

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)
A Division of the American Arbitration Association (AAA)
CASE # 50 117 T 1083 13**

In the matter of an Independent Review Process pursuant to the Internet Corporation for Assigned Names and Number's (ICANN's) Bylaws, the *International Dispute Resolution Procedures* of the ICDR, and the *Supplementary Procedures for ICANN Independent Review Process*

**Between: DotConnectAfrica (DCA) Trust;
("Claimant")**

Represented by Mr. Arif H. Ali, Ms. Marguerite Walter and Ms. Erica Franzetti of Weil, Gotshal, Manges, LLP located at 1300 Eye Street, NW, Suite 900, Washington, DC 20005, U.S.A.

And

**Internet Corporation for Assigned Names and Numbers (ICANN);
("Respondent")**

Represented by Mr. Jeffrey A. LeVee of Jones Day, LLP located at 555 South Flower Street, Fiftieth Floor, Los Angeles, CA 90071, U.S.A.

Claimant and Respondent will together be referred to as "Parties".

DECISION ON ICANN'S REQUEST FOR PARTIAL RECONSIDERATION

**Babak Barin, *Chair*
Prof. Catherine Kessedjian
Hon. Richard C. Neal (Ret.)**

4 June 2014

BACKGROUND & PARTIES' POSITIONS

1. On 20 May 2014, following receipt of the Panel's Decision on Interim Measures of Protection dated 12 May 2014 ("Decision"), ICANN applied to the Panel with a Request for Partial Reconsideration ("Request") of paragraphs 29 to 33 of the Decision, which read as follows:

29. First, the Panel is of the view that this Independent Review Process could have been heard and finally decided without the need for interim relief, but for ICANN's failure to follow its own Bylaws (Article IV, Section 3, paragraph 6) and Supplemental Procedures (Article 1), which require the creation of a standing panel as follows:

"There shall be an omnibus standing panel between six and nine members with a variety of expertise, including jurisprudence, judicial experience, alternative dispute resolution and knowledge of ICANN's mission and work from which each specific IRP Panel shall be selected."

30. This requirement in ICANN's Bylaws was established on 11 April 2013. More than a year later, no standing panel has been created. Had ICANN timely constituted the standing panel, the panel could have addressed DCA Trust's request for an Independent Review Process as soon as it was filed in January 2014. It is very likely that, by now, that proceeding would have been completed, and there would be no need for any interim relief by DCA Trust.

31. In the Panel's unanimous view, therefore, a stay order in this proceeding is proper to preserve DCA Trust's right to a fair hearing and a decision by this Panel before ICANN takes any further steps that could potentially moot DCA Trust's request for an independent review. This is the same opportunity DCA would have enjoyed without a stay, but for ICANN's failure to create the standing panel.

32. Whether the Panel's decision is advisory only, as ICANN contends, or binding, as DCA Trust argues, the Panel is strongly of the view that ICANN's unique, international and important public functions require it to scrupulously honor the procedural protections its Bylaws, rules and regulations purport to offer the internet community. ICANN has been entrusted with the important responsibility of bringing order to the global internet system. As set out in Article I, Sections 1 and 2 of ICANN's Bylaws:

"[t]he mission of ICANN is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems. [...] In performing its mission, the following core values should guide the decisions and actions of ICANN:

6. Introducing and promoting competition in the registration of domain names where practicable and beneficial to public interest.

[...]

8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness."

33. In the Panel's unanimous view, it would be unfair and unjust to deny DCA Trust's request for interim relief when the need for such a relief by DCA Trust arises out of ICANN's failure to follow its own Bylaws and procedures.
2. In its Request, ICANN submitted that it did not fail to follow its Bylaws and that the Panel's statement that it has failed to "follow its own Bylaws and procedures is not accurate". ICANN remarked, however, that the "Panel's statement was in the context of addressing which of the parties should be viewed as responsible for the delays associated with DCA's request for interim relief" and it indicated that ICANN was not asking the "Panel to re-evaluate its position on interim relief at this time."
 3. In its Request, while ICANN acknowledged that "a standing panel is not yet in place to hear the Independent Review proceedings", ICANN argued that the last sentence of Article IV, Section 3, paragraph 6 of ICANN's Bylaws – and in particular the passages that are in italics below – specifically provide that "in the circumstances in which a standing panel is not in place when a particular proceeding is initiated, the proceeding will be considered by a one – or three – member panel comprised in accordance with the ICDR's rules."

