

1.

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
INDEPENDENT REVIEW PROCESS
ICDR CASE NO. 01-15-0005-9838

In the Matter of an Independent Review Process

Between:

ASIA GREEN IT SYSTEM
BILGISAYAR SAN. VE TIC. LTD. STI., ("AGIT")
Claimant

Vs.

INTERNET CORPORATION for ASSIGNED
NAMES AND NUMBERS ("ICANN")
Respondent

FINAL DECLARATION

Independent Review Process Panel:

Calvin Hamilton, FCI Arb (Chair)

Honourable William Cahill (Ret.)

Klaus Reichert SC

PROCEDURAL HISTORY

2. The relevant procedural history of this Independent Review Process ("IRP") is set out in the following paragraphs. The Panel has only recorded those matters which it considers, in its appreciation of the file of this IRP, necessary for this Final Declaration.
3. The parties to the IRP are identified in the caption and are represented as follows:

Claimant: Mike Robenbaugh
Robenbaugh Law
548 Market Street (Box No 55819)
San Francisco, CA 94104

Respondent: Eric Enson, Jeffrey A. LeVee, Kelly Ozurovich
Jones Day
555 South Flower Street 50th Floor
Los Angeles, CA 90071

4. The authority for the IRP is found at Article IV, Section 3 of the ICANN Bylaws. The IRP Panel is charged with “declaring whether the Board has acted consistently with the Provision of ICANN’s Articles of Incorporation and Bylaws.”
5. The applicable procedural rules are the International Centre for Dispute Resolution’s (ICDR) International Dispute Resolution Procedures, as amended and in effect as of 1st June 2014, as augmented by ICANN’s Supplementary Procedures, as amended and in effect as of 2011.
6. On 7th February 2014, ICANN’s chairman informed AGIT that, following the New gTLD (“gTLD”) Programme Committee (“NGPC”) decision and subsequent Resolution made on 5th February 2014, “the NGPC will not address the applications further until such time as the noted conflicts have been resolved”.¹ AGIT submit that from this point, their applications were “On Hold”.²
7. On 26th February 2014, AGIT filed a Request for Reconsideration with ICANN’s Board Governance Committee (“BGC”). AGIT’s request was summarily dismissed by the BGC on 13th March 2014, and this decision was accepted by the NGPC.³
8. On 21st February 2014, AGIT requested that ICANN engage in a “Cooperative Engagement Process” in accordance with the Bylaws of ICANN.⁴ The Cooperative Engagement Process was terminated on 13th November 2015 and no resolution was reached.
9. AGIT submitted a Request for Independent Review Process (“IRP Request”) on 16th December 2015, which ICANN responded to on 1st February 2016. AGIT submitted a supplemental brief on 6th January 2017, which ICANN responded to on 3rd February 2017.

¹ See Annex 12 I

² This status was confirmed by Mr Enson in paras 13 – 25, pg 95 – Telephonic Hearing

³ See Annex 14

⁴ S3, Article IV, ICANN Bylaws

10. A preparatory conference call was held on 19th April 2016 during which a procedural calendar was agreed upon (Procedural Order No.1).
11. Pursuant to Procedural Order No. 1, AGIT submitted their ‘Observations on the Scope of Panel Authority’ on 3rd May 2016, which ICANN responded to on 13th May 2016.
12. With respect to document requests, pursuant to Procedural Order No. 1, AGIT were required to submit their request for document production on 3rd May 2016. ICANN were to answer by 13th May and, if appropriate, were to both request documents and object to AGIT’s request. On 23rd May 2016, AGIT were to both reply to ICANN’s objection, and file their own objection against ICANN’s request if appropriate. ICANN were to answer AGIT’s objection by 2nd June 2016. The 2nd June 2016 was set for ICANN’s document production, and 13th June 2016 for AGIT. The issue of document disclosure was eventually resolved by the parties themselves with little involvement by the Panel.
12. A telephonic hearing took place on 4th May 2017. Present for the hearing were the IRP Panel (Calvin Hamilton (Chair), Honourable William Cahill, Klaus Reichert SC), Mike Rodenbaugh for AGIT (“the Claimant”), Eric Enson for ICANN (“the Respondent”). Amy Stathos and Casandra Fure were also present on behalf of the Respondent. The hearing was reported by Jana J. Bommarito.

PANEL AUTHORITY

13. The authority of this Panel is set out in the following paragraphs.
14. Article IV, Section 3.4 ICANN 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?

15. As articulated by the IRP Panel in *Merck KGaA v ICANN*⁵ and as stipulated by the parties in this IRP:

“The analysis which the Panel is mandated to undertake is one of comparison. More particularly, a contested action of the Board is compared to the Articles of Incorporation and Bylaws in order to ascertain whether there is consistency. The analysis required for comparison requires careful assessment of the action itself rather than its characterisation by either the complainant or ICANN. The Panel, of course, does take careful note of the characterisations that are advanced by the Claimant and ICANN.

As regards the substantive object of the comparison exercise, namely, was there consistency as between 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 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.⁶”

FACTS OF THE CASE

16. The salient facts are set out in the following paragraphs.

17. ICANN is a non-profit, multi-stakeholder organisation incorporated in California, United States of America. It was established in 1998, and is charged with registering and administering both top and second level domain names. ICANN operates pursuant to its Articles of Incorporation and Bylaws.

⁵ International Centre for Dispute Resolution, Independent Review Process, Case No. 01-14-0000-9604

⁶ *Merck KGaA v ICANN* International Centre for Dispute Resolution, Independent Review Process, Case No. 01-14-0000-9604IRP Final Declaration Paras 16-18

18. From 2004-2011, the Generic Names Supporting Organisation (“GNSO”) of ICANN developed a programme to introduce new top-level domain names into the domain name system (gTLD). An applicant guidebook (“Guidebook”) was developed by ICANN in consultation with stakeholders, detailing a “transparent and predictable criteria” for applications.⁷

19. The Guidebook includes detailed procedures for applying for and objecting to the issuance of top level domain names. ICANN aimed to create “an application and evaluation process for new gTLDs that is aligned with the policy recommendations and provides a clear roadmap for applicants to reach delegation, including Board approval.”⁸ Applicants must provide detailed responses to 50 questions, which seek to establish the competency of applicant. The objection process includes an Independent Objector (“IO”) and the prospect of an objection by one or more of the Governments that make up ICANN’s Government Advisory Committee (“GAC”). The IO can lodge an objection, which ordinarily results in the appointment of one or more independent experts to consider and determine the merits of the objection.⁹

20. In addition to the IO and GAC formal objections, GAC members are permitted to file an “Early Warning Notice”, detailing concerns about applications.¹⁰ Early Warning Notices simply act to place an applicant on notice. It is not a formal objection, however it “raises the likelihood that the application could be the subject of GAC Advice on New gTLDs or of a formal objection at a later stage in the process.”¹¹ Concerning GAC Advice, in situations where members of the GAC provide “consensus” advice against an application, a strong presumption is created against that application. Should the Board of ICANN decide to act contrary to this advice, they must provide a rationale for doing so.¹² Concerning formal objections, the objection must fall within one of four specified grounds - String Confusion, Legal Rights, Limited Public Interest or Community Objection.¹³ In determining whether an objector has standing to object, they must satisfy one of these four identified Objection Grounds which are dependent of the ground being

⁷ Recommendation One, S.1.1.5, ICANN, gTLD Final Applicant Guidebook.

