INDEPENDENT REVIEW PROCESS

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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BILGISAYAR SAN. VE TIC. LTD. STI.,</td><td>)</td><td>ICDR CASE NO. 01-15-0005-9838</td></tr>
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**ICANN'S RESPONSE TO
ASIA GREEN IT SYSTEM BILGISAYAR SAN. VE TIC. LTD. STI.'S
OBSERVATIONS AS TO SCOPE OF PANEL AUTHORITY**

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Pursuant to Procedural Order No. 1, the Internet Corporation for Assigned Names and Numbers ("ICANN") hereby submits its response to the Observations as to the Scope of Panel Authority ("Submission") submitted by claimant Asia Green IT System Bilgisayar San. ve Tic. Ltd. Sti. ("AGIT") on 3 May 2016.

INTRODUCTION

1. ICANN's Bylaws clearly delineate the scope of an Independent Review Process ("IRP") panel's authority, which is limited to one task: "declaring whether the Board has acted consistently with the provisions of [ICANN's] Articles of Incorporation and Bylaws."[1] The Bylaws also provide that the final declarations issued by IRP panels are "final," and "hav[e] precedential value."[2]

2. In its Submission, AGIT attempts to argue that IRP panels are authorized to provide affirmative relief to IRP claimants beyond declaring whether any Board action violated ICANN's Articles of Incorporation ("Articles") or Bylaws, and that IRP final declarations are "binding." Neither of these two propositions is supported by ICANN's Bylaws or any other source.

3. To start, AGIT provides no support for the view that IRP panels may provide affirmative relief. This is because no such support exists.

4. AGIT then posits several reasons why it contends IRP final declarations are binding on the ICANN Board, none of which withstand scrutiny. First, AGIT argues that the drafting history of ICANN's current Bylaws indicates that IRP declarations are binding, but the plain text of the current Bylaws runs contrary to AGIT's reasoning in this regard. Second, AGIT claims that the April 2013 revisions to the Bylaws suggest that IRP declarations are binding,

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[1] Bylaws, Art. IV, § 3.4.
[2] *Id.*, § 3.21.

when in fact the opposite is true. The Bylaws were amended in April 2013 to make clear that

IRP declarations are "final and precedential" but were not amended to state that IRP declarations

are "binding." Third, AGIT selects just one final IRP declaration that it claims supports its views

as to the scope of an IRP panel's authority, but in doing so ignores a more recent IRP declaration

that squarely contravenes AGIT's position. Fourth, AGIT contends that ICANN's recently-

proposed (and not yet adopted) amendments to the Bylaws ("Proposed Amended Bylaws")

indicate that the **current** Bylaws should be interpreted to support the notion that IRPs are binding,

whereas in fact the opposite is true.[3] Fifth, and most tenuously, AGIT argues that IRP final

declarations must be binding because ICANN has not convened a standing panel to hear IRP

requests and therefore purportedly "cannot be trusted to police itself[.]" In fact, nothing in

ICANN's Bylaws requires a standing panel to be convened by a particular date, and the Bylaws

set forth procedures for the constitution of IRP panels until such time as the standing panel is

formed.

5.   In the words of the IRP panel in *Vistaprint v. ICANN* ("*Vistaprint* IRP"), an IRP

final "declaration is binding only with respect to the finding of compliance or not with the

Articles and Bylaws, **and non-binding** with respect to any measures that the Panel might

recommend the Board take or refrain from taking."[4]

6.   In short, AGIT ignores the plain text of the Bylaws, which govern this and all IRP

proceedings and unambiguously provide that IRP final declarations are "final" and "precedential"

(not "binding"), and which "charge[]" an IRP panel with the option of providing one and only

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[3] The Proposed Amended Bylaws are "out for a 30-day public comment from 21 April – 21 May [2016] . . . . [which] allows for comments to be analyzed and incorporated in time for a tentative 27 May [2016] adoption of the Bylaws by the ICANN . . . Board." Supplemental Annex C-5 at 2. The Proposed Amended Bylaws are not retroactive. *See id.*, at Pg. 2, fn. 1.

[4] Resp. Ex. 30 ¶ 131 (emphasis added).

one kind of relief to an IRP claimant, namely "declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws."[5] As such, AGIT's Submission does not advance its position with respect to its request for an IRP ("IRP Request"), which should be denied.

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ARGUMENT

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7.	AGIT's Submission conflates two aspects of the scope of this IRP Panel's authority. On the one hand is the range of remedies the Bylaws authorize the IRP Panel to provide, and on the other is the question of whether the IRP Panel's final declaration is "binding" on ICANN. This response to AGIT's Submission will take each in turn.

**I.	THE BYLAWS DO NOT PERMIT IRP PANELS TO AWARD AFFIRMATIVE RELIEF.**

8.	AGIT contends that this IRP Panel may provide affirmative relief in the event AGIT prevails on the merits of its IRP Request. Specifically, AGIT asks that this IRP Panel "require" ICANN to "disregard" the advice of the Governmental Advisory Committee ("GAC") relevant to its gTLD applications, and "issue the two TLD Registry Agreements to AGIT immediately."[6] AGIT, however, does not and cannot provide any authority to support the notion that an IRP panel may award affirmative relief of the type that AGIT seeks.

