

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

DOTCONNECTAFRICA TRUST,) ICDR CASE NO. 50 117 T 1083 13
)
Claimant,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)

ICANN'S FURTHER MEMORANDUM REGARDING PROCEDURAL ISSUES

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INTRODUCTION

1. Pursuant to the Panel’s Procedural Order No. 1 issued on 24 April 2014 and the questions that the Panel submitted on 12 May 2014, ICANN hereby submits this Further Memorandum Regarding Procedural Issues.

2. As an initial matter, ICANN wishes to emphasize that many of the questions that the Panel posed are outside the scope of this Independent Review Proceeding (“IRP”) and the Panel’s mandate. The Panel’s mandate is set forth in ICANN’s Bylaws, which limit the Panel to “comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and [] declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.” (Bylaws, Art. IV, § 3.4.) Moreover, DCA did not put at issue many of the topics that are the subject of the Panel’s questions. Accordingly, while ICANN addresses the Panel’s questions in this document, ICANN reiterates that many of the issues raised by the questions are not properly before the Panel.

ARGUMENT

I. IRP PANEL DECLARATIONS ARE NOT BINDING ON ICANN.

3. IRP Panel declarations are not binding on ICANN. The plain language of the IRP provisions set forth in Article IV, section 3 of ICANN’s Bylaws, as well as the drafting history of the development of the IRP provisions, make clear that IRP Panel declarations are not binding on ICANN. There is no ambiguity on this issue. And the *ICM* IRP Panel recognized the proper scope and authority of an IRP panel when it correctly stated: “The holdings of the Independent Review Panel are advisory in nature; they do not constitute a binding arbitral award.”¹

¹ *ICM* IRP Panel Declaration (19 Feb. 2010) ¶ 152; *see also id.* ¶ 134 (the IRP Panel’s declaration “is not binding, but rather advisory in effect”), available at <http://www.icann.org/en/news/irp/icm-v-icann/news/irp/-panel-declaration-19feb10-en.pdf>. To aid this IRP Panel, ICANN is attaching excerpts from its Response to

4. First, the Bylaws charge an IRP panel with “comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with *declaring* whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.”² The authority of an IRP panel is not to “decide” or “rule” whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws. Moreover, the Board is obligated to “review[]”³ and “consider” an IRP panel’s declaration at the Board next meeting “where feasible.”⁴ The direction to “review” and “consider” an IRP panel’s declaration means that the Board has discretion as to whether to adopt and implement that declaration; if the declaration were binding, there would be nothing to review or consider, only a binding order to implement.

5. Second, the lengthy drafting history of ICANN’s independent review process confirms that IRP panel declarations are not binding. Specifically, the Draft Principles for Independent Review, drafted in 1999, state that “the ICANN Board should retain ultimate authority over ICANN’s affairs – after all, it is the Board ... that will be chosen by (and is directly accountable to) the membership and supporting organizations.”⁵ And when, in 2001, the Committee on ICANN Evolution and Reform (“ERC”) recommended the creation of an independent review process, it called for the creation of “a process to require non-binding

(continued...)

ICM’s Memorial on the Merits, which extensively set forth facts demonstrating that IRP panel declarations are non-binding. ICANN’s Response to ICM’s Memorial on the Merits, 28-44, *attached as Ex. C-R-6*. The ICM IRP Panel members unanimously recognized ICANN’s arguments. *ICM IRP Panel Declaration ¶¶ 133-34*.

² Bylaws, Art. IV, § 3.4 (emphasis added). The IRP Panel has questioned whether the selection of the word “declare” suggests binding force. This term, standing alone, cannot conceivably be read to require a binding decision, particularly in the face of the voluminous evidence in the drafting history showing that the contrary was presupposed.

³ Bylaws, Art. IV, § 3.11.d.

⁴ *Id.* at Art. IV, § 3.21. Moreover, for the period during which the Board is reviewing and considering the IRP Panel’s declaration, the Panel may merely “recommend,” as opposed to “order,” that the Board stay any action or decision “until such time as the Board reviews and acts upon the opinion of the IRP.” *Id.* at Art. IV, § 3.11.d.

⁵ Draft Principles for Independent Review, Interim report of the Advisory Committee on Independent Review With Addendum, *available at* <http://cyber.law.harvard.edu/icann/berlin/archive/IRdraft.html>.

arbitration by an international arbitration body to review any allegation that the Board has acted in conflict with ICANN's Bylaws."⁶ The individuals who actively participated in the process also agreed that the review process would not be binding. As one participant stated: IRP "decisions will be nonbinding, because the Board will retain final decision-making authority."⁷

6. The only IRP Panel ever to issue a declaration, the *ICM* IRP Panel, unanimously rejected the assertion that IRP Panel declarations are binding⁸ and recognized that an IRP panel's declaration "is not binding, but rather advisory in effect."⁹ Nothing has occurred since the issuance of the *ICM* IRP Panel's declaration that changes the fact that IRP Panel declarations are not binding. To the contrary, in April 2013, following the *ICM* IRP, in order to clarify even further that IRPs are not binding, all references in the Bylaws to the term "arbitration" were removed as part of the Bylaws revisions. ICM had argued in the IRP that the use of the word "arbitration" in the portion of the Bylaws related to Independent Review indicated that IRPs were binding, and while the *ICM* IRP Panel rejected that argument, to avoid any lingering doubt, ICANN removed the word "arbitration" in conjunction with the amendments to the Bylaws.

7. The amendments to the Bylaws, which occurred following a community process on the proposed IRP revisions, added, among other things, a sentence stating that "declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value."¹⁰ DCA argues that this new language, which does not actually use the word

⁶ ICANN: A Blueprint for Reform (June 20, 2002), available at <http://www.icann.org/en/committees/evol-reform/blueprint-20jun02.htm>.

⁷ Becky Burr, Recommendations Regarding Accountability at II (August 23, 2002), available at <http://www.icann.org/en/committees/evol-reform/afap-report-23aug02.htm>.

⁸ The *ICM* IRP Panel specifically rejected the claimant's contention that use of the word "arbitration" in the then-existing Bylaws was determinative of an arbitral process that produces a binding award. *ICM* IRP Panel Declaration ¶ 133.

⁹ *ICM* IRP Panel Declaration ¶ 134.

¹⁰ DCA Proc. Br. ¶ 38.

“binding,” nevertheless provides that IRP Panel declarations are binding, trumping years of drafting history, the sworn testimony of those who participated in the drafting process,¹¹ the plain text of the Bylaws, and the reasoned declaration of a prior IRP panel. DCA is wrong.

8. The language DCA references was added to ICANN’s Bylaws to meet recommendations made by ICANN’s Accountability Structures Expert Panel (“ASEP”). The ASEP was comprised of three world-renowned experts on issues of corporate governance, accountability, and international dispute resolution, and was charged with evaluating ICANN’s accountability mechanisms, including the Independent Review process.¹² The ASEP recommended, *inter alia*, that an IRP should not be permitted to proceed on the same issues as presented in a prior IRP. The ASEP’s recommendations in this regard were raised in light of the second IRP constituted under ICANN’s Bylaws, where the claimant presented claims that would have required the IRP Panel to reevaluate the declaration of the IRP Panel in the *ICM* IRP. To prevent claimants from challenging a

¹¹ Vint Cerf, the former Chair of ICANN’s Board, testified in the *ICM* IRP that the independent review panel “is an advisory panel. It makes recommendations to the board but the board has the ultimate responsibility for deciding policy for ICANN.” *ICM v. ICANN*, Hearing Transcript, September 23, 2009, at 592:7-11; *see also id.* at 585:3-5, 591:16-594:13, *available at* <http://www.icann.org/en/news/irp/icm-v-icann/transcript-testimony-icm-independent-review-proceeding-23sep09-en.pdf>. Alejandro Pisanty, the Chair of the ERC, testified in the *ICM* IRP that “[i]t was decided to make this arbitration nonbinding in the thought that the liabilities and responsibilities for anything that’s done should lie on the board.” *ICM v. ICANN*, Hearing Transcript, September 24, 2009, at 807, 813:17-20; *see also id.* at 810:15-818:18, *available at* <http://www.icann.org/en/news/irp/icm-v-icann/redacted-transcript-testimony-icm-independent-review-proceeding-24sep09-en.pdf>.

