

ICANN 7 NOVEMBER 2014 NGPC MEETING
Committee Papers



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7 November 2014 NGPC Meeting

Main Agenda

- 1. GAC Advice – Los Angeles Communiqué – for discussion**
- 2. ALAC Statement on the Public Interest Commitments – for discussion**
- 3. BGC Recommendation Regarding Reconsideration Request 13-9, Amazon EU S.á.r.l.**
- 4. BGC Recommendation Regarding Reconsideration Request 13-10, Commercial Connect, LLC**
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ICANN NGPC PAPER NO. 2014.11.07.NG1a

TITLE: GAC Advice – Los Angeles Communiqué

PROPOSED ACTION: For Discussion

EXECUTIVE SUMMARY:

The Governmental Advisory Committee (GAC) delivered advice on the New gTLD Program in its [Los Angeles Communiqué](#) issued 15 October 2014. Over the past year, the NGPC developed and adopted a series of scorecards to respond to the GAC's advice. Included in these briefing materials is an initial draft of the scorecard to address the GAC's advice in the Los Angeles Communiqué, and any remaining advice from Beijing, Durban, Buenos Aires, Singapore or London. At this time, the NGPC is being asked to begin discussing the Los Angeles Communiqué, and to provide staff with direction on any briefings that are need to assist the NGPC's deliberations on the GAC's advice.

Consistent with the Applicant Guidebook, ICANN has notified relevant applicants of strings named in the Los Angeles Communiqué of the GAC advice, and has provided at least 21 days for those applicants to submit responses to the NGPC for consideration. The applicants' responses must be submitted by 17 November 2014, and a summary of the responses will be provided to the NGPC for consideration.

STAFF RECOMMENDATION:

Staff recommends the NGPC begin discussions of the GAC's advice in the Los Angeles Communiqué concerning the New gTLD Program.

Signature Block:

Submitted by: Jamie Hedlund

Position: Vice President, Strategic Initiative, Global Domains Division

Date Noted: 31 October 2014

Email: jamie.hedlund@icann.org

ICANN NGPC PAPER NO. 2014.11.07.NG1a

TITLE: Los Angeles GAC Advice – Category 2 Safeguards,
Restricted Access TLDs

PROPOSED ACTION: For Discussion

EXECUTIVE SUMMARY:

The Governmental Advisory Committee (GAC) issued its [Los Angeles Communiqué](#) on 15 October 2014, which included recommendations to the ICANN Board on the New gTLD Program. One of the recommendations was to “**focus its attention** on...

- v. Category 2 Safeguards: Ensuring Non-Discriminatory Registration Policies
 - 1. Amend the PIC specification requirement for Category 2 new gTLDs to include a non-discriminatory requirement to provide registrants an avenue to seek redress for discriminatory policies.”

There are two ways to interpret the GAC’s statements – either as a recommendation to “focus” on this issue, or as a direct recommendation to amend the Registry Agreement. The substance of the Los Angeles Communiqué reiterates previous advice from the GAC in Beijing. The NGPC previously considered how to implement this advice, which included public consultation. In keeping with the spirit of the Los Angeles Communiqué, it is recommended that the NGPC focus on this issue again.

In the [Beijing Communiqué](#), there were two pieces of advice in the [Category 2 Safeguards](#). The first piece of advice (“Category 2.1 Safeguards”) was related to all TLDs proposing restrictions on who could register in the TLD. The second piece of advice (“Category 2.2 Safeguards”) was related to generic strings proposing exclusive registry access. The focus of this briefing paper is the Category 2.1 Safeguards. (The NGPC continues to deliberate on the Category 2.2 Safeguards, including most recently at its meeting during ICANN 51.)

The Category 2.1 Safeguard advice from Beijing stated that, “As an exception to the general rule that the gTLD domain name space is operated in an open manner registration

may be restricted, in particular for strings mentioned under category 1 above. In these cases, the registration restrictions should be appropriate for the types of risks associated with the TLD. The registry operator should administer access in these kinds of registries in a transparent way that does not give an undue preference to any registrars or registrants, including itself, and shall not subject registrars or registrants to an undue disadvantage.”

On 23 April 2013, ICANN initiated a [public comment forum](#) to solicit input on how the NGPC should address GAC advice regarding safeguards applicable to broad categories of new gTLD strings. The NGPC considered the community comments in formulating its response to the GAC’s Category 2 Safeguard advice. The NGPC noted several concerns in the public comment forum regarding the GAC’s statement of a “general rule” that a TLD should be operated in an open manner. The NGPC understood the GAC’s advice for TLDs for which registration is restricted to generally be operated in an open manner to be a call for transparency, which is fundamental to providing consumers choice in the marketplace, and a goal that ICANN supports. Additionally, the NGPC considered that having a general non-discrimination requirement might be inconsistent with other parts of the GAC’s Beijing advice, particularly where discrimination would be required (e.g., .doctor should only accept registrations for licensed medical professionals and not other types of doctors.)

In light of the comments raised about implementing the advice, the NGPC revised Specification 11 in [June 2013](#) in a way that balances the concerns raised in the public comments with the GAC’s advice for restricted TLDs. The revised Specification 11 states that “Registry Operator will operate the TLD in a transparent manner consistent with general principles of openness and non-discrimination by establishing, publishing and adhering to clear registration policies.” (See [Specification 11, Section 3.c.](#)) The revised PIC Specification establishes what it means for a TLD to be operated consistent with principles of openness and non-discrimination. Specifically, by establishing, publishing and adhering to clear registration policies, the TLD would fulfill its obligation to be operated in a “transparent manner consistent with general principles of openness and non-discrimination.” Overall, the NGPC adapted the language of the Category 2 safeguards as

appropriate to meet the spirit and intent of the GAC's advice in a manner that allowed the safeguards to be implemented as public interest commitments in Specification 11 of the New gTLD Registry Agreement.

On the basis of the NGPC's June 2013 action to amend Specification 11 in response to the GAC's advice, ICANN has entered into almost 600 registry agreements with the approved provision. In its [Singapore](#) and [London](#) Communiqués, the GAC asked whether ICANN considered that for restricted TLDs, transparency alone might not be sufficient to deter unduly preferential or discriminatory registration policies. ICANN [responded](#) to the GAC's questions in each case, explaining its rationale for how it determined to implement the GAC's advice.

STAFF RECOMMENDATION:

Staff recommends that the NGPC affirm its 25 June 2013 action amending Specification 11 of the Registry Agreement to address the GAC's advice in the Beijing Communiqué regarding restricted access TLDs. Staff also recommends that the NGPC provide direction to continue with New gTLD operations, including entering into registry agreements with successful new gTLD applicants based on the currently approved New gTLD Registry Agreement.

Signature Block:

Submitted by: Jamie Hedlund

Position: Vice President, Strategic Programs, Global Domains Division

Date Noted: 31 October 2014

Email: jamie.hedlund@icann.org

ICANN NGPC PAPER NO. 2014.11.07.1b

TITLE: **ALAC Statement on the Public Interest
Commitments**

PROPOSED ACTION: **For Discussion**

EXECUTIVE SUMMARY:

The NGPC is being asked to take action on the ALAC's [statement](#) dated 16 October 2014 entitled "ALAC Statement on the Public Interest Commitments". The ALAC Statement advises the Board to immediately cease contracting of or delegating the 28 TLD strings identified by the GAC as requiring enhanced safeguards ("Category 1, Safeguards 1-8"), pending further community review and subsequent changes to the Public Interest provisions of the New gTLD Registry Agreements. Some of the strings included in this category are: .pharmacy, .medical, .doctor, .lotto, .casino, .bank, .charity, .cpa, .corp and .gmbh. (See <https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-2-05feb14-en.pdf>) As part of its statement, the ALAC noted that it was "deeply concerned about numerous identified problems with procedures related to Public Interest Commitments (PICs)" and that ICANN continues to sign registry agreements for the highly sensitive strings despite the repeated concerns expressed by the ALAC, GAC and broader community. The ALAC urges that the public interest protections be enhanced.

