

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

ICDR Case No. 50 117 T 1083 13

DotConnectAfrica Trust,

Claimant,

v.

Internet Corporation for Assigned Names and Numbers,

Respondent.

DCA'S SUBMISSION ON PROCEDURAL ISSUES

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5 May 2014

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I. INTRODUCTION

1. In accordance with the Panel’s Procedural Order No. 1, DotConnectAfrica Trust (“DCA”) hereby provides its submission on the procedures for conducting the Independent Review Process (“IRP”) it has initiated against the Internet Corporation for Assigned Names and Numbers (“ICANN”).¹ This brief addresses the issues raised by the Panel during the 22 April procedural hearing concerning the appropriate procedures for the IRP, as well as their legal effect. As set forth below, under the rules that ICANN has established for the IRP, this IRP is an arbitration, notwithstanding the nomenclature ICANN has devised to distinguish it from ordinary international commercial arbitration proceedings. The IRP has all the characteristics of an arbitration under California law and widely accepted international arbitral practice and procedure. It is the only third-party and truly independent review process available to applicants for new generic Top-Level Domains (“gTLDs”) under ICANN’s framework. In any event, the ICDR Rules and Supplementary Procedures empower the Panel to decide all procedural issues in dispute, such as the number of additional written pleadings and the conduct of the hearing on the merits, including the availability of witness testimony.

II. APPLICABLE RULES AND GOVERNING LAW

2. This IRP is constituted under Article IV, Section 3 of ICANN’s Bylaws.² It is governed by two complementary sets of procedural rules, the International Dispute Resolution Procedures (the “ICDR Rules”)³ and ICANN’s Supplementary Procedures for ICANN IRP.⁴ The parties

¹ See Procedural Order No. 1 (24 Apr. 2014).

² See ICANN Bylaws [Amended Notice of IRP, Ex. C-10].

³ See International Dispute Resolution Procedures, amended and effective as of 1 June 2009, *available at* https://www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTG_002037&revision=latestreleased [Ex. C-M-1].

⁴ See ICANN Supplementary Procedures for IRP [Amended Notice of IRP, Exhibits C-3 and C-4].

have agreed that the seat of this proceeding is Los Angeles, California.⁵ Accordingly, California law and United States federal law constitute the law of the seat and form the relevant legal background for matters of procedure in this IRP.

3. By selecting the ICDR Arbitration Rules, and representing to gTLD applicants that these rules (as modified by the Supplementary Procedures) form the dispute resolution regime applicable to the new gTLD application process, ICANN made a standing offer to applicants that it would agree to be bound by the terms of those rules and the ICDR's guidelines on the conduct of arbitrations, including the ICDR Guidelines for Arbitrators Concerning Exchanges of Information (the "ICDR Guidelines").⁶ That offer was accepted by DCA when it initiated these proceedings.⁷ ICANN's Supplementary Procedures provide that, in the event of a conflict between the Supplementary Procedures and the ICDR Rules, the Supplementary Procedures govern.⁸ Where there is no conflict or where the Supplementary Procedures are silent, the ICDR Rules govern. The merits of the dispute are governed by ICANN's Bylaws and Articles of

⁵ Letter from Jeffrey A. LeVee, Counsel for Respondent, to Carolina Cardenas-Soto, Senior International Case Manager, ICDR (5 Dec. 2013) [Ex. C-M-2].

⁶ See ICDR Guidelines for Arbitrators Concerning Exchanges of Information, *available at* https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002579 [Ex. C-M-3].

⁷ The system that ICANN has put in place is not dissimilar to the system of "consent" that applies in the context of investor-state arbitration, where binding dispute resolution in respect of breaches of an investment protection treaty or of a municipal investment law is based on a standing offer by the state to arbitrate that is contained in an applicable treaty or investment law. The required agreement to arbitrate is formed when the investor accepts the offer to arbitrate by filing its request to arbitrate.

⁸ ICANN Supplementary Procedures for IRP [Amended Notice of IRP, Exhibits C-3 and C-4].

Incorporation,⁹ the gTLD Applicant Guidebook,¹⁰ and international and local law, as provided in Article 4 of ICANN's Articles of Incorporation.¹¹

III. THE INDEPENDENT REVIEW PROCESS HAS ALL THE CHARACTERISTICS OF AN ARBITRATION

4. Under California law and applicable federal law, this IRP qualifies as an arbitration. It has all the characteristics that California courts look to in order to determine whether a proceeding is an arbitration: 1) a third-party decision-maker; 2) a decision-maker selected by the parties; 3) a mechanism for assuring the neutrality of the decision-maker; 4) an opportunity for both parties to be heard; and 5) a binding decision.¹² Other U.S. state and federal courts have identified similar features as determinative of whether a procedure constitutes an arbitration.¹³ Practitioners of international arbitration look to the same core elements in defining an arbitration:

⁹ ICANN Articles of Incorporation [Amended Notice of IRP, Ex. C-9].

¹⁰ gTLD Applicant Guidebook (Version 2012-06-04) [Amended Notice of IRP, Ex. C-11].

¹¹ See ICANN Articles of Incorporation, Art. 4 [Amended Notice of IRP, Ex. C-9].

¹² See *Cheng-Canindin v. Renaissance Hotel Assoc.*, 57 Cal. Rptr. 2d 867, 874 (Cal. Ct. App. 1996) [Ex. C-M-4]; see also *American Federation of State, County and Municipal Employees v. Metropolitan Water Dist. of Southern California*, 24 Cal. Rptr. 3d 285, 291 (Cal. Ct. App. 2005) [Ex. C-M-5]; *Saeta v. Superior Court*, 11 Cal. Rptr. 3d 610, 614 (Cal. Ct. App. 2004) [Ex. C-M-6]. The FAA does not define "arbitration." Most federal courts have looked to federal law to supply a definition given that the FAA is a federal statute. See, e.g., *Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 6 (1st Cir. 2004) (finding that "[a]ssuredly Congress intended a 'national' definition for a national policy") [Ex. C-M-7]. Some Circuit Courts of Appeal, however, including the Ninth Circuit, have held that state law governs. See *Wasyf, Inc. v. First Boston Corp.*, 813 F.2d 1579 (9th Cir. 1987) (applying California law to determine what constitutes an arbitration agreement) [Ex. C-M-8]. But see *Portland General Electric Co. v. U.S. Bank National Assoc.*, 218 F.3d 1085, 1091 (9th Cir. 2000) (Takima, J., concurring) [Ex. C-M-9]; *id.*, at 1091-92 (McKeown, J., specially concurring) (applying state law to define "arbitration" under the FAA because three-judge panel recognized that it was bound by *Wasyf*, but questioning whether *Wasyf* was correctly decided) [Ex. C-M-9].

