

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
INDEPENDENT REVIEW PANEL

ICDR Case No. 01-14-0001-5004

Dot Registry, LLC,

Claimant

v.

Internet Corporation for Assigned Names and Numbers,

Respondent

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

EMERGENCY INDEPENDENT REVIEW PANELIST'S ORDER ON REQUEST FOR
EMERGENCY MEASURES OF PROTECTION

Mark C. Morril
Emergency Independent Review Panelist

December 23, 2014

This Order determines Claimant Dot Registry, LLC.'s ("Dot Registry") application to the undersigned as Emergency Independent Review Panelist for emergency relief under Article 6 of the International Centre for Dispute Resolution ("ICDR") International Dispute Resolution Rules.

Dot Registry applied to Respondent Internet Corporation for Assigned Names and Numbers ("ICANN") for the right to operate three new generic Top Level Domains ["gTLDs"].¹ In the underlying proceeding, Dot Registry has invoked ICANN's Independent Review Process ("IRP") to review the July 24, 2014 Determination of ICANN's Board Governance Committee ("BGC") denying reconsideration of a Community Priority Evaluation ("CPE") panel report finding that Dot Registry's applications did not qualify for "community-based" status.

ICANN has announced its intention to proceed with an auction of the gTLDs at issue on January 21, 2015. Dot Registry seeks an order enjoining ICANN from taking any further steps toward delegating the gTLDs at issue pending the conclusion of its IRP. I find emergency relief to be required to preserve the pending IRP as a process capable of providing an effective remedy.

The Parties

1. Claimant Dot Registry is a limited liability company registered in the State of Kansas. It was formed in 2011 to apply for the rights to operate certain new gTLDs, including .CORP, .LTD and .LLP (collectively "the corporate identifier strings"), which are at issue in the underlying proceeding.
2. Respondent ICANN is a California non-profit public benefit corporation established "for the benefit of the Internet community as a whole." It is responsible, among other things, for administering certain aspects of the Internet Domain Name System.

Applicable Law

3. The parties agree that international law principles, applicable international conventions and local law govern this application.² Although there are a variety of formulations, the tests listed below are commonly applied in both international and U.S. matters to determine an application for preliminary relief or interim measures.

¹ Top-Level Domain or "TLDs" are the string of letters following the rightmost dot in domain names, such as the original gTLDs - .com, gov, .org, .net, .mil and .edu. ICANN began planning for the introduction of new TLDs in 2007 and in 2011 launched its "New gTLD Program" which provided policies and procedures to accomplish the expansion of available TLDs.

² ICANN Article of Incorporation ("Articles"), Article 4.

i. The existence of a right to be protected

Interim measures are available in international arbitration to preserve a party's rights or property pending a resolution on the merits. Article 6 of the ICDR rules, applicable here by consent of the parties, empowers the Emergency Independent Review Panelist to order or award any interim or conservancy measures deemed "necessary." The ICSID convention similarly refers to provisional measures "to preserve the specific rights of either party." The UNCITRAL Arbitration Rules provide in Article 26 for interim measures, among other things, to preserve the *status quo* and prevent action that might prejudice the arbitration process. Some formulations also identify the public interest as an interest to be protected.³

ii. Urgency

This factor requires a showing that in the absence of interim measures, actions prejudicial to the rights sought to be protected are likely to be taken before the arbitration panel has the opportunity to determine the merits.

iii. Necessity

This factor assesses a) the nature and risk of the harm interim measures are intended to avoid; and b) the balance of hardships as between the parties resulting from the grant or withholding of interim measures.

iv. Possibility of success on the merits

It generally is required that the party seeking interim measures makes some showing on the merits of its underlying claim. Article 26 of the UNCITRAL Arbitration Rules requires demonstration of a "reasonable possibility that the requesting party will succeed on the merits of the claim."

Procedural History and Jurisdiction of the Emergency Independent Review Panelist

4. Dot Registry commenced the underlying IRP by a Request for Independent Review Process submitted on September 22, 2014 ("the IRP Request.") Article IV, Section 3 of ICANN's Bylaws provides in pertinent part that:
 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 See *Alliance for the Wild Rockies v. Cottrell*, 632 F.3D 1127 (9th Cir. 2011)

7. All IRP proceedings shall be administered by an international dispute resolution provider appointed from time to time by ICANN (“the IRP Provider.”)

8. Subject to the approval of the Board, the IRP Provider shall establish operating rules and procedures....

5. ICANN’s Board appointed the ICDR as the IRP Provider. The parties agree that the current IRP is governed by the ICDR International Dispute Resolution Rules as in effect from June 1, 2014 (“the ICDR Rules”) and the ICDR Supplementary Procedures for Internet Corporation for Assigned Names and Numbers (ICANN) Independent Review Process.

