originally Planned? If not, Why Not?</b>	The implementation was completed as originally planned.
<b>If Material Issues Or Difficulties Were Encountered During The Implementation, How Did You Resolve Them And What Impact Did They Have On The Outcome Of Implementation?</b>	No material issues or difficulties were encountered.
<b>Prioritization</b>	Low
<b>Implementation Timeline</b> (Was implementation done on time? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	The Working Group deemed that this recommendation has been implemented under current processes and procedures.
<b>Implementation Cost</b> (Did the cost of Implementation fall within budget? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	There were no implementation costs.
<b>Additional Comments</b>	None

<p><b>Implementation Steps</b> (Include links to reports, actions or other documentation that provides evidence of implementation steps.)</p>	<p><i>Recommendation 20: That the GNSO Council should review annually ICANN's Strategic Objectives with a view to planning future policy development that strikes a balance between ICANN's Strategic Objectives and the GNSO resources available for policy development.</i></p> <p>After extensive discussion the GNSO Review Working Group decided that it would recommend that the decision concerning the process to implement this recommendation should be left to the GNSO Council. Furthermore, the Working Group notes that there are several existing options available to the Council to implement this recommendation, including – but not limited to – during an annual strategic planning session either at, or outside, of an ICANN meeting; tasking an existing or new Work Team with developing recommendations for Council consideration; or tasking ICANN staff with developing recommendations that might be addressed in a joint meeting of the GNSO Council and ICANN's Multistakeholder Strategy and Strategic Initiatives (MSSI) team.</p> <p><i>Recommendation 21: That the GNSO Council should regularly undertake or commission analysis of trends in gTLDs in order to forecast likely requirements for policy and to ensure those affected are well- represented in the policy-making process.</i></p> <p>Given that there are already a number of data sources available and research initiatives underway that provide information about trends in gTLDs, the Working Group does not anticipate a need for additional data collection and analysis efforts. The GNSO Council already maintains ties with the coordinators of these efforts and receives updates when they are timely. This approach allows the Council to receive information as it becomes available rather than setting rigid timeframes for updates. Should the Council decide that a different approach is needed, it may consider setting up a regular review of data and analysis at set intervals.</p> <p>Finally, the GNSO Review Working Group agreed via full consensus on 24 May 2018 that existing processes and procedures are in place that address the implementation of these recommendations and thus no new work it required.</p> <p>See the completed implementation charter at: <a href="#">IMPLEMENTED-GNSO Review Charter Recs 20-21 24 May 2018.pdf</a></p>
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<b>Recommendation # 22</b>	
<b>Recommendation Description</b>	That the GNSO Council develop a competency-based framework, which its members should use to identify development needs and opportunities.
<b>Was Implementation Completed As Originally Planned? If not, Why Not?</b>	The implementation was completed as originally planned.
<b>If Material Issues Or Difficulties Were Encountered During The Implementation, How Did You Resolve Them And What Impact Did They Have On The Outcome Of Implementation?</b>	No material issues or difficulties were encountered.
<b>Prioritization</b>	Low
<b>Implementation Timeline</b> (Was implementation done on time? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	The Working Group deemed that this recommendation is implemented under current processes and procedures.
<b>Implementation Cost</b> (Did the cost of Implementation fall within budget? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	There were no implementation costs.
<b>Additional Comments</b>	None
<b>Implementation Steps</b> (Include links to reports, actions or other documentation that provides evidence of implementation steps.)	<p>The Working Group has reviewed the existing ICANN-provided training options in the context of a competency-based framework and agreed by full consensus on 29 March 2018 that these address the recommendation that there should be a competency-based framework to identify development needs and opportunities. The Working Group notes that some training options do focus on accessibility of training, and in particular real-time interaction through remote platforms, and suggests that future training options should continue this focus. The Working Group also notes that all of the training and learning materials are linked from the GNSO website and described in the context of the competency-based framework. See: <a href="https://gns0.icann.org/en/basics">https://gns0.icann.org/en/basics</a>.</p> <p>See the completed implementation charter at: <a href="#">IMPLEMENTED-GNSO Review Charter Rec 22 29 March 2018.pdf</a></p>



Recommendations # 24 and # 25	
<b>Recommendation Description</b>	<p><b>Recommendation 24:</b> That the GNSO Council and Stakeholder Groups and Constituencies adhere to the published process for applications for new Constituencies. That the ICANN Board in assessing an application satisfy itself that all parties have followed the published process, subject to which the default outcome is that a new Constituency is admitted. That all applications for new Constituencies, including historic applications, be published on the ICANN website with full transparency of decision-making.</p> <p><b>Recommendation 25:</b> That the GNSO Council commission the development of, and implement, guidelines to provide assistance for groups wishing to establish a new Constituency.</p>
<b>Was Implementation Completed As Originally Planned? If not, Why Not?</b>	The implementation was completed as originally planned.
<b>If Material Issues Or Difficulties Were Encountered During The Implementation, How Did You Resolve Them And What Impact Did They Have On The Outcome Of Implementation?</b>	No material issues or difficulties were encountered.
<b>Prioritization</b>	Low
<b>Implementation Timeline</b> (Was implementation done on time? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	The Working Group deemed that these recommendations, as being part of Phase 1, were completed as work that was already underway.
<b>Implementation Cost</b> (Did the cost of Implementation fall within budget? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	There were no implementation costs.
<b>Additional Comments</b>	None
<b>Implementation Steps</b> (Include links to reports, actions or other documentation that provides evidence of implementation steps.)	<p>The Working Group agreed by full consensus on 10 July 2017 that the current processes relating to Recommendation 24 are effective and accessible; and that the current processes address Recommendation 25 and that improvements to the guidance are not necessary; and that these recommendations have been implemented.</p> <p>See the completed implementation charter at:  <a href="#">IMPLEMENTED-GNSO Review Charter Rec 24-25 10 July 2017.pdf</a></p>

<b>Recommendations # 26, # 27, #28, and #29</b>	
<b>Recommendation Description</b>	<p><u>Recommendation 26:</u> That GNSO Council members, Executive Committee members of Stakeholder Groups and Constituencies and members of Working Groups complete and maintain a current, comprehensive Statement of Interest on the GNSO website. Where individuals represent bodies or clients, this information is to be posted. If not posted because of client confidentiality, the participant's interest or position must be disclosed. Failing either of these, the individual not be permitted to participate.</p> <p><u>Recommendation 27:</u> That the GNSO establish and maintain a centralized publicly available list of members and individual participants of every Constituency and Stakeholder Group (with a link to the individual's Statement of Interest where one is required and posted).</p> <p><u>Recommendation 28:</u> That section 6.1.2 Membership of Chapter 6.0 Stakeholder Groups and Constituencies: Operating Principles and Participation Guidelines of the GNSO Operating Procedures be revised to clarify that key clauses are mandatory rather than advisory, and to institute meaningful sanctions for non-compliance where appropriate.</p> <p><u>Recommendation 29:</u> That Statements of Interest of GNSO Council Members and Executive Committee members of all Stakeholder Groups and Constituencies include the total number of years that person has held leadership positions in ICANN.</p>
<b>Was Implementation Completed As Originally Planned? If not, Why Not?</b>	The implementation was completed as originally planned.
<b>If Material Issues Or Difficulties Were Encountered During The Implementation, How Did You Resolve Them And What Impact Did They Have On The Outcome Of Implementation?</b>	No material issues or difficulties were encountered.
<b>Prioritization</b>	High and Medium
<b>Implementation Timeline</b> (Was implementation done on time? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	The Working Group deemed that these recommendations have been implemented under current processes and procedures.
<b>Implementation Cost</b> (Did the cost of Implementation fall within budget? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	There were no implementation costs.
<b>Additional Comments</b>	None



<p><b>Implementation Steps</b> (Include links to reports, actions or other documentation that provides evidence of implementation steps.)</p>	<p><u><b>Recommendation 26:</b></u> The GNSO Review Working Group has determined that this recommendation is implemented in the current GNSO Operating Procedures. In particular, the Working Group notes that GNSO Council members, Executive Committee members of Stakeholder Groups and Constituencies and members of Working Groups already do complete and maintain a current, comprehensive Statement of Interest on the GNSO website. Where individuals represent bodies or clients, this information also is posted. If not posted because of client confidentiality, the participant's interest or position must be disclosed as is already required in Chapter 5.0 of the GNSO Operating Procedures. Failing either of these, the as per the current Operating Procedures, the individual will not be permitted to participate.</p> <p><u><b>Recommendation 27:</b></u> The GNSO Review Working Group determined that this recommendation has been implemented since there already exists a centralized publicly available list of members and individual participants of every Constituency and Stakeholder Group (with a link to the individual's Statement of Interest where one is required and posted).</p> <p><u><b>Recommendation 28:</b></u> The GNSO Review Working Group determined that this recommendation has been implemented because key clauses in section 6.1.2 Membership of Chapter 6.0 Stakeholder Groups and Constituencies: Operating Principles and Participation Guidelines of the GNSO Operating Procedures already are mandatory rather than advisory, and that meaningful sanctions for non-compliance where appropriate also exist.</p> <p><u><b>Recommendation 29:</b></u> The GNSO Review Working Group determined that while it is not currently feasible that Statements of Interest of GNSO Council Members and Executive Committee members of all Stakeholder Groups and Constituencies include the total number of years that person has held leadership positions in ICANN, it did agree with the staff recommendation that upon the next change to the Statement of Interest form it should require entry of a start date so that the number of years can be calculated, and notes also that upon migration to the Global Enrollment platform in 2019 a closer link will be enabled between Statements of Interest and user profiles.</p> <p>The Working Group agreed by full consensus on 07 June 2018 that these recommendations are implemented. See the completed implementation charter at: <a href="#">IMPLEMENTED-GNSO Review Charter Recs 26-27-28-29 07 June 2018.pdf</a></p>
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<b>Recommendation # 30</b>	
<b>Recommendation Description</b>	That the GNSO develop and implement a policy for the provision of administrative support for Stakeholder Groups and Constituencies; and that Stakeholder Groups and Constituencies annually review and evaluate the effectiveness of administrative support they receive.
<b>Was Implementation Completed As Originally Planned? If not, Why Not?</b>	The implementation was completed as originally planned.
<b>If Material Issues Or Difficulties Were Encountered During The Implementation, How Did You Resolve Them And What Impact Did They Have On The Outcome Of Implementation?</b>	No material issues or difficulties were encountered.
<b>Prioritization</b>	Low
<b>Implementation Timeline</b> (Was implementation done on time? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	The Working Group deemed that this recommendation, as being part of Phase 1, was completed as work that was already underway.
<b>Implementation Cost</b> (Did the cost of Implementation fall within budget? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	There were no implementation costs.
<b>Additional Comments</b>	None
<b>Implementation Steps</b> (Include links to reports, actions or other documentation that provides evidence of implementation steps.)	<p>The Working Group agreed by full consensus on 31 August 2017 that this recommendation has been implemented as there is a current mechanism, the Annual Budget Review (ABR) Process, for the provision of administrative support for Stakeholder Groups and Constituencies; and that Stakeholder Groups and Constituencies can annually review and evaluate the effectiveness of administrative support they receive via the ABR process.</p> <p>See the completed implementation charter at:  <a href="#">IMPLEMENTED-GNSO Review Charter Rec 30 31 August 2017.pdf</a></p>

<b>Recommendation # 31</b>	
<b>Recommendation Description</b>	That the GAC-GNSO Consultation Group on GAC Early Engagement in the GNSO Policy Development Process continue its two work streams as priority projects. As a part of its work it should consider how the GAC could appoint a non-binding, non-voting liaison to the Working Group of each relevant GNSO PDP as a means of providing timely input.
<b>Was Implementation Completed As Originally Planned? If not, Why Not?</b>	The implementation was completed as originally planned.
<b>If Material Issues Or Difficulties Were Encountered During The Implementation, How Did You Resolve Them And What Impact Did They Have On The Outcome Of Implementation?</b>	No material issues or difficulties were encountered.
<b>Prioritization</b>	Medium
<b>Implementation Timeline</b> (Was implementation done on time? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	The Working Group deemed that this recommendation, as being part of Phase 1, was completed as work that was already underway.
<b>Implementation Cost</b> (Did the cost of Implementation fall within budget? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	There were no implementation costs.
<b>Additional Comments</b>	None
<b>Implementation Steps</b> (Include links to reports, actions or other documentation that provides evidence of implementation steps.)	The Working Group agreed by full consensus on 25 September 2017 that the recommendation is implemented via current mechanisms for the GAC to provide timely input to PDP Working Groups.  See the completed implementation charter at: <a href="#">IMPLEMENTED-GNSO Review Charter Rec 31 25 Sept 2017.pdf</a>

<b>Recommendation # 34</b>	
<b>Recommendation Description</b>	That PDP Working Groups rotate the start time of their meetings in order not to disadvantage people who wish to participate from anywhere in the world.
<b>Was Implementation Completed As Originally Planned? If not, Why Not?</b>	The implementation was completed as originally planned.
<b>If Material Issues Or Difficulties Were Encountered During The Implementation, How Did You Resolve Them And What Impact Did They Have On The Outcome Of Implementation?</b>	No material issues or difficulties were encountered.
<b>Prioritization</b>	Medium
<b>Implementation Timeline</b> (Was implementation done on time? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	The Working Group deemed that this recommendation was implemented under current processes and procedures.
<b>Implementation Cost</b> (Did the cost of Implementation fall within budget? <i>In accordance with the proposed Implementation Plan that was approved by the Board</i> )	There were no implementation costs.
<b>Additional Comments</b>	None
<b>Implementation Steps</b> (Include links to reports, actions or other documentation that provides evidence of implementation steps.)	<p>The GNSO Review Working Group has reviewed the current Working Group practices and processes for the rotation of meeting times and has determined that they address the recommendation that PDP Working Groups rotate the start time of their meetings in order not to disadvantage people who wish to participate from anywhere in the world. In particular, the Working Group has determined that at this time it does not appear necessary for there to be a mandate or rule regarding meeting rotation. Instead the decision as to whether to rotate meeting times should be left to the Working Group based on the composition of the membership and the utility of rotation. Thus, the Working Group agreed by full consensus on 18 January 2018 that this recommendation is implemented.</p> <p>See the completed implementation charter at:  <a href="#">IMPLEMENTED-GNSO Review Charter Rec 34 18 January 2018.pdf</a></p>

## REFERENCE MATERIALS - BOARD PAPER NO. 2019.01.27.1c

**TITLE:** **Acceptance of GNSO2 Review Working Group's Implementation Final Report**

### **Background**

ICANN organizes independent reviews of its supporting organizations and advisory committees as prescribed in [Article IV Section 4.4](#) of the ICANN Bylaws, to ensure ICANN's multistakeholder model remains transparent and accountable, and to improve its performance.

This action completes the second review of the GNSO and is based on the Implementation Final Report as adopted by the GNSO Council, the final report of the independent examiner, Westlake Governance, as well as the GNSO Review Working Group's (WG) assessment of the recommendations as adopted by the GNSO Council. Following the assessment of all pertinent documents and community feedback by the OEC, the Board is now in a position to consider and accept the Implementation Final Report.

The Board, with recommendation from the Organizational Effectiveness Committee of the Board (OEC), considered all relevant documents, including the final report, the [GNSO Review Working Party Feasibility Assessment and Prioritization of Recommendations by Independent Examiner](#) ("Feasibility Assessment"), and accepted the final report issued by the independent examiner on 25 June 2016. The Board adopted the Feasibility Assessment, except recommendations 23 and 32. Additionally, the Board directed the GNSO Council to: draft an implementation plan for the adopted recommendations with a realistic timeline that took into account the continuously high community workload and consideration of the prioritization proposed by the WG; publish the plan no later than six (6) months after the Board's adoption of the Feasibility Assessment; ensure that the implementation plan includes definitions of desired outcomes and a way to measure current state as well as progress toward the desired outcome; and report back regularly to the Board on its implementation progress.

On 3 February 2017, the Board accepted the Implementation Plan provided by the WG and approved by the GNSO Council on 15 December 2016, and directed the WG to provide semi-annual updates to the OEC until such time that the implementation efforts have concluded.

### **Discussion of Issues**

Please see the WG's Implementation Final Report, adopted by the GNSO Council, and considered by the OEC (Exhibit A).

### **Key Stakeholders and Positions**

The Board, through the OEC, consulted with the GNSO Review Working Group, who was responsible for the implementation, and recommended good practices for conducting effective reviews on a timely basis and monitored the progress of the review as well as the progress of the implementation of review recommendations. The implementation work conducted by the GNSO followed its standard best practices to ensure transparency and accountability. No concerns were voiced by the community.

### **Significant Materials Reviewed by the Board**

The Board reviewed relevant [Bylaws sections](#), [Organizational Review Process documentation](#), [GNSO Review Recommendations Implementation Plan](#), and the GNSO Review Working Group's [Implementation Final Report](#).

### **Significant Factors**

The Board found several factors to be significant, contributing to the effective completion of the implementation work:

- Convening a dedicated group that oversees the implementation of Board-accepted recommendations
- An implementation plan containing a realistic timeline for the implementation, definition of desired outcomes and a way to measure current state as well as progress toward the desired outcome
- Timely and detailed reporting on the progress of implementation

## **Community Impact**

This Board action is expected to have a positive impact on the community by acknowledging and highlighting an effective completion of implementation of GNSO Review Recommendations.

## **Resource Implications**

This Board action is anticipated to have no fiscal impact as the implementation efforts have successfully concluded. The ramifications on the ICANN organization, the community and the public are anticipated to be positive, as this Board action signifies an important milestone for organizational reviews and self-governance of ICANN.

## **Impact on Security, Stability and Resiliency of the DNS**

This Board action is not expected to have a direct effect on security, stability or resiliency issues relating to the DNS.

## **ICANN Mission and Serving the Public Interest**

The Board's action is consistent with ICANN's commitment pursuant to section 4.1 of the Bylaws to ensure ICANN's multistakeholder model remains transparent and accountable, and to improve the performance of its supporting organizations and advisory committees.

This action will serve the public interest by fulfilling ICANN's commitment to maintaining and improving its accountability and transparency.

## **Signature Block:**

Submitted by: Theresa Swinehart

Position: Senior Vice President, Multistakeholder Strategy and Strategic Initiatives

Date: 19 December 2018

Email: [theresa.swinehart@icann.org](mailto:theresa.swinehart@icann.org)



# Staff Report of Public Comment Proceeding

Draft PTI and IANA FY20 Operating Plans and Budgets																			
<b>Publication Date:</b>	05 December 2018																		
<b>Prepared By:</b>	Kirsten Wattson and Shani Quidwai																		
<table border="1"> <thead> <tr> <th colspan="2">Public Comment Proceeding</th> </tr> </thead> <tbody> <tr> <td>Open Date:</td> <td>28 September 2018</td> </tr> <tr> <td>Close Date:</td> <td>12 November 2018</td> </tr> <tr> <td>Staff Report Due Date:</td> <td>05 December 2018</td> </tr> </tbody> </table>		Public Comment Proceeding		Open Date:	28 September 2018	Close Date:	12 November 2018	Staff Report Due Date:	05 December 2018	<table border="1"> <thead> <tr> <th colspan="2">Important Information Links</th> </tr> </thead> <tbody> <tr> <td colspan="2" style="text-align: center;"><a href="#">Announcement</a></td> </tr> <tr> <td colspan="2" style="text-align: center;"><a href="#">Public Comment Proceeding</a></td> </tr> <tr> <td colspan="2" style="text-align: center;"><a href="#">View Comments Submitted</a></td> </tr> </tbody> </table>		Important Information Links		<a href="#">Announcement</a>		<a href="#">Public Comment Proceeding</a>		<a href="#">View Comments Submitted</a>	
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<a href="#">View Comments Submitted</a>																			
<b>Staff Contact:</b>	Kirsten Wattson and Shani Quidwai	<b>Email:</b>	<a href="mailto:planning@icann.org">planning@icann.org</a>																
Section I: General Overview and Next Steps																			
<p>PTI (Public Technical Identifiers) was incorporated in August 2016 and became operational in October 2016. Under PTI's Bylaws, draft Operating Plans and Budgets for PTI must be submitted to the PTI Board nine months before the start of each fiscal year. A draft Operating Plan and Budget for PTI for FY20 were presented to the PTI Board and ICANN Board Finance Committee for review and published for public comment on 28 September 2018.</p> <p>The FY20 PTI Operating Plan and Budget will be proposed for adoption by the PTI Board on 19 December 2018. As required under the PTI Bylaws, the PTI Operating Plan and Budget will also be presented to the ICANN Board as an input into ICANN's budget process and will also be the basis for the required IANA Budget. The FY20 IANA Operating Plan and Budget will be proposed for adoption by the ICANN Board at the beginning of January 2018.</p> <p>ICANN and PTI use comments on draft planning documents to identify areas of strength and areas for improvement. Comments provided in this public comment proceeding will help identify specific changes that may be incorporated into the final budget documents and/or implemented in the next planning process. This analysis is part of our commitment to continuous improvement.</p>																			



## Section II: Contributors

*At the time this report was prepared, a total of six (6) community submissions had been posted to the forum. The contributors are listed below in chronological order by posting date with initials noted. To the extent that quotations are used in the foregoing narrative (Section III), such citations will reference the contributor's initials.*

### Organizations and Groups:

<b>Name</b>	<b>Submitted by</b>	<b>Initials</b>
GNSO Council	Keith Drazek	GNSO
ICANN At Large Advisory Committee	Jean-Jacques Subrenat	ALAC
ICANN Business Constituency	Steve DelBianco	BC
Non-Commercial Stakeholders Group	Rafik Dammak	NCSG
Registrar Stakeholder Group	Zoe Bonython	RrSG
gTLD Registries Stakeholder Group	Samantha Demetriou	RySG

## Section III: Summary of Comments

*General Disclaimer: This section intends to summarize broadly and comprehensively the comments submitted to this public comment proceeding but does not address every specific position stated by each contributor. The preparer recommends that readers interested in specific aspects of any of the summarized comments, or the full context of others, refer directly to the specific contributions at the link referenced above (View Comments Submitted).*

There were six submissions to the public comment forum on the Draft FY20 PTI and IANA Operating Plans and Budgets. The comments were further broken down into a total of 21 individual comments and segmented by theme. Further analysis follows in the section below.

Many comments pertained to financial management or document structure on both the PTI and IANA documents. These comments provided suggestions for changes to improve readability and understanding. Other comments included those pertaining to general comment, level of detail provided in the documents, and one noted concern over potential PTI separation from ICANN.

We segmented comments thematically, and not based on the group submitting them, to gain a better understanding of the comments. The comment themes are listed here and the analysis section provides a high-level assessment of the observations, questions, and requests. Responses to individual comments are provided in the appendix.

### Themes

Document Structure (three Comments)  
Financial Management (11 Comments)  
PTI Structure (three Comments)  
General Comments (four Comments)

## **Section IV: Analysis of Comments**

*General Disclaimer:* This section intends to provide an analysis and evaluation of the comments submitted along with explanations regarding the basis for any recommendations provided within the analysis.

### **Document Structure/Format**

There were three comments on the document structure/Format of both draft Operating Plans and Budgets.

### **Financial Management**

There were 11 comments regarding the financial information presented. Most questions inquired about the level of granularity both with the dollar figures and the amount of detail that was presented. In addition, there were a couple of comments over the representation of depreciation.

### **PTI Separation & Structure**

There were two comments on the structure of PTI operations, and one comment regarding PTI separation. In a case of a separation of PTI, ICANN is expected to cover all costs related to a transition to separation and ICANN would not raise fees from TLD operators (registries, registrars and, indirectly, for registrants) in order to achieve separation of PTI. The other comment indicated that in a scenario in which PTI would become separated from ICANN, a PTI Reserve Fund should be considered in order to provide PTI sufficient means to continue to perform its key functions independently during a limited time. The CWG IANA Stewardship Transition Report, Annex L defines steps that would have to take place in order for a determination on how to proceed if the IANA Function Review (IFR) determines that a separation process is necessary. Annex L documents that a Separation Cross Community Working Group would be convened and any proposal would undergo a public comment. There is no requirement for a reserve fund to be established in advance of a proposal from the Separation Cross Community Working Group and the associated public comment.

### **General Comments**

General comments were mainly comprised of statements regarding the PTI and IANA budget process.

<b>Appendices</b>
Appendix A below provides a specific response to each individual comment.

**APPENDIX A**  
**Document Structure**

#	Comment	Contributor	Response / Action Taken
Section Summary: This section excerpts comments and questions relating to Capital Expenditures			
1.	Page 5, ALAC supports the medium-term approach and planning, in conjunction with the ICANN Strategic Goals, "In FY20, work is expected to principally conclude on a multi-year effort to develop a comprehensive set of systems and tools to support protocol parameter assignment workflows. These systems will enhance the way service is delivered to the Internet standards community. Other areas of activity include continued evolution of the Root Zone Management System, enhancements to the IANA.org website and associated tools to modernize and make information more accessible, and updates to the root zone key management software and facilities."	ALAC	Thank you for your comment.
2.	Page 5, last sentence makes no sense and needs to be reviewed, "It is anticipated work relating to ICANN initiatives such as variant TLDs and the subs."	ALAC	The sentence was not complete and should conclude "... and the subsequent procedures for new gTLDs would commence this period." The document will be updated for this correction.
3.	Page 8, item 5.2 IANA Numbering Function, fourth bullet point should spell "Unicast" with the first letter in upper case, as it is a specific and recognized addressing method, see <a href="https://en.wikipedia.org/wiki/Unicast">https://en.wikipedia.org/wiki/Unicast</a> .	ALAC	Thank you for your comment. The lowercase "unicast" appears to be the prevailing usage in standardization documents (i.e., the RFC series) from which we typically derive advice for managing numbering spaces, but we will research further to ensure we utilize a consistent style.

## Financial Management

#	Comment	Contributor	Response / Action Taken
Section Summary: This section excerpts comments and questions relating to Financials of the PTI & IANA Operating Plans and Budgets			
4.	Please elaborate on the activity of PTI staff which merits an increase of \$300,000 for 22.8 FTE for merit awards, increases and benefits?	ALAC	The \$300K increase is not related to any specific activity but consists of annual salary and benefits increases for all positions in PTI that are eligible for an increase on the annual merit increase cycle. In addition, there were separate salary adjustments were for three positions that aligns the salary for this positions to the market. The remuneration framework for PTI is covered by the ICANN's remuneration framework as published at this link: <a href="https://www.icann.org/en/system/files/files/remuneration-practices-fy18-01jul17-en.pdf">https://www.icann.org/en/system/files/files/remuneration-practices-fy18-01jul17-en.pdf</a> .
5.	Please explain which professional services were required for an increase of \$400,000 (31.1% over FY19 budget, due to shared services with ICANN)?	ALAC	The increase in professional services is due to the addition of Language Services and the Office of the Chief Technology Officer as support functions. In FY19, these departments were not considered part of the PTI Shared Services calculation, but upon further review with the departments during the FY20 budget process, it was determined that these two departments do contribute to PTI Services and should be included in the Shared Services calculations.
6.	Why are some decreases listed as totals (\$ USD), and some as percentages (%) making it more difficult to draw comparisons? For example: 1. A decrease in legal expenses of \$400,000; 2. Decreased travel and meeting expenditure by 16.9%; 3. Decreased administration of \$100,000 (7.4%) due to lower rent costs.	ALAC	Thank you for your comment. We agree that not being consistent with the format of the data in both dollars and percentages might be confusing. We will make these revisions to the FY20 Operating Plan and Budget

#	Comment	Contributor	Response / Action Taken
7.	Page 7, item 4.1 Budget Overview: in the table, the line entitled "Depreciation" gives a constant value (0.3 million USD), and yet predicts a -11% variation. This needs to be clarified, especially as current forecasts for the USD seem to indicate its positive valuation in the near future, instead of its depreciation, see this table from The Economy Forecast Agency (look at 2019 and beyond), <a href="https://longforecast.com/euro-todollar-eur-usd-forecast-2017-2018-2019-2020">https://longforecast.com/euro-todollar-eur-usd-forecast-2017-2018-2019-2020</a> .	ALAC	The figures presented in the documented are rounded, and the actual dollar figures are \$270K versus \$303K, which is an 11% decline. The decrease in depreciation is due to assets that are becoming fully depreciated, most notably, the Key Management Facilities infrastructure. Depreciation represents the cash expenses associated with the use of ICANN's assets in carrying out PTI Services.
8.	Page 7, under item 2.1 "Travels and Meetings" should read "I. Fewer PTI Operations Trips resulting in lower EXPENDITURES (Jean-Jacques 'emphasis)" instead of "lower costs". Costs are determined by travel and service providers, whereas expenditures are borne by PTI.	ALAC	Thank you for your comment. We will review this suggestion and make updates to the document as necessary.
9.	Page 7, under 4, last line should read "... shows a decrease of..." (instead of "...shows an decrease of...").	ALAC	Thank you for your comment. We will update the document.
10.	Page 8, under item 7, a clearer definition of "Depreciation" is required, in order to differentiate PTI/ICANN bilateral arrangements from the broader issue of depreciation in the monetary sense.	ALAC	Thank you for your comment. Depreciation represents the cost associated with the use of ICANN's assets that directly support PTI Services.
11.	There should an annex or addendum which lists the detailed breakdown of direct and indirect PTI costs, which was carried out by ICANN through different departments (e.g., Communications, Governance support, etc). It is included in the table, total figures, under "Professional services". For the sake of transparency, the detailed breakdowns should be included in the budget.	ALAC	Thank you for your comment. We will evaluate the feasibility of providing more specificity about the Departments included in the direct and indirect PTI costs.



#	Comment	Contributor	Response / Action Taken
12.	<p>PTI: The BC notes responsive improvement in the FY20 PTI Operating Plan and Budget proposal based on past comments. However, on page 7 there is a 0.1% reduction in FY20 Budget compared to that of FY19 when the subject values (Total Cash Expenses) are each USD\$10m, which is confusing. Similar situation is noted on the computations. We request that figures be computed to 2 decimal positions instead of one so that the equivalent percentage difference can be apparent.</p> <p>Also, since ICANN is producing long term budget scenarios, BC recommends that PTI does the same.</p>	BC	<p>Thank you for your comment. Any scale and arithmetic inconsistencies are due to rounding to the nearest million.</p> <p>We will consider the suggestion that we present the data with more detail in subsequent documents.</p> <p>The recommendation that PTI prepare long term budget scenarios will be raised at board level.</p>
13.	<p>IANA: The BC notes responsive improvement in the FY20 IANA Operating Plan and Budget proposal based on past comments. However, on page 5 there is a 0.1% reduction in FY20 Budget compared to that of FY19 when the subject values (Total Cash Expenses) are each USD\$10m, which is confusing. We request that figures be computed to 2 decimal positions instead of one so that the equivalent percentage difference can be apparent.</p> <p>We note an error in the computation of percentage increase of IANA budget handled by ICANN, which is 1.9% instead of 2.2% as indicated.</p> <p>Also, since ICANN is producing long term budget scenarios, BC recommends that IANA does the same.</p> <p>The BC endorses this draft IANA budget if noted computational errors are corrected</p>	BC	<p>Thank you for your comment. Any scale and arithmetic inconsistencies are due to rounding to the nearest million.</p> <p>The difference of the 1.9% vs the 2.2% as indicated, is due to the number of decimal places that are shown. The whole dollars are \$10.732M and \$10.499M respectively, which does correspond to the 2.2% variance.</p> <p>We will consider the suggestion that we present the data with more detail in subsequent documents.</p>
14.	<p>NCSG would look favourably upon including more decimals in future budgetary documents to be presented for public comment. Indeed, for a total budget of 10 million USD, it would be beneficial to have more precision than up to 100 000 USD.</p>	NCSG	<p>Thank you for your comment. We acknowledge that any scale and arithmetic inconsistencies are due to rounding to the nearest million.</p> <p>We will consider the suggestion that we present the data with more detail in subsequent documents.</p>

## PTI Structure

#	Comment	Contributor	Response / Action Taken
Section Summary: This section excerpts comments and questions relating to the PTI Structure			
15.	The GNSO Council notes that one of our current policy development activities does potentially intersect with the operations of the IANA Functions by PTI. The New gTLD Subsequent Procedures Policy Development Process Working Group is currently developing policy that may ultimately instruct PTI to place new gTLDs into the root. However, it is not anticipated that delegations would occur in FY20.	GNSO Council	Thank you for your comment. We do envisage preliminary preparatory work may need to be conducted in FY20, and thus have made an allocation that may be used for this and for other potential work such as implementation of Variant TLDs. The timing and impact of these activities will be better known when the input processes are further advanced.

#	Comment	Contributor	Response / Action Taken
16.	<p>While NCSG understands that ICANN wishes to maintain uniformity throughout the whole organisation on how budgetary matters are presented, certain elements of the two documents under comment here can appear confusing to the community and the public. More precisely, we are referring to naming conventions (“Core IANA Services”, “IANA Services”, “PTI O&amp;B”, “Contract Oversight and Auxiliary Services”), footnote (a) of Appendix A and B (which cannot be understood without precise knowledge of the context of the transition of IANA from ICANN to PTI), as well as the numbering of Section 5.1 in the IANA Budget.</p> <p>NCSG is happy to work further with the relevant persons and departments of ICANN org to find ways to improve the accessibility of future budgetary documents while meeting ICANN org’s objectives of uniform presentation.</p>	NCSG	<p>Thank you for the comment. We are happy to explore ways of more clearly communicating the different budget components so that the concepts can be more accessible.</p>



#	Comment	Contributor	Response / Action Taken
17.	<p>The RySG would like to reiterate its concern about potential scenarios in which PTI would become separated from ICANN. We suggest that such a scenario is thought through as well as the appropriateness of a PTI Reserve Fund providing PTI with sufficient means to continue to perform its key functions independently during a limited time.</p> <p>With regard to a possible PTI/ICANN Separation Process, the RySG would like to recall that:  ‘In the case of a recommendation for any action [by the Separation Cross Community Working Group (SCWG)], ICANN is expected to cover all costs i.e. costs related to the then transition, costs related to the possible selection of a new IFO and the ongoing operating costs of the successor operator. Moreover, in bearing such costs, it is to be required of ICANN that it does not raise fees from TLD operators (registries, registrars and, indirectly, for registrants) in order to do so.’</p> <p>The RySG considers a PTI/ICANN Separation Process to be a Consequential Event for which the ICANN Reserve Fund is expected to provide the appropriate level of support.</p>	RySG	<p>The scope of potential separation scenarios are for consideration in the IANA Naming Function Separation Process set out in the ICANN Bylaws at Article 19. The IANA Naming Function Contract at Section 9.3 requires that a Transition Plan be put in place so that PTI is in a position to transition its responsibilities if necessary.</p> <p>The CWG IANA Stewardship Transition Report, Annex L defines steps that would have to take place in order for a determination on how to proceed if the IANA Function Review (IFR) determines that a separation process is necessary. Annex L documents that a Separation Cross Community Working Group would be convened and any proposal would undergo a public comment. There is no requirement for a reserve fund to be established in advance of a proposal from the Separation Cross Community Working Group and the associated public comment.</p>

**General Comments**

#	Comment	Contributor	Response / Action Taken
Section Summary: This section excerpts comments and questions relating to General Comments			
18.	The GNSO, as a Decisional Participant within the Empowered Community, is aware that should any of its constituent parts have issue with the IANA/PTI budget, it is the IANA Operating Plan and Budget that would be subject to possible rejection petition should that occur.	GNSO Council	Thank you for your comment.
19.	The GNSO Council has no objection to the proposed IANA/PTI budgets published on 28 September 2018 and will defer any specific comments to its SGs/Cs.	GNSO Council	Thank you for your comment.

#	Comment	Contributor	Response / Action Taken
20.	<p>As a Civil Society Constituency, we are concerned with the rights of non-commercial internet users of and matters concerning the policy development regarding gTLDs. NCSG Supports the variations made to address the Technical and Administrative Expenditure in both PTI and IANA Budget to deliver smooth and robust operation and maintenance of key Internet Resources and we are keen follow up on IANA operations and developments from a GNSO stakeholder group perspective.</p> <p>NCSG strongly supports the continued maintenance of the PTI budget to ensure continuity of service in the IANA functions. The flat year on year approach of the FY20 budget is acceptable to NCSG as long as the IANA customers and the core maintenance of the RZMS and the other IANA functions are sufficiently accounted for in the FY20 budget.</p>	NCSG	Thank you for your comment. The proposed budget is expected to be sufficient for successful ongoing delivery of existing services to the service levels expected of our customers.
21.	<p>The Registrar Stakeholder Group (RrSG) is well aware of the importance of the PTI and IANA functions and that they need the resources to be able to continue performing effectively. However, in the current financial climate both within ICANN and the domain industry in general, the RrSG also appreciates that financial prudence is being applied to the Draft IANA, and particularly the PTI, Operating Plan and Budgets and is therefore supportive of what has been proposed.</p> <p>With that said, although an overview has been provided on the functions and projects which the plan and budgets support, the RrSG would still like to see more granular detail provided. This would permit a fuller understanding of budget allocations and spending and allow the community to better measure the appropriateness of the costs.</p>	RrSG	Thank you for your comment. We will consider whether and to what extent to provide more granularity in subsequent documents.

**End of Report**

# **FY20 Draft IANA Operating Plan and Budget**

28 September 2018



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# IANA Operating Plan & Budget

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## 1 Introduction

Note: All figures in this document are in US Dollars.

### **CONTENTS OF THE DOCUMENT**

This document contains the total draft FY20 Internet Assigned Numbers Authority (IANA) Operating Plan and Budget, which is posted for public comment as required by the Internet Corporation for Assigned Names and Numbers' (ICANN's) Bylaws, and in accordance with ICANN's public comment process.

This document provides the details of the IANA Functions and other IANA services for fiscal year 2020 (FY20) from 1 July 2019 to 30 June 2020. This draft FY20 IANA Operating Plan and Budget includes the amounts covered in the draft FY20 Public Technical Identifiers (PTI) Budget and the amounts for the IANA services performed by ICANN as the IANA Functions Operator, and which are not performed by PTI.

Section 6 of this document describes the IANA Functions and other IANA services and the activities performed to deliver them. Where useful, comparative information for FY19 is provided, which represents the total IANA Functions and other IANA services forecast information for this fiscal year.

### **MULTISTAKEHOLDER PARTICIPATION**

The multistakeholder model enables the engagement of stakeholders in the planning process through accessible information and effective interaction. This draft FY20 IANA Operating Plan and Budget is published for public comment to receive feedback from the community.

Enabling the engagement of stakeholders in a feedback loop through a public comment period is a fundamental part of the multistakeholder model. The publishing of this draft FY20 IANA Operating Plan and Budget for public comment is a key element of the transparency and community engagement in the planning process.

ICANN welcomes and recognizes the engagement of stakeholders into the planning process of the draft FY20 IANA Operating Plan and Budget.



## 2 Executive Summary

ICANN receives input from PTI on its budget and then develops an IANA Budget each year, which is predominantly comprised of the full PTI budget, plus other costs associated with governance and delivery of IANA Functions that are not borne directly by PTI.

### SEPARATION OF PTI AND IANA BUDGETS

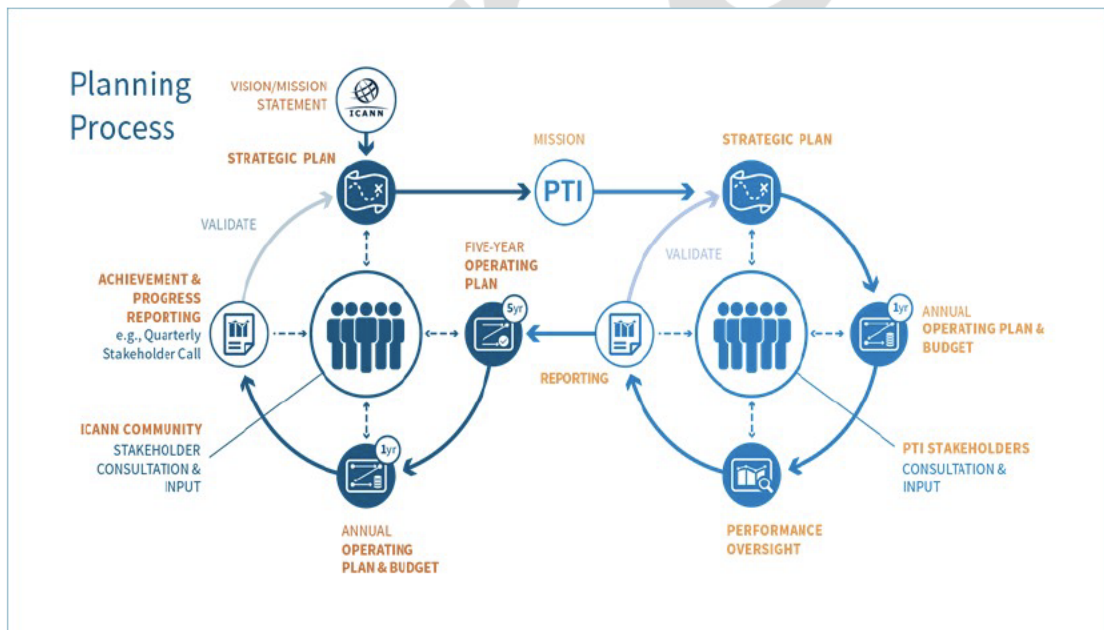
The PTI services and the IANA services will each be reflected under the overall IANA Budget, as described in this document.

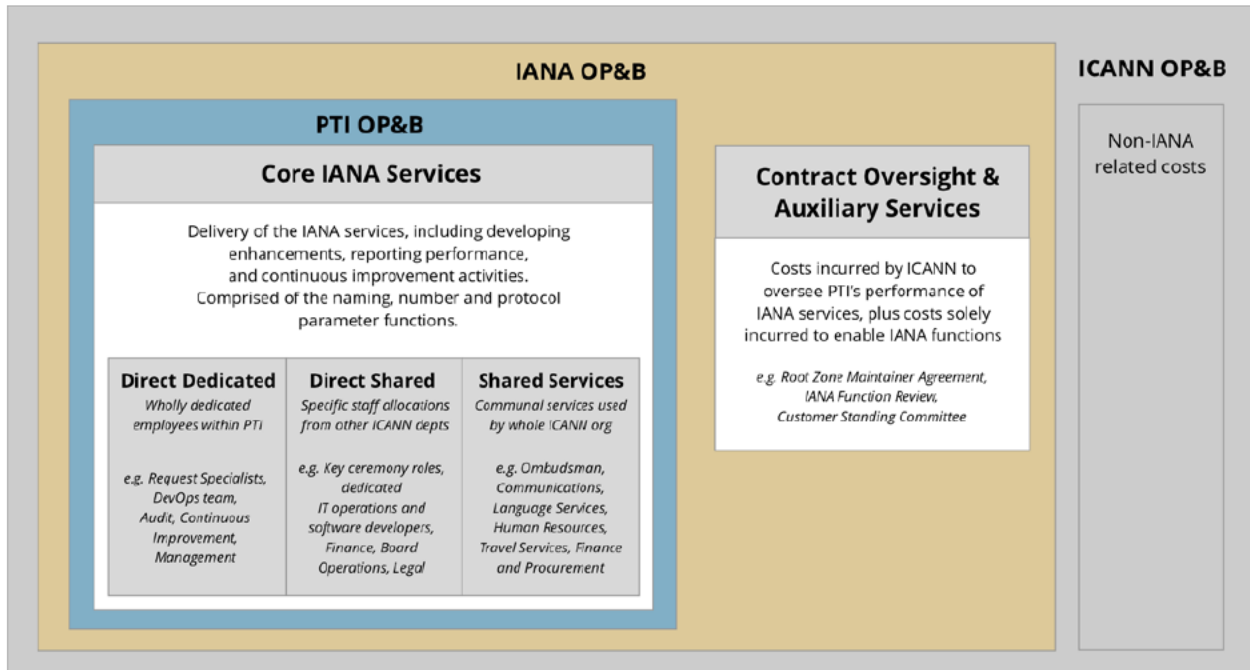
### STRUCTURE OF WORK

The ICANN-funded PTI operational activities and PTI technical systems enhancements (PTI Services) is outlined in the draft FY20 PTI Operating Plan and Budget. This represents the PTI Services component of the draft FY20 IANA Operating Plan and Budget. The other component of the draft FY20 IANA Operating Plan and Budget is the IANA Services performed by ICANN that are not borne directly by PTI in its role as the IANA Functions Operator.

### PLANNING AND BUDGET OVERVIEW

This graphic shows the FY20 planning process that encompasses ICANN's and PTI's planning. PTI's strategic goals are a sub-part of ICANN's strategic goals. PTI's multiyear operating plans are also reflected as a sub-part of ICANN's Five-Year Operating Plan. The adopted version of the draft FY20 IANA Operating Plan and Budget will become a component of ICANN's FY20 Operating Plan and Budget.





### 3 IANA Budget Overview

The PTI Board adopts the PTI Operating Plan and Budget each year, which constitutes a large component of the IANA Operating Plan and Budget, which in turn is included in ICANN's Operating Plan and Budget. This FY20 draft IANA Operating Plan Budget is presented for public comment, using ICANN's public comment process. When that process concludes, ICANN organization will include a proposed FY20 IANA Operating Plan and Budget as part of the total FY20 ICANN Operating Plan and Budget for the ICANN Board to review and adopt.

FY20 IANA Budget in Millions, USD	FY20 IANA Budget	FY19 IANA Budget	Increase/(Decrease)		FY18 IANA Actuals
			Total	%	
PTI Services	\$10.0	\$10.0	(\$0.0)	-0.1%	\$7.8
IANA Services (a)	\$0.7	\$0.5	\$0.2	51.0%	\$0.3
<b>TOTAL</b>	<b>\$10.7</b>	<b>\$10.5</b>	<b>\$0.2</b>	<b>2.2%</b>	<b>\$8.1</b>

(a) IANA Services includes the Root Zone Maintainer function, Customer Standing Committee, Root Zone Evolution Committee and IANA Naming Function reviews. These costs are funded by ICANN Operations.

The draft FY20 IANA Budget is \$10.7 million, which is an increase of \$0.2 million from the \$10.5 million IANA Budget for FY19. The draft FY20 IANA Budget is comprised of \$10.0 million for PTI Services and \$0.7 million for IANA Services not performed by PTI. The PTI Services remained relatively flat to FY19 with an increase in Professional Services costs of \$0.4M, or 31.1%, for incremental Shared Services resources, most notably Language Services the Office of Technology. Administration, Travel & Meetings, and Capital costs all decreased due to lower

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rent, less Board meeting support, and fewer Key Management Facility improvements. The IANA Services component increased by \$0.2 million due to the incremental cost of ICANN’s support for the IANA Naming Function review, the Customer Standing Committee (CSC) Effectiveness review, and Root Zone Management caretaker role.

## 4 IANA Caretaker Budget

There is a potential that the IANA Budget, even if approved by the ICANN Board, will not be in full force and effect at the start of FY20. If that is the case, under the ICANN Bylaws, there is both a “Caretaker ICANN Budget” and a “Caretaker IANA Budget” (described at Annexes E and F, respectively), which are required to go into effect if the respective budget is not able to come into full force and effect at the beginning of a fiscal year.

Under the ICANN Bylaws, the Empowered Community has the right to reject the IANA Budget and Operating Plan, as well as the broader ICANN Budget and Operating Plan. If FY20 begins prior to the required time period to allow for the Empowered Community to accept a petition to reject the IANA Budget, the Caretaker IANA Budget must go into effect until that rejection process has concluded pursuant to Annex D of the ICANN Bylaws.

For purposes of FY20, the "Caretaker IANA Budget" as described in Annex F to ICANN’s Bylaws, is defined as the FY19 IANA Operating Plan and Budget as approved by the ICANN Board in May 2018.

## 5 IANA Operating Plan and Budget

The work performed to deliver the IANA Functions and other IANA Services contributes to achieving ICANN’s overarching strategic objectives. The IANA Functions and other IANA Services sit within the objective “Support a healthy, stable and resilient unique identifier ecosystem” and goal “Foster and coordinate a healthy, secure, stable, and resilient identifier ecosystem.” <https://www.icann.org/accountability-indicators>

Within that strategic structure, the IANA Functions and other IANA Services include four portfolios: two portfolios where PTI operationalizes work and two for the IANA Services within ICANN. Of the two PTI portfolios one is focused on operational activities and the other is focused on systems enhancements and development. The two other IANA Services portfolios include the activities that ICANN performs as the IANA Functions Operator.

Costs are shown in millions of US dollars with a granularity of \$100,000. An absence of any expenditure is shown with a dash. The cost tables use abbreviations in some column headers and these are explained in this table.

Abbreviation	Meaning
<b>T&amp;M</b>	Travel and Meetings
<b>Prof Svcs</b>	Professional Services
<b>Admin</b>	Administration
<b>FTE</b>	Full Time Staff Equivalent

## 5.1 Portfolios

PTI is structured in two groups of thematically aligned portfolios:

### 2.1.3 – PTI Operations

Description: Delivery of the IANA services and all associated operational responsibilities, plus work to maintain and enhance processes, tools and systems

The three other IANA services portfolios performed by ICANN include policy support development for the CSC and RZERC, the IANA Naming Function review, the CSC Effectiveness review and the activities supporting the continued evolution of the root server system.

### 1.3.1 – Support Policy Development, Policy-Related and Advisory Activities

Description: Optimize efficiency and effectiveness of community policy development and advice efforts.

### 3.2.2 – Root Systems Operations

Description: Facilitating the continued evolution of the root server system to ensure its ongoing security, stability, and resiliency as domain name system technology and operations change over time: maintenance of relationships with the root server operators, Root Server System Advisory Committee (RSSAC), and related stakeholders.

### 2.1.2 Global Domains Division (GDD) Strategic Programs

Description: Work related to Global Domains Division strategic programs in support of a healthy, secure, stable and resilient identifier ecosystem.

Portfolios	FTE	Pers	T&M	Prof Svcs	Admin	Capital	Total
2.1.3 PTI Operations	22.5	5.9	0.5	2.0	1.5	0.1	10.0
1.3.1 Support Policy Development, Policy Related and Advisory Activities	0.8	0.1	0.0	-	-	-	0.1
3.2.2 Root Systems Operations	0.0	-	-	0.4	-	0.1	0.4
2.1.2 Global Domains Division (GDD) Strategic Programs	1.1	0.2	-	-	0.0	-	0.2
Total	24.3	6.2	0.6	2.3	1.5	0.2	10.7

## 6 Appendices

### Appendix A — FY20 Draft IANA Budget

FY20 IANA Budget in Millions, USD	IANA Budget FY20	IANA Budget FY19	Increase/(Decrease)		IANA Actuals FY18
			Total	%	
<b>FUNDING</b>	<b>\$10.7</b>	<b>\$10.5</b>	<b>\$0.2</b>	<b>2.2%</b>	<b>\$8.1</b>
Personnel	\$6.2	\$6.1	\$0.1	2.1%	\$4.9
Travel & Meetings	\$0.6	\$0.7	(\$0.1)	-14.6%	\$0.5
Professional Services	\$1.9	\$1.4	\$0.4	29.8%	\$1.4
Administration	\$1.2	\$1.3	(\$0.1)	-7.4%	\$1.1
Contingency	\$0.5	\$0.5	\$0.0	0.0%	\$0.0
Capital	\$0.2	\$0.3	(\$0.1)	-38.7%	\$0.0
Depreciation (a)	\$0.3	\$0.3	(\$0.0)	-11.0%	\$0.2
<b>TOTAL CASH EXPENSES</b>	<b>\$10.7</b>	<b>\$10.5</b>	<b>\$0.2</b>	<b>2.2%</b>	<b>\$8.1</b>
EXCESS/(DEFICIT)	\$0.0	\$0.0	\$0.0	0.0%	\$0.0
Average Headcount (FTE) (b)	24.3	22.6	1.8	7.8%	19.0

(a) Depreciation is treated as a cash expense for PTI since it will be reimbursed to ICANN

(b) FTE: Full-time staff equivalent



## Appendix B — FY20 Draft PTI Services and the Draft IANA Budget Summary

FY20 PTI Budget in Millions, USD	PTI Services FY20 Budget	PTI Services FY19 Budget	Increase/(Decrease)		PTI Services FY18
			Total	%	
<b>FUNDING</b>	<b>\$10.0</b>	<b>\$10.0</b>	<b>(\$0.0)</b>	<b>-0.1%</b>	<b>\$7.8</b>
Personnel	\$5.9	\$6.0	(\$0.024)	-0.4%	\$4.9
Travel & Meetings	\$0.5	\$0.7	(\$0.110)	-16.9%	\$0.5
Professional Services	\$1.5	\$1.1	\$0.357	31.1%	\$1.1
Administration	\$1.2	\$1.3	(\$0.095)	-7.4%	\$1.1
Contingency	\$0.5	\$0.5	\$0.000	0.0%	\$0.0
Capital	\$0.1	\$0.2	(\$0.104)	-47.5%	\$0.0
Depreciation (a)	\$0.3	\$0.3	(\$0.033)	-11.0%	\$0.2
<b>TOTAL CASH EXPENSES</b>	<b>\$10.0</b>	<b>\$10.0</b>	<b>(\$0.009)</b>	<b>-0.1%</b>	<b>\$7.8</b>
<b>EXCESS/(DEFICIT)</b>	<b>\$0.0</b>	<b>\$0.0</b>	<b>\$0.000</b>	<b>0.0%</b>	<b>\$0.0</b>
Average Headcount (FTE) (b)	22.5	22.8	(0.3)	-1.2%	19.0

(a) Depreciation is treated as a cash expense for PTI since it will be reimbursed to ICANN

(b) FTE: Full-time staff equivalent

FY20 IANA Budget in Millions, USD	FY20 IANA Budget	FY19 IANA Budget	Increase/(Decrease)		FY18 IANA Actuals
			Total	%	
PTI Services	\$10.0	\$10.0	(\$0.0)	-0.1%	\$7.8
IANA Services (c)	\$0.7	\$0.5	\$0.2	51.0%	\$0.3
<b>TOTAL</b>	<b>\$10.7</b>	<b>\$10.5</b>	<b>\$0.2</b>	<b>2.2%</b>	<b>\$8.1</b>

(c) IANA Services includes the Root Zone Maintainer function, Customer Standing Committee,

Root Zone Evolution Committee and IANA Naming Function reviews

These costs are funded by ICANN Operations.





## REFERENCE MATERIALS TO BOARD SUBMISSION No. 2019.01.27.1f

**TITLE:** **October 2021 ICANN Meeting Venue Contracting**

### **DETAILED ANALYSIS:**

#### **1. Background:**

Earlier this year, ICANN org conducted an extensive search and analysis of less costly venues for ICANN Meetings that still provide for an excellent meeting experience. Staff recommends the Hyatt Regency Seattle for ICANN72 in October 2021.

#### **2. Site Visit:**

- Seattle, Washington: A preliminary site visit was conducted in August 2018.

#### **3. Discussion of Issues:**

- Meeting Rooms: The Hyatt Regency Seattle has excellent conference facilities for an ICANN Meeting.
- Host Hotels: The Hyatt Regency Seattle will also serve as the host hotel for the Meeting.
- Area Hotels: Many nearby hotels, all accessible via a short walk, public transportation or a short taxi ride, offer a wide variety of guest room accommodations at varying price points.
- Food & Beverage Outlets: The Hyatt Regency Seattle has a number of restaurants onsite. In addition, there are many food options at varying price points in close proximity to the venue.
- Air Travel: Air access to Seattle is good, with direct flights from many major cities in Europe, Asia and North America, all arriving at Sea-Tac International Airport. However, some international itineraries may require a layover.
- Ground Transportation: Sea-Tac International Airport is 30 km/19 miles/30 minutes from the meeting venue and area hotels. Taxi fare is approximately US\$45. In addition, there is a light rail system available with a stop near the Hyatt for approximately US\$3.00.
- Safety & Security: A risk assessment by ICANN security has not identified any areas of concern for Seattle that would require other than standard security measures provided for an ICANN Meeting.

Staff recommends that the board approve Seattle, Washington as the location of the October 2021 ICANN Meeting.

Confidential Negotiation Information

Submitted by:	Nick Tomasso
Position:	VP, Global Meeting Operations
Date Noted:	05 December 2018
Email:	<a href="mailto:nick.tomasso@icann.org">nick.tomasso@icann.org</a>



Pages 62-65 Removed - Privileged & Confidential

## REFERENCE MATERIALS – BOARD PAPER NO. 2019.01.27.1i

**TITLE:** **Consideration of Reconsideration Request 16-11**

### **Documents**

The following attachments are relevant to the Board's consideration of Reconsideration Request 16-11.

Attachment A is [Reconsideration Request 16-11](#), submitted on 25 August 2016.

Attachment B is a [letter from Dot Registry LLC to the Board and the Board Governance Committee \(BGC\)](#), dated 31 August 2016.

Attachment C is a [letter from the Requestors to the ICANN Board](#), dated 5 September 2016.

Attachment D is a [letter from the Requestors to the ICANN Board](#), dated 28 December 2016.

Attachment E is a [letter from the Requestors to the Board Accountability Mechanisms Committee \(BAMC\)](#), dated 16 January 2018.

Attachment F is a [letter from the Requestors to the BAMC](#), dated 1 February 2018.

Attachment G is a [letter from the Requestors to the BAMC](#), dated 22 February 2018.

Attachment H is a [letter from the Requestors to the BAMC](#), dated 9 April 2018.

Attachment I is a [letter from the Requestors to the Board and the BAMC](#), dated 28 August 2018.

Attachment J is the [BAMC Recommendation on Request 16-11](#), issued 16 November 2018.

Attachment K is the [Requestors' Rebuttal to the BAMC Recommendation on Request 16-11](#), submitted on 30 November 2018.

## **Background Links**

The following links are relevant to the Board's consideration of Reconsideration Request 16-11.

The Community Priority Evaluation (CPE) Process Review Scope 1 Report is available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

The CPE Process Review Scope 2 Report is available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

The CPE Process Review Scope 3 Report is available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

Submitted By: Amy Stathos, Deputy General Counsel

Date Noted: 14 January 2019

Email: amy.stathos@icann.org

## **Reconsideration Request Form**

Version of 11 April 2013

ICANN's Board Governance Committee is responsible for receiving requests for reconsideration from any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information. Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit <http://www.icann.org/en/general/bylaws.htm#IV> and <http://www.icann.org/en/committees/board-governance/>.

This form is provided to assist a requester in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12 point font.

*For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.*

Please submit completed form to [reconsideration@icann.org](mailto:reconsideration@icann.org).

### **1. Requesters Information**

Requesters are represented by:

**Name:** Flip Petillion, Crowell & Moring LLP

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Phone Number:** Contact Information Redacted

Requesters are:

#### **Requester #1**

**Name:** Travel Reservations SRL ('TRS', formerly Despegar Online SRL)

**Address:** Contact Information Redacted



**Email:** Contact Information Redacted

**Requester #2**

**Name:** Spring McCook, LLC

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Requester #3**

**Name:** Minds + Machines Group Limited (formerly Top Level Domain Holdings Limited)

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Requester #4**

**Name:** Famous Four Media Limited

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

And its subsidiary applicant:

**Name:** dot Hotel Limited

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Requester #5**

**Name:** Radix FZC  
**Address:** Contact Information Redacted  
**Email:** Contact Information Redacted

And its subsidiary applicant:

**Name:** dot Hotel Inc.  
**Address:** Contact Information Redacted  
**Email:** Contact Information Redacted

**Requester #6**

**Name:** Fegistry LLC  
**Address:** Contact Information Redacted  
**Email:** Contact Information Redacted

**2. Request for Reconsideration of (check one only):**

- Board action/inaction**  
 **Staff action/inaction**

**3. Description of specific action you are seeking to have reconsidered.**

Requesters seek reconsideration of both actions and inactions of ICANN's Board of Directors. The specific actions/inactions of the Board are set forth in more detail below, specifically in response to Questions 8 and 10, and relate to the Board Resolutions 2016.08.09.14 and 2016.08.09.15, approved on 9 August 2016, published on 11 August 2016 and communicated to Requesters on 15

August 2016 (hereinafter, the 'Decision').

(Provide as much detail as available, such as date of Board meeting, reference to Board resolution, etc. You may provide documents. All documentation provided will be made part of the public record.)

**4. Date of action/inaction:**

On 11 August 2016, the Board published the Decision apparently taken on 9 August 2016.

(Note: If Board action, this is usually the first date that the Board posted its resolution and rationale for the resolution or for inaction, the date the Board considered an item at a meeting.)

**5. On what date did you become aware of the action or that action would not be taken?**

Requesters learned of the Decision on 15 August 2016, when ICANN informed Requesters of the Decision.

(Provide the date you learned of the action/that action would not be taken. If more than fifteen days has passed from when the action was taken or not taken to when you learned of the action or inaction, please provide discussion of the gap of time.)

**6. Describe how you believe you are materially affected by the action or inaction:**

As the ICANN Board did not offer Requesters a meaningful review of their complaints regarding HTLD's application for .hotel, the Decision prevented Requesters – who had applied for the gTLD string .hotel (application IDs 1-927-25198; 1-1249-36568; 1-1500-16803; 1-1181-77853; 1-1059-97519; 1-1913-57874) themselves – from self-resolving the string contention, as contemplated by the GNSO policy, and, ultimately, from allowing one of the applicants to

operate the .hotel gTLD.

Requesters manifestly meet the standing requirements for an RfR and ultimately an IRP. Requesters suffered from the same violations of ICANN's Articles of Incorporation (Aol) and Bylaws, as recognized in other cases<sup>1</sup> and as acknowledged by the ICANN Board<sup>2</sup>.

However, in contrast with other cases<sup>3</sup>, Requesters were materially affected by these violations as, without those violations, Requesters would have prevailed in their actions against HTLD's application for .hotel.

Dot Registry – *i.e.*, the applicant for .inc, .llc and .llp who requested community priority – never had a chance of succeeding in a community priority evaluation (CPE). Although, like any applicant, Dot Registry is entitled to ICANN respecting its Aol and Bylaws – and it may initiate whatever procedure to that purpose – until date it has not been proven that Dot Registry has been materially harmed by ICANN's violation of the Aol and Bylaws. A refusal of Dot Registry's solicited community priority would be in line with the CPE criteria, as the purpose of community-based applications has never been to eliminate competition among applicants for a generic word TLD or to pick winners and losers within a diverse commercial industry, and because the CPE criteria were specifically developed to prevent "undue priority [being given] to an application that refers to a 'community' construed merely to get a sought-after generic word as a gTLD string" (Applicant Guidebook, Module 4-9).

In the case of .hotel, ICANN violated its Aol and Bylaws and policy by giving

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<sup>1</sup> See *e.g.*, ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*; 38. Board Governance Committee determination on Request for Reconsideration 14-44 of 20 January 2015.

<sup>2</sup> In accepting the Dot Registry IRP Declaration, the Board acknowledged it had violated its Aol and Bylaws in the CPE.

<sup>3</sup> Mentioned in footnotes 1 and 2.

undue priority to an application that refers to a 'community' construed merely to get a sought-after generic word as a gTLD string, and by awarding the .hotel gTLD to an unreliable applicant.

ICANN's actions required, and still require, Requesters to incur unnecessary costs to guarantee observance of ICANN's Aol, Bylaws and policies. As will be shown below, the ICANN Board agreed to refund these costs to parties who did not show material harm.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

ICANN's failure to follow the policies created by the GNSO as well as its own Bylaws, Articles of Incorporation, and the Affirmation of Commitments creates inconsistency, injects unfairness and a lack of transparency in the process, and calls into question the fairness of the gTLD program as a whole. The Decision creates unequal treatment between applicants, and creates uncertainty for both existing and future gTLD applicants. ICANN had clear policies to deny community priority to mere industries, and to disqualify applicants who were not trustworthy. As ICANN fails to abide by these policies, the Decision creates a dangerous precedence that will encourage third parties who seek to game the application process and who vigorously defend positions that are unattainable in an attempt to discourage third parties that play by the book.

This situation will inevitably have a chilling effect on new entrants into the gTLD space.

In addition, the Decision goes against the core objectives of the new gTLD

program: a competitive process for opening up the top level of the Internet's namespace to foster diversity and to encourage competition to the benefit of Internet users across the globe. In its consideration of violations of its Aol, Bylaws and policies, ICANN must do more than perform a purely procedural review; it must perform a meaningful review with due respect for an applicant's fundamental rights, and ICANN's core mission.

#### **8. Detail of Board or Staff Action – Required Information**

**Staff Action:** If your request is in regards to a staff action or inaction, please provide a detailed explanation of the facts as you understand they were provided to staff prior to the action/inaction presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN policy(ies). Please identify the policy(ies) with which the action/inaction was inconsistent. The policies that are eligible to serve as the basis for a Request for Reconsideration are those that are approved by the ICANN Board (after input from the community) that impact the community in some way. When reviewing staff action, the outcomes of prior Requests for Reconsideration challenging the same or substantially similar action/inaction as inconsistent with established ICANN policy(ies) shall be of precedential value.

**Board action:** If your request is in regards to a Board action or inaction, please provide a detailed explanation of the material information not considered by the Board. If that information was not presented to the Board, provide the reasons why you did not submit the material information to the Board before it acted or failed to act. "Material information" means facts that are material to the decision.

If your request is in regards to a Board action or inaction that you believe is based upon inaccurate, false, or misleading materials presented to the Board and those materials formed the basis for the Board action or inaction being challenged, provide a detailed explanation as to whether an opportunity existed to correct the material considered by the Board. If there was an opportunity to do so, provide the reasons that you did not provide submit corrections to the Board before it acted or failed to act.

Reconsideration requests are not meant for those who believe that the Board made the wrong decision when considering the information available. There has to be identification of material information that was in existence of the time of the decision and that was not considered by the Board in order to state a reconsideration request. Similarly, new information – information that was not yet in existence at the time of the Board decision – is also not a proper ground for

reconsideration. Please keep this guidance in mind when submitting requests.

**Provide the Required Detailed Explanation here:**

(You may attach additional sheets as necessary.)

As will be demonstrated in greater detail below, the Board (1) disregarded material information, (2) relied on false and inaccurate material information, (3) failed to take material action, and (4) took action in violation of GNSO-created policy and ICANN's own Articles of Incorporation, Bylaws and Affirmation of Commitments.

**I. The ICANN Board disregarded material information**

**A. The ICANN Board failed to consider the impact of (its acceptance of) the IRP Declaration in the *Dot Registry* case**

On 29 July 2016, the IRP Panel in the matter between Dot Registry, LLC and ICANN issued its final IRP Declaration (the "*Dot Registry* IRP Declaration"). On 9 August 2016, the ICANN Board accepted the *Dot Registry* IRP Declaration, naming Dot Registry the prevailing party because the ICANN Board "failed to exercise due diligence and care in having a reasonable amount of facts in front of them and failed to fulfill its transparency obligations" in ICANN's handling of the CPE process.

The ICANN Board's acceptance of the *Dot Registry* IRP Declaration is incompatible with the ICANN Board's acceptance of the IRP Declaration regarding the .hotel gTLD (the "*Despegar et al.* IRP Declaration"). Both IRPs criticized the insufficiencies of ICANN's handling of the CPE process. But the *Dot Registry* IRP Panel considered that these insufficiencies amounted to a violation of ICANN's Aol and Bylaws, whereas the *Despegar et al.* IRP Panel came to the



opposite conclusion. The ICANN Board cannot accept both conclusions, as they are incompatible. The close relationship between these two IRP Declarations makes them an indivisible whole, which requires the ICANN Board to consider them together to avoid the risk of irreconcilable decisions.

The Board could only have accepted both IRP Declarations if it had addressed the insufficiencies of the CPE process, as recommended in the *Despegar et al.* IRP Declaration, that is 1) to put “a system in place that ensures that marks are allocated on a consistent and predictable basis by different individual evaluators”<sup>4</sup>, 2) “to ensure consistency, both of approach and marking”<sup>5</sup>, and 3) to affirm that “transparency and administrative due process” are applicable<sup>6</sup>. “Claimants in this IRP have raised a number of serious issues which give cause for concern and which the Panel considers the Board need to address.” Para. 158.

The reason why the *Dot Registry* IRP Panel came to the opposite conclusion to the *Despegar et al.* IRP Panel, is because – as revealed in the *Dot Registry* IRP Declaration – the *Despegar et al.* IRP Panel relied on false and inaccurate material information. When the ICANN Board accepted the *Despegar et al.* IRP Declaration, it relied on the same false and inaccurate material information. (see below under II.)

**B. The ICANN Board failed to consider the unfair competitive advantage HTLD obtained by maliciously accessing trade secrets of competing prospective registry operators**

In the Decision, the ICANN Board decided not to cancel HTLD’s application,

<sup>4</sup> ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 147.

<sup>5</sup> ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 147.

<sup>6</sup> ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 145.

based on the fact that ICANN had not “uncovered any evidence that: (i) the information Mr. Krischenowski may have obtained as a result of the portal issue was used to support HTLD's application for .HOTEL; or (ii) any information obtained by Mr. Krischenowski enabled HTLD's application to prevail in CPE.” The rationale also states that the ICANN Board had “the opportunity to consider all of the materials submitted relating to the .HOTEL Claimants' request for cancellation of HTLD's .HOTEL application. Following consideration of all relevant information provided and for the reasons set forth in the Resolution and Rationale, the Board has determined that cancellation of HTLD's .HOTEL application is not warranted, and the .HOTEL Claimants' request is therefore denied.”

The mere statement that the Board had “the opportunity to consider” all of the materials submitted by Requesters and that it did consider “all relevant information” does not show that all relevant information – submitted by Requesters or third parties – was actually considered. As a matter of fact, the Decision is based on findings which Requesters showed to be irrelevant. The arguments brought forward by Requesters have not been addressed in the Decision. More specifically, the ICANN Board did not address the unfair competitive advantage HTLD obtained via the illegal access of sensitive business information of its direct competitors. The ICANN Board also failed to address the argument that it is inappropriate – and contrary to ICANN's Aol, Bylaws and GNSO policy – to allocate a critical Internet resource to a party that has been cheating (or acquiesced in fraudulent actions). Finally, the ICANN Board did not

address the fact that the CPE result on HTLD's application was seriously criticized for being inconsistent with other CPE results and unreasonable, and that it would be discriminatory not to address these inconsistencies, whereas the Board has addressed inconsistency issues in similar situations. In its consideration of the *Dot Registry* IRP Declaration, the ICANN Board increased the disparate treatment towards Requesters.

Requesters explained to the ICANN Board – but the Board failed to consider – that it is of no relevance whether or not HTLD has used this information in the framework of ICANN's evaluation of .hotel. What matters is that the information was accessed with the obvious intent to obtain an unfair advantage over direct competitors. The future registry operator of the .hotel gTLD will compete with other registry operators. In the unlikely event that HTLD were allowed to operate the .hotel gTLD, HTLD would have an unfair advantage over competing registry operators, because of its access to sensitive business information of Requesters. HTLD could use this unfair advantage to adapt its commercial strategy, pricing, technical infrastructure, etc., an advantage HTLD would never have obtained, had it not illegally accessed sensitive business information of its direct competitors.

## **II. The ICANN Board relied on false and inaccurate material information**

The *Despegar et al.* IRP Panel's conclusion that the insufficiencies of the CPE process did not amount to a violation of ICANN's Aol, Bylaws and core values was based upon the premise that the EIU was not mandated to apply ICANN's

core values<sup>7</sup>, and upon the false premise that the EIU's determinations are presumptively final<sup>8</sup> and are made independently by the EIU, without ICANN's active involvement. In this respect, ICANN 'informed' Requesters and the IRP Panel that "[b]ecause of the EIU's role as the panel firm, ICANN does not have any communications (nor does it maintain any communications) with the evaluators that identify the scoring of any individual CPE".<sup>9</sup> The IRP Panel concluded: "That is a clear and comprehensive statement that such documentation does not exist"<sup>10</sup>, and the IRP Panel proceeded upon this premise. However, as the *Dot Registry* IRP Declaration has clearly shown, this turned out to be false.

Indeed, the findings in the *Dot Registry* IRP Declaration reveal that ICANN staff was "intimately involved in the CPE" and "in the production of the CPE [result]"<sup>11</sup> "The ICANN staff supplied continuing and important input on the CPE reports."<sup>12</sup> As the CPE reports identify the scoring of CPEs, ICANN did have communications with the evaluators that identify the scoring of individual CPEs. Moreover, ICANN's description in the *Despegar et al.* IRP of the EIU as the "panel firm" or independent evaluator, making "presumptively final" determinations was misleading. Because of ICANN's staff intimate involvement in the process, the EIU cannot be qualified as a "panel firm" or independent evaluator. The findings of the *Dot Registry* IRP Panel also reveal that the EIU was "simply a consultant to ICANN", and that ICANN had agreed with the EIU

<sup>7</sup> ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, paras. 148-151.

<sup>8</sup> ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, paras. 148-151.

<sup>9</sup> ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 95.

<sup>10</sup> ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 95.

<sup>11</sup> ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, paras. 93, 101.

<sup>12</sup> ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, para. 93.

that the EIU “would operate largely in the background, and that ICANN would be solely responsible of all legal matters pertaining to the application process”.<sup>13</sup>

ICANN was “solely responsible to applicants ... for the decisions it decide[d] to issue”, and “each decision [had to] be issued by ICANN in its own name only.”<sup>14</sup>

The intimate involvement of ICANN staff, and the fact that ICANN had to issue decisions in its own name is material to the IRP Determinations in the *Despegar et al.* and *Dot Registry* cases. Both IRP Panels agreed<sup>15</sup>, and ICANN acknowledged<sup>16</sup>, that ICANN staff is bound to conduct itself in accordance with ICANN’s Aol and Bylaws. The *Despegar et al.* IRP Panel considered:

“The Panel is, of course, charged with reviewing the action of ICANN’s Board, rather than its staff, but the Panel wishes to make clear that, in carrying out its activities, the Board should seek to ensure that ICANN’s staff comply with the Articles of Incorporation and Bylaws of ICANN, and that a failure of the Board to ensure such compliance is a failure of the Board itself.”<sup>17</sup>

The *Despegar et al.* Panel’s reliance on false information that the EIU served as an independent panel (*i.e.*, without intimate involvement of ICANN staff) was material to the IRP Declaration. It is now established that the ICANN staff was intimately involved. The finding that such intimate involvement of the ICANN staff existed was material to the outcome in the *Dot Registry* case. The Requesters and the *Despegar et al.* Panel were given incomplete and misleading information on the ICANN staff involvement in the CPE and that fact is the only reason for a divergent outcome between both IRP Declarations.

