

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

MERCK KGaA, ) ICDR CASE NO. 01-14-0000-9604  
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 Claimant, )  
 )  
 and )  
 )  
 INTERNET CORPORATION FOR ASSIGNED )  
 NAMES AND NUMBERS, )  
 )  
 Respondent. )  
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**ICANN'S REJOINDER TO CLAIMANT MERCK KGaA'S  
REPLY SUBMISSION**

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## INTRODUCTION

The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits its Rejoinder to the Reply Submission (“Reply”) submitted by claimant Merck KGaA (“Merck”) on 20 May 2015.

1. This Independent Review Process (“IRP”) occurs within the context of a decades-long dispute between two international pharmaceutical companies—Merck and its former affiliate, U.S.-based Merck Sharp & Dohme Corporation (“MSD”)—regarding their respective rights to the “Merck” trademark. Pursuant to complicated agreements between the two companies, each has rights to the mark in certain geographic territories but not in others, and the companies are constantly litigating against one another with respect to those rights. When each submitted applications through ICANN’s New gTLD Program (“Program”) for strings incorporating the “Merck” mark, their dispute spilled into the ICANN arena.

2. Both Merck and MSD applied for the .MERCK string, and MSD also applied for the .MERCKMSD string. As provided for in the Objection Procedures section of the New gTLD Applicant Guidebook (“Guidebook”),<sup>1</sup> both Merck and MSD filed legal rights objections regarding the other’s applications, asserting that those applications infringed upon their existing legal rights to the “Merck” mark. Pursuant to the terms of the Guidebook, those legal rights objections were forwarded to the World Intellectual Property Organization (“WIPO”), the independent dispute resolution provider tasked with appointing experts to review legal rights objections.

3. The expert appointed to review these legal rights objections (“Expert”) issued determinations overruling both MSD’s legal rights objection regarding Merck’s application and Merck’s legal rights objections regarding MSD’s applications. As a result, both MSD’s and

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<sup>1</sup> The Guidebook was developed by ICANN and the Internet community and details the process by which new gTLD applications are evaluated in connection with the New gTLD Program. (Cl. Annex 21.)

Merck's applications will proceed, and the parties' respective applications for .MERCK are in "contention" with each other, meaning that the parties will either reach an agreement to resolve their dispute or participate in an ICANN auction to determine which party will operate the .MERCK registry.<sup>2</sup>

4. MSD has accepted this outcome. Merck, however, refuses to accept the expert determinations overruling its legal rights objections to MSD's applications for .MERCK and .MERCKMSD ("Expert Determinations").<sup>3</sup> Instead, Merck continues to claim (without any supporting evidence) that MSD intends to violate Merck's legal rights, and further argues that the Expert should have anticipated these alleged potential "infringements" despite the fact that MSD has an undeniable, legitimate right to use the Merck trademark consistent with the agreements between MSD and Merck.

5. Merck's dissatisfaction with the Expert Determinations is not, however, a basis for independent review. Pursuant to Article IV, Section 3 of ICANN's Bylaws, independent review is available only where a claimant demonstrates that ICANN's Board acted inconsistently with ICANN's Articles of Incorporation ("Articles") or Bylaws. Here, the only action ICANN's Board took with respect to the Expert Determinations was the ICANN Board Governance Committee's ("BGC's") review of Merck's reconsideration request challenging the Expert Determinations. As explained in ICANN's Response to Merck's IRP Request and further below, the BGC properly evaluated whether the Expert had followed established policies and procedures set forth in the Guidebook for legal rights objections ("LROs"), and concluded that the Expert

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<sup>2</sup> Both Merck and MSD have filed community applications for .MERCK. This means that the applications will be evaluated for community priority. If one, but not both, of the applications passes community priority evaluation, then only the application that passes will proceed. Guidebook § 4.2.2 (Cl. Annex 21).

<sup>3</sup> The same Expert reviewed Merck's objections to: (1) MSD's application for .MERCK (WIPO Case No. LRO2013-009); and (2) MSD's application for .MERCKMSD (WIPO Case No. LRO2013-0010). The cases were not formally consolidated, but the Expert issued identical determinations in the two cases, which are attached as Annex 33 to Merck's IRP Request. Citations to the "Expert Determinations" refer those documents.

had done so. In accordance with Article IV, Section 2 of the Bylaws (which governs reconsideration requests), the BGC was not supposed to evaluate (and did not evaluate) the Expert’s legal conclusions in a substantive sense but, instead, reviewed them to confirm that the Expert had followed the Guidebook’s rules and procedures.

6. Merck now argues that the ICANN Board should have taken further action with respect to the Expert Determinations because the Board “was responsible for accepting the LRO determinations,” and there is some “international legal norm that a court or other body may review ADR decisions in the event of certain egregious error or actions.”<sup>4</sup> Merck is wrong: the Board was not required to—and properly did not—intervene. Although the Guidebook gives the Board discretion to review expert determinations, the Guidebook purposely does *not* require the Board to sit as an “appellate panel” and insert itself into the thousands of third-party determinations and reviews conducted in conjunction with the New gTLD Program. Not only do third-party experts have more substantive expertise than the Board in their designated areas, but requiring the Board to review all expert determinations would have slowed the new gTLD approval process to a crawl. Absolutely nothing in ICANN’s Articles or Bylaws requires the ICANN Board to sit as a court of appeal on expert determinations, and neither Merck’s IRP Request nor its Reply provides a single citation from the Articles or Bylaws stating otherwise.

7. Moreover, Merck has not identified any reason why the Board *should* have intervened with respect to the Expert Determinations, other than Merck’s own disagreement with the Expert’s conclusions. Merck argues that the Expert made “palpable mistakes due to the failure of the LRO Panel to apply appropriate LRO standards,”<sup>5</sup> but the Expert Determination is clear on its face that the Expert applied the proper standards under the Guidebook and did not

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<sup>4</sup> Reply ¶¶ 7-8.

<sup>5</sup> *Id.* ¶ 3.

import “improper standards” from the UDRP.

8. In its Reply, Merck again challenges the LRO procedures set forth in the Guidebook. ICANN adopted the Guidebook in 2012 following a lengthy process involving multiple drafts and thousands of public comments on those drafts. As described further below, that process was in full conformance with ICANN’s Articles and Bylaws. If a party wanted to challenge the procedures set forth in the Guidebook, the time to do so was in 2012, not years later after receiving expert determinations with which it disagreed.

9. Notably, these same types of arguments were recently rejected by the IRP panel in *Booking.com v. ICANN* (“*Booking.com* Panel”). As discussed below, Booking.com had applied for the new gTLD .hotels and argued that the Board should have intervened with respect to a third-party expert report issued regarding the .hotels and .hoteis strings. In its Final Declaration dated 3 March 2015, the *Booking.com* Panel unanimously rejected Booking.com’s claims, determining that Booking.com improperly sought to challenge the independent judgment of ICANN’s Board, and that Booking.com’s challenges to the Guidebook, which was issued in 2012, were time barred.<sup>6</sup> This Panel should reach the same conclusion.

### STANDARD OF REVIEW

10. The IRP is a unique mechanism available under ICANN’s Bylaws. Pursuant to the Bylaws, the Panel is tasked only with issuing its opinion as to whether the Board’s actions are inconsistent with ICANN’s Articles and Bylaws.<sup>7</sup> ICANN’s Bylaws also identify a “defined standard of review” the Panel must apply when evaluating the actions of the Board, considering:

- 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

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<sup>6</sup> *Booking.com* Final Determination ¶ 138 (Cl. Annex 61).

<sup>7</sup> Bylaws, Art. IV, §§ 3.2, 3.4 (Cl. Annex 16).

- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?<sup>8</sup>

11. This standard of review neither asks nor allows an IRP panel to substitute its judgment for that of the Board.<sup>9</sup> As the IRP panel in *Booking.com v. ICANN* explained:

[s]o long as the Board acts without conflict of interest and with due care, it is entitled—indeed, required—to exercise its independent judgment in acting in what it believes to be the best interests of ICANN . . . . In other words, in making decisions the Board is required to conduct itself reasonably in what it considers to be ICANN’s best interests; where it does so, the only question [for the IRP Panel] is whether its actions are or are not consistent with the Articles, Bylaws, and, in this case, with the policies and procedures established by the Guidebook.”<sup>10</sup>

## ARGUMENT

### I. THE BGC PROPERLY DENIED MERCK’S RECONSIDERATION REQUEST.

12. Merck’s IRP Request and Reply are primarily focused on challenging the BGC’s determination denying Merck’s reconsideration request (and, thereby challenging the substance of the underlying Expert Determinations). However, Merck fails to identify *any* Article or Bylaws provision that the BGC purportedly violated in determining that the Expert followed the LRO procedure set forth in the Guidebook. As Merck acknowledges, ICANN’s Bylaws limited the BGC’s review of the Expert Determinations to an assessment of whether the Expert violated “established [] policy(ies)” in rendering the Expert Determinations.<sup>11</sup> The BGC conducted this assessment and properly determined that the Expert had followed established policy in rendering the Expert Determinations.

