INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

DOTCONNECTAFRICA TRUST, Claimant, and INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS, Respondent.	)	ICDR CASE NO. 50 117 T 1083 13

ICANN'S FURTHER MEMORANDUM REGARDING PROCEDURAL ISSUES

Jeffrey A. LeVee
Eric Enson
Rachel Zernik
Jones Day
555 South Flower Street
50th Floor
Los Angeles, CA 90071
Tel: +1 213-489-3939
Fax: +1 213-243-2539

Counsel to Respondent
The Internet Corporation
For Assigned Names and Numbers

20 May 2014

INTRODUCTION

1. Pursuant to the Panel's Procedural Order No. 1 issued on 24 April 2014 and the questions that the Panel submitted on 12 May 2014, ICANN hereby submits this Further Memorandum Regarding Procedural Issues.

2. As an initial matter, ICANN wishes to emphasize that many of the questions that the Panel posed are outside the scope of this Independent Review Proceeding ("IRP") and the Panel's mandate. The Panel's mandate is set forth in ICANN's Bylaws, which limit the Panel to "comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and [] declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws." (Bylaws, Art. IV, § 3.4.) Moreover, DCA did not put at issue many of the topics that are the subject of the Panel's questions. Accordingly, while ICANN addresses the Panel's questions in this document, ICANN reiterates that many of the issues raised by the questions are not properly before the Panel.

ARGUMENT

I. IRP PANEL DECLARATIONS ARE NOT BINDING ON ICANN.

3. IRP Panel declarations are not binding on ICANN. The plain language of the IRP provisions set forth in Article IV, section 3 of ICANN's Bylaws, as well as the drafting history of the development of the IRP provisions, make clear that IRP Panel declarations are not binding on ICANN. There is no ambiguity on this issue. And the *ICM* IRP Panel recognized the proper scope and authority of an IRP panel when it correctly stated: "The holdings of the Independent Review Panel are advisory in nature; they do not constitute a binding arbitral award."[1]

[1] *ICM* IRP Panel Declaration (19 Feb. 2010) ¶ 152; *see also id*. ¶ 134 (the IRP Panel's declaration "is not binding, but rather advisory in effect"), *available at* http://www.icann.org/en/news/irp/icm-v-icann/news/irp/-panel-declaration-19feb10-en.pdf. To aid this IRP Panel, ICANN is attaching excerpts from its Response to

4. First, the Bylaws charge an IRP panel 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."[2] The authority of an IRP panel is not to "decide" or "rule" whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws. Moreover, the Board is obligated to "review[]"[3] and "consider" an IRP panel's declaration at the Board next meeting "where feasible."[4] The direction to "review" and "consider" an IRP panel's declaration means that the Board has discretion as to whether to adopt and implement that declaration; if the declaration were binding, there would be nothing to review or consider, only a binding order to implement.

5. Second, the lengthy drafting history of ICANN's independent review process confirms that IRP panel declarations are not binding. Specifically, the Draft Principles for Independent Review, drafted in 1999, state that "the ICANN Board should retain ultimate authority over ICANN's affairs – after all, it is the Board … that will be chosen by (and is directly accountable to) the membership and supporting organizations."[5] And when, in 2001, the Committee on ICANN Evolution and Reform ("ERC") recommended the creation of an independent review process, it called for the creation of "a process to require non-binding

(continued…)

ICM's Memorial on the Merits, which extensively set forth facts demonstrating that IRP panel declarations are non-binding. ICANN's Response to ICM's Memorial on the Merits, 28-44, *attached as* Ex. C-R-6. The *ICM* IRP Panel members unanimously recognized ICANN's arguments. *ICM* IRP Panel Declaration ¶¶ 133-34.

[2] Bylaws, Art. IV, § 3.4 (emphasis added). The IRP Panel has questioned whether the selection of the word "declare" suggests binding force. This term, standing alone, cannot conceivably be read to require a binding decision, particularly in the face of the voluminous evidence in the drafting history showing that the contrary was presupposed.

