THE MATTER OF AN INDEPENDENT REVIEW PROCESS

BEFORE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION

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DOTCONNECTAFRICA TRUST,   )

        Claimant.   )

 v.   )   ICDR Case No.

INTERNET CORPORATION FOR   )   50 2013 00 1083

ASSIGNED NAMES AND NUMBERS,   )

        Respondent.   )   Volume II

_____)

CONTINUED HEARING ON THE MERITS

BEFORE THE PANEL: PRESIDENT BABAK BARIN,

HONORABLE JUDGE WILLIAM CAHILL, AND

PROFESSOR CATHERINE KESSEDJIAN

Saturday 23, 2015; 9:13 a.m.

Reported by: Cindy L. Sebo, RMR, CRR, RPR, CSR,
              CCR, CLR, RSA, LiveDeposition Authorized Reporter
Job No.   14040

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4   Continued Hearing on the Merits in the

5 above-styled manner, held at the offices of:

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10   Jones Day

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18   The continued proceedings having been

19 reported by the Registered Merit Real-Time Court

20 Reporter, CINDY L. SEBO, RMR, CRR, RPR, CSR, CLR,

21 RSA, and LiveDeposition Authorized Reporter.

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1   P R O C E E D I N G S

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3   Washington, D.C.

4   Saturday, May 23, 2015; 9:13 a.m.

5

6   PRESIDENT BARIN: Good morning,

7   everyone.

8   The second day of the Merits Hearing

9   in the IRP under the American Arbitration

10   Association Case Number 50 2013 00 1083.

11   We are going to have the closing

12   arguments this morning, but a preliminary

13   housekeeping matter.

14   After yesterday's hearing of the

15   witnesses produced by both ICANN and

16   DCA Trust, the Panel, having consulted one

17   another, would like to get, Mr. LeVee, a

18   copy of the reports of the Subcommittee on

19   Ethics and Conflicts that's available in

20   relation to the testimony that Mr. Chalaby

21   gave yesterday.

22   So to the extent those are available

23   and -- then the Panel would request that a

24   copy be provided to it.

25   MR. LEVEE: Yes, I understand the

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 1        request.  Because the documents are

 2        privileged, I will take the request back

 3        to ICANN and have an answer for you next

 4        week.

 5             PRESIDENT BARIN:  Okay.  Thank you.

 6             MR. LEVEE:  Thank you.

 7             PRESIDENT BARIN:  Okay.  Then that

 8        brings us to the closing argument.

 9             Mr. Ali, good morning.

10                       -  -  -

11        CLOSING STATEMENT ON BEHALF OF CLAIMANT

12                 DOTCONNECTAFRICA TRUST

13                       -  -  -

14             MR. ALI:  Good morning.

15             And thank you, Members of the Panel.

16             Good morning colleagues from

17        Jones Day.

18             One of the best things about a

19        closing before such a hot Panel, and I

20        mean that in the sense of a very active

21        Panel, is that, in many respects, make

22        our life --

23             HONORABLE JUDGE CAHILL:  Thank you.

24             Thank you.

25             MR. ALI:  -- easier.
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1   But I should say that I'm sure I

2   don't speak just for myself, but sort of

3   the colleagues from ICANN. We very much

4   appreciate the degree of preparedness of

5   the questions that you put to us and to

6   the witnesses.

7   And, of course, as one does a

8   closing, one tries to divine what it is

9   that's of the greatest interest to a

10   panel. And with any sort of predictive

11   process of that nature, what ends up

12   happening is that rather than presenting

13   a symphony, one presents something that's

14   more like a Bohemian Rhapsody.

15   So I will -- with that caveat --

16   HONORABLE JUDGE CAHILL: "Bohemian

17   Rhapsody For A Hot Panel," that's a great

18   title.

19   MR. ALI: -- to try and present a

20   coherent view of what it is that we

21   believe has happened and why it is that

22   ICANN has breached its Bylaws and

23   Articles of Incorporation, as well as the

24   Applicant Guidebook.

25   Let me start out with some quick

 1   pointed remarks associated with the

 2   presentation of yesterday from my

 3   colleague and friend, Mr. LeVee.

 4   Mr. LeVee took the position, which I

 5   must say I find quite remarkable, that

 6   ICANN is not a regulator, but ICANN is

 7   just an administrator; that the AGB, the

 8   Applicant Guidebook, is just a contract;

 9   and ICANN simply promises to evaluate the

10   applications that are put forward in

11   accordance with this contract.

12   Now, ultimately, there are some

13   questions that are immediately raised by

14   a contract that apparently has only

15   limited enforceability in any fora and,

16   apparently, even before you.