¹³ See, e.g., *Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.*, 524 F.3d 1235, 1239 (11th Cir. 2008) (finding that although the presence or absence of one of the following factors will not always be determinative, to determine whether a particular dispute resolution mechanism chosen in a contract is a FAA arbitration, courts should look for "the 'common incidents' of 'classic arbitration,' including (1) an independent adjudicator, (2) who applies substantive legal standards (i.e. the parties' agreement and background contract law), (3) considers evidence and argument (however formally or informally) from each party, and (4) renders a decision that purports to resolve the rights and duties of the parties, typically by awarding damages or equitable relief") [Ex. C-M-10]; *Harrison v. Nissan Motor Corp.*, 111 F.3d 343, 350 (3rd Cir. 1997) (noting that "[a]lthough [arbitration] defies easy definition,

[V]irtually all authorities would accept that arbitration is a process by which the parties consensually submit a dispute to a non-governmental decision-maker, selected by or for the parties, to render a binding decision resolving a dispute in accordance with neutral, adjudicatory procedures affording the parties an opportunity to be heard.¹⁴

5. Thus, the mere fact that ICANN has labeled this proceeding an independent review process rather than an arbitration (and the adjudicator of the dispute is called a Panel rather than a Tribunal) does not change the fact that the IRP – insofar as its procedural framework and the legal effects of its outcome are concerned – is an arbitration.¹⁵ As long as the IRP meets the five criteria laid down by California and federal law, it is an arbitration no matter what it is called. We explain below why the IRP meets these criteria.

the essence of arbitration . . . is that, when the parties agree to submit their disputes to it, they have agreed to arbitrate these disputes through to completion, i.e. to an award made by a third-party arbitrator”) [Ex. C-M-11].

¹⁴ GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 246 (2014) [Ex. C-M-12].

¹⁵ See, e.g., *id.*, at 244 (“It is trite law in virtually all developed jurisdictions that the label adopted by the parties themselves for a dispute resolution mechanism is not decisive in determining the true character of that mechanism. That is true in common law jurisdictions (U.S., English and otherwise), as well as civil law jurisdictions.”). Federal and state courts, including California state courts, have reached a similar conclusion. See, e.g., *Painters District Council No. 33 v. Moen*, 181 Cal. Rptr. 17, 18 (Cal. Ct. App. 1982)(citing *General Drivers Union v. Riss & Co.*, 372 U.S. 517, 519 (1963)(“[T]he failure of the agreement to identify the grievance procedure as ‘arbitration’ is not fatal to its use as a binding mechanism for resolving disputes between the parties.”) [Ex. C-M-13].

A. The IRP Panel Is A Third-Party Decision-Maker

6. As the name “independent review process” indicates, the IRP Panel is an independent, third-party decision-maker; that is, unlike other levels of review for ICANN Board actions, it is independent of ICANN in addition to being independent of DCA.

7. Article 1 of the Supplementary Procedures confirms the Panel’s status as an independent, third-party decision-maker:

IRP PANEL refers to *the neutral(s) appointed to decide the issue(s) presented*. The IRP will be comprised of members of a standing panel identified in coordination with the ICDR. Certain decisions of the IRP are subject to review or input of the Chair of the standing panel. *In the event that an omnibus standing panel: (i) is not in place when an IRP PANEL must be convened for a given proceeding, the IRP proceeding will be considered by a one- or three-member panel comprised in accordance with the rules of the ICDR; or (ii) is in place but does not have the requisite diversity of skill and experience needed for a particular proceeding, the ICDR shall identify and appoint one or more panelists, as required, from outside the omnibus standing panel to augment the panel members for that proceeding.*¹⁶

8. As indicated by this definition, the IRP Panel is a neutral body appointed by the parties and the ICDR to hear the dispute. It therefore qualifies as a third-party decision-maker for purposes of defining the IRP as an arbitration.

B. The IRP Panel Was Chosen By The Parties

9. ICANN’s Bylaws contain its standing offer to arbitrate, through the IRP administered by the ICDR, disputes concerning Board actions alleged to be inconsistent with the Articles of Incorporation or the Bylaws.¹⁷ DCA accepted ICANN’s standing offer to arbitrate by submitting

¹⁶ ICANN Supplementary Procedures for IRP (emphasis added) [Amended Notice of IRP, Ex. C-3].

¹⁷ See ICANN Bylaws, Art. IV, § 3(1), 3(7) [Amended Notice of IRP, Ex. C-10].

its Notice of Independent Review (the “Notice”) to the ICDR on 24 October 2013.¹⁸ Because ICANN has yet to create a standing IRP panel from which to select panelists, the parties agreed that DCA’s claims would be heard by a three-member panel; that each party would appoint one panelist; and that the two party-appointed arbitrators would select the chairperson.¹⁹ When the two party-appointed panelists were unable to agree on a chairperson, the ICDR made the appointment pursuant to Article 6 of the ICDR Rules.²⁰ The parties thus chose to submit their dispute to the IRP Panel for resolution, as with any other arbitration.

C. There Is A Mechanism For Assuring The Neutrality Of The Decision-Maker

10. As noted above, the Supplementary Procedures provide that the IRP Panel is to be comprised of “neutral” parties and provide that the panel shall be comprised of members of a standing IRP panel or as selected by the parties under the ICDR Rules.²¹

11. The ICDR Rules also provide that panelists serving under the rules “shall be impartial and independent,” and require them to disclose any circumstances giving rise to “justifiable doubts” as to their impartiality or independence.²² Under Article 8 of the Rules, a party may challenge a panelist if there are circumstances that give rise to such doubts.²³ In the event that the challenged panelist does not withdraw, the challenge will be decided by the ICDR

¹⁸ DCA Notice of Independent Review (24 Oct. 2013) [Amended Notice of IRP, Ex. C-51].

¹⁹ See Email from Marguerite Walter to Carolina Cardenas-Soto and Jeffrey LeVee (8 Jan. 2013) [Ex. C-M-14].

²⁰ ICDR Rules, Art. 6(3) [Ex. C-M-15].

²¹ Supplementary Procedures, Art. 1 [Amended Notice of IRP, Ex. C-3] .

²² ICDR Rules, Art. 7 [Ex. C-M-15].

²³ See *id.*, at Art. 8.

administrator “in its sole discretion.”²⁴ If the challenge is upheld or the arbitrator withdraws, a replacement arbitrator is to be selected.²⁵

12. The IRP therefore contains a mechanism for ensuring the neutrality of the decision-maker, just like any other arbitration.

