

3 FEBRUARY 2016 BOARD MEETING

Reference Materials



TABLE OF CONTENTS – REFERENCE MATERIALS

Consent Agenda

RSSAC Co-Chair Appointments.....p. 2

Main Agenda

Consideration of Independent Review Panel’s Final Declaration in *Merck kGaA v. ICANN*.....p. 3-29

Reconsideration Requests 15-19 and 15-20.....p. 30-69

Consideration of Expert Determination Re: Objection to Application for .HOSPITAL.....p. 70-121

Ombudsman Report Regarding Complaint by Hu Yi Global Information Resources
(applicant for .招聘 (“recruitment” in Chinese)).....p. 122-127

GAC Advice: Dublin Communiqué (October 2015).....p. 128-133

Board Governance Committee Recommendation Regarding Implementation of Public Interest
Commitments for .DOCTOR Registry Agreement.....p. 134-136

Establishing a Set of KPIs for Board Performance and Improvement Efforts
(ATRT2 Rec. 1, 2 & 3).....p. 137-143

ICANN | RSSAC

Root Server System Advisory Committee

18 December 2015

To: ICANN Board of Directors
From: RSSAC Co-Chairs
Via: RSSAC Liaison to the ICANN Board of Directors

The purpose of this letter is to notify the Board of Directors of changes to the RSSAC leadership and, in particular, to request action with respect to the appointment of the co-chairs of RSSAC.

As you know, the RSSAC completed a restructure process in 2014. Lars-Johan Liman (Netnod, I-Root Server Operator) and Jun Murai (WIDE Project, M-Root Server Operator) served as the co-chairs after this restructure. Tripti Sinha (University of Maryland, D-Root Server Operator) was elected to a two-year term as co-chair in December 2014.

On 3 December 2015, the RSSAC conducted an election for one co-chair position and elected Brad Verd (Verisign, A/J-Root Server Operator) to a two-year term as co-chair. Tripti Sinha will continue to serve as co-chair for the second year of a two-year term.

According to Article XI, Section 2, Subsection 3B of the ICANN Bylaws, the ICANN Board of Directors shall appoint the co-chairs and the members of the RSSAC. Thus, the RSSAC recommends the Board of Directors appoint Brad and Tripti as co-chairs of RSSAC for 2016. Biographical information for Brad and Tripti is attached for your reference.

The RSSAC welcomes comments from the Board of Directors concerning this request.

Lars-Johan Liman and Tripti Sinha
Co-Chairs, Root Server Advisory Committee

REFERENCE MATERIALS – BOARD SUBMISSION NO. 2016.02.03.2a

TITLE: **Consideration of Independent Review Panel’s Final Declaration in *Merck kGaA v. ICANN***

Summary Background:

On 11 December 2015, the Independent Review Process (IRP) Panel (Panel) issued its Final Declaration in the IRP filed by Merck kGaA (Merck). Merck’s IRP Request arose out of its legal rights objections (LROs) to new gTLD applications submitted by its former affiliate for strings incorporating the “Merck” mark. Merck’s LROs were overruled (Expert Determinations). Merck filed Reconsideration Request 14-9 challenging the Expert Determinations. The Board Governance Committee (BGC) denied Reconsideration Request 14-9, finding that Merck had not stated proper grounds for reconsideration and found that Request 14-9 failed to demonstrate that the expert panel had acted in contravention of established policy or procedure. Merck’s IRP Request challenged the denial of Reconsideration Request 14-9 and, among other things, also argued that the Board should have taken further action with respect to the Expert Determinations. As explained by the Panel, “Merck effectively wanted the BGC to overturn the Sole Panel Expert’s decisions and have the process re-run (which is what it, in substance, wants from this Panel).” (*See* Final Declaration at ¶ 46, Attachment A hereto.)

In a unanimous decision, the Panel determined that: “Merck has not succeeded in this Independent Review Process. ICANN is the prevailing party. As per paragraph 69, Merck must pay ICANN costs in the amount of USD \$48,588.54.” (*Id.* at Section V, ¶ 1.)

Using the applicable standard of review, the Panel found that: (1) ICANN is the prevailing party in the *Merck kGaA v. ICANN* IRP; (2) the Board acted without conflict of interest in taking its decision; (3) the Board exercised due diligence and care in having a reasonable amount of facts in front of them; (4) the Board exercised independent judgment in taking the decision, believed to be in the best interests of the company; and

(5) the Board’s actions or inactions did not, in any way, violate the Articles of Incorporation (Articles), Bylaws, or Applicant Guidebook (Guidebook). (*See id.* at ¶¶ 41-68.)

More specifically, the Panel found that the standard of review for an IRP is specifically prescribed in Article IV, Section 3.4 of the Bylaws, and “the Panel may not substitute its own view of the merits of the underlying dispute.” (*Id.* at ¶¶ 21-22.) The Panel further found that the reconsideration process is “of limited scope” as set forth in Article IV, Section 2.2 of the Bylaws, and “[n]one of th[e] three bases for the Request for Reconsideration process requires or even permits this Panel to provide for a substitute process for exploring a different conclusion on the merits.” (*Id.* at ¶ 47.) The Panel also found that: “this Panel does not, because of the precise and limited jurisdiction we have, have the power to second guess [the BGC’s determination] that the Sole Panel Expert [in the legal rights objection proceedings] did not apply the wrong standards.” (*Id.* at ¶ 49.) The Panel was also clear that “a referral or appeal process for LRO decisions...was not included in the [Guidebook] and it is not open to this Panel to create it.” (*Id.* at ¶ 60.) In summary, the Panel explained that “Merck’s complaints are, in short, not focused on the applicable test by which this Panel is to review Board action, but rather are focused on the correctness of the conclusion of the Sole Panel Expert[, which] is not a basis for action by this Panel... .” (*Id.* at ¶ 50.)

Merck also claimed that ICANN discriminated against Merck through the Board’s (and the BGC’s) acceptance of the Expert Determinations because the “*Board has provided the possibility for third-party review of some prima facie erroneous expert determinations while denying the same to other, similarly situated parties, including the Claimant.*” (*Id.* at ¶ 53(emphasis in original).) In response to this disparate treatment claim, the Panel found that:

As to the claim of discrimination, this Panel finds that it was within the discretion of the BGC and Board...to conclude that the Sole Expert had applied the correct legal standard to the correctly found set of facts. Of course, in different cases, the BGC and Board are entitled to pursue different options depending upon the nature of the cases at issue. It is insufficient to ground an argument of discrimination simply to note that on

different occasions the Board has pursued different options among those available to it. [¶] In conclusion, Merck was not discriminated against.

(*Id.* at ¶ 61.)

As required, the Board considered the Final Declaration and, for the reasons set forth in the Resolution and Rationale, accepted the Final Declaration.

Document/Background Links

The following attachment is relevant to the Board’s consideration of the Panel’s Final Declaration in the *Merck* IRP:

- Attachment A is the Panel’s [Final Declaration](#), issued on 11 December 2015.

Other Relevant Materials

The documents submitted during the course of the Merck IRP are available at:

<https://www.icann.org/resources/pages/merck-v-icann-2014-07-22-en>.

Reconsideration Request 14-9 and the BGC’s Determination on Reconsideration Request 14-9 are available at: <https://www.icann.org/resources/pages/14-9-2014-03-14-en>.

Submitted by: Amy A. Stathos, Deputy General Counsel

Date Noted: 18 January 2016

Email: amy.stathos@icann.org

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

INDEPENDENT REVIEW PROCESS

Case No. 01-14-0000-9604

MERCK KGaA
(Claimant)

-v-

Internet Corporation for Assigned Names and Numbers
(Respondent)

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

Section I – Procedural History

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

Merck KGaA V. ICANN - Case 01-14-0000-9604

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

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

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

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

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

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

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

For and on behalf of the Panel.

Klaus Reichert SC

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

Dear Counsel,

The Panel has considered the submissions received.

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

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

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

Klaus Reichert

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

Dear Counsel,

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

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

Klaus Reichert

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

Dear Parties,

Thank you both for your letters on costs.

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

Klaus Reichert

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

Section II – The Panel's Authority

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

Requests for such independent review shall be referred to an Independent Review Process Panel ("IRP Panel"), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:

- a did the Board act without conflict of interest in taking its decision?;*
 - b did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
 - c did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*
17. The analysis which the Panel is mandated to undertake is one of comparison. More particularly, a contested action¹ of the Board is compared to the Articles of Incorporation and Bylaws in order to ascertain whether there is consistency. The analysis required for a comparison exercise requires careful assessment of the action itself, rather than its characterization by either the complainant or ICANN. The Panel, of course, does take careful note of the characterizations that are advanced by the Claimant and ICANN.
18. As regards the substantive object of the comparison exercise, namely, whether there was consistency as between the action and the Articles of Incorporation and Bylaws, the parameters of the evaluation for consistency are informed by the final part of Article IV, Section 3.4, which is explicit

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

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

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

Section III – Analysis

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

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

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

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

25. The Panel will first describe, based on its appreciation of the materials put before it, the background leading up to the initiation of this Independent Review Process.

26. Merck is a long-established pharmaceutical and chemical business in Germany. In 1917 its then American business (now Merck & Co., Inc. (“MSD”)) was separated from it by the Trading with the Enemy Act arising from the entry of the United States as a belligerent into World War I. The co-existence of Merck and MSD has been the subject of a number of formal agreements over the years, and also a number of disputes.

27. Merck and MSD each filed applications with ICANN for new gTLDs incorporating the word “Merck”. As a result, Merck and MSD then filed a number of Legal Rights Objections (“LROs”) against each other with the WIPO Arbitration and Mediation Centre in accordance with the New gTLD Dispute Resolution Procedure. At the heart of Merck’s complaint was the point that MSD apparently was not intending to limit, through

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

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

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

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

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

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

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

For the aforementioned reasons the Panel rejects the Objection.

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

The Panel addresses each of them in turn:

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

[Sole Panel Expert analysis follows]

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

[Sole Panel Expert analysis follows]

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

[Sole Panel Expert analysis follows]

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

[Sole Panel Expert analysis follows]

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

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

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

[Sole Panel Expert analysis follows]

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

[Sole Panel Expert analysis follows]

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

[Sole Panel Expert analysis follows]

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

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

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

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

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

.....

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

58. A professor of law in Paris was commissioned to provide advice, and this was incorporated into the decision of the NGPC.
59. The Panel’s attention is also drawn to the Recommendation in relation to the Reconsideration Request 13-9 of October 10, 2013, made by the BGC. At the end of the Recommendation, the following is stated:

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

A proposed review mechanism is outlined thereafter.

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

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

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

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

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

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

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

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

Section IV – Costs

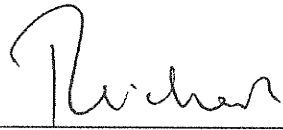
69. As ICANN is the prevailing party, Merck is held responsible for costs. Therefore the administrative fees and expenses of the International Centre for Dispute Resolution (ICDR) totaling US\$3,350.00 shall be borne by entirely by Merck KGaA, and the compensation and expenses of the Panelists totaling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

Section V – Declaration

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

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

December 10, 2015
Date



Klaus Reichert, Panelist/ Chair

Date

A. Howard Matz, Panelist

Date

Graeme Dinwoodie, Panelist

Section V – Declaration

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

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

Date

Klaus Reichert, Panelist/ Chair

December 10, 2015
Date

A. Howard Matz
A. Howard Matz, Panelist

Date

Graeme Dinwoodie, Panelist

Section V – Declaration

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

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

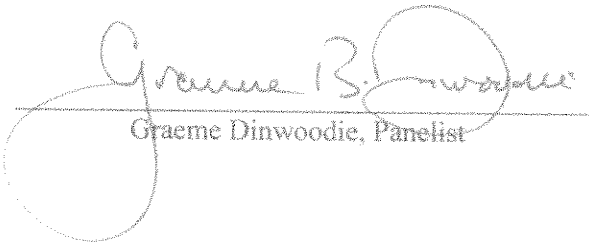
Date

Klaus Reichert, Panelist/ Chair

Date

A. Howard Matz, Panelist

December 10, 2015
Date



Graeme Dinwoodie, Panelist

REFERENCE MATERIALS – BOARD SUBMISSION 2016.02.03.2b

Title: **Reconsideration Requests 15-19 and 15-20**

Summary Background

While the full background can be found in the documentation attached to these Reference Materials, Reconsideration Requests 15-19 and 15-20 seek reconsideration of ICANN Board Resolutions 2015.09.28.04 (renewal of .CAT registry agreement), 2015.09.28.05 (renewal of .TRAVEL registry agreement), and 2015.09.28.06 (renewal of .PRO registry agreement).

The Board Governance Committee (BGC) considered Reconsideration Requests 15-19 and 15-20, concluded that the Requesters have not stated proper grounds for reconsideration, and recommended that the Board deny Reconsideration Requests 15-19 and 15-20. The Board agrees.

Document/Background Links

The following attachments are relevant to the BGC’s recommendation regarding Reconsideration Requests 15-19 and 15-20:

- Exhibit A is [Reconsideration Request 15-19](#), submitted on 13 October 2015.
- Exhibit B is [Reconsideration Request 15-20](#), submitted on 13 October 2015.
- Exhibit C is the [BGC’s Recommendation on Reconsideration Requests 15-19 and 15-20](#), issued on 13 January 2016.

Other Relevant Materials

Board Resolutions 2015.09.28.04 (renewal of .CAT registry agreement), 2015.09.28.05 (renewal of .TRAVEL registry agreement), and 2015.09.28.06 (renewal of .PRO registry agreement), available at: <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en>.

“Preliminary Issue Report on a Policy Development Process to Review All Rights Protection Mechanisms in All Generic Top-Level Domains” (Preliminary Issue Report), issued on 9 October 2015, available at: <http://gnso.icann.org/en/issues/new-gtlds/rpm-prelim-issue-09oct15-en.pdf>.

Submitted by: Amy A. Stathos, Deputy General Counsel
Date Noted: 18 January 2016
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.

1. Requester Information

Name: Steve DelBianco; Vice Chair for Policy Coordination, on behalf of the ICANN Business Constituency

Email: Contact Information Redacted

Name: Rafik Dammak; Chair, on behalf of the ICANN Noncommercial Stakeholders Group (NCSG)

E-mail: 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.)

The Business Constituency and the Noncommercial Stakeholders Group seek reconsideration of Resolutions 2015.09.28.04 (Renewal of .Cat Registry Agreement), 2015.09.28.05 (Renewal of .Travel Registry Agreement) and 2015.09.28.06 (Renewal of .Pro Registry Agreement). These Resolutions were approved as part of the Consent Agenda at the Regular Meeting of the ICANN Board held on September 28, 2015.

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.)

September 28, 2015

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.)

September 28, 2015, upon publication of the Approved Board Resolutions.

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

The Business Constituency (BC) is a member of ICANN's Commercial Stakeholder Group (CSG) and participates in the activities of the Generic Names Supporting Organization (GNSO) and its policymaking Council. The mission of the Business Constituency is to ensure that "ICANN policy positions derive from broad stakeholder participation in a common forum for suppliers and users", and, more generally, to assure that ICANN policies, including binding Consensus Policies, are developed through the bottom-up consensus-driven mechanism of the multistakeholder model (MSM).

The Noncommercial Stakeholders Group (NCSG) is the home of civil society and individual noncommercial users within ICANN. With two constituent components, the NCSG has in excess of 500 members from over 100 countries and is an active participant in the GNSO and its policymaking Council.

As stated in the BC [comment](#) on the “Proposed Renewal of .TRAVEL Sponsored TLD Registry Agreement”, and restated in regard to the renewal registry Agreements for [.Cat](#) and [.Pro](#):

“Concern About Top Down, Staff--Initiated Process Inconsistent with ICANN’s Bylaws

We wish to make clear at the outset that the BC’s concern is not in regard to the adoption of new gTLD rights protection mechanisms (RPMs) for legacy gTLDs. The BC has been a strong advocate for these RPMs as applied to new gTLD registries, and would support the GNSO taking up the question of and initiating a PDP regarding whether they should become consensus policies applicable to all legacy gTLDs.”

While the NCSG shares the BC’s desire to initiate a PDP on this matter, the NCSG does have concerns about the appropriateness and desirability of applying the new gTLD rights protection mechanisms (RPMs) to legacy gTLDs.

Our joint concern, though, is that a unilateral decision by ICANN contractual staff within the GDD to take the new gTLD registry agreement as the starting point for renewal RAs for legacy gTLDs has the effect of transforming the PDDRP and the URS into de facto Consensus Policies without following the procedures laid out in ICANN’s Bylaws for their creation. To be clear, we take no objection to a registry voluntarily agreeing to adopt RPMs in their contractual negotiations with ICANN.

The fact that these RPMs are present in all three proposed renewal RAs referenced in this letter reinforces that conclusion. While consistency of registry agreements is a worthwhile goal, it should not trump consistency of action in accord with ICANN’s Bylaws. ICANN’s current Consensus Policies are listed at <http://www.icann.org/en/resources/registrars/consensus-policies>. While the UDRP is a listed Consensus Policy, the PDDRP and the URS are not. We therefore question the authority for ICANN staff to seek to impose PDDRP and URS on legacy gTLDs through the contract renewal process.

As the NCSG public comment states “requiring legacy gTLD’s to base their renewal terms on multiple policies developed for the new gTLD programme is an explicit policy decision reserved for the community through the GNSO PDP process, not for staff to create under the guise of contractual negotiations”.

The BC comment letters also noted relevant provisions of the Final Report on Policy and Implementation (P&I) (<https://community.icann.org/display/PIWG/Final+Report+Redline+Version>) and, in particular, the following Principle: “Policy development processes must function in a bottom--up manner. **The process must not be conducted in a top--down manner and then imposed on stakeholders**, although an exception may be made in emergency cases such as where there are risks to security and stability, as defined in ICANN’s Security, Stability and Resiliency framework.”

(Emphasis added). No such emergency existed in regard to the renewal of these three legacy Registry Agreements.

The BC comment letters also cited another part of the P&I Report, noting that “the “Principles / Requirements that apply primarily to Policy” (p. 14) states as its first Standard, “As outlined in the ICANN Bylaws, the GNSO is responsible for developing and recommending to the ICANN Board substantive policies relating to generic top--level domains. **As such, gTLD policy development should not take place outside of the GNSO.**” (Emphasis added) In the matter we are addressing in this letter, policy development has arguably taken place outside of the GNSO.”

Finally, as also noted in BC comment letters, “Another troubling aspect of this staff decision is that it has been undertaken in the absence of a full evaluation of the issues related to the new gTLD RPMs... We find it troubling that ICANN contractual staff would seek to insert specific new gTLD program RPMs in legacy gTLD renewal RAs when ICANN policy staff have yet to define the issues they implicate, and the GNSO has yet to receive the Issues Report that may be the basis of one or more PDPs; including one addressing whether they should become Consensus Policies applicable to all gTLDs.”

Indeed, ICANN staff has just issued, on October 9th, the “Preliminary Issue Report on a GNSO Policy Development Process to Review All Rights Protection Mechanisms in All gTLDs”. This report will be considered by the GNSO Council and the ICANN community at the upcoming ICANN 54 meeting in Dublin, Ireland and, following a public comment period scheduled to end on November 30th, will result in a Final Staff report being issued on or about December 10th.

That Final Report will probably provide the foundation for the initiation of one or more Policy Development Processes (PDP) addressing whether the new gTLD RPMs should be adjusted and, more relevant to this reconsideration request, whether they should be applied to legacy gTLDs and/or integrated with the UDRP. Indeed, the Preliminary Issue Report notes (at pp.22-23):

These [potential] issues would be specific topics to be addressed as part of their Charter by the PDP Working Group, in addition to the more general, overarching issues such as:

- **Whether any of the new RPMs (such as the URS) should, like the UDRP, be Consensus Policies applicable to all gTLDs, and the transitional issues that would have to be dealt with as a consequence.**

This passage of the Preliminary Issue Report constitutes further evidence, provided directly by ICANN policy staff, that the question of whether the URS should become a Consensus Policy applicable to all gTLDs is a policy matter, and that it is wholly inappropriate for GDD staff to seek imposition of it on legacy gTLDs as the starting point for renewal agreement

negotiations because doing so creates de facto consensus policy via contract. It also identifies the presence of “transitional issues” that have in no way been considered in pressing for the inclusion of the URS in the three renewal agreements that are the focus of this reconsideration request.

Unless and until the URS is adopted as a Consensus Policy for all gTLDs, ICANN staff should not be initiating the registry agreement renewal process with any legacy gTLD by suggesting that new gTLD RPMs be the starting point for contract negotiation as, given the inequality in bargaining power, this can have the effect of making the URS a de facto Consensus Policy notwithstanding the fact that the regular order PDP outlined in and required by the Bylaws has not been followed.

Global Domain Division (GDD) staff did that in regard to all three of these Renewal Agreements – as we noted in our comment letters:

“The overview for each of these proposed registry renewal agreements contains a “Section I: Description, Explanation, and Purpose” which contains the following statement:

With a view to increase the consistency of registry agreements across all gTLDs, ICANN has proposed that the renewal agreement be based on the approved new gTLD Registry Agreement as updated on 9 January 2014.