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<sup>8</sup> *Id.* § 3.4.

<sup>9</sup> *See id.*

<sup>10</sup> *Booking.com* Final Declaration, ¶¶ 108-109 (Cl. Annex 61).

<sup>11</sup> Bylaws, Art. IV, § 2 (Cl. Annex 16); *see also* BGC Recommendation on Request 13-5 at 4 (allowing for reconsideration requests relating to the actions of third party dispute resolution service providers (“DSRPs”) “where it can be stated that [] the [DSRP] failed to follow its process in reaching the decision”) (Cl. Annex 64).

**A. The BGC Correctly Determined That The Expert Applied The LRO Standard Set Forth In The Guidebook.**

13. Merck attempts to characterize its disagreements with the Expert Determinations as challenges to the legal standard applied by the Expert. Specifically, Merck argues that the Expert improperly relied on the Uniform Domain Name Dispute Resolution Policy (“UDRP”) in conducting his analysis.<sup>12</sup> Of course, the Expert’s actions in rendering the Expert Determinations do not constitute conduct of the ICANN Board—the only Board conduct at issue here is the BGC’s consideration of Merck’s Reconsideration Request. In considering that Reconsideration Request, the BGC reviewed the determinations for violations of established policy or procedure. As is readily apparent from the Expert Determinations themselves, Merck’s analysis relies on a mischaracterization of the determinations. The BGC correctly found that the Expert did apply the LRO standard set forth in the Guidebook in rendering the Expert Determinations.

14. As the BGC explained, the Expert applied the LRO standard set forth in Section 3.5.2 of the Guidebook, which considers:

whether the potential use of the applied-for gTLD by the applicant takes unfair advantage of the distinctive character or the reputation of the objector’s [mark], or unjustifiably impairs the distinctive character or the reputation of the objector’s [mark], or otherwise creates an impermissible likelihood of confusion between the applied-for gTLD and the objector’s [mark] or IGO name or acronym.<sup>13</sup>

15. Specifically, the BGC noted that the Expert also adhered to the Guidebook in explaining how each of the eight non-exhaustive factors listed in Guidebook Section 3.5.2

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<sup>12</sup> IRP Request ¶¶ 58-60; Reply ¶¶ 27-30. Merck also devotes one paragraph of its Reply to renewing its argument that the Expert based his determinations on the incorrect understanding that MSD had committed to using geo-targeting. Reply ¶ 26. As explained in ICANN’s Response, the Expert himself addressed his misstatement in an addendum to his determination, clarifying that his error was inadvertent, did not reflect a misunderstanding of the evidentiary record, and in any event involved a fact immaterial to the outcome of the Expert Determinations. Response ¶¶ 24-26, 47 n.70; *see also* Addendum to Expert Determinations at 2 (Cl. Annex 33).

<sup>13</sup> Guidebook § 3.5.2 (Cl. Annex 21); Expert Determinations at 6 (Cl. Annex 33).



weighed in his determinations.<sup>14</sup> For example, the fifth, sixth, and seventh of the eight factors set forth in the Guidebook and explicitly evaluated by the Expert are as follows:

Whether and to what extent the 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 the applicant is consistent therewith and *bona fide*.<sup>15</sup>

Whether and to what extent Applicant has used, or has made demonstrable preparations to use, the sign corresponding to the [applied-for] 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 its mark rights.<sup>16</sup>

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.<sup>17</sup>

16. In considering the latter two factors, the Expert determined that MSD has “used MERCK for many years in connection with the *bona fide* offering of goods and services and owns trademarks for MERCK in North America” and that “such *bona fide* use as such does not interfere with the legitimate exercise by Objector of its trademark rights.”<sup>18</sup>

17. Ultimately, based upon his analysis of the LRO standard and all eight of the supporting factors, the Expert determined that “the potential use of [the .MERCK and .MERCKMSD strings] by [MSD] does not: (i) take unfair advantage of the distinctive character or the reputation [of Merck’s trademark], or (ii) unjustifiably impair the distinctive character or reputation [of Merck’s trademark], or (iii) otherwise create an impermissible likelihood of confusion between [MSD’s applied-for strings and Merck’s trademark].”<sup>19</sup>

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<sup>14</sup> BGC Determination on Request 14-9 at 8 (Cl. Annex 45).

<sup>15</sup> Guidebook § 3.5.2 (Cl. Annex 21); Expert Determinations at 8 (Cl. Annex 33).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Expert Determinations at 8 (Cl. Annex 33).

<sup>19</sup> *Id.* at 8-9.

18. In explaining his reasoning, the Expert noted the similarities between the LRO standard as set forth in the Guidebook and the UDRP, stating that “[i]n 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 [UDRP].”<sup>20</sup> As correctly determined by the BGC, this comment does not demonstrate that the Expert “relied upon the UDRP standard” (as Merck argues), and certainly gives no indication that the UDRP standard was somehow outcome-determinative.<sup>21</sup>

19. Instead, the Expert was simply noting that both the LRO standard and the UDRP standard consider whether the objected-to party is a “legitimate” or “*bona fide*” user of the mark. As discussed above, three of the LRO factors require consideration of whether the applicant is a “*bona fide*” user of the mark. As the BGC noted in its Determination, immediately following the Expert’s reference to the UDRP, he went on to apply the LRO standard, noting that MSD was a “*bona fide* user[] of the MERCK trademark” (an undeniably true statement) and that:

If the applicant for a new gTLD is *bona fide*, it will not be likely that one of the three criteria [in the LRO standard] 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 [applied-for] gTLD String and the objector’s mark is created, but it is not necessarily impermissible.<sup>22</sup>

20. Merck’s Reply attempts to mischaracterize the Expert’s use of the term “*bona fide*,” focusing on the Expert’s reference to the UDRP and arguing that the Expert improperly applied the UDRP’s “bad faith requirement” in rendering the Expert Determinations.<sup>23</sup> The Expert’s reference to the UDRP does not, however, demonstrate that the Expert relied on the UDRP’s bad faith

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<sup>20</sup> *Id.* at 6.

<sup>21</sup> BGC Determination on Request 14-9 at 8 (Cl. Annex 45).

<sup>22</sup> Expert Determinations at 6 (Cl. Annex 33); BGC Determination on Request 14-9 at 8 (Cl. Annex 45).

<sup>23</sup> Reply ¶ 45; *see also id.* ¶ 28.

standard. Indeed, the phrase “bad faith” does not appear a single time in the Expert Determinations (whether in the reference to the UDRP or elsewhere), and there is no evidence that the Expert made any findings related to bad faith. The Expert Determinations themselves make plain that the BGC correctly determined that the Expert based his determination on the LRO standard and the eight non-exhaustive factors listed in the Guidebook. Those factors repeatedly emphasize the importance of determining whether the applicant’s use of the mark is *bona fide*.

21. Notably, no ICANN policy or procedure prevents an expert from referring to the UDRP or any other relevant legal standards.<sup>24</sup> Further, the New gTLD Dispute Resolution Procedure makes clear that, in addition to applying the standards that have been identified by ICANN, an expert panel may “refer to and base its findings upon statements and documents submitted and any rules or principles that it determines to be applicable.”<sup>25</sup> Accordingly, there cannot be any issue with the BGC’s determining on reconsideration that there was no policy or procedure violation in this regard.

22. Merck’s real complaint is not with the legal standard the Expert applied, or the BGC’s Determination of that issue on Merck’s reconsideration request, but with the Expert’s conclusion that because MSD is a “*bona fide* trademark holder” in certain countries, MSD should not be prevented from obtaining the .MERCK and .MERCKMSD strings based simply on Merck’s speculation about “all the possible types of uses [MSD] could make” of the strings.<sup>26</sup> Merck’s disagreement with the Expert’s refusal to *assume* that MSD would engage in infringing behavior is the underlying basis of Merck’s argument that the Expert failed to look at MSD’s

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<sup>24</sup> The Expert also referred to the UDRP in the context of analyzing the first LRO factor—“whether the applied-for gTLD is identical or similar . . . to Objector’s existing mark.” Expert Determinations at 6-7 (Cl. Annex 45). The Expert accurately noted that the Guidebook “does not provide [] any details” to guide the application of that factor, and he looked to the “detailed test” in the UDRP for guidance. *Id.* at 6. Merck does not object to this reference to the UDRP, presumably because that factor in fact weighed in favor of Merck’s objection. *Id.* at 7.

<sup>25</sup> New gTLD Dispute Resolution Procedure, Art. 20(b) (Cl. Annex 22).

<sup>26</sup> Reply ¶ 31.

