

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

ICDR Case No. _____

Better Living Management Co., Ltd.,)
)
Claimant,)
)
v.)
)
Internet Corporation for Assigned Names and Numbers,)
)
Respondent.)

NOTICE OF INDEPENDENT REVIEW PROCESS

Mr. Rujira Bunnag
Marut Bunnag International Law Office
Contact Information Redacted

Counsel for Claimant

I. INTRODUCTION

Claimant, Better Living Management Co., Ltd, hereby requests Independent Review pursuant to ICANN Bylaws, Art. IV, Sec. 3. Specifically, Claimant maintains that the ICANN Board, through the NGPC, has acted inconsistently and contrary to various of ICANN's Articles of Incorporation and Bylaws, by accepting GAC Advice to reject the Claimant's application to operate the .Thai gTLD -- without any independent investigation or due diligence. Such action (or inaction, by failure to exercise due diligence and independent thought), has not been in the best interests of ICANN or of the Thai speaking people throughout the world.

Specifically, The Board has violated ICANN's Articles of Incorporation, Art. 4, which require it to "carry out its activities in conformance with relevant principles of international law and applicable conventions and local law."

The Board also has violated ICANN's Bylaws Art. I, Sec. 2, ("core values that should guide the decisions and actions of ICANN"):

No. 3, delegating coordination functions to or recognizing the policy role of other responsible entities that reflect the interests of third parties.

No. 7, employing open and transparent policy development mechanisms that promote well-informed decisions based on expert advice.

No. 8, making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

No. 9, obtaining informed input from those entities most affected.

The Board has also violated Bylaws Art. II, Sec. 1, because the Board has not acted "by a majority vote of all members of the Board," nor followed other procedures set forth in Bylaws Art. III, Sec. 6.

The Board also has violated Bylaws Art. II, Sec. 3, which mandates that ICANN “shall not apply its standards, policies, procedures, or practices inequitably, or single out any particular party for disparate treatment, unless justified by substantial and reasonable cause.”

The Board has also violated Bylaws Art. X, Annex A, Sec. 9:

- a. requiring that PDP Recommendations approved by a GNSO Supermajority Vote shall be adopted by the Board unless, by a vote of 2/3 of the Board, the Board determines that such policy is not in the best interests of the ICANN Community or ICANN; and,
- b. requiring, in the event the Board determines that such a policy is not in the best interests of the ICANN Community or ICANN, the Board shall (i) articulate the reasons for its determination in a report to the Council (the “Board Statement”), and (ii) submit the Board Statement to the Council.

Such violations of the Articles and Bylaws have caused Claimant to suffer injury directly caused by these violations. In support of this argument, Claimant avers the following, but further reserves the right to produce further evidence and argument as it engages with ICANN to understand any rationale for ICANN’s decisions and inaction to date. Thus far, ICANN has offered precious little rationale for its decision to reject the application, which has cost Claimant hundreds of thousands of dollars to date.

II. FACTS

1. The Claimant, Better Living Management Co., Ltd, is a company incorporated under Thai law, which has registered capital of Baht 50,000,000, and has corporate objectives to operate internet and related businesses. The Claimant has 100 percent Thai shareholders, according to the company certification document, list of corporate objectives, and list of shareholders attached hereto. (Appendix 1.)

2. The Respondent is the Internet Corporation for Assigned Names and Numbers (ICANN), which is a California public benefit corporation, headquartered in Los Angeles. The Respondent

is responsible for coordination of the global DNS, ensuring its stable and secure operation, and management of the top level domain name space (DNS root zone) and DNS policy. The Respondent has accepted Claimant's application to operate the .Thai new gTLD. (Appendix 2.) Applicant has provided a \$185,000 application fee, a substantial credit instrument, and a substantial application containing more than 100 pages of text and evidence, involving a number of professional consultants in order to pass ICANN's evaluation process.

3. The Claimant's application, indicated for community use, was filed with the Respondent on July 8, 2012 -- Application number 1-2112-4478. (Appendix 3.)