We interpret the words “ICANN has proposed” to mean that ICANN staff members within the Global Domains Division (GDD) have proposed this approach.”

In conclusion, as participants in the CSG, GNSO, and the bottom-up multistakeholder process the BC, the NCSG, and the rights of their constituent members are materially and adversely affected whenever ICANN staff seek to impose de facto Consensus Policy in a top-down manner that is inconsistent with the Bylaws, and that fails to take adequate consideration of public comment and relevant facts and considerations in reaching its decisions – especially where the Board subsequently endorses such action by approving the underlying contractual agreement containing the staff-imposed top-down de facto Consensus Policy.

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

This consideration was also addressed in our comment letters, as follows:

“Impact on the Community

The staff decision is also contrary to the expectations of many members of the ICANN community. During the lengthy development of the RPMs many

community members of sought assurances that the RPMs would not be imposed on legacy gTLDs until their implementation was fully evaluated and a follow-up PDP was initiated. The GNSO's request for an Issues Report on the RPMs indicates that it has had a similar understanding.

The staff action of taking certain RPMs as a starting point for legacy gTLD renewal RAs is at odds with community expectations that the policy procedures set forth in the Bylaws would be followed. In addition, while registrants at new gTLDs had clear advance notice that they would be subject to the URS, registrants at legacy gTLDs have no such expectation and deserve to have such a decision made through the standard approach of a PDP resulting in the establishment of Consensus Policy.”

The BC and NCSG believe that all members of the ICANN community are materially and adversely affected whenever ICANN staff seeks to impose de facto Consensus Policy in a top-down manner that is inconsistent with the Bylaws, and that fails to take adequate consideration of public comment and relevant facts and considerations in reaching its decisions, and such staff action is subsequently approved by the Board notwithstanding broad public comment urging its reversal.

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(yes) 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.)

The BC and NCSG understand that you are requesting “a detailed explanation of the material information not considered by the Board” and that “Reconsideration requests are not meant for those who believe that the Board made the wrong decision when considering the information available.”

The BC and NCSG further note that the Board did consider the specific concerns raised in the public comments on these renewal agreements, including that “Some public comments expressed concern regarding ICANN’s process to use the new gTLD registry agreement as the starting point for renewal RAs for legacy gTLDs. These commenters suggest that taking such a position has the effect of transforming the New gTLD Post-Delegation Dispute Resolution Procedures ... and the Uniform Rapid Suspension (URS) into de facto Consensus Policies without following the procedures laid out in ICANN’s Bylaws for their creation.”, as well as that “most of the comments received expressed their objection to the inclusion of the URS to the proposed renewal of .CAT Registry Agreement, claiming that the URS can become a consensus policy only after a full policy development process (PDP) engaged in by the entire ICANN community of stakeholders. These commenters also suggested that imposing URS on a legacy gTLD via the contracting process is an unacceptable staff intervention into the policymaking process.”

We further note and appreciate the Board’s clear statement that “Although the URS was developed and refined through the process described here, including public review and discussion in the GNSO, it has not been adopted as a consensus policy and ICANN has no ability to make it mandatory for any TLDs other than new gTLD applicants who applied during the 2012 New gTLD round.

Accordingly, the Board's approval of the Renewal Registry Agreement is not a move to make the URS mandatory for any legacy TLDs, and it would be inappropriate to do so. In the case of [these registries] inclusion of the URS was developed as part of the proposal in bilateral negotiations between the

Registry Operator and ICANN.” (Emphasis added)

The BC and NCSG particularly appreciate the Board’s clear statement that “ICANN has no ability to make it [URS] mandatory for any TLDs other than new gTLD applicants” and that the Board’s decision “is not a move to make the URS mandatory for any legacy TLDs”.

The material information that we believe the Board has failed to consider is the actual record of exchanges – emails and other correspondence, as well as notes and minutes of meetings and discussions -- between GDD staff and officers and personnel of these three registries that would support the conclusion that “inclusion of the URS was developed as part of the proposal in bilateral negotiations between the Registry Operator and ICANN”. The rationale supporting the Board’s approval of all three of these renewal agreements does not state that it reviewed, or directed non-GDD staff to review, any such documentary evidence in reaching its conclusion that inclusion of the URS was the result of even-handed “bilateral negotiations” rather than staff insistence that the registries accept it to achieve timely registry agreement renewal.

The Board has ready access to such material documentary information given its broad powers to oversee and investigate staff conduct. The BC has no such ability.

While it is true that we could seek disclosure of such material information under the [ICANN Documentary Information Disclosure Policy \(DIDP\)](#) it is unlikely that such disclosure would be timely or complete.

Under the DIDP, “If a member of the public requests information not already publicly available, ICANN will respond, to the extent feasible, to reasonable requests within 30 calendar days of receipt of the request.” The comment period on all three registry agreements was only 40 days. Given that, even if the BC was able to develop and submit a comprehensive DIDP request quickly, there is no assurance that the requested disclosure would be made in manner timely enough to provide adequate review and analysis of any subsequently disclosed materials for the purpose of guiding the drafting of a BC comment letter. Utilization of the DIDP in such circumstances is not practical within the context of the BC’s lengthy internal drafting and review process for all of its public comments.

Further, even if a DIDP was responded to in a timely manner, there is no assurance that all of the documents requested would be provided, given the multiple Defined Conditions for Nondisclosure that exist in the DIDP. Further, the necessary staff review of documents exchanged and developed in confidential contract negotiations again emphasizes that a DIDP request would not likely have provided the BC with relevant documents in a timely manner given the short public comment window.

In addition, the Board has also failed to consider – because it did not exist at the

time of the Board’s decision – the passage of the just-issued “Preliminary Issue Report on a GNSO Policy Development Process to Review All Rights Protection Mechanisms in All gTLDs” which specifically identifies the question of “[w]hether any of the new RPMs (such as the URS) should, like the UDRP, be Consensus Policies applicable to all gTLDs” as an “overarching” issue in an upcoming PDP, as well as the Report’s citation of “transitional issues that would have to be dealt with as a consequence” of such a policy decision. GDD’s staff actions have had the effect, for the three registries we are now concerned with, of interfering with the standard policy development process as well as ignoring the consideration of important transitional issues, such as the fact that current registrants at these gTLDs have not entered into a registrant agreement that includes their consent to be bound by the URS and other new gTLD RPMs.

In closing, the BC and NCSG wish to express their appreciation for the Board statement that making the URS mandatory for any legacy gTLD would be “inappropriate”, and to support the view that a legacy gTLD can voluntarily adopt RPMs drawn from the new gTLD program at the time of contract renewal.

Our concern is that the Board has not considered material information that is uniquely available to it, as well as key passages of the just-issued Preliminary Issue Report, that would inform it as to whether the inclusion of the URS in these three legacy gTLDs was truly the product of even-handed bilateral negotiations and voluntary registry action, rather than staff imposition of a de facto top-down Consensus Policy that was not the product of a PDP as required by the Bylaws; as well as the full damage to the standard policymaking process when GDD staff make unilateral decisions that are beyond their proper role.

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?)

In our comment letters on the three renewal registry agreements, the BC’s request was “For all of the reasons cited above, the BC believes it is inappropriate for GDD staff to take the new gTLD RA as the starting point for the renewal of legacy gTLDs. Therefore, section 2 of Specification 7 of the renewal RAs for .Travel and the other gTLDs noted in the introduction to this comment should be deleted.”

The BC and NCSG are now requesting that the Board ask the staff of the GDD to disclose all of the unconsidered material information cited in our answer to question #8, and to review it to determine whether the inclusion

of the URS in these three renewal registry agreements was truly the result of voluntary registry action in the context of even-handed bilateral negotiations. Following such review, the Board should publicly state its conclusions and disclose the material information supporting them.

Further, regardless of the result of the Board's review of such material information, we believe the Board should instruct GDD staff to refrain from proposing that the approved new gTLD Registry Agreement be used as the basis for legacy gTLD renewal agreements.

Such GDD staff restraint would reinforce the conclusion that a registry's acquiescence to inclusion of the URS in such an agreement was truly voluntary and the result of even-handed bilateral negotiations. It would also avoid any potential perception that facts are being created by staff to influence the outcome of the PDP(s) that will result from consideration of the just-issued Preliminary Issue Report on a GNSO Policy Development Process to Review All Rights Protection Mechanisms in All gTLDs.

Finally, we are asking the Board to review and consider the above-cited provisions of the October 9th "Preliminary Issue Report on a GNSO Policy Development Process to Review All Rights Protection Mechanisms in All gTLDs" that are relevant to this matter and to recognize the full extent of GDD staff's intrusion into the policymaking process by effectively seeking to predetermine the outcome of an overarching policy matter prior to the initiation and completion of a relevant PDP.

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 BC and the NCSG believe it has the standing and right to file this request based upon their long-standing participation in ICANN's activities and policymaking process as a member of the CSG and GNSO.

The material harm and adverse impact suffered by the BC, the NCSG and their members in relation to the integrity and preservation of the Bylaws mandated policy development process is fully described in our answer to question 7.

While a financial value cannot be placed upon this harm, we believe that the multistakeholder policy development policy is priceless and worthy of preservation, and that any harm inflicted upon it is an affront to the global public interest. The relief requested by us in answer to question 9 would reverse or ameliorate the perceived harm and prevent or minimize its future recurrence.

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.

The BC and the NCSG are both constituent components of the GNSO and participate actively in its policymaking process on behalf of their members; and would suffer comparable harm, as described in our answer to question 10.

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.



13-Oct-2015

Signature

Date

Note: Mr Rafik Dammak was traveling at the time of this submission. His signature can be provided upon request.

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.

1. Requester Information

Name: Philip S. Corwin, Founding Principal, Virtualaw LLC; in my capacity as Counsel to, and on behalf of, the Internet Commerce Association

Email: Contact Information Redacted

(Note: ICANN will post the Requester's name on the Reconsideration Request page at <http://www.icann.org/en/committees/board-governance/requests-for-reconsideration-en.htm>. Requestors address, email and phone number will be removed from the posting.)

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.)

The Internet Commerce Association (ICA) seeks reconsideration of Resolutions 2015.09.28.04 (Renewal of .Cat Registry Agreement), 2015.09.28.05 (Renewal of .Travel Registry Agreement) and 2015.09.28.06 (Renewal of .Pro Registry Agreement). These Resolutions were approved as part of the Consent Agenda at the Regular Meeting of the ICANN Board held on September 28, 2015.

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.)

September 28, 2015

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.)

September 28, 2015, upon publication of the Approved Board Resolutions.

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

ICA is a not-for-profit trade association representing the domain name industry, including domain registrants, domain marketplaces, and direct search providers. Its membership is composed of domain name registrants who invest in domain names (DNs) and develop the associated websites, as well as the companies that serve them. Professional domain name registrants are a major source of the fees that support registrars, registries, and ICANN itself. ICA members own and operate approximately ten percent of all existing Internet domains on behalf of their own domain portfolios as well as those of thousands of customers.

The ICA also participates actively in the GNSO's policymaking process for gTLDs as a member of the Business Constituency (BC) within the Commercial Stakeholder Group (CSG). As the asset value, marketability, and legal status of domains are substantially affected by ICANN Consensus Policies it is of critical importance to ICA members that ICANN Consensus Policies are developed in a manner that is fully consistent with ICANN's Bylaws and provides for full participation by all stakeholders, including ICA and its constituent members.

[While the views expressed in this request are solely those of the ICA, I presently serve as Interim Chair of the BC and have just been reelected to a two-year term on the policymaking GNSO Council.]

As stated in the ICA's comment on the "Proposed Renewal of .TRAVEL Sponsored TLD Registry Agreement", and restated in regard to the renewal registry Agreements for .Cat and .Pro:

The ICA is strongly opposed to the inclusion of new gTLD rights protection mechanisms (RPMs), particularly Uniform Rapid Suspension (URS), in this renewal agreement (RA) for a legacy gTLD. We believe that this attempt by ICANN contracting staff to create de facto Consensus Policy via individual registry contract, absent a relevant Policy Development Process (PDP), is a glaring example of the type of top down, unaccountable action that should be targeted by enhanced accountability measures accompanying the IANA transition proposal. Contracts with legacy gTLDs can contain and enforce Consensus Policy, but it is an impermissible violation of ICANN's Bylaws for contracts to attempt to create Consensus Policy.

... There can be no doubt that this is a staff attempt to create de facto Consensus Policy, as is clearly documented by the fact that the same objectionable provision appears in the proposed renewal RAs for .Cat and .Pro, both released for comment on May 28th. This evidences a deliberate and illegitimate attempt by contracting staff to create a series of precedents that would lead inevitably to the imposition of the URS on major legacy gTLDs such as .Org, .Net and .Com when they come up for renewal, despite the fact that the URS is not an ICANN Consensus Policy. Acting in a manner that is consistent with ICANN's Bylaws is far more important than consistency of RAs – if that latter principle had been paramount then there would be no RPMs at new gTLDs to begin with because they are inconsistent with the Consensus Policy in effect at legacy gTLDs.

The ICA's comment letters also noted relevant provisions of the Final Report on Policy and Implementation (P&I) (<https://community.icann.org/display/PIWG/Final+Report+Redline+Version>) and, in particular, the following Principle: "Policy development processes must function in a bottom--up manner. **The process must not be conducted in a top--down manner and then imposed on stakeholders**, although an exception may be made in emergency cases such as where there are risks to security and stability, as defined in ICANN's Security, Stability and Resiliency framework."

(Emphasis added). No such emergency existed in regard to the renewal of these three legacy Registry Agreements.

The ICA's comment letters also cited another part of the P&I Report, noting that "the "Principles / Requirements that apply primarily to Policy" (p. 14) states as its first Standard, "As outlined in the ICANN Bylaws, the GNSO is responsible for developing and recommending to the ICANN Board substantive policies relating to generic top--level domains. **As such, gTLD policy development should not take place outside of the GNSO.**" (Emphasis added) In the matter we are addressing in this letter, policy development has arguably taken place outside of the GNSO."

As also noted in ICA's comment letters, "This staff decision is all the more troubling because it was made in an irresponsibly uninformed manner without waiting for a full evaluation and identification of issues concerning the new gTLD RPMs. On May 1st the public comment period on "Draft Report: Rights Protection Mechanisms Review" (<https://www.icann.org/public-comments/rpm-review-2015-02-02-en>) closed, and on May 29th ICANN staff issued a "Report of Public Comments" (<https://www.icann.org/en/system/files/files/report-comments-rpm-review-29may15-en.pdf>) based upon community input. The Background on that Draft Report states that it "is intended to be available to inform the Issue Report requested by the GNSO as well as the independent review of Trademark Clearinghouse recommended by the GAC. In addition, this paper will serve as input to the Review Team on Competition, Consumer Trust, and Consumer Choice to be convened under Section 9.3 of the Affirmation of Commitments, charged with assessing the effectiveness of the safeguards developed for the New gTLD Program."

None of these additional reviews have been completed. Further, one of the major reasons that the GNSO requested the referenced Issue Report was so that GNSO's stakeholders could decide whether those RPMs should become Consensus Policy for all gTLDs."

We further note that ICANN staff has just issued, on October 9th, the "Preliminary Issue Report on a GNSO Policy Development Process to Review All Rights Protection Mechanisms in All gTLDs". This report will be considered by the GNSO Council and the ICANN community at the upcoming ICANN 54 meeting in Dublin, Ireland and, following a public comment period scheduled to end on November 30th, will result in a Final Staff report being issued on or about December 10th.

That Final Report will probably provide the foundation for the initiation of one or more Policy Development Processes (PDP) addressing whether the new gTLD RPMs should be adjusted and, more relevant to this reconsideration request, whether they should be adopted as Consensus Policy and applied to legacy gTLDs and/or integrated with the UDRP. Indeed, the Preliminary Issue Report notes (at pp.22-23):

These [potential] issues would be specific topics to be addressed as part of their Charter by the PDP Working Group, in addition to the more general, overarching issues such as:

- **Whether any of the new RPMs (such as the URS) should, like the UDRP, be Consensus Policies applicable to all gTLDs, and the transitional issues that would have to be dealt with as a consequence.**

This passage of the Preliminary Issue Report constitutes further and new material evidence, provided directly by ICANN policy staff, that the question of whether the URS should become a Consensus Policy applicable to all gTLDs is an overarching policy matter, and that it is wholly inappropriate for GDD staff to seek imposition of it on legacy gTLDs as the starting point for registry renewal agreement negotiations because doing so creates de facto consensus policy via contract. It also identifies the presence of “transitional issues” that have in no way been considered in pressing for the inclusion of the URS in the three renewal agreements that are the focus of this reconsideration request.

Unless and until the URS is adopted as a Consensus Policy for all gTLDs, ICANN staff should not be initiating the registry agreement renewal process with any legacy gTLD by suggesting that new gTLD RPMs be the starting point for contract negotiation as, given the inequality in bargaining power, this can have the effect of making the URS a de facto Consensus Policy notwithstanding the fact that the regular order PDP outlined in and required by the Bylaws has not been followed. Such GDD staff actions make a mockery of and undermine the integrity of the GNSO’s upcoming PDP review of RPMs.

Global Domain Division (GDD) staff did just that in regard to all three of these Renewal Agreements. As we noted in our comment letters:

The rationale for this decision – *“With a view to increase the consistency of registry agreements across all gTLDs, ICANN has proposed that the renewal agreement be based on the approved new gTLD Registry Agreement as updated on 9 January 2014.”* – is flimsy and unconvincing. ICANN staff possesses no legitimate authority to create and impose what amounts to Consensus Policy. Proposing that the RA take the new gTLD RA as its starting point is tantamount to creating de facto Consensus Party given the overwhelming negotiating advantage that ICANN has in such a context.

Finally, the GDD’s tactics have an unfair impact on ICA members as both domain investors and as participants in ICANN’s policymaking process, and raises substantial legal issues in the event that any of their legacy gTLD domains affected by this matter become the subject of a URS action. As we stated, “Registrants at new gTLDs had clear notice that they would be subject to the new RPMs. Registrants at legacy gTLDs expect that they shall only be subject to Consensus Policy adopted in accordance with ICANN’s Bylaws. The proposed

RA is a complete betrayal of that legitimate expectation and is totally at odds with ICANN rhetoric in support of registrant rights. It is also likely to raise legality of enforceability issues if there is any attempt to enforce new gTLD RPMs against registrants at legacy gTLDs absent their adoption via Consensus Policy.”

In conclusion, as a participant in the bottom-up multistakeholder policymaking process the ICA , and the rights of our constituent members, are materially and adversely affected whenever ICANN staff seek to impose de facto Consensus Policy in a top-down manner that is inconsistent with the ICANN Bylaws, and that fails to take adequate consideration of majority public comment views and relevant facts and considerations in reaching its decisions – especially where the Board subsequently endorses such action by approving the underlying contractual agreement containing the staff-imposed, top-down de facto Consensus Policy.

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

This consideration was also addressed in our comment letters, as follows:

“When the Applicant Guidebook for the new gTLD program was being drafted I was extensively engaged on ICA’s behalf in the vigorous community debate over its RPMs. Throughout their development by the IRT, STI-RT, and then the full community I repeatedly inquired of other stakeholders as well as ICANN senior staff whether adopting these RPMs as new gTLD program “implementation details” would in any way result in their automatic application to legacy gTLDs like .Com. I received repeated assurances that this would not occur – that the RPMs could be imposed on legacy gTLDs only after their impact and efficacy was fully assessed, and then only via a standard PDP to create new Consensus Policy in conformity with ICANN Bylaws.”

ICA members have been deprived of their legitimate expectation, based upon assurances of senior ICANN staff, that application of the URS to legacy gTLDs would only be imposed upon such registries as the outcome of a standard PDP in which they could fully participate. While the recently issued Preliminary issue report is the prelude to such a PDP, its result has been severely prejudiced by this GDD staff intervention.

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(yes) 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.)

The ICA understands that you are requesting "a detailed explanation of the material information not considered by the Board" and that "Reconsideration requests are not meant for those who believe that the Board made the wrong decision when considering the information available."

The ICA further notes that the Board did consider the specific concerns raised in the public comments on these renewal agreements, including that "Some public comments expressed concern regarding ICANN's process to use the new gTLD registry agreement as the starting point for renewal RAs for legacy gTLDs. These commenters suggest that taking such a position has the effect of transforming the New gTLD Post-Delegation Dispute Resolution Procedures ... and the Uniform Rapid Suspension (URS) into de facto Consensus Policies without following the procedures laid out in ICANN's Bylaws for their creation.", as well as

that “most of the comments received expressed their objection to the inclusion of the URS to the proposed renewal of .CAT Registry Agreement, claiming that the URS can become a consensus policy only after a full policy development process (PDP) engaged in by the entire ICANN community of stakeholders. These commenters also suggested that imposing URS on a legacy gTLD via the contracting process is an unacceptable staff intervention into the policymaking process.”

