

INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

GULF COOPERATION COUNCIL,) ICDR CASE NO. 01-14-0002-1065
)
)
Claimant,)
)
and)
)
INTERNET CORPORATION FOR ASSIGNED)
NAMES AND NUMBERS,)
)
Respondent.)
_____)

ICANN'S SUBMISSION REGARDING ALLOCATION OF COSTS

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The Internet Corporation for Assigned Names and Numbers (“ICANN”) hereby submits its Submission Regarding Allocation of Costs, as requested in the 24 October 2016 Partial Final Declaration of The Independent Review Process (“Final Declaration”).

INTRODUCTION

1. Both ICANN’s Bylaws and the International Center for Dispute Resolution’s (“ICDR’s”) Supplementary Procedures for ICANN’s Independent Review Process (“Supplementary Procedures”) provide that, in an “extraordinary case,” up to half of the costs incurred by an Independent Review Panel (“IRP”) may be allocated to the prevailing party.¹

2. This IRP was “extraordinary” for several reasons. First, both sides presented reasonable and thorough positions on novel issues of geopolitical sensitivity. Second, the parties’ briefing of these issues served the public interest. Third, the Gulf Cooperation Council (the “GCC”) filed its IRP before engaging in ICANN’s Cooperative Engagement Process (“CEP”), which is aimed at narrowing issues for, and reducing the costs of, IRPs. Finally, a finding that both sides should bear its own costs is in line with the cost allocations set forth by other IRP panels in similar circumstances. Thus, ICANN requests that the Panel declare that each side bear its own costs (i.e., allocate half of the costs to the GCC as the prevailing party).²

APPLICABLE STANDARD

3. ICANN’s Bylaws and the ICDR’s Supplementary Procedures both set forth the standard used to determine the allocation of costs in an IRP.³

4. ICANN’s Bylaws provide: “The party not prevailing shall ordinarily be responsible for bearing all costs of the IRP Provider, but in an extraordinary case the IRP Panel

¹ Bylaws, Art. IV, § 3.18; Supplementary Procedures ¶ 11. The Bylaws are exhibit R-1, and the Supplementary Procedures are exhibit R-19.

² As of this writing, ICANN has paid \$104,929.18 to the ICDR associated with this IRP.

³ Bylaws, Art. IV, § 3.18; Supplementary Procedures ¶ 11.

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."⁴

5. Paragraph 11 of the Supplementary Procedures includes a substantively identical provision: "The party not prevailing in an IRP shall ordinarily be responsible for bearing all costs of the proceedings, but under extraordinary circumstances the IRP PANEL may allocate up to half of the costs to the prevailing party, taking into account the circumstances of the case, including the reasonableness of the parties' positions and their contribution to the public interest."⁵

ARGUMENT

6. This IRP represents an "extraordinary" case such that the GCC should bear its own costs, for three reasons.⁶ First, ICANN asserted reasonable positions and arguments throughout these proceedings, which involved extraordinary issues of geopolitical sensitivity. Second, both parties contributed to the public interest by presenting thorough briefing and good faith arguments regarding the novel issues raised by this IRP. Third, the GCC never initiated a formal CEP, thereby increasing the costs of this IRP. Moreover, ordering each side to bear its own costs is in line with prior IRP precedent.

I. THE CIRCUMSTANCES OF THIS IRP RENDER IT APPROPRIATE FOR THE GCC TO BEAR ITS OWN COSTS.

7. As an initial matter, the Bylaws instruct that the "reasonableness of the parties' positions" be taken into account in allocating costs.⁷ Both sides raised reasonable arguments

⁴ Bylaws, Art. IV, § 3.18 (emphasis added).

⁵ Supplementary Procedures ¶ 11.

⁶ See Bylaws, Art. IV, § 3.18; Supplementary Procedures ¶ 11.

⁷ Bylaws, Art. IV, § 3.18.

here. Indeed, the Panel “agree[d] with ICANN” as to certain arguments, and sided with the GCC on other points.⁸ Moreover, the Final Declaration recognized that this IRP raised significantly novel issues because it involved “a geo-politically charged application” that implicated the “well-known geo-political sensitivities associated with the name ‘Persian Gulf’.”⁹ As the Panel noted: “It would seem that both Parties hoped that such a political dispute would somehow resolve itself.”¹⁰ It did not, and both sides presented thorough and reasonable arguments regarding the novel and sensitive issues raised in this IRP, which also contributed to the public interest. As such, each side should bear its own costs.