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<sup>13</sup> ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, para. 91.

<sup>14</sup> ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, para. 92.

<sup>15</sup> ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 104; ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, paras. 88, 100

<sup>16</sup> ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, para. 100.

<sup>17</sup> ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 104.

Moreover, the fact that material information was hidden from Requesters and the *Despegar et al.* Panel is a clear transparency violation. Requesters specifically asked for all communications, agreements between ICANN and the CPE Panel. Requesters and the *Despegar et al.* Panel were told by ICANN staff and the ICANN Board that this information was inexistent and/or could not be disclosed. However, the *Dot Registry* IRP Declaration reveals that ICANN did possess information, which it had first once more pretended to be inexistent, and that it afterwards disclosed to Dot Registry, while it failed to disclose similar information to Requesters, although Requesters had explicitly asked for this information and the *Despegar et al.* Panel had expressly questioned ICANN about this information at the IRP hearing. It is inexcusable that ICANN did not inform Requesters and the Panel at that time that it had disclosed the information to Dot Registry. ICANN should have informed Requesters and the Panel spontaneously about the existence and the content of this material information.

### **III. The ICANN Board failed to take material action**

#### **A. The ICANN Board failed to properly investigate and address illegal actions that are attributable to HTLD**

The Decision's rationale shows that the ICANN Board relied on unverified and implausible statements that Mr. Krischenowski "did not inform HTLD's personnel about 'his action,' 'did not provide any of the accessed information' to HTLD or its personnel, and HTLD 'personnel did not have any knowledge about Mr. Krischenowski's action, and did not consent to it or approve it.'"<sup>18</sup>. ICANN does

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<sup>18</sup> See rationale to the Decision.

not show it has done anything to check the veracity of these statements.

Moreover, for the very first time in this matter, Requesters learnt from the Decision that Mr. Krischenowski was not the only individual affiliated to HTLD, who violated Requesters' trade secrets. Mr. Oliver Süme and Ms. Katrin Ohlmer (identified in the Decision as Mr. Krischenowski's associates) were also "responsible for numerous instances of suspected intentional unauthorized access to other applicants' confidential information, which occurred from March through October 2014"<sup>19</sup>. Again, this is new information for Requesters and Requesters have not been able so far to perform a thorough check on Mr. Süme and Ms. Ohlmer's background. But summary research shows that ICANN and its Board have not done any check at all. Ms. Ohlmer was the CEO of HTLD at the time she obtained unauthorized access to other applicants' confidential information. She was listed as CEO in HTLD's application until 17 June 2016, and she also acquired shares from Mr. Krischenowski in a HTLD affiliated company after Mr. Krischenowski's actions were subject to serious challenge. Nevertheless, the Decision is based on Mr. Krischenowski's actions and affiliation to HTLD only. While Mr. Krischenowski's actions, combined with HTLD's inaction towards him, are a sufficient reason to disqualify HTLD as an applicant, the fact that HTLD's CEO committed the same violations is an even stronger reason for disqualification. As HTLD's CEO, Ms. Ohlmer would have been able to use the illegally obtained information to HTLD's benefit. While the information may not have directly impacted HTLD's position as an applicant, it is clear that the information could have been used to improve its position towards

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<sup>19</sup> See rationale to the Decision.

competing registry operators, both existing ones and prospective ones. It would be completely incredible if a CEO were to obtain unauthorized access to confidential information on numerous occasions without the intention to use this information to its advantage. Moreover, the competitive advantage obtained via this information allowed HTLD to improve its market value. HTLD's shareholders must have benefited from it, when selling their shares.

**B. The ICANN Board failed to remedy the violations of its Aol and Bylaws in the CPE process for Requesters, while the ICANN Board is addressing these issues for other applicants**

The ICANN Board is addressing the violations of its Aol and Bylaws in the CPE for Dot Registry (cfr. ICANN Board Resolutions 2016.08.09.11 - 2016.08.09.12).

The ICANN Board even agreed to refund Dot Registry's legal costs.

Requesters suffered from the same violations. However, the ICANN Board did not remedy these violations for Requesters.

**IV. The ICANN Board took action in violation of GNSO-created policy and ICANN's Aol, Bylaws and Affirmation of Commitments**

**A. The ICANN Board's refusal to cancel HTLD's application for .hotel is unjustified and a violation of ICANN's core obligations**

Allowing HTLD's application to proceed goes against everything that ICANN stands for. It amounts to an acquiescence in criminal acts that were committed with the obvious intent to obtain an unfair advantage over direct competitors. Such acquiescence is contrary to ICANN's obligations under its Articles of Incorporation and Bylaws and to ICANN's mandate to operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with



relevant principles of international law and applicable international conventions and local law and through open and transparent processes that enable competition and open entry in Internet-related markets. When the background screening criteria for new gTLD applicants were introduced, ICANN affirmed the right to deny an otherwise qualified application, recognizing ICANN's duty "to protect the public interest in the allocation of critical Internet resources" (gTLD Applicant Guidebook (v. 2012-06-04), Module 1-24). In this respect, ICANN made clear that "applications from any entity with or including any individual [who] has ever been convicted of any crime involving the use of computers [...] or the Internet to facilitate the commission of crimes" were going to be "automatically disqualified from the program" (gTLD Applicant Guidebook (v. 2012-06-04), Module, 1-22).

In the case at hand, ICANN caught not one, but multiple representatives of HTLD stealing trade secrets of competing applicants via the use of computers and the Internet. The situation is even more critical as the crime was committed with the obvious intent of obtaining sensitive business information of a competing applicant. It is clearly not in the public interest, and the public interest will not be protected, if critical Internet resources are allocated to HTLD. Allocating the .hotel TLD to HTLD is not in accord with any of the core values that should guide the decisions and actions of ICANN. It goes against ICANN's mandate to act in conformity with, *inter alia*, open and transparent processes that enable competition and open entry in Internet-related markets.

**B. The ICANN Board discriminated against Requesters by accepting Dot Registry IRP Determination and refusing to reconsider its position on the CPE determination re .hotel**

As already explained under section III.B above, the ICANN Board is addressing the violations of its Aol and Bylaws in the CPE for Dot Registry, and has provided a remedy to Dot Registry. ICANN also provided remedies for the applicant for .gay. Moreover, ICANN disclosed information to Dot Registry, but not to Requesters, although Requesters had asked for the same or similar information. ICANN did not provide a justification why it treats Requesters differently, although Requesters are situated similarly.

**C. The ICANN Board turned a blind eye to HTLD's misdeeds following the fruitless attempt by one interest holder in HTLD application to evade responsibility for the illegal actions of other interest-holders in the same application**

HTLD and some of its shareholders acted in a way that was untrustworthy and in violation of the application's terms and conditions. It seems that ultimately HTLD was paid off, or was promised that it would be paid off, by the other interest-holder in the same application, Afilias.

After Mr. Krischenowski's illegal actions had been challenged and ICANN had informed HTLD that it was taking the situation seriously, Mr. Krischenowski's wholly-owned company transferred its interests in HTLD's application to the wholly-owned company of HTLD's CEO at the time. ICANN has now revealed that illegal access to trade secrets of competitors was also made through HTLD's CEO's email account.

One interest-holder cannot disclaim responsibility for another interest-holder's actions by buying him out. Those with an interest in an application must rise and

fall together; one ought not to benefit from the other's misdeeds. The point is all the stronger where the misdeeds are carried out by the applicant's acting CEO and consultant(s).

The (belated) replacement of the CEO and consultant(s)/associates and a change in the shareholder structure do not excuse nor annihilate illegal activities, committed by previous management and staff. The sale to Afiliias of shares (or Afiliias' promise to acquire shares) held by fraudulent interest-holders and the management reshuffle, are fruitless attempts to cover up the applicant's misdeeds. The ICANN Board cannot turn a blind eye to HTLD's illegal actions, simply because the shareholder and management structure recently changed.

Moreover, the ICANN Board cannot ignore the fact that HTLD made these changes only after it was informed that ICANN was taking the matter seriously, and more than two years after it had obtained illegal access to trade secrets of competitors. HTLD claims that it only learned about Mr. Krischenowski's illegal actions on 30 April 2015. This claim – however doubtful it may be – cannot be made for the illegal actions of HTLD's CEO, Ms. Ohlmer. Moreover, HTLD kept Mr. Krischenowski on as a consultant until 31 December 2015. He also remained the managing director of a HTLD-related company and a major shareholder. Ms. Ohlmer remained CEO until long after her misdeeds, and she even acquired shares in HTLD after ICANN had informed HTLD it was taking the situation seriously. The ICANN Board now turning a blind eye to HTLD's misdeeds contradicts that ICANN is taking the situation seriously.

## **9. What are you asking ICANN to do now?**

(Describe the specific steps you are asking ICANN to take. For example, should the action be reversed, cancelled or modified? If modified, how should it be modified?)

Requesters ask ICANN to reverse the Decision. The ICANN Board is requested to declare that HTLD's application for .hotel is cancelled, and to take whatever steps towards HTLD it deems necessary. The ICANN Board is also requested to take all necessary steps to ensure that Requesters' applications for .hotel remain in contention until Requesters have self-resolved the contention set, or until Requesters have resolved the contention set in an auction, organized by ICANN.

In the event that ICANN does not immediately reverse its Decision, Requesters ask that ICANN engage in conversations with Requesters and that a hearing is organized. In such event, ICANN is requested to refrain from executing the registry agreement with HTLD, and to provide full transparency about all communications between ICANN, the ICANN Board, HTLD, the EIU and third parties (including but not limited to individuals and entities supporting HTLD's application) regarding HTLD's application for .hotel.

In the unlikely event that the ICANN Board does not decide to cancel HTLD's application immediately, Requesters request that the ICANN Board takes the necessary steps to ensure a meaningful review of the CPE regarding .hotel, ensuring consistency of approach with its handling of the *Dot Registry* case.

**10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

(Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the requester must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial) that is a directly and causally connected to the Board or staff action or inaction that is the basis of the Request for Reconsideration. The requestor must be able to set out the loss or injury and the direct nature of that harm in specific and particular details. The relief requested from the BGC must be capable of reversing the harm alleged by the requester. Injury or harm caused by third parties as a result of acting in line with the Board's decision is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)

The Decision directly harms the Requesters, as it blocks the Requesters from self-resolving the string contention, as contemplated by the GNSO policy, and, ultimately, from allowing one of the applicants to operate the .hotel gTLD.

In addition, Requesters have invested significant time and effort in defending their application for .hotel against the unreasoned and inconsistent advice of the CPE panel, given in contravention of ICANN's Aol and Bylaws. As a result of ICANN's acceptance of this advice, the Requesters' applications for .hotel have all suffered unnecessary delays and are currently experiencing further delays because of the Decision.

Although the requested relief in this Reconsideration Request does not compensate for the lost time, costs and effort, it reverses most of the harm in that the relief would allow Requesters to proceed with fairly competing for the .hotel gTLD.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)**

Yes

No

**11a. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties? Explain.**

Requesters' harm is identical, as explained in section 6 above.

**Do you have any documents you want to provide to ICANN?**

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

At this stage, all relevant documents are believed to be in ICANN's possession.

**Terms and Conditions for Submission of Reconsideration Requests**

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar.

The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious.

Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC.

The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.

*Fly Petition*

Signature

*25 August 2016*

Date



Sent via email to [correspondence@icann.org](mailto:correspondence@icann.org) and [reconsideration@icann.org](mailto:reconsideration@icann.org)

August 31, 2016

**Internet Corporation for Assigned Names and Numbers (ICANN)**

**Attn: ICANN Board and ICANN Board Governance Committee**

12025 Waterfront Drive, Suite 300

Los Angeles, CA 90094-2536 USA

Phone: +1.310.301.5800

Fax: +1.310.823.8649

Email: [correspondence@icann.org](mailto:correspondence@icann.org) and [reconsideration@icann.org](mailto:reconsideration@icann.org)

**Re: *Correction of Factual Inaccuracies in Reconsideration Request 16-11 in relation to the 9 August 2016 Board Resolutions 2016.08.09.11, 2016.08.09.12, and 2016.08.09.13 in the Dot Registry, LLC v. ICANN (01-14-0001-5004) Independent Review Process (“IRP”) Declaration of 29 July 2016***

Dear ICANN Board members,

On 25 August 2016, the standard applicants for .HOTEL, in which ICANN cancelled their applications due to a community applicant prevailing at Community Priority Evaluation, filed Reconsideration Request 16-11<sup>1</sup>. Within Reconsideration Request 16-11, there are numerous factual inaccuracies that Dot Registry wishes to address and correct for the record.

**Inaccuracy No. 1 (Response to Question 6, page 5):**

*“...Dot Registry – i.e., the applicant for .inc, .llc and .llp who requested community priority – never had a chance of succeeding in a community priority evaluation (CPE). Although, like any applicant, Dot Registry is entitled to ICANN respecting its AoI and Bylaws – and it may initiate whatever procedure to that purpose - until date it has not been proven that Dot Registry has been materially harmed by ICANN’s violation of the AoI and Bylaws. A refusal of Dot Registry’s solicited community priority would be in line with the CPE criteria, as the purpose of community-based applications has never been to eliminate competition among applicants for a generic word TLD or to pick winners and losers within a diverse commercial industry, and because the CPE criteria were specifically developed to prevent “undue priority [being given] to an application that refers to a ‘community’ construed merely to get a sought-after generic word as a gTLD string” (Applicant Guidebook; Module 4-9).”*

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<sup>1</sup> Reconsideration Request 16-11: Travel Reservations SRL, Spring McCook, LLC, Minds + Machines Group Limited, Famous Four Media Limited, dot Hotel Limited, Radix FZC, dot Hotel Inc., Fegistry, LLC of 25 August 2016 (see: <https://www.icann.org/resources/pages/reconsideration-16-11-trs-et-al-request-2016-08-25-en>)

Applicant Guidebook, Section 4.2.3, Community Priority Evaluation Criteria, page 4-9 states, among other things, that community applications will be assessed against “false positives” (awarding undue priority to an application that refers to a “community” construed to get a sought-after generic word as a gTLD string) **and “false negatives” (not awarding priority to a qualified community application)** in a holistic approach. It should be noted that a qualified community application eliminates all directly contending standard applications, regardless of how well qualified the latter may be. Reconsideration Request 16-11 statements are therefore not consistent with what the Applicant Guidebook states.

In addition, these standard .HOTEL applicants are not in any position to determine if Dot Registry’s applications achieve Community Priority status or not, only ICANN retains such authority. Dot Registry reserves its legal rights to seek redress for any interference in the process of ICANN rendering its final decision in the *Dot Registry, LLC v. ICANN* matter.

**Inaccuracy No. 2 (Response to Question 7, page 6):**

*“...ICANN had clear policies to deny community priority to mere industries, and to disqualify applicants who were not trustworthy...”*

The word “industries” does not appear anywhere in the Applicant Guidebook nor does ICANN have a policy to exclude “industries” as communities. Consistent with Applicant Guidebook, Section 1.1.2.4, GAC Early warnings, pages 1-7 to 1-8, Dot Registry’s community applications for .corp, .inc, .llc, and .llp were all labeled by the Government Advisory Committee, and accepted by the New gTLD Program Committee, as “highly regulated sectors” vulnerable to online fraud and abuse needing additional protections, not “industries.” Furthermore, the Guidebook specifically contemplates that *“a community can consist of legal entities (for example, an association of suppliers of a particular service) . . . or a logical alliance of communities.”*<sup>2</sup>

**Inaccuracy No. 3 (Response to Question 8.I.A, page 9):**

*“...The close relationship between these two IRP Declarations makes them an indivisible whole, which requires the ICANN Board to consider them together to avoid the risk of irreconcilable decisions...”*

ICANN should not consider the two IRP Declaration to be one in the same. The *Despegar, et al. v. ICANN* IRP arose from scorned standard applicants whose applications were cancelled as a result of the community applicant prevailing at Community Priority Evaluation. The *Despegar* Panel determined that ICANN did not violate its Articles of Incorporation or Bylaws and that ICANN prevailed in the IRP. In contrast, the *Dot Registry, LLC v. ICANN* IRP arose out of issues relating to the fair and transparent treatment and handling of their community applications, by ICANN and the Economist Intelligence Unit, during the Community Priority Evaluation process, as required by ICANN’s Articles of Incorporation, ICANN’s Bylaws, ICANN’s

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<sup>2</sup> Applicant Guidebook, p. 4-12.



Applicant Guidebook, and the Economist Intelligence Unit's Community Priority Evaluation Guidelines. Unlike the .HOTEL standard applicants, Dot Registry prevailed in its IRP.

Dot Registry suggests that the Board consider the *Despegar* IRP Declaration only to the extent that it take heed of the *Despegar* IRP Panel's view that the BGC needs to look into how the EIU applies the CPE criteria to determine whether the EIU properly applied them. As the *Despegar* IRP Panel rightly noted, "*The BGC needs to have a reasonable degree of assurance that the EIU has correctly applied the policy.*"<sup>3</sup>

**Inaccuracy No. 4 (Response to Question 8.III.A, page 15):**

*"...Requesters learnt from the Decision [Despegar, et al. v. ICANN IRP] that Mr. Krischenowski was not the only individual affiliated to HTLD, who violated Requestors trade secrets. Mr. Oliver Süme and Ms. Katrin Ohlmer (identified in the Decision as Mr. Krischenowski's associates) were also 'responsible for numerous instances of suspected international unauthorized access to other applicants' confidential information, which occurred from March through October 2014'..."*

As an affected party to ICANN's Applicant Portal Data Breach, Dot Registry, LLC has not been made aware of the existence of this new information that other individuals may have also been involved in the data breach. As a matter of transparency, ICANN should immediately send formal notification to all of the affected parties.

**Inaccuracy No. 5 (Response to Question 8.III.B, page 16):**

*"...The ICANN Board even agreed to refund Dot Registry's legal costs."*

In accordance with the ICANN Board Resolution 2016.08.09.11:

*The Board accepts the findings of the Final Declaration that:*

- (i) Dot Registry is the prevailing party in the Dot Registry, LLC v. ICANN IRP; and*
- (ii) ICANN shall pay to Dot Registry US\$235,294.37 upon demonstration that these incurred costs have been paid in full.*

In the *Dot Registry, LLC v. ICANN IRP*, the majority Panel declared in Section 154:

*Pursuant to the ICANN Bylaws, Art. IV, Section 3.18, the Panel declares that Dot Registry is the prevailing party. The administrative fees and expenses of the International Centre for Dispute Resolution ("ICDR") totaling \$4,600.00 and the compensation and expenses for the Panelists totaling \$461,388.70 shall be borne entirely by ICANN. Therefore, ICANN shall pay to Dot Registry, LLC \$235,294.37 representing*

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<sup>3</sup> Final Declaration, *Despegar Online SRL v. ICANN*, ICDR Case No. 01-15-0002-8061, ¶ 69 (Feb. 11, 2016), <https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>.

*said fees, expenses and compensation previously incurred by Dot Registry, LLC upon demonstration that these incurred costs have been paid in full.*

ICANN has not paid any of Dot Registry's legal fees, only Dot Registry's portion of the ICDR fees related to the IRP, as required in the final Declaration.

**Inaccuracy No. 6 (Response to Question 8.IV.B, page 18):**

*"...As already explained under section III.B above, the ICANN Board is addressing the violations of its AoI and Bylaws in the CPE for Dot Registry, and has provided a remedy to Dot Registry..."*

ICANN has not provided a remedy or final decision related to the *Dot Registry, LLC v. ICANN* IRP Declaration. Dot Registry understands that the ICANN Board will meet during its 15 September 2016 retreat to discuss next steps in the matter. The *Dot Registry, LLC, v. ICANN* IRP Majority Panel determined that Dot Registry suffered harm and injury, directly and indirectly, as a result of the Board's actions and inactions, as well as ICANN staff and EIU actions and inactions, and that harm and injury has yet to be addressed by the Board in good faith. Dot Registry has written multiple times to the ICANN Board and has not received a response to date.

As previously conveyed to the ICANN Board, Dot Registry is certainly interested in meeting with the Board to discuss acceptable remedies in the context of their deliberations, in order to reach a mutually acceptable resolution once and for all.

Dot Registry asks ICANN to publish this correspondence on the correspondence page and under Reconsideration Request 16-11.

Please feel free to reach me directly at +1.816.200.7080 Central Time if you have any questions.

**DOT REGISTRY, LLC**

Sincerely,



Shaul Jolles  
Chief Executive Officer

5 September 2016

Members of the ICANN Board  
Internet Corporation for Assigned Names and Numbers  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536

UNITED STATES OF AMERICA

By email ([reconsideration@icann.org](mailto:reconsideration@icann.org))

Dear Members of the ICANN Board of Directors,

**Re: Reconsideration Request 16-11**

I am writing to you on behalf of the Requesters in Reconsideration Request 16-11. I refer to the email of Dot Registry of 31 August 2016, in which Dot Registry made some allegations.

**Below is a comment on each of the allegations, from which you will understand that Reconsideration Request 16-11 contains no inaccuracies.**

- Comment on alleged inaccuracy No. 1:

The selective quote by Dot Registry of the Applicant Guidebook Module 4-9 confirms that the CPE criteria were specifically developed to prevent "*undue priority [being given] to an application that refers to a 'community' construed merely to get a sought-after generic word as a gTLD string*". Dot Registry rightfully states that "*[i]t should be noted that a qualified community application eliminates all directly contending standard applications, regardless of how well qualified the latter may be*". However, Dot Registry chooses to omit the phrases that immediately follow this statement in the Applicant Guidebook, which provide that:

"[t]his is a fundamental reason for very stringent requirements for qualification of a community-based application, as embodied in the criteria below. Accordingly, a finding by the panel that an application does not meet the scoring threshold to prevail in a community priority evaluation is not necessarily an indication the community itself is in some way inadequate or invalid."<sup>1</sup>

<sup>1</sup> Applicant Guidebook, Module 4-9 (emphasis added).

Dot Registry also fails to take account of the overall purpose of the new gTLD program to promote competition in the provision of registry services<sup>2</sup>. This overall purpose is the reason why the requirements for qualification of a community-based application were so very stringent. When ICANN explained the community priority evaluation (CPE) to prospective applicants, it clarified that what the GNSO “*had in mind and what [it] had at heart*” when developing the CPE policy was “*really to protect communities like the Navaho community*”<sup>3</sup>, *the communities that really didn’t have any other kind of protection, and they*”<sup>4</sup> *wanted to protect these communities in a certain way. [...] The important thing is really remember what the GNSO had in mind, what the policy had in mind, and the policy [...] which was to protect the communities. The community-based application was nothing more but to protect small communities. That was the intent of the GNSO*”.<sup>5</sup>

Requesters fail to see how HTLD or Dot Registry could ever meet the very stringent criteria of the CPE.

With respect to Dot Registry, the majority of the IRP Panel did not pronounce itself on Dot Registry’s CPE Applications. The one IRP Panelist who addressed the issue stated that Dot Registry’s CPE applications “*never had a chance of succeeding. The ‘communities’ proposed by Dot Registry for three types of business entities (INCs, LLCs, and LLPs) do not demonstrate the characteristics of ‘communities’ under any definition. They certainly do not satisfy the standards set forth in ICANN’s Applicant Guidebook*”.<sup>6</sup>

With respect to the CPE of HTLD’s application for .hotel, all three IRP Panelists agreed that Requesters’ arguments about the inconsistent application of the CPE criteria by the EIU in the evaluation of .hotel have merit.<sup>7</sup>

Requesters do not determine whether Dot Registry’s applications achieve community priority status or not; however it is clear to Requesters that HTLD’s application for .hotel should not achieve community priority status.

#### - Comment on alleged inaccuracy No. 2:

Dot Registry challenges the fact that ICANN had clear policies to deny community priority to mere industries.

Whereas the Applicant Guidebook does not explicitly state that mere industries do not qualify as a community, the very stringent requirements for qualification of a community-based application make clear that mere industries could not qualify as a community. As explained above, the purpose of the CPE policy was to protect small communities like the Navajo community. ICANN required more cohesion than a “*mere commonality of interest*”<sup>8</sup>.

<sup>2</sup> See *inter alia* Principle C of the Board approved policy: ICANN GNSO, *Final Report – Introduction of New Generic Top-Level Domains – Part A: Final Report*, 8 August 2007.

<sup>3</sup> The Navajo community refers to the largest federally recognized tribe of indigenous people in the United States of America.

<sup>4</sup> The GNSO members.

<sup>5</sup> Transcript of Karla Valente morning session in Abu-Dhabi on 4 August 2009, as published on <https://archive.icann.org/en/topics/new-gtlds/consultation-outreach-en.htm>.

<sup>6</sup> ICDR Case No. 01-14-0001-5004, *Dot Registry, LLC v. ICANN*, Dissenting Opinion of Judge Charles N. Brower, para. 3.

<sup>7</sup> ICDR Case No. 01-15-0002-8061, *Despegar Online SRL et al. v. ICANN*, Final Declaration, para. 146.

<sup>8</sup> Applicant Guidebook, Module 4-11.

Dot Registry alleges that, according to the Applicant Guidebook, an association of suppliers of a particular service *can* form a community. However, for the association of suppliers to qualify as a community, the Applicant Guidebook provides that there needs to be awareness and recognition of the community among the members of that community<sup>9</sup>. Moreover, the applied-for string had to identify the community described in the application, which means that the applied for string must “*closely describe the community or the community members, without over-reaching substantially beyond the community*”<sup>10</sup>. Associations are known under the name of the association or their acronym; not by the service they provide or the sector they are active in. *E.g.*, the Women's Tennis Association (WTA) is known by its name and acronym; not by the word “tennis”.<sup>11</sup> The service or industry in which members of a well-defined, delineated, organized and pre-existing association are active does not describe the community; they merely refer to the sector in which they are active.

Therefore, it can be seen that ICANN had clear policies to deny community priority to mere industries.

Also, it is unclear how Dot Registry is concerned by Requesters' description of ICANN's CPE policy, as Dot Registry does not define the alleged communities it invokes as “industries”.

Finally, Dot Registry does not challenge the fact that ICANN had clear policies to disqualify applicants who were not trustworthy, and, as is apparent from Dot Registry's alleged “inaccuracy No. 4” (which is in fact not an inaccuracy, see below), Dot Registry seems to be in agreement that untrustworthy applicants must be disqualified.

- Comment on alleged inaccuracy No. 3:

Dot Registry tries to trivialize the close connection between the IRP Declarations in the *Despegar et al.* case and the *Dot Registry* case by focusing on the underlying interests of the Claimants in both cases. The underlying interests of the Claimants in the respective IRPs are clearly different. Indeed, Dot Registry never had a chance of succeeding in a CPE, even if no violation of ICANN's Articles of Incorporation (Aol) and Bylaws had occurred. In contrast, Requesters would have prevailed in their actions against HTLD's application for .hotel, if no violation of ICANN's Aol and Bylaws had occurred. In any event, both IRPs are closely connected, as they both arose out of issues relating to the fair and transparent treatment and handling of applicants by ICANN and the Economist Intelligence Unit during the CPE process.

In Reconsideration Request 16-11, Requesters explain in detail why the IRP Panels in both cases reached incompatible conclusions. Dot Registry recognizes that the two IRP Panels reached opposite conclusions, and that these conclusions are incompatible because Claimants in both IRPs criticized the same failings in ICANN's handling of the CPE process.

For the reasons explained in more detail in Reconsideration Request 16-11, the ICANN Board should consider both IRP Declarations together to avoid the risk of irreconcilable decisions.

<sup>9</sup> Applicant Guidebook, Module 4-12.

<sup>10</sup> Applicant Guidebook, Modules 4-12 and 4-13.

<sup>11</sup> In contrast with Dot Registry's alleged communities, the WTA is an association; Dot Registry's applied for strings refer to specific corporate forms, not to an association with a commonality of interest.

- Comment on alleged inaccuracy No. 4:

Under the heading "Inaccuracy No. 4", Dot Registry describes itself as a party affected by ICANN's Applicant Portal Data Breach, because it was not made aware of the existence of the new information that other individuals may have also been involved in the data breach. Dot Registry rightfully submits that, as a matter of transparency, ICANN should immediately send formal notification to all of the affected parties.

Dot Registry's submission in this respect is not an "inaccuracy", but a confirmation that ICANN's handling of the Applicant Portal Data Breach violates ICANN's Aol and Bylaws.

- Comment on alleged inaccuracy No. 5:

Dot Registry clarifies that ICANN has not paid any of Dot Registry's legal fees, but that it only refunded the legal costs related to Dot Registry's share of the ICDR fees.

Requesters never claimed that the ICANN Board agreed to refund all of Dot Registry's legal costs, and thanks Dot Registry for its clarification.

- Comment on alleged inaccuracy No. 6:

Dot Registry claims that ICANN has not provided a remedy or final decision in their regard. However, Dot Registry has been refunded a share of its legal costs, and it has received the ICANN Board's assurance that the ICANN Board will consider next steps in relation to Dot Registry's Reconsideration Requests or the relevant new gTLDs before the Board takes any further action. The former provides a remedy, which is final; the latter provides the assurance that the ICANN Board will consider the issue. Because of the ICANN Board's assurance, Dot Registry has obtained a provisional remedy given that the resolution of the contention set for its applications has been stayed.

In contrast, until now, ICANN has not taken the necessary steps to ensure that Requesters' applications for .hotel remain in contention.

\*

In view of the above, Requester's Reconsideration Request 16-11 contains no inaccuracies.

In summary, I wish to remind the Board about two essential main points in the current proceedings:

1. There are now two IRPs that concern ICANN's handling of the CPE process. In one case (in which the CPE panel decided to grant the priority to HTLD), the IRP panel's finding that ICANN had followed the process was based upon the belief that ICANN had merely adopted a decision made by the CPE panel. In other words, the IRP panel reached this decision because ICANN had convinced the panel that the CPE panel was acting independently. In the second case (in which the CPE did not agree to grant priority to Dot Registry) the IRP panel found that ICANN's process was flawed because it discovered

that ICANN was closely involved in the CPE process. In view of this second case, the IRP panel in the first case was unquestionably misled and would have decided differently had it known ICANN's real role in the CPE process.

2. The illegal entry to ICANN's platform and the collection of information by Mr. Krischenowski and two of his associates, including the CEO of HTLD, is an unquestionable violation of the application rules which should disqualify the applicant regardless of both when that access and collection took place and who the owner is of that applicant.

In our view, the reason why Dot Registry is invoking so-called inaccuracies – all of which have been explained away – is because Requesters made a side comment that Dot Registry had not proved it had suffered material harm as a result of ICANN's violation of the Aol and Bylaws. However, I would ask the ICANN Board not to be distracted by this nibbling at the edges of the main issue.

I remain at your disposal for further comments.

Should the ICANN Board organize a meeting with Dot Registry or otherwise have contact with Dot Registry regarding the Reconsideration Request 16-11, Requesters request that there be full transparency concerning this contact.

Yours sincerely,

  
Filip Röllin



28 December 2016

Members of the ICANN Board  
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UNITED STATES OF AMERICA

**By e-mail ([reconsideration@icann.org](mailto:reconsideration@icann.org))**

Dear Members of the ICANN Board of Directors,

**Re: Reconsideration Request 16-11**

We refer to our telephone conversation of 16 December 2016 with the BGC and the request by the BGC's chair for a written report on our position in this case.

Below, we first explain why Requesters argued that HTLD's application for .hotel must be cancelled. Second, we explain why the ICANN Board should have considered the impact for .hotel when it proceeded to a review of the Dot Registry case, and how the IRP Declaration in the .charity case supports this argument.

Although the BGC's chair was kind enough to allow us to take as many pages as we needed to report on our position, we will try to keep it short. For the sake of clarity, we can confirm that the arguments contained in Requesters' Reconsideration Request 16-11 and Requesters' letter of 5 September 2016 are repeated here in their entirety.

**I. Reasons why HTLD's application for .hotel must be cancelled**

1. HTLD's application must be cancelled because allowing the application to proceed and ultimately delegating the .hotel TLD to HTLD would give HTLD an unjustified competitive advantage in the operation of the .hotel TLD in relation to other applicants.

Indeed, HTLD executives had illegally accessed information from competing applicants, and especially from one of the competing applicants for .hotel, namely Despegar. Despegar has already successfully applied for .hoteles. HTLD had illegal and unauthorised access to confidential information and trade secrets of Despegar.

2. During our call of last week, Mr. Cherine Chalaby asked if the request to have HTLD's application cancelled was really appropriate, given that the unauthorized access by HTLD executives was not relevant as regards HTLD's application, which had already been filed. In our view, it remains

appropriate to cancel the application because: (i) the illegal access by HTLD executives would create an unfair advantage for HTLD over competing registry operators in the event that HTLD were allowed to operate the .hotel gTLD; and (ii) HTLD's illegal access to trade secrets amounted to behavior that is unacceptable to the Internet community and it should remain so because it is in violation of the application rules and not in the interest of the Internet community as a whole.

### **(i) The unfair advantage created by HTLD**

The unauthorized access by HTLD's executives was made willfully and with intent; it was not coincidental or accidental. Unauthorized access occurred on more than one occasion and information contained in the applications of direct competitors was targeted. For all these reasons, the access was indisputably unfair, anti-competitive and illegal.

The future registry operator of the .hotel gTLD – whoever that will be – will compete with other registry operators. If HTLD were allowed to operate the .hotel gTLD, HTLD would have an unfair advantage over competing registry operators, because of the access it has had to the sensitive business information of others, including Requesters.

HTLD accessed business plans, pricing information, and confidential information on the technical infrastructure of its competitors. HTLD thus obtained an advantage which is unfair. If allowed to operate a competing registry, HTLD could use this unfair advantage to adapt its commercial strategy, pricing, technical infrastructure, etc., an advantage HTLD would never have obtained, had it not illegally accessed sensitive business information concerning its direct competitors.

One of the applicants targeted by HTLD is Travel Reservations SRL ('TRS', formerly Despegar Online SRL), one of the Requesters in this case. During the latest round of new gTLDs, TRS was awarded the operation of the .hoteles TLD. 'Hoteles' is Spanish for 'hotels', and it is obvious that TRS is a competing registry operator of any prospective registry operator for .hotel.

Although HTLD's illegal access of confidential information in applications by TRS (and others) did not reinforce its actual application for .hotel (which had indeed already been filed) the access to confidential information has created an unfair competitive advantage for HTLD, who would be in a position to abuse it in its capacity as prospective registry operator, if its application were successful. This unfair advantage can only be removed, if HTLD is not allowed as a registry operator. As the access was intentional, it is inexcusable and unforgivable.

### **(ii) The interests of the Internet community as a whole**

The illegal access to ICANN's platform and the collection of information by HTLD executives is unquestionably a violation of the application rules, and should disqualify the applicant, no matter when that access and collection took place and irrespective of who was or became the owner of that applicant.

ICANN must operate in the interests of the Internet community as a whole. As registry operators control a critical part of the Internet, ICANN has affirmed its right to deny an application in order "to protect the public interest in the allocation of critical Internet resources."<sup>1</sup> As explained in the Reconsideration Request, applications from any entity or including any individual who has ever

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<sup>1</sup> gTLD Applicant Guidebook (v. 2012-06-04), Module 1-24.

been convicted of any crime involving the use of computers or the Internet to facilitate the commission of crimes should be automatically disqualified from the new gTLD Program.<sup>2</sup>

If such an entity or individual is to be disqualified because of a conviction of a past crime, it should also be disqualified because of such crime committed during the application process.

It is only logical, therefore, to apply the same sanction when ICANN catches not one, but multiple representatives of HTLD stealing the trade secrets of competing applicants via the use of computers and the Internet. The integrity of the new gTLD Program and its processes would be jeopardized if ICANN were to neglect to correct these wrongs and allow the infringer to pursue its application to operate a critical part of the Internet. Such a course of action would not be in the best interests of the Internet community as a whole.

To use the words of the IRP Panel in the .charity case, “[i]t is plainly in the best interests of the Internet community as a whole that ICANN maintains a procedurally fair system with the highest levels of consistency and integrity.”<sup>3</sup> Accepting applications by entities which showed to be anything other than entirely honest, would not be in the best interests of the Internet community.

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That is why HTLD’s application must be denied and cancelled.

## **II. The IRP Declaration in the .charity case supports the argument that the ICANN Board should have considered the impact of a review of the Dot Registry case for the .hotel applications**

1. In our request for reconsideration, we argued that the ICANN Board should have reconsidered its handling of the CPE process regarding .hotel when it accepted the findings of the *Dot Registry* IRP Panel and decided to review the Dot Registry’s reconsideration request. We refer to our request for reconsideration in which we explained our argument in detail.

A similar situation occurred in the .charity case, when a review process required a reconsideration of the .charity case.

In the .charity case, there were three applicants for .charity (two for .charity and one for an IDN version of .charity). All applications were the subject of a community objection by the Independent Objector that resulted in an expert determination. The cases were consolidated, but the results differed. Two applications were upheld, as the community objections against these two applications were denied. The community objection against the third application (filed by Corn Lake) was upheld. As a consequence, ICANN denied the third application.

The reason proffered for the different outcome was that one applicant had a vague reference in its application that the TLD would be limited to registrants with a charitable purpose, but such reference would not be binding on the applicant because it did not agree to a voluntary Public Interest Commitment (“PIC”). Another applicant offered a PIC in the middle of objection proceeding that said that the TLD would be limited, but that it reserved the right to eliminate the

<sup>2</sup> gTLD Applicant Guidebook (v. 2012-06-04), Module, 1-22.

<sup>3</sup> Corn Lake IRP Declaration, § 8.83.

PIC at its discretion. Corn Lake did not offer a specific PIC on eligibility, but would adopt any eligibility requirements required by the NGPC.

However, ICANN made mandatory certain PICs for all .charity applicants, so all three applicants would be required to adopt the same eligibility requirements. The PICs were made mandatory in the course of the then pending objection procedure but the expert determinant who handled the case against Corn Lake's application did not allow Corn Lake to raise this point or to develop an additional brief on this essential subject. That is why this issue was not discussed in the expert determination denying Corn Lake's application.

On 12 October 2014 and on 3 February 2016, the ICANN Board introduced review mechanisms for some expert determinations, as it considered some expert determinations to be inconsistent or otherwise unreasonable.<sup>4</sup> This review mechanism was not envisioned for .charity related cases.

Corn Lake filed a request for reconsideration which the ICANN Board denied. Corn Lake subsequently initiated an IRP. The IRP Panel in the .charity case found that the ICANN Board's failure to include .charity in the review mechanism was discriminatory. It also found that all three applicants were similarly situated and the underlying panel was incorrect in treating them differently.<sup>5</sup>

Following the IRP declaration, the Board reconsidered the handling of Corn Lake's .charity application. As was concluded by the .charity IRP panel,<sup>6</sup> the ICANN Board accepted that it should have considered the impact of performing reviews which were not previously envisioned on earlier decisions.<sup>7</sup> On 8 November 2016, the ICANN Board decided to extend its final review procedure to include review of Corn Lake's .charity expert determination.<sup>8</sup>

2. This outcome is immediately relevant to the present case. The ICANN Board should have considered the impact of a review of the Dot Registry case for the .hotel applications. A review of the .hotel case was more than appropriate. As explained in the request for reconsideration, the IRP panel in the .hotel case had noticed inconsistencies in the application of the CPE criteria by the EIU on .hotel.<sup>9</sup> However, the IRP panel in the .hotel case had not noticed the discrepancies found by the IRP panel in the Dot Registry case. The IRP panel in the .hotel case would also have found these discrepancies, had it been given complete and accurate information regarding the involvement of ICANN staff and the decisive role of the ICANN Board. Instead, the panel was made to believe that the ICANN staff was not involved in the CPE and that the EIU (not the ICANN Board) had taken the ultimate CPE decision. Both happened to be untrue: ICANN staff played an active role in the CPE and the ICANN Board took the ultimate decision.

As a result of these inconsistencies, a review of the .hotel CPE is appropriate, and not including .hotel in a review mechanism (despite this having been seen as acceptable for Dot Registry and

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<sup>4</sup> ICANN, *NGPC Resolutions 2014.10.12.NG02 – 2014.10.12.NG03*, <https://www.icann.org/resources/board-material/resolutions-new-qtld-2014-10-12-en#2.b>; ICANN, *Board Resolutions 2016.02.03.12 – 2016.02.03.13*, <https://www.icann.org/resources/board-material/resolutions-2016-02-03-en#2.c>.

<sup>5</sup> "For the same reasons, any 'reasonable explanations' for perceived inconsistencies between the .CHARITY Expert Determinations based on the different eligibility requirement undertakings prior to October 2013 were eliminated by the ICANN Board's announcement that it would adopt the GAC Beijing Communiqué recommendations. The effect of that decision, coupled with all applicants' undertakings to follow any GAC Beijing Communiqué recommendations adopted by ICANN, was to render the applicants' eligibility requirements criteria identical across all three applications." (Corn Lake IRP Declaration, § 8.62).

<sup>6</sup> See *inter alia* Corn Lake IRP Declaration, §§ 8.53 and following, 8.68, 8.73.

<sup>7</sup> ICANN, *Board Resolutions 2016.11.08.16 – 2016.11.08.18*, <https://www.icann.org/resources/board-material/resolutions-2016-11-08-en#2.b>.

<sup>8</sup> ICANN, *Board Resolutions 2016.11.08.16 – 2016.11.08.18*, <https://www.icann.org/resources/board-material/resolutions-2016-11-08-en#2.b>.

<sup>9</sup> See Despegar et al. IRP Declaration, §§ 146 and following.

for inconsistent or unreasonable decisions impacting Ruby Pike, Corn Lake, Amazon and United TLD Holdco<sup>10</sup>) would amount to discrimination.

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ICANN must act fairly and without discrimination, meaning that a party may not be treated differently from others in its situation without “substantial and reasonable” justification. The ICANN Board has intervened in many cases, where perceived inconsistencies were found or where a violation of its transparency obligations occurred. In those cases, ICANN has offered a review, which is capable of undoing the inconsistency. In the case of .hotel, inconsistencies have been found, and a violation of the ICANN’s transparency obligations is apparent. There is no substantial and reasonable justification to exclude the .hotel CPE from a review mechanism, which is capable of undoing the inconsistency.

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In view of the above, Requesters reiterate the request for ICANN to reverse the Decision and to declare that HTLD’s application for .hotel should be cancelled and that whatever punitive steps towards HTLD it may deem necessary should be taken. The ICANN Board is also requested to take all necessary steps to ensure that Requesters’ applications for .hotel remain in contention until Requesters have themselves resolved the contention set, or until Requesters have resolved the contention set in an auction, organized by ICANN.

In the event that ICANN does not immediately reverse its Decision, ICANN is requested to refrain from executing the registry agreement with HTLD, and to provide full transparency regarding all communications between ICANN, the ICANN Board, HTLD, the EIU and third parties (including but not limited to individuals and entities supporting HTLD’s application) regarding HTLD’s application for .hotel.

In the unlikely event that the ICANN Board does not decide to cancel HTLD’s application immediately, Requesters request that the ICANN Board take the necessary steps to ensure a meaningful review of the CPE regarding .hotel, ensuring consistency of approach with its handling of other cases such as the Dot Registry, the Corn Lake and the Ruby Pike cases.

We remain at your disposal, should you request further clarification.

Yours sincerely,



Flip Petillion

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<sup>10</sup> ICANN, *Board Resolution 2016.09.15.15*, <https://www.icann.org/resources/board-material/resolutions-2016-09-15-en#2.e>; ICANN, *Board Resolution 2016.09.17.01*, <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>; ICANN, *Board Resolutions 2016.02.03.12 – 2016.02.03.13*, <https://www.icann.org/resources/board-material/resolutions-2016-02-03-en#2.c>; ICANN, *Board Resolutions 2016.11.08.16 – 2016.11.08.18*, <https://www.icann.org/resources/board-material/resolutions-2016-11-08-en#2.b>; ICANN, *NGPC Resolutions 2014.10.12.NG02 – 2014.10.12.NG03*, <https://www.icann.org/resources/board-material/resolutions-new-qtld-2014-10-12-en#2.b>.

16 January 2018

ICANN  
Board Accountability Mechanisms Committee (BAMC)  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536, USA

**By email: [reconsideration@icann.org](mailto:reconsideration@icann.org)**

Dear Members of the BAMC,

**Re: Consideration of Next Steps in the Community Priority Evaluation Process Review (Reconsideration Request 16-11)**

We refer to our letter of 27 July 2017 in which we requested, on behalf of the Requesters in Reconsideration Request 16-11, more transparency about the community priority evaluation (CPE) process and the CPE process review.

Requesters appreciate that ICANN has now published the report of the CPE process reviewer. Requesters are currently analysing the report.

However, a first cursory review of the report already shows that Requesters' concerns about the lack of transparency remain unaddressed.

In addition to the lack of transparency in the CPE process and the CPE process review, Requesters are equally concerned about the methodology used by the CPE process reviewer, and about due process and policy violations, disparate treatment and inconsistencies that have not been considered.

We understand that, at its next meeting, the BAMC will consider next steps in the CPE process review. Requesters trust that the next steps the BAMC will consider shall address

*Petillion*

Requesters' concerns and that ICANN shall hear Requesters before proceeding further in this matter.

This letter is sent without prejudice and reserving all rights.

Yours sincerely,

*Flip Petillion*  
Flip Petillion

1 February 2018

ICANN  
Board Accountability Mechanisms Committee (BAMC)  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536, USA

**By email: [reconsideration@icann.org](mailto:reconsideration@icann.org)**

Dear Members of the BAMC,

**Re: Consideration of Next Steps in the Community Priority Evaluation Process Review (Reconsideration Request 16-11)**

We refer to our letter of 16 January 2018 and to the BAMC meeting that was supposed to take place on 17 January 2018. Pursuant to Article 3(5)(c) of ICANN's Bylaws, the preliminary report of said meeting should have been published already. However, no such report was published. It is unclear what steps, if any, the BAMC considered in the CPE process review.

In any event, ICANN confirmed that our letter of 16 January 2018 was going to be provided to the BAMC for consideration. As a follow-up to that letter, Requesters' wish to clarify further their concerns about the CPE process review.

**1. Lack of transparency in ICANN's organisation of the CPE process review**

Despite numerous requests (see letters of 14 June 2017 and of 27 July 2017 on behalf of Requesters), Requesters remain without information as to the selection process for the CPE process reviewer ('FTI Consulting' or 'FTI'), and the names and curricula vitae of the FTI individuals involved in the review.

Requesters are left in the dark about the instructions FTI received from ICANN, either directly or indirectly. Despite Requester's previous demands, ICANN failed to communicate



about the criteria and standards that FTI used to perform the CPE process review. ICANN did not communicate these criteria and standards before the start of the CPE process review, as it should have. And, now that FTI's review is apparently finished, the criteria and standards remain still unclear (cf. *infra*).

## **2. Lack of transparency before, during and beyond the CPE process review**

In addition to the above, Requesters have asked for (i) the disclosure of correspondence between the ICANN organization and the CPE provider, (ii) the content of the interviews made by FTI during the CPE process review, (iii) FTI's engagement letter with ICANN, and (iv) the information requested in our letter of 14 June 2017.

To date, ICANN did not respond to this request.

On 13 December 2017, ICANN published three reports made by FTI on its review of the CPE process. FTI's reports provide little transparency about the requested information.

The first part of FTI's report (Scope 1) aimed at understanding ICANN's involvement in the CPE process. However, FTI offers no transparency about the identity and qualifications of the evaluators who performed the CPE. In addition, FTI's report does not contain the documents or the recordings of the interviews on which its findings are based. FTI fails to provide the questions that were asked during interviews.

Without access to the documents on which FTI based its review, it is impossible for anyone, including the ICANN Board, to assess the weight of FTI's conclusions.

## **3. Lack of diligence and care in the CPE process review**

FTI claims that it examined different data sets of communication between ICANN and the CPE Provider and that it conducted interviews with ICANN personnel and the two remaining evaluators of the CPE Provider.<sup>2</sup> However, FTI recognized that it did not benefit from a complete data set, as the CPE Provider refused to give access to its email communication pertaining to the CPE process.<sup>3</sup> No reason is provided as to why the CPE Provider refused access.

Remarkably, it seems that the vast majority of evaluators had left the CPE Provider before FTI started its review of the CPE process.<sup>4</sup> Yet, FTI did not investigate the reasons for departure. Nor did FTI mention any efforts to contact the evaluators who left the CPE Provider to inquire about ICANN's involvement in the CPE process.

FTI's review of the CPE process was thus extremely limited.

Given its limited scope, no value can be attached to FTI's conclusion in the report that it found no evidence of undue influence of the ICANN organization on the CPE provider.<sup>5</sup>

#### **4. FTI's report reveals a lack of independence of the CPE provider**

As a matter of fact, FTI's report shows a lack of independence of the CPE provider. FTI's Scope 1 report reveals that abundant phone calls were made between the CPE Provider and ICANN.<sup>6</sup> It also mentions that ICANN advised at times that the CPE Provider's conclusions were not supported by sufficient reasoning.<sup>7</sup>

ICANN was thus intimately involved in the evaluation process. The CPE Provider was anything but an independent provider. The abundant phone calls between ICANN and the CPE Provider to discuss "various issues"<sup>8</sup> and ICANN's influence on the CPE Provider's rationale demonstrate that the CPE Provider was not free from external influence from ICANN. As a result, the CPE Provider was not independent.

FTI's attempt to minimize ICANN's influence on the CPE Provider is unconvincing. FTI's report shows (i) that ICANN made extensive comments on the draft reports prepared by the CPE Provider, (ii) that those drafts were discussed at length between the CPE Provider and ICANN, and (iii) that the working of the CPE Provider and ICANN became intertwined to such extent that it became "difficult to discern which comments were made by ICANN organization versus the CPE Provider".<sup>9</sup> It is apparent from the report that FTI was unable to attribute affirmatively specific comments to either ICANN or the CPE Provider.

One can only conclude from these findings that the CPE Provider was not independent from ICANN. Any influence by ICANN in the CPE was contrary to the policy, and therefore undue. FTI's report confirms ICANN's intimate involvement in the CPE and the fact that the *Despegar et al.* IRP Panel was given incomplete and misleading information.

#### **5. FTI fails to analyse the consistency issues of CPE decisions**

The second part of FTI's report (Scope 2) was supposed to focus on the consistency – or better, the lack of consistency – of CPE decisions.

However, FTI's did not *analyse* the consistency issues during CPE. The report simply *sums up* the different reasons that the CPE Provider provided to demonstrate adherence to the community priority criteria. FTI did not examine the consistency between the reasons invoked by the CPE Provider. It also failed to examine whether the CPE provider was consistent in applying those reasons to the different applications. There is no analysis whatsoever as to the inconsistencies invoked by applicants in RfRs, IRPs or other processes.

Emblematic of the lack of analysis is the fact that FTI did not examine the gTLD applications underlying the CPE report. These gTLD applications are not even mentioned among the materials reviewed by FTI.<sup>10</sup> Without reviewing the underlying applications, it is impossible to assess the consistent application of policies and standards.

Specifically with respect to .hotel, the CPE report contains inconsistencies that are readily apparent. To give but one example, the CPE panel determined that the applicant provided for an appeal system, whereas the application does not provide for an appeal system. These inconsistencies and others are left unaddressed in FTI's report.

The fact that those inconsistencies were left unaddressed by FTI is inexcusable. Requesters described the inconsistencies clearly and repeatedly. The *Despegar et al.* IRP Panel considered Requesters' description of those inconsistencies to have merit.<sup>11</sup> The existence of said inconsistencies has never been contested. And FTI's report simply ignores them.

Therefore, we ask you to address these inconsistencies – in the event that you do not simply decide to cancel HTLD's application for the reasons set out in our Reconsideration Request – and to ensure a meaningful review of the CPE regarding .hotel.

This letter is sent without prejudice and reserving all rights.

Yours sincerely,

  
Flip Petillion

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<sup>1</sup> This letter is sent on behalf of Travel Reservations SRL, Minds + Machines Group Limited, Radix FZC, dot Hotel Inc. and Fegistry LLC (Requesters in Reconsideration Request 16-11).

<sup>2</sup> FTI Scope 1 report, pp. 13-15

<sup>3</sup> FTI Scope 1 Report, p. 6.

<sup>4</sup> FTI Scope 1 Report, p. 14.

<sup>5</sup> FTI Scope 1 Report, p. 17.

<sup>6</sup> The report makes mention of weekly conference calls between ICANN and the CPE Provider: FTI Scope 1 Report, p. 14.

<sup>7</sup> FTI Scope 1 Report, p. 12.

<sup>8</sup> FTI Scope 1 Report, p. 12.

<sup>9</sup> FTI Scope 1 Report, pp. 15-16.

<sup>10</sup> FTI Scope 2 Report, pp. 5-9.

<sup>11</sup> *Despegar et al* IRP Declaration, ¶ 146.

22 February 2018

ICANN  
Board Accountability Mechanisms Committee (BAMC)  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536, USA

**By email: [reconsideration@icann.org](mailto:reconsideration@icann.org)**

Dear Members of the BAMC,

**Re: Consideration of Next Steps in the Community Priority Evaluation Process Review (Reconsideration Request 16-11)**

We refer to our letters, sent by email, of 16 January 2018 and 1 February 2018 and to the BAMC meetings of 17 January 2018 and 2 February 2018.

In our letter of 1 February 2018, Requesters complained *inter alia* about the lack of transparency regarding the BAMC's consideration of the FTI CPE review reports. ICANN has never published the preliminary report of the BAMC meeting of 17 January 2018 at which it discussed the FTI CPE review reports.

ICANN has now published the minutes of the BAMC meeting of 17 January 2018. It appears from the meeting minutes that the BAMC did not take into account our letter of 16 January 2018. Shortly after that meeting, ICANN informed us that it had received our email of 16 January 2018 and that it would provide the email to the BAMC for consideration.

On 1 February 2018, we have sent a second letter to the BAMC. ICANN acknowledged receipt of the second letter on 2 February 2018. Also on 2 February 2018, ICANN posted the agenda of the BAMC meeting of 2 February 2018. The agenda mentions as first item: "Recent Correspondence to the ICANN Board re Community Priority Evaluation Process Review Reports". As the agenda does not identify the correspondence, it is yet unclear whether the BAMC considered both our letters at its meeting of 2 February 2018.

By now, ICANN should have informed Requesters about the discussions at the BAMC meeting of 2 February 2018, as it was under the obligation to publish the preliminary report of said meeting at the latest on 14 February 2018, pursuant to Article 3(5)(c) of ICANN's Bylaws. Article 3(5)(c) sets forth a simple and unambiguous rule, which is designed to ensure openness and transparency.

Requesters fail to understand why ICANN decided not to publish the preliminary report of the meeting of 2 February 2018 after Requesters already gave notice to ICANN about its previous failure to publish a preliminary report on the same topic.

As explained in more detail in Reconsideration Request 16-11 and previous correspondence, the lack of transparency surrounding the CPE and the CPE review is appalling. The finding that, for the second consecutive time and while being put on notice, ICANN is ignoring the simple and explicit rule of Article 3(5)(c) can only be explained by the fact that ICANN is being non-transparent about the CPE deliberately.

By failing to provide the necessary transparency, ICANN makes it impossible for affected parties to evaluate whether ICANN has been acting accountably, whether meeting minutes are accurate or whether they are influenced by events that occurred after the meeting.

In any event, ICANN should not proceed as suggested in the meeting minutes of 12 February 2018 pertaining to the BAMC meeting of 17 January 2018. According to said meeting minutes, the BAMC considered that as a result of FTI's findings, there will be no overhaul or change to the CPE process in the current New gTLD round. As explained in our letters of 16 January 2018 and 1 February 2018, FTI's findings are inconclusive. FTI's report is also non-transparent, containing gaps and lacking diligence and care. Nevertheless, the report reveals a lack of independence of the CPE provider, requiring ICANN to intervene and disregard the CPE result on .hotel.

ICANN confirmed that the BAMC would take our letters into account. The content of our letters leaves the BAMC no choice but to reconsider its findings of 17 January 2018. Please inform us immediately whether the BAMC has done so.

Requesters also urge ICANN to provide full transparency on its consideration of the CPE process and to list and give access to all material the BAMC considered during its meetings on the CPE process.

This letter is sent without prejudice and reserving all rights.

Yours sincerely,

  
Flip Petillion

9 April 2018

ICANN  
Board Accountability Mechanisms Committee (BAMC)  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094-2536, USA

**By email: [reconsideration@icann.org](mailto:reconsideration@icann.org)**

Dear Members of the ICANN Board,

**Re: Reconsideration Request 16-11 and new Reconsideration Request**

We refer to our letters, sent by email, of 16 January 2018, 1 February 2018 and 22 February 2018 regarding Reconsideration Request 16-11 and to the ICANN Board Meeting of 15 March 2018.

In your meeting of 15 March 2018, you accepted the findings set forth in the CPE Process Review Reports and decided that no overhaul or change to the CPE process for this current round of the New gTLD Program is necessary. You took these decisions without considering Requesters' arguments against accepting the findings set forth in the CPE Process Review Reports.

Instead, you considered that Requesters will have the opportunity to address their arguments in support of Reconsideration Request 16-11. In this respect, on 19 March 2018, you invited us (i) to submit additional information relating to Reconsideration Request 16-11, and (ii) to make a telephonic oral presentation to the BAMC in support of Reconsideration Request 16-11.

However, the ICANN Board Resolutions 2018.03.15.08 – 2018.03.15.11 makes a meaningful review of main arguments expressed by Requesters impossible. Indeed, Requesters urged the ICANN Board to address Requesters' concerns and to hear Requesters *before* (not after) proceeding further in its consideration of the CPE Process Review. Unless the ICANN Board simply decides to cancel HTLD's application – which it ought to do for the reasons set out

in Reconsideration Request 16-11 – the ICANN Board must address the fatal flaws of the CPE and the CPE Process Review, as identified by Requesters in the framework of Reconsideration Request 16-11. These fatal flaws cannot be addressed if the ICANN Board were to uphold Resolutions 2018.03.15.08 – 2018.03.15.11, accepting the findings of the CPE Process Review and deciding that no overhaul or change to the CPE process is necessary. Unless the ICANN Board decides to cancel HTLD's application, upholding Resolutions 2018.03.15.08 – 2018.03.15.11 would preclude the ICANN Board from granting the remedies requested by Requesters in the framework of Reconsideration Request 16-11.

Thus, in accepting the BAMC's recommendations prior to addressing Requesters' arguments, while being prompted not to do so, the ICANN Board not only denied Requesters from a meaningful review; it showed that it was either careless and incompetent or prejudiced.

That is why Requesters request that – unless you finally decide to cancel HTLD's application – you reconsider the ICANN Board Resolutions 2018.03.15.08 – 2018.03.15.11 and you reverse the decisions in which you (i) accepted the findings set forth in the CPE Process Review Reports, (ii) concluded that no overhaul or change to the CPE process for this current round of the New gTLD Program is necessary, (iii) declared that the CPE Process Review has been completed.

For reasons of procedural economy, Requesters propose that this new request for reconsideration be handled together with Reconsideration Request 16-11 that was put on hold pending completion of the CPE Process Review.

Requesters reserve the right to explain the reasons for reconsideration more fully by submitting a reconsideration request form and during oral hearings.

This letter is sent without prejudice and reserving all rights.

Yours sincerely,

  
Flip Petillion

28 August 2018

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Board and Board Accountability Mechanisms Committee (BAMC)  
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**By email: [reconsideration@icann.org](mailto:reconsideration@icann.org)  
[independentreview@icann.org](mailto:independentreview@icann.org)**

Dear Members of the ICANN Board,

**Re: Requests for Reconsideration 16-11 and 18-6**

I am coming back to our call of 19 July 2018. During our call, we requested, on behalf of our clients, that Request for Reconsideration (RfR) 16-11 and RfR 18-6 be handled together.

In the meantime, ICANN Board resolution 2018.07.18.09 (the 'Resolution') has come to our attention. In this resolution, the ICANN Board accepted the BAMC recommendation on RfR 18-6, thereby concluding RfR 18-6 and making it impossible that RfR 16-11 and RfR 18-6 be handled together.

Requesters regret that none of the BAMC Members informed us about the Resolution that was taken the day before our call and the content of which was directly related to the subject matter of our call.

Requesters respectfully request that the ICANN Board reverse its decision on RfR 18-6. Should the ICANN Board not do so at its own initiative, Requesters are prepared to participate to ICANN's Cooperative Engagement Process.



We thank you in advance for your consideration of this matter and for informing us about the posting of the Minutes of the Board Meeting of 18 July 2018.

Sincerely yours,

*Flip Petillion*  
Flip Petillion

**RECOMMENDATION  
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)  
RECONSIDERATION REQUEST 16-11  
16 NOVEMBER 2018**

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The Requestors, Travel Reservations SRL, Famous Four Media Limited (and its subsidiary applicant dot Hotel Limited), Fegistry LLC, Minds + Machines Group Limited, Spring McCook, LLC, and Radix FZC (and its subsidiary applicant dot Hotel Inc.) (collectively, Requestors) submitted standard applications<sup>1</sup> for the .HOTEL generic top-level domain (gTLD). The Requestors seek reconsideration of ICANN Board Resolutions 2016.08.09.14 and 2016.08.09.15 (collectively, the 2016 Resolutions), which directed ICANN organization to move forward with the processing of the prevailing community application for the .HOTEL gTLD (HTLD's Application) submitted by Hotel Top-Level Domain S.a.r.l (HTLD).<sup>2</sup> The Requestors do not challenge the application of the Community Priority Evaluation (CPE) criteria to HTLD's Application or a particular finding by the CPE Provider on any of the CPE criteria. Instead, the Requestors claim that the 2016 Resolutions are inconsistent with ICANN org's Articles of Incorporation (Articles) and Bylaws because by accepting the CPE report determining that HTLD's Application prevailed in CPE, the Board is awarding "undue priority . . . to an application that refers to a 'community' construed merely to get a sought-after generic word as a gTLD string" when "the purpose of community based applications has never been to eliminate competition among applicants for a generic TLD."<sup>3</sup> The Requestors also assert that in deciding

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<sup>1</sup> Applicants may apply for a standard or community-based gTLD. A "community-based gTLD is a gTLD that is operated for the benefit of a clearly delineated community. . . . [A]n application that has not been designated as community-based will be referred to . . . as a standard application." Applicant Guidebook (Guidebook), Module 1, § 1.2.3. (<https://newgtlds.icann.org/en/applicants/agb/intro-04jun12-en.pdf>).

<sup>2</sup> As discussed in further detail below, HTLD's Application prevailed in CPE and thus prevailed over all other applications in the .HOTEL contention set. *See* Applicant Guidebook, Module 4.2, § 4.2.3 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>3</sup> Request 16-11 § 6, at Pgs. 5-6.

to proceed with HTLD’s Application, the Board did not consider “the unfair competitive advantage” that HTLD allegedly gained by exploiting a privacy configuration in the New gTLD Applicant portal (Portal Configuration) to obtain confidential information of competing applicants.<sup>4</sup> The Requestors also allege that the Board discriminated against Requestors by refusing to reconsider the Board’s position regarding the CPE results on HTLD’s Application when the Board did so for other applicants.<sup>5</sup>

## **I. Brief Summary**

The Requestors and HTLD submitted applications for the .HOTEL gTLD and were placed in the same contention set. As a community-based application, HTLD participated and prevailed in CPE.<sup>6</sup> CPE is a method of string contention resolution.<sup>7</sup> As a result, HTLD’s Application prevailed over all other applications in the .HOTEL contention set and none of the Requestors’ applications for .HOTEL will proceed.

In 2014, some of the Requestors submitted Reconsideration Requests 14-34 and 14-39, challenging HTLD’s Application CPE results and ICANN org’s response to Requestors’ requests for documents relating to the HTLD CPE, respectively.<sup>8</sup> Both Requests were denied by the Board Governance Committee (BGC).<sup>9</sup> Thereafter, some of the Requestors (the IRP Claimants)

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<sup>4</sup> *Id.*, § 8, at Pg. 9-11. On 1 March 2015, ICANN org discovered that, under certain circumstances, an authenticated user of the new gTLD applicant and GDD portals could access the data of, or related to, other users without permission. See <https://www.icann.org/news/announcement-2015-03-01-en>, <https://www.icann.org/news/announcement-2015-04-30-en> and <https://www.icann.org/news/announcement-2015-05-27-en>.

<sup>5</sup> Request 16-11, § 8, Pg. 18.

<sup>6</sup> See HTLD CPE Report (<https://newgtlds.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>).

<sup>7</sup> Guidebook, Module 4, § 4.2 (<https://newgtlds.icann.org/en/applicants/agb>).

<sup>8</sup> See Request 14-34 (<https://www.icann.org/resources/pages/14-34-2014-07-01-en>) and Request 14-39 (<https://www.icann.org/resources/pages/14-39-2014-09-23-en>).

<sup>9</sup> Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. See ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e) (<https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>). Since 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with initial review of reconsideration requests. See ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

filed an independent review process (IRP) challenging the BGC's determinations on Requests 14-34 and 14-39 (Despegar IRP).<sup>10</sup> While the Despegar IRP was pending, the IRP Claimants added a claim in the IRP that HTLD's Application should be rejected because an individual that was at one time associated with HTLD purportedly exploited the privacy configuration of the new gTLD applicant portal to access confidential data of other applications, including data associated with some of the Requestors' .HOTEL applications.<sup>11</sup>

In 2016, the Despegar IRP Panel declared ICANN to be the prevailing party.<sup>12</sup> The IRP Panel declined to make a finding on the Portal Configuration issue because it was raised after the IRP process had commenced and the issue was still under consideration by the ICANN Board.<sup>13</sup> The Board accepted the Despegar IRP Panel's findings and directed ICANN org to complete the investigation of the issues alleged by the IRP Claimants regarding the Portal Configuration.<sup>14</sup>

Pursuant to the Board's directive, as described in detail below, ICANN org conducted a thorough forensic investigation of the Portal Configuration and related allegations by the IRP Claimants. ICANN org found no evidence that HTLD received any unfair advantage in the CPE process as a result of the Portal Configuration or that any information obtained as a result of the Portal Configuration was used to support HTLD's Application in CPE.

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<sup>10</sup> See Despegar IRP Panel Declaration (<https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>). Travel Reservations SRL (one of the Requestors) was formerly known as Despegar Online SRL. Request 16-11, § 1, at Pg. 1 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-request-redacted-25aug16-en.pdf>).

<sup>11</sup> *Id.* at ¶ 49. See also Additional Submission Reply to ICANN's Response by Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC, dated 19 Oct. 2015, Pgs. 18-20, (<https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-additional-submission-19oct15-en.pdf>).

<sup>12</sup> *Id.* ¶ 151.

<sup>13</sup> *Id.* ¶¶ 134-38.

<sup>14</sup> Resolutions 2016.03.10.10 – 2016.03.10.11 (<https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>).

After taking into consideration all relevant information concerning the forensic investigation into the Portal Configuration, the Board passed the 2016 Resolutions, concluding that the cancellation of HTLD's Application was not warranted, and directed ICANN org to move forward with processing HTLD's Application.<sup>15</sup>

Thereafter, the Requestors submitted Request 16-11 seeking reconsideration of the 2016 Resolutions.<sup>16</sup>

While Request 16-11 was pending, the ICANN Board and BGC directed ICANN org to undertake a review of certain aspects of the CPE process (CPE Process Review). As discussed in further detail in the Facts section below, the CPE Process Review (i) evaluated the process by which ICANN org interacted with the CPE Provider; (ii) evaluated whether the CPE criteria were applied consistently throughout and across each CPE report; and (iii) compiled the research relied upon by the CPE Provider for the evaluations which are the subject of pending Reconsideration Requests.<sup>17</sup> The BGC determined that the pending Reconsideration Requests relating to CPEs, regardless of the basis for those requests, including Request 16-11, would be placed on hold until the CPE Process Review was completed.<sup>18</sup>

On 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).<sup>19</sup>

On 15 March 2018, the Board passed Resolutions 2018.03.15.08 through 2018.03.15.11 (2018 Resolutions), which accepted the findings in the CPE Process Review Reports; declared

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<sup>15</sup> *Id.*

<sup>16</sup> Request 16-11.

<sup>17</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>;  
<https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

<sup>18</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>19</sup> See <https://www.icann.org/news/announcement-2017-12-13-en>.

the CPE Process Review complete; concluded that, there would be no overhaul or change to the CPE process for this current round of the New gTLD Program; and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to CPEs that had been placed on hold.<sup>20</sup>

Subsequently, the BAMC invited the Requestors to provide a telephonic presentation to the BAMC in support of Request 16-11, which the Requestors did on 19 July 2018. The BAMC also invited the Requestors to submit additional written materials in response to the CPE Process Review Reports.

The BAMC has reviewed all relevant materials and submissions by the Requestors in support of Request 16-11 to date. The BAMC finds that reconsideration is not warranted because the Board considered all material information, did not disregard any material information, and did not rely on false or inaccurate material information when it adopted the 2016 Resolutions. Moreover, the BAMC finds that there is no evidence supporting the Requestors' claim that the Board failed to consider the purported "unfair advantage" HTLD obtained as a result of the Portal Configuration. The BAMC also finds that there is no evidence supporting the Requestors' claim that the Board discriminated against the Requestors accepting the CPE results on HTLD's Application. Accordingly, there is no evidence that the Board's adoption of the 2016 Resolutions were based on false information or that the Board failed to consider material information in doing so, and the BAMC recommends that the Board deny Request 16-11.

## **II. Facts.**

As referenced above, in their challenge of the 2016 Resolutions, the Requestors raise

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<sup>20</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

arguments relating to the CPE result of HTLD's Application, the Portal Configuration, and the overall CPE process. The following are the key facts relevant to the Requestors' claims.

**A. The .HOTEL Contention Set**

Seven applications were submitted for the .HOTEL gTLD: six standard applications submitted by the Requestors and one community-based application submitted by HTLD.<sup>21</sup> All seven applications were placed into a contention set.<sup>22</sup> As a designated community-based application, HTLD participated and prevailed in CPE.<sup>23</sup> As a result, HTLD's Application prevailed over all other applications in the .HOTEL contention set and none of the Requestors' applications for the .HOTEL will proceed.

**B. The Requestors' Challenges to the CPE Result Regarding HTLD's Application.**

On 28 June 2014, the Requestors challenged the CPE result of HTLD's Application through Reconsideration Request 14-34.<sup>24</sup> The BGC denied Request 14-34 because the Requestors did not identify any misapplication of a policy or procedure by the CPE Provider. Rather, the Requestors simply disagreed with the merits of the CPE Provider's Report, which the BGC determined was not a proper basis for reconsideration.<sup>25</sup>

On 22 September 2014, the Requestors filed a second Reconsideration Request: Request 14-39. This Request challenged ICANN org's response to the Requestors' request for documentary information relating to the CPE of HTLD's Application pursuant to ICANN's Documentary Information Disclosure Policy (2014 DIDP).<sup>26</sup> On 11 October 2014, the BGC

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<sup>21</sup> See <https://gtldresult.icann.org/applicationstatus/applicationdetails/1562>.

<sup>22</sup> See Contention Set Diagram, HOTEL (<https://gtldresult.icann.org/applicationstatus/contentionsetdiagram/51>).

<sup>23</sup> See CPE Report (<https://newgtlds.icann.org/sites/default/files/tlds/hotel/hotel-cpe-1-1032-95136-en.pdf>).

<sup>24</sup> Request 14-34 (<https://www.icann.org/en/system/files/files/request-despegar-online-et-al-28jun14-en.pdf>).

<sup>25</sup> BGC Determination on Request 14-34 (<https://www.icann.org/en/system/files/files/determination-despegar-online-et-al-22aug14-en.pdf>).

<sup>26</sup> Request 14-39 (<https://www.icann.org/en/system/files/files/request-despegar-online-et-al-22sep14-en.pdf>).

determined that the Requestors' claims did not support reconsideration and denied Request 14-39.<sup>27</sup>

On 4 March 2015, some of the Requestors filed the Despegar IRP, challenging, among other things, the BGC's Determinations on Requests 14-34 and 14-39.<sup>28</sup> While the Despegar IRP was pending, the IRP Claimants raised new claims concerning the Portal Configuration. The IRP Claimants asserted that "ICANN must reject HTLD's Application for .hotel"<sup>29</sup> because the user who purportedly exploited the Portal Configuration issue to access confidential data of other applications, including some of the Requestors' applications for .HOTEL, was associated with HTLD.<sup>30</sup> On 11 February 2016, the Despegar IRP Panel declared ICANN the prevailing party.<sup>31</sup> The Panel specifically declared that

in relation to each of the specific issues raised in the .hotel . . . IRP[] that it is satisfied that the BGC acted consistently with the provisions of ICANN's Articles [] and Bylaws, and that the Claimants' complaints have not been made out.<sup>32</sup>

The Despegar IRP Panel also noted that the IRP Claimants raised a number of serious concerns with respect to the Portal Configuration. The Panel declined to make a finding on this claim because it was raised well after the IRP process had commenced and the ICANN Board was still considering it.<sup>33</sup> The Board subsequently accepted the findings of the Despegar IRP

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<sup>27</sup> BGG Determination on Request 14-39, Pg. 4 (<https://www.icann.org/en/system/files/files/determination-despegar-online-et-al-11oct14-en.pdf>).

<sup>28</sup> Despegar IRP Request, Pgs. 8-10 (<https://www.icann.org/en/system/files/files/irp-request-redacted-10mar15-en.pdf>).

<sup>29</sup> *Id.* ¶49.

<sup>30</sup> See Additional Submission Reply to ICANN's Response by Despegar Online SRL, Donuts Inc., Famous Four Media Limited, Fegistry LLC and Radix FZC, dated 19 Oct. 2015, at Pgs. 18-20 (<https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-additional-submission-19oct15-en.pdf>).

<sup>31</sup> Despegar IRP Panel Declaration (<https://www.icann.org/en/system/files/files/irp-despegar-online-et-al-final-declaration-12feb16-en.pdf>).