“future use” of the gTLDs and ignored “factors demonstrating the potential for impermissible infringement, and the absence of any mitigating statements from MSD.”<sup>27</sup>

23. This argument again mischaracterizes the Expert Determinations, which include a detailed discussion of the LRO factor relating to the “purported or likely use of the gTLD by the Applicant.”<sup>28</sup> The Expert concluded that because MSD was a *bona fide* user of the “Merck” mark in certain countries, “[t]he purported use of the [applied-for] gTLD String[s] by Applicant is consistent with the use Applicant has made of the Merck trademarks.”<sup>29</sup>

24. Rather than speculating about the possible types of infringing uses MSD *might* make of the applied-for strings, the Expert stated that, if MSD did in fact infringe on Merck’s trademark rights once it began operating either of the gTLDs, Merck could enforce those rights by taking legal action (as both Merck and MSD have done numerous times over the course of their decades-long dispute).<sup>30</sup> That substantive conclusion does not reflect the Expert failing to apply the LRO standard. As discussed above, the BGC correctly found that the Expert had applied all eight non-exhaustive LRO factors, three of which explicitly require the Expert to consider whether an applicant is a *bona fide* trademark holder (and MSD obviously is).

25. The sole purpose of any IRP is to test whether the conduct of ICANN’s *Board* was inconsistent with ICANN’s Articles or Bylaws. The BGC’s review of the Expert Determinations was limited by ICANN’s Bylaws to whether the Expert followed established policy or procedure in rendering the Expert Determinations. Merck’s substantive disagreement with the Expert’s refusal

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<sup>27</sup> *Id.* ¶¶ 22, 32; *see also id.* ¶¶ 31-33.

<sup>28</sup> Expert Determination at 8. The phrase “future use,” which Merck uses repeatedly in its Reply, does not appear in the Guidebook.

<sup>29</sup> *Id.*

<sup>30</sup> Expert Determinations at 6. Merck raises this same grievance when it states that it “demonstrated the clear potential for infringement” while MSD “avoid[ed] any discussion of its intended use of the TLD in its LRO responses.” *Id.* ¶ 25. Merck wanted the Expert to draw an adverse inference based on the fact that MSD’s applications lacked the affirmative assurances Merck wanted. The Expert declined to do so. Expert Determinations at 6, 8 (Cl. Annex 33).

to make the assumption that Merck wanted him to make does not, as the BGC found, demonstrate that the Expert failed to adhere to the Guidebook’s LRO policies or procedures. The Expert clearly applied the LRO standard from the Guidebook, and the BGC correctly determined that he did. Accordingly, the BGC properly denied Merck’s Reconsideration Request and did not in any way act inconsistently with ICANN’s Articles or Bylaws in doing so.

**B. The BGC Was Not Supposed To Perform, And Did Not Perform, Any Substantive Analysis Of The Relevant Legal Standards.**

26. Merck argues that, in order to properly evaluate the arguments it raised in its request for reconsideration (“Reconsideration Request”), the BGC “necessarily” needed to make a “substantive” assessment of “interdependent questions of law”—specifically, whether the UDRP standard was consistent with the LRO standard set forth in the Guidebook.<sup>31</sup> Merck contends that the BGC did not have the expertise to make this “substantive” determination and should have obtained the opinion of an independent legal expert.<sup>32</sup>

27. Merck is wrong. As discussed above, the BGC was not required to engage in any “substantive” assessment of the LRO or UDRP standards, and the BGC did not need the help of an independent legal expert to determine that the Expert followed the Guidebook’s procedures. A simple reading of the Expert Determinations demonstrates that the BGC correctly determined that the determinations were based on the Expert’s application of the LRO standard, including the relevant factors set forth in the Guidebook. The BGC did not engage (and did not need to engage) in any substantive analysis of either the LRO or the UDRP standards. Nor did it need to determine whether the LRO and UDRP standards are “incompatible.”<sup>33</sup> The Expert Determinations were quite clear as to the legal standard on which they were based. As the BGC’s review showed, “the

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<sup>31</sup> Reply ¶ 45.

<sup>32</sup> *Id.* ¶ 52.

[Expert] correctly referenced and considered the eight non-exhaustive factors listed in the Guidebook and explained how those factors supported the [Expert] Determinations.”<sup>34</sup>

28. Further, there is no Article or Bylaws provision requiring the BGC to consult with experts regarding reconsideration requests. The BGC was perfectly capable of reading the Expert Determinations without the help of intellectual property law experts. Merck’s substantive disagreement with the BGC’s determination does not demonstrate that the BGC failed to “exercise due diligence”<sup>35</sup> in its consideration of Merck’s Reconsideration Request, nor is it a basis for independent review.

29. The BGC does not sit as a court of appeal for expert determinations; its scope of review for reconsideration requests is limited by ICANN’s Bylaws to assessing whether established policy was followed.<sup>36</sup> That is precisely what the BGC did in this case, and the BGC properly found that the Expert had followed established policy in rendering the Expert Determinations.

**C. Merck Provides No Evidence For Its Speculation That The BGC Was Financially Motivated.**

30. Because Merck’s and MSD’s objections with respect to the other’s applications for .MERCK were denied, both Merck’s and MSD’s applications for the .MERCK string proceeded and were placed in a contention set. Both Merck and MSD have filed community applications for .MERCK. This means that the applications will be evaluated for community priority under the terms of the Guidebook. If one, but not both, of the applications passes community priority

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(continued...)

<sup>33</sup> *Id.* ¶ 46.

<sup>34</sup> BGC Determination on Request 14-9 at 8 (Cl. Annex 45).

<sup>35</sup> IRP Request ¶¶ 75, 82.

<sup>36</sup> Bylaws, Art. IV, § 2.2 (Cl. Annex 16).

evaluation (“CPE”), then only the application that passes will proceed.<sup>37</sup> If neither or both pass CPE, the Guidebook provides that, if Merck and MSD cannot reach a resolution between themselves, the .MERCK string will proceed to auction, although the Guidebook strongly encourages applicants in a contention set “to reach a settlement or agreement among themselves that resolves the contention,” which “may occur at any stage of the process . . . .”<sup>38</sup> Auctions are explicitly described as a “last resort” method of resolving contention sets.<sup>39</sup>

31. Because of the possibility that the .MERCK contention set will result in an ICANN auction, Merck speculates that the BGC had a financial incentive to deny Merck’s Reconsideration Request (and, presumably, every other reconsideration request that, if denied, might result in an auction).<sup>40</sup> Despite the fact that Merck has the burden of proof in this IRP and was required to submit “all evidence necessary to support [its] claims” with its IRP Request,<sup>41</sup> Merck fails to provide *any* evidence that the BGC denied its Reconsideration Request because ICANN has some financial incentive to encourage auctions.

32. In fact, a review of the BGC’s determinations on reconsideration requests demonstrates that numerous determinations have had the result of *resolving* contention sets, thereby obviating the need for an auction on the new gTLD strings at issue.<sup>42</sup> In any event, the proceeds of any auction will not go to ICANN’s general operating fund but will, as the

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<sup>37</sup> Guidebook § 4.2.2 (Cl. Annex 21).

<sup>38</sup> *Id.* §§ 4.1.3, 4.3.

<sup>39</sup> *Id.* § 1.2.3.2.

<sup>40</sup> Reply ¶¶ 54-56.

<sup>41</sup> Supplementary Procedures ¶ 5 (Resp. Ex. C-R-1).

<sup>42</sup> Reconsideration Requests 14-39, 14-41, 14-46 each challenged determinations by independent, third-party experts that certain new gTLD applications qualified for community priority status (“CPE Reports”). As a result of those CPE Reports, the contention sets for HOTEL, .RADIO, and .ECO, respectively, were resolved, with only the community applicants for those strings proceeding. In all three instances, the BGC denied the challenges to the CPE Reports, effectively upholding the resolutions of those contention sets and eliminating the possibility of an auction. *See* BGC Determinations on Requests 14-39, 14-41, and 14-46, *available online at* <https://www.icann.org/en/system/files/files/determination-despegar-online-et-al-11oct14-en.pdf>, <https://www.icann.org/en/system/files/files/determination-afiliat-et-al-20jan15-en.pdf>, <https://www.icann.org/en/system/files/files/determination-little-birch-minds-machines-18nov14-en.pdf>.

Guidebook provides, “be reserved and earmarked until the uses of [the] funds are determined,” and must be used in a way that “allows ICANN to maintain its not for profit status.”<sup>43</sup>

**II. THE ICANN BOARD DID NOT TAKE—AND WAS NOT REQUIRED TO TAKE—ANY ACTION WITH RESPECT TO THE EXPERT DETERMINATIONS APART FROM THE BGC’S CONSIDERATION OF MERCK’S RECONSIDERATION REQUEST.**

33. ICANN does not dispute that its Board took action with respect to the Expert Determinations when the BGC, a Board committee designated with authority from the full Board to do so, reviewed Merck’s Reconsideration Request challenging the Expert Determinations.<sup>44</sup> The BGC’s decision is appropriately reviewed in this IRP. Beyond the BGC’s decision, the Board did not take—and was not required to take—any action with respect to the Expert Determinations; accordingly, there is no other “Board” conduct for this IRP Panel to review.