4. In applying to operate the new gTLD, ".thai", the Claimant was supported by the following organizations within the Thailand government, via written evidence provided with the application, to wit:

A. Letter of the Permanent Secretary, Ministry of Information and Communication Technology, on April 12, 2012. (Appendix 4.)

B. Letter of the Permanent Secretary, Ministry of Interior, on April 12, 2012. (Appendix 5.)

C. Letter of the Permanent Secretary, Ministry of Industry, on May 21, 2012. (Appendix 6.)

D. Letter of the Office of the Permanent Secretary, Ministry of Culture, on November 1, 2012. (Appendix 7.)

E. Letter of the Miracle of Life Foundation, under Her Royal Heiness, Princess Ubolratara Rajakanya Sirivadhana Barnavadi, on November 8, 2012. (Appendix 8.)

5. The Claimant also took effort to obtain support from the Ministry of Science and Technology, because Dr. Thaweesak Koanantakool, the Director of the National Science and Technology Development Agency, at the time, was the member of Government Advisory Committee (GAC) of the Respondent from Thailand.

However, the Claimant was refused because of Dr. Thaweesak's competitive concerns about ".thai" service provision overlapping with the existing domain name ".th" which he is involved in managing, and also about control and management of the .thai TLD. Therefore, the Claimant explained its corrective measures, and a specific proposal for prevention of the problems according to the criteria of the Respondent. (Appendix 9.) On October 31, 2012, the Memorandum of the National Science and Technology Development Agency (NSTDA) No. 5401/77726, by Ms. Chadamas Thuvasethakul, Executive Vice President of NSTDA, acting on behalf of the President of NSTDA, provided her opinion that the Ministry of Science and Technology would issue a letter informing that it did not intend to object or deny the application of the Claimant. Therefore, the Office of the Permanent Secretary, Ministry of Science and Technology, issued the letter of no objection to the registration of the domain name ".thai" to the Claimant on March 13, 2013. (Appendix 10.)

6. During May 2013 until June 29, 2013, Respondent provided a "GAC Early Warning" period which provided opportunity for the GAC representative of each country to file an initial objection for any TLD application which its government did not agree with. At the time, Dr. Thaweesak Koanantakool, the Director of NSTDA, who was the GAC member from Thailand, did not file any objection. Therefore, the Claimant reasonably believed that Dr. Thaweesak Koanantakool, according to the NSTDA letter referred to above (Appendix 10), did not object to the registration of the domain name ".thai".

7. However, during the Conference of the Respondent in Beijing, China on April 7, 2013, without any authority of either ICANN or the Thai government to do so, Dr. Thaweesak Koanantakool appointed Mr. Wanawit Ahkuputra, Deputy Director of Electronic Transactions Development Agency, Ministry of Information and Communication Technology, as the new GAC representative. Mr. Wannawit, without any authority from the Thai government to do so, and in direct contradiction of his agency's Permanent Secretary's letter (and 4 other Thai government agencies' letters) of support one year earlier (Appendix 4-7), suddenly then demanded the GAC to reject the Claimant's application.

The Claimant paid a visit to Mr. Wanawit Ahkuputra after the conference in Beijing, China, to ask for the reason for his sudden objection, and received the explanation – for the first time ever uttered -- that the word “Thai” in “English” is a Geographical Name in the parlance of Respondent's Applicant Guidebook. (Appendix 11.)

The GAC, and subsequently the NGPC committee of the Board of the Respondent then accepted the objection of Mr. Wanawit Ahkuputra, as Official GAC member of Thailand of the Thai Government. Consequently, the Claimant's application was rejected by the Respondent (Appendix 12.) This occurred without any further inquiry whatsoever to Claimant, or otherwise by the Board of the Respondent. And this occurred even though the Claimant had passed the New gTLD Program, Initial Evaluation, via Respondent's report dated May 3, 2013, that the Claimant's financial stability, technical service met the appropriate levels of international standards, and specifically finding that “Thai” is not a Geographical Name in the parlance of the Applicant Guidebook. (Appendix 13.)