D. The IRP Provides An Opportunity For Both Parties To Be Heard

13. The IRP affords both parties an opportunity to be heard, both in writing and orally. Article 5 of the Supplementary Procedures confirms that both parties have an opportunity to be heard by means of written submissions:

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.²⁶

14. Article 4 of the Supplementary Procedures further provides that the Panel may hold a hearing in which parties may make oral submissions. In addition, Article 16(1) of the ICDR Rules provides that the Panel may, subject to the other provisions of the ICDR Rules, conduct the proceeding in the manner it deems to be 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

²⁴ *Id.*, at Art. 9.

²⁵ *See id.*, at Art. 10.

²⁶ Supplementary Procedures, Art. 5 [Amended Notice of IRP, Ex. C-3]. The other version of the Supplementary Procedures posted to the ICDR website when DCA accepted ICANN’s standing offer to arbitrate likewise gives both parties an opportunity to be heard. The only limitation the other version of the Supplementary Procedures places on hearings is that “[t]he IRP should conduct its proceedings by electronic means to the extent feasible,” but “[w]here necessary, the IRP may conduct telephone conferences.” Supplementary Procedures, Art. 4 [Ex. C-4].

present its case.”²⁷ Moreover, at the conclusion of the proceedings, the IRP Panel “*shall* make its declaration *solely on* the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party.”²⁸ In other words, after giving each party an opportunity to be heard, the IRP is limited to making its decision only on the information properly gleaned through these procedures.

E. The IRP Decision-Making Process Is Final And Binding

15. During the procedural hearing held on 22 April, ICANN’s counsel disputed the fact that the IRP is final and binding. As we explained then, however, whatever ICANN may have intended when it created the IRP, it has put in place a binding mechanism for final resolution of disputes over ICANN Board decisions. To the extent that the language of the various instruments drafted by ICANN and governing the IRP is ambiguous on this point, DCA submits that the Panel should construe that language *contra proferentem* and find that the IRP results in a final and binding outcome for the parties.

1. The Independent Review Process is the Final And Only Neutral And Independent Step in an Escalating Set of Accountability and Review Mechanisms

16. The IRP is the final accountability and review mechanism available to parties materially affected by ICANN Board decisions. The IRP is also the only ICANN accountability mechanism conducted by an independent third-party decision-maker with the power to render a decision resolving the dispute and naming a prevailing party.²⁹ Thus, the IRP is distinct from the review procedures leading up to it in that it provides for external and independent review of actions taken by ICANN’s Board. In other words, the IRP is not simply another layer of internal

²⁷ ICDR Rules, Art. 16(1) [Ex. C-M-15].

²⁸ See ICANN Bylaws, Art. IV, § 3(18) (emphasis added) [Amended Notice of IRP, Ex. C-10].

²⁹ See *id.*, at Art. IV § 3(7), (18).

review under ICANN’s control, but functions like any other arbitration to exert external review and control on ICANN’s activities.

a. The First Layer Of Review: Reconsideration

17. The first step in the escalating set of review processes available to parties is reconsideration. Parties may submit a request to ICANN for “reconsideration or review” of an ICANN action or inaction (a “Reconsideration Request”).³⁰ The process is conducted by the ICANN Board Governance Committee (the “BGC”) and the Board is not bound to follow the BGC’s recommendations.³¹ The BGC conducts the review process, weighs the evidence, may even conduct in-person hearings and “makes a final determination or recommendation to the Board” on the Reconsideration Request.³² If the requestor’s Reconsideration Request is denied, the requestor may escalate the dispute by entering into a “cooperative engagement” process with ICANN or move directly to filing a request for independent review.

18. DCA submitted a Reconsideration Request on 19 June 2013, which BGC denied on 1 August 2013.³³

b. The Second Layer Of Review: Cooperative Engagement

19. ICANN encourages claimants to enter into a “cooperative engagement” process with ICANN for purpose of “resolving or narrowing the issues that are contemplated to be brought to the IRP.”³⁴ Although the cooperative engagement process is voluntary, if a party requesting

³⁰ *Id.*, Art. IV, § 2(2).

³¹ *Id.*, at Art. IV, § 2(17).

³² *Id.*, at Art. IV, § 2(2), (12).

³³ DCA’s Reconsideration Request Form (19 June 2013) [Amended Notice of IRP, Ex. C-46]; Recommendation of the BGC Reconsideration Request 13-4, 1 August 2013 [Amended Notice of IRP, Ex. C-47]. *See also* DCA’s Amended Notice of IRP, paras. 38-39.

³⁴ ICANN Bylaws, Art. IV, § 3(14) [Amended Notice of IRP, Ex. C-10]. If the parties are unable to resolve their dispute through the cooperative engagement process, the Bylaws urge the parties to participate in a “conciliation

independent review does not first participate “in good faith” in the cooperative engagement and conciliation processes with ICANN, the Bylaws mandate that the future IRP Panel must award to ICANN (if ICANN is the prevailing party) all reasonable fees and costs, including legal fees, incurred in the IRP.³⁵ This amounts to a potential penalty for not first engaging in these non-binding dispute resolution mechanisms.

20. On 19 August 2013, DCA informed ICANN of its intent to seek relief via the IRP and, at ICANN’s suggestion, participated in the cooperative engagement process with ICANN to try to resolve the issues surrounding DCA’s application.³⁶ DCA and ICANN met on several occasions as part of the cooperative engagement process but were unable to resolve the dispute. Only after DCA was unable to resolve its issues with ICANN through the cooperative engagement process did DCA file its Notice of Independent Review (the “Notice”).³⁷

c. The Third Layer Of Review: The IRP

21. The IRP represents a fundamentally different stage of review from those that precede it. Unlike reconsideration or cooperative engagement, the IRP is conducted pursuant to a set of independently developed international arbitration rules (as minimally modified) and administered by a provider of international arbitration services, not ICANN itself. Likewise, the decision-maker is not ICANN, but a Panel comprised of neutral third parties selected by the parties in consultation with the ICDR, or appointed pursuant to the ICDR Rules.

period” upon filing a request for independent review. Conciliation is similar to the cooperative engagement process, except that it involves a neutral party to help narrow the issues in the request for independent review. Bylaws, Art. IV, § 3(15) [Amended Notice of IRP, Ex. C-10].

³⁵ *Id.*, at Art. IV, § 3(16).