⁸ Preamble, ‘New gTLD Program Background’ gTLD Applicant Guidebook Version 2012-06-04

⁹ S3.2.5 Applicant Guidebook

¹⁰ S1.1.2.4 Applicant Guidebook

¹¹ Ibid (1.1.2.4)

¹² S1.1.2.7 Applicant Guidebook

¹³ S3.2.1 Grounds for Objection

used.¹⁴ In addition, a Limited Public Interest Objection comment process¹⁵ is available, which allows for the “participation of many stakeholder groups in a public discussion.”¹⁶

21. In early 2012, Asia Green IT System (“AGIT”), a Turkish cooperation, submitted two applications to ICANN under the new gTLD programme to operate the .ISLAM and .HALAL top-level domains. Following their applications, Early Warning Notices were submitted by the United Arab Emirates (UAE) and India¹⁷ in November 2012, to which AGIT filed formal responses.¹⁸ Within their responses, AGIT included a proposed Governance Model and Public Interest Commitments (“PICs”), which it hoped would alleviate the concerns raised in the Early Warning Notices.¹⁹

22. In addition, the IO, Dr Pellet, was instructed to evaluate the applications. The UAE then filed two formal objections under the grounds of a Community Objection against each of the applications. The Applicant Guidebook details those with standing to submit a Community Objections as “(e)stablished institutions associated with clearly delineated communities are eligible to file a community objection. The community named by the objector must be a community strongly associated with the applied-for gTLD string in the application that is the subject of the objection.”²⁰ Following this, Mr Cremades, a Panellist from the International Chamber of Commerce, was instructed to consider the objections.

23. On 11th April 2013, the GAC, in accordance with the Applicant Guidebook,²¹ published a Communique to the ICANN Board following a meeting in Beijing to consider the two applications. The Communique noted:

“The GAC recognizes that Religious terms are sensitive issues. Some GAC members have raised sensitivities on the applications that relate to Islamic terms, specifically .islam and .halal. The GAC members concerned have noted that the applications for .islam and .halal lack community involvement and support. It is the view of these GAC members that these applications should not proceed.”²²

¹⁴ See 3.2.2 Applicant Guidebook,

¹⁵ See telephonic pg 69 lines 20-25

¹⁶ See Guidebook I.1.2.3

¹⁷ India did not post formal objections following their Early Warning Notices.

¹⁸ See Annex 6

¹⁹ Ibid - 6

²⁰ See 3.2.2.4

²¹ S3.1 Applicant Guidebook

²² See full text of Communique at <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>

24. Following this, a scorecard system was produced to assist in the evaluation of the applications, and a subsequent meeting took place in Durban in July 2013.
25. On 25th July 2013, both Kuwait and the Gulf Cooperation Council (“GCC”) expressed objections to the applications by AGIT and support of the Community Objection by the UAE.²³
26. On 30th August 2013, AGIT were informed that both the .ISLAM and the .HALAL applications were accepted by ICANN’s expert evaluation Panels,²⁴ and that their applications had passed Initial Evaluation²⁵.
27. On 4th September 2013, Lebanon expressed objections to the applications by AGIT and support of the Community Objection by the UAE.
28. On 24th October 2013, Mr Cremades published a report evaluating the Community Objection filed by the UAE against both applications. In his decision, Mr Cremades found there was neither substantial opposition to the applications, nor would the applications create a “likelihood of any material detriment to the rights or legitimate interests of a significant portion of the relevant community.”²⁶
29. On 4th November 2013, a letter was received by the ICANN Board, and subsequently sent to the GAC, from the Organisation of Islamic Council (“OIC”). The letter contained a formal objection to the use of top-level domain names by “any entity not representing the collective voice of the Muslim people.”²⁷ Following receipt of this letter, dialogue was recommended and a meeting held in Buenos Aires. It is submitted by ICANN that the letter of objection by the OIC was received as part of their “public comment” process,²⁸ which allows for the “participation of many stakeholder groups in a public discussion”²⁹ thereby giving a platform to interested parties outside of the formal objection process. Time constraints are provided for the consideration of comments during the Initial

²³ See telephonic pg 67 Lines 6-1

²⁴ See Annex 2

²⁵ Ibid

²⁶ See Annex 8

²⁷ See pg10 AGIT’s request for an IRP wherein they note: “in November 2013, the Chair of the ICANN Board forwarded to the GAC Chair a letter from the OIC which requested the GAC to “kindly consider this letter as an official opposition of the Member States of the OIC ... [to] use of these [TLDs] by any entity not representing the collective voice of the Muslim people.”

²⁸ See telephonic pg 69 lines 20-25

²⁹ See Guidebook 1.1.2.3 and telephonic g 61 lines 10 - 16

Evaluation review (the formal objection period runs for seven months following the posting of applications³⁰), however the Guidebook allows for comments received after this period to be “stored and available (along with comments received during the period) for other considerations, such as the dispute resolution process, as described below.”³¹

30. On 19 December 2013, the OIC informed ICANN that a unanimous resolution had been adopted by the 57 Member States of the OIC objecting to the operation of .ISLAM and .HALAL by “any entity not reflecting the collective voice of Muslim people”.³² The Panel notes that this resolution is not amongst the materials placed before it.

31. On 24th December 2013, the Government of Indonesia filed its objection with ICANN to both of the applications.

32. On 5th February 2014, the NGPC applied the objections raised to the scorecard, and on 7th February 2014, AGIT were informed “the NGPC will not address the applications further until such time as the noted conflicts have been resolved.”³³ The letter informed AGIT that two IGOs and two Government representatives (the GCC, the OIC, Lebanon and Indonesia) had indicated conflicts with AGIT’s Governance model and the PIC.

33. The task of this Panel is to determine whether ICANN have acted in a manner consistent with ICANN’s Articles of Incorporation, Bylaws and Guidebook.

PROVISIONS OF ICANN’S ARTICLES OF INCORPORATION, BYLAWS AND THE APPLICANT GUIDEBOOK

34. The salient provisions of these governance documents are listed below:

35. Article 4, Articles of Incorporation

The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and

³⁰ Guidebook 1.1.2.6

³¹ Ibid

³² See telephonic pg 70 lines 8-13

³³ See Annex 12

consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.

36. S3 (4) Article IV Bylaws and Rule 8 of ICANN Supplementary (Independent Review of Board Actions)

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?*

37. S2 Article I Bylaws (Core Values)

In performing its mission, the following core values should guide the decisions and actions of ICANN:

- a. *Core Value 3*
- b. *To the extent feasible and appropriate, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of affected parties.*
- c. *Core Value 7*
- d. *Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.*
- e. *Core Value 8*
- f. *Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.*
- g. *Core Value 9*
- h. *Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.*

38. Article II, Section 2 (3) Bylaws (Non-Discriminatory Treatment)

ICANN shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by substantial and reasonable cause, such as the promotion of effective competition.

39. Article II, Section 2 (1) Bylaws (General Powers)

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board (as defined in Section 7.1). With respect to any matters that would fall within the provisions of Section 3.6(a)-(c), the Board may act only by a majority vote of all Directors.

