

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION  
CASE NO. 01-14-0002-1065

GULF COOPERATION COUNCIL  
(Claimant)

And

INTERNET CORPORATION FOR ASSIGNED  
NAMES AND NUMBERS  
(Respondent)

**INDEX TO DOCUMENTS SUBMITTED WITH ICANN'S RESPONSE TO  
CLAIMANT'S SUPPLEMENTARY REQUEST FOR INDEPENDENT REVIEW PROCESS**

<b><u>Exhibit</u></b>	<b><u>DESCRIPTION</u></b>
<b>R-24</b>	Final Declaration, Merck KGaA v. ICANN, ICDR Case No. 01-14-0000-9604
<b>R-25</b>	Operating Principles of ICANN's Governmental Advisory Committee
<b>R-26</b>	Minutes of 13 August 2013 NGPC Meeting

**Ex. R-24**

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

**INDEPENDENT REVIEW PROCESS**

**Case No. 01-14-0000-9604**

***MERCK KGaA***  
**(Claimant)**

**-v-**

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

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

**Section I – Procedural History**

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

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

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

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

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

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

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

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

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

*For and on behalf of the Panel.*

*Klaus Reichert SC*

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

*Dear Counsel,*

*The Panel has considered the submissions received.*

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

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

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

*Klaus Reichert*

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

*Dear Counsel,*

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

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

*Klaus Reichert*

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

*Dear Parties,*

*Thank you both for your letters on costs.*

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

*Klaus Reichert*

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

### Section II – The Panel's Authority

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

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

- a did the Board act without conflict of interest in taking its decision?;*
  - b did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and*
  - c did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?*
17. The analysis which the Panel is mandated to undertake is one of comparison. More particularly, a contested action<sup>1</sup> of the Board is compared to the Articles of Incorporation and Bylaws in order to ascertain whether there is consistency. The analysis required for a comparison exercise requires careful assessment of the action itself, rather than its characterization by either the complainant or ICANN. The Panel, of course, does take careful note of the characterizations that are advanced by the Claimant and ICANN.
18. As regards the substantive object of the comparison exercise, namely, whether there was consistency as between the action and the Articles of Incorporation and Bylaws, the parameters of the evaluation for consistency are informed by the final part of Article IV, Section 3.4, which is explicit

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

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

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



Section III – Analysis

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

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

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

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

25. The Panel will first describe, based on its appreciation of the materials put before it, the background leading up to the initiation of this Independent Review Process.
26. Merck is a long-established pharmaceutical and chemical business in Germany. In 1917 its then American business (now Merck & Co., Inc. (“MSD”)) was separated from it by the Trading with the Enemy Act arising from the entry of the United States as a belligerent into World War I. The co-existence of Merck and MSD has been the subject of a number of formal agreements over the years, and also a number of disputes.
27. Merck and MSD each filed applications with ICANN for new gTLDs incorporating the word “Merck”. As a result, Merck and MSD then filed a number of Legal Rights Objections (“LROs”) against each other with the WIPO Arbitration and Mediation Centre in accordance with the New gTLD Dispute Resolution Procedure. At the heart of Merck’s complaint was the point that MSD apparently was not intending to limit, through

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

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

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

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

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

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

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

*For the aforementioned reasons the Panel rejects the Objection.*

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

*The Panel addresses each of them in turn:*

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

*[Sole Panel Expert analysis follows]*

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

*[Sole Panel Expert analysis follows]*

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

*[Sole Panel Expert analysis follows]*

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

*[Sole Panel Expert analysis follows]*

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

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

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

*[Sole Panel Expert analysis follows]*

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

*[Sole Panel Expert analysis follows]*

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

*[Sole Panel Expert analysis follows]*

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

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

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

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

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

.....

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A proposed review mechanism is outlined thereafter.

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

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

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

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

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

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

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

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

Section IV – Costs

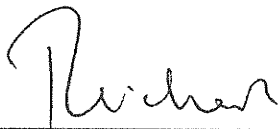
69. As ICANN is the prevailing party, Merck is held responsible for costs. Therefore the administrative fees and expenses of the International Centre for Dispute Resolution (ICDR) totaling US\$3,350.00 shall be borne by entirely by Merck KGaA, and the compensation and expenses of the Panelists totaling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

**Section V – Declaration**

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

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

December 10, 2015  
Date

  
\_\_\_\_\_  
Klaus Reichert, Panelist/ Chair

\_\_\_\_\_  
Date

\_\_\_\_\_  
A. Howard Matz, Panelist

\_\_\_\_\_  
Date

\_\_\_\_\_  
Graeme Dinwoodie, Panelist



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Date

\_\_\_\_\_  
Klaus Reichert, Panelist/ Chair

December 10, 2015  
Date

A. Howard Matz  
A. Howard Matz, Panelist

\_\_\_\_\_  
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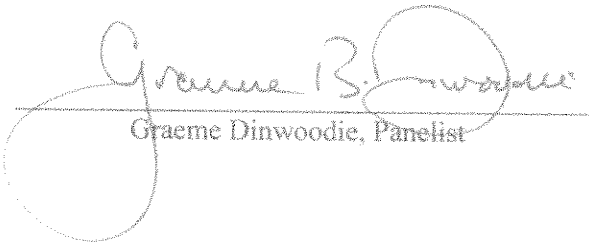
\_\_\_\_\_  
Date