<sup>32</sup> *Id.* ¶151.

<sup>33</sup> *Id.* ¶¶ 134-38.



Panel and directed ICANN org to complete the investigation of the issues alleged by the IRP Claimants regarding the Portal Configuration.<sup>34</sup>

Pursuant to the Board's directive, ICANN org completed an investigation of the issues regarding the Portal Configuration and provided the Board with its findings. The details of the forensic investigation are discussed in detail in the following section. After consideration of all relevant information concerning the forensic investigation into the Portal Configuration and the Requestors' claims relating to the Portal Configuration, the Board passed the 2016 Resolutions.<sup>35</sup> The 2016 Resolutions concluded that the cancellation of HTLD's Application was not warranted, and directed ICANN org to move forward with processing HTLD's Application.<sup>36</sup>

### **C. The Portal Configuration.**

In late February 2015, ICANN org discovered that the privacy settings for the new gTLD applicant and GDD portals had been misconfigured, which resulted in authorized users of the portals (New gTLD Program applicants and new gTLD registry operators) being able to see information belonging to other authorized users without the permission.<sup>37</sup>

Upon becoming aware of the Portal Configuration issue, ICANN org took the portals offline to re-configure the privacy settings and to prevent any further unauthorized access. ICANN org also began a forensic investigation to identify instances of unauthorized access to information on the portals.<sup>38</sup> ICANN org retained two independent firms to review and analyze

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<sup>34</sup> Resolutions 2016.03.10.10 – 2016.03.10.11 (<https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>).

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> Portal Configuration Notice (<https://www.icann.org/news/announcement-2015-03-01-en>); New gTLD Applicant and GDD Portals Q&A (<https://www.icann.org/en/system/files/files/new-gtld-applicant-portal-qa-rysg-20aug15-en.pdf>).

<sup>38</sup> *See* New gTLD Applicant and GDD Portal Update (<https://www.icann.org/news/announcement-2015-03-01-en>); Update: New gTLD Applicant and GDD Portal Back Online (<https://www.icann.org/news/announcement-3-2015-03-02-en>); Update: New gTLD Applicant and GDD Portal Q&A Published

the full set of log files detailing activity on the portals going back to when the portals first launched. The firms confirmed that over 60 searches, resulting in the unauthorized access of more than 200 records, were conducted from March through October 2014 using a limited set of user credentials issued to Mr. Dirk Krischenowski and his associates, Mr. Oliver Süme and Ms. Katrin Ohlmer.<sup>39</sup>

ICANN org informed the parties whose data was viewed and provided them with information regarding: (1) the name(s) of the user(s) whose credentials were used to view their information without their authorization or by individuals that were not officially designated by their org to access certain data; (2) any explanation(s) and/or certification(s) that the user(s) provided to ICANN regarding the unauthorized access; (3) the date(s) and time(s) of access; and (4) what portion(s) of their data was seen.<sup>40</sup> Some of the Requestors were among the affected parties whose data relating to their .HOTEL applications were viewed by Mr. Krischenowski.<sup>41</sup>

ICANN org also contacted the users, including Messrs. Krischenowski and Süme and Ms. Ohlmer, who appeared to have viewed information that was not their own, and required that they provide an explanation of their activity. ICANN org also asked them to certify that they will delete or destroy all information obtained and to certify that they have not and will not use the data or convey it to any third party.<sup>42</sup>

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(<https://www.icann.org/news/announcement-4-2015-03-02-en>); New gTLD Applicant and GDD Portal Update (<https://www.icann.org/news/announcement-2015-04-30-en>).

<sup>39</sup> See Announcement: New gTLD Applicant and GDD Portals Update (<https://www.icann.org/news/announcement-2015-05-27-en>); Response to DIDP Request No. 20150605-1 (<https://www.icann.org/en/system/files/files/didp-response-20150605-1-petillion-05jul15-en.pdf>); ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>).

<sup>40</sup> Announcement: New gTLD Applicant and GDD Portals Update (<https://www.icann.org/news/announcement-2015-05-27-en>); Response to DIDP Request No. 20150605-1 (<https://www.icann.org/en/system/files/files/didp-response-20150605-1-petillion-05jul15-en.pdf>).

<sup>41</sup> See 23 February 2016 Letter from ICANN org to Despegar (Guillermo Luis Perrone), (<https://www.icann.org/en/system/files/bm/briefing-materials-2-2-redacted-09aug16-en.pdf> at Pgs. 95-96).

<sup>42</sup> Announcement: New gTLD Applicant and GDD Portals Update (<https://www.icann.org/news/announcement-2015-05-27-en>).

Mr. Krischenowski acknowledged that he accessed confidential information of other users, but denied that he acted improperly or unlawfully. Among other things, Mr. Krischenowski claimed that he did not realize the portal issue was a malfunction, and that he used the search tool in good faith. Mr. Krischenowski and his associates also certified to ICANN that they would delete or destroy all information obtained, and affirmed that they had not used and would not use the information obtained, or convey it to any third party.<sup>43</sup>

ICANN's investigation revealed that at the time that Mr. Krischenowski accessed confidential information, he was not directly linked to HTLD's Application as an authorized contact or as a shareholder, officer, or director. Rather, Mr. Krischenowski was a 50% shareholder and managing director of HOTEL Top-Level-Domain GmbH, Berlin (GmbH Berlin), which was a minority (48.8%) shareholder of HTLD. Mr. Philipp Grabensee, the sole Managing Director of HTLD, informed ICANN org that Mr. Krischenowski was "not an employee" of HTLD, but that Mr. Krischenowski acted as a consultant for HTLD's Application at the time it was submitted in 2012. Mr. Grabensee further verified that HTLD "only learned about [Mr. Krischenowski's access to the data] on 30 April 2015 in the context of ICANN's investigation." Mr. Grabensee stated that the business consultancy services between HTLD and Mr. Krischenowski were terminated as of 31 December 2015.<sup>44</sup>

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<sup>43</sup> Rationale for Resolutions 2016.08.09.14 – 2016.08.09.15 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>).

<sup>44</sup> Letter from Mr. Philipp Grabensee to ICANN (<https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-23mar16-en.pdf>). The Requestors assert that Ms. Ohlmer has also been associated with HTLD. *See* Request 16-11 § 8, at Pg. 15. The Board considered this information when passing the 2016 Resolutions. *See* Rationale for Resolutions 2016.08.09.14 – 2016.08.09.15 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>). The BAMC concludes that Ms. Ohlmer's prior association with HTLD, which the Requestors acknowledge ended no later than 17 June 2016 (Request 16-11 § 8, at Pg. 15) does not support reconsideration because there is no evidence that any of the confidential information that Ms. Ohlmer (or Mr. Krischenowski) improperly accessed was provided to HTLD or resulted in an unfair advantage to HTLD's Application in CPE.

In its investigation, ICANN org did not uncover any evidence that: (i) the information Mr. Krischenowski may have obtained as a result of the portal issue was used to support HTLD's Application; or (ii) any information obtained by Mr. Krischenowski enabled HTLD's Application to prevail in CPE. HTLD submitted its application in 2012, elected to participate in CPE on 19 February 2014, and prevailed in CPE on 11 June 2014. Mr. Krischenowski's first instance of unauthorized access to confidential information did not occur until early March 2014; and his searches relating to the .HOTEL applicants did not occur until 27 March, 29 March and 11 April 2014.<sup>45</sup>

On 29 July 2015 and 8 March 2016, Despegar requested that ICANN cancel HTLD's Application.<sup>46</sup>

On 9 August 2016, after the conclusion of ICANN org's Portal Configuration investigation, the Board considered the Requestors' request for cancellation of HTLD's Application.<sup>47</sup> The Board concluded that, even assuming that Mr. Krischenowski did obtain confidential information belonging to the .HOTEL applicants, this would not have had any impact on the CPE process for HTLD's Application. Specifically, whether HTLD's Application met the CPE criteria was based upon the application as submitted in May 2012, or when the last documents amending the application were uploaded by HTLD on 30 August 2013<sup>48</sup> – all of which occurred before Mr. Krischenowski or his associates accessed any confidential

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<sup>45</sup> Resolutions 2016.08.09.14 – 2016.08.09.15 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>).

<sup>46</sup> See Letter from Requestors to ICANN org (<https://www.icann.org/en/system/files/correspondence/petillion-to-atallah-08mar16-en.pdf>). See also Briefing Materials (2) for Special Meeting of the ICANN Board (Minutes), 9 August 2016 at Pgs. 95-96 (<https://www.icann.org/en/system/files/bm/briefing-materials-2-2-redacted-09aug16-en.pdf>).

<sup>47</sup> Resolutions 2016.08.09.14 – 2016.08.09.15, dated 8 August 2016 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>).

<sup>48</sup> *Id.*

information, which occurred from March 2014 through October 2014. HTLD did not submit a change request during CPE to amend its application, nor did it submit any documentation that could have been considered by the CPE panel.<sup>49</sup> In fact, the last documents amending HTLD's Application were uploaded on 16 August and 30 August 2013 (change of address and additional endorsements), well before the unauthorized access.<sup>50</sup> The Board also concluded that there was no evidence or claim by the Requestors that the CPE Panel had any interaction at all with Mr. Krischenowski or HTLD during the CPE process, which began on 19 February 2014.<sup>51</sup> The Board declined to cancel HTLD's Application<sup>52</sup> and directed ICANN org to move forward with processing HTLD's Application.<sup>53</sup>

**D. Request 16-11.**

The Requestors submitted Request 16-11<sup>54</sup> asserting that the 2016 Resolutions are inconsistent with ICANN org's Articles and Bylaws because by accepting the CPE results of HTLD's Application, the Board is awarding "undue priority [ ] to an application that refers to a 'community' construed merely to get a sought-after generic word as a gTLD string" when "the purpose of community based applications has never been to eliminate competition among applicants for a generic TLD."<sup>55</sup> The Requestors also asserted that in deciding to proceed with HTLD's Application, the Board did not consider "the unfair competitive advantage" that HTLD allegedly gained by exploiting the Portal Configuration to obtain trade secrets of competing

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<sup>49</sup> Briefing Materials in Support of Resolutions 2016.08.09.14 – 2016.08.09.15, Pgs. 95-96 (<https://www.icann.org/en/system/files/bm/briefing-materials-2-2-redacted-09aug16-en.pdf>).

<sup>50</sup> *See id.* at Pgs. 156-158.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> Request 16-11 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-request-redacted-25aug16-en.pdf>).

<sup>55</sup> *Id.*, § 6, at Pgs. 5-6.

applicants.<sup>56</sup> The Requestors also alleged that the Board discriminated against the Requestors by refusing to reconsider its position on HTLD’s CPE determination when it did so for other applicants and asked the Board to conduct a meaningful review of the .HOTEL CPE to ensure consistency of approach in the application of the CPE criteria by the CPE Provider.<sup>57</sup> The Requestors did not challenge the application of particular CPE criteria to HTLD’s Application or a particular finding by the CPE Provider on any of the CPE criteria.

On 16 December 2016, at the BGC’s invitation, the Requestors made a telephonic presentation to the BGC regarding Request 16-11.<sup>58</sup> Pursuant to the BGC’s request during the presentation, the Requestors provided the Board with a written statement of their position concerning Request 16-11.<sup>59</sup> The Requestors argued that even though Krischenowski’s unauthorized access to confidential information did not occur until after HTLD submitted its application and elected to participate in CPE, the information HTLD obtained “would create an unfair advantage for HTLD over competing registry operators in the event that HTLD were allowed to operate the .hotel gTLD,” and Krischenowski’s behavior was “unacceptable to the Internet behavior and it should remain so because it is in violation of the application rules and not in the interest of the Internet community as a whole.”<sup>60</sup>

#### **E. The CPE Process Review.**

On 17 September 2016, the Board directed ICANN org to undertake a review of the “process by which ICANN [org] interacted with the CPE Provider, both generally and

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<sup>56</sup> *Id.*, § 8, at Pg. 9-11.

<sup>57</sup> Request 16-11, §§ 8-9, at Pgs. 18, 20.

<sup>58</sup> Minutes, Board Governance Committee Meeting, 16 December 2016 (<https://www.icann.org/resources/board-material/minutes-bgc-2016-12-16-en>).

<sup>59</sup> Letter from Crowell and Moring to ICANN Board, dated 28 December 2016 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-crowell-moring-to-board-redacted-28dec16-en.pdf>).

<sup>60</sup> *Id.* at Pg. 2.

specifically with respect to the CPE reports issued by the CPE Provider” as part of the Board’s oversight of the New gTLD Program (Scope 1).<sup>61</sup> The Board’s action was part of the ongoing discussions regarding various aspects of the CPE process, including some issues that were identified in the Final Declaration from the IRP proceeding initiated by Dot Registry, LLC.

The BGC later determined that the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations that are the subject of pending Reconsideration Requests relating to the CPE process (Scope 3).<sup>62</sup> Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. The BGC determined that the pending Requests relating to the CPE process, including Request 16-11, would be on hold until the CPE Process Review was completed.<sup>63</sup>

FTI Consulting, Inc.’s (FTI) Global Risk and Investigations Practice and Technology Practice were retained to conduct the CPE Process Review. On 13 December 2017, ICANN org published FTI’s reports issued in connection with the CPE Process Review (the CPE Process Review Reports).

With respect to Scope 1, FTI concluded:

there is no evidence that ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process.<sup>64</sup>

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<sup>61</sup> ICANN Board Rationale for Resolution 2016.09.17.01 (<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>).

<sup>62</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

<sup>63</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>64</sup> Scope 1 Report, at Pg. 2 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>).

FTI also concluded that “ICANN organization had no role in the evaluation process and no role in writing the initial draft CPE report,” and reported that the “CPE Provider stated that it never changed the scoring or the results [of a CPE report] based on ICANN organization’s comments.”<sup>65</sup>

For Scope 2, “FTI found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner.”<sup>66</sup>

For Scope 3, FTI compiled the research relied upon by the CPE Provider for the evaluations which are the subject of the pending Reconsideration Requests relating to CPE.<sup>67</sup> The results of Scope 3 of the CPE Process Review are set forth in the CPE Process Review Reports, and are not relevant to the issues raised in Request 16-11.<sup>68</sup>

On 15 March 2018, the Board acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the remaining Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.<sup>69</sup> As part of the process, the BAMC invited the Request 16-11 Requestors to “submit additional information relating to Request 16-11, provided the submission is limited to any new information/argument based upon the CPE Process Review Reports” by 2 April 2018. The BAMC also invited the

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<sup>65</sup> *Id.*, at Pg. 9, 15.

<sup>66</sup> Scope 2 Report, at Pg. 2 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>).

<sup>67</sup> Scope 3 Report, at Pg. 3-4 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>).

<sup>68</sup> *See id.*

<sup>69</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.



Request 16-11 Requestors to “make a telephonic oral presentation to the BAMC in support of” Request 16-11. The BAMC requested “that any such presentation be limited to providing additional information that is relevant to the evaluation of Request 16-11 and that is not already covered by the written materials.”<sup>70</sup>

#### **F. The Requestors’ Response to the CPE Process Review.**

The Requestors challenged the Board’s acceptance of the CPE Process Review Reports in a series of letters in January and February 2018.<sup>71</sup>

Subsequently, the Requestors accepted the BAMC’s invitation to submit additional materials and to provide a telephonic presentation to the BAMC, and on 9 April 2018, the Requestors submitted a letter to the Board concerning the 2018 Resolutions. The Requestors asserted that the Board passed the resolutions “without considering Request[o]rs’ arguments against accepting the findings set forth in the CPE Process Review Reports,” and “[i]nstead . . . considered that Request[o]rs will have the opportunity to address their arguments in support of . . . Request 16-11.”<sup>72</sup> The Requestors asserted that the 2018 Resolutions “make[] a meaningful review of [the] main arguments expressed by Request[o]rs impossible.”<sup>73</sup> The Requestors believed that “upholding [the 2018 Resolutions] would preclude the ICANN Board from

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<sup>70</sup> 19 March 2018 email from ICANN org to Flip Petillion, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-bamc-recommendation-attachment-1-14jun18-en.pdf>.

<sup>71</sup> See 16 January 2018 letter from Petillion to BAMC (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-16jan18-en.pdf>); 1 February 2018 letter from Petillion to BAMC, (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>); and 22 February 2018 letter from Petillion to BAMC (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-22feb18-en.pdf>). Although the subject lines of these letters reference Request 16-11, the letters challenged the Board action concerning the CPE Process Review, which is the subject of Request 18-6, filed by a subset of the Requestors. Accordingly, the Board has considered and addressed the claims raised in these letters in its consideration of Request 18-6.

<sup>72</sup> 9 April 2018 letter from Petillion to Board at Pg. 1 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-09apr18-en.pdf>).

<sup>73</sup> *Id.*

granting the remedies requested by Request[ors] in the framework of . . . Request 16-11.”<sup>74</sup> The Requestors concluded that the 2018 Resolutions were “either careless and incompetent or prejudiced.”<sup>75</sup>

On 14 April 2018, a subset of the Requestors<sup>76</sup> submitted Request 18-6, challenging the 2018 Resolutions.<sup>77</sup> The Requestors claimed that the 2018 Resolutions are contrary to ICANN org’s commitments to transparency and to applying documented policies in a consistent, neutral, objective, and fair manner.<sup>78</sup> The Board denied Request 18-6 on 18 July 2018.<sup>79</sup>

### **G. Relief Requested**

The Requestors ask the BAMC to:

1. “[R]everse the [2016 Resolutions] . . . and declare that HTLD’s application for .hotel is cancelled, and . . . take whatever steps towards HTLD it deems necessary”;
2. “[T]ake all necessary steps to ensure that Requestors’ applications for .hotel remain in contention until Requestors have self-resolved the contention set, or until Requestors have resolved the contention set in an auction, organized by ICANN”;
3. “[E]ngage in conversations with Requestors,” organize a hearing, and “refrain from executing the registry agreement with HTLD, and . . . provide full transparency about all communications between ICANN, the ICANN Board, HTLD, the [CPE Provider] and third parties . . . regarding HTLD’s application for .hotel”; and

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<sup>74</sup> *Id.* at Pg. 1-2.

<sup>75</sup> *Id.* at Pg. 2.

<sup>76</sup> Spring McCook, LLC, Famous Four Media Limited, and dot Hotel Limited, all parties to Request 16-11, were *not* parties to Request 18-6. Travel Reservations SRL, Minds + Machines Group Limited, Radix FZC, dot Hotel Inc., and Fegistry LLC are parties to Request 16-11 and 28-6. *Compare* Request 18-6 § 1, at Pg. 2-3 (<https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-request-redacted-14apr18-en.pdf> with [Request 16-11, § 1, at Pg. 1-3](#)).

<sup>77</sup> Request 18-6, § 2, at Pg. 3.

<sup>78</sup> *Id.* § 7, at Pg. 6-7.

<sup>79</sup> Board action on Request 18-6 (<https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.g>).

4. If the Board decides to not cancel HTLD’s Application, then it should “take[] the necessary steps to ensure a meaningful review of the CPE regarding .hotel, ensuring consistency of approach with its handling of the *Dot Registry* [IRP Panel Declaration].”<sup>80</sup>

### **III. Issues Presented.**

The issue is as follows:

1. Whether the Board’s adoption of the 2016 Resolutions occurred without consideration of material information or were taken as a result of its reliance on false or inaccurate material information.

### **IV. The Relevant Standards for Reconsideration Requests.**

Article IV, Section 2.1 and 2.2 of ICANN’s Bylaws<sup>81</sup> provide 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);
- (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.<sup>82</sup>

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<sup>80</sup> Request 16-11, § 9, Pg. 20.

<sup>81</sup> The BAMC has considered Request 16-11 under the 11 February 2016 version of the Bylaws (the version in effect when the Requestors submitted Request 16-11).

<sup>82</sup> ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.1, 2.2.

Where, as here, the reconsideration request seeks reconsideration of Board action, the operative version of the Bylaws direct the BAMC<sup>83</sup> to review the request and provide a recommendation to the Board.<sup>84</sup> Denial of a request for reconsideration of ICANN org action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>85</sup>

Reconsideration requests from different parties may be considered in the same proceeding if: (1) the requests involve the same general action or inaction; and (ii) the parties submitting the requests are similarly affected by such action or inaction.<sup>86</sup>

On 26 April 2017, the BGC placed Request 16-11 on hold, and it remained on hold until 15 March 2018 when the Board directed the BAMC to proceed with its evaluation of Request 16-11. Accordingly, the BAMC has reviewed Request 16-11 and all relevant materials, and issues this Recommendation.

## **V. Analysis and Rationale.**

### **A. The Board Adopted The 2016 Resolutions After Considering All Material Information And Without Reliance On False Or Inaccurate Material Information.**

The Requestors appear to be dissatisfied with ICANN org’s investigation of the Portal Configuration and the Board’s decision to allow HTLD’s Application to proceed, asserting that ICANN org “failed to properly investigate and address illegal actions.”<sup>87</sup> However, under the relevant Bylaws, reconsideration is permitted only to challenge Board actions taken either: (a)

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<sup>83</sup> As noted above, *supra* n.2, the BAMC is currently tasked with reviewing and making recommendations to the Board on reconsideration requests. See ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

<sup>84</sup> See ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.3, 2.10, 2.15.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* § 2.8.

<sup>87</sup> Request 16-11, § 8, Pg. 14.

without consideration of material information, or (b) in reliance on false or inaccurate material information.<sup>88</sup> The Requestors fail to identify any material information that the Board allegedly failed to consider or any Board action taken in reliance on false or inaccurate material information. As such, the Requestors fail to identify a proper basis for reconsideration.

1. The Requestors Have Not Identified False or Misleading Information that the Board Relied Upon, or Material Information that the Board Did Not Consider, In Investigating The Portal Configuration.

The Requestors assert that reconsideration is warranted because ICANN org “failed to properly investigate and address illegal actions,” insofar as ICANN org did not verify Mr. Krischenowski’s affirmation that he did not and would not provide the information he accessed to HTLD or its personnel.<sup>89</sup> However, contrary to the Requestors’ claim, ICANN org *did* verify that statement when it obtained HTLD’s confirmation that none of its personnel received that information.<sup>90</sup> ICANN org concluded that Mr. Krischenowski’s affirmation that he and his associates did not and would not share the confidential information with HTLD, coupled with HTLD’s confirmation that it did not receive the confidential information, was sufficient verification under ICANN org’s policies and procedures, and the Requestors have not identified a policy or procedure that required ICANN org to undertake different or additional verification processes.

Even if Mr. Krischenowski (or his associates) had obtained sensitive business documents belonging to the Requestors, it would not have had any impact on the CPE process for HTLD’s Application, for a number of reasons. First, CPE is performed by the CPE Provider, and entails

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<sup>88</sup> Bylaws, Article IV, § 2.2.

<sup>89</sup> Request 16-11, § 8, Pg. 14.

<sup>90</sup> See Letter from Mr. Philipp Grabensee to ICANN organization (<https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-23mar16-en.pdf>).

scoring each application according to four specified criteria: (i) community establishment; (ii) nexus between the proposed string and community; (iii) registration policies; and (iv) community endorsement.<sup>91</sup> The Requestors have not explained how confidential documents belonging to the other applicants for .HOTEL could impact these criteria, which do not consider other entities' confidential information.

Second, even if the information obtained by Mr. Krischenowski could have had an impact in some way on the CPE process (there is no evidence that it did, as discussed below), that information was not obtained by Mr. Krischenowski until late in March 2014, when the CPE process for HTLD's Application was already underway. While Mr. Krischenowski's access occurred prior to the issuance of the CPE Report in June 2014, HTLD did not submit a change request during CPE to amend its application, nor did it submit any documentation that could have been considered by the CPE panel.<sup>92</sup> In fact, the last documents amending HTLD's Application were uploaded on 16 August and 30 August 2013 (the change of address and additional endorsements), well before the unauthorized access.<sup>93</sup> There is no evidence that the CPE Panel had any interaction at all with Mr. Krischenowski during the CPE process, and therefore there is no reason to believe that the CPE Panel ever received the confidential information that Mr. Krischenowski obtained.<sup>94</sup>

Nor does the BAMC agree with the Requestors' assertion that ICANN org "failed to properly investigate" the Portal Configuration. As detailed above, ICANN org undertook a careful and thorough analysis of the Portal Configuration. Pursuant to the Board's directive on

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<sup>91</sup> See Guidebook, § 4.2.

<sup>92</sup> Briefing Materials in Support of Resolutions 2016.08.09.14 – 2016.08.09.15, Pgs. 95-96 (<https://www.icann.org/en/system/files/bm/briefing-materials-2-2-redacted-09aug16-en.pdf>).

<sup>93</sup> See *id.* at Pgs. 156-158.

<sup>94</sup> *Id.* at Pg. 95-96.

10 March 2016, ICANN org completed its investigation of the issues raised by the Requestors regarding the Portal Configuration. The Requestors have not identified any false or inaccurate material information they allege the Board relied on, and for the reasons discussed in section V.A.2 below, the Board *did* consider the evidence that the Requestors claim it ignored. Indeed, as noted above, ICANN org did not uncover—and the Requestors have not identified—any evidence that: (i) the information Mr. Krischenowski may have obtained as a result of the portal issue was used to support HTLD’s Application; or (ii) any information obtained by Mr. Krischenowski enabled HTLD’s Application to prevail in CPE.<sup>95</sup>

Moreover, the Requestors have not offered any evidence that Mr. Krischenowski shared the Requestors’ confidential information with HTLD.<sup>96</sup> In the course of ICANN org’s investigation, Mr. Krischenowski affirmed that he and his associates had not used and would not use the information obtained, or convey it to any third party,<sup>97</sup> and HTLD confirmed that Mr. Krischenowski did not inform HTLD’s personnel about “his action” and “did not provide any of the accessed information” to HTLD or its personnel.<sup>98</sup> The Board’s conclusion that Mr. Krischenowski did not provide confidential information to HTLD is not changed simply because Mr. Krischenowski was a 50% shareholder and managing director of a minority (48.8%) shareholder of HTLD.<sup>99</sup> Without evidence that the confidential information was shared, Mr. Krischenowski’s corporate holdings alone are not sufficient to demonstrate that HTLD received

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<sup>95</sup> Resolutions 2016.08.09.14 – 2016.08.09.15 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>).

<sup>96</sup> See Request 16-11.

<sup>97</sup> ICANN Board Resolutions 2016.08.09.14 – 2016.08.09.15 (<https://www.icann.org/resources/board-material/resolutions-2016-08-09-en#2.h>).

<sup>98</sup> Letter from Mr. Philipp Grabensee to ICANN organization (<https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-23mar16-en.pdf>).

<sup>99</sup> *Id.*

any of the information that Mr. Krischenowski accessed and/or that HTLD gained some “unfair advantage” from Mr. Krischenowski’s access to the information.

This evidence also undermines the Requestors’ argument that information Mr. Krischenowski obtained “would create an unfair advantage for HTLD over competing registry operators in the event that HTLD were allowed to operate the .hotel gTLD.”<sup>100</sup> Because ICANN org’s investigation determined that there was no evidence that HTLD received the Requestors’ confidential information, the Requestors’ assertion that the information will create an unfair advantage for HTLD if it is allowed to operate the .HOTEL gTLD does not support reconsideration.

2. The Requestors Have Not Identified False or Misleading Information that the Board Relied Upon, or Material Information that the Board Did Not Consider, In Deciding to Allow HTLD’s Application To Proceed.

The Requestors claim that the Board “failed to consider the unfair competitive advantage HTLD obtained by maliciously accessing trade secrets of prospective registry operators.”<sup>101</sup> The Requestors state that “allowing HTLD’s Application to proceed ... amounts to an acquiescence in criminal acts.”<sup>102</sup> The BAMC considers these claims very seriously, but must conclude that they do not support reconsideration, insofar as the Requestors do not identify any action taken by the Board without material information or in reliance on false or inaccurate information. Rather, the Requestors appear to simply disagree with the Board’s actions in adopting the 2016 Resolutions; however, the Requestor’s disagreement with the merits of the Board’s decision, alone, without evidentiary support that it was taken without material

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<sup>100</sup> Letter from Crowell and Moring to ICANN Board, dated 28 December 2016, at Pg. 2 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-crowell-moring-to-board-redacted-28dec16-en.pdf>).

<sup>101</sup> Request 16-11, § 8, Pg. 9.

<sup>102</sup> *Id.* at Pg. 16.



information or in reliance on false or inaccurate information, is not a proper basis for reconsideration.<sup>103</sup>

As discussed in more detail above, the Requestors have not identified any material information that the Board failed to consider (nor any false material information that the Board relied on) when it accepted ICANN org's conclusion that Mr. Krischenowski's and his associates' access to confidential information had no effect on the CPE outcome of HTLD's Application and that HTLD did not receive any unfair benefit from Mr. Krischenowski's access to the information.

The Board's decision to allow HTLD's Application to proceed was made following a comprehensive investigation, and was well reasoned and consistent with ICANN org's Articles and Bylaws. In particular, in reaching its decision that HTLD's Application should not be excluded, the Board carefully considered the results of ICANN org's forensic review and investigation of the Portal Configuration and the Requestors' claims relating the alleged impact of Portal Configuration on the CPE of HTLD's Application. The details of ICANN org's investigation into these matters are described above.

Further, the Board did consider the actions of Mr. Krischenowski and his associates. The Board evaluated the timeline of events, Mr. Krischenowski's affirmations that he did not and would not share the confidential information with any third party, and HTLD's confirmation that it did not receive the confirmation. Based on all of this evidence, the Board determined that the Requestors were not harmed as a result of the information Mr. Krischenowski and his associates obtained through the portal misconfiguration. As discussed above, ICANN org did not uncover any evidence that: (i) the information Mr. Krischenowski may have obtained as a

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<sup>103</sup> *Id.* at Pg. 9.

result of the Portal Configuration was used to support HTLD's Application; or (ii) any information obtained by Mr. Krischenowski enabled HTLD's Application to prevail in CPE. The Requestors provide no evidence otherwise nor do the Requestors cite to any evidence demonstrating the alleged unfair competitive advantage gained by HTLD as a result of the Portal Configuration that the Board failed to consider. Accordingly, the Requestors' claims do not support reconsideration.

The Requestors also ignore the evidence uncovered by ICANN org during its investigation of the Portal Configuration. In particular, as evidenced in the letters exchanged with HTLD, at the time of his apparent access to materials belonging to the Requestors, Mr. Krischenowski was not an employee of HTLD, did not use HTLD's login ID to access the portal, and was merely a 50% shareholder in an entity that was a minority shareholder in HTLD.<sup>104</sup> Moreover, the Requestors fail to identify the specific harm they will have suffered as a result of Mr. Krischenowski's actions, and even concede that the information obtained by Mr. Krischenowski and his associates "may not have directly impacted HTLD's position as an applicant."<sup>105</sup> As such, contrary to Requestors' assertions, the Board fully considered whether the Portal Configuration conferred an unfair competitive advantage to HTLD, and concluded that the misconfiguration had no bearing on the CPE process for .HOTEL or the Requestors' applications for .HOTEL.

Despite all of this, the Requestors maintain that the information Mr. Krischenowski obtained "would create an unfair advantage for HTLD over competing registry operators in the event that HTLD were allowed to operate the .hotel gTLD," and Mr. Krischenowski's behavior

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<sup>104</sup> Letter from Mr. Philipp Grabensee to ICANN (<https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-23mar16-en.pdf>).

<sup>105</sup> Request 16-11, § 8, Pg. 15.

was “unacceptable to the Internet behavior and it should remain so because it is in violation of the application rules and not in the interest of the Internet community as a whole.”<sup>106</sup> But the Requestors do not identify any false or inaccurate information or any information that the Board did not consider, to support this argument. Accordingly, this argument does not support reconsideration.

In conclusion, far from relying upon incomplete or false information, the Board carefully considered all of the materials and issues presented and came to a well-reasoned decision based on these considerations in adopting the 2016 Resolutions.

**B. The Board Did Not Rely Upon False Or Misleading Information In Accepting The Despegar IRP Panel’s Declaration.**

Although Request 16-11 challenges the Board’s conduct as it “relate[s] to the Board Resolutions 2016.08.09.14 and 2016.08.09.15, approved on 9 August 2016,”<sup>107</sup> which concern the Board’s consideration of the request for cancellation of HTLD’s Application, the Requestors also appear to challenge the Board’s acceptance of the Despegar IRP Panel’s Declaration. In particular, the Requestors assert that “the Despegar et al. IRP Panel relied on false and inaccurate material information,” such that “[w]hen the ICANN Board accepted the Despegar et al. IRP Declaration, it relied on the same false and inaccurate material information.”<sup>108</sup>

As an initial matter, the Requestors’ claim is time-barred. The Board’s resolution accepting the findings of the Despegar IRP Panel’s Declaration was published on 10 March 2016.<sup>109</sup> Request 16-11 was submitted on 25 August 2016, over five months after the Board’s

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<sup>106</sup> Letter from Crowell and Moring to ICANN Board, dated 28 December 2016, at Pg. 2 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-crowell-moring-to-board-redacted-28dec16-en.pdf>).

<sup>107</sup> Request 16-11, § 3, Pg. 3.

<sup>108</sup> *Id.*, § 8, Pg. 9.

<sup>109</sup> 2016 Resolutions (<https://www.icann.org/resources/board-material/resolutions-2016-03-10-en#2.a>).

acceptance of the Despegar IRP Panel's Declaration, and well past the 15-day time limit to seek reconsideration of a Board action.<sup>110</sup>

1. The Requestors' Claims Regarding the Dot Registry and Corn Lake IRP Panel Declarations Do Not Support their Claims of Discrimination.

Even had the Requestors timely challenged the Board's acceptance of the Despegar IRP Panel's Declaration, their claims do not support reconsideration. The Requestors cite to the IRP Panel Declaration issued in *Dot Registry, LLC v. ICANN* (Dot Registry IRP Panel Declaration) to support their claim that the Despegar IRP Panel Declaration was based "upon the false premise that the [CPE Provider's] determinations are presumptively final and are made independently by the [CPE Provider], without ICANN's active involvement."<sup>111</sup> In particular, the Requestors claim that the Dot Registry IRP Panel Declaration demonstrates that "ICANN did have communications with the evaluators that identify the scoring of individual CPEs,"<sup>112</sup> such that the Despegar IRP Panel relied upon false information (namely ICANN org's representation in its Response to the 2014 DIDP Request that ICANN org does not engage in communications with individual evaluators, which was the subject of Request 14-39), when it found ICANN org to be the prevailing party. As a result, the argument goes, the ICANN Board also relied upon false information when it accepted the Despegar IRP Panel Declaration. The Requestors also argue that they are "situated similarly" to the Dot Registry claimants, and therefore if the Board refuses to grant the Requestors relief when the Board granted the Dot Registry claimants relief, then the Board is discriminating against the Requestors in contradiction to ICANN's Articles and Bylaws. The Dot Registry IRP Declaration and the Board's response to it, however, do not support the Requestors' request for reconsideration.

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<sup>110</sup> ICANN Bylaws, 11 February 2016, Art. IV, § 2.5.

<sup>111</sup> Request 16-11, § 8, Pg. 12.

<sup>112</sup> *Id.* (emphasis in original).

As an initial matter, the findings of one IRP Panel cannot be summarily applied in the context of an entirely separate, unrelated, and different IRP. The Dot Registry IRP concerned the .LLC, .INC, and .LLP gTLD strings. The Despegar IRP, by contrast, concerned .HOTEL. During the CPE process, .LLC, .INC, and .LLP were each awarded 5 out of 16 points, and therefore did not prevail in CPE; the .HOTEL string was awarded 15 out of 16 points, and therefore did prevail in CPE.<sup>113</sup> Different issues were considered in each IRP, based on different arguments presented by different parties concerning different applications and unrelated factual situations. As such, there is no support for the Requestors' attempt to apply the findings of the Dot Registry IRP Declaration to the Despegar IRP.

The Requestors similarly cite the Board's acceptance of the final declaration in *Corn Lake, LLC v. ICANN*, (Corn Lake IRP Declaration) and decision "to extend its final review procedure to include review of Corn Lake's charity expert determination."<sup>114</sup> The Requestors argue that a refusal to implement some form of review mechanism here would amount to inconsistent and discriminatory treatment, in violation of the Bylaws.<sup>115</sup> The argument does not support reconsideration. The Corn Lake IRP Declaration explains that ICANN org has "discretion to make decisions regarding its review processes as set out in the Applicant Guidebook, which may well require it to draw nuanced distinctions between different applications or categories of applications. Its ability to do so must be preserved as being in the best interest of the Internet community as a whole."<sup>116</sup> As was the case with the Dot Registry IRP, the circumstances in the Corn Lake IRP and the Board's subsequent decision concerning

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<sup>113</sup> See .LLC, .INC, .LLP, and .HOTEL CPE Reports (<https://newgtlds.icann.org/en/applicants/cpe>).

<sup>114</sup> Letter from Crowell and Moring to ICANN Board, dated 28 December 2016, at Pg. 4-5 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-crowell-moring-to-board-redacted-28dec16-en.pdf>).

<sup>115</sup> *Id.*

<sup>116</sup> Corn Lake IRP Declaration, ¶ 8.98 (<https://www.icann.org/resources/pages/corn-lake-v-icann-2015-04-07-en>).

.CHARITY involved different facts and distinct considerations specific to the circumstances in Corn Lake’s application. As such, the Board’s action there does not amount to inconsistent or discriminatory treatment; it is instead an example of the way that the Board must “draw nuanced distinctions between different [gTLD] applications,”<sup>117</sup> and is consistent with ICANN org’s Articles and Bylaws.

2. The CPE Process Review Confirms that ICANN Org did not have any Undue Influence on the CPE Provider with respect to the CPEs Conducted.

The Requestors argue that ICANN org exerted undue influence over the CPE Provider’s execution of CPE.<sup>118</sup> The ICANN Board considered and addressed this assertion in the 2018 Resolutions, and the BAMC incorporates that reasoning here by reference.<sup>119</sup>

The standards governing CPE are set forth in Module 4.2 of the Guidebook. CPE will occur only if a community-based applicant selects CPE and after all applications in the contention set have completed all previous stages of the gTLD evaluation process.<sup>120</sup> CPE is performed by an independent panel composed of two evaluators who are appointed by the CPE Provider.<sup>121</sup> A CPE panel’s role is to determine whether the community-based application fulfills the four community priority criteria set forth in Module 4.2.3 of the Guidebook. The four criteria are: (i) community establishment; (ii) nexus between proposed string and community; (iii) registration policies; and (iv) community endorsement. To prevail in CPE, an applicant must receive at least 14 out of 16 points on the scoring of the foregoing four criteria, each of which is worth a maximum of four points.

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<sup>117</sup> *Id.*

<sup>118</sup> Request 16-11, § 8, at Pg. 12-13.

<sup>119</sup> 2018 Resolutions (<https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>).

<sup>120</sup> Guidebook, Module 4.2.

<sup>121</sup> *Id.* Module 4.2.2.

The CPE Process Review’s Scope 1 Report confirms that “there is no evidence that ICANN org had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process,” including with respect to HTLD’s Application.<sup>122</sup> The Requestors believe that the Scope 1 Report demonstrates that “the CPE Provider was not independent from ICANN. Any influence by ICANN in the CPE was contrary to the policy, and therefore undue.”<sup>123</sup> The Requestors do not identify what “policy” they are referring to, but regardless, their disagreement with the conclusions of the Scope 1 Report do not support reconsideration. This is because the Requestors do not dispute that, when ICANN org provided input to the CPE Provider, that input did *not* involve challenging the CPE Provider’s conclusions, but rather was to ensure that the CPE Reports were clear and “that the *CPE Provider’s* conclusions”—not ICANN org’s conclusions—were “supported by sufficient reasoning.”<sup>124</sup> The Requestors also cite “phone calls between ICANN and the CPE Provider to discuss ‘various issues,’” claiming that those calls “demonstrate that the CPE Provider was not free from external influence from ICANN” org and was therefore not independent.<sup>125</sup>

Neither of these facts demonstrates that the CPE Provider was “not independent” or that ICANN org exerted undue influence over the CPE Provider. These types of communications instead demonstrate that ICANN org protected the CPE Provider’s independence by focusing on ensuring that the CPE Provider’s conclusions were clear and well-supported, rather than

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<sup>122</sup> FTI Scope 1 Report at Pg. 3 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>).

<sup>123</sup> 1 February 2018 letter from Petillion to BAMC, at Pg. 3 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>).

<sup>124</sup> 1 February 2018 letter from Petillion to BAMC, at Pg. 3, citing FTI Scope 1 Report, at Pg. 12 (emphasis added).

<sup>125</sup> *Id.*

directing the CPE Provider to reach a particular conclusion. This argument therefore does not support reconsideration.

Because the Scope 1 Report demonstrates that ICANN org did not exert undue influence on the CPE Provider and CPE process, it disproves the Requestors' claim that "the *Despegar et al.* IRP Panel was given incomplete and misleading information" which is based solely on the premise of ICANN org's undue influence in the CPE process.<sup>126</sup>

3. The Requestors Have Not Demonstrated that ICANN Org was Obligated to Produce Communications Between ICANN Org and the CPE Panel.

The Requestors suggest that there is unfairness by virtue of the fact that certain communications between ICANN org and the applicable CPE panel were produced in the Dot Registry IRP, but not in the Despegar IRP.<sup>127</sup> There is no support for the Requestors' assertions in this regard and reconsideration is not warranted on this basis.

Dispositive of this claim is the fact that ICANN org was not ordered by the IRP Panel to produce any documents in the Despegar IRP, let alone documents that would reflect communications between ICANN org and the CPE panel. And no policy or procedure required ICANN org to voluntarily produce documents during the Despegar IRP or thereafter.<sup>128</sup> In contrast, during the Dot Registry IRP, the Dot Registry IRP Panel ordered ICANN org to produce all documents reflecting "[c]onsideration by ICANN of the work performed by the [CPE Provider] in connection with Dot Registry's application" and "[a]cts done and decisions taken by ICANN with respect to the work performed by the [CPE Provider] in connection with Dot

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<sup>126</sup> *Id.*, at Pg. 3.

<sup>127</sup> See Letter from Crowell and Moring to ICANN Board, dated 28 December 2016, at Pg. 3 (<https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-crowell-moring-to-board-redacted-28dec16-en.pdf>).

<sup>128</sup> Nothing in ICANN's Bylaws, the DIDP, or other policy or procedure requires ICANN to voluntarily produce in the course of an IRP documents that were properly withheld in response to a DIDP request.



Registry’s applications.”<sup>129</sup> ICANN org’s communications with the CPE panels for .INC, .LLC, and .LLP fell within the scope of such requests, and thus were produced. Ultimately, ICANN org acted in accordance with applicable policies and procedures, including ICANN’s Bylaws, in both instances.<sup>130</sup>

4. The Requestors Have Not Demonstrated that a New CPE Review of HTLD’s Application is Appropriate.

Finally, without identifying particular CPE criteria, the Requestors ask the Board to “ensure meaningful review of the CPE regarding .hotel, ensuring consistency of approach with its handling of the *Dot Registry* [IRP Panel Declaration].”<sup>131</sup> To the extent the Requestors are asserting that the outcome of the CPE analysis of HTLD’s Application is inconsistent with other CPE applications, this argument was addressed in Scope 2 of the CPE Process Review. There, “FTI found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner.”<sup>132</sup> Additionally, for the reasons discussed in above, neither the .HOTEL CPE nor the 2016 Resolutions evidence inconsistent or discriminatory treatment toward the Requestors. For these reasons, this argument does not support reconsideration.

**C. The 2018 Resolutions Are Consistent With ICANN’s Mission, Commitments, Core Values and Established ICANN Policy(ies).**

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<sup>129</sup> Procedural Order No. 3, *Dot Registry LLC v. ICANN*, ICDR Case No. 01-14-0001-5004 (<https://www.icann.org/resources/pages/dot-registry-v-icann-2014-09-25-en>).

<sup>130</sup> The Requestors were fully aware that communications occurred between ICANN staff and the CPE panel, since such communications are expressly contemplated in the CPE Panel Process Document and ICANN disclosed the existence of these communications in the 2014 DIDP Response. See CPE Panel Process Document (<https://newgtlds.icann.org/en/applicants/cpe>) (“The Economist Intelligence Unit works with ICANN when questions arise or when additional process information may be required to evaluate an application.”).

<sup>131</sup> Request 16-11, § 9, Pg. 20.

<sup>132</sup> Scope 2 Report, at Pg. 2 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>).

The Requestors' criticisms of the 2018 Resolutions focus on the transparency, methodology, and scope of the CPE Process Review. None support reconsideration. The BAMC notes that it addressed the Requestors' concerns regarding the 2018 Resolutions in its Recommendation on Request 18-6,<sup>133</sup> which the Board adopted on 18 July 2018.<sup>134</sup> The rationales set forth by the BAMC, and the Board in its determination of Request 18-6, are incorporated herein by reference.

## **VI. Recommendation**

The BAMC has considered the merits of Request 16-11 and, based on the foregoing, concludes that the Board acted consistent with the Guidebook and did not violate ICANN's Mission, Commitments and Core Values when it passed the 2016 Resolutions. Accordingly, the BAMC recommends that the Board deny Request 16-11.

In terms of the timing of this decision, Section 2.16 of Article IV of the Bylaws applicable to Request 16-11 provides that the BAMC shall make a final determination or recommendation with respect to a reconsideration request within thirty days, unless impractical. To satisfy the thirty-day deadline, the BAMC would have to have acted by 24 September 2016. However, Request 16-11 was placed on hold pending completion of the CPE Process Review. The Requestors were then provided an opportunity to supplement their arguments in light of the CPE Process Review results, and to make a second presentation to the BAMC. The Requestors submitted additional written materials in January, February, and April 2018. Accordingly, the first opportunity that the BAMC had to fully consider Request 16-11 was 16 November 2018.

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<sup>133</sup> BAMC Recommendation on Request 18-6 (<https://www.icann.org/en/system/files/files/reconsideration-18-6-trs-et-al-bamc-recommendation-14jun18-en.pdf>).

<sup>134</sup> Resolution 2918.07.18.09 (<https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.g>).

## Rebuttal to the BAMC Recommendation in Reconsideration Request 16-11

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Requesters<sup>1</sup> submit this Rebuttal to the Board Accountability Mechanisms Committee's ('BAMC') Recommendation on Reconsideration Request (RfR) 16-11 (the 'Recommendation'). The Recommendation concerns Requesters' request that the Board (i) reverse Resolutions 2016.08.09.14 through 2016.08.09.15 (the '2016 Resolutions'), (ii) declare that HTLD's application for .hotel is cancelled, and take whatever steps towards HTLD it deems necessary, (iii) organize a hearing for Requestors following disclosure of the documents asked for, (iv) take the necessary steps to ensure a meaningful review of the CPE regarding .hotel, ensuring consistency of approach with its handling of other cases such as the Dot Registry, the Corn Lake and the Ruby Pike cases, and (v) address the inconsistencies in the CPE report on .hotel.

As Requesters explain in this rebuttal, the BAMC's Recommendation is based on both factual errors and on a misrepresentation of Requesters' position and of the applicable rules.

### **I. PRELIMINARY REMARKS**

#### **A. Imbalance due to formal requirements and lack of transparency**

This rebuttal is submitted in accordance with Article 4(2)(q) of ICANN's Bylaws (the 'Bylaws'). However, the formal requirements of Article 4(2)(q) and the circumstances of this case create an unjustified imbalance that prevents Requesters from participating in the reconsideration proceedings in a meaningful way. The imbalance is illustrated by the fact that, since the date of the last telephonic hearing in this case (*i.e.*, 19 July 2018), the BAMC took almost four months to prepare its 33-page Recommendation, whereas Requesters must respond within 15 days in a 10-page rebuttal. What is more, Requesters are given no access to essential documents kept by ICANN<sup>2</sup> and are therefore not given a fair opportunity to contest all arguments and evidence adduced by the BAMC. Without access to the underlying documents, Requesters are unable to verify many of the BAMC's factual arguments.

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<sup>1</sup> Travel Reservations SRL, Minds + Machines Group Limited, Radix FZC, dot Hotel Inc. and Fegistry LLC.

<sup>2</sup> *E.g.*, the report that was to be made by ICANN's President and CEO or his designee(s) on the portal configuration issue, the communications between ICANN and CPE Provider, between ICANN and HTLD, etc.

As a result, this rebuttal is not intended to be a complete statement of the elements of fact or law relevant to this matter and is sent without prejudice and reserving all rights.

### **B. Applicable Bylaws**

The BAMC has considered RfR 16-11 under a previous version of the Bylaws, namely the version of 11 February 2016.<sup>3</sup> However, when establishing its own authority to review and consider RfR 16-11, the BAMC refers to a more recent version of the Bylaws, namely the version of 22 July 2017.<sup>4</sup>

There is no valid ground to consider RfR 16-11 under a previous version of the Bylaws, let alone a ground for the BAMC, or the ICANN Board, to pick and choose which version of the Bylaws it uses, depending on the circumstances. The BAMC and the ICANN Board must use the version of the Bylaws that is applicable when making their recommendation *c.q.* decision. For that reason alone, the BAMC errs when it maintains that “under the relevant Bylaws, reconsideration is permitted only to challenge Board actions taken either: (a) without consideration of material information, or (b) in reliance on false or inaccurate material information.”<sup>5</sup> Indeed, the applicable version of the Bylaws (version of 18 June 2018) explicitly provides that RfRs may be submitted *inter alia* “to the extent that the requestor has been adversely affected by [...] one or more Board or Staff actions or inactions that contradict ICANN’s Mission, Commitments, Core Values and/or established ICANN policy(ies)”. This provision explicitly confirms a long-established principle that the ICANN Board must warrant observance of its Mission, Commitments, Core Values and established policies<sup>6</sup>, just like the ICANN Board must comply with all fundamental principles of its Articles of Incorporation and Bylaws<sup>7</sup>. When, as in the case at hand, it is confronted with a violation of its Rules or Principles, the ICANN Board must offer corrective measures to those parties affected.

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<sup>3</sup> Recommendation 16-11, p. 18, fn. 81; pp. 19-20.

<sup>4</sup> Recommendation, p. 2, fn. 9; p. 19, fn. 83.

<sup>5</sup> Recommendation, pp. 19-20.

<sup>6</sup> ICANN’s Mission, Commitments, Core Values and established policies are collectively referred to hereinafter as ‘Rules’.

<sup>7</sup> These fundamental principles are collectively referred to hereinafter as ‘Principles’.

Moreover, even if reconsideration was only permitted to challenge Board actions on the limited grounds examined by the BAMC (*quod non*), reconsideration would still be warranted, as the challenged Board decisions were taken (a) without consideration of material information, and (b) in reliance on false or inaccurate material information.

**II. ICANN FAILED TO CONSIDER MATERIAL INFORMATION ON HTLD AND ITS CEO'S INVOLVEMENT IN THE UNAUTHORIZED ACCESS TO OTHER APPLICANTS' CONFIDENTIAL INFORMATION**

As described in RfR 16-11, Requesters learnt from the 2016 Resolutions that Mr. Krischenowski was not the only individual affiliated to HTLD who violated Requesters' trade secrets. Mr. Oliver Süme and Ms. Katrin Ohlmer, HTLD's CEO at the time, were also "responsible for numerous instances of suspected intentional unauthorized access to other applicants' confidential information".<sup>8</sup>

However, in the 2016 Resolutions, the ICANN Board ignored the role of Ms. Ohlmer. As is apparent from the whereas clauses of the decision and the rationale, the ICANN Board only considered Mr. Krischenowski's behavior and not to the material facts of Ms. Ohlmer's intentional unauthorized access to other applicants' confidential information and her role as HTLD's CEO when accessing the confidential information.

The BAMC ignores that this material information was not considered by the ICANN Board and should, along with the other facts in this matter, have led to the disqualification of HTLD as an applicant. The Recommendation mentions Ms. Ohlmer's unauthorized involvement in a footnote, (i) alleging that Requesters acknowledge that Ms. Ohlmer's prior association with HTLD had ended no later than 17 June 2016, and (ii) concluding that her prior association with HTLD does not support reconsideration "because there is no evidence that any of the confidential information that Ms. Ohlmer (or Mr. Krischenowski) improperly accessed was provided to HTLD or resulted in an unfair advantage to HTLD's Application in CPE."<sup>9</sup>

Both the BAMC's allegation and its conclusion are incorrect. First, Requesters' statement that Ms. Ohlmer was listed as CEO in HTLD's application until 17 June 2016 is not an

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<sup>8</sup> See rationale to the 2016 Resolutions.

<sup>9</sup> Recommendation, p. 10, fn.44.

acknowledgment that Ms. Ohlmer's prior association with HTLD had ended by then. Second, Ms. Ohlmer illegally accessed confidential information at a time when she was CEO of HTLD. Through her access of this confidential information as CEO, the information was automatically provided to HTLD. Indeed, the individual who manages (or managed) HTLD was informed of competitors' trade secrets as from the moment Ms. Ohlmer accessed the confidential information. HTLD acknowledged that she was (i) principally responsible for representing HTLD, (ii) highly involved in the process of organizing and garnering support for the .hotel application, and (iii) responsible for the day-to-day business operations of HTLD. The fact that unauthorized access occurred on more than one occasion by different individuals associated to HTLD and that information contained in the applications of direct competitors was targeted, shows that the unauthorized access by HTLD's executives was made willfully and with intent.

Instead of acknowledging this fact and taking appropriate action by cancelling HTLD's application, ICANN fully relied on limited, self-serving and unverified statements by Mr. Philipp Grabensee<sup>10</sup> – HTLD's newly appointed Managing Director who had all interest in securing the investment in HTLD, made by a company of which he is a co-founder and deputy chairman – and an alleged, but undisclosed, affirmation by Mr. Krischenowski<sup>11</sup> through legal counsel.<sup>12</sup> The fact that the latter affirmation remains undisclosed is a clear violation of ICANN's transparency obligations. Even the identity of Mr. Krischenowski's legal counsel remains hidden. For all we know, Mr. Krischenowski might have been represented by Mr. Grabensee<sup>13</sup> or anyone else with a personal interest in HTLD. There is also no sign that Mr. Süme and Ms. Ohlmer made similar affirmations as the one allegedly made by Mr. Krischenowski. Without access to the underlying documents, it is impossible to

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<sup>10</sup> Letter from Mr. Philipp Grabensee to ICANN of 23 March 2016, <https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-23mar16-en.pdf>; letter from Mr. Philipp Grabensee to ICANN of 18 May 2016, <https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-18may16-en.pdf>; BAMC Recommendation, p. 10.

<sup>11</sup> BAMC Recommendation, p. 20: “ICANN org concluded that Mr. Krischenowski's affirmation that he and his associates did not and would not share the confidential information with HTLD, coupled with HTLD's confirmation that it did not receive the confidential information, was sufficient verification under ICANN org's policies and procedures [...]”

<sup>12</sup> Letter from ICANN to HTLD of 16 March 2016, <https://www.icann.org/en/system/files/correspondence/willett-to-lenz-hawliczek-16mar16-en.pdf>.

<sup>13</sup> Mr. Philip Grabensee is a German lawyer, practicing criminal law. See: <http://www.shsg.de/desk/index.php?id=44>.

verify the precise content and meaning of any such affirmations or even their existence. In any event, given Ms. Ohlmer's position with HTLD at the time of illegal access, it is impossible for her to make an affirmative statement that she did not and would not share the confidential information with HTLD. As a result, it is also impossible for HTLD to confirm that it did not access the confidential information.

Moreover, contrary to ICANN's claim, HTLD never confirmed that it did not "receive the confidential information".<sup>14</sup> Mr. Grabensee's self-serving statement on which ICANN bases its conclusion is carefully worded and makes a distinction between HTLD's personnel and HTLD. His statement reads as follows in the relevant paragraph:

"Mr. Krischenowski did not inform [HTLD]'s personnel of his action and did not provide any of the accessed information to [HTLD] or its personnel. [HTLD]'s personnel did not have any knowledge about Mr. Krischenowski's action, and did not consent to it or approve it. They only learned about it on 30 April 2015 in the context of ICANN's investigation."

This statement does not allow for the inference that HTLD did not (i) receive the information, or (ii) otherwise access the confidential information. Moreover, the statement regarding Mr. Krischenowski not informing about his actions only relates to HTLD's personnel; not to HTLD as such, HTLD's owners, or HTLD's (self-employed) executives.

In addition, even if HTLD had confirmed that it did not receive, or was not provided with, the confidential information, such a confirmation would not suffice. Ms. Ohlmer's actions, as disclosed in the 2016 Resolutions, show that HTLD accessed the confidential information it illegally obtained. Any statement to the contrary would not be credible.

In any event, the fact that ICANN read into Mr. Grabensee's statement a confirmation by HTLD that it did not receive the confidential information shows that the challenged Board decisions were made in reliance on false or inaccurate material information, as no such confirmation was made by HTLD. Contrary to ICANN's allegations, Requesters do not ignore the "evidence" allegedly uncovered by ICANN.<sup>15</sup> But Requesters challenge the lack of

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<sup>14</sup> BAMC Recommendation, p. 20.

<sup>15</sup> Recommendation, p. 25.

a critical review by ICANN of HTLD's self-serving statements and the fact that ICANN has only given a sparse view on this untested "evidence".

**III. ICANN FAILED TO CONSIDER MATERIAL INFORMATION DEMONSTRATING THAT THE INFORMATION ILLEGALLY OBTAINED BY MR. KRISCHENOWSKI WAS USED TO HTLD'S BENEFIT**

ICANN failed to consider *inter alia* the material information that (i) HTLD waited for almost an entire year, and after being summoned by ICANN, to terminate its relationship with Mr. Krischenowski, (ii) Mr. Krischenowski's illegal access to trade secrets must have influenced his decision making and his consultancy services to HTLD, (iii) HTLD kept Mr. Krischenowski as consultant until 31 December 2015 (*i.e.*, more than eight months after HTLD was summoned by ICANN), and (iv) HTLD has not provided any explanation as to why it kept Mr. Krischenowski as a consultant until 31 December 2015, although HTLD admits it knew about Mr. Krischenowski's illegal actions at least since 30 April 2015. HTLD has given no information whatsoever about Mr. Krischenowski's consultancy services between April 2014 and December 2015.<sup>16</sup>

There can be no doubt about the fact that Mr. Krischenowski used the information he illegally accessed to the benefit of HTLD, a company he had invested in through his 50% share in one of HTLD's major shareholders (*infra*). Indeed, Mr. Krischenowski cannot undo his actions, nor the fact that he illegally obtained trade secrets of HTLD's competitors. Even if Mr. Krischenowski considered that there was no need to change HTLD's plans or to inform HTLD about the information he accessed, such decision would have been influenced by the information he obtained illegally. As a result, there is sufficient evidence that the information Mr. Krischenowski obtained as a result of the portal issue was used to support HTLD's application.

**IV. ICANN FAILED TO CONSIDER MATERIAL INFORMATION AS IT IGNORED ITS RULES, PRINCIPLES AND ITS POLICIES AND PROCEDURES TO DISQUALIFY APPLICATIONS FROM THE NEW gTLD PROGRAM**

As explained in RfR 16-11, allowing HTLD's application to proceed is contrary to ICANN's

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<sup>16</sup> See: letter from Mr. Philipp Grabensee to ICANN of 18 May 2016, <https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-18may16-en.pdf>: HTLD only provided information about the period leading to HTLD's application, limited information about Mr. Krischenowski's consultancy services in March 2014 and information about the absence of a relationship on 18 May 2016.



Rules and Principles. ICANN caught not one, but multiple representatives of HTLD stealing trade secrets of competing applicants via the use of computers and the Internet. This kind of behavior was listed explicitly among the circumstances leading to the automatic disqualification from the New gTLD Program.<sup>17</sup> ICANN failed to consider this material fact and information in its decision that cancellation of HTLD's application is not warranted. ICANN's decision goes against the text and the spirit of the allocation criteria for critical Internet resources.

As part of its background screening, which is in place “to protect the public interest in the allocation of critical Internet resources”, ICANN was going to assess the behavior and antecedents of an applying entity's directors, officers, partners and major shareholders. At least two of HTLD's representatives engaged in illegal behavior that constitutes a ground for automatic disqualification from the New gTLD Program. When they committed the crime, Ms. Ohlmer was HTLD's CEO and Mr. Krischenowski was a major shareholder of HTLD through his 50% share in HOTEL Top-Level-Domain GmbH, Berlin (GmbH Berlin). GmbH Berlin was a 48,8% shareholder of HTLD. As a result, Mr. Krischenowski, who was GmbH Berlin's CEO, held 24,4% of the shares in HTLD through GmbH Berlin.

The BAMC is silent about Ms. Ohlmer's role as CEO and it tries to downplay Mr. Krischenowski's stake in HTLD by stating that he was “merely a 50% shareholder in an entity that was a minority shareholder in HTLD.”<sup>18</sup> Remarkably, the word “merely” was added by ICANN. It does not appear in the letter from Mr. Grabensee to which ICANN refers, when making this statement.<sup>19</sup> ICANN's own addition of the word “merely” suggests that ICANN was biased in its consideration of the matter. The point is all the stronger as the Guidebook provides that a shareholder holding at least 15% of shares in an applicant is a major shareholder, subject to background screening.<sup>20</sup> Also this material information was

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<sup>17</sup> gTLD Applicant Guidebook (v. 2012-06-04), Module 1-22.

<sup>18</sup> BAMC Recommendation, p. 25 (emphasis added).

<sup>19</sup> BAMC Recommendation, p. 25, fn. 104; Letter from Mr. Philipp Grabensee to ICANN of 23 March 2016, <https://www.icann.org/en/system/files/correspondence/grabensee-to-willett-23mar16-en.pdf>

<sup>20</sup> gTLD Applicant Guidebook (v. 2012-06-04), Module 2-3 *juncto* Attachment to Module 2, A-7, Question 11(c).

ignored by ICANN in its apparent effort to deemphasize Mr. Krischenowski's close affiliation with HTLD.

**V. ICANN'S FAILURE AND UNWILLINGNESS TO CONSIDER MATERIAL INFORMATION**

As is apparent from *inter alia* RfR 16-11, Requesters' letter of 28 December 2016 and Section III above, Requesters have demonstrated the unfair competitive advantage gained by HTLD as a result of Mr. Krischenowski's and Ms. Ohlmer's illegal access to trade secrets of competing applicants. ICANN's failure to consider the full extent of HTLD's unfair competitive advantage is evidenced by Mr. Cherine Chalaby's question during a telephone conversation on 16 December 2016 between the BGC and counsel to Requesters. Mr. Chalaby asked if the request to have HTLD's application cancelled was really appropriate, given that the unauthorized access by HTLD executives was not relevant as regards HTLD's application, which had already been filed. The fact that this question was raised by the ICANN Board Member who seconded the 2016 Resolutions<sup>21</sup> shows that the ICANN Board had not previously considered (i) the unfair advantage for HTLD over competing registry operators in the event that HTLD were allowed to operate the .hotel gTLD, (ii) the unfair advantage for HTLD in its application strategy, as it obtained intelligence that may have influenced its decision to maintain its application, nor (iii) the fact that HTLD's illegal access to trade secrets amounted to behavior that is unacceptable to the Internet community. This material information was previously submitted to ICANN and the ICANN Board, but has demonstrably never been considered by the Board.

The Recommendation suggests that ICANN is not willing to consider this material information. Instead, ICANN continues to focus solely on the immediate effects of Mr. Krischenowski's actions to HTLD's application and the CPE process. With respect to the latter, the Recommendation states:

“There is no evidence that the CPE Panel had any interaction at all with Mr. Krischenowski during the CPE process, and therefore there is no reason to believe that

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<sup>21</sup> ICANN, *Minutes - Special Meeting of the ICANN Board*, 9 August 2016, <https://www.icann.org/resources/board-material/minutes-2016-08-09-cn#2.h>.

the CPE Panel ever received the confidential information that Mr. Krischenowski obtained.”<sup>22</sup>

Apart from the fact that HTLD’s unfair competitive advantage exists also without any interactions between the CPE Panel and Mr. Krischenowski, it is striking that ICANN is apparently not in a position to make an affirmative statement that no such interactions took place. The fact that ICANN cannot confirm that there were no interactions between the CPE Panel and individuals associated to HTLD shows the insufficiency of the CPE Process review and of ICANN’s alleged “forensic review and investigation”.

The BAMC also considers that “the Board determined that the Requestors were not harmed as a result of the information Mr. Krischenowski and his associates obtained through the portal misconfiguration.”<sup>23</sup> However, the Board never made such determination, nor could it make such a determination, as Requesters’ trade secrets were violated.

In any event, ICANN’s focus on the effects and harm caused by the illegal actions by HTLD representatives is misplaced. Even if the harmful effects might not be immediately visible, that has no bearing on this matter. The fact remains that it is inappropriate to allocate a critical Internet resource to a party that has been cheating. Illegal activities are not judged by their harmful effects.

**VI. ICANN FAILED TO CONSIDER MATERIAL INFORMATION THAT WARRANTS A MEANINGFUL REVIEW OF THE CPE REGARDING .HOTEL**

Somewhat provocatively, the BAMC alleges that Requesters do not challenge the application of the CPE criteria to HTLD’s application or a particular finding by the CPE Provider on any of the CPE criteria.<sup>24</sup> That is simply not true. Requesters challenged ICANN’s decision for violation of ICANN’s Articles of Incorporation and Bylaws *inter alia* by the inconsistent and erroneous application of CPE criteria and for ICANN’s failure to correct these inconsistencies.<sup>25</sup>

Requesters also challenge the fact that ICANN has prejudged on, and failed to consider, the

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<sup>22</sup> Recommendation, p. 21.

<sup>23</sup> Recommendation, p. 24.

<sup>24</sup> Recommendation, p. 1.

<sup>25</sup> See e.g., RfR 16-11, pp. 10-11; Letter from Requesters to ICANN of 1 February 2018, <https://www.icann.org/en/system/files/files/reconsideration-16-11-trs-et-al-petillion-to-icann-bamc-redacted-01feb18-en.pdf>, pp. 3-4.

arguments against accepting the conclusions of the FTI report.<sup>26</sup> In addition, Requesters maintain their arguments with respect to ICANN's discriminatory treatment. The BAMC's assertion that ICANN's handling of .charity involved different facts and circumstances<sup>27</sup> is unsupported and ICANN provides no justification for its disparate treatment.

With respect to the communications between ICANN and the CPE Panel, there is no reason for ICANN not to disclose these. Without access to these documents, Requesters are not in a position to dispute allegations made by ICANN. Requesters have every reason to be suspicious, as ICANN has previously made false statements about the existence of these documents. Indeed, ICANN made a clear and comprehensive statement that it did not have any communications with the evaluators that identify the scoring of any individual CPE.<sup>28</sup> However, the FTI report revealed that ICANN has been commenting on the clarity of reasoning behind assigning one score or another and provided feedback to the CPE Provider's draft reports.<sup>29</sup> ICANN could not have made such comments without access to communications that identify the scoring of individual CPEs. Without full transparency about the CPE of .hotel, ICANN fails to provide a meaningful review.

## VII. CONCLUSION

Based on the foregoing and on the reasons expressed in RfR 16-11 and the letters exchanged in relation to this RfR, Requesters request that the Board deny the BAMC Recommendation and grant RfR 16-11.

Respectfully submitted,

30 November 2018



Flip Petillion  
Counsel for Requesters

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<sup>26</sup> See Recommendation, p. 29; The arguments made in relation to RfR 18-6 are incorporated here by reference.

<sup>27</sup> Recommendation, pp. 28-29.

<sup>28</sup> *Despegar et al.* IRP Declaration, § 95.

<sup>29</sup> FTI Report, Scope 1, <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>, p. 16; see also *Id.* At pp. 9, 14 and 15.

## REFERENCE MATERIALS – BOARD PAPER NO. 2019.01.27.1j

**TITLE:** **Consideration of Reconsideration Request 16-12**

### **Documents**

The following attachments are relevant to the Board's consideration of Reconsideration Request 16-12.

Attachment A is [Reconsideration Request 16-12](#), submitted on 15 August 2016.

Attachment B is a [letter from Merck & Co., Inc. to the Board Governance Committee \(BGC\)](#), dated 15 November 2016.

Attachment C is a [Written Summary of the Requestor's 29 March 2017 Oral Presentation to the BGC](#), dated 31 March 2017.

Attachment D is a [letter from the Requestor to the ICANN Board](#), dated 24 October 2017.

Attachment E is the [Requestor's Supplemental Submission in Support of Request 16-12](#), dated 14 April 2018.

Attachment F is the [Requestor's Written Submission in Support of Oral Presentation to the BAMC on 4 September 2018](#), dated 20 September 2018.

Attachment G is the [BAMC Recommendation on Request 16-12](#), issued 14 December 2018.

### **Background Links**

The following links are relevant to the Board's consideration of Reconsideration Request 16-12.

Annex 1 submitted in support of the Requestor's Request 16-12 is available at <https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kгаа-annex-1-25aug16-en.pdf>.

Annex 2 submitted in support of the Requestor's Request 16-12 is available at <https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kгаа-annex-2-redacted-25aug16-en.pdf>.

Annex 3 submitted in support of the Requestor's Request 16-12 is available at <https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kгаа-annex-3-25aug16-en.pdf>.

Annex 4 submitted in support of the Requestor's Request 16-12 is available at <https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kгаа-annex-4-25aug16-en.pdf>.

The Community Priority Evaluation (CPE) Process Review Scope 1 Report is available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>.

The CPE Process Review Scope 2 Report is available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

The CPE Process Review Scope 3 Report is available at <https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>.

Submitted By: Amy Stathos, Deputy General Counsel

Date Noted: 14 January 2019

Email: amy.stathos@icann.org

## Reconsideration Request Form

ICANN's Board Governance Committee is responsible for receiving requests for reconsideration from any person or entity that has been materially affected by any ICANN staff action or inaction if such affected person or entity believes the action contradicts established ICANN policies, or by actions or inactions of the Board that such affected person or entity believes has been taken without consideration of material information. Note: This is a brief summary of the relevant Bylaws provisions. For more information about ICANN's reconsideration process, please visit <http://www.icann.org/en/general/bylaws.htm#IV> and <http://www.icann.org/en/committees/board-governance/>.

This form is provided to assist a requester in submitting a Reconsideration Request, and identifies all required information needed for a complete Reconsideration Request. This template includes terms and conditions that shall be signed prior to submission of the Reconsideration Request.

Requesters may submit all facts necessary to demonstrate why the action/inaction should be reconsidered. However, argument shall be limited to 25 pages, double-spaced and in 12 point font.

*For all fields in this template calling for a narrative discussion, the text field will wrap and will not be limited.*

Please submit completed form to [reconsideration@icann.org](mailto:reconsideration@icann.org).

### **1. Requester Information**

Name: Merck KGaA

Representative: Dr. Torsten Bettinger

Address: Contact Information Redacted

Contact Information Redacted

Email: Contact Information Redacted

Phone Number (optional): Contact Information Redacted

**2. Request for Reconsideration of (check one only):**

Board action/inaction

Staff action/inaction

**3. Description of specific action you are seeking to have reconsidered.**

*(Provide as much detail as available, such as date of Board meeting, reference to Board resolution, etc. You may provide documents. All documentation provided will be made part of the public record.)*

Merck KGaA (hereinafter "Requester") seeks reconsideration of ICANN's acceptance of the Community Priority Evaluation Report, Application ID 1-980-7217, published on 10 August 2016. The panel that evaluated the Requester's application for MERCK did not follow established policies in making its determination that Requester did not meet the requirements specified in the Applicant Guidebook.

The Requester therefore asks ICANN to reject the Community Priority Evaluation Report, and instruct a different appointed panel to make an expert determination that applies the standards defined by ICANN.

**4. Date of action/inaction:**



*(Note: If Board action, this is usually the first date that the Board posted its resolution and rationale for the resolution or for inaction, the date the Board considered an item at a meeting.)*

The relevant report was published on 10 August, 2016 and notified to the Requester on that date. A copy of the decision is available at:

<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-980-7217-en.pdf>

**5. On what date did you become aware of the action or that action would not be taken?**

*(Provide the date you learned of the action/that action would not be taken. If more than fifteen days has passed from when the action was taken or not taken to when you learned of the action or inaction, please provide discussion of the gap of time.)*

The relevant report was published on 10 August, 2016 and notified to the Requester on that date.

**6. Describe how you believe you are materially affected by the action or inaction:**

The Requester is materially affected by the Community Priority Evaluation Report, as ICANN will utilize the findings of the panel in making any assessment as to whether the parties should proceed to the auction process, or whether the Requester has sufficient

pre-existing rights as a community to warrant an alternative mechanism for awarding (or withholding) delegation of the contested .MERCK string.

**7. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

Apart from the parties of the CPE procedures for .merck no other parties will be adversely affected by the action.

**8. Detail of Board or Staff Action – Required Information**

*(Staff Action: If your request is in regards to a staff action or inaction, please provide a detailed explanation of the facts as you understand they were provided to staff prior to the action/inaction presented to the staff and the reasons why the staff's action or inaction was inconsistent with established ICANN policy(ies). Please identify the policy(ies) with which the action/inaction was inconsistent. The policies that are eligible to serve as the basis for a Request for Reconsideration are those that are approved by the ICANN Board (after input from the community) that impact the community in some way. When reviewing staff action, the outcomes of prior Requests for Reconsideration challenging the same or substantially similar action/inaction as inconsistent with established ICANN policy(ies) shall be of precedential value.*

*Board Action: If your request is in regards to a Board action or inaction, please provide a detailed explanation of the material information not considered by the Board. If that*

*information was not presented to the Board, provide the reasons why you did not submit the material information to the Board before it acted or failed to act. "Material information" means facts that are material to the decision. If your request is in regards to a Board action or inaction that you believe is based upon inaccurate, false, or misleading materials presented to the Board and those materials formed the basis for the Board action or inaction being challenged, provide a detailed explanation as to whether an opportunity existed to correct the material considered by the Board. If there was an opportunity to do so, provide the reasons that you did not provide submit corrections to the Board before it acted or failed to act. Reconsideration requests are not meant for those who believe that the Board made the wrong decision when considering the information available. There has to be identification of material information that was in existence of the time of the decision and that was not considered by the Board in order to state a reconsideration request. Similarly, new information – information that was not yet in existence at the time of the Board decision – is also not a proper ground for reconsideration. Please keep this guidance in mind when submitting requests.)*

ICANN indicated that it will follow the Community Priority Evaluation Report, thus rendering this decision an "ICANN actions". As established in prior decisions of the Board of Governance Reconsideration Requests it has been noted that ICANN may review its decision to accept the decision of an expert panel in a Request for Reconsideration process where it may be shown that the panel failed to follow the

established policies or processes in reaching the decision, or that ICANN staff failed to follow its policies or processes in accepting that decision.