40. Article III, Section 3 (6) Bylaws (Notice and Comment on Policy Actions)

(a) With respect to any policies that are being considered by the Board for adoption that substantially affect the operation of the Internet or third parties, including the imposition of any fees or charges, ICANN shall:

- i. provide public notice on the Website explaining what policies are being considered for adoption and why, at least twenty-one days (and if practical, earlier) prior to any action by the Board;*
- ii. provide a reasonable opportunity for parties to comment on the adoption of the proposed policies, to see the comments of others, and to reply to those comments (such comment period to be aligned with ICANN's public comment practices), prior to any action by the Board; and*
- iii. in those cases where the policy action affects public policy concerns, to request the opinion of the Governmental Advisory Committee ("GAC" or "Governmental Advisory Committee") and take duly into account any advice timely presented by the Governmental Advisory Committee on its own initiative or at the Board's request.*

(b) Where both practically feasible and consistent with the relevant policy development process, an in-person public forum shall also be held for discussion of any proposed policies as described in Section 3.6(a)(ii), prior to any final Board action.

(c) *After taking action on any policy subject to this Section 3.6, the Board shall publish in the meeting minutes the rationale for any resolution adopted by the Board (including the possible material effects, if any, of its decision on the global public interest, including a discussion of the material impacts to the security, stability and resiliency of the DNS, financial impacts or other issues that were considered by the Board in approving such resolutions), the vote of each Director voting on the resolution, and the separate statement of any Director desiring publication of such a statement.*

41. Article VI, S 4 (6) Bylaws and Article I Supplemental Procedures

There shall be an omnibus standing Panel of between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected. The Panelists shall serve for terms that are staggered to allow for continued review of the size of the Panel and the range of expertise. A Chair of the standing Panel shall be appointed for a term not to exceed three years. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the standing Panel. In the event that an omnibus standing Panel: (i) is not in place when an IRP Panel must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member Panel comprised in accordance with the rules of the IRP Provider; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the IRP Provider shall identify one or more Panelists, as required, from outside the omnibus standing Panel to augment the Panel members for that proceeding.

42. §1.1.5 Applicant Guidebook

The following scenarios briefly show a variety of ways in which an application may proceed through the evaluation process (...)

a. *Scenario 4 – Pass Initial Evaluation, Win Objection, No Contention – In this case, the application passes the Initial Evaluation so there is no need for Extended Evaluation. During the objection filing period, an objection is filed on one of the four enumerated grounds by an objector with standing (refer to Module 3, Objection Procedures). The objection is heard by a dispute resolution service provider Panel that finds in favor of*

the applicant. The applicant can enter into a registry agreement and the application can proceed toward delegation of the applied-for gTLD

43. §3.1 Applicant Guidebook

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.³⁴

44. §3.1 (II) Applicant Guidebook

GAC Advice may take one of the following forms:

(...)

II. The GAC advises ICANN that there are concerns about a particular application “dot-example.” The ICANN Board is expected to enter into dialogue with the GAC to understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.

45. §3.2 Applicant Guidebook

As described in section 3.1 above, ICANN’s Governmental Advisory Committee has a designated process for providing advice to the ICANN Board of Directors on matters affecting public policy issues, and these objection procedures would not be applicable in such a case. The GAC may provide advice on any topic and is not limited to the grounds for objection enumerated in the public objection and dispute resolution process.

46. §5.1 Applicant Guidebook

ICANN’s Board of Directors has ultimate responsibility for the New gTLD Program. The Board reserves the right to individually consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD application. For example, the Board might individually consider an application as a result of GAC Advice on New gTLDs or of the use of an ICANN accountability mechanism.

³⁴ “May” no requirement to adhere to advice of experts, or indeed to appoint in the first place. Cf pg 21 AGIT Request for IRP

47. GNSO Recommendations:

ICANN GNSO, Final Report — Introduction of New Generic Top-Level Domains:³⁵

Recommendation No. 1: The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination. All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.

Recommendation No. 9: There must be a clear and pre-published application process using objective and measurable criteria.

Recommendation No. 12: Dispute resolution and challenge processes must be established prior to the start of the process.

Principle G:

The String Process must not infringe on the applicant's freedom of expression rights that are protected under internationally recognised principles of law.

PARTIES' POSITIONS

48. Having set forth the procedural history, the relevant facts and the applicable provisions of ICANN's governing documents, the Panel now sets forth the issues raised by the parties.

POSITION OF THE CLAIMANT

49. AGIT seeks a declaration that the Board of ICANN acted in a manner inconsistent with certain provisions, discussed below, of ICANN's Articles of Incorporation, Bylaws and/or Guidebook in connection with its granting of an "On Hold" status to AGIT applications for .HALAL and .ISLAM. AGIT makes the following contentions, set out below.

50. ICANN consulted in secret with the GAC and Objectors regarding the delay or denial of AGIT's application, in violation of Core Values 7 and 9. Core Value 7 mandates open and transparent policy development that promote well informed decisions based on expert advice. Core Value 9 mandates ICANN to act promptly while, as part of the decision-making process, obtaining informed input from those entities most affected.

³⁵ See AGIT Request for IRP – pg 18

51. In particular, through meetings in Beijing and Durban, and via correspondence with the OIC:

Beijing meeting:

Only ICANN staff, executives and Board members were allowed in the room – Restricted to “Members Only”³⁶ (although this policy changed shortly afterwards) No minutes, transcripts or rationales from the meeting were released;

Durban meeting:

Closed meeting held with “some GAC representatives”. No transcript has ever been produced outside of the 32 minute recording.³⁷

52. No effort was made to reach out to AGIT to participate in the discussion or provide input. The meeting was only attended by a “few GAC members” without inviting or informing the entire GAC what took place, or informing AGIT, the public or the GNSO of what occurred at the meeting.

53. Despite requests, no Board member met with AGIT CEO/MD while in Durban.

54. ICANN held a number of meetings with the OIC, despite the untimely and undocumented procedure for further objections. AGIT were unable to obtain further information on these meetings.

55. ICANN failed to obtain informed input from either AGIT or the Objectors prior to reaching its 5th February 2014 resolution, in violation of Core Value 9.

56. ICANN violated Core Value 8 by failing to inform AGIT of the conflicts which it must resolve in order to progress from “On Hold” status.

57. ICANN have violated Core Values 3, 7 and 8, along with §3.1 of the Guidebook by deciding in a manner inconsistent with expert advice, and this action is discriminatory.

³⁶ Annex 20

³⁷ See telephonic pg 22 lines 22 – 25

58. ICANN have acted in a discriminatory manner, contrary to Article II, §2 (3) Bylaws (Non-Discriminatory Treatment) by differentiating between the treatment of .KOSHER/.SHIA with .HALAL/.ISLAM.
59. Under Module 3³⁸, the GAC were responsible for rejecting any applications which violated public interest. By the GAC failing to recommend rejection of AGIT's applications to the Board as per the Guidebook §3.1, they provided implicit consent to both applications. This should have been taken into account by the Board.
60. ICANN have violated §1.1.5 of the Guidebook by acting in a manner inconsistent with the scenarios laid down.
61. The non-disclosure by ICANN of requested documents under the Document Disclosure Policy ("DIDP") violates Core Values 7 and 8.
62. ICANN have violated Article 4, §3 (6) by failing to create a Standing Panel as required by their Bylaws.