[3] Bylaws, Art. IV, § 3.11.d.

[4] *Id*. at Art. IV, § 3.21. Moreover, for the period during which the Board is reviewing and considering the IRP Panel's declaration, the Panel may merely "recommend," as opposed to "order," that the Board stay any action or decision "until such time as the Board reviews and acts upon the opinion of the IRP." *Id*. at Art. IV, § 3.11.d.

[5] Draft Principles for Independent Review, Interim report of the Advisory Committee on Independent Review With Addendum, *available at* http://cyber.law.harvard.edu/icann/berlin/archive/IRdraft.html.

arbitration by an international arbitration body to review any allegation that the Board has acted in conflict with ICANN's Bylaws."[6] The individuals who actively participated in the process also agreed that the review process would not be binding. As one participant stated: IRP "decisions will be nonbinding, because the Board will retain final decision-making authority."[7]

6. The only IRP Panel ever to issue a declaration, the *ICM* IRP Panel, unanimously rejected the assertion that IRP Panel declarations are binding[8] and recognized that an IRP panel's declaration "is not binding, but rather advisory in effect."[9] Nothing has occurred since the issuance of the *ICM* IRP Panel's declaration that changes the fact that IRP Panel declarations are not binding. To the contrary, in April 2013, following the *ICM* IRP, in order to clarify even further that IRPs are not binding, all references in the Bylaws to the term "arbitration" were removed as part of the Bylaws revisions. ICM had argued in the IRP that the use of the word "arbitration" in the portion of the Bylaws related to Independent Review indicated that IRPs were binding, and while the *ICM* IRP Panel rejected that argument, to avoid any lingering doubt, ICANN removed the word "arbitration" in conjunction with the amendments to the Bylaws.

7. The amendments to the Bylaws, which occurred following a community process on the proposed IRP revisions, added, among other things, a sentence stating that "declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value."[10] DCA argues that this new language, which does not actually use the word

---

[6] ICANN: A Blueprint for Reform (June 20, 2002), *available at* http://www.icann.org/en/committees/evol-reform/blueprint-20jun02.htm.
[7] Becky Burr, Recommendations Regarding Accountability at II (August 23, 2002), *available at* http://www.icann.org/en/committees/evol-reform/afap-report-23aug02.htm.
[8] The *ICM* IRP Panel specifically rejected the claimant's contention that use of the word "arbitration" in the then-existing Bylaws was determinative of an arbitral process that produces a binding award. *ICM* IRP Panel Declaration ¶ 133.
[9] *ICM* IRP Panel Declaration ¶ 134.
[10] DCA Proc. Br. ¶ 38.

"binding," nevertheless provides that IRP Panel declarations are binding, trumping years of drafting history, the sworn testimony of those who participated in the drafting process,[11] the plain text of the Bylaws, and the reasoned declaration of a prior IRP panel. DCA is wrong.

8. The language DCA references was added to ICANN's Bylaws to meet recommendations made by ICANN's Accountability Structures Expert Panel ("ASEP"). The ASEP was comprised of three world-renowned experts on issues of corporate governance, accountability, and international dispute resolution, and was charged with evaluating ICANN's accountability mechanisms, including the Independent Review process.[12] The ASEP recommended, *inter alia*, that an IRP should not be permitted to proceed on the same issues as presented in a prior IRP. The ASEP's recommendations in this regard were raised in light of the second IRP constituted under ICANN's Bylaws, where the claimant presented claims that would have required the IRP Panel to reevaluate the declaration of the IRP Panel in the *ICM* IRP. To prevent claimants from challenging a

