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 MEMORANDUM REGARDING PROCEDURAL ISSUES

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INTRODUCTION

1. Pursuant to the Panel's Procedural Order No. 1 issued on 24 April 2014, the Internet Corporation for Assigned Names and Numbers ("ICANN") hereby submits this Brief Regarding Procedural Issues.

FACTUAL AND PROCEDURAL BACKGROUND

2. This Independent Review proceeding involves an application for a new generic Top Level Domain ("gTLD") submitted by Claimant DotConnectAfrica Trust ("DCA"). The ICANN Board has accepted advice from ICANN's Governmental Advisory Committee ("GAC") that DCA's application should not proceed, and DCA is challenging that decision.

3. ICANN has three "accountability mechanisms" set out in its Bylaws that allow parties affected by an ICANN decision, including a final decision on a gTLD application, to seek some form of review of that decision.[1] One of the accountability mechanisms set forth in ICANN's Bylaws, the Independent Review Process ("IRP"), provides for "independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws."[2] In its fifteen-year history, ICANN has had only one IRP that went to a decision. Specifically, in June 2008, ICANN received its first IRP request, which was filed by

[1] The three mechanisms are the Ombudsman, the Reconsideration process and the Independent Review process. (ICANN's Bylaws ("Bylaws") Art. IV, V.) All applicants for new gTLDs, including DCA, were required to agree in their applications that, in the event they wished to challenge any "final decision made by ICANN with respect to [their] application[s]," that challenge could occur only through the "accountability mechanism[s] set forth in ICANN's Bylaws." Generic Top Level Domains Application Terms and Conditions ¶ 6, *available at* http://newgtlds.icann.org/en/applicants/agb/terms. ICANN's Board has publicly stated that this provision was included in the gTLD application because ICANN is "a non-profit public benefit corporation and lacks the resources to defend against potentially numerous lawsuits . . . initiated by applicants ." ICANN Board-GAC Consultation: "Legal Rescourse" for New gTLD Registry Applicants at p. 2, *available at* http://archive.icann.org/en/topics/new-gtlds/gac-board-legal-recourse-21feb11-en.pdf.

[2] Bylaws, Art. IV, § 3, *available at* http://www.icann.org/en/about/governance/bylaws/bylaws-11apr13-en.htm..

ICM Registry, LLC ("*ICM* IRP").[3] That IRP involved extensive discovery and a five-day hearing that included lengthy witness testimony. The IRP wound up costing the parties millions of dollars, and the IRP Panel took over a year and a half to render its declaration.[4]

4. In 2012, after the *ICM* IRP, and as part of its commitment to accountability and transparency, ICANN convened the Accountability Structures Expert Panel ("Experts"),[5] comprised of three world-renowned Experts on issues of corporate governance, accountability, and international dispute resolution to evaluate ICANN's accountability mechanisms as well as the prior evaluations and modifications of those mechanisms, including the Independent Review process. After significant and substantive research and review of ICANN's accountability mechanisms, the Experts recommended certain enhancements and refinements to the Reconsideration process and Independent Review process, with a focus on effectiveness, efficiency, ease of access, and expeditious resolution, as well as maintaining and enhancing ICANN's accountability to the community and the global public interest. After extensive analysis, including multiple opportunities for community input of the Expert's recommendations, ICANN amended its Bylaws with respect to the Independent Review process in order to streamline the proceedings dramatically.[6] Those Bylaws amendments, and the Supplementary

[3] ICM's Request for Independent Review Process, *available at* http://www.icann.org/en/news/irp/icm-v-icann/icm-irp-request-06jun08-en.pdf.

[4] 19 February 2010 Declaration of Independent Review Panel, *available at* http://www.icann.org/en/news/irp/icm-v-icann/news/irp/-panel-declaration-19feb10-en.pdf.

[5] The experts were Mervyn King S.C., a former Judge of the Supreme Court of South Africa; Graham MacDonald, a Presidential Member of Australia's Administrative Appeals Tribunal; and Richard Moran, a widely known expert on corporate leadership and governance. For more information, *see* Accountability Structures Expert Panel (ASEP), *available at* http://www.icann.org/en/news/in-focus/accountability/asep. *See also*, Report by Accountability Structures Expert Panel (ASEP), *available at* http://www.icann.org/en/news/in-focus/accountability/asep/report-26oct12-en.pdf

[6] 11 April 2013 Approved Board Resolutions, *available at* http://www.icann.org/en/groups/board/documents/resolutions-11apr13-en.htm#1.d.