17   So that's Point Number 1.

18   In fact, it isn't just a contract;

19   it is a set of rules that are reflective

20   of ICANN's core principles and reflective

21   of the fundamental underlying principle

22   in ICANN's Articles -- written Articles

23   of Incorporation that ICANN must conduct

24   itself in accordance with local law and

25   international law.

 1   That constitutive document, which

 2   constitutes part of ICANN's raison d'être

 3   and ICANN's commitment that they're

 4   reflected in the Bylaws, and the Bylaws

 5   get reflected in the Applicant Guidebook.

 6   So ICANN's promise is not just

 7   evaluate the application according to the

 8   Applicant Guidebook, but to evaluate the

 9   application according to the Guidebook,

10   the Bylaws and the Articles of

11   Incorporation, everything that they

12   reflect and incorporate and the promise

13   that is thereby made to parties that are

14   seeking to participate in the domain name

15   system which ICANN is responsible for.

16   And you need only look at Article IV

17   of the Articles of Incorporation. The

18   quote would state The corporation shall

19   operate for the benefit of the Internet

20   community as a whole, carrying out its

21   activities in conformity with relevant

22   principles of international law and

23   applicable international conventions and

24   local law and, to the extent appropriate

25   and consistent with these Articles and

1   its Bylaws, through open and transparent

2   processes that enable competition and

3   open entry in Internet-related markets.

4   Then one need just simply go through

5   various parts of ICANN's bylaws.

6   Article I, The mission of the Internet

7   Corporation for Assigned Names and

8   Numbers is to coordinate, at the overall

9   level, the global Internet's systems of

10   unique identifiers and, in particular, to

11   ensure the stable and secure operation of

12   the Internet's unique identifier systems.

13   In particular -- and there are a

14   variety of obligations and functions of

15   ICANN, including policy development.

16   Now, a coordinator of policy

17   development also ensures that the

18   policies are implemented. And ICANN does

19   that through the various mechanisms that

20   we have heard about.

21   So ICANN does have a regulatory

22   function. ICANN is a body that is the

23   curator of the Internet domain name

24   system. It governs who it is that

25   actually has the right to seek Internet

1   domain name, and it governs who it is

2   that ultimately can go forward in terms

3   of a domain name being put into the

4   Internet server.

5   So ICANN will tell you, No, that's

6   the U.S. Government, and there are others

7   involved, but those are ultimately really

8   rubber stamps that are applied once ICANN

9   has done its job, which one hopes is done

10   fairly, transparently and in a balanced

11   way, and in accordance with the missions

12   they're going to look at.

13   So the question was -- was put to

14   Mr. LeVee by the President as to who is

15   ICANN answerable if there is an issue.

16   Who is ICANN answerable to if -- in light

17   of this litigation waiver?

18   When an applicant has a problem --

19   yes, ICANN is answerable to governments

20   generally, although it pushes back and

21   says, No, we do not, we're not guided by

22   governments, but we have a bottom-up

23   process.

24   But at the end of the day, the only

25   people that ICANN is accountable to are

1   the three of you in the -- in this

2   particular instance, the Independent

3   Review Panels.

4   Within the system that they have

5   created, one that constitutes a -- in

6   this instance, the NGPC, which is part of

7   the Board, a Board Governance Committee

8   that reviews the NGPC's work, and the

9   NGPC adopts the Board Governance

10   Committee's recommendations.

11   Somewhat incestuous, particularly

12   when one looks at the number of people

13   who are on the Board -- the Board, the

14   NGPC, the Board Governance Committee.

15   It's all -- there's a fair amount of --

16   of overlap.

17   And so where does the accountability

18   come in? When we have no right to seek

19   damages, according to ICANN, that is; we

20   have no right to go to public forum; we

21   have no right to apparently seek a

22   binding decision, according to the rules

23   that they have written and rules which

24   they change as and when they wish.

25   Now, that's put down to

1   interpretation, but I would submit to you

2   that it is arbitrary application of rules

3   that are very clear as to what must

4   happen.

5   But ICANN chooses how those rules

6   will be applied. And when those rules

7   are applied in a way that creates for an

8   applicant, such as DCA Trust, a -- a -- a

9   significant problem in that its vision,

10   its goals, its objectives, its work is

11   simply wiped away, but they can go

12   nowhere but to an IRP Panel that could

13   only issue a recommendation which the

14   very Board whose conduct is being

15   questioned can decide whether they're

16   going to accept it or not.

17   Is that a real system of

18   accountability?

19   I would submit to you, no. The

20   accused cannot decide whether it will

21   accept the verdict as correct or not.

22   At the end of the day, there is a

23   decision that ICANN will tell you, Oh, of

24   course, we will comply with it, but we're

25   not bound by it.