9.	In fact, as ICANN made clear in its response to AGIT's IRP Request, an IRP panel's authority is limited to "declar[ing] whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws" and recommending that the Board stay any further action (or undertake an "interim action") until it reviews the declaration of the IRP

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[5] Bylaws, Art. IV, § 3.4.
[6] Submission ¶ 1; IRP Request at 27.

panel.[7] As the panel in the *Vistaprint* IRP concluded after reviewing the Bylaws, an IRP panel "does not have authority to render affirmative relief ***requiring*** ICANN's Board to take . . . any action or decision."[8]

10.   AGIT notes that the panel in the *DCA Trust v. ICANN* IRP ("*DCA* IRP") "affirmatively ***recommended***" that the ICANN Board take certain actions.[9] However, AGIT ignores the distinction between a recommendation and a binding requirement. The Bylaws sharply limit the circumstances in which an IRP panel may mandate affirmative Board conduct.[10] Nothing in the Bylaws suggests that an IRP panel may ***require*** any Board action ***after*** a final declaration has issued.

11.   Indeed, even the final declaration issued by the *DCA* IRP panel ("*DCA* Final Declaration") did not provide the type of drastic relief that AGIT is requesting here. The *DCA* Final Declaration did not require ICANN to "immediately" enter into a Registry Agreement with the claimant (as AGIT asks this IRP Panel to do),[11] but instead *recommended* that ICANN "permit DCA Trust's application to proceed through the remainder of the new gTLD application process."[12] The Board then adopted a resolution consistent with that recommendation.[13]

12.   In short, this IRP Panel does not have the authority to award affirmative relief or to require ICANN to undertake specific conduct. Irrespective of the ultimate merits of its IRP Request, the IRP Panel should decline to award AGIT the relief it seeks.

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[7] Bylaws, Art. IV, § 3.11; ICANN's Response to IRP Request ¶ 75.
[8] *Vistaprint Limited v. ICANN*, Final Declaration ¶ 149 (Resp. Ex. 30), https://www.icann.org/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf (emphasis added).
[9] Submission ¶ 5 (emphasis added).
[10] Bylaws, Art. IV, § 3.11(d).
[11] Submission ¶ 1; IRP Request at 27.
[12] Annex C-11 ¶ 133.
[13] *See generally* Supplemental Annex C-2.

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II. IRP FINAL DECLARATIONS ARE "FINAL AND HAVE PRECEDENTIAL VALUE" BUT ARE NOT "BINDING" ON ICANN.

13.   To be clear, ICANN takes IRPs seriously and the Board has always considered and reviewed an IRP panel's declaration at the first opportunity, as the Board will do with this Panel's final declaration. IRP panel declarations, however, do not bind the Board in a legal sense, as AGIT argues. AGIT posits four bases for its argument that IRP final declarations are binding on ICANN's Board, but none provide grounds for reaching that conclusion.

14.   First, AGIT notes that a procedural declaration issued in the *DCA* IRP ("*DCA* Procedural Order") applied a presumption against ICANN's interpretation of its Bylaws because the *DCA* IRP Panel found that ICANN drafted the Bylaws and deemed the Bylaws ambiguous as to whether IRP final declarations are binding.[14] The *DCA* Procedural Order, however, did not seem to consider the fact that ICANN's Bylaws were not drafted solely by ICANN. They were, instead, subject to extensive public comment, including the portions of the current Bylaws addressing the effect of an IRP final declaration.[15]

15.   Second, AGIT argues that the April 2013 amendments to the Bylaws, which added language about final declarations being "precedential," indicate that IRP declarations are also binding.[16] Yet whether IRP final declarations are precedential on subsequent IRP final declarations is a separate inquiry from whether they are binding on ICANN, and the 2013 revisions did not address the latter question.

16.   Third, AGIT argues that because the *DCA* Procedural Order has "precedential" value, the issue of whether IRP final declarations are binding may not be "litigated, yet again"

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[14] Supplemental Annex C-1 ¶¶ 108-09.
[15] *See* https://www.icann.org/en/system/files/bm/briefing-materials-4-11apr13-en.pdf (describing working group's "report [published] in October 2012 that was posted for public comment along with proposed Bylaws revisions [regarding] ICANN's Reconsideration and Independent Review processes").
[16] Submission ¶ 6.

here.[17] Yet AGIT ignores a more recent IRP declaration that squarely contravenes AGIT's

position. The *Vistaprint* IRP panel declared that its final declaration was "***non-binding*** with

respect to any measures that the Panel might recommend the Board take or refrain from

taking."[18] AGIT attempts to explain away this finding by summarily asserting that "the