³⁶ See DCA Notice of Intent (19 Aug. 2013) [Amended Notice of IRP, Ex. C-49]; Letter from Ms. Sophia Bekele (DCA) to the President/CEO (ICANN) (4 Sept. 2013) [Amended Notice of IRP, Ex. C-50].

³⁷ See DCA Notice of Independent Review (24 Oct. 2013) [Amended Notice of IRP, Ex. C-51].

22. It is also critical to understand that ICANN created the IRP as an alternative to allowing disputes to be resolved by courts. By submitting its application for a gTLD, DCA agreed to eight pages of terms and conditions, including a nearly page-long string of waivers and releases.³⁸ Among those conditions was the waiver of all of its rights to challenge ICANN's decision on DCA's application in court.³⁹ For DCA and other gTLD applicants, the IRP is their only recourse; no other legal remedy is available. The very design of this process is evidence that the IRP is fundamentally unlike the forms of administrative review that precede it and is meant to provide a final and binding resolution of disputes between ICANN and persons affected by its decisions.

2. The Governing Instruments Of The IRP Confirm That It Is Final And Binding

23. The governing instruments of the IRP – *i.e.*, the Bylaws, the ICDR Rules, and the Supplementary Procedures – confirm that the IRP is final and binding. The powers of the IRP Panel, and the language used to describe its functions, demonstrate that it is meant to provide a final and binding decision resolving the dispute between the parties.

a. The Bylaws Describe The IRP In Terms Indicating It Is A Final And Binding Review

24. In section 3 of Article IV of ICANN's Bylaws, titled "Accountability and Review," ICANN sets forth the procedures for "Independent Review of Board Actions."⁴⁰ This section provides that "[a]ny person materially affected by a decision or action by the Board that he or she asserts is inconsistent with the Articles of Incorporation or Bylaws may submit a request for

³⁸ See ICANN gTLD Guidebook (Version 2012-06-04), Module 6 [Amended Notice of IRP, Ex. C-11].

³⁹ See *id.*, at Module 6-4.

⁴⁰ ICANN Bylaws, Art. IV, § 3 [Amended Notice of IRP, Ex. C-10].

independent review of that decision or action.”⁴¹ Requests are referred to an IRP Panel that is charged with “comparing contested actions of the Board to the Articles of Incorporation and Bylaws.”⁴²

25. In language echoing the ordinary functions of a court, the Bylaws provide that the IRP Panel has the authority to “summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious” and to “declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws.”⁴³ The power to summarily dismiss claims deemed frivolous or vexatious by the Panel amounts to the power to dismiss claims with prejudice. If the IRP Panel has dismissed a claim, then the Panel’s decision is inherently final and binding because the review stops there.

26. The Bylaws further provide that the IRP Panel “shall make its declaration” and “in its declaration shall specifically designate the prevailing party.”⁴⁴ ICANN’s Bylaws are silent on the definition of “declaration.” However, the Supplementary Procedures clarify that “declaration” means the “decisions/opinions of the IRP Panel.” A “decision” or “opinion” connotes judicial finality.

27. Moreover, the Bylaws provide that the declarations of the IRP Panel, and the Board’s subsequent actions on those declarations, “*are final and have precedential value.*”⁴⁵ During the hearing on procedural matters, counsel for ICANN dismissed the use of the word “precedential” in the Bylaws as not being indicative that IRP declarations are binding. But as the Panel rightly

⁴¹ *Id.*, at Art. IV, § 3(2).

⁴² *Id.*, at Art. IV, § 3(4).

⁴³ *Id.*, at Art. IV, § 3(11).

⁴⁴ *Id.*, at Art. IV, § 3(18).

⁴⁵ *Id.*, at Art. IV, § 3(21) (emphasis added).

noted, the word “precedential” indicates a binding outcome. Definitions of the word “precedent” demonstrate that the use of the word “precedential” in the Bylaws means that IRP Panel declarations are binding. According to Black’s Law Dictionary, precedent refers to “[a] decided case that furnishes a basis for determining later cases involving similar facts or issues.”⁴⁶ Similarly, a scholarly article defines precedent as “a means of enforcing rule-of-law values such as continuity and predictability.”⁴⁷

28. This is precisely the function that the Bylaws give IRP declarations when they describe them as “precedential,” *i.e.*, they have a binding and determinative effect on subsequent IRPs in order to provide continuity and predictability in the accountability standards to which ICANN will be held. Critically, the version of the Bylaws in force during the *ICM* IRP did not contain this language, as discussed below. Thus, the *ICM* Panel’s conclusion that its declaration was not binding is not determinative of the effect of this Panel’s declaration under the revised Bylaws.

⁴⁶ Black’s Law Dictionary (9th ed. 2009).

⁴⁷ Berkolow, *Much Ado about Pluralities: Pride and Precedent Amidst the Cacophony of Concurrences, and Re-percolation after Rapanos*, 15 Va. J. Soc. Pol’y & L 299, 306 (2008) [Ex. C-M-16].

b. The Supplementary Procedures And ICDR Rules Further Confirm The Binding Authority Of The IRP's Declaration

29. Much of the language in the Supplementary Procedures echoes what is contained in the Bylaws. Together with the ICDR Rules, the Supplementary Procedures confirm that the IRP's declaration has binding effect.

30. The Supplementary Procedures are silent as to the binding effect of the IRP Panel's declaration. Article 10 of the Supplementary Procedures describes the form and function of the Panel's Declaration as follows:

- a. Declarations shall be made in writing, promptly by the IRP Panel based on the documentation, supporting materials and arguments submitted by the parties.
- b. The declaration shall specifically designate the prevailing party.
- c. A declaration may be made public only with the consent of all parties or as required by law. Subject to the redaction of Confidential information, or unforeseen circumstances, ICANN will consent to publication of a declaration if the other party so request.
- d. Copies of the declaration shall be communicated to the parties by the ICDR.

31. However, the powers granted to the IRP Panel in the Supplementary Procedures indicate that declarations are final and binding. In particular, the Supplementary Procedures, like the Bylaws, grant the IRP Panel the authority to summarily dismiss a request for independent review "where a prior IRP on the same issue has concluded through declaration."⁴⁸ In other words, the doctrine of *res judicata* applies to IRP Panel decisions. If the declaration of an IRP Panel can preclude future claims, the declaration necessarily must be final and binding.

⁴⁸ Supplementary Procedures § 6 [Amended Notice of IRP, Ex. C-3].