 1   So the curator of the Internet and

 2   fair play in the Internet governance

 3   system cannot decide what it will do when

 4   it wants to and decide whether or not it

 5   is going to be bound by the hard work

 6   that you are doing.

 7   Now, we're also told that ICANN

 8   tries to be neutral but has no obligation

 9   to be neutral.

10   Let me table that for one side,

11   because that's going to be a core part of

12   my overall presentation.

13   And I'm quoting Mr. LeVee. ICANN

14   tries to be neutral but has no obligation

15   to be neutral.

16   Now, I know that Mr. LeVee knows the

17   Bylaws inside and out. And the Bylaws

18   are replete with references to

19   neutrality, transparency, equity,

20   nondiscrimination, and fairness and

21   equitable treatment.

22   So let's -- let's just turn now, if

23   we might, to some of the key facts that

24   we have now become aware of and that we

25   believe are undisputed, and those which

1   are disputed and which we would hopefully

2   convince you that the evidence falls in

3   our favor in terms of our view of what

4   happened.

5   So there's no question that through

6   2007 to 2010, DCA has gone about

7   gathering support in support of its -- or

8   endorsements in support of its idea, its

9   initiative.

10   Maybe ICANN will say it's irrelevant

11   that, ultimately, .africa was

12   Ms. Bekele's idea and initiative and

13   vision.

14   But what did DCA do? DCA went

15   around the African continent and obtained

16   support at the highest levels of the AUC,

17   which, like most public bodies, is rife

18   with politics. But she got the support

19   of Chairman Ping; she got the support of

20   UNECA, a UN body that -- that represents

21   African interests; it got the support of

22   the Ethiopian Government; got the support

23   of the Kenyan Government.

24   And we've heard two things from

25   ICANN, that at the time the application

 1   was submitted, DCA Trust did not have the

 2   support that was required.

 3   Well, that's incorrect. Perhaps

 4   there are questions that can be raised

 5   about the AUC's position, which certainly

 6   should be viewed under a cloud, in light

 7   of what the AUC is doing at the same

 8   time, which is acting as a competitor or

 9   was a competitor to DCA Trust.

10   But when the application was

11   submitted, there was support. And as the

12   rules state very clearly, that support

13   can continue to be garnered throughout

14   the process of evaluation of financial

15   and technical and other infrastructure

16   aspects -- do something that is very

17   technical, operate a registry that will

18   not, in any way, undermine the security

19   and stability of the Internet.

20   And so support will come along

21   during this process.

22   What we do know, though, is that

23   ZACR, the AUC's applicant, actually

24   didn't have, technically, the same kind

25   of support that DCA did when the

1   application was submitted.

2   What ZACR was relying upon was the

3   support that was given by the AUC -- AU

4   Members for the Reserved Names Initiative

5   that, ultimately, ICANN rejected.

6   Now, insofar as this issue of

7   support is concerned, I would simply ask

8   you to look at the correspondence between

9   ICANN Staff and the independent

10   Geographic Names Panel, because that

11   documentation, which we will visit

12   shortly, makes it very clear that the

13   independent Geographic Names Panel

14   certainly considered that DCA did have

15   support.

16   And this discussion went on for over

17   a year between ICANN Staff -- between

18   ICANN -- really, one shouldn't make a

19   distinction. ICANN Staff operates at the

20   behest and direction of the Board.

21   ICANN -- I mean, for -- for -- for

22   Mr. LeVee to say, Well, you can only look

23   at Board action or inaction, independent

24   of ICANN Staff, I find to be, with all

25   respect, something of an absurd

1   proposition.

2   ICANN Staff only does what they are

3   directed to do or what they believe they

4   can do if they do not have specific

5   direction and are, therefore, part of the

6   overall accountability through the

7   mechanism of the IRP examining the

8   actions or inaction of the Board and,

9   thereby, ICANN and its constituent

10   organizations.

11   And I will point you shortly to

12   where it says that ICANN is responsible

13   or that your responsibility is to look at

14   the overall application of the system --

15   ICANN system that includes ICANN, the

16   Secretariat and the constituent bodies.

17   So DCA's gathered support. ZACR

18   doesn't have it -- doesn't have support

19   when it files its application. At the end

20   of the day, there's a big question mark of

21   how they're going to deal with this

22   question of support.

23   The application window opens in

24   January 2012. Slightly before that, we

25   have seen the request that was made by the

 1   AUC. The AUC has written to ICANN

 2   October 2011.

 3   And what the AUC wants -- and we heard

 4   some reference to this yesterday about

 5   country code top-level domains, such as

 6   .fr; or .us; or, in the special instance of

 7   the European Union, .eu.

 8   Well, the African Union Commission --

 9   the Secretariat has made a request to ICANN

10   saying, We want the same thing as the EU.