The ALAC's statement raises immediate New gTLD Program operational questions about whether the NGPC should halt contracting for the gTLD strings identified in the ALAC's statement in order to immediately launch a process to consider changes to the Public Interest Commitments in the New gTLD Registry Agreement, or continue operations of the Program on the basis that the NGPC has already considered and addressed the ALAC's concern.

To note, in November 2013 the NGPC considered the Policy Advisory Board model [proposed](#) by Mr. Ron Andruff, which he recommended as a mechanism to implement the Category 1 Safeguards. After reviewing the proposal, the NGPC decided not to adopt the Policy Advisory Board model because it would have required drastic changes to some

fundamental elements of the New gTLD Program that had not been vetted by the community, including the role and authority of a registry operator to operate a TLD, ICANN's responsibility to oversee the operations of each TLD's Policy Advisory Board, and revisions to the form of New gTLD Registry Agreement approved by the NGPC. The Reference Materials include materials previously provided to the NGPC concerning the Policy Advisory Board model, which can be found [HERE](#).

The ALAC subsequently published for public comment the Policy Advisory Board in March 2014 (<https://www.icann.org/public-comments/pab-new-gtld-strings-2014-03-21-en>).

STAFF RECOMMENDATION:

Staff recommends that that the NGPC affirm its 5 February 2014 action amending Specification 11 of the Registry Agreement for strings identified in the GAC's Category 1 Safeguards. Staff also recommends that the NGPC provide direction to continue with New gTLD operations, including entering into registry agreements with successful new gTLD applicants based on the currently approved New gTLD Registry Agreement, and to communicate its decision to the ALAC.

Signature Block:

Submitted by: Jamie Hedlund

Position: Vice President, Strategic Programs, Global Domains Division

Date Noted: 31 October 2014

Email: jamie.hedlund@icann.org

ICANN NGPC PAPER NO. 2014.11.07.1c

TO: ICANN New gTLD Program Committee
TITLE: Reconsideration Request 13-9
PROPOSED ACTIONS: For Committee Consideration and Approval

EXECUTIVE SUMMARY:

Amazon EU S.a.r.l. (“Requester”) has sought reconsideration of the Expert Determination finding that the Requester’s application for the Japanese characters that translate to “online shopping” is confusingly similar to Commercial Connect LLC’s application for .SHOP. The BGC reviewed this Reconsideration Request (“Request 13-9”) and concluded that the Requester has not stated proper grounds for reconsideration, as there is no indication that either the ICDR or the Panel violated any policy or process in accepting and finding in favor of Commercial Connect LLC’s objection. The BGC has recommended that the New gTLD Program Committee (“NGPC”) deny Request 13-9.

BRIEF BACKGROUND:

In recommending denial of Request 13-9, the BGC also recommended that staff draft a report on String Confusion Objections “setting out options for dealing with the situation raised within this Request, namely the differing outcomes of the String Confusion Objection Dispute Resolution process in disputes similar to that of Amazon’s Applied-for String and TLDH’s Applied-for String.”¹ At its 16 November 2013 meeting, the NGPC noted that Request 13-9 should not be resolved until the NGPC completed its consideration of the perceived inconsistent String Confusion Objection (“SCO”) Expert Determinations.

At its 12, 14 October 2014 meeting, the NGPC concluded its consideration of the perceived inconsistent or otherwise unreasonable SCO Expert Determinations, which included consideration of a proposed SCO Review Mechanism that was the subject of public comment.

¹ TLDH’s Applied-for String is the subject of Reconsideration Request 13-10, consideration of which was also postponed for this purpose.

The NGPC identified two specific SCO Expert Determinations, one of which is the SCO at issue in Request 13-9, as not in the best interest of the New gTLD Program and the Internet community. The NGPC directed that these Expert Determinations be sent back to the ICDR for a three-member panel evaluation to render a final Expert Determination. The NGPC further noted that it would now resume its consideration of the BGC Recommendation on Reconsideration Request 13-9.

BOARD GOVERNANCE COMMITTEE (BGC) RECOMMENDATION:

The BGC recommends that Request 13-9 be denied and that no further action be taken in response to the Request. As detailed in the Recommendation attached to the Reference Materials in support of this paper, the BGC determined that there is no indication that either the ICDR (the dispute resolution service provider), the Panel or ICANN staff violated any policy or process that would support reconsideration.

PROPOSED RESOLUTION:

Whereas, Amazon EU S.a.r.l.'s ("Amazon's") Reconsideration Request ("Request 13-9"), seeks reconsideration of the Expert Determination sustaining Commercial Connect LLC's objection to Amazon's TLD application for the Japanese characters that translate into "online shopping" as being confusingly similar to Commercial Connect's application for .SHOP.

Whereas, the Board of Governance Committee ("BGC") considered the issues raised in Request 13-9.

Whereas, the BGC recommended that Request 13-9 be denied because the Requester has not stated proper grounds for reconsideration and the New gTLD Program Committee agrees.

Resolved (2014.11.07.NGxx), the New gTLD Program Committee adopts the BGC Recommendation on Reconsideration Request 13-9, which can be found at <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-amazon-10oct13-en.pdf>.

PROPOSED RATIONALE:

I. Brief Summary

The Requester Amazon EU S.a.r.l. is an applicant for the TLD in Japanese characters that translate into “online shopping” (“Amazon’s Applied-for String”). Commercial Connect LLC (“CC”) applied for .SHOP (“CC’s Applied-for String”). CC objected to Amazon’s Applied-for String, asserting that it was confusingly similar to CC’s Applied-for String (“CC’s Objection”). The Panel ruled in favor of CC’s Objection on the grounds that Amazon’s Applied-for String is confusingly similar to CC’s Applied-for String. The Requester claims that the Dispute Resolution Provider (ICDR) and the Panel failed to follow the established process for registering and/or accepting CC’s Objection. The Requester further claims the Panel applied the wrong standard in evaluating CC’s Objection. The Requester asks that ICANN disregard the Panel’s Expert Determination, and either instruct a new Panel to review CC’s objection with the standards set forth in the Applicant Guidebook or make the necessary accommodations to allow for a “non-discriminatory application of ICANN standards, policies and procedures.” (Request, Section 9.)

The BGC concluded that the Requester has not stated proper grounds for reconsideration because there is no indication that either the ICDR or the Panel violated any policy or process in accepting and sustaining CC’s Objection. Given this, the BGC recommends that Request 13-9 be denied. The NGPC agrees.

II. Facts

A. Relevant Facts

The Requester Amazon EU S.a.r.l. is an applicant for the TLD in Japanese characters that translate into “online shopping” (“Amazon’s Applied-for String”). Commercial Connect LLC (“CC”) applied for .SHOP (“CC’s Applied-for String”). Top Level Domain Holdings Limited (“TLDH”) applied for the TLD in Chinese characters that translate into “shopping” (“TLDH’s Applied-for String”).

CC objected to both Amazon’s Applied-for String and TLDH’s Applied-for-String, asserting that both strings were confusingly similar to CC’s Applied-for String.

On 21 August 2013, the Expert Panel sustained CC's objection to Amazon's Applied-for String on the grounds that Amazon's Applied-for String is confusingly similar to CC's Applied-for String.

A different Expert Panel dismissed CC's objection to TLDH's Applied-for-String on the grounds that the two applied-for strings are not confusingly similar and on 4 September 2013, the Requester filed Request 13-9.

