

No. 16-55693

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DOTCONNECTAFRICA TRUST,

Plaintiff/Appellee,

v.

**INTERNET CORPORATION FOR ASSIGNED
NAMES AND NUMBERS, *et al.***

Defendant/Appellant.

On Appeal from the United States District Court
for the Central District of California, No. 2:16-CV-00862-RGK
The Honorable R. Gary Klausner

**EXCERPTS OF RECORD
VOLUME 4 OF 7
(ER-634-858)**

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No. 16-55693

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10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA
 12 WESTERN DIVISION
 13

14 DOTCONNECTAFRICA TRUST

15 Plaintiff,

16 v.

17 INTERNET CORPORATION FOR
 ASSIGNED NAMES AND
 18 NUMBERS,

19 Defendant.
 20

Case No. CV 16-00862-RGK

Assigned for all purposes to the
 Honorable R. Gary Klausner

**DECLARATION OF CHRISTINE
 WILLETT IN SUPPORT OF
 DEFENDANT ICANN'S
 OPPOSITION TO PLAINTIFF'S
 MOTION FOR PRELIMINARY
 INJUNCTION**

[Opposition to Motion and
 Declarations of Akram Atallah,
 Kevin Espinola, Jeffrey A. LeVee,
 and Moctar Yedaly Filed
 Concurrently]

Hearing Date: April 4, 2016
 Hearing Time: 9:00 a.m.
 Hearing Location: Courtroom 850

1 I, Christine Willett, declare the following:

2 1. I am the Vice President for Operations of the Global Domains Division
3 of Internet Corporation for Assigned Names and Numbers (“ICANN”), a defendant
4 in this action. I have personal knowledge of the matters set forth herein and am
5 competent to testify as to those matters. I make this declaration in support of
6 ICANN’s Opposition to DotConnectAfrica Trust’s (“DCA’s” or “Plaintiff’s”)
7 Motion for Preliminary Injunction

8 2. In my role as Vice President for Operations, I have been responsible
9 for overseeing the evaluation of the 1,930 gTLD applications ICANN received in
10 2012 as part of ICANN’s New gTLD Program. Those applications are evaluated in
11 accordance with the procedures set forth in the New gTLD Applicant Guidebook
12 (“Guidebook”). A copy of the Guidebook is attached as Exhibit 3 to the declaration
13 of Sophia Bekele Eshete (“Eshete Declaration”).

14 3. In the spring of 2012, Plaintiff and ZA Central Registry (“ZACR”)
15 each submitted applications to operate the .AFRICA gTLD. In doing so, they, like
16 all new gTLD applicants, expressly accepted and acknowledged the Guidebook,
17 including the release and covenant not to sue found in paragraph 6 of Module 6.

18 4. In order to ensure the safety and stability of the domain name system,
19 new gTLD operators are required to demonstrate that they are stable business
20 entities that have the significant technical and financial wherewithal required to
21 operate a gTLD registry. Applicants in the New gTLD Program included some of
22 the world’s largest companies, such as Google, WalMart, J.P. Morgan Chase, and
23 Amazon.com.

24 5. The new gTLD application was complex and required considerable
25 detail. A list of the information new gTLD applicants were required to submit with
26 their applications can be found in the Guidebook. (Guidebook at 201-42 (A-1 –
27 A46).) Among other things, each applicant was required to submit an extensive,
28

1 technical explanation of its plans for operating a gTLD registry. Attached hereto as
2 Exhibit A is a true and correct copy is a partial excerpt of the technical explanation
3 Plaintiff submitted as part of its New gTLD Application. As required, Plaintiff also
4 submitted evidence of substantial financial support for its Application.

5 6. In addition, because Plaintiff and ZACR had each applied for a gTLD
6 that represents the name of a geographic region, in this instance, a continent, the
7 Guidebook requires that Plaintiff and ZACR each provide documentation of
8 support or non-objection from at least 60% of the governments in the region.
9 (Eshete Decl. Ex. 3 (“Guidebook”) at 170-72 (§ 2.2.1.4.2).) The Guidebook also
10 provides that a Geographic Names Panel operated by a third-party vendor retained
11 by ICANN must verify the relevance and authenticity of an applicant’s
12 documentation of support. (*Id.* at 173-75 (§ 2.2.1.4.4).) The Guidebook
13 contemplated the possibility that more than one application for a geographic gTLD
14 would be determined to have the requisite support and would also pass all of the
15 other evaluations (technical, financial and so forth). In the event that both are
16 supported by the same government or public authority, and that government or
17 public authority so requests, the applications are placed in a “contention set” that
18 could be resolved via an auction or other processes since only one registry operator
19 can operate a Top Level Domain consisting of the exact same letters. (*Id.*)
20 Otherwise, assuming that the applicants do not reach a resolution amongst
21 themselves, their applications will be rejected. (*Id.*)

22 7. Plaintiff submitted with its Application what it called a letter of
23 support dated in 2009 (three years earlier) from the African Union Commission
24 (“AUC”). A copy of that letter is attached as Exhibit 6 to the Eshete Declaration. I
25 have been informed that in 2010, Plaintiff had received a letter from the AUC (and
26 all of the African governments that were its members) that formally withdrew the
27 AUC’s support for Plaintiff. A copy of that letter is attached as Exhibit 7 to the
28

1 Eshete Declaration. Plaintiff did not submit with its Application to ICANN the
2 2010 letter from the AUC to Plaintiff withdrawing its support for Plaintiff.

3 8. Plaintiff also submitted with its Application an August 2008 letter
4 from the United Nations Economic Commission for Africa (“UNECA”). In
5 September 2015, UNECA stated that it was a “United Nations entity [that] is
6 neither a government nor public authority and therefore is not qualified to issue a
7 letter of support for a prospective applicant,” and that its August 2008 letter was
8 “merely an expression of a view in relation to [Plaintiff’s] initiatives and efforts
9 regarding internet governance [and] cannot be properly considered as a ‘letter
10 of support’ within the context of ICANN’s requirements and cannot be used as
11 such.” A true and correct copy of UNECA’s September 2015 letter is attached as
12 Exhibit B to my declaration.

13 9. On June 5, 2013, at the time when ICANN’s Board accepted the
14 Governmental Advisory Committee’s (“GAC’s”) advice objecting to Plaintiff’s
15 Application, Plaintiff had already passed all of the Initial Evaluation reviews except
16 for the Geographic Names Panel review. At that time, the Geographic Names Panel
17 was in the midst of its review of Plaintiff’s Application; it had determined that the
18 documented support submitted by Plaintiff, including the letters from the AUC and
19 UNECA, did not meet the criteria set forth in the Guidebook, and was therefore
20 planning to send “clarifying questions” to Plaintiff. Clarifying questions are sent
21 where documented support does not meet the criteria set forth in the Guidebook and
22 are an accommodation to provide applicants an opportunity to explain/supplement
23 their documentation. However, as a result of the ICANN Board’s acceptance of the
24 GAC’s advice, Plaintiff’s Application was removed from further processing, and
25 the clarifying questions were not sent at that time.

26 10. By July 31, 2015 following ICANN’s Board’s adoption of the
27 recommendations of the independent review panel in *DCA v. ICANN* (“IRP Panel”),
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1 Plaintiff's Application was returned to processing as the Board directed. Contrary
2 to what Plaintiff argues on page 1 of its motion for preliminary injunction,
3 Plaintiff's Application was not returned to the "beginning of the process." Instead,
4 it was returned to precisely the portion of the review that was pending on the date
5 the Application was removed from processing—the Geographic Names Panel
6 review. As the Geographic Names Panel had been preparing to do when Plaintiff's
7 Application was removed from processing, the Geographic Names Panel sent
8 Plaintiff clarifying questions regarding the documentation Plaintiff had submitted
9 with its Application. Those clarifying questions are attached as Exhibit 15 to the
10 Eshete Declaration. Plaintiff was given an opportunity to respond to those
11 questions. Instead of supplementing its documentation, Plaintiff took the position
12 that the documentation that it had submitted with its Application in 2012 was
13 sufficient.

14 11. On October 13, 2015, ICANN issued the Initial Evaluation Report ("IE
15 Report") regarding Plaintiff's Application. The IE Report noted that the
16 Application had passed all reviews except for the Geographic Names Panel review.
17 As provided by the Guidebook, the report stated that Plaintiff would have the
18 opportunity to participate in "Extended Evaluation," which offered Plaintiff
19 additional time to provide the requisite documentation of support or non-objection
20 from African governments. A copy of that IE Report is attached as Exhibit 16 to
21 the Eshete Declaration.

22 12. As part of Extended Evaluation, the Geographic Names Panel again
23 sent Plaintiff clarifying questions, identifying the issues with the documented
24 support submitted by Plaintiff. Those questions are attached as Exhibit 17 to the
25 Eshete Declaration. Plaintiff was given until January 28, 2016, to supplement its
26 documentation. However, on that date, rather than supplementing its
27 documentation, Plaintiff submitted a letter from its counsel and again took the
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position that the documentation that it had submitted with its Application in 2012 was sufficient.

13. On February 17, 2016, ICANN issued an Extended Evaluation Report (“EE Report”) stating that the Geographic Names Panel had determined that Plaintiff had failed to provide the requisite documentation of support or non-objection from relevant governments, despite the extended opportunity to do so. A copy of that EE Report is attached as Exhibit 18 to the Eshete Declaration. As a result, and as provided by the Guidebook, ICANN stopped processing Plaintiff’s Application. (Guidebook at 174 (§ 2.2.1.4.4).)

14. Accordingly, on March 3, 2016, ICANN’s Board adopted a resolution lifting the stay on the delegation of .AFRICA, a stay that had been in place since 2014 and continued pending ICANN’s full compliance with the IRP Panel’s recommendation that ICANN resume its evaluation of Plaintiff’s Application for .AFRICA. A true and correct copy of the Board’s March 3, 2016 resolution is attached to this declaration as Exhibit C.

15. ICANN is now prepared to delegate the .AFRICA gTLD for operation by ZACR. However, in accordance with this Court’s March 4, 2016 temporary restraining order, ICANN has stayed the delegation pending the Court’s ruling on Plaintiff’s motion for preliminary injunction.

Executed on March 14, 2016, in Los Angeles, California.


Christine Willett

EXHIBIT A

registry will be operated identically to CentralNic's existing registry by the same team, and will benefit from an economy of scale with regards to access to CentralNic's resources. CentralNic's resourcing model assumes that after launch, the "dedicated" resourcing required for .africa (ie, that required to deal with issues related specifically to .africa and not to general issues) will be equal to the proportion of the overall registry system that .africa will use. After three years of operation, the optimistic projection for .africa states that there will be 600,000 domains in the zone. CentralNic has calculated that, if all its TLD clients are successful in their applications, and all meet their optimistic projections after three years, its registry system will be required to support up to 4.5 million domain names. Therefore .africa will require 13% of the total resources available for this area of the registry system.

In the event that registration volumes exceed this figure, CentralNic will proactively increase the size of the Technical Operations, Technical Development and support teams to ensure that the needs of .africa are fully met. Revenues from the additional registration volumes will fund the salaries of these new hires. Nevertheless, CentralNic is confident that the staffing outlined above is sufficient to meet the needs of .africa for at least the first 18 months of operation.

Demonstration of Technical & Operational Capability

24. Shared Registration System (SRS) Performance

24.1. Registry Type

The DCA DotAfrica Registry will operate a "thick" registry based on that of CentralNic's infrastructure, in which the registry maintains copies of all information associated with registered domains. Registrars maintain their own copies of registration information, thus registry-registrar synchronization is required to ensure that both registry and registrar have consistent views of the technical and contact information associated with registered domains. The Extensible Provisioning Protocol (EPP) adopted supports the thick registry model. See §25 for further details.

24.2. Architecture

Figure 24.1 provides a diagram of the overall configuration of the SRS. This diagram should be viewed in the context of the overall architecture of the registry system described in §32.

The SRS is hosted DCA DotAfrica Registry's primary operations centre in Nairobi, Kenya. It will be connected to the public Internet via two upstream connections, one of which is provided by Safaricom. Figure 32.1 provides a diagram of the outbound network connectivity. Interconnection with upstream transit providers is via two BGP routers that connect to the firewalls which implement access controls over registry services.

Within the firewall boundary, connectivity is provided to servers by means of resilient gigabit ethernet switches implementing Spanning Tree Protocol.

The registry system will implement two interfaces to the SRS: the standard EPP system (described in §25) and the Registrar Console (described in §31). These systems will interact with the primary registry database (described in §33). The database is the central repository of all registry data. Other registry services also interact with this database.

An internal "Staff Console" will be used by DCA DotAfrica Registry personnel to perform management of the registry system.

24.3. EPP System Architecture

A description of the characteristics of the EPP system is provided in §25. This response describes the infrastructure which supports the EPP system.

A network diagram for the EPP system is provided in Figure 24.2. The EPP system is hosted at the primary operations centre in Nairobi. During failover conditions, the EPP system operates from the Isle of Man Disaster Recovery site (see §34).

DCA DotAfrica Registry's EPP system will have a three-layer logical and physical architecture, consisting of load balancers, a cluster of front-end protocol servers, and a pool of application servers. Each layer can be scaled horizontally in order to meet demand.

Registrars establish TLS-secured TCP connections to the load balancers on TCP port 700. Load is balanced using DNS round-robin load balancing.

The load balancers pass sessions to the EPP protocol servers. Load is distributed using a weighted-least-connections algorithm. The protocol servers run the Apache web server with the mod_epp and mod_proxy_balancer modules. These servers process session commands ("hello", "login" and "logout") and function as reverse proxies for query and transform commands, converting them into plain HTTP requests which are then distributed to the application servers. EPP commands are distributed using a weighted-least-connections algorithm. Application servers receives EPP commands as plain HTTP requests, which are handled using application business logic. Application servers process commands and prepare responses which are sent back to the protocol servers, which return responses to clients over EPP sessions.

Each component of the system is resilient: multiple inbound connections, redundant power, high availability firewalls, load balancers and application server clusters enable seamless operation in the event of component failure. This architecture also allows for arbitrary horizontal scaling: commodity hardware is used throughout the system and can be rapidly added to the system, without disruption, to meet an unexpected growth in demand.

The DCA DotAfrica Registry EPP system will comprise of the following systems:

- ☐ 4x load balancers (1U rack mount servers with quad-core Intel processors, 16GB RAM, 40GB solid-state disk drives, running the CentOS operating system using the Linux Virtual Server [see<http://www.linuxvirtualserver.org/>])
- ☐ 8x EPP protocol servers (1U rack mount servers with dual-core Intel processors, 16GB RAM, running the CentOS operating system using Apache and mod_epp)
- ☐ 20x application servers (1U rack mount servers with dual-core Intel processors, 4GB of RAM, running the CentOS operating system using Apache and PHP)

24.3.1. mod_epp

mod_epp is an Apache server module which adds support for the EPP transport protocol to Apache. This permits implementation of an EPP server using the various features of Apache, including CGI scripts and other dynamic request handlers, reverse proxies, and even static files. mod_epp was originally developed by Nic.at, the Austrian ccTLD registry. Since its release, a large number of ccTLD and other registries have deployed it and continue to support its development and maintenance. Further information can be found at <http://sourceforge.net/projects/aepps>. CentralNic uses mod_epp to manage EPP sessions with registrar clients, and to convert EPP commands into HTTP requests which can then be handled by backend application servers, which will be replicated for The DCA DotAfrica Registry.

24.3.2. mod_proxy_balancer

mod_proxy_balancer is a core Apache module. Combined with the mod_proxy module, it implements a load-balancing reverse proxy, and includes a number of load balancing algorithms and automated failover between members of a cluster. CentralNic uses mod_proxy_balancer to distribute EPP commands to backend application servers, which will be replicated for The DCA DotAfrica Registry.

24.4. Performance

The DCA DotAfrica Registry will perform continuous remote monitoring of its EPP system, and this monitoring will include measuring the performance of various parts of the system. As of writing, the average round-trip times (RTTs) for various functions of CentralNic's EPP system, which will be used as a model for The DCA DotAfrica Registry, were as follows:

connect time: 87ms
 login time: 75ms
 hello time: 21ms
 check time: 123ms
 logout time: 20ms

These figures include an approximate latency of 2.4ms due to the distant between the monitoring site and the EPP system. They were recorded during normal weekday operations during the busiest time of the day (around 1300hrs UTC) and compare very favourably to the requirement of 4,000ms for session commands and 2,000ms for query commands defined in the new gTLD Service Level Agreement. RTTs for overseas registrars will be higher than this due to the greater distances involved, but will remain well within requirements.

24.5. Scaling

Horizontal scaling is preferred over vertical scaling. Horizontal scaling refers to the introduction of additional nodes into a cluster, while vertical scaling involves using more powerful equipment (more CPU cores, RAM etc) in a single system. Horizontal scaling also encourages effective mechanisms to ensure high-availability, and eliminate single points of failure in the system.

Vertical scaling leverages Moore's Law: when units are depreciated and replaced, the new equipment is likely to be significantly more powerful. If the average lifespan of a server in the system is three years, then its replacement is likely to be around four times as powerful as the old server.

For further information about Capacity Management and Scaling, please see §32.

24.6. Registrar Console

The Registrar Console is a web-based registrar account management tool. It provides a secure and easy-to-use graphical interface to the SRS. The DCA DotAfrica Registry Registrar Console will be hosted on a virtual platform at the primary operations centre in Nairobi. As with the rest of the registry system, during a failover condition it will be operated from the Isle of Man. The virtual platform is described in Figure 24.3.

The features of the Registrar Console are described in §31.

The virtual platform is a utility platform that supports systems and services which do not operate at significant levels of load, and which therefore do not require multiple servers or the additional performance that running on "bare metal" would provide. The platform functions as a private cloud, with redundant storage and failover between hosts.

The CentralNic Registrar Console, which will be replicated for the use of The CentralNic Africa Registry, currently sustains an average of 6 page requests per minute during normal operations, with peak volumes of around 8 requests per minute. Volumes during weekends are significantly lower (fewer than 1 requests per minute). Additional load resulting from this and other new gTLDs is expected to result in a trivial increase in Registrar Console request volumes, and CentralNic does not expect additional hardware resources to be required to support it.

24.7. Quality Assurance

The DCA DotAfrica Registry will employ the following quality assurance (QA) methods:

1. 24x7x365 monitoring provides reports of incidents to NOC
2. Quarterly review of capacity, performance and reliability
3. Monthly reviews of uptime, latency and bandwidth consumption
4. Hardware depreciation schedules
5. Unit testing framework
6. Frequent reviews by QA working group
7. Schema validation and similar technologies to monitor compliance on a real-time, ongoing basis
8. Revision control software with online annotation and change logs
9. Bug Tracking system to which all employees have access
10. Code Review Policy in place to enforce peer review of all changes to core code prior to deployment

11. Software incorporates built-in error reporting mechanisms to detect flaws and report to Operations team
12. Four stage deployment strategy: development environment, staging for internal testing, OT&E deployment for registrar testing, then finally production deployment
13. Evidence-based project scheduling
14. Specification development and revision
15. Weekly milestones for developers
16. Gantt charts and critical path analysis for project planning

Registry system updates will be performed on an ongoing basis, with any user-facing updates (ie changes to the behaviour of the EPP interface) being scheduled at specific times. Disruptive maintenance is scheduled for periods during which activity is lowest. These quality assurance measures will be based on the existing methods CentralNic's infrastructure.

24.8. Billing

The DCA DotAfrica Registry will operate a complex billing system for domain name registry services to ensure registry billing and collection services are feature rich, accurate, secure, and accessible to all registrars. The goal of the system is to maintain the integrity of data and create reports which are accurate, accessible, secured, and scalable. The foundation of the process is debit accounts established for each registrar. The DCA DotAfrica Registry will withdraw all domain fees from the registrar's account on a per-transaction basis and will provide fee-incurring services (e.g., domain registrations, registrar transfers, domain renewals) to a registrar for as long as that registrar's account shows a positive balance.

Once ICANN notifies DCA that a registrar has been issued accreditation, The DCA DotAfrica Registry will begin the registrar on-boarding process, including setting up the registrar's financial account within the SRS.

24.9. Registrar Support

The DCA DotAfrica Registry will provide a multi-tier support system on a 24x7 basis with the following support levels, replicating that of CentralNic's infrastructure:

- ☐ 1st Level: initial support level responsible for basic customer issues. The first job of 1st Level personnel is to gather the customer's information and to determine the customer's issue by analyzing the symptoms and figuring out the underlying problem.
- ☐ 2nd Level: more in-depth technical support level than 1st Level support containing experienced and more knowledgeable personnel on a particular product or service. Technicians at this level are responsible for assisting 1st Level personnel solve basic technical problems and for investigating elevated issues by confirming the validity of the problem and seeking for known solutions related to these more complex issues.
- ☐ 3rd Level: the highest level of support in a three-tiered technical support model responsible for handling the most difficult or advanced problems. Level 3 personnel are experts in their fields and are responsible for not only assisting both 1st and 2nd level personnel, but with the research and development of solutions to new or unknown issues.

The DCA DotAfrica Registry will provide a support ticketing system for tracking routine support issues. This is a web-based system (available via the Registrar Console) allowing registrars to report new issues, follow up on previously raised tickets, and read responses from DCA DotAfrica Registry's support personnel.

When a new trouble ticket is submitted, it is assigned a unique ID and priority. The following priority levels are used:

1. Normal: general enquiry, usage question, or feature enhancement request. Handled by 1st level support.
2. Elevated: issue with a non-critical feature for which a work-around may or may not exist. Handled by 1st level support.
3. Severe: serious issue with a primary feature necessary for daily operations for which no work-around has been discovered and which completely prevents the feature from being used. Handled by 2nd level support.
4. Critical: A major production system is down or severely impacted. These issues are

catastrophic outages that affect the overall

Registry System operations. Handled by 3rd level support.

Depending on priority, different personnel will be alerted to the existence of the ticket. For example, a Priority 1 ticket will cause a notification to be emailed to the registrar customer support team, but a Priority 4 ticket will result in a broadcast message sent to the pagers of senior operations staff including the CTO. The system permits escalation of issues that are not resolved within target resolution times.

24.10. Enforcement of Eligibility Requirements

The SRS supports enforcement of eligibility requirements, as required by specific TLD policies. However, these will not be used for .africa.

24.11. Interconnectivity With Other Registry Systems

The registry system is based on multiple resilient stateless modules. The SRS, Whois, DNS and other systems do not directly interact with each other. Interactions are mediated by the database which is the single authoritative source of data for the registry as a whole. Individuals modules perform "CRUD" (create, read, update, delete) actions upon the database. These actions then affect the behaviour of other registry systems: for example, when a registrar adds the "clientHold" status to a domain object, this is recorded in the database. When a query is received for this domain via the Whois service, the presence of this status code in the database results in the "Status: CLIENT HOLD" appearing in the whois record. It will also be noted by the zone generation system, resulting in the temporary removal of the delegation of the domain name from the DNS.

24.12. Resilience

The SRS has a stateless architecture designed to be fully resilient in order to provide an uninterrupted service in the face of failure or one or more parts of the system. This is achieved by use of redundant hardware and network connections, and by use of continuous "heartbeat" monitoring allowing dynamic and high-speed failover from active to standby components, or between nodes in an active-active cluster. These technologies also permit rapid scaling of the system to meet short-term increases in demand during "surge" periods, such as during the initial launch of a new TLD.

24.12.1. Synchronisation Between Servers and Sites

DCA DotAfrica Registry's system will be implemented as multiple stateless systems which interact via a central registry database. As a result, there will only be few situations where synchronisation of data between servers is necessary:

1. replication of data between active and standby servers (see §33). CentralNic implements redundancy in its database system by means of an active/standby database cluster. The database system used by CentralNic supports native real-time replication of data allowing operation of a reliable hot standby server. Automated heartbeat monitoring and failover is implemented to ensure continued access to the database following a failure of the primary database system.
2. replication is used to synchronise the primary operations centre with the Disaster Recovery site hosted in the Isle of Man (see §34). Database updates are replicated to the DR site in real-time via a secured VPN, providing a "hot" backup site which can be used to provide registry services in the event of a failure at the primary site.

24.13. Operational Testing and Evaluation (OT&E)

An Operational Testing and Evaluation (OT&E) environment is provided for registrars to develop and test their systems. The OT&E system replicates the SRS in a clean-room environment. Access to the OT&E system is unrestricted and unlimited: registrars can freely create multiple OT&E accounts via the Registrar Console.

24.14. Resourcing

As can be seen in the Resourcing Matrix found in Appendix 23.2, DCA DotAfrica Registry will maintain a team of full-time developers and engineers who will contribute to the development and maintenance of this aspect of the registry system. These developers and engineers will not

work on specific subsystems full-time, but a certain percentage of their time will be dedicated to each area. The total HR resource dedicated to this area is equivalent to more than one full-time post.

Although DCA DotAfrica Registry will operate on a dedicated registry environment, the .africa registry will be operated identically to CentralNic's existing registry by the same team, and will benefit from an economy of scale with regards to access to CentralNic's resources.

CentralNic's resourcing model assumes that after launch, the "dedicated" resourcing required for .africa (ie, that required to deal with issues related specifically to .africa and not to general issues) will be equal to the proportion of the overall registry system that .africa will use. After three years of operation, the optimistic projection for .africa states that there will be 529,000 domains in the zone. CentralNic has calculated that, if all its TLD clients are successful in their applications, and all meet their optimistic projections after three years, its registry system will be required to support up to 4.5 million domain names. Therefore .africa will require 12% of the total resources available for this area of the registry system.

In the event that registration volumes exceed this figure, CentralNic will proactively increase the size of the Technical Operations, Technical Development and support teams to ensure that the needs of .africa are fully met. Revenues from the additional registration volumes will fund the salaries of these new hires. Nevertheless, CentralNic is confident that the staffing outlined above is sufficient to meet the needs of .africa for at least the first 18 months of operation.

25. Extensible Provisioning Protocol (EPP)

Except where specified this answer refers to the operations of the DCA's Backend Registry Service Provider, CentralNic.

The Extensible Provisioning Protocol (EPP) is an application layer client-server protocol for the provisioning and management of objects stored in a shared central repository. EPP defines generic object management operations and an extensible framework that maps protocol operations to objects. EPP has become established as the common protocol by which domain registrars can manage domains, nameservers and contact details held by domain registries. It is widely deployed in the gTLD and ccTLD registry space.

CentralNic has operated its EPP system since 2005 and it currently operates at significant load in terms of registrars, sessions and transaction volumes. This system will be replicated for DCA DotAfrica Registry. DCA DotAfrica's EPP system will be fully compliant with the following RFC specifications:

- ☐ 5730 - Base Protocol
- ☐ 5731 - domains
- ☐ 5732 - Host Objects
- ☐ 5733 - Contact Objects
- ☐ 5734 - TCP Transport
- ☐ 3735 - Extension Guidelines
- ☐ 3915 - RGP Extension
- ☐ 5910 - DNSSEC Extension

25.1. Description of Interface

EPP is a stateful XML protocol layered over TCP (see RFC 3734). Protected using lower-layer security protocols, clients exchange identification, authentication, and option information, and engage in a series of client-initiated command-response exchanges. All EPP commands are atomic (there is no partial success or partial failure) and designed so that they can be made idempotent (executing a command more than once has the same net effect on system state as successfully executing the command once).

EPP provides four basic service elements: service discovery, commands, responses, and an extension framework that supports definition of managed objects and the relationship of protocol requests and responses to those objects.

EPP servers respond to client-initiated communication (which can be either a lower-layer connection request or an EPP service discovery message) by returning a greeting to a client. The server then responds to each EPP command with a coordinated response that describes the results of processing the command.

EPP commands fall into three categories: session management, queries, and transform commands. Session management commands are used to establish and end persistent sessions with an EPP server. Query commands perform read-only object information retrieval operations. Transform commands perform read-write object management operations.

Commands are processed by a server in the order they are received from a client. The protocol includes features that allow for offline review of transform commands before the requested action is completed. In such situations, the response clearly notes that the command has been received but that the requested action is pending. The corresponding object then reflects processing of the pending action. The server will also notify the client when offline processing of the action has been completed. Object mappings describe standard formats for notices that describe completion of offline processing.

EPP uses XML namespaces to provide an extensible object management framework and to identify schemas required for XML instance parsing and validation. These namespaces and schema definitions are used to identify both the base protocol schema and the schemas for managed objects.

25.1.1. Objects supported

Registrars may create and manage the following object types in the DCA DotAfrica's EPP system:

- ☐ domains (RFC 5731)
- ☐ host objects (RFC 5732)
- ☐ contact objects (RFC 5733)

25.1.2. Commands supported

DCA DotAfrica will support the following EPP commands:

- ☐ "hello" - retrieve the "greeting" from the server
- ☐ "login" and "logout" - session management
- ☐ "poll" - message queue management
- ☐ "check" - availability check
- ☐ "info" - object information
- ☐ "create" - create object
- ☐ "update" - update object
- ☐ "renew" - renew object
- ☐ "delete" - delete object
- ☐ "transfer" - manage object transfer

25.2. EPP state diagram

Figure 25.1 describes the state machine for the EPP system. Clients establish a connection with the server, which sends a greeting. Clients then authenticate, and once a login session is established, submits commands and receive responses until the server closes the connection, the client sends a logout command, or a timeout is reached.

25.3. EPP Object Policies

The following policies apply to objects provisioned via the EPP system:

25.3.1. domains

1. domains must comply with the syntax described in RFC 1035 §2.3.1. Additionally, the first label of the name must be between 3 and 63 characters in length.
2. domains must have a registrant attribute which is associated with a contact object in the database.
3. domains must have an administrative contact attribute which is associated with a

contact object in the database.

4. domains must have a technical contact which attribute is associated with a contact object in the database.
5. domains may have an billing contact attribute which is associated with a contact object in the database.
6. domains may have between 0 (zero) and 13 DNS servers. A domain with no name servers will not resolve and no records will be published in the DNS
7. the host object model for domains is used rather than the host attribute model.
8. domains may have a number of status codes. The presence of certain status codes indicates the domain's position in the lifecycle, described further in §27.
9. where policy requires, the server may respond to a "domain:create" command with an "Object Pending" (1001) response. When this occurs, the domain is placed onto the pendingCreate status while an out-of-band validation process takes place.
10. when registered, the expiry date of a domain may be set up to ten years from the initial date of registration. Registrars can specify registration periods in one-year increments from one to ten.
11. when renewed, the expiry date of a domain may be set up to ten years from the current expiry date. Registrars can specify renewal periods in one-year increments from one to ten. domains which auto-renew are renewed for one year at a time.
12. domains must have an authInfo code which is used to authenticate inter-registrar transfer requests. This authInfo code may contain up to 48 bytes of UTF-8 character data.
13. domains may have one or more DS records associated with them. DS records are managed via the secDNS EPP extension, as specified in RFC 5910.
14. only the sponsoring registrar of the domain may submit "update", "renew" or "delete" commands for the domain.

25.3.2. Host objects

1. host names must comply with RFC 1035. The maximum length of the host name may not exceed 255 characters.
2. in-bailiwick hosts must have an IPv4 address. They may optionally have an IPv6 address.
3. multiple IP addresses are not currently permitted.
4. sponsorship of hosts is determined as follows: if an object is in-bailiwick (ie child of a domain in the database, and therefore also child to a TLD in the system), then the sponsor is the sponsor of the parent domain. If the object is out-of-bailiwick, the sponsor is the registrar which created the contact.
5. if a registrar submits a change to the name of a host object, if the new host name is subordinate to an in-bailiwick domain, then that registrar must be the sponsor of the new parent domain.
6. registrars are not permitted to create hosts that are subordinate to a non-existent in-bailiwick domain, or to change the name of a host object so that it is subordinate to a non-existent in-bailiwick domain.
7. a host cannot be deleted if one or more domains are delegated to it (the registry deletes hosts to remove orphan glue, see §28).
8. inter-registrar transfers are not permitted.
9. only the sponsoring registrar of the host may submit "update" or "delete" commands for the object.

25.3.3. Contact objects

1. contact IDs may only contain characters from the set [A-Z, 0-9, . (period), - (hyphen) and _ (underscore)] and are case-insensitive.
2. phone numbers and email addresses must be valid as described in RFC 5733 §2.5 and §2.6.
3. contact information is accepted and stored in "internationalized" format only: that is, contact objects only have a single "contact:postalInfo" element and the type attribute is always "int".
4. the "contact:org", "contact:sp", "contact:pc", "contact:phone" and "contact:fax" elements are optional.
5. contacts must have an authInfo code which is used in inter-registrar transfers. This code may contain up to 48 bytes of UTF-8 character data.
6. a contact cannot be deleted if one or more domains are associated with it.

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7. only the sponsoring registrar of the contact may submit "update" or "delete" commands for the object.

25.4. EPP Extensions

DCA DotAfrica will support the following EPP extensions. CentralNic's implementations fully comply with the required specifications.

25.4.1. Registry Grace Period Mapping

Various grace periods and hold periods are supported by the Registry Grace Period mapping, as defined in RFC 3915. This is described further in §27.

25.4.2. DNSSEC Security Extensions Mapping

Registrars may submit Delegation Signer (DS) record information for domains under their sponsorship. This permits the establishment of a secure chain-of-trust for DNSSEC validation.

DCA DotAfrica will support the specification defined in RFC 5910. This supports two interfaces: the DS Data Interface and Key Data Interface. DCA DotAfrica will support the former interface (DS Data), where registrars submit the keytag, algorithm, digest type and digest for DS records as XML elements, rather than as key data. Key data is stored if provided as a child element of the "secDNS:dsData" element. The maxSigLife element is optional in the specification and is not currently supported.

25.4.3. Launch Phase Extension

CentralNic has assisted development of a standard EPP extension for registry "launch phases" (ie Sunrise and Landrush periods), during which the steady-state mode of "first-come, first-served" operation does not apply. This extension permits registrars to submit requests for domains with claimed rights such as a registered trademark. The extension is currently described in an Internet-Draft (see <http://tools.ietf.org/html/draft-tan-epp-launchphase-00>). It is hoped that this draft will eventually be published as an RFC which can be implemented by other registries and registrars.

DCA DotAfrica's system will implement this extension and will support the most recent version of the draft during the initial launch of .africa. Once .africa enters General Availability, this extension will no longer be available for use by registrars. Example frames describing the use of this extension are included in Appendix 25.2. As of writing, the current draft does not include a full schema definition, but a schema from a previous version has been included in Appendix 25.3. When the Draft is updated to include a schema, it will be based on this version.

25.5. Registrar Credentials and Access Control

Registrars are issued with a username (their registrar ID) and a password. This password cannot be used to access any other service and only this password can be used to access the EPP system. Registrar officers with the "Management" access level can change their EPP password via the Registrar Console.

RFC 5730 requires "mutual, strong client-server authentication". CentralNic requires that all registrars connect using an SSL certificate. This certificate may be obtained from a recognised certificate authority, or it may be a self-signed certificate registered with CentralNic via the Registrar Console. Registrar officers with the "Management" access level can upload SSL certificates for their account.

25.6. Session Limits and Transaction Volumes

There are no limits on the number of active sessions a registrar can maintain with the server. Similarly, there are no limits on the volume of transactions a registrar may send. However the system is fully capable of imposing connection limits and this measure may be used in future to ensure equal access amongst registrars.

25.7. Transaction Logging and Reporting

All "transform" commands are logged. Transform commands are: "create", "renew", "update", "delete" and "transfer". The system logs the time and date when the command was received, the registrar which submitted it, the request and response frames, the result code and message.

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All commands, whether successful or not, are logged. #2199

The transaction log is stored in the primary registry database. Registrars have access to the log for their account via the Registrar Console.

The log viewer permits filtering by command, object type, object ID (domain, host name, contact ID), result code and timestamp.

Query commands (“check”, “info”, “poll op=“req””) and session commands (“login”, “logout” and “hello”) are not logged due to the large volume of such queries (particularly “check” queries). The EPP system uses counters for these commands to facilitate generation of monthly reports.

25.8. EPP Message Queue

The EPP protocol provides a message queue to provide registrars with notifications for out-of-band events. CentralNic’s infrastructure currently supports the following EPP message notifications which will be replicated for DCA DotAfrica:

- ☐ approved inbound transfer
- ☐ rejected inbound transfer
- ☐ new outbound transfer
- ☐ cancelled outbound transfer
- ☐ approved or rejected domain registration request (where TLD policy requires out-of-band approval of “domain:create” requests)

25.9. Registrar Support, Software Toolkit

CentralNic has supported EPP for many years. CentralNic has released a number of open source client libraries for several popular programming languages. These are used by registrars and registries around the world. CentralNic maintains the following open source EPP libraries:

- ☐ Net::EPP, a general purpose EPP library for Perl. See <http://code.google.com/p/perl-net-epp/>
- ☐ Preppi, a graphical EPP client written in Perl. See <https://www.centralnic.com/company/labs/preppi>
- ☐ Net_EPP, a PHP client class for EPP. See <https://github.com/centralnic/php-epp>
- ☐ Simpleepp, a Python client class for EPP. See <https://bitbucket.org/milosn/simpleepp>
- ☐ tx-epp-proxy, a EPP reverse proxy for shared-nothing client architectures written in Python. See <https://bitbucket.org/milosn/tx-epp-proxy>

These libraries are available for anyone to use, at no cost. CentralNic develops these libraries, and accepts submissions and bug reports from users around the world.

25.10. Quality Assurance, RFC Compliance

To ensure that its EPP system fully complies with the relevant specifications documents, CentralNic has implemented the following, which will be replicated for DCA DotAfrica:

25.10.1. Schema Validation

The EPP system automatically validates all response frames against the XSD schema definitions provided in the RFCs. Should a non-validating response be sent to a registrar, an alert is raised with the NOC to be investigated and corrected. By default, this feature is disabled in the production environment but it is enabled in all other environments (as described below).

25.10.2. Multi-stage Deployment and Testing

EPP system code is developed, tested and deployed in a multi-stage environment:

1. Developers maintain their own development environment in which new code is written and changes are prepared. Development environments are configured with the highest level of debugging and strictness to provide early detection of faults.
2. All changes to the EPP system are subjected to peer review: other developers in the team must review, test and sign off the changes before being committed (or, if developed on a branch, being merged into the stable branch).
3. Changes to EPP system code are then deployed in the OT&E environment. Registrars continually test this system as part of their own QA processes, and this additional phase provides an additional level of quality assurance.

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25.10.3. Registrar Feedback

Registrars are provided with an easy way to report issues with the EPP system, and many perform schema validation on the responses they receive. When issues are detected by registrars, they are encouraged to submit bug reports so that developers can rectify the issues.

25.11. EPP System Resourcing

As can be seen in the Resourcing Matrix found in Appendix 23.2, DCA DotAfrica will maintain a team of full-time developers and engineers which will contribute to the development and maintenance of this aspect of the registry system. These developers and engineers will not work on specific subsystems full-time, but a certain percentage of their time will be dedicated to each area. The total HR resource dedicated to this area is equivalent to more than one full-time person.

Although DCA DotAfrica Registry will operate on a dedicated registry environment, the .africa registry will be operated identically to CentralNic's existing registry by the same team, and will benefit from an economy of scale with regards to access to CentralNic's resources.

CentralNic's resourcing model assumes that after launch the "dedicated" resourcing required for .africa (ie, that required to deal with issues related specifically to .africa and not to general issues with the system as a whole) will be equal to the proportion of the overall registry system that .africa will use. After three years of operation, the optimistic projection for .africa states that there will be 529,000 domains in the zone. CentralNic has calculated that, if all its TLD clients are successful in their applications, and all meet their optimistic projections after three years, its registry system will be required to support up to 4.5 million domain names. Therefore .africa will require 12% of the total resources available for this area of the registry system.

In the event that registration volumes exceed this figure, CentralNic will proactively increase the size of the Technical Operations, Technical Development and support teams to ensure that the needs of .africa are fully met. Revenues from the additional registration volumes will fund the salaries of these new hires. Nevertheless, CentralNic is confident that the staffing outlined above is sufficient to meet the needs of .africa for at least the first 18 months of operation.

26. Whois

Except where specified this answer refers to the operations of DCA's Backend Registry Service Provider, CentralNic.

Whois is one of the oldest Internet protocols still in use. It allows interested persons to retrieve information relating to Internet resources (domain names and IP addresses). Whois services are operated by the registries of these resources, namely TLD registries and RIRs. Whois is described by RFC 3912, which serves as a description of existing systems rather than requiring specific behaviours from clients and servers. The protocol is a query-response protocol, in which both the query and the response are opaque to the protocol, and their meanings are known only the server and to the human user who submits a query. Whois has a number of limitations, but remains ubiquitous as a means for obtaining information about name and number resources.

26.1. Compliance

The Whois service for .africa will comply with RFC3912 and Specifications 4 and 10 of the New gTLD Registry Agreement. The service will be provided to the general public at no cost. If ICANN specify alternative formats and protocols (such as WEIRDS) then CentralNic will implement these as soon as reasonably practicable.

DCA DotAfrica will monitor its Whois system to confirm compliance. Monitoring stations will check the behaviour and response of the Whois service to ensure the correctness of Whois

EXHIBIT B



Date: 20 July 2015
Ref: OES/15/09/0157)

Dear Dr. Ibrahim

Re: Request for Support to Dot Africa Project

I am writing in connection with the request made to the Executive Secretary, Dr. Lopes for his support to the African Union's (AU") efforts in getting the regional identifier top level domain "dotAfrica" delegated to ZA Central Registry ("ZACR"), the entity we understand is authorized by the AU to apply for and administer the DotAfrica top level domain.

I understand from your letter that in addition to ZACR, another competing entity, DotConnectAfrica ("DCA") has submitted an application to obtain the same delegation as ZACR, and that DCA is purporting to use a letter of support obtained from ECA in 2008 as an endorsement from ECA for its application.

We also note that in September 2011, ECA wrote to you in response to a letter you sent regarding the setting up of the structure and modalities for the implementation of the DotAfrica project and in that letter, ECA reaffirmed its continued commitment and support to the AU in the management of Internet-based resources in Africa.

As you are aware, one of ICANN's requirement for the application for delegation for geographic Top Level Domain ("gTLD") as detailed in ICANN's 2012 Applicant Guidebook, is a minimum of 60% support from *relevant governments or public authorities*, with no more than one government objection from any country from the region.

ECA as United Nations entity is neither a government nor a public authority and therefore is not qualified to issue a letter of support for a prospective applicant in support of their application. In addition, ECA does not have a mandate to represent the views or convey the support or otherwise of African governments in matters relating to application for delegation of the gTLD.

Dr. Elham M.A. Ibrahim
Commissioner
Infrastructure and Energy
African Union
Addis Ababa

P.O. Box 3001, Addis Ababa, Ethiopia Tel: (251-11) 551 72 00 Fax: (251-11) 551 4418



United Nations
Economic Commission for Africa

In this regard, the August 2008 letter referenced above is merely expressions of a view in relation to the entity's initiatives and efforts regarding internet governance, including efforts to obtain gTLD for Africa. It is ECA's position that the August 2008 letter to Ms Bekele cannot be properly considered as a "letter of support or endorsement" within the context of ICANN's requirements and cannot be used as such.

I hope this clarifies ECA's position on the matter. Please feel free to contact me if you need any further clarification on tel: 0115443378 or sbaffoe-bonnie@uneca.org

Yours sincerely,

A handwritten signature in black ink, appearing to read "S. Baffoe-Bonnie".

Sandra Baffoe-Bonnie
Secretary of the Commission and Legal Advisor

Cc: Ms Sophia Bekele, DotConnectAfrica

EXHIBIT C

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Resources

▶ [About ICANN \(Internet Corporation for Assigned Names and Numbers\) \(/resources/pages/welcome-2012-02-25-en\)](#)

▶ [Board \(/resources/pages/board-of-directors-2014-03-19-en\)](#)

▶ [Accountability \(/resources/accountability\)](#)

▶ [Governance \(/resources/pages/governance-2012-02-25-en\)](#)

▶ [Groups \(/resources/pages/groups-2012-02-06-en\)](#)

[Business \(/resources/pages/business\)](#)

▶ [Contractual Compliance \(/resources/pages/compliance-](#)

Approved Board Resolutions | Regular Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board

1. Main Agenda

a. .AFRICA Update

Rationale for Resolution 2016.03.03.01

b. Consideration of Re-evaluation of the Vistaprint Limited String Confusion Objection Expert Determination

Rationale for Resolutions 2016.03.03.02 – 2016.03.03.04

1. Main Agenda

a. .AFRICA Update

Whereas, in its 11 April 2013 Beijing Communiqué, the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) provided consensus advice pursuant to the Applicant Guidebook that DotConnectAfrica Trust's (DCA)'s application for .AFRICA should not proceed.

2012-02-25-en)	Whereas, on 4 June 2013, the New gTLD (generic Top Level Domain) Program Committee (NGPC) adopted the "NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC (Governmental Advisory Committee) Beijing Communiqué," which included acceptance of the GAC (Governmental Advisory Committee)'s advice related to DCA's application for .AFRICA. (See https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-04-en#1.a)
▶ Registrars (/resources/pages/registrars-0d-2012-02-25-en)	
▶ Registries (/resources/pages/registries-46-2012-02-25-en)	
Operational Metrics (/resources/pages/metrics-gdd-2015-01-30-en)	Whereas, staff informed DCA of and published the "Incomplete" Initial Evaluation result and halted evaluation of DCA's application for .AFRICA on 3 July 2013 based on the NGPC resolution of 4 June 2013.
▶ Identifier Systems Security, Stability (Security, Stability and Resiliency) and Resiliency (IS-SSR) (/resources/pages/is-ssr-2014-11-24-en)	Whereas, on 25 November 2013, DCA initiated an Independent Review Process (IRP) regarding the 4 June 2013 resolution, but did not at that time seek to stay ICANN (Internet Corporation for Assigned Names and Numbers) from moving forward the ZA Central Registry NPC trading as Registry.Africa's (ZACR) application.
▶ ccTLDs (/resources/pages/cctlds-21-2012-02-25-en)	Whereas, on 24 March 2014, ZACR executed a Registry Agreement (RA (Registrar)) for .AFRICA.
▶ Internationalized Domain Names (/resources/pages/idn-2012-02-25-en)	Whereas, on 13 May 2014 ICANN (Internet Corporation for Assigned Names and Numbers) halted further progress with respect to ZACR's RA (Registrar) for .AFRICA following the IRP Panel's interim declaration that ICANN (Internet Corporation for Assigned Names and Numbers) should stop proceeding with ZACR's application for .AFRICA during the pendency of the IRP that DCA had initiated.
▶ Universal Acceptance Initiative (/resources/pages/universal-acceptance-2012-02-25-en)	Whereas, on 9 July 2015, the IRP Panel issued its Final Declaration and recommended that ICANN (Internet Corporation for Assigned Names and Numbers) continue to refrain from delegating the .AFRICA gTLD (generic Top Level Domain) in order to permit DCA's application to proceed through the remainder of the new gTLD (generic Top Level Domain) application process. (See https://www.icann.org/en/system/files/files/final-declaration-2-redacted-09jul15-en.pdf) [PDF, 1.04 MB])
▶ Policy (/resources/pages/policy-01-2012-02-25-en)	
▶ Public Comment (/public-comments)	
▶ Technical Functions (/resources/pages/technical-functions-2015-10-15-en)	Whereas, on 16 July 2015, the Board directed the President and CEO, or his designee(s), to continue to refrain from delegating the .AFRICA gTLD (generic Top Level Domain) and to take all steps necessary to resume the evaluation of DCA's application for .AFRICA in accordance with the established process(es). (See https://www.icann.org/resources/board-material/resolutions-2015-07-16-en#1.a)
▶ Contact (/resources/pages/contact-2012-02-06-en)	
▶ Help (/resources/pages/help-	Whereas, on 1 September 2015, evaluation of DCA's application for .AFRICA resumed.

2012-02-03-en)

Whereas, on 13 October 2015, the Initial Evaluation report based on the Geographic Names Panel's review of DCA's application was posted and indicated that DCA's application did not pass Initial Evaluation, but that DCA was therefore eligible for Extended Evaluation; DCA chose to proceed through Extended Evaluation.

Whereas, on 17 February 2016, an Extended Evaluation report was posted and indicated that the resumed evaluation of DCA's application for .AFRICA had concluded, and that DCA had failed to submit information and documentation sufficient to meet the criteria described in AGB Section 2.2.1.4.3, rendering it ineligible for further review or evaluation.

Resolved (2016.03.03.01), the Board authorizes the President and CEO, or his designee(s), to proceed with the delegation of .AFRICA to be operated by ZACR pursuant to the Registry Agreement that ZACR has entered with ICANN (Internet Corporation for Assigned Names and Numbers).

Rationale for Resolution 2016.03.03.01

Two applicants, DotConnectAfrica Trust (DCA) and ZA Central Registry trading as Registry.Africa (ZACR), applied to be become the operator for the .AFRICA generic top-level domain (gTLD (generic Top Level Domain)) in furtherance of ICANN (Internet Corporation for Assigned Names and Numbers)'s New gTLD (generic Top Level Domain) Program. In its 11 April 2013 Beijing Communiqué, ICANN (Internet Corporation for Assigned Names and Numbers)'s Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) provided consensus advice pursuant to the New gTLD (generic Top Level Domain) Program's Applicant Guidebook (Guidebook) that DCA's application to operate .AFRICA should not proceed. The Board accepted that GAC (Governmental Advisory Committee) advice, evaluation of DCA's application was halted, and ICANN (Internet Corporation for Assigned Names and Numbers) proceeded to execute a Registry Agreement with the other applicant that applied to operate .AFRICA.

DCA challenged the GAC (Governmental Advisory Committee) advice that DCA's application should not proceed, and the Board's acceptance of that advice, through the Independent Review Process (IRP). The IRP is one of the accountability mechanisms set out in ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws. First, only after ICANN (Internet Corporation for Assigned Names and Numbers) signed a registry agreement to operate .AFRICA with the other .AFRICA applicant, did DCA obtained interim relief from an IRP panel recommending that ICANN (Internet Corporation for Assigned Names and Numbers) not proceed further with .AFRICA pending conclusion of the IRP. ICANN (Internet Corporation for Assigned Names and Numbers) adopted that recommendation. Second, DCA prevailed in the IRP and the IRP Panel recommended that ICANN (Internet Corporation for Assigned Names and Numbers) resume evaluation

of DCA's application and continue to refrain from delegating .AFRICA to the party with which ICANN (Internet Corporation for Assigned Names and Numbers) already had executed a Registry Agreement to operate the .AFRICA gTLD (generic Top Level Domain).

On 16 July 2015 the Board passed the following resolution:

Resolved (2015.07.15.01), the Board has considered the entire Declaration, and has determined to take the following actions based on that consideration:

1. ICANN (Internet Corporation for Assigned Names and Numbers) shall continue to refrain from delegating the .AFRICA gTLD (generic Top Level Domain);
2. ICANN (Internet Corporation for Assigned Names and Numbers) shall permit DCA's application to proceed through the remainder of the new gTLD (generic Top Level Domain) application process as set out below; and
3. ICANN (Internet Corporation for Assigned Names and Numbers) shall reimburse DCA for the costs of the IRP as set forth in paragraph 150 of the Declaration.

(See <https://www.icann.org/resources/board-material/resolutions-2015-07-16-en#1.a> (/resources/board-material/resolutions-2015-07-16-en#1.a).)

