

**Recommendation Of The Board Governance Committee  
Reconsideration Request 12-1  
1 June 2012**

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On 10 May 2012, the International Olympic Committee (“IOC”), through its counsel, submitted a reconsideration request (“Request”) to the Board Governance Committee (“BGC”). The Request asked the New gTLD Program Committee (the “Committee”) to reconsider its 10 April 2012 resolution regarding the GNSO’s Recommendation for Protection of Red Cross and International Olympic Committee Names in New gTLDs (“GNSO Recommendations”). Specifically, the IOC asks that the Board, through the New gTLD Program Committee, reconsider its decision and adopt the GNSO Recommendations, thereby providing additional protections to the Red Cross and the IOC in the first application round for the New gTLD Program.

**I. Relevant Bylaws.**

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

- (a) one or more staff actions or inactions that contradict established ICANN policy(ies); or
- (b) one or more actions or inactions of the ICANN Board that have been taken or refused to be taken without consideration of material information.

The Bylaws do not provide for reconsideration 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.” Bylaws, Art. IV, § 2.2. Similarly, the Bylaws do not provide for reconsideration of an action or inaction of the ICANN Board that was taken after the Board’s consideration of material information. Bylaws, Art. IV, § 2.2(b).

When challenging a Board action or inaction, a request must contain, among other things, “a detailed explanation of the material information not considered by the Board and, if the information was not presented to the Board, the reasons the party submitting the request did not submit it to the Board before it acted or failed to act.” Bylaws, Art. IV, § 2.6(h).

Dismissal of a request for reconsideration is appropriate if the BGC finds that the requesting party does not have standing because it failed to satisfy the criteria set forth in the Bylaws. Bylaws, Art. IV, § 2.16. These standing requirements are intended to protect the reconsideration process from abuse and to ensure that it is not used as a mechanism simply to challenge a decision with which someone disagrees, but that it is limited to situations where the Board did not have access to information that, if available, may have resulted in a different decision.

The Request was received on 10 May 2012, making it timely under the Bylaws. Bylaws, Art. IV, § 2.5. The Bylaws require that the BGC publicly announce by 9 June 2012 its intention either to decline to consider or to proceed to consider the Request. Bylaws, Art. IV, § 2.9.

## **II. Background.**

Throughout the New gTLD Program implementation work, the Red Cross and the IOC have sought heightened protections for their organizations' names, in recognition of, among other things, of the special statutory protections afforded to each organization in countries around the world. This was also the topic of advice from the Governmental Advisory Committee ("GAC"). On 20 June 2011, when ICANN approved the New gTLD Program, the Board approved "incorporation of text [into the Applicant Guidebook] concerning protection for specific requested Red Cross and IOC names for the top level only during the initial application round, until the GNSO and GAC develop policy advice based on the global public interest." See <http://www.icann.org/en/groups/board/documents/resolutions-20jun11-en.htm>. That decision resulted in a moratorium in the first application round that prohibited any application for certain strings identified by the Red Cross and IOC. 11 January 2012 Applicant Guidebook ("Guidebook"), Section 2.2.1.2.3, available at <http://newgtlds.icann.org/en/applicants/agb/guidebook-full-11jan12-en.pdf>. That decision is not being challenged.

Following the 20 June 2011 resolution, the Generic Names Supporting Organization ("GNSO") initiated the GNSO International Olympic Committee/Red Cross Drafting Team ("Drafting Team") to provide policy advice to the Board as requested in the resolution. The Drafting Team's work was informed by a 14 September 2011 letter from the GAC (at <https://gacweb.icann.org/download/attachments/1540128/GAC+advice+on+IOC+and+Red+Cross+Sep.+2011.pdf?version=1&modificationDate=1317031625914>) recommending that ICANN adopt a new schedule of names to be reserved from registration at the second level that represent the terms most commonly associated with the Red Cross or the IOC. The GAC letter also noted that the top-level protections introduced after the 20 June 2011 resolution should be extended to all future New gTLD Program application rounds, and made recommendations regarding the scope of language protections that should be afforded.