\_\_\_\_\_  
Klaus Reichert, Panelist/ Chair

\_\_\_\_\_  
Date

\_\_\_\_\_  
A. Howard Matz, Panelist

December 10, 2015  
Date

  
\_\_\_\_\_  
Graeme Dinwoodie, Panelist

**Ex. R-25**

 Select Language | ▼

- ▼ Governmental Advisory Committee
  - ▼ About The GAC
    - [GAC Operating Principles](#)
    - ICANN Bylaws
    - GAC Leadership
    - ▶ Members & Observers
    - GAC Secretariat and Support Team - Contact
    - Travel Support
  - ▶ GAC Meetings
  - ▶ Key Topics
  - ▶ Newcomers
  - GAC Announcement Archive
  - ▶ GAC Correspondence
  - File lists

## GAC Operating Principles

*Dedicated to preserving the central co-ordinating functions of the global Internet for the public good.*

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN)

GOVERNMENTAL ADVISORY COMMITTEE (GAC) - OPERATING PRINCIPLES

*As amended, GAC Buenos Aires meeting in June, 2015*

- ARTICLE I - SCOPE OF THE GOVERNMENTAL ADVISORY COMMITTEE
- ARTICLE II - MEETINGS
- ARTICLE III - AGENDA
- ARTICLE IV - MEMBERSHIP
- ARTICLE V - OBSERVERS
- ARTICLE VI - REPRESENTATION
- ARTICLE VII - CHAIR, VICE CHAIRS, OTHER OFFICERS AND COMMITTEES
- ARTICLE VIII - POWERS OF THE CHAIR
- ARTICLE IX - ELECTION OF CHAIR AND VICE CHAIRS
- ARTICLE X - CONDUCT OF BUSINESS
- ARTICLE XI - THE SECRETARIAT
- ARTICLE XII - PROVISION OF ADVICE TO THE ICANN BOARD
- ARTICLE XII - RECORDS
- ARTICLE XIII - PUBLICITY OF MEETINGS
- ARTICLE XIV - REVISION
- ARTICLE XV - GENERAL PROVISIONS

Whereas:

1. The functions and responsibilities of the Internet Assigned Numbers Authority (IANA) are being transferred to a new private not for profit corporation, the Internet Corporation for Assigned Names and Numbers (ICANN).
2. ICANN's functions and responsibilities will affect the functioning of the global Internet.
3. ICANN's Articles of Incorporation establish that the corporation shall operate for the benefit of the Internet community as a whole and shall pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet by performing and co-ordinating functions associated with the technical management of Internet names and addresses.
4. a) The Articles of Incorporation and Bylaws establish that ICANN shall carry out its activities in conformity with

relevant principles of international law and applicable international conventions and local law. b) ICANN is committed to carrying out its activities based on the principles of stability, competition, private bottom-up coordination, and representation.

5. ICANN's Bylaws, Article XI Advisory Committees, Section 2.1 provide for a Governmental Advisory Committee The Governmental Advisory Committee should consider and provide advice on the activities of ICANN as they relate to concerns of governments and where they may affect public policy issues. The Advice of the Governmental Advisory Committee on public policy matters shall be duly taken into account by ICANN, both in the formulation and adoption of policies.

6. The GAC commits itself to implement efficient procedures in support of ICANN and to provide thorough and timely advice and analysis on relevant matters of concern with regard to government and public interests

Considering that:

1. The Internet naming and addressing system is a public resource that must be managed in the interests of the global Internet community;

2. The management of Internet names and addresses must be facilitated by organisations that are global in character.

3. ICANN's decision making should take into account public policy objectives including, among other things:

- secure, reliable and affordable functioning of the Internet, including uninterrupted service and universal connectivity;
- the robust development of the Internet, in the interest of the public good, for government, private, educational, and commercial purposes, world wide;
- transparency and non-discriminatory practices in ICANN's role in the allocation of Internet names and address;
- effective competition at all appropriate levels of activity and conditions for fair competition, which will bring benefits to all categories of users including, greater choice, lower prices, and better services;
- fair information practices, including respect for personal privacy and issues of consumer concern; and
- freedom of expression.

4. Country code top level domains are operated in trust by the Registry for the public interest, including the interest of the Internet community, on behalf of the relevant public authorities including governments, who ultimately have public policy authority over their ccTLDs, consistent with universal connectivity of the Internet.

## ARTICLE I - SCOPE OF THE GOVERNMENTAL ADVISORY COMMITTEE

### Principle 1

The Governmental Advisory Committee (GAC) shall consider and provide advice on the activities of ICANN as they relate to concerns of governments, multinational governmental organisations and treaty organisations, and distinct economies as recognised in international fora, including matters where there may be an interaction between ICANN's policies and various laws and international agreements and public policy objectives.

### Principle 2

The GAC shall provide advice and communicate issues and views to the ICANN Board. The GAC is not a decision making body. Such advice given by the GAC shall be without prejudice to the responsibilities of any public authority with regard to the bodies and activities of ICANN, including the Supporting Organisations and Councils.

**Principle 3**

The GAC shall report its findings and recommendations in a timely manner to the ICANN Board through the Chair of the GAC.

**Principle 4**

The GAC shall operate as a forum for the discussion of government and other public policy interests and concerns.

**Principle 5**

The GAC shall have no legal authority to act for ICANN.

**ARTICLE II - MEETINGS****Principle 6**

The GAC shall meet at least once annually; notwithstanding this designated annual meeting, the GAC shall meet as appropriate.

**Principle 7**

A meeting may be convened on the initiative of the Chair, at the request of a Member or at the request of the ICANN Board, concurred in by one third (1/3) of the Current Membership.

**Principle 8**

Face-to-face meetings of the GAC shall be convened by the Chair, by a notice issued not less than twenty-eight (28) calendar days prior to the date set for the meeting. This notice may be issued electronically, via telefacsimile, or via airmail.

**Principle 9**

Online and electronic meetings of the GAC shall be convened by the Chair, by a notice issued not less than ten (10) calendar days prior to the date set for the meeting.

