

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION (ICDR)
Independent Review Panel
CASE # 50 2013 001083

In the matter of an Independent Review Process (IRP) 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 Trust;
("Claimant")

Represented by Mr. Arif H. Ali of Weil, Gotshal, Manges, LLP
located at Contact Information Redacted

And

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

Represented by Mr. Jeffrey A. LeVee of Jones Day, LLP located at
Contact Information Redacted

Claimant and the Respondent are hereafter jointly referred to as the
"Parties".

THIRD DECLARATION ON THE IRP PROCEDURE

1. This Declaration is rendered following the Panel's review of the Parties' written submissions concerning the following two issues filed on 8 April 2015:

- i) Presence of and opportunity for the Panel *only* to ask witnesses *viva voce* questions during any in-person, telephonic or video hearing ordered by the Panel; and
- ii) Evidentiary treatment by the Panel of the witness statements already filed, if there is to be no cross-examination by the Parties and no *viva voce* questions asked by the Panel during any in-person, telephonic or video hearing ordered by the Panel.

I. THE PARTIES' POSITIONS

2. DCA Trust submits that witnesses should be present (or available by telephone or videoconference, as appropriate) and the Panel should have the opportunity to ask witnesses questions *viva voce* during any in-person, telephonic or video hearing the Panel orders, and counsel tendering the witness for examination should have the opportunity to ask follow-up questions in light of the Panel's questions, as well as a brief opportunity for direct examination.
3. DCA Trust also submits "the Panel should give the witness statements filed full weight and effect as presented, provided that each party complies with the procedural orders of the Panel, that is, tendering the witnesses for examination. In the event a witness is unavailable [...] without a valid reason for *viva voce* questioning by the Panel during any...hearing ordered by the Panel, DCA respectfully requests that the Panel exercise its discretion to strike the statement of such witness, draw adverse inferences against the testimony of the witness, or otherwise accord negative evidentiary treatment to the testimony of the witness as the Panel deems appropriate."
4. Finally, DCA Trust submits that "ICANN's announcement at this stage of the proceedings – months after the Panel ruled on the issue of live witness testimony – that it will not make its witnesses available should have cost consequences for ICANN. The approach ICANN has adopted is characteristic of its position throughout these proceedings: constantly making ad hoc decisions to suit ICANN's strategic interests with seemingly little regard for the principles of transparency, fairness and accountability embodied in its governing documents and espoused by its leadership."
5. ICANN on the other hand argues that, "ICANN's Bylaws do not permit any examination of witnesses by the parties or the Panel during the hearing." In support of this proposition, ICANN cites Article IV, section

3, and Paragraph 12 of its Bylaws. ICANN also writes that it “understands that, in its March 24, 2015 declaration, the Panel concluded that a hearing could include not only arguments but examination of witnesses, rejecting ICANN’s argument that the hearing of witnesses was not permissible. However, ICANN has determined that it has no choice but to follow the provisions of its Bylaws that set forth the rules for all Independent Review proceedings.” Instead, ICANN offers the Panel the possibility to ask witnesses questions in writing.

6. With respect to the second issue identified in paragraph 1, ICANN submits that, “the law is clear that there is no ‘right’ to cross-examination in an arbitration (much less an independent Review proceeding). If the written testimony is demonstrated to be [at] odds with other testimony and exhibits, the written testimony can be given less (or even no) weight. On the other hand, if the written testimony is consistent with other testimony and exhibits, the Panel likely would credit the veracity of the written testimony.”
7. According to ICANN, in this matter, ICANN “has two declarants – Ms. Dryden and Mr. Chalaby. Ms. Dryden’s declaration addresses events that occurred before and during the Governmental Advisory Committee (GAC) meeting at which the GAC issued ‘consensus advice’ against DCA’s application for .AFRICA. After ICANN submitted Ms. Dryden’s declaration, ICANN produced documents from the GAC that confirm the accuracy of Ms. Dryden’s testimony and refute DCA’s position. [...]”
8. ICANN also submits that, “Mr. Chalaby’s declaration addresses DCA’s claim that two of ICANN’s Board members might have had conflicts of interest when they voted to accept the GAC Advice that DCA’s application not proceed. DCA has *never* submitted any evidence on the conflict issue, and DCA’s Reply Memorial does not even address the issue. Ms. Bekele’s declaration...does briefly address the conflict issue but does not submit any evidence to rebut Mr. Chalaby’s statements or the exhibits that Mr. Chalaby referenced (including ICANN’s conflict of interest policy and how the policy was followed in this instance).”

II. ANALYSIS OF THE ISSUES AND REASONS

9. ICANN is not an ordinary California nonprofit organization. Rather it has a large international purpose and responsibility to coordinate and

ensure the stable and secure operation of the Internet's unique identifier systems.

10. Indeed, Article 4 of ICANN's Articles of Incorporation require ICANN to "operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets." ICANN's Bylaws also impose duties on it to act in an open, transparent and fair manner with integrity.
11. ICANN's Bylaws (as amended on 11 April 2013) read in relevant parts as follows:

ARTICLE IV: ACCOUNTABILITY AND REVIEW

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in Section 2 of this Article, ICANN shall have in place a *separate process for independent third-party review* of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.