In this case, the panel failed to take reasonable care in evaluating the Requester's evidence and misapplied standards and policies developed by ICANN in the Applicant Guidebook, resulting in a denial of due process to the Requester in the context of its Community Priority Application.

In particular, the panel failed to correctly apply the standards and policies developed by ICANN in the Applicant Guidebook with respect to evaluating the criteria for the Nexus between the Proposed String and Community. In addition and as a consequence of its failure to correctly apply the "Nexus" criterion the panel further failed to correctly apply the standards for the criterion for "Uniqueness".

The scoring criteria for the Nexus component is as follows: 3 points - The string matches the name of the community or is a well-known short form or abbreviation of the community. 2 points – String identifies the community, but does not qualify for a score of 3. 0 points – String nexus does not fulfill the requirements for a score of 2.

The term "Identify" means that the applied for string closely describes the community or the community members, without over reaching substantially beyond the community.

In evaluating the criteria, the panel must ask, "*Does the string match the name of the Community or is it a well-known short form or abbreviation of the community name?*"

The panel, while recognizing that the string MERCK was the well-known name of the Requestor – and therefore clearly matches the name of the Community, nevertheless awarded Requestor 0 points, on the basis that another entity was also known by this name.

The panel misapplied the policy by equating "over-reaching substantially beyond the community" with anything less than absolute world-wide exclusivity. This is not the definition in the Applicant Guidebook and the CPE guidelines take this fact into consideration as they state "*since the evaluation takes place to resolve contention there will obviously be other applications, community based and/or standard with identical or confusingly similar strings in the contention set to resolve, so the string will clearly not be "unique" in the sense of "alone".*". The CPE is only done in cases where multiple applications for the identical string compete and it is the panel's task to identify whether the applied for string matches the name of the community. Under the panel's interpretation applied in the CPE for ".merck", it is likely that no string could ever be awarded more than zero points for this criterion, a result clearly inconsistent with the standards and policies developed by ICANN for this process.

The Requester's position is clearly supported by the underlying facts in the record. The parties involved in the dispute are the Requester, the world's oldest pharmaceutical

company, and Merck & Co. Inc., a US pharmaceuticals concern and former subsidiary of the Requester. The Requester was forced by the US government to divest its US subsidiary, along with its US trademark rights, based on the US "Trading With the Enemy Act", since Requester was and is based in Germany.

The two companies currently exercise their rights in the "Merck" trademark under a reciprocal use agreement, which has been in force (through various versions and revisions) since the 1930s. Merck & Co.'s rights are territorially limited to two countries within North America, whereas Requester retains those rights throughout the rest of the world. A copy of the currently-valid agreement, signed in 1970, is attached as **Annex 1**.

Merck & Co. is prohibited by contract and existing trademark and name rights from using the name "MERCK" on the internet and otherwise in almost all countries. The Requester has taken legal action against the infringing activities of Merck & Co Inc. before the District Court of Hamburg and Frankfurt, Germany, and in the courts of the United Kingdom and France. The courts in UK, France and Frankfurt confirmed that the use of Merck & Co. infringes the contractual and intellectual property rights of the Requester. The court in UK issued an order on 15/01/2016 preventing Merck & Co. from any use of MERCK standalone in UK online as well as offline (A copy of the Judgment of the High Court of Justice, is attached as **Annex 2**). The preliminary injunction of the Landgericht Frankfurt, issued on 29/01/2016 prevents a subsidiary of Merck & Co., the applicant for the gTLD ".merckmsd" to use the gTLD within the region of the European

Union. A translation of the preliminary injunction of the Landgericht Frankfurt is attached as **Annex 3**.

While the Requester explicitly stated in its application and in a Public Interest Commitment that it will take all necessary measures, including geo-targeting, to avoid internet access by users in the few territories in which Merck & Co. has trademark rights, Merck & Co. has not done the same. Indeed, Merck & Co. has indicated in its applications not only that it intends to use the .MERCK space internationally (where it has no rights in the MERCK trademark whatsoever), but also that it intends to sell and license domain names to affiliates and other entities throughout the world, including territories where Requester has exclusive rights.

Trademark and name rights exclusively identify the commercial source or origin. As the Requester holds exclusive rights in the name and trademark MERCK in the vast majority of countries there cannot be any doubt that the applied for string identifies Requester's community.

Requester's community covers 99% of the world's jurisdictions, home to 95% of the world's population. The community has existed for 348 years (A history of the trademark development and use over the last 348 years is attached as **Annex 4**). The Requester has exclusive rights to use MERCK in 191 out of 193 UN countries. The string clearly identifies the Requestor. The exclusivity of the Requester is not only acknowledged and

granted by 191 UN countries globally in form of trademark and name rights but also by Merck & Co. in a territorial co-existence agreement.

The Requestor has, on the face of its application, eliminated "over-reaching," substantial or otherwise. The Requester has provided a public interest commitment not to use it in the two territories where Merck & Co. has rights, including restricting internet access.

Any "over-reaching" beyond the community is due to the current and proposed unlawful intrusion by MERCK & Co. into the Requester's territories. As a result of the unlawful intrusion, namely Merck & Co.'s use of MERCK on the internet, it is not surprising that the panel has been misled when undertaking the internet search to be utilized according to the CPE guidelines to help to understand whether the string identifies the community. Merck & Co.'s illegal use of MERCK in the Requestor's territories creates massive confusion about the source of the Requestor's community MERCK. No right can be obtained out of an illegal use, and the panel cannot contribute or consolidate such an illegal use.

As a result the Requester's application clearly and completely addressed the over-reaching issue, and the application of the policies and standards developed by ICANN to the Requester results in an award of 3 point for Nexus.

Further, as a consequence of the wrong evaluation by the panel it did not consider the criterion of "Uniqueness". The guidelines for the CPE state as follows:



*"Uniqueness" will be scored both with regard to the community context and from a general point of view. For example, a string for a particular geographic location community may seem unique from a general perspective, but would not score a 1 for uniqueness if it carries another significant meaning in the common language used in the relevant community location. **The phrasing "...beyond identifying the community" in the score of 1 for "uniqueness" implies a requirement that the string does identify the community, i.e. scores 2 or 3 for "Nexus," in order to be eligible for a score of 1 for "Uniqueness."***

*It should be noted that "Uniqueness" is only about the meaning of the string since the evaluation takes place to resolve contention there will obviously be other applications, community based and/or standard with identical or confusingly similar strings in the contention set to resolve, so the string will clearly not be "unique" in the sense of "alone".*

As outlined above Requester's longstanding and sole use of its community name MERCK in 99% of global jurisdictions led to a single source indicator ensuring exclusivity in form of the existing trademark and name rights. The name MERCK has no other meaning than the name of the family owning the majority of Requester's community.

**9. What are you asking ICANN to do now?**

*(Describe the specific steps you are asking ICANN to take. For example, should the action be reversed, cancelled or modified? If modified, how should it be modified?)*

As ICANN has now adopted the panel decisions as ICANN staff/Board actions, these procedural and judgment errors have become those of ICANN, and accordingly the Requester has been harmed by ICANN actions which contradict published ICANN policies (namely, the New gTLD Dispute Resolution Policy and procedure). The Requester asks ICANN 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.

The requestor hereby request a hearing.

**10. Please state specifically the grounds under which you have the standing and the right to assert this Request for Reconsideration, and the grounds or justifications that support your request.**

*(Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the requester must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial) that is a directly and causally connected to the Board or staff action or inaction that is the basis of the Request for Reconsideration. The requestor must be able to set out the loss or injury and the direct nature of that harm in specific and particular details. The relief requested from the BGC*

*must be capable of reversing the harm alleged by the requester. Injury or harm caused by third parties as a result of acting in line with the Board's decision is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)*

Under the language of the ICANN Bylaws, a Requester may bring a case if it has been affected by: - one or more staff actions or inactions that contradict established ICANN policy(ies); or - 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 - 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.

These provisions are further modified by the Board of Governance's ruling in its Recommendation on Reconsideration Request No. 13-6, which indicates that the Reconsideration process can properly be invoked for challenges of the third-party decisions where it can be stated that the evaluating panel failed to follow the established policies or processes in reaching the decision, or that ICANN staff failed to follow its policies or processes in accepting that decision.

In this case, the Requester submits that it has been harmed by the failure of the Community Priority Evaluation panel to follow the mandated ICANN procedure for the Community Priority Evaluation. The panel failed to decide the case on the basis of the correct and applicable policies and standards, and moreover has failed to decide the case on the basis of the true and accurate factual record which was presented to it. Accordingly, the Requester has 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.

**11. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)**

No

11a. If yes, Is the causal connection between the circumstances of the Reconsideration Request and the harm the same for all of the complaining parties?

Explain.

Do you have any documents you want to provide to ICANN?

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at

<http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>.

## Terms and Conditions for Submission of Reconsideration Requests

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if the issues stated within are sufficiently similar. The Board Governance Committee may dismiss Reconsideration Requests that are querulous or vexatious. Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing. The BGC may take a decision on reconsideration of requests relating to staff action/inaction without reference to the full ICANN Board. Whether recommendations will issue to the ICANN Board is within the discretion of the BGC. The ICANN Board of Director's decision on the BGC's reconsideration recommendation is final and not subject to a reconsideration request.



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Martin Müller *for*  
Dr. Torsten Bettinger  
On behalf of Merck KGaA

August 25, 2016

## List of Annexes

- Annex 1      Currently-valid agreement, signed in 1970
  
- Annex 2      Judgment of the High Court of Justice
  
- Annex 3      Translation of the preliminary injunction of the Landgericht Frankfurt
  
- Annex 4      Trademark history

15 November 2016

To the attention of:

ICANN Board Governance Committee  
[reconsider@icann.org](mailto:reconsider@icann.org)  
[reconsideration@icann.org](mailto:reconsideration@icann.org)

Our ref 1656362

## LETTER OF RESPONSE TO RECONSIDERATION REQUEST 16-12 FILED BY MERCK KGAA

Dear Members of the Board Governance Committee

On 25 August 2016, Merck KGaA ("KGaA") submitted Reconsideration Request 16-12 in relation to the Report of the Community Priority Evaluation Panel ("Panel") appointed by The Economist Intelligence Unit ("EIU") concerning application number 1-980-7217 for .MERCK. The Report is an assessment of KGaA's application for .MERCK and its claimed status as a Community, based upon the policies and criteria set out at Section 4.2 of the New gTLD Applicant Guidebook ("AGB").

In the interest of full disclosure, Merck & Co., Inc, ("Merck") submitted its Community-based application for .MERCK (application number 1-1702-73085) for Community Priority Evaluation ("CPE") by the EIU.

### 1. EIU CPE REPORT – KGAA CLAIMS

Having carefully considered Reconsideration Request 16-12, Merck strongly disagrees with the arguments put forward therein and it is respectfully submitted that this Reconsideration Request should be rejected in its entirety.

In Reconsideration Request 16-12 KGaA claims that the Panel failed to *"take reasonable care in evaluating the Requester's evidence and misapplied standards and policies developed by ICANN in the Applicant Guidebook, resulting in a denial of due process to the Requester in the context of its Community Priority Application."*

KGaA claims that the Panel failed to correctly assess its application with regard to Criterion 2 of the CPE Criteria *"Nexus between Proposed String and Community"*.

As set out in the AGB, Section 4.2.3, there are a maximum of four points available under Criterion 2. Criterion 2 is split into sub-criteria, namely Nexus, worth three points and Uniqueness, worth one point.

KGaA's claims in relation to these points are examined below.

## 1.1 Nexus

In the CPE Report for application number 1-980-7217, the Panel awarded zero points for the sub-criterion of Nexus. The Panel found that:

*"Although the string Merck matches the name of the community as defined by the applicant [KGaA], it also matches the name of another corporate entity known as "Merck" within the US and Canada. This US-based company, Merck & Co, Inc., operates in the pharmaceutical, vaccines, and animal health industry, has 68,000 employees, and had revenue of US\$39.5 billion in 2015. It is therefore a substantial entity also known by the name "Merck". The Panel has therefore determined that the string is "over-reaching substantially beyond the community" it defines because the applied-for string also identifies a substantial entity—Merck in the US and Canada—that is not part of the community defined by the applicant."*

KGaA disputes this finding and falsely claims that the Panel has "misapplied the policy by equating "over-reaching substantially beyond the community" with anything less than absolute world-wide exclusivity."

KGaA attempts to justify this position by citing the following CPE guidelines from the AGB at Section 4.2.3:

*"...since the evaluation takes place to resolve contention there will obviously be other applications, community based and/or standard with identical or confusingly similar strings in the contention set to resolve, so the string will clearly not be "unique" in the sense of "alone"."*

However, the above guidelines cited by KGaA are not applicable to the scoring methodology for the sub-criterion of Nexus. The above cited guidelines are only applicable to the sub-criterion of Uniqueness, which has an entirely different scoring criteria and set of guidelines.

Based upon this incorrect misunderstanding, or deliberate misapplication, of the CPE process and guidelines, KGaA states that:

*"...under the panel's interpretation applied in the CPE for ".merck", it is likely that no string could ever be awarded more than zero points for this criterion, a result clearly inconsistent with the standards and policies developed by ICANN for this process."*

This conclusion on the part of KGaA is utterly without foundation and the CPE Policy scoring criteria and guidelines make this clear.

KGaA's application scored zero points on the sub-criterion of Nexus because of the existence of Merck. As such, the Panel found that *"that the string [.MERCK] is "over-reaching substantially beyond the community" it defines because the applied-for string also identifies a substantial entity—Merck in the US and Canada—that is not part of the community defined by the applicant."*

KGaA's arguments should be disregarded as without basis.

## 1.2 Uniqueness

Due to the obvious failure of KGaA's application to achieve a score on the Nexus sub-criterion, the Panel did not need to consider the sub-criterion of Uniqueness.

KGaA disputes this on the mistaken grounds outlined above under 1.1 and brashly asserts that its application should have scored the one available point on the grounds that:

*"The name MERCK has no other meaning than the name of the family owning the majority of Requester's community."*



However, this assertion is completely false as it is the same family name that is the basis for Merck's name. Thus it is nonsensical to claim that the string MERCK is in any way unique to KGaA, given the shared origins of both KGaA and Merck.

## 2. FACTUAL BACKGROUND

Merck would also like to take this opportunity to correct some of KGaA's more egregious statements in the Reconsideration Request.

### 2.1 Claims relating to Coexistence Agreement between KGaA and Merck

KGaA makes multiple erroneous statements concerning the Coexistence Agreement.

Firstly, it claims that the agreement has been in place since the 1930s.

This is not true. The 1932 Agreement was challenged by the US Department of Justice under the US Sherman Act and in 1945 was cancelled by a Consent Decree in the New Jersey Courts. The relevant agreement and provisions have been in place since 1955 (the 1955 Agreement being superseded by the 1970 Agreement which contained formalistic amendments caused by a change of company name of KGaA's predecessor).

Secondly, KGaA claims that Merck's rights are "*territorially limited to two countries within North America*" and that KGaA "*retains those rights throughout the rest of the world*".

This does not accurately reflect the situation. Furthermore, the use of words such as "*limited*" and "*retains*" in this context is a poor attempt by KGaA to show itself as the "superior" rights holder when this is clearly not the case.

In reality, the Coexistence Agreement provided for a global division of rights consisting of three parts:

#### i) United States and Canada

In the United States and Canada, Merck had exclusive rights to the trade mark MERCK.

E Merck (as KGaA's predecessor was known, KGaA only having been formed in 1995) was permitted to use a firm or corporate name "E. Merck" with a geographical identifier in a specific format.

#### ii) Germany

In Germany, E. Merck had exclusive rights to the trade mark MERCK.

Merck was permitted to use "Merck &Co., Inc." as a firm or corporate name with a geographical identifier in a specific format. Merck was also permitted to use Merck, Sharp & Dohme as a firm or corporate name with a geographical identifier other than Germany.

#### iii) Rest of the world

In all other countries Merck was permitted to use "Merck Sharp & Dohme" as a **trade mark** and as a firm or corporate name. The parties agreed that "Merck Sharp & Dohme" was not confusingly similar to any trade marks or names E. Merck owned.

Merck was also permitted to use "Merck & Co., Inc." as a firm or corporate name with a geographical identifier.

E. Merck was permitted to use MERCK as, or as part of, a trade mark and name, provided that any marks or names adopted in future were not confusingly similar to Merck's permitted marks or names.

In Cuba and the Philippines, both parties had unrestricted rights to use MERCK as a trade name and a trade mark. Each party agreed to take appropriate steps to distinguish its goods from those of the other to avoid confusion.

The result of the Coexistence Agreement is that, with the exception of the United States, Canada and Germany, both parties were permitted to use MERCK in some form as a trade mark.

The fact that Merck is permitted to use MERCK SHARP & DOHME as a trade mark throughout the world (except in Germany) is an important fact that KGaA fails to mention in its Reconsideration Request. It should also be noted that KGaA was not granted the right to use a MERCK variation as a trade mark in the United States or Canada – a fact that KGaA also fails to mention.

## 2.2 Claims relating to exclusivity

As can be seen from 2.1 above, KGaA's claims regarding the territorial differentiation of rights are a complete misrepresentation of the reality of the situation. KGaA's repeated descriptions and claims of its global "exclusive" rights are extremely misleading.

KGaA's claim regarding how much geographic territory it covers is completely irrelevant to the borderless Internet. In addition, the claims of exclusivity and being a single source identifier are also completely false. KGaA does not have "exclusive" rights to use of the name MERCK. Furthermore, KGaA fails to mention that Merck is the fourth largest pharmaceutical company in the world with revenues nearly three times the size of KGaA.

Thus, in terms of the size of the respective entities, global sales and philanthropic activities, Merck is the larger and better known of the two companies.

## 2.3 Claims relating to use of MERCK on the Internet

KGaA makes the absurdly false claim that Merck is prohibited *"by contract and existing trade mark and name rights from using the name MERCK on the Internet"*.

This statement is clearly ridiculous given that Merck is the owner of the domain name <merck.com> which it registered in 1992 and has used for nearly 25 years.

While KGaA has recently taken legal action across several jurisdictions regarding certain of Merck's uses of MERCK on the Internet, no final binding decision has yet been made in this respect and Merck is vigorously defending against all such claims.

Moreover, the 1970 Agreement was signed before the Internet existed and thus makes no reference to the Internet.

KGaA then makes a series of inaccurate assertions regarding the court proceedings in the UK, France, and the court of Frankfurt, Germany, claiming that these courts have *"confirmed that the use of Merck & Co. infringes the contractual and intellectual property rights"* of KGaA.

These assertions are not true.

In the UK courts, the Judge found use of MERCK in the domain name <merck.com> and email addresses ending in "@merck.com" did not constitute infringing use.

It should also be noted that the Judge's order, dated 3 March 2016 (and not 15 January 2016 as wrongly stated by KGaA), has been appealed and is stayed, pending the outcome of that appeal.



In any event, it should be noted that use of .MERCK by Merck would not necessarily be trade mark or infringing use.

In the French courts, KGaA's legal action was based on the grounds of trade mark infringement and not a breach of the Coexistence Agreement. Thus it is a misrepresentation to assert that the French courts found that Merck had infringed the contractual rights of KGaA.

With respect to the French court's ruling on trade mark infringement, unfair competition and company and name rights, only one of Merck's uses was found to be infringing. This was related to occasional uses of "MERCK" to refer to the US companies of Merck's corporate structure on the websites found at [www.msd-france.com](http://www.msd-france.com) and [www.msd-sante-animale.fr](http://www.msd-sante-animale.fr).

In France, contrary to KGaA's assertions, the use of the email addresses ending in '@merck.com', of "MERCK" as metatag data and "Manuel Merck" as a title of books were not considered acts of trade mark infringement or unfair competition.

Turning to the court of Frankfurt, Germany, KGaA sought a preliminary injunction against the use of the gTLD .MERCKMSD solely based on alleged infringement of KGaA's rights to the trade mark "MERCK" in the European Union and its rights to the trade name "MERCK" in Germany. As in the French proceedings, KGaA's legal action was not based on a breach of the Coexistence Agreement. Thus it is yet another misrepresentation on the part of KGaA to claim that the Frankfurt court found that Merck had infringed the contractual rights of KGaA.

It is also important to note that the first instance decision of the Frankfurt District Court is currently under appeal. As a result no final decision has yet been made by the court and thus it is a falsehood to claim that the court of Frankfurt has "*confirmed that the use of Merck & Co. infringes the contractual and intellectual property rights*" of KGaA.

#### 2.4 Claims relating to Merck's proposed use of the .MERCK gTLD

KGaA's claims regarding Merck's proposed use of the .MERCK TLD are based upon KGaA's wilful misinterpretation of the statements contained in Merck's application for .MERCK and are simply untrue and unsubstantiated.

#### 2.5 Claims relating to geotargeting

KGaA claims that it will take all necessary measures, including geotargeting to avoid internet access by users in territories in which Merck has trade mark rights.

However, such claims regarding geotargeting do not stand up to scrutiny.

It should be noted that during the 2012 New gTLD Application Program, KGaA submitted two gTLD applications:

- Application number 1-980-7217 for the gTLD .MERCK
- Application number 1-980-60636 for the gTLD .EMERCK

These applications were published on the ICANN website on 13 June 2012.

At the time of their publication, the applications contained no provisions or statements whatsoever regarding the use of "geotargeting" technology.

In March 2013, KGaA submitted change requests to ICANN concerning geotargeting for its applications for .MERCK and .EMERCK.

It is pertinent to note that these change requests to KGaA's new gTLD applications were made just prior to (i) the commencement of its multi-jurisdictional litigation against Merck, and; (ii) the

submission of its Legal Rights Objections (LRO) to the World Intellectual Property Organisation (WIPO) (LRO) against the new gTLD applications filed by Merck.

When viewed in this context, it is clear that the statements concerning geotargeting were inserted into KGaA's applications for .MERCK and .EMERCK solely in order to strengthen KGaA's strategic position with regard to its litigations and the new gTLD application process.

Therefore, contrary to KGaA's posturing in relation to geotargeting, the truth of the matter is that KGaA decided to introduce the concept of geotargeting purely for legal strategic reasons prior to filing its first litigation. Presumably this was done because KGaA incorrectly thought it would look better in the multiple litigations filed against Merck.

Prior to this, KGaA had, for many years, blatantly and openly used MERCK on its websites that were accessible to Internet users in the United States and Canada. This was done without any concerns or regard for remaining in compliance with the 1970 agreement.

Since adopting geotargeting for its US and Canada directed [www.emdgroup.com](http://www.emdgroup.com) website, KGaA has continued to make widespread use of MERCK in exactly the same way that it has criticised Merck. As the website is directed to the US and Canada, the only explanation for this is that such use is deliberate, showing that KGaA's assurances with regard to geotargeting are worthless.

The new language that KGaA inserted into its applications for .MERCK and .EMERCK was as follows:

#### **.MERCK**

*"Moreover, in order to avoid trademark-related concerns within North America, the Applicant will use geo-targeting tools to prevent any Internet traffic originating from the US or Canada from accessing websites within the .MERCK space. As defined above, all members of the Merck Community maintain their principal places of business outside of North America, and thus no domain names within the space shall be registered by entities headquartered within this geographic locale."*

#### **.EMERCK**

*"Moreover, in order to avoid trademark-related concerns within North America, the Applicant will use geo-targeting tools to prevent any Internet traffic originating from the US or Canada from accessing websites within the .EMERCK space, and will not license the use of domain names within the TLD to affiliated entities whose principal places of business are located within North America."*

However, far from making use of "geo-targeting tools to prevent any Internet traffic originating from the US or Canada from accessing websites within the .EMERCK space", KGaA is actively permitting Internet users from the US and Canada to access websites and content within the .EMERCK domain name space.

Thus, KGaA has totally failed to adhere to its own definition of geotargeting with the use of the .EMERCK gTLD. Either KGaA had no intention of implementing geotargeting as it outlined in the application for .EMERCK or it found that it was unable to implement it due to technical limitations<sup>1</sup> and financial constraints.

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<sup>1</sup> Based upon how the DNS currently works, it is unlikely that geo-targeting can be implemented at the DNS root and apex without changing its current structure. Any such change would result in the need for a security and stability evaluation by the Registry Services Technical Evaluation Panel (RSTEP). At the time of writing no RSTEP evaluation has been started for such a proposal.



This blatant misrepresentation within its application for .EMERCK and the actual use of the .EMERCK gTLD raises serious questions regarding KGaA's integrity and conduct throughout the entire New gTLD Program.

Furthermore, geotargeting is not an effective solution. It is easily circumvented by the use of proxy DNS services or the use of a Virtual Private Network which effectively renders geotargeting useless as Internet users can circumvent any geotargeting restrictions that have been put in place.

The effectiveness of geotargeting is further compromised when large multinational corporations are taken into consideration. Such entities will often have geographically dispersed locations for their technology networks. Access to the Internet will not always be from an IP address based in the same geographic location as the Internet user. Thus it is entirely possible that an Internet user located in the US or Canada could appear to be using an IP address from France.

### 3. CONCLUSION

Reconsideration Request 16-12 is full of inaccuracies. This has been the *modus operandi* of KGaA throughout the New gTLD program.

Yet again, it is disappointing to see the Board Governance Committee's time being wasted with such a clear abuse of the Reconsideration Request process.

Reconsideration Request 16-12 should be rejected in its entirety for not only being an abuse of the Reconsideration Request process but also for being a blatant misinterpretation of the CPE rules and guidelines.

Respectfully submitted

A handwritten signature in black ink that reads "D. Taylor". The signature is stylized, with a large, bold "D" and a cursive "Taylor".

David Taylor

## Written Summary of Merck KGaA's presentation to ICANN's Board of Governance Committee (March, 29, 2017)

Good afternoon. I am Torsten Bettinger, and I appreciate the opportunity to speak to you on behalf of our client, Merck KGaA.

Next to me is Jonas Koelle, General Counsel Trademarks, Merck KGaA.

Our firm is representing Merck KGaA in this matter because we believe that the EIU made fundamental mistakes in its evaluation of Merck's application for community priority status.

We believe that the EIU misapplied the "nexus requirement" contained in Module 4.2.3. of the AGB because it ignored material information during its analysis, and that this failure contradicts an established procedure.

As it was recently put by the Despegar IRP Panel, "the Request for Reconsideration is not a mere administrative "box ticking" exercise to see whether mention was made of the relevant policy or procedure by a panel formed by a third party service provider such as the EIU, but requires that the BGC looks into how the relevant policy or procedure was actually applied by the EIU, and whether in doing so, the BGC could have a reasonable degree of assurance that the EIU had correctly applied the policy or procedure.

Now, how can you have a reasonable degree of assurance that the EIU correctly applied ICANN's policy as implemented in the AGB?

You are supposed to ensure that the information the EIU relied on is accurate and that the EIU did not ignore any material information during its analysis. Then, you need to make an independent judgement and decide whether the EIU has applied ICANN's policies correctly to these facts. I will briefly explain how the EIU contradicted ICANN's policies:

- (1) The EIU determined that the community defined by Merck met the criterion for "Community Establishment" in the Applicant Guidebook, as the "community" defined in the Requestor's application demonstrates sufficient delineation, organization and pre-Existence. The EIU awarded a maximum score of 4 point under criterion 1.
- (2) The Panel also determined that Registration policies set out in the application met the criteria for Eligibility, Content of use and Enforcement and awarded a maximum score of 4 point under criterion 3.
- (3) The Community Priority Evaluation panel further determined that the application fully met the criterion for Community Endorsement specified in section 4.2.3 of the Applicant Guidebook, as Merck had documented support from the recognized community member organizations. It awarded 3 out of 4 points.

However, Merck failed in the CPE process because it received a score of 0 points out of 4 points with regard to the so-called "Nexus Requirement. Out of four points available under the nexus requirement, 3 points relate to the issue of whether the applied for string matches the name of the community and one point relates to the uniqueness of the string.

The nexus requirement as defined in the applicant guidebook refers to the “Nexus” between the applied for string and the name of the community. To obtain three points the applicant must show that the applied for string closely describes the community, without overreaching substantially beyond the community.

According to the application, the community served by the <.merck> TLD space is the collection of corporate entities, their affiliates and subsidiaries, which together comprise the Merck Community.

To be recognized as a member of the Merck Community, a registrant must meet the Eligibility Requirements, which are as follows:

- the registrant is Merck KGaA or a company which is a fully owned subsidiary of Merck KGaA,
- the registrant uses “Merck” as the sole element or as a component of its company name, and the registrant uses as its umbrella brand the trademark “MERCK

There can be no doubt that the TLD <.merck> closely describes the Merck community, as defined in the Applicant Guidebook. Nevertheless, the EIU awarded Requestor 0 points.

So what was the key issue of the EIU consideration of the nexus requirement?

The key issue was whether the applied for gTLD <.merck> was “overreaching substantially beyond the community”.

It was the EIU’s understanding that in order to score three points under the nexus requirement it was necessary to show that there is no other entity known by the same name. The EIU panel equated “over reaching substantially beyond the community” with anything less than world wide exclusivity.

This is not the definition in the Applicant Guidebook and the CPE guidelines take this fact into consideration as they state “since the evaluation takes place to resolve contention there will obviously be other applications, community based or standard with identical or confusingly similar strings in the contention set to resolve, so the string will clearly not be “unique” in the sense of “alone”.

Under the panel’s interpretation applied in the CPE for <.merck>, it is likely that no string could ever be awarded more than zero points for this criterion, a result clearly inconsistent with the standards and policies developed by ICANN for this process.

The Applicant Guidebooks provides one example for a gTLD that would be “overreaching substantially beyond the community”. It says: “If a local tennis club applies for “.tennis” claiming to represent the tennis community, the string TLD would be excessively broad.”

The Requestor is not comparable with a local tennis club. Requester’s community covers 99% of the world’s jurisdictions, home to 95% of the world’s population. The Merck community has existed for 348 years. The Requester has exclusive rights to use MERCK in isolated form in 191 out of 193 UN countries.

EIU in its evaluation of the Nexus requirement also contradicted ICANN'S non-discrimination policy because in other cases the EIU concluded that the mere existence of another entity with the same name does not require than absolute world-wide exclusivity.

The Requestor can point out now at least four cases in which an applicant was awarded three points under the nexus requirement although there were other entities using the same name: .ECO, .RADIO, .SPA and .ART.

As a result, the Requester's application clearly and completely addressed the over-reaching issue, and the application of the policies and standards developed by ICANN to the Requester has to result in an award of 3 point for Nexus.

The Requestor is aware that the BGC has regularly disregarded blatant misapplication of an evaluation standard by third party service providers, such as the EIU, stating that the Reconsideration process does not permit evaluation of a third party service provider's substantive conclusion. There has been a multitude of inconsistent and wrong determinations rendered in the name of ICANN by third party service providers, which the BGC refused to revoke. Many parties and among them the Requestor have been left out in the rain with blatantly wrong decisions by third providers such as Legal Rights Objection Panel, String Confusion Panels and also the EIU.

The failure of ICANN's accountability mechanisms to effectively prevent the wrong application of objection or evaluation criteria by third party providers was widely criticized on many fronts during the review of the Rights Protection Mechanisms conducted by Competition, Consumer Trust and Consumer Choice Review Team.

However, this Request for Reconsideration does not only address the wrong interpretation and application of the Community Priority Evaluation criteria. It also addresses the fact that EIU disregarded material information when applying the nexus criteria set out in the AGB.

Even if the BGC concludes that the EIU's wrong interpretation of the "nexus requirement" cannot be addressed in this Procedure, the CPE Panel's Report has to be set aside and new evaluators have to be appointed to conduct a new CPE because the CPE ignored material facts in its analysis of the "nexus requirement".

The CPE denied a "Nexus" between the applied for string <.merck> and the Merck community because there is another corporate entity also known by the name "Merck".

It did, however ignore the fact, that this other corporate entity exercises its right to use the name "Merck" under a reciprocal use agreement, which has been in force since the 1970s.

Merck & Co.'s rights to use the trademark and tradename "Merck" in isolated form are territorially limited to two countries within North America, whereas Requester retains those rights throughout the rest of the world.

It also ignored the fact that the Requester explicitly stated in its application and in a Public Interest Commitment that it will take all necessary measures, including geo-targeting, to avoid internet access by users in the two countries, the US and Canada, in which the other corporate entity has trademark rights.



Merck & Co has not done the same. Indeed, Merck & Co has indicated in its applications not only that it intends to use the <.merck> space internationally (where it has no rights in the MERCK trademark whatsoever), but also that it intends to sell and license domain names to affiliates and other entities throughout the world, including territories where Requester has exclusive rights.

Various court proceedings are currently pending in the UK, Switzerland, Germany, France on the grounds of Merck & Co.'s trademark infringement and breach of the "Coexistence Agreement". If the BGC finds these court proceedings to be of relevance for its analysis, the Requestor will provide the BGC with updated information on the status quo of these proceedings on request.

Any "over-reaching" beyond the community is due to the current and proposed unlawful intrusion by Merck & Co. into the Requester's territories.

As a result of the unlawful intrusion, namely Merck & Co's global use of the name MERCK on the Internet, it is not surprising that the panel has been misled when undertaking the internet search to be utilized according to the CPE guidelines to help to understand whether the string identifies the community.

These facts have been neglected by the CPE because ICANN did not transmit this information to the EIU. The information was available to ICANN. These facts have been the cause of several legal rights objection procedures and Request for Reconsideration Procedures. It was ICANN's duty to transmit this information to the CPE Panel in case it regarded the existence of the other corporate entity using the name Merck as relevant for the evaluation of the Requestor's community priority status.

What are we asking the BGC to do after this hearing?

Please do your due diligence. Closely review all the information regarding the Merck application, including the Requestor's Public Interest Commitment, the Coexistence Agreement between the Requestor and Merck & Co and all other facts we brought to your attention today and which are relevant for the evaluation of the Requestor's community priority status.

Request from the CPE Panel the underlying materials used for its analysis. You will see how the CPE Panel misapplied the nexus criteria and neglected important information when applying these criteria.

Set aside the CPE Panel's report and have new members be appointed to conduct a new CPE for the Requestor's application. Transmit all the information regarding the Merck application, including the Requestor's Public Interest Commitment, the Coexistence Agreement between the Requestor and Merck & Co and the information brought to your attention today to the new evaluators.

I thank you very much again for the opportunity to make this presentation today.

BETTINGER Rechtsanwälte • Patentanwälte, Bavariaring 14, 80336 München

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UNITED STATES OF AMERICA

By email ([Reconsideration@icann.org](mailto:Reconsideration@icann.org))

**Re: Request 16-12: Merck KGaA**

Munich, October 24, 2017

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4 European Patent Attorney  
5 European Trademark Attorney,  
European Design Attorney  
6 Nicht als Rechtsanwalt zugelassen

Dear Members of the ICANN Board of Directors,

we are writing on behalf of our client Merck KGaA regarding ICANN's Community Priority Evaluation Process Review ("CPE Process Review"). The Review is being conducted by FTI Consulting Inc. (FTI) and focuses on gathering information and materials from the ICANN organization, and from the CPE provider (the Economist Intelligence Unit or "EIU") regarding the process.

Our client appreciates that ICANN undertakes a review of the CPE process, which has raised the concerns of many applicants.

ICANN has provided information about the Review in the 26 April 2017 update from the Chair of the Board of the Governance Committee, in the 2 June 2017 Community Priority Evaluation Process Review Update and in the September 1 2017 Community Priority Evaluation Process Review Update.

According to ICANN's September 1 2017 Community Priority Evaluation Update, the interview Process of the CPE provider personnel that had involvement in CPEs has been completed and FTI is also working with the CPE provider to obtain the reference materials for the evaluations that are the subject of the pending Reconsideration Requests.

Our client notes that it has requested access to the documents that the CPE panel relied upon in making its determination with respect to its community application for <.merck> (“Community Priority Evaluation Report”) and, in particular, to the independent research that the panel conducted and to the information on the process by which ICANN interacted with the Community Priority Evaluation (CPE) Provider.

To date, our client has not been contacted by FTI Consulting Inc. regarding the CPE Process Review related to its Request for Reconsideration of the Community Priority Evaluation Report for its <.MERCK> community application.

It is also unclear whether FTI’s final report and findings and in particular, the documents which the CPE panel used to form its determination, the independent research that the panel conducted and the information on the process by which ICANN interacted with the CPE Provider will be communicated to our client before the BGC renders a decision in this Request for Reconsideration Proceeding.

Our client therefore seeks confirmation that ICANN will disclose FTI’s final report and in particular,

- the documents that the CPE panel used to make its determination,
- the independent research that the panel conducted and
- the information on the process with which ICANN interacted with the CPE Provider

related to the CPE Provider’s “Community Priority Evaluation Report” for <.merck> immediately after FTI completes its review and that our client will have the opportunity to respond and comment on FTI’s findings before ICANN renders a determination regarding our client’s Request for Reconsideration.

Kind regards,



Torsten Bettinger

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Only via email

Munich, 12/04/18

Your Ref.:  
Our Ref.: M60371 TB/js

**Reconsideration Request 16-12  
Response to FTI Consulting, Inc.'s Independent Review of the Community Priority Evaluation Process**

Dear Members of the BAMC,

We are writing on behalf of our client, Merck KGaA, regarding your invitation to submit additional information and arguments based upon the FTI's CPE Process Review Reports (CPE Process Reports).

1. The CPE Process Review Reports are part of ongoing discussions related to various aspects of ICANN's Community Priority Evaluation Process (CPE process) including issues that were identified in the Final Declaration of the Expert Panel in an Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC. (ICDR Case No. 01 - 14 - 0001 – 5004).

In that case, the IRP decision found that the ICANN's Board Governance Committee (BGC), failed to make the proper determination

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as to whether ICANN staff and the EIU complied with ICANN's bylaws in turning down the application, and failed to be transparent about its reconsideration process. The IRP found that both the EIU and ICANN staff were required to follow ICANN's bylaws, and that the BGC was required to "exercise due diligence and care in having a reasonable amount of facts in front of them" to examine "whether the EIU or ICANN staff engaged in unjustified discrimination or failed to fulfill transparency obligations" under those bylaws.

2. This criticism of the BGC and the EIU Panel's CPE reports raised by the IRP Panel was shared by the other applicants which had elected to participate in CPE (see Requests for Reconsideration 14-30 (.LLC), 14-32 (.INC), 14-33 (.LLP), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.hotel) filed in connection with the respective EIU Reports) and was confirmed by the Expert Opinion of Professor William N. Eskridge Jr., who was retained by the Applicant Dotgay LLC to provide an independent expert opinion on the validity of the CPE Report in connection with the community application for the gTLD <.gay> (Second Expert Opinion of Professor William N. Eskridge, Jr., in Response to FTI Consulting, Inc.'s Independent Review of the Community Priority Evaluation Process).

The Expert Opinion of Professor William N. Eskridge Jr., addressing EIU evaluation of the Nexus Criterion, concluded that the EIU misread ICANN's Applicant Guidebook and ignored its Bylaws.

3. In its request for reconsideration of the CPE Report, Merck KGaA has specified in detail that in determining that Merck KGaA application for <.merck>, the CPE Report:
  - (1) made interpretative errors by misreading or misapplying the Nexus Criterion laid out in ICANN's Applicant Guidebook ("AGB"), and;
  - (2) ignored important evidence that supports Full credit under the Nexus Criterion.
4. FTI's CPE Process reports supports these conclusions. FTI Report Scope 2 completely failed to evaluate whether the EIU Panel committed interpretive errors by applying the

“Nexus Criterion” laid out in ICANN’s Applicant Guidebook. FTI Report Scope 3 revealed that EIU only consulted three Wikipedia articles in its evaluation of the Nexus factor (the factor that led to the rejection of community status). This confirms that the CPE process was grossly inadequate and that the EIU failed to conduct proper due diligence and research in its assessment.

*a) The FTI Report completely failed to evaluate whether EIU Panel committed interpretive errors in applying the “Nexus Criterion” laid out in in ICANN’s Applicant Guidebook (“AGB”) to the <.merck> application*

(1) As set forth in the AGB, the Nexus Criterion is measured by two sub-criteria (i) 2-A “Nexus”, and (ii) 2-B “Uniqueness.

An application may receive a maximum of four points under the Nexus criterion, which includes up to three points for “Nexus” and one point for “Uniqueness”. An application merits 3 points if “the string matches the name of the community or is a well-known short-form or abbreviation of the community.” (AGB, p. 4-12). “Name” of the community means ‘the established name by which the community is commonly known by others.’ (AGB, p. 4-13.)

For a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification/name of the community.”

An application merits 2 points if the “string identifies the community, but does not qualify for a score of 3” (AGB, p. 4-12.).

“Identify” means that “the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community.” (AGB, p. 4-13). “As an example, a string could qualify for a score of 2 if it is a noun that the typical community member would naturally be called in the context.” AGB, p. 4-13. If the string appears excessively broad (such as a globally well-known but local tennis club applying for .TENNIS) then it would not qualify for a score of 2. Zero points are awarded if the string "does not fulfill the requirements

for a score of 2." It is not possible to receive a score of one for this sub-criterion. (AGB, p. 4-12).

- (2) Applying these criteria to Merck KGaA's application for <.merck> the EIU Panel awarded Merck KGaA 0 points for Criterion #2, including 0 out of 3 possible points for the nexus element (CPE Report, p. 4. ). Since Merck KGaA secured 11 points from the remaining criteria and needed 14 points for approval, Criterion # 2 was the main reason for its shortfall.

The reasoning the EIU presented for its conclusion was based on clear legal and factual errors. The EIU observed that "although the string Merck matches the name of the community as defined by the applicant, it also matches the name of another corporate entity known as "Merck" within the US and Canada and that "this US-based company, Merck & Co, Inc., operates in the pharmaceutical, vaccines, and animal health industry, has 68,000 employees, and had revenue of US\$39.5 billion in 2015." It therefore concluded that the string is "over-reaching substantially beyond the community" (AGB) because the applied-for string also identifies a substantial entity—Merck in the US and Canada—that is not part of the community defined by the applicant. The Panel determined that the applied-for string does not match or identify the community, or the community members as defined in the application and therefore does not meet the requirements for Nexus. (CPE Report, p 4).

As the FTI Report Scope 3 revealed (FTI Report Scope 3, p. 56), the CPE Report did not reflect any references to research or reference material for its evaluation of the 2-A, Nexus and only consulted three Wikipedia web articles and a Bloomberg article which is no longer available on the Internet:

- [https://en.wikipedia.org/wiki/Merck\\_%26\\_Co](https://en.wikipedia.org/wiki/Merck_%26_Co) (Merck Sharp & Dohme's (MSD) Wikipedia page); (Merck KGaA's Wikipedia Page);
- <http://www.merckgroup.com/en/index.htm> (Merck KGaA's and Merck KGaA's Wikipedia page) and

- <http://www.bloomberg.com/news/articles/2014-02-10/a-tale-of-two-mercks-as-protesters-takeonwrong-company> (This is no longer an active link).

The CPE Report does not devote not a single word to the relationship between the two companies. It ignores the fact that the two companies currently exercise their rights in the “Merck” trademark and company name under a reciprocal use agreement, which has been in force (through various versions and revisions) since the 1930s. The CPR Report fails to acknowledge that Merck & Co.’s rights are territorially limited to two countries within North America, whereas Merck KGaA’s community covers 99% of the world’s jurisdictions, is home to 95% of the world’s population, and that the community has existed for 348 years.

Furthermore, the CPE Report fails to take into account that Merck & Co. is actually prohibited by contract and existing trademark and name rights from using the name “MERCK” on the internet and otherwise in almost all countries.

All of these facts were known to ICANN due to a Request for Reconsideration against CANN’s acceptance of the Expert Determinations in the Legal Rights Objection Procedures against Merck Registry Holdings, Inc.’s applications for <.merck> >. A current copy of the agreement had been submitted to ICANN and a in connection with Merck KGaA’s legal rights objection against MSD’s application for <.merck>, as well as in connection with an Independent Review Process filed by Merck KGaA against ICANN (Independent Review Process Case No. 01-14-0000-9604, MERCK KGaA v. Internet Corporation for Assigned Names and Numbers).

By failing to consider these facts, including Merck & Co.’s contractual obligations to refrain from all use the name Merck outside the US and Canada, the EIU came to the clearly erroneous conclusion that the string <.merck> is excessively broad and identifies another substantial corporate entity.

The CPE Report also makes no mention of the fact that Merck KGaA explicitly stated in its application and in a Public Interest Commitment that it will take all



necessary measures, including geo-targeting, to avoid internet access by users in the few territories in which Merck & Co. has trademark rights. Merck & Co. has not done the same. Indeed, Merck & Co. has indicated in its applications that not only it intends to use the .MERCK space internationally (where it has no rights in the MERCK trademark whatsoever), but also that it intends to sell and license domain names to affiliates and other entities throughout the world, including territories where Merck KGaA has exclusive rights.

By providing a public interest commitment not to use it in the two territories where Merck & Co. has rights, including restricting internet access, Merck KGaA has eliminated the prospect of “over-reaching” on the face of its application. Any “over-reaching” beyond the community is due to the current and proposed intrusion by MERCK & Co. into the Requester’s territories. This unlawful intrusion, namely Merck & Co.’s use of MERCK on the Internet, is that the basis of the panel’s erroneous finding that the string <.merck> is “over-reaching substantially beyond the community.”

- (3) FTI’s CPE Process Review Reports do not address any of these issues that were raised in Merck KGaA’s Request for Reconsideration, nor do they reevaluate EIU’s application of the Nexus criteria or assess the propriety or reasonableness of the research undertaken by the CPE provider.

With regard to the Nexus Requirements, FTI limited itself to observing that “the CPE Provider determined that the applications underlying the 11 CPE reports, and among them Merck KGaA application for <.merck>, received zero points for the Nexus sub-criterion because the CPE Provider determined that the applied- for string “did not identify the community as it substantially overreached the community as defined in the application by indicating a wider or related community of which the applicant is a part but is not specific to the applicant's community”. (FTI Scope 2 Report, p. 37).

The FTI states without any basis or analysis that “CPE Provider engaged in a consistent evaluation process that strictly adhered to the criteria and requirements set

forth in the Applicant Guidebook and CPE Guidelines and that there were no instances where the CPE Provider's evaluation process deviated from the applicable guidelines pertaining to the Nexus-criterion”.

FTI then concludes that the CPE Provider “consistently applied the Nexus criterion in all CPEs” and that “the scoring decisions were based on the same rationale, namely a failure to satisfy the requirements that are set forth in the Applicant Guidebook and CPE Guidelines.”

This is not a “compliance investigation” as FTI claims to have done, but a mere description of its outcomes. (see FTI Report Scope 2, p. 3 where FTI describes its investigation as “analyzing applicable policies and procedures and evaluating whether a person, corporation or other entity complied with or *properly* applies those policies and procedures”). The FTI report does not evaluate or analyze the questions of whether EIU *properly* applied the Nexus criterion to the <.merck> application and whether the CPE report was based upon sufficient evidence.

FTI’s conclusion that it found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the “applicable guideline” is not based on any interpretative analysis of the nexus criterion nor on an investigation of whether the EIU ignored important facts that supported a full credit under the Nexus Criterion.

As much as the EIU, FTI showed no interest in or knowledge of the historical and contractual relationship between Merck KGaA and Merck & Co. and that the corporate entity which used the name Merck is prohibited from doing so in almost all countries of the world, except the U.S. and Canada.

As much as the EIU’s CPE Report, FTI makes no mention of the Public Interest Commitment made only by Merck KGaA that it will take all necessary measures, including geo-targeting, to avoid internet access by users in the few territories in which Merck & Co. has rights in the trademark Merck.

In addition, the FTI personnel who conducted the review did not rely upon the substance of the reference material, assess the reasonableness of the research undertaken by the CPE Provider or take into consideration the information and materials provided by Merck KGaA.

Accordingly, the FTI Report 2 provides no useful information and has no significance with respect to Merck KGaA's Request for Reconsideration against EIU's CPE Report on its <.merck> application.

*b) FTI Report Scope 3 confirms that the CPE Provider was ignoring important Evidence that support Merck KGaA's full credit under the Nexus Criterion*

The FTI Scope 3 Report describes FTI's compilation of the reference materials relied upon by the EIU for each of the eight pending Reconsideration Requests, including that of Merck KGaA's application for <.merck> (FTI Scope 3 Report p. 55 - 57).

A review of the FTI Scope 3 Report confirms Merck KGaA's objection against EIU Panel's CPE Report on the .Merck application. Specifically, the FTI Scope 3 Report reveals that EIU's personnel were completely ignorant of the contractual obligations between Merck KGaA and Merck & Co. and Merck KGaA's Public Interest Commitment to take all necessary measures, including geo-targeting, to avoid internet access by users in the few territories in which Merck & Co. has trademark rights.

It also revealed that the EIU Panel actually consulted only three Wikipedia websites and one Bloomberg article to evaluate whether there is a "Nexus" between the string <.merck> Merck KGaA application for <.merck>.

It is obvious that this was grossly inadequate and that the EIU failed to conduct proper due diligence and research in its assessment.

However, the FTI did not raise the question about whether the evidence assembled by the EIU supported its conclusion. Indeed, FTI itself states that it did not (1) reevaluate the CPE Applications, (2) assess the propriety or reasonableness of the research undertaken by the

CPE Provider, (3) interview Merck KGaA or take into consideration the information and materials provided by Merck KGaA (see FTI Report Scope 3 p. 7).

The Board cannot rely on the FTI's review and still comply with the requirements of ICANN's Bylaws that require that decisions must be made by applying documented policies neutrally and objectively, with integrity and fairness.

5. Finally, Merck KGaA notes that the FTI Report Scope 1 concluded that there is no evidence that the ICANN organization had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process. This conclusion was based upon FTI's review of publicly available documents, but also upon FTI's interviews with relevant personnel and internal and external communication among relevant ICANN organisation personnel which were not disclosed to Merck KGaA.

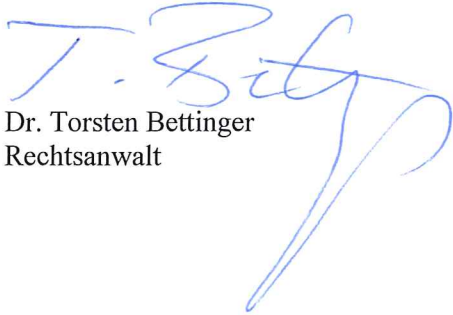
"Transparency is one of the essential principles in ICANN's creation documents, and its name reverberates through its Articles [of Incorporation] and Bylaws. (see Dot Registry, LLC v. ICANN , ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (29 Jul. 2016), 117 at <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf> ). ICANN is therefore required to act in a transparent manner under the Articles and Bylaws, and must disclose the materials and research used by FTI in its independent review. None of Reasons for nondisclosure of these documents set forth in ICANN's Documentary Information Disclosure Policy is applicable here.

6. Based on the forgoing, Merck KGaA respectfully requests that:

- (1) the Board sets aside and disregards the CPE Report relating to the Community Priority Evaluation of Merck KGaA's application for <merck>
- (2) the Board request the CPE Provider to perform a de novo evaluation of Merck KGaA's <.merck> application, with instructions and guidance to insure that all policies are fairly and correctly applied;

(3) the Board discloses all documentary information and communications between the ICANN organization and the CPE Provider relating to the Community Priority Evaluation of Merck KGaA's application for <merck>.

Sincerely,

A handwritten signature in blue ink, appearing to read 'T. Bettinger', with a long, sweeping flourish extending downwards and to the right.

Dr. Torsten Bettinger  
Rechtsanwalt

**Merck KGaA's written summary of its telephonic presentation of September 4, 2018**

Good afternoon.

I am Torsten Bettinger. I appreciate the opportunity to speak to you on behalf of my client, Merck KGaA.

Also on the line from Darmstadt on behalf of Merck KGaA is Jonas Koelle, General Counsel Trademarks.

Our firm is representing Merck KGaA in this matter because we believe that the EIU made fundamental mistakes in its evaluation of Merck's application for community priority status.

We believe that the EIU misapplied the "nexus requirement" contained in Module 4 of the AGB because it ignored material information during its analysis, and that this failure contradicts an established procedure.

As confirmed by the Council of Europe in its 2016 Report on ICANN's policies and procedures concerning community based applications, ICANN staff has never challenged or disagreed with the recommendations made by EIU Panels. ICANN staff merely verified the Panels' reports for completeness to ensure they are comprehensible for the ICANN community, they never reviewed or considered the scoring or the results and neither questioned nor rejected the Panel's conclusions.

As there is no appeal of substance or on merits available of the EIU's evaluation, my client is very concerned that the BAMC, relying on the FTI Reports when deciding its Request for Reconsideration, does not go into the merits of the decision by the EIU and, as in all previous Request for Reconsideration proceedings, will provide a mere 'rubber-stamping' of the EIU decision with respect to its .merck application.

The Council of Europe in its 2016 Report has made it perfectly clear, that a Request for Reconsideration of the EIU decision Process should not be regarded by the BAMC as an administrative "box ticking" exercise to see whether mention was made of the relevant policy or procedure by a third party service provider such as the EIU, but requires that the BAMC looks into how the relevant policy or procedure was actually applied by the EIU, and whether in doing so, the EIU correctly applied them.

The BAMC has argued many times that it is only authorized to determine if any policies or processes were violated during CPE, and that it has no authority to evaluate whether the CPE results are correct.

This view is fundamentally wrong. The EIU is merely a service provider to ICANN, assessing and recommending on applications, but ICANN is the decision maker. ICANN should therefore make sure that EIU recommendations comply with due process standards and do not violate ICANN's processes and policies before accepting it within the dispute resolution process.

The BAMC has the Duty to evaluate that the EIU exercised due diligence and care in having a reasonable amount of facts in front of them.

The ICANN community members, CBA Applicants, independent legal Experts, the ICANN Ombudsman, the Council of Europe and an Independent Review Panel of Experts have criticized the EIU process and FTI's Review Reports on all fronts:

- (1) the Council of Europe, a leading human rights organization with an observer status within ICANN's Governmental Advisory Committee ("GAC"), has provided an in-depth analysis of the ICANN's policies and procedures from a human rights perspective finding that the current assessment by the EIU as a delegated decision maker on the metrics set out in the AGB and CPE guidelines is insufficient to live up to due process standards and determined the EIU inconsistently applied the CPE criteria.<sup>1</sup>

The Council of Europe, in particular questioned the application of the Nexus criterion, which is in dispute in this conflict.<sup>2</sup>

- (2) Also the ICANN Ombudsman Chris LaHatte's Report, when looking at the complaint about the Reconsideration Process from dotgay LLC has raised issues of inconsistencies in the way the EIU has applied the CPE criteria and reminds ICANN that it has a commitment to principles of international law, including human rights, fairness and transparency.<sup>3</sup>

He also took to task the fact that the BAMC has a narrow view of its own jurisdiction in considering reconsideration requests and pointed out that "it has always been open to ICANN to reject an EIU recommendation.

- (3) The community priority applicants' concerns with the CPE process are also supported by independent legal experts.

Professor Eskridge, Professor of Jurisprudence at the Yale Law School, performed an independent review of .DOTGAYs CPE and found that it

- (a) shows an "incomplete understanding" of the CPE's criteria,
- (b) contained "interpretive errors," and
- (c) contained "errors of inconsistency and discrimination."<sup>4</sup>

- (4) Furthermore, the Final Declaration of the Expert Panel in an Independent Review Process proceeding initiated by Dot Registry found that the BAMC

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<sup>1</sup> See Eve Salomon and Kinanya Pijl, "Applications to ICANN for Community-based New Generic Top Level Domains(gTLDs): Opportunities and challenges from a human rights perspective," Council of Europe Report DGI(2016)17 (Nov. 2017), pp. 41-57, <https://rm.coe.int/16806be175>

<sup>2</sup> See Council of Europe Report DGI(2016)17 (Nov. 2017), pp. 58-59.

<sup>3</sup> Chris LaHatte, "Dot Gay Report" (27 July 2016), <http://www.lahatte.co.nz/2016/07/dot-gay-report.html>

<sup>4</sup> Letter from A. Ali on behalf of dotgay to the ICANN Board, attaching the Second Expert Opinion of Professor William N. Eskridge, Jr. (31 Jan. 2018), in Response to FTI Consulting, Inc.'s Independent Review of the Community Priority Evaluation Process <https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>.

failed to make the proper determination as to whether ICANN staff and the EIU complied with ICANN's bylaws in turning down the application, and failed to be transparent about its reconsideration process.

The IRP found that both the EIU and ICANN staff were required to follow ICANN's bylaws, and that the BGC was required to "exercise due diligence and care in having a reasonable amount of facts in front of them" to examine "whether the EIU or ICANN staff engaged in unjustified discrimination or failed to fulfill transparency obligations" under those bylaws.<sup>5</sup>

- (5) And finally, even ICANN—through some of its Board Members and Vice Chair of the GAC have acknowledged the inconsistencies and unfairness in the CPE process.<sup>6</sup>

Despite being aware of these problems with the CPE Process Review Reports, the ICANN Board nonetheless fully acknowledged and accepted them and then directed the BAMC to "move forward with consideration of the remaining Reconsideration Requests relating to the CPE process," which includes Merck's Request for Reconsideration 16-12.

The BAMC's reliance on the fallacious CPE Process Review Reports will therefore directly affect the BAMC's consideration of my client's Request for Reconsideration 16-12.

In its request for reconsideration of the CPE Report and the telephonic presentation of March 29, 2018 my client already specified in detail that in evaluating the community status of its application for <.merck> the EIU Report:

- (1) made fundamental interpretive errors by misreading the Nexus Criterion laid out in ICANN's Applicant Guidebook ("AGB");
- (2) ignored important evidence that supports Full credit under the Nexus Criterion.

These arguments are not undermined by FTI's CPE Process reports.

First, FTI Report Scope 2 completely failed to evaluate whether EIU Panel committed interpretive errors by applying the "Nexus Criterion" laid out in ICANN's Applicant Guidebook.

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<sup>5</sup> Dot Registry v. ICANN, ICDR Case No. 01-14-0001-5004, Declaration of the Independent Review Panel (July 29, 2016), 93-101, <https://www.icann.org/en/system/files/files/irp-dot-registry-final-declaration-redacted-29jul16-en.pdf>

<sup>6</sup> Letter from Christine Willett to Jamie Baxter (16 May 2017), p. 2, <https://www.icann.org/en/system/files/correspondence/willett-to-baxter-et-al-16may17-en.pdf>, Approved Board Resolutions, Special Meeting of the ICANN Board (17 Sep. 2016), <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>



Second, FTI Report Scope 3 by identifying the reference material that EIU consulted in its evaluation of the Nexus factor of the .Merck evaluation revealed that EIU has only consulted three Wikipedia websites for the evaluation of the Nexus factor and thus backs Merck KGaA's claim that the CPE process was grossly inadequate and that the EIU failed to conduct proper due diligence and research in its assessment.

Let me briefly summarize our argument again:

As set forth in the AGB, the Nexus Criterion is measured by two sub-criteria "Nexus" and "Uniqueness."

An application may receive a maximum of four points under the Nexus criterion, which includes up to three points for "Nexus" and one point for "Uniqueness".

An application merits 3 points if "the string matches the name of the community or is a well-known short-form or abbreviation of the community."

For a score of 3, the essential aspect is that the applied-for string is commonly known by others as the identification/name of the community."

"Identify" means that "the applied-for string closely describes the community or the community members, without over-reaching substantially beyond the community."

Applying these criteria to Merck KGaA's application for <.merck> the EIU Panel awarded Merck KGaA 0 out of 4 possible points for Criterion #2, including 0 out of 3 possible points for the nexus element

As it is without question that the applied for Merck string is identical to the Merck's community's distinctive corporate name and globally famous trademark, the decisive question was whether the string "merck" is over-reaching substantially beyond the community.

It is also obvious that the term "overreaching substantially beyond the community" cannot be construed as meaning there cannot be another entity with the same name.

This cannot be the definition in the Applicant Guidebook and the CPE guidelines take this fact into consideration as they state "since the evaluation takes place to resolve contention there will obviously be other applications, community based and/or standard with identical or confusingly similar strings in the contention set to resolve, so the string will clearly not be "unique" in the sense of "alone".

The CPE is only done in cases where multiple applications for the identical string compete.

It therefore appears that the core argument of the EIU in denying community status is that there is another substantial company that uses the name Merck.

I read from the EIU report:

"although the string Merck matches the name of the community as defined by the applicant, it also matches the name of another corporate entity known as "Merck" within the US and Canada and that "this US-based company, Merck &

Co, Inc., operates in the pharmaceutical, vaccines, and animal health industry, has 68,000 employees, and had revenue of US\$39.5 billion in 2015.”<sup>7</sup>

The Panel determined that the string is “over-reaching substantially beyond the community” because the applied-for string also identifies a substantial entity—Merck in the US and Canada—that is not part of the community defined by the applicant.

As the FTI Report Scope 3<sup>8</sup> revealed the CPE Report did not reflect any references to research or reference material for its evaluation of the Nexus criterion and only consulted three Wikipedia websites and a Bloomberg article which is no longer available on the Internet:

- a Wikipedia article on Merck Sharp & Dohme’s
- a Wikipedia article on Merck KGaA’s; and
- a Bloomberg article published under the URL Bloomberg a-tale-of-two-companies which is no longer available on the Internet.

This factual and legal analysis is deficient. It ignores contractual relationship between the two entities, the territorial limited rights of Merck & CO and the territorially restricted use of the applied for community gTLD.

The CPE Report does not devote a single word to the relationship between the two companies and the fact that the two companies currently exercise their rights in the “Merck” trademark and company name under a reciprocal use agreement, which has been in force since the 1930s.

Merck & Co.’s rights are territorially limited to two countries within North America, whereas Merck KGaA Merck KGaA’s community covers 99% of the world’s jurisdictions, is home to 95% of the world’s population and that the community has existed for 348 years.

Merck & Co. is prohibited by contract and existing trademark and name rights from using the name “MERCK” on the internet and otherwise in almost all countries.

A copy of the currently-valid agreement, signed in 1970, had been submitted to ICANN in connection with Merck KGaA’s legal rights objection against MSD’s application for <.merck> as well as in connection with an Independent Review Process file by Merck KGaA against ICANN

Not taking note of this agreement and Merck & Co.’s contractual obligations to refrain from all use the name Merck outside the US and Canada, the EIU inevitably came to the erroneous conclusion that the string <.merck> is excessively broad and identifies another substantial corporate entity.

The CPE Report also makes no mention of the fact that Merck KGaA explicitly stated in its application and in a Public Interest Commitment that it will take all necessary

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<sup>7</sup> New gTLD Program, Community Priority Evaluation Report, Report Date: 10 August 2016, Application ID: 1-980-7217 Applied-for String: MERCK (Applicant Merck KGaA), p. 4.

<sup>8</sup> FTI Reports on the Review of the Community Priority Evaluation Process (Scope 3)

<https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>

measures, including geo-targeting, to avoid internet access by users in the few territories in which Merck & Co. has trademark rights.

By providing a public interest commitment not to use it in the two territories where Merck & Co. has rights, including restricting internet access. Merck KGaA has, on the face of its application, eliminated “over-reaching”.

FTI’s CPE Process Review Reports do not address any of these issues raised in Merck KGaA’s Request for Reconsideration nor do they reevaluate EIU’s application of the Nexus criteria or assess the propriety or reasonableness of the research undertaken by the CPE provider.

With regard to the Nexus Requirements FTI limited itself to observing that

I read from the FTI Report (Scope 2):

“the applied- for string did not identify the community as it substantially overreached the community as defined in the application by indicating a wider or related community of which the applicant is a part but is not specific to the applicant's community”.<sup>9</sup>

And then, two pages later, without further arguments and analysis, the FTI states its observation that “CPE Provider engaged in a consistent evaluation process that strictly adhered to the criteria and requirements set forth in the Applicant Guidebook and CPE Guidelines and that there were no instances where the CPE Provider's evaluation process deviated from the applicable guidelines pertaining to the Nexus-criterion”.

FTI then concludes that the CPE Provider “consistently applied the Nexus criterion in all CPEs and that “the scoring decisions were based on the same rationale, namely a failure to satisfy the requirements that are set forth in the Applicant Guidebook and CPE Guidelines.

I regret to say, but this is not a “compliance investigation” which FTI claims to have done but a mere description of its outcomes.

The FTI report does not evaluate or analyze the questions of whether EIU properly applied the Nexus criterion to the <.merck> application and whether the CPE report was based upon sufficient empirical evidence.

FTI’s normative conclusion that it found no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guideline” is not based on any interpretative analysis of the nexus criterion nor on an investigation of whether the EIU ignored important facts that supported a full credit under the Nexus Criterion.

As much as the EIU, FTI showed no interest in or knowledge of the contractual relationship between Merck KGaA and Merck & Co. and the fact that the corporate

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<sup>9</sup> FTI Reports on the Review of the Community Priority Evaluation Process (Scope 2), <https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>.

entity which used the name Merck is prohibited by contract and existing trademark and name rights from using that name “MERCK” on the Internet and in almost all countries of the world except the U.S. and Canada.

As much as the EIU, FTI makes no mention of the Public Interest Commitment that it will take all necessary measures, including geo-targeting, to avoid internet access by users in the few territories in which Merck & Co. has rights in the trademark Merck.

Also the FTI personnel who conducted the review did not rely upon the substance of the reference material, assess the reasonableness of the research undertaken by the CPE Provider or take into consideration the information and materials provided by Merck KGaA.

Accordingly, the FTI Report 2 provides no useful information and has no significance with respect to Merck KGaA’s Request for Reconsideration against EIU’s CPE Report on its <.merck> application.

In contrast, the FTI Scope 3 Report reveals that EIU’s personnel were completely ignorant of the contractual obligations between Merck KGaA and Merck & Co. and Merck KGaA’s Public Interest Commitment.

It is obvious that this was grossly inadequate and that the EIU failed to conduct proper due diligence and research in its assessment.

However, the FTI did not raise the question about whether the evidence assembled by the EIU supported its conclusion. Indeed, FTI itself sates that it did not

- (1) reevaluate the CPE Applications,
- (2) assess the propriety or reasonableness of the research undertaken by the CPE Provider,
- (3) interview Merck KGaA or take into consideration the information and materials provided by Merck KGaA (see FTI Report Scope 3 p. 7).

Merck KGaA therefore cannot see how the Board can rely on the FTI’s review and still comply with the requirements of ICANN’s Bylaws that decision must be made by applying documented policies neutrally and objectively, with integrity and fairness.

What are we asking the BAMC to do after this hearing?

Please do your due diligence.

1. Closely review all the information regarding the Merck application, including Merck’s Public Interest Commitment, the Coexistence Agreement between Merck KGaA and Merck & Co and all other facts we brought to your attention today and which are relevant for the evaluation of the Requestor’s community priority status.

Under reference to the FTI Reports, the BAMC cannot claim to have discharged its duty to provide due diligence and accountability

2. Set aside the CPE Panel's report and have new members be appointed to conduct a new CPE for the Requestor's application.

3. Transmit all the information regarding the Merck application, including the Requestor's Public Interest Commitment, the Coexistence Agreement between the Requestor and Merck & Co and the information brought to your during the application process and the following proceedings to the new evaluators.

4. Ensure procedural fairness and disclose the process with which ICANN interacted with the CPE.

I thank you very much again for the opportunity to make this presentation today.

I will pass the word now to Jonas Kölle who would like to make some brief final remarks.

**Mr. Jonas Kölle's statement:**

„Our company Merck is a science and technology driven company and around for 350 years. The curiosity of the Merck founding family, which has remained the majority owner to this very day made Merck what it is today.

In 2012 we applied for “.merck” as we trusted and believed in the benefits a “.merck” space would bring to internet community, especially to our stakeholders in the fields of pharmaceuticals, chemicals and life sciences, a much regulated field of science and industry.

Today, despite all our investments and efforts, “.merck” is still not delegated to Merck, the company owned by the Merck founding family. After six years of discussions with ICANN and its accountability bodies we only can conclude that ICANN's accountability mechanisms do not serve their purpose.

As outlined by Dr. Bettinger, not only today but over the course of our application process, we fulfill all criteria set by the applicant guidebook for delegation of “.merck” to our company. I therefore request ICANN to correct the mistakes made in the process and ensure a fair treatment.”

**RECOMMENDATION  
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)  
RECONSIDERATION REQUEST 16-12  
14 DECEMBER 2018**

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The Requestor, Merck KGaA, seeks reconsideration of the Community Priority Evaluation (CPE) report (CPE Report) of its community-based application for the .MERCK generic top-level domain (gTLD), and ICANN organization's acceptance of that Report.<sup>1</sup> Specifically, the Requestor claims that the independent provider that conducted the CPE (CPE Provider) violated established CPE procedures by misapplying CPE Criterion 2 (Nexus between Proposed String and Community) in its evaluation of the Requestor's application.

**I. Brief Summary.**

The Requestor submitted a community-based application for .MERCK (Application), which was placed in a contention set with two other .MERCK applications.<sup>2</sup> The Requestor participated in CPE but did not prevail. The Requestor submitted Request 16-12 on 25 August 2016, challenging the CPE Provider's evaluation of its Application and ICANN org's acceptance of the CPE Report.<sup>3</sup>

While Request 16-12 was pending, the ICANN Board and Board Governance Committee (BGC) directed ICANN org to undertake a review of certain aspects of the CPE process (CPE Process Review). The CPE Process Review: (i) evaluated the process by which ICANN org interacted with the CPE Provider; (ii) evaluated whether the CPE criteria were applied consistently throughout and across each CPE report; and (iii) compiled the research relied upon

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<sup>1</sup> Request 16-12, § 3, at Pg. 2; *id.* § 8, at Pg. 6 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kgaa-request-redacted-25aug16-en.pdf>).

<sup>2</sup> <https://gtldresult.icann.org/applicationstatus/applicationdetails/1631>.

<sup>3</sup> Request 16-12, § 3, at Pg. 2; *id.* § 8, at Pg. 6.

by the CPE Provider for the evaluations which are the subject of pending Reconsideration Requests.<sup>4</sup> The BGC determined that the pending Reconsideration Requests regarding CPEs, including Request 16-12, would be placed on hold until the CPE Process Review was completed.<sup>5</sup>

On 13 December 2017, ICANN org published three reports on the CPE Process Review (CPE Process Review Reports).<sup>6</sup>

On 15 March 2018, the Board passed Resolutions 2018.03.15.08 through 2018.03.15.11 (2018 Resolutions), which accepted the findings in the CPE Process Review Reports; declared the CPE Process Review complete; concluded that there would be no overhaul or change to the CPE process for this current round of the New gTLD Program; and directed the BAMC to move forward with consideration of the remaining Reconsideration Requests relating to CPEs that had been placed on hold.<sup>7</sup>

Subsequently, the BAMC invited the Requestor to provide a telephonic presentation to the BAMC in support of Request 16-12. The BAMC also invited the Requestor to submit additional written materials in response to the CPE Process Review Reports.<sup>8</sup> The Requestor submitted supplemental materials in support of its Request on 12 April 2018<sup>9</sup> and conducted a

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<sup>4</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>;  
<https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

<sup>5</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>. Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. See ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e) (<https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>). Since 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with initial review of reconsideration requests. See ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e) (<https://www.icann.org/resources/pages/governance/bylaws-en#article4>).

<sup>6</sup> See <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>7</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>8</sup> See Attachment 1 to BAMC Recommendation.

<sup>9</sup> Supplemental Submission by Requestor in support of Request 16-12 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kga-a-supp-submission-12apr18-en.pdf>).

telephonic presentation to the BAMC on 4 September 2018.<sup>10</sup> The Requestor also submitted a written summary of its telephonic presentation to the BAMC.<sup>11</sup>

The BAMC then evaluated the Requestor's claims, taking into consideration all relevant materials. Based on its extensive review of all relevant materials, the BAMC finds that reconsideration is not warranted because the CPE Provider did not violate any established policies or procedure in its evaluation of Criterion 2 and that ICANN org's acceptance of the CPE Provider's Report complied with established policies. Accordingly, the BAMC recommends that the Board deny Request 16-12.

## **II. Facts.**

### **A. The CPE Provider's Evaluation of the Requestor's Application.**

#### **1. The CPE Report.**

The Requestor submitted a community-based application for .MERCK. One other applicant, Merck Registry Holdings, Inc. (MRH), a subsidiary of Merck & Co., Inc., submitted both a community application (Merck & Co. Application) and a standard (meaning, not community-based) application for .MERCK. All three .MERCK applications were placed into a contention set.<sup>12</sup>

As a community-based applicant, the Requestor participated in CPE. CPE is a method of resolving string contention,<sup>13</sup> described in Module 4, section 4.2 of the gTLD Applicant Guidebook (Guidebook). To prevail in CPE, an applicant must receive at least 14 out of 16

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<sup>10</sup> Minutes, 4 September 2018 BAMC Meeting (<https://www.icann.org/resources/board-material/minutes-bamc-2018-09-04-en>).

<sup>11</sup> <https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kгаа-oral-presentation-bamc-20sep18-en.pdf>.

<sup>12</sup> <https://gtldresult.icann.org/applicationstatus/applicationdetails/1631>.

<sup>13</sup> "String contention refers to the scenario in which there is more than one qualified application for the identical gTLD string or for similar gTLD strings." Guidebook Module 1, § 1.1.2.10.



points. The Requestor’s Application received 11 points, and therefore did not prevail in CPE.<sup>14</sup> As discussed in further detail below, the Requestor earned the maximum four points for Criterion 1: Community Establishment, zero points on Criterion 2: Nexus between Proposed String and Community, four points for Criterion 3: Registration Policies, and three points for Criterion 4: Community Endorsement.