32. Moreover, and as indicated above, the ICDR Rules apply to all procedural matters not covered by the Supplementary Procedures. Article 27 of the ICDR Rules specifies that an award “shall be final and binding on the parties.” Because the Supplementary Procedures do not state that declarations are not final and binding – and in fact indicate that they are binding because they have *res judicata* effect – Article 27 confirms that the declaration of the Panel is final and binding on DCA and ICANN.

c. The Language Used in the Bylaws to Describe a Non-Binding Reconsideration Review Mechanism is Different than the Language Used to Describe the IRP

33. ICANN knows how to design a non-binding advisory process because it did so with the reconsideration process. When the language in the Bylaws for reconsideration is compared to that describing the IRP, it is clear that the declaration of an IRP Panel is intended to be final and binding.

34. For example, the Bylaws provide that the BGC “shall act on a Reconsideration Request on the basis of the written public record” and “shall make a final determination or recommendation.”⁴⁹ The Bylaws even expressly state that “**the Board shall not be bound to follow the recommendations**” of the BGC.⁵⁰

35. By contrast, the IRP Panel makes “**declarations**”—defined by ICANN in its Supplementary Procedures as “decisions/opinions”—that “**are final and have precedential value.**”⁵¹ The IRP Panel “shall specifically designate the prevailing party” and may allocate the costs of the IRP Provider to one or both parties.⁵² Moreover, nowhere in ICANN’s Bylaws or

⁴⁹ ICANN Bylaws, Art. IV, § 2(14), (16) [Amended Notice of IRP, Ex. C-10].

⁵⁰ *Id.*, at Art. IV, § 2(17) (emphasis added).

⁵¹ *Id.*, at Art. IV, § 3(21) (emphasis added).

⁵² *Id.*, at Art. IV, § 3(18).

the Supplementary Procedures does ICANN state that the Board shall not be bound by the declaration of the IRP. If that is what ICANN intended, then it certainly could have stated it plainly in the Bylaws, as it did with reconsideration. The fact that it did not do so is telling.

F. The *ICM* Panel’s Conclusion in *ICM v. ICANN* that its Declaration was “Advisory In Effect” Does Not Control

36. The panel in *ICM v. ICANN* based its decision that its declaration would not be binding, “but rather advisory in effect,” on specific language in both a *different* set of Bylaws and a *different* set of Supplementary Procedures than those that apply in this dispute.⁵³ As indicated above, one crucial difference in the Bylaws applicable during *ICM* was the absence of the language describing panel declarations as “final and precedential.”

37. At the time *ICM v. ICANN* was decided, section 3(15) of Article IV of ICANN’s Bylaws provided that “[w]here feasible, the Board shall consider the IRP declaration at the Board’s next meeting.”⁵⁴ Despite the *ICM* Panel’s observation that the attributes of the IRP were “suggestive of an *arbitral process* that produces a *binding award*,” the Panel nevertheless found that “[t]his relaxed temporal proviso to do no more than ‘consider’ the IRP declaration, and to do so at the next meeting of the Board ‘where feasible,’ emphasizes that it is not binding.”⁵⁵

38. Following the *ICM* declaration, however, ICANN amended this section of its Bylaws to add a second sentence explaining that the “declarations of the IRP Panel, and the Board’s subsequent action on those declarations, *are final and have precedential value*.”⁵⁶ This new

⁵³ *ICM Registry LLC, v. ICANN*, ICDR Case No. 50 117 T 00224 08, p. 61 (19 Feb. 2010) [Ex. C-M-17].

⁵⁴ ICANN Bylaws, as amended (29 May 2008), Art. IV, Section 3(15) [Ex. C-M-18].

⁵⁵ *ICM Registry LLC*, p. 61 [Ex. C-M-17].

⁵⁶ ICANN Bylaws, Art. IV, § 3(21) (emphasis added) [Amended Notice of IRP, Ex. C-10].

language undercuts the *ICM* Panel’s analysis. A “decision” or “opinion” that is “final” and has “precedential value” is inherently binding.

39. Interestingly, in finding that the IRP was advisory, the *ICM* Panel also relied on the fact that the Bylaws gave the IRP Panel the authority to “declare,” rather than “decide” or “determine,” whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or the Bylaws.⁵⁷ However, the *ICM* Panel did not address the fact that the Supplementary Procedures, which govern the process in combination with the ICDR Rules, defined “declaration” as “decisions/opinions of the IRP.”⁵⁸ If a “declaration” is a “decision,” then surely a panel with the authority to “declare” has the authority to “decide.”

40. The *ICM* Panel also found it significant that the Supplementary Procedures adopted for the IRP omitted Article 27 of the ICDR Rules—which specifies that an award “shall be final and binding on the parties.” On that basis, the *ICM* Panel concluded that Article 27 did not apply.⁵⁹ ICANN’s Supplementary Procedures, however, were—and continue to be—silent on the effect of an award.⁶⁰ In the event there is an inconsistency between the Supplementary Procedures and the ICDR Rules, then the Supplementary Procedures govern; but there is nothing in the applicable rules suggesting that an *omission* of an ICDR Rule means that it does not apply. Indeed, the very same Supplementary Procedures provide that “the ICDR’s International Arbitration Rules . . . will govern the process *in combination with* these Supplementary

⁵⁷ *ICM Registry LLC*, p. 61 [Ex. C-M-17].

⁵⁸ Supplementary Procedures §1, copyright (2007) [Ex. C-M-19].

⁵⁹ *ICM Registry LLC*, p. 61 [Ex. C-M-17].

⁶⁰ See Supplementary Procedures §8, copyright (2007) [Ex. C-M-19]; Supplementary Procedures §10 [Amended Notice of IRP, Ex. C-3].

Procedures.”⁶¹ Furthermore, it is only in the event there is “any inconsistency” between the Supplementary Procedures and the ICDR Rules that the Supplementary Procedures govern.⁶²

41. Finally, we note that observers of the *ICM* IRP came away with doubts about the effectiveness of the IRP for various reasons. One was its expense and lengthiness, as mentioned by counsel for ICANN during the 22 April procedural hearing.⁶³ But of course, one reason the *ICM* proceeding was so expensive was ICANN’s arbitration strategy. (Indeed, ICANN’s insistence on the narrowest possible interpretation of the rules applicable to this proceeding is what led the Panel to request briefing on procedural matters, which undeniably will add to the cost and length of this proceeding as well.) Observers of the *ICM* IRP were troubled by ICANN’s similar strategy in *ICM*:

In addition to the questions raised about limits of the IRP as an accountability mechanism, others questioned how ICANN’s interpretation of the process reflects on ICANN’s commitment to accountability. Some interviewees expressed the belief that ICANN’s interpretation of the IRP – that the process should not entail live testimony, that ICANN should be offered deference under the business judgment rule, and that the IRP’s decision should not be binding on the ICANN Board – was inconsistent with an organization with a mandate to ensure that it is accountable to its stakeholders.⁶⁴

42. ICANN’s unwillingness to submit to genuine accountability procedures continues to trouble the Internet community.⁶⁵ Indeed, ICANN has been described as a “troublesome” model

⁶¹ Supplementary Procedures § 1, copyright (2007) (emphasis added) [Ex. C-M-19].

