



ICANN

17 January 2006

VIA US MAIL & E-MAIL: EDWARD@HASBROUCK.ORG

Edward Hasbrouck
1130 Treat Avenue
San Francisco, CA 94110
USA

Re: IRP Request

Dear Mr. Hasbrouck:

Thank you for your e-mail in which you confirm your acknowledgement that ICANN's Bylaws provide that "The party not prevailing shall ordinarily be responsible for bearing the costs of the IRP Provider"
<<http://www.icann.org/general/bylaws.htm#IV-3.12>>.

In my 4 December 2005 e-mail to you, we further requested that you "provide us with your formal IRP request" so that we can "forward your request to the International Centre for Dispute Resolution which ICANN has designated to provide independent review services in accordance with the Bylaws." In order to assist you in drafting your formal IRP request, we provided you with a link to the ICDR's procedures <www.adr.org/International>. Article 2, section 3 of those procedures provides that a formal notice shall contain a statement of claim including the following:

- (a) a demand that the dispute be referred to arbitration;
- (b) the names, addresses and telephone numbers of the parties;
- (c) a reference to the arbitration clause or agreement that is invoked;
- (d) a reference to any contract out of or in relation to which the dispute arises;
- (e) a description of the claim and an indication of the facts supporting it;
- (f) the relief or remedy sought and the amount claimed; and
- (g) may include proposals as to the means of designating and the number of arbitrators, the place of arbitration and the language(s) of the arbitration.

<http://www.adr.org/sp.asp?id=22090#Intl_Arb_Rules> (Art. 2, § 3). You assert that your 8 April 2005 e-mail to <argentina@icann.org> is your formal IRP request, however, that e-mail does not meet the guidelines required by the ICDR procedures and consequently cannot be considered a formal IRP request sufficient to forward to the ICDR.¹

Further, while we have appreciated your attempts to clarify your grounds for requesting independent review, serious doubt exists as to whether any of your concerns are appropriate for independent review. ICANN's Bylaws referred to herein as "Bylaws" provide that only a "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*"
<<http://www.icann.org/general/archive-bylaws/bylaws-08apr05.htm>> (Art. IV, § 3(1))

¹ It goes without saying that any formal IRP request must also be consistent with the language of Article IV, section 3 of the Bylaws.

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(emphasis added)). Your purported grounds for requesting independent review, however, appear to concern *procedures* allegedly followed, or not followed, by *ICANN staff* during the evaluation and public comment process surrounding .TRAVEL.

The Bylaws clearly state that it is the role of ICANN staff -- not the ICANN Board -- to "coordinate the various aspects of public participation in ICANN, including the Website and various other means of communicating with and receiving input from the general community of Internet users" <<http://www.icann.org/general/archive-bylaws/bylaws-08apr05.htm>> (Art. III. § 3 (Manager of Public Participation)). As I read your purported grounds for requesting independent review, each ground does not involve -- nor could it involve -- a "decision or action by the Board." I understand your concerns to include the following topics:

- (1) *Notice of meetings* of the .TRAVEL Independent Evaluation Panel and other meetings of ICANN and its constituent bodies concerning the .TRAVEL sTLD.
- (2) *Allowing journalists or stakeholders to observe or audit meetings* of the .TRAVEL Independent Evaluation Panel and other meetings of ICANN and its constituent bodies concerning the .TRAVEL sTLD.
- (3) *Release of documents and records* in relation to the .TRAVEL sTLD evaluation process.
- (4) *Requests to participate* in the Mar del Plata press conference.
- (5) *Notice* of the ICANN Board agenda for the Mar del Plata Board meeting.
- (6) *Posting* of the "proposed policy decisions" on .TRAVEL.
- (7) *Posting* of the reasons for the "proposed policy decisions" on .TRAVEL.

See, e.g., <hasbrouck.org/blog/archives/000557.html> (Hasbrouck 15 April 2005 blog entry); <<http://www.icann.org/correspondence/hasbrouck-to-icann-07apr05.htm>> (Hasbrouck 7 April 2005 e-mail). While we have already explained to you in my 12 May 2005 e-mail <<http://www.icann.org/correspondence/jeffry-to-hasbrouck-12may05.htm>> and my 4 December 2005 e-mail <<http://www.icann.org/correspondence/jeffrey-to-hasbrouck-04dec05.htm>> that ICANN has at all times acted consistently with its Articles of Incorporation and its Bylaws with respect to each of these areas of concern, significantly, the Bylaws do not provide for independent review of your concerns. In fact, the only types of concerns that are potentially appropriate for independent review in this regard would be those concerns directed at the Board's resolutions on 18 October 2004 and 8 April 2005, which are the only decisions or actions by the Board pertaining to .TRAVEL <<http://www.icann.org/minutes/resolutions-18oct04.htm>>, <<http://www.icann.org/minutes/minutes-08apr05.htm>>. Each of these resolutions involve the Board's decision to delegate .TRAVEL, and nothing more.

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Even assuming that your grounds for requesting independent review are appropriate -- which they are not -- it still remains unclear how you have been "materially affected," as that language is provided for in the Bylaws. In your 17 May 2005 e-mail to ICANN and the e-mails following it, you state a number of purported reasons that you believe you have been "materially affected" but, again, those reasons do not involve a "decision or action by the Board."

As I have stated in previous correspondence, "[t]he use of the .TRAVEL TLD will be completely optional. If you are not satisfied with the policies of the proposed sponsor of the TLD, you are free to not use or register in that domain" <<http://www.icann.org/correspondence/jeffrey-to-hasbrouck-12may05.htm>>. Moreover, if you seek a registration in .TRAVEL, **and are in fact provided one**, that would wholly negate any purported material affect on you because obviously the option of maintaining a registration in .TRAVEL would be available to you and no action by the ICANN Board would be prohibiting you from doing so.

If you feel that we have misstated your concerns, and you believe that grounds still properly exist under the Bylaws for independent review, ICANN's standing agreement to have your concerns reviewed by an arbitrator remains and will proceed upon receipt of your formal IRP request.

Thank you for your attention. As always, feel free to call or write if you have any questions.

Best regards,

A handwritten signature in black ink, appearing to read "John O. Jeffrey", written over a horizontal line.

John O. Jeffrey
General Counsel & Secretary
ICANN