B. Requester's Claims

The Requester claims that CC failed to provide Amazon with a copy of the objection as required by Article 7(b) of the New gTLD Dispute Resolution Procedure ("Procedure"), and that this failure is a deficiency that cannot be rectified. The Requester further claims that the Panel applied the wrong standard in evaluating CC's Objection. Specifically, the Requester claims that the Panel applied a standard that considered "the use of essentially the same word in two different languages [as] sufficient to cause string confusion among the average, reasonable Internet user," and claims that such a standard would eliminate the need to evaluate translations of words on a case-by-case basis.

III. Issues

The issues for reconsideration are: (1) whether the ICDR and the Panel's acceptance of CC's Objection demonstrate a policy or process violation; and (2) whether the Panel applied the wrong standard in evaluating CC's Objection.

IV. The Relevant Standards for Evaluating Reconsideration Requests

ICANN's Bylaws call for the BGC to evaluate and make recommendations to the Board with respect to Reconsideration Requests. *See* Article IV, Section 2 of the Bylaws. The NGPC, bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC Recommendation on Request 13-9 and finds the analysis sound.

V. Analysis and Rationale

A. The ICDR and the Panel's Acceptance of Commercial Connect's Objection Does Not Demonstrate A Process Violation.

The BGC concluded, and NGPC agrees, that the ICDR's acceptance of CC's Objection does not demonstrate a policy or process violation, and the Requester has not demonstrated otherwise. The Requester claims that CC failed to provide the Requester with a copy of the objection as required by Article 7(b) of the Procedure, and that this failure is a deficiency that cannot be rectified. The Requester further claims that, pursuant to Article 9(d) of the Procedure, which provides for dismissal of objections that do not comply with Articles 5-8 of the Procedure and where deficiencies have not been cured in the specified timeframe, the ICDR should have dismissed CC's Objection and closed the proceedings. Pursuant to the Procedure, the ICDR was required to perform an administrative review of CC's Objection, and to inform the objector, applicant, and ICANN of the results of its administrative review. (Procedure, Art. 9(a).) The BGC concluded that the available record shows that the ICDR complied with its obligations in this regard. The ICDR's 4 April 2013 email, requesting CC to cure the stated deficiency, was consistent with the process established in the Procedure for the administrative review of objections.

The BGC further noted that the available record demonstrates that the Requester did receive notice that an objection had been filed against it and that the Requester was required to respond to avoid default. The Requester acknowledged receipt of a copy of the objection, and that the ICDR invited the Requester to raise the alleged procedural defects in its response to CC's Objection. The BGC found that the Panel, having received and considered the Requester's claims of procedural deficiencies, rejected the Requester's claims indicating there was no actual prejudice to the Requester. Accordingly, the BGC concluded that the ICDR's acceptance of CC's Objection did not violate any policy or process.

B. The Requester's Claim That The Panel Applied The Wrong Standard Is Unsupported And Is Not A Basis For Reconsideration.

The BGC concluded, and the NGPC agrees, that the Requester's claim that the Panel applied the wrong standard does not support reconsideration. The BGC noted that the relevant

standard for evaluating a string confusion objection is set out in Section 3.5.1 of the Applicant Guidebook and that the Panel referenced and correctly stated the applicable standard more than once in its evaluation of CC's Objection. Based on the parties' contentions, it appears that the Panel concentrated on the meanings of the two strings and identified three related issues that needed to be examined. The BGC determined that the Panel's focus on the meanings of the strings is consistent with the standard for evaluating string confusion objections. A likelihood of confusion can be established with any type of similarity, including similarity of meaning. (Guidebook, Section 2.2.1.1.3.) The BGC further concluded that any claim by the Requester that the Panel must limit itself to a standard of aural or visual similarity is not supported by available documentation, and does not support a finding that the Panel violated any established policy or procedure.

The BGC also noted that, contrary to the Requester's contention, the Panel did not automatically conclude that there was a likelihood of confusion between CC's Applied-for String and Amazon's Applied-for String. Rather, it appears that the Panel conducted a detailed and comprehensive analysis of the issues before reaching its determination.

With respect to the Requester's reliance on another ICDR Panel's determination finding that Top Level Domain Holdings Limited's ("TLDH") application for the TLD in Chinese characters that translate into "shopping" ("TLDH's Applied-for String") is not confusingly similar to CC's application for .SHOP as evidence that the Panel applied the wrong standard, the BGC found that the fact that these two ICDR Panels evaluated potentially similar objections yet came to different conclusions does not mean that one Panel applied the wrong standard. On a procedural level, each Panel generally rests its determination on the materials presented to it by the parties to that particular objection, and the objector bears the burden of proof. Two Panels confronting nearly identical issues could rightfully reach different determinations, based on the strength of the materials presented. While CC was the objector in both proceedings, the objections were rebutted by different applicants. Thus, the Panels reached different determinations at least in part because the materials submitted by each applicant (Amazon and TLDH) in defense of its proposed strings were different.

VI. Decision

The NGPC had the opportunity to consider all of the materials submitted by or on behalf of the Requestor (see <https://www.icann.org/resources/pages/13-9-2014-02-13-en>) or that otherwise relate to Request 13-9. Following consideration of all relevant information provided, the NGPC reviewed and has adopted the BGC's Recommendation on Request 13-9, which shall be deemed a part of this Rationale and the full text of which can be found at <https://www.icann.org/en/groups/board/governance/reconsideration/13-9/recommendation-amazon-10oct13-en.pdf>.

Although 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 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 disputes similar to that of Amazon's Applied-for String and TLDH's Applied-for String. As a result, the NGPC postponed its consideration of Request 13-9 pending the NGPC's completion of its consideration of how to address concerns of perceived inconsistent SCO Expert Determinations. At its 5 February 2014 meeting, the NGPC directed the President and CEO to initiate a public comment period on framework principles of a proposed SCO Review Mechanism, which was the subject of public comment (see <https://www.icann.org/en/system/files/files/report-comments-sco-framework-principles-24apr14-en.pdf>).

After careful consideration of the report that the BGC asked staff to draft regarding Reconsideration Request 13-9 and 13-10, the public comments received regarding a proposed SCO Review Mechanism, other comments provided to the NGPC for consideration, as well as the processes set out in the Guidebook, at its 12, 14 October 2014 meeting, the NGPC concluded its consideration of the perceived inconsistent or otherwise unreasonable SCO Expert Determinations. At that time, the NGPC identified two specific SCO Expert Determinations, one of which is the SCO at issue in Request 13-9, as not in the best interest of the New gTLD Program and the Internet community. The NGPC directed that these Expert Determinations be sent back to the ICDR for a three-member panel evaluation to render a

final Expert Determination. As part of its rationale, the NGPC acknowledged that on balance, adopting the SCO Review Mechanism would not be appropriate for the current round of the New gTLD Program, but recommended that the development of rules and processes for future rounds of the New gTLD Program (to be developed through the multi-stakeholder process) should explore whether there is a need for a formal review process with respect to Expert Determinations. The NGPC noted that it would now resume its consideration of the BGC Recommendation's on Request 13-9.

In terms of timing of the BGC's Recommendation, the Bylaws provide that the BGC shall make a final determination or recommendation to the Board [or NGPC as appropriate] with respect to a Reconsideration Request within thirty days following receipt of the request, unless impractical. *See* Article IV, Section 2.16 of the Bylaws. To satisfy the thirty-day deadline, the BGC would have to have acted by 4 October 2013. Due to the number of Reconsideration Requests submitted, the first practical opportunity for the BGC to take action on this Request was on 10 October 2013. Additionally, Article IV, Section 2.17 provides that the Board (or NGPC in this case) shall issue its decision on the recommendation of the BGC within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible. Due to the NGPC's consideration of how to handle perceived inconsistent SCO Expert Determinations, including the proposed SCO Review Mechanism and the public comment on the proposal, it was impractical for the NGPC to consider the Request sooner than now.