When the Board passed the above resolution, the only remaining evaluation process for DCA's application for .AFRICA during the Initial Evaluation (IE) period was the Geographic Names Panel review, as DCA had successfully completed the other stages of IE. Accordingly, at staff's request, in August 2015, the Geographic Names Panel resumed its evaluation of DCA's application to operate .AFRICA. The Geographic Names Panel determined that .AFRICA is a geographic name as defined in Guidebook Section 2.2.1.4, but that the DCA's application to operate .AFRICA has not sufficiently met the requisite criteria of possessing evidence of support or non-opposition from 60% of the relevant public authorities in the geographic region of Africa, as described in AGB Section 2.2.1.4.3.

Per the Guidebook, having failed to pass IE, DCA was eligible and chose to proceed to Extended Evaluation (EE), which provided DCA with an additional 90 days to obtain the requisite documentation needed to pass the Geographic Names Panel review. On 17 February 2016, EE results were posted showing that DCA again did not satisfy the necessary criteria to pass the Geographic Names Panel review, rendering, DCA's application ineligible for any further review.

Now that both IE and EE have been completed for DCA's application to operate .AFRICA, and both have resulted in DCA not passing the Geographic Names Panel review, ICANN (Internet Corporation for Assigned Names and Numbers) is prepared to move forward toward delegation of .AFRICA and with the party that has signed a Registry Agreement to operate .AFRICA. The party that has signed the Registry Agreement to operate .AFRICA is eager to move forward so that members of the African community can begin utilizing this gTLD (generic Top Level Domain). Further, as there are no remaining avenues available to DCA to proceed in the New gTLD (generic Top Level Domain) Program, there is no reason within defined Guidebook processes to delay any further.

Accordingly, the Board today is authorizing the President and CEO or his designee(s), to resume delegating the .AFRICA gTLD (generic Top Level Domain), and all that entails, which it has previously directed ICANN (Internet Corporation for Assigned Names and Numbers) to refrain from doing.

Taking this action is beneficial to ICANN (Internet Corporation for Assigned Names and Numbers) and the overall Internet community, as it will allow delegation of the .AFRICA gTLD (generic Top Level Domain) into the authoritative root zone. There likely will be a positive fiscal impact by taking this action in that there will be another operational gTLD (generic Top Level Domain). This action will not have a direct impact on the security, stability and resiliency of the domain name system.

This is an Organizational Administrative Function that does not require public comment.

b. Consideration of Re-evaluation of the Vistaprint Limited String Confusion Objection Expert Determination

Whereas, on 9 October 2015, an Independent Review Process (IRP) Panel issued its Final Declaration in the IRP filed by Vistaprint Limited (Vistaprint) against ICANN (Internet Corporation for Assigned Names and Numbers) wherein the Panel declared ICANN (Internet Corporation for Assigned Names and Numbers) to be the prevailing party and that the Board's actions did not violate the Articles of Incorporation (Articles), Bylaws, or Applicant Guidebook (Guidebook).

Whereas, Vistaprint specifically challenged the String Confusion Objection (SCO) Expert Determination (Expert Determination) in which the Panel found that Vistaprint's applications for .WEBS were confusingly similar to Web.com's application for .WEB (Vistaprint SCO).

Whereas, while the IRP Panel found that ICANN (Internet Corporation for Assigned Names and Numbers) did not discriminate against Vistaprint in not directing a re-evaluation of the Expert Determination, the Panel

recommended that the Board exercise its judgment on the question of whether it is appropriate to establish an additional review mechanism to re-evaluate the Vistaprint SCO.

Whereas, in Resolutions 2014.10.12.NG02-2015.10.12.NG03, the New gTLD (generic Top Level Domain) Program Committee (NGPC) exercised its discretion to address a certain limited number of perceived inconsistent and unreasonable SCO expert determinations that were identified as not being in the best interest of the New gTLD (generic Top Level Domain) Program and the Internet community (SCO Final Review Mechanism).

Whereas, the NGPC has already considered the Vistaprint SCO Expert Determination, among other expert determinations, in evaluating whether to expand the scope of the SCO Final Review Mechanism and determined that those other expert determinations, including the Vistaprint SCO Expert Determination, did not warrant re-evaluation.

Whereas, pursuant to the recommendations of the IRP Panel in the Final Declaration, the Board has again evaluated whether an additional review mechanism is appropriate to re-evaluate the Vistaprint SCO and resulting Expert Determination.

Resolved (2016.03.03.02), the Board concludes that the Vistaprint SCO Expert Determination is not sufficiently "inconsistent" or "unreasonable" such that the underlying objection proceedings resulting in the Expert Determination warrants re-evaluation.

Resolved (2016.03.03.03), the Board finds, as it has previously found, that ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws concerning core values and non-discriminatory treatment and the particular circumstances and developments noted in Final Declaration do not support re-evaluation of the objection proceedings leading to the Vistaprint SCO Expert Determination.

Resolved (2016.03.03.04), the Board directs the President and CEO, or his designee(s), to move forward with processing of the .WEB/.WEBS contention set.

Rationale for Resolutions 2016.03.03.02 – 2016.03.03.04

The Board is taking action today to address the recommendation of the Independent Review Process (IRP) Panel (Panel) set forth in its Final Declaration in the IRP filed by Vistaprint Limited (Vistaprint). Specifically, the IRP Panel recommended that the Board exercise its judgment on the question of whether an additional review is appropriate to re-evaluate the Vistaprint String Confusion Objection (SCO) leading to the "Vistaprint SCO Expert Determination."

I. Background

A. VistaprintSCO Expert Determination

The background on the Vistaprint SCO Expert Determination is discussed in detail in the Reference Materials and IRP Final Declaration, which is attached as Attachment A to the Reference Materials. The Reference Materials are incorporated by reference into this resolution and rationale as though fully set forth here.

B. Vistaprint IRP

Vistaprint filed an IRP request challenging ICANN (Internet Corporation for Assigned Names and Numbers)'s acceptance of the Vistaprint SCO Expert Determination. In doing so, among other things, Vistaprint challenged procedures, implementation of procedures, and ICANN (Internet Corporation for Assigned Names and Numbers)'s purported failure to correct the allegedly improperly issued Expert Determination.

On 9 October 2015, a three-member IRP Panel issued its Final Declaration. After consideration and discussion, pursuant to Article IV, Section 3.21 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, the Board adopted the findings of the Panel. (See Resolutions 2015.10.22.17 – 2015.10.22.18, *available at* <https://www.icann.org/resources/board-material/resolutions-2015-10-22-en#2.d> (*/resources/board-material/resolutions-2015-10-22-en#2.d*); *see also*, IRP Final Declaration, *available at* <https://www.icann.org/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf> (*/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf*) [PDF, 920 KB].)

In the Final Declaration, the Panel found, among other things, that it did not have the authority to require ICANN (Internet Corporation for Assigned Names and Numbers) to reject the Expert Determination and to allow Vistaprint's applications to proceed on their merits, or in the alternative, to require a three-member re-evaluation of the Vistaprint SCO objections. However, the Panel did recommend that

the Board exercise its judgment on the questions of whether an additional review mechanism is appropriate to re-evaluate the [expert] determination in the Vistaprint

SCO, in view of ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws concerning core values and non-discriminatory treatment, and based on the particular circumstances and developments noted in this Declaration, including (i) the Vistaprint SCO determination involving Vistaprint's .WEBS applications; (ii) the Board's (and NGPC's) resolutions on singular and plural gTLDs, and (iii) the Board's decisions to delegate numerous other singular/plural versions of the same gTLD (generic Top Level Domain) strings.

(Final Declaration at ¶ 196, *available at* <https://www.icann.org/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf> (/en/system/files/files/vistaprint-v-icann-final-declaration-09oct15-en.pdf) [PDF, 920 KB].) The Board acknowledged and accepted this recommendation in Resolution 2015.10.22.18. (See <https://www.icann.org/resources/board-material/resolutions-2015-10-22-en#2.d> (/resources/board-material/resolutions-2015-10-22-en#2.d).)

C. Confusing Similarity

1. The Generic Names Supporting Organization (Supporting Organization)'s (GNSO (Generic Names Supporting Organization)) Recommendation on confusing similarity.

In August 2007, the GNSO (Generic Names Supporting Organization) issued a set of recommendations (approved by the ICANN (Internet Corporation for Assigned Names and Numbers) Board in June 2008) regarding the introduction of new generic top-level domains (gTLDs). The policy recommendations did not include a specific recommendation regarding singular and plural versions of the same string. Instead, the GNSO (Generic Names Supporting Organization) included a recommendation (Recommendation 2) that new gTLD (generic Top Level Domain) strings must not be confusingly similar to an existing top-level domain or a reserved name. (See GNSO (Generic Names Supporting Organization) Final Report: Introduction of New Generic Top-Level Domains, <http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm> (<http://gnso.icann.org/en/issues/new-gtlds/pdp-dec05->

fr-parta-08aug07.htm.)

2. The issue of confusing similarity was agreed as part of the Applicant Guidebook and is addressed in the evaluation processes.

As discussed in detail in Reference Materials document related to this paper, and which is incorporated by reference as though fully set forth here, the issue of confusing similarity is addressed in two manners in the evaluation processes – through the String Similarity Review (SSR) process and through the String Confusion Objection process. The objective of this preliminary review was to prevent user confusion and loss of confidence in the DNS (Domain Name System) resulting from delegation of similar strings. (See *Module 2.2.1.1*, available at <https://newgtlds.icann.org/en/applicants/agb/evaluation-procedures-04jun12-en.pdf> (<https://newgtlds.icann.org/en/applicants/agb/evaluation-procedures-04jun12-en.pdf>) [PDF, 916 KB], and *Module 3.2.1*, available at <https://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf> (<https://newgtlds.icann.org/en/applicants/agb/objection-procedures-04jun12-en.pdf>) [PDF, 260 KB].) The SSR Panel did not find any plural version of a word to be visually similar to the singular version of that same word, or vice versa. (<http://newgtlds.icann.org/en/program-status/application-results/similarity-contention-01mar13-en.pdf> (<http://newgtlds.icann.org/en/program-status/application-results/similarity-contention-01mar13-en.pdf>) [PDF, 168 KB]; <http://newgtlds.icann.org/en/announcements-and-media/announcement-01mar13-en> (<http://newgtlds.icann.org/en/announcements-and-media/announcement-01mar13-en>).

3. The Board previously addressed the issue of confusing similarity as it relates to singular and plural versions of the same string in response to Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) advice.

On 25 June 2013, the Board, through the New gTLD (generic Top Level Domain) Program Committee (NGPC), considered the issue of singular and plural

versions of the same strings being in the root in response to the GAC (Governmental Advisory Committee)'s advice from the Beijing Communiqué. (<https://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf> ([/en/news/correspondence/gac-to-board-18apr13-en.pdf](https://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf)) [PDF, 156 KB].) The NGPC determined that no changes are needed to the existing mechanisms in the Guidebook to address the GAC (Governmental Advisory Committee) advice relating to singular and plural versions of the same string. (See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-25-en#2.d> ([/resources/board-material/resolutions-new-gtld-2013-06-25-en#2.d](https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-25-en#2.d).) As noted in the Rationale for Resolution 2013.06.25.NG07, the NGPC considered several significant factors as part of its deliberations, including the following factors: (i) whether the SSR evaluation process would be undermined if it were to exert its own non-expert opinion and override the determination of the expert panel; (ii) whether taking an action to make program changes would cause a ripple effect and re-open the decisions of all expert panels; (iii) the existing nature of strings in the DNS (Domain Name System) and any positive and negative impacts resulting therefrom; (iv) whether there were alternative methods to address potential user confusion if singular and plural versions of the same string are allowed to proceed; (iv) the SCO process as set forth in Module 3 of the Guidebook. (See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-25-en-2.d> ([/resources/board-material/resolutions-new-gtld-2013-06-25-en-2.d](https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-25-en-2.d).)

The NGPC determined that the mechanisms established by the Guidebook (SSR and SCO) should be unchanged and should remain as the mechanisms used to address whether or not the likelihood potential user confusion may result from singular and plural versions of the same strings.

D. SCO Final Review Mechanism

As discussed in full in the Reference Materials and incorporated herein by reference, the SCO Final Review Mechanism was established by the NGPC on 12 October 2014, after consultation with the community, to address a very

limited set of perceived inconsistent and unreasonable SCO expert determinations. (See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b> (/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b).) The SCO Final Review Mechanism was not a procedure to address the likelihood of confusion of singular and plural versions of the same string in the root. Rather, it was a mechanism crafted to address two SCO expert determinations (.CAM/.COM and .SHOPPING/.通販 expert determinations) that had conflicting expert determinations about the same strings issued by different expert panels, thus rendering their results to be so seemingly inconsistent and unreasonable as to warrant re-evaluation. (NGPC Resolution 2014.10.12.NG03, *available at* <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b> (/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b).) The NGPC also identified the SCO Expert Determinations for .CAR/.CARS as not in the best interest of the New gTLD (generic Top Level Domain) Program and the Internet community, which also resulted in opposite determinations by different expert panels on objections to the exact same strings. Because the .CAR/.CARS contention set resolved prior to the approval of the SCO Final Review Mechanism, it was not part of the final review. (See *id.*)

As part of its deliberations, the NGPC considered and determined that it was not appropriate to expand the scope of the proposed SCO Final Review Mechanism to include other expert determinations such as other SCO expert determinations relating to singular and plural versions of the same string, including the Vistaprint SCO Expert Determination. With respect to its consideration of whether all SCO expert determinations relating to singular and plurals of the same string should be re-evaluated, the NGPC noted that it had previously addressed the singular/plurals issue in Resolutions 2013.06.25.NG07, and had determined "that no changes [were] needed to the existing mechanisms in the Applicant Guidebook" (<https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b> (/resources/board-material/resolutions-new-gtld-2014-10-12-en#2.b).)

II. Analysis

A. Confusing Similarity as it Relates to Singular/Plurals of the Same String Has Already Been Addressed By The Board.

As discussed above, the NGPC first considered the issue of singular and plural versions of same strings in the root in June 2013 in consideration of the GAC (Governmental Advisory Committee)'s advice from the Beijing Communiqué regarding singular and plural versions of the same strings. Then, the NGPC determined that no changes were needed to the existing mechanisms in the Guidebook to address the issue. (<https://www.icann.org/en/news/correspondence/gac-to-board-18apr13-en.pdf> (/en/news/correspondence/gac-to-board-18apr13-en.pdf) [PDF, 156 KB].) As part of its evaluation, the NGPC considered applicant responses to the GAC (Governmental Advisory Committee) advice. The NGPC noted that most were against changing the existing policy, indicating that this topic was agreed as part of the Guidebook and is addressed in the evaluation processes. (<https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-25-en#2.d> (/resources/board-material/resolutions-new-gtld-2013-06-25-en#2.d).) The NGPC also considered existing string similarity in the DNS (Domain Name System) at the second level and any positive and negative impacts resulting therefrom. At the time, no new gTLD (generic Top Level Domain) had been delegated, and therefore, there was no evidence of singular and plurals of the same string in the DNS (Domain Name System) at the top level. To date, seventeen singular/plural pairs have been delegated. The Board is not aware of any evidence of any impact (positive or negative) from having singular and plurals of the same string in the DNS (Domain Name System). As such, the evidence of the existence of singular and plural versions of the same string, while it did not exist in June 2015, should not impact the NGPC's previous consideration of this matter.

As the NGPC acknowledged in Resolution 2013.06.25.NG07, the existing mechanisms (SSR and SCO) in the Guidebook to address the issue of potential consumer confusion resulting from allowing singular and plural versions of the same string are adequate. (<https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-25-en#2.d> (/resources/board-material/resolutions-new-gtld-2013-06-25-en#2.d).) These mechanisms are intended to address the issue of confusing similarity at the outset of the application process. A decision to send the Vistaprint SCO Expert Determination back for re-evaluation because there is now evidence of singular and plural versions of the same string in the DNS (Domain Name System) would effectively strip away the objective function of the evaluation processes that have

been set in place, which in the case of a SCO is to evaluate the likelihood of confusion at the outset of the application process, not some time after there has been evidence of delegation of singular and plural versions of the same string. (See Guidebook, Module 3.5.1.) To do so would be to treat Vistaprint differently and arguably more favorably than other applicants, which could be argued to be contradictory to ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws.

B. The SCO Final Review Mechanism Does Not Apply to the Vistaprint Expert Determination.

The Board notes that Vistaprint argued in the IRP that the Vistaprint SCO Expert Determination is as equally unreasonable as the .CAM/.COM, .通販/.SHOP, .CARS/CAR Expert Determinations and therefore should be sent back for re-evaluation pursuant to the Final Review Mechanism. (See Final Declaration, ¶¶ 93, 94.) However, the Vistaprint SCO Expert Determination is plainly distinguishable from the .CAM/.COM, .通販/.SHOP, .CARS/.CAR expert determinations, and therefore, the reasons warranting re-evaluation as determined by the NGPC in those decisions do not apply to the Vistaprint Expert Determination.

The CAM/.COM, .通販/.SHOP, .CARS/.CAR Expert Determinations were ripe for re-evaluation because those expert determinations involved *multiple conflicting SCO determinations issued by different experts on the same strings*, thus rendering their results to be so seemingly inconsistent and unreasonable as to warrant re-evaluation. Moreover, the NGPC discussion of the .CARS/.CAR expert determinations in the scope of the SCO Final Review Mechanism was not based on the singular/plural issue, but rather, due to conflicting SCO expert determinations (two expert determinations finding .CARS/.CAR not to be confusingly similar and one finding .CARS/.CAR to be confusingly similar. (See Charleston Road Registry, Inc. v. Koko Castle, LLC SCO expert determination at <http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determin1-1-1377-8759-en.pdf> (<http://newgtlds.icann.org/sites/default/files/drsp/25sep13/determin1-1-1377-8759-en.pdf>) [PDF, 196 KB] (finding no likelihood of confusion between .CARS/.CAR); Charleston Road Registry, Inc. v. Uniregistry, Corp. SCO expert determination at <http://newgtlds.icann.org/sites/default/files/drsp/25oct13/determin1-1-845-37810-en.pdf> (<http://newgtlds.icann.org/sites/default/files/drsp/25oct13/determin1-1-845-37810-en.pdf>)).

[1-1-845-37810-en.pdf](#) [PDF, 7.08 MB] (finding no likelihood of confusion between .CARS/.CAR); and Charleston Road Registry, Inc. v. DERCars, LLC SCO expert determination at <http://newgtlds.icann.org/sites/default/files/drsp/14oct13/determining-1-1-909-45636-en.pdf> (<http://newgtlds.icann.org/sites/default/files/drsp/14oct13/determining-1-1-909-45636-en.pdf>) [PDF, 2.09 MB] (finding likelihood of confusion between .CARS/.CAR).)

Here, none of the factors significant to the NGPC's decision to send the CAM/.COM, .通販/.SHOP, expert determinations back for re-evaluation exist for the Vistaprint Expert Determination. The Vistaprint SCO proceedings resulted in one Expert Determination, in favor of Web.com on both objections. There were no other conflicting SCO expert determinations on the same strings issued by different expert panels ending in a different result. One expert panel had all of the arguments in front of it and considered both objections in concert, and made a conscious and fully informed decision in reaching the same decision on both objections. In this regard, Vistaprint already had the same benefit of consideration of the evidence submitted in both objection proceedings by one expert panel that the CAM/.COM, .通販/.SHOP objections received on re-evaluation. Thus, a re-evaluation of the objections leading to the VistaprintSCO Expert Determination is not warranted because it would only achieve what has already been achieved by having the same expert panel review all of the relevant proceedings in the first instance. Further, as discussed above, the NGPC has already considered the VistaprintSCO Expert Determination as part of its deliberations on the scope of the SCO Final Review Mechanism, and determined that the objection proceedings leading to the Expert Determination did not warrant re-evaluation. Thus, while Vistaprint may substantively disagree with the Expert Determination, there is no evidence that it is "inconsistent" or "unreasonable" such that it warrants re-evaluation.

The Board's evaluation is guided by the criteria applied by the NGPC in reaching its determination on the scope of the Final Review Mechanism, the NGPC's consideration and determination on the existence of singular and plurals of the same word as TLD (Top Level Domain) as set forth in Resolution 2013.06.25.NG07, the GNSO (Generic Names Supporting Organization) Final Report Introduction of New Generic Top-Level Domains, the Applicant Guidebook, including the mechanisms therein to address potential

3/14/2016

consumer confusion, the circumstances and developments noted in the Final Declaration, and the core values set forth in Article I, Section 2 of the Bylaws. Applying these factors, for the reasons stated below, the Board concludes that a re-evaluation of the objection proceedings leading to the VistaprintSCO Expert Determination is not appropriate because the Expert Determination is not "inconsistent" or "unreasonable" as previously defined by the NGPC or in any other way to warrant re-evaluation.

The Board considered the following criteria, among others, employed by the NGPC in adopting Resolutions 2014.10.12.NG02 – 2014.10.12.NG03:

- Whether it was appropriate to change the Guidebook at this time to implement a review mechanism.
- Whether there was a reasonable basis for certain perceived inconsistent expert determinations to exist, and particularly why the identified expert determinations should be sent back to the ICDR while other expert determinations should not.
- Whether it was appropriate to expand the scope of the proposed review mechanism to include other expert determinations such as other SCO expert determinations relating to singular and plural versions of the same string, including the VistaprintSCO Expert Determination.
- Community correspondence on this issue in addition to comments from the community expressed at the ICANN (Internet Corporation for Assigned Names and Numbers) meetings.

(See <https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en> ([/resources/board-material/resolutions-new-gtld-2014-10-12-en](https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-10-12-en))). In addition, the Board also reviewed and took into consideration the NGPC's action on the existence of singular and plurals of the same string as a TLD (Top Level Domain) in Resolution 2013.06.25.NG07.

As part of this decision, the Board considered and balanced the eleven core values set forth in Article I, Section 2 of the Bylaws. Article I, Section 2 of the Bylaws states that "situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN (Internet Corporation for Assigned Names and Numbers) body making a recommendation or decision shall exercise its judgment to

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determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values." (Bylaws, Art. I, § 2, <https://www.icann.org/resources/pages/governance/bylaws-en/#1> (/resources/pages/governance/bylaws-en/#1).) Among the eleven core values, the Board finds that value numbers 1, 4, 7, 8, 9, and 10 to be most relevant to the circumstances at hand. Applying these values, the Board concludes that re-evaluation of the objection proceedings leading to the Vistaprint SCO Expert Determination is not warranted.

This action will have no direct financial impact on the organization and no direct impact on the security, stability or resiliency of the domain name system. This is an Organizational Administrative Function that does not require public comment.

Published on 3 March 2016



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 8 INTERNET CORPORATION FOR
 ASSIGNED NAMES AND NUMBERS
 9

10 UNITED STATES DISTRICT COURT
 11 CENTRAL DISTRICT OF CALIFORNIA
 12 WESTERN DIVISION
 13

14 DOTCONNECTAFRICA TRUST

15 Plaintiff,

16 v.

17 INTERNET CORPORATION FOR
 ASSIGNED NAMES AND
 18 NUMBERS,

19 Defendant.
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 26
 27
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Case No. CV 16-00862-RGK

Assigned for all purposes to the
 Honorable R. Gary Klausner

**DECLARATION OF JEFFREY
 LEVEE IN SUPPORT OF
 DEFENDANT ICANN'S
 OPPOSITION TO PLAINTIFF'S
 MOTION FOR PRELIMINARY
 INJUNCTION**

[Opposition to Motion and
 Declarations of Akram Atallah,
 Kevin Espinola, Christine Willett,
 and Moctar Yedaly Filed
 Concurrently]

Hearing Date: April 4, 2016
 Hearing Time: 9:00 a.m.
 Hearing Location: Courtroom 850

1 I, Jeffrey A. LeVee, declare the following:

2 1. I am a partner of Jones Day, counsel to defendant the Internet
3 Corporation for Assigned Names and Numbers (“ICANN”), the defendant in this
4 action. I have personal knowledge of the matters set forth herein and am competent
5 to testify as to those matters. I make this declaration in support of ICANN’s
6 Opposition to DotConnectAfrica Trust’s (“DCA’s” or “Plaintiff’s”) Application for
7 Temporary Restraining Order.

8 2. I was counsel to ICANN when it was formed in 1998, and I have
9 remained ICANN’s primary outside litigation counsel since that time. I represented
10 ICANN in connection with the independent review proceeding (“IRP”) initiated by
11 DCA (“DCA IRP”).

12 3. DCA filed its Notice of IRP in October 2013 but did not include the
13 paperwork that was necessary until January 2014. DCA did not initially move for
14 any form of interim relief. Instead, DCA waited until March 28, 2014 to file such a
15 request. On 12 May 2014, the three-member IRP panel (“IRP Panel”) issued an
16 interim declaration recommending that the delegation of .AFRICA to ZA Central
17 Registry (“ZACR”) be stayed pending the conclusion of the IRP. ICANN’s Board
18 then agreed to abide by that recommendation.

19 4. DCA’s CEO, Sophia Bekele Eshete, submitted a declaration to the
20 IRP Panel. A true and correct copy of an excerpt of that declaration is attached
21 hereto as Exhibit A.

22 5. In May 2015, a two-day final hearing was held in the *DCA* IRP. On
23 July 9, 2015, the IRP Panel issued a 63-page final declaration (“Declaration”).
24 Because of the length of the Declaration, for the Court’s convenience, I summarize
25 that Declaration in the next several paragraphs.

26 6. Paragraphs 1-60 of the Declaration (pages 2-17) summarize the
27 procedural background of the case. Paragraphs 53-61 (pages 16-18) summarize the
28 parties’ positions on the merits, and state in a summary fashion the IRP Panel’s

LEVEE DECLARATION IN SUPPORT OF
ICANN’S OPPOSITION TO PI
Case No. CV 16-00862-RGK

1 determination that ICANN's Board did not act consistently with ICANN's Articles
2 of Incorporation and Bylaws. Paragraphs 62-77 (pages 19-77) summarize the
3 parties' positions on the standard of review to be applied and the IRP Panel's
4 determination in that regard.

5 7. Paragraphs 78-85 (pages 23-27) detail DCA's position on the merits.
6 Paragraph 80 describes DCA's various contentions regarding ICANN's and the
7 Geographic Names Panel's handling of DCA's and ZACR's applications
8 for .AFRICA. Paragraphs 81-82 describe DCA's contention that ICANN's Board
9 should not have accepted the advice of ICANN's Governmental Advisory
10 Committee ("GAC") objecting to DCA's application for .AFRICA ("Advice").

11 8. Paragraphs 86-91 (pages 27-38) then detail ICANN's position on the
12 merits of each of these issues. The IRP Panel quotes extensively from ICANN's
13 briefs, which responded at length both to DCA's various contentions regarding the
14 handling of Plaintiff's and ZACR's applications and also to DCA's contention
15 regarding the GAC's advice.

16 9. Paragraphs 92-117 (pages 39-54) detail the IRP Panel's findings
17 regarding the merits of DCA's claims. The entirety of the Panel's discussion is
18 devoted to the Board's acceptance of the GAC's Advice. The IRP Panel concludes
19 that ICANN's Board did not act consistently with ICANN's Articles and Bylaws in
20 accepting the GAC's Advice. (§ 115.) With respect to all of DCA's other claims,
21 the Panel reaches no conclusion except to state in Paragraph 117 that:

22 [Plaintiff] had criticized ICANN for its various actions and
23 decisions throughout this IRP and ICANN has responded to each
24 of these criticisms in detail. However, the Panel, having carefully
25 considered these criticisms and decided that the above [i.e., its
26 finding regarding the GAC's Advice] is dispositive of this IRP, []
27 does not find it necessary to determine who was right, to what
28 extent and for what reasons in respect to the other criticisms and
alleged shortcomings of the ICANN Board identified by DCA
Trust.

1 10. Paragraphs 118-133 (pages 54-57) discuss the issue of whether the IRP
2 Panel can recommend a course of action to ICANN's Board. The Panel concludes
3 that it can (¶ 128), and accordingly recommends that "ICANN continue to refrain
4 from delegating the .AFRICA gTLD and permit [Plaintiff's] application to proceed
5 through the remainder of the new gTLD application process" (*id.* ¶ 133).

6 11. Paragraphs 134-147 (pages 57-61) discuss the issues of prevailing
7 party and costs. The Panel concludes that DCA is the prevailing party and orders
8 ICANN to pay DCA's costs. (¶¶139, 146.)

9 12. Finally, paragraphs 148-150 set forth the Panel's final declaration.
10 The Panel repeats its finding that ICANN's Board did not act consistently with
11 ICANN's Articles and Bylaws, as well as its recommendation that DCA's
12 Application be "permit[ted] [] to proceed through the remainder of the new gTLD
13 application process." (*Id.* ¶¶ 148-149.) It also repeats its finding that DCA is the
14 prevailing party and its awards of costs to DCA. (*Id.* ¶ 150.)

15 13. In sum, the IRP Panel made no findings whatsoever concerning
16 ICANN's processing of either Plaintiff's Application or ZACR's application
17 for .AFRICA. Nor did the IRP Panel make findings that could possibly be
18 construed to remove or eliminate the Guidebook requirement that an application for
19 a gTLD representing a geographic region (such as .AFRICA) must obtain the
20 support or non-objection of at least 60% of the governments in that region. As a
21 result, DCA's (apparent) argument that it should be allowed to skip this essential
22 Guidebook requirement does not find support in the IRP Panel's declaration. To the
23 contrary, the net effect of the IRP Panel declaration was that the Panel wanted DCA
24 to have another opportunity to meet that requirement and any other requirements
25 that DCA had not yet been able to meet (or that ICANN had not yet evaluated).

26 14. In its briefs to the IRP Panel, ICANN argued that IRP panel
27 declarations were not binding on ICANN's Board. ICANN's argument was based,
28 in part, on the fact that the only previous IRP declaration to have been issued (as of

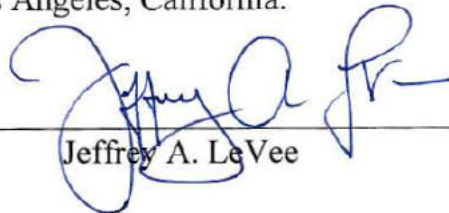
1 that time) expressly found that IRP Panel declarations are not binding. The IRP
2 Panel disagreed, however, and in a 14 August 2014 declaration on procedural issues
3 (“Procedural Declaration”), the IRP Panel determined that its declaration would be
4 binding on ICANN’s Board. The portions of the Procedural Declaration that
5 address this point are reproduced at paragraph 23 (pages 5-6) of the IRP Panel’s
6 Declaration.

7 15. Following the IRP Panel’s Declaration, another IRP panel addressed
8 the issue and concluded that IRP panel declarations were not binding on ICANN’s
9 Board. Most importantly, however, the question of whether the IRP Panel’s
10 declaration was considered binding in conjunction with DCA’s IRP became a moot
11 point when ICANN’s Board elected to adopt all of the findings and
12 recommendations in the IRP Panel’s Declaration. A copy of the resolution by
13 ICANN’s Board adopting the IRP Panel’s Declaration is attached as Exhibit B to
14 the concurrently-filed Declaration of Akram Atallah.

15 I declare under penalty of perjury under the laws of the United States of
16 America that the foregoing is true and correct.

17 Executed on March 14, 2016, in Los Angeles, California.

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Jeffrey A. LeVee

EXHIBIT A

International Centre for Dispute Resolution

CASE No. Case 50-20-1300-1083

Between

DOTCONNECTAFRICA TRUST (DCA TRUST),
Claimant

v.

INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS (ICANN),
Respondent

WITNESS STATEMENT OF SOPHIA BEKELE ESHETE

I, SOPHIA BEKELE ESHETE, of Walnut Creek, California, hereby make the following statement:

1. I make this statement based on my own personal knowledge of issues related to the application made by DotConnectAfrica Trust (“DCA”) for rights to .AFRICA, a new generic top-level domain name (“gTLD”), to the Internet Corporation for Assigned Names and Numbers (“ICANN”).
2. I am the founder and executive director of DCA and a champion for DCA’s application for the .AFRICA gTLD. I have devoted the past eight years to an initiative, DotConnectAfrica, to ensure the creation of an Internet domain name space by and for Africa and Africans. I believe that DCA submitted a well-qualified and compelling application for .AFRICA, which was undermined at each stage of the application process by ICANN’s breaches of its Bylaws,

Articles of Incorporation, and the New gTLD Guidebook due to its improper cooperation with the African Union Commission (“AUC”), the backer of the competing application for the .AFRICA gTLD submitted by UniForum S.A., now known as ZA Central Registry (“ZACR”).¹ ICANN basically drew a road map for the AUC to prevent any other applicant from obtaining rights to .AFRICA by advising the AUC that it could reserve .AFRICA for its own use as a member of ICANN’s Governmental Advisory Committee (“GAC”). ICANN then accepted the GAC’s advice—engineered by the AUC following ICANN’s road map—to block DCA’s application for .AFRICA. In my view, this entire process was highly improper and most irregular.

I. PERSONAL AND PROFESSIONAL BACKGROUND

3. I was born in Addis Ababa, Ethiopia, the third of six children, to Ato Bekele Eshete and Sister Mulualem Beyene. My father was a prominent and successful businessman who was involved in diverse businesses in Ethiopia and was the founder and board member of United Bank and United Insurance, one of the largest financial institutions in Ethiopia. My mother was a career nurse. Growing up, I idolized my mother, who was kind, compassionate and deeply religious. At the same time, I listened to my father talk about his businesses to friends and family at home, where I learned a lot from him about the business world and learned the value of independence, networking, and risk-taking. I came to the U.S. after completing my secondary school education. I earned my bachelor’s degree in business analysis and information systems from San Francisco State University and a master’s of business administration in management of information systems from Golden Gate University.

¹ For the sake of consistency, I refer to the applicant competing with DCA for .AFRICA as ZACR in my statement.

4. When I finished my bachelor's degree, I was recruited by Bank of America ("BoA") to serve as an information auditing and security professional. As a senior information technology audit consultant, I led, planned and executed medium to complex control reviews of production application systems for various technical platforms and I served as lead auditor for BoA's Capital Markets activities in San Francisco, New York, Chicago and Latin America. My responsibilities included auditing computer systems to ensure that data inputs and outputs were consistent (similar to how an auditor would examine a company's cash flows), performing and overseeing corporate governance and risk management functions, providing training and support to BoA employees on system security and technology related issues and coordinating and implementing pilot projects, including developing working standards, models and programs within various audit divisions.

5. Approximately five years later, I moved to UnionBanCal, to reengineer and manage UnionBanCal's audit division. In the role of senior information technology audit specialist, I reported directly to the audit director in UnionBanCal's Corporate Audit Risk Management Division. My main role was to set up a new information technology auditing unit and team. I provided strategies and action plans for streamlining existing auditing processes and procedures, improving existing audit programs, developing new audit programs and recommending technical and business specifications for implementing a local area network within the division. I also mentored and supervised auditors and executed technology and integrated audits locally and within the holding bank located in New York, as well as supported external auditors (*e.g.*, Deloitte & Touche) on audit projects. About one year later, I moved to PricewaterhouseCoopers ("PwC") to manage the information technology audit portfolio of one of the firm's largest

banking accounts, Barclay's Bank. After spending one year at PwC in the role of senior technology advisory consultant, I started my own companies.

6. In 1998, I founded and became the chief executive officer of tech start-ups CBS International ("CBS"), based in California, and affiliate SbCommunications Network plc ("SbCnet"), based in Addis Ababa. CBS primarily offers services in the areas of technology and business consulting and internet solutions. Using Africa as a base, I launched affiliate SbCnet, which specializes in systems and technology integration and support services. Both companies are part of an initiative to support the transfer of technology and knowledge to enterprises in emerging markets. Clients include global, multinational, continental and national organizations in both the private and public sectors.

7. In 2004, I shifted my focus back to the U.S. to help meet the challenges arising from the major corporate governance scandals taking place, such as Enron and WorldCom. I advised U.S.-based clients, including Intel Corp., NASDAQ, Genetech, BDO Sieldman LLP and the Federal Reserve Bank, on corporate governance and risk management within the context of information technology, including on complying with the requirements of Sarbanes-Oxley. I also advised clients on corporate relations and communications programs.

8. In the course of my career, I have obtained and I continue to maintain various professional certifications, including Certified Information Systems Auditor or "CISA," Certified Control Specialist or "CCS," and Certified in the Governance of Enterprise Information Technology or "CGEIT." These certifications are issued to professionals who demonstrate knowledge and proficiency in the field of information systems auditing and security, and enterprise information technology governance principles and practices.

9. I am also a founding member and executive director of the San Francisco Bay Area chapter of the Internet Society (“ISOC”), which serves the ISOC’s purpose of promoting open access to the Internet for all persons by focusing on local issues and representing the interests of those who live or work in the San Francisco Bay Area. In addition, I am a co-founder of the Internet Business Council for Africa (“IBCA”), the aim of which is to promote the involvement and participation of the African private/non-governmental sector (and the global private sector involved in Africa) in the global information and communication technology and Internet community, and also to provide an avenue for them to participate in global Internet governance.²

10. In 2008, I formed DCA to pursue applying for and obtaining a .AFRICA gTLD. Through my involvement in the Internet domain name systems (“DNS”) industry, I got the idea to apply for .AFRICA and recognized the potential benefits to the people of Africa of operating a .AFRICA gTLD for charitable purposes. In 2012, DCA applied for .AFRICA through the New gTLD Program.

II. EARLY INVOLVEMENT WITH ICANN AND INTERNET GOVERNANCE MATTERS

11. Since 2005, I have been very active in the DNS industry, which encompasses website design and hosting, building servers and hosting domain names, managing and registering domain names and setting up email addresses. In 2005, I was elected as the first African to serve on ICANN’s Generic Names Supporting Organization Council (“GNSO”), a policy advisory body that advises the ICANN Board of Directors (the “Board”) on global public policies that guide the development of the Internet, including the gTLD policy and processes affecting such TLDs as .asia, .com, .net, .org, and others.

² Internet Business Council for Africa, <http://theibca.org/>.

12. In my initial statement of interest to ICANN, I declared my interest in issues facing emerging economies relating to information and communications technology and the Internet as well as my interest in pursuing an initiative to obtain a .AFRICA continental domain name.³ Later, my statement of interest evolved to encompass the many projects I worked on at the GNSO, including my efforts to obtain the .AFRICA gTLD.

13. During the two years that I served on the GNSO, ICANN was actively engaged in a global Internet expansion project to introduce new gTLDs. As a member of the GNSO, I helped develop the rules and requirements for the New gTLD Program and participated in discussions about how to “standardize” the rules to ensure that the process for awarding new gTLDs would be fair, transparent and equitable. When we were formulating the rules and requirements, we tried to craft the requirements in such a way as to ensure that the application process would be open and competitive, and that applications would be evaluated on the basis of objective criteria.

14. During my service on the GNSO, I was also instrumental in initiating policy dialogue over internationalized domain names (“IDNs”). I led an active campaign to introduce IDNs under which new IDNs in Arabic, Cyrillic, Chinese and other non-Latin alphabets would become available, thereby providing non-English/non-Latin language native speakers an opportunity to access and communicate on the Internet in their native languages. In furtherance of this goal, I helped form an IDN working group within ICANN to bring the global voices of the IDN stakeholders to ICANN. I was then nominated to chair ICANN’s IDN Working Group at the GNSO and was highly influential in drafting the IDN policy guidelines.⁴ Our group, which later organized itself as the International Domain Resolution Union (“IDRU”), is credited with

³ Sophia Bekele Statement of Interest, ICANN, <https://mex.icann.org/node/4985>.

⁴ Sophia Bekele, ICANNWiki, http://icannwiki.com/index.php/Sophia_Bekele.

pioneering the IDN TLD globally.⁵ These new IDNs have been introduced by ICANN through the current New gTLD Program.⁶

III. NEW gTLD PROGRAM

15. One of ICANN's key responsibilities is to introduce and promote competition in the registration of Internet domain names, while ensuring that the domain name system is secure and stable. For the first several years of ICANN's existence, TLDs were very few in number and were limited by ICANN. The New gTLD Program is a response to demands by Internet stakeholders that ICANN permit the expansion of new top-level domain names into the root zone (*i.e.*, the top-level Domain Name System zone maintained by ICANN). The New gTLD Program is meant to allow an unlimited number of new TLDs in order to enhance competition for and to promote consumer choice in domain names. It evolved, in large part, out of the work ICANN's GNSO performed between 2005 and 2007 to explore introducing new gTLDs, work in which I was directly involved as a member of the GNSO Council at that time.

16. In 2005, the year I was elected to the GNSO, I and other members of the GNSO began the process of developing the parameters for introducing new gTLDs. The process involved detailed discussions and debate about what the rules and requirements should be for new gTLDs, including what technical, operational and financial standards should apply. During this process, we were mindful of the balance between ICANN's objective of expanding the universe of Internet domain names and protecting the security and stability of the system. In 2008, relying on the work of the GNSO, ICANN's Board adopted the GNSO's recommendations for introducing new gTLDs. Ultimately, these recommendations and input from various Internet

⁵ Letter from David Allen, Exec. Director IDRU, to Sophia Bekele, Exec. Director, DCA (5 Dec. 2010), *available at* <http://origin.library.constantcontact.com/download/get/file/1102516344150-330/TAS-IDRU+endorsement++DCA.pdf>.

⁶ *ICANN in Beijing, China: IDNs to win big in the new gTLD process*, Tanda Biashara (17 Apr. 2013), <http://tandaabiashara.com/icann-in-beijing-idn-to-win-big-in-the-new-gtld-process/>.

stakeholders was brought together in 2011 in ICANN's gTLD Applicant Guidebook (the "AGB") and the launch of the New gTLD Program.

IV. THE DOTCONNECTAFRICA INITIATIVE AND THE DOTCONNECTAFRICA TRUST

17. While serving on the GNSO Council, I came across discussions being held on new geographic TLDs like .asia and .lat, as well as .EU under the country-code TLD ("ccTLD") program. Being from Africa and in light of my activities in Africa at the time, I asked my colleagues at the GNSO why a ".AFRICA" did not exist. Part of the diligence I performed to ensure that my efforts to obtain a .AFRICA gTLD would not overlap with the work of others, included making inquiries into registered TLDs potentially relating to .AFRICA. After confirming that no one was championing it among the African participants in ICANN, that there was no African participation in GNSO sessions nor any sign that anyone appeared to be interested in .AFRICA as a new gTLD, I turned my focus to securing the .AFRICA TLD.

a. Creation of the DotConnectAfrica Initiative and Formation of DCA

18. I first proposed developing .AFRICA as a new gTLD in 2006, in a presentation given to the African members of the ICANN Board. The following year, I gave a presentation on the topic to different African organizations of the ICANN community during the ICANN 28 meeting in Lisbon, Portugal.⁷ Soon thereafter, I led the .AFRICA initiative under a new start-up, envisioning connecting the dots in Africa under one umbrella and calling the initiative "DotConnectAfrica." In February 2008, I wrote to the Board to notify ICANN of the "DotConnectAfrica Initiative"⁸ and in June of 2008, at the ICANN 32 meeting in Paris, I made

⁷ Presentation to the ICANN Africa Group ICANN 28 meeting in Lisbon, Portugal (2007), *available at* <http://www.slideshare.net/Nyosef/dotafrika>.

⁸ Letter from Sophia Bekele, Executive Coordinator (.Africa), to P. Dengate Thrush, Chairman, ICANN (13 Feb. 2008), *available at* <http://www.scribd.com/doc/99725682/Letter-of-Notification-for-ICANN-for-Applying-for-Delegation-of-Dotafrika-TLD-Chairman-ICANN>.

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8 INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS

9
10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION

13
14 DOTCONNECTAFRICA TRUST

15 Plaintiff,

16 v.

17 INTERNET CORPORATION FOR
ASSIGNED NAMES AND
18 NUMBERS,

19 Defendant.

Case No. CV 16-00862-RGK

Assigned for all purposes to the
Honorable R. Gary Klausner

**DECLARATION OF KEVIN
ESPINOLA IN SUPPORT OF
DEFENDANT ICANN'S
OPPOSITION TO PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION**

[Opposition to Motion and
Declarations of Akram Atallah,
Jeffrey A. LeVee, Christine Willett,
and Moctar Yedaly Filed
Concurrently]

Hearing Date: April 4, 2016
Hearing Time: 9:00 a.m.
Hearing Location: Courtroom 850

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1 I, Kevin Espinola, declare the following:

2 1. I am a partner of Jones Day, counsel to defendant the Internet
3 Corporation for Assigned Names and Numbers (“ICANN”), a defendant in this
4 action. I have personal knowledge of the matters set forth herein and am competent
5 to testify as to those matters. I make this declaration in support of ICANN’s
6 Opposition to DotConnectAfrica Trust’s (“Plaintiff’s”) Motion for Preliminary
7 Injunction.

8 2. I have served as outside counsel to ICANN since May 2009. As
9 outside counsel, I assisted in the development of ICANN’s New gTLD Program.

10 3. The Generic Names Supporting Organization (“GNSO”)—one of the
11 supporting organizations that develops global Internet policy within ICANN—was
12 responsible for policy development work on the introduction of new generic top-
13 level domains (“gTLDs”) and approved a set of 19 policy recommendations. The
14 GNSO’s work involved representatives from a wide variety of stakeholder
15 groups—governments, individuals, civil society, business and intellectual property
16 constituencies, the technology community, and others—engaging in discussions on
17 policy questions regarding new gTLDs, including the application criteria and the
18 contractual conditions that should be required for new gTLD registries going
19 forward. An overview of the GNSO’s policy work and its outcomes is available at
20 <http://gns0.icann.org/issues/new-gtlds>. The culmination of the GNSO’s policy
21 development work was a June 2008 decision by the ICANN Board of Directors to
22 adopt the GNSO-developed new gTLD policy.

23 4. Following this decision, ICANN and its community began the process
24 of developing the New gTLD Applicant Guidebook (“Guidebook”), which
25 implemented the recommendations made by the GNSO and set forth the
26 requirements and the criteria by which new gTLD applications are evaluated. The
27 Guidebook was developed as part of a years-long, bottom-up multistakeholder
28 process during which numerous versions were published by ICANN for public

1 comment and revised, in part based on comments received. In total, six complete
2 versions of the Guidebook were published for public comment.¹

3 5. On December 13, 2010, as part of this process, Plaintiff submitted a
4 written public comment regarding the November 12, 2010 version of the
5 Guidebook (“November 2010 Guidebook”), noting its support for the New gTLD
6 Program and for a .AFRICA gTLD. Attached hereto as Exhibit A is a true and
7 correct copy of Plaintiff’s comment. Attached hereto as Exhibit B is a true and
8 correct copy of an excerpt of the “New gTLDs Proposed Final Applicant
9 Guidebook Public Comment Summary,” summarizing comments received
10 regarding the November 2010 Guidebook. Plaintiff’s comment is addressed on
11 page 3. I am informed and believe that Plaintiff did not submit any comments
12 regarding Section 6 of Module 6 of the Guidebook (“Covenant Not to Sue”).

13 6. In the April 15, 2011 version of the Guidebook (“April 2011
14 Guidebook”), language was added to Section 6 of Module 6 of the Guidebook
15 (“Covenant Not to Sue”) making explicit that: “[an] applicant may utilize any
16 accountability mechanism set forth in ICANN’s Bylaws for [the] purposes of
17 challenging any final decision made by ICANN with respect to the application.”
18 Attached hereto as Exhibit C is a true and correct copy of Module 6 of the April
19 2011 Guidebook, which was published with a redline, showing changes made from
20 the prior version of the Guidebook.

21 7. It is my belief that this addition was principally made in response to
22 comments from ICANN’s Governmental Advisory Committee (“GAC”) regarding
23 the Covenant Not to Sue, as reflected on page 2 of a February 21, 2011 document
24 responding to those comments. A true and correct copy of that document, “ICANN
25

26 ¹ Some modifications were made to the Guidebook requirements after the last
27 Guidebook was published. But no modifications were made to the portions of the
28 Guidebook relevant in this case—i.e., the requirement of governmental support for
gTLDs representing geographic regions and Section 6 of Module 6.

1 Board-GAC Consultation: ‘Legal Recourse’ for New gTLD Registry Applicants,”
2 is attached to this declaration as Exhibit D.

3 8. ICANN’s decision to include the Covenant Not to Sue reflected its
4 reasoned determination regarding the sort of risk, including financial, to which
5 ICANN—a non-profit public benefit corporation—should reasonably subject itself
6 as part of the New gTLD Program.

7 9. In response to public comments regarding the Covenant Not to Sue in
8 the February 18, 2009 draft of the Guidebook (“February 2009 Guidebook”),
9 ICANN explained: “Under its Bylaws ICANN’s actions are subject to numerous
10 transparency, accountability and review safeguards, and are guided by core values
11 including ‘Making decisions by applying documented policies neutrally and
12 objectively, with integrity and fairness[,]’ but it would not be feasible for ICANN
13 to subject itself to unlimited exposure to lawsuits from potential unsuccessful
14 applicants.” Attached hereto as Exhibit E is a true and correct copy of an excerpt of
15 the report of public comments to the February 2009 Guidebook. The relevant
16 language appears on p. 184.

17 10. Similarly, in responding to the GAC’s comments regarding the
18 Covenant Not to Sue, ICANN explained:

19
20 ICANN is a non-profit public benefit corporation and lacks the
21 resources to defend against potentially numerous lawsuits in
22 jurisdictions all over the world initiated by applicants that might want
23 to challenge the results of the community-designed new gTLD
24 application process. ICANN anticipates that, absent a broad waiver
25 and limitation of liability in the application terms and conditions,
26 rejected or unsuccessful applicants could initiate frivolous and costly
27 legal actions in an attempt to challenge legitimate ICANN decisions,
28 and possibly delay further the successful rollout of the new gTLD
program. Accordingly, ICANN has carefully considered how to
protect the new gTLD program from such challenges. The release
from such potential claims was deemed appropriate in light of these
considerations.

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(Exhibit D at 2.)

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 14, 2016, in Irvine, California.



Kevin Espinola

EXHIBIT A

Greeting Mr. Chair, Distinguished Board and participants,

also a great thank you to the local hosts and organizers of this meetings. It has gone all well.

My name is Sophia Bekele and I represent DotConnectAfrica, an organization that is applying for the .africa gTLD in the next round of application, also we have been championing the .africa TLD all over Africa.

Most of you here have recognized our activities through our regular press releases and distributions on facebook and twitter. (Not to advertise here of course) **but those who want to know us**, can find us there.

While I stand here in front of you, ladies & gentleman to express like most, not to delay the application process, **(also being careful not to ask for an expectation for Africa)**, I want to say why the Africa continent needs it most!

We have championed .africa for Africa anchored on **3 key principles**.