11   Yes, we accept that we're not the EU --

12   they know that -- but we want the same

13   thing that the EU has. We want .africa

14   reserved. Although it's well-recognized

15   country code, it's not on the list of

16   country codes, but we want .africa,

17   .afrikia, you know, .afrique reserved for

18   us.

19   And ICANN writes back telling the AUC,

20   after some months of deliberation, which

21   includes, as we have seen, consultation of

22   some sort with the GAC -- and, clearly,

23   Ms. Dryden couldn't remember how much

24   consultation, or perhaps could have been

25   reminded through documentation, which we

1   didn't have, of the degree of consultation

2   that took place.

3   But we know that she was given the

4   opportunity to review the final

5   communication that went back to the AUC's

6   request.

7   And what is it that the -- that ICANN

8   tells the AUC?

9   Well, it says, Look, we can't do what

10   you want because the Reserve Names List is

11   closed. And you don't technically fall

12   within this reserve names category, but we

13   are going to tell you how you can achieve

14   the same end through the processes that are

15   in place.

16   And I would suggest to you that

17   there's nothing necessarily sinister about

18   that. But is the same direction, guidance,

19   advice being given to .africa or other

20   applicants where the applicant will be able

21   to use the system to its own benefit when

22   the other applicants aren't being told --

23   the nongovernmental applicants aren't being

24   told that governments can apply -- oh,

25   well, it doesn't say that governments can't

1   apply, so, therefore, governments can

2   apply -- and that governments can use the

3   system in any way they so wish to benefit

4   themselves?

5   That really isn't fairness. That's an

6   imbalance of power within the context of

7   what is supposed to be rules that apply

8   with equal force and effect to all parties.

9   And to the -- and that is what ICANN,

10   in some respects, is saying. Look, we

11   cannot do for you what you want, but play

12   in this system where these rules apply,

13   but, by the way, you can game the system to

14   your benefit to achieve the same ends.

15   And, of course, as we come to see, the

16   AUC took that very much to heart.

17   Now, the AUC -- again, Ms. Dryden

18   couldn't help us very much as to why the

19   AUC was part -- made part of the GAC, how

20   it moved from being a nonvoting member to a

21   voting member.

22   And, apparently, nobody really quite

23   knows, including the GAC Chair, as who it

24   is to be a voting member, a nonvoting

25   member, whether or not you can issue

1   Early Warnings or not, whether or not you

2   can issue GAC advice or participate in the

3   issuance of GAC advice or not.

4   If the GAC Chair isn't clear, how is

5   it that DCA Trust is supposed to know what

6   any of this means?

7   But I will put forward to you, as the

8   Independent Review Panel, the following

9   proposition: that when the system allows

10   applicant to also participate in the

11   overall judging, there is a higher degree

12   of care that is required in the evaluation

13   of that application.

14   And what is it that we know from the

15   documents? There is a debate that starts

16   as early as August 2012, soon after the

17   application period is closed. There is a

18   debate that's taking place about the highly

19   politicized nature of these applicants, the

20   controversy associated with these

21   applications.

22   Everybody appreciates and understands

23   that there are issues associated with these

24   applications, issues associated with

25   potential conflicts of interests vested

 1   interests, that there are two applicants,

 2   there's the AUC, the AUC may not

 3   necessarily be entitled to be in the

 4   position that it is.

 5   Well, all of this considered and

 6 evaluated by intelligent individuals and many

 7 individuals within the ICANN infrastructure

 8 should lead to the outcome that I'm suggesting,

 9 that we need to apply a heightened degree of

10 diligence and care associated with these

11 applications because of the imbalance of power.

12   Now, I wish I had the documentation

13 that would allow me to prove the propositions

14 that we fundamentally believe that ICANN and the

15 GAC and the AUC were basically rigging the

16 system. And I think that there's enough there

17 for you to be able to make -- to arrive at the

18 conclusion that what they were doing was perhaps

19 not purposely, perhaps not in a sinister fashion,

20 but ICANN, as a political organization, was

21 tilting the balance in favor of one of the

22 parties to achieve the ccTLD outcome through a

23 process which is not the right process, because

24 it couldn't use the right process to achieve the

25 outcome that the AUC wanted.

1   All right. So we -- there are

2   question marks now that are raised about the GAC

3   advice that are, I believe, incredibly

4   significant.

5   What's the image that was created in

6   my mind as I heard Ms. Dryden speak? A large

7   room filled with people milling in and out,

8   having discussions, discuss- -- discussions in

9   the corridor, discussions in the room. And

10   there's Ms. Dryden, who puts forward a

11   proposition that apparently appears on the agenda

12   that we haven't seen, but what we're told is, All

13   the agenda says is .africa and DCA's application.