This notice may be issued electronically, via telefacsimile, or via airmail.

**Principle 10**

An emergency meeting of the GAC may be convened by the Chair, by a notice issued not less than ten (10) calendar days prior to the date set for the meeting. This notice may be issued electronically, via telefacsimile, or via airmail. Principle 11 In addition to face-to-face meetings, meetings and discussions may be conducted online via secure communications. "Online" includes electronic mail, web-based communications, and teleconferences.

**ARTICLE III - AGENDA****Principle 12**

A proposed agenda for the meeting shall be communicated to Members prior to the meeting.

**Principle 13**

Requests for items to be placed on the agenda of a forthcoming meeting shall be communicated to the Secretariat of the GAC in writing, either via electronic mail, telefacsimile or airmail.

**ARTICLE IV - MEMBERSHIP****Principle 14**

Members of the GAC shall be national governments, multinational governmental organisations and treaty organisations, and public authorities, each of which may appoint one representative and one alternate representative to the GAC. The accredited representative of a Member may be accompanied by advisers. The accredited representative, alternate and advisers must hold a formal official position with the Member's public administration. The term 'official' includes a holder of an elected governmental office or a person who is employed by such government, public authority or multinational governmental or treaty organisation, and whose primary function with such government, public authority or organisation is to develop or influence governmental or public policies.

#### Principle 15

Membership is open to all national governments. Membership is also open to distinct economies as recognised in international fora. Multinational governmental organisations and treaty organisations, may also participate as observers, on the invitation of the GAC through the Chair.

#### Principle 16

Accredited representatives of governments and other public authorities, Members of GAC, have voting rights. Accredited representatives of International Organisations and entities other than public authorities participate fully in the GAC and its Committees and Working Groups, as Observers, but do not have voting rights.

#### Principle 17

Those who constitute the Current Membership are defined as those Members from whom the Chair has received formal notification of the name and contact details of their accredited representative. The list of current Members shall be updated regularly and be posted online.

## ARTICLE V - OBSERVERS

#### Principle 18

Representatives of invited UN Inter-governmental Organisations, non-member public authorities and other relevant entities may attend meetings of the GAC as observers, at the discretion of the Chair.

## ARTICLE VI - REPRESENTATION

#### Principle 19

If a Member's accredited representative, or alternate representative, is not present at a meeting, then it shall be taken that the Member government or organisation is not represented at that meeting. Any decision made by the GAC without the participation of a Member's accredited representative shall stand and nonetheless be valid.

#### Principle 20

In consideration of the GAC's commitment to efficiency, there shall be no attendance or voting by proxy. Members may only be represented at meetings, both face-to-face and electronic, by their accredited representative, or designated alternate representative.

## ARTICLE VII - CHAIR, VICE CHAIRS, OTHER OFFICERS AND COMMITTEES

#### Principle 21

If the GAC moves to require additional officers other than the Chair, then five (5) Vice-Chairs shall be elected from among the Members. To the extent possible, the Vice-Chairs should appropriately reflect the geographic and development diversity of the membership. The Chair shall hold office for a term of two (2) years, renewable once.

The Vice-Chairs shall hold office for a term of one (1) year and may be re-elected; however no person may serve as Vice-Chair for more than two consecutive terms.

#### Principle 22

The GAC Chair and Vice Chairs shall be elected by the Members of the GAC from among the accredited representatives of governments and other public authorities, Members of GAC, pursuant to procedures outlined under Article IX (Election of Office Holders) of these Operating Principles The elections of the Chair and Vice Chairs will be concurrent, as provided for in Principle 34.

#### Principle 23

The GAC may designate other officers as necessary.

#### Principle 24

The Chair shall normally participate in the proceedings as such and not as the accredited representative of a Member, in which case the Member may accredit another representative. The Chair may, however, at any time request permission to act in either capacity. The Vice Chairs shall participate in the proceedings as accredited representatives of a Member.

#### Principle 25

If the Chair is absent from any meeting or part thereof, one of the five (5) Vice-Chairs shall perform the functions of the Chair. If no Vice-Chairs were elected or if no Vice-Chair is present the GAC shall elect an interim Chair for that meeting or that part of the meeting.

#### Principle 26

If the Chair can no longer perform the functions of the office, the GAC shall designate one of the Vice-Chairs referred to in Principle 22 of these Operating Principles to perform those functions pending election of a new Chair in pursuant to procedures outlined under Article IX (Election of Chair and Vice Chairs) of these Operating Principles. If no Vice-Chair was elected, the GAC shall elect an interim Chair to perform those functions pending the election of a new Chair.

#### Principle 27

The Chair may call for the creation of Committees and Working Groups to address matters that relate to concerns of governments and where they may affect public policy issues. Accredited representatives may designate advisers to serve on such committees.

### ARTICLE VIII - POWERS OF THE CHAIR

#### Principle 28

In addition to exercising the power conferred elsewhere by these Principles, the Chair shall declare the opening and closing of each meeting shall direct the discussion, accord the right to speak, submit questions for decisions, announce decisions, rule on points of order and subject to these rules, have control of the proceedings. The Chairperson may also call a speaker to order if the remarks of the speaker are not relevant.

#### Principle 29

The Chair, with the consent of the meeting, may limit the time allowed to each speaker.

#### Principle 30

The Chair shall not normally have voting power; however in the event of a tie, the Chair shall have a casting vote.