6. The parties agreed that Article 6 of the ICDR Rules would apply to any application Dot Registry might make for emergency relief during the pendency of the IRP.⁴ Dot Registry filed a Request for Emergency Independent Review Panelist and Interim Measures of Protection dated November 19, 2014 (“the Emergency Request.”) The undersigned was appointed Emergency Independent Review Panelist on November 24, 2014 and made certain disclosures in connection with the appointment.

7. I conducted a telephonic preliminary hearing on November 25, 2014, which was attended by counsel for both parties and a Dot Registry executive. During the preliminary hearing, the parties confirmed their acceptance of the undersigned as Emergency Independent Review Panelist. Following that preliminary hearing, I issued Procedural Order No. 1, dated November 26, 2014, which provided *inter alia* that:

- a) ICANN confirmed that Dot Registry would not be required to pay any deposits associated with the auctions for the gTLD strings that are the subject of this dispute until sometime after January 2, 2015 and that no auction would be conducted for the gTLD strings prior thereto;
- b) The Emergency Independent Review Panelist would conduct a telephonic hearing on December 16, 2014; and
- c) The Emergency Independent Review Panelist would provide a reasoned order or award.

8. I have reviewed on this application the IRP Request, ICANN’s Response thereto dated October 27, 2014 (“ICANN Merits Response”), the Emergency Request, ICANN’s Response thereto dated December 8, 2014 (“ICANN Emergency Response”), a letter from Dot Registry’s counsel Weil, Gotshal & Manges LLP

⁴ See C-ER-40 (Email from Jeffrey LeVee dated October 29, 2014 to Ali Arif and others); Procedural Order No. 1, ¶ 1.

dated December 15, 2014, a post-hearing submission from each party and exhibits to each of the foregoing documents.⁵

9. I conducted a telephonic hearing on December 16, 2014. Both parties appeared through their respective counsel. Executives from Dot Registry and ICANN also were in attendance. With the agreement of both parties, the record on this application was closed on December 18, 2014.

Factual Background

ICANN Governance and Accountability

10. ICANN's governance documents include the Articles and ICANN's Bylaws. The Articles require ICANN to carry "out its activities in conformity with relevant principles of international law and applicable international conventions and local law."⁶ The Bylaws provide enumerated "Core Values" to "guide the decisions and actions of ICANN."⁷ The Core Values include "making decisions by applying documented policies neutrally and objectively with integrity and fairness" and "remaining accountable to the Internet community..." Article III of the Bylaws, "Transparency," 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."
11. Article IV of the Bylaws, "Accountability and Review" sets out two formal review tiers for persons materially affected by an action of ICANN – A Reconsideration Request and the Independent Review Process.⁸ The stated purpose is to hold ICANN "accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values."
12. The Bylaws provide that a Reconsideration Request is available to review "one or more staff actions or inactions that contradict established ICANN policies" as well as Board actions or inactions where the Board failed to consider material information

⁵ The exhibits are cited herein as: "C-[number]" (IRP Petition); "C-ER-[number]" (Emergency Request); "I-[number]" (ICANN Merits Response); "I-ER-[number]" (ICANN Emergency Response.)

⁶ Articles ¶4

⁷ Bylaws, Article 1, §2

⁸ In addition to the these formal review processes, the Bylaws provide complainants a voluntary period of "cooperative engagement" with ICANN prior to initiating an IRP for the purpose of resolving or narrowing the issues that are contemplated to be brought to the IRP. Upon the filing of an IRP request, the Bylaws provide for a further voluntary "conciliation period" for the purpose of narrowing the issues that are stated within the IRP request. ICANN also maintains an ombudsman program.

or relied on false or inaccurate material information.⁹ ICANN's board has designated its Board Governance Committee ("BGC") to review and consider Reconsideration Requests.¹⁰ The Bylaws do not provide a standard of review for Reconsideration Requests. At the hearing, ICANN's counsel stated that the BGC has determined that review of staff or agent action on a Reconsideration Requests would be limited to whether there were any "procedural irregularities" in the activity reviewed. Counsel stated that the BGC's Determination on Dot Registry's Request applied that standard. ICANN's Merits Response asserts here that the Board made a "considered decision" not to review the substance of any agent or staff action on a Reconsideration Request.¹¹

13. The Independent Review Process is available to any "person materially affected by a decision or action by the Board that he or she asserts is inconsistent" with the Articles or the Bylaws.¹² Requests for Independent Review are referred to an Independent Process Panel which is "charged with comparing contested actions of the Board" to the Articles and Bylaws.¹³
14. The Government Advisory Committee ("GAC") is an Advisory Committee to the Board, comprised of representatives of national governments, distinct economies and multinational and treaty organizations, whose role is to provide advice on ICANN's activities as they relate to concerns of governments.¹⁴