- 1- To brand the Continent's product and services so people will know what Africa does and the positives that Africa has to offer. While Africa's image has suffered thru war, famine and governance issues, there is also another image that the world does not know about Africa, and that can be told through its people when they engage in promoting their products & services for trade and investment in the new gTLD. This is also quite in line with the current US administration's policy on "focus on Africa", to assist in increasing trade and investment. While, we all acknowledge ICANN is an international organization, it is also based in the US. **Therefore, the dotafrica TLD fulfills this US agenda and support for Africa's speedy entry in the global village.**
- 2- DotConnectAfrica has created "generation.africa", a theme, to empower the youth to adapt to the powers of the internet and its use, thus enjoying a great following thus far. ITU, a good-will partner to ICANN, and also its secretary general, Dr. Hamadoun Toure, an African as well; under his administration has championed Broadband for Africa in 2007, and since, the penetration rate has been amazing supported by African leadership. We want the same from ICANN for our generation.africa, a potential of 900billion people.
- 3- A shift in industry from US market of .com and .org to Africa empowered by the dotafrica registry to Africa, which is to be housed locally in the continent. This will mean development of new industry and market for Africa empowering African jobs and wealth creation. So that Africa does not have come to ICANN for financial support, like the community gtlds. Dotafrica registry can instead fulfill that need, and this DCA has announced at the Brussels meeting.

So these are very powerful and compelling reasons for Africa to need this gTLD. In fact, this is our economic study for ICANN that can be used as input, we shall need no more. So ICANN should continue with its commitment with new gtlds.

Finally, DCA has promised generation.africa to take them to this promised land, **but Africa cannot get there, without ICANN----** first taking, **ALL OF US to that promised land**. Africa has already missed the boat in the last many rounds, but have seen the successes of .eu and then .asia. and now it is time for .africa. Thank you for listening!

EXHIBIT B

21 February 2011

NEW gTLDs PROPOSED FINAL APPLICANT GUIDEBOOK PUBLIC COMMENT SUMMARY

Sources:

Public Comment Postings (12 Nov. 2010-15 Jan. 2011). The full text of the comments may be found at <http://www.icann.org/en/topics/new-gtlds/comments-5-en.htm>.

GENERAL COMMENTS

Support for New gTLD Program

Key Points

- Supporters have argued, in general, that New gTLDs promote, competition, consumer choice, innovation and can help new businesses grow.
- Other supporters argue that while not perfect, the current proposed final AG is robust enough to support the launch of the new gTLD application process. The elements that still cause concern can be fixed within the proposed schedule.

Summary of Comments

One of ICANN's core principles is to bring competition to the registry space. New TLDs will bring innovation, consumer choice, and lower prices. Five years ago the battle was fought--the anti-TLD community lost and the vast majority of the community reached consensus that new TLDs should be introduced. The ICANN Board—with the GAC at its side—announced its approval in June 2008, which was the correct decision. The anti-TLD forces have been attempting to prevent the communities' will, consumer choice and innovation and it is no surprise that they are firing their last shots on the eve of final approval. Their efforts should be rebuffed. ICANN's implementation plan has taken into account the multitude of inputs from scores of individuals and entities. ICANN has made countless changes to the guidebook in the process and has explained its decisions along the way. Just because an input was disagreed with does not mean that it was ignored. How many economic studies are needed to show that there is demand for new TLDs? Perhaps the real life experience of a half-million .co names in three months is sufficient evidence. It is time to move on with the process--the Guidebook is ready to go and we have all waited far too long. *D. Schindler (5 Dec. 2010)*.

While not perfect, the current proposed final AG is robust enough to support the launch of the new gTLD application process. The AG will evolve as the process moves forward.

It is time to put it to the test by approving the AG so we can move forward with the proposed timeline ICANN has set for the new gTLD launch which will create more competition in the market and greater benefits to consumers. *Network Solutions (8 Dec. 2010)*. *Demand Media (8 Dec. 2010)*. *AFNIC (9 Dec. 2010)*. *AusRegistry (9 Dec. 2010)*. *Domain Dimensions (9 Dec. 2010)*.

The NCUC supports prompt commencement of the application program for new gTLDs. The elements that still cause concern (e.g. IO) can be fixed within the proposed schedule. *NCUC (10 Dec. 2010)*.

It is time to put the demand to prove the unpredictable to rest and allow innovation and progress to flourish. At ICANN meetings policy based on consensus position is developed. Yet for the last two years we have heard a few self-protectionist opponents demand study after study that will prove the consumer need for innovation. In response many analogies have been expressed. Did the Wright Brothers do market studies to get a solid number on the demand to fly from consumers? Looking back, would that study have been accurate? How about the innovations to the bicycle? The consumer "need" for the iPhone? Juan Calle, president of .co said "With the new domain extensions, creativity can live to the right of the dot. Registries will have to innovate to stay alive." *E. Pruis (6 Dec. 2010)*.

RySG supports the introduction of new gTLDs and believes the time has come to introduce further competition into the marketplace. RySG does believe certain issues it highlights in its comments need to be resolved and hopes that ICANN provides the latitude to allow further amendment to the AG even beyond the Cartagena meeting if necessary. RySG is ready to engage with ICANN Staff to ensure resolution of these items with no impact on the projected timetable for the new gTLD round. Use of the "TDG" legal group may be the appropriate forum to resolve these issues in a timely fashion. *RySG (7 Dec. 2010)*.

New gTLDs are a platform for innovation. This change will benefit individual users and especially large brands on a scale not previously seen in the DNS. Brand owners will be the biggest beneficiaries; they will use their own top level domain to manage their Internet presence. When users grow to expect to find Internet resources at ".company" the need for brand protection and the opportunity for user confusion will be greatly diminished. We also should think in terms of how a large number of domains in the aggregate will provide competition for .com. This issue cannot be understood by studying the extremely limited TLD introductions of the past. *Tucows (8 Dec. 2010)*.

Overall, it has been established that external benefits of the gTLD program exceed its external costs. For each new gTLD individually the right thing to do is to focus preventive action on the cases where external costs will occur. It is wrong to stop the entire gTLD program because of concern about externalities from some potential gTLDs. *W. Staub (10 Dec. 2010)*. *F. Krueger (10 Dec. 2010)*.

ICANN should move ahead with the new gTLD program so that the benefits of Internet connectivity can be expanded to places such as Africa. There are powerful and compelling reasons for Africa to need the .africa gTLD and now is the time for this opportunity to happen. *DotConnectAfrica (13 Dec. 2010)*.

New gTLDs will create innovation and create a multitude and variety of jobs, all of which will create competition. New gTLDs will also bring more security to the Internet through the requirement to utilize DNSSEC. Please do not allow any further delay. Begin the communications period so people can get to work. *E. Pruis (6 Jan. 2011)*.

New gTLDs should proceed without delay, as they will bring innovation and many benefits. In particular they will bring about “cause based TLDs” –ie. those TLDs that will benefit the greater and global public good. *DotGreen (9 Jan. 2011)*.

Opposition to New gTLD Program

Key Points

- Critics have argued that the program does not serve the public interest, the risks outweigh the benefits and ICANN lacks sufficient public support. Some also oppose the introduction of an “unlimited” number of TLDs.
- Other critics express concern that the critical overarching issues, including among other things a failure to include strong trademark protections has not been fully addressed.

Summary of Comments

ICANN in pursuing the new gTLD program is acting against the broader public interest and only in the interests of itself and a small number of “insiders” who would directly profit from short term schemes that threaten the long term stability of the Internet naming system and that impose externalities on third parties (via increased confusion and defensive registration costs). “Innovation” from new gTLDs is a myth. The public has not been clamoring for new TLDs. The past new TLDs (e.g., .name, .asia, .jobs, .travel) were failures for the public. ICANN needs to go back and consider proposals such as the competitive bidding concept recommended by the DOJ (i.e., tender processes for operation of new TLDs for fixed terms at the lowest possible cost to consumers), or our suggestion of “Ascended TLDs” which uses the legal concept of easements to ensure fair allocation of new TLDs taking into full account the existing property rights of domain registrants. *G. Kirikos (13 Nov. 2010)*. *G. Kirikos (24 Nov. 2010)*. *AIPLA (6 Dec. 2010)*.

ICANN and its Board need to get things right and stop gambling with the future of the DNS. ICANN needs to stop acting like a startup trying to make commercial gains for itself, and remember that it was created to serve the public interest. There has been talk



Applicant Guidebook

April 2011 Discussion Draft Module 6

Please note that this is a discussion draft only. Potential applicants should not rely on any of the proposed details of the new gTLD program as the program remains subject to further consultation and revision.

15 April 2011

Module 6

Top-Level Domain Application - Terms and Conditions

By submitting this application through ICANN's online interface for a generic Top Level Domain (gTLD) (this application), applicant (including all parent companies, subsidiaries, affiliates, agents, contractors, employees and any and all others acting on its behalf) agrees to the following terms and conditions (these terms and conditions) without modification. Applicant understands and agrees that these terms and conditions are binding on applicant and are a material part of this application.

1. Applicant warrants that the statements and representations contained in the application (including any documents submitted and oral statements made and confirmed in writing in connection with the application) are true and accurate and complete in all material respects, and that ICANN may rely on those statements and representations fully in evaluating this application. Applicant acknowledges that any material misstatement or misrepresentation (or omission of material information) may cause ICANN and the evaluators to reject the application without a refund of any fees paid by Applicant. Applicant agrees to notify ICANN in writing of any change in circumstances that would render any information provided in the application false or misleading.
2. Applicant warrants that it has the requisite organizational power and authority to make this application on behalf of applicant, and is able to make all agreements, representations, waivers, and understandings stated in these terms and conditions and to enter into the form of registry agreement as posted with these terms and conditions.
3. Applicant acknowledges and agrees that ICANN has the right to determine not to proceed with any and all applications for new gTLDs, and that there is no assurance that any additional gTLDs will be created. The decision to review and consider an application to establish one or more gTLDs is entirely at ICANN's discretion. ICANN reserves the right to



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reject any application that ICANN is prohibited from considering under applicable law or policy, in which case any fees submitted in connection with such application will be returned to the applicant.

4. Applicant agrees to pay all fees that are associated with this application. These fees include the evaluation fee (which is to be paid in conjunction with the submission of this application), and any fees associated with the progress of the application to the extended evaluation stages of the review and consideration process with respect to the application, including any and all fees as may be required in conjunction with the dispute resolution process as set forth in the application. Applicant acknowledges that the initial fee due upon submission of the application is only to obtain consideration of an application. ICANN makes no assurances that an application will be approved or will result in the delegation of a gTLD proposed in an application. Applicant acknowledges that if it fails to pay fees within the designated time period at any stage of the application review and consideration process, applicant will forfeit any fees paid up to that point and the application will be cancelled. Except as expressly provided in this Application Guidebook, ICANN is not obligated to reimburse an applicant for or to return any fees paid to ICANN in connection with the application process.
5. Applicant shall indemnify, defend, and hold harmless ICANN (including its affiliates, subsidiaries, directors, officers, employees, consultants, evaluators, and agents, collectively the ICANN Affiliated Parties) from and against any and all third-party claims, damages, liabilities, costs, and expenses, including legal fees and expenses, arising out of or relating to: (a) ICANN's [or an ICANN Affiliated Party's](#) consideration of the application, and any approval or rejection of the application; and/or (b) ICANN's [or an ICANN Affiliated Party's](#) reliance on information provided by applicant in the application.
6. Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are

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in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. 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. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD. PROVIDED, 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. APPLICANT ACKNOWLEDGES THAT ANY ICANN AFFILIATED PARTY IS AN EXPRESS THIRD PARTY BENEFICIARY OF THIS SECTION 6 AND MAY ENFORCE EACH PROVISION OF THIS SECTION 6 AGAINST APPLICANT.

7. Applicant hereby authorizes ICANN to publish on ICANN's website, and to disclose or publicize in any other manner, any materials submitted to, or obtained or generated by, ICANN and the ICANN Affiliated Parties in connection with the application, including evaluations, analyses and any other materials prepared in connection with the evaluation of the application; provided, however, that information will not be disclosed or published to the extent that this Applicant Guidebook expressly

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states that such information will be kept confidential, except as required by law or judicial process. Except for information afforded confidential treatment, applicant understands and acknowledges that ICANN does not and will not keep the remaining portion of the application or materials submitted with the application confidential.

8. Applicant certifies that it has obtained permission for the posting of any personally identifying information included in this application or materials submitted with this application. Applicant acknowledges that the information that ICANN posts may remain in the public domain in perpetuity, at ICANN's discretion.
9. Applicant gives ICANN permission to use applicant's name in ICANN's public announcements (including informational web pages) relating to Applicant's application and any action taken by ICANN related thereto.
10. Applicant understands and agrees that it will acquire rights in connection with a gTLD only in the event that it enters into a registry agreement with ICANN, and that applicant's rights in connection with such gTLD will be limited to those expressly stated in the registry agreement. In the event ICANN agrees to recommend the approval of the application for applicant's proposed gTLD, applicant agrees to enter into the registry agreement with ICANN in the form published in connection with the application materials. (Note: ICANN reserves the right to make reasonable updates and changes to this proposed draft agreement during the course of the application process, including as the possible result of new policies that might be adopted during the course of the application process). Applicant may not resell, assign, or transfer any of applicant's rights or obligations in connection with the application.
11. Applicant authorizes ICANN to:
 - a. Contact any person, group, or entity to request, obtain, and discuss any documentation or other information that,

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- in ICANN's sole judgment, may be pertinent to the application;
- b. Consult with persons of ICANN's choosing regarding the information in the application or otherwise coming into ICANN's possession, provided, however, that ICANN will use reasonable efforts to ensure that such persons maintain the confidentiality of information in the application that this Applicant Guidebook expressly states will be kept confidential.
12. For the convenience of applicants around the world, the application materials published by ICANN in the English language have been translated into certain other languages frequently used around the world. Applicant recognizes that the English language version of the application materials (of which these terms and conditions is a part) is the version that binds the parties, that such translations are non-official interpretations and may not be relied upon as accurate in all respects, and that in the event of any conflict between the translated versions of the application materials and the English language version, the English language version controls.

EXHIBIT D

21 February 2011
DRAFT

ICANN Board-GAC Consultation: "Legal Recourse" for New gTLD Registry Applicants

EXPLANATION OF ISSUE/HISTORY

The following is background on the issue of "legal recourse" for new gTLD applicants, which is one of the issues identified by the GAC for the forthcoming Board-GAC consultation on new gTLDs.

The GAC's Comments on v4 of the Draft Applicant Guidebook (23 September 2010) noted, "The GAC supports a framework whereby applicants can legally challenge any decision made by ICANN with respect to the application. The GAC believes therefore that the denial of any legal recourse as stated in Module 6 of the DAG under item 6 is inappropriate. The GAC cannot accept any exclusion of ICANN's legal liability for its decisions and asks that this statement in the DAG be removed accordingly." <<http://www.icann.org/en/correspondence/dryden-to-dengate-thrush-23sep10-en.pdf>>

This appears to be a new issue that has not been raised in previous GAC communiqués, even though the legal release language is essentially the same since the first draft applicant guidebook published in 2008 <<http://www.icann.org/en/topics/new-gtlds/terms-24oct08-en.pdf>>. Two years ago (in February 2009), seven words ("IN COURT OR ANY OTHER JUDICIAL FORA") were added to make it clear that the release only applied to challenges in court <<http://www.icann.org/en/topics/new-gtlds/draft-terms-redline-18feb09-en.pdf>>. In other words, applicants would agree not to sue ICANN, but would still have access to the avenues for review built in to the new gTLD application process, as well as ICANN's existing accountability mechanisms: ombudsman, reconsideration, and independent review. Additional mechanisms may result from the consideration and implementation of the recommendations of the Accountability and Transparency Review Team.

REMAINING AREAS OF DIFFERENCE

The GAC requests that ICANN remove language for the Applicant Terms and Conditions that (paraphrasing) the Applicant agrees not to challenge in court final decisions made by ICANN with respect to the application and the Applicant waives the right to sue ICANN with respect to the application. ICANN has declined this request, stating (among other things) it would be an inappropriate risk for ICANN to undertake.

ICANN Response to GAC on "Legal Recourse" for New gTLD Registry Applicants

In the letter from Peter Dengate Thrush to Heather Dryden (23 November 2010) "Response to GAC Comments on New gTLDs and DAGv4" <<http://icann.org/en/minutes/resolutions-25sep10-en.htm> - 2.10>, the ICANN Chairman noted that:

As stated earlier in this letter, one of the guiding principles in developing the Applicant Guidebook has been to address and mitigate risks and costs to ICANN and the global Internet community.

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ICANN reaffirms its commitment to be accountable to the community for operating in a manner that is consistent with ICANN's Bylaws, including ICANN's Core Values such as "making decisions by applying documented policies neutrally and objectively, with integrity and fairness." The Board does not believe however that ICANN should expose itself to costly lawsuits any more than is appropriate.

The new gTLD process has been carefully designed over several years with multiple opportunities for public comment in order to develop a well-documented process that can be operated neutrally and objectively to the maximum extent feasible, and with integrity and fairness. Also, all of ICANN's standard accountability and review mechanisms will be available to all participants and affected parties in the new gTLD process, including ICANN's reconsideration process, independent review, and the ICANN Ombudsman.

Based on the above, in Trondheim, the Board resolved that, "The Board approves the inclusion of a broad waiver and limitation of liability in the application terms and conditions."

ICANN is a non-profit public benefit corporation and lacks the resources to defend against potentially numerous lawsuits in jurisdictions all over the world initiated by applicants that might want to challenge the results of the community-designed new gTLD application process. ICANN anticipates that, absent the broad waiver and limitation of liability in the application terms and conditions, rejected or unsuccessful applicants could initiate frivolous and costly legal actions in an attempt to challenge legitimate ICANN decisions, and possibly delay further the successful rollout of the new gTLD program. Accordingly, ICANN has carefully considered how to protect the new gTLD program from such challenges. The release from such potential claims was deemed appropriate in light of these considerations.

ICANN has surveyed multiple jurisdictions including outside the U.S., and is not aware of any law prohibiting the inclusion of such a waiver in a contract. Further, such a waiver is consistent with competition laws since it does not have the effect of excluding competition; the release simply limits the recourses available to one of the contracting parties. As noted above however, all internal ICANN accountability and review processes will remain available to applicants. ICANN will review whether further changes to the wording of the terms and conditions are necessary to clarify that internal review mechanisms will be available to applicants.

Under its Bylaws, ICANN's actions are subject to numerous transparency, accountability and review safeguards, and are guided by core values including "making decisions by applying documented policies neutrally and objectively, with integrity and fairness", but it would not be feasible for ICANN to subject itself to unlimited exposure to legal actions from potential unsuccessful applicants.

RELEVANT GUIDEBOOK SECTIONS

The following is the wording of the legal release provision in the most recent several drafts:

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"Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. 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. APPLICANT ACKNOWLEDGES AND ACCEPTS THAT APPLICANT'S NONENTITLEMENT TO PURSUE ANY RIGHTS, REMEDIES, OR LEGAL CLAIMS AGAINST ICANN OR THE ICANN AFFILIATED PARTIES IN COURT OR ANY OTHER JUDICIAL FORA WITH RESPECT TO THE APPLICATION SHALL MEAN THAT APPLICANT WILL FOREGO ANY RECOVERY OF ANY APPLICATION FEES, MONIES INVESTED IN BUSINESS INFRASTRUCTURE OR OTHER STARTUP COSTS AND ANY AND ALL PROFITS THAT APPLICANT MAY EXPECT TO REALIZE FROM THE OPERATION OF A REGISTRY FOR THE TLD."

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REFERENCE DOCUMENTS: LEGAL RECOURSE FOR APPLICANTS

- **CHRONOLOGICAL LISTING OF GAC ADVICE AND COMMENTS ON NEW GTLDS AND RESPONSES PROVIDED BY ICANN AND KEY DOCUMENTS PUBLISHED ON THE TOPICS**

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GAC Advice and Comments	ICANN responses and key documents
<p>10 March 2009: Comments on V1 of Applicant Guidebook</p>	<p>24 October 2008: Applicant Guidebook Version 1 http://www.icann.org/en/topics/new-gtlds/draft-rfp-24oct08-en.pdf</p> <p>18 February 2009, version 1 Public Comments Analysis Report http://www.icann.org/en/topics/new-gtlds/agv1-analysis-public-comments-18feb09-en.pdf</p>
	<p>18 February 2009: Applicant Guidebook Version 2 http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-18feb09-en.pdf</p> <p>31 May 2009, Summary and analysis of public comments on version 2 http://www.icann.org/en/topics/new-gtlds/agv2-analysis-public-comments-31may09-en.pdf</p>
	<p>28 May 2010: Applicant Guidebook Version 4 http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-28may10-en.pdf</p> <p>12 November 2010: Summary and analysis of comments version 4 http://www.icann.org/en/topics/new-gtlds/summary-analysis-agv4-12nov10-en.pdf</p>
<p>23 September 2010: Comments on V4 of Applicant Guidebook</p> <p>The GAC supports a framework whereby applicants can legally challenge any decision made by ICANN with respect to the application. The GAC believes therefore that the denial of any legal recourse as stated in Module 6 of the DAG under item 6 is inappropriate. The GAC cannot accept any exclusion of ICANN's legal liability for its decisions and asks that this statement in the DAG be removed accordingly.</p>	<p>23 November 2010: Reply from ICANN Chairman http://www.icann.org/en/correspondence/dengate-thrush-to-dryden-23nov10-en.pdf</p> <p>As stated earlier in this letter, one of the guiding principles in developing the Applicant Guidebook has been to address and mitigate risks and costs to ICANN and the global Internet community.</p> <p>ICANN reaffirms its commitment to be accountable to the community for operating in a manner that is consistent with ICANN's Bylaws, including ICANN's Core Values such as "making decisions by applying documented policies neutrally and objectively, with integrity and fairness." The Board does not believe however that ICANN should expose itself to costly lawsuits any more than is appropriate.</p>

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	<p>The new gTLD process has been carefully designed over several years with multiple opportunities for public comment in order to develop a well-documented process that can be operated neutrally and objectively to the maximum extent feasible, and with integrity and fairness. Also, all of ICANN's standard accountability and review mechanisms will be available to all participants and affected parties in the new gTLD process, including ICANN's reconsideration process, independent review, and the ICANN Ombudsman.</p> <p>Based on the above, in Trondheim, the Board resolved that, "The Board approves the inclusion of a broad waiver and limitation of liability in the application terms and conditions.</p>
	<p>25 September 2010: Board meeting in Trondheim http://www.icann.org/en/minutes/resolutions-25sep10-en.htm</p> <p>Board Briefing Materials: One [PDF, 3.23 MB] Two [PDF, 2.03 MB] Three [PDF, 816 KB] Four [PDF, 240 KB] Five [PDF, 546 KB]</p> <p>"... Whereas, on 23 September 2010, the Governmental Advisory Committee (GAC) provided comments on version 4 of the draft Applicant Guidebook. Resolved (2010.09.25.___), staff is directed to determine if the directions indicated by the Board below are consistent with GAC comments, and recommend any appropriate further action in light of the GAC's comments."</p> <p>Role of the Board The Board intends to approve a standard process for staff to proceed to contract execution and delegation on applications for new gTLDs where certain parameters are met. Examples of such parameters might include: (1) the application criteria were met, (2) no material exceptions to the form agreement terms, and (3) an independent confirmation that the process was followed. The Board reserves the right under exceptional circumstances to individually</p>

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	<p>consider an application for a new gTLD to determine whether approval would be in the best interest of the Internet community, for example, as a result of the use of an ICANN accountability mechanism. The Board approves the inclusion of a broad waiver and limitation of liability in the application terms and conditions.</p>
	<p>12 November 2010: Proposed Final Applicant Guidebook http://www.icann.org/en/topics/new-gtlds/draft-rfp-clean-12nov10-en.pdf</p>
<p>9 December 2010: Communiqué Cartagena That the GAC will provide the Board at the earliest opportunity with a list or "scorecard" of the issues which the GAC feels are still outstanding and require additional discussion between the Board and the GAC. These include:</p> <ul style="list-style-type: none"> • Legal recourse for applicants; 	<p>10 December 2010, Board meeting</p> <p>New gTLD Remaining Issues http://www.icann.org/en/minutes/resolutions-10dec10-en.htm#2</p> <p>Resolved (2010.12.10.21), the Board:</p> <ol style="list-style-type: none"> 1. Appreciates the GAC's acceptance of the Board's invitation for an inter-sessional meeting to address the GAC's outstanding concerns with the new gTLD process. The Board anticipates this meeting occurring in February 2011, and looks forward to planning for this meeting in consultation and cooperation with the GAC, and to hearing the GAC's specific views on each remaining issue. 2. Directs staff to make revisions to the guidebook as appropriate based on the comments received during the public comment period on the Proposed Final Applicant Guidebook and comments on the New gTLD Economic Study Phase II Report. 3. Invites the Recommendation 6 Community Working Group to provide final written proposals on the issues identified above by 7 January 2011, and directs staff to provide briefing materials to enable the Board to make a decision in relation to the working group's recommendations. 4. Notes the continuing work being done by the Joint Applicant Support Working Group, and reiterates the Board's 28 October 2010 resolutions of thanks and encouragement. 5. Directs staff to synthesize the results of these consultations and comments, and to prepare revisions to the guidebook to enable the Board to make a decision on the launch of the new gTLD program as soon as possible. 6. Commits to provide a thorough and reasoned explanation of ICANN

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	<p>decisions, the rationale thereof and the sources of data and information on which ICANN relied, including providing a rationale regarding the Board's decisions in relation to economic analysis.</p> <p>7. Thanks the ICANN community for the tremendous patience, dedication, and commitment to resolving these difficult and complex issues.</p>
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EXHIBIT E

Terms and Conditions (Module 6)

I. Key points

- It is unfair to applicants to allow ICANN to deny an application for any or no reason.

II. Summary of Comments

Fairness to applicants. ICANN has the option to unilaterally deny an application at any time, but it appears that if ICANN offers an applicant a Registry Agreement of ICANN's choice, the applicant must sign it and has no right to walk away for whatever reason. This seems unenforceable. *NCUC (13 April 2009)*. *S. Soboutipour (Module 6, 12 April 2009)*. *DotAfrica (Module 6, 13 April 2009)*. *L.Andreff (Module 6, 13 April 2009)*. *S. Subbiah (Module 6, 13 April 2009)*.

Specific comments on application terms and conditions. None of the matters INTA raised in Module 6 of version 1 were acted upon in version 2. INTA incorporates by reference its comments on Module 6, version 1 in their entirety and requests consideration of them by ICANN. Para. 1: oral statement must be confirmed in writing, and there should be a clear process for recording or documenting discussions outside the written application process; the phrase "reflect negatively" needs clarification/definition; Para 2: applicant must make full disclosure of all corporate relationships and any other gTLD applications, and a corporate entity should not be allowed to submit more than one application at a time for a particular gTLD; Para. 3: ICANN should be able to reject an application where the applicant intentionally submitted or provided fraudulent information, and no application refund should be issued. Para. 4: There should be notice and cure in the case where an applicant's fees are not received in a timely manner; a late fee should not be grounds for cancelling the application; Para. 6: ICANN has not justified the requirement that an applicant release ICANN from all claims and waive any rights to judicial action and review; this paragraph should be deleted and rewritten with appropriate limits on the release of ICANN from liability. Para. 7: Applicants should be notified before ICANN treats as "nonconfidential" information that the applicant submits as "confidential"; Para. 8: ICANN should require the applicant to keep its personal identifying information current and up to date, with updates required within a reasonable period of time after information has changed. Para. 9: ICANN should not have perpetual, unlimited rights to use an applicant's name and/or logo in ICANN public announcements; the right to use should be limited to announcements relating exclusively to the applicant's application. *INTA (8 April 2009)*.

Application terms and conditions suggestions. In provision 1 add the qualifier "to the best of applicant's knowledge"; and amend phrase to read "or willful omission of material information"; provision 6, release of claims against ICANN, is overreaching and inappropriate unless it is amended to include some exceptions for acts of negligence and misconduct on the

*Analysis of Public Comment of the New gTLD Application Guidebook Version 2
May 2009*

part of ICANN or its affiliated parties.; provision 11b should be amended to exclude any part of the application designated by the applicant as “confidential” without the express written permission of the applicant. *Go Daddy (13 April 2009)*.

Application procedure—limited rights. Applicants are strongly limited in their rights by agreeing with the application procedure. This is in conflict with the goal to create a clear, uncontested procedure for gTLD applications, since the final outcome of the procedure is at ICANN’s sole discretion. *SIDN (14 April 2009)*.

Applicant’s permission to ICANN (paragraph 9). This should be limited to use of the Applicant’s name in ICANN public announcements relating solely to that Applicant. ICANN must obtain specific permission from an Applicant to use its logo. *Microsoft (Guidebook, 13 April 2009)*.

Confidential information. Will ICANN treat as confidential applicant material that is clearly and separately marked as confidential (please answer Yes or No)? *NCUC (13 April 2009)*. *A. Sozonov (Module 6, 9 April 2009)*. *Association Uninet (Module 6, 11 April 2009)*. *S. Soboutipour (Module 6, 12 April 2009)*. *DotAfrica (Module 6, 12 April 2009)*. *L. Andreff (Module 6, 13 April 2009)*. *S. Subbiah (Module 6, 13 April 2009)*. Microsoft supports the version 2 position that applicant response to security and financial questions will be considered confidential and will not be posted. *Microsoft (Guidebook, 13 April 2009)*.

ICANN exclusion of liability. The exclusion of ICANN liability in clause 6 of the Terms and Conditions provides no leverage to applicants to challenge ICANN’s determinations to a recognized legal authority. If ICANN or the applicant engaged in questionable behavior then legal recourse and investigation should remain open. *NCUC (13 April 2009)*. *A. Sozonov (Module 6, 9 April 2009)*. *S. Soboutipour (Module 6, 12 April 2009)*. *Association Uninet (Module 6, 11 April 2009)*. *DotAfrica (Module 6, 12 April 2009)*. *L. Andreff (Module 6, 13 April 2009)*. *S. Subbiah (Module 6, 13 April 2009)*. *D. Allen (Module 6, 13 April 2009)*. The covenant not to challenge and waiver in Paragraph 6 is overly broad, unreasonable, and should be revised in its entirety. *Microsoft (Guidebook, 13 April 2009)*.

III. Analysis and Proposed Position

Prospective applicants cannot appropriately be offered any reassurances that ICANN will enter into a registry agreement with them, otherwise this undermines the purpose and intent of a rigorous application review. Further, ICANN must retain this right to evaluate applicants up to the point of entry into a registry agreement. Under its Bylaws ICANN's actions are subject to numerous transparency, accountability and review safeguards, and are guided by core values including "Making decisions by applying documented policies neutrally and objectively, with integrity and fairness", but it would not be feasible for ICANN to subject itself to unlimited exposure to lawsuits from potential unsuccessful applicants. The other specific comments and suggestions on the application terms and conditions will be considered by ICANN in the preparation of version 3 of the Applicant Guidebook.

EXHIBIT F

3/14/2016

Resources - ICANN

[English \(/translations\)](#) [العربية \(/ar\)](#) [Español \(/es\)](#)[Français \(/fr\)](#) [Русский \(/ru\)](#) [中文 \(/zh\)](#)[Log In \(/users/sign_in\)](#) [Sign Up \(/users/sign_up\)](#)

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Resources

Adopted Board Resolutions

- ▶ [About ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)

[\(/resources/pages/welcome-2012-02-25-en\)](#)

25 Sep 2010

Trondheim, Norway

- ▶ [Board \(/resources/pages/board-of-directors-2014-03-19-en\)](#)

- ▶ [Accountability \(/resources/accountability\)](#)

- ▶ [Governance \(/resources/pages/governance-2012-02-25-en\)](#)

- ▶ [Groups \(/resources/pages/groups-2012-02-06-en\)](#)

[Business \(/resources/pages/business\)](#)

- ▶ [Contractual](#)

1. [New gTLD \(generic Top Level Domain\) Program Budget](#)2. [New gTLDs – Directions for Next Applicant Guidebook](#)2.1. [Geographic Names](#)2.2. [New gTLD \(generic Top Level Domain\) Applicant Support](#)2.3. [Root Zone \(Root Zone\) Scaling](#)2.4. [String Similarity](#)2.5. [Variant Management](#)2.6. [Trademark Protection](#)2.7. [Role of the Board](#)2.8. [Mitigating Malicious Conduct](#)2.9. [GNSO \(Generic Names Supporting Organization\) New gTLD \(generic Top Level Domain\) Recommendation 6 Objection Process](#)2.10. [Registrar Agreement](#)

<p>Compliance (/resources/pages/compliance-2012-02-25-en)</p>	<p>2.11. <u>Vertical Integration</u></p>
<p>▶ Registrars (/resources/pages/registrars-0d-2012-02-25-en)</p>	<p>3. <u>Data and Consumer Protection Working Group</u></p>
<p>▶ Registries (/resources/pages/registries-46-2012-02-25-en)</p>	<p>4. <u>Board Global Relationships Committee</u></p> <p>5. <u>Nominating Committee Chair</u></p> <p>6. <u>March 2011 International Public Meeting</u></p> <p>7. <u>Appointment of Akram Atallah as Chief Operating Officer</u></p>
<p>Operational Metrics (/resources/pages/metrics-gdd-2015-01-30-en)</p>	<p>1. <u>New gTLD (generic Top Level Domain) Program Budget</u></p> <p>Whereas, the Board Finance Committee considered the New gTLD (generic Top Level Domain) Deployment Budget at its meeting on 20 September 2010 and unanimously recommended that the Board adopt the Deployment Budget <http://www.icann.org/en/topics/new-gtlds/explanatory-memo-new-gtld-program-budget-22oct10-en.pdf (/en/topics/new-gtlds/explanatory-memo-new-gtld-program-budget-22oct10-en.pdf)>.</p> <p>Whereas, the Board considered and discussed the New gTLD (generic Top Level Domain) Application Processing Budget at its 24-25 September 2010 retreat in Trondheim, Norway.</p> <p>Resolved (2010.09.25.01), that the New gTLD (generic Top Level Domain) Deployment Budget and the New gTLD (generic Top Level Domain) Application Processing Budgets are approved. The Deployment Budget is to be released in order to enable the launch of the program on a timely basis upon Board approval of the Applicant Guidebook. The Application Processing budget should be released upon the approval of the final Applicant Guidebook.</p>
<p>▶ Identifier Systems Security, Stability (Security, Stability and Resiliency) and Resiliency (IS-SSR) (/resources/pages/is-ssr-2014-11-24-en)</p>	<p>2. <u>New gTLDs – Directions for Next Applicant Guidebook</u></p> <p>Whereas, ICANN (Internet Corporation for Assigned Names and Numbers)'s primary mission is to coordinate, at the overall level, the global Internet's systems of unique identifiers, and in particular to ensure the stable and secure operation of the Internet's unique identifier systems.</p> <p>Whereas, ICANN (Internet Corporation for Assigned Names and Numbers)'s Core Values include "depending on market mechanisms to promote and sustain a competitive environment" where feasible and appropriate, and "introducing and promoting competition in the registration of domain names where practicable and beneficial in the public interest."</p>
<p>▶ ccTLDs (/resources/pages/cctlds-21-2012-02-25-en)</p>	<p>Whereas, in June 2008, the ICANN (Internet Corporation for Assigned Names and</p>
<p>▶ Internationalized Domain Names (/resources/pages/idn-2012-02-25-en)</p>	<p>Whereas, in June 2008, the ICANN (Internet Corporation for Assigned Names and</p>
<p>▶ Universal Acceptance Initiative (/resources/pages/universal-acceptance-2012-02-25-en)</p>	<p>Whereas, in June 2008, the ICANN (Internet Corporation for Assigned Names and</p>
<p>▶ Policy (/resources/pages/policy-01-2012-02-25-en)</p>	<p>Whereas, in June 2008, the ICANN (Internet Corporation for Assigned Names and</p>
<p>▶ Public Comment (/public-comments)</p>	<p>Whereas, in June 2008, the ICANN (Internet Corporation for Assigned Names and</p>
<p>▶ Technical Functions (/resources/pages/technical-functions-2015-10-15-en)</p>	<p>Whereas, in June 2008, the ICANN (Internet Corporation for Assigned Names and</p>
<p>▶ Contact</p>	<p>Whereas, in June 2008, the ICANN (Internet Corporation for Assigned Names and</p>

(/resources/pages/contact-2012-02-06-en)

▶ Help
(/resources/pages/help-2012-02-03-en)

Numbers) Board adopted the GNSO (Generic Names Supporting Organization) policy recommendations for the introduction of new gTLDs <<http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm> (<http://gnso.icann.org/issues/new-gtlds/pdp-dec05-fr-parta-08aug07.htm>)>, and directed staff to develop detailed implementation plans in communication with the community.

Whereas, one of the goals of the New gTLD (generic Top Level Domain) program is to establish a clear and predictable process.

Whereas, ICANN (Internet Corporation for Assigned Names and Numbers) seeks to mitigate risks and costs to ICANN (Internet Corporation for Assigned Names and Numbers) and the broader Internet community to the extent possible.

Whereas, meeting these goals require tradeoffs and balancing of competing interests.

Whereas, in Brussels the ICANN (Internet Corporation for Assigned Names and Numbers) Board resolved <<http://www.icann.org/en/minutes/resolutions-25jun10-en.htm#11> ([/en/minutes/resolutions-25jun10-en.htm#11](http://www.icann.org/en/minutes/resolutions-25jun10-en.htm#11))> to dedicate its retreat scheduled for 24-25 September for the consideration of all the outstanding issues relating to the implementation of the New gTLD (generic Top Level Domain) program.

Whereas, the Board held a retreat in Trondheim, Norway on 24-25 September 2010, and talked through the outstanding issues relating to the implementation of the New gTLD (generic Top Level Domain) program in order to identify potential ways forward.

Whereas, the Board has identified certain directions to the CEO regarding items for inclusion in the forthcoming version of the Applicant Guidebook for the New gTLD (generic Top Level Domain) program.

Whereas, the forthcoming version of the Applicant Guidebook will be posted for public comment, and ICANN (Internet Corporation for Assigned Names and Numbers) will take into consideration all public comments before making final decisions on all these remaining issues by approving the final version of the Applicant Guidebook.

Whereas, on 23 September 2010, the Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) provided comments on version 4 of the draft Applicant Guidebook.

Resolved (2010.09.25.02), staff is directed to determine if the directions indicated by the Board below are consistent with GAC (Governmental Advisory Committee) comments, and recommend any appropriate further action in light of the GAC (Governmental Advisory Committee)'s comments.

Resolved (2010.09.25.03), the Board gives the CEO the following directions relating to the forthcoming version of the Applicant Guidebook for new gTLDs, which is intended to be posted for public comment before the ICANN (Internet Corporation for Assigned Names and Numbers) meeting in Cartagena in December 2010:

2.1 Geographic Names

Sub-national place names: Geographic names protection for ISO (International Organization for Standardization) 3166-2 names should not be expanded to include translations. Translations of ISO (International Organization for Standardization) 3166-2 list entries can be protected through community objection process rather than as geographic labels appearing on an authoritative list.

Continents and UN Regions: The definition of Continent or UN Regions in the Guidebook should be expanded to include UNESCO's regional classification list which comprises: Africa, Arab States, Asia and the Pacific, Europe and North America, Latin America and the Caribbean.

Governments that file objections should be required to cover costs of the objection process just like any other objector; the objection process will be run on a cost-recovery and loser-pays basis (so the costs of objection processes in which governments prevail will be borne by applicants). Also, the Board notes that the GAC (Governmental Advisory Committee) proposal for free government objections is not specific as to particular objection grounds or particular government objectors (for example whether both national and local government objectors would be covered).

2.2 New gTLD (generic Top Level Domain) Applicant Support

Support to applicants will generally include outreach and education to encourage participation across all regions, but any direct financial support for applicant fees must come from sources outside of ICANN (Internet Corporation for Assigned Names and Numbers).

Staff will publish a list of organizations that request assistance and organizations that state an interest in assisting with additional program development, for example pro-bono consulting advice, pro-bono in-kind support, or financial assistance so that those needing assistance and those willing to provide assistance can identify each other and work together.

Owing to the level of uncertainty associated with the launch of new gTLDs, the fee levels currently in the Applicant Guidebook will be maintained for all applicants.

2.3 Root Zone (Root Zone) Scaling

Real-world experience in root zone scaling has been gained as a result of the implementation of IPv6, DNSSEC (DNS Security Extensions) and IDNs (Internationalized Domain Names) and the hard work of RSSAC (Root Server System Advisory Committee) and SSAC (Security and Stability Advisory Committee) members in tackling the underlying stability question. Staff is directed to publish its analysis of the impact of IPv6, DNSSEC (DNS Security Extensions) and IDN deployment on the root zone so far.

Staff has also developed a model and a rationale for the maximum rate of applications that can be processed over the next few years. Staff is directed to publish this model and rationale and to seek Board support for the judgments embodied in this model, thereby providing a firm basis for limiting the rate of new delegations. Based on the discussions to date, this limit is expected to be in the range of 1,000 new delegations per year, with this number to be defined precisely in the publication.

The Board notes that an initial survey of root server operators' ability to support this rate of growth has been conducted successfully, and directs staff to revisit the estimate on a regular basis and consider whether a further survey should be repeated .

Further, ICANN (Internet Corporation for Assigned Names and Numbers) will periodically consult with root zone operators regarding a procedure to define, monitor and publish data on root zone stability. As part of the regular interaction with the root server operators, ICANN (Internet Corporation for Assigned Names and Numbers) will invite inputs from the root server operators and other interested parties regarding any signs of stress in the system and advice as to what actions or changes in process might be appropriate.

Finally, in the event that the number of applications exceeds the maximum rate, an objective method for determining the order of application processing that conforms to the limited delegation rate (not relying primarily on time-stamping) will be defined in the Applicant Guidebook.

2.4 String Similarity

Similar strings should not be delegated through the New gTLD (generic Top Level Domain) Program absent an in-depth policy examination of the issues, including a clear, enforceable set of operating rules to avoid possible user confusion. Community-suggested modifications raise a complex set of policy issues and cannot be considered as a straightforward implementation matter for the first round of applications. Further policy work in this area is encouraged.

2.5 Variant Management

No changes will be made to the next version of the Applicant Guidebook with respect to the handling of gTLDs containing variant characters. I.e., no variants of gTLDs will be delegated through the New gTLD (generic Top Level Domain) Program until appropriate variant management solutions are developed.

The recent delegation of Chinese-language ccTLDs does not yet provide a generally workable approach for gTLDs; there are serious limits to extending this approach at this time. ICANN (Internet Corporation for Assigned Names and Numbers) will coordinate efforts to develop long-term policy and technical development work on these issues.

The Board notes that the following scenarios are possible while evaluating variant

The Board notes that the following scenarios are possible while evaluating variant gTLD (generic Top Level Domain) strings:

1. Applicant submits a gTLD (generic Top Level Domain) string and indicates variants to this string. The applicant, if successful, will get the primary string. The indicated variant strings are noted for future reference, and these variant strings will not be delegated to the applicant; the applicant has no rights or claim to those strings. ICANN (Internet Corporation for Assigned Names and Numbers) may independently determine which strings are variants of each other, and will not necessarily acknowledge that the applicant's list of purported variants be treated as variants under the process.
2. Multiple applicants apply for strings that are variants of each other. They will be in contention.
3. Applicant submits a request for a string and does not indicate that there are variants. ICANN (Internet Corporation for Assigned Names and Numbers) will not identify variant strings unless scenario 2 above occurs.

The CEO is directed to develop (in consultation with the board ES-WG (Working Group)) an issues report identifying what needs to be done with the evaluation, possible delegation, allocation and operation of gTLDs containing variant characters IDNs (Internationalized Domain Names) as part of the new gTLD (generic Top Level Domain) process in order to facilitate the development of workable approaches to the deployment of gTLDs containing variant characters IDNs (Internationalized Domain Names). The analysis of needed work should identify the appropriate venues (e.g., ICANN (Internet Corporation for Assigned Names and Numbers), IETF (Internet Engineering Task Force), language community, etc.) for pursuing the necessary work. The report should be published for public review.

The CEO is directed to produce for the board by the next Board meeting (28 October 2010):

1. A Work plan for developing the issues report.
2. An identification of the skills and capabilities needed by ICANN (Internet Corporation for Assigned Names and Numbers) to complete the issues report and further develop ICANN (Internet Corporation for Assigned Names and Numbers)'s organizational ability to continue the strategic rollout of IDN TLDs.

2.6 Trademark Protection

Substantive Evaluation: The Applicant Guidebook will provide a clear description of "substantive evaluation" at registration, and retain the requirement for at least

substantive review of marks to warrant protection under sunrise services and utilization of the URS, both of which provide a specific benefit to trademark holders. Specifically, evaluation, whether at registration or by a validation service provider, is required on absolute grounds AND use of the mark.

Substantive evaluation upon trademark registration has essentially three requirements: (i) evaluation on absolute grounds - to ensure that the applied for mark can in fact serve as a trademark; (ii) evaluation on relative grounds - to determine if previously filed marks preclude the registration; and (iii) evaluation of use - to ensure that the applied for mark is in current use.

Substantive review by Trademark Clearinghouse validation service provider shall require: (i) evaluation on absolute grounds; and (ii) evaluation of use.

URS timing: In response to public comment, change the time to respond to a complaint from 20 days to 14 days , with one opportunity for an extension of seven days if there is a good faith basis for such an extension.

The Board notes that the suggestion for a globally-protected marks list (GPML) was not adopted by the Board (in 2009), including for the following reasons: it is difficult to develop objective global standards for determining which marks would be included on such a GPML, such a list arguably would create new rights not based in law for those trademark holders, and it would create only marginal benefits because it would apply only to a small number of names and only for identical matches of those names.

The Board recognizes that additional policy development through the GNSO (Generic Names Supporting Organization) could lead to further mechanisms for enhanced protection for trademarks.

2.7 Role of the Board

The Board intends to approve a standard process for staff to proceed to contract execution and delegation on applications for new gTLDs where certain parameters are met.

Examples of such parameters might include: (1) the application criteria were met, (2) no material exceptions to the form agreement terms, and (3) an independent confirmation that the process was followed.

The Board reserves the right under exceptional circumstances to individually consider an application for a new gTLD (generic Top Level Domain) to determine whether approval would be in the best interest of the Internet community, for example, as a result of the use of an ICANN (Internet Corporation for Assigned Names and Numbers) accountability mechanism. The Board approves the inclusion of a broad waiver and limitation of liability in the application terms and conditions.

2.8 Mitigating Malicious Conduct

While efforts to mitigate malicious conduct will continue, the implementation work completed to date by the community and staff to address the mitigation of malicious conduct issue is sufficient to proceed to launch the first New gTLD (generic Top Level

Domain) application round. The remaining issues should not delay launch with the following specific directives incorporated:

Background check: The background check should be clarified to provide detail and specificity in response to comment. The specific reference to terrorism will be removed (and the background check criteria will be revised). These clarifications regarding the background check criteria and process shall be included in the forthcoming version of the Applicant Guidebook.

Orphan glue records: Current provisions in the guidebook require each applicant to describe proposed measures for management and removal of orphan glue records for names removed from the zone. This requirement should remain in place, and will be adjusted if SSAC (Security and Stability Advisory Committee) makes a new recommendation in its report on this issue.

High Security (Security – Security, Stability and Resiliency (SSR))Zone (HSTLD) concept: The HSTLD concept is a voluntary concept being developed by a cross-stakeholder group including the financial services industry for use in TLDs wishing to provide services on a high-security basis. Thus, the development of the concept does not impact the launch of the gTLD (generic Top Level Domain) application process. Any publication of this concept will be shared freely with other organizations that might be interested in development of such a concept.

ICANN (Internet Corporation for Assigned Names and Numbers) will not be certifying or enforcing the HSTLD concept; ICANN (Internet Corporation for Assigned Names and Numbers) is supporting the development of a reference standard for industry that others may choose to use as a certification standard of their own. ICANN (Internet Corporation for Assigned Names and Numbers) will not endorse or govern the program, and does not wish to be liable for issues arising from the use or non-use of the standard.

2.9 GNSO (Generic Names Supporting Organization) New gTLD (generic Top Level Domain) Recommendation 6 Objection Process

The Board acknowledges receipt of the Rec6CWG report. This is a difficult issue, and the work of the community in developing these recommendations is appreciated. The Board has discussed this important issue for the past three years.

The Board agrees that ultimate responsibility for the new gTLD (generic Top Level Domain) program rests with the Board. The Board, however, wishes to rely on the determinations of experts regarding these issues.

The Board will accept the Rec6 CWG recommendations that are not inconsistent with the existing process, as this can be achieved before the opening of the first gTLD (generic Top Level Domain) application round, and will work to resolve any inconsistencies. Staff will consult with the Board for further guidance as required.

2.10 Registry Agreement

Required Notice and consent for increased or premium renewal prices: The current provision is necessary to protect registrants from predatory pricing upon renewals and the term should be retained.

Limitation of liability: The limitation of liability should remain as is. The remedies for registry operator are limited but appropriate given that ICANN (Internet Corporation for Assigned Names and Numbers) is a non-profit entity that cannot afford to be open to unlimited liability.

Collection of variable transaction fee from registries if registrars decline to pay ICANN (Internet Corporation for Assigned Names and Numbers) directly: The provision for the pass-through of fees is necessary to ensure that ICANN (Internet Corporation for Assigned Names and Numbers) receives adequate funding in the event that ICANN (Internet Corporation for Assigned Names and Numbers) accredited registrars (as a group) fail to approve the variable accreditation fees and should remain in the agreement.

Searchable Whois: Refer to the Board Data Consumer Protection Working Group to study issues and provide information to the Board relating to access and privacy to develop recommendations for possible inclusion in the forthcoming version of the applicant guidebook.

Indemnification of ICANN (Internet Corporation for Assigned Names and Numbers): The indemnification right should remain. ICANN (Internet Corporation for Assigned Names and Numbers) staff has invited the Registry Stakeholder Group to propose language more precisely defining the exceptions to registry operator's indemnification obligations for inclusion in the next version of the Draft Registry Agreement, and such a proposal should be considered for inclusion if received in a timely fashion.

2.11 Vertical Integration

The Board will send a letter to the GNSO (Generic Names Supporting Organization) requesting that the GNSO (Generic Names Supporting Organization) send to the Board, by no later than 8 October 2010, a letter (a) indicating that no consensus on vertical integration issues has been reached to date, or (b) indicating its documented consensus position. If no response is received by 8 October 2010, then the Board will deem lack of consensus and make determinations around these issues as necessary. At the time a policy conclusion is reached by the GNSO (Generic Names Supporting Organization), it can be included in the applicant guidebook for future application rounds.

3. Data and Consumer Protection Working Group

Whereas, the Board asked the Board Governance Committee (BGC) to make recommendations to the Board regarding establishment and membership of a working

group to address data and consumer protection issues (DCP-WG (Working Group)).

Whereas the BGC has recommended the establishment and membership of the DCP-WG (Working Group).

Resolved (2010.09.25.04), the Board hereby establishes the DCP-WG (Working Group), with its membership as follows: Harald Alvestrand, Dennis Jennings (Chair), Mike Silber, Bruce Tonkin, and Ram Mohan (non-voting member).

4. Board Global Relationships Committee

Whereas, the Board asked the Board Governance Committee (BGC) to make recommendations to the Board regarding the membership of a Board Global Relationships Committee (BGRC).

Whereas the BGC has recommend the membership of the BGRC.