34. As described in ICANN’s Response, the BGC examined each of Merck’s contentions regarding the process followed by the Expert and issued a reasoned analysis properly concluding that the Expert had not violated any established policy in rendering the Expert Determinations.<sup>45</sup> Certainly, Merck has not demonstrated that the BGC violated any ICANN Article or Bylaws provision in reviewing Merck’s Reconsideration Request.

35. Once the BGC acted, neither the Articles, nor the Bylaws, nor the Guidebook

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<sup>43</sup> Guidebook § 4.3 (Cl. Annex 21). Possible uses contemplated by the Guidebook include the “formation of a foundation with a clear mission and a transparent way to allocate funds to projects that are of interest to the greater internet community” or the “establishment of a security fund to expand [the] use of secure [internet] protocols, conduct research, and support standards development organizations.” *Id.* During ICANN’s public meeting in Buenos Aires in June 2015, two sessions were devoted to discussion of the Community Working Group tasked with proposing uses for the auction proceeds. *Complete transcripts available at* <https://buenosaires53.icann.org/en/schedule/sat-gnso-working/transcript-new-gtld-auction-proceeds-20june15-en>, <https://buenosaires53.icann.org/en/schedule/wed-cwg-new-gtld-auction>.

<sup>44</sup> Bylaws, Art. IV, § 2.3 (designating the BGC with authority to make final determinations with respect to reconsideration requests challenging the actions of ICANN staff); *see also* BGC Recommendation on Request 13-5 at 4 (allowing for reconsideration requests relating to the actions of third party dispute resolution service providers (“DSRPs”) “where it can be stated that [] the [DSRP] failed to follow its process in reaching the decision”) (Cl. Annex 64).

<sup>45</sup> IRP Response ¶¶ 46-51; *see also* BGC Determination on Request 14-9 at 8-12 (Cl. Annex 45).



contains any provision requiring the full ICANN Board to act with respect to the Expert Determinations. This is especially understandable given the thousands of determinations made by third-party evaluators in the context of the New gTLD Program. The Guidebook does provide that, in “exceptional circumstances . . . the Board might individually consider an application.”<sup>46</sup> On this basis, Merck argues that the Board could (or should) have intervened in this matter because the Board did so in two other, entirely separate circumstances, regarding: (1) a community objection to an application for .MED; and (2) perceived inconsistent expert determinations regarding the strings .COM/.CAM and .SHOP/.通販 (online shopping in Japanese).<sup>47</sup>

36. Neither of these situations, however, has any relation to the Expert Determinations at issue here. With respect to the first, the BGC determined that the independent panel evaluating a community objection to an application for .MED had violated established policy regarding standing requirements for community objectors, and thus there was no basis for the objection to the application even to have been asserted in the first instance.<sup>48</sup> With respect to the second, following an extensive process that included a number of reconsideration requests, a report by ICANN’s staff, and a new public comment period, ICANN’s New gTLD Program Committee (“NGPC”) decided to intervene with respect to what were viewed by many as inconsistent determinations on string confusion objections.<sup>49</sup>

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<sup>46</sup> Guidebook § 5.1 (Cl. Annex 21).

<sup>47</sup> Reply ¶¶ 59-66.

<sup>48</sup> BGC Determination on Reconsideration Request 14-1 (Cl. Annex 68.)

<sup>49</sup> See Rationale for NGPC Resolution 2014.02.05.NG02, (Resp. Ex. C-R-5), also available at <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-02-05-en>. In the case of .COM/.CAM, for example, one expert had upheld a string confusion objection asserting that .CAM was confusingly similar to .COM, while another expert had overruled a separate string confusion objection asserting precisely the same thing in conjunction with a .CAM application submitted by a second applicant. Compare Expert Determinations, ICDR Case No. 50 504 T 229 13, available at <http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-2-1-1255-75865-en.pdf>, with Expert Determinations, ICDR Case No. 50 504 T 00224 13, available at <http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determination-2-1-1234-83704-en.pdf>. Notably, the

37. The fact that the Board (whether the BGC, the NGPC, or both) took action in those two unique circumstances in no way obligated the Board to exercise its discretion with respect to the .MERCK applications. Merck has not identified any Article or Bylaws provision that required the Board to intervene, and the terms of the Guidebook are clear that the Board has the *discretion* to determine whether to intervene in any particular circumstance, and that such discretion is to be used “under exceptional circumstances.”<sup>50</sup>

38. Given this, the Board properly exercised its independent judgment in determining not to intervene further with respect to the Expert Determinations. As the *Booking.com* IRP Panel found: “the fact that the ICANN Board enjoys [the] discretion [to individually consider an application for a New gTLD] and may choose to exercise it at any time does not mean that it is bound to exercise it, let alone at the time and in the manner demanded by [a claimant].”<sup>51</sup>

### **III. MERCK’S CHALLENGES TO THE GUIDEBOOK’S OBJECTION PROCEDURES ARE UNSUPPORTED AND TIME BARRED.**

39. Merck devotes several pages of its Reply to challenging the entire legal rights objection process set forth in the Guidebook.<sup>52</sup> Merck’s challenge is unsupported, and the time for Merck to assert such a challenge has long since passed.

40. As detailed in the Board’s Rationales for the Approval of the Launch of the New gTLD Program, issued in June 2011, the dispute resolution procedures, including the legal rights objection procedures, were adopted by the ICANN Board after years of policy development that included extensive review and analysis by ICANN, as well as input and comment from legal and

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(continued...)

Expert Determinations were consistent with the expert determination overruling MSD’s legal rights objection to Merck’s application for .MERCK.

<sup>50</sup> Guidebook § 5.1 (Cl. Annex 21).

<sup>51</sup> *Booking.com* Final Determination ¶ 138 (Cl. Annex 61).

<sup>52</sup> Notably, Merck does not appear to challenge these procedures insofar as they allowed Merck to prevail in the legal rights objection brought by MSD against Merck’s application.

arbitration experts from various jurisdictions, numerous ICANN committees and Internet stakeholders, and community members from around the world. This extensive process was in compliance with ICANN’s Articles and Bylaws, and Merck does not contend otherwise.<sup>53</sup>

41. Specifically, in 2005, ICANN’s Generic Names Supporting Organization (“GNSO”), which is the ICANN body designated by the Bylaws as “responsible for developing and recommending to the ICANN Board substantive policies relating to generic top-level domains,”<sup>54</sup> began a policy development process to consider the introduction of new gTLDs. Two years later, again in accordance with the ICANN Bylaws, the GNSO issued a set of policy recommendations regarding the New gTLD Program, which included recommendations that “[d]ispute resolution and challenge processes . . . must be established prior to the start of” the gTLD program and should utilize independent dispute resolution providers.<sup>55</sup>

42. Between 2007 and 2008, based on the GNSO’s recommendations and in consultation with various Internet stakeholders and legal experts, ICANN outlined an application objection process that would permit four types of objections, including an objection relating to existing legal rights.<sup>56</sup> In this same time frame, ICANN evaluated and selected independent dispute resolution providers to evaluate objections to gTLD applications and conducted public consultations with legal experts and Internet stakeholders to help define the standing requirements and standards to be used by dispute resolution panels to resolve disputes on the various objection grounds.<sup>57</sup>

43. In June 2008, the ICANN Board approved the GNSO’s policy recommendations on

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<sup>53</sup> ICANN Board Rationales for the Approval of the Launch of the New gTLD Program (“ICANN Board Rationales”) at 66-67 (Resp. Ex. C-R-6).

<sup>54</sup> Bylaws, Art. X, § 1 (Cl. Annex 16).

<sup>55</sup> ICANN Board Rationales at 65-66 (Resp. Ex. C-R-6).

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 67.

new gTLDs, including the need for dispute resolution procedures. Between October 2008, when ICANN issued its first version of the Guidebook with its dispute resolution procedures, and June 2012, when the current version of the Guidebook was issued, ICANN engaged with various legal and arbitration experts, held numerous public comment sessions, considered and took advice from ICANN supporting organizations and advisory committees, and issued scores of papers and documents discussing the dispute resolution procedures contained in the Guidebook.<sup>58</sup>

44. Ultimately, the Board approved the dispute resolution procedures contained in the Guidebook based on the Board’s detailed findings that the procedures were “designed to protect certain interests and rights . . . identified by the GNSO in their policy recommendations;” they were “more cost effective and efficient than judicial proceedings;” and they were as “independent as possible so that the applicants, the community and ICANN have the benefit of neutral expert opinion,” among other reasons.<sup>59</sup>

45. All of this policy development work, implementation, and decision making, which culminated in the current version of the Guidebook, was open, fair and transparent; the process led to clear and predictable procedures. Indeed, the Guidebook sets forth specific standards to be applied by the expert panels as the GNSO’s original recommendations mandated.<sup>60</sup> All of this work was fully consistent with ICANN’s Articles and Bylaws. And while Merck argues that the Articles and Bylaws require that the Board review every expert determination made in conjunction with the New gTLD Program, no such requirement exists, which is why Merck does not cite to a

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<sup>58</sup> ICANN Board Rationales at 66-71, 72-75 (Resp. Ex. C-R-6).

