

**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 A. Hamilton, FCI Arb

Hon. William J. Cahill (Ret.)

Klaus Reichert SC

Claimant hereby responds to the email directive of the honorable Panel, dated May 24, 2016, requiring “observations on the issue of the scope of the Panel’s Authority in the context of Section II of the *Merck KGaA v. ICANN*, Declaration of the Independent Review Process Panel.” Thus, Claimant hereby provides its further Observations as to the scope of an IRP panel’s authority.<sup>1</sup>

1. The *Merck* panel’s succinct analysis of the scope of its authority under ICANN’s Bylaws is precise, as far as it goes. Claimant does not dispute that the Panel must determine whether ICANN has violated its Articles and/or Bylaws, per Art. IV, Sec. 3.4, quoted in Section II of the *Merck* declaration. Nor does Claimant dispute that the Panel must objectively examine ICANN’s actions or inaction in light of all the Articles and Bylaws, *de novo*.
2. The *Merck* declaration does not cite the prior *DCA Trust* precedent on the issue of panel authority. Indeed, it does not appear to have been briefed by either party in that case, and the panel had no need to do discuss it, because ICANN was not found to have violated its Articles or Bylaws. So there was no actual issue whether the *Merck* panel could or should make any “recommendation” to the Board to remedy a violation, nor whether such recommendation would be binding on the Board. In *DCA Trust*, to the contrary, the Board was found to have violated its Bylaws by failing to further investigate GAC Advice against the .Africa TLD application, and by failing to provide rationale for the decision to accept the

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<sup>1</sup> Claimant generally references its prior Observations as to the panel’s authority in this matter, submitted May 3, 2016. <https://www.icann.org/en/system/files/files/irp-agit-claimant-observations-panel-authority-scope-03may16-en.pdf>.

GAC Advice and reject the application. So the Panel appropriately conducted an exhaustive analysis, determining that it could and indeed should make a remedial recommendation to the Board, that such recommendation would be binding, and ultimately, what that recommendation should be.<sup>2</sup> The Board then accepted and implemented that recommendation, returning the subject application to processing, effectively reversing the Board's earlier decision to reject it.<sup>3</sup>

3. In this case, Claimant seeks essentially the same findings, among others, and the same remedial recommendation that the subject applications be returned to normal processing -- because the basic factual underpinnings of the *DCA Trust* case are at least equally as present and important in this case. In this case, Claimant avers that ICANN failed to appropriately investigate GAC Advice indicating "concerns of some GAC members", failed to accept two of its own appointed experts' determinations against the Objectors, failed to provide any specific rationale for doing so, or for indefinitely delaying Claimant's applications, and has unfairly subjected Claimant to additional, impossible, vague and/or still unknown criteria unique only to Claimant's applications -- effectively creating new, discriminatory policy without community deliberation or other reasonable information before the Board.<sup>4</sup>

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<sup>2</sup> IRP Request, Annex 11, ¶¶ 23, 131 (Final Decl. -- "the panel has the authority to recommend affirmative relief"); and, Annex C-1, ¶¶ 88-128, 131 (Final Decl. on the IRP Procedure -- "this Declaration and [the] future Declaration on the Merits of this case are binding on the Parties").

<sup>3</sup> ICANN Board Resolution dated July 16, 2015. Annex C-2.

<sup>4</sup> Claimant alleges additional violations of the Bylaws as well, as set forth in the IRP Request.

4. If the Panel agrees with Claimant that the Bylaws have been violated, then the Panel must recommend that ICANN remedy the violations of its Bylaws by reversing the improper decision to indefinitely delay Claimant's applications, and return them to processing.<sup>5</sup> Otherwise, why does the IRP exist? What good would it do Claimant (or, any claimant) to spend so much money and effort to prove ICANN has violated its Bylaws, if the ICANN Board is free to ignore such decision, so there is no remedy? The Board has already uniquely and unfairly delayed these applications for several years, so if they choose to ignore the Panel's finding of a Bylaws violation and/or the Panels' remedial recommendation, then what would stop them from delaying the applications forever? When would a decision be made as to the applications, and by what criteria or policy?
  