Resolved (2010.09.25.05), the Board hereby sets the membership for the BGRC as follows: Peter Dengate-Thrush (chair), George Sadowsky, Jean-Jacques Subrenat, Katim Touray, Kuo-Wei Wu, Vanda Scartezini (non-voting member).

5. Nominating Committee Chair

Whereas the Board Governance Committee is tasked each year with recommending to the Board a candidate to serve as the Nominating Committee ("NomCom") Chair.

Whereas the BGC called for expressions of interest from all who would be interested in serving as the 2010-2011 NomCom Chair.

Whereas the BGC considered and discussed all legitimate expressions of interest.

Whereas the BGC recommends that the Board appoint Adam Peake as the 2010-2011 NomCom Chair.

Resolved (2010.09.25.06), that Adam Peake is appointed as Chair of the 2010-2011 NomCom, to serve until the conclusion of the ICANN (Internet Corporation for Assigned Names and Numbers) annual meeting in 2011, or until the Chair's earlier resignation, removal, or other disqualification from service.

6. March 2011 International Public Meeting

Whereas, the BFC reviewed the budget for the North America ICANN (Internet Corporation for Assigned Names and Numbers) meeting, compared it to prior meeting budgets, and recommend that the Board approve the budget not to exceed \$1.941 million.

Resolved (2010.09.25.07), the Board approves San Francisco, California as the location of the ICANN (Internet Corporation for Assigned Names and Numbers) 2011

3/14/2016

North America Meeting to be held from 13-18 March 2011, with a budget not to exceed US\$1.941M.

7. Appointment of Akram Atallah as Chief Operating Officer

Whereas, the attraction and retention of high calibre staff is essential to ICANN (Internet Corporation for Assigned Names and Numbers)'s operations and ICANN (Internet Corporation for Assigned Names and Numbers) desires to ensure competitive compensation for staff.

Whereas, Akram Atallah has been identified through a vigorous global search and senior management agrees that he is the right candidate to fill the role of Chief Operating Officer.

Whereas, independent market data provided by the outside compensation consultants indicates that the base compensation for a Chief Operating Officer would fall between [redacted] at the 50th percentile and [redacted] at the 75th percentile.

Whereas, independent market data provided by the outside compensation consultants indicates that the overall compensation for a Chief Operating Officer would fall between [redacted] at the 50th percentile and [redacted] at the 75th percentile. [redacted]

Whereas, the Compensation Committee has recommended that the Board appoint Akram Atallah as the Chief Operating Officer and approve the suggested compensation package.

Resolved (2010.09.25.08), the Board hereby appoints Akram Atallah as an Officer of the Company in the position of Chief Operating Officer effective 20 September 2010.

Resolved (2010.09.25.09), the Board authorizes a starting compensation package for Akram Atallah to consist of: (i) a base salary of \$350,000 USD per year; (ii) a bonus opportunity of 30% of base salary per year to be paid in a manner consistent with other U.S. based staff and in accordance with the company's bonus program; and (iii) the standard benefit programs made available to all other regular full time U.S. based staff.



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(<https://community.icann.org>)



3/14/2016

[ICANN Blog \(/news/blog\)](#)

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Learning (/en/about/learning)	Global Support (/resources/pages/customer-support-2015-06-22-en)	Independent Review Process (/resources/pages/irp-2012-02-25-en)	Agreements (/en/about/agreements)	Domain Name Dispute Resolution (/en/help/dndr)
Participate (/en/about/participate)	Security Team (/about/staff/security)	Request for Reconsideration (/groups/board/governance/reconsideration)	AOC Review (/en/about/aoc-review)	Name Collision (/en/help/name-collision)
Groups (https://www.icann.org/resources/pages/groups-2012-02-06-en)	PGP Keys (/en/contact/pgp-keys)	Ombudsman (/help/ombudsman)	Annual Report (/about/annual-report)	Registrar Problems (/en/news/announcements/announcement-06mar07-en.htm)
Board (/resources/pages/board-of-directors-2014-03-19-en)	Certificate Authority (/contact/certificate-authority)	Registry Liaison (/resources/pages/contact-f2-2012-02-25-en)	Financials (/en/about/financials)	WHOIS (http://whois.icann.org/)
President's Corner (/presidents-corner)	AOC Review (http://forms.icann.org/en/about/aoc-review/contact)	Reviews (http://forms.icann.org/en/groups/reviews/contact)	Document Disclosure (/en/about/transparency)	Dashboard Beta (https://www.icann.org/dashboard)
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Careers (https://icann-openhire.silkroad.com/employments/index.cfm?fuseaction=app.allpositions&organization_id=16025&amp;version=1)	Field Journalists (/en/news/press)	Litigation (/en/news/litigation)	Correspondence (/en/news/correspondence)	
Newsletter (/en/news/newsletter)				
Development and Public Responsibility (https://www.icann.org/development-and-public-responsibility)				

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ASSIGNED NAMES AND NUMBERS
9

10 UNITED STATES DISTRICT COURT
11 CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION
13

14 DOTCONNECTAFRICA TRUST,

15 Plaintiff,

16 v.

17 INTERNET CORPORATION FOR
ASSIGNED NAMES AND
18 NUMBERS,

19 Defendant.
20
21
22

Case No. CV 16-00862-RGK

Assigned for all purposes to the
Honorable R. Gary Klausner

**DECLARATION OF AKRAM
ATALLAH IN SUPPORT OF
ICANN'S OPPOSITION TO
PLAINTIFF'S MOTION FOR
PRELIMINARY INJUNCTION**

Hearing Date: April 4, 2016

Hearing Time: 9:00 a.m.

Hearing Location: Courtroom 850
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I, Akram Atallah declare the following:

1. I am the President, Global Domains Division, for the Internet Corporation for Assigned Names and Numbers (“ICANN”), a defendant in this action. I have personal knowledge of the matters set forth herein and am competent to testify as to those matters. I make this declaration in support of ICANN’s Opposition to DotConnectAfrica Trust’s (“DCA’s”) Motion for Preliminary Injunction.

ICANN and the New gTLD Program

2. ICANN is a California not-for-profit public benefit corporation. Pursuant to a series of agreements over the years with the United States Department of Commerce, ICANN oversees the technical coordination of the Internet’s domain name system (“DNS”) on behalf of the Internet community, ensuring the DNS’s continued security, stability, and integrity. As set forth in its Bylaws, ICANN’s mission “is to coordinate, at the overall level, the global Internet’s system of unique identifiers, and in particular to ensure the stable and secure operation of the Internet’s unique identifier systems,” including the domain name system (“DNS”). ICANN’s Bylaws are attached as Exhibit 4 to the declaration of Sophia Bekele Eshete (“Eshete Decl.”). (Eshete Decl. Ex. 4 at 442-43 (Bylaws, Art. I, § 1).)

3. The essential function of the DNS is to convert numeric IP addresses into easily-remembered domain names that permit users to find specific websites, such as “USCOURTS.GOV” and “ICANN.ORG.” The “.GOV” and “.ORG” in these addresses, just like the more well-known “.COM,” are referred to as top-level domains (“TLDs”). ICANN is solely responsible for evaluating potential TLD operators and recommending that TLDs be added to the DNS. No government entity or regulatory scheme governs ICANN’s decisions in that respect.

4. Throughout its history, ICANN has sought to expand the number of accessible TLDs in the DNS in order to promote consumer choice and competition.

1 The New gTLD Program (“Program”), launched in 2012, constitutes by far
2 ICANN’s most ambitious expansion of the Internet’s naming system. The
3 Program’s goals include enhancing competition and consumer choice, and enabling
4 the benefits of innovation via the introduction of new gTLDs, including both new
5 ASCII gTLDs and new non-ASCII, internationalized domain name (“IDN”)
6 gTLDs. It resulted in 1,930 applications for new gTLDs, including DCA’s and ZA
7 Central Registry’s (“ZACR’s”) applications for the .AFRICA gTLD.

8 5. A number of “Advisory Committees” advise ICANN’s Board on
9 various topics described in the ICANN Bylaws. The Governmental Advisory
10 Committee of ICANN has members composed of national governments and distinct
11 economies as recognized in international fora, including the United States, and its
12 purpose is to “consider and provide advice on the activities of ICANN as they relate
13 to concerns of governments, particularly matters where there may be an interaction
14 between ICANN’s policies and various laws and international agreements or where
15 they may affect public policy issues.” (Eshete Decl. Ex. 4 at 496-97 (Bylaws, Art.
16 XI, § 2.1).)

17 **ICANN’s Accountability Mechanisms**

18 6. ICANN’s Bylaws provide for several accountability mechanisms to
19 ensure that ICANN operates in accordance with its Articles of Incorporation,
20 Bylaws, policies and procedures. (See Eshete Decl. Ex. 4 at 448-60 (Bylaws, Arts.
21 IV, V).) For example, an aggrieved applicant can file a “request for
22 reconsideration,” which is a mechanism that asks the ICANN Board to re-evaluate
23 certain Board or staff actions and inactions that the applicant believes have harmed
24 it. (*Id.* at 448-53 (Bylaws, Art. IV, § 2).) In addition, an aggrieved applicant can
25 file a “request for independent review,” a unique process set forth in ICANN’s
26 Bylaws that asks independent panelists to evaluate whether an action of ICANN’s
27 Board was consistent with ICANN’s Articles of Incorporation and Bylaws. (*Id.* at
28

1 453-57 (Bylaws, Art. IV, § 3).)

2 7. The current version of ICANN's Bylaws—like the version in effect at
3 the time new gTLD applications were submitted—provides for the IRP panel to
4 issue a written determination “declar[ing] whether an action or inaction of the
5 Board was inconsistent with the Articles of Incorporation or Bylaws” and
6 “recommend[ing] that the Board stay any action or decision, or that the Board take
7 any interim action, until such time as the Board reviews and acts upon the opinion
8 of the IRP.” (Eshete Decl. Ex. 4 at 455 (Bylaws, Art. IV, § 3.11).) The ICANN
9 Board then considers and acts on the determination. (*Id.* at 456 (Bylaws, Art. IV, §
10 3.21.)

11 8. I am informed and believe that prior to the opening of the gTLD
12 Program application period, only one IRP had resulted in a written determination,
13 *ICM Registry, LLC v. ICANN*. The *ICM* panel declared that the determinations of
14 IRP panels were not binding on ICANN's Board. Attached hereto as Exhibit A is a
15 true and correct copy of an excerpt of the final declaration of the *ICM* Panel.

16 9. To my knowledge, ICANN has never represented that IRPs are
17 binding. Instead, ICANN has consistently argued that IRP declarations are not
18 binding, and I understand that all but one IRP panel (the panel in the *DCA v.*
19 *ICANN* IRP (“*DCA* Panel”)) have agreed.

20 10. In the case of the *DCA* IRP, the *DCA* Panel declared that its decision
21 would be binding on ICANN's Board. But, most importantly, the question of
22 whether the Panel's declaration was or was not legally binding became a moot issue
23 once ICANN's Board elected to adopt all of the *DCA* Panel's recommendations,
24 contrary to the representations in Plaintiff's motion for preliminary injunction and
25 TRO application.

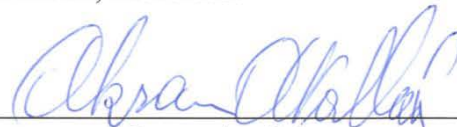
26 11. Specifically, on July 9, 2015, the *DCA* Panel issued its final
27 declaration. The *DCA* Panel determined that ICANN's Board had violated
28

1 ICANN's Articles of Incorporation and Bylaws by accepting the GAC's consensus
2 advice that Plaintiff's application for .AFRICA ("Application") should not proceed.
3 The Panel therefore recommended that "ICANN continue to refrain from delegating
4 the .AFRICA gTLD and permit [Plaintiff]'s application to proceed through the
5 remainder of the new gTLD application process." (Eshete Decl. Ex. 1 at 61-62
6 ¶ 149.)

7 12. As it has done with every IRP declaration to date, ICANN's Board
8 promptly considered and adopted each of the *DCA* Panel's recommendations.
9 Specifically, on July 16, 2015, the Board resolved to "continue to refrain from
10 delegating the .AFRICA gTLD," "permit [Plaintiff's] application to proceed
11 through the remainder of the new gTLD application process," and "reimburse DCA
12 for the costs of the IRP." Attached hereto as Exhibit B is a true and correct copy of
13 ICANN Board Resolutions 2015.07.16.01-05, adopting the *DCA* Panel's
14 recommendations.

15 I declare under penalty of perjury under the laws of the United States of
16 America that the foregoing is true and correct.

17 Executed on March 10, 2016, in Marrakech, Morocco.

18 

19
20 Akram Atallah

EXHIBIT A

INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

ICDR Case No. 50 117 T 00224 08

In the Matter of an Independent Review Process:

ICM REGISTRY, LLC,

Claimant,

v.

INTERNET CORPORATION FOR ASSIGNED NAMES
AND NUMBERS ("ICANN"),

Respondent

DECLARATION OF THE INDEPENDENT REVIEW PANEL

Judge Stephen M. Schwebel, *Presiding*
Mr. Jan Paulsson
Judge Dickran Tevrizian

February 19, 2010

130. As to whether ICM was treated unfairly and was the object of discrimination, ICANN relies on the following statement of Dr. Cerf at the hearing:

“...I am surprised at an assertion that ICM was treated unfairly...the board could have simply accepted the recommendations of the evaluation teams and rejected the proposal at the outset...the board went out of its way to try to work with ICM through the staff to achieve a satisfactory agreement. We spent more time on this particular proposal than any other...We repeatedly defended our continued consideration of this proposal...If...ICM believes that it was treated in a singular way, I would agree that we spent more time and effort on this than any other proposal that came to the board with regard to sponsored TLDs.” (Tr. 654:3-655:7.)

PART FOUR: THE ANALYSIS OF THE INDEPENDENT REVIEW PANEL

The Nature of the Independent Review Panel Process

131. ICM and ICANN differ on the question of whether the Declaration to be issued by the Independent Review Panel is binding upon the parties or advisory. The conflicting considerations advanced by them are summarized above at paragraphs 51 and 91-94. In the light of them, the Panel acknowledges that there is a measure of ambiguity in the pertinent provisions of the Bylaws and in their preparatory work.

132. ICANN’s officers testified before committees of the U.S. Congress that ICANN had installed provision for appeal to “independent arbitration” (*supra*, paragraph 55). Article IV, Section 3 of ICANN’s Bylaws specifies that, “The IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators...nominated by that provider”. The provider so chosen is the American Arbitration Association’s International Centre for Dispute Resolution (“ICDR”), whose Rules (at C-11) in Article 27 provide for the making of arbitral awards which “shall be final and binding on the parties. The parties undertake to carry out any such award without delay.” The Rules of the ICDR “govern the arbitration” (Article 1). It is unquestioned that the term, “arbitration” imports production of a binding award (in contrast to conciliation and mediation). Federal and California courts have so held. The Supplementary Procedures adopted to supplement the independent review procedures set forth in ICANN’s Bylaws provide that the ICDR’s “International Arbitration Rules...will govern the process in combination with these Supplementary Procedures”. (C-12.) They specify

that the Independent Review Panel refers to the neutrals “appointed to decide the issue(s) presented” and further specify that, “DECLARATION refers to the decisions/opinions of the IRP”. “The DECLARATION shall specifically designate the prevailing party.” All of these elements are suggestive of an arbitral process that produces a binding award.

133. But there are other indicia that cut the other way, and more deeply. The authority of the IRP is “to declare whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws” – to “declare”, not to “decide” or to “determine”. Section 3(8) of the Bylaws continues that the IRP shall have the authority to “recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP”. The IRP cannot “order” interim measures but do no more than “recommend” them, and this until the Board “reviews” and “acts upon the opinion” of the IRP. A board charged with reviewing an opinion is not charged with implementing a binding decision. Moreover, Section 3(15) provides that, “Where feasible, the Board shall consider the IRP declaration at the Board’s next meeting.” This relaxed temporal proviso to do no more than “consider” the IRP declaration, and to do so at the next meeting of the Board “where feasible”, emphasizes that it is not binding. If the IRP’s Declaration were binding, there would be nothing to consider but rather a determination or decision to implement in a timely manner. The Supplementary Procedures adopted for IRP, in the article on “Form and Effect of an IRP Declaration”, significantly omit the provision of Article 27 of the ICDR Rules specifying that award “shall be final and binding on the parties”. (C-12.) Moreover, the preparatory work of the IRP provisions summarized above in paragraph 93 confirms that the intention of the drafters of the IRP process was to put in place a process that produced declarations that would not be binding and that left ultimate decision-making authority in the hands of the Board.

134. In the light of the foregoing considerations, it is concluded that the Panel’s Declaration is not binding, but rather advisory in effect.

The Standard of Review Applied by the Independent Review Process

135. For the reasons summarized above in paragraph 56, ICM maintains that this is a *de novo* review in which the decisions of the ICANN Board do not enjoy a deferential standard of review. For the reasons summarized above in paragraphs 100-103, ICANN maintains that the decisions of the Board are entitled to deference by the IRP.

EXHIBIT B

[English \(/translations\)](#) [العربية \(/ar\)](#) [Español \(/es\)](#)

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Resources

- ▶ [About ICANN \(Internet Corporation for Assigned Names and Numbers\)](#)
(/resources/pages/welcome-2012-02-25-en)
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Approved Board Resolutions | Special Meeting of the ICANN (Internet Corporation for Assigned Names and Numbers) Board

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16 Jul 2015

1. [Main Agenda](#)
 - a. [DotConnectAfrica Trust \(DCA\) v. ICANN \(Internet Corporation for Assigned Names and Numbers\) IRP Final Declaration](#)
Rationale for Resolutions 2015.07.16.01 – 2015.07.16.05

1. Main Agenda
 - a. [DotConnectAfrica Trust \(DCA\) v. ICANN \(Internet Corporation for Assigned Names and Numbers\) IRP Final Declaration](#)
Whereas, on 9 July 2015, an independent review panel ("Panel") issued a final Declaration ("Declaration") in the independent review proceedings (IRP) initiated by DotConnectAfrica Trust (DCA), in which DCA sought relief relating to Board action or inaction on its application for .AFRICA.

(/resources/pages/registrars-0d-2012-02-25-en)

- ▶ Registries
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Operational Metrics
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- ▶ Identifier Systems
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- ▶ ccTLDs
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- ▶ Internationalized Domain Names
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- ▶ Policy
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- ▶ Public Comment
(/public-comments)

- ▶ Technical Functions
(/resources/pages/technical-functions-2015-10-15-en)

- ▶ Contact
(/resources/pages/contact-2012-02-06-en)

- ▶ Help
(/resources/pages/help-2012-02-03-en)

Whereas, in the Declaration, the Panel set forth the following:

148. Based on the foregoing, after having carefully reviewed the Parties' written submissions, listened to the testimony of the three witness [sic], listened to the oral submissions of the Parties in various telephone conference calls and at the in-person hearing of this IRP in Washington D.C. on 22 and 23 May 2015, and finally after much deliberation, pursuant to Article IV, Section 3, paragraph 11 (c) of ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, the Panel declares that both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD (generic Top Level Domain) were inconsistent with the Articles of Incorporation and Bylaws of ICANN (Internet Corporation for Assigned Names and Numbers).

149. Furthermore, pursuant to Article IV, Section 3, paragraph 11 (d) of ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, the Panel recommends that ICANN (Internet Corporation for Assigned Names and Numbers) continue to refrain from delegating the .AFRICA gTLD (generic Top Level Domain) and permit DCA Trust's application to proceed through the remainder of the new gTLD (generic Top Level Domain) application process.

150. The Panel declares DCA trust to be the prevailing party in this IRP and further declares that ICANN (Internet Corporation for Assigned Names and Numbers) is to bear, pursuant to Article IV, Section 3, paragraph 18 of the Bylaws, Article 11 of the Supplementary Procedures and Article 31 of the ICDR Rules, the totality of the costs of this IRP and the totality of the costs of the IRP Provider as follows:

- a) the fees and expenses of the panelists;
- b) the fees and expenses of the administrator, the ICDR;
- c) the fees and expenses of the emergency panelist incurred in connection with the application for interim emergency relief sought pursuant to the Supplementary Procedures and the ICDR Rules; and
- d) the fees and expenses of the reporter associated with the hearing on 22 and 23 May 2015 in Washington D.C.
- e) As a result of the above, the administrative fees of the ICDR totalling US\$4,600 and Panelists' compensation and expenses totalling US\$403,467.08 shall be born entirely by ICANN (Internet Corporation for Assigned Names and Numbers), therefore, ICANN (Internet Corporation for Assigned Names and Numbers) shall reimburse DCA Trust the sum of US\$198,046.04.

151. As per the last sentence of Article IV, Section 3, paragraph 18 of the Bylaws, DCA Trust and ICANN (Internet Corporation for Assigned Names and Numbers) shall each bear their own expenses. The parties shall also each bear their own legal representation fees.

Whereas, the independent review process is an integral ICANN (Internet

Corporation for Assigned Names and Numbers) accountability mechanism that helps support ICANN (Internet Corporation for Assigned Names and Numbers)'s multistakeholder model, and the Board thanks the Panel for its efforts in this IRP, and would like to specifically honor the memory of former panelist Hon. Richard C. Neal, who passed away during the proceedings.

Whereas, in addition to the Declaration, the Board must also take into account other relevant information, including but not limited to: (i) that ICANN (Internet Corporation for Assigned Names and Numbers) received and accepted GAC (Governmental Advisory Committee) consensus advice that DCA's application for .AFRICA should not proceed; and (ii) that ICANN (Internet Corporation for Assigned Names and Numbers) has a signed Registry Agreement with ZA Central Registry ("ZACR") to operate the .AFRICA top-level domain.

Whereas, pursuant to Article IV, Section 3.21 of the Board considered the Declaration at the Board's next meeting, which the Board specifically scheduled in order to take action on this matter as quickly as possible.

Resolved (2015.07.15.01), the Board has considered the entire Declaration, and has determined to take the following actions based on that consideration:

1. ICANN (Internet Corporation for Assigned Names and Numbers) shall continue to refrain from delegating the .AFRICA gTLD (generic Top Level Domain);
2. ICANN (Internet Corporation for Assigned Names and Numbers) shall permit DCA's application to proceed through the remainder of the new gTLD (generic Top Level Domain) application process as set out below; and
3. ICANN (Internet Corporation for Assigned Names and Numbers) shall reimburse DCA for the costs of the IRP as set forth in paragraph 150 of the Declaration.

Resolved (2015.07.16.02), since the Board is not making a final determination at this time as to whether DCA's application for .AFRICA should proceed to contracting or delegation, the Board does not consider that resuming evaluation of DCA's application is action that is inconsistent with GAC (Governmental Advisory Committee) advice.

Resolved (2015.07.16.03), the Board directs the President and CEO, or his designee(s), to take all steps necessary to resume the evaluation of DCA's application for .AFRICA and to ensure that such evaluation proceeds in accordance with the established process(es) as quickly as possible (see Applicant Guidebook at <http://newgtlds.icann.org/en/applicants/agb> (<http://newgtlds.icann.org/en/applicants/agb>) for established processes).

Resolved (2015.07.16.04), with respect to the GAC (Governmental Advisory Committee)'s consensus advice in the Beijing Communiqué that DCA's application for .AFRICA should not proceed, which was confirmed in the London Communiqué, the Board will ask the GAC (Governmental Advisory Committee) if it wishes to refine that advice and/or provide the Board with further information regarding that advice and/or otherwise address the concerns raised in the Declaration.

Resolved (2015.07.16.05), in the event that DCA's application for .AFRICA successfully passes the remainder of the evaluation process, at that time or before, the Board will consider any further advice or information received from the GAC (Governmental Advisory Committee), and proceed as necessary, balancing all of the relevant material information and circumstances. Should the Board undertake any action that may be inconsistent with the GAC (Governmental Advisory Committee)'s advice, the Board will follow the established process set out in the Bylaws (see ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, Article XI, Section 2.1).

Rationale for Resolutions 2015.07.16.01 – 2015.07.16.05

On 24 October 2013, DotConnectAfrica Trust (DCA) initiated an independent review proceeding (IRP) against ICANN (Internet Corporation for Assigned Names and Numbers), and filed a notice of independent review with the International Centre for Dispute Resolution (ICDR), ICANN (Internet Corporation for Assigned Names and Numbers)'s chosen IRP provider. In the IRP proceedings, DCA challenged the 4 June 2013 decision of the ICANN (Internet Corporation for Assigned Names and Numbers) Board New gTLD (generic Top Level Domain) Program Committee (NGPC), which was delegated authority from the Board to make decisions regarding the New gTLD (generic Top Level Domain) Program. In that decision, the NGPC accepted advice from ICANN (Internet Corporation for Assigned Names and Numbers)'s Governmental Advisory Committee (Advisory Committee) (GAC (Governmental Advisory Committee)) that DCA's application for .AFRICA should not proceed.

On 9 July 2015, the IRP Panel (Panel) issued its Final Declaration (Declaration or Decl.). The Panel cited two main concerns relating to the GAC (Governmental Advisory Committee)'s advice on DCA's application: (1) the Panel was concerned that the GAC (Governmental Advisory Committee) did not include, and that ICANN (Internet Corporation for Assigned Names and Numbers) did not request, a rationale on the GAC (Governmental Advisory Committee)'s advice; and (2) the Panel expressed concern that ICANN (Internet Corporation for Assigned Names and Numbers) took action on the GAC (Governmental Advisory Committee)'s advice without conducting diligence on the level of transparency and the manner in which the advice was developed by the GAC (Governmental Advisory Committee). The Panel found that ICANN (Internet Corporation for Assigned Names and Numbers)'s conduct was inconsistent with the ICANN (Internet Corporation for Assigned Names and Numbers) Articles and Bylaws because of certain actions and inactions of the ICANN (Internet Corporation for Assigned Names and Numbers) Board.

As provided in Article IV (/resources/pages/governance/bylaws-en/#IV), Section 3 of the Bylaws, 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. The Panel is charged with comparing the contested Board actions to the Articles of Incorporation and Bylaws, and declaring whether the Board acted consistently with the provisions of those Articles of Incorporation and Bylaws. The Panel must apply a defined standard of review to the IRP request focusing on:

- a. did the Board act without conflict of interest in taking its decision?;
- b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

After the Panel issues its final Declaration, the Board is then required to consider the Declaration at its next meeting (where feasible). Pursuant to Article IV, Section 3.21 of the ICANN (Internet Corporation for Assigned Names and Numbers) Bylaws, the Board has considered and discussed the Declaration and is taking action to: (1) continue to refrain from delegating the .AFRICA gTLD (generic Top Level Domain); (2) permit DCA's application to proceed through the remainder of the new gTLD (generic Top Level Domain) application process; and (3) reimburse DCA for the costs of the IRP as set forth in paragraph 150 of the Declaration.

Additionally, the Board will communicate with the GAC (Governmental Advisory Committee) and attempt to ascertain whether the GAC (Governmental Advisory Committee) wishes to refine its advice concerning DCA's application for .AFRICA and/or provide the Board with further information regarding that advice and/or otherwise address the concerns raised in the Declaration. The Board will consider any response the GAC (Governmental Advisory Committee) may choose to provide, and proceed as necessary, balancing all of the relevant material information and circumstances. Should the Board undertake any action that may be inconsistent with the GAC (Governmental Advisory Committee)'s advice, the Board will follow the established processes set out in the Bylaws. As required by the Bylaws, if the Board decides to take an action that is not consistent with the GAC (Governmental Advisory Committee) advice, it must inform the GAC (Governmental Advisory Committee) and state the reasons why it decided not to follow the advice. The Board and the GAC (Governmental Advisory Committee) will then try in good faith to find a mutually acceptable solution. If no solution can be found, the Board will state in its final decision why the GAC (Governmental Advisory Committee) advice was not followed.

The Board's action represents a careful balance, weighing the opinion of the Panel, as well as other significant factors discussed in this rationale. In taking this action today, each of the Board members exercised independent judgment, was not conflicted on this matter, and believes that this decision is in the best interests of the ICANN (Internet Corporation for Assigned Names and Numbers). The Board considered several significant factors as part of its consideration of the Declaration and had to balance its consideration with other factors. Among the factors the Board considered to be significant are the following:

1. The IRP is an integral ICANN (Internet Corporation for Assigned Names and Numbers) accountability mechanism that helps support ICANN (Internet Corporation for Assigned Names and Numbers)'s multistakeholder model. The Board considers the principles found in ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms to be fundamental safeguards in ensuring that ICANN (Internet Corporation for Assigned Names and Numbers)'s bottom-up, multistakeholder model remains effective, and ICANN (Internet Corporation

for Assigned Names and Numbers) achieves its accountability and transparency mandate. The Board has carefully considered the Declaration, and in taking its action the Board, as did the Panel, takes specific note of the following regarding the independent review process and its obligations for accountability and transparency:

- ICANN (Internet Corporation for Assigned Names and Numbers) is bound by its own Articles of Incorporation to act fairly, neutrally, non-discriminatorily and to enable competition. (Decl. ¶ 94.)
- ICANN (Internet Corporation for Assigned Names and Numbers) is also bound by its own Bylaws to act and make decisions "neutrally and objectively, with integrity and fairness." (Decl. ¶ 95.)
- As set out in Article IV (Accountability and Review) of ICANN (Internet Corporation for Assigned Names and Numbers)'s Bylaws, in carrying out its mission as set out in its Bylaws, ICANN (Internet Corporation for Assigned Names and Numbers) should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article I of the Bylaws. (Decl. ¶ 97.)

2. ICANN (Internet Corporation for Assigned Names and Numbers) has a signed Registry Agreement with ZA Central Registry NPC trading as Registry.Africa (ZACR) under which ZACR is authorized to operate the .AFRICA top-level domain. Parties affected by these resolutions have had, and may continue to have, the ability to challenge or otherwise question DCA's application through the evaluation and other processes.
3. The Board considered the community-developed processes in the New gTLD (generic Top Level Domain) Program Applicant Guidebook (Guidebook). According to Section 3.1 of the Guidebook, the GAC (Governmental Advisory Committee) may provide public policy advice to the ICANN (Internet Corporation for Assigned Names and Numbers) Board on any application, which the Board must consider. When the GAC (Governmental Advisory Committee) advises ICANN (Internet Corporation for Assigned Names and Numbers) that it is the consensus of the GAC (Governmental Advisory Committee) that a particular application should not proceed, it "will create a strong presumption for the ICANN (Internet Corporation for Assigned Names and Numbers) Board that the application should not be approved." In its 11 April 2013 Beijing Communiqué, the GAC (Governmental Advisory Committee) stated (<https://gacweb.icann.org/display/GACADV/2013-04-11-Obj-Africa>) it had reached consensus on GAC (Governmental Advisory Committee) Objection Advice for .AFRICA application number 1-1165-42560, thereby creating a strong presumption for the ICANN (Internet Corporation for Assigned Names and Numbers) Board that this application should not proceed through the program. Additionally, in its 25 June 2014 London Communiqué, the GAC (Governmental Advisory Committee) stated (<https://gacweb.icann.org/display/GACADV/2014-06-25+.africa>) that "Consistent with the new gTLD (generic Top Level Domain) applicant guidebook, the GAC (Governmental Advisory Committee) provided consensus advice articulated in the April 11 2013 communiqué that the

DotConnectAfrica (DCA) application number 1-1165-42560 for dot Africa should not proceed. The GAC (Governmental Advisory Committee) welcomes the June 2013 decision by the New gTLD (generic Top Level Domain) Program Committee to accept GAC (Governmental Advisory Committee) advice on this application."

The Guidebook does not require the Board to engage the GAC (Governmental Advisory Committee) in a dialogue about its advice when consensus has been reached, or question the GAC (Governmental Advisory Committee) how such consensus was reached. The acceptance of the GAC (Governmental Advisory Committee) advice on this matter was fully consistent with the Guidebook. Notably, however, the Board has requested additional information from the GAC (Governmental Advisory Committee) when the Board thought it needed more information before taking a decision, both before and during the New gTLD (generic Top Level Domain) Program. Here, the NGPC did not think it required additional information from the GAC (Governmental Advisory Committee). Further, in addition to the GAC (Governmental Advisory Committee) advice, the Board also had DCA's response to that advice, which the NGPC considered before accepting the GAC (Governmental Advisory Committee) advice. Notwithstanding the Guidebook, the Panel has suggested that, ". . . the GAC (Governmental Advisory Committee) made its decision without providing any rationale . . ." (Decl. ¶ 104), and ". . . the Panel would have expected the ICANN (Internet Corporation for Assigned Names and Numbers) Board to, at a minimum, investigate the matter further before rejecting DCA Trust's application." (Decl. ¶ 113).

4. The Board considered Section 5.1 of the Guidebook, which provides that, "ICANN (Internet Corporation for Assigned Names and Numbers)'s Board of Directors has ultimate responsibility for the New gTLD (generic Top Level Domain) Program. The Board reserves the right to individually consider an application for a new gTLD (generic Top Level Domain) to determine whether approval would be in the best interest of the Internet community. Under exceptional circumstances, the Board may individually consider a gTLD (generic Top Level Domain) application. For example, the Board might individually consider an application as a result of GAC (Governmental Advisory Committee) Advice on New gTLDs or of the use of an ICANN (Internet Corporation for Assigned Names and Numbers) accountability mechanism."

On balance, the Board has determined that permitting DCA's application to proceed through the remainder of the new gTLD (generic Top Level Domain) application evaluation process is the best course of action at this time. Doing so helps promote ICANN (Internet Corporation for Assigned Names and Numbers)'s ability to make a decision concerning DCA's application for .AFRICA by applying documented procedures in the most transparent, neutral and objective manner possible, while also recognizing the importance of ICANN (Internet Corporation for Assigned Names and Numbers)'s accountability mechanisms. Completion of the application evaluation would allow DCA's application to undergo the same review processes as other gTLD (generic Top Level Domain) applicants, and is not inconsistent with the GAC (Governmental Advisory Committee)'s advice. Further,

completing the evaluation will provide additional relevant information for ICANN (Internet Corporation for Assigned Names and Numbers) to consider as part of any final determination as to whether DCA's application for .AFRICA should proceed beyond initial evaluation.

There will be a financial impact on ICANN (Internet Corporation for Assigned Names and Numbers) in taking this decision in that resuming the evaluation process for DCA's application for .AFRICA will result in additional cost, but that cost was anticipated in the application fee already received. The Board directs the President and CEO to re-engage the evaluation processes for DCA's application as quickly as possible, and to strongly encourage any third-party providers charged with performing the relevant New gTLD (generic Top Level Domain) Program evaluations and analysis also to act as quickly as possible in concluding their evaluations in accordance with the established processes and procedures in the Guidebook.

There may also be additional costs to ICANN (Internet Corporation for Assigned Names and Numbers) the extent any party challenges this decision. This action will have no impact on the security, stability or resiliency of the domain name system.

The significant materials related to the matters at issue in the Determination include, but are not limited to the following:

- Dakar Communiqué (27 October 2011)
 (<https://gacweb.icann.org/download/attachments/27132037/Communique%20Da%2027%20October%202011.pdf?version=1&modificationDate=1323819889000&api=v2>)
 (<https://gacweb.icann.org/download/attachments/27132037/Communique%20Da%2027%20October%202011.pdf?version=1&modificationDate=1323819889000&api=v2>)
- Letter from Stephen Crocker to Elham M.A. Ibrahim
 (<https://www.icann.org/en/system/files/correspondence/crocker-to-ibrahim-08mar12-en.pdf> (/en/system/files/correspondence/crocker-to-ibrahim-08mar12-en.pdf))
- African Union Communiqué (<https://www.icann.org/resources/files/african-union-communicue-2011-10-21-en> (/resources/files/african-union-communicue-2011-10-21-en))
- DotConnectAfrica Trust's application for .AFRICA
 (<https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1276?t:ac=1276> (<https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1276?t:ac=1276>))
- ZACR's application for .AFRICA (<https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1184?t:ac=1184> (<https://gtdresult.icann.org/application-result/applicationstatus/applicationdetails:downloadapplication/1184?t:ac=1184>))

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- Letter from Heather Dryden to Stephen Crocker (17 June 2012) re: Processing of Applications for New Generic TopLevel Domain (<https://www.icann.org/en/news/correspondence/dryden-to-crocker-17jun12-en> (/en/news/correspondence/dryden-to-crocker-17jun12-en))
- Letter from Stephen Crocker to Heather Dryden (27 July 2012) re: Processing of applications for New Generic Top-Level Domains (<http://www.icann.org/en/system/files/correspondence/crocker-to-dryden-27jul12-en.pdf> (<http://www.icann.org/en/system/files/correspondence/crocker-to-dryden-27jul12-en.pdf>))
- GAC (Governmental Advisory Committee) Early Warnings filed against DCA's application for .AFRICA
 - African Union Commission: <https://gacweb.icann.org/download/attachments/27131927/Africa-AUC-42560.pdf?version=1&modificationDate=1353382039000&api=v2> (<https://gacweb.icann.org/download/attachments/27131927/Africa-AUC-42560.pdf?version=1&modificationDate=1353382039000&api=v2>)
 - Comoros: <https://gacweb.icann.org/download/attachments/27131927/Africa-KM-42560.pdf?version=1&modificationDate=1353384893000&api=v2> (<https://gacweb.icann.org/download/attachments/27131927/Africa-KM-42560.pdf?version=1&modificationDate=1353384893000&api=v2>)
 - Kenya: <https://gacweb.icann.org/download/attachments/27131927/Africa-KE-42560.pdf?version=1&modificationDate=1353389367000&api=v2> (<https://gacweb.icann.org/download/attachments/27131927/Africa-KE-42560.pdf?version=1&modificationDate=1353389367000&api=v2>)
 - Cameroon: <https://gacweb.icann.org/download/attachments/27131927/Africa-CM-42560.pdf?version=1&modificationDate=1353430788000&api=v2> (<https://gacweb.icann.org/download/attachments/27131927/Africa-CM-42560.pdf?version=1&modificationDate=1353430788000&api=v2>)
 - DRC: <https://gacweb.icann.org/download/attachments/27131927/Africa-CD-42560.pdf?version=2&modificationDate=1353432869000&api=v2> (<https://gacweb.icann.org/download/attachments/27131927/Africa-CD-42560.pdf?version=2&modificationDate=1353432869000&api=v2>)
 - Benin: <https://gacweb.icann.org/download/attachments/27131927/Africa-BJ-42560.pdf?version=1&modificationDate=1353433003000&api=v2> (<https://gacweb.icann.org/download/attachments/27131927/Africa-BJ-42560.pdf?version=1&modificationDate=1353433003000&api=v2>)
 - Egypt: <https://gacweb.icann.org/download/attachments/27131927/Africa-EG-1-42560.pdf?version=1&modificationDate=1353378092000&api=v2> (<https://gacweb.icann.org/download/attachments/27131927/Africa-EG-1-42560.pdf?version=1&modificationDate=1353378092000&api=v2>)
 - Gabon: [https://gacweb.icann.org/download/attachments/27131927/Africa-GA-\(General Assembly Mailing List\)-42560.pdf?version=1&modificationDate=1353451525000&api=v2](https://gacweb.icann.org/download/attachments/27131927/Africa-GA-(General%20Assembly%20Mailing%20List)-42560.pdf?version=1&modificationDate=1353451525000&api=v2)

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<https://gacweb.icann.org/download/attachments/27131927/Africa-GA-42560.pdf?version=1&modificationDate=1353451525000&api=v2>

- Burkina Faso: <https://gacweb.icann.org/download/attachments/27131927/Africa-BF-42560.pdf?version=1&modificationDate=1353451829000&api=v2>
<https://gacweb.icann.org/download/attachments/27131927/Africa-BF-42560.pdf?version=1&modificationDate=1353451829000&api=v2>
- Ghana: <https://gacweb.icann.org/download/attachments/27131927/Africa-GH-42560.pdf?version=1&modificationDate=1353451997000&api=v2>
<https://gacweb.icann.org/download/attachments/27131927/Africa-GH-42560.pdf?version=1&modificationDate=1353451997000&api=v2>
- Mali: <https://gacweb.icann.org/download/attachments/27131927/Africa-ML-42560.pdf?version=1&modificationDate=1353452174000&api=v2>
<https://gacweb.icann.org/download/attachments/27131927/Africa-ML-42560.pdf?version=1&modificationDate=1353452174000&api=v2>
- Uganda: <https://gacweb.icann.org/download/attachments/27131927/Africa-UG-42560.pdf?version=1&modificationDate=1353452442000&api=v2>
<https://gacweb.icann.org/download/attachments/27131927/Africa-UG-42560.pdf?version=1&modificationDate=1353452442000&api=v2>
- Senegal: <https://gacweb.icann.org/download/attachments/27131927/Africa-SN-42560.pdf?version=1&modificationDate=1353452452000&api=v2>
<https://gacweb.icann.org/download/attachments/27131927/Africa-SN-42560.pdf?version=1&modificationDate=1353452452000&api=v2>
- South Africa: <https://gacweb.icann.org/download/attachments/27131927/Africa-ZA-89583.pdf?version=1&modificationDate=1353452595000&api=v2>
<https://gacweb.icann.org/download/attachments/27131927/Africa-ZA-89583.pdf?version=1&modificationDate=1353452595000&api=v2>
- Nigeria: <https://gacweb.icann.org/download/attachments/27131927/Africa-NG-2-42560.pdf?version=1&modificationDate=1353378092000&api=v2>
<https://gacweb.icann.org/download/attachments/27131927/Africa-NG-2-42560.pdf?version=1&modificationDate=1353378092000&api=v2>
- Tanzania: <https://gacweb.icann.org/download/attachments/27131927/Africa-TZ-42560.pdf?version=1&modificationDate=1353452982000&api=v2>
<https://gacweb.icann.org/download/attachments/27131927/Africa-TZ-42560.pdf?version=1&modificationDate=1353452982000&api=v2>
- DCA Response to GAC (Governmental Advisory Committee) Early Warning
<http://www.dotconnectafrica.org/wp-content/uploads/2012/12/Response-to-the-ICANN-Internet-Corporation-for-Assigned-Names-and-Numbers-GAC-Governmental-Advisory-Committee-Early-Warning-Advice-against-the-Africa-Application-Submitted-by-DotConnectAfrica-Trust.pdf>
[http://www.dotconnectafrica.org/wp-content/uploads/2012/12/Response-to-](http://www.dotconnectafrica.org/wp-content/uploads/2012/12/Response-to-the-ICANN-Internet-Corporation-for-Assigned-Names-and-Numbers-GAC-Governmental-Advisory-Committee-Early-Warning-Advice-against-the-Africa-Application-Submitted-by-DotConnectAfrica-Trust.pdf)

the-ICANN-GAC-Early-Warning-Advice-against-the-Africa-Application-Submitted-by-DotConnectAfrica-Trust.pdf)

- GAC (Governmental Advisory Committee) Beijing Communiqué (11 April 2013) (<https://www.icann.org/en/system/files/correspondence/gac-to-board-11apr13-en.pdf> (/en/system/files/correspondence/gac-to-board-11apr13-en.pdf))
- DCA Response to GAC (Governmental Advisory Committee) Advice in Beijing Communiqué (<http://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-1165-42560-en.pdf> (<http://newgtlds.icann.org/sites/default/files/applicants/23may13/gac-advice-response-1-1165-42560-en.pdf>))
- NGPC Resolution 2014.06.04.NG01 (<https://www.icann.org/resources/board-material/resolutions-new-gtld-2013-06-04-en#1.a> (/resources/board-material/resolutions-new-gtld-2013-06-04-en#1.a))
- The NGPC Scorecard of 1As Regarding Non-Safeguard Advice in the GAC (Governmental Advisory Committee) Beijing Communiqué (4 June 2013) (<https://www.icann.org/en/groups/board/documents/new-gtld-resolution-annex-1-04jun13-en.pdf> (/en/groups/board/documents/resolutions-new-gtld-annex-1-04jun13-en.pdf))
- DCA Trust Reconsideration Request 13-4 and attachments (<https://www.icann.org/en/groups/board/governance/reconsideration/13-4/request-dca-trust-19jun13-en.pdf> (/en/groups/board/governance/reconsideration/13-4/request-dca-trust-19jun13-en.pdf))
- BGC Recommendation on Reconsideration Request 13-14 (<https://www.icann.org/en/groups/board/governance/reconsideration/13-4/recommendation-dca-trust-01aug13-en.pdf> (/en/groups/board/governance/reconsideration/13-4/recommendation-dca-trust-01aug13-en.pdf))
- NGPC Action Adopting BGC Recommendation on Reconsideration Request 13-4 (<https://www.icann.org/en/groups/board/documents/resolutions-new-gtld-13aug13-en.htm#1.c> (/en/groups/board/documents/resolutions-new-gtld-13aug13-en.htm#1.c))
- GAC (Governmental Advisory Committee) London Communiqué (25 June 2014) (<https://www.icann.org/en/system/files/correspondence/gac-to-board-25jun14-en.pdf> (/en/system/files/correspondence/gac-to-board-25jun14-en.pdf))
- DCA Response to GAC (Governmental Advisory Committee) Advice in London Communiqué (<http://newgtlds.icann.org/sites/default/files/applicants/11aug14/gac-advice-response-1-1165-42560.pdf> (<http://newgtlds.icann.org/sites/default/files/applicants/11aug14/gac-advice-response-1-1165-42560.pdf>))

3/14/2016

Case 2:16-cv-00862-RGK-JC Document 36-2 Filed 03/14/16 Page 13 of 14 Page ID #:2125

- NGPC Resolution 2014.09.08.NG02 (<https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-09-08-en-1.b> ([/resources/board-material/resolutions-new-gtld-2014-09-08-en#1.b](https://www.icann.org/resources/board-material/resolutions-new-gtld-2014-09-08-en#1.b)))
- The NGPC Scorecard - GAC (Governmental Advisory Committee) Advice (London, Singapore, Buenos Aires, Durban, Beijing): Actions and Updates (as of 8 September 2014) (<https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-08sep14-en.pdf> ([/en/system/files/files/resolutions-new-gtld-annex-1-08sep14-en.pdf](https://www.icann.org/en/system/files/files/resolutions-new-gtld-annex-1-08sep14-en.pdf)))
- Letter from Steve Crocker to Heather Dryden re: NGPC Meeting of 8 September 2014 (<https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-10sep14-en.pdf> ([/en/system/files/correspondence/crocker-to-dryden-10sep14-en.pdf](https://www.icann.org/en/system/files/correspondence/crocker-to-dryden-10sep14-en.pdf)))
- All briefs, declarations, and supporting documents filed by DCA Trust and ICANN (Internet Corporation for Assigned Names and Numbers) in the Independent Review Proceeding *DCA Trust v. ICANN (Internet Corporation for Assigned Names and Numbers)* (<https://www.icann.org/resources/pages/dca-v-icann-2013-12-11-en> ([/resources/pages/dca-v-icann-2013-12-11-en](https://www.icann.org/resources/pages/dca-v-icann-2013-12-11-en)))
- Letter from Akram Atallah to Neil Dundas (13 July 2015) re: Final Declaration in the DotConnectAfrica Trust (DCA) Independent Review Proceeding (IRP) (<https://www.icann.org/en/system/files/correspondence/atallah-to-unddas-13jul15-en.pdf> ([/en/system/files/correspondence/atallah-to-unddas-13jul15-en.pdf](https://www.icann.org/en/system/files/correspondence/atallah-to-unddas-13jul15-en.pdf)))
- Letter from Dr. Elham M.A. Ibrahim to Steve Crocker (14 July 2015) re: Independent Review Panel (IRP) recommendation on the matter between DCA and ICANN (Internet Corporation for Assigned Names and Numbers) related to Dot Africa gTLD (generic Top Level Domain) (<https://www.icann.org/en/system/files/correspondence/ibrahim-to-crocker-14jul15-en.pdf> ([/en/system/files/correspondence/ibrahim-to-crocker-14jul15-en.pdf](https://www.icann.org/en/system/files/correspondence/ibrahim-to-crocker-14jul15-en.pdf)))
- Letter from Lucky Masilela to Steve Crocker (15 July 2015) re: ZACR Response on the Independent Review Process (IRP) Final Declaration (<https://www.icann.org/en/system/files/correspondence/masilela-to-crocker-15jul15-en.pdf> ([/en/system/files/correspondence/masilela-to-crocker-15jul15-en.pdf](https://www.icann.org/en/system/files/correspondence/masilela-to-crocker-15jul15-en.pdf)))

This is an Organizational Administrative function that does not require public comment.

Published on 16 July 2015



[You Tube](http://www.youtube.com/icannorg)
[Twitter](https://www.twitter.com/icannorg)
[LinkedIn](https://www.linkedin.com/company/icannorg)
[Flickr](http://www.flickr.com/photos/icannorg/)
[Facebook](http://www.facebook.com/icannorg)
[RSS Feeds \(/en/news/rss\)](http://en/news/rss)
[Community Wiki](https://community.icann.org)



[ICANN Blog \(/news/blog\)](http://en/news/blog)

<p>Who We Are</p> <p>Get Started (/get-started)</p> <p>Learning (/en/about/learning)</p> <p>Participate (/en/about/participate)</p> <p>Groups (/resources/pages/groups-2012-02-06-en)</p> <p>Board (/resources/pages/board-of-directors-2014-03-19-en)</p> <p>President's Corner (/presidents-corner)</p> <p>Staff (/en/about/staff)</p> <p>Careers (/resources/pages/careers)</p> <p>Newsletter (/en/news/newsletter)</p> <p>Development and Public Responsibility (/resources/pages/development-and-public-responsibility)</p>	<p>Contact Us</p> <p>Offices (/resources/pages/offices)</p> <p>Global Support (/resources/pages/customer-support-2015-06-22-en)</p> <p>Security Team (/resources/pages/about-staff-security-2012-02-06-en)</p> <p>PGP Keys (/en/contact/pgp-keys)</p> <p>Certificate Authority (/contact/certificate-authority)</p> <p>Registry Liaison (/resources/pages/contact-f2-2012-02-25-en)</p> <p>AOC Review (/resources/pages/aoc-review/contact)</p> <p>Reviews (/resources/pages/groups/reviews/contact)</p> <p>Request a Speaker (/resources/pages/contact/speakers)</p> <p>For Journalists (/resources/pages/for-journalists)</p>	<p>Accountability & Transparency</p> <p>Accountability (/en/news/in-focus/accountability/mechanisms)</p> <p>Mechanisms (/en/news/in-focus/accountability/mechanisms)</p> <p>Independent Review Process (/resources/pages/irp-2012-02-25-en)</p> <p>Request for Reconsideration (/groups/board/governance/reconsideration)</p> <p>Ombudsman (/help/ombudsman)</p>	<p>Governance</p> <p>Documents (/en/about/governance)</p> <p>Agreements (/en/about/agreements)</p> <p>AOC Review (/en/about/aoc-review)</p> <p>Annual Report (/about/annual-report)</p> <p>Reconsideration (/en/about/reconsideration)</p> <p>Financials (/en/about/financials)</p> <p>Document Disclosure (/en/about/transparency)</p> <p>Planning (/en/about/planning)</p> <p>Dashboard Beta (/resources/pages/dashboard-beta)</p> <p>RFPs (/en/news/rfps)</p> <p>Litigation (/en/news/litigation)</p> <p>Correspondence (/en/news/correspondence)</p>	<p>Help</p> <p>Dispute Resolution (/en/help/dispute-resolution)</p> <p>Domain Name Dispute Resolution (/en/help/dndr)</p> <p>Name Collision (/en/help/name-collision)</p> <p>Registrar Problems (/en/news/announcements/announcement-06mar07-en.htm)</p> <p>WHOIS (/en/help/whois)</p>
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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	CV 16-00862 RGK (JCx)	Date	March 4, 2016
Title	<i>DOTCONNECTAFRICA TRUST v. INTERNET CORP. FOR ASSIGNED NAMES AND NUMBERS</i>		

Present: The Honorable	R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE
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<u>Sharon L. Williams (not present)</u> Deputy Clerk	<u>Not Reported</u> Court Reporter / Recorder	<u>N/A</u> Tape No.
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Attorneys Present for Plaintiffs:

Attorneys Present for Defendants:

Not Present

Not Present

Proceedings: (IN CHAMBERS) Plaintiff's Ex Parte Application for TRO (DE 20)

On March 2, 2016, DotConnectAfrica Trust ("Plaintiff") filed this Ex Parte Application for TRO. By way of this application, Plaintiff seeks an order enjoining Internet Corporation for Assigned Names and Numbers ("Defendant" or "ICANN") from issuing the .Africa gTLD until the Court decides Plaintiff's Motion for Preliminary Injunction, scheduled for hearing on April 4, 2016.