14   That's her testimony.

15   Redacted - GAC Designated Confidential Information

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19   As she tells you, Well, we had no

20   rationale. We're not required to give a

21   rationale. I didn't give a rationale. That's

22   not the GAC's job.

23   What does she tell you? Whose job is

24   it? It is the Board's job. It is our job to

25   somehow reflect some type of consensus, consensus

 1   of one government that raises its hand, consensus

 2   by acquiescence or silence, and the Board then

 3   simply accepts that.

 4   What sort of system of fairness,

 5   transparency and integrity is that? Certainly

 6   not one that I believe is appropriate for the

 7   massive responsibility that ICANN has to the

 8   Internet domain name system and the applicants

 9   who spend their money and come before ICANN

10   asking for a fair deal.

11   How is it fair that ICANN Staff are

12   trying to strong-arm the independent Geographic

13   Names Panel? Why?

14   Ask yourself the following questions,

15   please: What role is it of ICANN Staff to say to

16   the Geographic Names Panel whether or not the

17   AUC's endorsement is valid or not and to say, no,

18   it's not in August 2012; to question whether or

19   not UNECA's support is sufficient; to delay the

20   very questions, the clarifying questions that the

21   GNP is insisting, per the Guidebook, per the

22   rules, by the Bible, by the Koran, per the --

23   whichever book you wish, the very, very rules say

24   that these clarifying questions should be issued.

25   Why delay? Why delay? Why delay?

 1   Delay for over a year?

 2   No, you mustn't send those out, please

 3   confirm that you are not going to send those out.

 4   You mustn't contact the AU. You

 5   mustn't contact the AU- -- well, actually, they

 6   don't say, Don't contact the AUC; they say, Don't

 7   contact the AU.

 8   Send the clarifying questions to the

 9   individual applicants, is their final concession;

10   but within days of that final consensus, they

11   write back and say, Oh, don't send out the

12   clarifying questions and, by the way, the AU

13   support -- or the AUC support is sufficient; a

14   complete about-face between May of 2012 and May

15   of 2013.

16   Is that fair? Is that transparent?

17   I believe not.

18   So let's take a look very quickly at

19   some of these -- some of the standards that we

20   believe you should be applying.

21   I, yesterday, addressed the -- the

22   question of the standard review, so I won't

23   repeat myself. But, of course, I look forward to

24   answer any questions that you have.

25   I'll simply emphasize that please

 1   think of the standard review within the context

 2   of where you sit, the litigation waiver, the fact

 3   that there is this incestuous circular system of

 4   checks and balances or controls within ICANN.

 5   And at the end of the day, you are the only

 6   independent objective reviewers of what it is --

 7   HONORABLE JUDGE CAHILL: What do you

 8   mean by "litigation"?

 9   MR. ALI: The litigation waiver,

10   sir?

11   HONORABLE JUDGE CAHILL: Yes.

12   MR. ALI: Yes. As you know, as --

13   when an applicant files an application,

14   they are required --

15   HONORABLE JUDGE CAHILL: The

16   waiver -- the trial --

17   MR. ALI: -- to waive all of their

18   rights with respect to taking ICANN to

19   any forum other than the IRP --

20   HONORABLE JUDGE CAHILL: I

21   understand what --

22   MR. ALI: -- so I think that that,

23   to me, is dispositive.

24   HONORABLE JUDGE CAHILL: What you're

25   talking about is when you say, I'm not

 1   going to go to Court, right?

 2   MR. ALI: Yes. We cannot take you

 3   to Court. We cannot take you to

 4   arbitration. We can't take you anywhere.

 5   We can't sue you for anything.

 6   The only thing you, applicant, can

 7   do is come before this Panel, which, by

 8   the way, cannot issue anything that's

 9   binding against us, which, of course, we

10   don't agree with, as -- as DCA, and the

11   Panel, you know, must defer to -- to the

12   omnipotence of ICANN.

13   So let's just go back, if we could.

14   Let's run back to Slide 4.

15   I already told you about Slide -- on

16   the third slide, you had the Articles of

17   Incorporation.

18   I'd like you to take a look at

19   Slide 4.

20   This is direct response to

21   Mr. LeVee's submission yesterday on

22   neutrality.

23   Let's take a look at what ICANN's

24   core values provide.

25   In performing its mission, the

 1   following core values should guide the

 2   decisions and actions of ICANN. And

 3   Number 8, Making decisions by applying

 4   documented policies neutrally and

 5   objectively, with integrity and fairness.

 6   Those are words that are incredibly

 7   important, "integrity and fairness,"

 8   "neutrally and objectively."

 9   Let's take a look at Section 3 of

10   the Bylaws.

11   ICANN shall not apply its standards,

12   policies, procedures or practices

13   inequitably or single out any particular

14   party for disparate treatment unless

15   justified by substantial and reasonable

16   cause, such as the promotion of effective

17   competition.