The New gTLD Program

15. The ICANN Board delegated authority to its New gTLD Program Committee ("NGPC") to manage "any and all issues that may arise relating to the New gTLD Program," including the administration of applications to register new gTLDs.¹⁵ In June, 2011 ICANN published its "gTLD Applicant Guidebook" ("AGB"), a detailed handbook which sets out policies and procedures to guide applicants seeking to register new gTLDs.¹⁶

⁹ The BGC determined that the reconsideration process is available also to challenge expert determinations rendered by panels formed by third party service providers. See C-ER-18 at fn. 41

¹⁰ Article IV, §2 (3); The BGC is empowered to request additional information and to conduct a meeting with the requester. Article IV, §2 (12)

¹¹ ICANN Merits Response at 21

¹² Bylaws Article IV, §3 (2)

¹³ Id. The section also states that the IRP Panel "must apply a defined standard of review" "focusing on" whether the Board acted without conflict of interest and exercised due diligence and care in having a reasonable amount of facts in front of them and exercised independent judgment in taking the decision, believed to be in the best interests of the company." Article IV, §3 (4)

¹⁴ Article XI, §2 (1)

¹⁵ Resolution of 10 April 2012, cited at Merits Response R-3.

¹⁶ C-ER-6

16. The AGB provided for ICANN to appoint Community Priority Panels to Review Community applications.¹⁷ ICANN engaged the Economist Intelligence Unit (“EIU”) to conduct the CPE panels. EIU is the “business information arm” of the Economist Group, publisher of the Economist magazine.¹⁸
17. The AGB provides that applications for a gTLD “operated for the benefit of a clearly-defined community” may be designated as “community-based.” All applications not so designated are designated as “standard” applications. An applicant for a community-based gTLD is expected to i) demonstrate an ongoing relationship with a clearly delineated community; ii) have applied for a gTLD string strongly and specifically related to the community; iii) have proposed dedicated registration and use policies... including appropriate security verification procedures; and iv) have the application endorsed in writing by one or more established institutions representing the community it has named.¹⁹
18. The GAC recommended in its Beijing Communiqué of 11 April 2013 that certain categories of gTLDs be designated “Category I” on the basis that they are “likely to invoke a level of implied trust from consumers, and carry higher levels of risk associated with consumer harm.” It recommended a series of “safeguards” to be applied to this category.²⁰ GAC identified the corporate identifier strings as Category I gTLDs. By Resolution of 5 February 2014, ICANN’s NGPC classified the corporate identifier strings as involving a “highly-regulated” sector and required applicants for these strings to implement certain “Safeguards as Public Interest Commitments.” One such safeguard was to mandate that Registrars include in their Registration Agreements a provision requiring any applicant for a corporate identifier string to “represent that it possesses any necessary authorizations ...for participation in the sector associated with the Registry TLD string.”²¹
19. The AGB provides a “string contention process” to resolve competing applications to register the same gTLD.²² Applications determined to have Community status are entitled to priority over all Standard applications. In the case of competing applications within either the Community or the Standard category, the string contention process culminates in an auction of the gTLD. The AGB denominates the auction the “Mechanism of Last Resort.” It states the expectation that “most cases of contention will be resolved by the community priority evaluation, or through voluntary agreement among the involved applicants.”²³

¹⁷ AGB 4.2.2

¹⁸ C-16

¹⁹ AGB 1.2.3

²⁰ C-10.

²¹ I-3 at 8.

²² AGB 4.1

²³ AGB 4.3

20. ICANN issued Auction Rules for New gTLDs (“the Auction Rules.”) Auction Rule 8 provides that no auction may take place unless all active applications in the contention set have “no pending ICANN Accountability Measures.”²⁴
21. At the hearing, ICANN’s counsel stated that ICANN has applied Auction Rule 8 to preclude all auctions during the pendency of Reconsideration Requests. ICANN has determined to make case-by-case determinations whether to schedule an auction during the pendency of an IRP request. Counsel stated that ICANN determined to proceed with the auction in this case because it deemed Dot Registry’s position in the IRP to be “frivolous.” ICANN’s counsel stated that the question of whether to proceed with an auction while an IRP is outstanding has arisen in only a few instances.²⁵
22. The new gTLD application form included in the AGB contains a mandatory broad waiver of any remedies other than those expressly set forth in the Bylaws:

Applicant agrees not to challenge, in court or in any other judicial fora, any final decision made by ICANN with respect to the application and irrevocably waives any right to sue or proceed in court or any other judicial fora on the basis of any other legal claim against ICANN and ICANN affiliated parties with respect to the application.²⁶
23. The waiver contains a proviso “that applicant may utilize any accountability mechanism set forth in ICANN’s Bylaws for purposes of challenging any final decision made by ICANN with respect to the application.” (“the Proviso”)

Review of Dot Registry’s CPE Applications

24. Dot Registry submitted separate applications for the .INC, .LLP and .LLC gTLDs on or about 13 June 2012, designating each as a community-based application. Dot Registry identified the relevant “community” in its .INC application as “the Community of Registered Corporations.”²⁷ Dot Registry’s application stated the “Mission/Purpose” of its proposed gTLD to be “authenticating each of our registrant’s right to conduct business in the United States.” It cited to the “rise of business identity thefts online which in turn creates a loss of consumer confidence” and an NASS White Paper on Business Identity Theft. Dot Registry stated its

²⁴ ICANN Auction Rules for New gTLDs, Version 2014-11-03 at 1.