[11] Vint Cerf, the former Chair of ICANN's Board, testified in the *ICM* IRP that the independent review panel "is an advisory panel. It makes recommendations to the board but the board has the ultimate responsibility for deciding policy for ICANN." *ICM v. ICANN*, Hearing Transcript, September 23, 2009, at 592:7-11; *see also id*. at 585:3-5, 591:16-594:13, *available at* http://www.icann.org/en/news/irp/icm-v-icann/transcript-testimony-icm-independent-review-proceeding-23sep09-en.pdf. Alejandro Pisanty, the Chair of the ERC, testified in the *ICM* IRP that "[i]t was decided to make this arbitration nonbinding in the thought that the liabilities and responsibilities for anything that's done should lie on the board." *ICM v. ICANN*, Hearing Transcript, September 24, 2009, at 807, 813:17-20; *see also id*. at 810:15-818:18, *available at* http://www.icann.org/en/news/irp/icm-v-icann/redacted-transcript-testimony-icm-independent-review-proceeding-24sep09-en.pdf.

[12] ICANN convened the ASEP in April 2012, following the recommendation of the Accountability and Transparency Review Team 1 ("ATRT1"). *See* ATRT1 Recommendations, *available at* https://www.icann.org/en/about/aoc-review/atrt/final-recommendations-31dec10-en.pdf. The ATRT1 was itself convened in accordance with ICANN's Affirmation of Commitments (AoC) with the Department of Commerce, in which ICANN committed to "maintain and improve robust mechanisms for public input, accountability, and transparency," and "organize a review of its execution of [those] commitments" at least once every three years. *See* ICANN AoC, *available at* https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en. Like the ASEP after it, the ATRT1 solicited community involvement and comment as part of its review process. *See* https://www.icann.org/resources/pages/1-2012-11-14-en.

prior IRP Panel declaration, the ASEP recommended that "[t]he declarations of the IRP, and ICANN's subsequent actions on those declarations, should have precedential value."[13]

9. The ASEP's recommendations in this regard did not convert IRP Panel declarations into binding decisions.[14] One of the important considerations underlying the ASEP's work was the fact that ICANN, while it operates internationally, is a California non-profit public benefit corporation subject to the statutory law of California as determined by United States courts. That law requires that ICANN's Board retain the ultimate responsibility for decision making.[15] As a result, the ASEP's recommendations were premised on the understanding that the declaration of the IRP Panel is not "binding" on the Board.

10. In any event, a declaration clearly can be both non-binding and precedential.

> In the United States . . . [w]hen the prior court is the same as the subsequent court, the general rule is that precedent is not binding, even though a court may give great weight to its own prior decisions. If the prior court is at the same level as the subsequent court but the two courts are coordinate rather than identical, as in the case of two district courts in the federal system, then stare decisis is not binding on the subsequent court."[16]

---

[13] ASEP Report, October 2012, *available at* http://www.icann.org/en/news/in-focus/accountability/asep/report-26oct12-en.pdf.

[14] The ASEP confirmed the non-binding nature of the IRP on 17 October 2012 at a public session where community members were able to "give feedback [and] hear from the panel on the work that they [had] been doing so far." *See* Transcript of 17 Oct. 2012 Public Session with ASEP Panel, *available at* http://toronto45.icann.org/meetings/toronto2012/transcript-asep-17oct12-en.pdf. Graham McDonald, one of the three ASEP experts, explained the guiding principles for the ASEP's work: "As you would be aware, ICANN is an incorporated not-for-profit Californian company, and the corporations law of California applies, and as part of that law, the board has to retain responsibility for decision-making, so that in any recommendation that is made for -- or that arises out of a review, the board still has the final word on." *Id*. at Pg. 5.

[15] Cal. Civ. Code § 5210 ("[T]he activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.")

[16] 18-134 Moore's Federal Practice - Civil § 134.02 [1][a]; *see also In re Silverman*, 616 F.3d 1001, 1004-05 (9th Cir. 2010) (affirming a bankruptcy court's holding that a district court decision from another district constituted "non-binding precedent"); *Kuhns v. City of Allentown*, 636 F. Supp. 2d 418, 437 (E.D. Pa. 2009) ("the Opinions of other district courts are persuasive but not binding authority on this Court"); *McNamara v. Royal Bank of Scotland Group, PLC*, No. 11-cv-2137-L (WVG), 2013 U.S. Dist. LEXIS 66516, at *8 (S.D. Cal. May 8, 2013) (defining "persuasive authority" as "[a] precedent that is not binding on a court, but that is entitled respect and careful consideration").

