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

CASE NUMBER 01-15-0005-9838

Between:

Asia Green IT System Bilgisayar San. ve Tic. Ltd. Sti.,

CLAIMANT

and

Internet Corporation for Assigned Names and Numbers,

RESPONDENT

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CLAIMANT'S OBSERVATIONS AS TO SCOPE OF PANEL AUTHORITY

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Panelists:

Calvin Hamilton

Hon. William J. Cahill (Ret.)

Klaus Reichert SC

Pursuant to Procedural Order No. 1 in this matter, Claimant hereby provides its further Observations as to the scope of an IRP panel's authority.

1.   Claimant has requested, *inter alia*, that this panel find that ICANN has violated its Bylaws in seven described ways, and must be bound to comply with them and with the documented policies in the Applicant Guidebook. Consequently, AGIT requests that the panel require ICANN to disregard the non-consensus, unclear, unsubstantiated and out-of-bound governmental advice as to AGIT's applications. Since there are no other outstanding issues as to the applications, the panel should require ICANN to issue the two TLD Registry Agreements to AGIT immediately. (IRP Request, p. 26-27.)

2.   ICANN, on the other hand, argues that an IRP panel "is limited to 'declaring whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws' and recommending that the Board stay any further action until it reviews the opinion of the IRP Panel." (IRP Response, p. 25.) In other words, ICANN maintains that IRP panels may only make advisory, non-binding declarations for consideration of the ICANN Board.

3.   This issue was exhaustively briefed and decided in the .Africa case. *See, DCA Trust v. ICANN*, Final Declaration, ¶ 23. (IRP Request, Annex 11 (quoting *DCA Trust v.* ICANN, Declaration on the IRP Procedure, Aug. 14, 2014, ¶¶ 99-115, attached hereto as Annex C-1).   In that panel's Declaration on the IRP Procedure, it thoroughly summarized the parties' briefing, the history of the Bylaws and of ICANN's founding, a prior IRP opinion on the issue -- and analyzed in painstaking detail whether IRP panel decisions are binding, or merely advisory. (Annex C-1, ¶¶ 88-128.) Drafting ten pages of summary and analysis on this specific issue, the panel unanimously held that IRP decisions may contain binding recommendations to the Board, and are not merely advisory. (*Id.*, ¶ 131.)

4.   The panel found that, since ICANN drafted the Bylaws, IRP procedure, as well as the adhesive contract with TLD applicants, that any ambiguity (if any) must be construed against ICANN:

> Moreover, even if it could be argued that ICANN's Bylaws and Supplementary Procedures are ambiguous on the question of whether or not a decision, opinion or declaration of the IRP Panel is binding, in the Panel's view, this ambiguity would weigh against ICANN's position. The relationship between ICANN and the applicant is clearly an adhesive one. There is no evidence that the terms of the application are negotiable, or that applicants are able to negotiate changes in the IRP. [¶] In such a situation, the rule of *contra proferentem* applies. As the drafter and architect of the IRP Procedure, it was open to ICANN and clearly within its power to adopt a procedure that expressly and clearly announced that the decisions, opinions and declarations of IRP Panels were advisory only. ICANN did not adopt such a procedure.

(*Id.*, ¶ 108-09.)

4.   The panel recognized the relevant language of the Bylaws, added in 2013, which provides that panel declarations "are final and have precedential effect." (*Id.*, ¶ 122.) Moreover, the panel held that the ICDR Rules are specifically incorporated into the IRP Supplementary Procedures, and specifically provide that panel decisions "shall be final and binding on the parties." (*Id.*, ¶ 124.) The panel held the prior opinion distinguishable and lacking in serious analysis of the question, particularly insofar as it did not address the fact that ICANN forced all TLD applicants to execute a waiver of any right to judicial review pertaining to the New gTLD Program. (*Id.*, ¶ 125.) Thus, under ICANN's interpretation of its contracts and Bylaws, TLD applicants simply have no method to challenge ICANN, other than asking ICANN's Board to reconsider ICANN Board decisions. Of course, the panel refuted such a ludicrous contention, given ICANN's unique and important role in internet governance. (*See, id.*, ¶ 110-114, and n. 62.)