## ARTICLE IX - ELECTION OF CHAIR AND VICE CHAIRS

### Principle 31

Elections for the GAC Chair shall take place during the final meeting of every second year (even years) unless the Chair can no longer perform the functions of the office. If Chair can no longer perform the functions during the first year in the office, the elections shall be organized for the remaining term in the office during the next GAC meeting. If Chair can no longer perform the functions during the second year in the office, the GAC shall decide which of the Vice Chairs should replace the Chair until the regular elections are held.

Elections for the five Vice Chairs shall normally take place during the final meeting of the year. If Vice Chair can no longer perform the functions before the full term has finished, new elections shall be organized for the remaining term in the office during the next GAC meeting. The results of each election shall formally be announced at the end of any meeting in which an election has taken place, and shall take effect at the end of the next GAC meeting.

### Principle 32

In the event of a single candidate he or she shall be elected by acclamation. If there is more than one candidate for the position of Chair, or more than five (5) candidates for the positions of Vice Chairs, an election will be held. For elections, the candidate or candidates with the most votes shall be elected to the position(s) that he or she has stood for.

In case of a tie ballot for two leading candidates, an additional ballot shall be held restricted to these candidates after an interval of at least one hour.

Elections shall be valid if more than 1/3 of the GAC members participate in the voting in person and by electronic mail. In case of the second round of voting, only present at the meeting GAC members participate.

### Principle 33

Nominations for candidates to the official position of Chair and/or Vice Chair of the GAC shall normally start during the GAC meeting which precedes the meeting in which the confirmation is due to take place. In any event, the nomination procedure will close 45 days before the start of the meeting at which the confirmation of appointment is due to take place and a list of candidates should be posted on the GAC website within 14 days. In the event that there are more candidates than positions available, the GAC Chair will notify members that an election will be organized in accordance with principles 34 to 36 of this document.

### Principle 34

For elections, votes shall be taken by secret ballot. It will be a matter for each voting Member to decide if they wish to make his or her choice public. This includes the taking of votes in person, or ballots transmitted by electronic mail. The GAC Secretariat will organize the voting procedure and count the votes under the supervision of the Chair or Vice Chairs who do not stand for re-election.

### Principle 35

For votes to be taken in person, the GAC Secretariat will distribute ballot papers to Members' accredited representatives at that meeting, and arrange for a ballot box to be placed in the conference room.

### Principle 36

Members unable to attend in person, should notify the Secretariat no less than 7 days before the beginning of the meeting in which the election is due to take place. They will then be provided with the opportunity to cast their

votes by electronic mail addressed to the Secretariat, which shall then be added to the votes cast by other members during the meeting. Any Member from whom a vote has not been received within such a time-limit shall be regarded as not voting.

## ARTICLE X - CONDUCT OF BUSINESS

### Principle 40

One third of the representatives of the Current Membership with voting rights shall constitute a quorum at any meeting. A quorum shall only be necessary for any meeting at which a decision or decisions must be made. The GAC may conduct its general business face-to-face or online.

A Member may initiate an online discussion of a question by forwarding to the Chair a request for the opening of an online discussion on a specific topic. The GAC Secretariat will initiate this discussion and all Members may post their contributions during a period of time established by the Chair, the period of which is to be no longer than sixty (60) calendar days. At the end of this discussion period, the Chair will summarise the results of the discussion and may forward the results to the ICANN Board. Nothing in this Principle overrides the decision making processes set out elsewhere in these Operating Principles.

### Principle 41

Representatives of Members shall endeavour, to the extent that a situation permits, to keep their oral statements brief. Representatives wishing to develop their position on a particular matter in fuller detail may circulate a written statement for distribution to Members.

### Principle 42

Representatives should make every effort to avoid the repetition of a full debate at each meeting on any issue that has already been fully debated in the past and on which there appears to have been no change in Members' positions already on record.

### Principle 43

In order to expedite the conduct of business, the Chair may invite representatives who wish to express their support for a given proposal to show their hands, in order to be duly recorded in the records of the GAC as supporting statements; thus only representatives with dissenting view or wishing to make explicit points or proposals would actually be invited to make a statement. This procedure shall only be applied in order to avoid undue repetition of points already made, and will not preclude any representative who so wishes from taking the floor.

## ARTICLE XI - THE SECRETARIAT

### Principle 44

The Secretariat of the Governmental Advisory Committee shall undertake such administrative, coordination, liaison and research activities as shall be necessary for the efficient functioning of the GAC. The Secretariat shall facilitate communications among the GAC Chair, Vice Chairs, other Officers, the GAC membership and with ICANN. The Secretariat participates in all GAC meetings.

### Principle 45

The Secretariat shall be financed by such means as shall be agreed by the GAC members.

## ARTICLE XII - PROVISION OF ADVICE TO THE ICANN BOARD

#### Principle 46

Advice from the GAC to the ICANN Board shall be communicated through the Chair.

#### Principle 47

The GAC works on the basis of seeking consensus among its membership. Consistent with United Nations practice<sup>[1]</sup>, consensus is understood to mean the practice of adopting decisions by general agreement in the absence of any formal objection. Where consensus is not possible, the Chair shall convey the full range of views expressed by members to the ICANN Board.

#### Principle 48

The GAC may deliver advice on any other matter within the functions and responsibilities of ICANN, at the request of the ICANN Board or on its own initiative. The ICANN Board shall consider any advice from the GAC prior to taking action.

### ARTICLE XII - RECORDS

#### Principle 49

Records of the meetings of the GAC shall be in the form of Executive Minutes.

### ARTICLE XIII - PUBLICITY OF MEETINGS

#### Principle 50

The meetings of the GAC shall ordinarily be held in private. The Chair may decide that a particular meeting, or part of a particular meeting, should be held in public.

#### Principle 51

After a private meeting has been held, the Chair may issue a communiqué to the Media, such communiqué having been approved by the GAC beforehand.