POSITION OF THE RESPONDENT

63. ICANN disputes each of AGIT's contentions, and asserts that the Board did not violate the Articles of Incorporation, the Bylaws or the Guidebook.
64. ICANN refutes the accusation that secret consultations took place with GAC Objectors, specifically as regards the *Beijing Meeting*: the ICANN Board examined, discussed, evaluated and responded to the GAC's advice from the Beijing meeting. Meetings prior to mid-2013 were held with GAC members only, making the decision to hold the Beijing meeting with members-only routine.
65. Specifically as regards the *Durban Meeting*, neither the Articles of Incorporation, Bylaws nor the Guidebook mandate a full complement of GAC members or Board members to be present during such a meeting.
66. Neither the Articles of Incorporation, Bylaws nor the Guidebook mandate that members of the Board meet with an applicant on the applicant's request.

³⁸ See pg7 AGIT - Supplementary Brief

67. Specifically as regards *OIC correspondence* ICANN staff members' responsibilities include outreach and dialogue with stakeholders in the Middle East, which includes the OIC.
68. There is no evidence that any communications with the OIC influenced the Board's decision to place the applications on hold.
69. The Board not only fulfilled but exceeded its requirements under §3.1 (2) by:
- a. Entering into dialogue with concerned GAC members at the Durban meeting;
 - b. Reviewing correspondence from various Objectors;
 - c. Its use of the 5th February Scorecard; and
 - d. Communicating the rationale behind its decision in a letter to the Claimant, dated 7th February 2014, by informing the Claimant of the conflicts arising, the identities of the objectors, the nature of their objections and what the Claimant must do before the Board would resume consideration of the applications.
70. The Board will resume consideration of the .ISLAM and .HALAL applications once the conflicts noted have been resolved, however ICANN is not required to act as liaison between the Claimant and those who objected to its application.
71. New policy has not been created, rather the Board have followed §5.1 of the Guidebook in exercising their discretion to consider individual applications and whether they are in the best interests of the Internet community.
72. The Board is not mandated under either the Articles of Incorporation, Bylaws or Guidebook to follow expert opinion.
73. No discrimination has occurred with the granting of .KOSHER/.SHIA and .HALAL/.ISLAM. Any difference in treatment of the referenced applications was a result of different circumstances.
74. Scenario 4 contained in §1.1.5 Guidebook is not "any sort of promise by ICANN"³⁹, and instead provides scenarios by which an application may proceed. This provision does not mandate that an application must proceed.⁴⁰

³⁹ Supplementary Response by ICANN pg 22 para 50

75. ICANN staff are tasked with responding to document requests, not the ICANN Board. Board involvement takes place when a reconsideration request, seeking the Board's review of staff action regarding document disclosure, is requested by a Claimant. As a reconsideration request was not filed, no Board action was taken. An IRP is concerned only with Board actions. However, should ICANN's response to the DIDP request be subject to review by the IRP, ICANN submits that staff complied with "standards applicable to DIDP requests."⁴¹
76. The decision not to produce certain documents under the DIDP request but to do so under the IRP conforms to standards and processes in place.

STATEMENT OF REASONS

77. The Panel is of the view that in order to address the party's positions as posed in this IRP, the analysis utilised in the *Merck* declaration is instructive. Applying Article IV, §3.4 Articles of Incorporation and Bylaws, with, where relevant, consideration to the following questions:
- a. Did the Board act without conflict of interest when taking its decision?
 - b. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?
 - c. Did the Board members exercise independent judgement in taking the decision, believed to be in the best interests of the company?

BEIJING MEETING:

ACTION: RELIANCE ON LIMITED OUTPUT FROM THE BEIJING MEETING

78. In order for the GAC to properly evaluate gTLD applications, geographic meetings are held in accordance with §3.1 Guidebook.
79. The GAC was formed to consider and provide advice on the activities of ICANN as they relate to concerns of governments, particularly in matters where there may be an

2. _____

⁴⁰ See telephonic pg. 97 lines 2-10 "These are simply 2 examples of ways in which applications may proceed. This is not intended it be an exhaustive list of possibilities."

⁴¹ Ibid pg 23 para 54

interaction between ICANN's policies and various laws and international agreements or where they may affect public policy issues.

80. The framework and structure for how these meetings are convened, minuted and disseminated are a matter of convention, outside of structured rules. Guidance can be taken from convention, noting from an interview held on 10th May 2014 between Heather Dryden, Head of the GAC with Brad White, ICANN Communications, that, although policy has now changed, previous GAC meetings were held through a 'closed format.'⁴² It is instructive that in May 2013, Heather Dryden confirmed that going forward, GAC meetings would be more open.⁴³

81. The sole output from the Beijing meeting was a Communique of 6 pages.⁴⁴ The only wording relating to the Claimants application consisted of 58 words, detailing concerns on 'religious sensitivity' of the gTLDs.⁴⁵ In addition, the Communique stated that the GAC members concerned were of the view that the applications should not proceed.⁴⁶ No more is said. Core Value 7 calls upon ICANN to employ "open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process". It is the opinion of the Panel that a 58 word output in this manner and language is insufficient to comply with the open and transparent requirements mandated by Core Value 7. Anyone not physically present at that meeting would have little idea, if any, beyond the general contours contained the Communique, as to what actually happened during the meeting nor what was said by any of the participants.

Did the Board act without a conflict of interest?

82. This is not applicable. There is no evidence of a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front to it?

⁴² See Annex 21 – Claimant's Supplemental Brief

⁴³ Ibid

⁴⁴ Excluding Annexes.

Full Communique available here: <https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf>

⁴⁵ As quoted in para 23 above

⁴⁶ The GAC recognizes that Religious terms are sensitive issues. Some GAC members have raised sensitivities on the applications that relate to Islamic terms, specifically .ISLAM and .HALAL. The GAC members concerned have noted that the applications for .islam and .halal lack community involvement and support. It is the view of these GAC members that these applications should not proceed.

83. The closed nature and limited record of the regarding the Beijing meeting provides little in the way of ‘facts’ to the Board. Of the 6 page document produced by the GAC to the Board, only 58 words concerned the .HALAL and .ISLAM applications, utilising vague and non-descript terms. For the reasons set out in paragraph 81 above, any reliance on the Beijing Communique by the Board in making their decision would necessarily be to do so without a reasonable amount of facts.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

84. This is not applicable. There is no evidence of a lack of independence with regards the Beijing Communique and the manner in which the Board considered this document.

DURBAN MEETING:

ACTIONS: LIMITED OUTPUT FROM THE MEETING; INSUFFICIENT INVOLVEMENT BY GAC MEMBERS; INSUFFICIENT INVOLVEMENT BY ICANN BOARD; INSUFFICIENT INVOLVEMENT BY CLAIMANT

85. The meetings in Durban were held in July 2013, post the noted policy change⁴⁷ of employing a more open structure to GAC meetings. The Claimant has received a 32-minute audio recording of this meeting, however no Communique was issued.

86. The Guidebook, under §3.1, references the process of the GAC providing advice to the ICANN Board where objections exist to the gTLD application. It would appear eight Board members and ten GAC members were present.