Adopting the BGC's recommendation has no direct 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.

Submitted By: Amy A. Stathos, Deputy General Counsel

Dated Noted: 1 November 2014

Email: amy.stathos@icann.org

ICANN NGPC PAPER NO. 2014.11.07.1d

TO: ICANN New gTLD Program Committee
TITLE: Reconsideration Request 13-10
PROPOSED ACTIONS: For Committee Consideration and Approval

EXECUTIVE SUMMARY:

In Reconsideration Request 13-10, Commercial Connect, LLC (“Requester” or “CC”) challenges the Expert Determination dismissing CC’s objection to Top Level Domain Holdings Limited’s new gTLD application for the Chinese characters that translate into “shopping” (“TLDH’s Applied-for String”). This challenge is submitted, according to the Requester, in light of the Expert Determination sustaining CC’s objection to Amazon EU S.a.r.l.’s new gTLD application for the Japanese characters that translate into “online shopping.” (“Amazon’s Applied-for String”). The BGC considered Request 13-10 and concluded that that CC has not stated proper grounds for reconsideration and recommended that the New gTLD Program Committee (“NGPC”) deny the Request.

BRIEF BACKGROUND:

In recommending denial of Request 13-10, the BGC also recommended that staff draft a report on String Confusion Objections “setting out options for dealing with the situation raised within this Request, namely the differing outcomes of the String Confusion Objection Dispute Resolution process in disputes similar to that of Amazon’s Applied-for String and TLDH’s Applied-for String.” At its 16 November 2013 meeting, the NGPC noted that Request 13-10 should not be resolved until the NGPC completed its consideration of how to address perceived inconsistent String Confusion Objection (“SCO”) Expert Determinations.

At its 12, 14 October 2014 meeting, the NGPC concluded its consideration of the perceived inconsistent or otherwise unreasonable SCO Expert Determinations, which included consideration of a proposed SCO Review Mechanism that was the subject of public comment. The NGPC identified two specific SCO Expert Determinations as not in the best interest of the New gTLD Program and the Internet community. The NGPC directed that these Expert

Determinations be sent back to the ICDR for a three-member panel evaluation to render a final Expert Determination. Of significance to this Reconsideration Request, the NGPC specifically directed review of the Expert Determination concerning Amazon's Applied-for String (subject of Request 13-9), and in so doing the NGPC recommended that the three-member panel also review as background the Expert Determination concerning TLDH's Applied-for String at issue in Request 13-10. The NGPC further noted that it would now resume its consideration of the BGC Recommendation on Reconsideration Request 13-10.

BOARD GOVERNANCE COMMITTEE (BGC) RECOMMENDATION:

The BGC recommends that Request 13-10 be denied and that no further action be taken in response to the Request. As detailed in the Recommendation attached to the Reference Materials in support of this paper, the BGC determined that Commercial Connect has not stated proper grounds for reconsideration.

PROPOSED RESOLUTION:

Whereas, Commercial Connect, LLC's ("Commercial Connect's") Reconsideration Request ("Request 13-10"), seeks reconsideration of ICANN staff's acceptance of two allegedly inconsistent expert determinations from dispute resolution Panels appointed by the International Centre for Dispute Resolution.

Whereas, Request 13-10 challenges the staff's acceptance of the Expert Determination dismissing Commercial Connect's objection to Top Level Domain Holdings Limited's gTLD application for the Chinese characters that translate into "shopping" in light of the 21 August 2013 Expert Determination sustaining Commercial Connect's objection to Amazon EU S.a.r.l.'s gTLD application for the Japanese characters that translate into "online shopping".

Whereas, the Board of Governance Committee ("BGC") considered the issues raised in Request 13-10.

Whereas, the BGC recommended that Request 13-10 be denied because Commercial Connect has not stated proper grounds for reconsideration and the New gTLD Program Committee ("NGPC") agrees.

Resolved (2014.11.07.NGxx), the NGPC adopts the BGC Recommendation on Reconsideration Request 13-10, which can be found at <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-commercial-connect-10oct13-en.pdf>.

PROPOSED RATIONALE:

I. Brief Summary

The Requester Commercial Connect LLC (“Requester” or CC”) applied for the .SHOP string (“CC’s Applied-for String”). Top Level Domain Holdings Limited (“TLDH”) applied for the gTLD in Chinese characters that translate into “shopping” (“TLDH’s Applied-for String”). Amazon EU S.a.r.l. applied for the gTLD in Japanese characters that translate into “online shopping” (“Amazon’s Applied-for String”). CC objected to both TLDH’s Applied-for String and Amazon’s Applied-for String, asserting that both strings were confusingly similar to CC’s Applied-for String. The ICDR ruled in favor of CC on its objection to Amazon’s Applied-for String on the grounds that Amazon’s Applied-for String is confusingly similar to CC’s Applied-for String. A different ICDR Expert Panel dismissed CC’s objection to TLDH’s Applied-for String on the grounds that TLDH’s Applied-for String was not confusingly similar to CC’s Applied-for String. The Requester claims that both Expert Panels failed to follow the appropriate process in evaluating the merits of the objections by applying the Applicant Guidebook in an inconsistent manner. The Requester also claims that ICANN staff’s failure to provide clear and well-defined guidance to the Panels and failure to ensure that the Panels complied with the guidelines constituted a material failure of process resulting in inconsistent decisions by the Panels.

The BGC concluded the Requester has not stated proper grounds for reconsideration. There is no indication that either panel violated any policy or process and there is similarly no indication that ICANN acted inconsistent with any established policy or procedure. Given this, the BGC recommends that Request 13-10 be denied. The NGPC agrees.

II. Facts

A. Relevant Facts

The Requester Commercial Connect LLC (“Requester” or “CC”) applied for the .SHOP string (“CC’s Applied-for String”). Top Level Domain Holdings Limited (“TLDH”) applied for a gTLD in Chinese characters that translate into “shopping” (“TLDH’s Applied-for String”). Amazon EU S.a.r.l. applied for the gTLD in Japanese characters that translate into “online shopping” (“Amazon’s Applied-for String”).

The Requester objected to both TLDH’s Applied-for String and Amazon’s Applied-for String, asserting that both strings were confusingly similar to CC’s Applied-for String; TLDH and Amazon each filed responses in separate proceedings.

On 8 August 2013, ICDR’s appointed panelist rendered an expert determination on CC’s objection to TLDH’s Applied-for String (“TLDH Expert Determination”). The Panel (“TLDH Panel”) dismissed CC’s objection on the grounds that the two applied-for strings are not confusingly similar to the average, reasonable Internet user under the standard set forth in the New gTLD Dispute Resolution Procedure (“Procedure”) and the Applicant Guidebook (“Guidebook”).

Separately, for the Requester’s objection to Amazon’s Applied-for String, a different ICDR panel (“Amazon Panel”) sustained CC’s objection on the grounds that the two applied-for strings are confusingly similar (“Amazon Expert Determination”).

On 5 September 2013, the Requester filed Request 13-10.

B. Requester’s Claims

The Requester claims that both the TLDH and the Amazon Panels failed to follow the appropriate process in evaluating the merits of the objections by applying the Guidebook in an inconsistent manner. The Requester claims that ICANN staff’s failure to provide clear and well-defined guidance to the Panels and failure to ensure that the Panels complied with the guidelines constituted a material failure of process resulting in inconsistent decisions.

III. Issues

The issues for reconsideration are: (1) whether the purported inconsistencies between expert determinations demonstrate a policy or process violation; and (2) whether ICANN's alleged failure to provide guidance to the Panels supports Reconsideration.