We further note and appreciate the Board’s clear statement that “Although the URS was developed and refined through the process described here, including public review and discussion in the GNSO, it has not been adopted as a consensus policy and ICANN has no ability to make it mandatory for any TLDs other than new gTLD applicants who applied during the 2012 New gTLD round.

Accordingly, the Board's approval of the Renewal Registry Agreement is not a move to make the URS mandatory for any legacy TLDs, and it would be inappropriate to do so. In the case of [these registries] inclusion of the URS was developed as part of the proposal in bilateral negotiations between the Registry Operator and ICANN.” (Emphasis added)

The ICA particularly appreciates the Board’s clear statement that “ICANN has no ability to make it [URS] mandatory for any TLDs other than new gTLD applicants” and that the Board’s decision “is not a move to make the URS mandatory for any legacy TLDs”.

The material information that we believe the Board has failed to consider is the actual record of exchanges – emails and other correspondence, as well as notes and minutes of meetings and discussions -- between GDD staff and officers and personnel of these three registries that would support the conclusion that “inclusion of the URS was developed as part of the proposal in bilateral negotiations between the Registry Operator and ICANN”. The rationale supporting the Board’s approval of all three of these renewal agreements does not state that it reviewed, or directed impartial non-GDD staff to review, any such documentary evidence in reaching its conclusion that inclusion of the URS was the result of even-handed “bilateral negotiations” rather than GDD staff insistence that the three registries accept it to achieve timely registry agreement renewal.

The Board has ready access to such material documentary information given its broad powers to oversee and investigate staff conduct. The ICA has no such ability.

While it is true that we could have sought disclosure of such material information under the [ICANN Documentary Information Disclosure Policy \(DIDP\)](#) it is unlikely that such disclosure would be timely or complete.

Under the DIDP, “If a member of the public requests information not already publicly available, ICANN will respond, to the extent feasible, to reasonable requests within 30 calendar days of receipt of the request.” The comment period

on all three registry agreements was only 40 days. Given that, even if the ICA was able to develop and submit a comprehensive DIDP request quickly, there is no assurance that the requested disclosure would be made in manner timely enough to provide adequate review and analysis of any subsequently disclosed materials for the purpose of guiding the drafting of an ICA comment letter. Utilization of the DIDP in such comment period circumstances is not practical.

Further, even if a DIDP was responded to in a timely manner, there is no assurance that all of the relevant documents requested would be provided, given the multiple Defined Conditions for Nondisclosure that exist in the DIDP. And the necessary staff review of documents exchanged and developed in confidential contract negotiations again emphasizes that a DIDP request would not likely have provided the ICA with relevant documents in a timely manner given the short public comment window.

In addition, the Board has also failed to consider – because it did not exist at the time of the Board’s decision – the publication of the just-issued “Preliminary Issue Report on a GNSO Policy Development Process to Review All Rights Protection Mechanisms in All gTLDs” which specifically identifies the question of “[w]hether any of the new RPMs (such as the URS) should, like the UDRP, be Consensus Policies applicable to all gTLDs” as an “overarching” issue in an upcoming PDP, as well as the Report’s citation of “transitional issues that would have to be dealt with as a consequence” of such a policy decision.

GDD’s staff actions have had the effect, for the three registries we are now concerned with, of interfering with the standard policy development process in regard to an overarching RPM issue; as well as ignoring the consideration of important transitional issues, such as the fact that current registrants at these gTLDs have not entered into a registrant agreement that includes their consent to be bound by the URS and other new gTLD RPMs (contract terms in which registrants agree to abide by new Consensus Policies adopted in the future would not encompass these registry contracts).

In closing, the ICA wishes to express its appreciation for the Board statement that making the URS mandatory for any legacy gTLD would be “inappropriate.

Our concern is that the Board has not considered material information that is uniquely available to it, as well as key passages of the just-issued Preliminary Issue Report, that would inform it as to whether the inclusion of the URS in these three legacy gTLDs was truly the product of even-handed bilateral negotiations and voluntary registry action, rather than staff imposition of a de facto top-down Consensus Policy that was not the product of a PDP as required by the Bylaws; as well as the full extent of damage to the standard policymaking process encompassing RPMs when GDD staff make unilateral decisions that are beyond their proper role.

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?)

In our comment letters on the three renewal registry agreements, the ICA's request was “ **We strongly urge that Section 2 of Specification 7 of the Renewal Agreement (RA) for [these RAs], which contains the URS as well as the Trademark Post-Delegation Dispute Resolution Procedure (PDDRP) be deleted in its entirety. Failure to take that action, and the resulting approval of a .Travel RA that contains these RPMs, will constitute a gross and unacceptable violation of ICANN Bylaws.**”

The ICA is now requesting that the Board ask the staff of the GDD to disclose all of the unconsidered material information cited in our answer to question #8, and to review it to determine whether the inclusion of the URS in these three renewal registry agreements was truly the result of voluntary registry action in the context of even-handed bilateral negotiations. Following such review, the Board should publicly state its conclusions and disclose the material information supporting them.

Further, regardless of the result of the Board's review of such material information, we believe the Board should instruct GDD staff to refrain from proposing that the approved new gTLD Registry Agreement be used as the basis for legacy gTLD renewal agreements.

Such GDD staff restraint would reinforce the conclusion that a registry's acquiescence to inclusion of the URS in such an agreement was truly voluntary and the result of even-handed bilateral negotiations. It would also avoid any potential perception that facts are being deliberately created by ICANN staff to influence the outcome of the PDP(s) that will result from consideration of the just-issued Preliminary Issue Report on a GNSO Policy Development Process to Review All Rights Protection Mechanisms in All gTLDs.

Finally, we are asking the Board to review and consider the above-cited provisions of the October 9th “Preliminary Issue Report on a GNSO Policy Development Process to Review All Rights Protection Mechanisms in All gTLDs” that are relevant to this matter and to recognize the full extent of GDD staff's intrusion into the policymaking process by effectively seeking to predetermine the outcome of an overarching policy matter prior to the initiation and completion of a relevant PDP.

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 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 ICA believes it has the standing and right to file this request based upon our long-standing participation in ICANN's activities and policymaking process as a member of the BC.

The immediate and prospective material harm and adverse impact suffered by the ICA and our members in relation to the integrity and preservation of the Bylaws mandated policy development process is fully described in our answer to question 7.

While a specific financial value cannot be placed upon this harm, we believe that the multistakeholder policy development policy is priceless and worthy of preservation, and that any harm inflicted upon it is an affront to the global public interest. In addition, exposure to potential URS actions at legacy gTLDs raises legal and monetary risks for ICA members regardless of whether potential allegations of infringement are proved valid, especially as the imposition of RPMs by contract fails to address the transition issues noted in the Preliminary Issue report on RPMs. The relief requested by us in answer to question 9 would reverse or ameliorate the perceived harm and prevent or minimize its future recurrence.

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.

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.

• •

Signature

Date 10/13/15

**RECOMMENDATION
OF THE BOARD GOVERNANCE COMMITTEE (BGC)
RECONSIDERATION REQUESTS 15-19 AND 15-20**

13 JANUARY 2016

The Requesters, the ICANN Business Constituency (BC), the ICANN Noncommercial Stakeholders Group (NCSG), and the Internet Commerce Association (ICA), seek reconsideration of ICANN Board Resolutions 2015.09.28.04 (renewal of .CAT registry agreement), 2015.09.28.05 (renewal of .TRAVEL registry agreement) and 2015.09.28.06 (renewal of .PRO registry agreement).¹

I. Brief Summary.

In passing Board Resolutions 2015.09.28.04, 2015.09.28.05, and 2015.09.28.06 (collectively, the Resolutions), the ICANN Board approved the renewal of registry agreements for three legacy TLDs—.CAT, .TRAVEL, and .PRO, respectively. The three renewed registry agreements (Renewed Registry Agreements) are the result of bilateral negotiations between ICANN staff and the respective registry operators. The Renewed Registry Agreements are based on the form of the registry agreement for new gTLDs (New gTLD Registry Agreement) and include new gTLD rights protection mechanisms (RPMs) such as the Trademark Post-Delegation Dispute Resolution Procedure (Trademark PDDRP) and the Uniform Rapid Suspension system (URS), which did not exist under the legacy registry agreements.

In seeking reconsideration of the Resolutions, the Requesters note that the Generic Names Supporting Organization (GNSO) has not yet issued a consensus policy regarding the application of new gTLD rights protection mechanisms (RPMs) to legacy TLDs and suggest that

¹ Because Reconsideration Requests 15-19 and 15-20 (Requests 15-19 and 15-20) involve the same conduct and issues, they will be jointly addressed in the same BGC Recommendation. (*See* Reconsideration Request Form, Terms and Conditions; Bylaws, Art. IV, § 2.8.)

the Renewed Registry Agreements represent an attempt by ICANN staff to preempt that policy development process. The Requesters further assert that, in passing the Resolutions, the Board failed to consider: (1) the details of the relevant contract negotiations, specifically email communications and other documents reflecting communications between ICANN staff and the relevant registry operators; and (2) a later-published preliminary issue report by ICANN staff regarding gTLD RPMs (Preliminary Issue Report), which recommends, among other things, that a GNSO policy development process be undertaken to address the application of RPMs to legacy TLDs generally.

The Requesters' claims do not support reconsideration. The inclusion of the new gTLD RPMs in the Renewed Registry Agreements is part of the package of agreed-upon terms resulting from the bilateral negotiations between ICANN and each registry operator, and not, as Requesters claim, a "unilateral decision by ICANN contractual staff."² The Requesters present no evidence to the contrary – i.e., that applying the new gTLD RPMs to the Renewed Registry Agreements was based on a unilateral decision by ICANN staff. The Requesters suggest that the Board should have reviewed all of ICANN staff's communications with the .CAT, .TRAVEL, and .PRO registry operators in order to confirm that the negotiations were in fact bilateral. Such contention, however, does not support reconsideration. Staff provided the Board with all material information, including the comments from the public comment forum for consideration. In approving the Resolutions, the Board considered all material information provided by staff. No policy or procedure requires the Board to review each and every email or other written exchange between ICANN staff and registry operators during the course of the negotiations (and the Requesters cite no such policy or procedure). The Requesters also do not identify any

² Request 15-19, § 6, Pg. 3; *see also* Request 15-20, § 8, Pg. 9.

particular piece of material information that the Board failed to consider. Moreover, as is publicly posted in the respective public comment reports as well as in the Board’s rationales for each of the Resolutions, the registry operators specifically “expressed their interest to renew their registry agreement based on the New gTLD Registry Agreement.”³ Indeed, not one of these registry operators has indicated that their renewal negotiations were anything but bilateral or sought reconsideration of either staff or Board action as it relates to the Renewed Registry Agreements. Further, the registry agreements each called for presumptive renewal of the agreements at their expiration so long as certain requirements were met – meaning that, if the parties took no action, the registry agreements would have renewed automatically under the same terms as the original registry agreements so as long as the registry operators were in good standing at the time of renewal as provided in the registry agreements.⁴ At the time of renewal, these registry operators were in good standing and were therefore subject to the terms of the presumptive renewal. The registry operators, however, elected to enter into negotiations with ICANN based on the existing New gTLD Registry Agreement terms.

³ .CAT Public Comments Report, Pg. 7; .PRO Public Comments Report, Pg. 6; TRAVEL Public Comments Report, Pg. 6; Rationale for Resolution 2015.09.28.04; Rationale for Resolution 2015.09.28.04; Rationale for Resolution 2015.09.28.04; *available at* <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.c>.

⁴ Article IV, Section 2 of the .CAT, .TRAVEL, and .PRO registry agreements provide that the agreements shall be renewed upon the expiration of the initial term for successive terms, unless the following has occurred:

- (i) an arbitrator or court has determined that Registry has been in fundamental and material breach of Registry's obligations set forth in Sections 3.1(a), (b), (d) or (e); Section 5.2 or Section 7.3 despite notice and an opportunity to cure in accordance with Article VI hereof and (ii) following the final decision of such arbitrator or court, Registry has failed to correct the conduct found to constitute such breach....

.CAT Registry Agreement, *available at* <https://www.icann.org/resources/unthemed-pages/cat-agreement-2005-09-23-en>; .TRAVEL Registry Agreement, *available at* <https://www.icann.org/resources/unthemed-pages/travel-agreement-2006-04-12-en>; .PRO Registry Agreement, *available at* <https://www.icann.org/resources/unthemed-pages/pro-agreement-2010-04-22-en>.

As the Requesters have not demonstrated that the Board failed to consider any material information in passing the Resolutions, they have not stated a basis for reconsideration of the Resolutions.

II. Facts.

A. Background Facts.

On 5 May 2005, ICANN and Tralliance Registry Management Company, LLC signed the registry agreement for .TRAVEL, which contained an expiration date of 19 October 2015. On 23 September 2005, ICANN and Fundació puntCAT signed the registry agreement for .CAT, which contained an expiration date of 19 December 2015. On 22 April 2010, ICANN and Registry Services Corporation signed the registry agreement for .PRO, which contained an expiration date of 20 October 2015. As noted above, at the time of renewal, these registry operators were in good standing and were therefore subject to the terms of the presumptive renewal under the the registry agreements. The registry operators elected to enter into negotiations with ICANN based on the existing New gTLD Registry Agreement terms.

As a result of those bilateral negotiations, each proposed Renewed Registry Agreement included modified provisions to make the agreement more consistent with the New gTLD Registry Agreement. While not all of the provisions of the New gTLD Registry Agreement were included, all three proposed Renewed Registry Agreements included certain minimum requirements for RPMs, including the Trademark PDDRP and the URS, which are similar (although not identical) to Specification 7 found in the New gTLD Registry Agreement.⁵

⁵ See New gTLD Base Registry Agreement, Specification 7, available at <http://newgtlds.icann.org/sites/default/files/agreements/agreement-approved-09jan14-en.pdf>.

The proposed renewed registry agreement for .TRAVEL was posted for public comment on 12 May 2015 and remained open for public comment through 21 June 2015.⁶ The proposed renewed registry agreements for .CAT and .PRO were posted for public comment on 28 May 2015 and remained open for public comment through 7 July 2015.⁷

As noted in the materials that the Board considered in passing the Resolutions, ICANN received 15 public comments regarding the proposed renewed registry agreement for .CAT, including one comment from each of the Requesters.⁸ Twelve of the commenters, including the ICA and the NCSG, objected to the inclusion of the URS in the proposed renewed registry agreement.⁹ Eleven of the commenters, including each of the Requesters, objected to the method of renewing legacy TLD registry agreements by using the existing New gTLD Agreement terms. These commenters specifically claimed (without any supporting evidence) that ICANN staff unilaterally imposed the provisions of the New gTLD Registry Agreement as a starting point for the renewal of the registry agreements.¹⁰ They claimed that ICANN staff effectively transformed the Trademark PDDRP and the URS into de facto consensus policies.¹¹ ICANN received similar comments, including from the Requesters, regarding the proposed renewed registry agreements for .TRAVEL and .PRO.¹² Had the commenters presented material information to support their

⁶ See <https://www.icann.org/sites/default/files/tlds/travel/travel-proposed-renewal-12may15-en.pdf>.

⁷ See, e.g., Proposed .CAT Registry Agreement Renewal, available at <https://www.icann.org/public-comments/cat-renewal-2015-05-28-en>.

⁸ See Report of Public Comments Re. Proposed Renewal of .CAT Sponsored TLD Registry Agreement (“CAT Public Comments Report”), available at <https://www.icann.org/en/system/files/files/reissued-report-comments-cat-renewal-18aug15-en.pdf>.

⁹ *Id.* at 2-3.

¹⁰ *Id.* at 3.

¹¹ *Id.*

¹² See Report of Public Comments Re. Proposed Renewal of .PRO Sponsored TLD Registry Agreement (.PRO Public Comments Report”), available at <https://www.icann.org/en/system/files/files/reissued-report-comments-pro-renewal-18aug15-en.pdf>; Report of Public Comments Re. Proposed Renewal of .TRAVEL Sponsored TLD Registry Agreement (.TRAVEL Public Comments Report”), available at <https://www.icann.org/en/system/files/files/reissued-report-comments-travel-renewal-18aug15-en.pdf>.

claims of unilateral conduct by staff, the Board would certainly have considered that information. No comments were submitted by the .CAT, .TRAVEL, or .PRO registry operators.

On 18 August 2015, ICANN published the reports of public comments regarding the proposed renewed registry agreements for .CAT, .TRAVEL, and .PRO. In response to the comments regarding the inclusion of the URS in the proposed renewed registry agreements, ICANN noted that “[a]lthough the URS was developed and refined through [a process including] public review and discussion in the GNSO, it has not been adopted as a consensus policy and ICANN staff has no ability to make it mandatory for any TLDs other than those subject to the new gTLD registry agreement.”¹³ ICANN also noted that it was the respective registry operators who expressed their “interest [in] renew[ing] [their respective registry agreements] based on the new gTLD Registry Agreement.”¹⁴

On 28 September 2015, the Board passed Resolutions 2015.09.28.04, 2015.09.28.05, and 2015.09.29.06, approving the renewal of the registry agreements for .CAT, .TRAVEL, and .PRO, respectively.¹⁵ In approving the Resolutions, the Board:

acknowledge[d] the concerns expressed by some community members regarding the inclusion of the URS in the Renewal Registry Agreement[s], [and] note[d] that the inclusion of the URS in the Renewal Registry Agreement [was] based on the bilateral negotiations between ICANN and the Registry Operator[s], where Registry Operator[s] expressed their interest to renew their registry agreement based on the new gTLD Registry Agreement.¹⁶

The Board further noted that the GNSO has stated that the URS “was not inconsistent with any of [the GNSO’s] existing policy recommendations.”¹⁷ The Board acknowledged that the URS

¹³ .CAT Public Comments Report, Pg. 7; .PRO Public Comments Report, Pg. 6; TRAVEL Public Comments Report, Pg. 6.

¹⁴ *Id.*

¹⁵ See <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.c>.

¹⁶ Rationale for Resolution 2015.09.28.04; Rationale for Resolution 2015.09.28.05; Rationale for Resolution 2015.09.28.06; *available at* <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.c>.

¹⁷ *Id.*

had not been adopted as consensus policy and that “ICANN has no ability to make it mandatory for any TLDs other than new gTLD applicants who applied during the 2012 new gTLD round.”¹⁸ Accordingly, the Board specifically stated that its “approval of the Renewal Registry Agreement [was] not a move to make the URS mandatory for any legacy TLDs, and it would be inappropriate to do so.”¹⁹

On 15 December 2011, the GNSO Council requested that, 18 months after the launch of the New gTLD Program, ICANN staff prepare and publish an issue report regarding all RPMs implemented for both existing and new gTLDs, including but not limited to the UDRP and URS.²⁰ In response to that request, and following the solicitation of public comments regarding new gTLD RPMs, on 9 October 2015, ICANN published a “Preliminary Issue Report on a Policy Development Process to Review All Rights Protection Mechanisms in All Generic Top-Level Domains” (Preliminary Issue Report).²¹ The Preliminary Issue Report invited community feedback regarding the inclusion of several topics in a GNSO policy development process charter, including “[w]hether any of the new RPMs (such as the URS) should, like the UDRP, be Consensus Policies applicable to all gTLDs, and the transitional issues that would have to be dealt with as a consequence.”²² That same date, a public comment period on the report opened; the public comment period ended on 30 November 2015.²³

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See “Preliminary Issue Report on a Policy Development Process to Review All Rights Protection Mechanisms in All Generic Top-Level Domains” (Preliminary Issue Report) at 1, available at <http://gns0.icann.org/en/issues/new-gtlds/rpm-prelim-issue-09oct15-en.pdf>.

²¹ See Preliminary Issue Report.

²² Preliminary Issue Report, Pg. 23.

²³ See <https://www.icann.org/public-comments/rpm-prelim-issue-2015-10-09-en>.

On 13 October 2015, the BC and the NCSG submitted Reconsideration Request 15-19²⁴ and the ICA submitted Reconsideration Request 15-20.²⁵ Requests 15-19 and 15-20 seek reconsideration of the Board’s Resolutions renewing the registry agreements for .CAT, .TRAVEL, and .PRO.

On 21 October 2015, during the ICANN 54 meeting in Dublin, the ICANN community and the GNSO considered the Preliminary Issue Report.²⁶ ICANN will take into account the public comments received in Dublin and during the public comment period regarding the Preliminary Issue Report, and will publish a final report for the GNSO’s consideration on or about 10 December 2015.

B. Relief Requested.

The Requesters ask that the Board:

1. “[A]sk [] staff [] to disclose all of the [] material information” regarding the negotiation of the Registry Agreements that Requesters assert was not considered by the Board prior to passing the Resolutions;²⁷
2. “[I]nstruct [] staff to refrain from proposing that the approved new gTLD Registry Agreement be used as the basis for legacy gTLD renewal agreements;”²⁸ and
3. “[R]eview and consider the [Requester’s cited provisions of the GNSO Report] that are relevant to this matter and [] recognize the full extent of [] staff’s intrusion into the policymaking process by effectively seeking to predetermine the outcome of an overarching policy matter prior to the initiation and completion of a relevant [policy development process].”²⁹

III. Issues.

²⁴ See Request 14-19, available at <https://www.icann.org/en/system/files/files/reconsideration-request-15-19-bc-ncsg-redacted-13oct15-en.pdf>.

