

INDEPENDENT REVIEW PROCESS
INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 01-14-0001-5004

In the matter of an Independent Review

DOT REGISTRY, LLC,

Claimant

And

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS,

Respondent

PROCEDURAL ORDER NO. 8

Independent Review Panel:

August 26, 2015

The Honorable Charles N. Brower

Mark Kantor

M. Scott Donahey, Chair

1. The Panel designates the place of these proceedings as New York, New York. In the event that in the future the Panel should determine that there shall be an in-person hearing, the Panel may designate a different location for the holding of any such hearing, as provided in ICDR International Rules, Art. 17.2, and without legal impact on the consequences, if any, of the designation of the place of these proceedings as New York, New York.
2. The Panel requests that the parties address the following matters in additional written submissions. The Panel will not accept further submissions unless specifically requested by the Panel. The Panel imposes no page limitations on the parties. However, any and all such submissions are due no later than October 12, 2015. The Panel requests that such submissions be focused, succinct, and not repeat matters already addressed in material fashion in that party's previous submissions or expert report. Please note: NO EXTENSIONS OF THIS DATE WILL BE GRANTED ABSENT A SHOWING OF GOOD CAUSE.

(a) Paragraph 3 of the ICANN Articles of Incorporation states that ICANN "is organized under the California Nonprofit Benefit Corporation Law for charitable and public purposes." (Emphasis added.) Further, Paragraph 4 of the ICANN Articles of Incorporation provides that:

The Corporation shall operate for the benefit of the Internet community as a whole, carrying out its activities in conformity with relevant principles of international law and applicable international conventions and local law and, to the extent appropriate and consistent with these Articles and its Bylaws, through open and transparent processes that enable competition and open entry in Internet-related markets.

What are the "relevant principles of international law and applicable International conventions" encompassed by Paragraph 4 of the Articles for purposes of this dispute, and why? What principles of "local law" referred to in Paragraph 4 are relevant to this dispute, and why?

As the IRP Provider selected by ICANN pursuant to Article 1, Section 3.7 of the Bylaws is the International Centre for Dispute Resolution

("ICDR"), which calls for the application of the ICDR International Rules of Arbitration and supplementary rules thereto in any IRP, does the phrase "relevant principles of international law" include relevant principles of international arbitration?

Does (i) California law applicable to nonprofit public benefit corporations, and/or (ii) the statement in Paragraph 3 of the Articles that ICANN is "organized under the California law for companies under the California Nonprofit Public Benefit Corporation Law . . . *for public purposes*," (emphasis added) and/or (iii) the statement in Paragraph 4 of the Articles that "[t]he Corporation shall operate for the benefit of the Internet community as a whole" impose any specific responsibilities (whether in the nature of fiduciary duties, due process, non-discrimination, transparency or otherwise) on ICANN under California law beyond those binding on a California corporation generally? Under relevant principles of international law?

To what extent, if any, are the determinations of the Board of ICANN in the course of managing allocation of a gTLD subject to principles of due process under either relevant California law or relevant international law?

(b) Article 3, Section 1 of the Bylaws provides that "ICANN and its constituent bodies shall operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness."

Article 4, Section 1 of the Bylaws provides that "[t]he provisions of this Article, creating processes for reconsideration and independent review of ICANN actions . . . are intended to reinforce the various accountability mechanisms otherwise set forth in these Bylaws, including the transparency provisions of Article III"

Article 4, Section 3.4 of the Bylaws provides that the IRP is to consider *inter alia* whether “the Board exercised due diligence and care in having a reasonable amount of facts in front of them” and whether “the Board members exercised independent judgment” in taking the decision at issue in the dispute.

Does Article 4, Section 3.4 limit the IRP’s review of Board diligence and care solely to “having a reasonable amount of facts in front of them?” And, if so, is that limited scope of review consistent with Article 4, Section 1 of the Bylaws or with the Articles of Incorporation and/or applicable law? Or is the IRP charged under the Articles, the Bylaws, the ICDR Rules, the Supplementary Procedures and/or relevant law with reviewing the Board’s exercise of diligence and care more generally?

What are the duties of the Board under relevant principles of international law, international conventions and/or local law in evaluating recommendations of the EIU or ICANN staff as to the issues in dispute, taking into account these provisions of the Bylaws and paragraph 4 of the ICANN Articles of Incorporation? Can those duties be delegated to EIU or ICANN staff under relevant legal principles, and would such delegation be consistent with the reference to “independent judgment” in Article 4, Section 3.4 of the Bylaws? If so, what standard is applicable under the Bylaws, the Articles of Incorporation, applicable California law, or applicable international law to the taking of, or omitting to take, action by the Board in reliance on work performed by EIU or ICANN staff pursuant to such delegation, and why?

- (c) Does California law discuss the legal effect of a “declaration,” as that term is used in Article 4, Sections 3.18 and 3.21 of the Bylaws?

(d) Both Dot Registry and ICANN have referred the Panel to the Final Declaration by the *Booking.com* IRP Panel. Paragraph 53 of that Final Declaration states: "As was clearly established during the hearing, it is common ground between the parties that the term 'action' (or 'actions') as used in Article IV, section 3 of the Bylaws is to be understood as actions or *inactions* by the ICANN Board." (Emphasis in original). Footnote 75 of that Final Declaration states, "Both parties agree that, as submitted by Booking.com, the 'rules' at issue, against which the conduct of the ICANN Board is to be assessed, include the relevant provisions of the Guidebook." Do the parties believe that these statements are also applicable to this IRP as well? If not, why not?

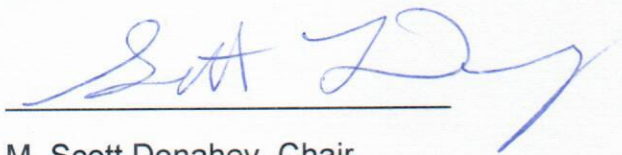
(e) Do the applicable laws set out in Article 4 of the Articles of Incorporation, the Articles of Incorporation themselves, and/or the Bylaws mandate or prohibit the holding of an in-person hearing, or otherwise provide guidance as to the conduct of any such in-person hearing, including whether it is necessary or advisable at any such hearing for EIU or ICANN officials to be examined before or by the Panel? If so, which such EIU or ICANN officials?

3. In Paragraph 6 of Procedural Order No. 2, the Panel postponed consideration of whether or not Dot Registry should be permitted to make requests to ICANN for production of documents. In Procedural Orders Nos. 2, 3, 4, and 6, the Panel requested of ICANN that it produce to the Panel and to Dot Registry certain documents. ICANN has certified in its communication of June 19, 2015 that it has complied completely, except for fourteen items as to which it has submitted a privilege log. At this point the Panel is satisfied that ICANN has complied with the Panel's document requests.

Should Dot Registry wish to request that it be given the opportunity to propound any additional document request(s), it should make its request to the Panel, specifying the precise request(s) it wishes to propound and (i) an explanation as

to why it believes that the documents responsive to each such request would not have already been produced in response to the document requests propounded by the Panel, (ii) setting forth in detail why it believes such requested document(s) to be relevant and material to this proceeding, and (iii) setting forth why it believes such document(s) actually exist in the possession custody or control of ICANN. This request for an opportunity to propound additional document request(s) should be received by the Panel no later than September 11, 2015. ICANN shall have the opportunity to respond to any such request made by Dot Registry to the Panel, such response to be filed no later than September 25, 2015.

On behalf of the Panel



M. Scott Donahey, Chair