¹² ICANN convened the ASEP in April 2012, following the recommendation of the Accountability and Transparency Review Team 1 (“ATRT1”). *See* ATRT1 Recommendations, *available at* <https://www.icann.org/en/about/aoc-review/atrt/final-recommendations-31dec10-en.pdf>. The ATRT1 was itself convened in accordance with ICANN’s Affirmation of Commitments (AoC) with the Department of Commerce, in which ICANN committed to “maintain and improve robust mechanisms for public input, accountability, and transparency,” and “organize a review of its execution of [those] commitments” at least once every three years. *See* ICANN AoC, *available at* <https://www.icann.org/resources/pages/affirmation-of-commitments-2009-09-30-en>. Like the ASEP after it, the ATRT1 solicited community involvement and comment as part of its review process. *See* <https://www.icann.org/resources/pages/1-2012-11-14-en>.

prior IRP Panel declaration, the ASEP recommended that “[t]he declarations of the IRP, and ICANN’s subsequent actions on those declarations, should have precedential value.”¹³

9. The ASEP’s recommendations in this regard did not convert IRP Panel declarations into binding decisions.¹⁴ One of the important considerations underlying the ASEP’s work was the fact that ICANN, while it operates internationally, is a California non-profit public benefit corporation subject to the statutory law of California as determined by United States courts. That law requires that ICANN’s Board retain the ultimate responsibility for decision making.¹⁵ As a result, the ASEP’s recommendations were premised on the understanding that the declaration of the IRP Panel is not “binding” on the Board.

10. In any event, a declaration clearly can be both non-binding and precedential.

In the United States . . . [w]hen the prior court is the same as the subsequent court, the general rule is that precedent is not binding, even though a court may give great weight to its own prior decisions. If the prior court is at the same level as the subsequent court but the two courts are coordinate rather than identical, as in the case of two district courts in the federal system, then stare decisis is not binding on the subsequent court.”¹⁶

¹³ ASEP Report, October 2012, *available at* <http://www.icann.org/en/news/in-focus/accountability/asep/report-26oct12-en.pdf>.

¹⁴ The ASEP confirmed the non-binding nature of the IRP on 17 October 2012 at a public session where community members were able to “give feedback [and] hear from the panel on the work that they [had] been doing so far.” *See* Transcript of 17 Oct. 2012 Public Session with ASEP Panel, *available at* <http://toronto45.icann.org/meetings/toronto2012/transcript-asep-17oct12-en.pdf>. Graham McDonald, one of the three ASEP experts, explained the guiding principles for the ASEP’s work: “As you would be aware, ICANN is an incorporated not-for-profit Californian company, and the corporations law of California applies, and as part of that law, the board has to retain responsibility for decision-making, so that in any recommendation that is made for -- or that arises out of a review, the board still has the final word on.” *Id.* at Pg. 5.

¹⁵ Cal. Civ. Code § 5210 (“[T]he activities and affairs of the corporation shall be managed and all corporate powers shall be exercised under the ultimate direction of the board.”)

¹⁶ 18-134 Moore’s Federal Practice - Civil § 134.02 [1][a]; *see also In re Silverman*, 616 F.3d 1001, 1004-05 (9th Cir. 2010) (affirming a bankruptcy court’s holding that a district court decision from another district constituted “non-binding precedent”); *Kuhns v. City of Allentown*, 636 F. Supp. 2d 418, 437 (E.D. Pa. 2009) (“the Opinions of other district courts are persuasive but not binding authority on this Court”); *McNamara v. Royal Bank of Scotland Group, PLC*, No. 11-cv-2137-L (WVG), 2013 U.S. Dist. LEXIS 66516, at *8 (S.D. Cal. May 8, 2013) (defining “persuasive authority” as “[a] precedent that is not binding on a court, but that is entitled respect and careful consideration”).

II. ICANN HAS THE AUTHORITY TO ESTABLISH THE PROCEDURES FOR ITS OWN INTERNAL ACCOUNTABILITY MECHANISMS, AND DCA VOLUNTARILY AGREED TO THOSE MECHANISMS.

11. The Panel has posed questions relating to the propriety of ICANN's internal accountability mechanisms and the gTLD application signed by DCA, including questions relating to due process and unconscionability.¹⁷ These questions are well outside the scope of the Panel's narrow mandate established under ICANN's Bylaws, *i.e.*, to declare whether the Board violated ICANN's Bylaws or Articles of Incorporation in its consideration of DCA's application for .AFRICA.¹⁸

12. California non-profit public benefit corporations, such as ICANN, are expressly authorized to establish internal accountability mechanisms and to define the scope and form of those mechanisms.¹⁹ Pursuant to this explicit authority, ICANN established the Independent Review process, as well as the procedures that would govern that process. ICANN was not required to establish *any* internal corporate accountability mechanism, but instead did so *voluntarily*. Accordingly, DCA does not have any "due process" or "constitutional" rights with respect to the Independent Review process.²⁰

¹⁷ ICANN is attempting to answer all of the questions posed by the IRP Panel, but because many of the questions are related, ICANN is addressing the questions collectively, rather than individually.

¹⁸ Although ICANN does not concede that the IRP process is subject to the Federal Arbitration Act or the California Arbitration Act, it is worth noting that under those statutes, "enforceability of an arbitration agreement is ordinarily to be determined by the court" unless it is established "by clear and unmistakable evidence that the parties intended to delegate the issue to the arbitrator." *Ajamaian v. CantorCO2e, L.P.*, 203 Cal. App. 4th 771, 781-82 (2012) (noting that California law is consistent with the FAA with regard to the application of the "clear and unmistakable" rule).

¹⁹ Cal. Corp. Code § 5150(a) (authorizing the board of a nonprofit public benefit corporation to adopt and amend the corporation's bylaws).

²⁰ DCA continues to argue that the IRP process constitutes an "arbitration." DCA is wrong. In all events, as ICANN noted in its previous memorandum, the United States Supreme Court has repeatedly affirmed the right of parties to tailor unique rules for dispute resolution processes, including even *binding arbitration proceedings*, and international arbitration norms similarly recognize the right of parties to tailor their own, unique arbitral procedures. ICANN Memo Re: Procedural Issues ¶¶ 19-21. The Panel inquired about the procedures of arbitration providers such as the ICDR, UNCITRAL, the ICC, and JAMS. Each of those providers' rules specifically allow for the parties to substitute their own arbitral procedures. *See* ICDR Arbitration Rules Art.

13. Nonetheless, “due process” considerations were duly considered and appropriately accounted for in the design of the revised IRP. In refining and enhancing the Independent Review process, as discussed above, ICANN engaged world-renowned dispute resolution experts to participate in the ASEP and, in keeping with ICANN’s commitment to accountability and transparency, ICANN solicited advice and input from the Internet community. On 17 October 2012, ICANN held a public session with all three of the ASEP’s experts, at which community members were able to “give feedback [and] hear from the panel on the work that they [had] been doing so far.”²¹ Thereafter, ICANN requested written public comments on the ASEP’s report, and subsequently published an analysis of and response to all the comments received.²² ICANN also published proposed revisions to ICANN’s Bylaws to meet the recommendations of the ASEP.²³ In short, the Bylaws provisions that DCA now objects to—including the rule against presenting evidence at any IRP hearing—were adopted only after being publicly vetted with ICANN’s stakeholders and the broader Internet community.

14. DCA voluntarily applied for a gTLD and lawfully waived its rights to sue ICANN for claims arising out of its gTLD application. DCA also voluntarily agreed, as part of that

(continued...)

1(a) (“[T]he arbitration shall take place in accordance with these Rules, as in effect at the date of commencement of the arbitration, subject to whatever modifications the parties may adopt in writing.”); JAMS Comprehensive Arbitration Rules and Procedures, Rule 2 (“The Parties may agree on any procedures not specified herein or in lieu of these Rules that are consistent with the applicable law and JAMS policies”); UNCITRAL Arbitration Rules, Art. 1 (“[S]uch disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree.”); ICC Arbitration and ADR Rules, Art. 23.1(g) (Terms of Reference shall include the “particulars of the applicable procedural rules”), Appendix IV (providing for the parties’ use of “case management techniques . . . for controlling time and cost,” including “[i]dentifying issues to be decided solely on the basis of documents rather than through oral evidence or legal argument at a hearing.”)