The unauthorized objection of Mr. Wanawit Ahkuputra, who was not appointed in accord with proper procedures of either ICANN or the Thai government, had a direct negative impact to the Claimant and its application. If there had been no objection from Mr. Wanawit Ahkuputra,

the improper GAC member from Thailand, then the Claimant would have had an opportunity to make a successful contract with the Respondent, and would be ready to provide the “.thai” TLD to the Thai people throughout the world.

8. During the 47th Conference of ICANN at Durban, South Africa, Mr. Wanawit Ahkuputra, again without any proper authorization either as the official GAC member from Thailand per ICANN’s policy, or otherwise authorized by the Thai government, again objected to the Claimant’s application for “.thai”, stating it was a Geographical Name.

As a consequence, and without any further inquiry whatsoever to either the Claimant or the Thai government, the Claimant’s application was officially rejected by the Respondent’s NGPC. The NGPC merely assumed that Mr. Wanawit Ahkuputra was the GAC member of Thailand, because the prior GAC member had authorized him. And so the GAC and the NGPC of the Respondent inaccurately recognized such objection as the policy of the Thai Government. (Appendix 14.)

9. The basis of Mr. Wanawit Ahkuputra of being a GAC member of Thailand was invalid. Mr. Wanawit Ahkuputra was appointed by Dr. Taweesak Koanantakool, but Dr. Taweesak Koanantakool also had not been appointed by the Thai government to be the GAC member of Thailand.

The Minister of Science and Technology of Thailand, by letter to Claimant, Ref. Wor Tor 5401/219, dated January 20, 2014, stated clearly that GAC had invited Dr. Taweesak Koanantakool to be GAC member of Thailand, however, it did not state that the Thai Government had appointed Dr. Taweesak Koanantakool to be GAC member of Thailand. He never was properly appointed by the Thai government, but instead was erroneously recruited by the GAC. (Appendix 15.) This is contradictory to the GAC Operating Principles of the

Respondent, which requires the GAC representative from any country to be properly authorized by that country's particular Government. Consequently, Dr. Taweesak Koanantakol's appointment to be Thai GAC was contradictory to GAC Operating Principle, Article IV, 4 Membership, Principle 14. (Appendix 16.) Therefore, as Dr. Taweesak Koanantakool had never been appointed to be GAC member of Thailand, and so later he appointed Mr. Wanawit Ahkuputra unlawfully. Mr. Wanawit Ahkuputra also had never been appointed officially from the Thai Government.

Because the appointment of Dr. Taweesak Koanantakool is proved to be invalid, the appointment of Mr. Wanawit Ahkuputra, and his objection to the Claimant's ".thai" TLD application, are invalid as well.

10. The performance of Mr. Wanawit Ahkuputra as GAC member of Thailand was biased, and not neutral as an agent or representative authorized by the Thai Government should be.

Mr. Wanawit Ahkuputra was interviewed, which interview was published in Prachachart Turakij Thai newspaper, and newspapers online in June 2013, in which the Thai newspaper published that the Claimant is a Thai company, with most capital from Malaysia. This was untrue, because the Claimant is a Thai Company with 100% Thai shareholders.

Mr. Wanawit Ahkuputra also stated that for ".thai", it was unnecessary to be Thai, or stay in Thailand, to utilize the domain name ".thai" which is also untrue, because the Claimant will allow Thai people to utilize the domain name ".thai", as stated in Appendix 17.

Mr. Wanawit Ahkuputra also obstructed the free and fair competition in the Thai market for domain names in Thailand, depriving users of a chance to get less expensive registration fees than available in .th, which Mr. Wanawit Ahkuputra is involved in managing. He demanded and asked for the signatures from the people who objected to the domain name ".thai" as stated

in the newspaper. (Appendix 18.) Such actions should not be performed by the person who purported to represent his nation as the GAC member from Thailand.

Mr. Wanawit Ahkuputra also gave a biased interview to Cyber Magazine that the Claimant would cause damage to Thailand. (Appendix 19.)