2. Request 16-12.

The Requestor submitted Request 16-12 on 25 August 2016.<sup>15</sup> The Requestor claimed that the CPE provider incorrectly required a showing of “absolute world-wide exclusivity” over the applied-for string to receive points under sub-criterion 2-A-Nexus,<sup>16</sup> which considers, among other things, whether the string closely describes the community defined in the application without over-reaching substantially beyond the community.<sup>17</sup> The CPE Provider concluded that the applied-for string, .MERCK, ““over-reach[ed] substantially beyond the community”” because the string matched the name of both the Requestor and of Merck & Co., Inc., another substantial entity.<sup>18</sup> The Requestor also argued that ICANN org “failed to take reasonable care in evaluating the Request[o]r’s evidence and misapplied standards and policies developed by ICANN in the...Guidebook, resulting in a denial of due process to the Request[o]r.”<sup>19</sup>

The Requestor sought an opportunity to make a presentation to the BGC<sup>20</sup> regarding Request 16-12. In response, the BGC invited the Requestor to make a presentation at the 29

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<sup>14</sup> *Id.*

<sup>15</sup> Request 16-12 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kga-a-request-redacted-25aug16-en.pdf>).

<sup>16</sup> Request 16-12, § 8, Pg. 7.

<sup>17</sup> Guidebook, Module 4, § 4.2.3, at Pg. 4-13.

<sup>18</sup> CPE Report, at Pg. 4 (quoting Guidebook, Module 4, § 4.2.3, at Pg. 4-13).

<sup>19</sup> *Id.*, § 8, Pg. 6.

<sup>20</sup> Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. See ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e) (<https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>). Following 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with reviewing and making

March 2017 BGC meeting.<sup>21</sup> The Requestor did so (2017 Presentation), and submitted a written summary of the points raised in its 2017 Presentation.<sup>22</sup> The Requestor also made a presentation to the BAMC in September 2018,<sup>23</sup> after the Board passed the 2018 Resolutions.

**B. The CPE Process Review.**

On 17 September 2016, the Board directed ICANN org to undertake a review of the “process by which ICANN [org] interacted with the CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider” as part of the Board’s oversight of the New gTLD Program (Scope 1).<sup>24</sup> The Board’s action was part of the ongoing discussions regarding various aspects of the CPE process, including some issues that were identified in the Final Declaration from the Independent Review Process (IRP) proceeding initiated by Dot Registry, LLC.

The BGC later determined that the review should also include: (i) an evaluation of whether the CPE criteria were applied consistently throughout each CPE report (Scope 2); and (ii) a compilation of the research relied upon by the CPE Provider to the extent such research exists for the evaluations that are the subject of pending Reconsideration Requests relating to the CPE process (Scope 3).<sup>25</sup> Scopes 1, 2, and 3 are collectively referred to as the CPE Process Review. The BGC determined that the pending Requests relating to CPEs, including Request

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recommendations to the Board on reconsideration requests. See ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

<sup>21</sup> See <https://www.icann.org/resources/board-material/agenda-bgc-2017-03-29-en>.

<sup>22</sup> See <https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kgaa-summary-bgc-presentation-31mar17-en.pdf>.

<sup>23</sup> Minutes, 4 September 2018 BAMC Meeting (<https://www.icann.org/resources/board-material/minutes-bamc-2018-09-04-en>).

<sup>24</sup> ICANN Board Rationale for Resolution 2016.09.17.01 (<https://www.icann.org/resources/board-material/resolutions-2016-09-17-en#1.a>).

<sup>25</sup> <https://www.icann.org/resources/board-material/minutes-bgc-2016-10-18-en>.

16-12, would be on hold until the CPE Process Review was completed.<sup>26</sup>

FTI Consulting, Inc.'s (FTI) Global Risk and Investigations Practice and Technology Practice were retained to conduct the CPE Process Review. On 13 December 2017, ICANN org published FTI's reports issued in connection with the CPE Process Review (the CPE Process Review Reports).<sup>27</sup>

With respect to Scope 1, FTI concluded:

there is no evidence that ICANN org[] had any undue influence on the CPE Provider with respect to the CPE reports issued by the CPE Provider or engaged in any impropriety in the CPE process.<sup>28</sup>

FTI also concluded that "ICANN org[] had no role in the evaluation process and no role in writing the initial draft CPE report," and reported that the "CPE Provider stated that it never changed the scoring or the results [of a CPE report] based on ICANN org[]'s comments."<sup>29</sup>

For Scope 2, "FTI found no evidence that the CPE Provider's evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner."<sup>30</sup>

For Scope 3, FTI compiled the research relied upon by the CPE Provider for the evaluations which are the subject of the pending Reconsideration Requests relating to CPE.<sup>31</sup> In the specific instance of the Requestor's CPE, FTI observed that the CPE Provider included a

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<sup>26</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>.

<sup>27</sup> See <https://www.icann.org/news/announcement-2017-12-13-en>.

<sup>28</sup> Scope 1 Report, at Pg. 2 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-1-communications-between-icann-cpe-provider-13dec17-en.pdf>).

<sup>29</sup> *Id.*, at Pg. 9, 15.

<sup>30</sup> Scope 2 Report, at Pg. 2 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>).

<sup>31</sup> Scope 3 Report, at Pg. 3-4 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-3-cpe-provider-reference-material-compilation-redacted-13dec17-en.pdf>).

citation in the CPE Report for each reference to research.<sup>32</sup> Relevant here, FTI observed that the CPE Report did not reflect any references to research or reference material in its application of Criterion 2: Nexus between Proposed String and Community, but the working papers contained four citations to research or reference material for sub-criterion 2-A-Nexus and four citations to research or reference material for sub-criterion 2-B-Uniqueness.<sup>33</sup> Additional detailed results of Scope 3 of the CPE Process Review are set forth in the CPE Process Review Reports.<sup>34</sup>

On 15 March 2018, the Board passed the 2018 Resolutions, which acknowledged and accepted the findings set forth in the CPE Process Review Reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move forward with consideration of the remaining Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Reviews.<sup>35</sup>

In adopting the 2018 Resolutions, the Board noted that Merck KGaA and the other requestors with pending reconsideration requests relating to CPEs

each will have an opportunity to submit supplemental materials and make a presentation to the BAMC to address how the CPE Process Review is relevant to their pending Reconsideration Requests. Any specific claims they might have related to the FTI Reports with respect to their particular applications can be addressed then, and ultimately will be considered in connection with the determination on their own Reconsideration Requests.<sup>36</sup>

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<sup>32</sup> *Id.* at Pg. 55-57.

<sup>33</sup> *Id.* at Pg. 56. FTI provided those references, which included the Wikipedia pages for “Merck Group” and for Merck & Co., Inc., <http://www.merckgroup.com/en/index.html>, and <http://www.bloomberg.com/news/articles/2014-02-10/a-tale-of-two-mercks-as-prottesterstakeonwrong-company>.

<sup>34</sup> *See generally id.*

<sup>35</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>36</sup> 2018 Resolutions.

Accordingly, the Board instructed the BAMC to consider the remaining Requests in accordance with the Transition Process of Reconsideration Responsibilities from the BGC to the BAMC (Transition Process),<sup>37</sup> and with a Roadmap for the review of the pending Reconsideration Requests (Roadmap).<sup>38</sup> As part of the Transition Process, the BAMC invited the Requestor to “submit additional information relating to Request 16-12, provided the submission is limited to any new information/argument based upon the CPE Process Review Reports” by 2 April 2018. The BAMC also invited the Requestor to “make a telephonic oral presentation to the BAMC in support of” Request 16-12. The BAMC requested “that any such presentation be limited to providing additional information that is relevant to the evaluation of Request 16-12 and that is not already covered by the written materials.”<sup>39</sup> The BAMC asked the Requestor to confirm its interest in proceeding with a telephonic presentation by 23 March 2018.<sup>40</sup>

### **C. The Requestor’s Response to the CPE Process Review.**

On 24 October 2017, the Requestor submitted a letter to ICANN org “not[ing] that it has requested access to the documents that the CPE [Provider] relied upon in making its determination with respect to [the Application] and, in particular, to the independent research that the [CPE Provider] conducted and to the information on the process by which ICANN interacted with the [CPE] Provider.”<sup>41</sup> The Requestor asked ICANN org to confirm

that ICANN will disclose FTI’s final report and in particular, the documents that the CPE [Provider] used to make its determination,

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<sup>37</sup> <https://www.icann.org/en/system/files/files/reconsideration-responsibilities-transition-bgc-to-bamc-05jan18-en.pdf>.

<sup>38</sup> 2018 Resolutions. *See also* Roadmap (<https://www.icann.org/en/system/files/files/roadmap-reconsideration-requests-cpe-15feb18-en.pdf>).

<sup>39</sup> Attachment 1 to BAMC Recommendation.

<sup>40</sup> *Id.*

<sup>41</sup> 24 October 2017 letter from Bettinger to ICANN (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kgaa-bettinger-to-icann-board-24oct17-en.pdf>).

the independent research that the [CPE Provider] conducted and the information on the process with which ICANN interacted with the CPE Provider related to [the CPE Report] immediately after FTI completes its review and that our client will have the opportunity to respond and comment on FTI's findings before ICANN renders a determination regarding [the Requestor's] Request for Reconsideration.<sup>42</sup>

On 12 April 2018, pursuant to the BAMC's invitation to submit additional materials,<sup>43</sup> the Requestor submitted a ten-page letter to the BAMC challenging the scope of FTI's investigation and asserting the information in the Scope 3 Report relating to Request 16-12 supported the Requestor's arguments concerning the Nexus criterion.<sup>44</sup> On 4 September 2018, the Requestor made its telephonic presentation to the BAMC, reiterating its arguments that the CPE Provider misapplied the nexus requirement (Criterion 2) and ignored material information in its consideration of the Application, and that the BAMC should disregard the CPE Process Review Reports in its consideration of Request 16-12,<sup>45</sup> and additionally asserting that the BAMC has "authority to evaluate whether the CPE results are correct," even if it concludes that the CPE adhered to applicable policies and procedures.<sup>46</sup>

#### **D. Relief Requested.**

The Requestor asks the BAMC to:

1. Set aside the CPE Report;
2. "Closely review" all evidence the Requestor submitted in support of its

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<sup>42</sup> *Id.* at Pg. 2.

<sup>43</sup> The Requestor sought and was granted a ten-day extension of the 2 April 2018 deadline for submitting supplemental materials. *See* Attachment 1 to BAMC Recommendation.

<sup>44</sup> 12 April 2018 letter from Bettinger to ICANN (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kгаа-supp-submission-12apr18-en.pdf>).

<sup>45</sup> Requestor's Written Submission in support of Oral Presentation to BAMC on 4 September 2018 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kгаа-oral-presentation-bamc-20sep18-en.pdf>).

<sup>46</sup> *Id.* at Pg. 1.

Application, including its Public Interest Commitment and a contract between the Requestor and Merck & Co., Inc.;<sup>47</sup>

3. Ask new evaluators “to perform a *de novo* evaluation of [the Application], with instructions and guidance to ensure that all policies are fairly and correctly applied;”<sup>48</sup> and
4. “[D]isclose[] all documentary information and communications between the ICANN organization and the CPE Provider relating to the Community Priority Evaluation of Merck KGaA’s application for [.MERCK].”<sup>49</sup>

### **III. Issues Presented.**

The issues are as follows:

1. Whether the CPE Provider adhered to the Guidebook in its application of Criterion 2, Nexus between Proposed String and Community, in the CPE Report;
2. Whether ICANN org complied with applicable policies and procedures when it accepted the CPE Report;
3. Whether ICANN org must disclose documentary information and communications between ICANN org and the CPE Provider relating to the Application; and
4. Whether the Board complied with applicable Commitments, Core Values, and policies when it acknowledged and accepted the findings set forth in the CPE Process Review Reports.

### **IV. The Relevant Standards for Reconsideration Requests and CPE.**

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<sup>47</sup> *Id.* at Pg. 7.

<sup>48</sup> 12 April 2018 letter from Bettinger to ICANN, at Pg. 9-10; Requestor’s Written Submission in support of Oral Presentation to BAMC on 4 September 2018, at Pg. 8.

<sup>49</sup> 12 April 2018 letter from Bettinger to ICANN, at Pg. 9-10. *See also* Request 16-12, at § 9, Pg. 12 (requests 1 and 2 only).

## A. Reconsideration Requests.

Article IV, Section 2.1 and 2.2 of ICANN's Bylaws<sup>50</sup> provide 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);
- (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.<sup>51</sup>

Where, as here, the reconsideration request seeks reconsideration of ICANN Staff and Board action, the operative version of the Bylaws direct the BAMC<sup>52</sup> to review the request and provide a recommendation to the Board.<sup>53</sup> Denial of a request for reconsideration of ICANN org action or inaction is appropriate if the BAMC recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>54</sup>

On 26 April 2017, the BGC placed Request 16-12 on hold, and it remained on hold until the Board directed the BAMC to proceed with its evaluation of Request 16-12. Accordingly, the BAMC has reviewed Request 16-12 and all relevant materials, and issues this Recommendation.

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<sup>50</sup> The BAMC has considered Request 16-12 under the 11 February 2016 version of the Bylaws (the version in effect when the Requestor submitted Request 16-12). Although the Bylaws have since changed (*see* the Bylaws archive, <https://www.icann.org/resources/pages/governance/bylaws-archive-en>, and 22 July 2017 Bylaws, <https://www.icann.org/resources/pages/governance/bylaws-en>), the operative version of the Bylaws is the one in effect when Request 16-12 was submitted.

<sup>51</sup> ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.1, 2.2.

<sup>52</sup> As noted above, *supra* n.35, the BAMC is currently tasked with reviewing and making recommendations to the Board on reconsideration requests. *See* ICANN Bylaws, 22 July 2017, Art. 4, § 4.2(e) (<https://www.icann.org/resources/pages/governance/bylaws-en/#article4>).

<sup>53</sup> *See* ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.3, 2.10, 2.15.

<sup>54</sup> *Id.*



## **B. The CPE Criteria and Procedures.**

CPE is a contention resolution mechanism available to applicants that self-designated their applications as community applications.<sup>55</sup> The standards and CPE process are defined in Module 4, Section 4.2 of the Guidebook. Community-based applications that elect to participate in CPE are evaluated by the following criteria: Criterion 1: Community Establishment; Criterion 2: Nexus Between the Proposed String and Community; Criterion 3: Registration Policies; and Criterion 3: Community Endorsement.<sup>56</sup> Pursuant to the Guidebook, the sequence of the criteria reflects the order in which they will be assessed by the CPE Provider. To prevail in CPE, an applicant must receive at least 14 out of 16 points on the scoring of the foregoing four criteria, each of which is worth a maximum of four points. An application that prevails in CPE “eliminates all directly contending standard applications, regardless of how well qualified the latter may be.”<sup>57</sup>

CPE will occur only if a community-based applicant selects CPE and after all applications in the contention set have completed all previous stages of the gTLD evaluation process.<sup>58</sup> CPE is performed by an independent panel composed of two evaluators who are appointed by the CPE Provider.<sup>59</sup> A CPE Provider’s role is to determine whether the community-based application fulfills the four community priority criteria set forth in Module 4.2.3 of the Guidebook.<sup>60</sup>

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<sup>55</sup> See Guidebook, Module 4, § 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>). See also <https://newgtlds.icann.org/en/applicants/cpe>.

<sup>56</sup> *Id.* at Module 4, § 4.2 at Pg. 4-7 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>57</sup> *Id.* at Module 4, § 4.2.3, Pg. 4-9.

<sup>58</sup> Guidebook, Module 4, § 4.2.

<sup>59</sup> *Id.* Module 4, § 4.2.2.

<sup>60</sup> *Id.* at Module 4, §§ 4.2.2 and 4.2.3. at Pgs. 4-8 and 4-9 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

In addition to the Guidebook, the CPE Provider’s supplementary guidelines (CPE Guidelines) provide more detailed scoring guidance, including scoring rubrics, definitions of key terms, and specific questions to be scored.<sup>61</sup> The CPE Guidelines accompany the Guidebook and do not alter the CPE criteria established by the Guidebook.<sup>62</sup> Rather, the CPE Guidelines were intended to increase transparency, fairness, and predictability around the assessment process by explaining the methodology that the CPE Provider undertook to evaluate each criterion.<sup>63</sup> The CPE Provider also published the CPE Panel Process Document explaining the CPE evaluation process as described in the Guidebook and discussed in the CPE Guidelines.<sup>64</sup>

## **V. Analysis and Rationale.**

### **A. The CPE Provider Adhered to Applicable Policies and Procedures in its Application of Criterion 2.**

The Requestor received zero points for Criterion 2. Criterion 2 evaluates “the relevance of the string to the specific community that it claims to represent.”<sup>65</sup> It is measured by two sub-criterion: sub-criterion 2-A-Nexus; and sub-criterion 2-B-Uniqueness.<sup>66</sup> Sub-criterion 2-A is worth a maximum of three points and sub-criterion 2-B is worth a maximum of one point, for a total of four points.

To obtain three points for sub-criterion 2-A, the applied-for string must “match the name of the community or be a well-known short-form or abbreviation of the community.”<sup>67</sup> For a score of two, the applied-for string should “closely describe the community or the community

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<sup>61</sup> See CPE Guidelines (<https://newgtlds.icann.org/en/applicants/cpe/guidelines-27sep13-en.pdf>).

<sup>62</sup> *Id.* at Pg. 2.

<sup>63</sup> See *id.*

<sup>64</sup> See CPE Panel Process Document, at Pg. 2 (<http://newgtlds.icann.org/en/applicant/cpe/panel-process-07aug14-en.pdf>).

<sup>65</sup> See Guidebook, Module 4, § 4.2.3 at Pg. 4-13 (<https://newgtlds.icann.org/en/applicants/agb/string-contention-procedures-04jun12-en.pdf>).

<sup>66</sup> *Id.* at Pgs. 4-12-4-13.

<sup>67</sup> *Id.*

members, without over-reaching substantially beyond the community.”<sup>68</sup> The Guidebook explains the scoring rubric for sub-criterion 2-A as follows:

As an example, a string could qualify for a score of two if it is a noun that the typical community member would naturally be called in the context. If the string appears excessively broad (such as, for example, a globally well-known but local tennis club applying for “.TENNIS”) then it would not qualify for two points.<sup>69</sup> Zero points are awarded if the string “does not fulfill the requirements for a of 2.”<sup>70</sup>

It is not possible to obtain a score of one for this sub-criterion.

To obtain one point for sub-criterion 2-B, the applied-for string must have no other significant meaning beyond identifying the community described in the application.<sup>71</sup> An application that does not qualify for two or three points for sub-criterion 2-A will not qualify for a score of one for sub-criterion 2-B.<sup>72</sup>

The Requestor challenges the CPE Provider’s application of sub-criterion 2-A-Nexus, and sub-criterion 2-B-Uniqueness. For the reasons set forth below, the Requestor’s arguments do not support reconsideration.

1. The CPE Provider Adhered to Applicable Policies and Procedures in its Application of Sub-Criterion 2-A-Nexus.

The Requestor’s Application received zero points for sub-criterion 2-A. The CPE Provider determined that the Requestor’s Application did not satisfy the three point test because the applied-for string does not “match the name of the community as defined in the application, nor is it a well known short-form or abbreviation of the community.”<sup>73</sup> The CPE Provider also

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<sup>68</sup> *Id.* at Pg. 4-12.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at Pg. 4-13.

<sup>72</sup> *Id.* at Pg. 4-14.

<sup>73</sup> CPE Report, at Pg. 3.

found that the Requestor’s Application did not satisfy the two point test because the applied-for string does not “identify...the community as defined in the application.”<sup>74</sup>

The community as defined by the Requestor’s Application consists of

the collection of corporate entities, their affiliates and subsidiaries which together comprise the Merck Community. Membership in the Merck Community is clearly defined in the following manner. Members of the Merck Community are the companies which are part of the Merck Group...To be recognized as a member of the Merck Community, a registrant must meet the Eligibility Requirements, which are as follows: - the registrant is Merck KGaA or a company which is a fully owned subsidiary of Merck KGaA, - the registrant uses “Merck” as the sole element or as a component of its company name, and - the registrant uses as its umbrella brand the German figurative trademark No. 30130670, “MERCK”.<sup>75</sup>

The Application further states

The applied-for “.MERCK” string is identical to the Merck Community’s distinctive corporate name and globally famous trademark. The individual companies which comprise the Merck Community actively self-identify as members of the Merck Community, and utilize the Merck name within their own corporate titles. Members of the public recognize the name Merck as corresponding to the Merck Community and its constituent members.<sup>76</sup>

The CPE Provider noted that, pursuant to the Guidebook, “identify means that the applied[-]for string closely describes the community or the community members, without over-reaching substantially beyond the community” and the applied-for string must at least identify the community for full or partial credit for sub-criterion 2-A.<sup>77</sup> The CPE Provider concluded that

although the string “Merck” matches the name of the community defined in the Application, it also matches the name of another

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<sup>74</sup> *Id.*

<sup>75</sup> Written Summary of Requestor’s 29 March 2017 Presentation to the BGC, Pg, 2 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kgaa-summary-bgc-presentation-31mar17-en.pdf>).

<sup>76</sup> CPE Report at Pgs. 3-4.

<sup>77</sup> *Id.* at Pg. 4.

corporate entity known as “Merck” within the US and Canada. This US-based company, Merck & Co., Inc., operates in the pharmaceutical, vaccines, and animal health industry, has 68,000 employees, and had revenue of US\$39.5 billion in 2015. It is therefore a substantial entity also known by the name “Merck”.<sup>78</sup>

The CPE Provider therefore determined that the string is ““over-reaching substantially beyond the community’ ...it defines because the applied-for string also identifies a substantial entity—Merck in the US and Canada—that is not part of the community defined by the applicant.”<sup>79</sup>

The Requestor disagrees with the CPE Provider’s conclusion that the applied-for string, .MERCK, over-reached the community defined in the Application, and on that basis argues that reconsideration is warranted. However, the Requestor has not identified any policy or procedure that the CPE Provider violated in its determination.<sup>80</sup> Nor has the Requestor provided any evidence that the CPE Provider violated any established policy or procedure. The Requestor’s substantive disagreement with the CPE Provider’s conclusion is not grounds for reconsideration. Additionally, as reported in the CPE Process Review Scope 2 Report, the CPE Provider acted consistent with the Guidebook in its analysis under sub-criterion 2-A for all the CPEs that were conducted.<sup>81</sup>

The BAMC notes that the Requestor does not deny that the U.S.-based entity is connected to the Requestor’s community as defined in the Application; to the contrary, the majority of Request 16-12 is devoted to summarizing the decades-old, contentious legal dispute

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> The Requestor asserts that the BAMC should re-evaluate the Application in the course of making a recommendation on Request 16-12. See Written Submission in support of Oral Presentation to BAMC on 4 September 2018, at Pg. 1 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kгаа-oral-presentation-bamc-20sep18-en.pdf>). ICANN’s Bylaws direct the BAMC to consider only whether the challenged action violates established ICANN policies or procedures and do not authorize the BAMC to perform a *de novo* review of the Application. See ICANN Bylaws, 11 February 2016, Art. IV, §§ 2.1, 2.2.

<sup>81</sup> CPE Process Review Scope 2 Report, at pgs. 36-37 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>).

between the Requestor and the U.S.-based Merck & Co., Inc. (a former subsidiary of the Requestor) over which company may use the name “MERCK” outside the United States.<sup>82</sup> Instead of denying this relationship, the Requestor claims the CPE Provider erred “by equating ‘over-reaching substantially beyond the community’ with anything less than absolute world-wide exclusivity.”<sup>83</sup> However, the Requestor’s portrayal of the CPE Provider’s analysis is inaccurate. Far from determining that the existence of *any* entity called “Merck” would necessarily prevent the Application from scoring points in the nexus element, the CPE Provider emphasized the U.S.-based entity’s substantial revenues, and the significant operations the U.S.-based entity maintains “in the pharmaceutical, vaccines and animal health industry[.]”<sup>84</sup> As such, the Requestor is incorrect to surmise that the CPE Provider would have awarded zero points for nexus if there existed an entity called Merck of negligible size and importance that was not included in the Requestor’s community definition.<sup>85</sup> As a result, there is no support for the Requestor’s claim that the CPE Provider required “absolute world-wide exclusivity” for a finding of nexus.

Consideration of the CPE Provider’s treatment of the Merck & Co. Application confirms the inaccuracy of the Requestor’s portrayal of the CPE Report. On 10 August 2016, the CPE Provider issued its report on the Merck & Co. Application (Merck & Co. CPE Report).<sup>86</sup> There, the CPE Provider considered whether the existence of *the Requestor* should prevent *the Merck & Co. Application* from receiving any points on the nexus element.<sup>87</sup> The CPE Provider applied

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<sup>82</sup> See Request 16-12, § 8, Pgs. 7-10.

<sup>83</sup> Request 16-12, § 8, Pg. 7.

<sup>84</sup> CPE Report, Pg. 4.

<sup>85</sup> See Request 16-12, § 8, Pgs. 7, 9, 11.

<sup>86</sup> Merck & Co., Inc. CPE Report, at Pg. 1 (<https://www.icann.org/sites/default/files/tlds/merck/merck-cpe-1-1702-73085-en.pdf>). The Merck & Co., Inc. Application earned nine out of 16 possible points on the CPE criteria, and therefore did not qualify for community priority.

<sup>87</sup> Merck & Co., Inc. CPE Report, Pg. 4.

the same reasoning to the Merck & Co. Application as the reasoning included in the Requestor's CPE Report: it found that the Merck & Co., Inc.'s applied-for string (.MERCK) substantially over-reaches beyond the community because *the Requestor* is "a substantial entity also known by the name 'Merck'" and is not included in the *Merck & Co. Application's* community definition in its application for .MERCK.<sup>88</sup> For that reason, the CPE Provider awarded the Merck & Co. Application zero points on sub-criterion 2-A, just as the CPE Provider did with respect to the Requestor's Application.<sup>89</sup>

The Requestor next argues that its own community is larger than the community associated with Merck & Co., Inc. and therefore "the string clearly identifies the Requestor."<sup>90</sup> It argues that it has the "exclusive rights to use MERCK in 191 out of 193 UN countries," and that its community "covers 99% of the world's jurisdictions, home to 95% of the world's population."<sup>91</sup> These assertions do not show that the CPE Provider failed to adhere to any established policy or procedure in its evaluation of sub-criterion 2-A. The Requestor does not dispute the fact that Merck & Co., Inc. is: (i) not included in the Application's community definition; (ii) known as "Merck," and (iii) of substantial size. As such, the Requestor has failed to identify any policy or procedure that the CPE Provider violated in concluding that the string .MERCK over-reaches substantially beyond the community definition in the Application. Nor has the Requestor shown that the CPE Provider failed to adhere to any policy or procedure in awarding zero points on the nexus element, and in fact, the Guidebook specifically instructs that zero points must be awarded if the string substantially over-reaches beyond the community in the Application.

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<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Request, § 8, Pg. 9.

<sup>91</sup> *Id.*

The Requestor also asserts that it should have been awarded more points for sub-criterion 2-A because it “will take all necessary measures, including geo-targeting, to avoid internet access by users in the few territories in which Merck & Co. has trademark rights” and claims that Merck & Co., Inc. has not made any such reciprocal commitments.<sup>92</sup> But the Requestor does not point to any policy or procedure indicating that the CPE Provider must (or even should) take geo-targeting considerations into account under sub-criterion 2-A, because none exist. As such, no reconsideration is warranted because the CPE Provider did not take the Requestor’s geo-targeting plans into account when scoring sub-criterion 2-A.

The Requestor argues that the only reason its community overlaps with Merck & Co., Inc.’s community is because of Merck & Co., Inc.’s “unlawful intrusion” into its territories and its “illegal use” of the word MERCK.<sup>93</sup> It contends that “the [CPE Provider] cannot contribute or consolidate such an illegal use.”<sup>94</sup> The CPE Provider explained in the CPE Report its rationale for concluding that the string over-reached,<sup>95</sup> which is discussed in detail above. That rationale did not depend exclusively on Merck & Co., Inc.’s presence outside the United States and Canada.<sup>96</sup> The CPE Provider was not required to weigh in on the decades long legal dispute between the Requestor and Merck & Co., Inc.,<sup>97</sup> as part of its application of any of the CPE criteria under the Guidebook.<sup>98</sup> Accordingly, the CPE Provider did not violate any established policy or procedure in omitting this consideration, and this argument does not warrant reconsideration.

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<sup>92</sup> Request, § 8, Pg. 9.

<sup>93</sup> *Id.*, § 8, Pg. 10.

<sup>94</sup> *Id.*

<sup>95</sup> CPE Report, at Pg. 3-4.

<sup>96</sup> *Id.* (discussing Merck & Co., Inc.’s U.S. presence).

<sup>97</sup> *See* Request 16-12, § 8, at Pg. 7-10.

<sup>98</sup> *See*, Guidebook, Module 4, § 4.2.3.



Additionally, the Requestor argues that ICANN org should have, but failed to, provide the following information, which would have affected the CPE Provider's determination under sub-criterion 2-A.

- Merck & Co., Inc. “exercises its right to use the name ‘Merck’ under a reciprocal use agreement, which has been in force since the 1970s.”<sup>99</sup>
- “Merck & Co., Inc.’s rights to use the trademark and tradename ‘Merck’ in isolated form are territorially limited to two countries within North America, whereas Request[o]r retains those rights throughout the rest of the world.”<sup>100</sup>
- The Requestor “explicitly stated in its application and in a Public Interest Commitment that it will take all necessary measures, including geo-targeting, to avoid internet access by users in the two countries, the US and Canada, in which the other corporate entity has trademark rights.”<sup>101</sup>
- “Merck & Co has indicated in its applications not only that it intends to use the <.merck> space internationally (where it has no rights in the MERCK trademark whatsoever), but also that it intends to sell and license domain names to affiliates and other entities throughout the world, including territories where Request[o]r has exclusive rights.”<sup>102</sup>
- “Various court proceedings are currently pending in the UK, Switzerland, Germany, [and] France on the grounds of Merck & Co.’s trademark infringement and breach of [contract with Merck KGaA].”<sup>103</sup>
- “Any ‘over-reaching’ beyond the community is due to the current and proposed unlawful intrusion by Merck & Co. into the Request[o]r’s territories. As a result of this unlawful intrusion, namely Merck & Co’s global use of the name MERCK on the Internet, it is not surprising that the [CPE Provider] has been misled when undertaking the internet search to be utilized according to the CPE guidelines to help understand whether the string identifies the community.”<sup>104</sup>

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<sup>99</sup> 2017 Presentation, at Pg. 3 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kgaa-summary-bgc-presentation-31mar17-en.pdf>).

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at Pg. 4.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* See also Written Submission in support of Oral Presentation to BAMC on 4 September 2018, at Pg. 5 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kgaa-oral-presentation-bamc-20sep18-en.pdf>).

There is no requirement under the Guidebook that required ICANN org to provide such information to the CPE Provider. In its email notice to the CPE Provider to begin the CPE evaluation of the Requestor’s Application, ICANN org stated that the following are in scope: “Application questions 1-30a, [a]pplication comments (that have been loaded into an external share drive for [the CPE Provider’s] retrieval and attached to this email, [c]orrespondence, [o]bjection outcomes, [o]utside research (as necessary).”<sup>105</sup> The CPE Provider acknowledged—and therefore *was* aware—of several of these issues, including that Merck & Co., Inc. is only known as “Merck” in the United States and Canada.<sup>106</sup> Further, as explained above, none of these facts are determinative as to the analysis of sub-criterion 2-A. Nevertheless, because there is no requirement under Module 4, Section 4.2.3 of the Guidebook that ICANN org provide the above information to the CPE Provider, no policy or procedure was violated by ICANN org.

2. The Application of Sub-Criterion 2-A is Consistent with Other CPE Reports.

The Requestor asserts that the CPE Provider’s analysis of sub-criterion 2-A in the CPE Report is inconsistent with its analysis of the same sub-criterion for the applications for .ECO, .RADIO, .SPA, and .ART, claiming that in each of those cases, the “applicant was awarded three points under the nexus requirement although there were other entities using the same name.”<sup>107</sup> The Requestor provides no support or additional argument concerning this assertion, and further, the argument is misplaced. In each of these cases, the CPE Provider determined that the applied-for string did *not* match the name of the community, but it identified the community without

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<sup>105</sup> Attachment 2 to BAMC Recommendation.

<sup>106</sup> CPE Report at Pg. 4, n.2.

<sup>107</sup> 2017 Presentation Summary at Pg. 3 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kgaa-summary-bgc-presentation-31mar17-en.pdf>).

over-reaching substantially beyond the community.<sup>108</sup> By contrast, the CPE Provider concluded that .MERCK *did* match the name of the community, but it *also* matched the name of another community, that of US-based Merck & Co., Inc.<sup>109</sup>

Concerning .ART, the CPE Provider concluded that the community defined in the application “is broad and encompasses all areas that are typically considered as art. However, given the subjective nature and meaning of what constitutes art, the general public may not necessarily associate all of the members of the defined community with the string.”<sup>110</sup> Therefore, the CPE Provider concluded that although the string did not match the defined community, it identified the community.<sup>111</sup> The Requestor here does not argue that the general public might subjectively disagree as to the meaning of “Merck.” Instead, the Requestor acknowledges Merck & Co., Inc., but disagrees with the CPE Provider’s determination that Merck & Co., Inc. constituted a community that matched the name of the string .MERCK. Accordingly, the CPE Provider’s determination concerning the .ART application is not inconsistent with its determination concerning the Application.

In the .ECO CPE, the CPE Provider determined that there was a “common association of the prefix ‘eco’ with various phrases closely associated with environmental protection,” and therefore determined that “.ECO” identified the community.<sup>112</sup> Similarly, the CPE Provider concluded that the community of spa associations and establishments were “commonly known

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<sup>108</sup> .ART CPE Report at Pg. 5 (<https://newgtlds.icann.org/sites/default/files/tlds/art/art-cpe-1-1675-51302-en.pdf>); .SPA CPE Report at Pg. 4 (<https://newgtlds.icann.org/sites/default/files/tlds/spa/spa-cpe-1-1309-81322-en.pdf>); .ECO CPE Report at Pg. 5-6 (<https://newgtlds.icann.org/sites/default/files/tlds/eco/eco-cpe-1-912-59314-en.pdf>); .RADIO CPE Report at Pg. 4-5 (<https://newgtlds.icann.org/sites/default/files/tlds/radio/radio-cpe-1-1083-39123-en.pdf>).

<sup>109</sup> CPE Report at Pg. 3-4.

<sup>110</sup> .ART CPE Report at Pg. 5.

<sup>111</sup> *Id.*

<sup>112</sup> .ECO CPE Report at Pg. 4-5.

by others” by the applied-for string .SPA,<sup>113</sup> and that the “public will generally associate the [.RADIO] string with the community as defined by the [.RADIO] applicant.”<sup>114</sup> On that basis, the CPE Provider concluded that the strings identified the communities. There was no separate, competing community associated with .ECO, .SPA, or .RADIO as there is in the Requestor’s case.

3. The CPE Provider Adhered to Applicable Policies and Procedures in its Application of Sub-Criterion 2-B-Uniqueness.

The Requestor argues that the CPE Provider should have awarded the Application one point on the uniqueness element because of the Requestor’s longstanding and sole use of its community name MERCK in “99% of global jurisdictions . . . . The name MERCK has no other meaning than the name of the family owning the majority of Requestor’s community.”<sup>115</sup>

As discussed above, to fulfill the requirements for element sub-criterion 2-B, the applied-for string must have “no other significant meaning beyond identifying the community described in the application and it must also score a 2 or 3 on [sub-criterion 2-A] Nexus.”<sup>116</sup> Accordingly, to be eligible for a point on the uniqueness element, an application must have “identif[ied] the community,” *i.e.*, scored 2 or 3 on the nexus element. Here, the CPE Provider awarded zero points under sub-criterion 2-B because the applied-for string did not receive a score of two or three on sub-criterion 2-A for the reasons discussed above.<sup>117</sup>

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<sup>113</sup> .SPA CPE Report at Pg. 4.

<sup>114</sup> .RADIO CPE Report at Pg. 5. The CPE Provider noted that “the community, as defined in the [.RADIO] application, also includes some entities that are only tangentially related to radio,” but concluded that those entities “comprise only a small part of the community.” *Id.*

<sup>115</sup> Request, § 8, Pg. 11.

<sup>116</sup> CPE Report at Pg. 4.

<sup>117</sup> CPE Report at Pg. 5; *see also* Guidebook, Module 4, § 4.2.3, Pg. 4-14 (“The phrasing ‘. . . beyond identifying the community’ in the score of 1 for ‘uniqueness’ implies a requirement that the string does identify the community, *i.e.* scores 2 or 3 for ‘Nexus,’ in order to be eligible for a score of 1 for ‘Uniqueness.’”).

Similar to its arguments in sub-criterion 2-A, the Requestor’s challenge of the CPE Provider’s scoring on sub-criterion is based on a substantive disagreement with the CPE Provider’s conclusions. The Requestor has not provided any evidence demonstrating that the CPE Provider failed to comply with established policy or procedure. On the contrary, the CPE Report clearly demonstrates that the CPE Provider applied the standards set forth in the Guidebook in evaluating sub-criterion 2-B. Indeed, the Guidebook advises

For example, a string for a particular geographic location community may seem unique from a general perspective, but would not score a 1 for uniqueness if it carries *another significant meaning* in the common language used in the relevant community location.<sup>118</sup>

The Application makes clear that .MERCCK *does* carry a significant meaning other than the Application’s defined community, as the Application references “trademark-related concerns within North America.”<sup>119</sup> The CPE Provider therefore adhered to the Guidebook in finding that the Application merits zero points for sub-criterion 2-B.

In sum, the Requestor has failed to show any policy or procedure violation in connection with the CPE Provider’s finding that the Application should receive a score of zero points for Criterion 2, and accordingly, reconsideration is not warranted.

4. The CPE Report did not Implicate Due Process Rights.

The Requestor argues that the CPE Provider “failed to take reasonable care” in drafting the CPE Report, “and misapplied standards and policies developed by ICANN in the [Guidebook], resulting in a denial of due process to the Request[o]r.”<sup>120</sup> This argument does not warrant reconsideration. For the reasons discussed above, the Requestor has not demonstrated

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<sup>118</sup> Guidebook, Module 4, § 4.2.3.

<sup>119</sup> Application ¶ 20(c) (emphasis added) (<https://gtldresult.icann.org/applicationstatus/applicationdetails/1631>).

<sup>120</sup> Request 16-12, § 8, Pg. 6.

any failure by the CPE Provider to follow the established policy and procedures for CPE as set forth in the Guidebook.

Relatedly, the Requestor asserts that

the BGC has regularly disregarded blatant misapplication of an evaluation standard by third party service providers, such as the [CPE Provider], stating that the Reconsideration process does not permit evaluation of a third party service provider's substantive conclusion. . . . Many parties [including] the Requestor have been left out in the rain with blatantly wrong decisions by third [party] providers such as Legal Rights Objection Panel, String Confusion Panels and also the [CPE Provider].<sup>121</sup>

The Requestor is suggesting that there should have been a formal appeal process for decisions by ICANN org's third-party service providers, including the CPE Provider, Legal Rights Objection Panel, and String Confusion Panels. The methods for challenging determinations in the course of the gTLD contention resolution process are set forth in the Guidebook, which was developed after more than 18 months of extensive discussions with a wide variety of stakeholder groups, including governments, individuals, civil society, business and intellectual property constituencies, and the technology community, culminating in the Board's June 2008 decision to adopt the community-developed New gTLD policy.<sup>122</sup> Drafts of the Guidebook itself were released for public comment, and revised in light of meaningful community input.<sup>123</sup> The time for challenging the Guidebook has long passed.<sup>124</sup>

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<sup>121</sup> 2017 Presentation, at Pg. 3.

<sup>122</sup> Guidebook, Preamble.

<sup>123</sup> *Id.*

<sup>124</sup> See <https://newgtlds.icann.org/en/applicants/agb>, indicating current version of guidebook is dated 4 June 2012. Under the Guidelines in effect in June 2012, Reconsideration Requests were due within thirty days after publication of Board actions or within thirty days after a Requestor became aware of or should reasonably have become aware of challenged Staff action. ICANN Bylaws, 16 March 2012, Art. IV, § 2.5 (<https://www.icann.org/resources/pages/bylaws-2012-12-21-en#IV>).

Moreover, the Guidebook provides a path for challenging the results of the CPE process: Module 6 of the Guidebook states that applicants, including the Requestor, “may utilize any accountability mechanism set forth in ICANN’s Bylaws for purposes of challenging any final decision made by ICANN with respect to the application.”<sup>125</sup> The Requestor has exercised this right by invoking the Reconsideration process with Request 16-12.<sup>126</sup>

Because the CPE Provider’s application of Criterion 2 to the Application was consistent with the Guidebook, ICANN org’s acceptance of the CPE Report was also consistent with applicable policies and procedures, and did not implicate any “due process” violation. Nor does the fact that there was no option to appeal the substance of evaluation results implicate any due process violation.

**B. The CPE Process Review Supports the Results of the Merck KGaA Application.**

Request 16-12 was placed on hold pending completion of the CPE Process Review, which was conducted to evaluate claims, like the Requestor’s, that the CPE Provider inconsistently applied the CPE criteria. FTI considered those issues, and concluded, among other things, that there was “no evidence that the CPE Provider’s evaluation process or reports deviated in any way from the applicable guidelines; nor did FTI observe any instances where the CPE Provider applied the CPE criteria in an inconsistent manner.”<sup>127</sup> For this additional reason,

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<sup>125</sup> Guidebook, Module 6, § 6, at Pg. 6-4.

<sup>126</sup> The Requestor also exercised this right when it filed an IRP proceeding concerning objections that the Requestor and Merck & Co., Inc. filed against each other in the course of their competing applications for the .MERCK gTLD. See <https://www.icann.org/en/system/files/files/irp-merck-final-declaration-11dec15-en.pdf>.

<sup>127</sup> Scope 2 Report, at Pg. 2 (<https://www.icann.org/en/system/files/files/cpe-process-review-scope-2-cpe-criteria-analysis-13dec17-en.pdf>). The Requestor believes that the Scope 2 Report “has no significance with respect to Merck KGaA’s Request for Reconsideration.” (12 April 2018 Letter from Bettinger to ICANN, at Pg. 8.) However, the Scope 2 Report’s findings are directly relevant to the Requestor’s claim that the CPE Provider’s determination concerning sub-criterion 2-A-Nexus, was inconsistent with the CPE Provider’s determinations under the same sub-criterion for .SPA, .RADIO, .ART, and .ECO.

the Requestor’s argument that the CPE Provider incorrectly applied Criterion 2 does not support reconsideration.

The Requestor argues that the CPE Process Review Scope 2 and 3 Reports are excessively narrow in scope, because they “do not address any of the[] issues that were raised in [Request 16-12], nor do they reevaluate [the CPE Provider’s] application of the Nexus criteria or assess the propriety or reasonableness of the research undertaken by the CPE [P]rovider.”<sup>128</sup>

Similarly, the Requestor complains that the CPE Process Review “is not a ‘compliance investigation’ as FTI claims to have done, but a mere description of [CPE report] outcomes.”<sup>129</sup>

The Requestor also lists other entities, including the Council of Europe, ICANN Ombudsman Chris LaHatte, and Professor William N. Eskridge, Jr., who have criticized the CPE Process Review Reports.<sup>130</sup> The Requestor’s claims do not support reconsideration.

The BGC, not FTI, determined the parameters of the Scope 2 investigation.<sup>131</sup> The Board (including the BGC) was not obligated to institute the CPE Process Review, but did so in its discretion pursuant to its best judgment, after considering all the relevant issues. “[T]he fact that the ICANN Board enjoys . . . discretion and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded” by the

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<sup>128</sup> 12 April 2018 Letter from Bettinger to ICANN, at Pg. 6 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kga-supp-submission-12apr18-en.pdf>). See also Written Submission in support of Oral Presentation to BAMC on 4 September 2018, at Pg. 7 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kga-oral-presentation-bamc-20sep18-en.pdf>).

<sup>129</sup> 12 April 2018 Letter from Bettinger to ICANN, at Pg. 6 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kga-supp-submission-12apr18-en.pdf>).

<sup>130</sup> See Written Submission in support of Oral Presentation to BAMC on 4 September 2018, at Pg. 2 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kga-oral-presentation-bamc-20sep18-en.pdf>). Professor Eskridge discussed the CPE Process Review Reports in a submission in support of the Requestor in Reconsideration Request 16-3. See 31 January 2018 Letter from A. Ali to ICANN Board attaching Second Eskridge Opinion (<https://www.icann.org/en/system/files/correspondence/ali-to-icann-board-31jan18-en.pdf>).

<sup>131</sup> See 2 June 2017 Update on Review of the CPE Process Review (<https://www.icann.org/news/announcement-4-2017-06-02-en>).



Requestor.<sup>132</sup> Accordingly, the Board was not obligated to direct ICANN org to undertake the CPE Process Review at all, let alone set a particularly wide or narrow scope for it. Further, the Requestor has not identified any policy or procedure violated by the Board’s discretionary decision not to include in the CPE Process Review a substantive and wholesale reevaluation of CPE applications or analysis of the “reasonableness” of the CPE Provider’s research.<sup>133</sup>

The Requestor also asserts that FTI’s Scope 2 conclusion that the CPE Provider’s evaluation process and reports were consistent with the Guidebook “is not based on any interpretative [*sic*] analysis of the nexus criterion nor on an investigation of whether the EIU ignored important facts that supported a full credit [score] under the Nexus Criterion,” and “showed no interest in or knowledge of” the Requestor’s historical relationship with Merck & Co., Inc., or Merck KGaA’s promise to limit access to the .MERCK string by users in areas where Merck & Co., Inc. holds rights to the name.<sup>134</sup> These matters are similarly beyond the scope of the CPE Process Review and do not support reconsideration.

The Requestor asserts that the Scope 3 Report “reveals that [the CPE Provider was] completely ignorant of the contractual obligations between Merck KGaA and Merck & Co., Inc. and Merck KGaA’s Public Interest Commitment,” and that the CPE Provider “consulted only three Wikipedia websites and one Bloomberg article to evaluate” the Nexus sub-criterion.<sup>135</sup> According to the Requestor, this demonstrates that the CPE Provider’s research and diligence were “grossly inadequate.”<sup>136</sup>

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<sup>132</sup> *Booking.com v. ICANN*, ICDR Case No. 50-20-1400-0247, Final Declaration, ¶ 138 (<https://www.icann.org/en/system/files/files/final-declaration-03mar15-en.pdf>).

<sup>133</sup> 12 April 2018 Letter from Bettinger to ICANN, at Pg. 6.

<sup>134</sup> *Id.* at Pg. 7. *See also* Written Submission in support of Oral Presentation to BAMC on 4 September 2018, at Pg. 7 (<https://www.icann.org/en/system/files/files/reconsideration-16-12-merck-kgaa-oral-presentation-bamc-20sep18-en.pdf>).

<sup>135</sup> 12 April 2018 Letter from Bettinger to ICANN, at Pg. 8.

<sup>136</sup> *Id.*

The CPE Report makes clear that the CPE Provider *was* cognizant of the contractual relationship between the Requestor and Merck & Co., Inc., and of the contentious legal history. For example, the CPE Report notes that Merck & Co., Inc. “is known as MSD outside of the US and Canada,” i.e., where the Requestor has exclusive rights to the “Merck” mark.<sup>137</sup> Additionally, the CPE Provider referenced and cited Merck & Co., Inc.’s Legal Rights Objection (LRO) to the Application.<sup>138</sup> The LRO, which the BAMC assumes the CPE Provider reviewed, having cited it, sets forth the same facts as to the legal disputes between the Requestor and Merck & Co., Inc. that the Requestor argues the CPE Provider was “ignorant of.”<sup>139</sup> The Requestor’s assertion is inaccurate and does not support reconsideration.

Additionally, concerning the CPE Provider’s independent research, no policy or procedure required the CPE Provider to rely on any minimum number or particular type of resources. The Guidebook *permits* the CPE Provider to “perform independent research,” but only “if deemed necessary.”<sup>140</sup> The Requestor has not put forth any arguments demonstrating that the CPE Provider should have determined that additional research was necessary. Accordingly, reconsideration on this ground is not warranted.

For all of the reasons discussed above, reconsideration is not warranted.

**C. The Requestor’s Request for the Disclosure of Documentary Information is Not Grounds for Reconsideration.**

The Requestor has requested that “the Board disclose[] all documentary information and communications between the ICANN org and the CPE provider relating to” the Application and CPE Report.<sup>141</sup>

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<sup>137</sup> CPE Report, at Pg. 4.

<sup>138</sup> *Id.* at Pg. 7 & Pg. 7 n.7.

<sup>139</sup> LRO at Pg. 3-4 (<https://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-980-7217-en.pdf>).

<sup>140</sup> Guidebook, Module 4, § 4.2.3, at Pg. 4-9.

<sup>141</sup> 12 April 2018 Letter from Bettinger to ICANN, at Pg. 10.

This request does not set forth grounds for reconsideration, nor is it properly made in the context of a reconsideration request, as the Requestor is not asking ICANN org to reconsider Board or staff action or inaction. To the extent the Requestor wishes to make a request under ICANN org's Documentary Information Disclosure Policy (DIDP), the Requestor may do so separately, consistent with the DIDP.<sup>142</sup> However, the BAMC notes that the documentary information that the Requestor seeks was the subject of multiple DIDP Requests and subsequent Requests for Reconsideration, which the Requestor may consider consulting before submitting an additional substantially identical request.<sup>143</sup>

## **VI. Recommendation**

The BAMC has considered the merits of Request 16-12 and, based on the foregoing, concludes that ICANN org (and the CPE Provider) acted consistent with the Guidebook and did not violate applicable policies or procedures when the CPE Provider determined that the Application did not satisfy the requirements for Community Priority and ICANN org accepted the CPE Report. Accordingly, the BAMC recommends that the Board deny Request 16-12.

In terms of the timing of this decision, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation with respect to a reconsideration request within thirty days, unless impractical. To satisfy the thirty-day deadline, the BGC would have to have acted by 14 August 2016. However, Request 16-12 was placed on hold pending completion of the CPE Process Review. The Requestor was then provided an opportunity to supplement its arguments in light of the CPE Process Review results, and to make

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<sup>142</sup> See <https://www.icann.org/resources/pages/didp-2012-02-25-en>.

<sup>143</sup> See, e.g., DIDP Request 20180115-1 and response thereto (<https://www.icann.org/resources/pages/didp-20180115-1-ali-request-2018-02-15-en>) (Request for Reconsideration Denied on 18 July 2018 (<https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.c>)); DIDP Request 20180110-1 and response thereto (<https://www.icann.org/resources/pages/didp-20180110-1-ali-request-2018-02-12-en>) (Request for Reconsideration Denied on 18 July 2018, (<https://www.icann.org/resources/board-material/resolutions-2018-07-18-en#2.b>)).

a telephonic presentation to the BAMC prior to its recommendation. The Requestor accepted both invitations and made its presentation to the BAMC on 4 September 2018. Accordingly, the first opportunity that the BAMC has to make a recommendation on Request 16-12 is 14 December 2018.

**REFERENCE MATERIALS – BOARD PAPER NO. 2019.01.27.1k**

**TITLE:** **Consideration of Reconsideration Request 18-9**

**Documents**

The following attachments are relevant to the Board’s consideration of Reconsideration Request 18-9.

Attachment A is [Reconsideration Request 18-9](#), submitted on 21 September 2018.

Attachment B is the [Ombudsman Action Regarding Request 18-9](#), dated 4 October 2018.

Attachment C is the [BAMC Recommendation on Request 18-9](#), issued 16 November 2018.

Attachment D is the [Requestor’s Rebuttal to the BAMC Recommendation on Request 18-9](#), submitted on 3 December 2018.

Submitted By: Amy Stathos, Deputy General Counsel  
Date Noted: 14 January 2019  
Email: amy.stathos@icann.org

## **Reconsideration Request Form**

Version of 1 October 2016

**Submission Date:** Sep 21, 2018

### **1. Requestor Information**

**Name:** DotKids Foundation (New gTLD Applicant: 1-1309-46695)

**Address:** Contact Information Redacted

**Email:** Contact Information Redacted

**Phone Number (optional):**

(Note: ICANN will post the Requestor's name on the Reconsideration Request page at <https://www.icann.org/resources/pages/accountability/reconsideration-en>. Requestor's address, email and phone number will be removed from the posting.)

### **2. Description of specific action you are seeking to have reconsidered.**

(Provide as much detail as available, such as date of Board meeting, reference to Board resolution, etc. You may provide documents. All documentation provided will be made part of the public record.)

On Aug 27, 2018 (case number 00901528), DotKids Foundation, as a Support-Approved Candidate (SAC), inquired and requested for the process to apply for financial support for later stages in the new gTLD process.

On Aug 28, 2018, ICANN rejected the request, indicating that ICANN is unable to provide such financial assistance.

### **3. Date of action/inaction:**

(Note: If Board action, this is the date on which information about the challenged Board action is first published in a resolution, unless the posting of the resolution is not accompanied by a rationale. In that instance, the date is the date of the initial posting of the rationale.)

Aug 28, 2018

**4. On what date did you become aware of the action or that action would not be taken?**

(Provide the date you learned of the action/that action would not be taken. If more than thirty days has passed from when the action was taken or not taken to when you learned of the action or inaction, please provide discussion of the gap of time.)

Aug 28, 2018

**5. Describe how you believe you are materially and adversely affected by the action or inaction:**

As a Support-Approved Candidate (SAC), DotKids Foundation is by definition financially needy. Therefore, without a proper process for DotKids Foundation to make full use of the financial support as an SAC, means that DotKids Foundation, a non-profit community organization, will be facing contention auction against other for-profit companies, without adequate financial means that otherwise could have been provided for in the financial support program upon the full implementation of the JAS report.

**6. Describe how others may be adversely affected by the action or inaction, if you believe that this is a concern.**

The JAS Final Report specifically recommended that: "Support Should Be Offered from the First Round Onward" and went on to explain the importance of properly implementing the financial support program for ICANN and the new gTLD process. As such, without the full implementation of the financial support program (beyond merely the reduction of application fees), the integrity of the entire new gTLD program is adversely affected.

**7. Detail of the ICANN Action/Inaction – Required Information**

Please provide a detailed explanation of the facts as you understand they were provided to the Board or the ICANN organization (acting through its staff) prior to the action/inaction and the reasons why ICANN's action or inaction was: (i) contrary to ICANN's Mission, Commitments, Core Values and/or established ICANN policy(ies); (ii) taken or refused to be taken without consideration of material information; or (iii) taken as a result of ICANN's reliance on false or inaccurate relevant information..

If your request is in regards to an ICANN action or inaction that you believe is contrary to established ICANN policy(ies), the policies that are eligible to serve as the basis for a Reconsideration Request are those that

are approved by the ICANN Board (after input from the community) that impact the community in some way. When reviewing Board or staff action, the outcomes of prior Reconsideration Requests challenging the same or substantially similar action/inaction as inconsistent with established ICANN policy(ies) shall be of precedential value.

If your request is in regards to an action or inaction taken or refused to be taken without consideration of material information, please provide a detailed explanation of the material information not considered by the ICANN. If that information was not presented to the ICANN, provide the reasons why you did not submit the material information before ICANN acted or failed to act. "Material information" means facts that are material to the decision.

If your request is in regards to an action or inaction that you believe is taken as a result of ICANN's reliance on false or inaccurate relevant information, provide a detailed explanation as to whether an opportunity existed to correct the material considered by the Board or Organization. If there was an opportunity to do so, provide the reasons that you did not provide submit corrections before the action/failure to act.

Reconsideration Requests are not meant for those who believe that ICANN made the wrong decision when considering the information available. There has to be identification of material information that was in existence of the time of the decision and that was not considered by ICANN in order to state a Reconsideration Request. Similarly, new information – information that was not yet in existence at the time of the decision – is also not a proper ground for reconsideration.

Reconsideration Requests are not available as a means to seek review of country code top-level domain ("ccTLD") delegations and re-delegations, issues relating to Internet numbering resources, or issues relating to protocol parameters.

Please keep this guidance in mind when submitting requests.

**Provide the Required Detailed Explanation here:**

(You may attach additional sheets as necessary.)

ICANN's premature rejection of the request stating that it is "unable to provide such financial assistance" and that "additional funding past evaluations ... is currently out of scope" goes against the community developed final report by the Joint Working Group Applicant Support (JAS):

<https://newgtlds.icann.org/en/applicants/candidate-support/jas-wg-materials>

On Mar 12, 2010, the ICANN Board resolved (2010.03.12.47) to request stakeholders to work to develop a sustainable approach to providing support to applicants requiring assistance in applying for and operating new gTLDs:



<https://www.icann.org/resources/board-material/resolutions-2010-03-12-en>

On Sep 13, 2011, the Joint Working Group Applicant Support (JAS) issued its final report: <http://dakar42.icann.org/meetings/dakar2011/presentation-jas-final-report-13sep11-en.pdf>

On Oct 28, 2011, the ICANN Board resolved (2011.10.28.21) to take the JAS WG Final Report seriously and to oversee the scoping and implementation of the recommendations arising out of that Report, as feasible:

<https://www.icann.org/resources/board-material/resolutions-2011-10-28-en#2>

On Dec 8, 2011, the ICANN Board further resolved (2011.12.08.01) to finalize the implementation plan in accordance with the proposed criteria and process for the launch of the Applicant Support Program in January 2012, and resolved (2011.12.08.02) to approve the fee reduction to \$47,000 Applicant Support candidates that qualify according to the established criteria:

<https://www.icann.org/resources/board-material/resolutions-2011-12-08-en#1.1>

In the Rationale for Resolutions 2011.12.08.01 – 2011.12.08.03, it is specifically noted that *“Note: This process does not follow all JAS recommendations. In particular, the JAS recommendations state that the \$2MM seed fund should not be used for fee reductions. The JAS intended the \$2MM and other funds raised be paid out to needy and worthy applicants to help build out registries.”*

It is understood that in 2011 when the board resolved on the issue, there was time pressure to allow for the implementation of part of the JAS Final Report (in particular application fee reduction and processes for evaluating and approving support candidates). Therefore some other parts were not considered at that time (including the second part in “Cost Reduction”, “Staggered Fees” and “Funds and Foundations”).

It is now 2018 more than 7 years since the completion of the JAS Final Report. Therefore the excuse for time pressure to roll out the program is no longer tenable. ICANN must therefore properly address the remainder of the JAS Final Report (even if it may be the case that it is eventually found infeasible to implement the remainder of the recommendations).

In particular to include considerations for the remainder of the JAS recommendations, such as:

- “to provide further funding opportunities for Support-Approved Candidates in the later stages of the process” (for example, including but not limited to string contention)
- “fees for Support-Approved Candidates be staggered. Instead of paying the entire fee upon acceptance of the application, a Candidate meeting the criteria established for support could pay the fee incrementally” (for example, including but not limited to string contention fees, auction fees and other ICANN fees)
- “Further adjustments to financial requirements might include, for example,

a reduction in basic registry-service-related expenses through modifications to certain guidelines such as the continuity instrument or other adjustments” (for example, including but not limited to accountability measures, string contention fees, etc.)

The summary rejection of the request by DotKids Foundation, as a Support Approved Candidate is inappropriate. DotKids Foundation has patiently waited for ICANN to continue and uphold its commitment to take the JAS Final Report seriously and to consider the feasibility of implementation of all aspects of the report. The ICANN Board has not rejected the remaining recommendations of the JAS Final Report nor suggested that it will not further consider the remaining recommendations of the report as time permits.

Furthermore, it is apparent that the budget allocation from ICANN already committed has not been depleted yet, and can be used for addressing the remaining recommendations of the JAS Final Report for Support Approved Candidates.

Therefore, ICANN must, seriously consider the remaining recommendations of the JAS Final Report as it has committed in its own resolutions.

Until such considerations are complete and either ICANN rejects some or all of the remaining recommendations of the JAS Final Report, and/or completes the implementation of a process and mechanism for Support Approved Candidates to apply and make use of such funds, ICANN should not push the DotKids Foundation application forward hastily.

Such forceful push of DotKids Foundation’s community not-for-profit application, as a Support Approved Candidate into an auction with for-profit conglomerates, without having fully considered and implemented the JAS Final Report recommendations, is against the principles by which the Applicant Support Program was committed to and developed, and certainly against ICANN’s core value to ascertain the global public interest.

**8. What are you asking ICANN to do now?**

(Describe the specific steps you are asking ICANN to take. For example, should the action be reversed, cancelled or modified? If modified, how should it be modified?)

To proceed to take the remainder of the JAS Final Report recommendations seriously, and to oversee the scoping and implementation of the remaining recommendations (including “Cost Reductions” – Further adjustments to financial requirements might include, for example, a reduction in basic registry-service-related expenses through modifications to certain guidelines such as the continuity instrument or other adjustments, “Staggered Fees” and “Funds and Foundations”) arising out of that Report, as feasible.

NOTE: This Reconsideration Request does not request that ICANN implement the above financial support as presented in the Joint Applicant Support (JAS) report directly, but rather request that ICANN initiate and complete the process for such consideration, and if found feasible, cause for such implementation process be put in place.

And to place the DotKids Foundation application on hold, as a Support-Approved Candidate (SAC), who is in need of financial support for later stages in the new gTLD process, until such implementation process for financial assistance is complete and an SAC can request and apply for them appropriately.

**9. Please state specifically the grounds under which you have the standing and the right to assert this Reconsideration Request, and the grounds or justifications that support your request.**

(Include in this discussion how the action or inaction complained of has resulted in material harm and adverse impact. To demonstrate material harm and adverse impact, the Requestor must be able to demonstrate well-known requirements: there must be a loss or injury suffered (financial or non-financial) that is a directly and causally connected to ICANN's action or inaction that is the basis of the Reconsideration Request. The Requestor must be able to set out the loss or injury and the direct nature of that harm in specific and particular details. The relief requested must be capable of reversing the harm alleged by the Requestor. Injury or harm caused by third parties as a result of acting in line with the ICANN's decision/act is not a sufficient ground for reconsideration. Similarly, injury or harm that is only of a sufficient magnitude because it was exacerbated by the actions of a third party is also not a sufficient ground for reconsideration.)

Without ICANN considering seriously and implementing all the JAS Final Report recommendations, as feasible, the DotKids Foundation, as a Support Approved Candidate is unable to apply and request for the otherwise could be available financial assistance to support its application through the new gTLD process.

As a not-for-profit initiative, it will be very difficult for the DotKids Foundation to compete in a capital/market driven auction (not to mention our strong belief that the interests of kids and the children community should not be put on the auction block in any case), especially if it is pushed forward before ICANN has fully considered and implemented the JAS Final Report recommendations.

As the entity directly affected by ICANN action/inaction, DotKids Foundation have the standing and the right to assert this Request for Reconsideration.

**10. Are you bringing this Reconsideration Request on behalf of multiple persons or entities? (Check one)**

Yes

No

**10a. If yes, is the causal connection between the circumstances of the Reconsideration Request and the harm substantially the same for all of the Requestors? Explain.**

N/A

**Do you have any documents you want to provide to ICANN?**

If you do, please attach those documents to the email forwarding this request. Note that all documents provided, including this Request, will be publicly posted at <https://www.icann.org/resources/pages/accountability/reconsideration-en> .

No

**Terms and Conditions for Submission of Reconsideration Requests**

The Board Governance Committee has the ability to consolidate the consideration of Reconsideration Requests if: (i) the requests involve the same general action or inaction; and (ii) the Requestors are similarly affected by such action or inaction.

The Board Governance Committee may dismiss a Reconsideration Requests if: (i) the Requestor fails to meet the requirements for bringing a Reconsideration Request; or (ii) it is frivolous.

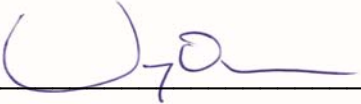
Hearings are not required in the Reconsideration Process, however Requestors may request a hearing. The BGC retains the absolute discretion to determine whether a hearing is appropriate, and to call people before it for a hearing.

For all Reconsideration Requests that are not summarily dismissed, except where the Ombudsman is required to recuse himself or herself and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request. The BGC shall make a final recommendation to the Board with respect to a Reconsideration Request following its receipt of the Ombudsman's evaluation (or following receipt of the Reconsideration Request involving those matters for which the Ombudsman recuses himself or herself or the receipt of the Community Reconsideration Request, if applicable).

The final recommendation of the BGC shall be documented and promptly (i.e., as soon as practicable) posted on the ICANN Website and shall address each of the arguments raised in the Reconsideration Request. The Requestor may file a 10-page (double-spaced, 12-point font) document, not including exhibits, in rebuttal to the BGC's recommendation within 15 days of receipt of the recommendation, which shall also be promptly (i.e., as soon as practicable) posted to the ICANN Website and provided to the Board for its evaluation; provided, that such rebuttal shall: (i) be limited to rebutting or contradicting the issues raised in the BGC's final recommendation; and (ii) not offer new evidence to support an argument

made in the Requestor's original Reconsideration Request that the Requestor could have provided when the Requestor initially submitted the Reconsideration Request.

The ICANN Board shall not be bound to follow the recommendations of the BGC. The ICANN Board's decision on the BGC's recommendation is final and not subject to a Reconsideration Request.



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Signature

Edmon Chung, as Primary Contact of the  
DotKids Foundation application for ".kids",  
On behalf of DotKids Foundation

\_\_Sep 21, 2018\_\_

Date

**Subject:** Re: [Reconsideration Request] Reconsideration Request 18-9  
**Date:** Thursday, October 4, 2018 at 6:06:35 AM Pacific Daylight Time  
**From:** reconsider on behalf of Herb Waye  
**To:** Reconsideration  
**CC:** ombudsman  
**Attachments:** ATT00001.txt

Reconsideration Request 18-9

Pursuant to Article 4, Section 4.2(l)(iii), I am recusing myself from consideration of Request 18-9.

Best regards,

Herb Waye  
ICANN Ombudsman

Herb Waye  
ICANN Ombudsman

<https://www.icann.org/ombudsman> [icann.org]  
<https://www.facebook.com/ICANNOmbudsman> [facebook.com]  
Twitter: @IcannOmbudsman

ICANN Expected Standards of Behavior:

<https://www.icann.org/en/system/files/files/expected-standards-15sep16-en.pdf> [icann.org]

Community Anti-Harassment Policy

<https://www.icann.org/resources/pages/community-anti-harassment-policy-2017-03-24-en> [icann.org]

Confidentiality

All matters brought before the Ombudsman shall be treated as confidential. The Ombudsman shall also take all reasonable steps necessary to preserve the privacy of, and to avoid harm to, those parties not involved in the complaint being investigated by the Ombudsman. The Ombudsman shall only make inquiries about, or advise staff or Board members of the existence and identity of, a complainant in order to further the resolution of the complaint. The Ombudsman shall take all reasonable steps necessary to ensure that if staff and Board members are made aware of the existence and identity of a complainant, they agree to maintain the confidential nature of such information, except as necessary to further the resolution of a complaint

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**From:** Reconsideration <Reconsideration@icann.org>  
**Date:** Monday, October 1, 2018 at 4:54 PM  
**To:** ombudsman <ombudsman@icann.org>  
**Cc:** Reconsideration <Reconsideration@icann.org>  
**Subject:** Reconsideration Request 18-9

Dear Herb,

ICANN recently received the attached reconsideration request (Request 18-9), which was submitted on 21 September 2018 by DotKids Foundation (Requestor)

seeking reconsideration of ICANN organization's response to the Requestor's request, pursuant to the "Final Report of the Joint SO/AC New gTLD Applicant Support Working Group (JAS)" (the Final Report), for financial support for engaging in the string contention resolution process for the .KID/.KIDS contention set.

The Board Accountability Mechanisms Committee (BAMC) has determined that Request 18-9 is sufficiently stated pursuant to Article 4, Section 4.2(k) of the ICANN Bylaws. Pursuant the Article 4, Section 4.2(l) of the ICANN Bylaws, a reconsideration request must be sent to the Ombudsman for consideration and evaluation if the request is not summarily dismissed following review by the BAMC to determine if the request is sufficiently stated. Specifically, [Section 4.2 \(l\)\[icann.org\]](#) states:

- (l) For all Reconsideration Requests that are not summarily dismissed, except Reconsideration Requests described in [Section 4.2\(l\)\(iii\)](#) and Community Reconsideration Requests, the Reconsideration Request shall be sent to the Ombudsman, who shall promptly proceed to review and consider the Reconsideration Request.
  - (i) The Ombudsman shall be entitled to seek any outside expert assistance as the Ombudsman deems reasonably necessary to perform this task to the extent it is within the budget allocated to this task.
  - (ii) The Ombudsman shall submit to the Board Accountability Mechanisms Committee his or her substantive evaluation of the Reconsideration Request within 15 days of the Ombudsman's receipt of the Reconsideration Request. The Board Accountability Mechanisms Committee shall thereafter promptly proceed to review and consideration.
  - (iii) For those Reconsideration Requests involving matters for which the Ombudsman has, in advance of the filing of the Reconsideration Request, taken a position while performing his or her role as the Ombudsman pursuant to [Article 5](#) of these Bylaws, or involving the Ombudsman's conduct in some way, the Ombudsman shall recuse himself or herself and the Board Accountability Mechanisms Committee shall review the Reconsideration Request without involvement by the Ombudsman.

Please advise whether you are accepting Request 18-9 for evaluation or whether you are recusing yourself pursuant to the grounds for recusal set forth in Section 4.2(l)(iii). If you are accepting Request 18-9 for evaluation, please note that your substantive evaluation must be provided to the BAMC within 15 days of receipt of Request 18-9.

Best regards,  
ICANN  
12025 Waterfront Drive, Suite 300  
Los Angeles, CA 90094

**RECOMMENDATION  
OF THE BOARD ACCOUNTABILITY MECHANISMS COMMITTEE (BAMC)  
RECONSIDERATION REQUEST 18-9  
16 NOVEMBER 2018**

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The Requestor, DotKids Foundation, seeks reconsideration of ICANN org’s response to the Requestor’s request, pursuant to the “Final Report of the Joint SO/AC New gTLD Applicant Support Working Group” (the JAS Final Report), for financial support to engage in the string contention resolution process for the .KID/.KIDS contention set.<sup>1</sup> Specifically, the Requestor claims that “ICANN’s premature rejection of the request stating that [ICANN org] is ‘unable to provide such financial assistance’ and that ‘additional funding past evaluations ... is currently out of scope’ goes against the community developed final report by the [JAS]....”<sup>2</sup> The Requestor also asserts that ICANN org’s decision goes “against ICANN’s core value to ascertain the global public interest.”<sup>3</sup>

**I. Brief Summary.**

In March 2010, the ICANN Board asked that community “stakeholders work through their [Supporting Organizations] SOs and [Advisory Committees] ACs and form a Working Group to develop a sustainable approach to providing support to applicants requiring assistance in applying for and operating new gTLDs.”<sup>4</sup> In response, the Joint SO/AC New gTLD Applicant Support Working Group (JAS WG) was formed.<sup>5</sup>

On 13 September 2011, the JAS WG issued its Final Report “for consideration to the GNSO, ALAC, ICANN Board and ICANN community.”<sup>6</sup> The JAS Final Report sets forth

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<sup>1</sup> Reconsideration Request 18-9, § 2, at Pg. 1.

<sup>2</sup> Reconsideration Request 18-9, § 7, at Pg. 3.

<sup>3</sup> Reconsideration Request 18-9, § 7, at Pg. 5

<sup>4</sup> Resolution 2010.03.12.46 and 2010.03.12.47, available at <https://www.icann.org/resources/board-material/resolutions-2010-03-12-en>.

<sup>5</sup> <http://dakar42.icann.org/meetings/dakar2011/presentation-jas-final-report-13sep11-en.pdf>.

<sup>6</sup> *Id.*



various recommendations regarding financial and non-financial assistance to “Support-Approved Candidates” in conjunction with the New gTLD Program.<sup>7</sup>

The Applicant Support Program (ASP) was subsequently developed as part of the New gTLD Program to help “ensur[e] worldwide accessibility to, and competition within,” the program by providing financial and non-financial assistance to qualifying New gTLD Applicants.<sup>8</sup> The financial assistance portion of the ASP provided a limited number of qualifying applicants the opportunity to pay a reduced evaluation fee of USD \$47,000 instead of the full evaluation fee of USD \$185,000.<sup>9</sup>

The Requestor submitted a community-based application for .KIDS (DotKids Application), which was placed in a contention set with one other .KIDS application and an application for .KID. The Requestor applied for – and was awarded – financial assistance in the form of a reduced application fee pursuant to the ASP.<sup>10</sup>

The Requestor participated in Community Priority Evaluation (CPE) and did not prevail.<sup>11</sup> The Requestor thereafter filed two reconsideration requests (Reconsideration Request 16-6 and Reconsideration Request 17-5) relating to CPE; both were denied. An ICANN Auction to resolve the .KID/.KIDS contention set was scheduled for 10 October 2018.<sup>12</sup>

On 27 August 2018, the Requestor contacted ICANN org “looking to request financial support for engaging in the string contention resolution process.”<sup>13</sup> On 29 August 2018, ICANN

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<sup>7</sup> *Id.*

<sup>8</sup> Applicant Support Program Fact Sheet, <https://newgtlds.icann.org/en/applicants/candidate-support/applicant-support-fact-sheet-20feb12-en.pdf>. See also Applicant Support Program webpage, available at <https://newgtlds.icann.org/en/applicants/candidate-support>.

<sup>9</sup> Applicant Support Program Update, 12 March 2013, <https://newgtlds.icann.org/en/applicants/candidate-support/sarp-results-12mar13-en.pdf>.

<sup>10</sup> Applicant Support Program Update, 12 March 2013, <https://newgtlds.icann.org/en/applicants/candidate-support/sarp-results-12mar13-en.pdf>.

<sup>11</sup> <https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>.

<sup>12</sup> <https://newgtlds.icann.org/en/applicants/auctions/schedule-30jul18-en.pdf>.