[...]

4. Requests for such independent review shall be referred to an Independent Review Process Panel [...], which shall be *charged with comparing contested actions of the Board to Articles of Incorporation and Bylaws*, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:
 - a. did the Board act without conflict of interest in taking its decision?
 - b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
 - c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company? [Emphasis by way of italics is that of the Panel]

12. Section 8 of the Supplementary Procedures for ICANN Independent Review Process similarly subject the IRP to the standard of review set out in subparagraphs a., b., and c., above, and add:

If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the internet community and the global public interest, the requestor will have established proper grounds for review.

13. In the Panel's view, Article IV, Section 3, and Paragraph 4 of ICANN's Bylaws (reproduced above) – the Independent Review Process – was designed and set up to offer the Internet community, an accountability process that would ensure that ICANN acted in a manner consistent with ICANN's Articles of Incorporation and Bylaws.
14. Both ICANN's Bylaws and the Supplementary Rules require an IRP Panel to *examine* and *decide* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws. As ICANN's Bylaws explicitly put it, an IRP Panel is "*charged with* comparing contested actions of the Board [...], and with *declaring* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws.
15. The IRP is the only independent third party process that allows review of board actions to ensure their consistency with the Articles of Incorporation or Bylaws. As already explained in this Panel's 14 August 2014 Declaration on the IRP Procedure ("August 2014 Declaration"), the avenues of accountability for applicants that have disputes with ICANN do *not* include resort to the courts. Applications for gTLD delegations are governed by ICANN's Guidebook, which provides that applicants waive all right to resort to the courts:

"Applicant hereby releases ICANN [...] from any and all claims that arise out of, are based upon, or are in any way related to, any action or failure to act by ICANN [...] in connection with ICANN's review of this application, investigation, or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS

OF ANY OTHER LEGAL CLAIM AGAINST ICANN ON THE BASIS OF ANY OTHER LEGAL CLAIM.”

Thus, assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, then the only and ultimate “accountability” remedy for an applicant is the IRP.

16. Accountability requires an organization to explain or give reasons for its activities, accept responsibility for them and to disclose the results in a transparent manner.
17. ICANN’s Bylaws have determined that the IRP would be governed by the ICDR International Arbitration Rules (“ICDR Rules”) as supplemented by the Supplementary Procedures. In the event there is any inconsistency between these Supplementary Procedures and the ICDR Rules, the Supplementary Procedures are to govern.
18. Again, as explained in this Panel’s August 2014 Declaration, “a key provision of the ICDR Rules, Article 16, under the heading “Conduct of Arbitration” confers upon the Panel the power to “conduct [proceedings] in whatever manner [the Panel] 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.”
19. Another key provision of the ICDR Rules, Article 36 directs the Panel to “interpret and apply these Rules insofar as they relate to its powers and duties”. Like in all other ICDR proceedings, the details of the exercise of such powers are left to the discretion of the Panel itself.
20. Nothing in the Supplementary Procedures either expressly or implicitly conflicts with or overrides the general and broad powers that Articles 16 and 36 of the ICDR Rules confer upon the Panel to interpret and determine the manner in which the IRP proceedings are to be conducted and to assure that each party is given a fair opportunity to present its case.
21. In order to keep the costs and burdens of independent review as low as possible, ICANN’s Bylaws, in Article IV, Section 3 and Paragraph 12, suggests that the IRP Panel conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible, and where necessary the IRP Panel may hold meetings by telephone. Use of the words “should” and “may” versus “shall” are demonstrative of this point. In the same paragraph, however, ICANN’s Bylaws state that, “in the unlikely event that a telephonic or in-person hearing is convened, the hearing *shall* be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.”

22. The Panel finds that this last sentence in Paragraph 12 of ICANN's Bylaws, unduly and improperly restricts the Panel's ability to conduct the "independent review" it has been explicitly mandated to carryout in Paragraph 4 of Section 3 in the manner it considers appropriate.
23. How can a Panel compare contested actions of the Board and declare whether or not they are consistent with the provisions of the Articles of Incorporation and Bylaws, without the ability to fact find and make enquiries concerning those actions in the manner it considers appropriate?
24. How can the Panel for example, determine, if the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, or exercised independent judgment in taking decisions, if the Panel can not ask the questions it needs to, in the manner it needs to or considers fair, just and appropriate in the circumstances?
25. How can the Panel ensure that the parties to this IRP are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case with respect to the mandate the Panel has been given, if as ICANN submits, "ICANN's Bylaws do not permit any examination of witnesses by the parties or the Panel during the hearing"?
26. The Panel is unanimously of the view that it cannot. The Panel is also of the view that any attempt by ICANN in this case to prevent it from carrying out its independent review of ICANN Board's actions in the manner that the Panel considers appropriate under the circumstances deprives the accountability and review process set out in the Bylaws of any meaning.
27. ICANN has filed two 'Declarations' in this IRP, one signed by Ms. Heather Dryden, a Senior Policy Advisor at the International Telecommunications Policy and Coordination Directorate at Industry Canada, and Chair of ICANN Government Advisory Committee from 2010 to 2013, and the other by Mr. Cherine Chalaby, a member of the Board of Directors of ICANN since 2010. Mr. Chalaby is also, since its inception, one of three members of the Subcommittee on Ethics and Conflicts of ICANN's Board of Governance Committee.
28. In their respective statements, both individuals have confirmed that they "have personal knowledge of the matters set forth in [their] declaration and [are] competent to testify to these matters *if called as a witness.*" These statements were most likely prepared under the