²⁵ In at least one such instance, the IRP Panel enjoined the auction during the pendency of the IRP. See Decision on Interim Measures of Protection, *DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-117-T-1083-13 (2014) (C-ER-60) It appears that ICANN has agreed to put other contention sets on hold pending IRPs. See IRP Request at fn. 73.

²⁶ See Top Level Domain Application – Terms and Conditions at AGB Module 6 (C-5)

²⁷ The .LLC and .LLP applications had similar community descriptions. Dot Registry submitted the only community based application as to each of the corporate identifier strings.

intention to verify the identity of each registrant through the records of Secretaries of State “by the creation of a seamless connection and strong communication channel between our organization and the governmental authority charged with monitoring the creation and good standing of corporations.”²⁸ It claimed to be a “corporate affiliate” of the NASS and cited support from “various Secretaries of States offices.”²⁹

25. The record before the CPE Panel included letters from several Secretaries of State expressing concerns about fraudulent use of corporate entities and business identity theft online, stating the need to “protect consumers and the community of interest that exists among validly registered U.S. companies and ...secretaries of state ...that are responsible for administering the nation’s legal entity registration system.”³⁰ The NASS in a letter dated 1 April 2014 to EUI affirmed its position that “the community application process is the only option to ensure that safeguards and restrictions to protect U.S. businesses can and will be enforced...” It noted Dot Registry’s work as the only community applicant with NASS and Secretaries of State over “several years” and urged that “Any award by ICANN should be to the applicant that will commit to maintaining and enforcing a system with regular, real-time verification of each company’s legal status, in accordance with state law.”³¹
26. EIU issued its CPE panel determinations of Dot Registry’s applications on 11 June 2014. The panels awarded each of Dot Registry’s applications a score of 5 of the available 16 points. Since a score of 14 was required to achieve Community Priority status, each of Dot Registry’s applications for priority failed.
27. Among EIU’s most significant findings in its evaluation of Dot Registry’s applications were that the applications failed to identify a “community” within the AGB definition because businesses “typically do not associate themselves with being part of the community as defined by the applicant” and instead “Research showed that firms are typically organized around specific industries, locales and other criteria not related to the entities’ structure...” EIU also found that the Secretaries of State could not represent the community Dot Registry stated because they “are not mainly dedicated to the community as they have other functions beyond processing corporate registrations.”³²
28. Dot Registry applied for reconsideration of the CPE Panel determination on 25 June 2014. Dot Registry cited numerous instances in which it alleged EUI mismanaged the CPE process, as well as scoring errors in each of the four categories by which

²⁸ C-ER-12 at 7-9.

²⁹ Id. at 15.

³⁰ C-ER 18 at Annex 1 (letter dated 20 March 2012 from Jeffrey W. Bullock, Secretary of State of the State of Delaware to ICANN.) The FTC Office of International Affairs expressed similar concerns about the need for a “proactive approach ...to combat fraudulent websites” in a letter dated 29 January 2014. Id.

³¹ C-ER 18 at Annex 1

³² C-18, 19, 20

EIU evaluated the applications. Dot Registry also asserted that EIU had a conflict of interest in respect to the corporate identifier strings. NASS was a co-Requester on the face of the Reconsideration Request Form.³³

29. The BGC denied Dot Registry's Reconsideration Request in a written Determination dated 24 July 2014. The BGC did not list NASS on its Determination and did not discuss NASS or the interests it asserted in the body of its Determination. The BGC stated that it had not evaluated the CPE Panels substantive conclusions that Dot Registry's applications did not prevail in the CPE process. Rather its review was limited to whether the Panels violated any established policy or procedure.³⁴ It found that Dot Registry had not demonstrated any procedural violation or that it had been adversely affected by the challenged actions of the Panels.