<sup>13</sup> Email from E. Chung to ICANN org, 27 August 2018, attached as Exh. A.

org denied the Requestor’s request, stating that “[p]roviding Applicant Support applications with additional funding past evaluations and specifically to fund a bidding deposit or accountability mechanisms is currently out of scope for this program.”<sup>14</sup>

On 21 September 2018, the Requestor submitted Reconsideration Request 18-9 (Request 18-9). The Requestor claims that ICANN org’s rejection of the Requestor’s request for additional financial support now for engaging in the contention resolution process violated the JAS Final Report and ICANN org’s core value to ascertain the global public interest.<sup>15</sup>

The BAMC has considered Request 18-9 and all relevant materials and recommends that the Board deny Request 18-9. ICANN org adhered to established policies and procedures in responding to the Requestor’s request for financial assistance for engaging in the string contention resolution process; and ICANN org did not violate its core values established in the Bylaws concerning the global public interest.

## **II. Facts.**

### **A. Background Facts on the ASP.**

In March 2010, as part of the New gTLD Program, the ICANN Board “request[ed] stakeholders to work through their [Supporting Organizations] SOs and [Advisory Committees] ACs, and form a Working Group to develop a sustainable approach to providing support to applicants requiring assistance in applying for and operating new gTLDs.”<sup>16</sup> In response, the JAS WG was formed.<sup>17</sup>

On 20 June 2011, the ICANN Board resolved to implement

a program to ensure support for applicants from developing countries, with a form, structure and processes to be determined by the Board in consultation

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<sup>14</sup> Email from ICANN org to E. Chung, 29 August 2018, attached as Exh. A.

<sup>15</sup> Request 18-9, § 7, at Pgs. 3, 5.

<sup>16</sup> 12 March 2010 Board Resolution, <https://www.icann.org/resources/board-material/resolutions-2010-03-12-en>.

<sup>17</sup> <http://dakar42.icann.org/meetings/dakar2011/presentation-jas-final-report-13sep11-en.pdf>.

with stakeholders including: (a) consideration of the GAC recommendation for a fee waiver corresponding to 76 percent of the \$185,000 USD evaluation fee, (b) consideration of recommendations of the ALAC and GNSO as chartering organizations of the Joint Applicant Support (JAS) Working Group, (c) designation of a budget of up to \$2 million USD for seed funding, and creating opportunities for other parties to provide matching funds, and (d) the review of additional community feedback, advice from ALAC, and recommendations from the GNSO following their receipt of a Final Report from the JAS Working Group (requested in time to allow staff to develop an implementation plan for the Board’s consideration at its October 2011 meeting in Dakar, Senegal), with the goal of having a sustainable applicant support system in place before the opening of the application window.<sup>18</sup>

On 13 September 2011, the JAS WG issued its Final Report “for consideration to the GNSO, ALAC, ICANN Board and ICANN community.”<sup>19</sup> The JAS Final Report sets forth various recommendations regarding financial and non-financial support to be offered to “Support-Approved Candidates” in conjunction with the New gTLD Program.<sup>20</sup>

On 28 October 2011, the ICANN Board resolved to take the JAS Final Report seriously and noted that a working group of Board members had been convened “to oversee the scoping and implementation of the recommendations arising out of [the JAS Final Report], as feasible.”<sup>21</sup> The Board further resolved that “the President and CEO is expected to commence work immediately and provide a detailed plan for consideration.”<sup>22</sup>

That work was undertaken with the oversight of the Board working group, whose work included discussions with a sub team appointed by the JAS WG.<sup>23</sup> The work resulted in two

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<sup>18</sup> 20 June 2011 Board Resolution, <https://www.icann.org/resources/board-material/resolutions-2011-06-20-en>.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> 28 October 2011 Board Resolution, <https://www.icann.org/resources/board-material/resolutions-2011-10-28-en#2>.

<sup>22</sup> *Id.*

<sup>23</sup> ICANN Board Submission No. 2011-12-08-06, Applicant Support Program, included as part of Board Briefing Materials for 8 December 2011 Board Meeting, <https://www.icann.org/en/system/files/bm/briefing-materials-2-08dec11-en.pdf>, at Pg. 130 of 156; *see also* 8 December 2011 Board Meeting Minutes, <https://www.icann.org/resources/board-material/minutes-2011-12-08-en> (the JAS-appointed sub team “comprised of Avri Doria, Cintra Sooknana, Alan Greenberg, and Rafik Rammak”).

documents that describe a *Process* and *Criteria* for evaluating candidates for support and providing support where merited.<sup>24</sup>

The ICANN Board thereafter “considered and discussed potential implementation models taking into account the current New gTLD Program development stage and timing.”<sup>25</sup>

On 8 December 2011, the ICANN Board resolved to “direct[] staff to finalize the implementation plan in accordance with the proposed criteria and process for the launch of the Applicant Support Program in January 2012.”<sup>26</sup> In the Rationale accompanying the Board’s 8 December 2011 Resolution, the Board made clear its decision not to adopt all of the recommendations set forth in the JAS Final Report: “Note: This process does not follow all JAS recommendations.”<sup>27</sup>

The *Process* and *Criteria* documents were posted for public comment and comments were received until 16 December 2011.<sup>28</sup> The comments received were summarized in a Report of Public Comments in early 2012.<sup>29</sup>

The ASP was embodied in the *Process* and *Criteria* documents, and it limited the available financial support to a reduction in the application fee. Specifically, the *Process* document provided that “the Applicant Support Program will provide financial support in the form of a reduction of new gTLD program fees by \$138,000 for the selected applicants. Under

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<sup>24</sup> ICANN Board Submission No. 2011-12-08-06, <https://www.icann.org/en/groups/board/documents/briefing-materials-2-08dec11-en.pdf>, at Pg. 130 of 156.

<sup>25</sup> *Id.* at Pg. 22 of 156.

<sup>26</sup> *Id.*

<sup>27</sup> Rationale for Resolutions 2011.12.08.01 – 2011.12.08.03, <https://www.icann.org/resources/board-material/resolutions-2011-12-08-en#1.1>.

<sup>28</sup> <https://www.icann.org/news/announcement-2011-10-13-en>.

<sup>29</sup> Report of Public Comments, <https://www.icann.org/en/system/files/files/report-comments-jas-final-report-02mar12-en.pdf>.

the regular process, applicants are required to pay \$185,000 as part of the normal application fee to be considered for receiving and managing the registry for a new gTLD.<sup>30</sup>

On 12 January 2012, ICANN org launched the ASP.<sup>31</sup> In the implementation of the ASP, ICANN took into account the public comments received, the timing of the launch of the New gTLD Program as well as the input from the JAS WG sub-group and the Board committee specially formed to guide the implementation details.<sup>32</sup> The ASP consists of three elements: (1) access to community pro bono services for startup registries; (2) financial assistance to qualifying applicants; and (3) a seed fund set up by the ICANN Board to assist needy applicants.<sup>33</sup> Relevant here is the financial assistance portion of the program, which provided a limited number of qualifying applicants the opportunity to pay a reduced evaluation fee of USD \$47,000 instead of the full evaluation fee of USD \$185,000.<sup>34</sup>

## **B. Background Facts on the Requestor's Application**

The Requestor submitted a community-based application for .KIDS (DotKids Application), which was placed in a contention set with one other .KIDS application and an application for .KID.<sup>35</sup>

The Requestor applied for financial assistance pursuant to the ASP. On 12 March 2013, ICANN org published an update on the ASP, identifying the Requestor as the only entity that

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<sup>30</sup> ICANN Board Submission No. 2011-12-08-06, Applicant Support Process, included as part of Board Briefing Materials for 8 December 2011 Board Meeting, <https://www.icann.org/en/system/files/bm/briefing-materials-3-08dec11-en.pdf>, at Pg. 82 of 164. See also Report of Public Comments, <https://www.icann.org/en/system/files/files/report-comments-jas-final-report-02mar12-en.pdf>, at Pg. 3.

<sup>31</sup> Applicant Support Program Fact Sheet, <https://newgtlds.icann.org/en/applicants/candidate-support/applicant-support-fact-sheet-20feb12-en.pdf>.

<sup>32</sup> See Report of Public Comments, <https://www.icann.org/en/system/files/files/report-comments-jas-final-report-02mar12-en.pdf>, at Pg. 3.

<sup>33</sup> Applicant Support Program FAQ, <https://newgtlds.icann.org/en/applicants/candidate-support/faqs>.

<sup>34</sup> Applicant Support Program Update, 12 March 2013, <https://newgtlds.icann.org/en/applicants/candidate-support/sarp-results-12mar13-en.pdf>.

<sup>35</sup> The application for the .KID string was withdrawn on 5 October 2018. Accordingly, the contention set consists of the two applications for .KIDS. See <https://gtldresult.icann.org/applicationstatus/applicationdetails/1320>; see also <https://gtldresult.icann.org/applicationstatus/contentionsetdiagram/215>.

met the threshold criteria for financial assistance in the form of a reduced application fee of USD \$47,000.<sup>36</sup>

The Requestor participated in CPE and did not prevail.<sup>37</sup>

On 23 April 2016, the Requestor filed a reconsideration request, Request 16-6<sup>38</sup>, challenging the CPE panel's report addressing the DotKids Application, and ICANN org's acceptance of that CPE report. The .KID/.KIDS contention set was placed on hold pending resolution of Request 16-6.

On 21 July 2016, the Board Governance Committee (BGC) denied Request 16-6.<sup>39</sup> The BGC found that the Requestor had not stated proper grounds for reconsideration.<sup>40</sup> The .KID/.KIDS contention set was taken off hold in July 2016 following resolution of Request 16-6.<sup>41</sup>

On 17 September 2016, the Board directed the President and CEO, or his designee(s), to undertake a review of the "process by which ICANN [organization] interacted with the [Community Priority Evaluation] CPE Provider, both generally and specifically with respect to the CPE reports issued by the CPE Provider" as part of the Board's oversight of the New gTLD Program (the CPE Process Review).<sup>42</sup> The BGC determined that the pending Reconsideration

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<sup>36</sup> Applicant Support Program Update, 12 March 2013, <https://newgtlds.icann.org/en/applicants/candidate-support/sarp-results-12mar13-en.pdf>.

<sup>37</sup> <https://www.icann.org/sites/default/files/tlds/kids/kids-cpe-1-1309-46695-en.pdf>.

<sup>38</sup> See Reconsideration Request 16-6, <https://www.icann.org/resources/pages/reconsideration-16-6-dotkids-request-2016-05-06-en>.

<sup>39</sup> See BGC Determination on Reconsideration Request 16-6, <https://www.icann.org/en/system/files/files/reconsideration-16-6-dotkids-bgc-21jul16-en.pdf>. Prior to 22 July 2017, the BGC was tasked with reviewing reconsideration requests. See ICANN Bylaws, 1 October 2016, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/bylaws-2016-09-30-en#article4>. Following 22 July 2017, the Board Accountability Mechanisms Committee (BAMC) is tasked with reviewing and making recommendations to the Board on reconsideration requests. See ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(e), available at <https://www.icann.org/resources/pages/governance/bylaws-en>.

<sup>40</sup> See *id.* at Pg. 19.

<sup>41</sup> See Reconsideration Request 17-5, § 4, at Pg. 2, <https://www.icann.org/resources/pages/reconsideration-17-5-dotkids-request-2017-12-06-en>.

<sup>42</sup> <https://www.icann.org/resources/board-material/resolutions-2016-09-17-en>

Requests regarding the CPE process would be placed on hold until the CPE Process Review was completed.<sup>43</sup> As the Requestor did not have a pending Reconsideration Request at the time, the DotKids Application was not placed on hold pending completion of the CPE Process Review.

On 2 October 2017, ICANN org invited the Requestor to an ICANN Auction for the .KID/.KIDS contention set.<sup>44</sup>

On 6 December 2017, two days before the deadline to submit certain requested information for the ICANN Auction, the Requestor filed a reconsideration request, Request 17-5,<sup>45</sup> challenging ICANN org's decision to take the DotKids Application off hold before the CPE Process Review was completed.<sup>46</sup> The filing of Request 17-5 impacted the status of the .KID/.KIDS contention set, which was placed on hold pending resolution of Request 17-5, and which resulted in the postponement of the ICANN Auction of the .KID/.KIDS contention set.<sup>47</sup>

On 13 December 2017, ICANN org published three reports on the CPE Process Review.<sup>48</sup> On 15 March 2018, the Board acknowledged and accepted the findings set forth in the reports, declared that the CPE Process Review was complete, concluded that, as a result of the findings in the CPE Process Review Reports there would be no overhaul or change to the CPE process for this current round of the New gTLD Program, and directed the BAMC to move

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<sup>43</sup> <https://www.icann.org/en/system/files/correspondence/disspain-letter-review-new-gtld-cpe-process-26apr17-en.pdf>. The eight Reconsideration Requests that the BGC placed on hold pending completion of the CPE Process Review are: 14-30 (.LLC) (withdrawn on 7 December 2017, *see* <https://www.icann.org/en/system/files/files/dotregistry-llc-withdrawal-redacted-07dec17-en.pdf>), 14-32 (.INC) (withdrawn on 11 December 2017, *see* <https://www.icann.org/en/system/files/files/reconsideration-14-32-dotregistry-request-redacted-11dec17-en.pdf>), 14-33 (.LLP) (withdrawn on 15 February 2018, *see* <https://www.icann.org/en/system/files/files/reconsideration-14-33-dotregistry-request-redacted-15feb18-en.pdf>), 16-3 (.GAY), 16-5 (.MUSIC), 16-8 (.CPA), 16-11 (.HOTEL), and 16-12 (.MERCK).

<sup>44</sup> Attachment 1 to BAMC Recommendation on Reconsideration Request 17-5, at Pg. 3.

<sup>45</sup> *See* Reconsideration Request 17-5, <https://www.icann.org/resources/pages/reconsideration-17-5-dotkids-request-2017-12-06-en>.

<sup>46</sup> *Id.*

<sup>47</sup> Update on Application Status and Contention Sets, *available at* <https://newgtlds.icann.org/en/applicants/advisories/application-contention-set-14mar14-en>.

<sup>48</sup> *See* [https://www.icann.org/news/announcement-2017-12-13-en?\\_prclt=HzlEs9ss](https://www.icann.org/news/announcement-2017-12-13-en?_prclt=HzlEs9ss).

forward with consideration of the remaining Reconsideration Requests relating to the CPE process that were placed on hold pending completion of the CPE Process Review.<sup>49</sup>

On 13 May 2018, the ICANN Board denied Request 17-5 on the basis that the Requestor had received the relief requested and therefore Request 17-5 was moot.<sup>50</sup> The .KID/.KIDS contention set was taken off hold following resolution of Request 17-5 and an ICANN Auction to resolve the .KID/.KIDS contention set was scheduled for 10 October 2018.<sup>51</sup>

On 27 August 2018, the Requestor contacted ICANN org “looking to request financial support for engaging in the string contention resolution process<sup>52</sup>.... and for engaging in an appeal of the new gTLD program process through an appropriate ICANN accountability mechanism.”<sup>53</sup> On 29 August 2018, ICANN org responded, stating in relevant part that “[w]e are unable to provide such financial assistance. As you are aware, the Applicant Support Program was implemented and subsequently incorporated into the Applicant Guidebook. The program provided financial assistance that came in the form of a reduced evaluation fee of US\$47,000k in lieu of the full evaluation fee of US\$185,000. Providing Applicant Support applications with additional funding past evaluations and specifically to fund a bidding deposit or accountability mechanisms is currently out of scope for this program.”<sup>54</sup>

On 21 September 2018, the Requestor filed Request 18-9. The Requestor claims that ICANN org contravened the JAS Final Report when it rejected the Requestor’s request for financial assistance for engaging in the string contention resolution process.<sup>55</sup> The Requestor

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<sup>49</sup> <https://www.icann.org/resources/board-material/resolutions-2018-03-15-en#2.a>.

<sup>50</sup> See Approved Board Resolutions, Regular Meeting of the ICANN Board, 13 May 2018, <https://www.icann.org/resources/board-material/resolutions-2018-05-13-en#2.c>.

<sup>51</sup> <https://newgtlds.icann.org/en/applicants/auctions/schedule-30jul18-en.pdf>.

<sup>52</sup> Email from E. Chung to ICANN org, 27 August 2018, Case No. 00901527, attached as Exh. A.

<sup>53</sup> Email from E. Chung to ICANN org, 27 August 2018, Case No. 00901476, attached as Exh. B.

<sup>54</sup> Email from ICANN org to E. Chung, 29 August 2018, attached as Exh. A.

<sup>55</sup> Reconsideration Request 18-9, § 7, at Pg. 3. As noted above, in its correspondence to ICANN org, the Requestor sought financial support both “for engaging in the string contention resolution process .... and for engaging in an



also claims that this decision is contrary to ICANN org’s core value to ascertain the global public interest.<sup>56</sup>

Pursuant to Article 4, Section 4.2(1) of the Bylaws, ICANN org transmitted Request 18-9 to the Ombudsman for consideration, and the Ombudsman recused himself.<sup>57</sup>

The BAMC has considered Request 18-9 and all relevant materials and recommends that the Board deny Request 18-9 because ICANN org adhered to established policies and procedures in responding to the Requestor’s request for financial assistance for engaging in the string contention resolution process; and ICANN org did not violate its core values established in the Bylaws concerning the global public interest.

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

The Requestor asks the BAMC to “[t]o proceed to take the remainder of the JAS Final Report recommendations seriously, and to oversee the scoping and implementation of the remaining recommendations ... arising out of that Report, as feasible.”<sup>58</sup> The Requestor further asks that the BAMC “place the DotKids Foundation application on hold ... until such implementation process for financial assistance is complete and a [Support-Approved Candidate] can request and apply for them appropriately.”

### **III. Issues Presented.**

The issues are as follows:

1. Whether ICANN org complied with established policies when responding to the

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appeal of the new gTLD program process through an appropriate ICANN accountability mechanism.” *See* Exhs. A & B. In Request 18-9, the Requestor challenges only ICANN org’s rejection of the request as it relates to the string contention resolution process. *See generally* Reconsideration Request 18-9.

<sup>56</sup> Reconsideration Request 18-9, § 7, at Pg. 5.

<sup>57</sup> ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(1)(iii); *see also* Ombudsman Action Regarding Reconsideration Request 18-9, Pg. 1, available at <https://www.icann.org/en/system/files/files/reconsideration-18-9-dotkids-ombudsman-action-04oct18-en.pdf>.

<sup>58</sup> Reconsideration Request 18-9, § 8, at Pg. 5.

Requestor's request for financial support for engaging in the string contention resolution process for the .KID/.KIDS contention set under the ASP; and

2. Whether ICANN org complied with its Core Values established in the Bylaws concerning ICANN org's commitment to ascertain the global public interest.<sup>59</sup>

#### **IV. The Relevant Standards for Reconsideration Requests.**

Article 4, Section 4.2(a) and (c) of ICANN's Bylaws provide 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:

- (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."<sup>60</sup>

Pursuant to Article 4, Section 4.2(k) of the Bylaws, if the BAMC determines that the Reconsideration Request is sufficiently stated, the Reconsideration Request is sent to the Ombudsman for review and consideration.<sup>61</sup> Where the Ombudsman has recused himself from the consideration of a Reconsideration Request, the BAMC shall review the request without involvement by the Ombudsman, and provide a recommendation to the Board.<sup>62</sup> Denial of a request for reconsideration of ICANN org action or inaction is appropriate if the BAMC

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<sup>59</sup> See generally, Reconsideration Request 18-9.

<sup>60</sup> ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(a), (c).

<sup>61</sup> ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(k), (l).

<sup>62</sup> ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(l)(iii).

recommends and the Board determines that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.<sup>63</sup>

On 1 October 2018, the BAMC determined that Request 18-9 is sufficiently stated and sent Request 18-9 to the Ombudsman for review and consideration.<sup>64</sup> The Ombudsman thereafter recused himself from this matter.<sup>65</sup> Accordingly, the BAMC has reviewed Request 18-9 and all relevant materials, and issues this Recommendation.

## **V. Analysis and Rationale.**

### **A. ICANN Org Adhered to Established Policies and Procedures in Responding to the Requestor’s Request for Financial Assistance.**

The Requestor claims that ICANN org’s “premature rejection of the request stating that [ICANN org] is ‘unable to provide such financial assistance’ and that ‘additional funding past evaluations ... is currently out of scope’ goes against the community developed final report by the [JAS]....”<sup>66</sup> Specifically, the Requestor claims that ICANN org was under “time pressure” when it considered the JAS Final Report, which caused the ICANN Board to only approve the JAS WG’s recommendation for a reduction in the application fee for qualified applicants and, correspondingly, the ICANN Board did “not consider[.]” other parts of the recommendations at that time.<sup>67</sup> The Requestor does not provide any evidence to support its claim that the ICANN Board did not consider the entire JAS Final Report in 2011, but nonetheless asserts that ICANN should “properly address the remainder of the JAS Final Report” before responding to the

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<sup>63</sup> ICANN Bylaws, 18 June 2018, Art. 4, § 4.2(e)(vi), (q), (r).

<sup>64</sup> Ombudsman Action Regarding Reconsideration Request 18-9, Pg. 1, *available at* <https://www.icann.org/en/system/files/files/reconsideration-18-9-dotkids-ombudsman-action-04oct18-en.pdf>.

<sup>65</sup> *Id.* at Pg. 1.

<sup>66</sup> Reconsideration Request 18-9, § 7, at Pg. 3.

<sup>67</sup> Reconsideration Request 18-9, § 7 at Pg. 4.

Requestor's request for financial support for engaging in the string contention resolution process.<sup>68</sup> The Requestor's claims do not support reconsideration.

Contrary to the Requestor's assertion, ICANN org *did* thoughtfully and fully consider all of the recommendations set forth in the JAS Final Report. The JAS issued its Final Report on 13 September 2011.<sup>69</sup> On 28 October 2011, the ICANN Board resolved to "seriously" consider the Final Report and convened a working group of Board members "to oversee the scoping and implementation of the recommendations arising out of [the JAS Final Report], as feasible."<sup>70</sup> The Board working group thereafter worked with a subgroup of community members appointed by the JAS WG to develop the *Process* and *Criteria* documents that set forth the scope and requirements of the ASP, which the Board then approved in December 2011.<sup>71</sup>

The fact that the ICANN Board did not adopt all of the JAS Final Report's recommendations when it approved the implementation plan in accordance with the *Process* and *Criteria* documents does not support the Requestor's view that ICANN org did not consider (and reject) the recommendations which were not implemented. As an initial matter, no policy or procedure required ICANN to adopt the recommendations set forth in the JAS Final Report in full. To the contrary, as noted in the JAS Final Report, the recommendations were only "submitted *for consideration* to the GNSO, ALAC, ICANN Board and ICANN community."<sup>72</sup> It remained within the ICANN Board's discretion to determine which recommendations to implement, if any, and the ICANN Board resolved to do so only "as feasible."<sup>73</sup>

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<sup>68</sup> Reconsideration Request 18-9, § 7 at Pg. 4.

<sup>69</sup> *Id.*

<sup>70</sup> 28 October 2011 Board Resolution, <https://www.icann.org/resources/board-material/resolutions-2011-10-28-en#2>.

<sup>71</sup> 8 December 2011 Board Resolution, <https://www.icann.org/resources/board-material/resolutions-2011-12-08-en#1>.

<sup>72</sup> JAS Final Report at I (emphasis added), <http://dakar42.icann.org/meetings/dakar2011/presentation-jas-final-report-13sep11-en.pdf>.

<sup>73</sup> 28 October 2011 Board Resolution, <https://www.icann.org/resources/board-material/resolutions-2011-10-28-en#2>.

The Requestor’s position also is contradicted by the plain language of the Board’s rationale supporting its resolution to “direct[] staff to finalize the implementation plan in accordance with the proposed *criteria* and *process*” documents.<sup>74</sup> Specifically, the Board made clear that it had determined *not* to adopt all of the recommendations set forth in the JAS Final Report, which clearly shows that the Board considered – and rejected – all recommendations not set forth in the implementation documents: “Note: This process does not follow all JAS recommendations.”<sup>75</sup> Instead, the Board, in its discretion, found it feasible and resolved to approve financial assistance in the form of a “fee reduction to \$47,000” for qualifying Applicant Support candidates.<sup>76</sup>

In short, the only JAS recommendations the Board approved are those set forth in the *Process* and *Criteria* documents, which in turn defined the scope and requirements of the ASP. All other JAS WG recommendations were considered and not adopted. Because the ASP, as implemented, does not provide for financial assistance for the contention resolution process, ICANN org did not contravene any established policy or procedure when it denied the Requestor’s request for such support.

Nor does the Requestor identify any policy or procedure (because there is none) obligating ICANN to go back and reconsider, as part of the current New gTLD Program round, the JAS WG’s recommendations that were previously not adopted. To the contrary, the

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<sup>74</sup> ICANN Board Submission No. 2011-12-08-06, Applicant Support Program, included as part of Board Briefing Materials for 8 December 2011 Board Meeting, <https://www.icann.org/en/system/files/bm/briefing-materials-2-08dec11-en.pdf>, at Pg. 22 of 156.

<sup>75</sup> 8 December 2011 Board Resolution, <https://www.icann.org/resources/board-material/resolutions-2011-12-08-en#1>.

<sup>76</sup> 8 December 2011 Board Resolution, <https://www.icann.org/resources/board-material/resolutions-2011-12-08-en#1>.

requirements of the ASP as set forth in the *Process* and *Criteria* documents were intended to be “very clear requirements that are the *final requirements* of the program for applicant support.”<sup>77</sup>

Moreover, even if the ICANN Board previously neglected to consider all of the recommendations set forth in the JAS Final Report (which it did not), reconsideration still would be not warranted. The BAMC has reviewed the JAS Final Report and associated relevant materials, including comments made in response to the Request for Public Comment, and has confirmed that financial assistance in the form requested by the Requestor was never recommended by the JAS WG or otherwise. Thus, even if ICANN org were to “address the remainder of the JAS Final Report,” as the Requestor asks,<sup>78</sup> ICANN org would not find any recommendation in the JAS Final Report that financial support be made available for engaging in the contention resolution process.

The BAMC is not persuaded otherwise by the Requestor’s citation to three recommendations in the JAS Final Report.<sup>79</sup> Specifically, the Requestor relies on the JAS Final Report recommendations: (i) “to provide further funding opportunities for Support-Approved Candidates in the later stages of the process;” (ii) that “fees for Support-Approved Candidates be staggered;” and (iii) that “[f]urther adjustments to financial requirements might include, for example, a reduction in basic registry-service-related expenses through modifications to certain guidelines such as the continuity instrument or other adjustments.”<sup>80</sup> As the text of the JAS Final Report make clear, none of the recommendations quoted by the Requestor suggest a specific intent to make financial support available to assist in the contention resolution process.<sup>81</sup>

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<sup>77</sup> 28 October 2011 Board Minutes (emphasis added), <https://www.icann.org/resources/board-material/minutes-2011-10-28-en#2>.

<sup>78</sup> Reconsideration Request 18-9, § 7 at Pg. 4.

<sup>79</sup> Reconsideration Request 18-9, § 7 at Pg. 4.

<sup>80</sup> Reconsideration Request 18-9, § 7 at Pgs. 4-5.

<sup>81</sup> In addition, contrary to the Requestor’s assertion, ICANN org *did* implement that JAS Final Report’s recommendation that certain fees be staggered for qualifying Support-Approved Candidates. The *Process* document

The Requestor does not demonstrate otherwise, but instead merely quotes the three aforementioned recommendations from the JAS Final Report and then offers (by way of parenthetical) its own speculation that financial support for the contention resolution process could be one “example” of what the JAS WG intended.<sup>82</sup> The Requestor’s view is not supported by any facts, and that view is inconsistent with the language in the JAS Final Report. Specifically, in the JAS Final Report, the JAS WG proposed a framework that required the Support-Approved Candidate to pay the full costs associated with string contention resolution: “If there is a string contention then the Application will go through normal ICANN channels *with the Applicant funding this additional step of the [Applicant Guidebook] AG.*”<sup>83</sup> Accordingly, reconsideration is not warranted.

Ultimately, no policy or procedure requires ICANN org to provide financial support for the Requestor to engage in the string contention resolution process for the .KID/.KIDS contention set. Accordingly, the BAMC recommends that Request 18-9 be denied.

**B. ICANN Org Adhered to Its Core Values in Responding to the Requestor’s Request for Financial Assistance.**

The Requestor makes a single passing reference to “ICANN’s core value to ascertain the global public interest,”<sup>84</sup> and claims that ICANN org has contravened this core value by denying the Requestor’s request for financial support to engage in the contention resolution process.<sup>85</sup>

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provides that “ICANN will seek to make additional aid to qualifying needy applicants such as translation services and staggered fees.” See <https://www.icann.org/en/system/files/bm/briefing-materials-3-08dec11-en.pdf> at Pg. 82 of 164.

<sup>82</sup> Reconsideration Request 18-9, § 7 at Pgs. 4-5.

<sup>83</sup> JAS Final Report at 28, <http://dakar42.icann.org/meetings/dakar2011/presentation-jas-final-report-13sep11-en.pdf>; see also JAS Second Milestone Report at 15, <https://archive.icann.org/en/topics/new-gtlds/jas-second-milestone-report-09may11-en.pdf>.

<sup>84</sup> Reconsideration Request 18-9, § 7 at Pg. 5.

<sup>85</sup> Reconsideration Request 18-9, § 7 at Pg. 5.

The Requestor's claims do not support reconsideration.

The cited Core Value provides, in full, the following:

Seeking and supporting broad, informed participation reflecting the functional, geographic, and cultural diversity of the Internet at all levels of policy development and decision-making to ensure that the bottom-up, multistakeholder policy development process is used to ascertain the global public interest and that those processes are accountable and transparent.<sup>86</sup>

ICANN org's implementation of the ASP is the embodiment of this Core Value, not, as the Requestor claims, a contravention of it. To start, the Core Value to "seek[] and support broad, informed participation" via the multistakeholder model is illustrated in the ICANN Board's request, in March 2010, that stakeholders "work through their [Supporting Organizations] SOs and [Advisory Committees] ACs, and form a Working Group to develop a sustainable approach to providing support to applicants requiring assistance in applying for and operating new gTLDs."<sup>87</sup> The JAS Final Report, which the ICANN Board fully considered, was developed in response to ICANN's commitment to the multistakeholder model, and exemplifies ICANN's commitment to "ascertain the global public interest" as it concerns the New gTLD Program. Indeed, in resolving to consider the JAS Final Report, the Board noted that it "takes seriously the assertions of the ICANN community that applicant support will encourage diverse participation in the New gTLD Program and promote ICANN's goal of broadening the scope of the multi-stakeholder model."<sup>88</sup>

Here, the Requestor appears to urge ICANN org to circumvent the established policy set forth in the requirements governing the ASP in a manner favorable to the Requestor, which undermines, rather than bolsters, the global public interest. ICANN org is committed to

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<sup>86</sup> ICANN Bylaws, 18 June 2018, Art. 1, § 1.2(b)(ii).

<sup>87</sup> 12 March 2010 Board Resolution, <https://www.icann.org/resources/board-material/resolutions-2010-03-12-en>.

<sup>88</sup> <https://www.icann.org/resources/board-material/minutes-2011-10-28-en#2>.



diversity, operational stability, and non-discrimination, but it is not responsible for guaranteeing a gTLD for any specific applicant. Rather, ICANN org is committed to creating a process for evaluating and providing applicant support, and it applied that here. The Requestor's opinion does not demonstrate violation of that process, and does not support reconsideration.

**VI. Recommendation.**

The BAMC has considered the merits of Request 18-9, and, based on the foregoing, concludes that ICANN org did not violate ICANN's commitments, Core Values or established ICANN policy(ies) in its response to the Requestor's request for financial assistance for engaging in the string contention resolution process for the .KID/.KIDS contention set. Accordingly, the BAMC recommends that the Board deny Request 18-9.

## Exhibit A

**Sent via case: 00901475, 00901476, 00901527, 00901528 (sent in 4 times with exact same message)**

From: Edmon Chung

Date: 27 August 2018

Subject: Request for Financial Support for later stages in the new gTLD process as a Support Approved Candidate (string contention)

Dear ICANN,

As a Support Approved Candidate (SAC), DotKids Foundation is looking to request financial support for engaging in the string contention resolution process.

Based on the Joint Applicant Support Working Group Final Report ([http://dakar42.icann.org/meetings/dakar2011/presentation\\_jas\\_final\\_report\\_13sep11\\_en.pdf](http://dakar42.icann.org/meetings/dakar2011/presentation_jas_final_report_13sep11_en.pdf)), and the subsequent Board Resolutions on the matter, we understand that financial support for later stages in the new gTLD process is to be developed and provided.

We have not found further implementation details on the Applicant Support website ([https://newgtlds.icann.org/en/applicants/candidate\\_support](https://newgtlds.icann.org/en/applicants/candidate_support)) at this moment. We would like to inquire how the implementation will be completed and how we could apply for such support.

Sincerely,  
Edmon Chung

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**ICANN Response via case: 00901527**

Date: 29 August 2018

Dear Edmon Chung,

Thank you for submitting the auction documentation through case 00899096 (Intent to Auction Notification for 1 1309 46695). We will review the submitted documents and revert back with any additional questions regarding the auction forms. Please note, we have received your requests for additional financial assistance through cases 00901527 and 00901528 regarding the string contention resolution process as well as the appeal of the New gTLD program process through an ICANN accountability mechanism.

We are unable to provide such financial assistance. As you are aware, the Applicant Support Program was implemented and subsequently incorporated into the Applicant Guidebook. The program provided financial assistance that came in the form of a reduced evaluation fee of US\$47,000k in lieu of the full evaluation fee of US\$185,000. Providing Applicant Support applications with additional funding past evaluations and specifically to fund a bidding deposit or accountability mechanisms is currently out of scope for this program.

Please keep in mind, per Section 4.1.3 of the Applicant Guidebook and as mentioned in previous communication, contention set members are encouraged to self resolve the contention set amongst themselves.

Regards,  
Justin Ho  
New gTLD Operations Team

## Exhibit B

**Sent via case: 00901476**

From: Edmon Chung

Date: 27 August 2018

Subject: Request for Financial Support for later stages in the new gTLD process as a Support Approved Candidate (accountability mechanism)

Dear ICANN,

As a Support Approved Candidate (SAC), DotKids Foundation is looking to request financial support for engaging in an appeal of the new gTLD program process through an appropriate ICANN accountability mechanism.

Based on the Joint Applicant Support Working Group Final Report ([http://dakar42.icann.org/meetings/dakar2011/presentation\\_jas\\_final\\_report\\_13sep11\\_en.pdf](http://dakar42.icann.org/meetings/dakar2011/presentation_jas_final_report_13sep11_en.pdf)), and the subsequent Board Resolutions on the matter, we understand that financial and non financial support for later stages in the new gTLD process is to be developed and provided.

We have not found further implementation details on the Applicant Support website ([https://newgtlds.icann.org/en/applicants/candidate\\_support](https://newgtlds.icann.org/en/applicants/candidate_support)) at this moment. We would like to inquire how the implementation will be completed and how we could apply for such support.

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Please keep in mind, per Section 4.1.3 of the Applicant Guidebook and as mentioned in previous communication, contention set members are encouraged to self resolve the contention set amongst themselves.

Regards,  
Justin Ho  
New gTLD Operations Team

# Response to the Recommendation of The Board Accountability Mechanisms Committee (BAMC) Reconsideration Request 18-9

We would like to start by emphasizing that the request is focused on asking the ICANN Board to reconsider parts of the Joint Applicant Support (JAS) Final Report which the ICANN Board has not yet considered previously, which in turn impacts the integrity of the new gTLD program itself and viability for needy applicants (i.e. Support-Approved Candidates), and therefore the global public interest as put forth in the intent of the new gTLD program.

More specifically:

1. The argument put forth by the Recommendation of the BAMC is simply wrong. That there was not discussion about how further support can be given to Support Approved Candidates does not therefore conclude that such support is precluded, in fact, the report specifically tasks ICANN to further study the matter and put in place such support.
2. The Reconsideration Request is not directly asking for funding support for the last-resort auction (although that may be a form), other forms of further support, if put in place can help directly the cause and make a significant difference. For example, while the further support may not be used for the Auction fees, if further support can be applied to reduced future ICANN fees or adjusted payment times, then such reduction can allow a Support Approved Candidate to raise some financing for it to enter into the auction process and have a stronger means (the Applicant Support) to support future payback of that financing.
3. Without some further support (e.g. in terms of fee reduction, adjustment, staggering or otherwise), the Applicant Support program simply does not make sense, because in order to satisfy the requirement, the applicant must show that it has no other sources of financing available, yet when a Support Approved Candidate is locked in a contention set, it does not have any further support from ICANN to allow it to leverage for further financing (even if such support is not directly against auction fees), then the Applicant Support program is at best a dysfunctional and cosmetic support for needy applicants in the new gTLD program.

This is the background of the Reconsideration Request. Of course it is a matter that affects DotKids Foundation's community application, but it is as a Support Approved Candidate (in general) that the reconsideration is sought.

Again, the reconsideration part is simply for the ICANN Board to initiate the process to consider the remaining parts of the JAS Final Report. If the result of such deliberations are that no further actions are to be taken, that should be provided clearly with the rationale for rejecting further financial support to Support Approved Candidates even when the pool of resources available allows for such allocation.

Without which, the Applicant Support Program is only superficial because it requires that a successful Applicant be sufficient needy and to show that it has already tried different avenues and unable to raise further financing, yet when there is contention, the program cannot even help the Support Approved Candidate to raise further financing to engage in that process. The Reconsideration Request is neither asking for such support directly, nor asking for financial support for engaging in the contention resolution process, the Reconsideration Request only asks that ICANN Board complete the consideration of further financing support for Support Approved Candidates as it sees fit and feasible, and hold the applications for those Support Approved Candidates such that once such further financing support are available, whatever they may be, it could then have an



impact to the Support Approved Candidate's ability to engage further in the process leveraging that support (even if it is indirect).

In particular response to the Recommendation of the BAMC:

*"for the .KID/.KIDS contention set."*

*"a contention set with one other .KIDS application and an application for .KID"*

The above information is no longer correct as one of the application has since withdrawn its application.

*"The fact that the ICANN Board did not adopt all of the JAS Final Report's recommendations when it approved the implementation plan in accordance with the Process and Criteria documents does not support the Requestor's view that ICANN org did not consider (and reject) the recommendations which were not implemented."*

The statement does not draw any conclusions because neither does it support the view that ICANN Board has actually considered all of the recommendations. It is at best left open the question of whether they should be further considered. This Reconsideration Request is about asking that particular question.

*"It remained within the ICANN Board's discretion to determine which recommendations to implement, if any, and the ICANN Board resolved to do so only "as feasible.""*

That is correct, the specific question raised by this Reconsideration Request is to ask if the ICANN board did determine that further support as considered by the JAS Final Report is not feasible.

*"Specifically, the Board made clear that it had determined not to adopt all of the recommendations set forth in the JAS Final Report, which clearly shows that the Board considered – and rejected – all recommendations not set forth in the implementation documents: "Note: This process does not follow all JAS recommendations.""*

The argument put forth by the BAMC is flawed. That the Board resolution states that the particular process under consideration (i.e. the approved Applicant Support Program for the new gTLD application process) does not therefore mean that all JAS recommendations are forever not going to be further considered. Again, it at best leaves the question open. Therefore, it is not unreasonable to seek a clarification of whether the Board do intend to proceed with such considerations or not. At the heart of this Reconsideration Request is that question.

*"very clear requirements that are the final requirements of the program for applicant support."*

The BAMC appears to have conflated the issue. This pertains the requirements of becoming a Support Approved Applicant, and yes the final requirements have been established and has been applied. This Reconsideration Request is about how further support are to be provided and has an impact immediately to a Support Approved Applicant that has fulfilled the final requirements of the program for applicant support.

*“The BAMC has reviewed the JAS Final Report and associated relevant materials, including comments made in response to the Request for Public Comment, and has confirmed that financial assistance in the form requested by the Requestor was never recommended by the JAS WG or otherwise. Thus, even if ICANN org were to “address the remainder of the JAS Final Report,” as the Requestor asks,<sup>78</sup> ICANN org would not find any recommendation in the JAS Final Report that financial support be made available for engaging in the contention resolution process.”*

This is a false statement. The Reconsideration Request did not request any particular form of financial assistance. The Reconsideration Request specifically requested ICANN Board to reconsider its position on whether further support as included in the JAS Final Report should be further considered, studied and implemented and if not, why not (and why it is in the global public interest to do so). It may as well end up concluding that no further consideration is necessary, but all the current evidence (as put forward by the BAMC also) at best indicates that the issue is open. However, the BAMC seem to have pre-empted such discussion at all.

*“Specifically, the Requestor relies on the JAS Final Report recommendations: (i) “to provide further funding opportunities for Support-Approved Candidates in the later stages of the process;” (ii) that “fees for Support-Approved Candidates be staggered;” and (iii) that “[f]urther adjustments to financial requirements might include, for example, a reduction in basic registry-service-related expenses through modifications to certain guidelines such as the continuity instrument or other adjustments.”<sup>80</sup> As the text of the JAS Final Report make clear, none of the recommendations quoted by the Requestor suggest a specific intent to make financial support available to assist in the contention resolution process.”*

This is a wrong conclusion. Even if direct support for the contention resolution process is not available, the adjustment of other fees can have significant impact on the Support Approved Candidate’s ability to raise funds for the contention resolution process. That is precisely why the Reconsideration Request asks that ICANN board reconsider its position so that the full JAS Final Report can be considered and if such fee adjustments are to be made, it will provide benefit that will materially affect a Support Approved Candidate’s ability to leverage that to raise further funds for the contention resolution process. Therefore, to conclude that just because direct contribution might not be included even if such discussions were held is simply pre-empting the discussion itself, and pre-empting how other fee adjustments could in fact help the Support Approved Candidate at this critical juncture of the new gTLD program.

*“The Requestor does not demonstrate otherwise, but instead merely quotes the three aforementioned recommendations from the JAS Final Report and then offers (by way of parenthetical) its own speculation that financial support for the contention resolution process could be one “example” of what the JAS WG intended. The Requestor’s view is not supported by any facts, and that view is inconsistent with the language in the JAS Final Report.”*

The conclusion is flawed. Just because the JAS Final Report did not contain specific mentioning of financial support for the contention resolution process does not mean that other financial support cannot impact the Support Approved Candidate’s ability to raise and leverage further funding which could in turn support the contention resolution process. Concluding that any other further financial support will not help is simply wrong. As a Support Approved Candidate, the DotKids Foundation understands clearly that every bit counts. If a plan for further financial support is laid out based on the current resources and the JAS Final Report, there is material

difference and possibility that it may be able to much better meaningfully leverage that additional support which it knows it will be eligible later to leverage financing to engage in the contention resolution process.

That is why this Reconsideration Request is critical to the integrity of the Applicant Support Program and the new gTLD program as a whole in its stated goal to support needy applicants.



# **Report on the Delegation of the موريتانيا .country-code top-level domain representing Mauritania in Arabic Script to Université de Nouakchott Al Aasriya**

8 January 2019

This report is a summary of the materials reviewed as part of the process for the delegation of the .xn--mgbah1a3hjkrd (موريتانيا) country-code top-level domain. It includes details regarding the proposed delegation, evaluation of the documentation pertinent to the request, and actions undertaken in connection with processing the delegation.

## **FACTUAL INFORMATION**

### **Country**

The “MR” ISO 3166-1 two-letter country code from which the application’s eligibility derives, is designated for use to represent Mauritania.

### **String**

The domain under consideration for the delegation at the DNS root level is “موريتانيا”. This is represented in ASCII-compatible encoding to the IDNA specification as “xn--mgbah1a3hjkrd”. The individual Unicode code points that comprise this string are U+0645 U+0648 U+0631 U+064A U+062A U+0627 U+0646 U+064A U+0627.

In the Arabic language, the string’s transliteration and translation is “Mauritania” in English. The string is expressed using the Arabic script.

### **Chronology of events**

In April 2009, the government of Mauritania held a consultation with stakeholders in the ICT sector in Mauritania. The consultation focused on the management of Internet domains in Mauritania.

On 23 October 2014, the government of Mauritania signed Decree number 3468. The Decree calls for the establishment of NIC-Mauritanie to manage the day-to-day operations of the Mauritanian top-level domains including the .MR and موريتانيا .country-code top-level domains. The decree tasks Université des Sciences, de Technologie et de Médecine to implement it.

Under Article 63 of Mauritanian law 2013-025 dated 15 July 2013 relating to electronic communications, and under the provisions of Decree 3468, the University decided to seek transfer of the organization and management of the Mauritania ccTLDs to NIC Mauritanie.

On 21 July 2016, the Université de Nouakchott Al Aasriya (UNA) was established by Decree 138-2016, causing the unification of Université de Nouakchott and Université des Sciences, de Technologie et de Médecine. UNA is a public university in Mauritania and NIC-Mauritanie is a department within UNA. Université de Nouakchott had been responsible for the management of the .MR country code top-level domain since it was introduced in 1996. As such, UNA currently manages the .MR country-code top-level domain following the unification of the two universities into UNA.

On 27 February 2017, a review by the IDN Fast Track DNS Stability Panel found that the applied-for string “presents none of the threats to the stability or security of the DNS identified in Module 4 of the Fast Track Implementation Plan, and presents an acceptably low risk of user confusion.” The request for the “موريتانيا” string to represent Mauritania was subsequently approved.

In October 2017, a workshop on the management and security of ccTLD registries was organized by NIC-Mauritanie in partnership with the West Africa Regional Communications Infrastructure Program Project (WARCIP) project of the World Bank and the Association Française pour le Nomage Internet en Coopération (AFNIC).

In March 2018, an information day on the management of Internet domains for Mauritania was attended by the Minister of Higher Education, the Minister in Charge of IT, the President of the National Regulation Authority, the President of the University, and representatives of “all actors in the ICT sector”, according to the applicant.

On 12 July 2018, UNA commenced a request for the delegation of موريتانيا. as a top-level domain.

### **Proposed Manager and Contacts**

The proposed manager is Université de Nouakchott Al Aasriya. It is based in Mauritania.

The proposed administrative contact is Ahmedou Haouba, Professor at Université de Nouakchott Al Aasriya. The administrative contact is understood to be based in Mauritania.

The proposed technical contact is Ahmed Salem Cheikh, Director of NIC-Mauritanie.

## **EVALUATION OF THE REQUEST**

### **String Eligibility**

The top-level domain is eligible for delegation as the string has been deemed an appropriate representation of Mauritania through the ICANN Fast Track String Selection process, and Mauritania is presently listed in the ISO 3166-1 standard.

### **Public Interest**

Government support was provided by:

- Seyedna Ali Ould Mohamed Khouna, Minister of Employment, Vocational Training, and Information and Communication Technologies, Mauritania.
- Dr. Sidi Ould Salem, Minister of Higher Education and Scientific Research, Mauritania.
- Cheikh Ahmed Ould Sid'Ahmed, President of the National Regulatory Council, the National Regulatory Authority of Mauritania.

Additional support letters were provided by the following:

- Dominique Saint-Jean, Chairman and CEO of the Mauritania-Tunisian Company of Telecommunications (MATTEL SA), the “first fully fledged GSM operator in Mauritania” which “provides a full range of products and services in the field of Telecommunications and Information Technology”.
- Zouheir Jorio, Director General of the Mauritanian Telecommunications Company (Mauritel), a nationwide operator “providing telecommunications and information technology services including voice calls and broadband internet connection for the general public as well as for business and economic entities”.
- Mme Fatma Elkory Oumrane, President of the Internet Society Mauritanian Chapter.

The application is consistent with known applicable laws in Mauritania. The proposed manager undertakes responsibilities to operate the domain in a fair and equitable manner.

### **Based in country**

The proposed managing organization is constituted in Mauritania. The proposed administrative contact is understood to be a resident of Mauritania. The registry is to be operated in Mauritania.

### **Stability**

The application does not involve a transfer of domain operations from an existing domain registry, and therefore stability aspects relating to registry transfer are not relevant.

The application is not known to be contested.

### **Competency**

The application has provided information on the technical and operational infrastructures and expertise that will be used to operate the proposed new domain. The applicant is also the current operator of the .MR country-code top-level domain.

Proposed policies for management of the domain have also been tendered.

## **EVALUATION PROCEDURE**

PTI is tasked with coordinating the Domain Name System root zone as part of a set of functions governed by a contract with ICANN. This includes accepting and evaluating requests for delegation and transfer of top-level domains.

A subset of top-level domains are designated for the local Internet communities in countries to operate in a way that best suits their local needs. These are known as country-code top-level domains (ccTLDs), and are assigned to responsible managers that meet a number of public-interest criteria for eligibility. These criteria largely relate to the level of support the manager has from its local Internet community, its capacity to ensure stable operation of the domain, and its applicability under any relevant local laws.

Through the IANA Services performed by PTI, requests are received for delegating new ccTLDs, and transferring or revoking existing ccTLDs. An investigation is performed on the circumstances pertinent to those requests, and, the requests are implemented where they are found to meet the criteria.

### **Purpose of evaluations**

The evaluation of eligibility for ccTLDs, and of evaluating responsible managers charged with operating them, is guided by a number of principles. The objective of the assessment is that the action enhances the secure and stable operation of the Internet's unique identifier systems.

In considering requests to delegate or transfer ccTLDs, input is sought regarding the proposed new manager, as well as from persons and organizations that may be significantly affected by the change, particularly those within the nation or territory to which the ccTLD is designated.

The assessment is focused on the capacity for the proposed manager to meet the following criteria:

- The domain should be operated within the country, including having its manager and administrative contact based in the country.
- The domain should be operated in a way that is fair and equitable to all groups in the local Internet community.
- Significantly interested parties in the domain should agree that the prospective manager is the appropriate party to be responsible for the domain, with the desires of the



national government taken very seriously.

- The domain must be operated competently, both technically and operationally. Management of the domain should adhere to relevant technical standards and community best practices.
- Risks to the stability of the Internet addressing system must be adequately considered and addressed, particularly with regard to how existing identifiers will continue to function.

### **Method of evaluation**

To assess these criteria, information is requested from the applicant regarding the proposed manager and method of operation. In summary, a request template is sought specifying the exact details of the delegation being sought in the root zone. In addition, various documentation is sought describing: the views of the local internet community on the application; the competencies and skills of the manager to operate the domain; the legal authenticity, status and character of the proposed manager; and the nature of government support for the proposal.

After receiving this documentation and input, it is analyzed in relation to existing root zone management procedures, seeking input from parties both related to as well as independent of the proposed manager should the information provided in the original application be deficient. The applicant is given the opportunity to cure any deficiencies before a final assessment is made.

Once all the documentation has been received, various technical checks are performed on the proposed manager's DNS infrastructure to ensure name servers are properly configured and are able to respond to queries correctly. Should any anomalies be detected, PTI will work with the applicant to address the issues.

Assuming all issues are resolved, an assessment is compiled providing all relevant details regarding the proposed manager and its suitability to operate the relevant top-level domain.

Sensitive Delegation Information

# **Report on the Delegation of the .SS (South Sudan) country-code top-level domain to the National Communication Authority (NCA)**

8 January 2019

This report is a summary of the materials reviewed as part of the process for the delegation of the .SS (South Sudan) country-code top-level domain. It includes details regarding the proposed delegation, evaluation of the documentation pertinent to the request, and actions undertaken in connection with processing the delegation.

## **FACTUAL INFORMATION**

### **Country**

The “SS” ISO 3166-1 code is designated for use to represent South Sudan.

### **Chronology of events**

In July 2011, South Sudan seceded from Sudan. This was the result of an independence referendum that took place in January of the same year.

In August 2011, the “SS” two-letter country code was assigned for South Sudan in the ISO 3166-1 standard. The two-letter country code for Sudan remains unchanged as “SD”.

The National Communication Authority (NCA) was established under Section 7 of the South Sudan National Communication Act of 2012. The Authority is answerable to the President of the Republic of South Sudan and under the direct supervision of the Competent Minister. The functions and powers of the Authority include regulating Internet domain names in South Sudan.

In 2017 a Memorandum of Understanding was signed between NCA and the Kenya Network Information Center (KeNIC), the manager of the .KE (Kenya) country-code top-level domain. The MOU tasks KeNIC to provide technical support to the .SS country-code top-level domain registry for a period of one year. At the end of the year, the MOU provides for potential renewal following a review, or NCA will fully take over management of the registry.

From 21-25 August 2017 KeNIC provided registry training for two engineers from NCA, including the proposed technical contact, Unguec Stephen Kang Ilario.

On 7 May 2018, a meeting between NCA and significantly interested parties was held to seek their input on the .SS (South Sudan) country-code top-level domain operations.

On 23 July 2018, a second meeting was held with significantly interested parties. At this meeting, the policies governing the .SS (South Sudan) country-code top-level domain were revised and reviewed by the attendees, and were accepted by consensus.

On 21 August 2018, NCA commenced a request for the delegation of .SS (South Sudan) country-code top-level domain.

### **Proposed Manager and Contacts**

The proposed manager is National Communication Authority (NCA). It is based in South Sudan.

The proposed administrative contact is Eng. Virginio Kenyi Lomena, Director of Admin and Finance at NCA. The administrative contact is understood to be based in South Sudan.

The proposed technical contact is Unguec Stephen Kang Ilario, Network Engineer at NCA.

### **EVALUATION OF THE REQUEST**

#### **String Eligibility**

The top-level domain is eligible for delegation as the string for South Sudan is presently listed in the ISO 3166-1 standard.

#### **Public Interest**

Government support was provided by:

- Hon. Justin Alier, Undersecretary of Information, Ministry of ICT & Postal Services, the Republic of South Sudan.

Additional support letters were provided by the following:

- Kamrul Hasan Sagar, Managing Director of IPTEC Limited, an ISP in South Sudan.
- Bahaeldin Ahmed Zayed, Managing Director of Talia Limited, an ISP in South Sudan.

The application is consistent with known applicable laws in South Sudan. The

proposed manager undertakes responsibilities to operate the domain in a fair and equitable manner.

### **Based in country**

The proposed manager organization is constituted in South Sudan. The proposed administrative contact is understood to be a resident of South Sudan. The registry is to be operated in South Sudan.

### **Stability**

The application does not involve a transfer of domain operations from an existing domain registry, and therefore stability aspects relating to registry transfer are not relevant.

The application is not known to be contested.

### **Competency**

The application has provided information on the technical and operational infrastructures and expertise that will be used to operate the proposed new domain.

Proposed policies for management of the domain have also been tendered.

## **EVALUATION PROCEDURE**

PTI is tasked with coordinating the Domain Name System root zone as part of a set of functions governed by a contract with ICANN. This includes accepting and evaluating requests for delegation and transfer of top-level domains.

A subset of top-level domains are designated for the local Internet communities in countries to operate in a way that best suits their local needs. These are known as country-code top-level domains (ccTLDs), and are assigned to responsible managers that meet a number of public-interest criteria for eligibility. These criteria largely relate to the level of support the manager has from its local Internet community, its capacity to ensure stable operation of the domain, and its applicability under any relevant local laws.

Through the IANA Services performed by PTI, requests are received for delegating new ccTLDs, and transferring or revoking existing ccTLDs. An investigation is performed on the circumstances pertinent to those requests, and, the requests are implemented where they are found to meet the criteria.

### **Purpose of evaluations**

The evaluation of eligibility for ccTLDs, and of evaluating responsible managers

charged with operating them, is guided by a number of principles. The objective of the assessment is that the action enhances the secure and stable operation of the Internet's unique identifier systems.

In considering requests to delegate or transfer ccTLDs, input is sought regarding the proposed new manager, as well as from persons and organizations that may be significantly affected by the change, particularly those within the nation or territory to which the ccTLD is designated.

The assessment is focused on the capacity for the proposed manager to meet the following criteria:

- The domain should be operated within the country, including having its manager and administrative contact based in the country.
- The domain should be operated in a way that is fair and equitable to all groups in the local Internet community.
- Significantly interested parties in the domain should agree that the prospective manager is the appropriate party to be responsible for the domain, with the desires of the national government taken very seriously.
- The domain must be operated competently, both technically and operationally. Management of the domain should adhere to relevant technical standards and community best practices.
- Risks to the stability of the Internet addressing system must be adequately considered and addressed, particularly with regard to how existing identifiers will continue to function.

### **Method of evaluation**

To assess these criteria, information is requested from the applicant regarding the proposed manager and method of operation. In summary, a request template is sought specifying the exact details of the delegation being sought in the root zone. In addition, various documentation is sought describing: the views of the local internet community on the application; the competencies and skills of the manager to operate the domain; the legal authenticity, status and character of the proposed manager; and the nature of government support for the proposal.

After receiving this documentation and input, it is analyzed in relation to existing root zone management procedures, seeking input from parties both related to as well as independent of the proposed manager should the information provided in the original application be deficient. The applicant is given the opportunity to cure any deficiencies before a final assessment is made.

Once all the documentation has been received, various technical checks are

performed on the proposed manager's DNS infrastructure to ensure name servers are properly configured and are able to respond to queries correctly. Should any anomalies be detected, the IANA Services staff will work with the applicant to address the issues.

Assuming all issues are resolved, an assessment is compiled providing all relevant details regarding the proposed manager and its suitability to operate the relevant top-level domain.

**GAC Advice – Barcelona Communiqué: Actions and Updates (27 January 2019)**

GAC Advice Item	Advice Text	Board Understanding Following Board-GAC Call	Board Response
<p><b>§1.a.I</b> <b>Two-character Country Codes at the Second Level</b></p>	<p><b>a. the GAC advises the ICANN Board to:</b></p> <p style="padding-left: 40px;">i. Explain in writing how and why it considers it is implementing GAC advice on the release of country codes at the second level; and</p> <p><u>RATIONALE:</u></p> <p>This advice is adopted to support and oversee implementation by the Board of existing GAC Advice on the matter, including calling upon the Board to work towards resolution of countries concerns relating to the release of country codes as a result of the withdrawal of the release process in 2016.</p>	<p>The Board understands that the GAC wishes for the ICANN Board to explain in writing how ICANN Board is implementing GAC advice on the release of two-character labels at the second level.</p> <p>The Board acknowledges that the GAC adopted this advice to support and oversee implementation of existing GAC Advice on the matter. The Board notes this includes the GAC advising the Board to work towards a resolution of countries’ concerns relating to the release of their corresponding country codes at second level.</p>	<p>The Board resolution taken in <a href="#">November 2016</a> adopting the <a href="#">Measures for Letter/Letter Two-Character ASCII Labels to Avoid Confusion with Corresponding Country Codes</a> followed a multi-year effort of community consultation, including consideration of requests from registry operators, relevant GAC advice and individual government input.</p> <p>The Board took its <a href="#">initial action</a> directing the ICANN org to develop an efficient procedure for the release of two-character labels following the receipt of Registry Service Evaluation Process (RSEP) requests in 2014. Over the subsequent two years, the ICANN org implemented the Measures in phases, as described in a <a href="#">letter</a> from Akram Atallah in August 2015. In each phase of development, the Board directed the ICANN org to make changes to the process based on GAC advice, including advice from the <a href="#">Los Angeles</a>, <a href="#">Singapore</a>, and <a href="#">Dublin</a> Communiqués.</p> <p>The Board is aware that there is some concern among GAC members that the Board did not consider the advice regarding two-characters in the <a href="#">Helsinki Communiqué</a> until after the November 2016 resolution. While the Board did not formally resolve on the advice prior to the resolution of November 2016 (the Board <a href="#">formally resolved on</a> the advice in December 2016), the Board would like to note that this advice was discussed within the Board prior to the resolution and was incorporated into the Measures. The November 2016 resolution states: “Whereas, in the GAC’s <a href="#">Helsinki Communiqué</a> (30 June 2016), the GAC</p>



GAC Advice Item	Advice Text	Board Understanding Following Board-GAC Call	Board Response
			<p>advised the Board to ‘urge the relevant Registry or the Registrar to engage with the relevant GAC members when a risk is identified in order to come to an agreement on how to manage it or to have a third-party assessment of the situation if the name is already registered.’ The advice was incorporated in the proposed measures to avoid confusion.”</p> <p>Since the Helsinki Communiqué, and starting with the Copenhagen Communiqué, the ICANN Board and GAC have agreed upon a new procedure for addressing GAC advice to ensure that advice is formally addressed at least four weeks prior to the subsequent ICANN meeting. This procedure is implemented by ICANN Org and has now been in place for over a year, to mutual satisfaction.</p> <p>The ICANN org has provided detailed explanations of this development process in their <a href="#">memo to the GAC</a> dated 22 January 2019 as well as in a <a href="#">Historical Overview</a> of the process.</p> <p>Based on the above, the Board believes it has both fully considered and implemented the GAC advice on two-character labels at the second level.</p>
<p><b>§1.a.II Two-character Country Codes at the Second Level</b></p>	<p><b>a. the GAC advises the ICANN Board to:</b></p> <p>ii. Explain in writing whether its Resolution of 8 November 2016 and its change from the preexisting release process (indicated in specification 5.2 of the Registry Agreement, sentence 1) to a new curative process (under sentence 2) are compatible with GAC advice on</p>	<p>The Board understands that the GAC wishes for the ICANN Board to explain in writing whether the Board’s Resolution of 8 November 2016 and its change to a new curative release process are compatible with GAC advice by 31 December 2018. The Board notes that previous GAC advice on this matter stands.</p>	<p>The Board sees the November 2016 resolution as compatible with and taking into account GAC advice. As stated in the <a href="#">November 2016</a> resolution: “...[T]he Board considered the public comments, the staff summary and analysis report of public comments, and GAC advice. The proposed measures were updated to take into account the public comments and GAC advice relating to the proposed measures and two-character labels.”</p>

GAC Advice Item	Advice Text	Board Understanding Following Board-GAC Call	Board Response
	<p>this topic, or whether it constitutes a rejection of GAC advice. The GAC advises the Board to set out its explanation in writing by 31 December 2018. Previous GAC advice on this matter stands.</p> <p><u>RATIONALE:</u></p> <p>This advice is adopted to support and oversee implementation by the Board of existing GAC Advice on the matter, including calling upon the Board to work towards resolution of countries concerns relating to the release of country codes as a result of the withdrawal of the release process in 2016.</p>	<p>The Board acknowledges that the GAC adopted this advice to support and oversee implementation of existing GAC Advice on the matter. The Board notes this includes the GAC advising the Board to work towards a resolution of countries’ concerns relating to the release of their corresponding country codes at second level.</p>	<p>As explained in detail in the <a href="#">ICANN org memo</a> and <a href="#">Historical Overview</a>, Specification 5, Section 2 of the Registry Agreement provides two alternate paths for release of two-character labels at the second-level, the second of which is based on ICANN approval. Accordingly, it is within the ICANN org’s remit to pursue a process by which registry operators seek approval for release of two-character labels from ICANN.</p> <p>The November 2016 resolution did not constitute a switch from a “release process” to a “curative process”, but rather was the culmination of a multi-year process of development, which allowed for input from registry operators, GAC members and individual governments, and other community members. As expressed to the GAC throughout the development process, it was intended that a set of standard measures would be developed that could be implemented by any registry operator.</p> <p>The Board examined the issue with respect to ICANN's mission, commitments and core values, and believes that it adopted a resolution that is consistent with GAC advice. The Board shares the GAC's concern that use of two-character strings corresponding to country codes should not be done in a way to deceive or confuse consumers, and, based on the process described in the <a href="#">ICANN org memo</a> and <a href="#">Historical Overview</a>, believes it has implemented a solution that resolves any issues related to user confusability. The Board is not aware of any further negative consequences from the 8 November 2016</p>

GAC Advice Item	Advice Text	Board Understanding Following Board-GAC Call	Board Response
			resolution regarding security, stability, or user confusability.
<p><b>§1.a.III Two-character Country Codes at the Second Level</b></p>	<p><b>a. the GAC advises the ICANN Board to:</b></p> <p>iii. Ensure that its direction to the ICANN CEO to “engage with concerned governments to listen to their views and concerns and further explain the Board’s decision making process” (Board Resolution 2017.06.12.01) is fully implemented including direct engagement with those governments in order to fully address their concerns.</p> <p><u>RATIONALE:</u></p> <p>This advice is adopted to support and oversee implementation by the Board of existing GAC Advice on the matter, including calling upon the Board to work towards resolution of countries concerns relating to the release of country codes as a result of the withdrawal of the release process in 2016.</p>	<p>The Board understands that the GAC wishes for the ICANN Board to instruct the ICANN CEO to engage directly with concerned governments to listen to their views and concerns, fully address their concerns, and further explain the Board’s decision making process.</p> <p>The Board acknowledges that the GAC adopted this advice to support and oversee implementation of existing GAC Advice on the matter. The Board notes this includes the GAC advising the Board to work towards a resolution of countries’ concerns relating to the release of country codes.</p>	<p>The Board acknowledges that some GAC members have expressed concerns regarding the process for release of two-character labels at the second-level and that the GAC has issued advice directing the ICANN org to engage with concerned governments.</p> <p>The Board notes that the ICANN org conducted telephonic conversations with concerned governments in May 2017 explaining the rationale and development of the framework adopted by the 8 November 2016 Board resolution. Additionally, the ICANN Board and org engaged in discussions with the GAC at the Board-GAC Recommendation Implementation (BGRI) meetings at ICANN61, ICANN62 and ICANN63.</p> <p>The adopted Measures also urged registry operators to engage with the relevant GAC members when a risk is identified in order to come to an agreement on how to manage it or to have a third-party assessment of the situation if the name in question was already registered, advice which the GAC provided in its <a href="#">Helsinki Communiqué</a>.</p> <p>The Board notes that the ICANN org is developing a dedicated webpage for the GAC members to easily track the registration of two-character domain names that correspond with a specific country code and which enables GAC members to submit a request for ICANN compliance action in the event of a perceived misuse. This service will aggregate two-character second level domains</p>

GAC Advice Item	Advice Text	Board Understanding Following Board-GAC Call	Board Response
			<p>automatically to a table on the GAC site, which can also be downloaded for offline analysis by GAC members. The service will run daily after all root zone files are updated, aggregating all new two-character second-level domain registrations and displaying to GAC Members.</p> <p>The ICANN org also describes this engagement and these tools in its <a href="#">memo</a> and <a href="#">Historical Overview</a>.</p> <p>Although the Board believes that the advice to engage with concerned governments to explain the process and rationale has been fully implemented, the Board directs the ICANN President and CEO to continue to develop the tools as noted above to allow concerned GAC members to track two-character registrations.</p>
<p><b>§2.a.I IGO Protections</b></p>	<p><b>a. The GAC advises the ICANN Board to:</b></p> <p>i. Facilitate a substantive, solutions-oriented dialogue between the GNSO and the GAC in an effort to resolve the longstanding issue of IGO protections, on which it reaffirms its previous advice, notably with respect to the creation of a curative mechanism and maintenance of temporary protections.</p> <p><u>RATIONALE</u> The GAC understands that the GNSO has decided at this stage to not vote on the final report for the PDP on IGO-INGO Access to Curative Rights Protection Mechanisms, which adopted recommendations in direct conflict with longstanding GAC advice. Noting the positive advancements achieved to bridge the gap between GNSO</p>	<p>The Board understands that the GAC wishes for the ICANN Board to facilitate a solutions-oriented dialogue between the GNSO and the GAC to resolve the longstanding issue of IGO protections. The Board notes that the GAC reaffirms its previous advice on this topic.</p> <p>The Board acknowledges the GAC’s understanding that, at this stage, the GNSO has decided not to vote on the final report for the PDP on IGO-INGO Access to Curative Rights Protection Mechanisms.</p> <p>The Board notes, further, that the GAC remains optimistic that a substantive dialogue between the GAC and the GNSO may be helpful in reaching a lasting solution that can provide IGOs with GAC-</p>	<p>The Board stands ready to facilitate a substantive, solutions-oriented discussion should it be invited to do so by the GNSO and the GAC and is aware that a dialogue has been initiated between the GNSO and the GAC on this topic. The Board intends to consider GAC advice in accordance with the process documented in the ICANN Bylaws. The Board confirms that the interim protections afforded to IGO acronyms at the second level of the domain name system will remain in place pending the GNSO’s final recommendations and the Board’s consideration of those recommendations.</p>

GAC Advice Item	Advice Text	Board Understanding Following Board-GAC Call	Board Response
	and GAC advice on identifiers for the Red Cross, the GAC remains optimistic that a substantive dialogue with the GSNO could help both sides better understand the issues at play and reach a lasting solution that can provide IGOs with GAC-advised protections for their acronyms while addressing the concerns of the GNSO.	advised protections for their acronyms while addressing the concerns of the GNSO.	

**GAC Advice – Barcelona Communiqué: Follow-up on Previous Advice (27 January 2019)**

<b>GAC Follow-up on Previous Advice Item</b>	<b>Advice Text</b>	<b>Board Understanding Following Board-GAC Call</b>	<b>Board Response</b>
<b>1. GDPR and WHOIS</b>	<p>We emphasize the GAC consensus advice from ICANN62 that urged ICANN to take all steps necessary to ensure the development and implementation of a unified access model that addresses accreditation, authentication, access and accountability, and applies to all contracted parties. We welcome ICANN’s efforts to facilitate the necessary community discussion through the Unified Access Model papers and emphasize the need to drive these discussions towards concrete and timely results.</p>	<p>The Board understands that the GAC urges the ICANN Board to take all steps necessary to develop and implement a unified access model that applies to all contracted parties and addresses accreditation, authentication, access, and accountability. The Board also understands the GAC emphasizes the need to drive these discussions towards detailed and timely results.</p>	<p>The Board acknowledges and appreciates this follow-up on the GAC’s advice regarding GDPR and WHOIS. ICANN org continues to solicit community input on a possible unified access model with the aim of diminishing the legal risks for contracted parties and in order to create a predictable and consistent user experience. In relation to this and as raised at ICANN63, in order to inform the EPDP and the Community, the ICANN org is forming a technical study group to explore possible technical solutions for accrediting, authenticating and providing access to non-public registration data. ICANN org will continue to keep the community apprised and updated.</p>
<b>2. Dot Amazon Applications</b>	<p>The GAC welcomes the 16 September 2018 Board resolution on the .Amazon applications directing the ICANN President and CEO “to support the development of a solution that would allow the .AMAZON applications to move forward in a manner that would align GAC (Governmental Advisory Committee) advice and inputs on this topic”.</p> <p>The GAC notes that the rationale of the 16 September 2018 Board resolution states that “[t]he Board is taking this action today to further the possibility of delegation of the .AMAZON applications...while recognizing the public policy issues raised through GAC advice on these applications”.</p>	<p>The Board understands that the GAC welcomes the 16 September 2018 Board resolution on the .AMAZON applications and calls upon the Board to continue facilitating work that results in a mutually acceptable solution for the Amazon countries and for the applicant.</p>	<p>The Board acknowledges and appreciates this follow-up on the GAC’s advice regarding the .AMAZON applications. Following the Board <a href="#">resolution</a> on .AMAZON at ICANN63, a <a href="#">Reconsideration Request</a> was filed by the ACTO member states on 5 November 2018. The Board took action on this <a href="#">Reconsideration</a> Request on 16 January 2019, including a resolution that “encourages a high level of communication between the President and CEO and the relevant stakeholders, including the representatives of the Amazonian countries and the Amazon corporation, between now and ICANN 64, and directs the President and CEO to provide the Board with updates on the facilitation process in anticipation of revisiting the status of the .AMAZON applications at its meeting at ICANN64”.</p> <p>The Board also notes the most recent letter of <a href="#">18 December 2018</a> from the ICANN org President &amp; CEO to the GAC Chair regarding the facilitation process between</p>

GAC Follow-up on Previous Advice Item	Advice Text	Board Understanding Following Board-GAC Call	Board Response
	<p>The GAC recalls its latest advice on the matter where “[t]he GAC recognizes the need to find a mutually acceptable solution” for the Amazon countries and for the applicant, and calls upon the Board to continue facilitating work that could result in such a solution (GAC Communiqué, Abu Dhabi, 1 November 2017).</p>		<p>the ACTO member states and the Amazon corporation, led by ICANN org. ICANN org notes in the letter that over the last 12 months it has put great effort into working with ACTO member states and the Amazon Corporation to develop a solution for the delegation of .AMAZON that would be of mutual benefit to the peoples of the Amazon region, as well as the Amazon Corporation. It is for this reason, that both the Board and ICANN org believe that the recent turn of events is truly unfortunate and sincerely hope that we can move forward together in a constructive and positive manner towards the best possible outcome for all parties concerned.</p>
<p><b>3. Protection of the Red Cross and Red Crescent Designations and Identifiers</b></p>	<p>The GAC welcomes the progress made in the process of reconciliation between the GAC’s consistent advice and the GNSO’s past policy determinations on the issue of the protection of the Red Cross and Red Crescent designations and identifiers and marks its appreciation for the inclusive consultative process conducted under the auspices of the GNSO’s reconvened Working Group on the Red Cross and Red Crescent names.</p> <p>The Board is encouraged to adopt the GNSO Council’s recommendations, which regard the reservation of the list of names of the 191 National Red Cross and Red Crescent Societies in relevant languages, as well as of the international organizations within the International Red Cross and Red Crescent Movement.</p>	<p>The Board understands that the GAC encourages the ICANN Board to adopt the GNSO Council’s recommendations regarding the reservation of the list of names of the 191 organizations within the International Red Cross and Red Crescent Movement.</p> <p>The Board acknowledges the GAC’s note that the issue of the acronyms ICRC and IFRC were not covered under the GNSO’s reconvened process. The Board understands that the GAC advises the temporary protections given to these acronyms remain in place until an appropriate resolution of this issue is reached.</p>	<p>The Board acknowledges and appreciates this follow-up on the GAC’s advice regarding the Protection of the Red Cross and Red Crescent designations and identifiers. The Board notes, however, that prior to any Board action the transparency provisions in Section 3.6 of the ICANN Bylaws require that the Board: (1) provide a reasonable opportunity for the public to comment on proposed policies that substantially affect the operation of the Internet or third parties; and (2) request the GAC’s opinion where public policy concerns may be affected. Accordingly, the Board intends to take into account any public comments and GAC advice that may be timely received when it considers the GNSO’s policy recommendations.</p> <p>Please also see the Board’s response to item §2.a.I above regarding IGO Protections.</p>

GAC Follow-up on Previous Advice Item	Advice Text	Board Understanding Following Board-GAC Call	Board Response
	<p>The GAC notes that the issue of the acronyms of the two international organizations within the Movement (ICRC and IFRC) were not covered under the abovementioned GNSO process and recalls standing GAC Advice that the temporary protections presently accorded to these acronyms remain in place until such time an appropriate resolution of this issue is reached.</p>		
<p><b>Follow-up to the joint statement by ALAC and GAC (Abu Dhabi, 2 November 2017)</b></p>	<p>The At-Large Advisory Committee (ALAC) and the Governmental Advisory Committee (GAC) thank the ICANN Board for its response to their joint statement “Enabling inclusive, informed and meaningful participation at ICANN”, issued at ICANN60 in Abu Dhabi on 2 November 2017.</p> <p>In its response, the Board referred to the Information Transparency Initiative (ITI), launched in January 2018, which hopefully will lead to the creation of a document managing system that – as required by the ALAC and the GAC – will allow, even to non-expert stakeholders, a quick and easy access to ICANN documents. However, its development will take time. According to the ICANN website, its delivery is expected in December 2019.</p> <p>In their joint statement, the ALAC and the GAC also asked ICANN to produce executive summaries, key points and synopses for all relevant issues, processes and activities – something that could be implemented without delay.</p>	<p>The Board acknowledges the GAC’s thanks for the Board’s response to the GAC’s joint statement with the ALAC on “Enabling inclusive, informed and meaningful participation at ICANN”.</p> <p>The Board understands that while the GAC finds the current provision of information through monthly newsletters, pre-and post-meeting reports, video interviews and the ICANN Learn online platform commendable, the GAC believes those initiatives are not enough to reach the goal that the ALAC and GAC have in mind.</p> <p>The Board understands that the ALAC and GAC request that executive summaries be provided at least on issues put out for public comment.</p> <p>The Board understands that the ALAC and GAC are asking ICANN to put the same level of effort and service as was done for the IANA stewardship transition process toward all relevant issues for the community.</p>	<p>The Board notes that the GAC has provided clarification on this advice in a <a href="#">letter from the GAC Chair to Cherine Chalaby of 20 December 2018</a>. The Board thanks the GAC for this clarification.</p> <p>The Board affirms its response to the original advice, in which it stated: “The Board accepts this advice and is committed to accountability and transparency and pursuing easily understandable and relevant information on matters of concern to all stakeholders. The Board’s commitment to these values aligns with the recently started Information Transparency Initiative (<a href="https://www.icann.org/news/blog/creating-contentgovernance-and-rebuilding-the-infrastructure-of-icann-spublic-sites">https://www.icann.org/news/blog/creating-contentgovernance-and-rebuilding-the-infrastructure-of-icann-spublic-sites</a>). The Board acknowledges and agrees with the need to ensure effective and equal participation in the policy process by all stakeholders, which is in line with the Mission, Commitments, and Core Values, as expressed in the Bylaws” (see the <a href="#">Abu Dhabi scorecard</a>).</p> <p>Additionally, the Board understands that the ICANN organization is currently undertaking a review of the relevant interface and format of public comment proceedings. The Board intends to direct the ICANN</p>



GAC Follow-up on Previous Advice Item	Advice Text	Board Understanding Following Board-GAC Call	Board Response
	<p>In its response, the Board referred to the current offer of monthly newsletters, pre-and post-meeting reports and video interviews, as well as to the ICANN Learn online platform. All these initiatives are commendable and likely to improve access to information and content regarding ICANN activities. However, they are not enough to reach the goal that the ALAC and GAC have in mind.</p> <p>Particularly in policy development processes, non-expert stakeholders need executive summaries to be able to quickly determine, whether a particular issue is of concern to them, and if yes, to participate in the process easily and effectively, on equal footing with other stakeholders, even if ICANN is not in their full-time focus. Summaries should be provided at least, but not only, on issues put out for public comment. Clear and up-to-date information to facilitate quick understanding of relevant issues and high interest topics is key for inclusive, informed and meaningful participation by all stakeholders, including non-experts.</p> <p>In the context of the IANA transition process, ICANN was able to offer timely and comprehensible information by breaking down complex issues into understandable components, which allowed interaction within the entire community. The ALAC and the GAC are now asking</p>		<p>organization to explore specific improvements to public comments, including the use of summaries, that can allow the community to quickly identify the questions being asked in each proceeding.</p> <p>The Board notes that the provision of timely and comprehensible information on all other relevant topics will mean additional financial and staff resources will be needed. In view of the current budgetary constraints, the Board intends to consult with the ICANN organization to consider the feasibility of prioritizing possible topics for ongoing improvements in this area.</p>

GAC Follow-up on Previous Advice Item	Advice Text	Board Understanding Following Board-GAC Call	Board Response
	from ICANN that the same level of effort be made and the same service be provided to the community concerning information on all other relevant issues.		