common law tradition and with direct input of counsel. It also appears that ICANN's witnesses signed their respective Declarations with full knowledge that they may be called as a witness to explain and elaborate on their statements. Considering the above, it is apparent that ICANN has changed its position since it filed its Declarations.

29. In his Declaration, Mr. Chalaby states that "all members of the NGPC were asked to and did specifically affirm that they did not have a conflict of interest related to DCA's application for .AFRICA when they voted on the GAC advice. In addition, the NGPC asked the BGC to look into the issue further, and the BGC referred the matter to the Subcommittee. After investigating the matter, the Subcommittee concluded that Chris Disspain and Mike Silber did not have conflicts of interest with respect to DCA's application for .AFRICA."
30. The Panel considers it important and useful for ICANN's witnesses, and in particular, Mr. Chalaby as well as for Ms. Sophia Bekele Eshete to be present at the hearing of this IRP.
31. While the Panel takes note of ICANN's position depicted on page 2 of its 8 April 2015 letter, the Panel nonetheless invites ICANN to reconsider its position.
32. The Panel also takes note of ICANN's offer in that same letter to address written questions to its witnesses before the hearing, and if the Panel needs more information after the hearing to clarify the evidence presented during the hearing. The Panel, however, is unanimously of the view that this approach is fundamentally inconsistent with the requirements in ICANN's Bylaws for it to act openly, transparently, fairly and with integrity.
33. As already indicated in this Panel's August 2014 Declaration, analysis of the propriety of ICANN's decisions in this case will depend at least in part on evidence about the intentions and conduct of ICANN's top personnel. Even though the Parties have explicitly agreed that neither will have an opportunity to cross-examine the witnesses of the other in this IRP, the Panel is of the view that ICANN should not be allowed to rely on written statements of its top officers attesting to the propriety of their actions and decisions without an opportunity for the Panel and thereafter DCA Trust's counsel to ask any follow-up questions arising out of the Panel's questions of ICANN's witnesses. The same opportunity of course will be given to ICANN to ask questions of Ms. Bekele Eshete, after the Panel has directed its questions to her.

34. The Parties having agreed that there will be no cross-examination of witnesses in this IRP, the procedure for asking witnesses questions at the hearing shall be as follows:
 - a) The Panel shall first have an opportunity to ask any witness any questions it deems necessary or appropriate;
 - b) Each Party thereafter, shall have an opportunity to ask any follow-up questions the Panel permits them to ask of any witness.
35. The Panel of course, reserves and retains the right to modify and adapt the above procedure during the hearing as it deems it appropriate or necessary. The Panel shall also at all times have complete control over the procedure in relation to the witnesses answering *viva voce* any questions that the Panel or any follow-up questions that a Party may have for them.

III. DECLARATION OF THE PANEL

36. Based on the foregoing, after having carefully considered the Parties' written submissions, and after deliberation, the Panel is of the view that the hearing in this IRP should be *in-person* in Washington, D.C. at the offices of Jones Day on 22 and 23 May 2015.
37. Based on the above, the Panel requires all three witnesses in this IRP to be physically present at the hearing in Washington, D.C. If a witness fails to appear at the hearing without a valid reason acceptable to the Panel, the Panel shall in its sole discretion draw the necessary inferences and reach appropriate conclusions regarding that witness's Declaration.
38. Based on the above, the Panel requires all three witnesses in this IRP to answer *viva voce* any questions the Panel may have for them, and thereafter, answer any follow up questions that counsel for the Parties may have for them in respect to the questions asked by the Panel.
39. Finally, considering the Panel's decisions above with respect to the first issue set out in paragraph 1, the second issue in that same paragraph is moot and no longer requires consideration by the Panel at this stage.
40. The Panel reserves its decision on the issue of costs relating to this stage of the proceeding until the decision on the merits.

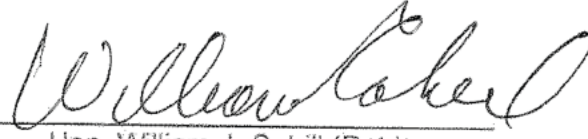
This Third Declaration on the IRP Procedure has ten (10) pages.

Place of IRP: Los Angeles, California.

Dated: Monday, 20 April 2015



Professor Catherine Kessedjian



Hon. William J. Cahill (Ret.)



Babak Barr, President