A district court may issue a TRO where the moving party demonstrates the need for immediate relief, and establishes that relief is warranted under one of the following circumstances. Under the traditional criteria, a plaintiff must demonstrate "(1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases)." *Guzman v. Shewry*, 552 F.3d 941, 948 (9th Cir. 2009). Alternatively, "a court may grant the injunction if the plaintiff demonstrates "serious questions going to the merits" and a "balance of hardships that tip sharply toward" plaintiff, provided "plaintiff also show that there is a likelihood of irreparable injury and that the injunction is in the public interest." *Alliance for Wild Rockies v. Cottrell*, (632 F.3d 1127, 1131-1132 (9th Cir. 2011)).

Upon review of the parties' arguments, the Court finds serious questions going to the merits. Plaintiff has demonstrated that once the tGLD is issued, it will be unable to obtain those rights elsewhere. Moreover, the injury it will suffer cannot be compensated through monetary damages. In opposition, Defendant states in conclusory fashion only that the African governments and the ICANN community will suffer prejudice if the delegation of the gTLD is delayed.

Based on the foregoing, the Court **grants** Plaintiff's Ex Parte Application for TRO. Defendant is enjoined from issuing the Africa tGLD until the Court decides Plaintiff's Motion for Preliminary Injunction, scheduled for hearing on April 4, 2016.

IT IS SO ORDERED.

Initials of Preparer _____

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Los Angeles, California 90025
Telephone: (310) 593-9890
Facsimile: (310) 593-9980

Attorneys for Plaintiff
DOTCONNECTAFRICA TRUST

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA – WESTERN DIVISION

DOTCONNECTAFRICA TRUST

Plaintiff,

v.

INTERNET CORPORATION FOR
ASSIGNED NAMES AND NUMBERS
and DOES 1 through 50, inclusive,

Defendants.

Case No. 2:16-cv-00862-RGK (JCx)

**DECLARATION OF SOPHIA
BEKELE ESHETE**

Date: April 4, 2016
Hearing: 9:00 a.m.
Courtroom: 850

[Filed concurrently: Declarations of
Ethan J. Brown & Sara C. Colón;
Notice of Motion and Motion for
Preliminary Injunction; Memorandum
of Points and Authorities; [Proposed]
Order]; Application for Leave to File
Under Seal; and [Proposed] Order re
Application for Leave to File Under
Seal]

1 5. Attached hereto as **Exhibit 1** is a true and correct copy of the Internet
2 Corporation for Assigned Names and Numbers (“ICANN”) Internal Review
3 Process (“IRP”) Final Declaration dated July 9, 2015.

4 6. Attached hereto as **Exhibit 2** is a true and correct copy, as posted at
5 [https://www.icann.org/en/system/files/files/irp-procedure-declaration-14aug14-](https://www.icann.org/en/system/files/files/irp-procedure-declaration-14aug14-en.pdf)
6 [en.pdf](https://www.icann.org/en/system/files/files/irp-procedure-declaration-14aug14-en.pdf), of the ICANN IRP Declaration on the IRP Procedure dated August 14,
7 2014.

8 7. Attached hereto as **Exhibit 3** is a true and correct copy, as I obtained
9 it from ICANN, of the ICANN Applicant Guidebook (the “Guidebook”) DCA
10 referred to when preparing and filing its application for .Africa.

11 8. ICANN required DCA to agree to the terms and conditions in the
12 Guidebook upon submitting its application for the .Africa gTLD.

13 9. ICANN did not afford DCA the opportunity to negotiate any terms in
14 the Guidebook, including the covenant not to sue. Nor did DCA contribute to any
15 of the language of the terms in the Guidebook.

16 10. In fact, Module 6 of the Guidebook states that the applicant must
17 agree to the terms and conditions “without modification.”

18 11. DCA did not consult with an attorney regarding the provisions of the
19 Guidebook before it signed, nor did ICANN encourage it to do so.

20 12. Attached hereto as **Exhibit 4** is a true and correct copy, as posted at
21 <https://www.icann.org/resources/pages/bylaws-2012-02-25-en>, of ICANN’s
22 bylaws.
23

24 13. Attached hereto as **Exhibit 5** is a true and correct copy of the
25 description of ICANN’s Internal Review Process, as posted at ICANN’s website at
26 [https://www.icann.org/resources/pages/reconsideration-and-independent-review-](https://www.icann.org/resources/pages/reconsideration-and-independent-review-icann-bylaws-article-iv-accountability-and-review)
27 [icann-bylaws-article-iv-accountability-and-review](https://www.icann.org/resources/pages/reconsideration-and-independent-review-icann-bylaws-article-iv-accountability-and-review).
28

BEKELE DECLARATION

1 14. Attached hereto as **Exhibit 6** is a true and correct copy of the August
2 27, 2009 DCA endorsement letter from the AUC to me.

3 15. Attached hereto as **Exhibit 7** is a true and correct copy of the April
4 16, 2010 letter from the AUC to me.

5 16. Attached hereto as **Exhibit 8** is a true and correct copy of the August
6 8, 2008 DCA endorsement letter from the United Nations Economic Commission
7 on Africa (“UNECA”) to me.

8 17. Attached hereto as **Exhibit 9** is a true and correct copy of the March
9 23, 2014 email I received as part of a group list email, from Alice Munyua. This
10 email was also forwarded to me.

11 18. Attached hereto as **Exhibit 10** is a true and correct copy of the
12 September 21, 2015 letter from UNECA to Dr. Ibrahim, a representative of the
13 AUC, on which I was copied.

14 19. Attached hereto as **Exhibit 11** is a true and correct copy of the
15 December 5, 2010 DCA endorsement letter from the Internationalized Domain
16 Resolution Union (“IDRU”) to me.

17 20. Attached hereto as **Exhibit 12** is a true and correct copy of the
18 November 17, 2010 DCA endorsement letter from the Corporate Council on Africa
19 to me.

20 21. Attached hereto as **Exhibit 13** is a true and correct copy of the August
21 7, 2012 endorsement letter from Kenya to me.

22 22. Attached hereto as **Exhibit 14** is a true and correct copy, as posted on
23 ICANN’s website at
24 [https://www.icann.org/en/system/files/correspondence/crocker-to-ibrahim-](https://www.icann.org/en/system/files/correspondence/crocker-to-ibrahim-08mar12-en.pdf)
25 [08mar12-en.pdf](https://www.icann.org/en/system/files/correspondence/crocker-to-ibrahim-08mar12-en.pdf), of the March 8, 2012 letter from ICANN to AUC.
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BEKELE DECLARATION

1 23. Instead of allowing DCA's application to proceed through the
2 remainder of the application process after the IRP, ICANN restarted DCA's
3 application and re-reviewed its endorsements.

4 24. Attached hereto as **Exhibit 15** is a true and correct copy of the first set
5 of clarifying questions ICANN issued to DCA on September 2, 2015.

6 25. Attached hereto as **Exhibit 16** is a true and correct copy of ICANN's
7 response to DCA regarding the clarifying questions in the Initial Evaluation
8 Results Report issued on October 13, 2015.

9 26. Attached hereto as **Exhibit 17** is a true and correct copy of the second
10 set of clarifying questions ICANN issued to DCA on October 30, 2015 during the
11 Extended Evaluation.

12 27. The second set of clarifying questions from ICANN provided no
13 further guidance or clarification to DCA on its application.

14 28. Attached hereto as **Exhibit 18** is a true and correct copy of the
15 Extended Evaluation Report dated February 17, 2016 that DCA received from
16 ICANN.

17 29. DCA agreed to participate in an Extended Evaluation because it was
18 hoping to gain insight into what more it needed for its application, but ICANN
19 gave no further guidance or clarification.

20 30. Attached hereto as **Exhibit 19** is a true and correct copy of a March
21 15, 2013 email from Mark McFadden of the ICC to ICANN employees, as
22 produced to DCA during the IRP discovery process.

23 31. The members of the AUC committee formed to choose who to
24 endorse for the .Africa gTLD were individuals who were also members of other
25 organizations affiliated with ZACR.

26 32. Attached hereto as **Exhibit 20** is a true and correct copy of ZACR's
27 public application for the .Africa gTLD as posted on ICANN's website.
28

BEKELE DECLARATION

1 33. Attached hereto as **Exhibit 21** is a true and correct copy, as posted on
2 the AUC’s website at [http://www.au.int/en/sites/default/files/AUC-dotAfrica-](http://www.au.int/en/sites/default/files/AUC-dotAfrica-Communique-.pdf)
3 [Communique-.pdf](http://www.au.int/en/sites/default/files/AUC-dotAfrica-Communique-.pdf), of the AUC Communique on the AUC selecting ZACR.

4 34. After reviewing the ZACR endorsements produced to DCA, I noted
5 that only five specifically reference ZACR by name and that many of the letters
6 were actually endorsing AUC’s own initiative to make .Africa a “reserved” gTLD.

7 35. Attached hereto as **Exhibit 22** is a true and correct copy of the
8 ICANN news article regarding InterConnect Communications (“ICC”) published
9 at <https://newgtlds.icann.org/en/blog/preparing-evaluators-22nov11-en>
10

11 36. Attached hereto as **Exhibit 23** is a true and correct copy, as produced
12 to DCA from ICANN, of the October 15, 2012 email from the ICC to ICANN with
13 attachment.

14 37. Attached hereto as **Exhibit 24** is a true and correct copy, as produced
15 to DCA by ICANN, of the April 9, 2013 email from Samuel Buruchara to Heather
16 Dryden.

17 38. Attached hereto as **Exhibit 25** is a true and correct copy, as produced
18 to DCA by ICANN, of the April 10, 2013 email from Michael Kutundu to Heather
19 Dryden.

20 39. Attached hereto as **Exhibit 26** is a true and correct copy, as posted at
21 [https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-](https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf)
22 [en.pdf](https://www.icann.org/en/system/files/correspondence/gac-to-board-18apr13-en.pdf), of the April 11, 2013 GAC Communique.

23 40. Attached hereto as **Exhibit 27** is a true and correct copy, as produced
24 to DCA by ICANN, of the New GTLD Program Initial Evaluation Report for
25 ZACR’s application.

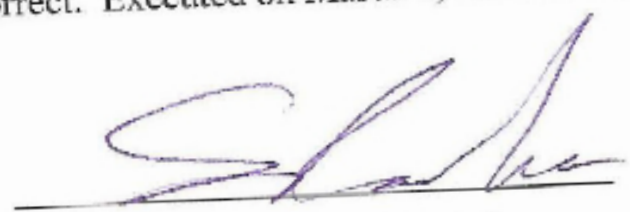
26 41. Attached hereto as **Exhibit 28** is a true and correct copy, as posted on
27 ICANN’s website at
28 <https://gacweb.icann.org/display/gacweb/Upcoming+Meeting%3A+Marrakech,+5->

BEKELE DECLARATION

1 10+March+2016, of the meeting schedule for the ICANN meeting from March 5,
2 2016 through March 10, 2016. I believe that ICANN will assign the rights to
3 .Africa at this meeting.

4 42. Attached hereto as Exhibit 29 is a true and correct copy, as posted at
5 ICANN's website at
6 <https://gacweb.icann.org/display/gacweb/GAC+Operating+Principles>, of the GAC
7 Operating Principles.

8
9 I declare under penalty of perjury under the laws of the United States of America
10 that the foregoing is true and correct. Executed on March 1, 2016 at Walnut
11 Creek, California.

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14 Sophia Bekele Eshete

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17 4833-2797-1630, v. 2

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BEKELE DECLARATION

Case 2:16-cv-00862-RGK-JC Document 17-1 Filed 03/01/16 Page 1 of 64 Page ID #:359

EXHIBIT 1

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
Independent Review Panel**

CASE #50 2013 001083

FINAL DECLARATION

In the matter of an Independent Review Process (IRP) pursuant to the Internet Corporation For Assigned Names and Number's (ICANN's) Bylaws, the *International Dispute Resolution Procedures (ICDR Rules)* and the *Supplementary Procedures for ICANN Independent Review Process* of the International Centre for Dispute Resolution (ICDR),

Between: DotConnectAfrica Trust;
("Claimant" or "DCA Trust")

Represented by Mr. Arif H. Ali, Ms. Meredith Craven, Ms. Erin Yates and Mr. Ricardo Ampudia of Weil, Gotshal & Manges, LLP located at 1300 Eye Street, NW, Suite 900, Washington, DC 2005, U.S.A.

And

Internet Corporation for Assigned Names and Numbers (ICANN);
("Respondent" or "ICANN")

Represented by Mr. Jeffrey A. LeVee and Ms. Rachel Zernik of Jones Day, LLP located at 555 South Flower Street, Fiftieth Floor, Los Angeles, CA 90071, U.S.A.

Claimant and Respondent will together be referred to as "Parties".

IRP Panel

**Prof. Catherine Kessedjian
Hon. William J. Cahill (Ret.)
Babak Barin, *President***

I. BACKGROUND

1. DCA Trust is non-profit organization established under the laws of the Republic of Mauritius on 15 July 2010 with its registry operation – DCA Registry Services (Kenya) Limited – as its principal place of business in Nairobi, Kenya.
2. DCA Trust was formed with the charitable purpose of, among other things, advancing information technology education in Africa and providing a continental Internet domain name to provide access to internet services for the people of Africa and not for the public good.
3. In March 2012, DCA Trust applied to ICANN for the delegation of the .AFRICA top-level domain name in its 2012 General Top-Level Domains (“gTLD”) Internet Expansion Program (the “New gTLD Program”), an internet resource available for delegation under that program.
4. ICANN is a non-profit corporation established on 30 September 1998 under the laws of the State of California, and headquartered in Marina del Rey, California, U.S.A. According to its Articles of Incorporation, ICANN was established for the benefit of the Internet community as a whole and is tasked with carrying out its activities in conformity with relevant principles of international law, international conventions and local law.
5. On 4 June 2013, the ICANN Board New gTLD Program Committee (“NGPC”) posted a notice that it had decided not to accept DCA Trust’s application.
6. On 19 June 2013, DCA Trust filed a request for reconsideration by the ICANN Board Governance Committee (“BGC”), which denied the request on 1 August 2013.
7. On 19 August 2013, DCA Trust informed ICANN of its intention to seek relief before an Independent Review Panel under ICANN’s Bylaws. Between August and October 2013, DCA Trust and ICANN participated in a Cooperative Engagement Process (“CEP”) to try and resolve the issues relating to DCA Trust’s application. Despite several meetings, no resolution was reached.
8. On 24 October 2013, DCA Trust filed a Notice of Independent Review Process with the ICDR in accordance with Article IV, Section 3 of ICANN’s Bylaws.

9. In an effort to safeguard its rights pending the ongoing constitution of the IRP Panel, on 22 January 2014, DCA Trust wrote to ICANN requesting that it immediately cease any further processing of all applications for the delegation of the .AFRICA gTLD, failing which DCA Trust would seek emergency relief under Article 37 of the ICDR Rules.
10. DCA Trust also indicated that it believed it had the right to seek such relief because there was no standing panel as anticipated in the Supplementary Procedures for ICANN Independent Review Process (“Supplementary Procedures”), which could otherwise hear requests for emergency relief.
11. In response, on 5 February 2014, ICANN wrote:

Although ICANN typically is refraining from further processing activities in conjunction with pending gTLD applications where a competing applicant has a pending reconsideration request, ICANN does not intend to refrain from further processing of applications that relate in some way to pending independent review proceedings. In this particular instance, ICANN believes that the grounds for DCA’s IRP are exceedingly weak, and that the decision to refrain from the further processing of other applications on the basis of the pending IRP would be unfair to others.

12. In its Request for Emergency Arbitrator and Interim Measures of Protection subsequently submitted on 28 March 2014, DCA Trust pleaded, *inter alia*, that, in an effort to preserve its rights, in January 2014, DCA requested that ICANN suspend its processing of applications for .AFRICA during the pendency of this proceeding. ICANN, however, summarily refused to do so.
13. DCA Trust also submitted that “on 23 March 2014, DCA became aware that ICANN intended to sign an agreement with DCA’s competitor (a South African company called ZACR) on 26 March 2014 in Beijing [...] Immediately upon receiving this information, DCA contacted ICANN and asked it to refrain from signing the agreement with ZACR in light of the fact that this proceeding was still pending. Instead, according to ICANN’s website, ICANN *signed its agreement with ZACR the very next day, two days ahead of plan, on 24 March instead of 26 March.*”
14. According to DCA Trust, that same day, “ICANN then responded to DCA’s request by presenting the execution of the contract as a *fait accompli*, arguing that DCA should have sought to stop ICANN from proceeding with ZACR’s application, as ICANN had already informed DCA of its intention [to] ignore its obligations to participate in this proceeding in good faith.”

15. DCA Trust also submitted that on 25 March 2014, as per ICANN's email to the ICDR, "ICANN for the first time informed DCA that it would accept the application of Article 37 of the ICDR Rules to this proceeding contrary to the express provisions of the Supplementary Procedures of ICANN has put in place for the IRP Process."
16. In its Request, DCA Trust argued that it "is entitled to an accountability proceeding with legitimacy and integrity, with the capacity to provide a meaningful remedy. [...] DCA has requested the opportunity to compete for rights to .AFRICA pursuant to the rules that ICANN put into place. Allowing ICANN to delegate .AFRICA to DCA's only competitor – which took actions that were instrumental in the process leading to ICANN's decision to reject DCA's application – would eviscerate the very purpose of this proceeding and deprive DCA of its rights under ICANN's own constitutive instruments and international law."
17. Finally, among other things, DCA Trust requested the following interim relief:
 - a. An order compelling *ICANN to refrain from any further steps toward delegation of the .AFRICA gTLD*, including but not limited to execution or assessment of pre-delegation testing, negotiations or discussions relating to delegation with the entity ZACR or any of its officers or agents; [...]
18. On 24 April and 12 May 2014, the Panel issued Procedural Order No. 1, a Decision on Interim Measures of Protection, and a list of questions for the Parties to answer.
19. In its 12 May 2014 Decision on Interim Measures of Protection, the Panel required ICANN to "immediately refrain from any further processing of any application for .AFRICA until [the Panel] heard the merits of DCA Trust's Notice of Independent Review Process and issued its conclusions regarding the same".
20. In the Panel's unanimous view, among other reasons, it would have been "unfair and unjust to deny DCA Trust's request for interim relief when the need for such a relief...[arose] out of ICANN's failure to follow its own Bylaws and procedures." The Panel also reserved its decision on the issue of costs relating to that stage of the proceeding until the hearing of the merits.
21. On 27 May and 4 June 2015, the Panel issued Procedural Order No. 2 and a Decision on ICANN's request for Partial Reconsideration of certain portions of its Decision on Interim Measures of Protection.

22. In its 4 June 2014 Decision on ICANN's request for Partial Reconsideration, the Panel unanimously concluded that ICANN's request must be denied. In that Decision, the Panel observed:

9. After careful consideration of the Parties' respective submissions, the Panel is of the unanimous view that ICANN's Request must be denied for two reasons.

10. First, there is nothing in ICANN's Bylaws, the International Dispute Resolution Procedures of the ICDR effective as at 1 June 2009 or the Supplementary Procedures for ICANN Independent Review Process that in any way address the Panel's ability to address ICANN's Request. The Panel has not been able to find any relevant guidance in this regard in any of the above instruments and ICANN has not pointed to any relevant provision or rule that would support its argument that the Panel has the authority to reconsider its Decision of 12 May 2014.

11. Moreover, ICANN has not pointed to any clerical, typographical or computation error or shortcoming in the Panel's Decision and it has not requested an interpretation of the Panel's Decision based on any ambiguity or vagueness. To the contrary, ICANN has asked the Panel to reconsider its prior findings with respect to certain references in its Decision that ICANN disagrees with, on the basis that those references are in ICANN's view, inaccurate.

12. Second, even if the Panel were to reconsider based on any provision or rule available, its findings with respect to those passages complained of by ICANN as being inaccurate in its Decision – namely paragraphs 29 to 33 – after deliberation, the Panel would still conclude that ICANN has failed to follow its own Bylaws as more specifically explained in the above paragraphs, in the context of addressing which of the Parties should be viewed as responsible for the delays associated with DCA Trust's Request for Interim Measures of Protection. It is not reasonable to construe the By-law proviso for consideration by a provider-appointed *ad hoc* panel when a standing panel is not in place as relieving ICANN indefinitely of forming the required standing panel. Instead, the provider appointed panel is properly viewed as an interim procedure to be used before ICANN has a chance to form a 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.

The Panel also reserved its decision on the issue of costs relating to that stage of the proceeding until the hearing of the merits.

23. On 14 August 2014, the Panel issued a Declaration on the IRP Procedure ("2014 Declaration") pursuant to which it (1) ordered a reasonable documentary exchange, (2) permitted the Parties to benefit from additional filings and supplementary briefing, (3) allowed a video hearing, and (4) permitted both Parties at the hearing to

challenge and test the veracity of any written statements made by witnesses.

The Panel also concluded that its Declaration on the IRP and its future Declaration on the Merits of the case were binding on the Parties. In particular, the Panel decided:

98. Various provisions of ICANN's Bylaws and the Supplementary Procedures support the conclusion that the Panel's decisions, opinions and declarations are binding. There is certainly nothing in the Supplementary Rules that renders the decisions, opinions and declarations of the Panel either advisory or non-binding.

[...]

100. Section 10 of the Supplementary Procedures resembles Article 27 of the ICDR Rules. Whereas Article 27 refers to "Awards", section 10 refers to "Declarations". Section 10 of the Supplementary Procedures, however, is silent on whether Declarations made by the IRP Panel are "final and binding" on the parties.

101. As explained earlier, as per Article IV, Section 3, paragraph 8 of the Bylaws, the Board of Directors of ICANN has given its approval to the ICDR to establish a set of operating rules and procedures for the conduct of the IRP set out in section 3. The operating rules and procedures established by the ICDR are the ICDR Rules as referred to in the preamble of the Supplementary Procedures. These Rules have been supplemented with the Supplementary Procedures.

102. This is clear from two different parts of the Supplementary Procedures. First, in the preamble, where the Supplementary Procedures state that: "These procedures supplement the International Centre for Dispute Resolution's International Arbitration Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws".

103. And second, under section 2 entitled (Scope), that states that the "ICDR will apply these Supplementary Procedures, in addition to the INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, in all cases submitted to the ICDR in connection with the Article IV, Section 3(4) of the ICANN Bylaws". It is therefore clear that ICANN intended the operating rules and procedures for the independent review to be an international set of arbitration rules supplemented by a particular set of additional rules.

104. There is also nothing inconsistent between section 10 of the Supplementary Procedures and Article 27 of the ICDR Rules.

105. One of the hallmarks of international arbitration is the binding and final nature of the decisions made by the adjudicators. Binding arbitration is the essence of what the ICDR Rules, the ICDR itself and its parent, the American Arbitration Association, offer. The selection of the ICDR Rules as the baseline set of procedures for IRP's, therefore, points to a binding adjudicative process.

106. Furthermore, the process adopted in the Supplementary Procedures is an adversarial one where counsel for the parties present competing evidence and arguments, and a panel decides who prevails, when and in what circumstances. The panellists who adjudicate the parties' claims are also selected from among experienced arbitrators, whose usual charter is to make binding decisions.

107. The above is further supported by the language and spirit of section 11 of ICANN's Bylaws. Pursuant to that section, the IRP Panel has the authority to summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious. Surely, such a decision, opinion or declaration on the part of the Panel would not be considered advisory.

[...]

110. ICANN points to the extensive public and expert input that preceded the formulation of the Supplementary Procedures. The Panel would have expected, were a mere advisory decision, opinion or declaration the objective of the IRP, that this intent be clearly articulated somewhere in the Bylaws or the Supplementary Procedures. In the Panel's view, this could have easily been done.

111. The force of the foregoing textual and construction considerations as pointing to the binding effect of the Panel's decisions and declarations are reinforced by two factors: 1) the exclusive nature of the IRP whereby the non-binding argument would be clearly in contradiction with such a factor; and, 2) the special, unique, and publicly important function of ICANN. As explained before, ICANN is not an ordinary private non-profit entity deciding for its own sake who it wishes to conduct business with, and who it does not. ICANN rather, is the steward of a highly valuable and important international resource.

[...]

115. Moreover, assuming for the sake of argument that it is acceptable for ICANN to adopt a remedial scheme with no teeth, the Panel is of the opinion that, at a minimum, the IRP should forthrightly explain and acknowledge that the process is merely advisory. This would at least let parties know before embarking on a potentially expensive process that a victory before the IRP panel may be ignored by ICANN. And, a straightforward acknowledgment that the IRP process is intended to be merely advisory might lead to a legislative or executive initiative to create a truly independent compulsory process. The Panel seriously doubts that the Senators questioning former ICANN President Stuart Lynn in 2002 would have been satisfied had they understood that a) ICANN had imposed on all applicants a waiver of all judicial remedies, *and* b) the IRP process touted by ICANN as the "ultimate guarantor" of ICANN accountability was only an advisory process, the benefit of which accrued only to ICANN. [Underlining is from the original decision.]

The Panel also reserved its decision on the issue of costs relating to that stage of the proceeding until the hearing of the merits.

24. On 5 September and 25 September 2014, the Panel issued Procedural Orders No. 3 and No. 4. In Procedural Order No. 3, the Panel notably required the Parties to complete their respective filing of briefs in accordance with the IRP Procedure Guidelines by 3 November 2014 for DCA Trust and 3 December 2014 for ICANN.
25. In Procedural Order No. 4 dated 25 September 2014, the Panel reached a decision regarding document production issues.
26. On 3 November 2014 and 3 December 2014, the Parties filed their Memorial and Response Memorial on the Merits in accordance with the timetable set out in Procedural Order No. 3.
27. On 26 February 2015, following the passing away of the Hon. Richard C. Neal (Ret.) and confirmation by the ICDR of his replacement arbitrator, the Hon. William J. Cahill (Ret.), ICANN requested that this Panel consider revisiting the part of this IRP relating to the issue of hearing witnesses addressed in the Panel's 2014 Declaration.
28. In particular, ICANN submitted that given the replacement of Justice Neal, Article 15.2 of the ICDR Rules together with the Supplementary Procedures permitted this IRP to in its sole discretion, determine "whether all or part" of this IRP should be repeated.
29. According to ICANN, while it was not necessary to repeat all of this IRP, since the Panel here had exceeded its authority under the Supplementary Procedures when it held in its 2014 Declaration that it could order live testimony of witnesses, the Panel should then at a minimum consider revisiting that issue.
30. According to ICANN, panelists derived "their powers and authority from the relevant applicable rules, the parties' requests, and the contractual provisions agreed to by the Parties (in this instance, ICANN's Bylaws, which establish the process of independent review). The authority of panelists is limited by such rules, submissions and agreements."
31. ICANN emphasized that "compliance with the Supplementary Procedures [was] critical to ensure predictability for ICANN, applicants for and objectors to gTLD applications, and the entire ICANN community...", and while "ICANN [was] committed to fairness and accessibility...ICANN [was] also committed to predictability and the like treatment of all applicants. For this Panel to change the rules

for this single applicant [did] not encourage any of these commitments.”

32. ICANN also pleaded that, DCA specifically agreed to be bound by the Supplementary Procedures when it initially submitted its application, the Supplementary Procedures apply to both ICANN and DCA alike, ICANN is now in the same position when it comes to testing witness declarations and finally, in alternative dispute resolution proceedings where cross examination of witnesses is allowed, parties often waive cross-examination.

33. Finally, ICANN advanced that:

[T]he Independent Review process is an alternative dispute resolution procedure adapted to the specific issues to be addressed pursuant to ICANN's Bylaws. The process cannot be transformed into a full-fledged trial without amending ICANN's Bylaws and the Supplementary Procedures, which specifically provide for a hearing that includes counsel argument only. Accordingly, ICANN strongly urges the Panel to follow the rules for this proceeding and to declare that the hearing in May will be limited to argument of counsel.

34. On 24 March 2015, the Panel issued its Declaration on ICANN's Request for Revisiting of the 14 August Declaration on the IRP Procedure following the Replacement of Panel Member. In that Declaration, the newly constituted Panel unanimously concluded that it was not necessary for it to reconsider or revisit its 2014 Declaration.

35. In passing and not at all as a result of any intended or inadvertent reconsideration or revisiting of its 2014 Declaration, the Panel referred to Articles III and IV of ICANN's Bylaws and concluded:

Under the general heading, Transparency, and title “Purpose”, Section 1 of Article III states: “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.” Under the general heading, Accountability and Review, and title “Purpose”, Section 1 of Article IV reads: “In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws.” In light of the above, and again in passing only, it is the Panel's unanimous view, that the filing of fact witness statements (as ICANN has done in this IRP) and limiting telephonic or in-person hearings to argument only is inconsistent with the objectives setout in Articles III and IV setout above.

The Panel again reserved its decision on the issue of costs relating to that stage of the proceeding until the hearing of the merits.

36. On 24 March and 1 April 2015, the Panel rendered Procedural Orders No. 5 and 6, in which, among other things, the Panel recorded the Parties' "agreement that there will no cross-examination of any of the witnesses" at the hearing of the merits.
37. On 20 April 2015, the Panel rendered its Third Declaration on the IRP Procedure. In that Declaration, the Panel decided that the hearing of this IRP should be an in-person one in Washington, D.C. and required all three witnesses who had filed witness statements to be present at the hearing.

38. The Panel in particular noted that:

13. [...] Article IV, Section 3, and Paragraph 4 of ICANN's Bylaws (reproduced above) – the Independent Review Process – was designed and set up to offer the Internet community, an accountability process that would ensure that ICANN acted in a manner consistent with ICANN's Articles of Incorporation and Bylaws.

14. Both ICANN's Bylaws and the Supplementary Rules require an IRP Panel to *examine* and *decide* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws. As ICANN's Bylaws explicitly put it, an IRP Panel is "*charged with* comparing contested actions of the Board [...], and with *declaring* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws.

15. The IRP is the only independent third party process that allows review of board actions to ensure their consistency with the Articles of Incorporation or Bylaws. As already explained in this Panel's 14 August 2014 Declaration on the IRP Procedure ("August 2014 Declaration"), the avenues of accountability for applicants that have disputes with ICANN do *not* include resort to the courts. Applications for gTLD delegations are governed by ICANN's Guidebook, which provides that applicants waive all right to resort to the courts:

"Applicant hereby releases ICANN [...] from any and all claims that arise out of, are based upon, or are in any way related to, any action or failure to act by ICANN [...] in connection with ICANN's review of this application, investigation, or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR 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 ON THE BASIS OF ANY OTHER LEGAL CLAIM."

Thus, assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, then the only and ultimate "accountability" remedy for an applicant is the IRP.

16. Accountability requires an organization to explain or give reasons for its activities, accept responsibility for them and to disclose the results in a transparent manner.

[...]

21. In order to keep the costs and burdens of independent review as low as possible, ICANN's Bylaws, in Article IV, Section 3 and Paragraph 12, suggests that the IRP Panel conduct its proceedings by email and otherwise via the Internet to the maximum extent feasible, and where necessary the IRP Panel may hold meetings by telephone. Use of the words "should" and "may" versus "shall" are demonstrative of this point. In the same paragraph, however, ICANN's Bylaws state that, "in the unlikely event that a telephonic or in-person hearing is convened, the hearing *shall* be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance."

22. The Panel finds that this last sentence in Paragraph 12 of ICANN's Bylaws, unduly and improperly restricts the Panel's ability to conduct the "independent review" it has been explicitly mandated to carryout in Paragraph 4 of Section 3 in the manner it considers appropriate.

23. How can a Panel compare contested actions of the Board and declare whether or not they are consistent with the provisions of the Articles of Incorporation and Bylaws, without the ability to fact find and make enquiries concerning those actions in the manner it considers appropriate?

24. How can the Panel for example, determine, if the Board acted without conflict of interest, exercised due diligence and care in having a reasonable amount of facts in front of it, or exercised independent judgment in taking decisions, if the Panel cannot ask the questions it needs to, in the manner it needs to or considers fair, just and appropriate in the circumstances?

25. How can the Panel ensure that the parties to this IRP are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case with respect to the mandate the Panel has been given, if as ICANN submits, "ICANN's Bylaws do not permit any examination of witnesses by the parties or the Panel during the hearing"?

26. The Panel is unanimously of the view that it cannot. The Panel is also of the view that any attempt by ICANN in this case to prevent it from carrying out its independent review of ICANN Board's actions in the manner that the Panel considers appropriate under the circumstances deprives the accountability and review process set out in the Bylaws of any meaning.

27. ICANN has filed two 'Declarations' in this IRP, one signed by Ms. Heather Dryden, a Senior Policy Advisor at the International Telecommunications Policy and Coordination Directorate at Industry Canada, and Chair of ICANN Government Advisory Committee from 2010 to 2013, and the other by Mr. Cherine Chalaby, a member of the Board of Directors of ICANN since 2010. Mr. Chalaby is also, since its inception, one of three members of the Subcommittee on Ethics and Conflicts of ICANN's Board of Governance Committee.

28. In their respective statements, both individuals have confirmed that they "have personal knowledge of the matters set forth in [their] declaration and [are] competent to testify to these matters *if called as a witness.*"

[...]

29. In his Declaration, Mr. Chalaby states that “all members of the NGPC were asked to and did specifically affirm that they did not have a conflict of interest related to DCA’s application for .AFRICA when they voted on the GAC advice. In addition, the NGPC asked the BGC to look into the issue further, and the BGC referred the matter to the Subcommittee. After investigating the matter, the Subcommittee concluded that Chris Disspain and Mike Silber did not have conflicts of interest with respect to DCA’s application for .AFRICA.”

30. The Panel considers it important and useful for ICANN’s witnesses, and in particular, Mr. Chalaby as well as for Ms. Sophia Bekele Eshete to be present at the hearing of this IRP.

31. While the Panel takes note of ICANN’s position depicted on page 2 of its 8 April 2015 letter, the Panel nonetheless invites ICANN to reconsider its position.

32. The Panel also takes note of ICANN’s offer in that same letter to address written questions to its witnesses before the hearing, and if the Panel needs more information after the hearing to clarify the evidence presented during the hearing. The Panel, however, is unanimously of the view that this approach is fundamentally inconsistent with the requirements in ICANN’s Bylaws for it to act openly, transparently, fairly and with integrity.

33. As already indicated in this Panel’s August 2014 Declaration, analysis of the propriety of ICANN’s decisions in this case will depend at least in part on evidence about the intentions and conduct of ICANN’s top personnel. Even though the Parties have explicitly agreed that neither will have an opportunity to cross-examine the witnesses of the other in this IRP, the Panel is of the view that ICANN should not be allowed to rely on written statements of its top officers attesting to the propriety of their actions and decisions without an opportunity for the Panel and thereafter DCA Trust’s counsel to ask any follow-up questions arising out of the Panel’s questions of ICANN’s witnesses. The same opportunity of course will be given to ICANN to ask questions of Ms. Bekele Eshete, after the Panel has directed its questions to her.

34. The Parties having agreed that there will be no cross-examination of witnesses in this IRP, the procedure for asking witnesses questions at the hearing shall be as follows:

- a) The Panel shall first have an opportunity to ask any witness any questions it deems necessary or appropriate;
- b) Each Party thereafter, shall have an opportunity to ask any follow-up questions the Panel permits them to ask of any witness.

The Panel again reserved its decision on the issue of costs relating to that stage of the proceeding until the hearing of the merits.

39. On 27 April and 4 May 2015, the Panel issued its Procedural Order No. 7 and 8, and on that last date, it held a prehearing conference call with the Parties as required by the ICDR Rules. In Procedural

Order No. 8, the Panel set out the order of witness and party presentations agreed upon by the Parties.

40. On 18 May 2015, and in response to ZA Central Registry's (ZACR) request to have two of its representatives along with a representative from the African Union Commission (AUC) attend at the IRP hearing scheduled for 22 and 23 May 2015 in Washington, D.C., the Panel issued its Procedural Order No. 9, denying the requests made by ZACR and AUC to be at the merits hearing of this matter in Washington, D.C.
41. In a letter dated 11 May 2015, ZACR and AUC's legal representative had submitted that both entities had an interest in this matter and it would be mutually beneficial for the IRP to permit them to attend at the hearing in Washington, D.C.
42. ZACR's legal representative had also argued that "allowing for interests of a materially affected party such as ZACR, the successful applicant for the dotAfrica gTLD, as well as broader public interests, to be present enhances the legitimacy of the proceedings and therefore the accountability and transparency of ICANN and its dispute resolution procedures."
43. For the Panel, Article 20 of the ICDR Rules, which applied in this matter, stated that the hearing of this IRP was "private unless the parties agree otherwise". The Parties in this IRP did not consent to the presence of ZACR and AUC. While ICANN indicated that it had no objection to the presence of ZACR and AUC, DCA Trust was not of the same view. Therefore, ZACR and AUC were not permitted to attend.
44. The in-person hearing of the merits of this IRP took place on 22 and 23 May 2015 at the offices of Jones Day LLP in Washington, D.C. All three individuals who had filed witness statements in this IRP, namely Ms. Sophia Bekele Eshete, representative for DCA Trust, Ms. Heather Dryden and Mr. Cherine Chalaby, representatives for ICANN, attended in person and answered questions put to them by the Panel and subsequently by the legal representatives of both Parties. In attendance at the hearing was also Ms. Amy Stathos, Deputy General Counsel of ICANN.
45. The proceedings of the hearing were reported by Ms. Cindy L. Sebo of TransPerfect Legal Solutions, who is a Registered Merit Real-Time Court Reporter.

46. On the last day of the hearing, DCA Trust was asked by the Panel to clearly and explicitly articulate its prayers for relief. In a document entitled Claimant's Final Request for Relief which was signed by the Executive Director of DCA Trust, Ms. Sophia Bekele and marked at the hearing as Hearing Exhibit 4, DCA Trust asked the Panel to:

Declare that the Board violated ICANN's Articles of Incorporation, Bylaws and the Applicant Guidebook (AGB) by:

- Discriminating against DCA and wrongfully assisting the AUC and ZACR to obtain rights to the .AFRICA gTLD;
- Failing to apply ICANN's procedures in a neutral and objective manner, with procedural fairness when it accepted the GAC Objection Advice against DCA; and
- Failing to apply its procedures in a neutral and objective manner, with procedural fairness when it approved the BGC's recommendation not to reconsider the NGPC's acceptance of the GAC Objection Advice against DCA;

And to declare that:

- DCA is the prevailing party in this IRP and, consequently, shall be entitled to its costs in this proceeding; and
- DCA is entitled to such other relief as the Panel may find appropriate under the circumstances described herein.

Recommend, as a result of each of these violations, that:

- ICANN cease all preparations to delegate the .AFRICA gTLD to ZACR;
- ICANN permit DCA's application to proceed through the remainder of the new gTLD application process and be granted a period of no less than 18 months to obtain Government support as set out in the AGB and interpreted by the Geographic Names Panel, or accept that the requirement is satisfied as a result of the endorsement of DCA Trust's application by UNECA; and
- ICANN compensate DCA for the costs it has incurred as a result of ICANN's violations of its Articles of Incorporation, Bylaws and AGB.

47. In its response to DCA Trust's Final Request for Relief, ICANN submitted that, "the Panel should find that no action (or inaction) of the ICANN Board was inconsistent with the Articles of Incorporation or Bylaws, and accordingly none of DCA's requested relief is appropriate."

48. ICANN also submitted that:

DCA urges that the Panel issue a declaration in its favor...and also asks that the Panel declare that DCA is the prevailing party and entitled to its costs. Although ICANN believes that the evidence does not support the

declarations that DCA seeks, ICANN does not object to the form of DCA's requests.

At the bottom of DCA's Final Request for Relief, DCA asks that the Panel recommend that ICANN cease all preparations to delegate the .AFRICA gTLD to ZACR, and that ICANN permit DCA's application to proceed and give DCA no less than 18 additional months from the date of the Panel's declaration to attempt to obtain the requisite support of the countries in Africa. ICANN objects to that appropriateness of these requested recommendations because they are well outside the Panel's authority as set forth in the Bylaws.

[...]

Because the Panel's authority is limited to declaring whether the Board's conduct was inconsistent with the Articles or the Bylaws, the Panel should limit its declaration to that question and refrain from recommending how the Board should then proceed in light of the Panel's declaration. Pursuant to Paragraph 12 of that same section of the Bylaws, the Board will consider the Panel's declaration at its next meeting, and if the Panel has declared that the Board's conduct was inconsistent with the Articles or the Bylaws, the Board will have to determine how to act upon the opinion of the Panel.

By way of example only, if the Panel somehow found that the unanimous NGPC vote on 4 June 2013 was not properly taken, the Board might determine that the vote from that meeting should be set aside and that the NGPC should consider the issue anew. Likewise, if the Panel were to determine that the NGPC did not adequately consider the GAC advice at [the] 4 June 2013 meeting, the Board might require that the NGPC reconsider the GAC advice.

In all events, the Bylaws mandate that the Board has the responsibility of fashioning the appropriate remedy once the Panel has declared whether or not it thinks the Board's conduct was inconsistent with ICANN's Articles of Incorporation and Bylaws. The Bylaws do not provide the Panel with the authority to make any recommendations or declarations in this respect.

49. In response to ICANN's submissions above, on 15 June 2015, DCA Trust advanced that the Panel had already ruled that its declaration on the merits will be binding on the Parties and that nothing in ICANN's Bylaws, the Supplementary Procedures or the ICDR Rules applicable in these proceedings prohibits the Panel from making a recommendation to the ICANN Board of Directors regarding an appropriate remedy. DCA Trust also submitted that:

According to ICANN's Bylaws, the Independent Review Process is designed to provide a remedy for "any" person materially affected by a decision or action by the Board. Further, "in order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation. Indeed, the ICANN New gTLD Program Committee, operating under the delegated authority of the ICANN Board, itself suggested that DCA could seek relief through ICANN's accountability

mechanisms or, in other words, the Reconsideration process and the Independent Review Process. If the IRP mechanism – the mechanism of last resort for gTLD applicants – is intended to provide a remedy for a claimant materially injured or harmed by Board action or inaction, and it serves as the only alternative to litigation, then naturally the IRP Panel may recommend how the ICANN Board might fashion a remedy to redress such injury or harm.

50. On 25 June 2015, the Panel issued its Procedural Order No. 10, directing the Parties to by 1 July 2015 simultaneously file their detailed submissions on costs and their allocation in these proceedings.
51. The additional factual background and reasons in the above decisions, procedural orders and declarations rendered by the Panel are hereby adopted and incorporated by reference in this Final Declaration.
52. On 1 and 2 July 2015, the Parties filed their respective positions and submissions on costs.

II. BRIEF SUMMARY OF THE PARTIES' POSITIONS ON THE MERITS & REQUEST FOR RELIEF

53. According to DCA Trust and as elaborated on in its Memorial on Merits dated 3 November 2014, the central dispute between it and ICANN in this IRP may be summarized as follows:

32. By preventing DCA'S application from proceeding through the new gTLD review process and by coordinating with the AUC and others to ensure that the AUC obtained the rights to .AFRICA, ICANN breached its obligations of independence, transparency and due process contained in its Articles of Incorporation and Bylaws, including its obligation to conduct itself consistent with its duty of good faith under relevant principles of international law.

54. According to DCA Trust, among other things, "instead of functioning as a disinterested regulator of a fair and transparent gTLD application process, ICANN used its authority and oversight over that process to assist ZACR and to eliminate its only competitor, DCA, from the process."
55. DCA Trust also advanced that, "as a result, ICANN deprived DCA of the right to compete for .AFRICA in accordance with the rules ICANN established for the new gTLD program, in breach of the Applicant Guidebook ("AGB") and ICANN's Articles of Incorporation and Bylaws."

56. In its 3 December 2014 Response to DCA's Memorial on the Merits, among other things, ICANN submitted that, "ICANN's conduct with respect to DCA's application for .AFRICA was fully consistent with ICANN's Bylaws, its Articles of Incorporation and the Applicant Guidebook. ICANN also pleaded that it acted through open and transparent processes, evaluated DCA's application for .AFRICA in accordance with the procedures set forth in the Guidebook, and followed the procedures set forth in its Bylaws in evaluating DCA's Request for Reconsideration."
57. ICANN advanced that, "DCA is using this IRP as a mean to challenge the right of African countries to support a specific (and competing) application for .AFRICA, and to rewrite the Guidebook."
58. ICANN also added that, "ICANN provided assistance to those who requested, cooperated with governmental authorities, and respected the consensus advice issued by the GAC, which speaks on behalf of the governments of the world."
59. In its Final Request for Relief filed on 23 May 2015, DCA Trust asked this Panel to:
 1. Declare that the Board violated ICANN's Articles of Incorporation, Bylaws and the Applicant Guidebook (AGB);
 2. Declare that DCA Trust is the prevailing party in this IRP and, consequently entitled to its costs in this proceeding; and
 3. Recommend as a result of the Board violations a course of action for the Board to follow going forward.
60. In its response letter of 1 June 2015, ICANN confirmed that it did not object to the form of DCA Trust's requests above, even though it believes that the evidence does not support the declarations that DCA Trust seeks. ICANN did, however, object to the appropriateness of the request for recommendations on the ground that they are outside of the Panel's authority as set forth in the Bylaws.

III. THE ISSUES RAISED AND THE PANEL'S DECISION

61. After carefully considering the Parties' written and oral submissions, perusing the three witness statements filed and hearing *viva voce* the testimonies of the witnesses at the in-person hearing of this IRP in Washington, D.C., the Panel answers the following four questions put to it as follows:

1. Did the Board act or fail to act in a manner inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook?

Answer: Yes.

2. Can the IRP Panel recommend a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act in a manner inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook (AGB)?

Answer: Yes.

3. Who is the prevailing party in this IRP?

Answer: DCA Trust

4. Who is responsible for bearing the costs of this IRP and the cost of the IRP Provider?

Answer: ICANN, in full.

Summary of Panel's Decision

For reasons explained in more detail below, and pursuant to Article IV, Section 3, paragraph 11 (c) of ICANN's Bylaws, the Panel declares that both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN.

Furthermore, pursuant to Article IV, Section 3, paragraph 11 (d) of ICANN's Bylaws, the Panel recommends 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.

Finally, DCA Trust is the prevailing party in this IRP and ICANN is responsible for bearing, pursuant to Article IV, Section 3, paragraph 18 of the Bylaws, Article 11 of Supplementary Procedures and Article 31 of the ICDR Rules, the totality of the costs of this IRP and the totality of the costs of the IRP Provider.

As per the last sentence of Article IV, Section 3, paragraph 18 of the Bylaws, DCA Trust and ICANN shall each bear their own expenses. The Parties shall also each bear their own legal representation fees.

IV. ANALYSIS OF THE ISSUES AND REASONS FOR THE PANEL'S DECISION

1) Did the Board act or fail to act in a manner inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook?

62. Before answering this question, the Panel considers it necessary to quickly examine and address the issue of "standard of review" as referred to by ICANN in its 3 December 2014 Response to DCA's Memorial on the Merits or the "law applicable to these proceedings" as pleaded by DCA Trust in its 3 November 2014 Memorial on the Merits.

63. According to DCA Trust:

30. The version of ICANN's Articles of Incorporation and its Bylaws in effect at the time DCA filed its Request for IRP applies to these proceedings. [Articles of Incorporation of Internet Corporation for Assigned Names and Numbers (21 November 1998) and Bylaws of the Internet Corporation for Assigned Names and Numbers (11 April 2013)]. ICANN's agreement with the U.S. Department of Commerce, National Telecommunications & Information Administration ("NTIA"), the "Affirmation of Commitments," is also instructive, as it explains ICANN's obligations in light of its role as regulator of the Domain Name System ("DNS"). The standard of review is a *de novo* "independent review" of whether the actions of the Board violated the Bylaws, with focus on whether the Board acted without conflict of interest, with due diligence and care, and exercised independent judgment in the best interests of ICANN and its many stakeholders. (Underlining added).

31. All of the obligations enumerated in these documents are to be carried out *first* in conformity with "relevant principles of international law" and *second* in conformity with local law. As explained by Dr. Jack Goldsmith in his Expert Report submitted in *ICM v. ICANN*, the reference to "principles of international law" in ICANN's Articles of Incorporation should be understood to include both customary international law and general principles of law.

64. In response, ICANN submits that:

11. The IRP is a unique process available under ICANN's Bylaws for persons or entities that claim to have been materially and adversely affected by a decision or action of the ICANN Board, but only to the extent that Board action was inconsistent with ICANN's Bylaws or Articles. This IRP Panel is tasked with providing its opinion as to whether the challenged Board actions violated ICANN's Bylaws or Articles. ICANN's Bylaws specifically identify the deferential standard of review that the IRP Panel must apply when evaluating the actions of the ICANN Board, focusing on:

- a. Did the Board act without conflict of interest in taking its decision?;
- b. Did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
- c. Did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

12. DCA disregards the plain language of ICANN's Bylaws and relies instead on the IRP Panel's declaration in a prior Independent Review proceeding, *ICM v. ICANN*. However, *ICM* was decided in 2010 under a previous version of ICANN's Bylaws. In its declaration, the *ICM* Panel explicitly noted that ICANN's then-current Bylaws "d[id] not specify or imply that the [IRP] process provided for s[hould] (or s[hould] not) accord deference to the decisions of the ICANN Board." As DCA acknowledges, the version of ICANN's Bylaws that apply to this proceeding are the version as amended in April 2013. The current Bylaws provide for the deferential standard of review set forth above. [Underlining is added]

65. For the following reasons, the Panel is of the view that the standard of review is a *de novo*, objective and independent one examining whether the Board acted or failed to act in a manner inconsistent with ICANN's Articles of Incorporation and Bylaws.
66. ICANN is not an ordinary California nonprofit organization. Rather it has a large international purpose and responsibility to coordinate and ensure the stable and secure operation of the Internet's unique identifier systems.
67. Indeed, Article 4 of ICANN's Articles of Incorporation require ICANN to "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." ICANN's Bylaws also impose duties on it to act in an open, transparent and fair manner with integrity.
68. ICANN's Bylaws (as amended on 11 April 2013) which both Parties explicitly agree that applies to this IRP, reads in relevant parts as follows:

ARTICLE IV: ACCOUNTABILITY AND REVIEW

Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

1. In addition to the reconsideration process described in Section 2 of this Article, ICANN shall have in place a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws.