**GAC Advice – Barcelona Communiqué: Follow-up on Deferred Advice (27 January 2019)**

GAC Deferred Advice Item	Advice Text	Board Understanding on Previous Scorecard	Board Response on Previous Scorecard	Board Response on Barcelona Scorecard
<p><b>San Juan Communiqué §1.a.IV GDPR and WHOIS</b></p>	<p><b>a. the GAC advises the ICANN Board to instruct the ICANN Organization to:</b></p> <p>iv. Distinguish between legal and natural persons, allowing for public access to WHOIS data of legal entities, which are not in the remit of the GDPR;</p>	<p>The Board understands that the GAC wishes for the ICANN Board to instruct the ICANN org to:</p> <p>iv. Distinguish between legal and natural persons, allowing for public access to WHOIS data of legal entities, which are not in the remit of the GDPR;</p>	<p>As requested by the GAC in its 17 May 2018 letter to the ICANN Board Chair, the Board defers consideration of this advice pending further discussion with the GAC.</p>	<p>Previously, the Board stated in response to this item that, as requested by the GAC in its <a href="#">17 May 2018</a> letter to the ICANN Board Chair, the Board defers consideration of this advice pending further discussion with the GAC. The Board is currently monitoring progress of the EPDP and community work on a unified access model and plans to address this advice following the outcome of those processes.</p>
<p><b>San Juan Communiqué §1.a.V GDPR and WHOIS</b></p>	<p><b>a. the GAC advises the ICANN Board to instruct the ICANN Organization to:</b></p> <p>v. Ensure continued access to the WHOIS, including non-public data, for users with a legitimate purpose, until the time when the interim WHOIS model is fully operational, on a mandatory basis for all contracted parties;</p>	<p>The Board understands that the GAC wishes for the ICANN Board to instruct the ICANN org to:</p> <p>v. Ensure continued access to the WHOIS, including non-public data, for users with a legitimate purpose, until the time when the interim WHOIS model is fully operational, on a mandatory basis for all contracted parties;</p>	<p>As requested by the GAC in its 17 May 2018 letter to the ICANN Board Chair, the Board defers consideration of this advice pending further discussion with the GAC.</p>	<p>Previously, the Board stated in response to this item that, as requested by the GAC in its <a href="#">17 May 2018</a> letter to the ICANN Board Chair, the Board defers consideration of this advice pending further discussion with the GAC. The Board is currently monitoring progress of the EPDP and community work on a unified access model and plans to address this advice following the outcome of those processes.</p>
<p><b>San Juan Communiqué §1.a.VI GDPR and WHOIS</b></p>	<p><b>a. the GAC advises the ICANN Board to instruct the ICANN Organization to:</b></p> <p>vi. Ensure that limitations in terms of query volume envisaged under an</p>	<p>The Board understands that the GAC wishes for the ICANN Board to instruct the ICANN org to:</p> <p>vi. Ensure that limitations in terms of query volume envisaged</p>	<p>As requested by the GAC in its 17 May 2018 letter to the ICANN Board Chair, the Board defers consideration of this advice pending further discussion with the GAC.</p>	<p>Previously, the Board stated in response to this item that, as requested by the GAC in its <a href="#">17 May 2018</a> letter to the ICANN Board Chair, the Board defers consideration of this advice pending further discussion with the GAC. The</p>

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	<p>accreditation program balance realistic investigatory crossreferencing needs;</p>	<p>under an accreditation program balance realistic investigatory crossreferencing needs; and</p>		<p>Board is currently monitoring progress of the EPDP and community work on a unified access model and plans to address this advice following the outcome of those processes.</p>
<p><b>San Juan Communiqué §1.a.VII GDPR and WHOIS</b></p>	<p><b>a. the GAC advises the ICANN Board to instruct the ICANN Organization to:</b></p> <p>vii. Ensure confidentiality of WHOIS queries by law enforcement agencies.</p>	<p>The Board understands that the GAC wishes for the ICANN Board to instruct the ICANN org to:</p> <p>vii. Ensure confidentiality of WHOIS queries by law enforcement agencies.</p>	<p>As requested by the GAC in its 17 May 2018 letter to the ICANN Board Chair, the Board defers consideration of this advice pending further discussion with the GAC.</p>	<p>Previously, the Board stated in response to this item that, as requested by the GAC in its <a href="#">17 May 2018</a> letter to the ICANN Board Chair, the Board defers consideration of this advice pending further discussion with the GAC. The Board is currently monitoring progress of the EPDP and community work on a unified access model and plans to address this advice following the outcome of those processes.</p>
<p><b>San Juan Communiqué §2.a.I IGO Reserved Acronyms</b></p>	<p>Noting ongoing developments in the PDP on IGO access to curative rights protection mechanisms, which the GAC is monitoring closely, the GAC affirms its advice from previous Communiqués concerning preventative protection of IGO identifiers, recalls the importance of maintaining temporary protections until a permanent resolution on IGO identifiers is reached in order prevent irreparable harm to IGOs and</p> <p><b>a. advises the ICANN Board to:</b></p> <p>i. Ensure that the list of IGOs eligible for preventative protection is as accurate and complete as possible.</p>	<p>The Board sent a <a href="#">letter</a> to the GAC requesting clarification regarding this advice. The GAC provided a <a href="#">response</a> on 15 May 2018. Based on the GAC’s response, the Board understands that the GAC wishes for the ICANN Board to:</p> <p>i. Ensure that the list of IGOs eligible for preventative protection is as accurate and complete as possible.</p> <p>The Board understands that the GAC and IGOs remain engaged on this issue and that the GAC is concerned that a</p>	<p>The Board thanks the GAC for the clarifications provided on <a href="#">15 May 2018</a>. The Board has asked the ICANN Organization to review the advice in light of these responses and to assess the feasibility of the request. The Board will defer action on this item at this time, and in due course will engage with the GAC should further clarifications be necessary before taking action on this advice.</p>	<p>The Board continues to defer action on this item as the ICANN org continues to assess the feasibility of the GAC’s request. The Board is aware that a dialogue has been initiated between ICANN Org and the GAC to ensure that the list of IGOs eligible for preventative protection is as accurate and complete as possible. The Board will monitor progress of this dialogue and will engage with the GAC as necessary before taking any further action on this advice.</p>

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	<p><u>RATIONALE</u> Despite indications to the contrary, the GNSO has still not concluded its PDP on curative rights protection mechanisms. The GAC and IGOs remain fully engaged on this issue and emphasize that a removal of interim protections before a permanent decision on IGO acronym protection is taken could result in irreparable harm to IGOs. In the interim, ICANN has moved forward to implement GAC advice related to protection of IGO full names at the second level. These protections will be based on a list of IGOs that fulfil previously agreed-upon criteria. To ensure this advice is effectively implemented, following significant work undertaken by IGOs resulting in significant progress on compiling this list, a focused effort is needed to contact remaining IGOs, so their names are protected accurately in the chosen two languages. ICANN has been in contact with the OECD and WIPO on this initiative, which the GAC supports.</p>	<p>removal of interim protections before a permanent decision on IGO acronym protection is taken could result in irreparable harm to IGOs.</p> <p>The Board also understands that the GAC emphasizes that to ensure this advice is effectively implemented, a focused effort is needed to contact remaining IGOs so their names are protected accurately in the chosen two languages.</p>		
<p><b>Panama Communiqué §3.a.I Two-character Country Codes at the Second Level</b></p>	<p><b>a. The GAC advises the ICANN Board to:</b></p> <ul style="list-style-type: none"> <li>i. Work, as soon as possible, with those GAC members who have expressed serious concerns with respect to the release of their 2-character country/territory codes</li> </ul>	<p>The Board understands that the GAC wishes for the ICANN Board to:</p> <ul style="list-style-type: none"> <li>i. Work with those GAC members who have expressed serious concerns with respect to the release of their 2-character</li> </ul>	<p>The Board will defer a formal response to the GAC on this advice pending further discussions with the GAC.</p>	<p>The Board acknowledges this advice and refers the GAC to the Board’s responses on items §1.a.I, II, and III above in the Barcelona consensus advice section. The Board also directs the GAC to the <a href="#">ICANN org memo</a> and <a href="#">Historical Overview</a> for additional details regarding this topic.</p>

GAC Deferred Advice Item	Advice Text	Board Understanding on Previous Scorecard	Board Response on Previous Scorecard	Board Response on Barcelona Scorecard
	<p>at the second level in order to establish an effective mechanism to resolve their concerns in a satisfactory manner, bearing in mind that previous GAC advice on the matter stands.</p> <p><u>RATIONALE</u>  The GAC notes the range of actions taken by the Board in response to concerns previously expressed with regard to release of 2-character codes at the second level. However, these actions have not been sufficient from the perspective of the concerned countries.</p> <p>On 15 March 2017, through the Copenhagen Communiqué, the GAC communicated its understanding to the ICANN community, and in particular to the ICANN Board, that there were “changes created by the 8 November 2016 Resolution” relating to the release procedure of 2- Character Country/Territory Codes at the Second Level.</p> <p>As stated in the 15 March 2017 Copenhagen Communiqué, the changes introduced by the 8 November 2016 Resolution meant that, contrary to the then prevailing practice, “it is no longer mandatory for the registries to notify governments of the plans for their use of 2-letter codes, nor are registries required</p>	<p>country/territory codes at the second level in order to establish an effective mechanism to resolve their concerns in a satisfactory manner.</p> <p>The Board acknowledges that some GAC members believe that the Board actions taken with regard to the release of 2-character codes at the second level have not been sufficient.</p> <p>The Board notes that in the 15 March 2017 Copenhagen Communiqué the GAC communicated there were changes created by the 8 November 2016 Resolution relating to the release procedure of 2-Character Country/Territory Codes at the Second Level which meant that it is no longer mandatory for the registries to notify or seek agreement of governments when releasing 2-Character country codes at the second level.</p> <p>The Board also notes that the GAC requested in the Copenhagen Communiqué the Board take into</p>		

GAC Deferred Advice Item	Advice Text	Board Understanding on Previous Scorecard	Board Response on Previous Scorecard	Board Response on Barcelona Scorecard
	<p>to seek agreement of governments when releasing two-letter country codes at the second level”.</p> <p>Accordingly, in the 15 March 2017 Copenhagen Communiqué, the GAC provided full consensus advice to the ICANN Board, which included requests that the Board “[t]ake into account the serious concerns expressed by some GAC Members as contained in previous GAC Advice”; “[i]mmediately explore measures to find a satisfactory solution of the matter to meet the concerns of these countries before being further aggravated”; and “[p]rovide clarification of the decision-making process and of the rationale for the November 2016 resolution, particularly in regard to consideration of the GAC advice, timing and level of support for this resolution.”</p> <p>Under the 8 November 2016 Resolution, ICANN’s “President and CEO, or his designee(s), is authorized to take such actions as appropriate to authorize registry operators to release at the second level the reserved letter/letter two-character ASCII labels, not otherwise reserved pursuant to Specification 5, Section 6 of the Registry Agreement, subject to these measures.”</p>	<p>account the serious concerns by some GAC members; immediately explore measures to find a satisfactory solution; and provide clarification of the decision-making process and of the rationale for the November 2016 Resolution.</p> <p>The Board understands that prior to the 8 November 2016 Resolution the GAC considered that in the event that no preference has been stated, a lack of response should not be considered consent for the release of 2-character country/territory codes. The Board also understands that prior to the 8 November 2016 Resolution there was an established process, as advised by the GAC in the Singapore Communiqué, for requests to release two-character country/territory codes.</p> <p>The Board understands that some GAC members have raised concerns about ICANN’s ability to engage with the relevant GAC members after the 12 June 2018 authorization by ICANN for the Registry Operator for .XXX to release all two-character labels not previously authorized.</p>		

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	<p>Previously to the “changes created by the 8 November 2016 Resolution”, in its 30 June 2016 Helsinki Communiqué, it was stated that “[t]he GAC considers that, in the event that no preference has been stated [as to the requirement that an applicant obtains explicit agreement of the country/territory whose 2-letter code is to be used at the second level], a lack of response should not be considered consent.”</p> <p>Also, previously to the “changes created by the 8 November 2016 Resolution”, there was an established process for requests to release two-letter codes. As advised by the GAC in its 11 February 2015 Singapore Communiqué, this process involved “an effective notification mechanism, so that relevant governments can be alerted as requests are initiated”, and it relied on “[a] list of GAC Members who intend to agree to all requests and do not require notification”.</p> <p>On 20 June 2018, the GAC was informed that, on 12 June 2018, ICANN had authorized the Registry Operator for .XXX “to release for registration to third parties and activation in the DNS at the second level all two-character letter/letter ASCII labels not previously authorized by ICANN for release and not otherwise required to be reserved pursuant to the Registry</p>			



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	<p>Agreement". The announcement of the release of not previously authorized 2-character codes at the second level has caused some GAC members to reiterate serious concerns about ICANN's ability to engage with the relevant GAC members to find a satisfactory solution to the matter. These unresolved concerns include doubts about ICANN Board's ability to provide a satisfactory explanation for the "changes created by the 8 November 2016 Resolution", as well as to adopt measures – pending a satisfactory settlement of the matter – to prevent further consequences from the "changes created by the 8 November 2016" for the concerned GAC members.</p>			
<p><b>Panama Communiqué §3.a.II Two-character Country Codes at the Second Level</b></p>	<p><b>a. The GAC advises the ICANN Board to:</b></p> <p>ii. Immediately take necessary steps to prevent further negative consequences for the concerned GAC members arising from the November 2016 Board Resolution.</p>	<p>The Board understands that the GAC wishes for the ICANN Board to:</p> <p>ii. Immediately take necessary steps to prevent further negative consequences for the concerned GAC members arising from the November 2016 Board Resolution.</p>	<p>The Board will defer a formal response to the GAC on this advice pending further discussions with the GAC.</p>	<p><i>See response on item §3.a.I above.</i></p>

**GAC Advice – Barcelona Communiqué: Actions and Updates (27 January 2019)**

GAC Advice Item	Advice Text	Board Understanding Following Board-GAC Call	Board Response
<p><b>§1.a.I</b> <b>Two-character Country Codes at the Second Level</b></p>	<p><b>a. the GAC advises the ICANN Board to:</b></p> <p style="padding-left: 40px;">i. Explain in writing how and why it considers it is implementing GAC advice on the release of country codes at the second level; and</p> <p><u>RATIONALE:</u></p> <p>This advice is adopted to support and oversee implementation by the Board of existing GAC Advice on the matter, including calling upon the Board to work towards resolution of countries concerns relating to the release of country codes as a result of the withdrawal of the release process in 2016.</p>	<p>The Board understands that the GAC wishes for the ICANN Board to explain in writing how ICANN Board is implementing GAC advice on the release of two-character labels at the second level.</p> <p>The Board acknowledges that the GAC adopted this advice to support and oversee implementation of existing GAC Advice on the matter. The Board notes this includes the GAC advising the Board to work towards a resolution of countries’ concerns relating to the release of their corresponding country codes at second level.</p>	<p>The Board resolution taken in <a href="#">November 2016</a> adopting the <a href="#">Measures for Letter/Letter Two-Character ASCII Labels to Avoid Confusion with Corresponding Country Codes</a> followed a multi-year effort of community consultation, including consideration of requests from registry operators, relevant GAC advice and individual government input.</p> <p>The Board took its <a href="#">initial action</a> directing the ICANN org to develop an efficient procedure for the release of two-character labels following the receipt of Registry Service Evaluation Process (RSEP) requests in 2014. Over the subsequent two years, the ICANN org implemented the Measures in phases, as described in a <a href="#">letter</a> from Akram Atallah in August 2015. In each phase of development, the Board directed the ICANN org to make changes to the process based on GAC advice, including advice from the <a href="#">Los Angeles</a>, <a href="#">Singapore</a>, and <a href="#">Dublin</a> Communiqués.</p> <p>The Board is aware that there is some concern among GAC members that the Board did not consider the advice regarding two-characters in the <a href="#">Helsinki Communiqué</a> until after the November 2016 resolution. While the Board did not formally resolve on the advice prior to the resolution of November 2016 (the Board <a href="#">formally resolved on</a> the advice in December 2016), the Board would like to note that this advice was discussed within the Board prior to the resolution and was incorporated into the Measures. The November 2016 resolution states: “Whereas, in the GAC’s <a href="#">Helsinki Communiqué</a> (30 June 2016), the GAC</p>

GAC Advice Item	Advice Text	Board Understanding Following Board-GAC Call	Board Response
			<p>advised the Board to ‘urge the relevant Registry or the Registrar to engage with the relevant GAC members when a risk is identified in order to come to an agreement on how to manage it or to have a third-party assessment of the situation if the name is already registered.’ The advice was incorporated in the proposed measures to avoid confusion.”</p> <p>Since the Helsinki Communiqué, and starting with the Copenhagen Communiqué, the ICANN Board and GAC have agreed upon a new procedure for addressing GAC advice to ensure that advice is formally addressed at least four weeks prior to the subsequent ICANN meeting. This procedure is implemented by ICANN Org and has now been in place for over a year, to mutual satisfaction.</p> <p>The ICANN org has provided detailed explanations of this development process in their <a href="#">memo to the GAC</a> dated 22 January 2019 as well as in a <a href="#">Historical Overview</a> of the process.</p> <p>Based on the above, the Board believes it has both fully considered and implemented the GAC advice on two-character labels at the second level.</p>
<p><b>§1.a.II Two-character Country Codes at the Second Level</b></p>	<p><b>a. the GAC advises the ICANN Board to:</b></p> <p>ii. Explain in writing whether its Resolution of 8 November 2016 and its change from the preexisting release process (indicated in specification 5.2 of the Registry Agreement, sentence 1) to a new curative process (under sentence 2) are compatible with GAC advice on</p>	<p>The Board understands that the GAC wishes for the ICANN Board to explain in writing whether the Board’s Resolution of 8 November 2016 and its change to a new curative release process are compatible with GAC advice by 31 December 2018. The Board notes that previous GAC advice on this matter stands.</p>	<p>The Board sees the November 2016 resolution as compatible with and taking into account GAC advice. As stated in the <a href="#">November 2016</a> resolution: “...[T]he Board considered the public comments, the staff summary and analysis report of public comments, and GAC advice. The proposed measures were updated to take into account the public comments and GAC advice relating to the proposed measures and two-character labels.”</p>

GAC Advice Item	Advice Text	Board Understanding Following Board-GAC Call	Board Response
	<p>this topic, or whether it constitutes a rejection of GAC advice. The GAC advises the Board to set out its explanation in writing by 31 December 2018. Previous GAC advice on this matter stands.</p> <p><u>RATIONALE:</u></p> <p>This advice is adopted to support and oversee implementation by the Board of existing GAC Advice on the matter, including calling upon the Board to work towards resolution of countries concerns relating to the release of country codes as a result of the withdrawal of the release process in 2016.</p>	<p>The Board acknowledges that the GAC adopted this advice to support and oversee implementation of existing GAC Advice on the matter. The Board notes this includes the GAC advising the Board to work towards a resolution of countries’ concerns relating to the release of their corresponding country codes at second level.</p>	<p>As explained in detail in the <a href="#">ICANN org memo</a> and <a href="#">Historical Overview</a>, Specification 5, Section 2 of the Registry Agreement provides two alternate paths for release of two-character labels at the second-level, the second of which is based on ICANN approval. Accordingly, it is within the ICANN org’s remit to pursue a process by which registry operators seek approval for release of two-character labels from ICANN.</p> <p>The November 2016 resolution did not constitute a switch from a “release process” to a “curative process”, but rather was the culmination of a multi-year process of development, which allowed for input from registry operators, GAC members and individual governments, and other community members. As expressed to the GAC throughout the development process, it was intended that a set of standard measures would be developed that could be implemented by any registry operator.</p> <p>The Board examined the issue with respect to ICANN's mission, commitments and core values, and believes that it adopted a resolution that is consistent with GAC advice. The Board shares the GAC's concern that use of two-character strings corresponding to country codes should not be done in a way to deceive or confuse consumers, and, based on the process described in the <a href="#">ICANN org memo</a> and <a href="#">Historical Overview</a>, believes it has implemented a solution that resolves any issues related to user confusability. The Board is not aware of any further negative consequences from the 8 November 2016</p>

GAC Advice Item	Advice Text	Board Understanding Following Board-GAC Call	Board Response
			resolution regarding security, stability, or user confusability.
<p><b>§1.a.III Two-character Country Codes at the Second Level</b></p>	<p><b>a. the GAC advises the ICANN Board to:</b></p> <p>iii. Ensure that its direction to the ICANN CEO to “engage with concerned governments to listen to their views and concerns and further explain the Board’s decision making process” (Board Resolution 2017.06.12.01) is fully implemented including direct engagement with those governments in order to fully address their concerns.</p> <p><u>RATIONALE:</u></p> <p>This advice is adopted to support and oversee implementation by the Board of existing GAC Advice on the matter, including calling upon the Board to work towards resolution of countries concerns relating to the release of country codes as a result of the withdrawal of the release process in 2016.</p>	<p>The Board understands that the GAC wishes for the ICANN Board to instruct the ICANN CEO to engage directly with concerned governments to listen to their views and concerns, fully address their concerns, and further explain the Board’s decision making process.</p> <p>The Board acknowledges that the GAC adopted this advice to support and oversee implementation of existing GAC Advice on the matter. The Board notes this includes the GAC advising the Board to work towards a resolution of countries’ concerns relating to the release of country codes.</p>	<p>The Board acknowledges that some GAC members have expressed concerns regarding the process for release of two-character labels at the second-level and that the GAC has issued advice directing the ICANN org to engage with concerned governments.</p> <p>The Board notes that the ICANN org conducted telephonic conversations with concerned governments in May 2017 explaining the rationale and development of the framework adopted by the 8 November 2016 Board resolution. Additionally, the ICANN Board and org engaged in discussions with the GAC at the Board-GAC Recommendation Implementation (BGRI) meetings at ICANN61, ICANN62 and ICANN63.</p> <p>The adopted Measures also urged registry operators to engage with the relevant GAC members when a risk is identified in order to come to an agreement on how to manage it or to have a third-party assessment of the situation if the name in question was already registered, advice which the GAC provided in its <a href="#">Helsinki Communiqué</a>.</p> <p>The Board notes that the ICANN org is developing a dedicated webpage for the GAC members to easily track the registration of two-character domain names that correspond with a specific country code and which enables GAC members to submit a request for ICANN compliance action in the event of a perceived misuse. This service will aggregate two-character second level domains</p>

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			<p>automatically to a table on the GAC site, which can also be downloaded for offline analysis by GAC members. The service will run daily after all root zone files are updated, aggregating all new two-character second-level domain registrations and displaying to GAC Members.</p> <p>The ICANN org also describes this engagement and these tools in its <a href="#">memo</a> and <a href="#">Historical Overview</a>.</p> <p>Although the Board believes that the advice to engage with concerned governments to explain the process and rationale has been fully implemented, the Board directs the ICANN President and CEO to continue to develop the tools as noted above to allow concerned GAC members to track two-character registrations.</p>
<p><b>§2.a.I IGO Protections</b></p>	<p><b>a. The GAC advises the ICANN Board to:</b></p> <p>i. Facilitate a substantive, solutions-oriented dialogue between the GNSO and the GAC in an effort to resolve the longstanding issue of IGO protections, on which it reaffirms its previous advice, notably with respect to the creation of a curative mechanism and maintenance of temporary protections.</p> <p><u>RATIONALE</u> The GAC understands that the GNSO has decided at this stage to not vote on the final report for the PDP on IGO-INGO Access to Curative Rights Protection Mechanisms, which adopted recommendations in direct conflict with longstanding GAC advice. Noting the positive advancements achieved to bridge the gap between GNSO</p>	<p>The Board understands that the GAC wishes for the ICANN Board to facilitate a solutions-oriented dialogue between the GNSO and the GAC to resolve the longstanding issue of IGO protections. The Board notes that the GAC reaffirms its previous advice on this topic.</p> <p>The Board acknowledges the GAC’s understanding that, at this stage, the GNSO has decided not to vote on the final report for the PDP on IGO-INGO Access to Curative Rights Protection Mechanisms.</p> <p>The Board notes, further, that the GAC remains optimistic that a substantive dialogue between the GAC and the GNSO may be helpful in reaching a lasting solution that can provide IGOs with GAC-</p>	<p>The Board stands ready to facilitate a substantive, solutions-oriented discussion should it be invited to do so by the GNSO and the GAC and is aware that a dialogue has been initiated between the GNSO and the GAC on this topic. The Board intends to consider GAC advice in accordance with the process documented in the ICANN Bylaws. The Board confirms that the interim protections afforded to IGO acronyms at the second level of the domain name system will remain in place pending the GNSO’s final recommendations and the Board’s consideration of those recommendations.</p>

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	and GAC advice on identifiers for the Red Cross, the GAC remains optimistic that a substantive dialogue with the GSNO could help both sides better understand the issues at play and reach a lasting solution that can provide IGOs with GAC-advised protections for their acronyms while addressing the concerns of the GNSO.	advised protections for their acronyms while addressing the concerns of the GNSO.	

**GAC Advice – Barcelona Communiqué: Follow-up on Previous Advice (27 January 2019)**

<b>GAC Follow-up on Previous Advice Item</b>	<b>Advice Text</b>	<b>Board Understanding Following Board-GAC Call</b>	<b>Board Response</b>
<b>1. GDPR and WHOIS</b>	<p>We emphasize the GAC consensus advice from ICANN62 that urged ICANN to take all steps necessary to ensure the development and implementation of a unified access model that addresses accreditation, authentication, access and accountability, and applies to all contracted parties. We welcome ICANN’s efforts to facilitate the necessary community discussion through the Unified Access Model papers and emphasize the need to drive these discussions towards concrete and timely results.</p>	<p>The Board understands that the GAC urges the ICANN Board to take all steps necessary to develop and implement a unified access model that applies to all contracted parties and addresses accreditation, authentication, access, and accountability. The Board also understands the GAC emphasizes the need to drive these discussions towards detailed and timely results.</p>	<p>The Board acknowledges and appreciates this follow-up on the GAC’s advice regarding GDPR and WHOIS. ICANN org continues to solicit community input on a possible unified access model with the aim of diminishing the legal risks for contracted parties and in order to create a predictable and consistent user experience. In relation to this and as raised at ICANN63, in order to inform the EPDP and the Community, the ICANN org is forming a technical study group to explore possible technical solutions for accrediting, authenticating and providing access to non-public registration data. ICANN org will continue to keep the community apprised and updated.</p>
<b>2. Dot Amazon Applications</b>	<p>The GAC welcomes the 16 September 2018 Board resolution on the .Amazon applications directing the ICANN President and CEO “to support the development of a solution that would allow the .AMAZON applications to move forward in a manner that would align GAC (Governmental Advisory Committee) advice and inputs on this topic”.</p> <p>The GAC notes that the rationale of the 16 September 2018 Board resolution states that “[t]he Board is taking this action today to further the possibility of delegation of the .AMAZON applications...while recognizing the public policy issues raised through GAC advice on these applications”.</p>	<p>The Board understands that the GAC welcomes the 16 September 2018 Board resolution on the .AMAZON applications and calls upon the Board to continue facilitating work that results in a mutually acceptable solution for the Amazon countries and for the applicant.</p>	<p>The Board acknowledges and appreciates this follow-up on the GAC’s advice regarding the .AMAZON applications. Following the Board <a href="#">resolution</a> on .AMAZON at ICANN63, a <a href="#">Reconsideration Request</a> was filed by the ACTO member states on 5 November 2018. The Board took action on this <a href="#">Reconsideration</a> Request on 16 January 2019, including a resolution that “encourages a high level of communication between the President and CEO and the relevant stakeholders, including the representatives of the Amazonian countries and the Amazon corporation, between now and ICANN 64, and directs the President and CEO to provide the Board with updates on the facilitation process in anticipation of revisiting the status of the .AMAZON applications at its meeting at ICANN64”.</p> <p>The Board also notes the most recent letter of <a href="#">18 December 2018</a> from the ICANN org President &amp; CEO to the GAC Chair regarding the facilitation process between</p>



GAC Follow-up on Previous Advice Item	Advice Text	Board Understanding Following Board-GAC Call	Board Response
	<p>The GAC recalls its latest advice on the matter where “[t]he GAC recognizes the need to find a mutually acceptable solution” for the Amazon countries and for the applicant, and calls upon the Board to continue facilitating work that could result in such a solution (GAC Communiqué, Abu Dhabi, 1 November 2017).</p>		<p>the ACTO member states and the Amazon corporation, led by ICANN org. ICANN org notes in the letter that over the last 12 months it has put great effort into working with ACTO member states and the Amazon Corporation to develop a solution for the delegation of .AMAZON that would be of mutual benefit to the peoples of the Amazon region, as well as the Amazon Corporation. It is for this reason, that both the Board and ICANN org believe that the recent turn of events is truly unfortunate and sincerely hope that we can move forward together in a constructive and positive manner towards the best possible outcome for all parties concerned.</p>
<p><b>3. Protection of the Red Cross and Red Crescent Designations and Identifiers</b></p>	<p>The GAC welcomes the progress made in the process of reconciliation between the GAC’s consistent advice and the GNSO’s past policy determinations on the issue of the protection of the Red Cross and Red Crescent designations and identifiers and marks its appreciation for the inclusive consultative process conducted under the auspices of the GNSO’s reconvened Working Group on the Red Cross and Red Crescent names.</p> <p>The Board is encouraged to adopt the GNSO Council’s recommendations, which regard the reservation of the list of names of the 191 National Red Cross and Red Crescent Societies in relevant languages, as well as of the international organizations within the International Red Cross and Red Crescent Movement.</p>	<p>The Board understands that the GAC encourages the ICANN Board to adopt the GNSO Council’s recommendations regarding the reservation of the list of names of the 191 organizations within the International Red Cross and Red Crescent Movement.</p> <p>The Board acknowledges the GAC’s note that the issue of the acronyms ICRC and IFRC were not covered under the GNSO’s reconvened process. The Board understands that the GAC advises the temporary protections given to these acronyms remain in place until an appropriate resolution of this issue is reached.</p>	<p>The Board acknowledges and appreciates this follow-up on the GAC’s advice regarding the Protection of the Red Cross and Red Crescent designations and identifiers. The Board notes, however, that prior to any Board action the transparency provisions in Section 3.6 of the ICANN Bylaws require that the Board: (1) provide a reasonable opportunity for the public to comment on proposed policies that substantially affect the operation of the Internet or third parties; and (2) request the GAC’s opinion where public policy concerns may be affected. Accordingly, the Board intends to take into account any public comments and GAC advice that may be timely received when it considers the GNSO’s policy recommendations.</p> <p>Please also see the Board’s response to item §2.a.I above regarding IGO Protections.</p>

GAC Follow-up on Previous Advice Item	Advice Text	Board Understanding Following Board-GAC Call	Board Response
	<p>The GAC notes that the issue of the acronyms of the two international organizations within the Movement (ICRC and IFRC) were not covered under the abovementioned GNSO process and recalls standing GAC Advice that the temporary protections presently accorded to these acronyms remain in place until such time an appropriate resolution of this issue is reached.</p>		
<p><b>Follow-up to the joint statement by ALAC and GAC (Abu Dhabi, 2 November 2017)</b></p>	<p>The At-Large Advisory Committee (ALAC) and the Governmental Advisory Committee (GAC) thank the ICANN Board for its response to their joint statement “Enabling inclusive, informed and meaningful participation at ICANN”, issued at ICANN60 in Abu Dhabi on 2 November 2017.</p> <p>In its response, the Board referred to the Information Transparency Initiative (ITI), launched in January 2018, which hopefully will lead to the creation of a document managing system that – as required by the ALAC and the GAC – will allow, even to non-expert stakeholders, a quick and easy access to ICANN documents. However, its development will take time. According to the ICANN website, its delivery is expected in December 2019.</p> <p>In their joint statement, the ALAC and the GAC also asked ICANN to produce executive summaries, key points and synopses for all relevant issues, processes and activities – something that could be implemented without delay.</p>	<p>The Board acknowledges the GAC’s thanks for the Board’s response to the GAC’s joint statement with the ALAC on “Enabling inclusive, informed and meaningful participation at ICANN”.</p> <p>The Board understands that while the GAC finds the current provision of information through monthly newsletters, pre-and post-meeting reports, video interviews and the ICANN Learn online platform commendable, the GAC believes those initiatives are not enough to reach the goal that the ALAC and GAC have in mind.</p> <p>The Board understands that the ALAC and GAC request that executive summaries be provided at least on issues put out for public comment.</p> <p>The Board understands that the ALAC and GAC are asking ICANN to put the same level of effort and service as was done for the IANA stewardship transition process toward all relevant issues for the community.</p>	<p>The Board notes that the GAC has provided clarification on this advice in a <a href="#">letter from the GAC Chair to Cherine Chalaby of 20 December 2018</a>. The Board thanks the GAC for this clarification.</p> <p>The Board affirms its response to the original advice, in which it stated: “The Board accepts this advice and is committed to accountability and transparency and pursuing easily understandable and relevant information on matters of concern to all stakeholders. The Board’s commitment to these values aligns with the recently started Information Transparency Initiative (<a href="https://www.icann.org/news/blog/creating-contentgovernance-and-rebuilding-the-infrastructure-of-icann-spublic-sites">https://www.icann.org/news/blog/creating-contentgovernance-and-rebuilding-the-infrastructure-of-icann-spublic-sites</a>). The Board acknowledges and agrees with the need to ensure effective and equal participation in the policy process by all stakeholders, which is in line with the Mission, Commitments, and Core Values, as expressed in the Bylaws” (see the <a href="#">Abu Dhabi scorecard</a>).</p> <p>Additionally, the Board understands that the ICANN organization is currently undertaking a review of the relevant interface and format of public comment proceedings. The Board intends to direct the ICANN</p>

GAC Follow-up on Previous Advice Item	Advice Text	Board Understanding Following Board-GAC Call	Board Response
	<p>In its response, the Board referred to the current offer of monthly newsletters, pre-and post-meeting reports and video interviews, as well as to the ICANN Learn online platform. All these initiatives are commendable and likely to improve access to information and content regarding ICANN activities. However, they are not enough to reach the goal that the ALAC and GAC have in mind.</p> <p>Particularly in policy development processes, non-expert stakeholders need executive summaries to be able to quickly determine, whether a particular issue is of concern to them, and if yes, to participate in the process easily and effectively, on equal footing with other stakeholders, even if ICANN is not in their full-time focus. Summaries should be provided at least, but not only, on issues put out for public comment. Clear and up-to-date information to facilitate quick understanding of relevant issues and high interest topics is key for inclusive, informed and meaningful participation by all stakeholders, including non-experts.</p> <p>In the context of the IANA transition process, ICANN was able to offer timely and comprehensible information by breaking down complex issues into understandable components, which allowed interaction within the entire community. The ALAC and the GAC are now asking</p>		<p>organization to explore specific improvements to public comments, including the use of summaries, that can allow the community to quickly identify the questions being asked in each proceeding.</p> <p>The Board notes that the provision of timely and comprehensible information on all other relevant topics will mean additional financial and staff resources will be needed. In view of the current budgetary constraints, the Board intends to consult with the ICANN organization to consider the feasibility of prioritizing possible topics for ongoing improvements in this area.</p>

GAC Follow-up on Previous Advice Item	Advice Text	Board Understanding Following Board-GAC Call	Board Response
	from ICANN that the same level of effort be made and the same service be provided to the community concerning information on all other relevant issues.		

**GAC Advice – Barcelona Communiqué: Follow-up on Deferred Advice (27 January 2019)**

GAC Deferred Advice Item	Advice Text	Board Understanding on Previous Scorecard	Board Response on Previous Scorecard	Board Response on Barcelona Scorecard
<p><b>San Juan Communiqué §1.a.IV GDPR and WHOIS</b></p>	<p><b>a. the GAC advises the ICANN Board to instruct the ICANN Organization to:</b></p> <p>iv. Distinguish between legal and natural persons, allowing for public access to WHOIS data of legal entities, which are not in the remit of the GDPR;</p>	<p>The Board understands that the GAC wishes for the ICANN Board to instruct the ICANN org to:</p> <p>iv. Distinguish between legal and natural persons, allowing for public access to WHOIS data of legal entities, which are not in the remit of the GDPR;</p>	<p>As requested by the GAC in its 17 May 2018 letter to the ICANN Board Chair, the Board defers consideration of this advice pending further discussion with the GAC.</p>	<p>Previously, the Board stated in response to this item that, as requested by the GAC in its <a href="#">17 May 2018</a> letter to the ICANN Board Chair, the Board defers consideration of this advice pending further discussion with the GAC. The Board is currently monitoring progress of the EPDP and community work on a unified access model and plans to address this advice following the outcome of those processes.</p>
<p><b>San Juan Communiqué §1.a.V GDPR and WHOIS</b></p>	<p><b>a. the GAC advises the ICANN Board to instruct the ICANN Organization to:</b></p> <p>v. Ensure continued access to the WHOIS, including non-public data, for users with a legitimate purpose, until the time when the interim WHOIS model is fully operational, on a mandatory basis for all contracted parties;</p>	<p>The Board understands that the GAC wishes for the ICANN Board to instruct the ICANN org to:</p> <p>v. Ensure continued access to the WHOIS, including non-public data, for users with a legitimate purpose, until the time when the interim WHOIS model is fully operational, on a mandatory basis for all contracted parties;</p>	<p>As requested by the GAC in its 17 May 2018 letter to the ICANN Board Chair, the Board defers consideration of this advice pending further discussion with the GAC.</p>	<p>Previously, the Board stated in response to this item that, as requested by the GAC in its <a href="#">17 May 2018</a> letter to the ICANN Board Chair, the Board defers consideration of this advice pending further discussion with the GAC. The Board is currently monitoring progress of the EPDP and community work on a unified access model and plans to address this advice following the outcome of those processes.</p>
<p><b>San Juan Communiqué §1.a.VI GDPR and WHOIS</b></p>	<p><b>a. the GAC advises the ICANN Board to instruct the ICANN Organization to:</b></p> <p>vi. Ensure that limitations in terms of query volume envisaged under an</p>	<p>The Board understands that the GAC wishes for the ICANN Board to instruct the ICANN org to:</p> <p>vi. Ensure that limitations in terms of query volume envisaged</p>	<p>As requested by the GAC in its 17 May 2018 letter to the ICANN Board Chair, the Board defers consideration of this advice pending further discussion with the GAC.</p>	<p>Previously, the Board stated in response to this item that, as requested by the GAC in its <a href="#">17 May 2018</a> letter to the ICANN Board Chair, the Board defers consideration of this advice pending further discussion with the GAC. The</p>

GAC Deferred Advice Item	Advice Text	Board Understanding on Previous Scorecard	Board Response on Previous Scorecard	Board Response on Barcelona Scorecard
	<p>accreditation program balance realistic investigatory crossreferencing needs;</p>	<p>under an accreditation program balance realistic investigatory crossreferencing needs; and</p>		<p>Board is currently monitoring progress of the EPDP and community work on a unified access model and plans to address this advice following the outcome of those processes.</p>
<p><b>San Juan Communiqué §1.a.VII GDPR and WHOIS</b></p>	<p><b>a. the GAC advises the ICANN Board to instruct the ICANN Organization to:</b></p> <p>vii. Ensure confidentiality of WHOIS queries by law enforcement agencies.</p>	<p>The Board understands that the GAC wishes for the ICANN Board to instruct the ICANN org to:</p> <p>vii. Ensure confidentiality of WHOIS queries by law enforcement agencies.</p>	<p>As requested by the GAC in its 17 May 2018 letter to the ICANN Board Chair, the Board defers consideration of this advice pending further discussion with the GAC.</p>	<p>Previously, the Board stated in response to this item that, as requested by the GAC in its <a href="#">17 May 2018</a> letter to the ICANN Board Chair, the Board defers consideration of this advice pending further discussion with the GAC. The Board is currently monitoring progress of the EPDP and community work on a unified access model and plans to address this advice following the outcome of those processes.</p>
<p><b>San Juan Communiqué §2.a.I IGO Reserved Acronyms</b></p>	<p>Noting ongoing developments in the PDP on IGO access to curative rights protection mechanisms, which the GAC is monitoring closely, the GAC affirms its advice from previous Communiqués concerning preventative protection of IGO identifiers, recalls the importance of maintaining temporary protections until a permanent resolution on IGO identifiers is reached in order prevent irreparable harm to IGOs and</p> <p><b>a. advises the ICANN Board to:</b></p> <p>i. Ensure that the list of IGOs eligible for preventative protection is as accurate and complete as possible.</p>	<p>The Board sent a <a href="#">letter</a> to the GAC requesting clarification regarding this advice. The GAC provided a <a href="#">response</a> on 15 May 2018. Based on the GAC’s response, the Board understands that the GAC wishes for the ICANN Board to:</p> <p>i. Ensure that the list of IGOs eligible for preventative protection is as accurate and complete as possible.</p> <p>The Board understands that the GAC and IGOs remain engaged on this issue and that the GAC is concerned that a</p>	<p>The Board thanks the GAC for the clarifications provided on <a href="#">15 May 2018</a>. The Board has asked the ICANN Organization to review the advice in light of these responses and to assess the feasibility of the request. The Board will defer action on this item at this time, and in due course will engage with the GAC should further clarifications be necessary before taking action on this advice.</p>	<p>The Board continues to defer action on this item as the ICANN org continues to assess the feasibility of the GAC’s request. The Board is aware that a dialogue has been initiated between ICANN Org and the GAC to ensure that the list of IGOs eligible for preventative protection is as accurate and complete as possible. The Board will monitor progress of this dialogue and will engage with the GAC as necessary before taking any further action on this advice.</p>

GAC Deferred Advice Item	Advice Text	Board Understanding on Previous Scorecard	Board Response on Previous Scorecard	Board Response on Barcelona Scorecard
	<p><u>RATIONALE</u> Despite indications to the contrary, the GNSO has still not concluded its PDP on curative rights protection mechanisms. The GAC and IGOs remain fully engaged on this issue and emphasize that a removal of interim protections before a permanent decision on IGO acronym protection is taken could result in irreparable harm to IGOs. In the interim, ICANN has moved forward to implement GAC advice related to protection of IGO full names at the second level. These protections will be based on a list of IGOs that fulfil previously agreed-upon criteria. To ensure this advice is effectively implemented, following significant work undertaken by IGOs resulting in significant progress on compiling this list, a focused effort is needed to contact remaining IGOs, so their names are protected accurately in the chosen two languages. ICANN has been in contact with the OECD and WIPO on this initiative, which the GAC supports.</p>	<p>removal of interim protections before a permanent decision on IGO acronym protection is taken could result in irreparable harm to IGOs.</p> <p>The Board also understands that the GAC emphasizes that to ensure this advice is effectively implemented, a focused effort is needed to contact remaining IGOs so their names are protected accurately in the chosen two languages.</p>		
<p><b>Panama Communiqué §3.a.I Two-character Country Codes at the Second Level</b></p>	<p><b>a. The GAC advises the ICANN Board to:</b></p> <ul style="list-style-type: none"> <li>i. Work, as soon as possible, with those GAC members who have expressed serious concerns with respect to the release of their 2-character country/territory codes</li> </ul>	<p>The Board understands that the GAC wishes for the ICANN Board to:</p> <ul style="list-style-type: none"> <li>i. Work with those GAC members who have expressed serious concerns with respect to the release of their 2-character</li> </ul>	<p>The Board will defer a formal response to the GAC on this advice pending further discussions with the GAC.</p>	<p>The Board acknowledges this advice and refers the GAC to the Board’s responses on items §1.a.I, II, and III above in the Barcelona consensus advice section. The Board also directs the GAC to the <a href="#">ICANN org memo</a> and <a href="#">Historical Overview</a> for additional details regarding this topic.</p>

GAC Deferred Advice Item	Advice Text	Board Understanding on Previous Scorecard	Board Response on Previous Scorecard	Board Response on Barcelona Scorecard
	<p>at the second level in order to establish an effective mechanism to resolve their concerns in a satisfactory manner, bearing in mind that previous GAC advice on the matter stands.</p> <p><u>RATIONALE</u>  The GAC notes the range of actions taken by the Board in response to concerns previously expressed with regard to release of 2-character codes at the second level. However, these actions have not been sufficient from the perspective of the concerned countries.</p> <p>On 15 March 2017, through the Copenhagen Communiqué, the GAC communicated its understanding to the ICANN community, and in particular to the ICANN Board, that there were “changes created by the 8 November 2016 Resolution” relating to the release procedure of 2- Character Country/Territory Codes at the Second Level.</p> <p>As stated in the 15 March 2017 Copenhagen Communiqué, the changes introduced by the 8 November 2016 Resolution meant that, contrary to the then prevailing practice, “it is no longer mandatory for the registries to notify governments of the plans for their use of 2-letter codes, nor are registries required</p>	<p>country/territory codes at the second level in order to establish an effective mechanism to resolve their concerns in a satisfactory manner.</p> <p>The Board acknowledges that some GAC members believe that the Board actions taken with regard to the release of 2-character codes at the second level have not been sufficient.</p> <p>The Board notes that in the 15 March 2017 Copenhagen Communiqué the GAC communicated there were changes created by the 8 November 2016 Resolution relating to the release procedure of 2-Character Country/Territory Codes at the Second Level which meant that it is no longer mandatory for the registries to notify or seek agreement of governments when releasing 2-Character country codes at the second level.</p> <p>The Board also notes that the GAC requested in the Copenhagen Communiqué the Board take into</p>		



GAC Deferred Advice Item	Advice Text	Board Understanding on Previous Scorecard	Board Response on Previous Scorecard	Board Response on Barcelona Scorecard
	<p>to seek agreement of governments when releasing two-letter country codes at the second level”.</p> <p>Accordingly, in the 15 March 2017 Copenhagen Communiqué, the GAC provided full consensus advice to the ICANN Board, which included requests that the Board “[t]ake into account the serious concerns expressed by some GAC Members as contained in previous GAC Advice”; “[i]mmediately explore measures to find a satisfactory solution of the matter to meet the concerns of these countries before being further aggravated”; and “[p]rovide clarification of the decision-making process and of the rationale for the November 2016 resolution, particularly in regard to consideration of the GAC advice, timing and level of support for this resolution.”</p> <p>Under the 8 November 2016 Resolution, ICANN’s “President and CEO, or his designee(s), is authorized to take such actions as appropriate to authorize registry operators to release at the second level the reserved letter/letter two-character ASCII labels, not otherwise reserved pursuant to Specification 5, Section 6 of the Registry Agreement, subject to these measures.”</p>	<p>account the serious concerns by some GAC members; immediately explore measures to find a satisfactory solution; and provide clarification of the decision-making process and of the rationale for the November 2016 Resolution.</p> <p>The Board understands that prior to the 8 November 2016 Resolution the GAC considered that in the event that no preference has been stated, a lack of response should not be considered consent for the release of 2-character country/territory codes. The Board also understands that prior to the 8 November 2016 Resolution there was an established process, as advised by the GAC in the Singapore Communiqué, for requests to release two-character country/territory codes.</p> <p>The Board understands that some GAC members have raised concerns about ICANN’s ability to engage with the relevant GAC members after the 12 June 2018 authorization by ICANN for the Registry Operator for .XXX to release all two-character labels not previously authorized.</p>		

GAC Deferred Advice Item	Advice Text	Board Understanding on Previous Scorecard	Board Response on Previous Scorecard	Board Response on Barcelona Scorecard
	<p>Previously to the “changes created by the 8 November 2016 Resolution”, in its 30 June 2016 Helsinki Communiqué, it was stated that “[t]he GAC considers that, in the event that no preference has been stated [as to the requirement that an applicant obtains explicit agreement of the country/territory whose 2-letter code is to be used at the second level], a lack of response should not be considered consent.”</p> <p>Also, previously to the “changes created by the 8 November 2016 Resolution”, there was an established process for requests to release two-letter codes. As advised by the GAC in its 11 February 2015 Singapore Communiqué, this process involved “an effective notification mechanism, so that relevant governments can be alerted as requests are initiated”, and it relied on “[a] list of GAC Members who intend to agree to all requests and do not require notification”.</p> <p>On 20 June 2018, the GAC was informed that, on 12 June 2018, ICANN had authorized the Registry Operator for .XXX “to release for registration to third parties and activation in the DNS at the second level all two-character letter/letter ASCII labels not previously authorized by ICANN for release and not otherwise required to be reserved pursuant to the Registry</p>			

GAC Deferred Advice Item	Advice Text	Board Understanding on Previous Scorecard	Board Response on Previous Scorecard	Board Response on Barcelona Scorecard
	<p>Agreement". The announcement of the release of not previously authorized 2-character codes at the second level has caused some GAC members to reiterate serious concerns about ICANN's ability to engage with the relevant GAC members to find a satisfactory solution to the matter. These unresolved concerns include doubts about ICANN Board's ability to provide a satisfactory explanation for the "changes created by the 8 November 2016 Resolution", as well as to adopt measures – pending a satisfactory settlement of the matter – to prevent further consequences from the "changes created by the 8 November 2016" for the concerned GAC members.</p>			
<p><b>Panama Communiqué §3.a.II Two-character Country Codes at the Second Level</b></p>	<p><b>a. The GAC advises the ICANN Board to:</b></p> <ul style="list-style-type: none"> <li>ii. Immediately take necessary steps to prevent further negative consequences for the concerned GAC members arising from the November 2016 Board Resolution.</li> </ul>	<p>The Board understands that the GAC wishes for the ICANN Board to:</p> <ul style="list-style-type: none"> <li>ii. Immediately take necessary steps to prevent further negative consequences for the concerned GAC members arising from the November 2016 Board Resolution.</li> </ul>	<p>The Board will defer a formal response to the GAC on this advice pending further discussions with the GAC.</p>	<p><i>See response on item §3.a.I above.</i></p>

# **Two-Character ASCII Labels Historical Overview**

**Historical Overview of Events Regarding Two-Character  
Labels at the Second Level in the New gTLD Namespace**

Global Domains Division  
22 January 2019



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## Executive Summary

On 8 November 2016, the ICANN Board approved a resolution directing the ICANN organization to authorize the release of reserved two-character labels at the second level subject to implementation by Registry Operators of certain measures to avoid confusion with corresponding country codes. In considering the resolution, the Board took into account previous community consultation, the language of the [New gTLD Registry Agreement](#), which was based on recommendations from the Generic Names Supporting Organization (GNSO) Reserved Names Working Group as well as [Module 5](#) of the New gTLD Applicant Guidebook, and consensus advice issued by the Governmental Advisory Committee (GAC).

At the direction of the Board, the ICANN org introduced the [first general authorization process](#) in December 2014. After receiving feedback from the GAC and Registry Operators, the Board directed the ICANN org to improve the process in February 2015. Over the course of the following year, the ICANN org consulted with the community on proposed measures for avoiding confusion with corresponding country codes. In July 2016, the ICANN org placed for public comment a draft framework of standard measures that could be implemented across any gTLD registry. Following the public comment, the ICANN org updated the procedures based on the feedback received. In November 2016, the Board adopted the framework, and subsequently, the ICANN org implemented the framework in December 2016.

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# Background: GNSO Recommendations and the New gTLD Registry Agreement

In May 2007, the GNSO Reserved Names Working Group issued recommendations regarding the reservation of two-character ASCII labels as part of the Policy Development Process (PDP) on the Introduction of New gTLDs. The report included the following recommendations:

- Registries may propose the release of two-character labels at the second level, provided they implement measures to avoid confusion with corresponding country codes.
- Evaluation of registry requests may involve technical analysis and opportunities for public input. Technical issues related to the release of two-character labels have been addressed by the [2006 RSTEP Report](#).

The Reserved Names Working Group's recommendations were incorporated into the GNSO's final [Report on the Introduction of New gTLDs](#), which recommended that any combination of two-letter/digit labels at the second level may be proposed for release provided that measures to avoid confusion with country codes were implemented.<sup>1</sup> This report was adopted by the GNSO Council in September 2007 and the recommendations later [adopted](#) by the Board in June 2008.

Following the Board's adoption of the GNSO recommendations, the community and the ICANN org considered and addressed numerous implementation issues with respect to the introduction of new gTLDs. The GAC engaged in the discussions through various communications including correspondence, communiqués and scorecards. The ICANN org drafted and published the [New gTLD Applicant Guidebook](#) to provide guidance regarding gTLD applicant requirements and evaluation processes. The guidebook was updated multiple times with extensive consultation with the community, including the GAC.

[Module 5](#) of the Guidebook contains a draft registry agreement for new gTLD Registry Operators. Specification 5 Section 2 of the Guidebook's draft agreement requires the initial reservation of two-character labels at the second level based on language from legacy gTLD agreements, providing two paths to release the labels:

1. **Government and ccTLD approval:** "The reservation of a two-character label string may be released to the extent that Registry Operator reaches agreement with the government and country-code manager." Or,
2. **ICANN approval:** "The Registry Operator may also propose release of these reservations based on its implementation of measures to avoid confusion with the corresponding country codes."

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<sup>1</sup>The final report notes that "The existing gTLD registry agreements provide for a method of potential release of two-character LDH names at the second level. In addition, two character LDH strings at the second level may be released through the process for new registry services, which process involves analysis of any technical or security concerns and provides opportunity for public input. Technical issues related to the release of two-letter and/or number strings have been addressed by the RSTEP Report on GNR's proposed registry service. The GAC has previously noted the WIPO II Report statement that 'If ISO 3166 alpha-2 country code elements are to be registered as domain names in the gTLDs, it is recommended that this be done in a manner that minimises the potential for confusion with the ccTLDs.'"

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In June 2011, the Board [directed](#) the ICANN org to implement the Guidebook. Over the next two years, the ICANN org updated the Guidebook's draft agreement to address questions and new concerns; the agreement was published for public comment multiple times. Throughout the iterative process, updates were made to Specification 5 Section 2 to provide additional clarity, but the two options by which Registries may release reserved two-character labels remained as detailed above.

In July 2013, the Board New gTLD Program Committee [approved](#) the [New gTLD Registry Agreement](#). Specification 5, Section 2 of the approved New gTLD Registry Agreement states:

*All two-character ASCII labels shall be withheld from registration or allocated to Registry Operator at the second level within the TLD. Such labels may not be activated in the DNS, and may not be released for registration to any person or entity other than Registry Operator, provided that such two-character label strings may be released to the extent that Registry Operator reaches agreement with the related government and country-code manager of the string as specified in the ISO 3166-1 alpha-2 standard. The Registry Operator may also propose the release of these reservations based on its implementation of measures to avoid confusion with the corresponding country codes, subject to approval by ICANN. Upon conclusion of Registry Operator's designation as operator of the registry for the TLD, all such labels that remain withheld from registration or allocated to Registry Operator shall be transferred as specified by ICANN. Registry Operator may self-allocate and renew such names without use of an ICANN accredited registrar, which will not be considered Transactions for purposes of Section 6.1 of the Agreement.*

In response to GAC advice from the Lisbon Communiqué, Specification 5, Section 4 of the New gTLD Registry Agreement states:

*The country and territory names (including their IDN variants, where applicable) contained in the following internationally recognized lists shall be withheld from registration or allocated to Registry Operator at All Levels:*

*4.1. the short form (in English) of all country and territory names contained on the ISO 3166-1 list, as updated from time to time, including the European Union, which is exceptionally reserved on the ISO 3166-1 list, and its scope extended in August 1999 to any application needing to represent the name European Union [http://www.iso.org/iso/support/country\\_codes/iso\\_3166\\_code\\_lists/iso-3166-1\\_decoding\\_table.htm](http://www.iso.org/iso/support/country_codes/iso_3166_code_lists/iso-3166-1_decoding_table.htm);*

*4.2. the United Nations Group of Experts on Geographical Names, Technical Reference Manual for the Standardization of Geographical Names, Part III Names of Countries of the World; and*

*4.3. the list of United Nations member states in 6 official United Nations languages prepared by the Working Group on Country Names of the United Nations Conference on the Standardization of Geographical Names;*

*provided, that the reservation of specific country and territory names (including their IDN variants according to the registry operator IDN registration policy, where applicable) may*



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*be released to the extent that Registry Operator reaches agreement with the applicable government(s). Registry Operator must not activate such names in the DNS; provided, that Registry Operator may propose the release of these reservations, subject to review by ICANN's Governmental Advisory Committee and approval by ICANN. Upon conclusion of Registry Operator's designation as operator of the registry for the TLD, all such names that remain withheld from registration or allocated to Registry Operator shall be transferred as specified by ICANN. Registry Operator may self-allocate and renew such names without use of an ICANN accredited registrar, which will not be considered Transactions for purposes of Section 6.1 of the Agreement.*

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# A Phased Approach to Implementation of the Process for Release of Two-Character ASCII Labels

In August 2015, Akram Atallah sent a [letter](#) to Thomas Schneider in response to his [letter](#) regarding the process for the release of two-letter codes as second-level domains for new gTLDs. The response detailed a phased approach to implementation of the process for release. Phase 1 below describes the initial attempt at finalizing a process; Phase 2 describes the effort in improving the process based on feedback from GAC members and Registries; Phase 3 describes the finalization of the framework adopted by the Board in November 2016.

## Phase 1: Registry Requests, GAC Consultation

Beginning in 2014, new gTLD Registry Operators submitted RSEP requests for ICANN approval to release two-character ASCII labels from reservation. At this time, there was no standard set of measures by which Registry Operators could demonstrate to ICANN they would avoid confusion for users between ccTLDs and corresponding country codes at the second level. Therefore, ICANN held five public comment opportunities<sup>2</sup> from 12 June 2014 to 24 October 2014 to obtain feedback from the community about user confusion related to the 28 RSEP amendment requests to release two-character labels on behalf of 207 gTLDs. The proposed amendments were published for comment. ICANN received 28 comments from stakeholders including the Business Constituency (BC), the At-Large Advisory Committee (ALAC) and an individual registrar; many comments showed support for the release of two-character labels.

The GAC issued advice to the Board in various communiqués, starting with the [Los Angeles Communiqué](#) in October 2014, in which the GAC stated:

*The GAC recognized that two-character second level domain names are in wide use across existing TLDs, and have not been the cause of any security, stability, technical or competition concerns. The GAC is not in a position to offer consensus advice on the use of two-character second level domains names in new gTLD registry operations, including those combinations of letters that are also on the ISO 3166-1 alpha 2 list.*

*In considering these RSEP requests, and consistent with the Applicant Guidebook, the GAC considers that the public comment period is an important transparency mechanism, and in addition asks that relevant governments be alerted by ICANN about these requests as they arise.*

The Board, ICANN org, and the GAC exchanged various communications from 2014 through 2016 regarding the GAC's advice on two-character labels, which are detailed in Annex 1.

In response to the RSEP amendment requests, the Board [directed](#) the ICANN org in October 2014 to create and implement an efficient procedure for the release of two-character labels in accordance with the authority provided in Specification 5 of the 2013 New gTLD Registry Agreement and which focused on measures for avoiding confusion with corresponding country codes. In this resolution, the Board considered the security and stability risks associated with

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<sup>2</sup> See the public comments here: [12 June 2014](#); [8 July 2014](#); [23 July 2014](#); [19 August 2014](#) and [12 September 2014](#).

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releasing two-character labels, the GAC's indication that some of its members raised concerns about the release of two-character domain names, the GAC's stated position in its Los Angeles Communiqué that it could not offer consensus advice on the use of two-character SLDs, and the public comment reports.

On 1 December 2014, the ICANN org announced a [new procedure](#) for the consideration and authorization for release of non-letter/letter two-character ASCII labels and letter/letter two-character ASCII labels that had not received comments from governments.

The [Authorization Process for Release of Two-Character ASCII Labels](#) required the following actions:

- Registry Operator submits a request to release some or all two-character labels.
- ICANN org reviews and posts the Registry Operator's request for comment for 30 days.
- ICANN notifies the GAC and its members of the request and the comment period.
- ICANN authorizes the release for two-character labels that received no comments related to confusion with the corresponding country code.

Following the introduction of this process, the ICANN org received feedback from both the GAC, via the Singapore Communiqué, and Registry Operators. As described below, Phase 2 of this process was ICANN org's effort to improve the process based on this feedback.

## Phase 2: Two-Character Process Improvements

In February 2015, the GAC stated in its [Singapore Communiqué](#) (11 February 2015) that it:

- a. The GAC advises [sic] the Board to: i. amend the current process for requests to release two-letter codes to establish an effective notification mechanism, so that relevant governments can be alerted as requests are initiated. Comments from relevant governments should be fully considered.*
- b. The GAC further advises the Board to: i. extend the comment period to 60 days. These changes should be implemented before proceeding with pending and future requests. A list of GAC Members who intend to agree to all requests and do not require notification will be published on the GAC website*

In response to the Singapore Communiqué, the Board [directed](#) the ICANN org to make process and system improvements, fully consider the comments from governments, and to extend or re-open comment periods so that each request would undergo 60 days of comment period in total. Following Board direction, the ICANN org instituted a mailing list for governments solely for new two-character requests and providing tutorials to governments on subscribing to automatic notifications for new two-character requests. The ICANN org also extended the comment period for Registry Operator requests to 60 days. Additionally, the ICANN org introduced updates to the Authorization Process information page in [February](#) and [March 2015](#) which included:

- the ability to sort release requests by reference number, TLD, registry name and date posted;
- a download link for the list of all requests for letter/letter two-character ASCII labels; an identification column for TLDs granted a .BRAND specification;

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- the "View Comments" page was updated to show all comments made in a calendar year, rather than showing comments on a month-by-month basis;
  - a Authorization status indication for TLDs that requested two-character labels to be released;
  - clarification language that ICANN will only consider comments submitted during the public comment period; and,
  - a column for Public Comment Period Close Date for each request.

In July 2015, the ICANN org [shared next steps](#) with the GAC at the joint meeting of the GAC and the Board at ICANN52 in Buenos Aires. In August 2015, the ICANN org [published](#) a blog describing the procedure for the authorization for release of two-character labels, and also issued a [letter](#) to the GAC regarding the phases of the development process. In both the blog and the letter, the ICANN org stated that it would reach out to relevant governments to further clarify the concerns from previous comments in order to make improvements.

ICANN org asked Registry Operators to respond to government comments with measures to avoid confusion with the corresponding country codes. ICANN org also consulted with the community, which included presenting to the GAC and Registry Operators, to develop standardized measures Registry Operators can adopt to avoid confusion between two-character domains and the corresponding country codes. ICANN org [launched](#) the comment consideration process on 6 October 2015.

Subsequently, in October 2015, the GAC advised the Board in its [Dublin Communiqué](#):

- a. The GAC advises the Board that: i. comments submitted by the relevant Governments be fully considered regardless of the grounds for objection.*
- b. The GAC further advises the Board to: i. be mindful of governments' capacity limitations and asks the Board to facilitate simplification of the process for providing comments to address their concerns.*
- c. With respect to new requests for release, the GAC advises the Board to: i. task ICANN to work with the GAC Secretariat to address the technical issues with comment forms and in the interim ii. offer alternative means for comments.*

The ICANN org [considered comments](#) received from governments in relation to any gTLD for which the comment was submitted. The Board noted in its [February 2016 response to the Dublin Communiqué](#) that "as part of ICANN's consideration of submitted comments, staff has performed outreach to governments to seek clarification of comments previously submitted. This further demonstrates ICANN's ongoing consideration of comments received, regardless of the grounds for the comment." In addition, ICANN org updated the comment form [in October 2015](#) by providing new web forms and a new interface to submit and view comments and conducted two webinars with GAC members in November 2015 to demonstrate the updated comment system.<sup>3</sup>

GAC members who continued to experience technical issues with the form were able to submit comments using alternative means, which included an ICANN GAC Support member

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<sup>3</sup> The GAC and ICANN org discussed the webinars during ICANN55 in Marrakech at GAC Meeting on Two Character Codes Implementation on 9 March 2016. See the transcript here: <https://meetings.icann.org/en/marrakech55/schedule/wed-gac-two-character-codes/transcript-gac-two-character-codes-09mar16-en>



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submitting comments in the system on the governments' behalf, if requested. The Board also noted the GAC's concerns regarding capacity limitations and its request for simplification of the process and considered these comments as development of the framework continued as noted in the [rationale for Board Resolution 2016.11.08.15](#).

In February 2016, ICANN org corresponded with Registry Operators requesting they provide proposed measures to avoid confusion with corresponding country codes in order to respond to governments' confusion concerns within 60 days.

In March 2016, ICANN org met with the GAC during ICANN55 in Marrakech to discuss Two Character Codes Implementation.<sup>4</sup> At that meeting a representative from ICANN org's Global Domains Division provided background on the development of the release process, the public comments taken on the subject, and the development of standard measures. In regards to the comments submitted by governments during phase 2, the representative stated:

*after processing and analyzing all the comments that we received, as was mentioned earlier by Gema, a substantial number of those met that lower bar of criteria for confusability against the corresponding country code. And I underline "corresponding" because, again, that's driven by the language from the Registry Agreement, specification five. And eight of which did not meet that criteria.*

*Now, I want to highlight that by not having met the confusability criteria, that does not mean this we did not take them into consideration. We actually pointed those eight two-character labels to appropriate courses of action, namely being perhaps if there was issues and concerns with spamming and things like that to the registries' point of -- use point of contact and so on.*

After the consideration of the government comments, registry operators had 60 days to propose measures to mitigate confusion. In addition to the comment from governments, the ICANN org considered the proposed user confusion mitigation measures from Registry Operators prior to moving to the finalization of a proposed framework, which was published for public comment, as described below.

## Phase 3: Creation of Framework of Standard Measures

In July 2016, ICANN [published](#) for public comment a draft framework of standard measures to avoid user confusion with corresponding ccTLDs that a registry must implement in order to release letter/letter two-character domains at the second level from reservation. The Proposed Measures also included a direct reference to the GAC Helsinki Advice urging "the relevant Registry or the Registrar to engage with the relevant GAC members when a risk is identified in order to come to an agreement on how to manage it or to have a third-party assessment of the situation if the name is already registered.

The public comment for the draft framework requested community feedback, including that of GAC members, on the proposed measures as they related to confusion with relevant country

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<sup>4</sup> See the transcript here: <https://meetings.icann.org/en/marrakech55/schedule/wed-gac-two-character-codes/transcript-gac-two-character-codes-09mar16-en>

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codes. When the public comment period closed on 17 August 2016, ICANN received over 40 comments regarding the proposed measures to avoid confusion; commenters included the Intellectual Property Constituency (IPC), the Non-Commercial Stakeholder Group (NCSG), the Registries Stakeholder Group (RySG), individual governments<sup>5</sup> and individual ccTLD operators. The comments reflected broad support for release of two-character labels and moderate support for the Proposed Measures to the extent the Proposed Measures allowed for the release of two-character labels. Some commenters took the position that governments did not have special rights to two-character labels that correspond with country codes beyond ccTLDs, and that the labels should be released as soon as possible. Comments from some individual governments and ccTLD operators objected to the release of two-character labels that correspond with country codes under the proposed framework based on concerns regarding potential user confusability and took the position that government and/or ccTLD manager approval is required for any release.

In September 2016, the ICANN org published a [Summary and Analysis Report](#) on the comments received, noting that based on the feedback received, ICANN org would establish a list of measures Registries must implement to release letter/letter two-character ASCII labels from reservation. Based on the feedback received, in November 2016, the ICANN org updated the proposed measures for Registry Operators to implement to avoid confusion between two-character domains and corresponding country codes. To address concerns throughout the lifecycle of a domain name, both pre- and post-registration measures were included in the framework of required measures.

On 8 November 2016, the Board [approved](#) the ICANN org to authorize<sup>6</sup> the release of reserved two-character labels subject to the [updated measures](#), which comprised the following:

1. **Exclusive Availability Pre-Registration Period (voluntary):** Registry Operators may implement an exclusive availability pre-registration for governments or ccTLD operators to register domain names corresponding to their country codes, before the names are generally available;
2. **Registration Policy:** Registry Operators must include a provision in the registry's registration policy requiring registrants to avoid misrepresenting affiliation with a government or ccTLD; and
3. **Post-Registration Complaint Investigation:** Registry Operators must investigate and respond to reports of confusion from government or ccTLD operators.

Registry operators who want to release two-character SLDs may incorporate these measures into their Registry Agreement and would then be subject to enforcement by ICANN

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<sup>5</sup>GAC representatives from Cambodia, China, Côte d'Ivoire (Former), Egypt, Italy, Hong Kong (Alternate), New Zealand, Swaziland, Spain, Singapore submitted public comments. Government representatives from Dominica, Mexico, Saudi Arabia, and Vietnam also submitted public comments.

<sup>6</sup> It should be noted that although the Board authorized ICANN org to authorize the release of two-character labels across all new gTLD Registry Operators in November 2016, two-character domains have existed in many legacy gTLDs and ccTLDs for years without apparent confusion, security or stability issues to the DNS. Examples of existing two-character domains include ME.CN and AW.ORG. ME.CN is a website for a mobile game and entertainment company whose domain name was originally registered in January 2014—'ME' corresponds with the country code for Montenegro and .CN is the ccTLD for China. AW.ORG is a website for an educational institution whose domain name was originally registered in January 1997—'AW' corresponds with the country code for Aruba. Additional examples can be found in Annex 3.

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Contractual Compliance. The measures would also exist in addition to other safeguards already built into the Registry Agreement as well as other measures that Registries may implement at their discretion.

On 13 December 2016, in accordance with the Board resolution, the ICANN org [authorized](#) new gTLD Registry Operators to release<sup>7</sup> reserved two-character labels, subject to the Registry Operator implementing the required measures to avoid confusion and subject to all other terms of the Registry Agreement. Should the ICANN org become aware that a Registry Operator was not complying with the required measures, the issue would be referred to ICANN Contractual Compliance for investigation and follow up.