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 IRP Provider [...].
 4. Hence, ICANN concluded, "since the Bylaws specifically address the possibility that a standing panel might not exist, and those same Bylaws set forth how an Independent Review proceeding would be presided over in the absence of a standing panel, it is not appropriate to state that, because no standing panel is in place, ICANN has failed to follow its Bylaws".
 5. Having been given the opportunity to respond to ICANN's Request in the Panel's 27 May 2014 Procedural Order No. 2, DCA Trust submitted that there "is no basis for modifying the Panel's Decision...for the simple reason that ICANN was under an obligation to create a standing panel and failed to do so."
 6. According to DCA Trust, ICANN "adopted the standing panel requirement in April 2013 at the recommendation of a panel of three experts chosen to evaluate ICANN's accountability structures and suggest improvements. Notably, the experts recommended that ICANN institute a standing panel, but did not recommend that there be any alternatives for forming an IRP Panel in the event that ICANN neglected to create such a panel. It is not clear how the additional language relating to the constitution of an IRP Panel in the absence of a standing panel came to be added to the Bylaws...The ICANN Board Resolution approving the amended language stated only that 'if a standing panel cannot be comprised or cannot remain comprised, the Bylaws now

allow for Independent Review proceedings to go forward with individually selected panelists’.”

7. According to DCA Trust, ICANN “added the language on the constitution of an IRP Panel in the absence of a standing panel solely in order to avoid delaying any potential IRP proceedings commenced after the effective date of the revised Bylaws but before ICANN had the opportunity to form an omnibus panel...Although there is no deadline in the Bylaws for forming the standing panel, given the mandatory nature of the provision, ICANN certainly should have acted by now – more than one year later – to establish it.”
8. Based on the above submissions, DCA Trust requested that the Panel deny ICANN’s Request.

THE PANEL’S REASONS & CONCLUSIONS

9. After careful consideration of the Parties’ respective submissions, the Panel is of the unanimous view that ICANN’s Request must be denied for two reasons.
10. First, there is nothing in ICANN’s Bylaws, the International Dispute Resolution Procedures of the ICDR effective as at 1 June 2009 or the Supplementary Procedures for ICANN Independent Review Process that in any way address the Panel’s ability to address ICANN’s Request. The Panel has not been able to find any relevant guidance in this regard in any of the above instruments and ICANN has not pointed to any relevant provision or rule that would support its argument that the Panel has the authority to reconsider its Decision of 12 May 2014.
11. Moreover, ICANN has not pointed to any clerical, typographical or computation error or shortcoming in the Panel’s Decision and it has not requested an interpretation of the Panel’s Decision based on any ambiguity or vagueness. To the contrary, ICANN has asked the Panel to reconsider its prior findings with respect to certain references in its Decision that ICANN disagrees with, on the basis that those references are in ICANN’s view, inaccurate.
12. Second, even if the Panel were to reconsider based on any provision or rule available, its findings with respect to those passages complained of by ICANN as being inaccurate in its Decision – namely paragraphs 29 to 33 – after deliberation, the Panel would still conclude that ICANN has failed to follow its own Bylaws as more specifically explained in the above paragraphs, in the context of addressing which of the Parties should be viewed as responsible for the delays associated with DCA Trust’s Request for Interim Measures of Protection. It is not reasonable to construe the By-law proviso for consideration by a provider-appointed *ad hoc* panel when a standing panel is

not in place as relieving ICANN indefinitely of forming the required standing panel. Instead, the provider appointed panel is properly viewed as an interim procedure to be used before ICANN has a chance to form a standing panel. Here, more than a year has elapsed, and ICANN has offered no explanation why the standing panel has not been formed, nor indeed any indication that formation of that panel is in process, or has begun, or indeed even is planned to begin at some point.

THE PANEL'S DECISION

13. The Panel therefore concludes that ICANN's Request must be denied.

14. The Panel reserves its decision on the issue of costs relating to this stage of the proceeding until the decision on the merits.

This Decision on ICANN's Request for Partial Reconsideration has five (5) pages. The members of the Panel have all reviewed this decision and agreed that the Chair may sign it alone on their behalf.

Signed in Montreal, Quebec for delivery to the Parties in Los Angeles, California.

Dated 4 June 2014.



Babak Barin, President of the Panel, on behalf of himself, Prof. Catherine Kessedjian and the Hon. Richard C. Neal (Ret.)