IV. The Relevant Standards for Evaluating Reconsideration Requests

ICANN's Bylaws call for the BGC to evaluate and make recommendations to the Board with respect to Reconsideration Requests. *See* Article IV, Section 2 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 Request 13-10 and finds the analysis sound.

V. Analysis and Rationale

A. The Purported Inconsistencies Between Expert Determinations Do Not Demonstrate A Process Violation.

The BGC concluded, and the NGPC agrees, that the fact that two different expert panels came to different conclusions does not mean that the panels inconsistently applied the standard for evaluating string confusion objections, nor does it establish a policy or process violation. CC relies on Section 2.2.1.1.3 of the Guidebook, which states that a string confusion objection may be based on any type of similarity, including visual, aural or similarity of meaning. CC contends that the TLDH Panel determined that "the guidelines do not permit confusion to be based on meaning alone" when evaluating an application for Internationalized Domain Names with foreign characters, while the Amazon Panel determined the "use of essentially the same word in two different languages is sufficient to cause string confusion." (Request, Pg. 5.) The BGC noted that each expert panel generally rests its determination on the materials presented to it by the parties to that particular objection, and the objector bears the burden of proof. Two panels confronting nearly identical issues could rightfully reach different determinations, based on the strength of the materials presented. While CC was the objector in each of these determinations, each objection was rebutted by a different applicant. Thus, the panels reached different decisions at least in part because the materials submitted by each applicant (TLDH and Amazon) in defense of its proposed string were different, and not because one panel violated any established policy or process in reaching its determination.

The BGC further noted that the TLDH Panel dismissed CC's objection not because it concluded that translations of essentially the same word are insufficient to cause string confusion – as CC contends – but because TLDH presented convincing evidence that there was little likelihood of confusion between CC's Applied-for String and TLDH's Applied-for String.

Accordingly, the BGC determined, and the NGPC agrees, that CC has not been able to establish an actual policy or process that either panel failed to follow. The Request instead challenges the substantive determinations of the panels rather than the processes by which the panels reached their determinations. While CC may disagree with the TLDH Panel's findings, Reconsideration is not available as a mechanism to re-evaluate the substantive determination of the TLDH Panel.

B. ICANN's Alleged Failure To Provide Guidance To The Panels Does Not Support Reconsideration.

The BGC concluded, and the NGPC agrees, that CC does not identify any established policy or process that required ICANN to take action above the action it has already taken in implementing the New gTLD Program. CC's disagreement as to whether the standards should have resulted in the TLDH Panel dismissing CC's objection does not mean that ICANN violated any policy or process in accepting the decision (nor does it support a conclusion that either panel's decision was wrong). The Guidebook sets out the standards used to evaluate and resolve objections. The TLDH Expert Determination and the Amazon Expert Determination reflect that the panels followed the evaluation standards.

The BGC also found that ICANN's acceptance of the determinations as advice to ICANN is also in accordance with the established process. (Guidebook, Section 3.4.6.) CC's attempt to claim here that the procedures set forth in the Guidebook for evaluating string confusion objections, which followed years of inclusive policy development and implementation planning, are somehow deficient because of allegedly inconsistent expert determinations is therefore not supported and should be rejected.

VI. Decision

The NGPC had the opportunity to consider all of the materials submitted by or on behalf of the Requestor (see <https://www.icann.org/resources/pages/13-10-2014-02-13-en>) or that otherwise relate to Request 13-10. Following consideration of all relevant information provided, the NGPC reviewed and has adopted the BGC's Recommendation on Request 13-10, which shall be deemed a part of this Rationale and the full text of which can be found at <https://www.icann.org/en/groups/board/governance/reconsideration/13-10/recommendation-commercial-connect-10oct13-en.pdf>.

Although 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 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 disputes similar to that of Amazon's Applied-for String and TLDH's Applied-for String. As a result, the NGPC postponed its consideration of Request 13-10 pending the NGPC's completion of its consideration of how to address concerns of perceived inconsistent SCO Expert Determinations. At its 5 February 2014 meeting, the NGPC directed the President and CEO to initiate a public comment period on framework principles of a proposed SCO Review Mechanism, which was the subject of public comment (see <https://www.icann.org/en/system/files/files/report-comments-sco-framework-principles-24apr14-en.pdf>).

After careful consideration of the report that the BGC asked staff to draft regarding Reconsideration Request 13-9 and 13-10, the public comments received regarding a proposed SCO Review Mechanism, other comments provided to the NGPC for consideration, as well as the processes set out in the Guidebook, at its 12, 14 October 2014 meeting, the NGPC concluded its consideration of the perceived inconsistent or otherwise unreasonable SCO Expert Determinations. At that time, the NGPC identified two specific SCO Expert Determinations as not in the best interest of the New gTLD Program and the Internet community. The NGPC directed that these Expert Determinations be sent back to the ICDR for a three-member panel evaluation to render a final Expert Determination. Of significance to this Reconsideration Request, the NGPC specifically directed review of the Expert Determination concerning Amazon's Applied-for String (at issue in Request 13-9), and in so

doing, the NGPC recommended that the three-member panel also review as background the Expert Determination concerning TLDH's Applied-for String. As part of its rationale, the NGPC acknowledged that on balance, adopting the SCO Review Mechanism would not be appropriate for the current round of the New gTLD Program, but recommended that the development of rules and processes for future rounds of the New gTLD Program (to be developed through the multi-stakeholder process) should explore whether there is a need for a formal review process with respect to Expert Determinations. The NGPC noted that it would now resume its consideration of the BGC Recommendation on Reconsideration Request 13-10.

In terms of timing of the BGC's Recommendation, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation to the Board [or the NGPC as appropriate] with respect to a Reconsideration Request within thirty days following receipt of the request, unless impractical. *See* Article IV, Section 2.16 of the Bylaws. To satisfy the thirty-day deadline, the BGC would have to have acted by 4 October 2013. Due to the number of Reconsideration Requests submitted between September through October 2013, the first practical opportunity for the BGC to take action on this Request was on 11 October 2013. Additionally, Article IV, Section 2.17 provides that the Board (or the NGPC in this case) shall issue its decision on the recommendation of the BGC within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible. Due to the NGPC's consideration of how to handle perceived inconsistent SCO Expert Determinations, including the proposed SCO Review Mechanism and the public comment on the proposal, it was impractical for the NGPC to consider the Request sooner than now.

Adopting the BGC's recommendation has no direct 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.

Submitted By: Amy A. Stathos, Deputy General Counsel

Dated Noted: 1 November 2014

Email: amy.stathos@icann.org



Proposed New gTLD Program Committee Resolutions
7 November 2014
Meeting of the New gTLD Program Committee

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1. Main Agenda:

a. BGC Recommendation Regarding Reconsideration Request 13-9, Amazon EU S.á.r.l.

Whereas, Amazon EU S.a.r.l.'s ("Amazon's") Reconsideration Request ("Request 13-9"), seeks reconsideration of the Expert Determination sustaining Commercial Connect LLC's objection to Amazon's TLD application for the Japanese characters that translate into "online shopping" as being confusingly similar to Commercial Connect's application for .SHOP.

Whereas, the Board of Governance Committee ("BGC") considered the issues raised in Request 13-9.

Whereas, the BGC recommended that Request 13-9 be denied because the Requester has not stated proper grounds for reconsideration and the New gTLD Program Committee agrees.

Resolved (2014.11.07.NGxx), the New gTLD Program Committee adopts the BGC Recommendation on Reconsideration Request 13-9, which can be found at <http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-amazon-10oct13-en.pdf>.