Procedures ("Supplementary Procedures") that set forth additional procedural rules for IRP proceedings, went into effect on 11 April 2013, six months before DCA filed its Notice of Independent Review.[7] Nonetheless, DCA's proposal for conducting this IRP proceeding disregards the community-vetted and Board-approved changes to the IRP and/or argues that those changes are "unfair" or somehow inapplicable because this is a quasi-international arbitration.

5. On 9 January 2014, prior to the filing of DCA's Amended Notice, ICANN explicitly emphasized that the Supplementary Procedures govern this IRP, stating in an email to DCA's counsel that, in ICANN's view, the Supplementary Rules bar the filing of supplemental submissions.[8] At no time prior to the initial call with the IRP Panel on 22 April had DCA ever suggested that the amendments to ICANN's Bylaws and Supplementary Procedures did not apply to these proceedings (which they undoubtedly do).

6. On 15 April 2014, following the constitution of the Panel and in light of DCA's 13 April 2014 Request for an Emergency Stay, ICANN submitted a procedural proposal aimed at expediting the Panel's resolution of this IRP. ICANN's proposal pointed out that, pursuant to the rules governing this proceeding, the parties had concluded their briefing, and the Panel needed only to conduct a hearing pursuant to Article IV, Section 3 of ICANN's Bylaws before reaching a decision on the merits. ICANN proposed that if the Panel set a hearing date that would allow it to commit to issuing a ruling on the merits by 15 May 2014, the need for any emergency relief would be eliminated because "[a]s a practical matter, [ICANN would] not be in

[7] Bylaws as Amended 11 April 2013, *available at* http://www.icann.org/en/about/governance/bylaws/bylaws-11apr13-en.htm.

[8] 9 January 2014 Letter from Jeffrey A. LeVee to Carolina Cardenas-Soto, Arif Ali and Marguerite Walter copied, attached as Ex. 1.

a position to . . . take the final steps that are necessary to delegate the .AFRICA TLD to ZA Central Registry" prior to 15 May.[9]

7. On 17 April 2014, DCA wrote a letter to the Panel objecting to ICANN's proposal. DCA proposed a schedule that would delay the Panel's ruling until at least September 2014, eleven months after it filed its Notice of IRP.[10] DCA argued that it had submitted its Amended Notice "on the understanding that opportunities would be available to make further submissions," failing to mention the 9 January 2014 email from ICANN's counsel that put DCA on notice that it would not be entitled to further briefing.[11] Without giving any indication of what evidence it planned to submit to refute the arguments and evidence in ICANN's Response, DCA contended that it "would be highly inappropriate to close the written record already, without further development of the disputed facts that require clarification through additional documentary evidence and/or testimony."[12] DCA took this position despite the fact that DCA, the Claimant, had the burden of presenting evidence proving its claims at the outset of this case, as required by the Supplementary Procedures that apply to these proceedings.[13]

8. On 20 April 2014, ICANN responded to DCA's proposal. It noted that DCA's proposal would severely delay the resolution of this IRP and pointed out that DCA's proposal

[9] 15 April 2014 email from Jeffrey LeVee to Babak Barin, Arif Ali, Carolina Cardenas-Soto copied, attached as Ex. 2.

[10] 17 April 2014 letter from DCA to President and Members of the Panel at 8, attached as Ex. 3.

[11] *Id*. at 2.

[12] *Id*.

[13] *See* ICDR Rules, Art. 19.1 ("Each party shall have the burden of proving the facts relied on to support its claim or defense."); Supplementary Procedures ¶ 5 ("All necessary evidence to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the [initial written] submission.")

"ignore[d] the significant changes that have been made to the rules for IRPs."[14] That same day, DCA responded to ICANN's letter and argued that the Supplementary Procedures "ultimately commit the conduct of the IRP to the discretion of the Panel."[15] DCA cited to no provision in the Supplementary Procedures giving the Panel such unfettered discretion, since no such provision exists.