²¹ See Transcript of 17 October 2012 Hearing with ASEP, *available at*

<http://toronto45.icann.org/meetings/toronto2012/transcript-asep-17oct12-en.pdf>.

²² <http://forum.icann.org/lists/asep-recommendations/>; <https://www.icann.org/en/news/public-comment/report-comments-asep-recommendations-12dec12-en.pdf>.

²³ <https://www.icann.org/en/news/public-comment/asep-recommendations-26oct12-en.htm>.

application process, that if it chose to, it could submit itself to ICANN’s internal accountability mechanisms. ICANN was not required to provide DCA the recourse of any review mechanism, much less a binding arbitration. A waiver of the right to sue is enforceable under California law even if it does not provide parties *any* alternative recourse, which was not the case here.²⁴

15. The waiver signed by DCA is not unconscionable. A finding of unconscionability is appropriate only when a contract provision is *both* procedurally and substantively unconscionable, and the waiver at issue here is neither.²⁵ The waiver is not procedurally unconscionable: DCA is a business entity with the resources to pay \$185,000 for the opportunity to have its application considered by ICANN, and the terms of the application, including the waiver, are and were publicly available and clearly known to DCA in advance of DCA submitting its application.²⁶ The terms of the gTLD Applicant Guidebook were extensively vetted by ICANN over a course of years and included a total of ten versions with multiple notice and public comment periods.²⁷ And, DCA was neither required nor entitled to apply for .AFRICA; it submitted its application voluntarily,

²⁴ See, e.g., *Sanchez v. Bally’s Total Fitness Corp.*, 68 Cal. App. 4th 62, 67 (1998) (upholding a total release of claims in an adhesion contract involving a consumer, noting that the consumer plaintiff did not argue that the language of the release was “unclear and ambiguous” and that the defendant “rationally required a release . . . as a condition of” entering into the contract).

²⁵ *Fittante v. Palm Springs Motors, Inc.*, 105 Cal. App. 4th 708, 722-23 (2003) (“Both procedural and substantive unconscionability must be present to deny enforcement to the contract. . . .”) (internal quotation marks and citations omitted).

²⁶ See *O’Donoghue v. Superior Court*, 219 Cal. App. 4th 245, 258-59 (2013) (Despite lenders’ arguments that “they were presented with the [loan] agreements in a ‘take-it-or leave-it manner,” and “felt they had no option but to sign the agreements to obtain the [needed] loan,” the court held that “the adhesive aspect of a contract is not dispositive on the issue of unconscionability.” The court found that “[e]ven if we do assume an imbalance in bargaining power, and that [the bank], as the stronger party, presumably prepared the [agreements] with an eye to its own advantage, and even if we also assume that [the bank] would not have countenanced the striking of the . . . reference provisions, [the lenders] have nevertheless only shown a low level of procedural unconscionability because . . . the elements of surprise or misrepresentation are not present.”).

²⁷ The current version of the Guidebook is available at <http://newgtlds.icann.org/en/applicants/agb>. The prior versions of the Guidebook are available at <http://newgtlds.icann.org/en/about/historical-documentation>.

knowingly, and under no duress.²⁸ Moreover, the application made clear that the submission of the application did not constitute a right to operate the applied-for TLD.²⁹

16. The waiver is not substantively unconscionable because “it does not “allocate[] the risks of the bargain in an objectively unreasonable or unexpected manner,”³⁰ but rather is justified by ICANN’s “legitimate commercial need.”³¹ The waiver provision was included because ICANN is “a non-profit public benefit corporation and lacks the resources to defend against potentially numerous lawsuits . . . initiated by applicants.”³² It is therefore entirely reasonable that ICANN would require such a waiver, without which ICANN could face serious financial constraints in administering the New gTLD Program. Further, ICANN did not exclude all avenues of recourse. All applicants may avail themselves of ICANN’s Ombudsman, Reconsideration process and the Independent Review process, which allows challenges on multiple bases, such as unfairness, failure to adhere to defined policies or processes, failure to consider material information in taking action, and ultimately, failure to adhere to ICANN’s Bylaws or Articles of Incorporation.

17. ICANN is also authorized to set the rules governing how its corporate accountability mechanisms are administered.³³ With respect to the Independent Review process, ICANN’s Bylaws, the Supplementary Rules, and the ICDR Rules govern.³⁴ If the ICDR Rules

²⁸ See *Captain Bounce, Inc. v. Business Fin. Servs.*, No. 11-cv-858 JLS (WMC), 2012 U.S. Dist. LEXIS 36750, at *19 (S.D. Cal. Mar. 19, 2012) (“[T]he Court agrees with Defendants that the business-to-business context of the Agreements is relevant . . . Plaintiffs are sophisticated borrowers distinguishable from the consumer or employee plaintiff who is a party to the typical unconscionable contract.”); see also *A&M Produce Co. v. FMC Corp.*, 135 Cal. App. 3d 473, 489 (1982) (“[C]ourts have not been solicitous of businessmen in the name of unconscionability . . . probably because courts view businessmen as possessed of a greater degree of commercial understanding and substantially more economic muscle than the ordinary consumer.”).

²⁹ gTLD Application Terms and Conditions ¶ 3.

³⁰ *Fittante*, 105 Cal. App. 4th at 722-723.

³¹ *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal. 4th 1109, 1134 (2013).

³² <http://archive.icann.org/en/topics/new-gtlds/gac-board-legal-recourse-21feb11-en.pdf>.

³³ Cal. Corp. Code §5210 (“[T]he activities and affairs of a corporation shall be conducted and all corporate powers shall be exercised by or under the direction of the board.”).

³⁴ Bylaws, Art. IV, § 3.8 (“Subject to the approval of the [ICANN] Board, the IRP Provider shall establish operating rules and procedures, **which shall implement and be consistent with this Section 3.**”).

conflict with the Supplementary Rules or ICANN’s Bylaws, the IRP Panel is required to apply to the rules set forth in the Bylaws and Supplementary Rules.³⁵

18. On the topic of live witness testimony, Paragraph 4 of the Supplementary Procedures and Article IV, Section 3.12 of the Bylaws are dispositive and expressly prohibit live witness testimony: “*the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.*”³⁶ DCA ignores this mandate, and instead argues that Article 16(1) of the ICDR Rules—which is silent on the topic of live witness testimony—makes it “clear” that the Panel has the discretion to conduct live witness examination.³⁷ In so doing, DCA urges the IRP Panel to apply the ICDR Rules in a manner that directly contradicts ICANN’s Bylaws and the Supplementary Procedures; there is *no way* to harmonize DCA’s position with the language of the Bylaws and Supplementary Procedures.³⁸ As discussed above, the Panel simply does not have the discretion to modify or ignore the Supplementary Procedures.

CONCLUSION

ICANN again thanks the Panel for its considerable attention to these issues and looks forward to a swift resolution of these Independent Review proceedings.

Respectfully submitted,

Dated: 20 May 2014

By: 
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LAI-3215285v1

³⁵ *Id.*; see also Supplementary Procedures ¶ 2 (“In the event there is any inconsistency between these Supplementary Procedures and the [ICDR Rules], these Supplementary Procedures will govern.”).

³⁶ Bylaws, Art. IV, § 3.12, Supplementary Procedures ¶ 4.

³⁷ DCA Proc. Br. ¶ 65.

³⁸ Supplementary Procedures ¶ 2 (“In the event there is any inconsistency between these Supplementary Procedures and the [ICDR Rules], these Supplementary Procedures will govern.”).

Exhibit C-R-6

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

In the Matter of the Independent Review Process:

ICM Registry, LLC,

Claimant,

v.

Internet Corporation For Assigned Names and
Numbers ("ICANN"),

Respondent.