5. The *Merck* declaration does not address the precedential effect of the *DCA Trust* case on the issue of a panel's remedial authority, likely because it was not briefed by either of the parties, and because the panel in that case had no need to address it. There have been final declarations in only six IRP cases, and only the *DCA Trust* panel has found ICANN to have violated its Bylaws. That panel was also the first to address this issue of remedial authority. Subsequent panels' discussion of the issue of their remedial authority is merely *dicta*, since no Bylaw violations were found and thus no remedy was warranted. Such discussion also is

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<sup>5</sup> The ultimate effect of this would be issuance of TLD registry contracts to Claimant, as there are no other outstanding issues with respect to the applications.

generally inappropriate in light of the earlier *DCA Trust* declaration which the Bylaws<sup>6</sup> require to have “precedential effect” - so that claimants need not relitigate settled issues, and ICANN is not able to cherry-pick precedents that it likes, and ignore those it does not like.<sup>7</sup>

6. It is important to note what ICANN has already done (and/or, not done) with respect to the 2014 *DCA Trust* panel decision finding that ICANN violated its 2012 Bylaws by failing to appoint a Standing IRP Panel, as clearly required by the Bylaws.<sup>8</sup> The Board has totally ignored that decision for two years thus far, and has done nothing whatsoever since 2012 to create the Standing Panel. That has further violated the Bylaw which clearly requires the Board to address IRP panel decisions at the Board’s next meeting.<sup>9</sup> They do not have the option, under the Bylaws, to simply ignore IRP panel findings. But that is what they have done.<sup>10</sup>

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<sup>6</sup> Art. IV, Sec. 3.21 (“The declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.”).

<sup>7</sup> Indeed, in Section 1 and ¶¶ 15 and 20 of its Response to Claimant’s Observations, ICANN ignores the key holding of the *DCA Trust* panel that it could, and did, make a binding remedial recommendation to the Board. (*See supra*, fn. 2.) ICANN also spends an inordinate amount of text in ¶¶ 14, 16, 19, arguing against the reasoning and conclusions of the *DCA Trust* panel, even though the Bylaws clearly deem that opinion precedential. (*See supra*, fn. 6.)

<sup>8</sup> IRP Request, Annex 11, ¶22.12; and, Annex C-6 attached hereto *DCA Trust v. ICANN*, Decision on ICANN’s Request for Partial Consideration, May 20, 2014, ¶ 12 (“ICANN has failed to follow its own Bylaws” by failing to appoint a Standing Panel).

<sup>9</sup> Art. IV, Sec. 3.21.

<sup>10</sup> *See* Annex C-2 (Board Resolution addresses other violations of the Bylaws, but does not address the violation found as to the lack of a Standing Panel).

7. ICANN only argues meekly that the Bylaws provide no deadline for creating the Standing Panel, and provides for interim appointments, and so it need never be created.<sup>11</sup> It is a weak argument, amply refuted two years ago by the *DCA Trust* panel.<sup>12</sup> Claimant further notes that the Bylaws do not provide any other deadlines for ICANN to comply with any other of its Bylaws – because they are Bylaws, requiring immediate compliance upon enactment. They were enacted four years ago. The failure to create the Standing Panel was independently judged a Bylaws violation two years ago. Still ICANN has done nothing to remedy the violation. So how can it be trusted to remedy any Bylaws violations determined by this Panel? How is it accountable in any meaningful way, if it is free to ignore independent arbitral findings that it has violated its Bylaws?
8. In this case, the Panel is urged to recognize and apply the *DCA Trust* precedent that, when ICANN is found to have violated its Bylaws, the Panel may make a binding, remedial recommendation to the Board. That is the only way to ensure that ICANN is accountable via

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<sup>11</sup> ICANN Response to Claimant’s Observations, ¶ 19.