The Drafting Team made three recommendations, herein referred to as the GNSO Recommendations:

1. Create a category of "Modified Reserved Names" that would be available for application as gTLD strings to the IOC and the Red Cross. These would include strings that are currently restricted from application due to the moratorium. Other applications for strings (i.e., those not from the IOC or Red Cross) would then be subject to a "string similarity" review against the Modified Reserved Names, and confusingly similar strings would not pass this initial review. If the string is an exact match to any of the Modified Reserved Names, the string cannot be registered by any entity other than the Red Cross or IOC. If the string is not an exact match, but did not pass the initial string similarity review, the applicant may seek a letter of non-objection from the Red Cross or IOC (as applicable). If the applicant is unable to obtain a letter of non-objection, the applicant may make a

demonstration of its legitimate interest in the use of the applied-for string and establish that the use of the string does not refer to IOC or Red Cross activity. A determination in favor of the applicant would not preclude the IOC or Red Cross from invoking the appropriate objection processes under the New gTLD Program to challenge the applied-for string.

2. Protect the IOC and Red Cross terms in as many languages as feasible. The GAC letter stated that the previously provided list of translated terms from the IOC and Red Cross is “illustrative” and recommended expanding the protection to additional languages. The Drafting Team accepted this recommendation, but noted that in order to perform any meaningful string similarity review, a definitive list of translated terms must be provided. If such a list was presented in time, the Drafting Team noted that it would consider recommending the list be substituted for the list currently in the Guidebook.
3. The recommendations on Top Level Protections afforded to the IOC and Red Cross are intended to apply for all future rounds, but are subject to review by the ICANN community as necessary.

The recommendations were posted for public comment on 2 March 2012, at <http://www.icann.org/en/news/public-comment/ioc-rcrc-proposal-02mar12-en.htm>. The specific recommendations are available at <http://gns0.icann.org/issues/ioc-rcrc-proposal-02mar12-en.pdf>.

At the GNSO Council Meeting on 26 March 2012, the GNSO Council approved the recommendations, including a recommendation that the Board consider these protections for inclusion in the first application round of the New gTLD Program, then scheduled to close on 12 April 2012. <http://gns0.icann.org/meetings/minutes-council-26mar12-en.htm>. The motion passed the bicameral GNSO with the following vote count: Contracted Parties House – seven votes in favor (unanimous); Non-Contracted Parties House – seven votes in favor, six abstentions. *Id.*

The Committee, which was formed on 10 April 2012 and is delegated all legal and decision making authority of the Board relating to the New gTLD Program (for the first round of the Program, which commenced in January 2012 and for the related Guidebook that applies to this current round), considered the GNSO Recommendations at its 10 April 2012 meeting. The Committee was provided with a staff recommendation prior to the discussion. After discussion, the Committee followed the staff recommendation, and then passed the following resolution:

Resolved (2012.04.10.NG4), the New gTLD Program Committee acknowledges receipt of the GNSO's recommendation on extending certain protections to the Red Cross/Red Crescent and the International Olympic Committee names at the top level.

Resolved (2012.04.10.NG5), the New gTLD Program Committee chooses to not change the Applicant Guidebook at this time.

<http://www.icann.org/en/groups/board/documents/resolutions-new-gtld-10apr12-en.htm>. The rationale for that decision (the “Rationale”), published in a [Preliminary Report](#) on 20 April 2012, states:

*The Committee thanks the GNSO for its work to date on this issue. While the recommendations of the GNSO are well taken, changing the Applicant Guidebook at this time must be balanced against ICANN's commitment to accountability and transparency. The public comment "reply" period remains open on this topic through 14 April 2012, therefore any Committee action at this time – other than maintaining the status quo – could not reflect all of the inputs received on this issue. The comments received to date also demonstrate the existence of opposition to the adoption of the recommendations.*

*Implementation details have not been worked out to address these recommendations. In addition, a change of this nature to the Applicant Guidebook nearly three months into the application window – and after the date allowed for registration in the system – could change the basis of the application decisions made by entities interested in the New gTLD Program.*

*Comments received in the public comment forum also raise procedural issues with these recommendations that indicate concerns with the multi-stakeholder process utilized in this instance. While the Committee is not making a determination at this time about these procedural concerns, their existence also weighs towards maintaining the status quo at this time.*

*The status quo is that the Applicant Guidebook already provides several other protections available to the IOC and Red Cross for the top level, including a moratorium on the delegation of certain names at the top level in the first round of applications; an objection process which allows parties with standing to submit an objection on the grounds that an application infringes its existing legal rights; and the GAC Early Warning and Advice Processes. As protections already exist, when balanced with the accountability and operational issues posed by changing the Applicant Guidebook at this time, the public interest will be better served by maintaining the status quo. This action is not expected to have an impact on resources, nor is it expected to have an impact on the security or the stability of the DNS.*

*Nothing in the Committee's action or this rationale is intended to preclude the consideration of the GNSO recommendations for future rounds of applications within the New gTLD Program.*

On 10 May 2012, the IOC submitted its Request.