[...]

4. Requests for such independent review shall be referred to an Independent Review Process Panel [...], which shall be charged with comparing contested actions of the Board to Articles of Incorporation and Bylaws, and with declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws. The IRP Panel must apply a defined standard of review to the IRP request, focusing on:
 - a. did the Board act without conflict of interest in taking its decision?
 - b. did the Board exercise due diligence and care in having a reasonable amount of facts in front of them?; and
 - c. did the Board members exercise independent judgment in taking the decision, believed to be in the best interests of the company?

69. Section 8 of the Supplementary Procedures similarly subject the IRP to the standard of review set out in subparagraphs a., b., and c., above, and add:

If a requestor demonstrates that the ICANN Board did not make a reasonable inquiry to determine it had sufficient facts available, ICANN Board members had a conflict of interest in participating in the decision, or the decision was not an exercise in independent judgment, believed by the ICANN Board to be in the best interests of the company, after taking account of the internet community and the global public interest, the requestor will have established proper grounds for review.

70. In the Panel's view, Article IV, Section 3, and Paragraph 4 of ICANN's Bylaws (reproduced above) – the Independent Review Process – was designed and set up to offer the Internet community, a *de novo, objective and independent* accountability process that would ensure that ICANN acted in a manner consistent with ICANN's Articles of Incorporation and Bylaws.
71. Both ICANN's Bylaws and the Supplementary Rules require an IRP Panel to *examine* and *decide* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws. As ICANN's Bylaws explicitly put it, an IRP Panel is "*charged with* comparing contested actions of the Board [...], and with *declaring* whether the Board has acted consistently with the provisions of the Articles of Incorporation and Bylaws.

72. The IRP is the only independent third party process that allows review of board actions to ensure their consistency with the Articles of Incorporation or Bylaws. As already explained in this Panel's 14 August 2014 Declaration on the IRP Procedure ("August 2014 Declaration"), the avenues of accountability for applicants that have disputes with ICANN do *not* include resort to the courts. Applications for gTLD delegations are governed by ICANN's Guidebook, which provides that applicants waive all right to resort to the courts:

Applicant hereby releases ICANN [...] from any and all claims that arise out of, are based upon, or are in any way related to, any action or failure to act by ICANN [...] in connection with ICANN's review of this application, investigation, or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR 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 ON THE BASIS OF ANY OTHER LEGAL CLAIM.

73. Thus, assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, then the only and ultimate "accountability" remedy for an applicant is the IRP.
74. As previously decided by this Panel, such accountability requires an organization to explain or give reasons for its activities, accept responsibility for them and to disclose the results in a transparent manner.
75. Such accountability also requires, to use the words of the IRP Panel in the *Booking.com B.V. v. ICANN* (ICDR Case Number: 50-20-1400-0247), this IRP Panel to "objectively" determine whether or not the Board's actions are in fact consistent with the Articles of Incorporation, Bylaws and Guidebook, which this Panel, like the one in *Booking.com* "understands as requiring that the Board's conduct be appraised independently, and without any presumption of correctness."
76. The Panel therefore concludes that the "standard of review" in this IRP is a *de novo, objective and independent* one, which does not require any presumption of correctness.
77. With the above in mind, the Panel now turns its mind to whether or not the Board in this IRP acted or failed to act in a manner inconsistent

with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook.

DCA Trust's Position

78. In its 3 November 2014 Memorial on the Merits, DCA Trust criticizes ICANN for variety of shortcomings and breaches relating to the Articles of Incorporation, Bylaws and Applicant Guidebook. DCA Trust submits:

32. By preventing DCA's application from proceeding through the new gTLD review process and by coordinating with the AUC and others to ensure that the AUC obtained the rights to .AFRICA, ICANN breached its obligations of independence, transparency and due process contained in its Articles of Incorporation and Bylaws, including its obligation to conduct itself consistent with its duty of good faith under relevant principles of international law.

79. DCA Trust also pleads that ICANN breached its Articles of Incorporation and Bylaws by discriminating against DCA Trust and failing to permit competition for the .AFRICA gTLD, ICANN abused its Regulatory authority in its differential treatment of the ZACR and DCA Trust applications, and in contravention of the rules for the New gTLD Program, ICANN colluded with AUC to ensure that the AUC would obtain control over .AFRICA.

80. According to DCA Trust:

34. ICANN discriminated against DCA and abused its regulatory authority over new gTLDs by treating it differently from other new gTLD applicants without justification or any rational basis— particularly relative to DCA's competitor ZACR—and by applying ICANN's policies in an unpredictable and inconsistent manner so as to favor DCA's competitor for .AFRICA. ICANN staff repeatedly disparaged DCA and portrayed it as an illegitimate bidder for .AFRICA, and the Board failed to stop the discriminatory treatment despite protests from DCA.

35. Moreover, ICANN staff worked with InterConnect to ensure that ZACR, but not DCA, would be able to pass the GNP evaluation, even going so far as to draft a letter supporting ZACR for the AUC to submit back to ICANN. While ICANN staff purported to hold DCA to the strict geographic support requirement set forth in the AGB, once DCA was removed from contention for .AFRICA, ICANN staff immediately bypassed these very same rules in order to allow ZACR's application to pass the GNP evaluation. After DCA's application was pulled from processing on 7 June 2013, ICANN staff directed InterConnect to equate the AUC's support for ZACR's application as support from 100% of African governments. This was a complete change of policy for ICANN, which had insisted (until DCA's application was no longer being considered) that the AUC endorsement was not material to the geographic requirement.

36. However, none of the AUC statements ZACR submitted were adequate endorsements under the AGB, either. ICANN staff then took the remarkable step of drafting the AUC endorsement letter in order to enable ZACR to pass review. The Director of gTLD Operations, Trang Nguyen, personally composed an endorsement letter corresponding to all the AGB requirements for Commissioner Ibrahim's signature. Once Commissioner Ibrahim responded with a signed, stamped copy of the letter incorporating minor additions, ICANN staff rushed to pass ZACR's application just over one week later.

37. In its Response to the GAC Advice rendered against its application, DCA raised concerns that the two .AFRICA applications had been treated differently, though at the time it had no idea of just how far ICANN was going or would go to push ZACR's application through the process. Apparently the NGPC failed to make any inquiry into those allegations. .AFRICA was discussed at one meeting only, and there is no rationale listed for the NGPC's decision in the "Approved Resolutions" for the 4 June 2013 meeting. An adequate inquiry into ICANN staff's treatment of DCA's and ZACR's application—even simply asking the Director of gTLD Operations whether there was any merit to DCA's concerns—would have revealed a pattern of discriminatory behavior against DCA and special treatment by both ICANN staff and the ICANN Board in favor of ZACR's application.

38. In all of these acts and omissions, ICANN breached the AGB and its own Articles of Incorporation and Bylaws, which require it to act in good faith, avoid discriminating against any one party, and ensure open, accurate and unbiased application of its policies. Furthermore, ICANN breached principles of international law by failing to exercise its authority over the application process in good faith and committing an abuse of right by ghost-writing an endorsement letter for ZACR and the AUC, and then decreeing that the letter was all that would be needed for ZACR to pass. Finally, the Board's failure to inquire into the actions of its staff, even when on notice of the myriad of discriminatory actions, violates its obligation to comply with its Bylaws with appropriate care and diligence.

81. DCA Trust submits that the NGPC breached ICANN's Articles of Incorporation and Bylaws by failing to apply ICANN's Procedures in a neutral and objective manner with procedural fairness, when it accepted the GAC Objection Advice against DCA Trust, the NGPC should have investigated questions about the GAC Objection Advice being obtained through consensus, and the NGPC should have consulted with an independent expert about the GAC advice given that the AUC used the GAC to circumvent the AGB's community objection procedures.

82. According to DCA Trust:

44. The decision of the NGPC, acting pursuant to the delegated authority of the ICANN Board, to accept the purported "consensus" GAC Objection Advice, violated ICANN's Articles of Incorporation and Article III § 1 of its Bylaws, requiring transparency, consistency and fairness. ICANN ignored

the serious issues raised by DCA and others with respect to the rendering and consideration of the GAC Objection Advice, breaching its obligation to operate “to the maximum extent possible in an open and transparent manner and consistent with procedures designed to ensure fairness.” It also breaches ICANN’s obligation under Article 4 of its Articles of Incorporation to abide by principles of international law, including good faith application of rules and regulations and the prohibition on the abuse of rights.

45. The NGPC gave undue deference to the GAC and failed to investigate the serious procedural irregularities and conflicts of interest raised by DCA and others relating to the GAC’s Objection Advice on .AFRICA. ICANN had a duty under principles of international law to exercise good faith and due diligence in evaluating the GAC advice rather than accepting it wholesale and without question, despite having notice of the irregular manner in which the advice was rendered. Importantly, ICANN was well aware that the AUC was using the GAC to effectively reserve .AFRICA for itself, pursuant to ICANN’s own advice that it should use the GAC for that purpose and contrary to the New gTLD Program objective of enhancing competition for TLDs. The AUC’s very presence on the GAC as a member rather than an observer demonstrates the extraordinary lengths ICANN took to ensure that the AUC was able to reserve .AFRICA for its own use notwithstanding the new gTLD application process then underway.

46. The ICANN Board and staff members had actual knowledge of information calling into question the notion that there was a consensus among the GAC members to issue the advice against DCA’s application, prohibiting the application of the rule in the AGB concerning consensus advice (which creates a “strong presumption” for the Board that a particular application “should not proceed” in the gTLD evaluation process). The irregularities leading to the advice against DCA’s application included proposals offered by Alice Munyua, who no longer represented Kenya as a GAC advisor at the time, and the fact that the genuine Kenya GAC advisor expressly refused to endorse the advice. Redacted - GAC Designated

Confidential Information

Finally, the ICANN Board knew very well that the AUC might attempt to use the GAC in an anticompetitive manner, since it was ICANN itself that informed the AUC it could use the GAC to achieve that very goal.

47. At a bare minimum, this information put ICANN Board and staff members on notice that further investigation into the rationale and support for the GAC’s decision was necessary. During the very meeting wherein the NGPC accepted the Objection Advice, the NGPC acknowledged that due diligence required a conversation with the GAC, even where the advice was consensus advice. The evidence shows that ICANN simply decided to push through the AUC’s appointed applicant in order to allow the AUC to control .AFRICA, as it had previously requested.

48. Even if the GAC’s Objection Advice could be characterized as “consensus” advice, the NGPC’s failure to consult with an independent expert about the GAC’s Objection Advice was a breach of ICANN’s duty to act to the “maximum extent feasible in an open and transparent manner

and consistent with procedures designed to ensure fairness.” The AGB specifically provides that when the Board is considering any form of GAC advice, it “may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.”

49. Given the unique circumstances surrounding the applications for .AFRICA—namely that one applicant was the designee of the AUC, which wanted to control .AFRICA without competition— ICANN should not have simply accepted GAC Objection Advice, proposed and pushed through by the AUC. If it was in doubt as to how to handle GAC advice sponsored by DCA’s only competitor for .AFRICA, it could have and should have consulted a third-party expert in order to obtain appropriate guidance. Its failure to do so was, at a minimum, a breach of ICANN’s duty of good faith and the prohibition on abuse of rights under international law. In addition, in light of the multiple warning signs identified by DCA in its Response to the GAC Objection Advice and its multiple complaints to the Board, failure to consult an independent expert was certainly a breach of the Board’s duty to ensure its fair and transparent application of its policies and its duty to promote and protect competition.

83. DCA Trust also submits that the NGPC breached ICANN’s Articles of Incorporation and Bylaws by failing to apply its procedures in a neutral and objective manner, with procedural fairness, when it approved the BGC’s recommendation not to reconsider the NGPC’s acceptance of the GAC Objection Advice against DCA.

84. According to DCA Trust:

50. Not only did the NGPC breach ICANN’s Articles of Incorporation and its Bylaws by accepting the GAC’s Objection Advice, but the NGPC also breached ICANN’s Articles of Incorporation and its Bylaws by approving the BGC’s recommendation not to reconsider the NGPC’s earlier decision to accept the GAC Objection Advice. Not surprisingly, the NGPC concluded that its earlier decision should not be reconsidered.

51. First, the NGPC’s decision not to review its own acceptance of the GAC Objection Advice lacks procedural fairness, because the NGPC literally reviewed its own decision to accept the Objection Advice. It is a well-established general principle of international law that a party cannot be the judge of its own cause. No independent viewpoint entered into the process. In addition, although Mr. Silber recused himself from the vote on .AFRICA, he remained present for the entire discussion of .AFRICA, and Mr. Disspain apparently concluded that he did not feel conflicted, so both participated in the discussion and Mr. Disspain voted on DCA’s RFR.

52. Second, the participation of the BGC did not provide an independent intervention into the NGPC’s decision-making process, because the BGC is primarily a subset of members of the NGPC. At the time the BGC made its recommendation, the majority of BGC members were also members of the NGPC.

53. Finally, the Board did not exercise due diligence and care in accepting the BGC's recommendation, because the BGC recommendation essentially proffered the NGPC's inadequate diligence in accepting the GAC Objection Advice in the first place, in order to absolve the NGPC of the responsibility to look into any of DCA's grievances in the context of the Request for Review. The basis for the BGC's recommendation to deny was that DCA did not state proper grounds for reconsideration, because failure to follow correct procedure is not a ground for reconsideration, and DCA did not identify the actual information an independent expert would have provided, had the NGPC consulted one. Thus, the BGC essentially found that the NGPC did not fail to take account of material information, because the NGPC did not have before it the material information that would have been provided by an independent expert's viewpoint. The BGC even claimed that if DCA had wanted the NGPC to exercise due diligence and consult an independent expert, DCA should have made such a suggestion in its Response to the GAC Objection Advice. Applicants should not have to remind the Board to comply with its Bylaws in order for the Board to exercise due diligence and care.

54. ICANN's acts and omissions with respect to the BGC's recommendation constitute further breaches of ICANN's Bylaws and Articles of Incorporation, including its duty to carry out its activities in good faith and to refrain from abusing its position as the regulator of the DNS to favor certain applicants over others.

85. Finally, DCA Trust pleads that:

[As] a result of the Board's breaches of ICANN's Articles of Incorporation, Bylaws and general principles of international law, ICANN must halt the process of delegating .AFRICA to ZACR and ZACR should not be permitted to retain the rights to .AFRICA it has procured as a result of the Board's violations. Because ICANN's handling of the new gTLD application process for .AFRICA was so flawed and so deeply influenced by ICANN's relationships with various individuals and organizations purporting to represent "the African community," DCA believes that any chance it may have had to compete for .AFRICA has been irremediably lost and that DCA's application could not receive a fair evaluation even if the process were to be re-set from the beginning. Under the circumstances, DCA submits that ICANN should remove ZACR's application from the process altogether and allow DCA's application to proceed under the rules of the New gTLD Program, allowing DCA up to 18 months to negotiate with African governments to obtain the necessary endorsements so as to enable the delegation and management of the .AFRICA string.

ICANN's Position

86. In its Response to DCA's Memorial on the Merits filed on 3 December 2014 ("ICANN Final Memorial"), ICANN submits that:

2. [...] Pursuant to ICANN's New gTLD Applicant Guidebook ("Guidebook"), applications for strings that represent geographic regions—such as "Africa"—require the support of at least 60% of the respective national governments in the relevant region. As DCA has acknowledged on

multiple occasions, including in its Memorial, DCA does not have the requisite governmental support; indeed, DCA now asks that ICANN be required to provide it with eighteen more months to try to gather the support that it was supposed to have on the day it submitted its application in 2012.

3. DCA is using this IRP as a means to challenge the right of African countries to support a specific (and competing) application for .AFRICA, and to rewrite the Guidebook. The Guidebook provides that countries may endorse multiple applications for the same geographic string. However, in this instance, the countries of Africa chose to endorse only the application submitted by ZA Central Registry (“ZACR”) because ZACR prevailed in the Request for Proposal (“RFP”) process coordinated by the African Union Commission (“AUC”), a process that DCA chose to boycott. There was nothing untoward about the AUC’s decision to conduct an RFP process and select ZACR, nor was there anything inappropriate about the African countries’ decision to endorse only ZACR’s application.

4. Subsequently, as they had every right to do, GAC representatives from Africa urged the GAC to issue advice to the ICANN Board that DCA’s application for .AFRICA not proceed (the “GAC Advice”). One or more countries from Africa—or, for that matter, from any continent—present at the relevant GAC meeting could have opposed the issuance of this GAC Advice, yet not a single country stated that it did not want the GAC to issue advice to the ICANN Board that DCA’s application should not proceed. As a result, under the GAC’s rules, the GAC Advice was “consensus” advice.

5. GAC consensus advice against an application for a new gTLD creates a “strong presumption” for ICANN’s Board that the application should not proceed. In accordance with the Guidebook’s procedures, the Board’s New gTLD Program Committee (the “NGPC”) considered the GAC Advice, considered DCA’s response to the GAC Advice, and properly decided to accept the GAC Advice that DCA’s application should not proceed. As ZACR’s application for .AFRICA subsequently passed all evaluation steps, ICANN and ZACR entered into a registry agreement for the operation of .AFRICA. Following this Panel’s emergency declaration, ICANN has thus far elected not to proceed with the delegation of the .AFRICA TLD into the Internet root zone.

6. DCA’s papers contain much mudslinging and many accusations, which frankly do not belong in these proceedings. According to DCA, the entire ICANN community conspired to prevent DCA from being the successful applicant for .AFRICA. However, the actions that DCA views as nefarious were, in fact, fully consistent with the Guidebook. They also were not actions taken by the Board or the NGPC that in any way violated ICANN’s Bylaws or Articles, the only issue that this IRP Panel is tasked with assessing.

87. ICANN submits that the Board properly advised the African Union’s member states of the Guidebook Rules regarding geographic strings, the NGPC did not violate the Bylaws or Articles of Incorporation by accepting the GAC Advice, the AUC and the African GAC members properly supported the .AFRICA applicant chosen through the RFP

process, the GAC issued consensus advice opposing DCA's application and the NGPC properly accepted the consensus GAC Advice.

88. According to ICANN:

13. DCA's first purported basis for Independent Review is that ICANN improperly responded to a 21 October 2011 communiqué issued by African ministers in charge of Communication and Information Technologies for their respective countries ("Dakar Communiqué"). In the Dakar Communiqué, the ministers, acting pursuant to the Constitutive Act of the African Union, committed to continued and enhanced participation in ICANN and the GAC, and requested that ICANN's Board take numerous steps aimed at increasing Africa's representation in the ICANN community, including that ICANN "include ['Africa'] and its representation in any other language on the Reserved Names List in order [for those strings] to enjoy [] special legislative protection, so [they could be] managed and operated by the structure that is selected and identified by the African Union."

14. As DCA acknowledges, in response to the request in the Dakar Communiqué that .AFRICA (and related strings) be reserved for a operator of the African ministers' own choosing, ICANN advised that .AFRICA and its related strings could not be placed on the Reserved Names List because ICANN was "not able to take actions that would go outside of the community-established and documented guidelines of the program." Instead, ICANN explained that, pursuant to the Guidebook, "protections exist that w[ould] allow the African Union and its member states to play a prominent role in determining the outcome of any application for these top-level domain name strings."

15. It was completely appropriate for ICANN to point the AU member states to the publicly-stated Guidebook protections for geographic names that were put in place to address precisely the circumstance at issue here—where an application for a string referencing a geographic designation did not appear to have the support of the countries represented by the string. DCA argues that ICANN was giving "instructions . . . as to how to bypass ICANN's own rules," but all ICANN was doing was responding to the Dakar Communiqué by explaining the publicly-available rules that ICANN already had in place. This conduct certainly did not violate ICANN's Bylaws or Articles.

16. In particular, ICANN explained that, pursuant to the Guidebook, "Africa" constitutes a geographic name, and therefore any application for .AFRICA would need: (i) documented support from at least 60% of the national governments in the region; and (ii) no more than one written statement of objection . . . from "relevant governments in the region and/or from public authorities associated with the continent and region." Next, ICANN explained that the Guidebook provides an opportunity for the GAC, whose members include the AU member states, to provide "Early Warnings" to ICANN regarding specific gTLD applications. Finally, ICANN explained that there are four formal objection processes that can be initiated by the public, including the Community Objection process, which may be filed where there is "substantial opposition to the gTLD application from a significant

portion of the community to which the gTLD string may be explicitly or implicitly targeted. Each of these explanations was factually accurate and based on publicly available information. Notably, ICANN did not mention the possibility of GAC consensus advice against a particular application (and, of course, such advice could not have occurred if even a single country had voiced its disagreement with that advice during the GAC meeting when DCA's application was discussed).

17. DCA's objection to ICANN's response to the Dakar Communiqué reflects nothing more than DCA's dissatisfaction with the fact that African countries, coordinating themselves through the AUC, opposed DCA's application. However, the African countries had every right to voice that opposition, and ICANN's Board acted properly in informing those countries of the avenues the Guidebook provided them to express that opposition.

18. In another attempt to imply that ICANN improperly coordinated with the AUC, DCA insinuates that the AUC joined the GAC at ICANN's suggestion. ICANN's response to the Dakar Communiqué does not even mention this possibility. Further, in response to DCA's document requests, ICANN searched for communications between ICANN and the AUC relating to the AUC becoming a voting member of the GAC, and the search revealed no such communications. This is not surprising given that ICANN has no involvement in, much less control over, whether the GAC grants to any party voting membership status, including the AUC; that decision is within the sole discretion of the GAC. ICANN's Bylaws provide that membership in the GAC shall be open to "multinational governmental organizations and treaty organizations, on the invitation of the [GAC] through its Chair." In any event, whether the AUC was a voting member of the GAC is irrelevant to DCA's claims. As is explained further below, the AUC alone would not have been able to orchestrate consensus GAC Advice opposing DCA's application.

19. DCA's next alleged basis for Independent Review is that ICANN's NGPC improperly accepted advice from the GAC that DCA's application should not proceed. However, nearly all of DCA's Memorial relates to conduct of the AUC, the countries of the African continent, and the GAC. None of these concerns is properly the subject of an Independent Review proceeding because they do not implicate the conduct of the ICANN Board or the NGPC. The only actual decision that the NGPC made was to accept the GAC Advice that DCA's application for .AFRICA should not proceed, and that decision was undoubtedly correct, as explained below.

20. Although the purpose of this proceeding is to test whether ICANN's Board (or, in this instance, the NGPC) acted in conformance with its Bylaws and Articles, ICANN addresses the conduct of third parties in the next few sections because that additional context demonstrates that the NGPC's decision to accept the GAC Advice—the only decision reviewable here—was appropriate in all aspects.

21. After DCA's application was posted for public comment (as are all new gTLD applications), sixteen African countries—Benin, Burkina Faso, Comoros, Cameroon, Democratic Republic of Congo, Egypt, Gabon, Ghana, Kenya, Mali, Morocco, Nigeria, Senegal, South Africa, Tanzania and Uganda—submitted GAC Early Warnings regarding DCA's application.

Early Warnings are intended to “provid[e] [] applicant[s] with an indication that the[ir] application is seen as potentially sensitive or problematic by one or more governments.” These African countries used the Early Warnings to notify DCA that they had requested the AUC to conduct an RFP for .AFRICA, that ZACR had been selected via that RFP, and that they objected to DCA’s application for .AFRICA. They further notified DCA that they did not believe that DCA had the requisite support of 60% of the countries on the African continent.

22. DCA minimizes the import of these Early Warnings by arguing that they did not involve a “permissible reason” for objecting to DCA’s application. But DCA does not explain how any of these reasons was impermissible, and the Guidebook explicitly states that Early Warnings “may be issued for any reason.” DCA demonstrated the same dismissive attitude towards the legitimate concerns of the sixteen governments that issued Early Warnings by arguing to the ICANN Board and the GAC that the objecting governments had been “teleguided (or manipulated).”

23. In response to these Early Warnings, DCA conceded that it did not have the necessary level of support from African governments and asked the Board to “waive th[e] requirement [that applications for geographic names have the support of the relevant countries] because of the confusing role that was played by the African Union.” DCA did not explain how the AUC’s role was “confusing,” and DCA ignored the fact that, pursuant to the Guidebook, the AUC had every right to promote one applicant over another. The AUC’s decision to promote an applicant other than DCA did not convert the AUC’s role from proper to improper or from clear to confusing.

24. Notably, long before the AUC opposed DCA’s application, DCA itself recognized the AUC’s important role in coordinating continent-wide technology initiatives. In 2009, DCA approached the AUC for its endorsement prior to seeking the support of individual African governments. DCA obtained the AUC’s support at that time, including the AUC’s commitment to “assist[] in the coordination of [the] initiative with African Ministers and Governments.”

25. The AUC, however, then had a change of heart (which it was entitled to do, particularly given that the application window for gTLD applications had not yet opened and would not open for almost two more years). On 7 August 2010, African ministers in charge of Communication and Information Technologies for their respective countries signed the Abuja Declaration. In that declaration, the ministers requested that the AUC coordinate various projects aimed at promoting Information and Communication Technologies projects on the African continent. Among those projects was “set[ting] up the structure and modalities for the [i]mplementation of the DotAfrica Project.”

26. Pursuant to that mandate, the AUC launched an open RFP process, seeking applications from private organizations (including DCA) interested in operating the .AFRICA gTLD. The AUC notified DCA that “following consultations with relevant stakeholders . . . [it] no longer endorse[d] individual initiatives [for .AFRICA].” Instead, “in coordination with the Member States . . . the [AUC] w[ould] go through [an] open [selection]

process”—hardly an inappropriate decision (and not a decision of ICANN or its Board). DCA then refused to participate in the RFP process, thereby setting up an inevitable clash with whatever entity the AUC selected. When DCA submitted its gTLD application in 2012 and attached its 2009 endorsement letter from the AUC, DCA knew full well (but did not disclose) that the AUC had retracted its support.

27. In sum, the objecting governments' concerns were the result of DCA's own decision to boycott the AUC's selection process, resulting in the selection of a different applicant, ZACR, for .AFRICA. Instead of addressing those governments' concerns, and instead of obtaining the necessary support of 60% of the countries on the African continent, DCA asked ICANN to re-write the Guidebook in DCA's favor by eliminating the most important feature of any gTLD application related to a geographic region—the support of the countries in that region. ICANN, in accordance with its Bylaws, Articles and Guidebook, properly ignored DCA's request to change the rules for DCA's benefit.

28. At its 10 April 2013 meeting in Beijing, the GAC advised ICANN that DCA's application for .AFRICA should not proceed.⁴⁰ As noted earlier, the GAC operates on the basis of consensus: if a single GAC member at the 10 April 2013 meeting (from any continent, not just from Africa) had opposed the advice, the advice would not have been considered “consensus.”⁴¹ As such, the fact that the GAC issued consensus GAC Advice against DCA's application shows that not a single country opposed that advice. Most importantly, this included Kenya: Michael Katundu, the GAC Representative for Kenya, and Kenya's only official GAC representative, was present at the 10 April 2013 Beijing meeting and did not oppose the issuance of the consensus GAC Advice.

29. DCA attempts to argue that the GAC Advice was not consensus advice and relies solely on the purported email objection of Sammy Buruchara, Kenya's GAC advisor (as opposed to GAC representative). As a preliminary matter (and as DCA now appears to acknowledge), the GAC's Operating Principles require that votes on GAC advice be made in person. Operating Principle 19 provides that:

If a Member's accredited representative, or alternate representative, is not present at a meeting, then it shall be taken that the Member government or organisation is not represented at that meeting. Any decision made by the GAC without the participation of a Member's accredited representative shall stand and nonetheless be valid.

Similarly, Operating Principle 40 provides:

One third of the representatives of the Current Membership with voting rights shall constitute a quorum at any meeting. A quorum shall only be necessary for any meeting at which a decision or decisions must be made. The GAC may conduct its general business face-to-face or online.

25. DCA argues that Mr. Buruchara objected to the GAC Advice via email, but even if objections could be made via email (which they cannot), Mr. Katundu, Kenya's GAC representative who was in Beijing at the GAC

meeting, not Mr. Buruchara, Kenya's GAC advisor, was authorized to speak on Kenya's behalf. Accordingly, under the GAC rules, Mr. Buruchara's email exchanges could not have constituted opposition to the GAC Advice.

26. Redacted - GAC Designated Confidential Information

27. Redacted - GAC Designated Confidential Information

28. Notably, immediately prior to becoming Kenya's GAC advisor, Mr. Buruchara had served as the chairman of DCA's Strategic Advisory Board. But despite Mr. Buruchara's close ties with DCA and with Ms. Bekele, the Kenyan government had: (i) endorsed the Abuja Declaration; (ii) supported the AUC's processes for selecting the proposed registry operator; and (iii) issued an Early Warning objecting to DCA's application.

In other words, the Kenyan government was officially on record as supporting ZACR's application and opposing DCA's application, regardless of what Mr. Buruchara was writing in emails.

29. Furthermore, correspondence produced by DCA in this proceeding (but not referenced in either of DCA's briefs) shows that, despite Ms. Bekele's and Mr. Buruchara's efforts to obtain the support (or at least non-opposition) of the Kenyan government, the Kenyan government had rescinded its earlier support of DCA in favor of ZACR. For example, in February 2013, Ms. Bekele emailed a Kenyan government official asking that Kenya issue an Early Warning regarding ZACR's application. The official responded that he would have to escalate the matter to the Foreign Ministry because the Kenyan president "was part of the leaders of the AU who endorsed AU to be the custodian of dot Africa." On 10 April 2013, Ms. Bekele emailed Mr. Buruchara, asking him to make further points objecting to the proposed GAC advice. Mr. Buruchara responded that he was unable to do so because the Kenyan government had been informed (erroneously informed, according to Mr. Buruchara), that Mr. Buruchara was "contradict[ing] the Heads of State agreement in Abuja." On 8 July 2013,

Mr. Buruchara explained to Ms. Bekele that he “stuck [his] neck out for DCA inspite [*sic*] of lack of Govt support.”

30. Because DCA did not submit a declaration from Mr. Buruchara (and because Ms. Bekele’s declaration is, of course, limited to her own interpretation of email correspondence drafted by others), the Panel is left with a record demonstrating that: (i) Mr.

Buruchara was not authorized by the Kenyan government to oppose the GAC Advice; Redacted - GAC Designated Confidential Information ; and (iii) the actual GAC representative from Kenya (Mr. Katundu) attended the 10 April 2013 meeting in Beijing and did not oppose the issuance of the consensus GAC Advice that DCA’s application for .AFRICA should not proceed.

31. In short, DCA’s primary argument in support of this Independent Review proceeding—that the GAC should not have issued consensus advice against DCA’s application—is not supported by any evidence and is, instead, fully contradicted by the evidence. And, of course, Independent Review proceedings do not test whether the GAC’s conduct was appropriate (even though in this instance there is no doubt that the GAC appropriately issued consensus advice).

32. As noted above, pursuant to the Guidebook, GAC consensus advice that a particular application should not proceed creates a “strong presumption for the ICANN Board that the application should not be approved.” The ICANN Board would have been required to develop a reasoned and well-supported rationale for not accepting the consensus GAC Advice; no such reason existed at the time the NGPC resolved to accept that GAC Advice (5 June 2013), and no such reason has since been revealed. The consensus GAC Advice against DCA’s application was issued in the ordinary course, it reflected the sentiment of numerous countries on the African continent, and it was never rescinded.

33. DCA’s objection to the Board’s acceptance of the GAC Advice is twofold. First, DCA argues that the NGPC failed to investigate DCA’s allegation that the GAC advice was not consensus advice. Second, DCA argues that the NGPC should have consulted an independent expert prior to accepting the advice. DCA also argued in its IRP Notice that two NGPC members had conflicts of interest when they voted to accept the GAC Advice, but DCA does not pursue that argument in its Memorial (and the facts again demonstrate that DCA’s argument is incorrect).

34. As to the first argument, the Guidebook provides that, when the Board receives GAC advice regarding a particular application, it publishes that advice and notifies the applicant. The applicant is given 21 days from the date of the publication of the advice to submit a response to the Board. Those procedures were followed here. Upon receipt of the GAC Advice, ICANN posted the advice and provided DCA with an opportunity to respond. DCA submitted a lengthy response explaining “[w]hy DCA Trust disagree[d]” with the GAC Advice. A primary theme was that its application had been unfairly blocked by the very countries whose support the Guidebook required DCA to obtain, and that the AUC should not have been allowed to endorse an applicant for .AFRICA. DCA argued that it had been

unfairly “victimized” and “muzzled into insignificance” by the “collective power of the governments represented at ICANN,” and that “the issue of government support [should] be made irrelevant in the process so that both contending applications for .Africa would be allowed to move forward” In other words, DCA was arguing that the AUC’s input was inappropriate, and DCA was requesting that ICANN change the Guidebook requirement regarding governmental support for geographic names in order to accommodate DCA. ICANN’s NGPC reviewed and appropriately rejected DCA’s arguments.

35. One of DCA’s three “supplementary arguments,” beginning on page 10 of its response to the GAC Advice, was that there had been no consensus GAC advice, in part allegedly evidenced by Mr. Buruchara’s (incomplete) email addressed above. DCA, however, chose not to address the fact that: (i) DCA lacked the requisite support of the African governments; (ii) Mr. Buruchara was not the Kenyan GAC representative; (iii) Mr. Buruchara was not at the Beijing meeting; (iv) the government of Kenya had withdrawn any support it may have previously had for DCA’s application; and (v) the actual Kenyan GAC representative (Mr. Katundu) was at the ICANN meeting in Beijing and did not oppose the issuance of the GAC Advice against DCA’s application for .AFRICA. All of these facts were well known to DCA at the time of its response to the GAC Advice.

36. The NGPC’s resolution accepting the GAC Advice states that the NGPC considered DCA’s response prior to accepting the GAC Advice, and DCA presents no evidence to the contrary. DCA’s disagreement with the NGPC’s decision does not, of course, demonstrate that the NGPC failed to exercise due diligence in determining to accept the consensus GAC Advice.

37. As to DCA’s suggestion that the NGPC should have consulted an independent expert, the Guidebook provides that it is within the Board’s discretion to decide whether to consult with an independent expert:

ICANN will consider the GAC Advice on New gTLDs as soon as practicable. The Board may consult with independent experts, such as those designated to hear objections in the New gTLD Dispute Resolution Procedure, in cases where the issues raised in the GAC advice are pertinent to one of the subject matter areas of the objection procedures.

The NGPC clearly did not violate its Bylaws, Articles or Guidebook in deciding that it did not need to consult any independent expert regarding the GAC Advice. Because DCA’s challenge to the GAC Advice was whether one or more countries actually had opposed the advice, there was no reason for the NGPC to retain an “expert” on that subject, and DCA has never stated what useful information an independent expert possibly could have provided.

89. ICANN also submits that the NGPC properly denied DCA’s request for reconsideration, ICANN’s actions following the acceptance of the GAC Advice are not relevant to the IRP, and in any event they were not improper, the ICANN staff directed the ICC to treat the two

African applications consistently, and ICANN staff did not violate any policy in drafting a template letter at the AUC request.

90. According to ICANN:

38. DCA argues that the NGPC improperly denied DCA's Reconsideration Request, which sought reconsideration of the NGPC's acceptance of the GAC Advice. Reconsideration is an accountability mechanism available under ICANN's Bylaws and administered by ICANN's Board Governance Committee ("BGC"). DCA's Reconsideration Request asked that the NGPC's acceptance of the GAC Advice be rescinded and that DCA's application be reinstated. Pursuant to the Bylaws, reconsideration of a Board (or in this case NGPC) action is appropriate only where the NGPC took an action "without consideration of material information" or in "reliance on false or inaccurate material information."

39. In its Reconsideration Request, DCA argued (as it does here) that the NGPC failed to consider material information by failing to consult with an independent expert prior to accepting the GAC Advice. The BGC noted that DCA had not identified any material information that the NGPC had not considered, and that DCA had not identified what advice an independent expert could have provided to the NGPC or how such advice might have altered the NGPC's decision to accept the GAC Advice. The BGC further noted that, as discussed above, the Guidebook is clear that the decision to consult an independent expert is at the discretion of the NGPC.

40. DCA does not identify any Bylaws or Articles provision that the NGPC violated in denying the Reconsideration Request. Instead, DCA simply disagrees with the NGPC's determination that DCA had not identified any material information on which the NGPC failed to rely. That disagreement is not a proper basis for a Reconsideration Request or an IRP. DCA also argues (again without citing to the Bylaws or Articles) that, because the NGPC accepted the GAC Advice, the NGPC could not properly consider DCA's Reconsideration Request. In fact, the DCA's Reconsideration Request was handled exactly in the manner prescribed by ICANN's Bylaws: the BGC—a separate Board committee charged with considering Reconsideration Requests—reviewed the material and provided a recommendation to the NGPC. The NGPC then reviewed the BGC's recommendation and voted to accept it. In short, the various Board committees conducted themselves exactly as ICANN's Bylaws require.

41. The NGPC accepted the GAC Advice on 4 June 2013. As a result, DCA's application for .AFRICA did not proceed. In its Memorial, DCA attempts to cast aspersions on ICANN's evaluation of ZACR's application, but that evaluation has no bearing on whether the NGPC acted consistently with its Bylaws and Articles in handling the GAC advice related to DCA's application. Indeed, the evaluation of ZACR's application did not involve any action by ICANN's Board (or NGPC), and is therefore not a proper basis for Independent Review. Although the actions of ICANN's staff are not relevant to this proceeding, ICANN addresses DCA's allegations for the sake of thoroughness and because the record demonstrates that ZACR's application was evaluated fully in conformance with the Guidebook requirements.

42. DCA alleges that “ICANN staff worked with [the ICC] to ensure that ZACR, but not DCA, would be able to pass the GNP evaluation.” DCA’s argument is based on false and unsupported characterizations of the ICC’s evaluation of the two .AFRICA applications.

43. First, DCA claims (without relevant citation) that ICANN determined that the AUC’s endorsement would count as an endorsement from each of the AU’s member states only after ICANN had stopped processing DCA’s application. In fact, the record indicates that ICANN accepted the ICC’s recommendation that the AUC’s endorsement would qualify as an endorsement from each of the AU’s member states while DCA’s application was still in contention, at a time when the recommendation had the potential to benefit both applicants for .AFRICA (had DCA also in fact received the AUC’s support).

44. The Guidebook provides that the Geographic Names Panel is responsible for “verifying the relevance and authenticity of supporting documentation.” Accordingly, it was the ICC’s responsibility to evaluate how the AUC’s endorsement should be treated. The ICC recommended that the AUC’s endorsement should count as an endorsement from each of the AU’s member states. The ICC’s analysis was based on the Abuja Declaration, which the ICC interpreted as “instruct[ing] the [AUC] to pursue the DotAfrica project, and in [the ICC’s] independent opinion, provide[d] suitable evidence of support from relevant governments or public authorities.” The evidence shows that ICANN accepted the ICC’s recommendation before the NGPC accepted the GAC Advice regarding DCA’s application— in a 26 April 2013 email discussing the preparation of clarifying questions regarding the AUC’s letters of support, ICANN explained to the ICC that “if the applicant(s) is/are unable to obtain a revised letter of support from the AU [], they may be able to fulfill the requirements by approaching the individual governments.”

45. DCA also claims that ICANN determined that endorsements from the UNECA would not be taken into account for geographic evaluations. This simply is not true. Pursuant to the ICC’s advice, the UNECA’s endorsement was taken into account. Like the AUC, the UNECA had signed letters of support for both DCA and ZACR. The ICC advised that because the UNECA was specifically named in the Abuja Declaration, it too should be treated as a relevant public authority. ICANN accepted the ICC’s advice.

46. DCA argues that, after ICANN had stopped processing DCA’s application, ICANN staff improperly assisted the AUC in drafting a support letter for ZACR. As is reflected in the clarifying questions the ICC drafted regarding the endorsement letters submitted on behalf of each of the two .AFRICA applications, the Guidebook contains specific requirements for letters of support from governments and public authorities. In addition to “clearly express[ing] the government’s or public authority’s support for or non-objection to the applicant’s application,” letters must “demonstrate the government’s or public authority’s understanding of the string being requested and its intended use” and that “the string is being sought through the gTLD application process and that the applicant is willing to accept the conditions under which the string will be available, i.e., entry into a registry agreement with ICANN” In light of these specific requirements, the Guidebook even includes a sample letter of support.

47. The first letter of support that the AUC submitted for ZACR's application did not follow the correct format and resulted in a clarifying question from the ICC. As a result, the AUC requested ICANN staff's assistance in drafting a letter that conformed to the Guidebook's requirements. ICANN staff drafted a template based on the sample letter of support in the Guidebook, and the AUC then made significant edits to that template. DCA paints this cooperation as nefarious, but there was absolutely nothing wrong with ICANN staff assisting the AUC, assistance that DCA would certainly have welcomed, and which ICANN would have provided, had the AUC been supporting DCA instead of ZACR.

91. Finally, ICANN submits:

50. ICANN's conduct with respect to DCA's application for .AFRICA was fully consistent with ICANN's Bylaws, its Articles of Incorporation and the Applicant Guidebook. ICANN acted through open and transparent processes, evaluated DCA's application for .AFRICA in accordance with the procedures set forth in the Guidebook, and followed the procedures set forth in its Bylaws in evaluating DCA's Request for Reconsideration. ICANN provided assistance to those who requested, cooperated with governmental authorities, and respected the consensus advice issued by the GAC, which speaks on behalf of the governments of the world.

51. DCA knew, as did all applicants for new gTLDs, that some of the applications would be rejected. There can only be one registry operator for each gTLD string, and in the case of strings that relate to geographic regions, no application can succeed without the significant support of the countries in that region. There is no justification whatsoever for DCA's repeated urging that the support (or lack thereof) of the countries on the African continent be made irrelevant to the process.

52. Ultimately, the majority of the countries in Africa chose to support another application for the .AFRICA gTLD, and decided to oppose DCA's application. At a critical time, no country stood up to defend DCA's application. These countries—and the AUC— had every right to take a stand and to support the applicant of their choice. In this instance, that choice resulted in the GAC issuing consensus advice, which the GAC had every right to do. Nothing in ICANN's Bylaws or Articles, or in the Guidebook, required ICANN to challenge that decision, to ignore that decision, or to change the rules so that the input of the AUC, much less the GAC, would become irrelevant. To the contrary, the AUC's role with respect to the African community is critical, and it was DCA's decision to pursue a path at odds with the AUC that placed its application in jeopardy, not anything that ICANN (or ICANN's Board or the NGPC) did. The NGPC did exactly what it was supposed to do in this circumstance, and ICANN urges this IRP Panel to find as such. Such a finding would allow the countries of Africa to soon provide their citizens with what all parties involved believe to be a very important step for Africa – access to .AFRICA on the internet.

The Panel's Decision

92. The Panel in this IRP, has been asked to determine whether, in the case of the application of DCA Trust for the delegation of the .AFRICA top-level domain name in its 2012 General Top-Level Domains ("gTLD") Internet Expansion Program (the "New gTLD Program"), the Board acted or failed to act in a manner inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook?
93. After reviewing the documentation filed in this IRP, reading the Parties' respective written submissions, reading the written statements and listening to the testimony of the three witnesses brought forward, listening to the oral presentations of the Parties' legal representatives at the hearing in Washington, D.C., reading the transcript of the hearing, and deliberating, the Panel is of the unanimous view that certain actions and inactions of the ICANN Board (as described below) with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN.
94. ICANN is bound by its own Articles of Incorporation to act fairly, neutrally, non-discriminatorily and to enable competition. Article 4 of ICANN's Articles of Incorporation sets this out explicitly:
4. 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. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations.
95. ICANN is also bound by its own Bylaws to act and make decisions "neutrally and objectively, with integrity and fairness."
96. These obligations and others are explicitly set out in a number of provisions in ICANN's Bylaws:

ARTICLE I: MISSION AND CORE (Council of Registrars) VALUES

Section 2. CORE (Council of Registrars) VALUES

In performing its mission, the following core values should guide the decisions and actions of ICANN (Internet Corporation for Assigned Names and Numbers):

1. Preserving and enhancing the operational stability, reliability, security, and global interoperability of the Internet.

[...]

7. Employing open and transparent policy development mechanisms that (i) promote well-informed decisions based on expert advice, and (ii) ensure that those entities most affected can assist in the policy development process.

8. Making decisions by applying documented policies neutrally and objectively, with integrity and fairness.

9. Acting with a speed that is responsive to the needs of the Internet while, as part of the decision-making process, obtaining informed input from those entities most affected.

10. Remaining accountable to the Internet community through mechanisms that enhance ICANN (Internet Corporation for Assigned Names and Numbers)'s effectiveness.

11. While remaining rooted in the private sector, recognizing that governments and public authorities are responsible for public policy and duly taking into account governments' or public authorities' recommendations.

These core values are deliberately expressed in very general terms, so that they may provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each new situation will necessarily depend on many factors that cannot be fully anticipated or enumerated; and because they are statements of principle rather than practice, situations will inevitably arise in which perfect fidelity to all eleven core values simultaneously is not possible. Any ICANN (Internet Corporation for Assigned Names and Numbers) body making a recommendation or decision shall exercise its judgment to determine which core values are most relevant and how they apply to the specific circumstances of the case at hand, and to determine, if necessary, an appropriate and defensible balance among competing values.

ARTICLE II: POWERS

Section 1. GENERAL POWERS

Except as otherwise provided in the Articles of Incorporation or these Bylaws, the powers of ICANN (Internet Corporation for Assigned Names and Numbers) shall be exercised by, and its property controlled and its business and affairs conducted by or under the direction of, the Board.

Section 3. NON-DISCRIMINATORY TREATMENT

ICANN (Internet Corporation for Assigned Names and Numbers) shall not apply its standards, policies, procedures, or practices inequitably or single out any particular party for disparate treatment unless justified by

substantial and reasonable cause, such as the promotion of effective competition.

ARTICLE III: TRANSPARENCY

Section 1. PURPOSE

ICANN (Internet Corporation for Assigned Names and Numbers) 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. [Underlining and bold is that of the Panel]

97. As set out in Article IV (Accountability and Review) of ICANN's Bylaws, in carrying out its mission as set out in its Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws and with due regard for the core values set forth in Article I of the Bylaws.
98. As set out in Section 3 (Independent Review of Board Actions) of Article IV, "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. In order to be materially affected, the person must suffer injury or harm that is directly and casually connected to the Board's alleged violation of the Bylaws or Articles of Incorporation, and not as a result of third parties acting in line with the Board's action."
99. In this IRP, among the allegations advanced by DCA Trust against ICANN, is that the ICANN Board, and its constituent body, the GAC, breached their obligation to act transparently and in conformity with procedures that ensured fairness. In particular, DCA Trust criticizes the ICANN Board here, for allowing itself to be guided by the GAC, a body "with apparently no distinct rules, limited public records, fluid definitions of membership and quorums" and unfair procedures in dealing with the issues before it.
100. According to DCA Trust, ICANN itself asserts that the GAC is a "constituent body." The exchange between the Panel and counsel for ICANN at the in-person hearing in Washington, D.C. is a living proof of that point.

HONORABLE JUDGE CAHILL:

Are you saying we should only look at what the Board does? The reason I'm asking is that your -- the Bylaws say that ICANN and its constituent bodies shall operate, to the maximum extent feasible, in an open and transparent manner. Does the constituent bodies include, I don't know,

GAC or anything? What is "constituent bodies"?

MR. LEVEE:

Yeah. What I'll talk to you about tomorrow in closing when I lay out what an IRP Panel is supposed to address, the Bylaws are very clear. Independent Review Proceedings are for the purpose of testing conduct or inaction of the ICANN Board. They don't apply to the GAC. They don't apply to supporting organizations. They don't apply to Staff.

HONORABLE JUDGE CAHILL:

So you think that the situation is a -- we shouldn't be looking at what the constituent -- whatever the constituent bodies are, even though that's part of your Bylaws?

MR. LEVEE:

Well, when I say not -- when you say not looking, part of DCA's claims that the GAC did something wrong and that ICANN knew that.

HONORABLE JUDGE CAHILL:

So is GAC a constituent body?

MR. LEVEE:

It is a constituent body, to be clear --

HONORABLE JUDGE CAHILL:

Yeah.

MR. LEVEE:

-- whether -- I don't think an IRP Panel -- if the only thing that happened here was that the GAC did something wrong --

HONORABLE JUDGE CAHILL:

Right.

MR. LEVEE:

-- an IRP Panel would not be -- an Independent Review Proceeding is not supposed to address that, whether the GAC did something wrong.

Now, if ICANN knew -- the Board knew that the GAC did something wrong, and that's how they link it, they say, Look, the GAC did something wrong, and ICANN knew it, the Board -- if the Board actually knew it, then we're dealing with Board conduct.

The Board knew that the GAC did not, in fact, issue consensus advice. That's the allegation. So it's fair to look at the GAC's conduct.

101. The Panel is unanimously of the view that the GAC is a constituent body of ICANN. This is not only clear from the above exchange between the Panel and counsel for ICANN, but also from Article XI (Advisory Committees) of ICANN's Bylaws and the Operating Principles of the GAC. Section 1 (General) of Article XI of ICANN's Bylaws states:

The Board may create one or more Advisory Committees in addition to those set forth in this Article. Advisory Committee membership may consist of Directors only, Directors and non-directors, or non-directors only, and may also include non-voting or alternate members. Advisory Committees shall have no legal authority to act for ICANN (Internet Corporation for Assigned Names and Numbers), but shall report their findings and recommendations to the Board.

Section 2, under the heading, Specific Advisory Committees states:

There shall be at least the following Advisory Committees:

1. Governmental Advisory Committee

a. The Governmental Advisory Committee should consider and provide advice on the activities of ICANN (Internet Corporation for Assigned Names and Numbers) as they relate to concerns of governments, particularly matters where there may be an interaction between ICANN (Internet Corporation for Assigned Names and Numbers)'s policies and various laws and international agreements or where they may affect public policy issues. [Underlining is that of the Panel]

Section 6 of the preamble of GAC's Operating Principles is also relevant. That Section reads as follows:

The GAC commits itself to implement efficient procedures in support of ICANN and to provide thorough and timely advice and analysis on relevant matters of concern with regard to government and public interests.

102. According to DCA Trust, based on the above, and in particular, Article III (Transparency), Section 1 of ICANN's Bylaws, therefore, the GAC was bound to the transparency and fairness obligations of that provision to "operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness", but as ICANN's own witness, Ms. Heather Dryden acknowledged during the hearing, the GAC did not act with transparency or in a manner designed to insure fairness.

Mr. ALI:

Q. But what was the purpose of the discussion at the Prague meeting with respect to AUC? If there really is no difference or distinction between voting/nonvoting, observer or whatever might be the opposite of observer,

or the proper terminology, what was -- what was the point?

THE WITNESS:

A. I didn't say there was no difference. The issue is that there isn't GAC agreement about what are the -- the rights, if you will, of -- of entities like the AUC. And there might be in some limited circumstances, but it's also an extremely sensitive issue. And so not all countries have a shared view about what those -- those entities, like the AUC, should be able to do.