9. On 22 April 2013, the parties participated in a telephone conference call ("22 April Call") with the Panel, during which the parties' procedural proposals were discussed. Noting the importance of the issues raised by the parties, the Panel requested that the parties submit briefs addressing the issues of: (1) *viva voce* testimony; (2) document requests; (3) additional filings; and (4) the method of hearing, whether telephonic, by video, or in-person.

ARGUMENT

I. THIS PROCEEDING IS AN INTERNAL ACCOUNTABILITY MECHANISM CONSTITUTED UNDER AND GOVERNED BY ICANN'S BYLAWS. IT IS NOT AN INTERNATIONAL ARBITRATION.

10. This proceeding is ***not*** an arbitration. Rather, an IRP is a truly unique "Independent Review" process established in ICANN's Bylaws with the specific purpose of providing for "independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws."[16] Although ICANN is using the International Center for Dispute Resolution ("ICDR") to administer these proceedings, nothing in the Bylaws can be construed as converting these proceedings into an "arbitration," and the Bylaws make clear that that these proceedings are not to be deemed as the equivalent of an "international arbitration." Indeed, the word "arbitration" does not appear in the relevant portion

[14] 20 April 2014 letter from ICANN to President and Members of the Panel at 2, attached as Ex. 4.

[15] 20 April 2014 letter from DCA to President and Members of the Panel at 2, attached as Ex. 5.

[16] Bylaws, Art. IV, § 3.1 (emphasis added).

of the Bylaws, and as discussed below, the ICANN Board retains full authority to accept or reject the declaration of all IRP Panels.

11. ICANN's Board had the authority to, and did, adopt Bylaws establishing internal accountability mechanisms and defining the scope and form of those mechanisms. Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation's bylaws). Indeed, ICANN would be in violation of its Bylaws were it to submit to an IRP conducted in a manner inconsistent with the Bylaws, which is what DCA is suggesting be done. ICANN's Bylaws state that "ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws" and provide for accountability mechanisms to reinforce ICANN's duty to act in consistence with its Bylaws.[17] ICANN should not be called on to violate certain provisions of its Bylaws, while ICANN is simultaneously being called on to explain why ICANN did not violate other provisions of its Bylaws.

12. Article IV, Section 3 of the Bylaws establishes "Independent Review of Board Actions" and addresses such items as the deadline for filing an IRP request, the standard of review to be applied to IRP requests, and the authority of IRP panels. With respect to the procedures governing IRP proceedings, Section 3 both addresses certain procedural issues and provides that "***[s]ubject 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***."[18]

13. Pursuant to Section 3, the ICANN Board has approved the use of the ICDR's International Arbitration Rules in IRPs in conjunction with the Supplementary Procedures.

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[17] Bylaws, Art. IV, § 1; *see also* Bylaws, Art. IV, §§ 2-3; Bylaws, Art. V, § 3.1.)

[18] Bylaws, Art. IV, § 8.

However, just as the Bylaws require that the ICDR Rules and the Supplementary Procedures "be consistent" with the IRP procedures set forth in the Bylaws, Paragraph 2 of the Supplementary Procedures requires that "***[i]n the event there is any inconsistency between these Supplementary Procedures and [the ICDR Rules], these Supplementary Procedures will govern***."[19] In sum, while ICANN has approved the use of the ICDR Rules, it has been clear that those rules are subordinate to the Bylaws and the Supplementary Procedures.

14. As noted above, DCA agreed to abide by the rules of the Independent Review process when it chose to apply for .AFRICA. The Terms and Conditions of the gTLD Applications state:

> Applicant agrees not to challenge, in court or in any other judicial fora, any final decision made by ICANN with respect to the Application . . . provided that Applicant may utilize any accountability mechanism set forth in ICANN's Bylaws for the purposes of challenging any final decision made by ICANN with respect to the application.[20]

DCA was neither required nor entitled to apply for .AFRICA. Nor does DCA (or any entity) have any "right" to any particular gTLD. In choosing to apply for a gTLD, DCA limited its recourse to ICANN's internal accountability mechanisms. In filing an IRP, DCA submitted itself to the rules established by ICANN (following community input) that govern IRPs.