5.   Consequently, the panel held that its final declaration would be binding. (*Id.*, ¶ 131.) Ultimately, the panel affirmatively recommended that ICANN "permit DCA Trust's application to proceed through the remainder of the new gTLD application process." (IRP Request, Annex 11, ¶ 133.) This recommendation was then promptly accepted by the ICANN Board via Resolution dated July 16, 2015. (Annex C-2.)

6.   Incredibly, ICANN now purports to argue that the *DCA Trust* opinion on this issue, accepted by the ICANN Board, is not precedential and must be relitigated. Yet, in that case, ICANN argued that the prior IRP opinion (actually, just three paragraphs from that *ICM v. ICANN* decision) was precedential and "dispositive of the question." (*Id.*, ¶¶ 93, 126.) After the *ICM* decision, ICANN's Bylaws were amended to specifically state that IRP decisions are "final and precedential." (Bylaws, § 3(21).) ICANN cannot offer any compelling reason why this issue should be litigated, yet again.

7.   ICANN has cited a more recent IRP decision that addresses the issue. (IRP Response, ¶ 75 (quoting *Vistaprint Ltd. v. ICANN*, Final Declaration, ¶ 149 (Resp. Ex. 30)).) In that case, again incredibly, ICANN continued to argue that IRP decisions are non-binding, even 8 months after the .Africa panel's thorough declaration on the matter. (*See*, Annex C-3, ICANN brief dated Apr. 2, 2015, ¶¶ 34-41 (failing to even mention the .Africa Declaration).) ICANN again relied on the three paragraphs from the conclusively inapposite *ICM* decision. (*Id.*, ¶ 37 (stating, perhaps most incredibly since it willfully ignores the *DCA Trust* decision, "Nothing has occurred since the issuance of the *ICM* IRP Panel's declaration that changes the fact that IRP panel declarations are not binding.").) Yet again, the panel held that IRP decisions are binding, at least insofar as they

declare whether the Board violated Bylaws, summarily dismiss an IRP Complaint, designate a prevailing party, fix costs, or make other procedural rulings. (Resp. Ex. 30, ¶ 140-141, 148.)

8.   The *Vistaprint* panel appears to have diverged from the *DCA Trust* panel only with respect to panel decisions "recommending that the Board take or refrain from taking any action or decision." (*Id.*, ¶ 140(iv), 148.) So, in that panel's ultimate view, it could declare that ICANN violated its Bylaws, and that declaration would be final and binding; but it could only "recommend" that the ICANN Board take or refrain from taking any action to address the violation, and that recommendation would be non-binding. (*Ibid.*) Essentially, that panel would have the IRP be a "toothless" process, which would effectively ensure that ICANN is accountable to nobody but itself. Indeed, the panel seems to recognize this, and incredibly concludes that "it is for ICANN to consider additional steps to address any ambiguities that might remain concerning the authority of an IRP panel and the legal effect of the IRP declaration." (*Id.*, ¶ 148.)

9.   The *Vistaprint* decision on that point should be disregarded for several reasons. First, the issue should not have been relitigated after the *DCA Trust* decision, since the Bylaws clearly mandate that IRP decisions are precedential. The 2013 amendments to the Bylaws were clearly intended to avoid exactly this situation, where successive IRP panels disagree with prior decisions, by specifically mandating that they be precedential. Such disagreement causes expensive and wasteful relitigation of issues not only in the instant matter, but in future matters also, since parties and panels have no mandate to respect precedent. ICANN, to be sure, is incented to constantly relitigate every issue resolved against it, until it finds precedent it likes – just as it is doing with this issue. Second, the *Vistaprint* panel did not consider the history of ICANN and the Bylaws nearly as carefully as did the *DCA Trust* panel, instead focusing primarily on the bare meaning of the word "recommend." The panel failed to realize that the Bylaws contain many words that are not interpreted merely per their bare meaning, but instead in context of ICANN's core mission and vital governance functions. Nor did the panel consider the rule of *contra preferendum*, such that any ambiguity (if any) must be construed against ICANN. Finally, and most fundamentally, the panel failed to understand the reality created by their ultimate conclusion – that ICANN can be found in violation of their Bylaws, but then only ICANN can decide how to remedy such a violation. The *DCA Trust* panel did understand that prospective reality (espoused only by ICANN), and came to the better, common-sense conclusion that indeed ICANN can, and sometimes must, be told what to do. They purport to absolve themselves of any judicial scrutiny with respect to TLD applicants, making IRP decisions all the more important. Even if a panel determination is called a "recommendation", it is binding and cannot be ignored by the ICANN Board.