87. The Claimant claims the limited number of GAC attendees at the Durban meeting to discuss the objections renders the advice insufficient to constitute “GAC Advice”. §3.1 does not specifically state what constitutes GAC Advice insofar as whether a full complement, majority, minority or affected parties need be present.

88. The Claimant claims that §3.1 should be interpreted using an *Expressio Unius* model in such that as other sections of the Guidebook and Bylaws use a restricted composition of the GAC, then any other reference automatically applies to the full GAC. For example:

⁴⁷ Para 71

§2.2.1.4 of the Guidebook states, with regard early warnings: “... *GAC Early Warning typically results from a notice to the GAC by one or more governments that an application might be problematic, e.g., potentially violate national law or raise sensitivities.*” and

“... *GAC consensus is not required for a GAC Early Warning to be issued.*”

89. The argument that a full complement of GAC members need to be present in order to constitute GAC advice is flawed. There is no reference to quorum requirements in §3.1 and it is practical that only relevant and concerned members be in attendance.
90. Contrastingly, the Claimant did not reference the statement in Guidebook §3.1 which states the “... *GAC as a whole will consider concerns raised by GAC members, and agree on GAC advice to forward to the ICANN Board of Directors...*” This gives rise to an implication that more than the mere objectors should be present at a GAC advisory meeting.
91. The Claimant uses a number of emails in order to demonstrate disagreement with the manner in which the meeting was carried out. The emails range in date from 1st July 2013 – 12th July 2013, and the Claimant relies specifically on emails sent by Ray Plzak, member of the ICANN Board, between the 1st July 2013 and 10th July 2013, questioning the form in which the meeting was to take place.⁴⁸ These emails indicate that Mr Plzak had a number of questions and queries regarding the format of the meeting. Heather Dryden stated that this was to be “*a meeting available to the subset of Members in the GAC that has a direct interest in these strings.*”⁴⁹ Mr Plzak acknowledges in his 2nd July email “*The fact is that not all GAC members are either interested in all matters or participate in all discussions, or even attend discussions on all matters.*”⁵⁰
92. The Claimant claims that the full Board membership should have been present for the Durban meeting. However, it is the view of this Panel that neither the Bylaws nor the Guidebook mandate full Board attendance.
93. The Claimant claims that a breach of Core Values 7 and 9 occurred through the lack of involvement by the CEO/MD⁵¹ of Claimant during the meeting in Durban. The CEO/MD

⁴⁸ See Annex 22, Claimants Supplementary Annexes

⁴⁹ Annex 22 - Email dated 2nd July 2013

⁵⁰ Ibid

⁵¹ Please note that both titles are present in the 11th July email from Mehdi Abbasnia, and as such, both are used here.

of the Claimant company attempted to meet with ICANN Board members during the Durban meeting (annex 25). The CEO/MD emailed all ICANN Board members on 11th July but was unsuccessful in meeting with any Board members.

Did the Board act without a conflict of interest

94. Claimants claim that the reason for the reduced complement of Board members at the Durban and Beijing meetings was, in the end, to ensure the gTLD string was made available to a 3rd party during the next round of applications.

95. Furthermore, the meetings were deemed to have been organised and structured in a way that was outside of usual GAC and Board meetings. It was accepted that this was not a meeting of the GAC but rather a discussion for the board to understand the concerns of the GAC. The Panel finds on this record the Board did not have a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front of it

96. The Board is mandated under the Guidebook §3.1 to review advice from the GAC at such meetings in collaboration with additional advice it deems necessary. The Respondent claims that it was unnecessary to include members over and above those with an interest in the gTLD which may have provided more rounded advice.

97. It is the opinion of this Panel that, whilst a meeting with the CEO/MD of the Claimant company may have increased the volume of facts which the Board had in front of it, the lack of available Board members to meet with the Claimant's CEO/MD is not inconsistent with Core Values 7 or 9. The meeting requests were private matters, and therefore at the discretion of each party.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

98. Judgement involving the make-up of the meetings being only those who have an interest is based on the Guidebook, which states:

II. The GAC advises ICANN that there are concerns about a particular application "dot-example." The ICANN Board is expected to enter into dialogue with the GAC to

understand the scope of concerns. The ICANN Board is also expected to provide a rationale for its decision.

99. The ICANN Board met with the GAC members who had an interest in .HALAL and .ISLAM in order to greater understand the concerns. There is no evidence that the reduced number of GAC members in attendance was not following the exercise of independent judgment.

ACTION: CONTINUED CONSULTATIONS WITH THE ORGANISATION OF ISLAMIC STATES (“OIC”)

100. There would appear to be a lack of openness and transparency with regards discussions with the OIC, in particular with regards alleged meetings which occurred via telephone on or around 29th October 2013⁵² and in November 2013 in Buenos Aires.⁵³ ICANN acknowledged through their Supplementary Response that that they are both unclear as to whether the meeting took place and unclear as to what was discussed beyond membership or failed community objections.⁵⁴ Whilst it is acknowledged that the OIC had lodged objections to the Claimant’s applications through the public comment process, it is the opinion of this Panel that such meetings, held with ICANN staff and not ICANN Board members, are not in breach of Core Value 7. ICANN staff do not hold decision making authority, and it is evidenced through Annex 28 that the OIC were advised of their obligations to follow ICANN procedure.⁵⁵ It is further noted that the members of staff which communicated with the OIC at this time were specifically tasked with outreach to the Middle East,⁵⁶ making such communications and meetings an expected element of such outreach.

Did the Board act without a conflict of interest

101. ICANN, in its Response to the Claimant’s request for an IRP, acknowledge that an outreach programme is operating with the Middle East, and with the OIC representing 57

⁵² See Claimant Supplementary Brief pg 5

⁵³ Ibid

⁵⁴ See para 21 ICANN’s Response to Claimant’s Supplementary Brief: “*Likewise, it is not clear that the meeting discussed in Annex 26 ever took place and, if it did, what was discussed beyond the OIC’s GAC membership or the OIC’s failed community objection against the Applications*”

⁵⁵ No. 129, Email from ICANN Senior Advisor – OIC Rep “asked the funny question whether the two strings could be delegated to the OIC. We told him never outside the process”.

⁵⁶ See ICANN Response to AGIT Request for IRP – pg 4.

Muslim states, consultations with the body throughout Claimant's application process were inevitable. ICANN have informed the Panel through their Supplementary Response that ICANN staff do not have decision making authority with respect to applications, and it is ICANN staff who were conducting the outreach. It is therefore the opinion of this Panel that the Board acted without a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front of it?

102. The content of the meetings between ICANN staff and the OIC is unclear. However, it is the remit of this IRP to consider Board actions, and it is the opinion of this Panel that the Board have exercised due diligence and care in light of a reasonable amount of facts in front of it.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

103. This Panel has no evidence of staff members passing on any information from the undocumented meetings discussed above to Board members. In light of the lack of evidence to the contrary, it is the view of this Panel that on this record, independent judgement was made.