II. LIVE WITNESS TESTIMONY IS NOT PERMITTED PURSUANT TO THE RULES GOVERNING THIS PROCEEDING.

15. Both the Supplementary Procedures and ICANN's Bylaws unequivocally and unambiguously prohibit live witness testimony in conjunction with any IRP. Paragraph 4 of the Supplementary Procedures, which governs the "Conduct of the Independent Review," states:

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[19] ICANN's Supplementary Procedures for Independent Review Process ("Supplementary Procedures") ¶ 2 (emphasis added), *available at* https://www.adr.org/cs/groups/international/documents/document/z2uy/mde0/~edisp/adrstage2014403.pdf.

[20] Top-Level Domain Application Terms and Conditions ¶ 6.

> The IRP Panel should conduct its proceedings by electronic means to the extent feasible . . . . In the extraordinary event that an in-person hearing is deemed necessary by the panel presiding over the IRP proceeding . . . ***the in-person hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance. Telephonic hearings are subject to the same limitation.***[21]

16. Indeed, two separate phrases of Paragraph 4 explicitly prohibit live testimony: (1) the phrase limiting the in-person hearing (and similarly telephonic hearings) to "argument only," and (2) the phrase stating that "all evidence, including witness statements, must be submitted in advance." The former explicitly limits hearings to the argument of counsel, excluding the presentation of any evidence, including any witness testimony.[22] The latter reiterates the point that *all* evidence, *including witness testimony*, is to be presented in writing and prior to the hearing. Each phrase unambiguously excludes live testimony from IRP hearings. Taken together, the phrases constitute irrefutable evidence that the Supplementary Procedures establish a truncated hearing procedure.

17. Paragraph 4 of the Supplementary Procedures is based on the exact same and unambiguous language in Article IV, Section 3.12 of the Bylaws, which provides that "[i]n the unlikely event that a telephonic or in-person hearing is convened, ***the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance***."[23]

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[21] Supplementary Procedures ¶ 4 (emphasis added).

[22] *See Burrell v. McIlroy*, 464 F.3d 853, 860 (9th Cir. 2006) (noting the distinction between "counsel's argument" and "record evidence").

[23] *Id*. (emphasis added).

18. While DCA may prefer a different procedure, the Bylaws and the Supplementary Procedures could not be any clearer in this regard.[24] Despite the Bylaws' and Supplementary Procedures' clear and unambiguous prohibition of live witness testimony, DCA attempts to argue that the Panel should instead be guided by Article 16 of the ICDR Rules, which states that subject to the ICDR Rules, "the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case."[25] However, as discussed above, the Supplementary Procedures provide that "[i]n the event there is any inconsistency between these Supplementary Procedures and [ICDR's International Arbitration Rules], these Supplementary Procedures will govern," and the Bylaws require that the ICDR Rules "be consistent" with the Bylaws.[26] As such, the Panel ***does not have discretion*** to order live witness testimony in the face of the Bylaws' and Supplementary Procedures' clear and unambiguous prohibition of such testimony.

19. During the 22 April Call, DCA vaguely alluded to "due process" and "constitutional" concerns with prohibiting cross-examination. As ICANN did after public consultation, and after the *ICM* IRP, ICANN has the right to establish the rules for these procedures, rules that DCA agreed to abide by when it filed its Request for IRP. First, "constitutional" protections do not apply with respect to a *corporate accountability mechanism*.

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[24] During the 22 April Call, DCA appeared to contest, for the first time, whether the current version of the Supplementary Procedures apply in this case, contrary to the positions both sides had previously taken. During an initial administrative call with the ICDR on 4 December 2013, DCA requested a copy of the rules governing the IRP proceeding. At that time, ICANN provided DCA with a copy of the current and applicable version of the Supplementary Procedures. Until the 22 April Call, DCA never contested the applicability of those Procedures. In fact, in its 17 April 2014 and 20 April 2014 letters to the Panel, DCA cited to and relied on the current version of the Supplementary Procedures. (*See, e.g.*, Ex. 3 at p. 5 n.13, Ex. 5 at p. 2.)

[25] ICDR Rules, Art. 16.

[26] Supplementary Procedures ¶ 2.