The Parties' Contentions

Dot Registry's contentions regarding the scope of the IRP process

30. The IRP Request alleges broad and detailed errors in EIU's management of the CPE process, including "conflating applications, deducting points when requisite criteria were admittedly met, engaging in double-counting, failing to verify statements of support and objection, engaging in unprofessional and arbitrary harassment and conclusively disposing of the rights of applicant based upon undisclosed and unverifiable "research."³⁵
31. The IRP petition attributes responsibility for EIU's alleged mismanagement of the CPE process and EIU's alleged errors in the scoring of Dot Registry's applications to ICANN and its Board. It asserts that ICANN failed to operate in a transparent and accountable manner, consistent with applicable principles of international law and its Bylaws, by allowing EIU to act in an "arbitrary and unprofessional manner" in numerous respects, and by failing to ensure that its policies were implemented accurately and in a transparent, unbiased manner and failing to address the EIU's violations when brought explicitly to the Board's attention.
32. The IRP petition further alleges that ICANN violated the forgoing obligations by appointing EIU which, it alleges, lacked the "requisite skill and expertise" to carry out the CPE review, and had a conflict of interest in relation to the corporate identifier strings.³⁶

Dot Registry's contentions regarding the Reconsideration Request

33. Dot Registry asserts that the Board, acting through its BGC, failed to exercise diligence and care on Dot Registry's Reconsideration Request. The BGC also mischaracterized Dot Registry's claims as challenges to the substantive

³³ C-ER-18

³⁴ C-ER-17 at 8

³⁵ IRP Request at 23

³⁶ Id.

determinations of the CPE panels rather than acknowledging that its challenges were to violations of established policies and procedures. ICANN “deliberately ignored” the role of the NASS and NASS’ participation as a co-Requester on Dot Registry’s Reconsideration Request.³⁷

Dot Registry’s contentions regarding the Board’s response to GAC advice

34. Dot Registry further avers that ICANN breached its Articles of Incorporation and Bylaws by failing to address adequately the GAC Beijing Communiqué findings relating to the risks inherent in the corporate identifier strings.³⁸

ICANN’s contentions regarding the scope of the IRP process

35. ICANN alleges that Dot Registry cannot succeed in the IRP because IRPs are not a vehicle to challenge third party reports such as the EIU scoring of Dot Registry’s application. The creation or acceptance of CPE panel reports is not Board action and the fact that a CPE panel may have come to a particular conclusion on an application is not evidence that the panel lacked skill and expertise and does not constitute a violation of ICANN’s Articles or Bylaws. The IRP Panel is tasked with providing a non-binding opinion, applying a defined deferential standard of review, as to whether challenged Board actions violated ICANN’s Articles or Bylaws.³⁹
36. Reserving its position regarding the proper scope of of an IRP (and a Reconsideration Request), ICANN nonetheless responded to Dot Registry’s claims in relation to EIU’s management of the CPE. Among other things, ICANN asserts i) the BGC properly found no evidence that the CPE panel had mismanaged the support and opposition letters relating to Dot Registry’s application ii) Dot Registry’s separate applications were separately evaluated to the extent required notwithstanding some degree of permitted collaboration between CPE panels; iii) the CPE panels were authorized to conduct independent research and not required to make any disclosure in relation thereto; and iv) there is no evidence that EIU’s alleged conflict of interest ever was brought to the attention of ICANN’s board since it is the obligation of third party providers, not ICANN, to address potential conflicts of interest.⁴⁰
37. Any error in EIU’s CPE scoring caused no harm to Dot Registry. Since Dot Registry received only 5 of the 14 points required to achieve community priority status, the errors it alleges would not have changed the result of the CPE review.

ICANN’s Contentions Regarding the Reconsideration Request

38. ICANN asserts that the BGC acted properly in denying Dot Registry’s Reconsideration Request. The BGC is not required on a reconsideration petition to

³⁷ IRP Request at 17-19, 24

³⁸ GAC also criticized ICANN for adopting the “looser requirement” of requiring registrants to represent their status, as opposed to the “validation and verification” process it had recommended in the Beijing Communiqué. C-13, 14.

³⁹ IR at 8.

⁴⁰ ICANN Merits Response at 7.

perform a substantive review of CPE panel reports. Rather, its role is to review whether the panel violated any policy or procedure in scoring the application.⁴¹ The BGC's failure to list NASS as a co-Requester on BGC's determination of the Reconsideration Request was inadvertent and "had no effect on the substance of the BGC's determination."

ICANN's contentions regarding the Board's response to GAC advice

39. ICANN argued that it instituted additional safeguards applicable to the operation of the corporate identifier strings, responsive to the recommendations of the GAC Beijing Communiqué, which will be included as non-negotiable terms of binding Registry Agreements. Dot Registry lacks standing to raise harm to consumers or other businesses and the CPE review of its application was not affected by the content of any other application.⁴²

Relief Sought

40. Dot Registry's application seeks interim measures
- Enjoining ICANN from taking any further steps towards delegating the corporate identifier strings until the conclusion of the IRP proceedings commenced by Dot Registry; and
 - Requiring ICANN to place the contention sets and each active application for .INC, .LLC and .LLP "on hold" and designate them "ineligible for auction" pending the outcome of the IRP proceedings commenced by Dot Registry.
41. On December 15, 2014, Dot Registry's counsel submitted a letter addressing its interactions with ICANN regarding the deadline to submit an "Auction Date Advancement/Postponement Request Form" pursuant to Auction Rule 10. It sought to extend the emergency relief requested in its application to "freeze all deadlines and actions in connection with the auction or disposition of the corporate identifier strings." ICANN's counsel responded at the hearing.