II. ICANN HAS THE AUTHORITY TO ESTABLISH THE PROCEDURES FOR ITS OWN INTERNAL ACCOUNTABILITY MECHANISMS, AND DCA VOLUNTARILY AGREED TO THOSE MECHANISMS.

11. The Panel has posed questions relating to the propriety of ICANN's internal accountability mechanisms and the gTLD application signed by DCA, including questions relating to due process and unconscionability.[17] These questions are well outside the scope of the Panel's narrow mandate established under ICANN's Bylaws, *i.e.,* to declare whether the Board violated ICANN's Bylaws or Articles of Incorporation in its consideration of DCA's application for .AFRICA.[18]

12. California non-profit public benefit corporations, such as ICANN, are expressly authorized to establish internal accountability mechanisms and to define the scope and form of those mechanisms.[19] Pursuant to this explicit authority, ICANN established the Independent Review process, as well as the procedures that would govern that process. ICANN was not required to establish ***any*** internal corporate accountability mechanism, but instead did so ***voluntarily***. Accordingly, DCA does not have any "due process" or "constitutional" rights with respect to the Independent Review process.[20]

---

[17] ICANN is attempting to answer all of the questions posed by the IRP Panel, but because many of the questions are related, ICANN is addressing the questions collectively, rather than individually.

[18] Although ICANN does not concede that the IRP process is subject to the Federal Arbitration Act or the California Arbitration Act, it is worth noting that under those statutes, "enforceability of an arbitration agreement is ordinarily to be determined by the court" unless it is established "by clear and unmistakable evidence that the parties intended to delegate the issue to the arbitrator." *Ajamaian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 781-82 (2012) (noting that California law is consistent with the FAA with regard to the application of the "clear and unmistakable" rule).

[19] Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation's bylaws).

[20] DCA continues to argue that the IRP process constitutes an "arbitration." DCA is wrong. In all events, as ICANN noted in its previous memorandum, the United States Supreme Court has repeatedly affirmed the right of parties to tailor unique rules for dispute resolution processes, including even *binding arbitration proceedings*, and international arbitration norms similarly recognize the right of parties to tailor their own, unique arbitral procedures. ICANN Memo Re: Procedural Issues ¶¶ 19-21. The Panel inquired about the procedures of arbitration providers such as the ICDR, UNCITRAL, the ICC, and JAMS. Each of those providers' rules specifically allow for the parties to substitute their own arbitral procedures. *See* ICDR Arbitration Rules Art.

13. Nonetheless, "due process" considerations were duly considered and appropriately accounted for in the design of the revised IRP. In refining and enhancing the Independent Review process, as discussed above, ICANN engaged world-renowned dispute resolution experts to participate in the ASEP and, in keeping with ICANN's commitment to accountability and transparency, ICANN solicited advice and input from the Internet community. On 17 October 2012, ICANN held a public session with all three of the ASEP's experts, at which community members were able to "give feedback [and] hear from the panel on the work that they [had] been doing so far."[21] Thereafter, ICANN requested written public comments on the ASEP's report, and subsequently published an analysis of and response to all the comments received.[22] ICANN also published proposed revisions to ICANN's Bylaws to meet the recommendations of the ASEP.[23] In short, the Bylaws provisions that DCA now objects to—including the rule against presenting evidence at any IRP hearing—were adopted only after being publicly vetted with ICANN's stakeholders and the broader Internet community.