CASE MANAGER: Carolina Cárdenas

ICDR Case No. 50 117 T 00224 08

**ICANN'S RESPONSE TO
CLAIMANT'S MEMORIAL ON THE MERITS**

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TABLE OF ABBREVIATIONS

ALAC	ICANN's At-Large Advisory Committee
DNS	domain name system
DNSO	Domain Name Supporting Organization
ERC	ICANN Evolution and Reform Committee
Evaluation Panel	independent panel of experts convened in April 2004 to review and make recommendations with respect to the sTLD applications
GAC	ICANN's Governmental Advisory Committee
GNSO	ICANN's Generic Names Supporting Organization
gTLD	generic Top Level Domain
ICANN	Internet Corporation for Assigned Names and Numbers
ICDR	International Centre for Dispute Resolution
ICDR Rules	ICDR International Arbitration Rules
ICM	ICM Registry, LLC
IFFOR	International Foundation for Online Responsibility
IP	Internet Protocol
IRP	ICANN's independent review process
Memorial	ICM's Memorial on the Merits
NTIA	National Telecommunications and Information Administration (an agency of the United States Department of Commerce)
Panel	IRP Panel
RFP	request for proposal
sTLD	sponsored Top Level Domain
TLD	Top Level Domain
uTLD	unsponsored Top Level Domain

the Bylaws that created the IRP process). ICM makes this claim despite the fact that the IRP procedure provides for review only of ICANN’s “conformity” with its Bylaws and Articles of Incorporation.⁹² In claiming that ICANN’s actions and decisions should be evaluated under international law, ICM misinterprets Article 4 of ICANN’s Articles of Incorporation (which states that ICANN will operate for the benefit of the Internet community by carrying out its activities “in conformity with relevant principles of international law”) as a “choice-of-law provision” governing the IRP, thereby allowing a party to bring into an IRP freestanding claims based on any and all general principles of international law (or to interpret ICANN’s Articles and Bylaws under any and all general principles of international law).⁹³ ICM’s reading – which is in no way “straightforward[]” as ICM contends⁹⁴ – contravenes the plain language of the governing provisions as well as their drafting history. Because ICM’s misreading is the basis for many of ICM’s claims, many of those claims may and should be disregarded.⁹⁵

1. The Results of The Independent Review Process Are Not Binding.

76. Ordinarily, the binding or non-binding character of a declaration issued by a panel such as this one would not be addressed by the panel itself; any such questions would be addressed in future proceedings, if needed. Nonetheless, ICM asks the Panel to state affirmatively that its declaration is “final and binding” on ICM and ICANN.⁹⁶ ICM’s request is improper, but, in any event, the Bylaws and other provisions governing IRPs make clear that this proceeding leads to a declaration that the ICANN Board must review and consider, but which it is not bound to act upon.

77. ICM suggests that, if the Panel’s declaration is not “binding,” ICANN will somehow take the process less seriously. ICANN hopes that its approach to this proceeding has made clear that ICANN takes this process seriously. Indeed, as shown below, ICANN

⁹² *See id.* ¶ 279.

⁹³ *See id.* ¶¶ 279, 324-42.

⁹⁴ *Id.* ¶ 332.

⁹⁵ *See* Caron Opinion ¶¶ 23-24 (stating that ICM’s interpretation of Article 4 “misapprehends the question” before the Panel, and this “confusion infuses ICM’s argument”).

⁹⁶ ICM Memorial ¶ 279.

established the IRP to serve the important function of increasing accountability by leading to public decisions that “shall be posted on the [ICANN] Website when they become available.”⁹⁷ The underlying petitions and claims must also be posted on the ICANN website, as ICANN has in fact done.⁹⁸ Because ICANN’s continuing existence is premised on its long tradition of transparency and involvement from the broader Internet community, the ICANN Board will be under enormous public pressure to take seriously its duty to “consider” and “review[]” IRP declarations as directed in the Bylaws.⁹⁹ But the seriousness with which ICANN addresses this proceeding is beside the point for the Panel and not a basis for the Panel to find that the proceedings are, or should be, “binding” in some fashion not contemplated by the Bylaws.

a. The Bylaws And Their Drafting History Make Clear That IRP Declarations Are Not Binding.

78. The plain language of the IRP provisions, which are set forth in Article IV, section 3 of ICANN’s Bylaws, provides that the Panel’s declaration is advisory to the ICANN Board and not binding. The drafting history of the development of the IRP provisions – history that ICM ignores even though its own counsel participated in it – similarly makes clear that IRP declarations are not binding on ICANN.

i. The Bylaws Make Clear That IRP Declarations Are Not Binding.

79. The starting point is the plain text of the Bylaws governing the IRP process. A reader of ICM’s Memorial would be unaware that any text of the Bylaws addresses the effect of a panel’s declarations. Yet the Bylaws speak directly to the manner in which ICANN should treat a panel’s declarations, and makes clear that such declarations are advisory and not binding.

80. The Bylaws that govern the IRP process, entitled “Independent Review of Board Actions,” provide in full:

1. In addition to the reconsideration process described in Section 2 of this Article [on reconsideration by the Board], ICANN shall

⁹⁷ ICANN Bylaws, *supra* note 2, Article IV, § 3.13. ICANN’s Bylaws require ICANN to “maintain a publicly-accessible Internet World Wide Web site.” *Id.* at Article III, § 2.

⁹⁸ *Id.*; see generally www.icann.org (last visited May 5, 2009).

⁹⁹ ICANN Bylaws, *supra* note 2, Article IV, §§ 3.8.c, 3.15.

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.

2. Any 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 independent review of that decision or action.
3. Requests for such independent review shall be referred to an Independent Review Panel (“IRP”), which shall be charged with comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.
4. The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN (“the IRP Provider”) using arbitrators under contract with or nominated by that provider.
5. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures, which shall implement and be consistent with this Section 3.
6. Either party may elect that the request for independent review be considered by a three-member panel; in the absence of any such election, the issue shall be considered by a one-member panel.
7. The IRP Provider shall determine a procedure for assigning members to individual panels; provided that if ICANN so directs, the IRP Provider shall establish a standing panel to hear such claims.
8. The IRP shall have the authority to:
 - a. request additional written submissions from the party seeking review, the Board, the Supporting Organizations, or from other parties;
 - b. declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws; and
 - c. recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.

9. Individuals holding an official position or office within the ICANN structure are not eligible to serve on the IRP.

10. In order to keep the costs and burdens of independent review as low as possible, the IRP should conduct its proceedings by e-mail and otherwise via the Internet to the maximum extent feasible. Where necessary, the IRP may hold meetings by telephone.

11. The IRP shall adhere to conflicts-of-interest policy stated in the IRP Provider's operating rules and procedures, as approved by the Board.

12. Declarations of the IRP shall be in writing. The IRP shall make its declaration based solely on the documentation, supporting materials, and arguments submitted by the parties, and in its declaration shall specifically designate the prevailing party. The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP may in its declaration allocate up to half of the costs of the IRP Provider to the prevailing party based upon the circumstances, including a consideration of the reasonableness of the parties' positions and their contribution to the public interest. Each party to the IRP proceedings shall bear its own expenses.

13. The IRP operating procedures, and all petitions, claims, and declarations, shall be posted on the Website when they become available.

14. The IRP may, in its discretion, grant a party's request to keep certain information confidential, such as trade secrets.

15. Where feasible, the Board shall consider the IRP declaration at the Board's next meeting.

81. In several places, the Bylaws make clear that panel declarations are advisory and not binding. The Bylaws charge the Panel with "comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws."¹⁰⁰ The Panel's "declarations" on this question are not binding on the Board. To the contrary, the IRP provisions repeatedly explain that panel declarations are committed to the ICANN Board for review and

¹⁰⁰ *Id.* at Article IV, § 3.3.

consideration. In particular, the Bylaws direct the Board to “consider” the declaration.¹⁰¹ The direction to “consider” the Panel’s declaration necessarily means that the Board has discretion whether and how to implement it; if the declaration were binding, such as with a court judgment or binding arbitration ruling, there would be nothing to consider, only an order to implement.

82. Another provision similarly states that the Board is to “review[]” IRP determinations, again making clear that ultimate authority is reserved to the Board.¹⁰² ICM argues that the word “review” entails a supervisory (and hence controlling) function.¹⁰³ Yet, this argument actually defeats ICM’s position because the ICANN Board is specifically directed to “review” the Panel’s declarations, not to “implement” them.¹⁰⁴

83. ICM offers no explanation for how the Panel’s declarations could be binding where the Board is expressly directed to “consider” and “review” the declarations, and is nowhere required to implement them uncritically (or otherwise).¹⁰⁵ ICM also offers no explanation for how declarations could be binding where the Panel is not given authority to issue injunctions or award damages.