Issues To Be Decided

I find that the following are the issues to be decided on this application:

42. Has Dot Registry established the existence of one or more rights potentially requiring protection by means of interim measures?
43. Is there an urgent need for interim measures?

⁴¹ ICANN Merits Response at 17-18; statement of ICANN counsel at hearing that BGC review is limited to "procedural irregularities"

⁴² ICANN Merits Response at 13-15

44. Are interim measures necessary, including i) has Dot Registry shown a risk of irreparable injury in the absence of such measures; and ii) does the potential harm to Dot Registry from the withholding of interim measures outweigh the potential harm to ICANN or other parties by imposing interim measures?
45. Has Dot Registry demonstrated the existence of substantial questions going to the merits in the underlying IRP?

Analysis

Rights subject to protection

46. I find the preservation of the IRP as a process that is capable of providing an effective remedy in the IRP to be a substantial right at issue on this application. ICANN's Bylaws provide a narrowly tailored tiered dispute resolution process with a defined and limited set of remedies. The stated core values of fairness and accountability, together with the Bylaw commitment to "procedures designed to ensure fairness," reinforce the importance of preserving an opportunity for the IRP Panel to provide an effective remedy to the extent the Panel deems relief to be required.⁴³
47. The terms and structure of the litigation waiver likewise reinforce the rights of applicants in the New gTLD registry process to a meaningful IRP process with the potential for an effective remedy. The structure of the broad waiver, coupled with the Proviso, suggests that the availability of "any accountability mechanism... for the purposes of challenging any final decision made by ICANN with respect to the application" is the *quid pro quo* for the relinquishment of substantial rights
48. The underlying substantive rights at issue in the IRP, priority registration rights available to a successful applicant in the Community Priority Evaluation process, also are substantial and potentially subject to preservation on the current application.

Urgency

49. I find the need for interim measures to be urgent since ICANN has stated its unequivocal intention to auction registry rights to the corporate identifier strings on January 21, 2015. Consummation of the procedures set out in the Auction Rules will confer unconditional and irrevocable rights to the prevailing party.

⁴³ I find the preservation of an opportunity for the IRP Panel to rule before an irrevocable auction of the corporate identifier strings takes place to be a substantial right, whether the IRP Panel determination is merely advisory, as ICANN contends, or is binding, as some authority has found. See *Declaration on the IRP Procedure, DotConnectAfrica Trust v. ICANN*, ICDR Case No. 50-117-T-1083-13 (2014) (holding that IRP Panel decision will be binding); *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petroleos del Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 1 at 22 (C-ER-38) (holding preservation of the effectiveness of a potential future award to be a right subject to protection by provisional measures)

Accordingly, the need for interim measures is urgent to prevent the imminent dissipation of substantial rights.⁴⁴

Necessity

Irreparable Injury

50. Recognizing that a common basis for the denial of preliminary relief is the availability of monetary damages to compensate any claimed injury, I consider here the nature of the injury Dot Registry claims is threatened. Commonly stated in U.S. jurisprudence as “irreparable injury,” the Model Law requirement is that the asserted harm is “not adequately repaired by an award of damages.”⁴⁵
51. The potential harm to Dot Registry is the irrevocable loss of the priority registration rights it sought to obtain and the ongoing operation of the corporate identifier strings under the terms and conditions set out in its application. The loss of those rights would not be compensable by monetary damages.
52. ICANN has not claimed here that monetary damages will be available to compensate Dot Registry if it is determined in the IRP process that Dot Registry’s rights were violated, but in the meantime another bidder has obtained registry rights to the corporate identifier strings in the auction. Emergency relief is necessary to preserve the *status quo* of the corporate identifier strings remaining undelegated.

Balance of Harms

53. The UNCITRAL Rule requires a finding that the harm “substantially outweighs the harm that is likely to result to the party against whom the measure is directed...”⁴⁶ I find that the balance of hardships as between the parties from the grant or withholding of interim measures tips decidedly in favor of Dot Registry. As discussed, Dot Registry has at stake significant procedural and substantive rights, which may be irrevocably lost and cannot be compensated with monetary damages.
54. While ICANN surely has an interest in the streamlined and orderly administration of its processes, it cannot show hardship comparable to that threatened against Dot Registry. The interim measures sought here are rather modest, involving a delay of perhaps several months in a registration process that has been ongoing since 2012.⁴⁷ ICANN has not identified any concrete harm that would result from the relatively short delay required for the IRP Panel to complete its review.

⁴⁴ In light of the interim measures provided here, I find that the relief requested in Dot Registry’s letter of December 15 is not urgent. Of course, Dot Registry may renew that application to the IRP Panel if it chooses to do so.