14. DCA voluntarily applied for a gTLD and lawfully waived its rights to sue ICANN for claims arising out of its gTLD application. DCA also voluntarily agreed, as part of that

(continued…)

1(a) ("[T]he arbitration shall take place in accordance with these Rules, as in effect at the date of commencement of the arbitration, subject to whatever modifications the parties may adopt in writing."); JAMS Comprehensive Arbitration Rules and Procedures, Rule 2 ("The Parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies"); UNCITRAL Arbitration Rules, Art. 1 ("[S]uch disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree."); ICC Arbitration and ADR Rules, Art. 23.1(g) (Terms of Reference shall include the "particulars of the applicable procedural rules"), Appendix IV (providing for the parties' use of "case management techniques . . . for controlling time and cost," including "[i]dentifying issues to be decided solely on the basis of documents rather than through oral evidence or legal argument at a hearing.")

[21] *See* Transcript of 17 October 2012 Hearing with ASEP, *available at* http://toronto45.icann.org/meetings/toronto2012/transcript-asep-17oct12-en.pdf.

[22] http://forum.icann.org/lists/asep-recommendations/; https://www.icann.org/en/news/public-comment/report-comments-asep-recommendations-12dec12-en.pdf.

[23] https://www.icann.org/en/news/public-comment/asep-recommendations-26oct12-en.htm.

application process, that if it chose to, it could submit itself to ICANN's internal accountability mechanisms. ICANN was not required to provide DCA the recourse of any review mechanism, much less a binding arbitration. A waiver of the right to sue is enforceable under California law even if it does not provide parties ***any*** alternative recourse, which was not the case here.[24]

15. The waiver signed by DCA is not unconscionable. A finding of unconscionability is appropriate only when a contract provision is ***both*** procedurally and substantively unconscionable, and the waiver at issue here is neither.[25] The waiver is not procedurally unconscionable: DCA is a business entity with the resources to pay $185,000 for the opportunity to have its application considered by ICANN, and the terms of the application, including the waiver, are and were publicly available and clearly known to DCA in advance of DCA submitting its application.[26] The terms of the gTLD Applicant Guidebook were extensively vetted by ICANN over a course of years and included a total of ten versions with multiple notice and public comment periods.[27] And, DCA was neither required nor entitled to apply for .AFRICA; it submitted its application voluntarily,

[24] *See, e.g.*, *Sanchez v. Bally's Total Fitness Corp.*, 68 Cal. App. 4th 62, 67 (1998) (upholding a total release of claims in an adhesion contract involving a consumer, noting that the consumer plaintiff did not argue that the language of the release was "unclear and ambiguous" and that the defendant "rationally required a release . . . as a condition of" entering into the contract).

[25] *Fittante v. Palm Springs Motors, Inc.*, 105 Cal. App. 4th 708, 722-23 (2003) ("Both procedural and substantive unconscionability must be present to deny enforcement to the contract….") (internal quotation marks and citations omitted).

[26] *See O'Donoghue v. Superior Court*, 219 Cal. App. 4th 245, 258-59 (2013) (Despite lenders' arguments that "they were presented with the [loan] agreements in a 'take-it-or leave-it manner," and "felt they had no option but to sign the agreements to obtain the [needed] loan," the court held that "the adhesive aspect of a contract is not dispositive on the issue of unconscionability." The court found that "[e]ven if we do assume an imbalance in bargaining power, and that [the bank], as the stronger party, presumably prepared the [agreements] with an eye to its own advantage, and even if we also assume that [the bank] would not have countenanced the striking of the … reference provisions, [the lenders] have nevertheless only shown a low level of procedural unconscionability because . . . the elements of surprise or misrepresentation are not present.").