Second, "due process" considerations (though inapplicable to corporate accountability mechanisms) were already considered as part of the design of the revised IRP.[27] And 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* (which an IRP is not). The Supreme Court has specifically noted that "[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. . . . And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution."[28]

20. The U.S. Supreme Court has explicitly held that the right to tailor unique procedural rules includes the right to dispense with certain procedures common in civil trials, including the right to cross-examine witnesses.[29] The Court noted that

> [T]he factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; *and* ***rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable*** . . . . Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution.")[30]

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[27] During the 22 April Call, the question of the applicability of the Federal Arbitration Act ("FAA") was raised. Whether or not the FAA applies here, U.S. case law is clear that parties have the right to tailor their own arbitration procedures. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748-49 (2011) ("The principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms . . . The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.") (internal quotations marks and citations omitted.) Similarly, whether or not the California Arbitration Act ("CAA") applies in this case, the CAA explicitly states that parties are entitled to cross-examine witnesses at hearing *only if* the parties' agreement does not provide otherwise. Cal. Civ. Proc. Code § 1282.2.

[28] *AT&T Mobility LLC*, 131 S. Ct. at 1748-1749; *see also 14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009) (noting that parties "trade the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.") (quotation marks and citations omitted).

[29] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 648 n.14 (1985).

[30] *Id*. (internal quotation marks and citations omitted) (emphasis added).

21. Similarly, international arbitration norms recognize the right of parties to tailor their own, unique arbitral procedures. "***Party autonomy is the guiding principle in determining the procedure to be followed in international arbitration***. It is a principle that is endorsed not only in national laws, but by international arbitral institutions worldwide, as well as by international instruments such as the New York Convention and the Model Law."[31]

22. In short, even if this were a formal "arbitration," ICANN would be entitled to limit the nature of these proceedings so as to preclude live witness testimony. The fact that this proceeding is not an arbitration further reconfirms ICANN's right to establish the rules that govern these proceedings.

23. DCA argues that it will be prejudiced if cross-examination of witnesses is not permitted. However, the procedures give both parties equal opportunity to present their evidence—the inability of either party to examine witnesses at the hearing would affect both the Claimant and ICANN equally. In this instance, DCA did not submit witness testimony with its Amended Notice (as clearly it should have). However, were DCA to present any written witness statements in support of its position, ICANN would not be entitled to cross examine those witnesses, just as DCA is not entitled to cross examine ICANN's witnesses. Of course, the parties are free to argue to the IRP Panel that witness testimony should be viewed in light of the fact that the rules to not permit cross-examination.

[31] *Redfern and Hunter on International Arbitration* § 6.08, Blackaby & Partasides (5th ed. 2009) (emphasis added).

III. DCA HAS NO RIGHT TO SUPPLEMENTAL BRIEFING, AND FURTHER BRIEFING IS NEITHER APPROPRIATE NOR NECESSARY.

24. DCA has no automatic right to additional briefing under the Supplementary Procedures. Paragraph 5 of the Supplementary Procedures, which governs written statements, provides:

> The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. ***All necessary evidence to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission.*** Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. ***The IRP Panel may request additional written submissions from the party seeking review***, the Board, the Supporting Organizations, or from other parties.[32]

This section clearly provides that DCA's opportunity to provide briefing and evidence in this matter has concluded, subject only to a request for additional briefing from the Panel. DCA has emphasized that the rule references the "initial" written submission, but the word "initial" refers to the fact that the Panel "may request additional written submissions," not that DCA has some "right" to a second submission. There is no Supplementary Rule that even suggests the possibility of a second submission as a matter of right. The fact that DCA has twice failed to submit evidence in support of its claims is not justification for allowing DCA a third attempt.

25. Further, as ICANN noted in its 20 April 2014 letter to the Panel, DCA's argument that it submitted its papers "on the understanding that opportunities would be available to make further submissions" is false. ICANN stated in an email to DCA's counsel on 9 January 2014—

[32] Supplementary Procedures ¶ 5 (emphasis added).

prior to the submission of DCA's Amended Notice—that the Supplementary Rules bar the filing of supplemental submissions absent a request from the Panel.[33]

26. The decision as to whether to allow supplemental briefing is within the Panel's discretion, and ICANN urges the Panel to decline to permit supplemental briefing for two reasons. First, despite having months to consider how DCA might respond to ICANN's presentation on the merits, DCA has never even attempted to explain what it could say in additional briefing that would refute the materials in ICANN's presentation. Indeed, when DCA filed its request for emergency relief on 28 March 2014, it did not indicate that it had witnesses who could respond to ICANN's briefing; DCA did not even acknowledge that ICANN had submitted its brief. During the 22 April Call, DCA's counsel remained unable to identify a single witness who has specific knowledge regarding the GAC's consideration of DCA's application.[34] The fact that DCA is unable to identify supplemental witnesses sixth months after filing its Notice of IRP is strong indication that further briefing would not be helpful in this case. Second, as ICANN has explained on multiple occasions, DCA has delayed these proceedings substantially, and further briefing would compound that delay.