10.   The *DCA Trust* panel understood ICANN's special public interest role, and thus the importance of real accountability mechanisms. "ICANN is not an ordinary private non-profit entity deciding for its own sake who it wishes to conduct business with, and who it does not. ICANN rather, is the steward of a highly valuable and important international resource." (Annex C-1, ¶ 111.) Further:

> If the waiver of judicial remedies ICANN obtains from applicants is enforceable, and the IRP process is non-binding, as ICANN contends, then that process leaves TLD applicants and the Internet community with no compulsory remedy of any kind. This is, to put it mildly, a highly watered down notion of "accountability". Nor is such a process "independent", as the ultimate decision maker, ICANN, is also a party to the dispute and directly interested in the outcome. Nor is the process "neutral," as ICANN's "core values" call for in its Bylaws.

(*Id.*, n. 62.) "The need for a minimum adequate remedy is indisputably more important where, as in this case, the party arguing that there is no compulsory remedy is the party entrusted with a special, internationally important and valuable operation." (*Id.*, ¶ 113.)

11.   The *DCA Trust* panel further realized that ICANN has clearly proved that it cannot be trusted to police itself:

> The need for a compulsory remedy is concretely shown by ICANN's longstanding failure to implement the provision of the Bylaws and Supplementary Procedures requiring the creation of a standing panel. ICANN has offered no explanation for this failure, which evidences that a self-policing regime at ICANN is insufficient. The failure to create a standing panel has consequences, as this case shows, delaying the processing of DCA Trust's claim….

(Annex C-1, ¶ 114.) It has been nearly two years since that panel's scathing declaration, and yet ICANN still appears to have done nothing whatsoever to comply with its Bylaws by creating a standing IRP panel.

12.   However, ICANN has engaged in a large-scale process to transition from oversight of the U.S. Government, to a new "community empowered" structure. As a part of this transition, the community and ICANN have agreed to new draft Bylaws to enhance ICANN's accountability. The new Bylaws will further clarify (to the extent not clear before) that the IRP shall "[l]ead to binding, final resolutions consistent with international arbitration norms that are enforceable in any court with proper jurisdiction." (Annex C-4, §4.3(a)(viii).) This is further exhaustively set forth in §4.3(x)(iii) of the new draft Bylaws; to wit: "ICANN intends, agrees, and consents to be bound by all IRP Panel decisions of Disputes of Covered Actions as a final, binding arbitration." These new draft Bylaws have been accepted by the ICANN Board, subject to a currently ongoing public comment period – with the Board's stated intent to adopt them on May 27. (Annex C-5.) Thus there is no reason why the existing Bylaws should not be interpreted in the same way.

13.   In this case, Claimant AGIT requests the panel to find ICANN has violated its Bylaws in seven different ways, including its ongoing failure to create a standing panel. AGIT's primary complaint is that its TLD applications have been subject of discriminatory new policy, as they are the only applications placed indefinitely "on hold" due to non-consensus, unsubstantiated "concerns" of a few governments. ICANN has ignored two of its own designated experts, its own Government Advisory Committee, and the exhaustive processes set forth its Applicant Guidebook – relying only upon one sentence in the Guidebook which, in ICANN's interpretation, allows ICANN to do whatever it wants with respect to any TLD application, for any reason or for no reason.

14.   Thus, in this case, if ICANN is held to have violated its Bylaws in such respects, then it must be ordered to remedy the situation by returning AGIT's application to the contracting process (just as in the .Africa matter, though in this case there are no other outstanding issues, so the contracts would be awarded to AGIT). There is no other adequate or viable remedy to the violations, yet ICANN cannot be trusted to implement that remedy on its own volition, given its demonstrated history of ignoring its own Bylaws, rules and processes in order to kowtow to unfounded government concerns about these applications.

List of Annexes

C-1 *DCA Trust v. ICANN*, Declaration on the IRP Procedure, Aug. 14, 2014.

C-2 ICANN Board Resolution dated July 16, 2015, accepting decision of *DCA Trust* IRP panel.

C-3 ICANN brief dated April 2, 2015, ignoring decision of the *DCA Trust* IRP panel.

C-4 ICANN Draft Bylaws dated April 20, 2016

C-5 ICANN Announcement re Draft Bylaws

Respectfully submitted,

By: _Mike Rodenbaugh_
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