<sup>59</sup> *Id.* at 75-77.

<sup>60</sup> Guidebook § 3.2.3 (Cl. Annex 21); *id.*, Attachment to Module 3, New gTLD Dispute Resolution Procedure, Art. 4(b)(i).

single Article or Bylaws provision in making this assertion.<sup>61</sup>

46. Further, Merck’s attack on the LRO procedures is time-barred. The current version of the Guidebook was published on 4 June 2012. IRPs must be initiated within 30 days “the posting of the minutes of the Board meeting (and the accompanying Board Briefing Materials, if available) that the requesting party contends demonstrates that ICANN violated its Bylaws or Articles of Incorporation.”<sup>62</sup> Merck did not object to the Guidebook procedures at the time the Guidebook was implemented, and did not raise any objection for several years after. If Merck had concerns related to these issues, it should have pursued them at the time, not years later after receiving expert determinations with which it disagreed.<sup>63</sup>

47. The claimant in the *Booking.com* IRP similarly argued it should have been able to bring a belated challenge the Guidebook because it had not suffered any harm until after an adverse expert determination had been rendered. The *Booking.com* Panel reject that argument, explaining:

[T]he time has long since passed for Booking.com or any other interested party to ask an IRP panel to review the actions of the ICANN Board in relation to the establishment of the string similarity review process, including Booking.com’s claims that specific elements of the process and the Board decisions to implement those elements are inconsistent with ICANN’s Articles and Bylaws. Any such claims, even if they had any merit, are long since time-barred by the 30-day limitation period set out in Article IV, Section 3(3) of the Bylaws.<sup>64</sup>

48. While the Guidebook process at issue in this case is different—string similarity review rather than legal rights objection—the *Booking.com* Panel’s reasoning applies equally.

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<sup>61</sup> Merck also argues that the Board must act in accordance with “relevant principles of international law,” and implies that the decision not to allow for an appeals process violates those principles. Reply ¶¶ 68-69. However, Merck has not identified any such principle that was violated when the Board determined, following the lengthy, transparent process described, not to provide for appeals of expert determinations made in the context of the New gTLD Program.

<sup>62</sup> See Guidebook, Preamble (Cl. Annex 21); Bylaws, Art. IV, § 3.3 (Cl. Annex 16).

<sup>63</sup> Bylaws, Art. IV, § 3.3 (30-day limitation period for IRP claims) (Cl. Annex 16).

<sup>64</sup> *Booking.com.com* Final Declaration ¶ 129 (Cl. Annex 61).

Because both processes were developed over three years ago as part of the development of the Guidebook, challenges to both are time-barred.

#### **IV. RESPONSE TO MERCK'S REQUESTED RELIEF.**

49. Merck's request should be denied in its entirety. In its Reply, Merck reiterates its request that this IRP Panel issue a declaration "[r]equiring that ICANN instruct a DSRP to appoint a new LRO Panel or Panels to decide upon Merck's Legal Rights Objections with regard to [MSD's Applications] . . . and/or provide any such relief as the Panel may find appropriate."<sup>65</sup> Any request that the IRP Panel grant affirmative relief goes well beyond an IRP panel's authority. An IRP panel is limited to "declaring whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws" and "*recommending* that the Board stay any action or decision or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP [panel]."<sup>66</sup> Even if there were a basis for some kind of relief here, an IRP panel does not have the authority to award affirmative relief.<sup>67</sup>

#### **CONCLUSION**

50. The BGC's conduct in evaluating Merck's Reconsideration Request was fully consistent with ICANN's Articles and Bylaws. Merck's substantive disagreement with the Expert Determinations is not a basis for independent review, and Merck's challenges to the Guidebook are both unfounded and time-barred. Merck's IRP Request should be denied.

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<sup>65</sup> Reply ¶ 78.

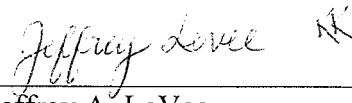
<sup>66</sup> Bylaws, Art. IV, §§ 3.4, 3.11(c)-(d) (Cl. Annex 16) (emphasis added).

<sup>67</sup> Indeed, the IRP Panel in the first IRP ever constituted under ICANN's Bylaws found that "[t]he IRP cannot 'order' interim measures but do no more than 'recommend' them, and this until the Board 'reviews' and 'acts upon the opinion' of the IRP." See Advisory Declaration of IRP Panel, ICM Registry, LLC v. ICANN, ICDR Case No. 50 117 T 00224 08, ¶ 133 (Cl. Ex. C-R-4), also available at <https://www.icann.org/en/system/files/files/-panel-declaration-19feb10-en.pdf>.

Respectfully submitted,

JONES DAY

Dated: 8 July 2015

By: Jeffrey LeVee   
Jeffrey A. LeVee

Counsel for Respondent ICANN

INDEPENDENT REVIEW PROCESS  
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

*MERCK KGaA,*  
(Claimant)  
v.  
*Internet Corporation for Assigned Names and Numbers*  
(Respondent)

Case No. 01-14-0000-9604

**INDEX TO DOCUMENTS SUBMITTED WITH RESPONDENT ICANN'S REJOINDER TO CLAIMANT**  
**MERCK KGAA'S REPLY SUBMISSION**

<b><u>Exhibit</u></b>	<b><u>DESCRIPTION</u></b>
<b>C-R-5</b>	NGPC Resolution 2014.02.05.NG02.
<b>C-R-6</b>	Excerpt from ICANN Board Rationales for the Approval of the Launch of the New gTLD Program.



**C-R-5**



# Approved Resolutions | Meeting of the New gTLD Program Committee

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05 Feb 2014

## 1. Main Agenda

- a. [Remaining Items from Beijing, Durban and Buenos Aires GAC Advice: Updates and Actions Rationale for Resolution 2014.02.05.NG01](#)
- b. [Discussion of Report on String Confusion Expert Determinations Rationale for Resolution 2014.02.05.NG02](#)
- c. [Staff Update on Reassignment of Registry Agreements](#)
- d. [Staff Update on Name Collision Framework](#)

## 1. Main Agenda:

- a. Remaining Items from Beijing, Durban and Buenos Aires [GAC Advice: Updates and Actions](#)

Whereas, the [GAC](#) met during the [ICANN](#) 46 meeting in Beijing and issued a Communiqué on 11 April 2013 ("Beijing Communiqué").

Whereas, the [GAC](#) met during the [ICANN](#) 47 meeting in Durban and issued a Communiqué on 18 July 2013 ("Durban Communiqué").

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remaining items of GAC advice in the Beijing Communiqué and the Durban Communiqué, and new advice in the Buenos Aires Communiqué.

Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the Board on 10 April 2012, to exercise the ICANN Board's authority for any and all issues that may arise relating to the New gTLD Program.

Resolved (2014.02.05.NG01), the NGPC adopts the "GAC Advice (Beijing, Durban, Buenos Aires): Actions and Updates" (5 February 2014), attached as [Annex 1](#) [PDF, 371 KB] to this Resolution, in response to open items of Beijing, Durban and Buenos Aires GAC advice as presented in the scorecard.

Rationale for Resolution 2014.02.05.NG01

Article XI, Section 2.1 of the ICANN Bylaws

<http://www.icann.org/en/about/governance/bylaws#XI> permit the GAC to "put issues to the Board directly, either by way of comment or prior advice, or by way of specifically recommending action or new policy development or revision to existing policies." The GAC issued advice to the Board on the New gTLD Program through its Beijing Communiqué dated 11 April 2013, its Durban Communiqué dated 18 July 2013, and its Buenos Aires Communiqué dated 20 November 2013. The ICANN Bylaws require the Board to take into account the GAC's advice on public policy matters in the formulation and adoption of the polices. If the Board decides to take an action that is not consistent with the GAC advice, it must inform the GAC and state the reasons why it decided not to follow the advice. The Board and the GAC will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC advice was not followed.

The NGPC has previously addressed items of the GAC's Beijing and Durban advice, but there are some items that the NGPC continues to work through. Additionally, the GAC issued new advice in its Buenos Aires Communiqué that relates to the New gTLD Program. The NGPC is being asked to consider accepting some of the remaining open items of the Beijing and Durban GAC advice, and new items of Buenos Aires advice as described in the attached scorecard dated 28 January 2014.