84. Notably, the Board is not even required to review or consider the declaration immediately, or at any particular time. Instead, the Bylaws simply encourage the Board to consider the declaration at the next Board meeting, but specifically provide that the Board need only do so “[w]here feasible.”¹⁰⁶ The use of non-mandatory language in this timing provision reinforces the fact that the Board’s action (review and consideration) is not itself contemplated to require acceptance of the Panel’s declaration.

¹⁰¹ *Id.* at Article IV, § 3.15.

¹⁰² *Id.* at Article IV, § 3.8.c.

¹⁰³ See ICM Memorial ¶¶ 281, 312.

¹⁰⁴ See also V. Cerf Witness Statement, ¶¶ 10-12 (explaining that the IRP provisions “demonstrate that the ICANN Board retains ultimate authority over ICANN’s affairs, and that any declaration by the Independent Review Panel is not binding on the ICANN Board”).

¹⁰⁵ Likewise, the Bylaws do not provide – as they would have had the dispute resolution process been intended to result in a binding decision – for a process by which the parties could enforce the panel’s decision. Nor do the Bylaws provide how any decision of the panel might be self-enforcing. The absence of all such provisions merely confirms again that the panel’s decision is not binding.

¹⁰⁶ ICANN Bylaws, *supra* note 2, Article IV, § 3.15.

85. Providing still further proof of the Board’s ultimate authority, for the period during which the Board is reviewing and considering the Panel’s declaration, the Panel may merely “*recommend* that the Board stay any action or decision, or that the Board take any interim action.”¹⁰⁷ The Panel’s limited authority to recommend, rather than to require, temporary action reinforces the conclusion that the Board retains ultimate authority to decide what actions to take – both temporary and permanent – in response to the Panel’s conclusions in an IRP. If *final* declarations were binding, it would make no sense for *interim* remedies merely to be *recommended* to the Board. ICM offers no explanation as to how this provision can be reconciled with its position urging a binding effect for the Panel’s results.

ii. The Drafting History of the Bylaws Makes Clear That IRP Declarations Are Not Binding.

86. The lengthy drafting history of ICANN’s independent review process confirms that ICM’s position is wrong. ICM ignores *all* of this history, despite the fact that one of its witnesses in this proceeding was directly involved in the drafting, and her recognition during the drafting that a Panel’s findings would *not* be binding could not have been more clear.

87. The original version of the Bylaws, adopted in November 1998 when ICANN was first formed, did not contain a provision establishing an independent review process. The Bylaws simply stated that “[t]he Board may, in its sole discretion, provide for an independent review process by a neutral third party.”¹⁰⁸ When the Bylaws were revised later that month, this provision was amended to direct the adoption of a review process, but it did not provide additional specificity as to the process itself.¹⁰⁹

¹⁰⁷ *Id.* at Article IV, § 3.8.c (emphasis added).

¹⁰⁸ ICANN Bylaws, Article III, § 4 (November 6, 1998), *available at* <http://www.icann.org/en/general/archive-bylaws/bylaws-06nov98.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit W.

¹⁰⁹ The revised provision states that the Board shall, “following solicitation of input from the Advisory Committee on Independent Review and other interested parties and consideration of all such suggestions, adopt policies and procedures for independent third-party review of Board actions alleged by an affected party to have violated the Corporation’s articles of incorporation or bylaws.” ICANN Bylaws, Article III, § 4(b) (November 21, 1998), *available at* <http://www.icann.org/en/general/archive-bylaws/bylaws-23nov98.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit X.

88. In nine subsequent revisions to the Bylaws during ICANN's early formative period, from March 31, 1999, through February 12, 2002, the IRP Bylaws remained the same.¹¹⁰ But during that period, ICANN proceeded with various activities to establish the independent review process as directed by the Bylaws. As part of that process, an advisory committee began working on the development of an independent review process and ultimately issued draft principles on matters ranging from the number of panelists to their length of service and required qualifications.¹¹¹

89. Throughout its work, the committee consistently emphasized the non-binding nature of the review process. For instance, in comments issued in 1999, the committee stated that the IRP would be persuasive in its authority, "rest[ing] on its independence, on the prestige and professional standing of its members, and on the persuasiveness of its reasoned opinions."¹¹² But the committee explained that "the ICANN Board *should retain ultimate authority* over ICANN's affairs – after all, it is the Board, not the [independent review panel], that will be chosen by (and is directly accountable to) the membership and the supporting organizations," and that the "reasoned and persuasive decision[s]" of the panel, which would be "made public," would "have to be taken seriously by the Board."¹¹³

90. When the committee's ideas were discussed at the Board's open meeting in May 1999, the non-binding nature of the contemplated process was again confirmed. A question was asked whether the Board's action would have "[p]recedence" over the conclusion of the

¹¹⁰ See generally ICANN Bylaws Archive, Cl. Ex. 38.

¹¹¹ See Draft Principles for Independent Review, Interim Report of the Advisory Committee on Independent Review With Addendum, available at <http://cyber.law.harvard.edu/icann/berlin/archive/IRdraft.html> (last visited May 5, 2009), attached hereto as ICANN Exhibit Y; see also Independent Review Policy, March 10, 2000, available at <http://www.icann.org/en/committees/indreview/policy.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit Z.

¹¹² Draft Principles for Independent Review, Interim Report of the Advisory Committee on Independent Review With Addendum, available at <http://cyber.law.harvard.edu/icann/berlin/archive/IRdraft.html> (last visited May 5, 2009), attached hereto as ICANN Exhibit Y.

¹¹³ *Id.* (emphasis added).

reviewing panel.¹¹⁴ The response was clear as to the non-binding effect of a panel’s results: “If the board disagreed with the independent review committee, the board would do what it thought was appropriate. But it would all be public.”¹¹⁵

91. The committee’s work did not lead to the creation of an independent review process in 1999, but ICANN renewed its efforts in 2001 as part of a broader evaluation of its structure and processes.¹¹⁶ In November 2001, ICANN established a committee that became known as the Committee on ICANN Evolution and Reform (the “ERC”), with responsibility for recommending changes to ICANN’s structure and processes.¹¹⁷ The ERC was tasked with, among other things, identifying workable “checks and balances that will ensure both the effectiveness and the openness of the organization.”¹¹⁸ To that end, in June 2002, the ERC issued a report entitled “ICANN: A Blueprint for Reform,” which outlined the Committee’s recommendations.¹¹⁹ The Board subsequently adopted the Blueprint.

92. The Blueprint stated unequivocally that any new independent review process would be non-binding. In a section entitled “Accountability,” the Blueprint recommended (and the Board agreed) that the Board would “create a process to require *non-binding* arbitration by an

¹¹⁴ ICANN Open Meeting – Afternoon Session, May 25 & 26, 1999, *available at* <http://cyber.law.harvard.edu/icann/berlin/archive/open2.html> (last visited May 5, 2009), attached hereto as ICANN Exhibit AA.

¹¹⁵ *Id.* Indeed, the committee initially described the review process as resulting in “advisory opinions.” *Id.* While the committee later substituted that phrase with the term “declar[at]ions,” it made clear that this change merely reflected the committee’s interest in “more firmly root[ing]” the independent review process in the overall structure of ICANN (*id.* at Addendum to Interim Report) and did not alter the non-binding nature of the review process.

¹¹⁶ The delay in implementing the committee’s suggestions resulted from the need for procedures and requirements for appointing the panelists, which proved more time-consuming to accomplish than anticipated. *See* Draft Principles for Independent Review, Interim Report of the Advisory Committee on Independent Review, *available at* <http://cyber.law.harvard.edu/icann/berlin/archive/IRdraft.html> (last visited May 5, 2009), attached hereto as ICANN Exhibit Y.

¹¹⁷ *See* Committee on ICANN Evolution and Reform, *available at* <http://www.icann.org/en/committees/evol-reform> (last visited May 5, 2009), attached hereto as ICANN Exhibit AB.