²⁵ See Request 14-20, available at <https://www.icann.org/en/system/files/files/reconsideration-request-15-20-ica-13oct15-en.pdf>.

²⁶ See <https://meetings.icann.org/en/dublin54/schedule/wed-new-gtld-subsequent-prelim>.

²⁷ Request 15-19, § 9, Pgs. 9-10; Request 15-20, § 9, Pg. 10.

²⁸ Request 15-19, § 9, Pg. 10; Request 15-20, § 9, Pg. 10.

²⁹ *Id.*

In view of the claims set forth in Requests 15-19 and 15-20, the issues for reconsideration are whether ICANN's Board failed to consider material information in passing the Resolutions approving the renewal of the registry agreements for .CAT, .TRAVEL, and .PRO.

IV. The Relevant Standards for Reconsideration Requests.

ICANN's Bylaws provide for reconsideration of a Board or staff action or inaction in accordance with specified criteria.³⁰ The Requesters challenge a Board action. In order to obtain reconsideration of a Board action or inaction, the Requesters must show that the Board failed to consider material information or relied on false or inaccurate material information.³¹ Denial of a request for reconsideration of Board action or inaction is appropriate if the BGC recommends, and the Board agrees, that the requesting party has not satisfied the reconsideration criteria set forth in the Bylaws.

V. Analysis and Rationale.

The Requesters claim, without support, that ICANN staff unilaterally imposed the New gTLD Registry Agreement as a starting point for the Renewed Registry Agreements and, therefore, "transform[ed] the PDDRP and URS into de facto Consensus Policies without following the procedures laid out in ICANN's Bylaws for their creation."³² Contrary to what the Requesters claim, while the registry operators had a presumptive right of renewal under the terms of their existing legacy registry agreement, they chose to re-negotiate and renew their agreements based upon the New gTLD Registry Agreement terms.

³⁰ Article IV, § 2.2 of ICANN's Bylaws states in relevant part that any entity may submit a request for reconsideration or review of an ICANN action or inaction to the extent that it has been adversely affected by:

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

³¹ *Id.*

³² Request 15-19, § 8, Pg. 7; Request 15-20, § 8, Pg. 7.

Indeed, the Board’s Rationales for the Resolutions as well as the public comment reports make clear that the Renewed Registry Agreements were “based on the bilateral negotiations between ICANN and the [respective] Registry Operator[s], where [the] Registry Operator[s] expressed their interest to renew their registry agreement based on the New gTLD Registry Agreements.”³³ The Board further stated in the Rationales for the Resolutions that the “inclusion of the URS was developed as part of the proposal in bilateral negotiations,”³⁴ and the parties to those negotiations have never claimed otherwise.

The Requesters voiced these same concerns in their public comments on the proposed Renewed Registry Agreements. And, as the Requesters acknowledge, the Board carefully considered “the specific concerns raised in the public comments on these renewal agreements,” including concerns that using “the new gTLD registry agreement as the starting point for renewal [Registry Agreements] for legacy gTLDs” would effectively “transform[] the [PDDRP] and [URS] into de facto Consensus Policies without following the procedures laid out in ICANN’s Bylaws for their creation.”³⁵ The Requesters also “note[d] and appreciate[d] the Board’s clear statement” that the URS “has not been adopted as a consensus policy and ICANN has no ability to make it mandatory for any TLDs other than new gTLD applicants who applied during the first round,” and that “the Board’s approval of the Renewal Registry Agreements[s] for .CAT, .PRO, and .TRAVEL] is not a move to make the URS mandatory for any legacy TLDs, and it would be

³³ Rationale for Resolution 2015.09.28.04; Rationale for Resolution 2015.09.28.04; Rationale for Resolution 2015.09.28.04.

³⁴ *Id.*

³⁵ Request 15-19, § 8, Pg. 7 (quoting Rationales for Resolutions 2015.09.28.04, 2015.09.28.04, 2015.09.28.04); Request 15-20, § 8, Pg. 7 (quoting Rationales for Resolutions 2015.09.28.04, 2015.09.28.04, 2015.09.28.04).

inappropriate to do so.”³⁶ In short, the Requesters’ claim that the provisions of the New gTLD Registry Agreement were in some way imposed on the registry operators is unsupported.

Pursuant to the Reconsideration standards set forth in Article IV, Section 2 of the ICANN Bylaws, in order to seek reconsideration of a Board action, the Requesters must demonstrate that the Board failed to consider material information or relied on false or inaccurate material information in passing the Resolutions. Here, the Requesters do not identify any material information that the Board purportedly failed to consider in passing the Resolutions. More specifically, the Requesters provide no support for their argument that the Board failed to consider “the actual record of exchanges—emails and other correspondence, as well as notes and minutes of meeting and discussions—between [ICANN] staff and officers and the personnel of these three registries that would support the conclusion that ‘inclusion of the URS was developed as part of the proposal in bilateral negotiations between the Registry Operator and ICANN.’”³⁷ The Requesters also present no support for their claim that the Board failed to consider the Preliminary Issue Report (because it “did not exist at the time of the Board’s decision”).³⁸ As such, neither assertion supports reconsideration.

First, the Requesters do not identify any material information that the Board purportedly failed to consider. That is, the Requesters do not identify any evidence that the negotiations between ICANN and the registry operators were not bilateral in nature because no such evidence exists. As there is no policy or procedure that requires the Board to review each and every email or other written exchange between ICANN staff and registry operators during the course of the contract negotiations, the Requesters do not and cannot identify such a policy or procedure.

³⁶ Request 15-19, § 8, Pg. 7 (quoting Rationales for Resolutions 2015.09.28.04, 2015.09.28.04, 2015.09.28.04); Request 15-20, § 8, Pgs. 7-8 (quoting Rationales for Resolutions 2015.09.28.04, 2015.09.28.04, 2015.09.28.04).

³⁷ Request 15-19, § 8, Pg. 8 (quoting Rationales for Resolutions 2015.09.28.04, 2015.09.28.04, 2015.09.28.04); Request 15-20, § 8, Pg. 8 (quoting Rationales for Resolutions 2015.09.28.04, 2015.09.28.04, 2015.09.28.04).

³⁸ Request 15-19, § 8, Pgs. 8-9; Request 15-20, § 8, Pg. 9.

The Requesters seem to imply that the Board's actions in approving the Renewed Registry Agreements would have been different if the Board considered other information. In making these suggestions, the Requesters fail to focus on the Board's fulsome discussion in the Rationales for Resolutions 2015.09.28.04, 2015.09.28.05, and 2015.09.28.06 of the issues that were considered by the Board in reaching its decisions, including, but not limited to, the Board's consideration of the concerns raised by the community during the public comment forum, including the inclusion of RPMs (specifically the URS and Trademark PDDRP) in the legacy TLD renewals without going through a PDP, as well as the ongoing work of the GNSO regarding whether any of the new RPMs (such as the URS) should, like the UDRP, be Consensus Policies applicable to all gTLDs.³⁹ Indeed, the Board stated:

The Board notes that existing registry agreement calls for presumptive renewal of the agreement at its expiration so long as certain requirements are met. The renewal agreement is subject to the negotiation of renewal terms reasonably acceptable to ICANN and the Registry Operator. The renewal terms approved by the Board are the result of the bilateral negotiations called for in the current registry agreement, and transitioning to the new form of the registry agreement would not violate established GNSO policy.⁴⁰

The Requesters' substantive disagreement with the Board's actions does not mean that the Board's actions were taken without consideration of all relevant material information.

Second, the Requesters claim that the Board failed to consider the Preliminary Issue Report, which invited community feedback regarding the inclusion of several topics in a GNSO policy development process charter, including "whether any of the new [RPMs] (such as the

³⁹ See Rationales for Resolutions 2015.09.28.04, 2015.09.28.05, and 2015.09.28.06, available at <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.c.rationale>, <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.d.rationale>, and <https://www.icann.org/resources/board-material/resolutions-2015-09-28-en#1.e.rationale>, respectively.

⁴⁰ *Id.*

URS) should, like the UDRP, be Consensus Policies applicable to all gTLDs.”⁴¹ The Requesters claim that, in light of the Preliminary Issue Report, the Renewed Registry Agreements will “interfer[e] with the standard policy development process.”⁴² These claims do not support reconsideration.

As the Requesters acknowledge, the Preliminary Issue Report did not exist at the time the Resolutions were approved, and thus could not constitute “material information” the Board failed to consider in approving the Resolutions. As such, no reconsideration is warranted on this basis.

In any event, the Requesters are mistaken when they assert that the Renewed Registry Agreements will “interfere[e] with the standard policy development process.”⁴³ As discussed above, the Board explicitly acknowledged, in the Rationales for the Resolutions, that the URS has not been adopted as consensus policy and that ICANN therefore has no ability to impose the URS (or other new RPMs applicable to new gTLDs) on legacy TLDs.⁴⁴ Rather, the Rationales explain that the Renewed Registry Agreements were the result of bilateral negotiations between ICANN and the registry operators of .CAT, .PRO, and .TRAVEL, respectively.⁴⁵ The existence of certain RPMs in the Renewed Registry Agreements, therefore, has no bearing on the GNSO policy development process to determine whether (or not) any of the new RPMs should be consensus policies applicable to all gTLDs.

The Resolutions were not intended to and will not impede the GNSO policy development process. The public comment period on the Preliminary Issue Report closed on 30 November 2015. Subsequently, ICANN staff expects to issue a final report on or about 10 December 2015

⁴¹ Request 15-19, § 8, Pg. 8 (quoting Preliminary Issue Report at 23); Request 15-20, § 8, Pg. 9 (quoting Preliminary Issue Report at 23).

⁴² Request 15-19, § 8, Pg. 8; Request 15-20, § 8, Pg. 9.

⁴³ *Id.*

⁴⁴ Rationale for Resolution 2015.09.28.04; Rationale for Resolution 2015.09.28.04; Rationale for Resolution 2015.09.28.04.

⁴⁵ *Id.*

and, if it is recommended in that final report, a GNSO policy development process regarding this issue may go forward.

VI. Recommendation.

For the reasons set forth above, the BGC concludes that the Requesters have not stated proper grounds for reconsideration, and therefore recommends that Requests 15-19 and 15-20 be denied. 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 following receipt of the request, unless impractical.⁴⁶ To satisfy the thirty-day deadline, the BGC would have to have acted by 13 November 2015. Due to timing of the Requests, it was impractical for the BGC to consider Requests 15-19 and 15-20 prior to 13 January 2016.

⁴⁶ *Id.*

REFERENCE MATERIALS - BOARD SUBMISSION NO. 2016.02.03.2c

TITLE: **Consideration of the Expert Determination Re: Objection to Application for .HOSPITAL**

I. Background

A. The .HOSPITAL Expert Determination

On 12 March 2013, the Independent Objector (IO) filed, among many others objections, a Limited Public Interest (LPI) objection (Objection) with the International Centre of Expertise of the International Chamber of Commerce (ICC) to Ruby Pike’s application for .HOSPITAL. The IO asserted that Ruby Pike’s application “is contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law based exclusively on the fourth ground [of LPI objections pursuant to Module 3.5.3 of the Applicant Guidebook (Guidebook)].” ([.HOSPITAL Expert Determination](#) at ¶ 21, *see* Attachment C to these Ref. Mat.) The Objection was one of nine LPI objections filed by the IO against health-related applications that resulted in an Expert Determination.

The standards for evaluating LPI objections are set forth in Module 3.5.3 of the Guidebook. Pursuant to Module 3.5.3, the expert panel hearing a LPI objection will “consider whether the applied-for gTLD string is contrary to general principles of international law for morality and public order.” ([Guidebook](#), § 3.5.3.) These general principles are contained in a number of human rights instruments, which are listed in a demonstrative fashion in Module 3.5.3.

Specifically, Module 3.5.3 provides:

The grounds upon which an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law are:

- Incitement to or promotion of violent lawless action;
- Incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin, or other similar types of discrimination that violate generally accepted legal norms recognized under principles of international law;
- Incitement to or promotion of child pornography or other sexual abuse of children; or

- A determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.

The panel will conduct its analysis on the basis of the applied for gTLD string itself. The panel may, if needed, use as additional context the intended purpose of the TLD as stated in the application.

(*Id.*) Module 3.5 states that “[t]he objector bears the burden of proof in each case.” (*Id.* at § 3.5.)

In a split decision, the Expert Panel upheld the IO’s Objection, finding that Ruby Pike’s application is contrary to generally accepted legal norms relating to morality and public order because it fails to contain the safeguards identified by the ICANN Governmental Advisory Committee (GAC) in the Beijing Communiqué Category 1 Safeguards. (*See* Attachment C to these Ref. Mat.: [.HOSPITAL Expert Determination](#), ¶¶ 83, 85.) The Panel found the intended use of the string to be problematic. (*See id.* at ¶¶ 71-73, 79-85.) More specifically, the Panel indicated that the intended purpose of the string was “commercial” and represented a “market approach” instead of a “social approach” to the management of the string. The Panel noted that the sole purpose of Ruby Pike’s application is simply for commercial purposes, which greatly increases the risk of the misuse of the word “hospital.” (*See id.* at ¶¶ 72, 81.) The Panel expanded its analysis to determine whether there were sufficient safeguards and/or protective measures in the application to ensure that reliable and trustworthy health-related information would be provided through the use of the string. The Panel relied on the GAC Category 1 Safeguards, noted that such protective measures were not included in the application, and concluded that the Ruby Pike’s Public Interest Commitments (PICs) were insufficient and the lack of measures to ensure that the information provided through the use of the string is reliable and trustworthy “breaches the right to health.” (*Id.* at ¶ 87.)

B. Ruby Pike’s Challenge of the .HOSPITAL Expert Determination

Ruby Pike contends that the .HOSPITAL Expert Determination is unreasonable, so much so that the outcome is inconsistent with the eight other health-related LPI expert determinations. (*See* Letter from J. Genga to A. Stathos dated 15 April 2015 at 1, Attachment A to these Ref. Mat.)

First, Ruby Pike asserts that the Expert Panel imposed upon Ruby Pike obligations not mandated by the Guidebook by looking to potential third party uses of a .HOSPITAL gTLD and concluding that the application does not contain sufficient safeguards to prevent potential misuses by third parties. (*See id.* at 4-5.) Ruby Pike argues that the Guidebook does not provide for consideration of a potential registrant’s use of a TLD. It only allows a panel to consider whether “the applied-for gTLD string itself,” including its “intended purpose ... *as stated in the application*,” would run contrary to “specific principles of international law as reflected in relevant international instruments of law.” (*See id.* at 4; Guidebook, § 3.5.3.) Ruby Pike points out that other expert panels have recognized this, and have not imposed affirmative obligations on applicants to take into account and attempt to prevent what registrants “may” do. (*See* Attachment A to these Ref. Mat.: Letter from J. Genga to A. Stathos at 4.)

Second, Ruby Pike asserts that by imposing an affirmative obligation to protect against third party violations of international law, the Expert Panel majority effectively shifts the burden of proof from the IO to Ruby Pike to prove that its operation of the string will not result in such a violation. (*See* Attachment A: Letter from J. Genga to A. Stathos at 5-6.) In contrast, the other health-related LPI expert determinations found that, pursuant to the Guidebook, the burden of proof rests with the IO. (*See id.* at 6.) Ruby Pike further notes that the eight other health-related LPI expert panels found that the IO failed to meet his burden of proof. (*See id.*) Accordingly, Ruby Pike argues that the objection to the .HOSPITAL application should likewise have been rejected. (*See id.*)

Finally, Ruby Pike provides that the .HOSPITAL Expert Panel exceeded the scope of review by finding that the application does not contain the safeguards to *preserve* the “right to health.” (*See id.* at 7-8.)

[T]he expert Panel finds that ... private entities are duly bound to ensure reliable access to health related information And where such mechanisms for ensuring safe and reliable health related information ... are non-existent or inadequate then the Application breaches the right to health.

(Attachment C to these Ref. Mat.: [.HOSPITAL Expert Determination](#) at ¶ 87.) Ruby Pike suggests that the .HEALTH (dotHealth) panel acknowledged that it is not the expert panel’s

obligation to implement safeguards on the operation of the gTLD registry. Rather, such safeguards are implemented by ICANN. (*See id.* at 7-8; [.HEALTH \(dotHealth\) Expert Determination](#) at ¶ 107.)

C. Ruby Pike’s Reference to the SCO Final Review Mechanism

The SCO Final Review Mechanism is a mechanism that was established by the NGPC on 12 October 2014, after consultation with the community, to address certain perceived inconsistent and unreasonable SCO expert determinations. (*See* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b>.) In Resolutions 2014.10.12.NG02 – 2014.10.12.NG03, the NGPC directed the President and CEO to take all steps necessary to:

establish processes and procedures, in accordance with this resolution and related rationale, pursuant to which the International Centre for Dispute Resolution (ICDR) shall establish a three-member panel to re-evaluate the materials presented, and the Expert Determinations, in the two objection proceedings set out in the chart above under the “SCO Expert Determinations for Review” column [.CAM/.COM, .通販/.SHOP] and render a Final Expert Determination on these two proceedings....

(NGPC Resolution 2014.10.12.NG03, *available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b>.)

Ruby Pike contends that the .HOSPITAL Expert Determination is as inconsistent and unreasonable as the .CAM/.COM and .通販/.SHOP SCO Expert Determinations. (*See* Attachment A to these Ref. Mat.: Letter from J. Genga to A. Stathos at 1.)

In adopting Resolutions 2014.10.12.NG02 – 2014.10.12.NG03, the NGPC noted that while on their face some of the Expert Determinations may appear inconsistent, there are reasonable explanations for these seeming discrepancies, both procedurally and substantively. (*See* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b>.)

The NGPC did not specifically evaluate the .HOSPITAL Expert Determination as part of its deliberations.

The NGPC also considered whether it was appropriate to expand the scope of the proposed review mechanism to include other Expert Determinations. The NGPC specifically

determined that it would not be appropriate to expand the scope of the proposed review to other Expert Determinations because “[a]pplicants have already taken action in reliance on many of the Expert Determinations, including signing Registry Agreements, transitioning to delegation, withdrawing their applications, and requesting refunds. Allowing these actions to be undone now would not only delay consideration of all applications, but would raise issues of unfairness for those that have already acted in reliance on the Applicant Guidebook.” (*Id.*) The NGPC concluded that “to promote the goals of predictability and fairness, establishing a review mechanism more broadly may be more appropriate as part of future community discussions about subsequent rounds of the New gTLD Program.”

([https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b.](https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b))

None of these factors exist here. As Ruby Pike is the only applicant for the .HOSPITAL string, no other applicants have taken action in reliance of the .HOSPITAL Expert Determination, nor would any other applicant be unfairly prejudiced a re-evaluation of the .HOSPITAL objection proceedings.

II. Assessment Ruby Pike’s Request For Re-evaluation Of The .HOSPITAL Objection Proceedings.

Having considered Ruby Pike’s arguments, the BGC was swayed by Ruby Pike’s assertions that the .HOSPITAL Expert Determination is inconsistent with the eight other health-related LPI Expert Determinations, thereby rendering it potentially unreasonable, and warranting re-evaluation. Therefore, the BGC has recommended that the .HOSPITAL Objection proceedings be re-evaluated by a new three-member panel established by the ICC. The Board agrees with the BGC.

Privileged and Confidential

The Board's action today, addressing how to deal with inconsistent Expert Determinations from the New gTLD Program LPI process, is part of the Board's role to provide general oversight of the New gTLD Program. The action being approved today is to send the .HOSPITAL LPI objection proceeding back for re-evaluation by a new three member panel established by the ICC. The Board's action arises from Ruby Pike's arguments that the .HOSPITAL Expert Determination deviates from all other health-related LPI expert determinations and that the result is seemingly inconsistent and unreasonable such that it warrants re-evaluation. (*See* Letter from J. Genga to A. Stathos, dated 15 April 2015, at 8.) Ruby Pike argues that the Board (via the NGPC) has previously taken steps to call for re-evaluation of other inconsistent and unreasonable results by initiating a final review

mechanism for a certain set of string confusion objection (SCO) expert determinations (SCO Final Review Mechanism). (*See id.*)

The Board notes that when it provided for a limited SCO Final Review Mechanism for just a very few expert determinations from string confusion objection proceedings, the NGPC specifically considered, but excluded its application to other forms of objections.

The NGPC considered whether it was appropriate, as suggested by some commenters, to expand the scope of the proposed review mechanism to include other Expert Determinations, such as some resulting from Community and Limited Public Objections, as well as other String Confusion Objection Expert Determinations, and possibly singular and plural versions of the same string. The NGPC determined that to promote the goals of predictability and fairness, establishing a review mechanism more broadly may be more appropriate as part of future community discussions about subsequent rounds of the New gTLD Program. Applicants have already taken action in reliance on many of the Expert Determinations, including signing Registry Agreements, transitioning to delegation, withdrawing their applications, and requesting refunds. Allowing these actions to be undone now would not only delay consideration of all applications, but would raise issues of unfairness for those that have already acted in reliance on the Applicant Guidebook.