As part of its consideration of the GAC advice, ICANN posted the GAC advice and officially notified applicants of the advice, triggering the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1. The Beijing GAC advice was posted on 18 April 2013 <http://newgtlds.icann.org/en/announcements-and-media/announcement-18apr13-en>, the Durban GAC advice was posted on 1 August 2013 <http://newgtlds.icann.org/en/announcements-and-media/announcement-01aug13-en>, and the Buenos Aires GAC advice was posted on 11 December 2013. The complete set of applicant responses are provided at: <http://newgtlds.icann.org/en/applicants/gac-advice/>.

In addition, on 23 April 2013, ICANN initiated a public comment forum to solicit input on how the NGPC should address Beijing GAC advice regarding safeguards applicable to broad categories of new gTLD strings <http://www.icann.org/en/news/public-comment/gac-safeguard-advice-23apr13-en.htm>. The NGPC has considered the applicant responses in addition to the community feedback on how ICANN could implement the GAC's safeguard advice in the Beijing Communiqué in formulating its response to the remaining items of GAC advice.

As part of the applicant responses, several of the applicants who were subject to GAC Category 1 Safeguard Advice have indicated that they support the NGPC's proposed implementation plan, dated 29 October 2013, and voiced their willingness to comply with the safeguards proposed in the plan. On the other hand, an applicant noted that the NGPC's plan to respond to the GAC's Category 1 Safeguard advice is a "step back from what the GAC has asked for" with regard to certain strings. Others contended that their applied-for string should not be listed among the Category 1 Safeguard strings. Some of the applicants for the .doctor string noted that the NGPC should not accept the new GAC advice on .doctor because the term "doctor" is not used exclusively in connection with medical services and to re-categorize the string as relating to a highly regulated sector is unfair and unjust.

With respect to the Category 2 Safeguards, some applicants urged ICANN to ensure that any Public Interest Commitments or application changes based on safeguards for applications in contention sets are "bindingly implemented and monitored after being approved as a Change Request." Additionally, some applicants indicated their support for the GAC advice protections for inter-governmental organization acronyms, protection of Red Cross/Red Crescent names, and special launch programs for geographic and community TLDs.

As part of its deliberations, the NGPC reviewed the following materials and documents:

- GAC Beijing Communiqué: [https://gacweb.icann.org/download/attachments/27132037/Final\\_GAC\\_Communique\\_Durban\\_20130718.pdf?version=1&modificationDate=1375787122000&api=v2](https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130718.pdf?version=1&modificationDate=1375787122000&api=v2) [PDF, 238 KB]
- GAC Durban Communiqué: [https://gacweb.icann.org/download/attachments/27132037/Final\\_GAC\\_Communique\\_Durban\\_20130717.pdf?version=1&modificationDate=1374215119858&api=v2](https://gacweb.icann.org/download/attachments/27132037/Final_GAC_Communique_Durban_20130717.pdf?version=1&modificationDate=1374215119858&api=v2) [PDF, 103 KB]
- GAC Buenos Aires Communiqué: [https://gacweb.icann.org/download/attachments/27132037/FINAL\\_Buenos\\_Aires\\_GAC\\_Communique\\_20131120.pdf?version=1&modificationDate=1385055905332&api=v2](https://gacweb.icann.org/download/attachments/27132037/FINAL_Buenos_Aires_GAC_Communique_20131120.pdf?version=1&modificationDate=1385055905332&api=v2) [PDF, 97 KB]
- Letter from H. Dryden to S. Crocker dated 11 September 2013 re: .vin and .wine: <http://www.icann.org/en/news/correspondence/dryden-to-crocker-09sep13-en.pdf> [PDF, 66 KB]
- Applicant responses to GAC advice: <http://newgtlds.icann.org/en/applicants/gac-advice/>
- Applicant Guidebook, Module 3: <http://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf> [PDF, 261 KB]

In adopting its response to remaining items of Beijing and Durban GAC advice, and the new Buenos Aires advice, the NGPC considered the applicant comments submitted, the GAC's advice transmitted in the Communiqués, and the procedures established in the AGB and the ICANN Bylaws. The adoption of the GAC advice as provided in the attached scorecard will assist with resolving the GAC advice in manner that permits the greatest

number of new gTLD applications to continue to move forward as soon as possible.

There are no foreseen fiscal impacts associated with the adoption of this resolution, but fiscal impacts of the possible solutions discussed will be further analysed if adopted. Approval of the resolution will not impact security, stability or resiliency issues relating to the DNS.

As part of ICANN's organizational administrative function, ICANN posted the Buenos Aires GAC advice and officially notified applicants of the advice on 11 December 2013. The Durban Communiqué and the Beijing Communiqué were posted on 18 April 2013 and 1 August 2013, respectively. In each case, this triggered the 21-day applicant response period pursuant to the Applicant Guidebook Module 3.1.

b. Discussion of Report on String Confusion Expert Determinations

Whereas, on 10 October 2013 the Board Governance Committee (BGC) requested staff to draft a report for the NGPC on String Confusion Objections "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."

Whereas, the NGPC is considering potential paths forward to address the perceived inconsistent Expert Determinations from the New gTLD Program String Confusion Objections process, including implementing a review mechanism. The review will be limited to the String Confusion Objection Expert Determinations for .CAR/.CARS and .CAM/.COM.

Whereas, the proposed review mechanism, if implemented, would constitute a change to the current String Confusion Objection process in the New gTLD Applicant Guidebook.

Whereas, the NGPC is undertaking this action pursuant to the authority granted to it by the Board on 10 April 2012, to exercise the ICANN Board's authority for any and all issues that may arise relating to the New gTLD Program.

Resolved (2014.02.05.NG02), the NGPC directs the President and CEO, or his designee, to publish for public comment the proposed review mechanism for addressing perceived inconsistent Expert Determinations from the New gTLD Program String Confusion Objections process.

Rationale for Resolution 2014.02.05.NG02

The NGPC's action today, addressing how to deal with perceived inconsistent Expert Determinations from the New gTLD Program String Confusion Objections process, is part of the NGPC's role to provide general oversight of the New gTLD Program. One core of that work is "resolving issues relating to the approval of applications and the delegation of gTLDs pursuant to the New gTLD Program for the current round of the Program." (See NGPC Charter, Section II.D).

The action being approved today is to first direct the ICANN President and CEO, or his designee, to initiate a public comment period on the framework principles of a potential review mechanism to address the perceived inconsistent String Confusion Objection Expert Determinations.

The effect of this proposal, and the issue that is likely to be before the NGPC after the

close of the public comments, is to consider implementing a new review mechanism in the String Confusion Objection cases where objections were raised by the same objector against different applications for the same string, where the outcomes of the String Confusion Objections differ. If the proposal is eventually adopted after public comment and further consideration by the NGPC, ICANN would work with the International Centre for Dispute Resolution (ICDR) to implement the new review mechanism outlined in the proposal.

There are no foreseen fiscal impacts associated with the adoption of this resolution, which would initiate the opening of public comments, but the fiscal impacts of the proposed new review mechanism will be further analyzed if adopted. Approval of the resolution will not impact security, stability or resiliency issues relating to the DNS. The posting of the proposal for public comment is an Organizational Administrative Action not requiring public comment, however follow on consideration of the proposal requires public comment.

c. Staff Update on Reassignment of Registry Agreements

Item not considered.

d. Staff Update on Name Collision Framework

Item not considered.

Published on 7 February 2014

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**C-R-6**



## ICANN Board Rationales for the Approval of the Launch of the New gTLD Program

\*Note: The Rationales are not final until approved with the minutes of the Board meeting.

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## 6. ICANN Board Rationale on Objection Process Associated with the New gTLD Program

## 6. ICANN Board Rationale on Objection Process Associated with the New gTLD Program

### I. Introduction

Recommendation 12 of the Generic Names Supporting Organization (GNSO) Final Report on the Introduction of New gTLDs (<http://gnsso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>), and approved by the Board in June 2008 ([http://www.icann.org/en/minutes/resolutions-26jun08.htm#\\_Toc76113171](http://www.icann.org/en/minutes/resolutions-26jun08.htm#_Toc76113171)) states that, “[D]ispute resolution and challenge processes must be established prior to the start of the process.” Further, Implementation Guideline H, also set forth by the GNSO, states “External dispute providers will give decisions on objections.”

Based on the GNSO Policy and implementation planning, it was determined that four of the GNSO recommendations should serve as a basis for an objection process managed by external providers. Those include the following:

- (i) Recommendation 2 “Strings must not be confusingly similar to an existing top-level domain or a Reserved Name” (String Confusion Objection);
- (ii) Recommendation 3 “Strings must not infringe the existing legal rights of others that are recognized or enforceable under generally accepted and internationally recognized principles of law” (Legal Rights Objection);
- (iii) Recommendation 6 “Strings must not be contrary to generally accepted legal norms relating to morality and public order that are recognized under international principles of law” (Limited Public Interest Objection); and
- (iv) Recommendation 20 “An application will be rejected if an expert panel determines that there is substantial opposition to it from a significant portion of the community to which the string may be explicitly or implicitly targeted” (Community Objection).