11. Consequently, the Claimant sued Mr. Wanawit Ahkuputra, Deputy Director of Electronic Transactions, Official Development Agency, Ministry of Information and Communication Technology, and Dr. Taweesak Koanantakool Director of NSTDA at the Central Administration Count in Thailand, Black Case No. 2305/56, demanding to have withdrawn the action of Mr. Wanawit Ahkuputra, GAC member of Thailand from obstructing the Claimant's application with the Respondent, and from obstructing the free trade for the service of domain names, and to stop the GAC member of Thailand objecting to domain name ".thai", and to allow free and fair competition. (Appendix 20.) The Case is currently pending. Meanwhile, the Respondent should not finally reject the Claimant's application, since the courts in Thailand are the proper arbiters of whether or not the purported Thai GAC representatives have been properly authorized by the Thai Government.

12. The Agent of the Claimant received the Outbound Message from the Respondent, Current Case 00110878, Message Date 1/24/2014, and only then understood that Claimant's application had been rejected by Respondent. (Appendix 21.) Consequently, the Claimant was required to file the Notice of Independent Review within 30 days from January 24, 2014.

Based on the aforementioned facts and reasons, the Claimant was treated unfairly by the GAC member of Thailand, as its objection to Claimant's application was not authorized by the Thai Government. The Claimant would like to point out that the Respondent's Board did not exercise due diligence and care in having a reasonable amount of facts in front of them, and did

not exercise independent judgment in taking the decision to accept GAC Advice with no further inquiry, and to reject Claimant's application.

III. CLAIMANT'S DEMANDS

1. The Respondent must accept Claimant's application to operate the ".thai" TLD, as Claimant has met every requirement of Respondent, and only the inaccurate and unauthorized GAC Advice has caused Respondent to reject the application.

2. The Independent Review Process Panel ("IRP Panel") must declare that the Respondent shall deem that Mr. Wanawit Ahkupura's act, purportedly done as GAC member of Thailand, has no binding effect, since his participation in ICANN has never been authorized by the Thai Government.

3. The Respondent must accept that the domain name ".thai" is not a Geographical Name within the meaning of the Applicant Guidebook or otherwise. It is a Community Name. Moreover, the Claimant did not violate any rules and regulations of the Respondent.

IV. PRELIMINARY ARGUMENT

The Claimant will send English translations of all Appendixes provided thus far in Thai language to ICDR and the Respondent within 30 days from the date of filing of this Request for independent review. The Claimant meanwhile seeks to engage ICANN to understand its rationale for rejecting Claimant's application, based solely on GAC Advice which was based solely on the unauthorized action of one man. And also to understand why ICANN took this action without any further investigation whatsoever, including any further inquiry to Claimant whatsoever. Upon understanding Respondent's reasoning for this action and inaction, Respondent shall file an Amended Notice of Independent Review Process which takes into

account any rationale provided by Respondent, if indeed Respondent continues to maintain the current refusal of Claimant's application.

Claimant hopes that by this Notice, ICANN will understand that a grave mistake has been made by the GAC and by the ICANN Board, and will revoke its refusal of Claimant's application until such time as the Thai courts rule as to the authority of the purported GAC Representatives from Thailand.

This would be consistent with the Respondent's duty to operate in compliance not only with its own policy as embodied in the GAC Principles, but also in compliance with Thai national law. This also would be consistent with Respondent's duty to recognize the policy role of other responsible entities that reflect the interests of third parties – namely the Thai courts. This would also be consistent with Respondent's duty to provide open and transparent policy development mechanisms that promote well-informed decisions based on expert advice. This would also be consistent with Respondent's duty to make decisions by applying documented policies neutrally and objectively, with integrity and fairness. This would also be consistent with Respondent's duty to obtain informed input from those entities most affected, namely the Thai people as represented by the Thai Government and Thai courts, and also the Claimant.

Claimant maintains that the Board has also violated Bylaws Art. II, Sec. 1, because the Board has not acted "by a majority vote of all members of the Board," nor followed other procedures set forth in Bylaws Art. III, Sec. 6. Instead, only the NGPC has acted on Claimant's application, and there is no indication whether a majority even of the NGPC was in agreement with the decision to accept GAC Advice without further inquiry or independent investigation, and to reject Claimant's application.