¹¹⁸ *See id.*

¹¹⁹ *See* ICANN: A Blueprint for Reform (June 20, 2002) (the “Blueprint”), *available at* <http://www.icann.org/en/committees/evol-reform/blueprint-20jun02.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit AC.

international arbitration body to review any allegation that the Board has acted in conflict with ICANN's Bylaws."¹²⁰ The Blueprint included three other recommendations for accountability: establishing an office of ombudsman; establishing a public-outreach staff position; and modifying the pre-existing reconsideration process in certain respects.¹²¹ Each of these recommendations, along with the IRP process, served the common purpose of "advanc[ing] ICANN's core values of openness and transparency."¹²²

93. ICM's counsel in conjunction with its sTLD application, Ms. J. Beckwith Burr, actively participated in the process and expressly agreed that the review process would *not* be binding. Ms. Burr, who had previously worked for the United States Department of Commerce, where she was responsible for issues related to ICANN, was in private law practice in 2002 (at the firm where she later represented ICM with respect to its .XXX sTLD application¹²³) when the ERC asked her to suggest ways to implement the Blueprint's recommendations on accountability. In a report dated August 23, 2002, Ms. Burr provided her suggestions, within the framework of the ERC's concern that "ICANN's decision making process must be perceived as unbiased."¹²⁴

94. In addressing the independent review process, Ms. Burr explained that IRP "*decisions will be nonbinding, because the Board will retain final decision-making authority.*"¹²⁵ Ms. Burr further noted that, especially when compared to the reconsideration process administered by the Board rather than a "neutral" entity, the significance of the IRP process was not any binding effect but rather the IRP's status as a "formal process to review allegations that the Board has acted in conflict with ICANN's Bylaws."¹²⁶ Accountability would

¹²⁰ *Id.* at § 5 (emphasis added).

¹²¹ *Id.*

¹²² *Id.*

¹²³ See ICM Memorial, Ms. J. Beckwith Burr Witness Statement, ¶ 7.

¹²⁴ Becky Burr, Recommendations Regarding Accountability at II (August 23, 2002), available at <http://www.icann.org/en/committees/evol-reform/afap-report-23aug02.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit V.

¹²⁵ *Id.* (emphasis added).

¹²⁶ *Id.*

be achieved by a panel’s “persuasive public power,” which would be possible by making panel announcements “easily available” to the public.¹²⁷

95. In this proceeding, ICM has submitted a lengthy witness statement by Ms. Burr, but her statement does not address any of her work on the IRP drafting issue.¹²⁸

96. The ERC ultimately proposed a set of substantially revised Bylaws to the Board, addressing a new independent review process as well as a host of other issues evaluated during the evolution-and-reform process.¹²⁹ In doing so, the ERC explained that the proposed IRP Bylaws (which became Article IV, section 3 of the Bylaws) “largely track[ed] the recommendations” of Ms. Burr.¹³⁰

97. In preparing and proposing the new Bylaws, the ERC again emphasized the non-binding nature of the new IRP. In an August 2002 interim report, the ERC stated: “We do not believe that ICANN should have either a Supreme Court or a ‘Super Board’ with the ability to nullify decisions reached by the ICANN Board, which will be the most broadly representative body within the ICANN structure.”¹³¹ In its final report issued in October 2002 along with the new set of Bylaws, the ERC similarly stated that “a ‘Supreme Court,’ with the power to revisit and potentially reverse or vacate decisions of the ICANN Board, would itself raise many difficult questions” and thus had not been adopted.¹³² As these comments demonstrate, although focused on providing accountability for the Board’s actions through the IRP, the ERC did not replace the

¹²⁷ Id.

¹²⁸ See ICM Memorial ¶ 10.

¹²⁹ See Proposed New Bylaws Recommended by the Committee on ICANN Evolution and Reform, Art. 4, § 3, ¶¶ 12-13 (October 23, 2002), available at <http://www.icann.org/en/committees/evol-reform/proposed-bylaws-23oct02.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit AD.

¹³⁰ ERC, Final Implementation Report and Recommendations, at § 5 (October 2, 2002) [“Final Implementation Report”], available at <http://www.icann.org/en/committees/evol-reform/final-implementation-report-02oct02.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit AE.

¹³¹ ERC, First Interim Implementation Report, at § 2 (August 1, 2002), available at <http://www.icann.org/en/committees/evol-reform/first-implementation-report-01aug02.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit AF.

¹³² Final Implementation Report, *supra* note 130.

ultimate authority of that broadly representative Board with that of an independent third party otherwise unconnected to ICANN and its constituencies.

98. In reviewing and ultimately adopting the ERC's proposed Bylaws in December 2002, the Board again confirmed the non-binding nature of the IRP. The Board agreed with the ERC that the Board would retain ultimate authority, and amended the language proposed by the ERC to clarify even further the non-binding nature of the IRP. Specifically, it replaced the ERC's reference to IRP "decisions" with the term "declarations."¹³³ As explained in the Board's minutes, this replacement was precisely to avoid any erroneous inference that the IRP determinations are binding decisions akin to those of a judicial or arbitral tribunal.¹³⁴

99. In his witness statement, Dr. Cerf, who was Chair of the ICANN Board when it adopted the IRP Bylaws, confirmed the Board's intent that the IRP would be non-binding. As he explained, "[w]hen the IRP was created, it was intended that an Independent Review Panel would consider claims that the ICANN Board violated ICANN's Articles of Incorporation or Bylaws, would conduct a reasoned and persuasive analysis of those claims, and would make public its conclusion and rationale so that members of the Internet community would understand the results of the process."¹³⁵ An independent review panel "was never meant to have the authority to overrule, nullify, or stay decisions of the ICANN Board."¹³⁶

iii. ICM's Contrary Arguments Are Baseless.

100. ICM does not acknowledge the Bylaws provisions and the substantial drafting history. Instead, in support of its argument that the IRP Bylaws provide for "final and binding" declarations, ICM takes a few fragmentary phrases in the IRP Bylaws out of context.

¹³³ Compare Proposed New Bylaws Recommended by the Committee on ICANN Evolution and Reform, Art. 4, § 3, ¶¶ 12-13 (October 23, 2002), available at <http://www.icann.org/en/committees/evol-reform/proposed-bylaws-23oct02.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit AD, with ICANN Bylaws, Art. 4, § 3, ¶¶ 12-13 (December 15, 2002) (referring to panel "declarations"), available at <http://www.icann.org/en/general/archive-bylaws/bylaws-15dec02.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit AG.

¹³⁴ See ICANN Minutes, October 31, 2002, available at <http://www.icann.org/en/minutes/minutes-31oct02.htm> (last visited May 5, 2009), attached hereto as ICANN Exhibit AH.

¹³⁵ V. Cerf Witness Statement, ¶ 9.

¹³⁶ *Id.*

101. ICM’s primary argument is that the IRP Bylaws’ use of the word “arbitration” necessitates the conclusion that the IRP is binding.¹³⁷ This is wrong. The Bylaws never characterize the IRP as “arbitration.” To the contrary, they consistently refer to the proceeding as an “independent review” and never as “arbitration.”¹³⁸ The Bylaws’ one use of the word “arbitration” refers not to the nature of the IRP proceeding, but rather to the *entity* that will implement the IRP.¹³⁹ Because arbitral bodies are suitable entities to implement the process that ICANN established, it is unremarkable that they would be used to implement the IRP, and an occurrence of the word “arbitration” in that context does not support ICM’s contention. In limiting the word’s occurrence to a reference to the entity conducting the review, and consistently refraining from using the term to characterize the nature of the proceedings or the effects of the Panel’s conclusions, the Bylaws actually reinforce that the IRP is not binding. Plainly, the Bylaws used the word “arbitration” where appropriate, so the failure to use the word “arbitration” in explaining the nature of the proceeding was deliberate.

102. Moreover, as shown above, the drafters of the Bylaws obviously did not understand the term “arbitration” to refer to a proceeding with necessarily binding results; in the course of the drafting history, they occasionally used the phrase “non-binding arbitration” to refer to the process.¹⁴⁰ Thus, the word “arbitration” would not be dispositive even if it had been used in reference to the proceeding as ICM wrongly claims.