### ARTICLE XIV - REVISION

#### Principle 52

The GAC may decide at any time to revise these Operating Principles or any part of them.

#### Principle 53

A Member or Members may move, at a meeting, for these Operating Principles to be open to revision. If so moved, the Chair shall call for the movement to be seconded. If so seconded, then the Chair shall call for a vote to support the resolution. The deciding vote may be by ballot, by the raising of cards, or by roll call, and shall constitute a simple majority of the Members who are present at the meeting at which it was moved for these Operating Principles to be revised. If so resolved in favour of a revision of these Operating Principles, then the proposal shall sit for consultation for a period of sixty (60) days. At the next meeting following the sixty days, the Chair shall call for a vote for or against the proposal. The deciding vote may be taken by ballot, by the raising of cards, or by roll call, and shall be a simple majority of the Members who are present at the meeting at which the vote takes place.

### ARTICLE XV - GENERAL PROVISIONS

#### Principle 54

Whenever there is a difference in interpretation between the principles set out in these Operating Principles and

ICANN's Articles of Incorporation and Bylaws, ICANN's Articles of Incorporation and Bylaws shall prevail.

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[1] In United Nations practice, the concept of “consensus” is understood to mean the practice of adoption of resolutions or decisions by general agreement without resort to voting in the absence of any formal objection that would stand in the way of a decision being declared adopted in that manner. Thus, in the event that consensus or general agreement is achieved, the resolutions and decisions of the United Nations meetings and conferences have been adopted without a vote. In this connection, it should be noted that the expressions “without a vote”, “by consensus” and “by general agreement” are, in the practice of the United Nations, synonymous and therefore interchangeable.

Previous Versions of the GAC Operating Principles:

[GAC Operating Principles Mar Del Plata - 2005](#)

[GAC Operating Principles Nairobi - 2010](#)

[GAC\\_Operating\\_Principles\\_Dakar 2011.pdf](#)

[GAC Operating Principles Buenos Aires 2015](#)

**Ex. R-26**


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 [Identifier Systems  
Security, Stability  
and Resiliency \(IS-  
SSR\)](#)
 [ccTLDs](#)
 [Internationalized  
Domain Names](#)

## Minutes | Meeting of the New gTLD Program Committee

13 Aug 2013

**A Special Meeting of the New gTLD Program Committee of the ICANN Board of Directors was held telephonically on 13 August 2013 at 21:00 UTC.**

**Committee Chairman Cherine Chalaby promptly called the meeting to order.**

**In addition to the Chair the following Directors participated in all or part of the meeting: Fadi Chehadé (President and CEO), Chris Disspain, Bill Graham, Olga Madruga-Forti, Erika Mann, Gonzalo Navarro, Ray Plzak, George Sadowsky, and Mike Silber. Kuo-Wei Wu sent apologies.**

**Jonne Soininen, IETF Liaison and Francisco da Silva, TLG Liaison, were in attendance as non-voting liaisons to the committee.**

**Steve Crocker, Bertrand de La Chapelle, Ram Mohan, Bruce Tonkin, and Suzanne Woolf were in attendance as invited observers for part of the meeting.**

**ICANN Staff in attendance for all or part of the meeting: Akram Atallah, Chief Operating Officer; John Jeffrey, General Counsel and Secretary; David Olive, Vice President, Policy Development Support; Megan Bishop; Michelle Bright; Samantha Eisner; Dan Halloran; Karen Lentz; Cyrus Namazi; and Amy Stathos.**

### 1. [Main Agenda](#)

#### a. [Dotless Domains](#)

[Rationale for Resolutions 2013.08.13.NG01 – 2013.08.13.NG03](#)

#### b. [Durban GAC Advice Draft Scorecard](#)

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### 1. Main Agenda

#### a. Dotless Domains

The Chair introduced the issue, noting that advice has been received from the [SSAC](#) and other organizations recommending that the NGPC prohibits the use of dotless domains. There have also been a lot of comments from the Board as a whole that the NGPC needs to be very decisive and clear on whether dotless domains will be allowed in the New gTLD Program. The Chair noted that Steve Crocker, Bruce Tonkin, Sébastien Bachollet, Bertrand de La Chapelle, Ram

Mohan and Suzanne Woolf had all been invited to the NGPC meeting for the purpose of sharing their views on this topics, and that the invited members would then be excused so that the NGPC could deliberate and vote on the matter.

Steve Crocker noted his position that based on all that has been presented, the NGPC should speak clearly that dotless domains at the top level are not going to happen at this time, to allow applicants to understand that this is not an available path.

Bruce Tonkin stated that the timing is wrong to allow the use of dotless domains, given the changes to the DNS that are coming already with the New gTLD Program. Though there could be a limited, narrow use in the corporate environment, allowing any usage today would also result in potential commercial uses, and inconsistent behavior. There could be the possibility of an intermediate route, that there be a moratorium period during which standardization work could occur, such as through the IETF. However, allowing dotless domains today would not be the right thing.

Sébastien Bachollet requested confirmation that any decision of the NGPC would only relate to the New gTLD Program, and that the Board would be required to make a decision that would impact other gTLDs or ccTLDs.

Steve Crocker clarified that the NGPC conversation was about new gTLDs only, and not about the existing gTLDs, nor about the ccTLDs. As it relates to ccTLDs, that topic is not really ripe to be addressed, even at the Board level. For existing gTLDs, each would have to come to ICANN to formally request dotless usage, and that would follow the existing RSEP processes.

Akram Atallah suggested that it might make sense for there to be some consideration of how to bring this subject forward with the full Board, to allow for future thinking on this topic.

Bertrand de La Chapelle noted his support for a a resolution specifically addressing dotless domains in new gTLDs.