⁶² *Id.*, at § 2.

⁶³ See Accountability and Transparency at ICANN, An Independent Review, Final Report, The Berkman Center for Internet and Society at Harvard University 123 (20 Oct. 2010) [Ex. C-M-20].

⁶⁴ *Id.*, at pp. 123-24

⁶⁵ See, e.g., Internet Governance Project, “ICANN’s Accountability Meltdown: A four-part series” (31 Aug. 2013) available at <http://www.internetgovernance.org/2013/08/31/icanns-accountability-meltdown-a-four-part-series/>; “Meltdown IV: How ICANN resists accountability” (18 Sept. 2013) available at <http://www.internetgovernance.org/2013/09/18/meltdown-iv-how-icann-resists-accountability/>.

for Internet governance because “it has monopoly control of a resource space critical to an entire global infrastructure while being completely disconnected from the normal accountability mechanisms that guide and constrain other corporations.”⁶⁶

43. Even if unwittingly, ICANN *has* subjected itself to one accountability mechanism that is genuinely neutral, outside of its control, and capable of providing independent and binding review of ICANN’s actions: the IRP.

* * *

44. In light of the foregoing, DCA submits that the IRP process is an arbitration in all but name. It is a dispute resolution procedure administered by an international arbitration service provider, in which the decision-makers are neutral third parties chosen by the parties to the dispute. There are mechanisms in place to assure the neutrality of the decision-makers and the right of each party to be heard. The IRP Panel is vested with adjudicative authority that is equivalent to that of any other arbitral tribunal: it renders decisions on the dispute based on the evidence and arguments submitted by the parties, and its decisions are binding and have *res judicata* and precedential value. The procedures appropriate and customary in international arbitration are thus equally appropriate in this IRP. But in any event, and as discussed below, the applicable rules authorize the Panel to conduct this IRP in the manner it deems appropriate regardless of whether it determines that the IRP qualifies as an arbitration.

IV. UNDER THE APPLICABLE RULES, THE PANEL HAS THE AUTHORITY TO DECIDE HOW TO CONDUCT THE INDEPENDENT REVIEW PROCESS

45. The ICDR Rules expressly provide that the Panel “may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and

⁶⁶ Internet Governance Project, “ICANN, Inc.: Accountability and participation in the governance of critical Internet resources” (16 Nov. 2009), *available at* <http://www.internetgovernance.org/wordpress/wp-content/uploads/ICANNInc.pdf>.

that each party has the right to be heard and is given a fair opportunity to present its case.”⁶⁷ It is the Panel—not ICANN—that has the power to decide how to conduct the IRP. The Panel’s discretion is limited only by mandatory law, the ICDR Rules and the Supplementary Procedures.⁶⁸ Under the applicable rules, the Panel is expressly authorized to order additional written submissions from the parties; may order document exchange and production; and may examine the parties’ witnesses.

A. The Supplementary Procedures And ICDR Rules Allow For The Submission of Further Written Pleadings

46. DCA’s right to be fairly and fully heard in this proceeding includes the right to submit a written memorial on the merits. This right is consistent with the procedures for commencing an IRP and the plain language of the applicable rules.

1. Only “Notice” is Required To Commence An IRP, Not A Final Written Submission On The Merits

47. DCA initiated this IRP on 24 October 2013 by filing a one-page form with the heading “Notice of Independent Review” (the “Notice”), as per instructions on ICANN’s website.⁶⁹ As indicated in DCA’s Amended Notice of IRP, at the time DCA initiated the IRP, the form available on ICANN’s website consisted of a single page, with space for a signature and date at the bottom.⁷⁰ This “first” page of the form does not have a page number on it to indicate that there is a second page. Nevertheless, ICANN later claimed that DCA was required to complete a second page as well, which currently is available on ICANN’s website, and submit a 25-page

⁶⁷ ICDR Rules, Art. 16 [Ex. CM-15].

⁶⁸ See Supplementary Procedures [Amended Notice of IRP, Ex. C-3].

⁶⁹ See Notice of Independent Review [Amended Notice of IRP, Ex. C-1].

⁷⁰ See Amended Notice of IRP, ¶¶ 1 n. 1, 41.

statement of claim.⁷¹ Curiously, this second page is drafted in a different font size than the first page, does not contain a space for a signature, and contains substantial waiver language absent from the single-page document available when DCA filed its Notice in October. DCA submitted this second page with its Amended Notice of IRP in January 2014.⁷²

48. The Notice is a simple form that collects basic information about the parties, the nature of the dispute (inviting claimants to “attach additional sheets, if necessary”), the claim or relief being sought and desired place of review.⁷³ The instructions on what now appears to be page one of the Notice direct claimants “to begin proceedings” by sending two copies of the notice and the filing fee to the ICDR and the original notice to the respondent.⁷⁴ Nothing in the applicable rules or pages one or two of the Notice indicate that the form must be accompanied by a claimant’s final (and only) submission on the merits, as ICANN has argued. Indeed, use of the word “notice” on the form suggests that it is a preliminary submission. The form leaves claimants a mere fill-in-the-blank space for describing the nature of the dispute and the claim or relief sought. Such a “notice” to “begin proceedings” can hardly constitute a final submission on the merits.

⁷¹ See Letter from Jeffrey A. LeVee, Counsel for Respondent, to Carolina Cárdenas-Soto, Senior International Case Manager, ICDR (27 Nov. 2013) [Ex. C-M-21].

⁷² See Notice of IRP [Ex. C-2].

⁷³ See Notice of IRP [Ex. C-1].

⁷⁴ *Id.*

2. The Additional Requirements Purportedly Imposed By Page Two Of The Notice Form Cannot Displace The Bylaws, Supplementary Procedures, And ICDR Rules

49. The sudden appearance of a second page to the notice in or around late November 2013 is particularly troubling because the acknowledgments on what ICANN calls the second page of the form contain new language that departs from the Bylaws, the Supplementary Procedures, and the ICDR Rules in a way that appears designed to undermine the effects of the IRP discussed above.