⁴⁵ UNCITRAL Arbitration Rule Article 26 (3)(a)

⁴⁶ *Id.*

⁴⁷ At least some of the timing of the IRP process and the review by ICANN’s board of the IRP panel’s determination will be within ICANN’s control. The IRP process itself is quite limited and streamlined.

55. Moreover, it appears that the requested relief does not differ greatly from that provided in ICANN's Auction Rule 8 which provides on its face that no auction will be scheduled while an accountability measure is pending. While ICANN at the hearing stated that it has applied a different standard when the pending accountability measure is an IRP, its claim of hardship is at least tempered by the plain language of its own rule.
56. ICANN argues that competing applicants for the strings will suffer substantial harm if further processing is delayed. It does not specify such harm beyond noting that a number of new gTLDs have been delegated and that there is "growing competition" in the gTLD space. However, Dot Registry's December 15 letter stated, and ICANN's counsel confirmed at the hearing, that all of the contending applicants for the corporate identifier strings, save one applicant for .INC, already have submitted formal Auction Rule 10 requests to postpone the January 21 auction date.⁴⁸
57. I also find that there is a significant public interest element at stake on this application. NASS, an association of public officials which supported Dot Registry's application and was a co-Requester on its Reconsideration Request, asserted that safeguards are important to protect consumers and that the Community Application process is the most appropriate to secure the necessary safeguards. The FTC and ICANN's own Government Advisory Committee raised similar concerns. The GAC expressed continuing concerns even after ICANN implemented a set of safeguards after the Beijing Communiqué. It is not appropriate to determine on this emergency application the merits of Dot Registry's proposals for safeguards to protect the interests it asserts, the sufficiency of the safeguards ICANN states it would impose instead or Dot Registry's standing to challenge this aspect of ICANN's actions. However, the expressed interest of accountable public officials in the subject matter of the IRP, coupled with an identified potential risk to the public interest, weighs in favor of granting the application.

Dot Registry's Possibility of Success on the Merits

58. ICANN relies primarily on this factor, arguing that it determined to move forward with the auction process because it deems Dot Registry's IRP "frivolous and unlikely to succeed on the merits."
59. UNCITRAL Arbitration Rule 26 (3) (b) conditions the grant of interim measures on a showing of a "reasonable possibility that the requesting party will succeed on the merits of the claim." The parties are not in full agreement on the strength of the required showing. Where, as here, the balance of hardships tips decidedly in favor of the party seeking relief, some courts have held that the required showing on the

⁴⁸ Auction Rule 10 permits a delay of up to two scheduled auction dates in ICANN's discretion if all applicants in a string contention so request. Dot Registry asserts that it did not file a timely Auction Rule 10 request to postpone the January 21 auction date because it was seeking the same relief on this application and it did not want to use up the sole Auction Rule 10 request permitted by the ICANN rules.

merits maybe somewhat relaxed.⁴⁹ For purposes of this application, I adopt ICANN's formulation that the requesting party must, at a minimum, show that it has raised "substantial questions going to the merits" on its underlying claim, a formulation that recognizes the flexible interplay among the various factors.⁵⁰

60. I find that Dot Registry has raised "substantial questions going to the merits" on this application. I do not attempt a comprehensive listing of such questions, but identify here some examples:

i) BGC Determination of the Reconsideration Request

ICANN states in its Merits Response, and emphasized at the hearing, that the Board made a "considered decision" not to perform any substantive reviews of third party evaluators' reports in the Reconsideration process. Rather, the BGC consistently is applying a policy of reviewing CPE determinations solely for procedural irregularities. Dot Registry has raised a substantial question going to the merits whether the standard the BGC applied to its Reconsideration Request is consistent with ICANN's Bylaws and the New gTLD application form.

ii) Failure to recognize NASS as a co-Requester on Dot Registry's Reconsideration Request

ICANN concedes that the BGC "inadvertently failed to list the NASS as a co-Requester," but argues that this "omission has no effect on the substance of the BGC's Determination."⁵¹ I cannot conclude at this preliminary stage that the omission in the heading of the BGC Determination was harmless error, given that the text of the Determination likewise lacks any reference to NASS or the positions that it (as well as the GAC and the FTC) asserted in respect to such issues as the existence of a cognizable community and the importance of invoking the Community process in relation to the corporate identifier strings.