Vistaprint panel did not consider the history of ICANN and the Bylaws nearly as carefully as did

the DCA" IRP panel.[19] To the contrary, the *Vistaprint* panel exhaustively summarized the

parties' arguments and the relevant background, and reached a detailed conclusion accompanied

by a lengthy explanation of the panel's reasoning.[20] AGIT cannot cherry-pick aspects of

previous IRP final declarations that it contends should bind this IRP Panel. Respectfully, the

later-decided *Vistaprint* IRP Final Declaration is more authoritative, as it adheres more closely to

the text of the Bylaws, which do not provide that IRP final declarations are binding. Moreover,

again, the *DCA* IRP Final Declaration did not mandate any affirmative Board action, but only

"recommend[ed] that ICANN continue to refrain from delegating the .AFRICA gTLD and

permit DCA Trust's application to proceed through the remainder of the new gTLD application

process."[21]

      17.   Fourth, AGIT contends that ICANN's Proposed Amended Bylaws, not currently

in effect, indicate that the ***currently effective*** Bylaws should be interpreted to support the

argument that IRP final declarations are binding.[22] In fact, the proposed revisions support

ICANN's position. As AGIT correctly notes, the Proposed Amended Bylaws include a new

provision that IRP panel declarations are intended to be "binding final decisions to the extent

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[17] *Id.* ¶ 6.
[18] Resp. Ex. 30 ¶ 131.
[19] Submission ¶ 9.
[20] Resp. Ex. 30 ¶¶ 74-79, 98-101, 129-48.
[21] Annex C-11 ¶ 133.
[22] Submission ¶ 12.

allowed by law" and "are intended to be enforceable in any court with jurisdiction over ICANN."[23] AGIT contends that "[t]here is no reason why the existing Bylaws should not be interpreted in the same way."[24] However, if the Bylaws *already* provided that IRP final declarations were to be binding, then there would be no need for this proposed revision. Further, the Proposed Amended Bylaws have not yet been adopted, and are not retroactive.[25] Nothing in the language AGIT cites from the Proposed Amended Bylaws, then, supports its position. Indeed, the Proposed Amended Bylaws only highlight the fact that the current Bylaws, pursuant to which this IRP was convened, *do not* deem IRP final declarations binding.

18.   Moreover, even the Proposed Amended Bylaws do not render an IRP declaration "binding" in the manner AGIT contemplates, namely that in AGIT's view ICANN "must[] be told what to do."[26] The Proposed Amended Bylaws do not provide that an IRP panel may direct the Board to take a specific action, but instead provide that an IRP Panel may issue a binding declaration asserting whether ICANN conduct "violated the Articles of Incorporation or Bylaws."[27]

19.   Fifth, AGIT argues that "ICANN cannot be trusted to police itself" because ICANN has not yet convened a standing panel of neutrals to hear IRP requests.[28] As ICANN explained in its response to AGIT's IRP Request,[29] nothing in the Articles or Bylaws required ICANN to do so by a date certain, and therefore the fact that ICANN has not yet done so cannot constitute a violation of either. Indeed, AGIT points to no source of authority setting a deadline for ICANN to set up the standing panel. Moreover, the Bylaws provide that, if a standing panel

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[23] *Id.* ¶ 12; Supplemental Annex C-4, § 4.3(a), (x).
[24] Submission ¶ 12.
[25] *See* Supplemental Annex C-4 at Pg. 2, fn. 1.
[26] Submission ¶ 9.
[27] Supplemental Annex C-4, § 4.3(o)(iii).
[28] *Id.* ¶ 11.
[29] ICANN's Response to IRP Request ¶¶ 71-72.

is not in place when a particular proceeding is initiated, the proceeding will be considered by a one- or three-member panel in accordance with the ICDR's rules.[30] Because ICANN's Bylaws identify how to select a panel when a standing panel is not in place, it is not accurate to state that ICANN "cannot be trusted to police itself" on that account. Also, the Proposed Amended Bylaws set forth procedures for selecting a standing panel, further reinforcing the view that no breach of the current Articles or Bylaws has occurred by virtue of the fact that no standing panel has been selected yet.[31]

CONCLUSION

20.	Nothing in AGIT's Submission supports the view that IRP panels have the authority to award substantive, affirmative relief, nor the contention that IRP final declarations are "binding." ICANN respectfully requests that, when the IRP Panel issues its Final Declaration in this proceeding, it declines to declare that IRP final declarations are binding on ICANN and adheres to the Bylaws' instruction that the an IRP panel is charged only with declaring whether ICANN has complied with its Articles and Bylaws. For the reasons set forth in ICANN's Response to AGIT's IRP Request, the ICANN Board's conduct in connection with AGIT's applications for .HALAL and .ISLAM was consistent with ICANN's Articles and Bylaws in all respects.

Respectfully submitted,

JONES DAY

Dated: May 13, 2016	By*: /s/ Eric P. Enson*
		Eric P. Enson
		Counsel for Respondent ICANN

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[30] Bylaws, Art. IV, § 3.6.
[31] Supplemental Annex C-4, at § 4.3(j).