ACTION: EXTENT OF INPUT OBTAINED FROM ENTITIES MOST AFFECTED

104. It is the opinion of the Panel that the numerous meetings and subsequent Communiqués demonstrate involvement by entities most affected in the context of the objectors, and therefore ICANN did not breach its obligation under Core Value 9. Core Value 9 mandates "acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected". Input was received by ICANN from objectors on numerous occasions, including and notably during the Durban meeting. Numerous communications have taken place between the GAC and the objectors, through both the Community Objection, subsequent support of the Objection and the public comment process. ICANN stated the following in their 7th February letter to the Claimant:

"... a substantial body of opposition urges ICANN not to delegate the strings .HALAL and .ISLAM. The Gulf Cooperation Council (25 July 2013: applications not supported by the community, applicants did not

consult the community; believe that sensitive TLDs like these should be managed and operated by the community itself through a neutral body such as the OIC); the Republic of Lebanon (4 September 2013: management and operation of these TLDs must be conducted by a neutral, nongovernmental multistakeholder group); the Organisation of Islamic Cooperation (19 December 2013: foreign ministers of 57 Muslim Member States supported a resolution opposing the strings; resolution was unanimously adopted); and the government of Indonesia (24 December 2013: strongly opposes approval of .islam) all voiced opposition to the AGIT applications... ”⁵⁷

Did the Board act without a conflict of interest?

105. This is not applicable. There is no evidence that the Board acted under a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front to it?

106. Based on the lack of information provided by the Board of the ‘religious sensitivities’ or information on how the Governance model offered by the Claimant could be improved, amended or adapted, it is the view of this Panel that, based on this record, the Board did not exercise the appropriate due diligence and care, due to not having a reasonable amount of facts in front of it. Had the Board been in a position to elaborate on the religious sensitivities and subsequent amendments which could be made to ensure the Governance model of the Claimant would be sufficient, the Claimant would have been in an improved position with regards removing itself from the current “On Hold” position in which it finds itself.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

107. The lack of detailed content obtained from the meetings held with concerned GAC members, along with insufficient information on the revisions needed by the Claimant for their Governance model, coupled with the significant reliance placed on the views of the objectors leads this Panel to the view that the Board did not exercise independent judgement with regards the objectors. Independent judgement requires a reasonable

⁵⁷ See Para 37, Pg 16 ICANN’s response to AGIT’s Supplemental Brief

amount of facts to be placed before the decision maker. Without such a reasonable amount of facts, independent judgement cannot be achieved.

ACTION: PLACING THE CLAIMANT'S APPLICATIONS "ON HOLD" WITHOUT DOCUMENTED PROCEDURE FOR SUCH AN OCCURRENCE

108. The Claimants maintain that they were not informed as to which conflicts they were to resolve with the objectors, why they must do so, how they might do so, who will judge whether it has done so, by what criteria or following which schedule.⁵⁸ ICANN maintains that their behaviour and information provision went over and above that necessary when informing the Claimant.
109. It is the opinion of this Panel that the Claimant was expressly informed as to what conflicts they were to resolve through the letter dated 7th February 2014. Through this letter, the Claimant was informed which countries had raised objections through documented, dated letters, detailed over 2 paragraphs.⁵⁹ Although somewhat brief, the conflicts were identified. However, the manner in which the Claimants and objectors were to resolve such conflicts, ascertain whether this had been successfully completed, upon which timescale and adjudged by whom was not and is not clear. Whilst it is clear that the Board required conflicts to be resolved, the Claimant was left with little guidance or structure as to how to resolve the conflicts, and no information as to steps needed to proceed should the conflicts be resolved.
110. The Panel accepts the contention made by ICANN that it is not ICANN's responsibility to act as intermediary, however it is the opinion of this Panel that insufficient guidance is currently available as to the means and methods by which an "On Hold" applicant should proceed and the manner in which these efforts will be assessed. Without such guidance, and lacking detailed criteria, the applicant is left, at no doubt significant expense, to make attempts at resolution without any benchmark or guidance with which to work.
111. During the telephonic hearing, ICANN submitted that by placing the .HALAL and .ISLAM applications in an "On Hold" category, the Claimants were given an opportunity to work with the community and group which they sought to represent.⁶⁰ However, ICANN went on to acknowledge that there is no obligation on the Objectors to speak with

⁵⁸ See, for example, pg 10 AGIT Supplementary Response

⁵⁹ See Ibid

⁶⁰ Telephonic - pg 72 – 73 lines 13-25 and 1 - 7

the Claimant, and ICANN does not have the jurisdiction to require such communication takes place.⁶¹ ICANN stated that should this be the case, and the Claimant is unable to make progress with the Objectors, they should inform ICANN in “some official manner” and inform the Board. This statement, made by Mr Enson on behalf of ICANN, is unacceptably vague, and even at this late stage, fails to provide the Claimant with a structured means of addressing a potential lack of cooperation in resolving in the conflicts noted. It is this absence of procedure and documented policy which concerns this Panel with regards the “On Hold” status. In addition, the Claimant has noted that “*there’s been no other applicant put on hold*”⁶² and this statement was not refuted by ICANN.

112. Core Value 8 mandates “making decisions by applying documented policies neutrally and objectively, with integrity and fairness”. There is a distinct lack of documented policy with regards the next steps required by the Claimant, and in particular how and when these steps will be assessed. Rather, it is unclear as to which or how many objectors have authority to even negotiate a resolution to the objections. Even if that were known, the Claimant is left entirely at the mercy of the Objectors, who may not agree to cooperate, may insist that unreasonable conditions be imposed on the Claimant or indeed any number of other potential unknown outcomes. The Guidebook provides for a detailed, clear, comprehensive and structured approach to applications, documenting policies and providing assistance with the application process. This does not mean that every application has an expectation of success, but rather that applicants know the “rules of the game” and exactly what the requirements for success are. However, the situation in which the Claimant finds itself does not feature in the Guidebook. It is the opinion of this Panel that this is a glaring omission, and should be rectified promptly. Without such a documented procedure, it is the view of this Panel that ICANN is acting in a manner which is inconsistent with Core Value 8.

113. The Claimant claims that by placing its application “On Hold”, ICANN has created a new policy, and by doing so without following documented procedure, inconsistency has occurred. The Panel agrees.

114. As discussed above, the Claimant argues that it was not informed as to what conflicts it must resolve with the Objectors, why it must do so, how it might do so, who will judge whether it has done so, and by what criteria or schedule.⁶³

⁶¹ Telephonic – pg 77 lines 16 - 25

⁶² Telephonic – pg 36 lines 19-25

⁶³ See, for example, pg 10 AGIT Supplementary Response

115. There are, therefore, two possible paths to consider with regards the “On Hold” status.
116. First, this is a new concept. A new norm has been created, which ICANN will have the discretion to apply to future applications, which in turn will have new policy creation implications as per the Bylaws.
117. Secondly, this is a one-off. Relevant only to the circumstances surrounding these two applications, in which case, the question of non-discrimination arises.
118. Based on the lack of previous use, and the positive light in which ICANN presented this “On Hold” status during the telephonic hearing (*“Judge Cahill, it’s a good question and I think it demonstrates what ICANN is doing here. And ICANN, rather than just denying the applications based on every Muslim country saying they don’t want this, the ICANN Board gave the Claimant the opportunity to work with the very community (...)”*)⁶⁴, this Panel are minded to consider this a new policy.
119. Placing the applicant on hold is markedly distinct from a ‘yes’ or ‘no’. Where a ‘yes’ is given, the Guidebook offers detailed procedure and policy to follow. When a ‘no’ is given, an application is refused. Both of these options follow clear and concise paths, which are prescribed and available. In contrast, the “On Hold” status is neither clear nor prescribed. One cannot easily predict the way in which such a status will be applied in the same way as they can a ‘yes’ or ‘no’. This is a very specific status, and one which requires greater clarification and explanation. It is for these reasons that the designation of these applications as “On Hold” is considered a new policy, created, without notice or authority, by ICANN.
120. Following the Bylaws, where a new policy is created, a structured procedure must be followed, and ICANN has failed to adhere to this obligation. In addition, with respect to Core Value 7, which calls for the employment of open and transparent policy development mechanisms, it is the opinion of this Panel that such openness and transparency with regards this policy development has not been forthcoming. The first opportunity which the Claimant had to learn of the new policy was when it was imposed upon them through the 7th February letter.

