

**IN THE MATTER OF AN INDEPENDENT REVIEW PROCESS BEFORE THE
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION**

ICDR Case No. 50 2013 00 1083

DotConnectAfrica Trust,

Claimant,

v.

Internet Corporation for Assigned Names and Numbers,

Respondent.

DCA'S RESPONSE TO ICANN'S REQUEST FOR RECONSIDERATION

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I. INTRODUCTION

1. Pursuant to the Panel’s Procedural Order No. 2,¹ DotConnectAfrica Trust (“DCA”) hereby provides its response to the request of the Internet Corporation for Assigned Names and Numbers (“ICANN”) that the Panel reconsider a portion of its Decision on Interim Measures of Protection² and “eliminate any inference or statement” from paragraphs 29 and 33 therein that “ICANN failed to follow its Bylaws.”³

II. THE PANEL’S DECISION SHOULD NOT BE MODIFIED BECAUSE ICANN HAS NOT FORMED A STANDING PANEL IN ACCORDANCE WITH ITS GOVERNING DOCUMENTS

2. There is no basis for modifying the Panel’s Decision on Interim Measures of Protection to remove references to ICANN’s breaches of its Bylaws and failure to comply with the Supplementary Procedures, for the simple reason that ICANN was under an obligation to create a standing panel and failed to do so.⁴ ICANN’s Bylaws state that “[t]here *shall be* an omnibus standing panel,”⁵ meaning that ICANN *must* form an omnibus standing panel; it is not optional. ICANN does not dispute that it has failed to create such a panel.

3. ICANN adopted the standing panel requirement in April 2013 at the recommendation of a panel of three experts chosen to evaluate ICANN’s accountability structures and suggest improvements.⁶ Notably, the experts recommended that ICANN institute a standing panel, but did *not* recommend that there be any alternatives for forming an IRP Panel in the event that

¹ See Procedural Order No. 2 (27 May 2014).

² See Decision on Interim Measures of Protection (12 May 2014).

³ ICANN’s Response to the Panel’s 12 May 2014 Decision and Request for Partial Reconsideration (20 May 2014).

⁴ See Decision on Interim Measures of Protection, paras. 29, 33.

⁵ ICANN Bylaws, Art. 4, § 3(6) (emphasis added) [Amended Notice of IRP, Ex. C-10].

⁶ See Proposed Independent Review Bylaws Revisions as of 26 October 2012 to Meet Recommendations of the Accountability Structures Expert Panel, Art. IV, § 3(6) [Ex. C-M-42]; Report by Accountability Structures Expert Panel (Oct. 2012), PDF p. 30 [Ex. C-M-43]. This is the panel of experts to which ICANN’s counsel referred during the First Procedural Hearing.

ICANN neglected to create such a panel.⁷ It is not clear how the additional language relating to the constitution of an IRP Panel in the absence of a standing panel came to be added to the Bylaws, since the ICANN Board of Directors added this language after the public comment period had ended and after the expert panel had concluded that no changes to the panel's recommended revisions should be made.⁸ The ICANN Board Resolution approving the amended language stated only that “[i]f a standing panel cannot be comprised, or cannot remain comprised, the Bylaws now allow for Independent Review proceedings to go forward with individually selected panelists.”⁹

4. ICANN's Supplementary Procedures were amended to reflect the changes to the Bylaws. They provide that the IRP Panel “*will be* comprised of *members of a standing panel* identified in coordination with the ICDR,” making it clear that the alternative methods for selecting an IRP panel are the exception and not the norm.¹⁰ Likewise, the provision regarding Interim Measures of Protection in the Supplementary Procedures presumes that a standing panel will be in place: “Where the IRP PANEL is not yet comprised, the *Chair of the standing panel* may provide a recommendation on the stay of any action or decision.”¹¹

5. This history suggests that ICANN added the language on the constitution of an IRP Panel in the absence of a standing panel solely in order to avoid delaying any potential IRP proceedings commenced after the effective date of the revised Bylaws but before ICANN had the

⁷ See Proposed Independent Review Bylaws Revisions as of 26 October 2012 to Meet Recommendations of the Accountability Structures Expert Panel [Ex. C-M-42].

⁸ See Expert Recommended Improvements to ICANN's Accountability Structures, Report of Public Comments (12 Dec. 2012), available at <https://www.icann.org/en/system/files/files/report-comments-asep-recommendations-12dec12-en.pdf> [Ex. C-M-44].

⁹ ICANN Accountability Structures Bylaws Effective Date, Rationale for Resolution 2013.04.11.06, p. 7 (11 Apr. 2013), available at <https://www.icann.org/resources/board-material/resolutions-2013-04-11-en#1.d> [Ex. C-M-45].

¹⁰ ICANN Supplementary Procedures, Art. 1 (emphasis added) [Amended Notice of IRP, Ex. C-3].

¹¹ *Id.*, Art. 7 (emphasis added).

opportunity to form an omnibus standing panel. In other words, this language does not mean that ICANN is not obligated to create a standing panel; rather, it serves the temporary function of permitting IRP proceedings to proceed during the temporal gap between amendment of the Bylaws and the constitution of the standing panel. Although there is no deadline in the Bylaws for forming the standing panel, given the mandatory nature of the provision, ICANN certainly should have acted by now—more than one year later—to establish it.¹²

6. For these reasons, it was appropriate for the Panel to find that ICANN has failed to follow its Bylaws and Supplementary Procedures with respect to the creation of a standing panel. It bears noting that ICANN’s Request for Reconsideration once again demonstrates ICANN’s willingness to rely on technicalities when doing so may further ICANN’s self-serving interpretations of the documents governing this proceeding, while reflexively disavowing such precision when doing so would be inconvenient to ICANN’s position in this proceeding. Indeed, even if ICANN were correct that there is any ambiguity in the Bylaws as to whether or not it is obligated to create a standing panel – which there is not – such ambiguity would in itself constitute a further breach of ICANN’s obligation of transparency and accountability to Internet stakeholders.

¹² Indeed, we are unaware of any actions ICANN has taken even to initiate the formation of such a panel. One ICANN observer has raised questions concerning ICANN’s intention to ever form such a panel in a blog post commenting on this case. *See* Kevin Murphy, “Was panel wrong to put .africa on ice or does ICANN have an accountability problem?” Domain Incite (13 May 2014), *available at* <http://domainincite.com/16652-was-panel-wrong-to-put-africa-on-ice-or-does-icann-have-an-accountability-problem> (recounting what is known of sequence of events leading to language in Bylaws on which ICANN relies and commenting, “I could be wrong, but it does look a little bit like the ICANN board giving itself a carte blanche [sic] to ignore the recommendations of the ASEP, and therefore, indirectly, the ATRT”) (accessed 28 May 2014) [Ex. C-M-46]. “ASEP” refers to the Accountability Structures Expert Panel that recommended the creation of a standing panel; “ATRT” is the Accountability and Transparency Review Team, formed to address concerns about ICANN’s lack of accountability and transparency. *See* <https://www.icann.org/resources/pages/applications-2012-11-14-en> (accessed 28 May 2014) [Ex. C-M-47].

III. CONCLUSION

7. Based on the foregoing, DCA respectfully requests that the Panel deny ICANN's Request for Reconsideration.

Respectfully submitted,



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