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<sup>7</sup> Following the Board resolution in November 2016 all gTLD Registries, with the exception of .TEL and .XXX, were authorized to release all two-character labels at the second level subject to the implementation of required measures to avoid confusion. ICANN org authorized the release of two-character labels at the second level for .XXX in May 2018, subject to the implementation of the same measures, and plans to follow through with .TEL later this year.

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# Addressing Subsequent GAC Advice

## Helsinki Communiqué

In June 2016, the GAC advised the Board in its [Helsinki Communiqué](#):

*The GAC advises the ICANN Board to: i. urge the relevant Registry or the Registrar to engage with the relevant GAC members when a risk is identified in order to come to an agreement on how to manage it or to have a third-party assessment of the situation if the name is already registered.*

The Board accepted the advice in the Helsinki Communiqué in [December 2016](#). In its response, the Board noted that “in adopting its resolution in Hyderabad regarding two-letter codes at the second level, the Board explicitly accepted the GAC advice contained in its Singapore Communiqué dated 11 February 2015.” In the Board’s [8 November 2016 resolution](#) the Board quotes the advice from the Helsinki Communiqué in a Whereas statement and notes “the advice was incorporated in the proposed measures to avoid confusion.” The [Measures](#) state:

*In addition to the measures identified below, in accordance with advice issued in the GAC Helsinki Communiqué, ICANN “urge[s] the relevant Registry or the Registrar to engage with the relevant GAC members when a risk is identified in order to come to an agreement on how to manage it or to have a third-party assessment of the situation if the name is already registered.*

## Hyderabad Communiqué

In November 2016, the GAC advised the Board in its [Hyderabad Communiqué](#):

*The GAC advises the Board to i. Clearly indicated whether the actions taken by the Board as referred to in the resolution adopted on 8 November 2016 are fully consistent with the GAC advice given in the Helsinki Communiqué. ii. Always communicate in future the position of the Board regarding GAC advice on any matter in due time before directly adopting any measure directly related to that advice.*

The Board [responded](#) to the Hyderabad Communiqué in February 2017 noting the topic of two-character domain names corresponding to country codes had been thoroughly examined over the two prior years. The Board noted “at least five public comment periods<sup>8</sup> on the topic as well as discussions with the GAC.” The Board stated that it “examined the issue with respect to ICANN’s mission, commitments and core values, and commented that the Board shared the GAC’s concern that use of two-character strings corresponding to country codes should not be done in a way to deceive or confuse consumers. The Board’s position is that the 8 November 2016 resolution is consistent with the GAC’s advice on the topic.” The Board also noted it was implementing a new process for consideration of GAC advice, starting with the ICANN 58 Copenhagen Communiqué.

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<sup>8</sup> See the public comments here: [12 June 2014](#); [8 July 2014](#); [23 July 2014](#); [19 August 2014](#); [12 September 2014](#); and [8 July 2016](#).



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## Copenhagen Communiqué

In March 2017, the GAC advised the Board in its [Copenhagen Communiqué](#):

*The GAC advises the Board to i. Take into account the serious concerns expressed by some GAC Members as contained in previous GAC Advice. ii. Engage with concerned governments by the next ICANN meeting to resolve those concerns. iii. Immediately explore measures to find a satisfactory solution of the matter to meet the concerns of these countries before being further aggravated. iv. Provide clarification of the decision-making process and of the rationale for the November 2016 resolution, particularly in regard to consideration of the GAC advice, timing and level of support for this resolution.*

The Board [responded](#) to the Copenhagen Communiqué in June 2017 noting

*The GAC, in its Helsinki Communiqué, reiterated the need to minimize the risk of confusion between country codes and 2-letter registrations at the second level in new gTLDs, but also conveyed the absence of consensus within the GAC on specific measures needed to address the potential for confusion...ICANN affirmatively required Registries/Registry Operators to take specific mandatory steps to avoid confusion with respect to the 2-character labels, and also identified several voluntary measures that Registry/Registry Operators could consider. Finally, in keeping with the GAC Advice, ICANN urged Registries/Registry Operators to the relevant Registry or the Registrar to engage with the relevant GAC members when a risk is identified in order to come to an agreement on how to manage it or to have a third-party assessment of the situation if the name in question was already registered. Although ICANN has fully implemented the GAC's Advice on this matter, the Board understood that some GAC members continue to feel that their concerns have not been addressed. Accordingly, the Board directed the CEO to engage with concerned governments to listen to their views and concerns and further explain the Board's decision-making process.*

The ICANN org conducted telephonic conversation with concerned governments in May 2017 explaining the rationale and development of the framework adopted by the 8 November 2016 Board resolution. Additionally, the ICANN org engaged in discussions with the GAC at the Board-GAC Recommendation Implementation (BGRI) meetings at ICANN61, ICANN62 and ICANN63.

In responding to the Copenhagen Communiqué, the Board also considered the [GNSO's response](#) to the Copenhagen Communiqué in which the GNSO reaffirmed the community consultation and input that went into the Board's 8 November 2016 resolution and stated "there should be no opportunity for this Advice to cause the Board to reopen their decision on two letter codes at the second level as contained in the Board's resolution of 8 November 2016."

## San Juan Communiqué

In November 2016, the GAC mentioned as follow-up to previous advice to the Board in its [San Juan Communiqué](#):

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*Some GAC members note that important concerns regarding the release of 2-Character Country/Territory codes at the 2nd Level, as expressed in previous GAC advice, still remain. The GAC also notes the availability of certain measures to mitigate governments concerns with regard to the release of 2 letter codes at the second level. Some GAC members noted that the current measures have not been used. Some GAC members considered that these measures are insufficient. The GAC intends to follow up on implementation of the proposed initiative at ICANN62, bearing in mind that all previous GAC advice on the matter stands*

The Board [responded](#) to the San Juan Communiqué in May 2018 noting the GAC's concerns on this topic. The Board also noted it stands ready to engage with the concerned governments on this issue and looks forward to further updates on this topic. As mentioned above, the ICANN org engaged in discussions with concerned GAC members at the Board-GAC Recommendation Implementation (BGRI) meetings at ICANN61, ICANN62 and ICANN63.

## Panama Communiqué

In June 2018, the GAC advised the Board in its [Panama City Communiqué](#):

*The GAC advises the Board to i. Work, as soon as possible, with those GAC members who have expressed serious concerns with respect to the release of their 2-character country/territory codes at the second level in order to establish an effective mechanism to resolve their concerns in a satisfactory manner, bearing in mind that previous GAC advice on this matter stands. ii. Immediately take necessary steps to prevent further negative consequences for the concerned GAC members arising from the November 2016 Board Resolution.*

The Board [responded](#) to the Panama City Communiqué in September 2018 deferring a formal response to the GAC pending further discussions with the GAC. At the direction of the Board, the ICANN org has implemented several measures to help address the concerns of governments related to the release of the two-character labels that correspond to their country code. ICANN org provided two documents to the GAC on 26 June 2018:

- A briefing on the process of enforcing compliance with contractual provisions related to the release of 2-character label SLDs
- A timeline of all communications by ICANN org on the subject throughout this process.

## Barcelona Communiqué

In October 2018, the GAC advised the Board in its [Barcelona Communiqué](#):

*The GAC advises the Board to i. Explain in writing how and why it considers it is implementing GAC advice on the release of country codes at the second level and ii. Explain in writing whether its Resolution of 8 November 2016 and its change from the preexisting release process (indicated in specification 5. 2 of the Registry Agreement, sentence 1) to a new curative process (under sentence 2) are compatible with GAC advice on this topic, or whether it constitutes a rejection of GAC advice. The GAC*

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*advises the Board to set out its explanation in writing by 31 December 2018. Previous GAC advice on this matter stands. iii. Ensure that its direction to the ICANN CEO to “engage with concerned governments to listen to their views and concerns and further explain the Board’s decision making process” (Board Resolution 2017.06.12.01) is fully implemented including direct engagement with those governments in order to fully address their concerns.*

The Board and ICANN org are preparing separate responses to this advice; both of which will be made available on ICANN’s [Two-Character ASCII Labels](#) webpage.

In response to advice item “iii,” to further address concerns regarding the release of two-letter domain names that correspond with country codes, the ICANN org provided additional dedicated services to GAC members, including the monitoring of their corresponding two-letter country code domain registrations at the second level in new gTLDs and explanations of possible recourse mechanisms in the event of a reported misuse. This service first became available following ICANN58 and continues to be available to all GAC members by request. To date, there are have been 24 requests from 20 countries; there have been no reports of non-compliance of two-letter domain names.

Additionally, following discussions with the GAC at ICANN61 in San Juan, the ICANN org is in the process of developing a dedicated webpage for the GAC members to easily track the registration of two-character domain names that correspond with a specific country code and request ICANN compliance action in the event of a perceived misuse. This online tool will have a members-only page on the GAC website that will filter two-letter domain name registrations on any TLD that correspond with their country codes. This service will aggregate two-character second level domains automatically to a table on the GAC site, which can also be downloaded for offline analysis by GAC members. The service will run daily after all root zone files are updated, aggregating all new two-character second-level domain registrations and displaying to GAC Members.

# Annex 1: Summary of Two-Character Communications with the GAC, Governments, and ccTLD Managers

DATE	TYPE	TO	FROM	SUMMARY
15 Oct 2014	Communiqué	ICANN Board	GAC	Communicated GAC did not have consensus regarding the use of two-character labels, and noted public comment was an important community mechanism.
16 Oct 2014	Publication: ICANN Board Resolution	--	ICANN Board	Board resolution authorizing ICANN org to develop and implement an efficient procedure for the release of two-character domains.
<b>PHASE ONE: AUTHORIZATION PROCESS</b>				
1 Dec 2014	Announcement	--	ICANN org	Announced launch of Authorization Process for Release of Two-Character ASCII Labels. Included blanket authorization of all non-letter/letter two-character labels.
11 Feb 2015	Communiqué	ICANN Board	GAC	Advised the Board to make improvements to the Authorization Process. Comments should be fully considered.
12 Feb 2015	Publication: ICANN Board Resolution	--	ICANN Board	Accepted GAC advice and directed ICANN org to make process improvements. Comments should be fully considered.
<b>PHASE TWO: GOVERNMENT COMMENTS AND REGISTRY-PROPOSED MEASURES</b>				
Jun 2015	Discussion	Specific GAC members	ICANN org	Discussed informally a process to address two-character requests that have received comments from relevant governments to specific GAC members.
11 Aug 2015	Blog	--	ICANN org	Communicated future process to address two-character requests that have received comments from relevant governments. The process would allow ICANN to more fully consider comments received from relevant governments. Labels that received comments not pertaining to confusion with the corresponding country code were authorized for release from reservation.
6 Oct 2015	Email	Governments who submitted comments	ICANN org	Requested clarification for comments submitted and communicated confusion standard for evaluating comments.



DATE	TYPE	TO	FROM	SUMMARY
6 Oct 2015	Announcement	--	ICANN org	Announced launch of Two-Character Letter/Letter Comments Consideration Process whereby ICANN will 1) request clarification from governments regarding comments 2) request mitigation measures from Registries to address government confusion concerns and 3) develop criteria for approval of registry confusion mitigation measures for two-character labels.
6 Oct 2015	Email	GAC <sup>9</sup> , Governments, ccTLDs	ICANN org	Announced launch of the Two-Character Letter/Letter Comments Consideration Process.
18 Oct 2015	Presentation – ICANN54 Public Session	GAC	GAC Secretariat	Presented Two-Character Letter/Letter Comments Consideration Process: ICANN will 1) request clarification from governments regarding comments 2) request mitigation measures from Registries to address government confusion concerns and 3) develop criteria for approval of registry confusion mitigation measures for two-character labels.
21 Oct 2015	Communiqué	ICANN Board	GAC	Advised the Board that ICANN should work with GAC Secretariat to resolve technical issues with comment forms and, in the interim, offer alternative methods for submitting comments. Comments should be fully considered regardless of grounds.
18, 19 Nov 2015	Webinar	GAC	ICANN org	2 webinars demonstrating comments form system and answering questions. ICANN GDD staff noted that although comments submitted prior to 6 September would be considered by ICANN even if they are not clarified by 5 December, the Registry Agreement only considers confusion with corresponding country codes.
20 Nov 2015	Email	GAC	ICANN org	Shared link to webinar recording with GAC Secretariat to be shared with the GAC. GAC Secretariat included summary of webinars in email. “Although comments submitted prior to 6 September would be considered by ICANN even if they are not clarified by 5 December, the Registry Agreement only considers ‘confusion with ccTLDs.’”

<sup>9</sup> Emails to the GAC were communicated via the GAC Support team.

DATE	TYPE	TO	FROM	SUMMARY
17 Feb 2016	Email	GAC, Governments, ccTLDs	ICANN org	Announced upcoming window for Registries to submit proposed measures to avoid confusion. Summarized Comments Consideration Process steps that have been completed and communicated next steps.
26 Feb 2016	Email	GAC, Governments, ccTLDs	ICANN org	Announced opening of window for Registries to submit proposed measures to avoid confusion. Summarized Comments Consideration Process steps that have been completed and communicated next steps.
14 Jun 2016	Teleconference	GAC Leadership	ICANN org	Presented summary of government confusion concerns and registry confusion avoidance measures, explained next steps and answered questions.
14 Jun 2016	Email	GAC	ICANN org	E-mailed presentation from teleconference with GAC.
27 Jun 2016	Presentation – ICANN56 Public Session	GAC	GAC Vice-Chair	GAC Vice-Chair explained community consultation process of soliciting inputs from governments and Registries, presented registry-proposed measures to avoid confusion to other GAC members, and communicated next step of ICANN establishing a framework to evaluate mitigation plans and confusion concerns from governments.
28 Jun 2016	Communiqué	ICANN Board	GAC	Advised Board to “urge the relevant Registry or the Registrar to engage with the relevant GAC members when a risk is identified in order to come to an agreement on how to manage it or to have a third-party assessment of the situation if the name is already registered.”
<b>PHASE THREE: CREATION AND PUBLICATION OF FRAMEWORK</b>				
8 Jul 2016	Announcement	--	ICANN org	Published for public comments the <a href="#">Proposed Measures for Letter/Letter Two-Character ASCII Labels to Avoid Confusion with Corresponding Country Codes</a> , which listed measures Registry Operators could adopt to avoid confusion with corresponding country codes and which incorporated the GAC’s advice as issued in the Helsinki Communiqué. As part of the proposal, Registry Operators who adopted the measures would be authorized to release all letter/letter two-character ASCII labels not otherwise

DATE	TYPE	TO	FROM	SUMMARY
				reserved in other sections of the Registry Agreement.
20 Jul 2016	Teleconference	GAC	ICANN Board	Discussion of GAC advice issued in Helsinki Communiqué.
23 Sep 2016	Publication	--	ICANN org	Published Summary and Analysis Report of comments received, which included next steps. "Taking into consideration the feedback provided by the community during the public comment period, ICANN will establish a list of measures Registries must implement in order to release from reservation letter/letter two-character ASCII labels not otherwise reserved pursuant to other sections of the Registry Agreement."
23 Sep 2016	E-mail	GAC	ICANN org	Communicated publication of Summary and Analysis Report.
<b>FINALIZATION OF FRAMEWORK</b>				
26 Oct 2016	Publication: ICANN Board Agenda	--	ICANN Board	Published Board agenda with item of two-character labels.
5 Nov 2016	Public Session: Public Forum	--	ICANN Board	Responded to questions pertaining to two-character label item on Board agenda.
7 Nov 2016	Public Session: GAC with Board	GAC	ICANN Board	Discussed two-character labels.
8 Nov 2016	Public Session: ICANN Board Meeting	--	ICANN Board	Approved a resolution approving the revised <a href="#">Measures to Avoid Confusion</a> , which states, "If adopted, all gTLD Registry Operators who implement these measures would be authorized to release all reserved two-letter second-level domains (except those otherwise reserved pursuant to Specification 5 Section 6)."
12 Dec 2016	Announcement	--	ICANN org	Authorized the release of remaining reserved two-character labels, subject to the Registry Operator implementing approved Measures to Avoid Confusion.
<b>CONTINUED DISCUSSIONS</b>				
15 Mar 2017	Communiqué	ICANN Board	GAC	Advised Board to: <ol style="list-style-type: none"> <li>1. Take into account the serious concerns expressed by some GAC Members as contained in previous GAC Advice</li> </ol>

DATE	TYPE	TO	FROM	SUMMARY
				<ol style="list-style-type: none"> <li>2. Engage with concerned governments by the next ICANN meeting to resolve those concerns.</li> <li>3. Immediately explore measures to find a satisfactory solution of the matter to meet the concerns of these countries before being further aggravated.</li> <li>4. Provide clarification of the decision-making process and of the rationale for the November 2016 resolution, particularly in regard to consideration of the GAC advice, timing and level of support for this resolution.</li> </ol>
17 May 2017	Telephonic	Governments	ICANN org	Explanation of process and rationale leading up to the authorization of release of two-character labels.
26 June 2017	In-person	GAC	ICANN org	Discussion of authorization of two-character labels and compliance process related to instances of misuse of such labels.
29 June 2017	Communiqué	ICANN Board	GAC	<p>“With respect to the 2-Character Country Codes at the Second Level GAC Copenhagen Communiqué Advice (para VI.4), the GAC; a) welcomes and appreciates the decision made by ICANN Board directing the President and CEO of ICANN or his designee(s) to take necessary actions for satisfactory resolution of the concerns raised in that Advice; and b) welcomes the announcement made by the President and CEO of ICANN of his intention to create a task force to resolve the concerns mentioned in the above communiqué. In this regard the GAC proposes that the mandate and working methods of the above mentioned Task Force be determined in consultation with GAC leadership and GAC members, and other interested parties.”</p>
1 Nov 2017	Communiqué	ICANN Board	GAC	<p>“Several GAC members expressed their strong concern that the ICANN CEO’s response to previous GAC statements on this issue have not addressed the specific matters raised in Section 5 of the</p>

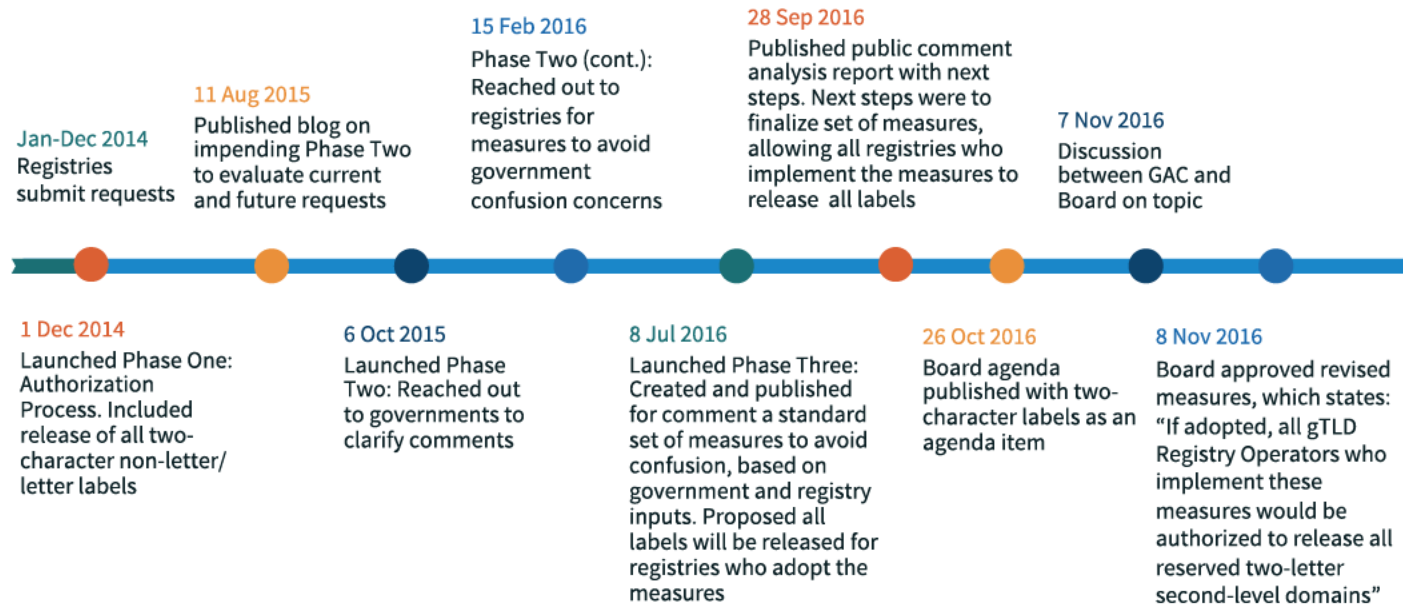


DATE	TYPE	TO	FROM	SUMMARY
				Johannesburg Communiqué. This concern was discussed at the GAC's meeting with the ICANN Board in August 2017. The GAC expects further efforts by ICANN Org to address, by appropriate mechanisms and with priority, concerns relating to this issue, as well as initiatives to improve communications between GAC members and ICANN Org."
10 Mar 2018	In-person	ICANN org	GAC	Discussion of concerns and way to improve communications between GAC members and ICANN org. ICANN org committed to developing webpage that allows GAC members to track registration of two-character domains that correspond with country codes.
15 Mar 2018	Communiqué	ICANN Board	GAC	"Some GAC members note that important concerns regarding the release of 2-Character Country/Territory codes at the 2nd Level, as expressed in previous GAC advice, still remain. The GAC also notes the availability of certain measures to mitigate governments concerns with regard to the release of 2 letter codes at the second level. Some GAC members noted that the current measures have not been used. Some GAC members considered that these measures are insufficient. The GAC intends to follow up on implementation of the proposed initiative at ICANN62, bearing in mind that all previous GAC advice on the matter stands."
26 June 2018	Email/reports	GAC	ICANN org	ICANN org provided two documents to the GAC: <ol style="list-style-type: none"> <li>1. A briefing on the process of enforcing compliance with contractual provisions related to the release of 2-character label SLDs</li> <li>2. A timeline of all communications by ICANN org on the subject throughout this process.</li> </ol>

DATE	TYPE	TO	FROM	SUMMARY
28 June 2018	Communiqué	ICANN Board	GAC	<p>"i. Work, as soon as possible, with those GAC members who have expressed serious concerns with respect to the release of their 2-character country/territory codes at the second level in order to establish an effective mechanism to resolve their concerns in a satisfactory manner, bearing in mind that previous GAC advice on the matter stands.</p> <p>ii. Immediately take necessary steps to prevent further negative consequences for the concerned GAC members arising from the November 2016 Board Resolution."</p>
31 July 2018	Telephonic	GAC	ICANN Board	As part of the GAC Advice consideration process, the Board held its Clarification Question call with the GAC to discuss the Panama Communiqué.
16 Sept ember 2018	Resolution	GAC	ICANN Board	The ICANN Board resolved on the Panama Communiqué. With regard to the two-character items, the Board deferred consideration pending further discussion with the GAC.
21 Octob er 2018	Public Presentation: ICANN63	GAC	ICANN Board	The ICANN Board and GAC discussed in a dedicated session the issue of two-character domains at the second level.

DATE	TYPE	TO	FROM	SUMMARY
25 October 2018	Communiqué	ICANN Board	GAC	<p>The GAC released its Barcelona Communiqué, in which it advised the Board to:</p> <ul style="list-style-type: none"> <li>i. Explain in writing how and why it considers it is implementing GAC advice on the release of country codes at the second level and</li> <li>ii. Explain in writing whether its Resolution of 8 November 2016 and its change from the preexisting release process (indicated in specification 5.2 of the Registry Agreement, sentence 1) to a new curative process (under sentence 2) are compatible with GAC advice on this topic, or whether it constitutes a rejection of GAC advice. The GAC advises the Board to set out its explanation in writing by 31 December 2018. Previous GAC advice on this matter stands.</li> <li>iii. Ensure that its direction to the ICANN CEO to “engage with concerned governments to listen to their views and concerns and further explain the Board’s decision making process” (Board Resolution 2017.06.12.01) is fully implemented including direct engagement with those governments in order to fully address their concerns.</li> </ul>

# Annex 2: Timeline of authorization for Two-Character ASCII Labels



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## Annex 3: Examples of Existing Two-Character Second Level Domains

- <http://aw.org/>
  - Anne Wright Schools is an educational institution.
  - AW corresponds with the country code for Aruba.
  - Domain Creation Date: 24 January 1997
- <http://me.cn>
  - Ai Te Mi Technology is a mobile game and entertainment company.
  - ME corresponds with the country code for Montenegro.
  - Domain Creation Date: 14 January 2014
- <http://es.com>
  - Evans & Sutherland is a computer graphics technology company focusing on digital planetariums and digital cinemas.
  - ES corresponds with the country code for Spain.
  - Domain Creation Date: 25 June 1990
- <http://ma.com>
  - Morris Adjmi Architects is a New York City-based architecture firm.
  - MA corresponds with the country code for Morocco.
  - Domain Creation Date: 4 January 1996
- <http://it.na>
  - Host Information Technology is a company providing business tools and business services in the areas of consumer engagement and social marketing among others.
  - IT corresponds with the country code for Italy.
  - Domain Creation Date: 8 August 2014
- <http://br.de>
  - Bayerischer Rundfunk is a public-service radio and broadcaster.
  - BR corresponds with the country code for Brazil.
  - Domain Updated Date: 13 May 2015
- <http://it.de>
  - Netzwelt is an online technology news provider.
  - IT corresponds with the country code for Italy.
  - Domain Updated Date: 13 June 2014
- <http://it.fr>
  - The IT Crew is an information systems consultancy.
  - IT corresponds with the country code for Italy.
  - Domain Creation Date: 26 December 2014



# Two-Character ASCII Labels Memo on Implementation

Memo on the Implementation of the Procedure for Release of  
Two-Character Labels and Standard Measures to Avoid  
Confusion with Corresponding Country Codes

Global Domains Division  
22 January 2019



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## Executive Summary

This memo provides clarification regarding the development and evolution of ICANN organization's (ICANN org) procedure for the release of two-character labels at the second level (e.g., us.example) and the standard framework of measures for avoiding confusion with corresponding country codes (e.g., example.us). The ICANN org wishes to provide to the GAC a clear and succinct explanation of events that occurred leading up to the November 2016 ICANN Board resolution, placing emphasis on the ways in which the ICANN org engaged with the GAC and the rest of the ICANN community to ensure that the process was developed in a transparent way and with clear references to public record.

Accordingly, this memo<sup>1</sup> provides the GAC information on the Registry Agreement language behind two-characters, the initial phase of development of a procedure for release of two-character labels, the improvements made to the procedure based on input from the GAC and registries, the adoption of the standard measures by the ICANN Board in November 2016, and subsequently, the ICANN org's efforts to explain the procedure and rationale behind it to the GAC and mitigate any additional concerns.

The ICANN org would also like to emphasize that this memo is its own method to communicate to the GAC the operational and community steps that were taken regarding the release of two-character labels. The ICANN Board, as part of its responsibility to the GAC, plans to formally respond to the GAC Advice contained in the Barcelona Communiqué regarding this topic via the established GAC Advice process and currently expects to adopt a scorecard during its meeting scheduled in January 2019.<sup>2</sup>

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<sup>1</sup> This memo is complemented by both a more detailed historical overview ("the Historical Overview"), as well as a response to the memo released at ICANN63 by GAC Vice-Chair Thiago Jardim, entitled "Concerns regarding the release of 2-Character Country Codes at the Second Level under gTLDs." The latter provides additional clarifications to points raised in the memo.

<sup>2</sup> This was also discussed on the Board-GAC Clarification call of 28 November 2018. Listen to the recording here: <https://gac.icann.org/sessions/barcelona-communicu-clarification-call-with-icann-board>.

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## Background: The Registry Agreement<sup>3</sup>

The community and the ICANN org considered and addressed numerous implementation issues with respect to the introduction of new gTLDs, and the ICANN org ultimately drafted and published the New gTLD Applicant Guidebook to provide guidance regarding gTLD applicant requirements and evaluation processes.<sup>4</sup> Module 5 of the Guidebook contained a draft registry agreement for new gTLD registry operators.<sup>5</sup> Specification 5 Section 2 of the Guidebook's draft registry agreement required the initial reservation of two-character labels at the second level based on language from legacy gTLD agreements, provided two paths to release the labels:

1. **Government and ccTLD approval ("Path 1"):** "The reservation of a two-character label string may be released to the extent that Registry Operator reaches agreement with the government and country-code manager." Or,
2. **ICANN approval ("Path 2"):** "The Registry Operator may also propose release of these reservations based on its implementation of measures to avoid confusion with the corresponding country codes, subject to approval by ICANN"

Path 2 above placed within ICANN's remit the ability to establish a method by which registry operators could release two-character labels. This path served as the basis for the implementation of the current procedures and measures, as described in this memo.

## Development of Procedures: RSEP Requests and Phase 1<sup>6</sup>

Beginning in 2014, new gTLD registry operators submitted Registry Service Evaluation Process (RSEP) requests for ICANN approval to release two-character ASCII labels from reservation.<sup>7</sup> At this time, there was no standard set of measures by which registry operators could demonstrate to ICANN they would avoid confusion for users between ccTLDs and corresponding country codes at the second level. For that reason, and within its remit according to Path 2 above, the ICANN org sought to establish an efficient process by which registry operators could deploy a standard set of measures to avoid confusion with corresponding country codes.

In October 2014, the GAC issued its Los Angeles Communiqué, in which it discussed the use of two-character domains at the second-level but noted that it could not offer consensus advice on the topic. The GAC also noted that "in considering these RSEP requests...the GAC considers that the public comment period is an important transparency mechanism, and...asks that relevant governments be alerted by ICANN about these requests as they arise."<sup>8</sup>

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<sup>3</sup> See Historical Overview, pgs. 1-3.

<sup>4</sup> See: <https://archive.icann.org/en/topics/new-qtlds/comments-7-en.htm>.

<sup>5</sup> See: <https://archive.icann.org/en/topics/new-qtlds/agreement-specs-clean-30may11-en.pdf>.

<sup>6</sup> See Historical Overview, pgs. 3-5.

<sup>7</sup> It should be noted that a 2006 RSTEP report found that "the proposed release of two-character Second Level Domains [will have] a material security or stability impact on the internet"

(<https://www.icann.org/en/system/files/files/rstep-gnr-proposal-review-team-report-04dec06-en.pdf>).

<sup>8</sup> See: <https://www.icann.org/en/system/files/correspondence/gac-to-board-15oct14-en.pdf>. Also note that ICANN had already conducted five public comment periods with regard to the RSEP requests: [12 June 2014](#); [8 July 2014](#); [23 July 2014](#); [19 August 2014](#) and [12 September 2014](#).

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In order to address the RSEP requests, the Board directed the ICANN org in October 2014 to create and implement an efficient procedure for the release of two-character labels.<sup>9</sup> The subsequent steps taken by the ICANN org to create and implement an efficient procedure were in response to the Board's October 2014 direction.

Accordingly, in December 2014, the ICANN org announced the Process for Requests for Release of Two-Character ASCII Labels, which kicked off the first phase of a multi-phased process for development of a standard set of measures that could be used by all registry operators.<sup>10</sup> The ICANN org took into account two main principles when establishing this process: compliance with the Registry Agreement, and ICANN's mission to maintain security and stability of the DNS. The initial procedure allowed for the release of non-letter/letter two-character labels and those letter/letter labels that had not previously been subject to the Public Comment Forum process, via RSEP submissions, and did not receive any comments from governments. For all other requests (whether received prior to the start of this process or after), the first phase of the new process was, as follows:

- Registry operator submitted a request to release some or all two-character letter/letter labels.
- ICANN org reviewed and posted the registry operator's request for comment for 30 days.
- ICANN notified the GAC and its members of the request and the comment period.
- ICANN authorized the release for two-character labels that received no comments from governments related to confusion with said governments' corresponding labels.

Following the introduction of this process, the ICANN org received feedback from both the GAC, via the Singapore Communiqué, and registry operators that the process was inefficient and burdensome. Based on this feedback provided by the GAC and registry operators, ICANN org understood both community groups wanted the ICANN org to improve the process of releasing two-letter labels that the org was still developing.

The GAC was informed of this multi-phased approach in August 2015, when Akram Atallah sent a [letter](#) to Thomas Schneider in response to his [letter](#) regarding the process for the release of two-letter codes as second-level domains for new gTLDs. The response detailed a phased approach to implementation of the process for release: Phase 1 was the initial stage of the process, as described above. Phases 2 and 3, described below, were part of the ICANN org's effort to improve the process based on feedback from GAC members and registries and develop the framework of standard measures adopted by the Board in November 2016.

## Development of Procedures: Phase 2<sup>11</sup>

The GAC issued advice in its Singapore Communiqué advising the Board “...to amend the process to establish an effective notification mechanism and extend the comment period to 60 days.”<sup>12</sup> In response to the Singapore Communiqué, the Board directed the ICANN org to make process and system improvements, fully consider the comments from governments, and to extend or re-open comment periods so that each request would undergo 60 days of comment period in total.<sup>13</sup> The ICANN org improved the notification mechanism by instituting a mailing list

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<sup>9</sup> See: <https://features.icann.org/introduction-two-character-domain-names-new-qtld-namespace>.

<sup>10</sup> See: <https://www.icann.org/news/announcement-2014-12-01-en>.

<sup>11</sup> See Historical Overview, pgs. 5-6.

<sup>12</sup> See: <https://www.icann.org/en/system/files/correspondence/gac-to-board-11feb15-en.pdf>.

<sup>13</sup> See: <https://www.icann.org/resources/board-material/resolutions-2015-02-12-en#2.a>.



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for governments solely for new two-character requests and providing tutorials to governments on subscribing to automatic notifications for new two-character requests.

Accordingly, in October 2015, with the goal of fully considering comments received by governments as part of this stage of the process, ICANN org launched a new comment consideration process to evaluate comments received on the release of certain labels.<sup>14</sup> This was done to provide an opportunity for governments to clarify their comments regarding potential user confusion. This process included four basic steps:

- ICANN reached out to all relevant governments to further clarify their comments
- ICANN reached out to registries to respond with mitigation plan *to avoid confusion with corresponding country codes*
- ICANN aggregated governments' comments and registries' mitigation plans to draft the criteria for approval
- ICANN took into consideration the feedback provided by the ICANN community and created finalized criteria for approval

The ICANN org noted in its announcement of this process that *“this process will address all previous requests and comments, and we expect it to result in the development of criteria by which ICANN can evaluate future requests and comments.”* The ICANN org also stated that *“[t]he current framework of the Authorization Process, whereby a registry submits an authorization request and relevant governments may submit comments, is not expected to change. However, we believe the finalized criteria for approval will help everyone with a more clearly defined standard with which ICANN can evaluate future requests.”*<sup>15</sup> The ICANN org acknowledges that it had previously stated that the process for governments to submit comments was not expected to change. However, based on the feedback provided by the registries and the subsequent GAC Advice issued in the Dublin Communiqué<sup>16</sup>, in which the GAC advised that comments be fully considered, while being mindful of capacity concerns and simplifying the process, the ICANN org continued working to establish a standard process that would allow for evaluation of all future requests.

Based on the two instances of GAC advice regarding the comment process, the ICANN org took the opportunity to further improve the process which would alleviate the burden on governments as well as registry operators. Thus, the ICANN org initiated Phase 3 of the development process, as described below.

## Development of Procedures: Phase 3<sup>17</sup>

In July 2016, ICANN published for community feedback a draft framework of standard measures that could be implemented across any gTLD registry to avoid user confusion with two-character labels. The proposed measures meant registries that had implemented the measures no longer needed to submit requests to release two-character labels as the risk of user confusion had been addressed via the comment process described above. The proposed measures additionally urged, based on the Advice in the Helsinki Communiqué, that *“the relevant Registry or the Registrar to engage with the relevant GAC members when a risk is identified in order to*

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<sup>14</sup> See: <https://www.icann.org/resources/pages/two-character-comments-consideration-2015-10-06-en>.

<sup>15</sup> See: <https://www.icann.org/news/blog/resolving-the-release-of-two-character-ascii-labels-with-comments>.

<sup>16</sup> See: <https://www.icann.org/en/system/files/correspondence/gac-to-board-21oct15-en.pdf>.

<sup>17</sup> See Historical Overview, pgs. 6-8.

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*come to an agreement on how to manage it or to have a third-party assessment of the situation if the name is already registered.*<sup>18</sup>

The public comment was clear in asking for community input on the proposed measures, including that of the GAC members, *as they relate to confusion with relevant country codes*. This confusion aspect was *the only* element of the contract under which ICANN could not authorize the release of two-character labels. Additionally, it was clearly stated in the purpose section of the public comment for the proposed measures that “[i]f adopted, all currently reserved two-letter second-level domains would be released for New gTLD registries that implement the measures.”

In November 2016, the mitigation measures were approved by Board resolution at the Hyderabad meeting.<sup>19</sup> The mitigation measures comprised the following:

1. **Exclusive Availability Pre-Registration Period (voluntary):** Registry Operators may implement an exclusive availability pre-registration for governments or ccTLD operators to register domain names corresponding to their country codes, before the names are generally available;
2. **Registration Policy:** Registry Operators must include a provision in the registry’s registration policy requiring registrants to avoid misrepresenting affiliation with a government or ccTLD; and
3. **Post-Registration Complaint Investigation:** Registry Operators must investigate and respond to reports of confusion from government or ccTLD operators.

In December 2016, based on the November 2016 Board resolution, the ICANN org authorized new gTLD registry operators to release reserved two-character labels, subject to the registry operator incorporating the required measures into their Registry Agreements to avoid confusion and subject to all other terms of the Registry Agreement.<sup>20</sup> The approved mitigation measures meant registries no longer needed to submit requests to release two-character labels, nor did the Community (e.g., registrants, governments, etc.) need to review or comment on two-character label registrations. Instead, registries that intended to release two-character labels were required, under their Registry Agreements, to comply with the mitigation measures to avoid confusion. Should the ICANN org become aware that a registry operator was not complying with the required measures, the issue would be referred to ICANN Contractual Compliance for investigation and follow up.

Throughout this process the organization took several proactive steps to inform the GAC of all new developments and to answer questions through webinars, presentations at ICANN meetings, as well as written communication to the GAC via the GAC Support team, as summarized in Annex 1 of the Historical Overview.<sup>21</sup>

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<sup>18</sup> See: <https://www.icann.org/en/system/files/files/proposed-measures-two-char-08jul16-en.pdf>.

<sup>19</sup> See: <https://www.icann.org/resources/board-material/resolutions-2016-11-08-en#2.a>.

<sup>20</sup> See: <https://www.icann.org/en/system/files/files/two-character-ltr-ltr-authorization-release-13dec16-en.pdf>.

<sup>21</sup> For one example, see transcript of the “GAC Meeting on Two Character Codes Implementation” at ICANN55: <https://meetings.icann.org/en/marrakech55/schedule/wed-gac-two-character-codes>.

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## Post-Implementation and Engaging with Concerned Governments<sup>22</sup>

Immediately following the resolution taken by the Board in November 2016, some members of the GAC expressed concerns with the resolution. Indeed, the GAC advised the Board in its Copenhagen Communiqué to engage with concerned governments. Based on this, the Board directed the CEO to engage with concerned governments to listen to their views and concerns and further explain the Board's decision-making process. Since then, the ICANN org has made a concerted effort to explain the evolution of the release process leading to the ultimate adoption of standard measures in November 2016.

For example, the ICANN org conducted telephonic conversations with concerned governments in May 2017 explaining the rationale and development of the framework adopted by the 8 November 2016 Board resolution. Additionally, the ICANN org engaged in discussions with the GAC at the Board-GAC Recommendation Implementation (BGRI) meetings at ICANN61, ICANN62 and ICANN63. The ICANN org also urged registry operators to engage with the relevant GAC members when a risk is identified in order to come to an agreement on how to manage it or to have a third-party assessment of the situation if the name in question was already registered.

Additionally, following ICANN58, the ICANN org provided additional dedicated services to GAC members, including the monitoring of their corresponding two-letter country code domain registrations at the second level in new gTLDs and explanations of possible recourse mechanisms in the event of a reported misuse. GAC members were able to request a manually created report of two-character domain name registrations corresponding to their country code. To date, 24 reports from 20 countries have been requested, and there have been no reports of non-compliance of domain names.

Finally, following discussions with the GAC at ICANN60 in Abu Dhabi, the ICANN org committed to the development of a dedicated webpage for the GAC members to easily track the registration of two-character domain names that correspond with a specific country code and which enables GAC members to submit a request for ICANN compliance action in the event of a perceived misuse. This online tool will have a members-only page on the GAC website that will filter two-letter domain name registrations that correspond with their country codes. This service will aggregate two-character second level domains automatically to a table on the GAC site, which can also be downloaded for offline analysis by GAC members. The service will run daily after all root zone files are updated, aggregating all new two-character second-level domain registrations and displaying to GAC Members.

## Closing

While the above process has been implemented, and all two-character labels have now been authorized for release, which cannot be reversed, the ICANN org acknowledges that this has caused concern to some GAC members, and that to date these concerns have not been alleviated. It is for that reason that the ICANN org has provided this response: in good faith and with the goal of moving this issue to its conclusion. The ICANN org hopes this response has

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<sup>22</sup> See also Historical Overview, pgs. 8-18.

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provided additional insight into the development and implementation process and is useful to the GAC as it considers the issue.



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# Annex 1: ICANN Organization Responses to GAC Briefing Memo “Concerns regarding the release of 2-Character Country Codes at the Second Level under gTLDs”

## Background

On 20 October 2018, the GAC distributed a memo entitled “Agenda Item 6: Concerns regarding the release of 2-Character Country Codes at the Second Level under gTLDs” to serve as a basis for discussion between the GAC and the ICANN Board at ICANN63.<sup>23</sup> This Annex builds on the information provided in the ICANN org memo to the GAC above as well as the historical background provided in the Historical Overview. As with the ICANN org memo above, this Annex is not intended to be a response for or on behalf of the ICANN Board, which will respond via the established GAC Advice process.

**1. Consistent with the rationale of the Panama GAC Advice, as reiterated uninterruptedly since ICANN 57 in Hyderabad, countries’ concerns regarding the release of their country-codes at the second level include:**

- a. *Losing the ability to play a role in a procedure for the release of their 2-character country codes (hereafter “the Authorization Process”) caused by the 8 November 2016 Board resolution;*<sup>24</sup>

**Org Response:** The development of the mitigation measures took over two years with various phases of development that incorporated several instances of GAC Advice and involved several public comment periods in which GAC members participated.<sup>25</sup> The ICANN org also communicated the changes to the process with the GAC on multiple occasions, as noted in Annex 1 of the Historical Overview.<sup>26</sup>

The ICANN org requested input from registry operators for proposed measures to address confusion concerns, resulting in the creation of a standard framework of measures that could be implemented across any gTLD registry. Such a standard framework alleviates the need for governments to comment on every request for release of a two-character label, and it also stipulates that the registry operators “include a provision in the registry’s registration policy requiring registrants to avoid misrepresenting affiliation with a government or ccTLD” and “investigate and respond to reports of confusion from government or ccTLD operators”. Additionally, the measures urged, based on the Advice in the Helsinki Communiqué, that “the relevant Registry or the Registrar to engage with the relevant GAC members when a risk is identified in order to come to an agreement on

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<sup>23</sup> See: <https://gac.icann.org/briefing-materials/icann63-2-characters-briefing-v2-20oct18.pdf>.

<sup>24</sup> See: <https://www.icann.org/resources/board-material/resolutions-2016-11-08-en#2.a>.

<sup>25</sup> See also Historical Overview, pgs. 5-12.

<sup>26</sup> At the “GAC Meeting on Two Character Codes Implementation” at ICANN55, the ICANN org explained the phases of development and answered questions on the process. See transcript of the meeting here: <https://meetings.icann.org/en/marrakech55/schedule/wed-gac-two-character-codes>.



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how to manage it or to have a third-party assessment of the situation if the name is already registered.”<sup>27</sup>

b. *ICANN Board not providing a satisfactory explanation for the “changes created by the 8 November 2016 Resolution”*,

**Org Response:** Prior to the resolution being taken, the ICANN org engaged with the GAC on multiple occasions to discuss the multi-phased development of the procedure and measures, as provided in Annex 1 of the Historical Overview. Additionally, following the resolution, the ICANN org engaged with concerned governments in telephone conversations on 17 May 2017 to explain the process and rationale leading up to the authorization of release of two-character labels. The ICANN org also discussed the authorization of two-character labels and the compliance process related to instances of misuses of such labels with the GAC at ICANN59 in Johannesburg.<sup>28</sup>

c. *ICANN Board not adopting measures to prevent further consequences from the “changes created by the 8 November 2016 Resolution” for the concerned GAC members.*

**Org Response:** The ICANN org developed the process for release of two-character labels bearing in mind issues related to security, stability, and user confusion.<sup>29</sup> It should be noted that although the Board resolved to allow the ICANN org to authorize the release of two-character labels across all new gTLD registry operators in November 2016, two-character domains have existed in many legacy gTLDs and ccTLDs for years without apparent confusion, security or stability issues to the DNS. Examples of existing two-character domains include ME.CN and AW.ORG. ME.CN is a website for a mobile game and entertainment company whose domain name was originally registered in January 2014—‘ME’ corresponds with the country code for Montenegro and .CN is the ccTLD for China. AW.ORG is a website for an educational institution whose domain name was originally registered in January 1997—‘AW’ corresponds with the country code for Aruba. Additional examples can be found in Annex 3 of the Historical Overview.

Additionally, the ICANN org has taken numerous steps to address concerns regarding registration of two-character second-level domains, as described above in the ICANN org memo. For example, the ICANN org committed to developing a webpage that allows GAC members to track registration of two-character domains that correspond with their country codes. Likewise, should the ICANN org become aware that a registry operator is not complying with the required measures, the issue can be referred to ICANN Contractual Compliance for investigation and follow up.<sup>30</sup>

**2. With respect to Board resolution of 8 November 2016, the GAC considers that there have been serious procedural flaws in the decision-making process, including:**

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<sup>27</sup> See: <https://www.icann.org/en/system/files/files/proposed-measures-two-char-08jul16-en.pdf>.

<sup>28</sup> See Historical Overview, pgs. 9-12.

<sup>29</sup> See also the 2006 RSTEP report on two-character domains at the second level:

<https://www.icann.org/en/system/files/files/rstep-gnr-proposal-review-team-report-04dec06-en.pdf>

<sup>30</sup> *Ibid.*, pg. 8.

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- a. *The Board adopting a decision significantly affecting a process that was the subject of a pending GAC Advice before it had considered and responded to that Advice.*

**Org Response:** The ICANN org notes that the Board did not formally resolve on the GAC Helsinki Advice until after the 8 November 2016 resolution at a Special Meeting of the Board on [13 December 2016](#). Steve Crocker noted in a [letter](#) to Thomas Schneider in October 2016 that the Board did not finalize consideration of the Helsinki Advice when initially intended. However, while the Board did not formally consider the above Advice until this time, the ICANN org notes that it was discussed in the Board prior to this date and during deliberations regarding the 8 November 2016 resolution (as noted in the “Whereas” clauses of the 8 November 2016 resolution). Likewise, the Proposed Measures included a direct reference to the Helsinki Advice.<sup>31</sup>

Subsequent to consideration of the Helsinki Advice in December 2016, the ICANN org instituted a new GAC Advice consideration process to ensure that all Advice is considered in a timely fashion and at least four weeks prior to the subsequent ICANN meeting. This new process has been used for every Communiqué starting with the Copenhagen Communiqué.

- b. *The Board adopting a decision significantly affecting a process recommended under GAC Advice, particularly where there were subsequent uncertainties regarding the interpretation of new GAC Advice, without further consultation with the GAC.*

**Org Response:** The ICANN org implemented the process of release of two-characters based on Board direction. Advice from the Los Angeles, Singapore, Dublin and Helsinki Communiqués was fully considered in the development of the mitigation measures.<sup>32</sup> The ICANN org also took steps to ensure that the GAC was aware of each step in the process as it was being implemented, as shown in Annex 1 of the Historical Overview.

### 3. The removal of the “Authorization Process” was inconsistent with GAC Advice.

- 1) *The “Authorization process” for the release of 2-character country codes ensured that:*

- *Governments, unless they indicated otherwise, were notified and could provide comments on requests for the release of their country codes. “For labels that receive objections from relevant governments, the labels will remain reserved.”*

**Org Response:** The ICANN org notes that the GAC has cited a letter from Akram Atallah to the registries Stakeholder Group (RySG) from March 2015.<sup>33</sup> As discussed in the ICANN org memo above and in the Historical Overview, the ICANN org announced a new procedure for release of two-character ASCII labels in December 2014. This was an first phase of the development of a process to authorize release of two-character domains at the second level and was intended to support language in Specification 5, Section 2 of the Registry Agreement regarding Path 2.

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<sup>31</sup> See: <https://www.icann.org/en/system/files/files/proposed-measures-two-char-08jul16-en.pdf>.

<sup>32</sup> See Historical Overview, pgs. 5-12.

<sup>33</sup> See: <https://www.icann.org/en/system/files/correspondence/atallah-to-rysg-23mar15-en.pdf>.

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Based on feedback from GAC members and registry operators after this initial phase, the ICANN org initiated efforts to improve the process beginning in August 2015.<sup>34</sup> The August 2015 improvements included a process for fully considering government comments received at this time (and to allow governments to clarify previous comments), stipulating that comments that do not pertain to user confusion would not be sufficient to block the release of two-character domains at the second level, consistent with Path 2 of Specification 5, Section 2 of the Registry Agreement.<sup>35</sup>

Subsequently, the ICANN org developed a standard framework for release of all two-character labels based on input from the GAC, registries and other community members, as described in the ICANN org memo above and in the Historical Overview.<sup>36</sup>

- 2) *GAC Advice recommended the establishment and retention by ICANN of the “Authorization Process”, i.e. a process where governments had a role to play before the release of their country codes.*
  - *In the Los Angeles Communiqué (15 October 2014), the GAC issued advice to the Board “ask[ing] that relevant governments be alerted by ICANN about these requests [by gTLDs registry operators to use two-character labels at the second level of their TLD] as they arise.”<sup>37</sup>*

**Org Response:** Although there was no consensus advice on this issue, based on the RSEP requests the Board directed the ICANN org to create and implement an efficient procedure for the release of two-character labels, taking into consideration GAC advice, leading to the procedure announced in December 2014.<sup>38</sup>

- *In the Dublin Communiqué (21 October 2015), the GAC advised the Board that “comments submitted by the relevant Governments be fully considered regardless of the grounds for objection”, having “note[d] that the process for considering comments [revised taking into account the Singapore advice] [was] not consistent with [that] GAC advice which recommended that governments’ comments be fully considered.”<sup>39</sup>*

**Org Response:** The ICANN org fully considered comments received from governments in relation to any gTLD for which the comment was submitted, including the public comments submitted by governments throughout the process, from the initial public comments on the RSEP requests to the 2016 public comment for the Proposed Measures for Letter/Letter Two-Character ASCII Labels to Avoid Confusion with Corresponding Country Codes.<sup>40</sup>

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<sup>34</sup> See: <https://www.icann.org/news/blog/resolving-the-release-of-two-character-ascii-labels-with-comments>.

<sup>35</sup> *Ibid.* See “1. ICANN reaches out to all relevant governments to further clarify their comments”: “As ICANN evaluates the responses to our outreach, comments not pertaining to confusion might be directed to recourse mechanisms outside of the Authorization Process, such as the Abuse Point of Contact, which is used when abuse is suspected.”

<sup>36</sup> See Historical Overview, pgs. 5-12.

<sup>37</sup> See: <https://gac.icann.org/content/Migrated/icann51-los-angeles-communication>.

<sup>38</sup> See Historical Overview, pgs. 5-12.

<sup>39</sup> See: <https://gac.icann.org/content/Migrated/icann54-dublin-communication>.

<sup>40</sup> See: <https://www.icann.org/en/system/files/files/summary-comments-government-two-char-08jul16-en.pdf>; <https://www.icann.org/public-comments/proposed-measures-two-char-2016-07-08-en>.



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- *In the Helsinki Communiqué (30 June 2016), the GAC clarified that, with regard the “Authorization Process”, “in the event that no preference has been stated, a lack of response should not be considered consent.”<sup>41</sup>*

**Org Response:** The ICANN org notes that the full text of the Helsinki Consensus Advice was, as follows:

*The GAC has discussed plans proposed by Registry Operators to mitigate the risk of confusion between country codes and 2-letter second level domains under new gTLDs. Some countries and territories have stated they require no notification for the release of their 2 letter codes for use at the second level. The GAC considers that, in the event that no preference has been stated, a lack of response should not be considered consent. Some other countries and territories require that an applicant obtains explicit agreement of the country/territory whose 2- letter code isto be used at the second level.*

*a. The GAC advises the ICANN Board to: i. urge the relevant Registry or the Registrar to engage with the relevant GAC members when a risk is identified in order to come to an agreement on how to manage it or to have a third-party assessment of the situation if the name is already registered.*

The ICANN org developed the process for release of two-characters in consultation with the ICANN community and over several public comment periods in which GAC members participated. Additionally, the ICANN org would like to emphasize that the GAC’s advice was taken into account and was referred to directly in the Proposed Measures.<sup>42</sup>

3) *ICANN developed and implemented this “Authorization Process” because of GAC Advice accepted by the Board.*

**Org Response:** Based on the RSEP requests, the Board directed the ICANN org in October 2014 to create and implement an efficient procedure for the release of two-character labels.<sup>43</sup> The subsequent steps taken by the ICANN org to implement the procedure were done based on Board direction as a result of the RSEP requests and not as a direct result of the GAC Advice.

- *In response to the Los Angeles advice, under Board resolution of 16 October 2014, “the Board authorize[d] the President and CEO, or his designee(s), to develop and implement an efficient procedure for the release of two-character domains currently required to be reserved in the New gTLD Registry Agreement, taking into account the GAC’s advice in the Los Angeles Communiqué.”<sup>44</sup>*
- *In response to the Singapore advice, under Board resolution of 12 February 2015, the Board “accept[ed] the advice of the GAC from the 11 February 2015 GAC Communiqué regarding the release of two-letter codes at the second level in gTLDs. The Board direct[ed] the President and CEO, or his designee(s), to revise the Authorization Process for Release of Two-Character ASCII Labels”.<sup>45</sup>*

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<sup>41</sup> See: <https://gac.icann.org/content/Migrated/icann56-helsinki-communication>.

<sup>42</sup> See Historical Overview, pgs. 8-9. See also: <https://www.icann.org/en/system/files/files/proposed-measures-two-char-08jul16-en.pdf>.

<sup>43</sup> See: <https://features.icann.org/introduction-two-character-domain-names-new-gtld-namespace>.

<sup>44</sup> See: <https://www.icann.org/resources/board-material/resolutions-2014-10-16-en#2.b>.

<sup>45</sup> See: <https://www.icann.org/resources/board-material/resolutions-2015-02-12-en#2.a>.

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- *In response to the Dublin advice, under Board resolution of 3 February 2016, the Board “clarifie[d] that all comments from relevant governments are fully considered under the current process.”<sup>46</sup>*

**Org Response:** The ICANN org refers the GAC to the detailed explanations in the Historical Overview regarding the subsequent actions taken by the ICANN org following the Board resolutions cited here.

4) *Notwithstanding all the above, Board resolution of 8 November 2016 authorized the replacement of the “Authorization Process” by a “blanket authorization” for the release of all country codes.<sup>47</sup>*

- *By virtue of the “blanket authorization”, governments are no longer alerted of requests of release of their country codes, nor do they play a role in the release process anymore, as has been recommended in GAC advice.<sup>48</sup>*

**Org Response:** The ICANN org notes that the 13 December 2016 authorization for the release of letter/letter two-character ASCII labels at the second level is not an automatic authorization for all registries. The authorization dictates mandatory measures registry operators must abide by should they choose to release two-letter domains at the second level that correspond to country codes. These measures require registry operators to address potential confusion with two-character country codes and are subject to full oversight and enforcement of the ICANN Contractual Compliance department.

Additionally, the authorization for release and the mitigation measures were part of a public comment period and their development was communicated to and discussed with the GAC on multiple occasions (as described in Annex 1 of the Historical Overview). GAC members also participated in the public comment periods, and GAC members’ comments were reviewed in the same manner as all public comments at ICANN: a cross-functional team within ICANN reviewed all submissions, summarized them, and then published a report with the analysis.<sup>49</sup>

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<sup>46</sup> See: <https://www.icann.org/resources/board-material/resolutions-2016-02-03-en#2.e>.

<sup>47</sup> See: <https://www.icann.org/resources/board-material/resolutions-2016-11-08-en#2.a>.

<sup>48</sup> See: <https://www.icann.org/en/system/files/files/two-character-ltr-ltr-authorization-release-13dec16-en.pdf>.

<sup>49</sup> See: <https://www.icann.org/en/system/files/files/report-comments-proposed-measures-two-char-ascii-23sep16-en.pdf>.



**REFERENCE MATERIALS – BOARD PAPER NO. 2019.01.27.2d**

**TITLE:** **Adoption of GNSO Consensus Policy relating to Certain Red Cross & Red Crescent Names at the Second Level of the Domain Name System**

**Document/Background Links**

The following attachments are relevant to the Board’s consideration of the GNSO’s recommendations for a Consensus Policy on protections for certain Red Cross and Red Crescent names at the second level of the domain name system:

Attachment A is the GNSO Council Recommendations Report on this issue.

Attachment B is the Input Tracking Checklist regarding GNSO & community input.

Submitted By: Mary Wong, Vice-President for Strategic  
Community Operations, Planning &  
Engagement

Date Noted:

Email: [mary.wong@icann.org](mailto:mary.wong@icann.org)

## Attachment A

### **GNSO Council Recommendations Report to the Board regarding Adoption of the Final Recommendations from the Reconvened Policy Development Process Working Group on Red Cross National Society and International Movement Names**

#### **1. Executive Summary**

This Recommendations Report is being sent to the ICANN Board for the Board's review and action on recommendations developed by the GNSO's Reconvened Policy Development Process (PDP) Working Group regarding appropriate second-level protections for the names of all the Red Cross National Societies and the Red Cross international movement. On August 2018 the GNSO Council [voted](#) unanimously to approve the final recommendations contained in the [Final Report](#) from the Reconvened Working Group. All the final PDP recommendations received Full Consensus support from all the members of the Reconvened Working Group (please see Annex A for a summary of all the approved recommendations).

The GNSO Council had [reconvened](#) the PDP Working Group in accordance with the GNSO's PDP Manual in order to determine whether policy recommendations previously approved by the GNSO Council in November 2013, relating to Red Cross National Society and international movement names, should be modified in light of the exceptional circumstances in this case. These exceptional circumstances, as highlighted in a facilitated discussion that took place in March 2017 between representatives of the GNSO and the Governmental Advisory Committee (GAC) and noted in the GNSO Council resolution reconvening the PDP Working Group, were as follows:

- (1) There are public policy considerations associated with protecting the Red Cross movement's identifiers in the domain name system;
- (2) The GAC's rationale for seeking permanent protection for the terms most closely associated with the Movement and its respective components is grounded in the protections of the designations "Red Cross", "Red Crescent", "Red Lion and Sun", and "Red Crystal" under international treaty law and under multiple national laws;
- (3) The list of names of the Red Cross and Red Crescent National Societies is a finite, limited list of specific names of the National Societies recognized within the international Red Cross movement ([http://www.ifrc.org/Docs/ExcelExport/NS\\_Directory.pdf](http://www.ifrc.org/Docs/ExcelExport/NS_Directory.pdf));
- (4) There are no other legitimate uses for these terms; and
- (5) The GAC had provided clarification following the completion of the previous GNSO PDP, via its March 2014 Singapore Communique, on the finite scope of the specific list of Movement names for which permanent protections were being requested



<https://gacweb.icann.org/download/attachments/28278854/Final%20Commu%20nique%20-%20Singapore%202014.pdf?version=1&modificationDate=1397225538000&api=v2>).

The Reconvened PDP Working Group began meeting in June 2017 and published its [recommendations](#) for public comment in June 2018. The Working Group's recommendations included a finite list of Red Cross National Society and international movement names and permitted variants, developed initially by representatives of the movement and reviewed by the Working Group based on specific criteria agreed on for the finite list of permitted variants. Following its review of all the public comments received to its recommendations, the Working Group completed its [Final Report](#) and submitted it to the GNSO Council on 6 August 2018. At the request of the GNSO's Non-Commercial Stakeholder Group (NCSG), a vote on the recommendations was deferred from the GNSO Council's August meeting to its September meeting. Prior to the September meeting, the Working Group chair and Council liaison met with NCSG Councilors and members to discuss the NCSG's concerns with the PDP recommendations.

The policy recommendations modify those approved previously by the GNSO Council in relation to the specific list of Red Cross National Society and international movement names under consideration. Essentially, the Reconvened PDP Working Group recommended that the full names of the 191 National Red Cross and Red Crescent Societies, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies (as contained in a finite, agreed [accompanying list](#) to the Final Report) are to be withheld from delegation at the second level, with an exception procedure to be put in place for the relevant organization to apply for the string matching its name. The Reconvened PDP Working Group also developed specific criteria to apply to error corrections, additions to and deletions from the finite list. These criteria were also used to develop the agreed list and are based on the recognition of a National Society in accordance with the rules and procedures of the international movement.

If approved by the Board, the policy recommendations will impose obligations on contracted parties. The GNSO Council's unanimous vote in favor of these items exceeds the voting threshold required by Article X, Section 3.9.f of the ICANN Bylaws regarding the formation of consensus policies. Under the ICANN Bylaws, the Council's supermajority support for the PDP recommendations obligates the Board to adopt the recommendations unless, by a vote of more than two-thirds, the Board determines that the policy is not in the best interests of the ICANN community or ICANN.

**2. If a successful GNSO Vote was not reached, a clear statement of all positions held by Council members. Each statement should clearly indicate (i) the reasons**

**underlying each position and (ii) the Constituency(ies) or Stakeholder Group(s) that held that position.**

N/A

**3. An analysis of how the issue(s) would affect each Constituency or Stakeholder Group, including any financial impact on the Constituency or Stakeholder Group.**

Implementation of the policy recommendations, if approved, will involve resources from ICANN's contracted parties for the initial execution of the approved list of names and implementation of any updates thereto. In accordance with the policy recommendations, withholding the agreed list of names and permitted variants from delegation at the second level of the domain name system will mean that only the relevant Red Cross organization can apply to register the domain name in question. No other financial impact on a Stakeholder Group or Constituency is otherwise anticipated.

**4. An analysis of the period of time that would likely be necessary to implement the policy.**

An Implementation Review Team (IRT) had been established to develop operational recommendations for implementing consensus policies concerning the names of certain International Governmental Organizations and International Non-Governmental Organizations (including the Red Cross), approved by the GNSO Council in November 2013 and the ICANN Board in April 2014. The agreed implementation mechanisms for these consensus policies included the development of an exception procedure for the affected organizations and details concerning the notification and communication of updates to the requisite list of organizational names being withheld from delegation. The Reconvened PDP Working Group was aware of the work of the IRT, and the Working Group's expectations were that implementation of the current recommendations will be based in substantial part on the processes developed by the IRT. In addition, the IRT remains in place and is expected to take on the implementation work from the Reconvened PDP as well. It is therefore anticipated that there will not be an undue delay in undertaking the implementation work or its completion.

**5. The advice of any outside advisors relied upon, which should be accompanied by a detailed statement of the advisor's (i) qualifications and relevant experience; and (ii) potential conflicts of interest.**

N/A

**6. The Final Report submitted to the GNSO Council**

The Final Report of the Reconvened PDP Working Group was submitted to the GNSO Council on 8 August 2018 and can be found here in full: <https://gns0.icann.org/sites/default/files/file/field-file-attach/red-cross-protection-policy-amend-process-final-06aug18-en.pdf>. The full, finite list of the agreed Red Cross National Societies and the international movement as well as their permitted variants (if any) can be found here: <https://gns0.icann.org/en/issues/igo-ingo/red-cross-identifiers-proposed-reservation-06aug18-en.pdf>.

**7. A copy of the minutes of the Council deliberation on the policy issue, including all opinions expressed during such deliberation, accompanied by a description of who expressed such opinions.**

The GNSO Council began considering the Final Report at its meeting on 16 August 2018, where the Non-Commercial Stakeholder Group (NCSG) Councilors requested that a vote on the report be deferred. In relation to the Council’s discussion of the NCSG request, please refer to the [transcript](#), [recording](#) and [meeting minutes](#) from the meeting. On 12 September 2018, the Working Group chair and Council liaison met with the NCSG to discuss the NCSG’s concerns and to explain how those concerns were addressed by the Working Group; for details, please refer to the [transcript](#) and [recording](#).

On 27 September 2018, the Council voted unanimously to approve the Final Report: please refer to the Council resolution at <https://gns0.icann.org/en/council/resolutions#20180816-2> as well as the [transcript](#) and [recording](#).

**8. Consultations undertaken**

*External*

The Reconvened PDP Working Group worked closely with representatives of the Red Cross to develop the final agreed list of names and permitted variants. An initial list of all eligible National Society names was provided by the Red Cross representatives and reviewed by the Working Group, which also derived specific criteria relating to the scope of permitted variants from that initial list.

*Internal*

Staff from ICANN’s Global Domains Division leading the IRT that had been formed to implement previously-approved consensus policies relating to specific Red Cross identifiers (i.e. “Red Cross”, “Red Crescent”, “Red Crystal” and “Red Lion & Sun”) attended the meetings of the Reconvened PDP Working Group to ensure that the group’s recommendations would be operationally feasible and in line with the IRT’s recommendations for the previously-concluded PDP. The Working Group also reviewed that PDP’s recommendations and deliberations that were relevant to the

group’s task, as well as briefings and other documents that were used in the March 2017 facilitated discussion that led to the reconvening of the PDP.

### **9. Summary and analysis of Public Comment Forum to provide input on the Reconvened PDP Working Group recommendations, as adopted by the GNSO Council prior to ICANN Board consideration.**

In accordance with the ICANN Bylaws, public notice as well as a “reasonable opportunity” for the public to comment “any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges” must be provided prior to Board consideration of the recommendations. Where the proposed policy affects public policy concerns, the opinion of the GAC must be solicited and any GAC input that is provided in a timely fashion must be duly taken into account by the ICANN Board.

### **10. Impact/implementation considerations from ICANN staff**

Given the existence of the IRT from the previously-concluded PDP and the expectation that implementation of the agreed, finite list of Red Cross names as well as the required exception procedure will follow the processes already developed by that IRT, ICANN staff anticipates that there will not be undue delay in finalizing implementation details or the time required for operationalization on the part of ICANN’s contracted parties. As representatives of the Red Cross as well as the GAC were involved in the Reconvened PDP deliberations, ICANN staff also does not anticipate major difficulties with proceeding with implementation planning or in dealing with any requested updates to the list of names and variants.

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### **Annex: Final Recommendations from the Reconvened PDP Working Group (extracted from Section 1.2 of the Final Report)**

Recommendation #1: The Reconvened WG confirms the GNSO Council’s proposed amendment as outlined in its resolution of 3 May 2017, whereby an agreed finite list of the full names of the 191 National Red Cross and Red Crescent Societies, the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies are to be placed into Specification 5 of the Base gTLD Registry Agreement.

Recommendation #2: The Reconvened WG confirms the GNSO Council’s proposed amendment as outlined in its resolution of 3 May 2017 whereby an exception

procedure is to be put in place for cases where the relevant Red Cross or Red Crescent Organization wishes to apply for its protected string(s) at the second level.

Recommendation #3: The Reconvened WG recommends that future error corrections, additions to and deletions of any entries in the finite list of reserved names and their agreed variants be made only in accordance with the criteria developed by the WG and listed in Recommendations #4-6 below.

Recommendation #4: The Reconvened WG recommends that future changes (if any) to the finite list of National Red Cross or Red Crescent Societies created as a result of this policy amendment process be made only in accordance with the variant criteria as defined by this WG. These criteria were also applied to the creation of the current finite list included as an attachment to this report.

Recommendation #5: The Reconvened WG recommends that any and all future changes to the finite list be made only upon notification to ICANN Organization and the confirmation, by designated representatives of the International Red Cross and Red Crescent Movement (Movement), to the effect that: (a) the proposed changes have been communicated to the GAC as well as the GNSO Council; (b) any new National Societies' names to be added to the list have been recognized in accordance with all the applicable rules and procedures of the Movement; and (c) any proposed deletions from the list would be based on the cessation of operations of that National Society or its removal from the Movement in accordance with all applicable rules and procedures of the Red Cross Movement.

Recommendation #6: The Reconvened WG recommends that a proposed correction of any errors (e.g. in translation or spelling) in the finite list of reserved names be made only through the submission of a formal request to ICANN Organization by official and designated representatives of the International Red Cross and Red Crescent and/or Registry Operators describing in detail the nature of the error and the specific correction to be made in the form of a direct replacement to the erroneous entry. The ICANN Organization shall have the right to refer the request to the GAC or otherwise conduct an investigation into the accuracy of the correction sought.

**ATTACHMENT B**  
**Input Tracking Checklist – GNSO PDP Recommendations**

The purpose of this checklist is to assist the Board in assuring that all parties with an interest have had an opportunity to participate and weigh in on the recommendations arising out of the GNSO PDP, and to provide a summary of how those inputs were considered. This checklist should be included with the Board paper transmitting the policy recommendations to the Board for decision.

**ISSUE: Consensus Policy for the Protection of Certain Red Cross & Red Crescent Names at the Second Level of the Domain Name System**

**DATE OF GNSO COUNCIL APPROVAL: 27 September 2018**

**Public Comment<sup>1</sup>**

Identify all documents submitted for public comment as part of the consideration of this issue and the dates of the public comment forums. Also identify the total number of commenters. Also note any open mic/forum sessions on the topic. Include link to the summary and analysis of public comments.<sup>2</sup> In the “outreach efforts” column, please identify the actions taken to publicize the comment period or meeting to encourage participation.

<b>Comment Period Dates</b>	<b>Dates opened / closed</b>	<b>Number of commenters</b>	<b>Outreach Efforts</b>
Public Comment Forum for Initial Report	21 June 2018	3	Broadly circulated, including announcement on ICANN website
Public Comment Forum for final recommendations subject to Board consideration	21 November 2018	3	Broadly circulated, including announcement on ICANN website

**Tracking of GNSO or Stakeholder Inputs**

<sup>1</sup> This checklist is not intended as a replacement for full public comment summaries. Rather, this checklist is a supplement to the comment summarization work, to identify in a quick manner that key inputs were received and taken into consideration prior to the issue reaching the Board.

<sup>2</sup> Required public comment sessions upon presentation of the GNSO Recommendations to the Board will be tracked separately.

For each GNSO Stakeholder Group, Constituency or Advisory Committee identified below, identify if any input was received, and provide a brief summary of how those inputs were considered. The brief summary should include whether the stakeholder group at issue voiced any opposition to the items under consideration and whether any changes were recommended to the recommendations. Note: In some cases, certain Stakeholder Groups may make comments through component constituencies instead of through a collective statement of the Stakeholder Group. Only comments that are provided on behalf of one of the identified SGs or Constituencies should be recorded in this section.

<b>GNSO Stakeholder Group/Constituency</b>	<b>Requested<sup>3</sup></b>	<b>Received</b>	<b>Summary of Action on Input</b>
Registrars Stakeholder Group	Yes	Yes	Joint comment submitted with the Registries Stakeholder Group on the reconvened PDP Working Group's Initial Report
Registries Stakeholder Group	Yes	Yes	Input provided to the original PDP Working Group and original PDP recommendations (Initial and Draft Final Reports); joint comment submitted with the Registrars Stakeholder Group on the reconvened PDP Working Group's Initial Report
Commercial Stakeholder Group	Yes	No (individual CSG constituencies provided input)	See below in relation to individual CSG Constituencies.
Business Constituency	Yes	Yes	Input provided on the Initial and Draft Final Reports for the original PDP; input also provided on both the Initial Report and the final recommendations from the reconvened PDP

<sup>3</sup> Note that the PDP Manual requires early solicitation of input from all ICANN Supporting Organizations and Advisory Committees. In this case, the requests were made in 2013 in respect of the original PDP, with the input received considered by the original Working Group.

IPC Constituency	Yes	Yes	Input provided on the Initial Report from the original PDP
ISP Constituency	Yes	Yes	Input provided in response to early solicitation of feedback from the original PDP Working Group and on the original PDP Initial Report
Non-Commercial Stakeholder Group	Yes	Yes	Input provided in response to early solicitation of feedback from the original PDP Working Group; input also provided on the reconvened PDP Initial Report and the final recommendations
Non-Commercial Users Constituency	Yes	No (subsumed under NCSG input)	Input provided via NCSG
Not for Profit Operational Concerns Constituency	Yes	No (subsumed under NCSG input)	Input provided via NCSG

<b>SO/AC Group</b>	<b>Requested</b>	<b>Received</b>	<b>Summary of Action on Input</b>
ccNSO	Yes	No	
ASO	Yes	No	
At-Large Advisory Committee	Yes	Yes	Input provided via early solicitation of feedback on the original PDP; input also provided on both the Initial Report and the final recommendations from the reconvened PDP Working Group
Governmental Advisory Committee <sup>4</sup>	Yes	Yes	Advice in several GAC Communiques (e.g. March, June & October 2012; April, July & November 2013; March, June & October 2014; February 2015; November 2016; March, June & November 2017; March & October 2018)
RSSAC	Yes	No	
SSAC	Yes	No	

<sup>4</sup> Formal GAC advice to the Board will be tracked through the GAC registry process.



## Specific Outreach and Emerging Interests

If the working group or the GNSO Council performed any specific outreach to groups not identified above for advice or assistance on the issues under discussion, please identify the groups/entities consulted, the inputs received and how they were considered. In addition, if a definable group of collective interests emerge during a PDP and is not listed above, those collective inputs should be identified below. In the “outreach efforts” column, please identify the actions taken to identify key interested parties to encourage their participation. Also note if there are any groups identified as key that did not respond to outreach efforts.

<b>Entity/Group</b>	<b>Outreach efforts</b>	<b>How inputs were considered</b>
Red Cross	Participated in the reconvened Working Group	In addition to participation as a full member of the Working Group, the Red Cross representatives also worked with ICANN staff to develop the final, specific list of names and permitted variants that was approved by the Working Group and the GNSO Council