50. For example, the second page of the Notice of Independent Review states, among other things, that the “ICANN Board’s decision on the prior IRP Panel is final and creates precedent for future IRP proceedings.”⁷⁵ This language omits the language in the Bylaws concerning the precedential value of the IRP’s declarations, *i.e.*, that “[d]eclarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.”⁷⁶ Instead, the finality and precedential value is imputed solely to the decisions of the Board, and not the IRP Panel.

51. In addition, the second page of the Notice states that “[i]f the subject matter of the request is on the same issue as a prior IRP proceeding, the Board’s decision on the prior IRP Panel is binding and serves as grounds for summary dismissal of the request for Independent review.”⁷⁷ Again, this language appears designed to displace the *res judicata* effect of Panel declarations in order to impute such effect to Board decisions.

⁷⁵ Notice of IRP (emphasis added) [Ex. C-2].

⁷⁶ ICANN Bylaws, Art. IV, § 3(21) [Amended Notice of IRP, Ex. C-10].

⁷⁷ Notice of IRP [Ex. C-2].

52. Perhaps not coincidentally, language requiring a 25-page submission is also located on the second page of the Notice form.⁷⁸ The specific language on page two requiring the claimant to “state specifically the grounds under which the claimant has standing and the right to assert [the] claim,” the requirement that the “decision of the IRP Panel (as reviewed and acted upon by the Board) must be able to stop the harm,” and the provision that “[i]njury or harm caused by third parties as a result of acting in line with the Board’s decision is not a sufficient ground for Independent Review,” is nowhere to be found in the Bylaws or the Supplementary Procedures.⁷⁹ These requirements only materialized with the second page of the notice sometime toward the end of November.

53. Regardless of the origin of page two of the notice form, which seems likely to remain indeterminate, DCA submits that it is the Bylaws, the Supplementary Procedures, and the ICDR Rules that govern procedural matters in this IRP. Insofar as the language contained on the disputed second page of the notice form departs from the provisions of those constitutive documents, it is not controlling on this proceeding. Indeed, given the fact that DCA was not aware that a second page of the Notice form—let alone one with new requirements—even existed at the time it accepted ICANN’s standing offer to arbitrate, any additional limitations on its rights purporting to take effect through page two of the notice should be held without effect.

54. Finally, DCA wishes to note that ICANN’ conduct concerning the issue of the second page of the Notice form is typical of its approach to any effort to hold it accountable to Internet stakeholders, including DCA. As the Panel may be aware, ICANN first informed DCA of the existence of the second page of the form in a letter dated 27 November 2013, over a month after

⁷⁸ *See id.*

⁷⁹ Compare Notice of IRP [Ex. C-2] with ICANN Bylaws [Amended Notice of IRP, Ex. C-10] and Supplementary Procedures [Amended Notice of IRP, Ex. C-3].

DCA had filed the one-page notice then on ICANN's website.⁸⁰ In the letter, ICANN stated that it had not received a request for independent review from DCA as required by the Bylaws and the ICDR Rules, because DCA had only filed the one-page notice form previously on ICANN's website, without the 25-page statement referred to on page two of the form. ICANN requested a copy of these items if they had been filed, but if they had not, it requested that the entire proceeding be dismissed.⁸¹ If ICANN had succeeded in shutting down the IRP on this technical ground (of questionable validity), DCA would have been deprived altogether of its right to seek independent review of ICANN's treatment of its application for .AFRICA since, as ICANN noted in the letter, a request for independent review must be filed within 30 days of the disputed Board action – and ICANN had already required DCA to waive its right to seek relief in court.⁸²

55. ICANN subsequently agreed to allow DCA to file an Amended Notice, but repeatedly pressured DCA to do so quickly, objecting to giving DCA additional time to prepare its submission after it had retained counsel on 31 December 2013. ICANN protested the ICDR's decision to grant DCA an additional eight days to file its submission (from 2 January until 10 January). It also objected to DCA's subsequent request for an additional seven days to file the Amended Notice (until 17 January), in part because, it said, there was no need for DCA to be represented by counsel in this proceeding (although of course, ICANN itself had the benefit of such representation).⁸³

⁸⁰ See Letter from Jeffrey A. LeVee, Counsel for Respondent, to Carolina Cárdenas-Soto, Senior International Case Manager, ICDR (27 Nov. 2013) [Ex. C-M-21].

⁸¹ See *id.*

⁸² See *id.*

⁸³ See Email from Jeffrey LeVee to Carolina Cardenas-Soto (8 Jan. 2013) [Ex. C-M-14].

56. ICANN now argues that DCA’s written pleadings in this matter should be limited to the single summary submission that ICANN insisted be submitted under circumstances very unfavorable to DCA. But such a procedure would be inconsistent with the provisions of the Supplementary Procedures and ICDR Rules, particularly Article 16(1) of the ICDR Rules, which requires that the procedural framework of the proceeding provide for equality of arms between the parties.

B. The Plain Language of the Applicable Rules Contemplate Additional Written Submissions

57. The plain language of the Supplementary Procedures pertaining to written submissions clearly demonstrates that claimants in IRPs are not limited to a single written submission incorporating all evidence, as argued by ICANN.⁸⁴ Section 5 of the Supplementary Procedures states that “initial written submissions of the parties shall not exceed 25 pages.”⁸⁵ The word “initial” confirms that there may be subsequent submissions, subject to the discretion of the Panel as to how many additional written submissions and what page limits should apply.

58. Section 5 of the Supplementary Procedures also provides 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 submission.”⁸⁶ Use of the word “should”—and not “shall”—confirms that it is desirable, but not required that all necessary evidence be included with the Notice of Independent Review. Plainly, the Supplementary Procedures do not preclude a claimant from adducing additional evidence nor would it make any sense if they did given that claimants may, subject to the Panel’s discretion, submit document requests.

⁸⁴ See Supplementary Procedures § 5 [Amended Notice of IRP, Ex. C-3].

⁸⁵ *Id.*

⁸⁶ *Id.*

59. In addition, section 5 of the Supplementary Procedures provides that the Panel may request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties.”⁸⁷ Thus, the Supplementary Procedures clearly contemplate that additional written submissions may be necessary to give each party a fair opportunity to present its case.