⁶⁴ Telephonic – Pg 72 lines 18 – 24

Did the Board act without a conflict of interest?

121. The Claimant contends that the decision to place the applications “On Hold”, without method or procedure which the Claimant could utilise to move its application forward, was done in order to allow a third party to submit a applications for these two TLDs. However ICANN staff have rebutted this contention, and no applications for .HALAL or .ISLAM have been accepted, some three or more years after the applications were placed on hold. Whilst questions surround the manner in which this policy has been implemented, it is the opinion of this Panel, on this record, that no conflict of interest has occurred.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front of it?

122. The decision to place the applications on hold, without foreseeing the need for a formalised mechanism to be in place under which applications placed in this category are to proceed, would indicate that the Board has not acted with sufficient facts in front of it. The Board could not have had a reasonable amount of facts in front of them pertaining to the operation of the on hold status, as such facts do not exist as yet. Had ICANN created a policy under which decisions such as this would operate and formulated a suitable framework, then the Panel could appreciate how the Board may have been acting with a reasonable amount of facts in order to make the decision to place the applications on hold. However, without such a procedure or mechanism in place to accompany the new policy, it is the view of this Panel that the Board has not exercised due diligence with regards this decision as the Board did not have a reasonable amount of facts in front of it.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

123. By the Respondent failing to foresee the need for or advance a formalised mechanism under which an “On Hold” applications are to proceed, the parties find themselves in front of this IRP in order to resolve the questions which have arisen following the “On Hold” decision. It is the opinion of this Panel that, although independent judgement was exercised by the Board, the decision to place the applications “On Hold” without foreseeing the difficulties that could arise from such a decision was not in the best interests of the internet. Clear, efficient and effective mechanisms are essential in ensuring that the best interests of the internet are suitably considered and served by ICANN.

ACTION: DECIDING IN A MANNER INCONSISTENT WITH EXPERT ADVICE

124. Core Value 7 calls for “well-informed decisions based on expert advice”, but does not mandate that once advice is provided, it must be followed.
125. The Guidebook permits the Board to consult with independent experts under §3.1 *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.*
126. The Guidebook therefore does not mandate consulting with independent experts, rather the discretion is left to the Board. This is clear through the inclusion of the term “may”. It would therefore be counter-logical if this Panel were to interpret the Guidebook as to allowing the Board discretion to determine *whether* to obtain an expert opinion, but should they decide to, *bind them* to the contents of the opinion.
127. In light of the provisions of both the Guidebook and the Bylaws, it is the opinion of this Panel that the Board is entitled to decide in a manner inconsistent with expert advice.

Did the Board act without a conflict of interest?

128. This is not applicable. There is no evidence that the Board acted under a conflict of interest.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front of it?

129. Although ultimately deciding to follow a course contrary to expert opinion, ICANN was privy to the opinions of experts when making their decision, including that of the Independent Objector, Dr. Pellet and of Mr. Cremades, the Community Objection Expert. There is no evidence of a lack of due diligence and care in having a reasonable amount of facts in front of it.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

130. Although deciding contrary to expert opinion, ICANN submitted that it did so in light of all of the facts in front of them. Expert opinion was sought and considered, and those experts were considered to be independent. This fact has not been contested. It is therefore the view of this Panel that the Board did exercise independent judgement in reaching its decision with regards expert opinions.

ACTION: DISTINGUISHING BETWEEN THE GRANTING OF .KOSHER/.SHIA AND “ON HOLD” STATUS OF .HALAL/.ISLAM

131. ICANN informed the Panel through their Response to the Supplemental Brief of the following:

“The applications for .KOSHER and .SHIA were not the subject of any GAC advice or successful Community Objections, and thus were properly delegated pursuant to the procedures set forth in the Guidebook”⁶⁵

132. In reaching its decision, the Panel have considered the .AMAZON case, whereby an allegation arose of disparate treatment by the NGPC against the Claimant.⁶⁶

Amazon argues that the NGPC discriminated against it by denying its application for .amazon, yet an application by a private Brazilian oil company for the string .ipiranga, another famous waterway in Brazil, was approved. Amazon contends that by approving .ipiranga and denying .amazon, the ICANN Board, here the NGPC, engaged in disparate treatment in violation of Article II, Section 3 of the Bylaws.

(...) As pointed out by ICANN’s counsel, in this instance neither the Board nor NGPC, acting on its behalf, considered, much less granted, the application for .ipiranga and, therefore, did not engage in discriminatory action against Amazon. We agree. In the context of this matter, the Bylaws’ proscription against disparate treatment applies to Board action, and this threshold requirement is missing.

⁶⁵ See ICANN’s response to the Supplemental Brief Pg 21, Para 48

⁶⁶ G : Para 120 – 121 AMAZON EU S.A.R.L

Thus, we do not find the NGPC impermissibly treated these applications differently in a manner that violated Article II, Section 3 of the Bylaws regarding disparate treatment.

133. It is the opinion of this Panel that, as with .AMAZON, no Board action took place with regards the .KOSHER application, and therefore the threshold for this requirement is missing. No action inconsistent with Article II, S3 of the Bylaws has occurred.

Did the Board act without a conflict of interest?

134. This is not applicable as the Board decision is not being considered due to the distinction made above.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front to it?

135. This is not applicable as the Board decision is not being considered due to the distinction made above.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

136. This is not applicable as the Board decision is not being considered due to the distinction made above.

ACTION: IMPACT OF THE GAC FAILING TO REJECT AN APPLICATION

137. This is outside of the remit of this Panel, which is tasked with ascertaining whether or not there have been actions by the Board which are inconsistent with the Bylaws, Articles of Incorporation or the Guidebook. However, as an observation, following the Guidebook, the GAC are not mandated to expressly accept or reject an application, and therefore their decision not to reject is in accordance with the Guidebook.

ACTION: DECIDING IN A MANNER INCONSISTENT WITH GUIDEBOOK SCENARIO

138. Following the overarching aim of the Guidebook, one must assume that the scenarios referenced were included in order to assist candidates with their applications, but with no intention of binding the Board. The following, found under §1.1.5, is deemed instructive of this: *“The following scenarios briefly show a variety of ways in which an application*

may proceed through the evaluation process.” The express inclusion of the term “may” is further indication that §1.1.5 was not intended to be binding on the Board, nor provide applications with a guaranteed route of success.