Rationale for Resolution 2014.11.07.NGxx

I. Brief Summary

The Requester Amazon EU S.a.r.l. is an applicant for the TLD in Japanese characters that translate into "online shopping" ("Amazon's Applied-for String"). Commercial Connect LLC ("CC") applied for .SHOP ("CC's Applied-for String"). CC objected to Amazon's Applied-for String, asserting that it was confusingly similar to CC's Applied-for String ("CC's Objection"). The Panel ruled in favor of CC's Objection on the grounds that Amazon's Applied-for String is confusingly similar to CC's Applied-for String. The Requester claims that the Dispute Resolution Provider (ICDR) and the Panel failed to

follow the established process for registering and/or accepting CC's Objection. The Requester further claims the Panel applied the wrong standard in evaluating CC's Objection. The Requester asks that ICANN disregard the Panel's Expert Determination, and either instruct a new Panel to review CC's objection with the standards set forth in the Applicant Guidebook or make the necessary accommodations to allow for a "non-discriminatory application of ICANN standards, policies and procedures." (Request, Section 9.)

The BGC concluded that the Requester has not stated proper grounds for reconsideration because there is no indication that either the ICDR or the Panel violated any policy or process in accepting and sustaining CC's Objection. Given this, the BGC recommends that Request 13-9 be denied. The NGPC agrees.

II. Facts

A. Relevant Facts

The Requester Amazon EU S.a.r.l. is an applicant for the TLD in Japanese characters that translate into "online shopping" ("Amazon's Applied-for String"). Commercial Connect LLC ("CC") applied for .SHOP ("CC's Applied-for String"). Top Level Domain Holdings Limited ("TLDH") applied for the TLD in Chinese characters that translate into "shopping" ("TLDH's Applied-for String").

CC objected to both Amazon's Applied-for String and TLDH's Applied-for-String, asserting that both strings were confusingly similar to CC's Applied-for String.

On 21 August 2013, the Expert Panel sustained CC's objection to Amazon's Applied-for String on the grounds that Amazon's Applied-for String is confusingly similar to CC's Applied-for String.

A different Expert Panel dismissed CC's objection to TLDH's Applied-for-String on the grounds that the two applied-for strings are not

confusingly similar and on 4 September 2013, the Requester filed Request 13-9.

B. Requester's Claims

The Requester claims that CC failed to provide Amazon with a copy of the objection as required by Article 7(b) of the New gTLD Dispute Resolution Procedure ("Procedure"), and that this failure is a deficiency that cannot be rectified. The Requester further claims that the Panel applied the wrong standard in evaluating CC's Objection. Specifically, the Requester claims that the Panel applied a standard that considered "the use of essentially the same word in two different languages [as] sufficient to cause string confusion among the average, reasonable Internet user," and claims that such a standard would eliminate the need to evaluate translations of words on a case-by-case basis.

III. Issues

The issues for reconsideration are: (1) whether the ICDR and the Panel's acceptance of CC's Objection demonstrate a policy or process violation; and (2) whether the Panel applied the wrong standard in evaluating CC's Objection.

IV. The Relevant Standards for Evaluating Reconsideration Requests

ICANN's Bylaws call for the BGC to evaluate and make recommendations to the Board with respect to Reconsideration Requests. See Article IV, Section 2 of the Bylaws. The NGPC, bestowed with the powers of the Board in this instance, has reviewed and thoroughly considered the BGC Recommendation on Request 13-9 and finds the analysis sound.

V. Analysis and Rationale

A. The ICDR and the Panel's Acceptance of Commercial Connect's Objection Does Not Demonstrate A Process Violation.

The BGC concluded, and NGPC agrees, that the ICDR's acceptance of CC's Objection does not demonstrate a policy or process violation, and the Requester has not demonstrated otherwise. The Requester claims that CC failed to provide the Requester with a copy of the objection as required by Article 7(b) of the Procedure, and that this failure is a deficiency that cannot be rectified. The Requester further claims that, pursuant to Article 9(d) of the Procedure, which provides for dismissal of objections that do not comply with Articles 5-8 of the Procedure and where deficiencies have not been cured in the specified timeframe, the ICDR should have dismissed CC's Objection and closed the proceedings. Pursuant to the Procedure, the ICDR was required to perform an administrative review of CC's Objection, and to inform the objector, applicant, and ICANN of the results of its administrative review. (Procedure, Art. 9(a).) The BGC concluded that the available record shows that the ICDR complied with its obligations in this regard. The ICDR's 4 April 2013 email, requesting CC to cure the stated deficiency, was consistent with the process established in the Procedure for the administrative review of objections.

The BGC further noted that the available record demonstrates that the Requester did receive notice that an objection had been filed against it and that the Requester was required to respond to avoid default. The Requester acknowledged receipt of a copy of the objection, and that the ICDR invited the Requester to raise the alleged procedural defects in its response to CC's Objection. The BGC found that the Panel, having received and considered the Requester's claims of procedural deficiencies, rejected the Requester's claims indicating there was no actual prejudice to the Requester. Accordingly, the BGC concluded that the ICDR's acceptance of CC's Objection did not violate any policy or process.

B. The Requester's Claim That The Panel Applied The Wrong Standard Is Unsupported And Is Not A Basis For Reconsideration.

The BGC concluded, and the NGPC agrees, that the Requester's claim that the Panel applied the wrong standard does not support reconsideration. The BGC noted that the relevant standard for evaluating a string confusion objection is set out in Section 3.5.1 of the Applicant Guidebook and that the Panel referenced and correctly stated the applicable standard more than once in its evaluation of CC's Objection. Based on the parties' contentions, it appears that the Panel concentrated on the meanings of the two strings and identified three related issues that needed to be examined. The BGC determined that the Panel's focus on the meanings of the strings is consistent with the standard for evaluating string confusion objections. A likelihood of confusion can be established with any type of similarity, including similarity of meaning. (Guidebook, Section 2.2.1.1.3.) The BGC further concluded that any claim by the Requester that the Panel must limit itself to a standard of aural or visual similarity is not supported by available documentation, and does not support a finding that the Panel violated any established policy or procedure.

The BGC also noted that, contrary to the Requester's contention, the Panel did not automatically conclude that there was a likelihood of confusion between CC's Applied-for String and Amazon's Applied-for String. Rather, it appears that the Panel conducted a detailed and comprehensive analysis of the issues before reaching its determination.

With respect to the Requester's reliance on another ICDR Panel's determination finding that Top Level Domain Holdings Limited's ("TLDH") application for the TLD in Chinese characters that translate into "shopping" ("TLDH's Applied-for String") is not confusingly similar to CC's application for .SHOP as evidence that the Panel applied the wrong standard, the BGC found that the fact that these two ICDR Panels evaluated potentially similar objections yet came to

different conclusions does not mean that one Panel applied the wrong standard. On a procedural level, each Panel generally rests its determination on the materials presented to it by the parties to that particular objection, and the objector bears the burden of proof. Two Panels confronting nearly identical issues could rightfully reach different determinations, based on the strength of the materials presented. While CC was the objector in both proceedings, the objections were rebutted by different applicants. Thus, the Panels reached different determinations at least in part because the materials submitted by each applicant (Amazon and TLDH) in defense of its proposed strings were different.

VI. Decision

The NGPC had the opportunity to consider all of the materials submitted by or on behalf of the Requestor (see <https://www.icann.org/resources/pages/13-9-2014-02-13-en>) or that otherwise relate to Request 13-9. Following consideration of all relevant information provided, the NGPC reviewed and has adopted the BGC's Recommendation on Request 13-9, which shall be deemed a part of this Rationale and the full text of which can be found at <https://www.icann.org/en/groups/board/governance/reconsideration/13-9/recommendation-amazon-10oct13-en.pdf>.