### **III. Stated Grounds For The Request.**

The Request is brought on multiple grounds:

- Changed circumstances (closure of the public comment period and that the first round application window is “still open”)
- Existence of opposition is not sufficient rationale to reject GNSO recommendation
- Time exists to work out implementation details
- Applicants were already on notice that further protections were under consideration and the Applicant Guidebook is subject to change
- Unique status of the legal protections afforded to the IOC and Red Cross supports providing further protections

For each of the grounds, the IOC identifies information that it claims the Committee did not consider in making its decision. The IOC relies upon the Rationale to support each of its grounds for making this Request.

### **1. Changed Circumstances – Public Comment Closure and TAS Glitch**

*Public Comment Reply Period.* On factor in the Committee’s decision not to change the Guidebook at that time was that the public comment period would not be closed for four more days. The Committee noted that any action taken prior to the closing of the comment period could not reflect all inputs on the issue. In its Request, the IOC notes that the reply period of the public comment cycle is now closed, and, further, that “there were no substantive comments in opposition to the proposal that were not fully considered before the GNSO passed the motion.” As the reply date has now past, the IOC argues, “this rationale [about the closing date of the public comment reply period] no longer supports the [ ] Committee’s action.”

*TAS.* In addition, following the Committee’s decision on 10 April 2012, the first application round was delayed due to a glitch in the TLD Application System (“TAS”). The IOC claims that this unforeseen delay due to the glitch in the TAS “fortuitously provides the Committee with the time and opportunity to reconsider the GNSO Recommendations.”

### **2. Opposition Comments Not Sufficient Rationale**

In its Request, the IOC states “there were no substantive comments in opposition to the proposal that were not fully considered before the GNSO Council passed the motion.” According to the IOC, all comments were heard and considered by the Drafting Team and GNSO Council, and yet the Council still approved the recommendations by a majority vote. The IOC therefore argues that the “Committee did not consider that recommendations do not have to be universally accepted to be approved by ICANN. The existence of some opposition to the adoption of the GAC and GNSO Recommendation is not a sufficient rationale for rejecting them.”

### **3. Time Exists to Work out Implementation Details**

In its Request, the IOC states that the “Committee did not consider that the GNSO Recommendations can be implemented by the string similarity panels” already outlined in the

Guidebook, and that there is “ample time to work out the implementation details before the evaluation period begins.” The IOC notes that items such as the Trademark Clearinghouse and the Uniform Rapid Suspension System are still undergoing implementation work, so not having full implementation details “is not a sufficient rationale for rejecting the GNSO Recommendations.” Further, the IOC states that the extension of the application window provides more time to create implementation details.

#### **4. Applicants Were Already On Notice That Further Protections Were Under Consideration and The Applicant Guidebook is Subject To Change**

In response to the portion of the Rationale stating “*a change of this nature to the Applicant Guidebook nearly three months into the application window – and after the date allowed for registration in the system – could change the basis of the application decisions made by entities interested in the New gTLD Program,*” the IOC states that the “Committee did not consider that applicants were placed on notice of the contemplated protection of the Olympics words well before the application window opened.” In addition, the IOC argues that the 14 September 2011 GAC letter was published and the work of the Drafting Team was initiated prior to the application window opening, and the discussion of the scope of protections was publicly available. The IOC claims that “[n]o diligent applicant could have made good-faith decisions based on the assumption that there would be no string similarity review for the marks protected in Section 2.2.1.2.3 of the Applicant Guidebook.” Further, the IOC states that “all applicants’ proposed contracts with ICANN are already subject to existing national law, which provides strong protection to the Olympic words.... [A]pplicants could not make decisions based on standards lower than the GNSO Recommendations.”

The IOC also states that because the Guidebook is subject to change, the Committee’s action to not change the Guidebook at this time cannot be supported. The IOC notes that the GAC requested a change to the Guidebook regarding the provision of GAC advice on sensitive and controversial strings, and it is “incongruous” to allow this change but refuse the GAC-supported GNSO Recommendations at this time.