18   Yes, there is a carve-out, the

19   promotion of effective competition.

20   Well, the disparate treatment to

21   which -- that was applied to -- to

22   .africa -- to DCA Trust, was that to

23   promote effective competition?

24   Not at all. It was completely the

25   opposite. There was no reason to single

 1   out or treat DCA Trust in the way that it

 2   was treated.

 3   Article III, Transparency. ICANN

 4   and its constituent bodies shall operate,

 5   to the maximum extent feasible, in an

 6   open and transparent manner and

 7   consistent with procedures designed to

 8   ensure fairness.

 9   I wish to speak. I say something

10   that is incomprehensible. The GAC Chair

11   reformulates what I say, tables a motion

12   based on what she says. And that is

13   supposed to be fairness?

14   The consequence that it has with --

15   the GAC Chair knows what the consequence

16   could be because the GAC Chair

17   participates in the subsequent meetings.

18   And there are at least two meetings,

19   May 8th and June 4th of 2013, when the

20   GAC Chair is participating in the NGPC

21   review, or the GAC advice.

22   And she cannot recall whether she

23   said anything, and she cannot recall

24   whether anything was raised.

25   I recall what I said about the

1   heightened standard that should be

2   applied.

3   I'm not saying by evidentiary

4   standard; I'm saying greater diligence

5   when you know that there are

6   sensitivities at play.

7   When it should be just so obvious,

8   as it was to Mr. Chalaby when I put my

9   last question to him about conflicts of

10   interest. And Mr. Chalaby, who said that

11   he applies the highest standards of

12   conflict of interest, that you have

13   applicant and judge within the system,

14   well, greater care is required, greater

15   diligence is required of the NGPC. Ask

16   questions, investigate, do what you are

17   required to do according to the very

18   Bylaws that govern the way you are

19   supposed to operate.

20   But they give it short shrift. It

21   goes to the Board Governance Committee,

22   which includes some people of the NGPC,

23   and the Board is required to conduct

24   investigations, or at least it should

25   conduct greater investigation of the

1   matter. But it doesn't; it gives it

2   short shrift.

3   Now, Mr. LeVee told us yesterday --

4   we can go to Slide Number 8. My numbers

5   are different. Go a slide back,

6   please -- that I don't know that the core

7   values refer to anticompetitive conduct

8   within a particular gTLD string. The

9   mission of ICANN was to increase

10   competition in the registry space.

11   I mean, that's, to me, akin to

12   saying that the United States economy is

13   an open capitalist economy, and it

14   doesn't matter if Microsoft acts

15   anticompetitively.

16   No. Competition applies at every

17   level. It applies a granular level,

18   because without those grains, the system

19   can't grow and remain anti- -- remain

20   competitive.

21   So I think that is a statement which

22   Mr. LeVee may want to retract.

23   So we'll move on.

24   I've talked a little bit about the

25   GAC. So let's -- you know, we've -- no

 1   distinct rules; there is the limited

 2   public records; fluid definitions of

 3   memberships and quorums; fluid

 4   definitions of what can happen within the

 5   context of the -- the GAC.

 6   It's all politicized. We're not

 7   quite sure even what different GAC

 8   Members do within the GAC.

 9   So, you know, again, I think that

10   there is yet another violation of the --

11   that -- there's another element of

12   unfairness as a result of how the GAC

13   operated.

14   But the GAC then transfers over

15   responsibility to -- to the Board. And I

16   must say, I -- I think, with respect to

17   this interaction between the Board -- the

18   GAC and the NGPC, the following

19   statements should say it all:

20   "Question: So not all countries

21   share the same view as to what entities,

22   such as the AUC, should -- what they

23   should be able to do. Is that what you

24   said?

25   "Answer: Right, because that would

 1   only get clarified if there is

 2   circumstances where you find the force --

 3   I'm sure that's meant to say

 4   something else -- meant to sent something

 5   else. But this is the interesting

 6   part -- in our business, we talk about

 7   creative ambiguity. We leave things --

 8   we leave things unclear so we don't have

 9   conflict."

10   "Creative ambiguity," I don't find

11   those words anywhere in the GAC

12   principles. I don't find those words

13   anywhere in the Bylaws. I don't find

14   those words anywhere articulating any

15   principle of California law or

16   international law.

17   But creative ambiguity is what was

18   applied, and creative ambiguity is the

19   responsibility that is then transferred

20   over, according to Ms. Dryden, to the

21   Board.

22   What does she say with respect to

23   the GAC consensus of advice that's a

24   result of creative ambiguity?

25   That isn't my concern as the Chair.

1   It's really for the Board to interpret --

2   to interpret the creative ambiguity

3   outputs coming from the GAC.