Suzanne Woolf noted that she is not comfortable with the setting of a specific time limit for a moratorium. Instead, it is important to reinforce that this is a relatively straightforward questions with a relatively straightforward answer, and the answer is no because it is not a positive contribution to the security and stability of the DNS. There are tougher choices that will be ahead; this is not one of them. The key things to emphasize now are the problems that this could cause in the underlying functioning of the Internet, and there is no way to mitigate those concerns at this time.

Ram Mohan agreed with the suggested ban on dotless domains, as the issue for now is the potential for causing irreparable harm. In addition, there is the principle of least surprise, which is a foundational principle on which much of the DNS is formed. Ram cautioned against setting a timeline for the allowance of dotless domains. Those who want this change have the onus of demonstrating that the irreparable harm will not be caused and the principle of least surprise are no longer valid; the onus is not on ICANN to figure out how to implement this change.

Chris Disspain requested some input from the invited experts on how an NGPC

decision on dotless domains is different from some of the other technical issues that the NGPC has been considering.

Ram responded that there is data here that supports that there will be material harm if dotless domains are allowed; this is not a theoretical problem where experts on differing sides are able to create divergent theoretical outcomes. There, there is empirical evidence, practical usage and theoretical evidence that all point to the same outcomes.

Suzanne agreed that the empirical evidence on this point is there. In addition, trying to follow some principles of conservatism has been part of all of these types of decisions.

The Chair thanked the invited Board members and liaisons for their input and excused them from the call.

Jonne Soininen, acting as the shepherd for this item, refreshed the NGPC on the recommended action before them, which would be to ban the use of dotless domains completely within new gTLDs. There is always the possibility that someone could come forth with new specifications provided by the IETF or other technology or documentation that would support a different decision, but that would be in the future. Today, the NGPC is recommended to approve a ban. Jonne also confirmed that the resolution was limited to new gTLDs only.

Mike Silber raised some concerns with the Carve Report recommendations regarding further study of the issue, but otherwise expressed his support for the resolution. Olga Madruga-Forti supported Mike's position.

Chris confirmed that the resolution would contain a reference to the Carve Report, as it is one of the items that the NGPC received and considered in taking this decision.

George Sadowsky then moved and Chris Disspain seconded the resolution, and the NGPC took the following action:

Whereas, dotless domains consist of a single label and require the inclusion of, for example, an A, AAAA, or MX, record in the apex of a TLD zone in the DNS.

Whereas, Section 2.2.3.3 of the Applicant Guidebook (AGB) prohibits the use of dotless domain names without evaluation of the registry services and ICANN's prior approval.

Whereas, on 23 February 2012, the ICANN Security and Stability Advisory Committee (SSAC) published [SAC 053: SSAC Report on Dotless Domains](#) [PDF, 183 KB], and recommended that the use of DNS resource records such as A, AAAA, and MX in the apex of a Top-Level Domain (TLD) should be contractually prohibited where appropriate, and strongly discouraged in all cases.

Whereas, on 23 June 2012, the ICANN Board adopted resolution [2012.06.23.09](#) tasking ICANN to consult with the relevant communities regarding implementation of the recommendations in SAC053.



Whereas, on 24 August 2012, ICANN staff published the [SAC053 Report for public comment](#) requesting input to consider in relation to implementing the recommendations of the [SSAC](#) report.

Whereas, in May 2013 ICANN [commissioned](#) a study on the stability and security implications of dotless domain name functionality to help ICANN prepare an implementation plan for the SAC053 recommendations, and on 29 July 2013 Carve Systems delivered a report to ICANN identifying the security and stability issues that should be mitigated before gTLDs implement dotless domain names (the "Carve Report").

Whereas, on 10 July 2013 the Internet Architecture Board (IAB) released a [statement on dotless domain names](#), recommending against the use of dotless domain names for TLDs.

Whereas, the NGPC has considered the risks associated with dotless domains as presented in SAC053, the IAB statement and the Carve Report, and the impracticality of mitigating these identified risks. The NGPC has also considered the comments received from the community on this issue.

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 (2013.08.13.NG01), the NGPC acknowledges the security and stability risks associated with dotless domains as presented in SAC053, the IAB statement and the Carve Report and affirms its commitment to its security and stability mandates as the New gTLD Program is implemented.

Resolved (2013.08.13.NG02), in light of the current security and stability risks identified in SAC053, the IAB statement and the Carve Report, and the impracticality of mitigating these risks, the NGPC affirms that the use of dotless domains is prohibited.

Resolved (2013.08.13.NG03), the President, Generic Domains Division is authorized to take all necessary steps to implement these resolutions.

**Ten members of the New gTLD Program Committee voted in favor of Resolutions 2013.08.13.NG01, 2013.08.13.NG02, and 2013.08.13.NG03. Kuo-Wei Wu was unavailable to vote on the Resolutions. The Resolutions carried.**

## Rationale for Resolutions 2013.08.13.NG01 – 2013.08.13.NG03

### Why the NGPC is addressing the issue?

The [SSAC](#) issued SAC 053 to the ICANN board which requests action be taken to prevent gTLDs from being approved to operate as dotless domain names. The Board requested staff to prepare an implementation

plan for SAC 053. The topic has gained attention of the community and was discussed in several forums at the [ICANN Meeting 47](#) in Durban, South Africa.

#### **What is the proposal being considered?**

The NGPC is being asked to consider taking action to provide clarity to the community that dotless domain names continue to pose technical risks to the security and stability of the [DNS](#) and that mitigation of these risks will be very difficult to achieve.