#### **5. Unique Status of the Legal Protections Afforded to the IOC and Red Cross Supports Providing Further Protections**

The IOC states that Committee’s decision to rely on the status quo, i.e., the protections already existing within the Guidebook including the moratorium on the delegation of certain IOC and Red Cross names at the top level, (GAC Early Warning and Advice Processes, and other objection mechanisms) did not take into consideration “the unique status of the legal protections afforded to the IOC.” That the IOC may have to use the trademark rights protection mechanisms provided for in the Guidebook does “not reflect the spirit and intent of the sui generis national laws that protect Olympic names.” According to the IOC, the Board’s previous approval of the moratorium “acknowledges that the Olympic names are entitled to special protection, but is not fully aligned” with the protections afforded to the Olympics through national legislation. The IOC claims that the 20 June 2011 request “entrust[ed] to the GAC and GNSO the issue of implementing proper standards for protection” of the Olympic names, and the GNSO Recommendations were formulated accordingly.

The IOC argues that the GNSO Recommendations would bring the Guidebook more closely in line with national legal standards and avert “improper” applications for Olympic names without requiring the “prolonged and expensive legal proceedings that would otherwise be required.” Such proceedings would “divert funding, time and attention from the unique Olympic global humanitarian mission.”

#### **IV. Alleged Harms if Reconsideration Not Granted.**

The IOC claims that if the Committee action is not reconsidered, and the GNSO Recommendations are not adopted at this time and incorporated into the Guidebook, the IOC and its National Olympic Committees would be subject to “costly and burdensome legal proceedings that, as a matter of law, they should not have to rely upon. By subjecting the IOC to costly and burdensome Legal Rights Objections, the [ ] Committee diverts resources away from the fulfillment of this unique, international humanitarian mission.”

The IOC also suggests that applicants may attempt to apply for IOC-related strings in ways that may violate national law, and the adoption of the GNSO Recommendations would allow for applicants to avoid “costly legal proceedings.” In addition, the IOC states that the Committee’s action ignores GAC advice, which “may add fuel to the fire of governments advocating for greater control over internet governance.”

#### **V. Analysis of the Request.**

It is the opinion of the BGC<sup>1</sup> that the Request fails to state any grounds that support reconsideration of the Committee’s 10 April 2012 decision. Accordingly, the BGC recommends that the Request be denied and that the decision on 10 April 2012 not be reconsidered.

As a preliminary matter, it is important to note that the Committee decision not to adopt the GNSO Recommendations “at this time” allows the Committee to review its decision on this issue as it deems appropriate. Indeed, the Rationale specifically notes that the Committee’s decision does not preclude consideration of this issue in future rounds. Based upon the language used by the Committee, this action cannot be cast as a rejection of the GNSO Recommendations, but rather noting that the action was not ripe as of 10 April 2012. The IOC’s Request does not controvert this timing issue; in fact, the Request is based in large part on “fortuitous” happenings after the 10 April 2012 decision.

Substantively, the IOC has not identified any material information that was in existence at the time of the Committee’s action that the Committee failed to consider. To the extent that the IOC’s Request is based upon the fact that the public comment period on the GNSO Recommendations is now closed, or that the application window for the first round of applications in the New gTLD Program was extended, neither of those occurrences was in existence on 10 April 2012 when the Committee made its decision. The IOC’s Request acknowledges this to be the case. Information that does not yet exist at the time of the action is not “material information” for the purposes of the Reconsideration process.

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<sup>1</sup> BGC members that have been identified as having a conflict of interest in relation to the New gTLD Program did not take part in the discussion or deliberation on this Recommendation.

Many of the additional grounds stated in the Request, though phrased as information not “considered” by the Committee, are in fact requests for the Committee to re-weigh the factors it already considered when taking the action.

The IOC’s assertion that the existence of opposition is not a sufficient rationale for rejecting the GNSO Recommendations does not identify any material information that the Committee failed to consider in making its decision and thus does not support a request for reconsideration pursuant to ICANN’s Bylaws. Instead, the IOC purports to impose a new standard on the ICANN Board, namely that if one of the ICANN Supporting Organizations or Advisory Committees presents a recommendation to the Board based upon majority support, the Board must adopt that recommendation, regardless of whether there is opposition.