4   Okay. So does -- and then she goes

5   on to tell you, I'm telling you the GAC

6   did not provide a rationale. And that

7   was not a requirement for issuing GAC

8   advice.

9   So GAC issues this advice through

10   facts that we now know that reflect a

11   decision taken in moments, creative

12   ambiguity as the overall atmosphere, and

13   now it goes over to the Board.

14   And you can take a look at what it

15   is that the Board is supposed to do.

16   Let's go to the slide that shows

17   what the Board must do in exercising due

18   diligence in care. And this is some

19   element of the standard review.

20   So even if we look at the specific

21   elements of what it is that -- that

22   the -- that the Board is supposed to

23   particularly do -- do. So did the Board

24   act without conflict of interest in

25   taking its decision?

 1   Well, just very briefly on the

 2   conflict of interest -- and I had made an

 3   absolute commitment to Mr. LeVee that I

 4   would end on 45 minutes.

 5   So five minutes left, if you're

 6   timing me.

 7   MR. LEVEE: I'm not timing you.

 8   MR. ALI: Okay.

 9   The -- on the question of the

10   conflict of interest, I mean, we know

11   very little, other than the fact that

12   Mr. Chalaby doesn't know and cannot

13   recall whether or not he interviewed, in

14   his digging and digging and digging and

15   digging, Mr. Silber and Mr. Disspain.

16   But they normally dig and dig and dig,

17   but he can't remember whether that

18   happened here or not.

19   He can't remember what materials

20   were actually presented as part of this

21   overall conflict of interest.

22   And, frankly, given the timing of

23   this conflict-of-interest review, six to

24   eight weeks after the actual vote was

25   taken, what difference would it have

1   made?

2   This review that they took -- that

3   they apparently did, digging and digging

4   and digging, wouldn't have changed the

5   outcome if they had come to the

6   conclusion that there was a conflict of

7   interest.

8   Why? Because, apparently, they had

9   enough votes anyway.

10   So there's a fundamental

11   inconsistency here.

12   How can you, on one hand, say the

13   vote was fair, transparent, and that

14   nothing untoward took place insofar as

15   the potential conflicts were concerned,

16   and, at the same time, say that we did a

17   very thorough conflicts of interest

18   review?

19   The only reason we were given was

20   that if conflicts of interest had been

21   determined, those who were -- those who

22   were the conflicted parties would have

23   been removed from the Board for purposes

24   of subsequent decisions.

25   That doesn't help DCA Trust. And we

1   don't know, because we don't have

2   details. They don't provide details. We

3   don't have the details as to what

4   Mr. Disspain's role or what Mr. Silber's

5   role was in guiding the outcomes.

6   But we do know that Mr. Silber is on

7   the -- is -- is a nonexecutive Board

8   member of ZADNA, and ZADNA has endorsed

9   the AUC application.

10   Actual, potential, or perceived

11   conflict of interest? I think that all

12   three standards are satisfied here.

13   Now, there's no obligation for the

14   NGPC to follow the GAC advice. It

15   doesn't say that. It doesn't say they

16   must accept GAC advice. It simply says

17   that it should be duly taken into

18   account.

19   Well, I would say that that actually

20   means something when you decide to adopt

21   a GAC advice. There's no doubt that the

22   Board members understand how the GAC

23   operates. That requires the Board, as a

24   control mechanism, to dig into and

25   understand what it is that happened

 1   within the GAC advice and how that GAC

 2   advice has come about.

 3   Why else does Heather Dryden

 4   participate as a nonvoting liaison? A

 5   liaison liases. A liaison provides

 6   information. A liaison describes what

 7   happened. Ah, here were the

 8   communications that took place, this is

 9   what Kenya said, here is what was the

10   final agreed text of the governments, and

11   here's what happened at the meeting.

12   That's what she's supposed to

13   present as a liaison; that's what's

14   supposed to be the inquiry by the Board;

15   and that is what Mr. Chalaby is supposed

16   to be directing. But, apparently, none

17   of that happened.

18   So once the NGPC unanimously accepts

19   the GAC advice, DCA files a request for

20   reconsideration, which now goes to the

21   Board Governance Committee. And the

22   Board Governance Committee also has

23   certain obligations. It doesn't --

24   again, there is what they call their

25   "control mechanism." These are the

 1   internal checks and balances.

 2   The Board Governance Committee is --

 3   is supposed to conduct a meaningful

 4   review, according to the Bylaws,

 5   Section -- Article IV, Section 2, that

 6   lays out a number of things that the

 7   Board should do.

 8   And here, in this instance where the

 9   Board Governance Committee and the NGPC

10   know how complicated and politically

11   sensitive this application is with two

12   applicants competing and one applicant

13   having certain superpowers or certain

14   extraordinary influence on the outcomes,

15   the control mechanisms don't work.