<sup>12</sup> IRP Request, Annex 11, ¶ 22.12, quoting *DCA Trust* panel decision of June 4, 2014:

It is not reasonable to construe the Bylaw ... as relieving ICANN indefinitely of forming the required standing panel.... Here, more than a year has elapsed, and ICANN has offered no explanation why the standing panel has not been formed, nor indeed any indication that formation of that panel is in process, or has begun, or indeed even is planned to begin at some point.

a meaningful Independent Review Process, as set forth in its Bylaws and confirmed by the *DCA Trust* panel decisions.

9. Indeed, the Board has now conclusively acknowledged this, by enacting on May 27, 2016, new Bylaws<sup>13</sup> which specifically confirm that IRP declarations “are intended to be enforceable in any court with jurisdiction over ICANN.”<sup>14</sup> ICANN’s lawyers cannot reasonably argue that the last version of the Bylaws were intended to be less binding, merely because they were less clear on the point.<sup>15</sup> Does ICANN seriously argue that it was less accountable last month, than it is today? That is odd, since ICANN has exactly the same mission and scope, and exactly the same, public interests at heart of each and every version

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<sup>13</sup> Annex C-7, New ICANN Bylaws, Art. 4.3 Independent Review Process for Covered Actions.

<sup>14</sup> *See also, id.*, Sec. 4.3(x)(iii):

ICANN intends, agrees, and consents to be bound by all IRP Panel decisions of Disputes of Covered Actions as a final, binding arbitration.

(A) Where feasible, the Board shall consider its response to IRP Panel decisions at the Board's next meeting, and shall affirm or reject compliance with the decision on the public record based on an expressed rationale. The decision of the IRP Panel, or en banc Standing Panel, shall be final regardless of such Board action, to the fullest extent allowed by law ...

(C) If the Board rejects an IRP Panel decision ..., the Claimant or the EC may seek enforcement in a court of competent jurisdiction.

<sup>15</sup> *See also*, Resp. Ex. 30, *Vistaprint v. ICANN*, Final Decl., ¶ 148 (“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”). ICANN has now done so, by enacting the new bylaws.

of its Bylaws. ICANN cannot be allowed to avoid accountability for past actions, any more than they can avoid accountability for future actions.

10. Ultimately, ICANN cannot reasonably argue in any IRP that, if the Board is judged to have violated its Bylaws, then the inquiry is over... the Board is free to ignore the findings of the IRP Panel. The recent Board decision to adopt amended Bylaws reinforces the plain intent of the IRP all along, as exhaustively analyzed by the unanimous *DCA Trust* panel -- to ensure that ICANN is accountable for the decisions that it makes or fails to make. The Board and broader community agreed to the new Bylaws to ensure ICANN's lawyers could no longer make the argument they have repeatedly made -- that essentially the Board is accountable to nobody, even after an adverse arbitration decision. ICANN lost that argument in the first and only precedential IRP declaration on point, *DCA Trust*, and the Board not only accepted the recommendation of that panel to return the application to normal processing -- but then clarified its Bylaws to ensure future Claimants would have a real remedy as well.

11. When ICANN has violated its Bylaws, it has been bound by a previous panel, and thus can be bound by this Panel, to remedy that violation via binding recommendation of the Panel. That was a key holding in the precedential *DCA Trust* case, it is a key principle confirmed in the latest Bylaws revision, and both the precedent and the principle are every bit as applicable in this case.



List of Annexes

C-6 *DCA Trust v. ICANN*, Decision on ICANN's Request for Partial Consideration, May 20, 2014.

C-7 Excerpt of New ICANN Bylaws, adopted May 27, 2016 (Sec. 4.3 - Independent Review Process).

Respectfully submitted,

By: 

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