Clearly, recommendations do not have to be universally accepted prior to adoption by the Board. However, even where a Supporting Organization’s recommendation was universally accepted (which is not the case here), the ICANN Board is duty bound to act in the best interests of ICANN when deciding to implement a recommendation. At times this can mean rejection of recommendations, or, as in this case, a decision to not immediately act on a recommendation. Even when the opposition raised during a public comment period is similar to opposition raised before a Supporting Organization’s approval of a recommendation, the Supporting Organization’s decision-making process does not replace the Board’s obligation to act as it determines, utilizing its judgment, to be in the best interests of ICANN.<sup>2</sup>

The IOC’s other stated grounds in support of its Request similarly do not identify material information that was not before the Board, and do not support reconsideration here:

- While the IOC provides specific (and yet incomplete) implementation options that the Committee could have considered, the IOC also notes that there “is ample time to work out the implementation details.” This statement by the IOC belies its assertion that implementation details existed and were not considered by the Committee. Instead, it makes clear that the IOC would have liked for the Committee to accept the GNSO Recommendations while directing implementation work to proceed.
- That potential applicants could have been on notice of changes to the Guidebook or the specific protections contemplated in the GNSO Drafting Team discussions does not identify material information not considered by the Committee. The Committee was clearly aware of the ability to modify the Guidebook; without that consideration, the decision to “not change the Applicant Guidebook at this time” is meaningless. Moreover, the IOC ignores the material information considered by the Committee on the effect of a change – *i.e.*, that no new applicants could register to submit an application in the first round, after determining how the proposed protections may inform their business choices. The IOC is instead seeking to have the information re-weighed based on the assertions that potential

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<sup>2</sup> Similarly, the 20 June 2011 request for policy advice that gave rise to the GNSO Recommendations did not comprise a complete “entrust[ment] to the GAC and the GNSO [on] the issue of implementing proper standards for the protection of the Olympic and Red Cross names” as claimed by the IOC.



applicants should have followed the GNSO Drafting Team discussions to anticipate protections that may be incorporated for the first round, including the creation of a new class of “Modified Reserved Names,” seeking non-objection letters, and demonstrating use. The IOC does not put forward material information; it puts forward conjecture. Similarly, the IOC believes that because ICANN will revise Guidebook language on the GAC Advice process based on requested changes by the GAC, that other Guidebook changes – no matter how substantive – are appropriate at this time. This is argument, not identification of material information that the Committee purportedly failed to consider.<sup>3</sup>

- The IOC’s assertion that the Committee failed to consider the unique status of the legal protections afforded to the IOC is not accurate. The unique status of the IOC has long been a material factor when considering the availability of heightened protections within the New gTLD Program and there is nothing in the Committee’s decision to suggest that the IOC’s status was not considered here. The initial GAC advice on this topic provided confirmation of the unique status of the IOC (and the Red Cross), and the Board recognized that unique status in adopting the moratorium for the first round of applications. In its 10 April 2012 Rationale, the Committee acknowledged that the moratorium was in place for the IOC and the Red Cross, as well as the ability to consider the GNSO Recommendations for future application rounds in the New gTLD Program. Though the IOC may not believe that the Committee gave *sufficient* consideration to the IOC’s unique status on 10 April 2012, that the IOC wishes for this to be re-weighed by the Committee is not a grounds for reconsideration.<sup>4</sup>

## **VI. Recommendation.**

Based on the foregoing, it is our opinion that the IOC has not stated proper grounds for reconsideration, and the BGC therefore recommends that the New gTLD Program Committee deny the IOC’s Request and not proceed with further consideration of the Request.

Though reconsideration is not proper in this instance, the BGC notes the use of the phrase “at this time” in the 10 April 2012 decision. As a matter of fairness, the BGC invites the New gTLD Program Committee to evaluate whether its decision on the GNSO Recommendations relating to the IOC is now ripe for determination given that the public comment period on the recommendations has now closed.

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<sup>3</sup> The IOC notes that applicants “could not make decision based on standards lower than the GNSO Recommendations” because of the strength of national laws protecting Olympic words. This statement suggests that applicants should already behave in the manner contemplated in the GNSO Recommendations, which negates the need for immediate action by the Committee in any event.

<sup>4</sup> The IOC notes that it may have to resort to “costly, time-consuming legal proceedings” to protect against potential applications that it finds objectionable. However, the GNSO Recommendations would not erase the probability that the IOC may still have to resort to the available objection procedures over applications it finds objectionable.