103. ICM’s only other textual argument is to quote phrases in the Bylaws out of context that, according to ICM, also suggest a “binding” effect. Thus, ICM points to the phrases “independent review,” “declaration,” “decisions/opinions,” “writing[s],” “act[ing] upon the opinion of the IRP,” and “prevailing party.”¹⁴¹ None of these terms, standing on their own and especially in their context, can possibly be read to require a binding decision, particularly in the

¹³⁷ ICM Memorial ¶¶ 291-92, 298-302.

¹³⁸ See ICANN Bylaws, *supra* note 2, Article IV, §§ 3.1-6, 3.9.

¹³⁹ See *id.* at Article IV, § 3.4 (stating that the review process should be administered by an “international arbitration provider . . . using arbitrators under contract with or nominated by that provider”).

¹⁴⁰ See Blueprint, *supra* note 119, at § 5.

¹⁴¹ See ICM Memorial ¶¶ 282, 304, 306-07.

face of the voluminous evidence ignored by ICM showing that the contrary was presupposed.¹⁴² ICM offers no contextual analysis that could in any way support its bare assertions.

104. ICM also quotes statements by then-ICANN president Stuart Lynn and current-president Dr. Paul Twomey discussing the need for transparency and accountability in ICANN's structure and processes.¹⁴³ ICM's quotations are badly inapposite. Interest in greater transparency and accountability, however, obviously does not require, or even suggest, a binding result. To the contrary, these statements make clear that the driving purpose of the IRP was *not* to create a new tribunal to impose binding decisions, but rather to provide another means to foster openness and accountability, which the IRP accomplishes through the persuasive public power of the panel's declarations.¹⁴⁴

105. ICM's heavy emphasis¹⁴⁵ on Dr. Twomey's use of the word "final" is particularly mystifying. During hearings before Congress in 2006 in which he addressed three "processes for accountability in [ICANN's] decision-making and in its bylaws," Dr. Twomey characterized the IRP as the Bylaws' "final method of accountability."¹⁴⁶ The IRP process was certainly "the final" (*i.e.*, the last in time) of the three methods to which Dr. Twomey referred (the first two

¹⁴² With respect to the phrase "prevailing party," ICM relies on case law addressing that term for purposes of attorneys' fee awards in civil rights litigation. *See* ICM Memorial ¶ 306. ICM provides no basis for applying that authority to the different situation here of an alternative dispute resolution where neither judicial litigation, civil rights, nor attorneys' fees are at issue. Obviously, a party "prevails" here if the panel issues a declaration in that party's favor, whether or not that declaration is binding.

¹⁴³ *See* ICM Memorial ¶¶ 284-89. Indeed, ICM claims that "it is instructive to consider" these statements "[b]efore considering the plain language of the provisions governing the Independent Review Process." ICM Memorial ¶ 284 (emphasis added). ICM's backward approach to interpreting the Bylaws underscores the absence of any textual basis for ICM's argument.

¹⁴⁴ *See* ICANN Governance, Hearing before the S. Subcommittee on Science, Technology, and Space of the Committee on Commerce, Science, and Transportation, 107 Cong. 2 (2002) (statement of Mr. Lynn that any reform efforts should "retain the fair, open, and transparent character of ICANN processes"); Hearings Before the H. Subcommittee on Commerce, Trade, and Consumer Protection and Subcommittee on Telecommunications & the Internet of the Committee on Energy and Commerce, 109th Cong. 19 (2006) (statement of Dr. Twomey emphasizing that the IRP is part of ICANN's "well-established principles and processes for accountability").

¹⁴⁵ ICM Memorial ¶¶ 288-89.

¹⁴⁶ Hearings Before the H. Subcommittee on Commerce, Trade, and Consumer Protection and Subcommittee on Telecommunications & the Internet of the Committee on Energy and Commerce, 109th Cong. 19 (2006).

being the Board’s initial decision-making process and the reconsideration process administered by the Board). Dr. Twomey obviously was not addressing whether an IRP declaration was legally binding on ICANN.

106. Likewise, ICM’s reliance on Mr. Lynn’s and Dr. Twomey’s references to “arbitrators” or “arbitration” is similarly misplaced.¹⁴⁷ The context of the statements ICM references makes clear that neither Mr. Lynn nor Dr. Twomey was referring to the question of whether a panel’s declarations were binding.¹⁴⁸ The word “arbitration” in this context does not have any relevance to the effect of IRP declarations, because, as shown above, ICANN has expressly used the term “arbitration” to refer to a “non-binding” process.¹⁴⁹

107. In short, nothing in the IRP provisions in any way suggests that the Panel’s declaration is “binding.” To the contrary, the provisions’ plain language and drafting history make clear that the Panel’s declarations, have persuasive and advisory force, but do not bind the ICANN Board.

b. The Supplementary Procedures Governing The IRP Confirm That IRP Declarations Are Not Binding.

108. The operating rules and procedures for the IRP confirm that IRP declarations are not binding. Pursuant to Article IV, section 3.5 of the ICANN Bylaws, ICANN established rules to govern the IRP, selecting the ICDR International Arbitration Rules (“ICDR Rules”)¹⁵⁰ as amended by ICANN’s Supplementary Procedures.¹⁵¹ ICANN’s individualization of the ICDR

¹⁴⁷ See ICM Memorial ¶¶ 287-88.

¹⁴⁸ See ICANN Governance, Hearing before the S. Subcommittee on Science, Technology, and Space of the Committee on Commerce, Science, and Transportation, 107 Cong. 2 (2002) (statement of Mr. Lynn that ICANN was creating a mechanism for “independent review of ICANN Board actions by experienced arbitrators”); Hearings Before the H. Subcommittee on Commerce, Trade, and Consumer Protection and Subcommittee on Telecommunications & the Internet of the Committee on Energy and Commerce, 109th Cong. 19 (2006) (statement of Dr. Twomey describing the IRP as “an independent review panel or arbitration process”).

¹⁴⁹ See Blueprint, *supra* note 119, § 5.

¹⁵⁰ See International Centre for Dispute Resolution, International Dispute Resolution Procedures [“ICDR Rules”], Cl. Ex. 11.

¹⁵¹ See Supplementary Procedures for Internet Corporation for Assigned Names and Numbers [“Supplementary Procedures”], Cl. Ex. 12.

Rules, through those Supplementary Procedures, makes clear that IRP declarations are not binding.

109. Supplementary Procedures 6 and 8 are determinative. Supplementary Procedure 6, entitled “Interim Measures of Protection,” tracks the similar provision in the IRP Bylaws by stating that the Panel may merely “*recommend* that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.”¹⁵² As noted above, the authority merely to “recommend” temporary action, until the Board “reviews” the panel’s conclusions, demonstrates that the panel’s declarations do not have binding force. Moreover, this Supplementary Procedure replaces Article 21 of the ICDR Rules, also entitled “Interim Measures of Protection.” Article 21 authorizes an arbitral panel to “take whatever measures it deems necessary, including injunctive relief and measures for the protection or conservation of property” or “an interim award” that may require “security for the costs of such measures.”¹⁵³ By replacing the ICDR rule that authorizes the panel itself to award interim relief, and providing its own rule that retains the ICANN Board’s judgment and decision-making authority, ICANN ensured that even interim declarations by a panel would not be binding on the Board.

110. Supplementary Procedure 8 similarly confirms the non-binding nature of IRP declarations. In the ICDR Rules, Article 27 is entitled “Form and Effect of the Award” and specifies that arbitration awards are “final and binding.”¹⁵⁴ ICANN, however, adopted Supplementary Procedure 8, which replaces this provision. The title of Supplementary Procedure 8 – “Form and Effect of an IRP Declaration” – corresponds to Article 27 but, again, is tailored to ICANN’s particular review process. Like the IRP Bylaws that it tracks,¹⁵⁵ the supplementary rule refers to “declarations” and specifically *omits* the Article 27 reference to a

¹⁵² *Id.* at Supplementary Procedure 6 (emphasis added). The IRP Bylaws state that the panel may “recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.” ICANN Bylaws, *supra* note 2, Article IV, § 3.8.c.

¹⁵³ ICDR Rules, *supra* note 150, Article 21; *see also id.*, Article 27(7) (“In addition to making a final award, the tribunal may make interim, interlocutory or partial orders and awards.”).

¹⁵⁴ *Id.* at Article 27.