Q. So not all countries share the same view as to what entities, such as the AUC, should be able to do. Is that what you said? I'm sorry. I didn't --

A. Right, because that would only get clarified if there is a circumstance where that link is forced. In our business, we talk about creative ambiguity. We leave things unclear so we don't have conflict.

103. As explained by ICANN in its Closing Presentation at the hearing, ICANN's witness, Ms. Heather Dryden also asserted that the GAC Advice was meaningless until the Board acted upon it. This last point is also clear from examining Article I, Principle 2 and 5 of ICANN GAC's Operating Principles. Principle 2 states that "the GAC is not a decision making body" and Principle 5 states that "the GAC shall have no legal authority to act for ICANN".

MR. ALI:

Q. I would like to know what it is that you, as the GAC Chair, understand to be the consequences of the actions that the GAC will take --

HONORABLE JUDGE CAHILL:

The GAC will take?

MR. ALI:

Q. -- the GAC will take -- the consequences of the actions taken by the GAC, such as consensus advice?

HONORABLE JUDGE CAHILL:

There you go.

THE WITNESS:

That isn't my concern as the Chair. It's really for the Board to interpret the outputs coming from the GAC.

104. Ms. Dryden also stated that the GAC made its decision without providing any rationale and primarily based on politics and not on potential violations of national laws and sensitivities.

ARBITRATOR KESSEDJIAN:

So, basically, you're telling us that the GAC takes a decision to object to an applicant, and no reasons, no rationale, no discussion of the concepts that are in the rules?

THE WITNESS:

I'm telling you the GAC did not provide a rationale. And that was not a requirement for issuing a GAC --

HONORABLE JUDGE CAHILL:

But you also want to check to see if the countries are following the right -- following the rules, if there are reasons for rejecting this or it falls within the three things that my colleague's talking about.

THE WITNESS:

The practice among governments is that governments can express their view, whatever it may be. And so there's a deference to that.

That's certainly the case here as well.

105. ICANN was bound by its Bylaws to conduct adequate diligence to ensure that it was applying its procedures fairly. Section 1 of Article III of ICANN's Bylaws, require it and its constituent bodies to "operate to the maximum extent feasible in an open and transparent manner and consistent with procedures designed to ensure fairness. The Board must also as per Article IV, Section 3, Paragraph 4 exercise due diligence and care in having a reasonable amount of facts in front of it.

106. In this case, on 4 June 2013, the NGPC accepted the GAC Objection Advice to stop processing DCA Trust's application. On 1 August 2013, the BGC recommended to the NGPC that it deny DCA Trust's Request for Reconsideration of the NGPC's 4 June 2013 decision, and on 13 August 2013, the NGPC accepted the BGC's recommendation (i.e., the NGPC declined to reconsider its own decision) without any further consideration.

107. In this case, ICANN through the BGC was bound to conduct a meaningful review of the NGPC's decision. According to ICANN's Bylaws, Article IV, Section 2, the Board has designated the Board Governance Committee to review and consider any such Reconsideration Requests. The [BGC] shall have the authority to, among other things, conduct whatever factual investigation is deemed appropriate, and request additional written submissions from the affected party, or from others.

108. Finally, the NGPC was not bound by – nor was it required to give deference to – the decision of the BGC.

109. The above, combined with the fact that DCA Trust was never given any notice or an opportunity in Beijing or elsewhere to make its position known or defend its own interests before the GAC reached consensus on the GAC Objection Advice, and that the Board of ICANN did not take any steps to address this issue, leads this Panel to conclude that both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were not procedures designed to insure the fairness required by Article III, Sec. 1 above, and are therefore inconsistent with the Articles of Incorporation and Bylaws of ICANN.

110. The following excerpt of exchanges between the Panel and one of ICANN's witnesses, Ms. Heather Dryden, the then Chair of the GAC, provides a useful background for the decisions reached in this IRP:

PRESIDENT BARIN:

But be specific in this case. Is that what happened in the .AFRICA case?

THE WITNESS:

The decision was very quick, and --

PRESIDENT BARIN:

But what about the consultations prior? In other words, were -- were you privy to --

THE WITNESS:

No. If -- if colleagues are talking among themselves, then that's not something that the GAC, as a whole, is -- is tracking or -- or involved in. It's really those interested countries that are.

PRESIDENT BARIN:

Understood. But I assume -- I also heard you say, as the Chair, you never want to be surprised with something that comes up. So you are aware of -- or you were aware of exactly what was happening?

THE WITNESS:

No. No. You do want to have a good sense of where the problems are, what's going to come unresolved back to the full GAC meeting, but that's -- that's the extent of it.

And that's the nature of -- of the political process.

Redacted - GAC Designated
Confidential Information

HONORABLE JUDGE CAHILL:

Okay.

THE WITNESS:

-- that question was addressed via having that meeting.

PRESIDENT BARIN:

And what's your understanding of what -- what the consequence of that decision is or was when you took it? So what happens from that moment on?

THE WITNESS:

It's conveyed to the Board, so all the results, the agreed language coming out of GAC is conveyed to the Board, as was the case with the communiqué from the Beijing meeting.

PRESIDENT BARIN:

And how is that conveyed to the Board?

THE WITNESS:

Well, it's a written document, and usually Support Staff are forwarding it to Board Staff.

ARBITRATOR KESSEDJIAN:

Could you speak a little bit louder? I don't know whether I am tired, but I --

THE WITNESS:

Okay. So as I was saying, the document is conveyed to the Board once it's concluded.

PRESIDENT BARIN:

When you say "the document", are you referring to the communiqué?

THE WITNESS:

Yes.

PRESIDENT BARIN:

Okay. And there are no other documents?

THE WITNESS:

The communiqué --

PRESIDENT BARIN:

In relation to .AFRICA. I'm not interested in any other.

THE WITNESS:

Yes, it's the communiqué.

PRESIDENT BARIN:

And it's prepared by your staff? You look at it?

THE WITNESS:

Right --

PRESIDENT BARIN:

And then it's sent over to --

THE WITNESS:

-- right, it's agreed by the GAC in full, the contents.

PRESIDENT BARIN:

And then sent over to the Board?

THE WITNESS:

And then sent, yes.

PRESIDENT BARIN:

And what happens to that communiqué? Does the Board receive that and say, Ms. Dryden, we have some questions for you on this, or --

THE WITNESS:

Not really. If they have questions for clarification, they can certainly ask that in a meeting. But it is for them to receive that and then interpret it and -- and prepare the Board for discussion or decision.

PRESIDENT BARIN:

Okay. And in this case, you weren't asked any questions or anything?

THE WITNESS:

I don't believe so. I don't recall.

PRESIDENT BARIN:

Any follow-ups, right?

THE WITNESS:

Right.

PRESIDENT BARIN:

And in the subsequent meeting, I guess the issue was tabled. The Board meeting that it was tabled, were you there?

THE WITNESS:

Yes. I don't particularly recall the meeting, but yes.

[...]

ARBITRATOR KESSEDJIAN:

Can I turn your attention to Paragraph 5 of your declaration?

Here, you basically repeat what is in the ICANN Guidebook literature, whatever. These are the exact words, actually, that you use in your declaration in terms of why there could be an objection to an applicant -- to a specific applicant. And you use three criteria: problematic, potentially violating national law, and raise sensitivities.

Now, I'd like you to, for us -- for our benefit, to explain precisely, as concrete as you can be, what those three concepts -- how those three concepts translate in the DCA case. Because this must have been discussed in order to get this very quick decision that you are mentioning. So I'd like to understand, you know, because these are the criteria -- these are the three criteria; is that correct?

THE WITNESS:

That is what the witness statement says, but the link to the GAC and the role that I played in terms of the GAC discussion did not involve me interpreting those three things. In fact, the GAC did not provide rationale for the consensus objection.

ARBITRATOR KESSEDJIAN:

No.

But, I mean, look, the GAC is taking a decision which -- very quickly -- I'm using your words, "very quickly" -- erases years and years and years of work, a lot of effort that have been put by a single applicant. And the way I understand the rules is that the -- the GAC advice -- consensus advice against that applicant are -- is based on those three criteria. Am I wrong in that analysis?

THE WITNESS:

I'm saying that the GAC did not identify a rationale for those governments that put forward a string or an application for consensus objection. They might have identified their reasons, but there was not GAC agreement about those reasons or -- or -- or -- or rationale for that. We had some discussion earlier about Early Warnings. So Early Warnings were issued by individual countries, and they indicated their rationale. But, again, that's not a GAC view.

ARBITRATOR KESSEDJIAN:

So, basically, you're telling us that the GAC takes a decision to object to an applicant, and no reasons, no rationale, no discussion of the concepts that are in the rules?

THE WITNESS:

I'm telling you the GAC did not provide a rationale. And that was not a requirement for issuing a GAC --

HONORABLE JUDGE CAHILL:

But you also want to check to see if the countries are following the right -- following the rules, if there are reasons for rejecting this or it falls within the three things that my colleague's talking about.

THE WITNESS:

The practice among governments is that governments can express their view, whatever it may be. And so there's [...] deference to that. That's certainly the case here as well. The -- if a country tells -- tells the GAC or says it has a concern, that's not really something that -- that's evaluated, in the sense you mean, by the other governments. That's not the way governments work with each other.

HONORABLE JUDGE CAHILL:

So you don't go into the reasons at all with them?

THE WITNESS:

To issue a consensus objection, no.

HONORABLE JUDGE CAHILL:

Okay. ---

[...]

PRESIDENT BARIN:

I have one question for you. We spent, now, a bit of time or a considerable amount of time talking to you about the process, or the procedure leading to the consensus decision.

Can you tell me what your understanding is of why the GAC consensus objection was made finally?

[...]

But in terms of the .AFRICA, the decision -- the issue came up, the agenda -- the issue came up, and you made a decision, correct?

THE WITNESS:

The GAC made a decision.

PRESIDENT BARIN:

Right. When I say "you", I mean the GAC.

Do you know -- are you able to express to us what your understanding of the substance behind that decision was? I mean, in other words, we've spent a bit of time dealing with the process.

Can you tell us why the decision happened?

THE WITNESS:

The sum of the GAC's advice is reflected in its written advice in the communiqué. That is the view to GAC. That's -- that's --

[...]

ARBITRATOR KESSEDJIAN:

I just want to come back to the point that I was making earlier. To your Paragraph 5, you said -- you answered to me saying that is my declaration, but it was not exactly what's going on. Now, we are here to --

at least the way I understand the Panel's mandate, to make sure that the rules have been obeyed by, basically. I'm synthesizing. So I don't understand how, as the Chair of the GAC, you can tell us that, basically, the rules do not matter -- again, I'm rephrasing what you said, but I'd like to give you another opportunity to explain to us why you are mentioning those criteria in your written declaration, but, now, you're telling us this doesn't matter.

If you want to read again what you wrote, or supposedly wrote, it's Paragraph 5.

THE WITNESS:

I don't need to read again my declaration. Thank you. The header for the GAC's discussions throughout was to refer to strings or applications that were controversial or sensitive. That's very broad. And --

ARBITRATOR KESSEDJIAN:

I'm sorry. You say the rules say problematic, potentially violate national law, raise sensitivities. These are precise concepts.

THE WITNESS:

Problematic, violate national law -- there are a lot of laws -- and sensitivities does strike me as being quite broad.

[...]

ARBITRATOR KESSEDJIAN:

Okay. So we are left with what? No rules?

THE WITNESS:

No rationale with the consensus objections.

That's the -- the effect.

ARBITRATOR KESSEDJIAN:

I'm done.

HONORABLE JUDGE CAHILL:

I'm done.

PRESIDENT BARIN:

So am I.

111. The Panel understands that the GAC provides advice to the ICANN Board on matters of public policy, especially in cases where ICANN activities and policies may interact with national laws or international agreements. The Panel also understands that GAC advice is developed through consensus among member nations. Finally, the Panel understands that although the ICANN Board is required to consider GAC advice and recommendations, it is not obligated to follow those recommendations.

112. Paragraph IV of ICANN's Beijing, People's Republic of China 11 April 2013 Communiqué [Exhibit C-43] under the heading "GAC Advice to the ICANN Board" states:

IV. GAC Advice to the ICANN Board

1. New gTLDs

a. GAC Objections to the Specific Applications

i. The GAC Advises the ICANN Board that:

i. The GAC has reached consensus on GAC Objection Advice according to Module 3.1 part I of the Applicant Guidebook on the following applications:

1. The application for .africa (Application number 1-1165-42560)

[...]

Footnote 3 to Paragraph IV.1. (a)(i)(i) above in the original text adds, "Module 3.1: The GAC advises ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved." A similar statement in this regard can be found in paragraph 5 of Ms. Dryden's 7 February 2014 witness statement.

113. In light of the clear "Transparency" obligation provisions found in ICANN's Bylaws, the Panel would have expected the ICANN Board to, at a minimum, investigate the matter further before rejecting DCA Trust's application.

114. The Panel would have had a similar expectation with respect to the NGPC Response to the GAC Advice regarding .AFRICA which was expressed in ANNEX 1 to NGPC Resolution No. 2013.06.04.NG01 [Exhibit C-45]. In that document, in response to DCA Trust's application, the NGPC stipulated:

The NGPC accepts this advice. The AGB provides that “if GAC advised ICANN that it is the consensus of the GAC that a particular application should not proceed. This will create a strong presumption for the ICANN Board that the application should not be approved. The NGPC directs staff that pursuant to the GAC advice and Section 3.1 of the Applicant Guidebook, Application number 1-1165-42560 for .africa will not be approved. In accordance with the AGB the applicant may withdraw [...] or seek relief according to ICANN’s accountability mechanisms (see ICANN’s Bylaws, Articles IV and V) subject to the appropriate standing and procedural requirements.

115. Based on the foregoing, after having carefully reviewed the Parties’ written submissions, listened to the testimony of the three witnesses, listened to the oral submissions of the Parties in various telephone conference calls and at the in-person hearing of this IRP in Washington, D.C. on 22 and 23 May 2015, and finally after much deliberation, pursuant to Article IV, Section 3, paragraph 11 (c) of ICANN’s Bylaws, the Panel declares that both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN.

116. As indicated above, there are perhaps a number of other instances, including certain decisions made by ICANN, that did not proceed in the manner and spirit in which they should have under the Articles of Incorporation and Bylaws of ICANN.

117. DCA Trust has criticized ICANN for its various actions and decisions throughout this IRP and ICANN has responded to each of these criticisms in detail. However, the Panel, having carefully considered these criticisms and decided that the above is dispositive of this IRP, it does not find it necessary to determine who was right, to what extent and for what reasons in respect to the other criticisms and other alleged shortcomings of the ICANN Board identified by DCA Trust.

2) Can the IRP Panel recommend a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act in a manner inconsistent with ICANN’s Articles of Incorporation, Bylaws or the Applicant Guidebook?

118. In the conclusion of its Memorial on the Merits filed with the Panel on 3 November 2014, DCA Trust submitted that ICANN should remove ZACR’s application from the process altogether and allow DCA’s application to proceed under the rules of the New gTLD Program, allowing DCA up to 18 months to negotiate with African governments

to obtain the necessary endorsements so as to enable the delegation and management of the .AFRICA string.

119. In its Final Request for Relief filed with the Panel on 23 May 2015, DCA Trust requested that this Panel recommend to the ICANN Board that it cease all preparations to delegate the .AFRICA gTLD to ZACR and recommend that ICANN permit DCA's application to proceed through the remainder of the new gTLD application process and be granted a period of no less than 18 months to obtain Government support as set out in the AGB and interpreted by the Geographic Names Panel, or accept that the requirement is satisfied as a result of the endorsement of DCA Trust's application by UNECA.

120. DCA Trust also requested that this Panel recommend to ICANN that it compensate DCA Trust for the costs it has incurred as a result of ICANN's violations of its Articles of Incorporation, Bylaws and AGB.

121. In its response to DCA Trust's request for the recommendations set out in DCA Trust's Memorial on the Merits, ICANN submitted that this Panel does not have the authority to grant the affirmative relief that DCA Trust had requested.

122. According to ICANN:

48. DCA's request should be denied in its entirety, including its request for relief. DCA requests that this IRP Panel issue a declaration requiring ICANN to "rescind its contract with ZACR" and to "permit DCA's application to proceed through the remainder of the application process." Acknowledging that it currently lacks the requisite governmental support for its application, DCA also requests that it receive "18 months to negotiate with African governments to obtain the necessary endorsements." In sum, DCA requests not only that this Panel remove DCA's rival for .AFRICA from contention (requiring ICANN to repudiate its contract with ZACR), but also that it rewrite the Guidebook's rules in DCA's favor.

49. IRP Panels do not have authority to award affirmative relief. Rather, an IRP Panel is limited to stating its opinion as to "whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws" and recommending (as this IRP Panel has done previously) that the Board stay any action or decision, or take any interim action until such time as the Board reviews and acts upon the opinion of the IRP Panel. The Board will, of course, give extremely serious consideration to the Panel's recommendations.

123. In its response to DCA Trust's amended request for recommendations filed on 23 May 2015, ICANN argued that because the Panel's authority is limited to declaring whether the Board's conduct was inconsistent with the Articles or the Bylaws, the Panel should limit its declaration to that question and refrain from

recommending how the Board should then proceed in light of the Panel's declaration.

124. In response, DCA Trust submitted that according to ICANN's Bylaws, the Independent Review Process is designed to provide a remedy for "any" person materially affected by a decision or action by the Board. Further, "in order to be materially affected, the person must suffer injury or harm that is directly and causally connected to the Board's alleged violation of the Bylaws or the Articles of Incorporation.

125. According to ICANN, "indeed, the ICANN New gTLD Program Committee, operating under the delegated authority of the ICANN Board, itself [suggests] that DCA could seek relief through ICANN's accountability mechanisms or, in other words, the Reconsideration process and the Independent Review Process." Furthermore:

If the IRP mechanism – the mechanism of last resort for gTLD applicants – is intended to provide a remedy for a claimant materially injured or harmed by Board action or inaction, and it serves as the only alternative to litigation, then naturally the IRP Panel may recommend how the ICANN Board might fashion a remedy to redress such injury or harm.

126. After considering the Parties' respective submissions in this regard, the Panel is of the view that it does have the power to recommend a course of action for the Board to follow as a consequence of any declaration that the Board acted or failed to act in a manner inconsistent with ICANN's Articles of Incorporation, Bylaws or the Applicant Guidebook.

127. Article IV, Section 3, paragraph 11 (d) of ICANN's Bylaws states:

ARTICLE IV: ACCOUNTABILITY AND REVIEW
Section 3. INDEPENDENT REVIEW OF BOARD ACTIONS

11. The IRP Panel shall have the authority to:

d. recommend that the Board stay any action or decision or that the Board take any interim action, until such time as the Board reviews and acts upon the opinion of the IRP.

128. The Panel finds that both the language and spirit of the above section gives it authority to recommend how the ICANN Board might fashion a remedy to redress injury or harm that is directly related and causally connected to the Board's violation of the Bylaws or the Articles of Incorporation.

129. As DCA Trust correctly points out, with which statement the Panel agrees, "if the IRP mechanism – the mechanism of last resort for

gTLD applicants – is intended to provide a remedy for a claimant materially injured or harmed by Board action or inaction, and it serves as the only alternative to litigation, then naturally the IRP Panel may recommend how the ICANN Board might fashion a remedy to redress such injury or harm.”

130. Use of the imperative language in Article IV, Section 3, paragraph 11 (d) of ICANN’s Bylaws, is clearly supportive of this point. That provision clearly states that the IRP Panel has the authority to recommend a course of action until such time as the Board considers the opinion of the IRP and acts upon it.

131. Furthermore, use of the word “opinion”, which means the formal statement by a judicial authority, court, arbitrator or “Panel” of the reasoning and the principles of law used in reaching a decision of a case, is demonstrative of the point that the Panel has the authority to recommend affirmative relief. Otherwise, like in section 7 of the Supplementary Procedures, the last sentence in paragraph 11 would have simply referred to the “declaration of the IRP”. Section 7 under the heading “Interim Measures of Protection” says in part, that an “IRP PANEL may recommend that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board reviews and acts upon the IRP declaration.”

132. The scope of Article IV, Section 3, paragraph 11 (d) of ICANN’s Bylaws is clearly broader than Section 7 of the Supplementary Procedures.

133. Pursuant to Article IV, Section 3, paragraph 11 (d) of ICANN’s Bylaws, therefore, the Panel recommends 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.

3) Who is the prevailing party in this IRP?

134. In its letter of 1 July 2015, ICANN submits that, “ICANN believes that the Panel should and will determine that ICANN is the prevailing party. Even so, ICANN does not seek in this instance the putative effect that would result if DCA were required to reimburse ICANN for all of the costs that ICANN incurred. This IRP was much longer [than] anticipated (in part due to the passing of one of the panelists last summer), and the Panelists’ fees were far greater than an ordinary IRP, particularly because the Panel elected to conduct a live hearing.”

135.DCA Trust on the other hand, submits that, “should it prevail in this IRP, ICANN should be responsible for all of the costs of this IRP, including the interim measures proceeding.” In particular, DCA Trust writes:

On March 23, 2014, DCA learned via email from a supporter of ZA Central Registry (“ZACR”), DCA’s competitor for .AFRICA, that ZACR would sign a registry agreement with ICANN in three days’ time (March 26) to be the registry operator for .AFRICA. The very same day, we sent a letter on behalf of DCA to ICANN’s counsel asking ICANN to refrain from executing the registry agreement with ZACR in light of the pending IRP proceedings. See DCA’s Request for Emergency Arbitrator and Interim Measures of Protection, Annex I (28 Mar. 2014). Instead, ICANN entered into the registry agreement with ZACR the very next day—two days ahead of schedule. [...] Later that same day, ICANN responded to DCA’s request by treating the execution of the contract as a *fait accompli* and, for the first time, informed DCA that it would accept the application of Rule 37 of the 2010 [ICDR Rules], which provides for emergency measures of protection, even though ICANN’s Supplementary Procedures for ICANN Independent Review Process expressly provide that Rule 37 does not apply to IRPs. A few days later, on March 28, 2014, DCA filed a Request for Emergency Arbitrator and Interim Measures of Protection with the ICDR. ICANN responded to DCA’s request on April 4, 2014. An emergency arbitrator was appointed by the ICDR; however, the following week, the original panel was fully constituted and the parties’ respective submissions were submitted to the Panel for its review on April 13, 2014. After a teleconference with the parties on April 22 and a telephonic hearing on May 5, the Panel ruled that “ICANN must immediately refrain from any further processing of any application for .AFRICA” during the pendency of the IRP. Decision on Interim Measures of Protection, ¶ 51 (12 May 2014).

136.A review of the various procedural orders, decisions, and declarations in this IRP clearly indicates that DCA Trust prevailed in many of the questions and issues raised.

137.In its letter of 1 July 2015, DCA Trust refers to several instances in which ICANN was not successful in its position before this Panel. According to DCA Trust, the following are some examples, “ICANN’s Request for Partial Reconsideration, ICANN’s request for the Panel to rehear the proceedings, and the evidentiary treatment of ICANN’s written witness testimony in the event it refused to make its witnesses available for questioning during the merits hearing.”

138.The Panel has no doubt, as ICANN writes in its letter of 1 July 2015, that the Parties’ respective positions in this IRP “were asserted in good faith.” According to ICANN, “although those positions were in many instances diametrically opposed, ICANN does not doubt that DCA believed in the credibility of the positions that it took, and

[ICANN believes] that DCA feels the same about the positions ICANN took.”

139. The above said, after reading the Parties’ written submissions concerning the issue of costs and deliberation, the Panel is unanimously of the view that DCA Trust is the prevailing party in this IRP.

4) Who is responsible for bearing the costs of this IRP and the cost of the IRP Provider?

140. DCA Trust submits that ICANN should be responsible for *all* costs of this IRP, including the interim measures proceeding. Among other arguments, DCA Trust submits:

This is consistent with ICANN’s Bylaws and Supplementary Procedures, which together provide that in ordinary circumstances, the party not prevailing shall be responsible for all costs of the proceeding. Although ICANN’s Supplementary Procedures do not explain what is meant by “all costs of the proceeding,” the ICDR Rules that apply to this IRP provide that “costs” include the following:

- (a) the fees and expenses of the arbitrators;
- (b) the costs of assistance required by the tribunal, including its experts;
- (c) the fees and expenses of the administrator;
- (d) the reasonable costs for legal representation of a successful party; and
- (e) any such costs incurred in connection with an application for interim or emergency relief pursuant to Article 21.

Specifically, these costs include all of the fees and expenses paid and owed to the [ICDR], including the filing fees DCA paid to the ICDR (totaling \$4,750), all panelist fees and expenses, including for the emergency arbitrator, incurred between the inception of this IRP and its final resolution, legal costs incurred in the course of the IRP, and all expenses related to conducting the merits hearing (e.g., renting the audiovisual equipment for the hearing, printing hearing materials, shipping hard copies of the exhibits to the members of the Panel).

Although in “extraordinary” circumstances, the Panel may allocate up to half of the costs to the prevailing party, DCA submits that the circumstances of this IRP do not warrant allocating costs to DCA should it prevail. The reasonableness of DCA’s positions, as well as the meaningful contribution this IRP has made to the public dialogue about both ICANN’s accountability mechanisms and the appropriate deference owed by ICANN to its Governmental Advisory Committee, support a full award of costs to

DCA.

[...]

To the best of DCA's knowledge, this IRP was the first to be commenced against ICANN under the new rules, and as a result there was little guidance as to how these proceedings should be conducted. Indeed, at the very outset there was controversy about the applicable version of the Supplemental Rules as well as the form to be filed to initiate a proceeding. From the very outset, ICANN adopted positions on a variety of procedural issues that have increased the costs of these proceedings. In DCA's respectful submission, ICANN's positions throughout these proceedings are inconsistent with ICANN's obligations of transparency and the overall objectives of the IRP process, which is the only independent accountability mechanism available to parties such as DCA.

141. DCA Trust also submits that ICANN's conduct in this IRP increased the duration and expense of this IRP. For example, ICANN failed to appoint a standing panel, it entered into a registry agreement with DCA's competitor for .AFRICA during the pendency of this IRP, thereby forcing DCA Trust to request for interim measures of protection in order to preserve its right to a meaningful remedy, ICANN attempted to appeal declarations of the Panel on procedural matters where no appeal mechanism was provided for under the applicable procedures and rules, and finally, ICANN refused only a couple of months prior to the merits hearing, to make its witnesses available for viva voce questioning at the hearing.

142. ICANN in response submits that, "both the Bylaws and the Supplementary Procedures provide that, in the ordinary course, costs shall be allocated to the prevailing party. These costs include the Panel's fees and the ICDR's fees, [they] would also include the costs of the transcript."

143. ICANN explains on the other hand that this case was extraordinary and this Panel should exercise its discretion to have each side bear its own costs as this IRP "was in many senses a first of its kind." According to ICANN, among other things:

This IRP was the first associated with the Board's acceptance of GAC advice that resulted in the blocking of an application for a new gTLD under the new gTLD Program;

This was the first IRP associated with a claim that one or more ICANN Board members had a conflict of interest with a Board vote; and

This was the first (and still only) IRP related to the New gTLD Program that involved a live hearing, with a considerable amount of debate associated with whether to have a hearing.

144. After reading the Parties' written submissions concerning the issue of costs and their allocation, and deliberation, the Panel is unanimous in deciding that DCA Trust is the prevailing party in this IRP and ICANN shall bear, pursuant to Article IV, Section 3, paragraph 18 of the Bylaws, Article 11 of Supplementary Procedures and Article 31 of the ICDR Rules, the totality of the costs of this IRP and the totality of the costs of the IRP Provider.

145. As per the last sentence of Article IV, Section 3, paragraph 18 of the Bylaws, however, DCA Trust and ICANN shall each bear their own expenses, and they shall also each bear their own legal representation fees.

146. For the avoidance of any doubt therefore, the Panel concludes that ICANN shall be responsible for paying the following costs and expenses:

- a) the fees and expenses of the panelists;
- b) the fees and expenses of the administrator, the ICDR;
- c) the fees and expenses of the emergency panelist incurred in connection with the application for interim emergency relief sought pursuant to the Supplementary Procedures and the ICDR Rules; and
- d) the fees and expenses of the reporter associated with the hearing on 22 and 23 May 2015 in Washington, D.C.

147. The above amounts are easily quantifiable and the Parties are invited to cooperate with one another and the ICDR to deal with this part of this Final Declaration.

V. DECLARATION OF THE PANEL

148. Based on the foregoing, after having carefully reviewed the Parties' written submissions, listened to the testimony of the three witness, listened to the oral submissions of the Parties in various telephone conference calls and at the in-person hearing of this IRP in Washington, D.C. on 22 and 23 May 2015, and finally after much deliberation, pursuant to Article IV, Section 3, paragraph 11 (c) of ICANN's Bylaws, the Panel declares that both the actions and inactions of the Board with respect to the application of DCA Trust relating to the .AFRICA gTLD were inconsistent with the Articles of Incorporation and Bylaws of ICANN.

149. Furthermore, pursuant to Article IV, Section 3, paragraph 11 (d) of ICANN's Bylaws, the Panel recommends 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.

150. The Panel declares DCA Trust to be the prevailing party in this IRP and further declares that ICANN is to bear, pursuant to Article IV, Section 3, paragraph 18 of the Bylaws, Article 11 of Supplementary Procedures and Article 31 of the ICDR Rules, the totality of the costs of this IRP and the totality of the costs of the IRP Provider as follows:

- a) the fees and expenses of the panelists;
- b) the fees and expenses of the administrator, the ICDR;
- c) the fees and expenses of the emergency panelist incurred in connection with the application for interim emergency relief sought pursuant to the Supplementary Procedures and the ICDR Rules; and
- d) the fees and expenses of the reporter associated with the hearing on 22 and 23 May 2015 in Washington, D.C.
- e) As a result of the above, the administrative fees of the ICDR totaling US\$4,600 and the Panelists' compensation and expenses totaling US\$403,467.08 shall be born entirely by ICANN, therefore, ICANN shall reimburse DCA Trust the sum of US\$198,046.04

151. As per the last sentence of Article IV, Section 3, paragraph 18 of the Bylaws, DCA Trust and ICANN shall each bear their own expenses. The Parties shall also each bear their own legal representation fees.

The Panel finally would like to take this opportunity to fondly remember its collaboration with the Hon. Richard C. Neal (Ret. and now Deceased) and to congratulate both Parties' legal teams for their hard work, civility and responsiveness during the entire proceedings. The Panel was extremely impressed with the quality of the written work presented to it and oral advocacy skills of the Parties' legal representatives.

This Final Declaration has sixty-three (63) pages.

Date: Thursday, 9 July 2015.

Place of the IRP, Los Angeles, California.



Professor Catherine Kessedjian



Hon. William J. Cahill (Ret.)



Babak Barn, President

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EXHIBIT 2

**INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
Independent Review Panel**

CASE # 50 2013 001083

DECLARATION ON THE IRP PROCEDURE

In the matter of an Independent Review Process (IRP) pursuant to the Internet Corporation for Assigned Names and Number's (ICANN's) Bylaws, the *International Dispute Resolution Procedures (ICDR Rules)* of the International Centre for Dispute Resolution (ICDR), and the *Supplementary Procedures for ICANN Independent Review Process*

**Between: DotConnectAfrica Trust;
("Claimant" or "DCA Trust")**

Represented by Mr. Arif H. Ali, Ms. Marguerite Walter and Ms. Erica Franzetti of Weil, Gotshal, Manges, LLP located at 1300 Eye Street, NW, Suite 900, Washington, DC 2005, U.S.A.

And

**Internet Corporation for Assigned Names and Numbers (ICANN);
("Respondent" or "ICANN")**

Represented by Mr. Jeffrey A. LeVee of Jones Day, LLP located at 555 South Flower Street, Fiftieth Floor, Los Angeles, CA 90071, U.S.A.

Claimant and Respondent will together be referred to as "Parties".

**IRP Panel:
Babak Barin, *Chair*
Prof. Catherine Kessedjian
Hon. Richard C. Neal (Ret.)**

I. BACKGROUND

- 1) DCA Trust is a non-profit organization established under the laws of the Republic of Mauritius on 15 July 2010 with its registry operation – DCA Registry Services (Kenya) Limited – as its principal place of business in Nairobi, Kenya. DCA Trust was formed with the charitable purpose of, among other things, advancing information technology education in Africa and providing a continental Internet domain name to provide access to internet services for the people of Africa and for the public good.
- 2) In March 2012, DCA Trust applied to ICANN for the delegation of the .AFRICA top-level domain name in its 2012 General Top-Level Domains (“gTLD”) Internet Expansion Program (the “New gTLD Program”), an internet resource available for delegation under that program.
- 3) ICANN is a non-profit corporation established under the laws of the State of California, U.S.A., on 30 September 1998 and headquartered in Marina del Rey, California. According to its Articles of Incorporation, ICANN was established for the benefit of the Internet community as a whole and is tasked with carrying out its activities in conformity with relevant principles of international law, international conventions, and local law.
- 4) On 4 June 2013, the ICANN Board New gTLD Program Committee (“NGPC”) posted a notice that it had decided not to accept DCA Trust’s application.
- 5) On 19 June 2013, DCA Trust filed a request for reconsideration by the ICANN Board Governance Committee (“BGC”), which denied the request on 1 August 2013.
- 6) On 19 August 2013, DCA Trust informed ICANN of its intention to seek relief before an Independent Review Panel under ICANN’s Bylaws. Between August and October 2013, DCA Trust and ICANN participated in a Cooperative Engagement Process (“CEP”) to try and resolve the issues relating to DCA Trust’s application. Despite several meetings, no resolution was reached.
- 7) On 24 October 2013, DCA Trust filed a Notice of Independent Review Process with the ICDR in accordance with Article IV, Section 3, of ICANN’s Bylaws.

II. SUMMARY OF THE PARTIES’ POSITIONS ON THE MERITS

- 8) According to DCA Trust, the central dispute between it and ICANN in the Independent Review Process (“IRP”) invoked by DCA Trust in October 2013 and described in its Amended Notice of Independent Review Process submitted to ICANN on 10 January 2014 arises out of:

“(1) ICANN’s breaches of its Articles of Incorporation, Bylaws, international and local law, and other applicable rules in the administration of applications for the .AFRICA top-level domain name in its 2012 General Top-Level Domains (“gTLD”) Internet Expansion Program (the “New gTLD Program”); and (2) ICANN’s wrongful decision that DCA’s application for .AFRICA should not proceed [...]”¹

- 9) According to DCA Trust, “ICANN’s administration of the New gTLD Program and its decision on DCA’s application were unfair, discriminatory, and lacked appropriate due diligence and care, in breach of ICANN’s Articles of Incorporation and Bylaws.”² DCA Trust also advanced that “ICANN’s violations materially affected DCA’s right to have its application processed in accordance with the rules and procedures laid out by ICANN for the New gTLD Program.”³
- 10) In its 10 February 2014 [sic]⁴ Response to DCA Trust’s Amended Notice, ICANN submitted that in these proceedings, “DCA challenges the 4 June 2013 decision of the ICANN Board New gTLD Program Committee (“NGPC”), which has delegated authority from the ICANN Board to make decisions regarding the New gTLD. In that decision, the NGPC unanimously accepted advice from ICANN’s Governmental Advisory Committee (“GAC”) that DCA’s application for .AFRICA should not proceed. DCA argues that the NGPC should not have accepted the GAC’s advice. DCA also argues that ICANN’s subsequent decision to reject DCA’s Request for Reconsideration was improper.”⁵
- 11) ICANN argued that the challenged decisions of ICANN’s Board “were well within the Board’s discretion” and the Board “did exactly what it was supposed to do under its Bylaws, its Articles of Incorporation, and the Applicant Guidebook (“Guidebook”) that the Board adopted for implementing the New gTLD Program.”⁶
- 12) Specifically, ICANN also advanced that “ICANN properly investigated and rejected DCA’s assertion that two of ICANN’s Board members had conflicts of interest with regard to the .AFRICA applications, [...] numerous African countries issued “warnings” to ICANN regarding DCA’s application, a signal from those governments that they had serious concerns regarding DCA’s application; following the issuance of those warnings, the GAC issued “consensus advice” against DCA’s application; ICANN then accepted the GAC’s advice, which was entirely consistent with ICANN’s Bylaws and the

¹ Claimant’s Amended Notice of Independent Review Process, *para.* 2.

² *Ibid.*

³ *Ibid.*

⁴ ICANN’s Response to Claimant’s Amended Notice contains a typographical error; it is dated “February 10, 2013” rather than 2014.

⁵ ICANN’s Response to Claimant’s Amended Notice, *para.* 4. Underlining is from the original text.

⁶ *Ibid.*, *para.* 5.

Guidebook; [and] ICANN properly denied DCA's Request for Reconsideration."⁷

13) In short, ICANN argued that in these proceedings, "the evidence establishes that the process worked exactly as it was supposed to work."⁸

14) In the merits part of these proceedings, the Panel will decide the above and other related issues raised by the Parties in their submissions.

III. PROCEDURAL BACKGROUND LEADING TO THIS DECISION

15) On 24 April 2013, 12 May, 27 May and 4 June 2014 respectively, the Panel issued a Procedural Order No. 1, a Decision on Interim Measures of Protection, a list of questions for the Parties to brief in their 20 May 2014 memorials on the procedural and substantive issues identified in Procedural Order No. 1 ("12 May List of Questions"), a Procedural Order No. 2 and a Decision on ICANN's Request for Partial Reconsideration of certain portions of its Decision on Interim Measures of Protection. The Decision on Interim Measures of Protection and the Decision on ICANN's Request for Partial Reconsideration of certain portions of the Decision on Interim Measures of Protection have no bearing on this Declaration. Consequently, they do not require any particular consideration by the Panel in this Declaration.

16) In Procedural Order No. 1 and the 12 May List of Questions, based on the Parties' submissions, the Panel identified a number of questions relating to the future conduct of these proceedings, including the method of hearing of the merits of DCA Trust's amended Notice of Independent Review Process that required further briefing by the Parties. In Procedural Order No. 1, the Panel identified some of these issues as follows:

B. Future conduct of the IRP proceedings, including the hearing of the merits of Claimant's Amended Notice of Independent Review Process, if required.

Issues:

- a) Interpretation of the provisions of ICANN's Bylaws, the *International Dispute Resolution Procedures* of the ICDR, and the *Supplementary Procedures for ICANN Independent Review Process* (together the "IRP Procedure"), including whether or not there should be *viva voce* testimony permitted.
- b) Document request and exchange.
- c) Additional filings, including any memoranda and hearing exhibits (if needed and appropriate).

⁷ *Ibid.*

⁸ ICANN's Response to Claimant's Amended Notice, *para.* 6. Underlining is from the original text.

- d) Consideration of method of hearing of the Parties, i.e., telephone, video or in-person and determination of a location for such a hearing, if necessary or appropriate, and consideration of any administrative issues relating to the hearing.

17) In that same Order, in light of: (a) the exceptional circumstances of this case; (b) the fact that some of the questions raised by the Parties implicated important issues of fairness, due process and equal treatment of the parties ("Outstanding Procedural Issues"); and (c) certain *primaie impressionis* or first impression issues that arose in relation to the IRP Procedure, the Panel requested the Parties to file two rounds of written memorials, including one that followed the 12 May List of Questions.

18) On 5 and 20 May 2014, the Parties filed their submissions with supporting material for consideration by the Panel.

IV. ISSUES TO BE DECIDED BY THE PANEL

19) Having read the Parties' submissions and supporting material, and listened to their respective arguments by telephone, the Panel answers the following questions in this Declaration:

- 1) Does the Panel have the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings?
- 2) If so, what directions does the Panel give the Parties with respect to the Outstanding Procedural Issues?
- 3) Is the Panel's decision concerning the IRP Procedure and its future Declaration on the Merits in this proceeding binding?

Summary of the Panel's findings

20) The Panel is of the view that it has the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings and consequently, it issues the procedural directions set out in paragraphs 58 to 61, 68 to 71 and 82 to 87 (below), which directions may be supplemented in a future procedural order. The Panel also concludes that this Declaration and its future Declaration on the Merits of this case are binding on the Parties.

V. ANALYSIS OF THE ISSUES AND REASONS FOR THE DECISION

1) Can the Panel interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings?

Interpretation and Future Conduct of the IRP Proceedings

DCA Trusts' Submissions

21) In its 5 May 2014 Submission on Procedural Issues ("DCA Trust First Memorial"), DCA Trust submitted, *inter alia*, that:

"[Under] California law and applicable federal law, this IRP qualifies as an arbitration. It has all the characteristics that California courts look to in order to determine whether a proceeding is an arbitration: 1) a third-party decision-maker; 2) a decision-maker selected by the parties; 3) a mechanism for assuring the neutrality of the decision-maker; 4) an opportunity for both parties to be heard; and 5) a binding decision[...]. Thus, the mere fact that ICANN has labeled this proceeding an independent review process rather than an arbitration (and the adjudicator of the dispute is called a Panel rather than a Tribunal) does not change the fact that the IRP – insofar as its procedural framework and the legal effects of its outcome are concerned – is an arbitration."⁹

22) According to DCA Trust, the IRP Panel is a neutral body appointed by the parties and the ICDR to hear disputes involving ICANN. Therefore, it "qualifies as a third-party decision-maker for the purposes of defining the IRP as an arbitration."¹⁰ DCA Trust submits that, "ICANN's Bylaws contain its standing offer to arbitrate, through the IRP administered by the ICDR, disputes concerning Board actions alleged to be inconsistent with the Articles of Incorporation or the Bylaws."¹¹

23) DCA Trust submits that, it "accepted ICANN's standing offer to arbitrate by submitting its Notice of Independent Review [...] to the ICDR on 24 October 2013 [...] when the two party-appointed panelists were unable to agree on a chairperson, the ICDR made the appointment pursuant to Article 6 of the ICDR Rules, amended and effective 1 June 2009. The Parties thus chose to submit their dispute to the IRP Panel for resolution, as with any other arbitration."¹²

24) According to DCA Trust, "the Supplementary Procedures provide that the IRP is to be comprised of 'neutral' [individuals] and provide that the panel shall be comprised of members of a standing IRP Panel or as selected by the

⁹ DCA Trust First Memorial, *para.* 4 and 5.

¹⁰ *Ibid.*, *para.* 8.

¹¹ *Ibid.*, *para.* 9.

¹² *Ibid.*

parties under the ICDR Rules. The ICDR Rules [...] provide that panelists serving under the rules, 'shall be impartial and independent', and require them to disclose any circumstances giving rise to 'justifiable doubts' as to their impartiality and independence [...]. The IRP therefore contains a mechanism for ensuring the neutrality of the decision-maker, just like any other arbitration."¹³

25) DCA Trust further submitted that the "IRP affords both parties an opportunity to be heard, both in writing and orally" and the "governing instruments of the IRP – *i.e.*, the Bylaws, the ICDR Rules, and the Supplementary Procedures – confirm that the IRP is final and binding." According to DCA Trust, the "IRP is the final accountability and review mechanism available to the parties materially affected by ICANN Board decisions. The IRP is also the only ICANN accountability mechanism conducted by an independent third-party decision-maker with the power to render a decision resolving the dispute and naming a prevailing party [...]. The IRP represents a fundamentally different stage of review from those that precede it. Unlike reconsideration or cooperative engagement, the IRP is conducted pursuant to a set of independently developed international arbitration rules (as minimally modified) and administered by a provider of international arbitration services, not ICANN itself."¹⁴

26) As explained in its 20 May 2014 Response to the Panel's Questions on Procedural Issues ("DCA Trust Second Memorial"), according to DCA Trust, "the IRP is the *sole forum* in which an applicant for a new gTLD can seek independent, third-party review of Board actions. Remarkably, ICANN makes no reciprocal waivers and instead retains all of its rights against applicants in law and equity. ICANN cannot be correct that the IRP is a mere 'corporate accountability mechanism'. Such a result would make ICANN – the caretaker of an immensely important (and valuable) global resource – effectively judgment-proof."¹⁵

27) Finally DCA Trust submitted that:

"[It] is [...] critical to understand that ICANN created the IRP as an alternative to allowing disputes to be resolved by courts. By submitting its application for a gTLD, DCA agreed to eight pages of terms and conditions, including a nearly page-long string of waivers and releases. Among those conditions was the waiver of all of its rights to challenge ICANN's decision on DCA's application in court. For DCA and other gTLD applicants, the IRP is their only recourse; no other legal remedy is available. The very design of this process is evidence that the IRP is fundamentally unlike the forms of

¹³ *Ibid*, paras. 10, 11 and 12.

¹⁴ *Ibid*, paras. 13, 16, 21 and 23.

¹⁵ DCA Trust Second Memorial, para. 6. Bold and italics are from the original text.

administrative review that precede it and is meant to provide a final and binding resolution of disputes between ICANN and persons affected by its decisions.”¹⁶

ICANN’s Submissions

28) In response, in its first memorial entitled ICANN’s Memorandum Regarding Procedural Issues filed on 5 May 2014 (“ICANN First Memorial”), ICANN argued, *inter alia*, that:

“[This] proceeding is *not* an arbitration. Rather, an IRP is a truly unique ‘Independent Review’ process established in ICANN’s Bylaws with the specific purpose of providing for ‘independent third-party review of Board actions alleged by an affected party to be inconsistent with the Articles of Incorporation or Bylaws’. Although ICANN is using the International Center [sic] for Dispute Resolution (‘ICDR’) to administer these proceedings, nothing in the Bylaws can be construed as converting these proceedings into an ‘arbitration’, and the Bylaws make clear that these proceedings are not to be deemed as the equivalent of an ‘international arbitration.’ Indeed, the word ‘arbitration’ does not appear in the relevant portion of the Bylaws, and as discussed below, the ICANN Board retains full authority to accept or reject the declaration of all IRP Panels [...] ICANN’s Board had the authority to, and did, adopt Bylaws establishing internal accountability mechanisms and defining the scope and form of those mechanisms. Cal. Corp. Code § 5150(a) (authorizing the board of a non-profit public benefit corporation to adopt and amend the corporation’s bylaws).”¹⁷

29) In its 20 May 2014 Further Memorandum Regarding Procedural Issues (“ICANN Second Memorial”), ICANN submitted that many of the questions that the Panel posed “are outside the scope of this Independent Review Proceeding [...] and the Panel’s mandate.”¹⁸ According to ICANN:

“The Panel’s mandate is set forth in ICANN’s Bylaws, which limit the Panel to ‘comparing contested actions of the Board to the Articles of Incorporation and Bylaws, and [...] declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.’”¹⁹

The Panel’s Decision on its power to interpret and determine the IRP Procedure

(i) Mission and Core Values of ICANN

30) ICANN is not an ordinary California non-profit organization. Rather, ICANN has a large international purpose and responsibility, to coordinate, at the overall level, the global Internet’s systems of unique identifiers, and in particular, to ensure the stable and secure operation of the Internet’s unique identifier systems.

¹⁶ DCA Trust First Memorial, *para.* 22.

¹⁷ ICANN First Memorial, *paras.* 10 and 11. Bold and italics are from the original text.

¹⁸ ICANN Second Memorial, *para.* 2.

¹⁹ *Ibid.*

31) ICANN coordinates the allocation and assignment of the three sets of unique identifiers for the Internet. ICANN's special and important mission is reflected in the following provisions of its Articles of Incorporation:

3. This Corporation is a [non-profit] public benefit corporation and is not organized for the private gain of any person. It is organized under the California [Non-profit] Public Benefit Corporation Law for charitable and public purposes. The Corporation is *organized, and will be operated, exclusively for charitable, educational, and scientific purposes ...* In furtherance of the foregoing purposes, and in *recognition of the fact that the Internet is an international network of networks, owned by no single nation, individual or organization*, the Corporation shall, except as limited by Article 5 hereof, *pursue the charitable and public purposes of lessening the burdens of government and promoting the global public interest in the operational stability of the Internet* by (i) coordinating the assignment of Internet technical parameters as needed to maintain universal connectivity on the Internet; (ii) performing and overseeing functions related to the coordination of the Internet Protocol ("IP") address space; (iii) performing and overseeing functions related to the coordination of the Internet domain name system ("DNS"), including the development of policies for determining the circumstances under which new top-level domains are added to the DNS root system; (iv) overseeing operation of the authoritative Internet DNS root server system; and (v) engaging in any other related lawful activity in furtherance of items (i) through (iv).

4. 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. To this effect, the Corporation shall cooperate as appropriate with relevant international organizations. [Emphasis by way of italics is added]

32) In carrying out its mission, ICANN must be accountable to the global internet community for operating in a manner that is consistent with its Bylaws, and with due regard for its core values.

33) In performing its mission, among others, the following core values must guide the decisions and actions of ICANN: preserve and enhance the operational stability, security and global interoperability of the internet, employ open and transparent policy development mechanisms, make decisions by applying documented policies neutrally and objectively, with integrity and fairness and remain accountable to the internet community through mechanisms that enhance ICANN's effectiveness.

34) The core values of ICANN as described in its Bylaws are deliberately expressed in general terms, so as to provide useful and relevant guidance in the broadest possible range of circumstances. Because they are not narrowly prescriptive, the specific way in which they apply, individually and collectively, to each situation will necessarily depend on many factors that cannot be fully anticipated or enumerated.

(ii) Accountability of ICANN

35) Consistent with its large and important international responsibilities, ICANN's Bylaws acknowledge a responsibility to the community and a need for a means of holding ICANN accountable for compliance with its mission and "core values." Thus, Article IV of ICANN's Bylaws, entitled "Accountability and Review," states:

"In carrying out its mission as set out in these Bylaws, ICANN should be accountable to the community for operating in a manner that is consistent with these Bylaws, and with due regard for the core values set forth in Article I of these Bylaws."

36) ICANN's Bylaws establish three accountability mechanisms: the Independent Review Process and two other avenues: Reconsideration Requests and the Ombudsman.

37) ICANN's BGC is the body designated to review and consider Reconsideration Requests. The Committee is empowered to make final decisions on certain matters, and recommendations to the Board of Directors on others. ICANN's Bylaws expressly provide that the Board of Directors "*shall not be bound to follow the recommendations of the BGC.*"

38) ICANN's Bylaws provide that the "charter of the Ombudsman shall be to act as a neutral dispute resolution practitioner for those matters for which the provisions of the Reconsideration Policy [...] or the Independent Review Policy have not been invoked." The Ombudsman's powers appear to be limited to "clarifying issues" and "using conflict resolution tools such as negotiation, facilitation, and 'shuttle diplomacy'." The Ombudsman is specifically barred from "instituting, joining, or supporting in any way any legal actions challenging ICANN's structure, procedures, processes, or any conduct by the ICANN Board, staff, or constituent bodies."

39) The avenues of accountability for applicants that have disputes with ICANN do *not* include resort to the courts. Applications for gTLD delegations are governed by ICANN's Guidebook, which provides that applicants waive all right to resort to the courts:

"Applicant hereby releases ICANN [...] from any and all claims that arise out of, are based upon, or are in any way related to, any action or failure to act by ICANN [...] in connection with ICANN's review of this application, investigation, or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR 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 ON THE BASIS OF ANY OTHER LEGAL CLAIM.”²⁰

40) Thus, assuming that the foregoing waiver of any and all judicial remedies is valid and enforceable, the ultimate “accountability” remedy for applicants is the IRP.