(*See* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b>.)

Notwithstanding the above, the Board is swayed, as was the BGC, by Ruby Lake's argument that the .HOSPITAL Expert Determination is sufficiently and seemingly inconsistent and unreasonable that the objection proceedings resulting in that determination warrants re-evaluation. As part of its deliberations, the Board took into consideration the following factors:

- The .HOSPITAL Expert Determination is inconsistent with the results of the eight other health related LPI objections, all of which were filed by the IO. The materials submitted by the IO and the Applicant to the Expert Panels in each instance were very similar and, in some instances, nearly identical (*i.e.*, .HOSPITAL, .MEDICAL, and .HEALTHCARE).

- The .HOSPITAL Expert Determination is the only LPI objection, out of the total of ten LPI objections that resulted in expert determinations, where the expert determination was in favor of the objector rather than the applicant.
- The .HOSPITAL Determination is the only LPI expert determination with a split panel decision.
- The .HOSPITAL Determination is the only LPI expert determination where a dissenting opinion was issued.
- Four of the nine health related LPI objections filed by the IO were against applications by subsidiaries of Donuts, Inc. (Steel Hill, LLC (.MEDICAL); Goose Fest, LLC (.HEALTH); Silver Glen, LLC (.HEALTHCARE); and Ruby Pike, LLC (.HOSPITAL). The objections filed by the IO in all four objections are virtually identical. The .HOSPITAL Determination is the only determination in favor of the objector.
- The .HOSPITAL Expert Panel is the only health related LPI expert panel that evaluated the sufficiency of certain protections and safeguards as part of its determination while other expert panels deferred to ICANN to implement and enforce such safeguards as necessary. (*See* <http://newgtlds.icann.org/sites/default/files/drsp/06dec13/determination-2-1-1492-32589-en.pdf>.)
- Because there are no other competing applications of the .HOSPITAL TLD, this action would not impact other .HOSPITAL applications and therefore would not contradict the NGPC's concern that expanding that re-review would delay consideration of competing applications. (*See* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b>)

Given these circumstances, the Board is persuaded that, consistent with the manner in which the Board had addressed previous inconsistent or unreasonable expert determinations, a re-evaluation of the objection proceedings against Ruby Pike's application for .HOSPITAL is warranted at this time.

DOCUMENTS/BACKGROUND LINKS

Attached to these Reference Materials are the following materials that may be relevant to the Board's consideration of this matter.

Attachment A is the Letter from John Genga to Amy Stathos, dated 15 April 2015.

Attachment B is a Supplemental Information relating to .HOSPITAL Expert Determination.

Attachment C is the .HOSPITAL Expert Determination.

Attachment D is the .HOSPITAL Dissenting Opinion.

The following are also links to the other LPI health-related Expert Determinations:

- [Independent Objector v. DotHealth, LLC \(.HEALTH\)](#)
- [Independent Objector v. Goose Fest, LLC \(.HEALTH\)](#)
- [Independent Objector v. Afilias Limited \(.HEALTH\)](#)
- [Independent Objector v. Silver Glen, LLC \(.HEALTHCARE\)](#)
- [Independent Objector v. HEXAP SAS \(.MED\)](#)
- [Independent Objector v. Medistry LLC \(.MED\)](#)
- [Independent Objector v. Charleston Road Registry Inc. \(.MED\)](#)
- [Independent Objector v. Steel Hill, LLC \(.MEDICAL\)](#)

Submitted By: Amy A. Stathos, Deputy General Counsel

Dated Noted: 26 January 2016

Email: amy.stathos@icann.org

Pages 79/139 thru 86/139 Redacted

Confidential Pursuant to the Cooperative Engagement Process

Pages 87/139 thru 94/139 Redacted

Privileged and Confidential

**THE INTERNATIONAL CENTRE FOR EXPERTISE OF THE
INTERNATIONAL CHAMBER OF COMMERCE**

CASE No. EXP/412/ICANN/29

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR

(FRANCE)

vs/

RUBY PIKE, LLC

(USA)

This document is a copy of the Expert Determination rendered in conformity with the New gTLD Dispute Resolution Procedure as provided in Module 3 of the gTLD Applicant Guidebook from ICANN and the ICC Rules for Expertise.

**NEW GENERIC TOP-LEVEL DOMAIN NAMES (“gTLD”)
DISPUTE RESOLUTION PROCEDURE**

THE EXPERT DETERMINATION

issued by the Expert Panel,
composed of

Mr. Piotr Nowaczyk (Chair)

e-mail:

piotr.nowaczyk@dentons.com

Mr. Ike Ehiribe

e-mail:

ehiribe@aol.com

Prof. August Reinisch

e-mail:

august.reinisch@univie.ac.at

Department of European,
International and
Comparative Law,
University of Vienna
Schottenbastei 10-16
1010 Vienna, Austria

DENTONS
Rondo ONZ 1, 30th Floor
00-124 Warsaw
Poland
T: +48 22 24 25 705
F: +48 22 24 25 242

Castaldi 7 Stones
Commercial & IP Chambers
88 Kingsway Holborn
London WC2 B6AA
England, United Kingdom

in Case No.

EXP/412/ICANN/29

PROF. ALAIN PELLET, INDEPENDENT OBJECTOR (FRANCE) v. RUBY PIKE, LLC (USA)

TABLE OF CONTENTS

I. Parties 5

II. Procedural History 5

III. Applicable rules and the language of the Dispute Resolution Procedure. 6

IV. Parties' Contentions..... 7

 A. The Independent Objector 7

 B. The Applicant 10

V. Discussion and reasoning 12

 A. The IO's alleged bias 12

 B. The IO's standing 13

 C. The scope of the Limited Public Interests Objection..... 14

 D. The Quick Look Procedure 14

 E. The Application should be reviewed in light of its purpose 14

 F. Burden of proof 15

 G. The Application is contrary to generally accepted legal norms relating to morality and public order 15

 H. The great care of public health required by morality and public order is reflected in the right to health which is broadly recognized in many international law instruments 17

VI. Decision 18

TABLE OF ABBREVIATIONS

| Name | Abbreviation |
|--|----------------------------|
| Rules for Expertise of the ICC | "Rules" |
| Appendix III to the ICC Expertise Rules, Schedule of expertise costs for proceedings under the new gTLD dispute resolution procedure | "Appendix III" |
| International Chamber of Commerce | "ICC" |
| ICC Practice Note on the Administration of Cases | "ICC Practice Note" |
| Attachment to Module 3 - New gTLD Dispute Resolution Procedure | "Procedure" |
| Module 3 of the gTLD Applicant Guidebook | "Guidebook" |
| The Independent Objector - prof. Alain Pellet (France) | "IO" |
| The Applicant - Ruby Pike, LLC (USA) | "Applicant" |
| The Applicant's parent company Donuts, Inc. | "Donuts" |
| ICC International Centre for Expertise | "Centre" |
| Domain name search tool | "WHOIS" |
| Prof. August Reinisch (co-expert), Mr. Ike Ehiribe (co-expert) and Mr. Piotr Nowaczyk (chair) appointed by the Centre to render Expert Determination | "Expert Panel" |
| Governmental Advisory Committee | "GAC" |

Identification of the Parties, their Representatives and related entities

Objector

| | |
|----------------|---|
| Name | Prof. Alain Pellet, Independent Objector |
| Contact person | |
| Address | 16, Avenue Alphonse de Neuville |
| City, Country | 92380 Garches, France |
| Telephone | |
| Email | contact@independent-objector-newgtlds.org |

Objector's Representative(s)

| | |
|----------------|--------------------------|
| Name | Ms. Héloïse Bajer-Pellet |
| Contact person | |
| Address | 15, Rue de la Banque |
| City, Country | 75002 Paris, France |
| Telephone | +33 1 53 45 47 47 |
| Email | avocat@bajer.fr |

| | |
|----------------|---------------------------------|
| Name | Mr. Daniel Muller |
| Contact person | |
| Address | 20, Avenue du Général de Gaulle |
| City, Country | 78290 Croissy sur Seine, France |
| Telephone | +33 1 39 76 52 29 |
| Email | mail@muellerdaniel.eu |

| | |
|----------------|------------------------------------|
| Name | Mr. Phon van den Biesen |
| Contact person | |
| Address | De Groene Bocht, Keizersgracht 253 |
| City, Country | 1016 EB Amsterdam, The Netherlands |
| Telephone | +31 20 7 37 18 69 |
| Email | phonvandenbiesen@vdbkadvocaten.eu |

| | |
|----------------|----------------------------------|
| Name | Mr. Sam Wordsworth |
| Contact person | |
| Address | 24 Lincoln's Inn Fields |
| City, Country | London, WC2A 3EG, United Kingdom |
| Telephone | +44 20 7813 8000 |
| Email | SWordsworth@essexcourt.net |

Applicant

| | |
|----------------|---|
| Name | Ruby Pike, LLC |
| Contact person | Mr. Daniel Schindler, Mr. John Nevett |
| Address | 10500 NE 8th Street, Suite 350 |
| City, Country | Bellevue, WA 98004, USA |
| Telephone | + 1 424 254 8537 |
| Email | rubypike@donuts.co ; secondary@donuts.co |

Applicant's Representative(s)

| | |
|----------------|---|
| Name | The IP & Technology Legal Group, P.C. dba New gTLD Disputes http://www.newgtlddisputes.com |
| Contact person | Mr. John M. Genga, Mr. Don C. Moody |
| Address | 15260 Ventura Blvd., Suite 1810 |
| City, Country | Sherman Oaks, CA 91403, USA |
| Telephone | + 1-888-402-7706; +1-818-444-4582 |
| Email | john@newgtlddisputes.com , don@newgtlddisputes.com |

Disputed gTLD

gTLD Objector objects to [.example]

| | |
|------|--|
| Name | .Hospital (Application ID: 1-1505-15195) |
|------|--|

I. PARTIES

1. The objector in this case is the Independent Objector (hereafter referred to as the "IO"), Prof. Alain Pellet, appointed by ICANN to serve for the entire new gTLD program and object to highly objectionable gTLD applications on Limited Public Interest and Community grounds as it is stated in paragraph 3.2.5 of the Guidebook.
2. The Applicant (hereafter referred to as the "**Applicant**") is an American company – Ruby Pike, LLC, an affiliate of Donuts, Inc. which has applied for 307 new gTLDs representing a variety of common dictionary names.

II. PROCEDURAL HISTORY

3. On 12 March 2013, the IO filed via email a Limited Public Interest Objection against the Application of Ruby Pike LLC, for the gTLD string .Hospital (Application ID: 1-1505-15195). Copies of the Objection were transmitted via email to the Applicant and to ICANN on 13 March 2013.
4. On 29 March 2013, the Dispute Resolution Service Provider, namely the International Centre for Expertise (hereafter referred to as the "**Centre**") of the International Chamber of Commerce (hereinafter referred to as the "**ICC**") informed the IO that it had conducted an administrative review of the Objection (Article 9 of the Procedure) and that the Objection was in compliance with Articles 5 - 8 of the Procedure and with the Rules.

5. On 15 April 2013, the Centre further informed the Parties that ICANN had published its Dispute Announcement pursuant to Article 10(a) of the Procedure on 12 April 2013. It invited the Applicant to file a Response within 30 days of the transmission of this invitation (Article 11 (b) of the Procedure).
6. On 15 May 2013, the Applicant filed via email its Response to the Objection with Annexes. Copies were transmitted to the IO and its representatives, as well as to ICANN.
7. On 28 May 2013, the Centre informed the Parties that the Response was in compliance with Article 11 of the Procedure and with the Rules and confirmed receipt of the Applicant's payment of the Filing Fee in the amount of EUR 5,000.
8. On 19 June 2013, the Centre informed the Parties that the Chairman of the Standing Committee of the Centre appointed Mr. Piotr Nowaczyk as the Chairman of the Expert Panel and Prof. August Reinisch, and Mr. Ike Ehribe as Co-Experts on the Expert Panel. The Centre also invited both Parties to make the required advance payment of costs for the Expert Panel to be fully constituted.
9. On 1 August 2013, the Centre confirmed receipt of the Parties' required advance payment and transferred the case file to the Expert Panel after confirmation of the full constitution of the Expert Panel.
10. By an email of 2 August 2013, the IO requested to file an additional written statement in order to address new issues that were raised in the Applicant's Response. The Expert Panel granted this request. In Procedural Order No. 1 dated 5 August 2013 it set a deadline of 12 August 2013 for the IO's additional written statement. In its Procedural Order No. 2 dated 9 August 2013 the Expert Panel clarified, at the request of the Applicant, that the scope of the additional written statement shall be limited to: (1) the allegation of bias raised by the Applicant; and (2) the interpretation of the new gTLD Dispute Resolution Procedure.
11. The IO accordingly filed the additional written statement via email on 12 August 2013. Electronic copies were transmitted to the Applicant and its representatives, as well as to ICANN.
12. In Procedural Order No. 3 dated 13 August 2013, the Expert Panel set a deadline of 20 August 2013 for the Applicant's response to the IO's additional written statement and limited the scope of the response to the matters raised in the IO's additional written statements. The Applicant's response was submitted accordingly on 20 August 2013. Electronic copies were transmitted to the IO and its representatives, as well as to ICANN.
13. In Procedural Order No. 4 dated 28 August 2013, the Expert Panel acknowledged that the Objection was not dismissed in the course of the Quick Look Procedure for the reasons that would be presented in an Expert Determination.
14. Pursuant to Article 6(a) of the Procedure, all communications by the Parties, the Expert Panel and the Centre were submitted electronically.
15. There was no hearing in this case, as the Expert Panel decided it was not necessary, as well as, it was not requested by the parties.
16. The draft Expert Determination was transmitted for scrutiny to the Centre within the 45 day time limit in accordance with Article 21 (a) and (b) of the Procedure.

III. APPLICABLE RULES AND THE LANGUAGE OF THE DISPUTE RESOLUTION PROCEDURE.

17. All proceedings before the Expert Panel shall be governed by the following rules:

- Rules for Expertise of the ICC (hereafter referred to as the “**Rules**”),
 - The ICC Practice Note on the Administration of the Cases (hereafter referred to as the “**ICC Practice Note**”),
 - Attachment to Module 3 of the gTLD Applicant Guidebook, New gTLD Dispute Resolution Procedure of the gTLD Applicant Guidebook (hereafter referred to as the “**Procedure**”),
 - ICANN gTLD Applicant Guidebook (hereafter referred to as the “**Guidebook**”).
18. The language of all submissions and proceedings is English (Art. 5(a) of the Procedure).

IV. PARTIES' CONTENTIONS

A. The Independent Objector

19. The IO confirms that he is not affiliated with any of the gTLD applicants and remains impartial and independent as required under the Guidebook. Responding to the Applicant's allegation of bias, the IO stated that he has not favoured any particular interests, including medical interests and that he has not targeted the Applicant's Application since he has filed objections against gTLD applications for strings entirely unrelated to health and the healthcare sector, including .Amazon, .Charity, .Indians and .Patagonia.
20. The IO asserts that he acts pursuant to paragraph 3.2.5 of the Guidebook, providing him with the standing to file the Objection, since there was more than one comment made in opposition to the Application in the public domain. Later, the IO also asserts that the above-mentioned procedural restriction concerning his standing did not allow him to file objections to other sensitive applications.
21. The IO asserts that the Limited Public Interest Objection is applicable in this case since the applied-for gTLD string is contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law based exclusively on the fourth ground, which stipulates as follows:
- “A determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.” (paragraph 3.5.3 of the Guidebook)
22. The IO states that while the Objection is against the applied-for gTLD string, however, in addition, it should be considered in the context of the stated intended purpose as it may be derived from the description of the Applicant's position provided especially in the section titled “Mission/Purpose” (Section 18) in the Application form. Therefore, the IO does not find the applied-for string to be objectionable *per se*, but that the applied-for string and its intended operation may be objectionable from the perspective of specific principles of international law for morality and public order. The IO argues further that the Applicant's Application as presented does not guarantee the use of the applied-for string in full respect of these general principles of international law for morality and public order.
23. The IO recognizes the importance of freedom of expression as, also, a general principle of international law relating to morality and public order. At the same time, according to the IO, freedom of expression is not free of any limits but “*carries with it special duties and responsibilities*” (Guidebook, paragraph 3.5.3, at p. 3-22). The concept of raising Limited Public Interest Objections implies that these limits may lead to the rejection of certain applied-for strings.

24. The IO provides a comprehensive deliberation regarding the validity of his Objection. The Applicant has itself recognized that the gTLD is "attractive to registrants with a connection to hospitals and medical treatment centers around the world.". In the IO's view, hospitals are inextricably connected to health, which is commonly deemed to be a fundamental human right under international law instruments. In support, the IO refers to, among others, the following instruments of international law :

- the proclamation of the Universal Declaration of Human Rights the General Assembly of the United Nations which has declared "health" to be part of this listing of Human Rights (*Article 25, (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and **medical care** and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*);
- the International Covenant on Economic, Social and Cultural Rights (*Article 12 (1) The States Parties to the present Covenant recognize **the right of everyone to the enjoyment of the highest attainable standard of physical and mental health***);
- International Convention on the Elimination of All Forms of Racial Discrimination (*Article 5 (e) Economic, social and cultural rights, in particular: (iv) **The right to public health, medical care, social security and social services***);
- Convention on the Elimination of All Forms of Discrimination against Women (*Article 11 (1) States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular (f) **The right to protection of health and to safety in working conditions, including the safeguarding of the function of reproduction. And Article 12 1. States Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, **access to health care services**, including those related to family planning. 2. Notwithstanding the provisions of paragraph 1 of this article, States Parties shall ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation***);
- Convention on the Rights of the Child (*Article 24 - 1. States Parties recognize **the right of the child to the enjoyment of the highest attainable standard of health** and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services. 2. States Parties shall pursue full implementation of this right and, in particular, shall take appropriate measures: (e) To ensure that all segments of society, **in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health** and nutrition, the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents*);
- Convention on the Rights of Persons with Disabilities (*Article 25 - **Persons with disabilities have the right to the highest attainable standard of health without discrimination on the basis of disability. They are to receive the same range, quality and standard of free or affordable health services as provided other persons, receive those health services needed because of their disabilities, and not to be discriminated against in the provision of health insurance***),

- WHO Constitution dated 22 July 1945 – “The enjoyment of the highest *attainable standard of health is one of the fundamental rights of every human being without distinction of race, religion, political belief, economic or social condition. The health of all peoples is fundamental to the attainment of peace and security and is dependent upon the fullest co-operation of individuals and States. (...) The extension to all peoples of the benefits of medical, psychological and related knowledge is essential to the fullest attainment of health*”.¹
25. The IO asserts that the International Covenant on Economic, Social and Cultural Rights imposes on the parties the obligation to assure the right to health. By referring to the comments of the United Nations Committee on Economics, Social and Cultural Rights, the IO connects the above-mentioned obligation with the duty to guarantee accessibility and quality of health care facilities. Therefore, as the IO later asserts, states providing misleading health-related information violate their obligations under the Covenant. In this regard the IO refers to an European Court of Human Rights decision in *Guerra and others v. Italy*, [1998] ECHR 7, 26 EHRR 357, where the failure of a state to provide essential information relating to environmental pollution that would have enabled the applicants to assess the risk they and their families would be exposed to in a particular town was found to be tantamount to a violation of the applicant’s right to respect for private and family life in breach of Article 8 of the European Convention of Human Rights.
26. The IO also states that not only public authorities, but also the private sector has responsibilities as regards the protection of human rights. In the IO’s opinion the Applicant has not given due consideration to the fundamental rights and related obligations that are at stake and has not considered how to include safeguard mechanisms that at all times would rather strengthen instead of hindering these obligations and fundamental rights.
27. The IO is of the view that the Applicant should demonstrate how, given the public interest at stake, the policies and decision-making of the Applicant will be properly connected to the public authorities, national as well as international, that are under a legal obligation to respect, protect and fulfill the right to health.
28. Moreover, the IO points out that the Applicant’s parent company Donuts has applied for over 300 gTLDs and that the texts of those applications all seem to be entirely identical although the applied-for strings have a completely different character.
29. The IO argues that the fact that the additional four protection mechanisms employed by the Applicant for .Hospital are present in many of Donuts’ applications that are completely unrelated to health confirms the Applicant’s lack of awareness of the specifics of health-related gTLDs like the present one.
30. Since the Applicant did not provide any insight on the extent or content of the social consultations that were allegedly conducted, the IO maintains his Objection to the instant Application as long as the Applicant does not - after consultation and coordination with all stakeholders of the health community, including states and competent international organizations – provide solutions for the serious concerns raised by the IO and other entities in the past.
31. In his additional written statements, the IO refers to the Safeguard Advice issued by ICANN’s Governmental Advisory Committee (GAC) on 11 April 2013 which states that extensive additional safeguards should be put in place for a whole range of gTLDs including .Hospital. According to the IO, this confirms the concerns expressed in the Objection and the sensitivity

¹ The emphasis is added by the Expert Panel in order to underline the relation to health and healthcare.

of a new .Hospital gTLD and demonstrates that those concerns are not to be considered as abusive, nor as harassment as alleged by the Applicant.