Claimant also maintains that the Board also has violated Bylaws Art. II, Sec. 3, which mandates that ICANN “shall not apply its standards, policies, procedures, or practices inequitably, or single out any particular party for disparate treatment, unless justified by substantial and reasonable cause.” Instead, the NGPC has rejected the Claimant’s application, along with only three other applications to date, based on purported governmental concerns. Yet ICANN has approved dozens if not hundreds of other new gTLD applications which also have had serious government concerns. And indeed, the concerns expressed by the purported Thai GAC Representative are not even the authorized concerns of the Thai Government, of which four other Ministries have specifically approved Claimant’s application.

Claimant also maintains that the Board has violated Bylaws Art. X, Annex A, Sec. 9:

- c. requiring that *PDP Recommendations* approved by a GNSO Supermajority Vote shall be adopted by the Board unless, by a vote of 2/3 of the Board, the Board determines that such policy is not in the best interests of the ICANN Community or ICANN; and,
- d. requiring, in the event the Board determines that such a policy is not in the best interests of the ICANN Community or ICANN, the Board shall (i) articulate the reasons for its determination in a report to the Council (the “Board Statement”), and (ii) submit the Board Statement to the Council.

Other than the GAC (solely at the behest of the unauthorized, rogue GAC Representative from Thailand), not one Advisory Committee, Supporting Organization, Stakeholder Group, Constituency, Working Group, Review Panel, Implementation Team, Independent Expert or any other ICANN creation is or ever has been opposed to Claimant’s application.

Respondent has not provided any criteria by which Applicant could either address or overcome the GAC Advice that was narrow-mindedly accepted by the NGPC. Respondent instead has effectively has given a veto power to the Thai GAC Representative, even though he was not authorized by the Thai Government, and was not properly authorized per ICANN’s own

policy embodied in the GAC Principles. This is directly contrary to ICANN's stated Principle "A" underlying the New gTLD Program:¹

New generic top-level domains (gTLDs) must be introduced in an orderly, timely and predictable way.

Further, it is directly contrary to Recommendation 1, 9 and 12:²

(1) The evaluation and selection procedure for new gTLD registries should respect the principles of fairness, transparency and non-discrimination.

All applicants for a new gTLD registry should therefore be evaluated against transparent and predictable criteria, fully available to the applicants prior to the initiation of the process. Normally, therefore, no subsequent additional selection criteria should be used in the selection process.

(9) There must be a clear and pre-published application process using objective and measurable criteria.

(12) Dispute resolution and challenge processes must be established prior to the start of the process.

It is also directly contrary to ICANN's Principle "G":³

The string evaluation process must not infringe the applicant's freedom of expression rights that are protected under internationally recognized principles of law.

Claimant has every right to operate the ".thai" TLD, as documented by many letters of support of the Thai Government which were included with Claimant's application, and under relevant U.N. Declarations cited by Respondent in its explanation of Principle "G".

¹ http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-part-08aug07.htm#_Toc43798015

² *Id.*

³ *Id.*

These Principles and Recommendations were adopted unanimously by the GNSO Council in late 2007, and almost unanimously by the ICANN Board in early 2008. The Applicant Guidebook represents the implementation of these Principles and Recommendations. Yet the NGPC has now gone completely outside the bounds of these bedrock principles underlying the New gTLD Program. Instead they apparently have allowed an unauthorized and inappropriate veto to one man who falsely purported to represent the Thai Government. Respondent has done this without any input whatsoever from any ICANN stakeholder group, for no discernible purpose whatsoever, and with no discernible means for the application to be further evaluated.

V. CONCLUSION

Such violations by Respondent of its Articles and Bylaws have caused Claimant to suffer injury directly caused by these violations. Claimant reserves the right to produce further evidence and argument as it engages with ICANN to understand any rationale for ICANN's decisions and inaction to date.

Respectfully submitted, February 23, 2014.

Signed: Rujira Bunnag

Mr. Rujira Bunnag
Marut Bunnag International Law Office
Contact Information Redacted