(iii) Scope of IRP review as applied to new gTLD application

ICANN's principal defense to the IRP is that Dot Registry cannot succeed because most of its claims are no more than a challenge to the substance of EIU's evaluation of its applications. ICANN asserts that IRPs are not a forum for challenging third party expert reports, which it contends, involve no board action.⁵² I find that Dot Registry has raised a colorable argument that the term "Board action," when read against the broad accountability and review provisions in Articles III and IV of the Bylaws, and against the Proviso, should be construed to encompass some aspects of Dot Registry's claims in respect to the selection of EUI and the processes EIU applied to

⁴⁹ See *Alliance for the Wild Rockies v. Cottrell*, 632 F.3D 1127 (9th Cir. 2011)

⁵⁰ *Id.*

⁵¹ ICANN Merits Response at fn. 25

⁵² ICANN Merits Response at 10; ICANN Emergency Response at 9

the CPE review of Dot Registry's applications.⁵³ This substantial question of scope and construction will be for the IRP Panel to determine.

iv) Board's response to the recommendations of the GAC's Beijing Communiqué

ICANN contends that it responded adequately to the GAC's recommendations as to special safeguards required for the corporate identifier strings. It further contends that Dot Registry lacks standing to question the Board's response. The NASS nonetheless urged both EIU and the BGC to consider the importance of the collaboration of NASS and its members with Dot Registry over several years to develop a "regular, real time verification system."⁵⁴ Dot Registry has raised substantial questions going to the merits as to its standing to address the issue and, if it is found to have standing, as to the adequacy of the Board's responses as a substitute for the safeguards proposed in Dot Registry's application.

iii) EIU's Conduct of the CPE

If the IRP Panel determines that review of any aspect of EIU's management of the CPE process (or the BGC's review thereof) is within the scope of the IRP, I find that Dot Registry has raised substantial questions going to the merits in relation to some of the processes EIU applied in the CPE panel review. These questions include whether each of Dot Registry's applications was independently evaluated to the extent required by the AGB and whether EIU made sufficient disclosure in relation to its independent research to enable Dot Registry to obtain a meaningful review of its findings at the Reconsideration stage.⁵⁵

Conclusion

61. I conclude that emergency measures of protection are required to preserve the pending IRP as a process that is capable of providing a meaning remedy should Dot Registry prevail in whole or in part. The IRP Panel will not be in a position to award effective relief should it find in favor of Dot Registry on some or all of its claims if ICANN previously has delegated to another party in an auction irrevocable and unconditional rights to the corporate identifier strings.

⁵³ I note that even the "deferential" IRP review standard ICANN cites requires examination of whether the Board exercised "due diligence and care in having a reasonable amount of facts in front of them." Bylaws Article IV, §3.4; *See also Declaration of the Independent Review Panel in the Matter of an Independent Review Process between ICM Registry, LLC and ICANN* ("[T]he actions and decisions of the ICANN Board are not entitled to deference whether by application of the "business judgment" rule or otherwise; they are to be appraised not deferentially but objectively.") (C-ER-5)

⁵⁴ C-ER-18 at Annex 1

⁵⁵ I cannot conclude on this preliminary application that the errors Dot Registry alleges in respect to EIU's management of the CPE process would be harmless individually or in the aggregate even if sustained.

62. Mindful that interim measures are not to be imposed lightly, I find the least intrusive measure adequate to protect the interests identified to be to require ICANN to apply its Auction Rule 8 in this IRP. Specifically, ICANN will be ordered to refrain from scheduling an Auction for the corporate identifier strings while the current IRP is pending.

Costs of the Application for Emergency Relief

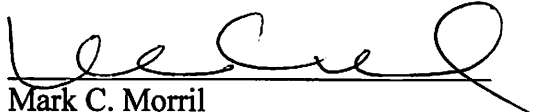
63. I have carefully reviewed all of the facts and circumstances of this application for emergency relief and carefully considered the allocation of costs. I have considered Dot Registry's request for an award of costs, including its legal fees and expenses, and ICANN's response to that request. Based on such careful review, I find it appropriate that the costs of the application should be borne as incurred, the Emergency Independent Review Panelist's compensation should be shared equally and each party should bear its own attorneys' fees and expenses.

Order

Upon consideration of the parties' submissions, including the evidence submitted therewith, and the arguments made by counsel, it is hereby ORDERED as follows:

1. The Emergency Independent Review Panelist finds that emergency measures of protection are necessary to preserve the pending Independent Review Process as an effective remedy should the Independent Review Panel determine that that the award of relief is appropriate.
2. It is therefore ORDERED that ICANN refrain from scheduling an auction for the new gTLDs .INC, .LLP and .LLC until the conclusion of the pending Independent Review Process.
3. The administrative fees of the ICDR shall be borne as incurred. The compensation of the Emergency Independent Review Panelist shall be borne equally by both parties. Each party shall bear all other costs, including its attorneys' fees and expenses, as incurred.
4. This Order renders a final decision on Claimant's Request for Emergency Independent Review Panel and Interim Measures of Protection. All other requests for relief not expressly granted herein are hereby denied.


Dated: December 23, 2014
New York, New York


Mark C. Morril
Emergency Independent Review Panelist

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS:

On this 23rd day of December, 2014, before me came Mark C. Morril, known to me to be the individual described in and who executed the foregoing instrument and acknowledged to me that he executed the same.

Date: December 23, 2014


Notary Public