32. The IO requests the Expert Panel to hold that the Objection is valid. Therefore, the Expert Panel should uphold the present Objection against the .Hospital Application.
33. In the alternative, the IO requests the Expert Panel to hold that the Objection is valid as long as the Applicant does not provide solutions for the serious objections raised above. Accordingly, the Expert Panel should conditionally uphold the present Objection against the .Hospital Application (ID: 1-1505-15195).
34. In addition, the IO requests that its advance payments of costs shall be refunded in accordance with Article 14 (e) of the Procedure.

B. The Applicant

35. The Applicant is an American limited liability company owned by Donuts, through which the Applicant and other direct and indirect subsidiaries, have applied for 307 new gTLDs representing a variety of common dictionary terms. The Applicant introduces itself as a well-prepared, amply resourced and highly qualified organization committed to offering consumers new and varied generic domain name alternatives through safe, stable and secure registry operations.
36. The Applicant declares that it seeks to help redefine the domain name space in the Internet by offering domains that would serve a more specific segment of the Internet user population. The Applicant repeatedly identifies itself with goals explicitly articulated by ICANN in specific connection with its new gTLD program such as: augmenting consumer choice, bolstering competition and expanding avenues of expression on the Internet.
37. In its response, the Applicant challenges the IO's independence, relying upon the following arguments:
 - The IO has filed relatively few objections overall, and Donuts' applications represent a significant proportion of them,
 - The IO has brought objections only against applications for health-related gTLDs and has not brought such objections against other controversial gTLDs,
 - The IO has a background in health-related matters and particular healthcare and policy interests since he has worked in co-operation with the World Health Organization (WHO),
 - The IO's legal assistant has alleged relationship with a WHO consultant.
38. In the Applicant's view, the IO clearly has some bias that favours healthcare and hospital interests and opposes those who would provide a forum for such topics on the Internet.
39. The Applicant seeks the dismissal of this Objection following the Quick Look Procedure since it is, in the Applicant's opinion, manifestly unfounded. As the Applicant asserts, the ICANN's standards focus on the string itself not on the Applicant whereas the IO simply criticizes its activity, putting the instant Application aside. Such attacks in the Applicant's view may amount to "an abuse of the right to object."
40. The Applicant states that the Objection is based on nothing more than speculation regarding matters beyond the applied-for string or its intended use as stated in the Application. Then, it is acknowledged that the applied-for string is nothing more than the generic term "hospital" which can be used in a variety of perfectly legitimate ways, none of which are "contrary to morality and public order." The Applicant also provides examples of the use of the word "hospital" as a second level domain in a context that is unrelated to the medical sector.

41. The Applicant states that the Objection is unfounded because it does not fall within the scope of the ground on which the IO relied (paragraph 3.5.3 of the Guidebook). Moreover, the Applicant argues that the fourth ground cannot be interpreted so broadly, since it would be inconsistent with the idea of the whole provision. The Applicant refers to the commonly known rule of interpretation - *ejusdem generis* ("of the same kinds, class, or nature") - and concludes that the norms of international law quoted in the Objection do not belong to the same category of topics as genocide, torture, slavery, violence against women, racism, and child pornography/sexual abuse, which are included in the first three grounds.
42. In the Applicant's view, the IO offers no evidence to meet the Objector's significant burden of proof since the Objection relies upon, among others, such innocuous and amorphous factors:
 - Whether Donuts affiliates have applied for three, three hundred or three thousand TLDs does not prove that the TLD applied for here will breach any international law restrictions;
 - Whether the instant Application resembles or differs from the over 300 others submitted by related entities neither proves that the string does, nor demonstrates that Applicant intends to, violate widely accepted international law norms against violent, discriminatory, sexually abusive or similarly egregious behaviour.
43. Furthermore, the Applicant claims that the IO arguably infringes upon the Applicant's and the public's rights to freedom of expression. As the Applicant supports an open gTLD, and believes in permitting the public to exercise freedom of expression unless such use violates the law, it disagrees with the policy position taken by the IO.
44. The Applicant also remarks that it is the only applicant for the .Hospital applied-for string. Therefore, if the IO succeeds in his Objection, the gTLD will not be available to any members of the public.
45. The Applicant acknowledges its intention to operate open and unrestricted gTLDs for the benefit of all law-abiding users. The Applicant calls the Expert Panel to bear in mind, however, that — as is the case in all forms of progress — there may be some level of cost. Further, the net benefit to the worldwide community should be recognized instead of closing off great sections of opportunity due to perceived possible, though unlikely, harm.
46. As the Applicant asserts, it should be noted that the term "hospital" is usually used in numerous second-level domain names. The Applicant has found over 26,000 uses in second-level domain names of the same term that the IO here claims will run afoul of international precepts of morality and public order.
47. Moreover, the Applicant finds the opinion issued by ICANN's Government Advisory Committee ("**GAC**") and recalled by the IO even supportive for its Application since the Applicant implements most of additional safeguards sought by the Committee. Then, the Applicant states that there were no restrictions yet accepted by the ICANN's Board as to .Hospital. In the Applicant's view, the present comments of GAC regarding potentially "sensitive strings" constitute the second form of GAC Advise as provided by Guidebook: "(ii) *The GAC advises ICANN that there are concerns about a particular application "dot-example."* *The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision*". Therefore, such advice has no relevance to the instant Objection because ICANN has no obligation to adopt all or any of the GAC recommendations regarding the subject string.
48. Therefore, the Applicant requests the Expert Panel to deny the Objection.

V. DISCUSSION AND REASONING

49. The Expert Panel is required to make the Expert Determination in accordance with the standards provided in Article 20 of the Procedure which states as follows:

- (a) For each category of Objection identified in Article 2(e), the Expert Panel shall apply the standards that have been defined by ICANN.
- (b) In addition, the Expert Panel may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines to be applicable.
- (c) The Objector bears the burden of proving that its Objection should be sustained in accordance with the applicable standards.

50. Thus, the Expert Panel is bound also by the standards defined by ICANN. Paragraph 3.5.3 of the Guidebook, which is applicable to the case under consideration, and which states that "*An expert panel hearing a Limited Public Interest objection will consider whether the applied-for gTLD string is contrary to general principles of international law for morality and public order.*" The same paragraph provides a non-exhaustive list of international law instruments containing such principles which includes among others:

- The Universal Declaration of Human Rights (UDHR) (1948),
- The International Covenant on Economic, Social, and Cultural Rights (1966), etc.

51. As is later stated: "*Under these principles, everyone has the right to freedom of expression, but the exercise of this right carries with it special duties and responsibilities. Accordingly, certain limited restrictions may apply.*"

52. Most essentially, paragraph 3.5.3 also specifies grounds upon which an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law such as:

- Incitement to or promotion of violent lawless action;
- Incitement to or promotion of discrimination based upon race, color, gender, ethnicity, religion or national origin, or other similar types of discrimination that violate generally accepted legal norms recognized under principles of international law;
- Incitement to or promotion of child pornography or other sexual abuse of children; or
- A determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law.

53. Paragraph 3.5.3 also instructs the Expert Panel to conduct its analysis on the basis of the applied-for gTLD string itself. The Expert Panel may, if needed, use as additional context the intended purpose of the gTLD as stated by the Applicant in its Application.

54. The Expert Panel has considered those standards listed above, the relevant international law instruments and relevant case law cited by the IO and has reasoned as follows.

A. The IO's alleged bias

55. Paragraph 3.2.5 of the Guidebook requires the IO to be independent of and unaffiliated with any of the gTLD applicants; however, it does not state any procedural consequences within the objection procedure for breaching these obligations.

56. Having considered the procedural requirements that the IO is obligated to fulfill in order to file a valid objection, the Expert Panel does not accept the Applicant's assertion that the IO's objections are unduly directed at the Applicant as alleged. The Expert Panel is satisfied that

the IO is acting in the best interest of the public who use the Internet and has filed this Objection in the public interest.

57. The Applicant's allegations concerning the IO's bias favouring healthcare or medical interests are also unfounded for lack of any verifiable evidence to substantiate such allegations. The Expert Panel accepts, contrary to the Applicant's assertion and as contended by the IO that the IO only acted for the French Republic as Counsel in an advisory proceeding concerning a request by the World Health Organization which came before the International Court of Justice. Just for the sake of completeness, the Expert Panel equally finds no merit in the alleged relationship said to be existing between the IO's legal assistant and a consultant of the World Health Organization which in any event the Applicant failed to substantiate by furnishing credible supporting evidence. Thus, the Expert Panel finds that the Applicant's challenge to the IO's independence and impartiality is manifestly unfounded.

B. The IO's standing

58. Pursuant to paragraph 3.2.5 of the Guidebook, the IO may file Limited Public Interest Objections against "highly objectionable" gTLD applications to which no objection has been filed. Moreover, the IO shall not object to an application unless at least one comment in opposition to the Application is made in the public sphere.
59. The Expert Panel finds that the foregoing conditions were satisfied by the IO in these proceedings. Indeed, there was no other Limited Public Interest Objection against .Hospital. Since the importance of hospitals' role for the safety and health of a society cannot be overrated, the instant Application can be deemed to be highly objectionable. Furthermore, the IO states that there were several (10) comments that were made at <https://qtlcomment.icann.org/comments-feedback/applicationcomment/viewcomments> in opposition to the Application in the public domain.
60. In any event the Expert Panel has taken into account various other comments in the public domain which were brought to its attention by the IO. Specifically, the Expert Panel refers to the letter dated 11 April 2012 from the World Health Organization seeking a postponement of the assignment of .health related top level domains, and expressing concerns on the likelihood of the illegal promotion and sale of medicines including spurious/falsely-labeled/counterfeit and unapproved medicines through such .health related domains. The second is the Safeguard Advice issued by ICANN's Governmental Advisory Committee (GAC) on 11 April 2013 wherein the applied-for gTLD .Hospital is listed as one of the applied-for strings that requires extensive further safeguards such as: (i) increased WHOIS verification and checks; (ii) expanded terms of use by registry operators to mitigate abusive activity; (iii) increased security checks by Registry operators, constant record keeping by registry operators to identify frequent inaccurate WHOIS records and security threats; (iv) provision of mechanisms for the handling of complaints by registry operators arising from the provision of inaccurate WHOIS information or the facilitation of infringement activity contrary to applicable law; and (v) the identification of real and immediate consequences for providing inaccurate WHOIS information and engaging in infringement or unlawful activity.
61. The Expert Panel considers that the recent Resolution adopted by the World Health Assembly on 27 May 2013 on eHealth standardization and interoperability also confirms the IO's concerns relating to the applied-for gTLD, .Hospital. The World Health Assembly is recorded to have commented on health related global top-level domain names as follows: "(...) *health-related global top-level domain names in all languages, including ".health", should be operated in a way that protects public health, including by preventing the further development of illicit markets of medicines, medical devices and unauthorized health products and services (...).*" Therefore, the Expert Panel rejects the Applicant's allegations questioning the IO's standing.

C. The scope of the Limited Public Interests Objection

62. The scope of the Limited Public Interest Objection is expressly limited to the four grounds enumerated in paragraph 3.5.3 of the Guidebook. The fourth and relevant ground to these proceedings being (“contrary to generally accepted legal norms relating to morality and public order (...) recognized under principles of international law”).
63. Although the list of grounds in paragraph 3.5.3 includes “or” instead of “and” so as the IO has asserted, there is no conjunction, the wording of this paragraph clearly indicates that this catalogue has an exhaustive character.
64. The fourth ground is an open clause that can be a subject of exemplification. The Expert Panel shares the Applicant’s view that according to the *ejusdem generis* doctrine the fourth ground should be interpreted in order to establish a relatively homogenous class of grounds. In this case, it is a class of various violations of human rights.
65. However, the Expert Panel cannot agree with the conclusion that violation of the right to health under the fourth ground is less serious than for example “incitement to or promotion of violent lawless action” which is a violation of right to life and basic freedom.
66. In the Expert Panel’s view, human rights such as right to life, freedom from slavery or personal immunity that are covered by the three first grounds are equally as important as the right to health. Thus, an objection against an application that is contrary to the right to health, a fundamental human right as is incorporated in international law instruments falls within the scope of the Limited Public Interests Objection.

D. The Quick Look Procedure

67. As was stated in Procedural Order No. 4 dated 28 August 2013, the Expert Panel did not dismiss the Objection under the Quick Look Procedure, which is aimed at eliminating frivolous and/or abusive objections.
68. Firstly, a Limited Public Interest Objection would be manifestly unfounded if it did not fall within one of the categories that have been defined as grounds for such an objection. As has been demonstrated above, the Objection falls within the fourth ground, which is stated in paragraph 3.5.3 of the Guidebook.
69. Secondly, in accordance with paragraph 3.2.2.3 a Limited Public Interest Objection should be dismissed when it abuses the right to object. The Expert Panel rejects the Applicant’s argumentation that the IO attacks it rather than the applied-for string. As is clarified in the next section, the objection may provide additional context for the applied-for string. All the information about the Applicant provided in the Objection is admissible and is not found by the Expert Panel to be abusive, if it is connected with the purpose of operating the present gTLD.
70. Taking into consideration that the Applicant’s parent company Donuts, has applied for multiple gTLDs, it is not surprising that a significant portion of the IO’s objections were filed against Donuts’ applications. Moreover, as was stated before, the procedural requirement for the IO is a veritable safeguard against frivolous objections. Therefore, there are no grounds to justify the Applicant’s contention that the Objection is abusive or aimed at harassing the Applicant.

E. The Application should be reviewed in light of its purpose

71. As the Applicant argues, the Guidebook expressly refers to an “applied-for gTLD string”; however, Paragraph 3.5.3 also authorizes the Expert Panel to use as additional context the intended purpose of the gTLD as stated in the Application to conduct its analysis on the basis of the applied-for gTLD string itself. The Applicant clearly states in answer to question 18 of the Application that the Applicant: *“intends to increase competition and consumer choice at the top level (...) In doing so, the TLD will introduce significant consumer choice and competition*

to the Internet namespace – the very purpose of ICANN's new TLD program.” Moreover, pursuant to Article 20(b) of the Procedure, the Expert Panel may refer to and base its findings upon the statements and documents submitted and any rules or principles that it determines applicable. Because of the manner that the case has been presented by the parties, the Expert Panel, in deciding on the instant case, considers all the elements: .Hospital and the Applicant's purpose as well as other arguments raised by the IO. Since the procedure is designed to serve the best interest of the public who use the global Internet, the review cannot be limited only to the applied-for string that is just a signboard for the tremendous amount of information. Which information finally is going to be available for users depends on the intended purpose of the Applicant who stands for .Hospital and its acts. Therefore, in the Expert Panel's view, limiting the scope of procedure only to the name of gTLD may render the entire objection procedure pointless.

72. In the Expert Panel's opinion the Applicant's sole purpose for the Application as expressed in the Application documents is simply for commercial purposes. The Application supports the idea of unlimited availability of the instant gTLD for all Internet users. It presents simply a “market approach” whereas morality and public order require a “social approach” as is stated in following sections.
73. It is significant that the Applicant's answer to question “18(c). *What operating rules will you adopt to eliminate or minimize social costs?*” is completely meritless since it concerns only prices for registering second level domains. Such a disregard for social cost of operating .Hospital provides a very clear indication of the commercial purpose and mission of the Application.

F. Burden of proof

74. Article 20 c) of the Procedure requires the IO to prove that the Objection should be sustained in accordance with the applicable standards. In this case the standard, provided by paragraph 3.5.3, is the following: “*an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law (...) as reflected in relevant international instruments of law.*” Therefore, the IO has to provide the necessary evidence that the Application is indeed contrary to those norms.
75. The Expert Panel finds that there is no binding provision, in either the Guidebook or the Procedure, stating a clear presumption in favour of the Application as the Applicant many times asserts. In the Application, the Applicant refers to archival notes of ICANN that allegedly provide such a presumption, but they no longer exist. Moreover, the Expert Panel is not obligated to follow all ICANN bylaws or its analysis.

G. The Application is contrary to generally accepted legal norms relating to morality and public order

76. In order to review the case under consideration, the Expert Panel has adopted, on its own initiative, definitions of “morality” and “public order” that are based upon common understanding and respective scientific sources.
77. Morality in the normative sense refers to a code of conduct that applies to all who can understand it and can govern their behaviour by it. Morality should never be overridden, that is, no one should ever violate a moral prohibition or requirement for non-moral considerations. All of those who use “morality” normatively also hold that, under plausible specified conditions, all rational persons would endorse that code (Stanford Encyclopedia of Philosophy, <http://plato.stanford.edu/entries/morality-definition/>, 09.09.2013). In the present case, the concept of morality is used jointly with the concept of public order.

78. Public order (or *ordre public* in French) has the same meaning as the term “public policy”, used especially in Anglo-American legal terminology. Thus, the notion of public order is often used interchangeably with the term “public policy” (Josef Mrazek, Public Order (Ordre Public) and Norms of *Ius Cogens* in Czech Yearbook of International Law, Public Policy and Ordre Public 2012, p. 79-80). Despite this terminological confusion, public order is commonly understood as the pillar of the legal system and social order. The civil law system recognizes public order as a long-term constant and one upon which rests, not only, the constitutional and legal order. However, in light of the common law approach this term also represents a much broader legislative category which expresses to a certain degree the prevailing political view of social priorities. The Expert Panel adopts the broader notion of public order (public policy) which is close to the category of public interests and goes beyond the interest of individuals (Alexander J. Belohlavek, Public Policy and Public Interest in International Law and EU Law in Czech Yearbook of International Law, Public Policy and Ordre Public 2012, p. 118-119). Such a notion is aimed to ensure the safety and welfare of the society.
79. Morality and public order require all members of society, whether public or private entities, to be extremely cautious on issues of human life and health. It is a duty that should be fulfilled in the field of the development of the Internet as well.
80. The term “Hospital” is a generic term that is commonly associated with healthcare and emergency. This original meaning and health related connotation cannot be replaced or obscured by the commercial use of this name.
81. Misuse of the word “hospital” may cause significant harm to society. The market approach presented by the Applicant greatly increases that risk. The examples of second level domains given by the Applicant that are not related to healthcare but are welcomed to register at “.Hospital” might be a source of mistakes leading to endangering health or life.
82. It is important to bear in mind that people seeking health care are often vulnerable and easy to manipulate. A person suffering from a serious disease has a significantly lower ability to access the content of websites critically. Furthermore, a need for a hospital often occurs in the event of emergency – unreliable information about healthcare providers can cause serious harm to vulnerable people and to society at large since there is usually no time for a critical consideration of health related information obtained from the Internet in such circumstances. This is the main reason for the highest standard of requirements for the present gTLD.
83. The GAC’s comments presented by the IO indicate that the Application may be considered contrary to generally accepted legal norms relating to morality and public order. The Application does not include the specific protection safeguards listed on page 8 of the GAC’s comments. The issue is not whether ICANN will follow these suggestions or not, because this Expert Panel is only expected to examine the present Application and cannot take into account possible amendments that may be made in the future. The safeguards currently employed by the Applicant - the fourteen protections required by ICANN and the eight additional that Donuts.Inc has taken on voluntarily in all its applications are in the Expert Panel view not sufficient. This conclusion is based upon GAC’s concerns. The Expert Panel relies on GAC’s statement since it is the body representing interests of multinational governments. Currently, .Hospital has the same level of protection as .Creditcard, .Legal or .Investments. However, in the Expert Panel’s view the sensitivity of .Hospital has a different dimension than gTLDs connected with banking or legal services since human life and health require greater care than pure commercial activity.
84. The Expert Panel has also taken into consideration the possibility of conditionally upholding the Objection as long as the Applicant does not provide sufficient safeguards. However, Article 21 (d) of the Procedure states expressly: “*The remedies available to an Applicant or an Objector pursuant to any proceeding before a Expert Panel shall be limited to the success or*

dismissal of an Objection and to the refund by the DRSP to the prevailing party, as determined by the Expert Panel in its Expert Determination, of its advance payment(s) of Costs pursuant to Article 14(e) of this Procedure and any relevant provisions of the applicable DRSP Rules." Therefore, in the view of the majority of the Expert Panel such a remedy is not available in the present procedure.

85. Having carefully considered the Applicant's Application, the response to the Objection and the response to the IO's additional written statements, the Expert Panel states that the Applicant has failed to appreciate the highly sensitive nature of the applied-for string .Hospital as articulated by the IO, and the Applicant's Public Interest Commitments filed on 6 March 2013 does not in any way address the concerns of the IO.