27. Finally, as ICANN noted in its letter of 20 April 2014, despite DCA's attempts to frame this case as implicating issues "reach[ing] far beyond the respective rights of the parties as concerns the delegation of .AFRICA," the issues in this case are in fact extremely limited in scope. This Panel is authorized only to address whether ICANN violated its Bylaws or Articles of Incorporation *in its handling of DCA's Application for .AFRICA*. The parties have had the

[33] 9 January 2014 email from Jeffrey A. LeVee, Ex. 1.

[34] The only witness DCA counsel identified was Sophia Bekele, DCA's Executive Director, who is not a member of the GAC and therefore almost certainly does not have firsthand knowledge of the GAC's consideration of DCA's application. Nor would Ms. Bekele have firsthand knowledge of ICANN's internal processes for evaluating alleged conflicts of interests of ICANN Board members.

opportunity to submit briefs and evidence regarding that issue. DCA has given no indication that it has further dispositive arguments to make or evidence to present. The Panel should resist DCA's attempt to delay these proceedings even further via additional briefing.

IV. DCA HAS NO AUTOMATIC RIGHT TO DISCOVERY AND HAS NOT DEMONSTRATED ANY NEED FOR DISCOVERY.

28. Pursuant to the ICDR Guidelines for Arbitrators on Exchanges of Information ("Discovery Rules"), a party must request that a panel order the production of documents. Those documents must be "reasonably believed to exist and to be relevant and material to the outcomes of the case," and requests must contain "a description of specific documents or classes of documents, along with an explanation of their materiality to the outcome of the case."[35]

29. As ICANN noted in its 20 April Letter, despite the fact that the Supplementary Rules explicitly state that "***[a]ll necessary evidence*** to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the [initial written] submission," DCA did not mention the notion of possible discovery until it served its initial request for emergency relief at the end of March 2014, three months after its served its amended papers and two months after ICANN served its initial papers. To date, DCA has not provided any indication as to what information it believes the documents it may request may contain and has made no showing that those documents could affect the outcome of the case.

30. While ICANN recognizes that the Panel may order the production of documents within the parameters set forth in the Discovery Rules, ICANN will object to any attempts by DCA to propound broad discovery of the sort permitted in American civil litigation. The ICDR has made clear that its Discovery Rules do not contemplate such broad discovery. The

[35] ICDR Guidelines for Arbitrators Concerning Exchanges of Information § 3(a).

introduction to the rules states that their purpose is to promote "the goal of providing a simpler, less expensive and more expeditious form of dispute resolution than resort to national courts." It notes that:

> One of the factors contributing to complexity, expense and delay in recent years has been the migration from court systems into arbitration of procedural devices that allow one party to a court proceeding access to information in the possession of the other, without full consideration of the differences between arbitration and litigation. The purpose of these guidelines is to make it clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process.[36]

31. Finally, during the 22 April Call, the Panel inquired about the possibility of a confidentiality agreement between the parties. Such a confidentiality agreement or protective order would be possible with respect to documents that are otherwise confidential, and where publicly releasing documents would violate existing confidentiality. Further, Article IV, Section 3.20 of ICANN's Bylaws provides that the "IRP Panel may, in its discretion, grant a party's request to keep certain information confidential . . . ."[37]

V. THE PANEL'S DECLARATION IN THIS CASE WILL NOT BE BINDING ON ICANN.

32. The Panel's Procedural Order No. 1 did not address the issue of whether its declaration would be binding, an issue that is not in any event a "procedural" issue. However, the issue was discussed at some length during the 22 April Call. Accordingly, ICANN briefly addresses the issue here.

33. The provisions of Article IV, Section 3 of the ICANN Bylaws, which govern the Independent Review process and these proceedings, make clear that the declaration of the Panel

[36] ICDR Guidelines for Arbitrators on Exchanges of Information, Introduction.