Although 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 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 disputes similar to that of Amazon's Applied-for String and TLDH's Applied-for String. As a result, the NGPC postponed its consideration of Request 13-9 pending the NGPC's completion of its consideration of how to address concerns of perceived inconsistent SCO Expert Determinations. At its 5 February 2014 meeting, the NGPC directed the President and CEO to initiate a public comment period on framework principles of a proposed SCO Review Mechanism, which was the subject of public

comment (see <https://www.icann.org/en/system/files/files/report-comments-sco-framework-principles-24apr14-en.pdf>).

After careful consideration of the report that the BGC asked staff to draft regarding Reconsideration Request 13-9 and 13-10, the public comments received regarding a proposed SCO Review Mechanism, other comments provided to the NGPC for consideration, as well as the processes set out in the Guidebook, at its 12, 14 October 2014 meeting, the NGPC concluded its consideration of the perceived inconsistent or otherwise unreasonable SCO Expert Determinations. At that time, the NGPC identified two specific SCO Expert Determinations, one of which is the SCO at issue in Request 13-9, as not in the best interest of the New gTLD Program and the Internet community. The NGPC directed that these Expert Determinations be sent back to the ICDR for a three-member panel evaluation to render a final Expert Determination. As part of its rationale, the NGPC acknowledged that on balance, adopting the SCO Review Mechanism would not be appropriate for the current round of the New gTLD Program, but recommended that the development of rules and processes for future rounds of the New gTLD Program (to be developed through the multi-stakeholder process) should explore whether there is a need for a formal review process with respect to Expert Determinations. The NGPC noted that it would now resume its consideration of the BGC Recommendation's on Request 13-9.

In terms of timing of the BGC's Recommendation, the Bylaws provide that the BGC shall make a final determination or recommendation to the Board [or NGPC as appropriate] with respect to a Reconsideration Request within thirty days following receipt of the request, unless impractical. See Article IV, Section 2.16 of the Bylaws. To satisfy the thirty-day deadline, the BGC would have to have acted by 4 October 2013. Due to the number of Reconsideration Requests submitted, the first practical opportunity for the BGC to take action on this Request was on 10 October 2013. Additionally, Article IV, Section 2.17 provides that the Board (or NGPC in this case) shall issue its decision on the recommendation of the BGC within 60 days of receipt of the Reconsideration Request or

as soon thereafter as feasible. Due to the NGPC's consideration of how to handle perceived inconsistent SCO Expert Determinations, including the proposed SCO Review Mechanism and the public comment on the proposal, it was impractical for the NGPC to consider the Request sooner than now.

Adopting the BGC's recommendation has no direct 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.

b. BGC Recommendation Regarding Reconsideration Request 13-10, Commercial Connect, LLC

Whereas, Commercial Connect, LLC's ("Commercial Connect's") Reconsideration Request ("Request 13-10"), seeks reconsideration of ICANN staff's acceptance of two allegedly inconsistent expert determinations from dispute resolution Panels appointed by the International Centre for Dispute Resolution.

Whereas, Request 13-10 challenges the staff's acceptance of the Expert Determination dismissing Commercial Connect's objection to Top Level Domain Holdings Limited's gTLD application for the Chinese characters that translate into "shopping" in light of the 21 August 2013 Expert Determination sustaining Commercial Connect's objection to Amazon EU S.a.r.l.'s gTLD application for the Japanese characters that translate into "online shopping".

Whereas, the Board of Governance Committee ("BGC") considered the issues raised in Request 13-10.

Whereas, the BGC recommended that Request 13-10 be denied because Commercial Connect has not stated proper grounds for reconsideration and the New gTLD Program Committee ("NGPC") agrees.

Resolved (2014.11.07.NGxx), the NGPC adopts the BGC Recommendation on Reconsideration Request 13-10, which can be found at

<http://www.icann.org/en/groups/board/governance/reconsideration/recommendation-commercial-connect-10oct13-en.pdf>.

Rationale for Resolution 2014.11.07.NGxx

I. Brief Summary

The Requester Commercial Connect LLC (“Requester” or CC”) applied for the .SHOP string (“CC’s Applied-for String”). Top Level Domain Holdings Limited (“TLDH”) applied for the gTLD in Chinese characters that translate into “shopping” (“TLDH’s Applied-for String”). Amazon EU S.a.r.l. applied for the gTLD in Japanese characters that translate into “online shopping” (“Amazon’s Applied-for String”). CC objected to both TLDH’s Applied-for String and Amazon’s Applied-for String, asserting that both strings were confusingly similar to CC’s Applied-for String. The ICDR ruled in favor of CC on its objection to Amazon’s Applied-for String on the grounds that Amazon’s Applied-for String is confusingly similar to CC’s Applied-for String. A different ICDR Expert Panel dismissed CC’s objection to TLDH’s Applied-for String on the grounds that TLDH’s Applied-for String was not confusingly similar to CC’s Applied-for String. The Requester claims that both Expert Panels failed to follow the appropriate process in evaluating the merits of the objections by applying the Applicant Guidebook in an inconsistent manner. The Requester also claims that ICANN staff’s failure to provide clear and well-defined guidance to the Panels and failure to ensure that the Panels complied with the guidelines constituted a material failure of process resulting in inconsistent decisions by the Panels.

The BGC concluded the Requester has not stated proper grounds for reconsideration. There is no indication that either panel violated any policy or process and there is similarly no indication that ICANN acted inconsistent with any established policy or procedure. Given this, the BGC recommends that Request 13-10 be denied. The NGPC agrees.

II. Facts

A. Relevant Facts

The Requester Commercial Connect LLC (“Requester” or “CC”) applied for the .SHOP string (“CC’s Applied-for String”). Top Level Domain Holdings Limited (“TLDH”) applied for a gTLD in Chinese characters that translate into “shopping” (“TLDH’s Applied-for String”). Amazon EU S.a.r.l. applied for the gTLD in Japanese characters that translate into “online shopping” (“Amazon’s Applied-for String”).

The Requester objected to both TLDH’s Applied-for String and Amazon’s Applied-for String, asserting that both strings were confusingly similar to CC’s Applied-for String; TLDH and Amazon each filed responses in separate proceedings.

On 8 August 2013, ICDR’s appointed panelist rendered an expert determination on CC’s objection to TLDH’s Applied-for String (“TLDH Expert Determination”). The Panel (“TLDH Panel”) dismissed CC’s objection on the grounds that the two applied-for strings are not confusingly similar to the average, reasonable Internet user under the standard set forth in the New gTLD Dispute Resolution Procedure (“Procedure”) and the Applicant Guidebook (“Guidebook”).

Separately, for the Requester’s objection to Amazon’s Applied-for String, a different ICDR panel (“Amazon Panel”) sustained CC’s objection on the grounds that the two applied-for strings are confusingly similar (“Amazon Expert Determination”).

On 5 September 2013, the Requester filed Request 13-10.

B. Requester’s Claims

The Requester claims that both the TLDH and the Amazon Panels failed to follow the appropriate process in evaluating the merits of the objections by applying the Guidebook in an inconsistent manner.

The Requester claims that ICANN staff's failure to provide clear and well-defined guidance to the Panels and failure to ensure that the Panels complied with the guidelines constituted a material failure of process resulting in inconsistent decisions.

III. Issues

The issues for reconsideration are: (1) whether the purported inconsistencies between expert determinations demonstrate a policy or process violation; and (2) whether ICANN's alleged failure to provide guidance to the Panels supports Reconsideration.

IV. The Relevant Standards for Evaluating Reconsideration Requests

ICANN's Bylaws call for the BGC to evaluate and make recommendations to the Board with respect to Reconsideration Requests. See Article IV, Section 2 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 Request 13-10 and finds the analysis sound.