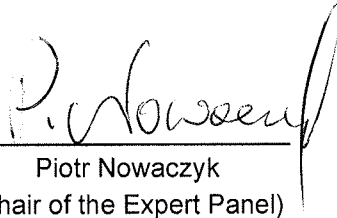
H. The great care of public health required by morality and public order is reflected in the right to health which is broadly recognized in many international law instruments

86. In this regard, the Expert Panel is convinced that the right to health is an important principle of international law, as is reflected in various documents. As it was pointed out by the IO's, Article 25 of the Universal Declaration of Human rights which provides as follows: "*Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social services and the right to security in the event of unemployment sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.*" Then, Article 12 (1) of the International Covenant on Economic, Social and Cultural Rights which states as follows: "*The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*"
87. Furthermore, the Expert Panel draws support from the 1998 European Court of Human Rights decision in the case of *Guerra v. Italy supra* where it was decided that a failure by the state to provide timely information on environmental pollution issues so that the citizens of that state could assess the health risks to themselves and their families was tantamount to a violation of their right to respect for their right to private and family life in breach of Article 8 of the European Convention on Human Rights. As was submitted by the IO, having access to reliable and trustworthy health related information is part of the fundamental right to health. Moreover, the Expert Panel accepts the argument presented by the IO that business enterprises should respect human rights by avoiding the infringement of human rights and addressing adverse human rights impacts with which they are involved (11 principle of "Guiding Principles" that were endorsed by the United Nations Human Rights Council in its Resolution 17/4 of 16 June 2011). Accordingly, the Expert Panel finds that both states and private entities are duly bound to ensure reliable access to health related information, goods and services. And where such mechanisms for ensuring safe and reliable health related information goods and services are non-existent or inadequate then the Application breaches the right to health. The Application falls outside the scope of freedom of expression.
88. Freedom of expression is connected with special duties and responsibilities as is stated in the Guidebook. In the case of registering .Hospital those duties include an application of very specific protection and an awareness of the importance of the role of hospitals in delivering credible healthcare objectives. The Expert Panel, in considering this Application, believes that the Applicant failed to avert its mind to these responsibilities.

89. The present case is an example of a hard case which requires not only the simple application of legal rules, but also balancing different values and rules (Ronald Dworkin, Taking rights seriously, 1977). Freedom of expression and the development of services in the Internet must be balanced with the right to health and even right to life. For the majority of the Expert Panel, there is no doubt that human health and its safety tips the scale in finding the Objection to be justified.
90. The Expert Panel's decision was not taken unanimously.

VI. DECISION

91. For the foregoing reasons, in accordance with Article 21 (d) of the Procedure, the majority of the Expert Panel renders the following Expert Determination:
- (i) The Objection is successful. Therefore, the Independent Objector is the prevailing party.
 - (ii) The Centre shall refund the Independent Objector's advance payment of costs of the proceeding.



Piotr Nowaczyk
(Chair of the Expert Panel)



Ike Ehiribe
(Co-Expert of the Expert Panel)

11th December 2013.


August Reinisch
(Co-Expert of the Expert Panel)
(dismissing)

DATE: 11 December 2013

**NEW GENERIC TOP-LEVEL DOMAIN NAMES (“gTLD”)
DISPUTE RESOLUTION PROCEDURE**

**Dissenting Opinion
by Prof. August Reinisch
12 December 2013**

relating to

**THE EXPERT DETERMINATION
of 11 December 2013**

issued by the Expert Panel,
composed of

Prof. August Reinisch
e-mail:
august.reinisch@univie.ac.at

Department of European,
International and
Comparative Law,
University of Vienna
Schottenbastei 10-16
1010 Vienna, Austria

Mr. Piotr Nowaczyk
e-mail:
piotr.nowaczyk@dentons.com

DENTONS
Rondo ONZ 1, 30th Floor
00-124 Warsaw
Poland
Tel. +48 22 24 25 705
Fax: +48 22 24 25 242

Mr. Ike Ehiribe
e-mail:
ehiribe@aol.com

Castaldi 7 Stones
Commercial & IP Chambers
88 Kingsway Holborn
London WC2 B6AA
England, United Kingdom

in Case No.
EXP/412/ICANN/29

Prof. Alain Pellet, Independent Objector (France) v. Ruby Pike, LLC (USA)

1. After having participated in an open exchange of views with my esteemed co-panelists, during which we have tried to arrive at a mutually acceptable expert determination in this case, I regret to find that this has proven impossible.
2. For the reasons outlined below, I am unable to concur with my colleagues' substantive determination to uphold the Independent Objector's (the "IO's") Objection in the case under consideration.
3. However, I am in agreement with them as regards the finding that there is no basis to assume the IO's lack of independence and impartiality, that the IO has standing in the present case and that there was no indication for a manifestly unfounded objection which would have justified a "quick look procedure".
4. I should state at the outset that I do share my co-panelists' concern about the importance of public access to reliable health-related information on the internet. However, I am unable to agree that this concern and the potential threat of future incorrect information received from websites/domains registered under the applied-for gTLD string ".hospital" constitutes a ground for upholding an objection to the registration of such a gTLD string.
5. As my colleagues have agreed, the scope of the Limited Public Interest Objection is expressly limited to the four grounds enumerated in paragraph 3.5.3. of Module 3 of the gTLD Applicant Guidebook (the "Guidebook") and "the wording of this paragraph clearly indicates that this catalogue has an exhaustive character." (Expert Determination of 11 December 2013, paras. 62, 63).
6. Pursuant to paragraph 3.5.3. of the Guidebook, "[a]n expert panel hearing a Limited Public Interest objection will consider whether the applied-for gTLD string is contrary to general principles of international law for morality and public order." These principles are contained in a number of human rights instruments which are listed in a demonstrative fashion in paragraph 3.5.3. of the Guidebook.
7. The same provision also contains an exhaustive list of four "grounds upon which an applied-for gTLD string may be considered contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law." These grounds are
 - "Incitement to or promotion of violent lawless action;
 - Incitement to or promotion of discrimination based upon race, colour, gender, ethnicity, religion or national origin, or other similar types of discrimination that violate generally accepted legal norms recognized under principles of international law;
 - Incitement to or promotion of child pornography or other sexual abuse of children; or
 - A determination that an applied-for gTLD string would be contrary to specific principles of international law as reflected in relevant international instruments of law." (paragraph 3.5.3. of the Guidebook).

8. In the present case, the IO has expressly limited his Objection to the fourth ground, i.e. he has argued that the applied-for string and its intended use would contravene “specific principles of international law as reflected in relevant international instruments of law.”
9. Importantly, paragraph 3.5.3. of the Guidebook mandates that “[t]he panel will conduct its analysis on the basis of the applied-for gTLD string itself. The panel may, if needed, use as additional context the intended purpose of the TLD as stated in the application.”
10. In my view the majority misconstrues the grounds for objecting to gTLDs which should be primarily the string itself and could also take into account the intended use of the string in a subsidiary way “as additional context”.
11. As my co-panelists concede in the Expert Determination there is nothing in the string “.hospital” itself that is objectionable. It rather appears that, in their view, the intended use of this string is objectionable.
12. In their reasoning arriving at the result that the application is contrary to morality and public order, my co-panelists state that “[m]orality and public order require all the members of society, either public or private entities, to be extremely cautious of human life and health.” (Expert Determination of 11 December 2013, para. 79). Such caution would be required because unreliable information retrieved from websites could cause serious harm to vulnerable people and to society at large.
13. Apparently this implies for the majority that the Applicant would have to ensure the veracity of content on websites registered at domains using the gTLD string “.hospital”. In my co-panelists’ view “the sensitivity of .Hospital has a different dimension than gTLDs connected with banking or legal services since human life and health require greater care than pure commercial activity.” (Expert Determination of 11 December 2013, para. 83).
14. In concluding, the majority states that that the “Applicant has failed to appreciate the highly sensitive nature of the applied-for string .Hospital as articulated by the IO.” (Expert Determination of 11 December 2013, para. 85). Thus, the Objection is held valid.
15. It is this finding that the intended purpose of the string “.hospital” by the Applicant was considered “contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law” with which I am unable to concur.
16. In my view this construction of the subsidiary relevance of the intended purpose of an applied-for string exceeds the powers of this expert panel.
17. It is not the task of an expert panel to rewrite the application standards for gTLD strings and to supplement them with higher standards in the public interest. Rather,

its task is limited to determining whether a specific applied-for string, taking into account its intended use as stated in the application is “contrary to generally accepted legal norms relating to morality and public order that are recognized under principles of international law.”

18. The grounds for objection listed in paragraph 3.5.3. of the Guidebook provide a clear indication that only a very limited set of particularly reprehensible behavior is objectionable. The examples listed in the Guidebook referring to the incitement or promotion of violence, unlawful discrimination and sexual abuse of children clearly illustrate this.
19. The limited scope of the fourth ground of objection in paragraph 3.5.3. of the Guidebook is also evident in the ICANN Explanatory Memorandum of 29 October 2008. Under the heading "Morality and Public Order Objection Considerations in New gTLDs" it stated that “[e]xtensive research has shown that it is difficult to identify existing generally accepted legal norms relating to morality and public order. There are, however, peremptory norms of public international law from which no derogation is permitted and which can be modified only by a subsequent norm of international law having the same character (jus cogens), such as the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity and the rules prohibiting piracy and trade in slaves.” (ICANN, New gTLD Program Explanatory Memorandum, p. 3, available at <http://archive.icann.org/en/topics/new-gtlds/morality-public-order-draft-29oct08-en.pdf>). This implies that only certain particularly reprehensible acts and omissions constitute grounds for objection.
20. This concept was taken up by the IO in stating his mission as one of protecting against the promotion of seriously offensive behavior. According to the IO, “the essential criterion is not to determine whether or not the application is contrary to the multiple potential interests of the public who use the global Internet. It is not the mission of the Independent Objector to protect personal or commercial interests of individual Internet users. The limited public interest objection aims at ensuring that no applied-for gTLD string and its intended use is contrary to fundamental norms of public order and morality that are recognized under international law.” (Website of the Independent Objector, <http://www.independent-objector-newgtlds.org/>).
21. The IO also provides an illustration of the limited scope of objectionable application by stating that “a limited public interests objection could be triggered in case an application promote unlawful activities or international crimes, such as child pornography, sale of counterfeit medicines, slavery, torture or genocide; in case it endangers international public order or again in case it is obviously against moral values that have been transcribed in international norms.” (Website of the Independent Objector, <http://www.independent-objector-newgtlds.org/>).
22. As stated in paragraph 3.5.3. of the Guidebook, in order to take the intended use into account, the IO and the Panel of Experts are required to look at the application itself.

23. Applying these considerations to the present case, one may well consider that the application for a string “.hospital” which contains an indication that the intended purpose of such a string might be the sale of counterfeit medicine or maybe also the offering of unsafe medical treatment or other high risk medical services might be objectionable.
24. However, I fail to see that the application by the Applicant indicates any intention of inciting or promoting any such highly reprehensive behavior.
25. The Applicant is a commercial domain name provider who intends to offer domain sites with the gTLD string “.hospital”. It is the task of such a provider to ensure that domains are available and functioning and that specific users may register. The prospective domain name provider in the present case is not itself active in the health or medical field and there is nothing in the application that lends itself to presume that it intends to engage in any activities like the sale of medicine, the offering of medical treatment or other medical or hospital services, let alone in the sale of counterfeit medicine or other reprehensible behavior.
26. Thus, under the IO’s own standards it would appear difficult to image how the present application could be considered to be contrary to “fundamental norms of public order and morality that are recognized under international law.”
27. One may criticize that Applicant’s purpose is primarily commercial, regarding the applied-for gTLD string as mere “commodity”, but that does not render it contrary to “morality and public order”.
28. I am sympathetic with the majority’s concern that the lack of a specific guarantee that the Applicant will ensure that the information imparted through internet sites registered with the “.hospital” gTLD will be reliable and trustworthy information is problematic.
29. However, I cannot tell from the current ICANN registration prerequisites that such an implied substantive, content-wise check is a precondition for a gTLD string registration.
30. The majority relies heavily on the fact that the present application “does not include those specific protection safeguards listed at page 8 of the GAC’s comments.” (Expert Determination of 11 December 2013, para. 83). Indeed, on 11 April 2013, ICANN’s Governmental Advisory Committee (GAC) issued an Advice to the ICANN Board which stated that extensive additional safeguards should be put in place for a whole range of gTLDs including “.hospital”. (Available at <http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm>).
31. The recommended safeguards comprise for all new gTLDs: (i) increased WHOIS verification and checks; (ii) expanded terms of use by registry operators to mitigate abusive activity; (iii) increased security checks by registry operators, (iv) constant record keeping by registry operators to identify frequent inaccurate WHOIS records and security threats; (v) provision of mechanisms for the handling of complaints by registry operators arising from the provision of inaccurate WHOIS information or

the facilitation of infringement activity contrary to applicable law; and (vi) the identification of real and immediate consequences for providing inaccurate WHOIS information and engaging in infringement or unlawful activity.

32. In addition, the GAC recommended safeguards for new gTLDs carrying a higher risk of consumer harm, which include the string “.hospital”, such as: (i) heightened use policy requirements in the interest of consumers, (ii) information obligations of registrars in this request, (iii) security measures for sensitive health and financial data, (iv) strategies to mitigate fraud and other illegal activities, and (v) the establishment by registrants of single points of contact for complaints.
33. I agree with my co-panelists that “the issue is not whether ICANN will follow these suggestions or not because this Panel is only expected to examine the present Application and cannot take into account possible amendments that may be made in the future.” (Expert Determination of 11 December 2013, para. 83).
34. However, I feel compelled to conclude that as long as ICANN has not adopted these GAC recommendations and added specific additional requirements for applications relating to the health sector, it would be inappropriate to demand compliance with such recommendations from applicants in order to grant gTLDs.
35. This consideration is all the more relevant to the function of the Expert Panel whose task is limited to ensuring that gTLD names, taking into account their intended use, are not contrary to “fundamental norms of public order and morality that are recognized under international law”. It is not the Expert Panel’s assignment to check compliance with registration prerequisites.
36. While I agree with my colleagues that “a hard case [] requires not only the simple application of legal rules, but also the balancing of different values and rules” (Expert Determination of 11 December 2013, para. 89), I do not think that this would entitle us to rewrite ICANN’s current registration policy and usurp its registration role.
37. Consequently, I have to dissent and would reject the IO’s Objection. I cannot see that the IO has met the burden of proof establishing that the intended purpose of the Applicant for the gTLD string “.hospital” as stated in its application is contrary to “fundamental norms of public order and morality that are recognized under international law.”



August Reinisch

(12 December 2013)

REFERENCE MATERIALS – BOARD SUBMISSION 2016.02.03.2d

TITLE: Ombudsman Report Regarding Complaint by Hu Yi Global Information Resources (applicant for .招聘 (“recruitment” in Chinese))

Summary Background

Hu Yi Global Information Resources Company (Hu Yi) submitted the only application for the new gTLD .招聘 (meaning “recruitment” in Chinese) (Application). Employ Media LLC filed a String Confusion Objection against the Application. Hu Yi did not provide a response to the objection within the allotted time period and was therefore deemed to be in default. Hu Yi sent an email to the International Centre for Dispute Resolution (ICDR), the dispute resolution provider handling String Confusion Objections, and explained that Hu Yi did not file a timely response due to a “clerical error.” The ICDR issued its determination on 25 September 2013, indicating that the “Objection shall be deemed successful” because “it has been determined that the Applicant is deemed to be in default as it has failed to file a timely Response to the Objection.” To reflect this, the status of the Application was changed to “Will Not Proceed.” Subsequently, and nearly two years later, Hu Yi and Employ Media reached an agreement and requested that ICANN permit the objection to be “withdrawn.” ICANN explained that there is no mechanism within the Applicant Guidebook (Guidebook), dispute resolution procedures, or the New gTLD Program processes to allow an objection to be withdrawn after the conclusion of the proceedings.

Hu Yi filed a complaint with the Ombudsman who subsequently investigated the matter, and issued an Ombudsman Report on 25 November 2015. The Ombudsman has recommended that the Board “revive” (or cause to be revived) the Application and permit it to proceed through the remainder of the new gTLD application process. In coming to this conclusion, the Ombudsman considered several factors, including the linguistic and cultural differences at issue, Hu Yi’s efforts to try and resolve the issue within a reasonable period following the Objection proceedings, Employ Media’s subsequent request to withdraw its objection to, and later support for, the Application, as well as the fact that there are no other applicants for the string in question. Given all of these above-stated factors, the Ombudsman concluded that permitting the Application to proceed would have no impact on any other applicant and would have no impact on any objector (because there

is none). In addition, there are no further evaluation or objection proceedings to which the Application would be subject. The next step in the application process is the contracting phase.

In light of the unique set of circumstances presented here (namely, the fact that the objection was sustained only on procedural grounds, and that the objector later explicitly rescinded the objection and in fact supported the Application), and after a review of the Ombudsman Report, the Board has determined to follow the Ombudsman's recommendation, and direct the President, Global Domains Division or his designee(s) to proceed with processing Hu Yi's Application for the gTLD .招聘 through the remainder of the new gTLD application process.

Document/Background Links

The following attachment is relevant to the Board's consideration of the Ombudsman Report:

- Exhibit A is the Ombudsman Report regarding the complaint by Hu Yi, issued on 25 November 2015.

Other Relevant Materials

The ICDR's determination sustaining the String Confusion Objection against Hu Yi's application, issued on 25 September 2013, available at <http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-1-1-1158-95080-en.pdf>.

Submitted by: Amy A. Stathos, Deputy General Counsel
Date Noted: 18 January 2016
Email: amy.stathos@icann.org

Office of the Ombudsman

Case 15-00147

In a matter of a Complaint by Huyi Global

Report dated 25th November 2015

Introduction

This investigation relates to a complaint which have been made about the new generic top-level domain application for the string .招聘 (label: xn—otu796d meaning “Recruitment” in Chinese). The complaint to the Ombudsman is that the ICANN decision refusing to permit reinstatement of the application is unfair.

Facts

The complainant initially applied for the new string for .招聘. The application preceded on a standard basis, and reached the stage where it was possible for a string confusion objection to be filed, and accordingly another company called Employ Media LLC filed a String Confusion Objection with the relevant tribunal being the ICDR. The Applicant Guide Book provided that the objection had to be answered within a strict time period, but unfortunately the complainant did not do so within the correct time, and the effect of the objection being unanswered was that the objection was sustained. The sting application is recorded ID 1-1158-95080 as “Will Not Proceed.”

The complainant explains that they

“Sent an email to the ICDR on June 3, 2013 which stated the reason for not submitting a response to the Objection within 30 days. This was a clerical error, which, after being discovered, we made absolute best efforts to remedy. However, Huyi Global was, at the time, a new applicant, and a non-native English speaking and non-Western culture one. At the time, I was not involved in operational aspects of the registry business. I am the only native English speaking and Western acculturated person within the entire Huyi Global company. Having taken on the responsibility of this issue and after reviewing the entire history, I strongly believe that cultural and linguistic differences contributed to longer than normal and less than clear communications between Huyi Global and the ICDR and ICANN. As such, Huyi Global’s entire “appeal” seemed to drag on with a seeming lack of urgency when in fact Huyi had consistently immediately responded to all of ICDR and ICANN’s communications, but then waited days and weeks for their responses. We also believe that we were exercising a “leave no stone unturned” approach to the problem but since these were unchartered for all involved parties, there was no one correct path to follow, but we often felt as if we were being penalized for not going about this in the “right way” when no one actually told us what the right way should be.”

The ICANN position is

“Thank you for your email of 15 July 2015, regarding Hu Yi Global Information Resources’ new gTLD application for .招聘 (“recruitment”).

As you know, Employ Media LLC filed a String Confusion Objection against Hu Yi Global Information Resources’ new gTLD application for .招聘(application ID 1-1158-95080). Hu Yi Global Information Resources did not provide a response to the objection within the allotted time period and was deemed to be in default. To reflect this, the status of application ID 1-1158-95080 is “Will Not Proceed.”

Hu Yi Global Information Resources’ new gTLD application for .招聘 has completed all relevant New gTLD Program processes as defined by the Applicant Guidebook. As the objection proceeding has concluded and the objection has been deemed successful, there are no further avenues for this application to pursue within the New gTLD Program. Further, there is no mechanism under the Applicant Guidebook, Dispute Resolution procedures, and Program processes for an objector to withdraw their objection after the conclusion of the objection.

We understand that the parties have reached an agreement and have requested that ICANN permit the objection to be withdrawn. However, there is no mechanism within the Applicant Guidebook, dispute resolution procedures, or Program processes to allow an objection to be withdrawn after the conclusion of the proceedings. ICANN’s decisions relating to this case are consistent with how all other new gTLD objections have been processed.”

Investigation

To undertake this investigation I have had a number of discussions with the complainant, and also with Employ Media who were formerly the objector to the string. I have also discussed this with the new gTLD team at ICANN to see if it was possible to reach an informal settlement of the complaint. I have seen submissions and correspondence from the complainant, together with references to the appropriate emails, correspondence and references to the AGB where appropriate.