#### **Which stakeholders or others were consulted?**

The [SSAC](#) published SAC 053 in February 2012 and have been consulted over the course of the last year on this issue. [ICANN](#) consulted with the community on the issue of dotless domains, and solicited public comment on SAC 053 in August – November 2012. Additionally, [ICANN](#) commissioned Carve Systems, LLC, a security consulting firm, to perform a detailed study of the potential risks that gTLDs operating as dotless domain names may pose. In July 2013, the Internet Architecture Board ([IAB](#)) issued a statement identifying concerns similar to the [SSAC](#) and Carve reports, and advising against the use of dotless domain names for gTLDs. The NGPC has considered the information provided from these stakeholders and outside experts on the issue.

#### **What concerns or issues were raised by the community?**

The [SSAC](#) expressed concern about the use of dotless domain names for gTLDs in SAC 053 and recommended against their use. During the public comment on SAC053, some members of the community supported the position of the [SSAC](#) and noted that due to the security and stability concerns posed by dotless domains, they should not be allowed. Others in the community have argued that dotless domains should be allowed for technical innovation and that the risk assessment is overly conservative as there are ways to mitigate the risks to not unduly upset the security and stability of the Internet. A report of the public comments can be reviewed at

<http://www.icann.org/en/news/public-comment/report-comments-sac053-dotless-domains-27nov12-en.pdf> [PDF, 137 KB].

#### **What significant materials did the NGPC review?**

The NGPC considered the following significant materials:

- [SAC 053: SSAC Report on Dotless Domains](#) [PDF, 183 KB]
- [The report of Public Comments on SAC 053](#) [PDF, 137 KB]
- [Carve Systems Report "Dotless Domain Name Security and Stability Study"](#) [PDF, 1.02 MB]
- The [IAB statement on dotless domain names](#)

#### **What factors did the NGPC find to be significant?**

The NGPC considered ICANN's core role as coordinator of the Internet naming system for the security, stability and resiliency of the DNS and the Internet's unique identifier system. The NGPC also found the reports presented by the SSAC and Carve Systems to be significant factors in its decision. On balance, the NGPC believes technical concerns continue to exist with the implementation of dotless domain names and the use of DNS Resource Records in the apex of a TLD zone beyond SOA, NS, and related DNSSEC records.

**Are there fiscal impacts or ramifications on ICANN (strategic plan, operating plan, budget); the community; and/or the public?**

There is no anticipated fiscal impact of adopting this action.

**Are there any security, stability or resiliency issues relating to the DNS?**

The technical experts of the SSAC, Carve Systems and the IAB believe gTLDs operated as dotless domain names will negatively impact the security, stability and resiliency of the DNS. Approval of the proposed resolution to prohibit use of dotless domains in the DNS will not negatively impact security, stability or resiliency issues relating to the DNS.

This is an Organizational Administrative Function for which public comment was received.

**b. Durban GAC Advice Draft Scorecard**

Chris Disspain provided an overview of this issue for the NGPC, noting that there is a new version of the scorecard to address the GAC advice coming out of the Durban meeting. Most of that advice is expected to be easy to deal with, however the time for applicant responses to GAC advice is still open. The NGPC should therefore wait to consider the applicant comment before taking action. Chris also provided some suggestions on wording that could be used in the scorecard to provide clarity on items, as well as noting that additional work is still ongoing in relation to the IGO names protection issue as well as the protection of acronyms for the Red Cross and IOC. Chris noted that the NGPC will also need to discuss an appropriate response to the GAC advice on community priority evaluation. George Sadowsky provided some input on the NGPC's proposed response to this issue, and noted that consideration needs to be given to the community applicants/industry groups coming together around this issue.

Chris also led some discussion regarding a response to the GAC advice relating to conflicts of law and the Registry and Registrar agreements and addressing the steps that ICANN has taken to try to mitigate the potential for conflicts.

Chris presented to the NGPC that it is recommended that the Durban advice be handled through the use of a scorecard. Olga stressed the import of continually updating all portions of scorecards relating to GAC advice, while only keeping the scorecards separate for the purpose of understanding timing of applicant responses and other time issues relating to each piece of advice.

The Chair asked for an update on the ongoing work relating to letters from applicant regarding the Category 1 protections raised in the Beijing Communiqué. Chris confirmed that work is still ongoing to review those communications and to develop methodologies to deal with the concerns raised. Chris also confirmed that work is still ongoing to clarify the Category 1 advice, as well as the IGO name/acronym issue.

Akram Atallah provided an update that a communication was being sent out to all of the Category 2 applicants requesting confirmation as to whether they intend to run the gTLD in a closed fashion.

No resolution was taken.

### c. Reconsideration Request 13-4

Amy Stathos provided the NGPC with an overview of this history of this Reconsideration Request, noting that DotConnectAfrica Trust ("DCA Trust") sought reconsideration of the NGPC's acceptance of GAC advice as it relates to the DCA Trust application for the .AFRICA gTLD. DCA Trust based its request, in part, on its belief that the NGPC should have sought the advice of independent experts prior to taking a decision on the GAC advice. The Board Governance Committee noted in its recommendation on the request that the NGPC was not required to seek expert advice in this instance that that the NGPC had all material information needed to make the decision. The BGC also noted that DCA Trust had an opportunity, prior to the NGPC's consideration of the GAC advice, to mention the "requirement" to seek independent advice, which DCA Trust did not do. As a result, there was no additional material information available that was not considered. The BGC therefore recommends denial of the request.

Amy also briefed the NGPC on DCA Trust's claims that the GAC advice issued should be questioned, because of a subsequent communication from the Kenyan GAC Representative on the GAC's advice. DCA Trust submitted this to both ICANN and the GAC representatives. Neither the Board nor the NGPC has received any indication from the GAC that it is intending to change, or has already changed, its advice on this application.