[37] Bylaws, Art. IV, § 3.20.

will not be binding on ICANN. Section 3.11 gives the IRP panels the authority to "*declare* whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws" and "*recommend* that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board *reviews and acts upon the opinion* of the IRP."[38] Section 3.21 provides that "[w]here feasible, the Board shall *consider* the IRP Panel *declaration* at the Board's next meeting."[39] Section 3 never refers to the IRP panel's declaration as a "decision" or "determination." It does refer to the "Board's subsequent action on [the IRP panel's] declaration[]."[40] That language makes clear that the IRP's declarations are advisory and not binding on the Board. Pursuant to the Bylaws, the Board has the discretion to consider an IRP panel's declaration and take whatever action it deems appropriate.

34. This issue was addressed extensively in the *ICM* IRP, a decision that has precedential value to this Panel.[41] The *ICM* Panel specifically considered the argument that the IRP proceedings were "arbitral and not advisory in character," and unanimously concluded that its declaration was "not binding, but rather advisory in effect."[42] At the time that the *ICM* Panel rendered its declaration, Article IV, Section 3 of ICANN's Bylaws provided that "IRP shall be

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[38] *Id*., Art. IV, § 3.11 (emphasis added).

[39] *Id*., Art. IV, § 3.21 (emphasis added).

[40] *Id*.

[41] Pursuant to Article IV, Section 3.21 of ICANN's Bylaws, the ICM Panel's declaration has precedential value and is properly considered by this Panel, although that declaration does not bind this Panel in any legal sense. During the 22 April Call, the Panel inquired as to whether a declaration may be non-binding while also having precedential value. In the American context—the legal and semantic context in which ICANN's Bylaws were drafted—it may. "In the United States, the doctrine of stare decisis has different implications depending on the relationship between the court rendering the judgment and the court that is asked to give the prior judgment precedential effect. When 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." 18-134 Moore's Federal Practice - Civil § 134.02. Thus, ICANN, claimants, and IRP Panels may refer to previous IRP declarations and view them as having precedential effect, but those precedents are not binding on subsequent IRP Panels.

[42] February 2010 Declaration of Independent Review Panel ¶¶ 55, 134.

operated by an international arbitration provider appointed from time to time by ICANN . . . using arbitrators . . . nominated by that provider."[43] ICM unsuccessfully attempted to rely on that language in arguing that the IRP constituted an arbitration, and that the IRP panel's declaration was binding on ICANN. Following that IRP, that language was removed from the Bylaws with the April 2013 Bylaws amendments, further confirming that, under the Bylaws, an IRP panel's declaration is not binding on the Board.

VI. IN-PERSON HEARINGS ARE TO BE HELD ONLY IN "EXTRAORDINARY CIRCUMSTANCES."

35. Paragraph 4 of the Supplementary Procedures provides:

> ***The IRP Panel should conduct its proceedings by electronic means to the extent feasible. Where necessary, the IRP Panel may conduct telephone conferences. In the extraordinary event that an in-person hearing is deemed necessary*** by the panel presiding over the IRP proceeding (in coordination with the Chair of the standing panel convened for the IRP, or the ICDR in the event the standing panel is not yet convened), the in-person hearing shall be limited to argument only . . . ."[44]

Similarly, Article IV, Section 3.12 of the Bylaws provides:

> ***In order to keep the costs and burdens of independent review as low as possible, the IRP Panel should conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP Panel may hold meetings by telephone. In the unlikely event that a telephonic or in-person hearing is convened,*** the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.[45]

36. During the 22 April 2014 Call, ICANN agreed that this IRP is one in which a telephonic or video conference would be helpful and offered to facilitate a video conference.

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[43] *Id*. ¶ 96.

[44] Supplementary Procedures ¶ 4 (emphasis added).

[45] Bylaws, Art. IV, § 3.12 (emphasis added)

ICANN does not believe, however, that this IRP is sufficiently "extraordinary" so as to justify an in-person hearing, which would dramatically increase the costs for the parties. As discussed above, the issues in this IRP are straight forward—limited to whether ICANN's Board acted consistent with its Bylaws and Articles of Incorporation in relation to DCA's application for .AFRICA—and can, and easily should, be resolved following a telephonic oral argument with counsel and the Panel.

CONCLUSION

ICANN 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: 5 May 2014

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