8. As a final note, the GCC should not recover its costs from ICANN in light of its failure to invoke CEP prior to filing its IRP request. Had the GCC done so, some of the issues presented in this IRP, such as the claims regarding the timeliness of this IRP and other procedural issues, may have been resolved or narrowed. Indeed, ICANN’s Bylaws urge complainants to enter into a CEP with ICANN prior to initiating a request for IRP “*for the purpose of resolving or narrowing the issues* that are contemplated to be brought to the IRP.”¹¹ Counsel for ICANN emphasized this point in a 19 December 2014 email to the GCC’s counsel: “A CEP is supposed to take place before the filing of an IRP in the hope of avoiding, or at least minimizing, the costs associated with an IRP. That, obviously, did not happen in this matter. . . . ICANN representatives informed GCC representative, on several occasions, that the CEP was available to the GCC and should be invoked before the filing of an IRP.”¹² It is undisputed that the GCC never invoked CEP, as this Panel recognized in the Final Declaration, finding that the

⁸ Final Declaration ¶ 102; *see, e.g., id.* ¶¶ 91, 105, R-29.

⁹ *Id.* ¶¶ 134, 141.

¹⁰ *Id.* ¶ 89.

¹¹ Bylaws, Art. IV, § 3.14 (emphasis added).

¹² Final Declaration ¶ 79, R-29.

parties merely engaged in a “conciliation process” and that “there was no formal CEP[.]”¹³ As such, it is only fair that the GCC bear half the costs of this IRP given that some of those costs could have been reduced had the GCC formally invoked the CEP procedure to resolve or narrow the issues argued and extensively briefed in this IRP.

II. IRP PRECEDENT INSTRUCTS THAT THE GCC SHOULD BEAR ITS OWN COSTS.

9. ICANN’s Bylaws provide that IRP final declarations “have precedential value.”¹⁴ The final declarations issued in three other IRPs weigh in favor of requiring the GCC to bear its own costs.

10. First, the final declaration issued in the *Corn Lake LLC v. ICANN* IRP (“*Corn Lake* Final Declaration”) declared the claimant to be the prevailing party, yet ordered each side to bear their own costs.¹⁵ The *Corn Lake* Final Determination found that “extraordinary circumstances” existed on account of, among other things, the “unique impact” of a Governmental Advisory Committee (“GAC”) recommendation to ICANN regarding the strings at issue, and “the lack of any deliberate disparate treatment of the Claimant by ICANN[.]”¹⁶ These same two circumstances are present here. The Final Declaration recognized that the “GAC sent a missive to the ICANN Board that fell outside all three permissible forms for its advice” and stated that “[s]ome of the fault for the outcome falls on the GAC, for not following its own principles.”¹⁷ The Final Declaration also expressly stated that it made no “finding on the GCC’s allegation that the Board discriminated against the GCC, or failed to provide the GCC with consistent treatment[.]”¹⁸ Just as in the *Corn Lake* Final Determination, here, given the

¹³ *Id.* ¶¶ 71-72, 87.

¹⁴ Bylaws, Art. IV, § 3.21.

novelty of the GAC advice at issue and the fact that the Panel here did not make any finding of deliberate disparate treatment on ICANN's part, each party should bear its own costs.

11. Second, the panels in the *Booking.com v. ICANN* IRP ("*Booking.com*") and the *Despegar Online SRL v. ICANN* IRP ("*Despegar* IRP") each issued a final declaration electing not to require the claimant to pay ICANN its costs, even though ICANN was the prevailing party in both proceedings.¹⁹ The panel in *Booking.com* noted: "ICANN is undoubtedly the prevailing party in this case. That being said, the Panel considers that the nature and significance of the issues raised by Booking.com, and the contribution to the 'public interest' of its submissions, are such that it is appropriate and reasonable that the IRP costs be shared equally by the parties."²⁰ Similarly, the panel in the *Despegar* IRP found that each side should bear its own costs because the IRP addressed a "number of serious issues[.]"²¹ As set forth above, in this IRP, the reasonableness of the parties' positions, coupled with the public interest inherent in a dispute involving a string raising such serious geopolitical sensitivities, means that each party should bear its own costs in this IRP, just like the parties in the *Corn Lake*, *Booking.com* and *Despegar* IRPs.

CONCLUSION

12. For the foregoing reasons, ICANN respectfully requests that each party should bear its own costs in this IRP, pursuant to section 3.18 of Article IV of ICANN's Bylaws and

(continued...)

¹⁵ *Corn Lake, LLC v. ICANN* IRP Final Declaration ¶ 9.5, R-30.

¹⁶ *Id.* ¶ 9.3.

¹⁷ Final Declaration ¶¶ 127-28, R-29.

¹⁸ *Id.* ¶ 144.

¹⁹ *Booking.com v. ICANN* IRP Final Declaration ¶¶ 152-54, R-28; *Despegar et al. v. ICANN* IRP Final Declaration ¶ 158, R-31.

²⁰ *Booking.com v. ICANN* IRP Final Declaration ¶¶ 152-54, R-28.

²¹ *Despegar et al. v. ICANN* IRP Final Declaration ¶ 158, R-31.

Paragraph 11 of the Supplementary Procedures.

Respectfully submitted,

JONES DAY

Dated: November 18, 2016

By: /s/ Eric Enson

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