139. It is the opinion of this Panel that such scenarios act merely to provide examples of how an application may proceed, but do not purport to provide a roadmap to follow to ensure success. Although it is understandable that a certain level of reliance may be placed on such scenarios by applicants, one would expect in the majority of cases for there to be distinguishing factors. As such, the scenarios cannot be considered binding on the Respondent, and no inconsistent act occurs should ICANN deviate from the scenarios.

Did the Board act without a conflict of interest?

140. The Board were not mandated to follow the scenarios laid down in the Guidebook, as it is found by this Panel that the scenarios were merely instructive. There is no evidence that the Board were conflicted in making this decision, rather they were exercising their judgement in order to distinguish the Claimant’s application from the scenario listed.

Did the Board exercise due diligence and care in having a reasonable amount of facts in front to it?

141. The decision to act in a manner contrary to the Guidebook scenario was made following an assessment of the objections, independent expert opinions and the applications, whereupon ICANN made the decision to distinguish the scenario from the applications. The status of the scenarios being advisory rather than mandatory confirms the notion that the Board acted with due diligence in choosing to distinguish the applications and act in a manner contrary to the scenario listed.

Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the internet?

142. Independent judgement is evidenced by the Board choosing to distinguish the applications from the scenarios. It is submitted that it is in the best interests of the internet for consideration to be given to each case in turn, rather than mandate through prescribed scenarios the way in which a case must proceed. The Board have utilised their right of independent judgement in taking the decision, and it is submitted that this path is in the best interests of the internet.

ACTION: CLASSIFICATION OF A NUMBER OF DOCUMENTS AS CONFIDENTIAL

143. ICANN has a published Documentary Information Disclosure Policy (DIDP) which states:

“ICANN's Documentary Information Disclosure Policy (DIDP) is intended to ensure that information contained in documents concerning ICANN's operational activities, and within ICANN's possession, custody, or control, is made available to the public unless there is a compelling reason for confidentiality.”

144. The Claimant claims a request was made under this policy for documents related to the parties' dispute, which was subsequently declined by ICANN, thereby acting in breach of Recommendation No. 1, Core Value 7 and Core Value 8. ICANN claims that the Claimant did not file a reconsideration request seeking the Board's review of ICANN staff's DIDP response. As no reconsideration request was filed, the DIDP response involved no Board action.⁶⁷

145. The remit of this Panel is restricted to the analysis of Board actions or inactions. The Claimant has not produced any evidence to indicate that a reconsideration request was filed, and it is therefore outside the purview of this IRP to consider the actions of ICANN staff members.

ACTION: FAILING TO ESTABLISH A STANDING PANEL

146. §4 (6) of the Articles of Incorporation and Bylaws requires a 'Standing Panel' be established, and this Panel recommends, along with previous IRP panel recommendations⁶⁸, that one is created. However, for clarity, this is not to be taken as or in any way inferred as a binding order (as the Panel has no such authority). Also, whether or not there is a standing panel seems to have no direct relationship with the facts of this IRP.

CONCLUSION

147. For the reasons stated above, the Panel concludes that ICANN has acted in a manner inconsistent with ICANN's Articles of Incorporation and Bylaws. Specifically:

⁶⁷ See ICANN's Supplementary Response para 4 and <https://www.icann.org/en/system/files/files/didp-response-process-29oct13-en.pdf>

⁶⁸ See *.AFRICA (DotConnectAfrica Trust v ICANN – Case #50 2013 001083)*

148. Core Value 7 – Articles of Incorporation and Bylaws

It is the opinion of the Panel that the volume and quality of information disseminated following the meeting of the GAC in Beijing constituted an act which was inconsistent with Core Value 7; to be consistent with Core Value 7 requires ICANN to act in an open and transparent manner.

149. Core Value 8 - Articles of Incorporation and Bylaws

It is the opinion of the Panel that, by placing the Claimant's applications "on hold", the Respondent acted inconsistently with Core Value 8; to be consistent with Core Value 8 requires the Respondent to make, rather than defer (for practical purposes, indefinitely), a decision ("making decisions by applying documented policies neutrally and objectively, with integrity and fairness") as to the outcome of the Claimant's applications. The Respondent, in order to act in a manner consistent with its Articles of Incorporation and Bylaws, needs to promptly make a decision on the application (one way or the other) with integrity and fairness. However, nothing as to the substance of the decision should be inferred by the parties from the Panel's opinion in this regard. The decision, whether yes or no, is for the Respondent.

150. Article III (S3 (b)) Articles of Incorporation and Bylaws

It is the opinion of the Panel that, by placing the Claimant's applications "on hold", the Respondent created a new policy. In light of this, the Respondent failed to follow the procedure detailed in Article III (S3 (b)), which is required when new policy is developed.

151. We further conclude that Claimant is the prevailing party in this IRP. We hold this view consistent with the finding that the designation of "On Hold" is a new policy. ICANN failed to implement procedures pursuant to which applications placed in an "On Hold" status are to proceed. As a result, the Board has not acted with due diligence in this regard.

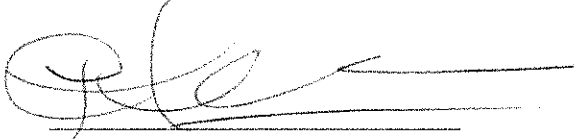
152. The failure to determine how Claimant should proceed under the new "On Hold" policy has largely resulted in the Claimant's costs in this IRP. Accordingly, pursuant to Article IV, Section 4.3(18) of the Bylaws, Rule 11 of ICANN's Supplementary Procedures and Article 34 of the ICDR Rules, ICANN shall bear the costs of this IRP, the cost of the Reporter, as well as the cost of the IRP provider.

153. The administrative fees and expenses of the International Centre for Dispute Resolution (ICDR) totalling US \$6,279.84 shall be borne by ICANN.

- 154. The compensation and expenses of the Panelists totalling US \$175,807.82 shall be borne by ICANN.
- 155. The fees and expenses of the Reporter, Ms. Bommarito, shall be borne by ICANN. ICANN has already settled Ms. Bommarito's invoices.
- 156. Therefore, ICANN shall reimburse AGIT the sum of US \$93,918.83, representing that portion of said fees and expenses in excess of the apportioned costs previously incurred by Respondent.
- 157. Each party shall bear its own expenses and attorneys' fees.
- 158. This Final Declaration 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.

The Panel would like to take this opportunity to congratulate the Parties' legal representatives for their hard work, civility and responsiveness during the proceedings. The Panel was pleased with the quality of the written submissions, in addition to the oral advocacy skills displayed throughout the proceedings.

Respectfully submitted:



Calvin A. Hamilton FCI Arb., Chair

November 28, 2017
Date

Honourable William Cahill (Ret.)

Date

Klaus Reichert SC

Date

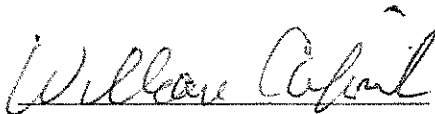
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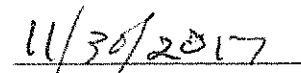
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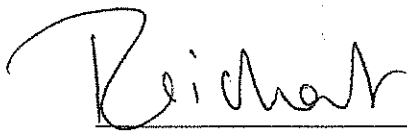
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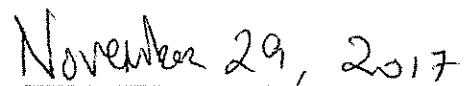
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