I have given both ICANN and Hu Yi an opportunity to comment on several drafts. I am grateful that both have taken the trouble to consider the issues in the report. I have taken into account supplementary material which both have provided.

Issues

The issue which I am required to investigate is whether the action by the new gTLD team in recording this application as not able to proceed, is fair. This is a situation where the AGB was silent on the process, rather than directly preventing or prohibiting the application from proceeding.

Jurisdiction

This is a matter where I clearly have jurisdiction because I have been asked to investigate issues of fairness and process, which are specifically set out in ICANN Bylaw V.

Reasoning

When I first received the complaint I was initially concerned about the delay in coming to my office with the complaint. The string objection took place in 2013, although there is no doubt that there was a fairly prompt response from the complainant when they discovered that the relevant email had been overlooked, and the time for objection had passed. There followed a long and fairly delayed exchange of emails and the formal complaint was made to me on the 9 June 2015. Following the complaint, I needed time to investigate the background and met with Alex Lee and others to discuss the matter on a number of occasions. I tried to suggest that this could be dealt with informally, because the objector had formally notified that they no longer objected to the string.

However the response is as cited above, that the AGB did not provide any ability to revive the application.

The point which has been made by the complainant, that their understanding of English was not sophisticated, is a factor in my opinion. A sophisticated and complex application system in a second language must be a formidable obstacle to any potential applicant operating in an English only application process. But notwithstanding this they did try to resolve the issue within a reasonable period.

The second issue which I regard as important, is that on discussions with the objector, it is clear that they accepted that their objection would probably not have succeeded in any event, if the complainant had responded within the specified time. But more importantly, after discussions with the complainant, they have specifically withdrawn the objection. In a situation where there are no other applicants for this string, and because the AGB is largely silent, I see no reason why this application should not proceed.

In the supplementary material provided by ICANN, they emphasised the difficulties presented by the rejection by ICDR in the absence of a response to the objection. It is acknowledged that the AGB is silent on what should be done next, but their position is that the application came to an end at that point. Hu Yi emphasise that they were dealing with cultural and linguistic differences, different time zones and sophisticated and complex Western centric application processes. They emphasise the subsequent acknowledgement by the objector that they may not have succeeded on the merits, but now support the application.

It is an essential part of the role of an ombudsman to look at overall fairness of the process. This means I need to look at the overall picture, rather than take a rule centric approach to process and procedure. In this case no other party will be affected as the objection no longer is relevant. The applicant has undoubtedly spent a very substantial sum of money which would be wasted otherwise.

If this is placed in proportion, the unfairness to Hu Yi is significantly greater than any difficulty that this might cause to the progression of the application. It is unlikely to have any precedential effect because the new gTLD program is virtually completed. On the balance, the procedural difficulties should not be insurmountable.

It is my opinion that it would be unfair for this application not to proceed, and I therefore recommend that it be permitted to continue down the path to delegation.

Result

As a result of this investigation, I recommend that the complaint be sustained and that the matter go back to the new gTLD committee or the appropriate ICANN person, and the application be revived and proceed.

Chris LaHatte

Ombudsman

Annex 1 - Board Resolution 2016.02.03.2e
GAC Advice – Dublin Communiqué (21 October 2015): Actions and Updates
As of 19 January 2016

| | GAC Register # | GAC Advice | Action/Update |
|---------------|--|---|--|
| 1. SAFEGUARDS | 2015-10-21 gTLD Safeguards : Current Round | <p>The GAC advises and urges the Board to develop and adopt a harmonized methodology for reporting to the ICANN community the levels and persistence of abusive conduct (e.g., malware, botnets, phishing, pharming, piracy, trademark and/or copyright infringement, counterfeiting, fraudulent or deceptive practices and other illegal conduct) that have occurred in the rollout of the new gTLD program.</p> | <p>The Board accepts this advice and notes the ongoing work of the community, including the GAC, on developing a framework to help guide Registry Operators as they implement the requirement in the New gTLD Registry Agreement to “periodically conduct a technical analysis to assess whether domains in the TLD are being used to perpetrate security threats, such as pharming, phishing, malware, and botnets. Registry Operator will maintain statistical reports on the number of security threats identified and the actions taken as a result of the periodic security checks. Registry Operator will maintain these reports for the term of the Agreement unless a shorter period is required by law or approved by ICANN, and will provide them to ICANN upon request.”</p> <p>To this end, a Framework Drafting Team was formed in July 2015. It is composed of 44 representatives from the GAC PSWG (9), Registries (30) and Registrars (5). The Registries and Registrars produced the first draft of a best practices Framework for the Drafting Team to review and provide feedback. In the spirit of mutual agreement, the group is working collaboratively together to with the view to ultimately publish a final draft Framework for public comment. The next steps are for the Drafting Team to discuss feedback, and once provided, and it is anticipated the Drafting Team will have an in person meeting during ICANN 55.</p> <p>Additionally, in the 18 October 2015 iteration of the GAC-NGPC Scorecard, the NGPC noted that the ICANN community is considering the issue of abusive domain names as part of the current exercise of assessing the New gTLD Program. The Scorecard lists the various reviews and metrics where this matter is being analyzed.</p> |

Annex 1 - Board Resolution 2016.02.03.2e

| | GAC Register # | GAC Advice | Action/Update |
|------------------|---|---|---|
| 2. FUTURE ROUNDS | 2015-10-21 Future gTLD Rounds | <p>The GAC advises the Board that before defining the modalities for future rounds, a rigorous assessment of all public policy related aspects of the current round should be undertaken, taking into account the advice given by the GAC on this subject since the beginning of the New gTLD process, including advice relating to community-wide engagement on the issues of communication to and access by developing countries and regions; and advice regarding past policy decisions taken by the Board to reserve the Red Cross and Red Crescent designations and names.</p> <p>In this regard, the GAC expects that those elements of the current framework for new gTLDs that are considered appropriate by the GAC will remain and that the elements that are not considered satisfactory will be improved for subsequent rounds.</p> | <p>The Board accepts this advice and acknowledges that as part of the reviews and activities related to evaluating the New gTLD Program, there is an opportunity for rigorous assessment of the public policy related aspects of the current round of the Program. There are a number of reviews currently underway including, but not limited to, Rights Protection reviews, Program Implementation reviews, and Economic studies. While there is not a separate Public Policy review contemplated as part of the New gTLD Program reviews, the Board notes that public policy matters often arise in the discussion and analysis of specific topics, and are therefore considered analyzed in the reports. The current status of all of the ongoing reviews is available here. The Board stands ready to receive input and advice from the GAC on public policy related aspects matters of Program reviews, in particular, as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN’s policies and various laws and international agreements or where they may affect public policy issues (see ICANN Bylaws Art. XI, Sec. 2.1.a).</p> |

Annex 1 - Board Resolution 2016.02.03.2e

| | GAC Register # | GAC Advice | Action/Update |
|--------------------|--|--|--|
| 3. IGO PROTECTIONS | 2015-10-21 Protection for IGOs | The GAC advises the Board to facilitate the timely conclusion of discussions of the “small group” and the NGPC in an effort to resolve the issue of IGO protections. | <p>On 16 July 2015, the “small group” of representatives of IGOs, the GAC and the NGPC met and outlined a draft proposal for dealing with the protection of IGO acronyms (the “Proposal”). The Proposal is under review and will be circulated to the GAC and the GNSO for review and consideration.</p> <p>As previously discussed, on 30 April 2014 the Board took action requesting additional time to consider certain GNSO consensus policy recommendations that differ from advice from the GAC to the Board with respect to protections for IGO names and acronyms, among other things. Subject to additional input received from the relevant parties about the Proposal, it is anticipated that the Board will need to consider whether or not to adopt the Proposal and to address any remaining open consensus policy recommendations from the GNSO on the topic.</p> |

Annex 1 - Board Resolution 2016.02.03.2e

| | GAC Register # | GAC Advice | Action/Update |
|----------------------------------|--|---|---|
| 4. COMMUNITY PRIORITY EVALUATION | 2015-10-21 Community Priority Evaluation | <p>The GAC advises the Board that:</p> <ul style="list-style-type: none"> i. the GAC reiterates previously expressed concerns that the Community Priority Evaluation (CPE) process has not met the expectations of applicants and notes that all the successful applications are currently the subject of dispute resolution procedures; ii. the GAC expects the current specific problems faced by individual applicants to be resolved without any unreasonable delay, and in a manner in which justified community interests are best served; iii. the GAC notes possibly unforeseen consequences for community applicants of recourse by competing applicants to other accountability mechanisms; and the specific challenges faced by some community applicants in auctions when in competition with commercial applicants; iv. the GAC will take into account the final report of the ICANN Ombudsman on this issue when preparing the GAC's input into the GNSO's review of issues for improving procedures relating to community-based applications in the next gTLD round; and the Competition, Trust and Consumer Choice Review (CCT) under the Affirmation of Commitments. | <p>The Board acknowledges that the GAC continues to keep under review the community application process for new gTLDs. At the 20 January 2015 meeting of the ICANN Board Governance Committee (BGC), the BGC authorized the Ombudsman to proceed with his "own motion" investigation regarding issues of fairness around the transparency of the Community Priority Evaluation (CPE) process and applicants' ability to provide materials to the panel conducting the CPE process. The Ombudsman published his report on 13 October 2015, which is available for review at the following: https://omblog.icann.org/.</p> <p>Additionally, the Board notes that it previously provided input to the GNSO on suggested areas for possible policy development for subsequent rounds of the New gTLD Program. In its 24 November 2014 letter to the GNSO, the Board identified CPE and community applications as a topic that the Board believes would be appropriate for discussion in an evaluation of the current gTLD application around and for possible adjustments for subsequent application procedures. The Board notes that the Preliminary Issue Report on New gTLD Subsequent Procedures (31 August 2015) includes a discussion of community applications, taking note of the concerns raised by the GAC in various Communiqués. The Preliminary Issue Report is a precursor to the GNSO considering whether or not to undertake a policy development process. (See Section 4.4.5 of the Preliminary Issues Report). At its 17 December 2015 meeting, the GNSO Council adopted a resolution to initiate a PDP to consider and analyze issues discussed in the Final Issue Report on New gTLD Subsequent Procedures.</p> |

Annex 1 - Board Resolution 2016.02.03.2e

| | GAC Register # | GAC Advice | Action/Update |
|--------------------------------|---|---|--|
| <p>5. TWO-CHARACTER LABELS</p> | <p>2015-10-21 Use of 2-letter Country Codes and Country Names at the Second Level</p> | <p>The GAC notes that the process for considering comments for two-character letter/letter labels launched on the 6th October 2015 is not consistent with GAC advice which recommended that governments' comments be fully considered. That advice was accepted by Board resolution 2015.02.12.16.</p> <p>GAC Members have now been asked to clarify which specific TLDs their comments pertain to, and to explain how the release of the two-letter label will cause confusion with their corresponding country code. The GAC reiterates its advice on this issue and</p> <p>a. advises the Board that:</p> <ul style="list-style-type: none"> i. comments submitted by the relevant Governments be fully considered regardless of the grounds for objection. <p>b. The GAC further advises the Board to:</p> <ul style="list-style-type: none"> i. be mindful of governments' capacity limitations and asks the Board to facilitate simplification of the process for providing comments to address their concerns. <p>c. With respect to new requests for release, the GAC advises the Board to:</p> <ul style="list-style-type: none"> 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. | <p>The Board has concerns with the GAC advice noting that the two-character comments consideration process launched on 6 October "is not consistent with GAC advice which recommended that governments' comments be fully considered." The process for evaluating comments states, "Comments will be reviewed and considered by ICANN in determining whether to authorize the release of requested Letter/Letter Two-Character ASCII Labels. ICANN will evaluate comments in light of the standard in the registry agreement...."</p> <p>Since the standard established in the registry agreement is confusion with the corresponding country code, comments will be evaluated against such standard. Comments not pertaining to confusion might be directed to other recourse mechanisms outside of the Authorization Process, such as the registry Abuse Point of Contact.</p> <p>The Board would like to clarify that all comments from relevant governments are fully considered under the current process. The Board has also taken into consideration input from the Registry Stakeholder Group expressed in its 9 November 2015 letter to the Board. 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. The Board stands ready to hear from the GAC if it has a different understanding or specific concerns about comments being "fully considered".</p> <p>With respect to governments' capacity limitations and working with the GAC Secretariat to address the technical issues with comment forms, the Board notes that staff held multiple webinars with members of the GAC to work through these issues and governments are continuing to submit comments via the Authorization Process.</p> |

REFERENCE MATERIALS - BOARD PAPER NO. 2016.02.03.2f

TITLE: Board Governance Committee Recommendation Regarding Implementation of Public Interest Commitments for .DOCTOR Registry Agreement

This document provides an overview of the background facts regarding the GAC's advice concerning .DOCTOR and the NGPC's response to the advice.

1. .DOCTOR was included as one of the [Category 1 strings](#) requiring additional safeguards in the GAC's [Beijing Communiqué](#) (11 April 2013).
2. ICANN initiated a public comment period (23 April 2013) to solicit input on how the NGPC should address the GAC's safeguard advice in the Beijing Communiqué.
3. On 29 October 2013, the NGPC sent a [letter](#) to the GAC about its proposed implementation of the Category 1 Safeguard advice in the Beijing Communiqué.
 - a. The NGPC proposed to modify the text of the Category 1 Safeguards as appropriate to meet the spirit and intent of the advice in a manner that allowed the requirements to be implemented as Public Interest Commitments (PICs) in Specification 11 of the New gTLD Registry Agreement.
 - b. The NGPC also proposed to distinguish the list of strings between those that the NGPC considered to be associated with market sectors or industries that have highly-regulated entry requirements in multiple jurisdictions, and those that do not. The Category 1 Safeguards in the PIC would apply to the TLDs based on how the TLD string was categorized (i.e. the highly-regulated TLDs would have 8 additional PICs, and the others would have 3 additional PICs). A copy of the PICs is included in the Reference Materials.

- c. In the October 2013 proposal, .DOCTOR was not proposed to be classified as “highly-regulated,” and thus it would be required to have 3 additional PICs in its Registry Agreement.
4. In the GAC’s [Buenos Aires Communiqué](#) (20 November 2013), the GAC [advised](#) the Board “to re-categorize the string .doctor as falling within Category 1 safeguard advice addressing highly regulated sectors, *therefore ascribing these domains exclusively to legitimate medical practitioners*. The GAC notes the strong implications for consumer protection and consumer trust, and the need for proper medical ethical standards, demanded by the medical field online to be fully respected.” (Emphasis added.)
5. The NGPC considered the GAC’s Buenos Aires advice, and in the iteration of the [Scorecard from 5 February 2014](#), the NGPC:
 - a. adopted the proposed [implementation](#) of Category 1 Safeguards that was sent to the GAC in October 2013; and
 - b. accepted the GAC’s Buenos Aires advice to reclassify .DOCTOR to highly-regulated so that it would be required to have the 8 additional PICs, and to “**ensure that domains in the TLD are restricted to legitimate medical practitioners.**” (Emphasis added.)
6. In January 2015, staff contacted the three contending .DOCTOR applicants in advance of the “private auction,” which was scheduled for late January 2015. To implement the NGPC’s action regarding .DOCTOR, staff informed the applicants that in addition to the standard eight PICs for Category 1 strings in the highly-regulated category, an additional PIC would be required to ensure that domains would be restricted to legitimate medical practitioners. The additional PIC would read as follows: “Registry Operator will ensure that the domains in the TLD are ascribed exclusively to legitimate medical practitioners.”
7. On 21 January 2015, Donuts sent an email to the CEO and some members of the NGPC raising concerns that the PIC developed by staff for .DOCTOR goes

beyond what the NGPC action called for in its 5 February 2014 Scorecard/resolution. The email stated that .DOCTOR is being singled out for disparate treatment far beyond that of any other highly sensitive TLD. The NGPC discussed the email from Donuts at its [12 February 2015 meeting](#), and after discussion, the sense of the NGPC was for staff to continue to move forward with implementation of the NGPC's 5 February 2014 resolution on the matter.

8. On 12 March 2015, Brice Trail filed Reconsideration Request 15-3.
9. At its 6 May 2015 meeting, the Board Governance Committee (BGC) began discussions about Reconsideration Request 15-3, and postponed making a final determination on the Reconsideration Request, but instead recommend that “the NGPC again review the proposed implementation of a public interest commitment for the .DOCTOR TLD, and to re-evaluate the NGPC's 12 February 2015 determination.”
10. The NGPC was decommissioned in October 2015, and the Board is now considering its response the BGC's recommendation. One response option that the Board is considering is a suggestion from Brice Trail asking ICANN to consider a “compromise solution, namely to require a registrant to demonstrate ‘legitimate medical practitioner’ status only if the registrant holds itself out as a medical practitioner. An obstetrician applying for OBSTRETICS.DOCTOR, for example, would have to demonstrate his or her qualification to practice medicine.” Brice Trail notes that the benefit of this solution is that it “would help protect against abuse of medical uses of the domain by non-practitioners (the very conduct the GAC seeks to prevent), and at the same time avoid potential discrimination against other legitimate, nonmedical uses of the domain (conduct also opposed by the GAC).”

REFERENCE MATERIALS - BOARD PAPER NO. 2016.02.03.2g

TITLE: **Establishing a Set of KPIs for Board Performance and Improvement Efforts (ATRT2 Rec. 1, 2 & 3)**

Background:

On June 26, 2014, the Board approved the ATRT2 recommendations ([2014.06.26.14](#)) among which Recommendations 1, 2 & 3 directly related to the Board's performance and improvement efforts. They read as follows.

Rec. 1: *“The Board should develop objective measures for determining the quality of ICANN Board members and the success of Board improvement efforts, and analyze those findings over time”*

Rec. 2: *“The Board should develop metrics to measure the effectiveness of the Board's functioning and improvement efforts and publish the materials used for training to gauge levels of improvement”.*

Rec. 3: *“The Board should conduct qualitative/quantitative studies to determine how the qualifications of Board candidate pools change over time and should regularly assess Directors' compensation levels against prevailing standards”*

In addition to the above, prior to the approval of the ATRT2 recommendations and in line with its charter, the BGC recommended that the Board encourage and support training and development efforts ([BGC recommendation of 23 March 2014](#)). The Board approved this recommendation from the BGC on [30 April 2014](#).

Implementation Actions Taken to Date:

As a result of the above-mentioned Board resolutions and the ATRT2 recommendations, the following items have already been developed or completed:

- A full on-boarding Training Programme has been developed encompassing governance principles/best practices, basic finance, budget and fiduciary responsibilities, history of ICANN, structure and role of the SOs & ACs, law & regulation and tools;
- A post-training survey to measure satisfaction and training effectiveness has been created;

- An online Board training platform was put in place in cooperation with ICANN-Learn (<http://learn.icann.org/courses/onboarding-icann-board>) to allow Board members to make use of online development training;
- Board members completed self-assessment forms describing their experience that will serve as a basis for the development of individual training plans specialized for each Board member;
- An exit questionnaire is now in use for Board members leaving the Board to help ICANN learn from their experience as ICANN Board members;
- Training Material provided by third parties have been published, to the extent that ICANN has had the right to do so (<https://www.icann.org/resources/pages/training-materials-2015-06-09-en>)
- On April 24, 2015, the Board completed the “On-Boarding” training modules on governance/best practices and basic finance, budget and fiduciary responsibilities. The new Board members since that time have also completed the on-boarding programme. As of the date of this document, the full Board has completed the modules, which allows the Board to establish a common baseline against which to measure improvements over time.
- With regards to Rec. 3, the process for benchmarking Directors’ compensation has been operationalized for several years. The commitment is to review Board member compensation regularly, and the current plan anticipates every two years, if feasible and practical. The most recent benchmarking of Board member compensation took place during the first half of 2014, as identified in the July 2014 resolution on Board compensation (See <https://www.icann.org/resources/board-material/resolutions-2014-07-30-en#2.b>). The independent valuation report on Board compensation that lead to this resolution was posted for public comment on 30 April 2014. (See <https://www.icann.org/en/system/files/files/board-compensation-considerations-30apr14-en.pdf>.)

Implementation Action Taken Here and Going Forward:

The ATRT 2 recommendations 1 and 2 call for the Board to develop measures/metrics for its performance and improvement efforts. The proposed initial set of KPIs for the Board's review and adoption is attached to these Reference Materials as Attachment A.

These KPIs are designed to be specifically responsive to ATRT2 Recommendations 1, 2 and 3 on the required Review timeline. Separately, and, in addition to these KPIs, the Board plans to take a holistic look at 'Board Performance' and continue to develop a more comprehensive, richer set of KPIs with which the Board can measure its effectiveness over time, which will be assessed, evaluated and revised as circumstances dictate.

Document/Background Links

Attachment A includes the relevant KPIs being approved by the Board today.

Submitted by: Melissa King / Vinciane Koenigsfeld
Position: VP Board Operations / Board Operations Content Manager
Date Noted: 26 January 2016
Email: melissa.king@icann.org; vinciane.koenigsfeld@icann.org