¹⁵⁵ *See* ICANN Bylaws, *supra* note 2, Article IV, § 3.12.

binding effect. The supplementary rule states that declarations shall: (i) “be made in writing, promptly by the [panel], based on the documentation, supporting materials and arguments submitted by the party,” (ii) “designate the prevailing party,” (iii) “be made public” if the parties consent, and (iv) be provided to the parties.¹⁵⁶ Supplementary Procedure 8 thus squarely rejects the “final and binding” language contained in Article 27.¹⁵⁷

111. ICM claims that Supplementary Rule 8 has no effect on Article 27 or its reference to “final and binding” awards.¹⁵⁸ ICM would have the Panel reach the absurd conclusion that there are *two* different rules, both labeled “Form and Effect” of a result, with largely overlapping but different content, despite the fact that one was specially adopted for this proceeding and differs from the other, which is a standardized rule governing proceedings in the absence of modification. ICM’s only rationale for this nonsensical position is that, whereas ICANN expressly provided that another ICDR Rule (Article 37 addressing procedures for emergency proceedings) “will not apply,” ICANN did not make a similar statement with respect to Article 27. But it would have made no sense for ICANN to have made such a statement regarding Article 27. Unlike with Article 37, which ICANN eliminated wholesale without any corresponding replacement, ICANN *modified* Article 27 by expressly adopting a supplemental provision with a corresponding title that altered the content of Article 27. In light of Article 27’s modification, rather than entire elimination, it would have made no sense for ICANN to state, as it did with respect to Article 37, that Article 27 “did not apply.”

¹⁵⁶ See Supplementary Procedures, *supra* note 151, Supplementary Procedure 8.

¹⁵⁷ Setting aside prefatory Supplementary Procedures 1 and 2 (identifying definitions and scope of the Supplementary Procedures), ICANN’s other Supplementary Procedures, like Procedures 6 and 8, correspond to particular provisions in the ICDR Rules. Specifically, Procedure 3, entitled “Number of Independent Review Panelists,” corresponds to Article 5 on “Number of Arbitrators”; Procedure 4, entitled “Conduct of the Independent Review,” corresponds to Article 16 on “Conduct of the Arbitration”; Procedure 5, entitled “Written Statements,” corresponds to Article 17 of the same name; Procedure 7, entitled “Declarations,” corresponds to Article 26 on “Awards, Decisions and Rulings”; and Procedure 9, entitled “Costs,” corresponds to Article 31 of the same name. In modifying the ICDR Rules in each instance, ICANN replaced references to “arbitration” or “tribunal” with “independent review” or “IRP”; references to “arbitrators” with “independent review panelists”; and references to “award, decision, or ruling” with “declaration.” ICANN’s consistent and repeated tailoring of the ICDR Rules confirms that ICANN rejected any binding effect of results otherwise provided for in those Rules.

¹⁵⁸ See ICM Memorial ¶¶ 282, 308. ICM does not address the significance of Supplementary Rule 6’s replacement of Article 21.

112. ICM also argues that the act of using the ICDR Rules on arbitration somehow transforms this proceeding into a binding arbitration.¹⁵⁹ But the use of the ICDR Rules – as amended by ICANN’s Supplementary Procedures – actually proves just the opposite. While the ICDR Rules on arbitration apply well-established rules to the conduct of an IRP – to govern such procedural matters as the appointment of panelists, scheduling, and the manner in which the parties may discuss and provide evidence – the Supplementary Procedures expressly replace those provisions in the ICDR Rules that concern the effect of a panel’s determinations, tailoring the rules to ICANN’s process in which a panel’s declarations are not binding. In relying superficially on the word “arbitration” in the title of the ICDR Rules, ICM ignores the content of ICANN’s amendments to those rules. Some of those amendments would not have been required if ICANN had intended the IRP to be binding. As a result, to the extent any aspects of “arbitration” are part of the IRP, they relate to the operation of the proceeding, not to its results, which are governed by ICANN’s Supplementary Procedures that render the results non-binding.¹⁶⁰

113. Finally, as with ICM’s misplaced reliance on various terms in the Bylaws, ICM cannot rely on the Supplementary Procedures’ various references to “independent review,” “declaration,” “decisions/opinions,” “writing[s],” “act[ing] upon the opinion of the IRP,” or “prevailing party” to infer a binding nature of the IRP.¹⁶¹ Whether in isolation or in context, none of those terms implies a binding result.

2. The Actions Of The ICANN Board Are Entitled To Substantial Deference From This Tribunal.

114. As explained above, ICANN created the IRP process as part of its effort to allow aggrieved parties to challenge whether the conduct of the ICANN Board was inconsistent with

¹⁵⁹ See ICM Memorial ¶ 293.

¹⁶⁰ ICM argues that the fact that ICANN selected the ICDR Rules on arbitration over its mediation rules supports ICM’s argument. See ICM Memorial ¶ 293. Mediation, however, is an entirely different and inapposite process designed to facilitate agreement of the parties, not an independent review. See Black’s Law Dictionary 996 (7th ed. 1999) (defining mediation as “help[ing] the disputing parties reach a mutually agreeable solution”). Mediation could not possibly have supplied the form of review called for in ICANN’s Bylaws.

¹⁶¹ See ICM Memorial ¶¶ 282, 304-07.

ICANN’s Bylaws and Articles of Incorporation. ICANN and its community deliberated with great care in crafting the rules governing this proceeding, and the rules and proceeding are unique to ICANN.

115. ICM suggests that the ICANN-created process, including the plain language of the governing Bylaws, be ignored and that the Panel should engage in a “full, non-deferential review of the ICANN’s actions.”¹⁶² ICM’s argument is also contrary to well-settled principles of law on deferential review of corporate board decisions. ICM rests its argument instead on a misinterpretation of a single word (“independent”) that has absolutely nothing to do with the appropriate degree of deference in this proceeding.

a. ICANN’s Bylaws Expressly Confer Discretionary Authority Upon The Board In Applying The Provisions At Issue Here.

116. The Bylaws provisions to which ICM asks the Panel to compare ICANN’s actions are collected and summarized in section 2 of Article I. This section identifies eleven “core values” of ICANN governance, several of which (*e.g.*, the adoption of “open and transparent” decision-making procedures (Article I, section 2) form the basis of ICM’s request for review.¹⁶³ This section directly speaks to the degree of latitude afforded to the Board and other ICANN decision-makers in implementing the provisions in question.

117. Article I, section 2 explains that the core values are “very general,” and that therefore “situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible.” The Bylaws thus make clear that the requirements must not be construed in a “narrowly prescriptive” manner. To the contrary, Article 1, section 2 emphatically provides that the ICANN Board is vested with broad discretion in implementing these provisions. The section begins by noting that the core values “should guide” ICANN’s decisions and actions, and the section concludes by elaborating on this broad guidance:

Any ICANN body making a recommendation or decision *shall exercise its judgment to determine which core values are most relevant and how they apply*

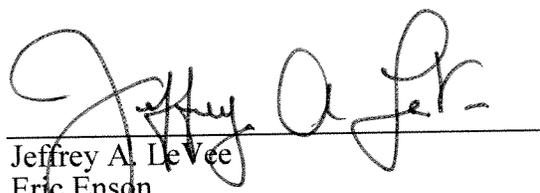
¹⁶² ICM Memorial ¶ 323.

¹⁶³ ICM expressly relies on core values 1, 2, 7, and 8.

Indeed, the procedures specify that the Panel “shall make its declaration based solely on the documentation, supporting materials, and arguments *submitted* by the parties.”⁴⁶⁶

327. For all of these reasons, ICANN proposes that the hearing that the Panel has scheduled to begin September 21, 2009 consist of detailed closing arguments by counsel, but not provide for live witness testimony. The closing argument could, for example, be structured according to the various legal and factual issues that the parties have addressed in ICM’s Memorial and ICANN’s Response.

Respectfully submitted,



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(continued...)

Supplementary Procedures, *supra* note 151, Supplementary Procedure 4 (“The IRP should conduct its proceedings by electronic means to the extent feasible. Where necessary, the IRP may conduct telephone conferences.”).

⁴⁶⁶ ICANN Bylaws, *supra* note 2, Article IV, § 3.12 (emphasis added).