[27] The current version of the Guidebook is available at http://newgtlds.icann.org/en/applicants/agb. The prior versions of the Guidebook are available at http://newgtlds.icann.org/en/about/historical-documentation.

knowingly, and under no duress.[28] Moreover, the application made clear that the submission of the application did not constitute a right to operate the applied-for TLD.[29]

16. The waiver is not substantively unconscionable because "it does not "allocate[] the risks of the bargain in an objectively unreasonable or unexpected manner,"[30] but rather is justified by ICANN's "legitimate commercial need."[31] The waiver provision was included because ICANN is "a non-profit public benefit corporation and lacks the resources to defend against potentially numerous lawsuits . . . initiated by applicants."[32] It is therefore entirely reasonable that ICANN would require such a waiver, without which ICANN could face serious financial constraints in administering the New gTLD Program. Further, ICANN did not exclude all avenues of recourse. All applicants may avail themselves of ICANN's Ombudsman, Reconsideration process and the Independent Review process, which allows challenges on multiple bases, such as unfairness, failure to adhere to defined policies or processes, failure to consider material information in taking action, and ultimately, failure to adhere to ICANN's Bylaws or Articles of Incorporation.

17. ICANN is also authorized to set the rules governing how its corporate accountability mechanisms are administered.[33] With respect to the Independent Review process, ICANN's Bylaws, the Supplementary Rules, and the ICDR Rules govern.[34] If the ICDR Rules

---

[28] *See Captain Bounce, Inc. v. Business Fin. Servs.*, No. 11-cv-858 JLS (WMC), 2012 U.S. Dist. LEXIS 36750, at *19 (S.D. Cal. Mar. 19, 2012) ("[T]he Court agrees with Defendants that the business-to-business context of the Agreements is relevant . . . Plaintiffs are sophisticated borrowers distinguishable from the consumer or employee plaintiff who is a party to the typical unconscionable contract."); *see also A&M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 489 (1982) ("[C]ourts have not been solicitous of businessmen in the name of unconscionability . . . probably because courts view businessmen as possessed of a greater degree of commercial understanding and substantially more economic muscle than the ordinary consumer.").

[29] gTLD Application Terms and Conditions ¶ 3.

[30] *Fittante*, 105 Cal. App. 4th at 722-723.

[31] *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1134 (2013).

[32] http://archive.icann.org/en/topics/new-gtlds/gac-board-legal-recourse-21feb11-en.pdf.

[33] Cal. Corp. Code §5210 ("[T]he activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board.").

[34] Bylaws, Art. IV, § 3.8 ("Subject to the approval of the [ICANN] Board, the IRP Provider shall establish operating rules and procedures, ***which shall implement and be consistent with this Section 3***.").

conflict with the Supplementary Rules or ICANN's Bylaws, the IRP Panel is required to apply to the rules set forth in the Bylaws and Supplementary Rules.[35]

18. On the topic of live witness testimony, Paragraph 4 of the Supplementary Procedures and Article IV, Section 3.12 of the Bylaws are dispositive and expressly prohibit live witness testimony: "***the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance***."[36] DCA ignores this mandate, and instead argues that Article 16(1) of the ICDR Rules—which is silent on the topic of live witness testimony—makes it "clear" that the Panel has the discretion to conduct live witness examination.[37] In so doing, DCA urges the IRP Panel to apply the ICDR Rules in a manner that directly contradicts ICANN's Bylaws and the Supplementary Procedures; there is ***no way*** to harmonize DCA's position with the language of the Bylaws and Supplementary Procedures.[38] As discussed above, the Panel simply does not have the discretion to modify or ignore the Supplementary Procedures.

CONCLUSION

ICANN again thanks the Panel for its considerable attention to these issues and looks forward to a swift resolution of these Independent Review proceedings.

Respectfully submitted,

Dated: 20 May 2014

By: Jeffrey A. LeVee /kpw

Jeffrey A. LeVee
Jones Day
Counsel for Respondent ICANN

LAI-3215285v1

---

[35] *Id.*; *see also* Supplementary Procedures ¶ 2 ("In the event there is any inconsistency between these Supplementary Procedures and the [ICDR Rules], these Supplementary Procedures will govern.").
[36] Bylaws, Art. IV, § 3.12, Supplementary Procedures ¶ 4.
[37] DCA Proc. Br. ¶ 65.
[38] Supplementary Procedures ¶ 2 ("In the event there is any inconsistency between these Supplementary Procedures and the [ICDR Rules], these Supplementary Procedures will govern.").