Thus, a process allowing third parties to object to applications for new gTLDs on each the four grounds stated above was developed.<sup>2</sup>

Subsequent to the development and refinement of the original Objection Procedures based on the GNSO recommendations and set out in Module 3 of the Applicant Guidebook (see <http://www.icann.org/en/topics/new-gtlds/objection-procedures-clean-30may11-en.pdf>) a separate process has been established for the GAC. That process is also set out in Module 3 of the Applicant Guidebook. In short, there is now a formal process for the GAC to provide advice in relation to the approval of an application.

## II. History of the Development of the Objection Processes and Procedures Associated with the New gTLD Program

This section sets forth a history of significant actions taken on the subject of the objection process associated with the new gTLD program.

- In December 2005, the GNSO commenced a rigorous policy development process to determine whether (and the circumstances under which) new gTLDs would be added. A broad consensus was achieved that new gTLDs should be added to the root in order to further stimulate competition and for numerous other reasons.
- In August 2007, the GNSO issued its final report regarding the introduction of new gTLDs. Recommendation 12 of the report (“Recommendation 12”) states that “[d]ispute resolution and challenge processes . . . must be established prior to the start of the process” and Implementation Guideline H states that “External dispute providers will give decisions on objections.” <http://gns0.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>
- In December 2007, ICANN posted a call for expressions of Interest from potential Dispute Resolution Service Providers (DSRP) for the new gTLD Program. <http://www.icann.org/en/announcements/announcement-21dec07.htm>

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<sup>2</sup> The International Centre for Dispute Resolution (ICDR) has agreed to administer disputes brought pursuant to String Confusion Objections. The Arbitration and Mediation Center of the World Intellectual Property Organization (WIPO) has agreed to administer disputes brought pursuant to Legal Rights Objections. The International Center of Expertise of the International Chamber of Commerce (ICC) has agreed to administer disputes brought pursuant to Limited Public Interest and Community Objections.

- Throughout 2008, external dispute resolution service providers were evaluated and selected. As noted above in footnote 1, the ICDR will administer disputes brought pursuant to String Confusion Objections, WIPO will administer disputes brought pursuant to Legal Rights Objections and the ICC will administer disputes brought pursuant to Limited Public Interest and Community Objections.
- Also throughout 2008, ICANN conducted public consultations, as well as thorough and global research to help define the standing requirements and standards to be used by dispute resolution panels to resolve the disputes on the various Objection grounds.
- In October 2008, ICANN published draft version 1 of the Applicant Guidebook, including Module 3, which laid out the Dispute Resolution Procedures. At that same time, ICANN posted a paper for community discussion entitled “Morality and Public Order Objection Considerations in New gTLDs,” which summarized the implementation work that had been accomplished in response to Recommendation 6 (now called Limited Public Interest Objection).  
<http://www.icann.org/en/topics/new-gtlds/morality-public-order-draft-29oct08-en.pdf>
- In February 2009, the Board discussed who would have standing to object to an applied-for string on the basis of morality and public order. There was a sense that an objection-based dispute resolution process was the appropriate method for addressing possible disputes. There was also a sense that any injured party would have standing to object. Limiting standing to governments or other official bodies might not address the potential harm.  
<http://www.icann.org/en/minutes/minutes-12feb09.htm>
- Also in February 2009, with the second draft version of the Applicant Guidebook, ICANN posted the separate “New gTLD Dispute Resolution Procedure”. <http://www.icann.org/en/topics/new-gtlds/draft-dispute-resolution-procedure-18feb09-en.pdf>
- Also in February 2009, ICANN posted a paper for community discussion entitled “Description of Independent Objector for the New gTLD Dispute Resolution Process,” which explored the potential benefits of

allowing an “Independent Objector” to object within the dispute resolution process.

<http://www.icann.org/en/topics/new-gtlds/independent-objector-18feb09-en.pdf>

- In May 2009, along with revised excerpts of the Applicant Guidebook, ICANN posted a paper for community discussion entitled “Standards for Morality and Public Order Research,” which summarized the research relating to the development of standards for morality and public order (now Limited Public Interest) objections.  
<http://www.icann.org/en/topics/new-gtlds/morality-public-order-30may09-en.pdf>
- In May 2010, ICANN posted a paper entitled “‘Quick Look’ Procedure for Morality and Public Order Objections,” which summarized a procedure requested by community members by which morality and public order objections could be dismissed if they are determined to be “manifestly unfounded and/or an abuse of the right to object.”  
<http://www.icann.org/en/topics/new-gtlds/morality-public-order-quick-look-28may10-en.pdf>
- In August 2010, Heather Dryden, Chair of the GAC, delivered a letter to Peter Dengate Thrush, Chairman of the Board, requesting that the proposed procedure for morality and public order objections be replaced with an alternative mechanism.  
<http://www.icann.org/en/correspondence/gac-to-dengate-thrush-04aug10-en.pdf>
- Also in August 2010, the Board considered Submission No. 2010-08-05-15, which discussed the feedback received by the GAC with regard to the proposed procedure for morality and public order objections.  
<http://www.icann.org/en/minutes/board-briefing-materials-2-05aug10-en.pdf>
- In September 2010, the cross-stakeholder group known as the New gTLD Recommendation 6 Cross-Community Working Group (“Rec6 CWG”) published a report on the Implementation of the Recommendation (the “Rec6 CWG report”). The report provided guidance to the Board with regard to procedures for addressing culturally objectionable and/or sensitive strings, while protecting internationally recognized freedom of expression rights. This report

was posted for public comment. [See link at http://www.icann.org/en/announcements/announcement-2-22sep10-en.htm](http://www.icann.org/en/announcements/announcement-2-22sep10-en.htm)

- Also in September 2010, the Board met in Trondheim, Norway and stated that they would “accept the [Rec6 CWG] recommendations that are not inconsistent with the existing process, as this can be achieved before the opening of the first gTLD application round, and [would] work to resolve any inconsistencies.” At the same meeting, the Board agreed that it had “ultimate responsibility for the new gTLD program ... however, [that it wished] to rely on the determination of experts on these issues.”  
<http://www.icann.org/en/minutes/resolutions-25sep10-en.htm>
- In October 2010, the Board again discussed the Rec6 CWG report, indicating that several of the working group recommendations could be included in the Guidebook for public discussion and that the working group recommendations should be discussed publicly at ICANN’s upcoming meeting in Cartagena.  
<http://www.icann.org/en/minutes/resolutions-28oct10-en.htm>
- In November 2010, ICANN posted the proposed final version of the Applicant Guidebook (the “Proposed Final Guidebook”), which adopted several of the recommendations set forth in the Rec6 CWG report.  
<http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-12nov10-en.pdf>
- Also in November 2010, ICANN posted an explanatory memorandum entitled ““Limited Public Interest Objection,”” which described the recommendations set forth in the Rec6 CWG report, ICANN’s responses to those recommendations and ICANN’s rationale for its responses.  
<http://www.icann.org/en/topics/new-gtlds/explanatory-memorality-public-order-12nov10-en.pdf>
- In December 2010 in Cartagena, Columbia, the Board had two separate sessions with the Rec6 CWG to help achieve further understanding of the working group’s positions.
- On 23 February the GAC issued the “GAC indicative scorecard on new gTLD issues listed in the GAC Cartagena Communique” (“Scorecard”)



identifying the Objection Process as one of twelve areas for discussion.  
<http://www.icann.org/en/topics/new-gtlds/gac-scorecard-23feb11-en.pdf>

- On 28 February and 1 March 2011, the Board and the GAC had a two-day consultation in Brussels, Belgium to discuss the issues raised in the Scorecard, including the suggestion that the GAC should not be subject to the Objection Procedures for Limited Public Interest Objections. Instead, a process was discussed by which the GAC could provide public policy advice on individual gTLD applications directly to the Board
- On 12 April 2011, the GAC issued “GAC comments on the ICANN’s Board’s response to the GAC Scorecard” that also addressed the Objection Procedures. <http://www.icann.org/en/topics/new-gtlds/gac-comments-board-response-gac-scorecard-12apr11-en.pdf>
- On April 15 2011, ICANN posted the April 2011 Discussion Draft of the Applicant Guidebook, containing a new “GAC Advice” section detailing the procedure by which the GAC could provide advice to the Board concerning gTLD applications. <http://www.icann.org/en/topics/new-gtlds/draft-dispute-resolution-procedures-redline-15apr11-en.pdf>
- Also on 15 April 2011, ICANN posted an Explanatory Memorandum entitled ‘GAC and Government Objections; Handling of Sensitive Strings; Early Warning’ to describe details of the new procedures. <http://www.icann.org/en/topics/new-gtlds/gac-objections-sensitive-strings-15apr11-en.pdf>
- Also on 15 April 2011, ICANN posted “Revised ICANN Notes on: the GAC New gTLDs Scorecard, and GAC Comments to Board Response” discussing its response to the GAC’s concerns on the Objection Process. <http://www.icann.org/en/topics/new-gtlds/board-notes-gac-scorecard-clean-15apr11-en.pdf>
- On 20 May the Board and GAC had further consultations that included discussion on the Objection Process. <http://www.icann.org/en/topics/new-gtlds/transcript-board-gac-20may11-en.pdf>