V. Analysis and Rationale

A. The Purported Inconsistencies Between Expert Determinations Do Not Demonstrate A Process Violation.

The BGC concluded, and the NGPC agrees, that the fact that two different expert panels came to different conclusions does not mean that the panels inconsistently applied the standard for evaluating string confusion objections, nor does it establish a policy or process violation. CC relies on Section 2.2.1.1.3 of the Guidebook, which states that a string confusion objection may be based on any type of similarity, including visual, aural or similarity of meaning. CC contends that the TLDH Panel determined that "the guidelines do not permit confusion to be based on meaning alone" when evaluating an

application for Internationalized Domain Names with foreign characters, while the Amazon Panel determined the “use of essentially the same word in two different languages is sufficient to cause string confusion.” (Request, Pg. 5.) The BGC noted that each expert panel generally rests its determination on the materials presented to it by the parties to that particular objection, and the objector bears the burden of proof. Two panels confronting nearly identical issues could rightfully reach different determinations, based on the strength of the materials presented. While CC was the objector in each of these determinations, each objection was rebutted by a different applicant. Thus, the panels reached different decisions at least in part because the materials submitted by each applicant (TLDH and Amazon) in defense of its proposed string were different, and not because one panel violated any established policy or process in reaching its determination.

The BGC further noted that the TLDH Panel dismissed CC’s objection not because it concluded that translations of essentially the same word are insufficient to cause string confusion – as CC contends – but because TLDH presented convincing evidence that there was little likelihood of confusion between CC’s Applied-for String and TLDH’s Applied-for String.

Accordingly, the BGC determined, and the NGPC agrees, that CC has not been able to establish an actual policy or process that either panel failed to follow. The Request instead challenges the substantive determinations of the panels rather than the processes by which the panels reached their determinations. While CC may disagree with the TLDH Panel’s findings, Reconsideration is not available as a mechanism to re-evaluate the substantive determination of the TLDH Panel.

B. ICANN’s Alleged Failure To Provide Guidance To The Panels Does Not Support Reconsideration.

The BGC concluded, and the NGPC agrees, that CC does not identify any established policy or process that required ICANN to take action

above the action it has already taken in implementing the New gTLD Program. CC's disagreement as to whether the standards should have resulted in the TLDH Panel dismissing CC's objection does not mean that ICANN violated any policy or process in accepting the decision (nor does it support a conclusion that either panel's decision was wrong). The Guidebook sets out the standards used to evaluate and resolve objections. The TLDH Expert Determination and the Amazon Expert Determination reflect that the panels followed the evaluation standards.

The BGC also found that ICANN's acceptance of the determinations as advice to ICANN is also in accordance with the established process. (Guidebook, Section 3.4.6.) CC's attempt to claim here that the procedures set forth in the Guidebook for evaluating string confusion objections, which followed years of inclusive policy development and implementation planning, are somehow deficient because of allegedly inconsistent expert determinations is therefore not supported and should be rejected.

VI. Decision

The NGPC had the opportunity to consider all of the materials submitted by or on behalf of the Requestor (see <https://www.icann.org/resources/pages/13-10-2014-02-13-en>) or that otherwise relate to Request 13-10. Following consideration of all relevant information provided, the NGPC reviewed and has adopted the BGC's Recommendation on Request 13-10, which shall be deemed a part of this Rationale and the full text of which can be found at <https://www.icann.org/en/groups/board/governance/reconsideration/13-10/recommendation-commercial-connect-10oct13-en.pdf>.

Although 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 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 disputes similar to that of Amazon's Applied-for String and TLDH's Applied-for String. As a result, the NGPC postponed its consideration of Request 13-10 pending the NGPC's completion of its consideration of how to address concerns of perceived inconsistent SCO Expert Determinations. At its 5 February 2014 meeting, the NGPC directed the President and CEO to initiate a public comment period on framework principles of a proposed SCO Review Mechanism, which was the subject of public comment (see <https://www.icann.org/en/system/files/files/report-comments-sco-framework-principles-24apr14-en.pdf>).

After careful consideration of the report that the BGC asked staff to draft regarding Reconsideration Request 13-9 and 13-10, the public comments received regarding a proposed SCO Review Mechanism, other comments provided to the NGPC for consideration, as well as the processes set out in the Guidebook, at its 12, 14 October 2014 meeting, the NGPC concluded its consideration of the perceived inconsistent or otherwise unreasonable SCO Expert Determinations. At that time, the NGPC identified two specific SCO Expert Determinations as not in the best interest of the New gTLD Program and the Internet community. The NGPC directed that these Expert Determinations be sent back to the ICDR for a three-member panel evaluation to render a final Expert Determination. Of significance to this Reconsideration Request, the NGPC specifically directed review of the Expert Determination concerning Amazon's Applied-for String (at issue in Request 13-9), and in so doing, the NGPC recommended that the three-member panel also review as background the Expert Determination concerning TLDH's Applied-for String. As part of its rationale, the NGPC acknowledged that on balance, adopting the SCO Review Mechanism would not be appropriate for the current round of the New gTLD Program, but recommended that the development of rules and processes for future rounds of the New gTLD Program (to be developed through the multi-stakeholder process) should explore whether there is a need for a formal review process with respect to Expert Determinations. The NGPC noted that it would now resume its consideration of the BGC Recommendation on Reconsideration Request 13-10.

In terms of timing of the BGC's Recommendation, Section 2.16 of Article IV of the Bylaws provides that the BGC shall make a final determination or recommendation to the Board [or the NGPC as appropriate] with respect to a Reconsideration Request within thirty days following receipt of the request, unless impractical. See Article IV, Section 2.16 of the Bylaws. To satisfy the thirty-day deadline, the BGC would have to have acted by 4 October 2013. Due to the number of Reconsideration Requests submitted between September through October 2013, the first practical opportunity for the BGC to take action on this Request was on 11 October 2013. Additionally, Article IV, Section 2.17 provides that the Board (or the NGPC in this case) shall issue its decision on the recommendation of the BGC within 60 days of receipt of the Reconsideration Request or as soon thereafter as feasible. Due to the NGPC's consideration of how to handle perceived inconsistent SCO Expert Determinations, including the proposed SCO Review Mechanism and the public comment on the proposal, it was impractical for the NGPC to consider the Request sooner than now.

Adopting the BGC's recommendation has no direct 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.

c. Any Other Business

New gTLD Program Committee Members,

Attached below please find Notice of the following New gTLD Program Committee Meeting:

7 November 2014 – NGPC Meeting at 22:00 UTC. This Committee meeting is estimated to last 90 minutes.

<http://www.timeanddate.com/worldclock/fixedtime.html?msg=New+gTLD+Program+Committee+&iso=20141107T22>

Some other helpful time zones:

7 November 2014 – 2:00 p.m. PST Los Angeles, CA

7 November 2014 – 5:00 p.m. EST Washington, D.C.

7 November 2014 – 11:00 p.m. CET Brussels

8 November 2014 – 9:00 a.m. AEDT Sydney

8 November 2014 – 6:00 a.m. CST Taipei

Main Agenda

- 1. GAC Advice – Los Angeles Communiqué – for discussion**
- 2. ALAC Statement on the Public Interest Commitments – for discussion**
- 3. BGC Recommendation Regarding Reconsideration Request 13-9, Amazon EU S.á.r.l.**
- 4. BGC Recommendation Regarding Reconsideration Request 13-10, Commercial Connect, LLC**
- 5. AOB**

Materials can be found [here](#) on BoardVantage.

If you have trouble with access, please let us know and we will work with you to assure that you can use the BoardVantage Portal for this meeting.

If call information is required, it will be distributed separately.

If you have any questions, or we can be of assistance to you, please let us know.

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