Ray Plzak then moved and Bill Graham seconded the following resolution:

Whereas, DotConnectAfrica Trust's ("DCA Trust") Reconsideration Request, Request 13-4, sought reconsideration of the Board action (through the New gTLD Program Committee) on 4 June 2013, accepting advice from ICANN's Governmental Advisory Committee regarding DCA Trust's new gTLD application for .AFRICA, and determining that this particular new gTLD application will not be approved.

Whereas, the BGC considered the issues raised in Reconsideration Request 13-4.

Whereas, the BGC recommended that Reconsideration Request 13-4 be denied because DCA Trust has not stated proper grounds for reconsideration.

Resolved (2013.08.13.NG04), the New gTLD Program Committee adopts

the BGC Recommendation on Reconsideration Request 13-4, which can be found at <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-dca-trust-01aug13-en.pdf> [PDF, 120 KB].

**Seven members of the New gTLD Program Committee voted in favor of Resolution 2013.08.13.NG04. George Sadowsky and Mike Silber abstained from voting on the Resolution. Olga Madruga-Forti and Kuo-Wei Wu were unavailable to vote on the Resolution. The Resolution carried.**

Mike Silber and George Sadowsky noted that their abstentions were based on the fact that DCA Trust has accused each of them of having a conflict as it relates to this issue, though neither has a conflict to announce on this issue.

Chris Disspain confirmed that he has carefully thought about his participation in a vote on this issue, as he too has previously been accused of having a conflict. Chris has confirmed that he has no conflict on this issue and that is the basis for his participation in the vote.

### Rationale for Resolution 2013.08.13.NG04

ICANN's Bylaws call for the Board Governance Committee to evaluate and make recommendations to the Board with respect to Reconsideration Requests. See Article IV, section 3 of the Bylaws. The New gTLD Program Committee ("NGPC"), bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC Recommendation on Reconsideration Request 13-4 and finds the analysis sound.

Having a reconsideration process whereby the BGC reviews and, if it chooses, makes a recommendation to the Board/NGPC for approval positively affects ICANN's transparency and accountability. It provides an avenue for the community to ensure that staff and the Board are acting in accordance with ICANN's policies, Bylaws and Articles of Incorporation.

This Request asserted that the NGPC should have consulted with and considered the inputs of independent experts before acting on advice from the Governmental Advisory Committee ("GAC") regarding DCA Trust's new gTLD application. The Request calls into consideration: (1) whether the NGPC was required to consult with independent experts prior to making the decision on the GAC Advice on DCA Trust's application and whether consultation with independent experts would have provided additional material information to the NGPC; and (2) whether the prescribed procedure for addressing GAC Advice in the Applicant Guidebook for the New gTLD Program was not complied with because the NGPC did not consult with independent experts in considering GAC Advice.

In consideration of the first issue, the BGC reviewed the grounds stated in the Request, including the attachments, as well as the briefing materials presented to the NGPC in advance of its 4 June 2013 decision, the rationale for that decision, the minutes of that meeting, and the material

information from both the GAC and DCA Trust that was available and considered prior to the NGPC's decision. The BGC concluded that DCA Trust failed to adequately state a Request for Reconsideration of Board action because they failed to identify any material information that was not considered by the NGPC. The BGC noted that DCA Trust does not suggest in the Request that the discretionary use of an independent expert would have resulted in a different outcome on their application. The BGC further concluded that, as DCA Trust had an opportunity to provide additional information in their response to the GAC Advice, but remained silent on this point, the NGPC considered all material information in making its 4 June 2013 decision.

In consideration of the second issue, the BGC determined that DCA Trust's interpretation of the Applicant Guidebook to require the Board to seek advice is not accurate. Section 3.1 of the Guidebook provides with Board the discretion to seek the input of an independent expert when considering GAC advice, but does not obligate the Board to do so. Accordingly, the BGC concluded that the plain language of the Guidebook does not support the suggestion that the NGPC violated its process, and therefore made a decision without material information, when it did not seek the input of an independent expert.

In addition to the above, the full BGC Recommendation that can be found at

<http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-dca-trust-01aug13-en.pdf> [PDF, 120 KB] and that is attached to the Reference Materials to the Board Submission supporting this resolution, shall also be deemed a part of this Rationale.

Although not detailed in DCA Trust's Request, and therefore not specifically discussed in the BGC Recommendation, the NGPC also considered DCA Trust's claim that because the designated Kenyan GAC Representative disclaimed the GAC Advice on DCA Trust's application, GAC Advice is in question. DCA Trust's communications on this topic were sent to ICANN and the GAC Chair. As the Board has not received any notice of change from the GAC regarding its advice on this application, DCA Trust's assertions on this topic do not provide any grounds for modification of the decision on Reconsideration Request 13-4.

Adopting the BGC's recommendation has no financial impact on ICANN and will not negatively impact the systemic security, stability and resiliency of the domain name system.

This decision is an Organizational Administrative Function that does not require public comment.

#### d. Approval of NGPC Meeting Minutes


The Chair called for consideration of the minutes of prior NGPC meetings. George Sadowksy moved, and Chris Disspain seconded the following resolution, and the Chair called for a vote.


Resolved (2013.08.13.NG05), the Board approves the minutes of the 18 June 2013, 25 June 2013 and 2 July 2013 New gTLD Program Committee Meetings.


**Nine members of the New gTLD Program Committee voted in favor of Resolution 2013.08.13.NG05. Olga Madruga-Forti and Kuo-Wei Wu were unavailable to vote on the Resolution. The Resolution carried.**


The Chair then called the meeting to a close.

Published on 30 September 2013


  
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