C. Equal Treatment of the Parties and Fairness Requires that the Parties be Given the Opportunity to Submit Further Briefing on the Merits

60. At the time DCA filed its Amended Notice of Independent Review, DCA was uncertain about which version of the Supplemental Rules were in effect and applicable to this IRP. One undated version of the Supplementary Procedures, which DCA now understands is no longer in effect, merely provides that the IRP “may request additional written submissions.”⁸⁸ The other undated version, however, and the one that ICANN maintains is applicable here, contains the language that “all necessary evidence to demonstrate requestor’s claims . . . *should* be part of the submission.”⁸⁹ As we have noted elsewhere, “should” is not mandatory language. In addition, where one party—DCA—lacked the benefit of knowing which set of rules applied to these proceedings, it would be particularly unfair to decide this matter on the merits based on the submissions to date.⁹⁰ It would also be inconsistent with Article 16(1) of the ICDR Rules, which requires that the Panel conduct the proceedings such that the parties are “treated with equality” and “given a fair opportunity” to present their case.⁹¹

⁸⁷ *Id.*

⁸⁸ See Supplementary Procedures, § 5 [Amended Notice of IRP, Ex. C-4].

⁸⁹ See Supplementary Procedures, § 5 [Amended Notice of IRP, Ex. C-3].

⁹⁰ See Amended Notice of Independent Review, para. 1 n. 1.

⁹¹ Supplementary Procedures, Art. 16(1) [Amended Notice of IRP, Ex. C-3].

61. In addition, as explained below, DCA is seeking document production since information potentially dispositive of the outcome of these proceedings is in ICANN's possession, custody or control. Given that these proceedings may be DCA's only opportunity to present and have its claims decided by an independent decision-maker, DCA submits that further briefing on the merits should be allowed following any and all document production in these proceedings.

62. For all of these reasons, it would be premature to decide this matter at this time without further briefing on the merits. In order for the Panel to carry out its duty pursuant to the ICDR Rules to conduct these proceedings such that the parties are "treated with equality" and each party is "given a fair opportunity to present its case," DCA submits that further briefing on the merits is necessary before the Panel can decide this case.

D. The Applicable Rules Provide For An In-Person Or Electronic Hearing

63. The parties agree that a hearing on the merits is appropriate in this IRP. DCA respectfully requests that the Panel schedule a hearing on the merits after document discovery has concluded and the parties have had the opportunity to file memorials on the merits. Although the Panel clearly has the authority to conduct a hearing in-person, in the interest of saving time and minimizing costs, DCA would agree to a video hearing, as stated during the April 22 hearing on procedural matters.

E. The Applicable Rules Allow Examination Of Witnesses At The Hearing

64. In April 2013, ICANN amended its Bylaws to limit telephonic or in-person hearings to "argument only."⁹² At some point after the *ICM* Panel's 2009 decision in *ICM v. ICANN*, ICANN also revised the Supplementary Procedures to limit hearings to "argument only."⁹³

⁹² ICANN Bylaws, Art. IV, § 3(12) [Amended Notice of IRP, C-10].

⁹³ ICANN Supplementary Procedures, § 4 [Amended Notice of IRP, C-3]

Accordingly, and as ICANN argued at the procedural hearing, ICANN's revised Bylaws and Supplementary Procedures suggest that there is to be no cross-examination of witnesses at the hearing. However, insofar as neither the Supplementary Procedures nor the Bylaws expressly exclude cross-examination, this provision remains ambiguous.

65. Nevertheless, regardless of whether the parties themselves may examine witnesses at the hearing, it is clear that the Panel may do so. Article 16(1) provides that the Panel "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." It is, moreover, customary in international arbitration for tribunal members to question witnesses themselves – often extensively – in order to test their evidence or clarify facts that are in dispute.

66. In this case, ICANN has submitted witness testimony that, among other things, purports to rely on secret documents that have not been provided. As long as those documents are withheld from DCA, it is particularly important for that witness testimony to be fully tested by the Panel, if not by the parties. Particularly in light of the important issues at stake in this matter and the general due process concerns raised when parties cannot test the evidence presented against them, DCA strongly urges the Panel to take full advantage of its opportunity to question witnesses. Such questioning will in no way slow down the proceedings, which DCA agrees are to be expedited – but not at the cost of the parties' right to be heard, and the Panel's right to obtain the information it needs to render its decision.

F. Document Production Is Available And Appropriate In This Proceeding

67. As we have previously explained, by choosing the ICDR Rules, the parties also chose the associated ICDR guidelines including the Guidelines for Arbitrators Concerning Exchanges of

Information.⁹⁴ The ICDR Guidelines provide that “[p]arties shall exchange, in advance of the hearing, all documents upon which each intends to rely.”⁹⁵ Furthermore, the Panel also may, upon application, “require one party to make available to another party documents in the party’s possession, not otherwise available to the party seeking the documents, that are reasonably believed to exist and to be relevant and material to the outcome of the case.”⁹⁶ Nothing in the Bylaws or the Supplementary Procedures excludes such document production, leaving the ICDR Rules to cover the field.

68. Given that ICANN relies in its written submission on documents it has not provided, allowing document production in this matter is essential to ensure that the parties are “treated with equality” and are given a “fair opportunity” to present their case.⁹⁷ General principles of equality, fairness and due process weigh heavily in favor of allowing document production, particularly where the parties do not have the ability to cross-examine witnesses and test the evidence presented against them. Document production is also important because critical information potentially dispositive of the outcome of these proceedings lies in ICANN’s possession, custody and control. Furthermore, these proceedings are presumptively the first and last opportunity for DCA to have its rights determined by an independent decision-maker. DCA thus urges the Panel to exercise its authority pursuant to the ICDR Rules to “order the parties to produce documents, exhibits or other evidence it deems necessary or appropriate.”⁹⁸

⁹⁴ See Letter from Arif H. Ali, Counsel for Claimants, to Babak Barin, Dr. Catherine Kessedjian and the Hon. Richard C. Neal, the IRP Panel (17 Apr. 2014) [C-M-22]; Letter from Arif H. Ali, Counsel for Claimants, to Babak Barin, Dr. Catherine Kessedjian and the Hon. Richard C. Neal, the IRP Panel (20 Apr. 2014) [C-M-23].

⁹⁵ ICDR Guidelines § 2 [Ex. C-M-3].

⁹⁶ *Id.*, at § 3(a).

⁹⁷ ICDR Rules, Art. 16 [C-M-15].

⁹⁸ *Id.*, at Art. 19(3).

V. CONCLUSION

69. Based on the foregoing, DCA respectfully requests that the Panel issue a procedural order declaring that—

- Each party shall have the opportunity to request documents from the other, and to seek an order from the Panel compelling production of documents if necessary;
- Each party shall have the opportunity to submit one additional written pleading on the merits of this dispute;
- There will be a hearing on the merits conducted by videoconference; and
- The Panel retains the discretion to examine witnesses at the hearing.

Respectfully submitted,



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5 May 2014