(iii) IRP Procedures

41) The Bylaws of ICANN as amended on 11 April 2013, in Article IV (Accountability and Review), Section 3 (Independent Review of Board Actions), paragraph 1, require ICANN to put in place, in addition to the reconsideration process identified in Section 2, a separate process for independent third-party review of Board actions alleged by an affected party to be inconsistent with ICANN’s Articles of Incorporation or Bylaws.

42) Paragraphs 7 and 8 of Section 2 of the Bylaws, require all IRP proceedings to be administered by an international dispute resolution provider appointed by ICANN, and for that IRP Provider (“IRPP”) to, with the approval of the ICANN’s Board, establish operating rules and procedures, which shall implement and be consistent with Section 3.

43) In accordance with the above provisions, ICANN selected the ICDR, the international division of the American Arbitration Association, to be the IRPP.

44) With the input of the ICDR, ICANN prepared a set of Supplementary Procedures for ICANN IRP (“Supplementary Procedures”), to “supplement the [ICDR’s] International Arbitration Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws.”

45) According to the Definitions part of the Supplementary Procedures, “Independent Review or IRP” refers to “the procedure that takes place upon filing of a request to review ICANN Board actions or inactions alleged to be inconsistent with ICANN’s Bylaws or Articles of Incorporation”, and “International Dispute Resolution Procedures or Rules” refers to the ICDR’s International Arbitration Rules (“ICDR Rules”) that will govern the process in combination with the Supplementary Rules.

46) The Preamble of the Supplementary Rules indicates that these “procedures supplement the [ICDR] Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws” and Article

²⁰ Applicant Guidebook, Terms and Conditions for Top Level Domain Applications, *para.* 6. Capital letters are from the original text.

2 of the Supplementary Procedures requires the ICDR to apply the Supplementary Procedures, *in addition* to the ICDR Rules, in all cases submitted to it in connection with Article IV, Section 3(4) of ICANN's Bylaws. In the event there is any inconsistency between the Supplementary Procedures and the ICDR Rules, ICANN requires the Supplementary Procedures to govern.

- 47)The online Oxford English Dictionary defines the word "supplement" as "a thing added to something else in order to complete or enhance it". Supplement, therefore, means to complete, add to, extend or supply a deficiency. In this case, according to ICANN's desire, the Supplementary Rules were designed to "add to" the ICDR Rules.
- 48)A key provision of the ICDR Rules, Article 16, under the heading "Conduct of Arbitration" confers upon the Panel the power to "conduct [proceedings] in whatever manner [the Panel] considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case."
- 49)Another key provision, Article 36 of the ICDR Rules, directs the Panel to "interpret and apply these Rules insofar as they relate to its powers and duties". Like in all other ICDR proceedings, the details of exercise of such powers are left to the discretion of the Panel itself.
- 50)Nothing in the Supplementary Procedures either expressly or implicitly conflicts with or overrides the general and broad powers that Articles 16 and 36 of the ICDR Rules confer upon the Panel to interpret and determine the manner in which the IRP proceedings are to be conducted and to assure that each party is given a fair opportunity to present its case.
- 51)To the contrary, the Panel finds support in the "Independent Review Process Recommendations" filed by ICANN, which indicates that the Panel has the *discretion* to run the IRP proceedings in the manner it thinks appropriate. [Emphasis added].
- 52)Therefore, the Panel is of the view that it has the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings, and it does so here, with specificity in relation to the issues raised by the Parties as set out below.

2) What directions does the Panel give the Parties with respect to the Outstanding Procedural Issues?

a) Document request and exchange

Parties' Submissions

- 53) In the DCA Trust First Memorial, DCA Trust seeks document production, since according to it, "information potentially dispositive of the outcome of these proceedings is in ICANN's possession, custody or control."²¹ According to DCA Trust, in this case, "ICANN has submitted witness testimony that, among other things, purports to rely on secret documents that have not been provided." Given that these proceedings may be "DCA's only opportunity to present and have its claims decided by an independent decision-maker", DCA Trust argues "that further briefing on the merits should be allowed following any and all document production in these proceedings."²²
- 54) According to DCA Trust, "by choosing the ICDR Rules, the Parties also chose the associated ICDR guidelines including the Guidelines for Arbitrators Concerning Exchanges of Information ("ICDR Guidelines"). The ICDR Guidelines provide that 'parties shall exchange, in advance of the hearing, all documents upon which each intends to rely' [...]"²³ DCA Trust submits that, "nothing in the Bylaws or Supplementary Procedures excludes such document production, leaving the ICDR Rules to cover the field."²⁴
- 55) DCA Trust therefore, requests that the Panel issue a procedural order providing the Parties with an opportunity to request documents from one another, and to seek an order from the Panel compelling production of documents if necessary.
- 56) ICANN agrees with DCA Trust, that pursuant to the ICDR Guidelines, which it refers to as "Discovery Rules", "a party must request that a panel order the production of documents."²⁵ According to ICANN, "those documents must be 'reasonably believed to exist and to be relevant and material to the outcomes of the case,' and requests must contain 'a description of specific documents or classes of documents, along with an explanation of their materiality to the outcome of the case."²⁶ ICANN argues, however, that despite the requirement by the Supplementary Rules that, '*all necessary evidence* to demonstrate the requestor's claims that ICANN violated its Bylaws or Articles of Incorporation

²¹ DCA Trust First Memorial, *para.* 61.

²² *Ibid*, *paras.* 61 and 66.

²³ *Ibid*, *para.* 67.

²⁴ *Ibid*.

²⁵ ICANN First Memorial, *para.* 28.

²⁶ *Ibid*.

should be part of the [initial written] submission', DCA Trust has not to date "provided any indication as to what information it believes the documents it may request may contain and has made no showing that those documents could affect the outcome of the case."²⁷

57) ICANN further submits that, "while ICANN recognizes that the Panel may order the production of documents within the parameters set forth in the Discovery Rules, ICANN will object to any attempts by DCA to propound broad discovery of the sort permitted in American civil litigation."²⁸ In support of its contention, ICANN refers to the ICDR Guidelines and states that those Guidelines have made it 'clear that its Discovery Rules do not contemplate such broad discovery. The introduction of these rules states that their purpose is to promote 'the goal of providing a simpler, less expensive and more expeditious form of dispute resolution than resort to national courts.' According to ICANN, the ICDR Guidelines note that:

"One of the factors contributing to complexity, expense and delay in recent years has been the migration from court systems into arbitration of procedural devices that allow one party to a court proceeding access to information in the possession of the other, without full consideration of the differences between arbitration and litigation. The purpose of these guidelines is to make it clear to arbitrators that they have the authority, the responsibility and, in certain jurisdictions, the mandatory duty to manage arbitration proceedings so as to achieve the goal of providing a simpler, less expensive, and more expeditious process."²⁹

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The Panel's directions concerning document request and exchange

58) Seeing that the Parties are both in agreement that some form of documentary exchange is permitted under the IRP Procedure, and considering that Articles 16 and 19 of the ICDR Rules respectively specify, *inter alia*, that, "[s]ubject to these Rules the [Panel] may conduct [these proceedings] in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case" and "at any time during the proceedings, the tribunal may order parties to produce other documents, exhibits or other evidence it deems necessary or appropriate", the Panel concludes that some document production is necessary to allow DCA Trust to present its case.

59) The Panel is not aware of any international dispute resolution rules, which prevent the parties to benefit from some form of document production. Denying document production would be especially unfair in the circumstances of this case given ICANN's reliance on internal confidential documents, as advanced by DCA Trust. In any event, ICANN's espoused goals

²⁷ *Ibid*, para. 29. Bold and italics are from the original text.

²⁸ *Ibid*, para. 30.

²⁹ ICDR Guidelines for Arbitrators on Exchanges of Information, Introduction.

of accountability and transparency would be disserved by a regime that truncates the usual and traditional means of developing and presenting a claim.

60)The Panel, therefore, orders a reasonable documentary exchange in these proceedings with a view to maintaining efficiency and economy, and invites the Parties to agree by or before 29 August 2014, on a form, method and schedule of exchange of documents between them. If the Parties are unable to agree on such a documentary exchange process, the Panel will intervene and, with the input of the Parties, provide further guidance.

61)In this last regard, the Panel directs the Parties attention to paragraph 6 of the ICDR Guidelines, and advises, that it is very “receptive to creative solutions for achieving exchanges of information in ways that avoid costs and delay, consistent with the principles of due process expressed in these Guidelines.”

b) Additional filings, including memoranda and hearing exhibits

Parties’ Submissions

62)In the DCA Trust First Memorial, DCA Trust submits that:

“[The] plain language of the Supplementary Procedures pertaining to written submissions clearly demonstrates that claimants in IRPs are not limited to a single written submission incorporating all evidence, as argued by ICANN. Section 5 of the Supplementary Procedures states that ‘initial written submissions of the parties shall not exceed 25 pages.’ The word ‘initial’ confirms that there may be subsequent submissions, subject to the discretion of the Panel as to how many additional written submissions and what page limits should apply.”³⁰

63)DCA Trust also submits that, “Section 5 of the Supplementary Procedures [...] provides that ‘[a]ll necessary evidence to demonstrate the requestor’s claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission.’ Use of the word ‘should’—and not ‘shall’—confirms that it is desirable, but not required that all necessary evidence be included with the Notice of Independent Review. Plainly, the Supplementary Procedures do not preclude a claimant from adducing additional evidence nor would it make any sense if they did given that claimants may, subject to the Panel’s discretion, submit document requests.”³¹

64)According to DCA Trust, in addition, “section 5 of the Supplementary Procedures provides that ‘the Panel may request additional written submissions from the party seeking review, the Board, the Supporting

³⁰ DCA Trust First Memorial, *para.* 57.

³¹ *Ibid*, *para.* 58.

Organizations, or from other parties.’ Thus, the Supplementary Procedures clearly contemplate that additional written submissions may be necessary to give each party a fair opportunity to present its case.”³²

65) In response, ICANN submits that, DCA Trust “has no automatic right to additional briefing under the Supplementary Procedures.”³³ According to ICANN, “paragraph 5 of the Supplementary Procedures, which governs written statements, provides:

The initial written submissions of the parties shall not exceed 25 pages each in argument, double-spaced and in 12-point font. *All necessary evidence to demonstrate the requestor’s claims that ICANN violated its Bylaws or Articles of Incorporation should be part of the submission.* Evidence will not be included when calculating the page limit. The parties may submit expert evidence in writing, and there shall be one right of reply to that expert evidence. *The IRP Panel may request additional written submissions from the party seeking review,* the Board, the Supporting Organizations, or from other parties.” [Bold and italics are ICANN’s]

ICANN adds:

“This section clearly provides that DCA [Trust’s] opportunity to provide briefing and evidence in this matter has concluded, subject only to a request for additional briefing from the Panel. DCA has emphasized that the rule references the ‘initial’ written submission, but the word ‘initial’ refers to the fact that the Panel ‘may request additional written submissions,’ not that DCA [Trust] has some ‘right’ to a second submission. There is no Supplementary Rule that even suggests the possibility of a second submission as a matter of right. The fact that DCA [Trust] has twice failed to submit evidence in support of its claims is not justification for allowing DCA [Trust] a third attempt.”³⁴

66) ICANN further notes, that in its 20 April 2014 letter to the Panel, ICANN already submitted that, “DCA [Trust’s] argument that it submitted its papers ‘on the understanding that opportunities would be available to make further submissions’ is false. ICANN stated in an email to DCA [Trust’s] counsel on 9 January 2014—prior to the submission of DCA [Trust’s] Amended Notice—that the Supplementary [Procedures] bar the filing of supplemental submissions absent a request from the Panel.”³⁵

67) According to ICANN:

“[The] decision as to whether to allow supplemental briefing is within the Panel’s discretion, and ICANN urges the Panel to decline to permit supplemental briefing for two reasons. First, despite having months to consider how DCA [Trust] might respond to ICANN’s presentation on the merits, DCA [Trust] has never even attempted to explain

³² *Ibid*, para. 59.

³³ ICANN First Memorial, para. 24.

³⁴ *Ibid*.

³⁵ *Ibid*, para. 25.

what it could say in additional briefing that would refute the materials in ICANN's presentation. [...] The fact that DCA is unable to identify supplemental witnesses six months after filing its Notice of IRP is strong indication that further briefing would not be helpful in this case. Second, as ICANN has explained on multiple occasions, DCA [Trust] has delayed these proceedings substantially, and further briefing would compound that delay [...] as ICANN noted in its letter of 20 April 2014, despite DCA [Trust's] attempts to frame this case as implicating issues 'reach[ing] far beyond the respective rights of the parties as concerns the delegation of .AFRICA,' the issues in this case are in fact extremely limited in scope. This Panel is authorized only to address whether ICANN violated its Bylaws or Articles of Incorporation *in its handling of DCA's Application for .AFRICA*. The parties have had the opportunity to submit briefs and evidence regarding that issue. DCA [Trust] has given no indication that it has further dispositive arguments to make or evidence to present. The Panel should resist DCA's attempt to delay these proceedings even further via additional briefing."³⁶

The Panel's directions concerning additional filings

- 68) As with document production, in the face of Article 16 of the ICDR Rules, the Panel is of the view that both Parties ought to benefit from additional filings. In this instance again, while it is possible as ICANN explains, that the drafters of the Supplementary Procedures may have desired to preclude the introduction of additional evidence not submitted with an initial statement of claim, the Panel is of the view that such a result would be inconsistent with ICANN's core values and the Panel's obligation to treat the parties fairly and afford both sides a reasonable opportunity to present their case.
- 69) Again, every set of dispute resolution rules, and every court process that the Panel is aware of, allows a claimant to supplement its presentation as its case proceeds to a hearing. The goal of a fair opportunity to present one's case is in harmony with ICANN's goals of accountability, transparency, and fairness.
- 70) The Panel is aware of and fully embraces the fact that ICANN tried to curtail unnecessary time and costs in the IRP process. However, this may not be done at the cost of a fair process for both parties, particularly in light of the fact that the IRP is the exclusive dispute resolution mechanism provided to applicants.
- 71) Therefore, the Panel will allow the Parties to benefit from additional filings and supplemental briefing going forward. The Panel invites the Parties in this regard to agree on a reasonable exchange timetable. If the Parties are unable to agree on the scope and length of such additional filings and supplemental briefing, the Panel will intervene and, with the input of the Parties, provide further guidance.

³⁶ *Ibid*, paras. 26 and 27.

c) Method of Hearing and Testimony

Parties' Submissions

72) In the DCA Trust First Memorial, DCA Trust submitted that:

"[The] parties agree that a hearing on the merits is appropriate in this IRP. DCA [Trust] respectfully requests that the Panel schedule a hearing on the merits after document discovery has concluded and the parties have had the opportunity to file memorials on the merits. Although the Panel clearly has the authority to conduct a hearing in-person, in the interest of saving time and minimizing costs, DCA [Trust] would agree to a video hearing, as stated during the April 22 hearing on procedural matters."³⁷

73) In response, ICANN submitted that, "during the 22 April 2014 Call, ICANN agreed that this IRP is one in which a telephonic or video conference would be helpful and offered to facilitate a video conference."³⁸ In addition, in the ICANN First Memorial, ICANN argued that according to Article IV, Section 3.12 of the Bylaws and paragraph 4 of the Supplementary Procedures, the IRP should conduct its proceedings by email and otherwise via Internet to the maximum extent feasible and in the extraordinary event that an in-person hearing is deemed necessary by the panel, the in-person hearing shall be limited to argument only.

74) ICANN also advanced, that:

"[It] does not believe [...] that this IRP is sufficiently 'extraordinary' so as to justify an in-person hearing, which would dramatically increase the costs for the parties. As discussed above, the issues in this IRP are straightforward – limited to whether ICANN's Board acted consistent with its Bylaws and Articles of Incorporation in relation to DCA's application for: AFRICA. – and can, easily [...], be resolved following a telephonic oral argument with counsel and the Panel."³⁹

75) In the DCA Trust First Memorial, DCA Trust also argued that, in "April 2013, ICANN amended its Bylaws to limit telephonic or in-person hearings to 'argument only.' At some point after the *ICM* Panel's 2009 decision in *ICM v. ICANN*, ICANN also revised the Supplementary Procedures to limit hearings to 'argument only.' Accordingly, and as ICANN argued at the procedural hearing, ICANN's revised Bylaws and Supplementary Procedures suggest that there is to be no cross-examination of witnesses at the hearing. However, insofar as neither the Supplementary Procedures nor the Bylaws expressly exclude cross-examination, this provision remains ambiguous."⁴⁰

³⁷ DCA Trust First Memorial, *para.* 63.

³⁸ ICANN First Memorial, *para.* 36.

³⁹ *Ibid*, *para.* 36.

⁴⁰ DCA Trust First Memorial, *para.* 64.

76)DCA Trust submitted that:

"[Regardless] of whether the parties themselves may examine witnesses at the hearing, it is clear that the Panel may do so. Article 16(1) provides that the Panel 'may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.' It is, moreover, customary in international arbitration for tribunal members to question witnesses themselves – often extensively – in order to test their evidence or clarify facts that are in dispute. In this case, ICANN has submitted witness testimony that, among other things, purports to rely on secret documents that have not been provided. As long as those documents are withheld from DCA [Trust], it is particularly important for that witness testimony to be fully tested by the Panel, if not by the parties. Particularly in light of the important issues at stake in this matter and the general due process concerns raised when parties cannot test the evidence presented against them, DCA [Trust] strongly urges the Panel to take full advantage of its opportunity to question witnesses. Such questioning will in no way slow down the proceedings, which DCA [Trust] agrees are to be expedited – but not at the cost of the parties' right to be heard, and the Panel's right to obtain the information it needs to render its decision."⁴¹

77)In response, ICANN submitted that:

"[Both] the Supplementary Procedures and ICANN's Bylaws unequivocally and unambiguously prohibit live witness testimony in conjunction with any IRP." Paragraph 4 of the Supplementary Procedures, which according to ICANN governs the "Conduct of the Independent Review", demonstrates this point. According to ICANN, "indeed, two separate phrases of Paragraph 4 explicitly prohibit live testimony: (1) the phrase limiting the in-person hearing (and similarly telephonic hearings) to 'argument only,' and (2) the phrase stating that 'all evidence, including witness statements, must be submitted in advance.' The former explicitly limits hearings to the argument of counsel, excluding the presentation of any evidence, including any witness testimony. The latter reiterates the point that *all evidence, including witness testimony*, is to be presented in writing and prior to the hearing. Each phrase unambiguously excludes live testimony from IRP hearings. Taken together, the phrases constitute irrefutable evidence that the Supplementary Procedures establish a truncated hearing procedure."⁴²

78)ICANN added:

"[Paragraph] 4 of the Supplementary Procedures is based on the exact same and unambiguous language in Article IV, Section 3.12 of the Bylaws, which provides that '[i]n the unlikely event that a telephonic or in-person hearing is convened, *the hearing shall be limited to argument only; all evidence, including witness statements, must be submitted in writing in advance.*'" [...] While DCA [Trust] may prefer a different procedure, the Bylaws and the Supplementary Procedures could not be any clearer in this regard. Despite the Bylaws' and Supplementary Procedures' clear and unambiguous prohibition of live witness testimony, DCA [Trust] attempts to argue that the Panel should instead be guided by Article 16 of the ICDR Rules, which states that subject to the ICDR Rules, 'the tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each

⁴¹ *Ibid*, paras. 65 and 66.

⁴² ICANN First Memorial, paras. 15 and 16.

party has the right to be heard and is given a fair opportunity to present its case.’ However, as discussed above, the Supplementary Procedures provide that ‘[i]n the event there is any inconsistency between these Supplementary Procedures and [ICDR’s International Arbitration Rules], these Supplementary Procedures will govern,’ and the Bylaws require that the ICDR Rules ‘be consistent’ with the Bylaws. As such, the Panel **does not have discretion** to order live witness testimony in the face of the Bylaws’ and Supplementary Procedures’ clear and unambiguous prohibition of such testimony.”⁴³

79) ICANN further submitted:

“[During] the 22 April Call, DCA vaguely alluded to ‘due process’ and ‘constitutional’ concerns with prohibiting cross-examination. As ICANN did after public consultation, and after the *ICM* IRP, ICANN has the right to establish the rules for these procedures, rules that DCA agreed to abide by when it filed its Request for IRP. First, ‘constitutional’ protections do not apply with respect to a *corporate accountability mechanism*. Second, ‘due process’ considerations (though inapplicable to corporate accountability mechanisms) were already considered as part of the design of the revised IRP. And the United States Supreme Court has repeatedly affirmed the right of parties to tailor unique rules for dispute resolution processes, including even *binding arbitration proceedings* (which an IRP is not). The Supreme Court has specifically noted that ‘[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute. . . . And the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution’.”⁴⁴

80) According to ICANN:

“[The] U.S. Supreme Court has explicitly held that the right to tailor unique procedural rules includes the right to dispense with certain procedures common in civil trials, including the right to cross-examine witnesses [...] Similarly, international arbitration norms recognize the right of parties to tailor their own, unique arbitral procedures. ***Party autonomy is the guiding principle in determining the procedure to be followed in international arbitration.*** It is a principle that is endorsed not only in national laws, but by international arbitral institutions worldwide, as well as by international instruments such as the New York Convention and the Model Law.”⁴⁵

81) In short, ICANN advanced that:

“[Even] if this were a formal ‘arbitration’, ICANN would be entitled to limit the nature of these proceedings so as to preclude live witness testimony. The fact that this proceeding is not an arbitration further reconfirms ICANN’s right to establish the rules that govern these proceedings [...] DCA [Trust] argues that it will be prejudiced if cross-examination of witnesses is not permitted. However, the procedures give both parties equal opportunity to present their evidence—the inability of either party to examine witnesses at the hearing would affect both the Claimant and ICANN equally. In this instance, DCA [Trust] did not submit witness testimony with its Amended Notice (as clearly it should have). However, were DCA [Trust] to present any written witness statements in support of its position, ICANN would not be entitled to cross examine

⁴³ *Ibid*, paras. 17 and 18. Bold and italics are from the original text.

⁴⁴ *Ibid*, para. 19.

⁴⁵ *Ibid*, paras. 20 and 21. Bold and italics are from the original text.

those witnesses, just as DCA [Trust] is not entitled to cross examine ICANN's witnesses. Of course, the parties are free to argue to the IRP Panel that witness testimony should be viewed in light of the fact that the rules do not permit cross-examination."⁴⁶

The Panel's directions on method of hearing and testimony

- 82) The considerations and discussions under the prior headings addressing document exchange and additional filings apply to the hearing and testimony issues raised in this IRP proceeding as well.
- 83) At this juncture, the Panel is of the preliminary view that at a minimum a video hearing should be held. The Parties appear to be in agreement. However, the Panel does not wish to close the door to the possibility of an in-person hearing and live examination of witnesses, should the Panel consider that such a method is more appropriate under the particular circumstances of this case after the Parties have completed their document exchange and the filing of any additional materials.
- 84) While the Supplementary Procedures appear to limit both telephonic and in-person hearings to "argument only", the Panel is of the view that this approach is fundamentally inconsistent with the requirements in ICANN's Bylaws for accountability and for decision making with objectivity and fairness.
- 85) Analysis of the propriety of ICANN's decisions in this case will depend at least in part on evidence about the intentions and conduct of ICANN's top personnel. ICANN should not be allowed to rely on written statements of these officers and employees attesting to the propriety of their actions without an appropriate opportunity in the IRP process for DCA Trust to challenge and test the veracity of such statements.
- 86) The Panel, therefore, reserves its decision to order an in-person hearing and live testimony pending a further examination of the representations that will be proffered by each side, including the filing of any additional evidence which this Decision permits. The Panel also permits both Parties at the hearing to challenge and test the veracity of statements made by witnesses.
- 87) Having said this, the Panel acknowledges the Parties' desire that the IRP proceedings be as efficient and economical as feasible, consistent with the overall objectives of a fair and independent proceeding. The Panel will certainly bear this desire and goal in mind as these proceedings advance further.

⁴⁶ *Ibid*, paras. 22 and 23.

3) Is the Panel's Decision on the IRP Procedure and its future Declaration on the Merits in this proceeding binding?

DCA Trust's Submissions

88) In addition to the submissions set out in the earlier part of this Decision, DCA Trust argues that, the language used in the Bylaws to describe the IRP process is demonstrative that it is intended to be a binding process. When the language in the Bylaws for reconsideration is compared to that describing the IRP, DCA Trust explains:

"[It] is clear that the declaration of an IRP is intended to be final and binding [...] For example, the Bylaws provide that the [ICANN] [Board Governance Committee] BGC 'shall act on a Reconsideration Request on the basis of the written public record' and 'shall make a final determination or recommendation.' The Bylaws even expressly state that 'the Board *shall not be bound to follow the recommendations*' of the BGC. By contrast, the IRP Panel makes 'declarations' — defined by ICANN in its Supplementary Procedures as 'decisions/opinions'— that '**are final and have precedential value.**' The IRP Panel 'shall specifically designate the prevailing party' and may allocate the costs of the IRP Provider to one or both parties. Moreover, nowhere in ICANN's Bylaws or the Supplementary Procedures does ICANN state that the Board shall not be bound by the declaration of the IRP. If that is what ICANN intended, then it certainly could have stated it plainly in the Bylaws, as it did with reconsideration. The fact that it did not do so is telling."⁴⁷

89) In light of the foregoing, DCA Trust advances:

"[The] IRP process is an arbitration in all but name. It is a dispute resolution procedure administered by an international arbitration service provider, in which the decision-makers are neutral third parties chosen by the parties to the dispute. There are mechanisms in place to assure the neutrality of the decision-makers and the right of each party to be heard. The IRP Panel is vested with adjudicative authority that is equivalent to that of any other arbitral tribunal: it renders decisions on the dispute based on the evidence and arguments submitted by the parties, and its decisions are binding and have *res judicata* and precedential value. The procedures appropriate and customary in international arbitration are thus equally appropriate in this IRP. But in any event, and as discussed below, the applicable rules authorize the Panel to conduct this IRP in the manner it deems appropriate regardless of whether it determines that the IRP qualifies as an arbitration."⁴⁸

ICANN's Submissions

90) In response, ICANN submits that:

"[The] provisions of Article IV, Section 3 of the ICANN Bylaws, which govern the Independent Review process and these proceedings, make clear that the declaration of the Panel will not be binding on ICANN. Section 3.11 gives the IRP panels the authority

⁴⁷ DCA Trust First Memorial, *paras.* 33, 34 and 35. Bold and italics are from the original text.

⁴⁸ *Ibid.* *para.* 44.

to '*declare* whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or Bylaws' and '*recommend* that the Board stay any action or decision, or that the Board take any interim action, until such time as the Board *reviews and acts upon the opinion* of the IRP.' Section 3.21 provides that '[w]here feasible, the Board shall *consider* the IRP Panel *declaration* at the Board's next meeting.' Section 3 never refers to the IRP panel's declaration as a '*decision*' or '*determination*.' It does refer to the 'Board's subsequent action on [the IRP panel's] declaration [...].' That language makes clear that the IRP's declarations are advisory and not binding on the Board. Pursuant to the Bylaws, the Board has the discretion to consider an IRP panel's declaration and take whatever action it deems appropriate."⁴⁹

91) According to ICANN:

"[This] issue was addressed extensively in the *ICM* IRP, a decision that has precedential value to this Panel. The *ICM* Panel specifically considered the argument that the IRP proceedings were '*arbitrary and not advisory in character*,' and unanimously concluded that its declaration was '*not binding, but rather advisory in effect*.' At the time that the *ICM* Panel rendered its declaration, Article IV, Section 3 of ICANN's Bylaws provided that '*IRP shall be operated by an international arbitration provider appointed from time to time by ICANN...using arbitrators . . . nominated by that provider*.' *ICM* unsuccessfully attempted to rely on that language in arguing that the IRP constituted an arbitration, and that the IRP panel's declaration was binding on ICANN. Following that IRP, that language was removed from the Bylaws with the April 2013 Bylaws amendments, further confirming that, under the Bylaws, an IRP panel's declaration is not binding on the Board."⁵⁰

92) ICANN also submits that:

"[The] lengthy drafting history of ICANN's independent review process confirms that IRP panel declarations are not binding. Specifically, the Draft Principles for Independent Review, drafted in 1999, state that '*the ICANN Board should retain ultimate authority over ICANN's affairs -- after all, it is the Board ... that will be chosen by (and is directly accountable to) the membership and supporting organizations*.' And when, in 2001, the Committee on ICANN Evolution and Reform ('*ERC*') recommended the creation of an independent review process, it called for the creation of '*a process to require non-binding arbitration by an international arbitration body to review any allegation that the Board has acted in conflict with ICANN's Bylaws*.' The individuals who actively participated in the process also agreed that the review process would not be binding. As one participant stated: '*IRP 'decisions will be nonbinding, because the Board will retain final decision-making authority*.'"⁵¹

93) According to ICANN:

"[The] only IRP Panel ever to issue a declaration, the *ICM* IRP Panel, unanimously rejected the assertion that IRP Panel declarations are binding and recognized that an IRP panel's declaration '*is not binding, but rather advisory in effect*.' Nothing has occurred since the issuance of the *ICM* IRP Panel's declaration that changes the fact that IRP Panel declarations are not binding. To the contrary, in April 2013, following the

⁴⁹ ICANN First Memorial, *para.* 33,

⁵⁰ *Ibid*, *para.* 34,

⁵¹ ICANN Second Memorial, *para.* 5,

ICM IRP, in order to clarify even further that IRPs are not binding, all references in the Bylaws to the term 'arbitration' were removed as part of the Bylaws revisions. *ICM* had argued in the IRP that the use of the word 'arbitration' in the portion of the Bylaws related to Independent Review indicated that IRPs were binding, and while the *ICM* IRP Panel rejected that argument, to avoid any lingering doubt, ICANN removed the word 'arbitration' in conjunction with the amendments to the Bylaws."⁵²

94) ICANN further submits that:

"[The] amendments to the Bylaws, which occurred following a community process on the proposed IRP revisions, added, among other things, a sentence stating that 'declarations of the IRP Panel, and the Board's subsequent action on those declarations, are final and have precedential value.' DCA argues that this new language, which does not actually use the word 'binding,' nevertheless provides that IRP Panel declarations are binding, trumping years of drafting history, the sworn testimony of those who participated in the drafting process, the plain text of the Bylaws, and the reasoned declaration of a prior IRP panel. DCA is wrong."⁵³

95) According to ICANN:

"[The] language DCA references was added to ICANN's Bylaws to meet recommendations made by ICANN's Accountability Structures Expert Panel ('ASEP'). The ASEP was comprised of three world-renowned experts on issues of corporate governance, accountability, and international dispute resolution, and was charged with evaluating ICANN's accountability mechanisms, including the Independent Review process. The ASEP recommended, *inter alia*, that an IRP should not be permitted to proceed on the same issues as presented in a prior IRP. The ASEP's recommendations in this regard were raised in light of the second IRP constituted under ICANN's Bylaws, where the claimant presented claims that would have required the IRP Panel to [re-evaluate] the declaration of the IRP Panel in the *ICM* IRP. To prevent claimants from challenging a prior IRP Panel declaration, the ASEP recommended that '[t]he declarations of the IRP, and ICANN's subsequent actions on those declarations, should have precedential value.' The ASEP's recommendations in this regard did not convert IRP Panel declarations into binding decisions."⁵⁴

96) Moreover, ICANN argues:

"[One] of the important considerations underlying the ASEP's work was the fact that ICANN, while it operates internationally, is a California non-profit public benefit corporation subject to the statutory law of California as determined by United States courts. That law requires that ICANN's Board retain the ultimate responsibility for decision-making. As a result, the ASEP's recommendations were premised on the understanding that the declaration of the IRP Panel is not 'binding' on the Board. In any event, a declaration clearly can be both non-binding and precedential."⁵⁵

97) In short, ICANN argues that the IRP is *not* binding. According to ICANN, "not only is there no language in the Bylaws stating that IRP Panel declarations

⁵² *Ibid*, para. 6.

⁵³ *Ibid*, para. 7.

⁵⁴ *Ibid*, paras. 8 and 9.

⁵⁵ *Ibid*, paras. 9 and 10.

are binding on ICANN, there is no language stating that an IRP Panel even may determine if its advisory Declarations are binding.”⁵⁶ According to ICANN, words such as “arbitration” and “arbitrator” were removed from the Bylaws to ensure that the IRP Panel’s declarations do not have the force of normal commercial arbitration. ICANN also argues that DCA Trust, “fails to point to a *single piece of evidence* in all of the drafting history of the Bylaws or any of the amendments to indicate that ICANN intended, through its 2013 amendments, to convert a non-binding procedure into a binding one.”⁵⁷ Finally, ICANN submits that “it is not within the scope of this Panel’s authority to declare whether IRP Panel declarations are binding on ICANN’s Board...the Panel does not have the authority to re-write ICANN’s Bylaws or the rules applicable to this proceeding. The Panel’s mandate is strictly limited to ‘comparing contested actions of the Board [and whether it] has acted consistently with the provisions of those Articles of Incorporation and Bylaws, and [...] declaring whether the Board has acted consistently with the provisions of those Articles of Incorporation and Bylaws.’”⁵⁸

The Panel’s Decision on Binding or Advisory nature of IRP decisions, opinions and declarations

98) Various provisions of ICANN’s Bylaws and the Supplementary Procedures support the conclusion that the Panel’s decisions, opinions and declarations are binding. There is certainly nothing in the Supplementary Rules that renders the decisions, opinions and declarations of the Panel either advisory or non-binding.⁵⁹

99) In paragraph 1, the Supplementary Procedures define “Declaration” as the “decisions and/or opinions of the IRP Panel”. In paragraph 9, the Supplementary Procedures require any Declaration of a three-member IRP Panel to be signed by the majority and in paragraph 10, under the heading “Form and Effect of an IRP Declaration”, they require Declarations to be in writing, based on documentation, supporting materials and arguments submitted by the parties. The Supplementary Procedures also require the Declaration to “specifically designate the prevailing party”.⁶⁰

⁵⁶ ICANN letter of 2 June 2014 addressed to the Panel.

⁵⁷ *Ibid.* Italics are from the original decision.

⁵⁸ *Ibid.*

⁵⁹ The Reconsideration process established in the Bylaws expressly provides that ICANN’s “Board *shall not be bound to follow* the recommendations” of the BGC for action on requests for reconsideration. No similar language in the Bylaws or Supplementary Procedures limits the effect of the Panel’s IRP decisions, opinions and declarations to an advisory or non-binding effect. It would have been easy for ICANN to clearly state somewhere that the IRP’s decisions, opinions or declarations are “advisory”—this word appears in the Reconsideration Process.

⁶⁰ Moreover, the word “Declaration” in the common law legal tradition is often synonymous with a binding decision. According to Black’s Law Dictionary (7th Edition 1999) at page 846, a “declaratory

100)Section 10 of the Supplementary Procedures, resembles Article 27 of the ICDR Rules. Whereas Article 27 refers to "Awards", section 10 refers to "Declarations". Section 10 of the Supplementary Procedures, however, is silent on whether Declarations made by the IRP Panel are "final and binding" on the parties.

101)As explained earlier, as per Article IV, Section 3, paragraph 8 of the Bylaws, the Board of Directors of ICANN has given its approval to the ICDR to establish a set of operating rules and procedures for the conduct of the IRP set out in section 3. The operating rules and procedures established by the ICDR are the ICDR Rules as referred to in the preamble of the Supplementary Procedures. These Rules have been supplemented⁶¹ with the Supplementary Procedures.

102)This is clear from two different parts of the Supplementary Procedures. First, in the preamble, where the Supplementary Procedures state that: "These procedures supplement the International Centre for Dispute Resolution's International Arbitration Rules in accordance with the independent review procedures set forth in Article IV, Section 3 of the ICANN Bylaws".

103)And second, under section 2 entitled (Scope), that states that the "ICDR will apply these Supplementary Procedures, in addition to the INTERNATIONAL DISPUTE RESOLUTION PROCEDURES, in all cases submitted to the ICDR in connection with the Article IV, Section 3(4) of the ICANN Bylaws". It is therefore clear that ICANN intended the operating rules and procedures for the independent review to be an international set of arbitration rules supplemented by a particular set of additional rules.

104)There is also nothing inconsistent between section 10 of the Supplementary Procedures and Article 27 of the ICDR Rules.

105)One of the hallmarks of international arbitration is the binding and final nature of the decisions made by the adjudicators. Binding arbitration is the essence of what the ICDR Rules, the ICDR itself and its parent, the American Arbitration Association, offer. The selection of the ICDR Rules as the baseline

judgment" is, "a binding adjudication that establishes the rights and other legal obligations of the parties without providing for or ordering enforcement".

⁶¹ As explained by the Panel before, the word "supplement" means to complete, add to, extend or supply a deficiency. The Supplementary Procedures, therefore, *supplement* (not replace or supersede) the ICDR Rules. As also indicated by the Panel before, in the event there is any inconsistency between the Supplementary Procedures and the ICDR Rules, ICANN requires the Supplementary Procedures to govern.

set of procedures for IRP's, therefore, points to a binding adjudicative process.

106) Furthermore, the process adopted in the Supplementary Procedures is an adversarial one where counsel for the parties present competing evidence and arguments, and a panel decides who prevails, when and in what circumstances. The panelists who adjudicate the parties' claims are also selected from among experienced arbitrators, whose usual charter is to make binding decisions.

107) The above is further supported by the language and spirit of section 11 of ICANN's Bylaws. Pursuant to that section, the IRP Panel has the authority to summarily dismiss requests brought without standing, lacking in substance, or that are frivolous or vexatious. Surely, such a decision, opinion or declaration on the part of the Panel would not be considered advisory.

108) Moreover, even if it could be argued that ICANN's Bylaws and Supplementary Procedures are ambiguous on the question of whether or not a decision, opinion or declaration of the IRP Panel is binding, in the Panel's view, this ambiguity would weigh against ICANN's position. The relationship between ICANN and the applicant is clearly an adhesive one. There is no evidence that the terms of the application are negotiable, or that applicants are able to negotiate changes in the IRP.

109) In such a situation, the rule of *contra proferentem* applies. As the drafter and architect of the IRP Procedure, it was open to ICANN and clearly within its power to adopt a procedure that expressly and clearly announced that the decisions, opinions and declarations of IRP Panels were advisory only. ICANN did not adopt such a procedure.

110) ICANN points to the extensive public and expert input that preceded the formulation of the Supplementary Procedures. The Panel would have expected, were a mere advisory decision, opinion or declaration the objective of the IRP, that this intent be clearly articulated somewhere in the Bylaws or the Supplementary Procedures. In the Panel's view, this could have easily been done.

111) The force of the foregoing textual and construction considerations as pointing to the binding effect of the Panel's decisions and declarations are reinforced by two factors: 1) the exclusive nature of the IRP whereby the non-binding argument would be clearly in contradiction with such a factor⁶²;

⁶² If the waiver of judicial remedies ICANN obtains from applicants is enforceable, and the IRP process is non-binding, as ICANN contends, then that process leaves TLD applicants and the Internet community with no compulsory remedy of any kind. This is, to put it mildly, a highly watered down notion of "accountability". Nor is such a process "independent", as the ultimate decision maker,

and, 2) the special, unique, and publicly important function of ICANN. As explained before, ICANN is not an ordinary private non-profit entity deciding for its own sake who it wishes to conduct business with, and who it does not. ICANN rather, is the steward of a highly valuable and important international resource.

112) Even in ordinary private transactions, with no international or public interest at stake, contractual waivers that purport to give up *all* remedies are forbidden. Typically, this discussion is found in the Uniform Commercial Code Official Comment to section 2719, which deals with "Contractual modification or limitation of remedy." That Comment states:

"Under this section parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect. However, it is the very essence of a sales contract that at least minimum adequate remedies be available. If the parties intend to conclude a contract for sale within this Article they must accept the legal consequence that there be at least a fair quantum of remedy for breach of the obligations or duties outlined in the contract." [Panel's emphasis by way of italics added].

113) The need for a minimum adequate remedy is indisputably more important where, as in this case, the party arguing that there is no compulsory remedy is the party entrusted with a special, internationally important and valuable operation.

114) The need for a compulsory remedy is concretely shown by ICANN's longstanding failure to implement the provision of the Bylaws and Supplementary Procedures requiring the creation of a standing panel. ICANN has offered no explanation for this failure, which evidences that a self-policing regime at ICANN is insufficient. The failure to create a standing panel has consequences, as this case shows, delaying the processing of DCA Trust's claim, and also prejudicing the interest of a competing .AFRICA applicant.

115) Moreover, assuming for the sake of argument that it is acceptable for ICANN to adopt a remedial scheme with no teeth, the Panel is of the opinion that, at a minimum, the IRP should forthrightly explain and acknowledge that the process is merely advisory. This would at least let parties know before embarking on a potentially expensive process that a victory before the IRP panel may be ignored by ICANN. And, a straightforward acknowledgment that the IRP process is intended to be merely advisory might lead to a legislative or executive initiative to create a truly independent compulsory process. The Panel seriously doubts that the Senators questioning former ICANN President Stuart Lynn in 2002 would have been satisfied had they

ICANN, is also a party to the dispute and directly interested in the outcome. Nor is the process "neutral," as ICANN's "core values" call for in its Bylaws.

understood that a) ICANN had imposed on all applicants a waiver of all judicial remedies, *and* b) the IRP process touted by ICANN as the “ultimate guarantor” of ICANN accountability was only an advisory process, the benefit of which accrued only to ICANN.⁶³

ICM Case

116)The Parties in their submissions have discussed the impact on this Decision of the conclusions reached by the IRP panel in the matter of *ICM v. ICANN* (“*ICM Case*”). Although this Panel is of the opinion that the decision in the *ICM Case* should have no influence on the present proceedings, it discusses that matter for the sake of completeness.

117)In the *ICM Case*, another IRP panel examined the question centrally addressed in this part of this Decision: whether declarations and/or decisions by an IRP panel are binding, or merely advisory. The *ICM Case* panel concluded that its decision was advisory.⁶⁴

118)In doing so, the *ICM Case* panel noted that the IRP used an “international arbitration provider” and “arbitrators nominated by that provider,” that the ICDR Rules were to “govern the arbitration”, and that “arbitration connotes a binding process.” These aspects of the IRP, the panel observed, were “suggestive of an arbitral process that produces a binding award.”⁶⁵ But, the panel continued, “there are other indicia that cut the other way, and more deeply.” The panel pointed to language in the Interim Measures section of the Supplementary Procedures empowering the panel to “recommend” rather than order interim measures, and to language requiring the ICANN Board to “consider” the IRP declaration at its next meeting, indicating, in the panel’s view, the lack of binding effect of the Declaration.

119)The *ICM Case* panel specifically observed that “the relaxed temporal proviso to do no more than ‘consider’ the IRP declaration, and to do so at the next meeting of the Board ‘where feasible’, emphasized that it is not binding. If the IRP’s declaration were binding, there would be nothing to consider but rather a determination or decision to implement in a timely manner. The Supplementary Procedures adopted for IRP, in the article on ‘Form and Effect of an IRP Declaration’, significantly omit provision of Article 27 of the ICDR Rules specifying that an award ‘shall be final and binding on the parties’. Moreover, the preparatory work of the IRP provisions...confirms that the

⁶³ See in this regard the Memorandum of Jack Goldsmith dated 29 July 2010 at <https://cyber.law.harvard.edu/pubrelease/icann/pdfs/Jack%20Goldsmith%20on%20ICANN-final.pdf>, referred to in footnote 58 of DCA Trust’s Second Memorial.

⁶⁴ *ICM Case*, footnote 30. The panel’s brief discussion on this issue appears in *paras.* 132-134 of the *ICM Decision*.

⁶⁵ *Ibid*, *para.* 132.

intention of the drafters of the IRP process was to put in place a process that produced declarations that would not be binding and that left ultimate decision-making authority in the hands of the Board.”⁶⁶

120) Following the issuance of the *ICM* Case Declaration, ICANN amended its Bylaws, and related Supplementary Procedures governing IRPs, removing most, but not all, references to “arbitration”, and adding that the “declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.”

Difference between this IRP and the *ICM* Case

121) According to DCA Trust, the panel in the *ICM* Matter, “based its decision that its declaration would not be binding, ‘but rather advisory in effect,’ on specific language in both a *different* set of Bylaws and a *different* set of Supplementary Procedures than those that apply in this dispute...one crucial difference in the Bylaws applicable during the *ICM* was the absence of the language describing panel declarations as ‘final and precedential’.”⁶⁷ The Panel agrees.

122) Section 3(21) of the 11 April 2013 ICANN Bylaws now provides: “Where feasible, the Board shall consider the IRP Panel declaration at the Board’s next meeting. The declarations of the IRP Panel, and the Board’s subsequent action on those declarations, are final and have precedential value.” At the time the *ICM* Matter was decided, section 3(15) of Article IV of ICANN’s Bylaws did not contain the second sentence of section 3(21).

123) As explained in the DCA Trust First Memorial:

“[In] finding that the IRP was advisory, the *ICM* Panel also relied on the fact that the Bylaws gave the IRP [panel] the authority to ‘declare,’ rather than ‘decide’ or ‘determine,’ whether an action or inaction of the Board was inconsistent with the Articles of Incorporation or the Bylaws. However, the *ICM* Panel did not address the fact that the Supplementary Procedures, which govern the process in combination with the ICDR Rules, defined ‘declaration’ as ‘decisions/opinions of the IRP’. If a ‘declaration’ is a ‘decision’, then surely a panel with the authority to ‘declare’ has the authority to ‘decide’.”⁶⁸

The Panel agrees with DCA Trust.

124) Moreover, as explained by DCA Trust:

⁶⁶ *Ibid*, para. 133.

⁶⁷ DCA Trust First Memorial, para. 36. Bold and italics are from the original text.

⁶⁸ *Ibid*, para. 39.

"[The] *ICM* Panel [...] found it significant that the Supplementary Procedures adopted for the IRP omitted Article 27 of the ICDR Rules – which specifies that an award ‘shall be final and binding on the parties.’ On that basis, the *ICM* Panel concluded that Article 27 did not apply. ICANN’s Supplementary Rules, however, were – and continue to be – silent on the effect of an award. In the event there is inconsistency between the Supplementary Procedures and the ICDR Rules, then the Supplementary Procedures govern; but there is nothing in the applicable rules suggesting that an *omission* of an ICDR Rule means that it does not apply. Indeed, the very same Supplementary Procedures provide that ‘the ICDR’s International Arbitration Rules [...] will govern the process *in combination* with these Supplementary Procedures. Furthermore, it is only in the event there is ‘any inconsistency’ between the Supplementary Procedures and the ICDR Rules that the Supplementary Procedures govern.”⁶⁹

Again, the Panel agrees with DCA Trust.

125)With respect, therefore, this Panel disagrees with the panel in the *ICM* Case that the decisions and declarations of the IRP panel are not binding. In reaching that conclusion, in addition to failing to make the observations set out above, the *ICM* panel did not address the issue of the applicant’s waiver of all judicial remedies, it did not examine the application of the *contra proferentem* doctrine, and it did not examine ICANN’s commitment to accountability and fair and transparent processes in its Articles of Incorporation and Bylaws.

126)ICANN argues that the panel’s decision in the *ICM* Case that declarations are not binding is dispositive of the question. ICANN relies on the provision in the Bylaws, quoted above, (3(21)) to the effect that declarations “have precedential value.” Like certain other terms in the IRP and Supplementary Procedures, the Panel is of the view that this phrase is ambiguous. Legal precedent may be either binding or persuasive.⁷⁰ The Bylaws do not indicate which kind of precedent is intended.

127)*Stare decisis* is the legal doctrine, which gives binding precedential effect, typically to earlier decisions on a settled point of law, decided by a higher court. The doctrine is not mandatory, as illustrated by the practice in common law jurisdictions of overruling earlier precedents deemed unwise or unworkable. In the present case, there is no “settled” law in the usual sense of a body of cases approved by a court of ultimate resort, but instead, a single decision by one panel on a controversial point, which this Panel, with respect, considers to be unconvincing.

128)Therefore, the Panel is of the view that the ruling in the *ICM* Case is *not* persuasive and binding upon it.

⁶⁹ *Ibid*, para. 40. Bold and italics are from the original text.

⁷⁰ Black’s Law Dictionary, (7th Edition 1999), p. 1195.

VI. DECLARATION OF THE PANEL

129)Based on the foregoing and the language and content of the IRP Procedure, the Panel is of the view that it has the power to interpret and determine the IRP Procedure as it relates to the future conduct of these proceedings.

130)Based on the foregoing and the language and content of the IRP Procedure, the Panel issues the following procedural directions:

(i) The Panel orders a reasonable documentary exchange in these proceedings with a view to maintaining efficacy and economy, and invites the Parties to agree by or before 29 August 2014, on a form, method and schedule of exchange of documents between them;

(ii) The Panel permits the Parties to benefit from additional filings and supplemental briefing going forward and invites the Parties to agree on a reasonable exchange timetable going forward;

(iii) The Panel allows a video hearing as per the agreement of the Parties, but reserves its decision to order an in-person hearing and live testimony pending a further examination of the representations that will be proffered by each side, including the filing of any additional evidence which this Decision permits; and

(iv) The Panel permits both Parties at the hearing to challenge and test the veracity of statements made by witnesses.

If the Parties are unable to agree on a reasonable documentary exchange process or to agree on the scope and length of additional filings and supplemental briefing, the Panel will intervene and, with the input of the Parties, provide further guidance.

131)Based on the foregoing and the language and content of the IRP Procedure, the Panel concludes that this Declaration and its future Declaration on the Merits of this case are binding on the Parties.

132)The Panel reserves its views with respect to any other issues raised by the Parties for determination at the next stage of these proceedings. At that time, the Panel will consider the Parties' respective arguments in those regards.

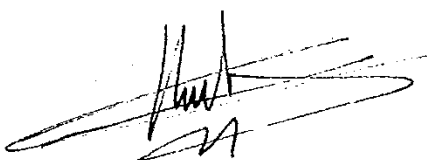
133)The Panel reserves its decision on the issue of costs relating to this stage of the proceeding until the hearing of the merits.

This Declaration may be executed in any number of counterparts, each of which shall be deemed an original, and all of which together shall constitute the Declaration of this Panel.

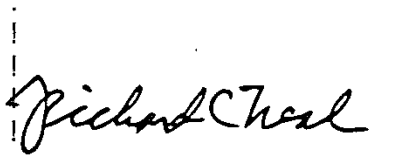
This Declaration on the IRP Procedure has thirty-three (33) pages.

Thursday, 14 August 2014

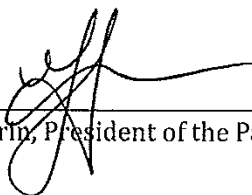
Place of the IRP, Los Angeles, California.



Professor Catherine Kessedjian



Hon. Richard C. Neal



Babak Barin, President of the Panel

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit, using the electronic case filing system of the court. The electronic case filing system sent a “Notice of Electronic Filing” to all the attorneys of record for Appellee who have consented in writing to accept service of this document by electronic means.

By: *s/ Jeffrey A. LeVee*
Jeffrey A. LeVee

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ASSIGNED NAMES AND NUMBERS