- [On 30 May, ICANN posted the current version of the Applicant Guidebook with additional refinements to the Objection Process as it relates to the GAC. http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm](http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm)
- [On 19 June 2011, the Board and the GAC had additional consultations.](#)

### III. The Board's Analysis of the Objection Process Associated with the New gTLD Program

#### A. Brief Introduction to the Objection Process

##### 1. Brief Overview of the Objection Process for all except the GAC.

- The new gTLD process is an objection-based process, in which parties with standing may file with an identified independent dispute resolution provider a formal objection to an application on certain enumerated grounds (see footnote 1 for list of providers). The grounds for filing a formal objection to an application are:
  - the gTLD string is confusingly similar to an existing TLD or another applied-for gTLD string in the same round of applications (“String Confusion Objection”)
  - the gTLD string infringes the existing legal rights of the objector (“Legal Rights Objection”)
  - the gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under international principles of law (“Limited Public Interest Objection”)
  - there is substantial opposition to the application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted (“Community Objection”).

<http://www.icann.org/en/topics/new-gtlds/draft-rfp-redline-15apr11-en.pdf>

- If the objectors have standing, their objections will be considered by a panel of qualified experts, that will issue a Determination.

- Specific standards under which each of the four types of objections will be evaluated are set forth in detail in Module 3 of the current Applicant Guidebook.
- There will be objection fees (fixed for String Confusion and Community Objections and hourly for Limited Public Interest and Community Objections) that will be refundable to the prevailing party.

## 2. Brief Overview of the GAC Advice Process.

- The process for GAC Advice on New gTLDs is intended to address applications that are identified by governments to be problematic, e.g., that potentially violate national law or raise sensitivities.
- For the Board to be able to consider the GAC advice during the evaluation process, the GAC advice would have to be submitted by the close of the Objection Filing Period
- Where GAC Advice on New gTLDs is received by the Board concerning an application, ICANN will publish the Advice and endeavor to notify the relevant applicant(s) promptly. The applicant will have a period of 21 calendar days from the publication date in which to submit a response to the ICANN Board.
- ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.
- The receipt of GAC advice will not toll the processing of any application (i.e., an application will not be suspended but will continue through the stages of the application process).

### **B. Why the Board Addressed the Objection Process as it has**

- The GNSO Policy Recommendations called for the creation of a dispute resolution or objection process in the new gTLD program.

- The GNSO also provided implementation guidelines suggesting that external dispute resolution providers should be utilized.
- A fully established objection process, with uniform standing requirements and standards available to the dispute resolution service providers, ensures that a reasonably objective process is in place. It further ensures that experts in dispute resolution make any determinations on the disputes after considering all of the evidence.
- A fully established dispute resolution process provides parties with a cost-effective alternative to initiating action in court, if there is a valid objection.
- The GAC advised the Board that it was not amendable to utilizing the standard Objection Process established for the new gTLD program. Accordingly, the Board worked closely with the GAC to develop a mutually acceptable “objection” mechanism, in the form of GAC Advice.

**C. Who the Board Consulted**

- Legal Counsel
- International arbitration experts
- Judges from various international tribunals such as the International Court of Justice
- Attorneys who practice in front of international tribunals such as the International Court of Justice
- The GNSO
- The GAC
- The ALAC
- The ccNSO
- The SSAC
- All other Stakeholders and Community Members

#### D. Significant Non-Privileged Materials the Board Reviewed

- GAC Principles Regarding New gTLDs.  
[http://gac.icann.org/system/files/gTLD\\_principles\\_0.pdf](http://gac.icann.org/system/files/gTLD_principles_0.pdf)
- GNSO “Final Report – Introduction of new generic top-level domains.” <http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>
- Report on Implementation of GNSO New GTLD Recommendation #6. See link to Report from <http://www.icann.org/en/announcements/announcement-2-22sep10-en.htm>
- All materials related to the Board/GAC consultation. See <http://www.icann.org/en/topics/new-gtlds/related-en.htm>
- All relevant GAC letters and Communiques. See <http://www.icann.org/en/correspondence/> and <http://gac.icann.org/communiques>.
- Applicant Guidebook, related explanatory memoranda, other related documents and related comment summaries and analyses:
  - Each version of the Applicant Guidebook, including all ICANN created explanatory memoranda and the specific proposals for trademark protections, along with numerous pages of public comment summaries and analysis related to the Objection Procedures. See (i) <http://www.icann.org/en/topics/new-gtlds/comments-en.htm>; (ii) <http://www.icann.org/en/topics/new-gtlds/comments-2-en.htm#expmem>; (iii) <http://www.icann.org/en/topics/new-gtlds/comments-e-en.htm>; (iv) <http://www.icann.org/en/topics/new-gtlds/comments-3-en.htm>; (v) <http://www.icann.org/en/topics/new-gtlds/gnso-consultations-reports-en.htm>; (vi) <http://www.icann.org/en/announcements/announcement-4-15feb10-en.htm>; (vii) <http://www.icann.org/en/topics/new-gtlds/summaries-4-en.htm>; (viii) <http://www.icann.org/en/topics/new-gtlds/comments-5-en.htm>; (ix)

<http://www.icann.org/en/topics/new-gtlds/comments-analysis-en.htm>; (x) <http://www.icann.org/en/topics/new-gtlds/dag-en.htm>; (xi) <http://www.icann.org/en/topics/new-gtlds/comments-6-en.htm>; and (xii) <http://www.icann.org/en/topics/new-gtlds/comments-7-en.htm>

#### **E. Significant Concerns the Community Raised**

- What will be done if there is an application for a highly objectionable name, but there are no objectors within the process?
- There is a need for clarification on what type of string would be considered to be “contrary to generally accepted legal norms relating to morality and public order . . . recognized under international principles of law.”
- Are the standards set out for each objection appropriate?
- How will fees be determined?
- Will ICANN fund certain stakeholders’ objections?
- Should it be a dispute process rather than a mere objection process?
- Are the independent dispute resolution providers the rights ones to handle the specific objections?
- Neither Governments nor the GAC should be required to utilize the Objection Procedures.

#### **F. Factors the Board Found to Be Significant**

- The Dispute Resolution Process is designed to protect certain interests and rights, those interests identified by the GNSO in their policy recommendations that were approved by the ICANN Board.
- The Dispute Resolution Process will be more cost effective and efficient than judicial proceedings. Fees will be paid directly to the dispute resolution providers.

- The Dispute Resolution Process should be independent as possible so that the applicants, the community and ICANN have the benefit of neutral expert opinion.
- It is critical to address risk to the established processes and to ICANN by providing a path for considering controversial applications that might otherwise result in litigation or attacks to the process or to the ICANN model.
- Governments have a particular interest in having an unencumbered process to provide advice to the Board without having to utilize the formal independent objection process.

**G. The Board’s Reasons for Supporting the Two-pronged Objection Process Established for the New gTLD Program**

- The Dispute Resolution Process complies with the policy guidance provided by the GNSO.
- The Dispute Resolution Process provides a clear, predictable path for objections and objectors.
- The Dispute Resolution Process provides clear standards that will lead to predictable, consistent results.
- The Dispute Resolution Process provides for an independent analysis of a dispute.
- The Dispute Resolution Process provides a bright line between public comment and a formal objection process so parties understand the manner in which a challenge to a particular application should be brought (a lesson learned from previous rounds).
- The Dispute Resolution Process appropriately limits the role for the Board.
- The Dispute Resolution Process limits involvement to those who truly have a valid objection.
- The Dispute Resolution Process provides for a more efficient and cost effective approach to dispute resolution than judicial proceedings.

- The Dispute Resolution Process, which provide for an “Independent Objector” to object is an important step to achieving the goal of independence and ensuring the objectionable strings are challenged.
- The GAC Advice process provides an avenue for the GAC to provide public policy advice to the Board on individual applications in a relatively timely fashion and consistent manner.
- The GAC Advice process was developed after close consultations with the GAC and provides a prescribed manner and time frame in which the Board will be able to consider GAC advice with respect to a particular string or applicant.