16   The NGPC -- well, the GAC basically

17   lies down. The Board Governance

18   Committee says, Well, we'll just casually

19   accept, with wave of a hand, that we got

20   from the GAC -- the NGPC, sorry, and then

21   the Board Governance Committee says,

22   Well, you know, we will sort of look at

23   this application. We don't see anything

24   that causes us any concern, so we're

25   going to accept the NGPC's -- we're

 1   not -- we're going to deny the request

 2   for reconsideration.

 3   And then all the Board Governance

 4   Committee members walk next door to the

 5   room that says NGPC, and they say, Well,

 6   we adopt the Board Governance Committee's

 7   recommendation. And they then tell

 8   ICANN Staff, "ICANN Staff, please, go

 9   right ahead."

10   And ICANN Staff goes right ahead and

11   does what it wanted to do, which is to

12   draft the support letter from the AUC to

13   the Geographic Names Panel.

14   Okay. Yes, it was a template, but

15   this is just nothing more than reflective

16   of how they were treating this applicant

17   all along.

18   But even more telling is the fact

19   that after months and months and months

20   and months of delay, some of which may

21   have been partly due to legitimate

22   debate, and some of it, I'll even

23   concede, may have been due to the fact

24   that ICANN Staff is somewhat busy and

25   overburdened, but 12 months of debate,

 1   12 months of delay, 12 months of

 2   resisting what it is that the GNP is

 3   asking.

 4   And then, as soon as the Board

 5   Governance -- as soon as the NGPC accepts

 6   the GAC advice, it's now rush, rush,

 7   rush, rush, rush. We need to get this

 8   application approved; and we need to get

 9   this application voted on; and we need to

10   get this application pushed through.

11   Not fair, not in the least bit

12   equitable, no transparency. And

13   certainly, their internal systems that

14   they're asking you to defer to didn't

15   operate with the rigor or care that one

16   would expect and DCA Trust expected when

17   it put its application in and the rules

18   and the Bylaws and the Articles of

19   Incorporation demand.

20   So with that, I will stop exactly on

21   48 minutes, and thank you very much for

22   your attention.

23   HONORABLE JUDGE CAHILL: Thank you.

24

25   MR. ALI: I should have said if you

 1   had any questions, now, I'm happy to

 2   answer them or --

 3   HONORABLE JUDGE CAHILL: Don't

 4   worry. We would have.

 5   ARBITRATOR KESSEDJIAN: I just have

 6   a very short question. And it came up

 7   yesterday when Ms. Bekele was testifying.

 8   Could you, at some stage before the

 9   end of the proceedings, point out to us

10   the exact rule -- it's probably in the

11   Guidebook -- which says that an applicant

12   can have an extra time to garner support

13   after the first application has been -- I

14   was unable to find the exact rule.

15   But you can answer later if you

16   want, but --

17   MR. ALI: It's right here. I may

18   forget.

19   PRESIDENT BARIN: We do have some

20   questions for Mr. Ali. I'm happy to ask

21   them now or after Mr. LeVee is done.

22   MR. ALI: I will point to -- take a

23   look in our opening slides at two

24   particular slides, 31 and 32.

25   Thirty-one --

 1   HONORABLE JUDGE CAHILL: What pages?

 2   PRESIDENT BARIN: Just one minute.

 3   HONORABLE JUDGE CAHILL: What page

 4   numbers?

 5   MR. ALI: Thirty-one and 32 of our

 6   opening slides.

 7   ARBITRATOR KESSEDJIAN: Okay. So

 8   that's in your --

 9   MR. ALI: Yes, the evaluation --

10   sorry -- well, 31 says -- addresses, I

11   think, a fundamental point here that --

12   which reflects the process, that really

13   does reflect what can happen here and

14   what the -- what the Bible says, which

15   is, you know what, countries can accept

16   the applications or support the

17   applications of two applicants, fair

18   game. Let them go into the ring and let

19   them, you know, duke it out with each

20   other.

21   So that's what 31 tells you.

22   And 32 says, on -- on Page 32, which

23   is Claimant's Exhibit 11, Page 72, AGB

24   Module 2.2.1.4.4, In cases where an

25   applicant has not provided the required

```
 1        documentation, the applicant will be

 2        contacted and notified of the requirement

 3        and given -- given a limited time frame

 4        to provide the documentation.

 5              HONORABLE JUDGE CAHILL:  Who makes

 6        the -- who contacts the -- the applicant?

 7              MR. ALI:  The GNP is supposed to.

 8              HONORABLE JUDGE CAHILL:  The GNP is

 9        supposed to contact the applicant --

10              MR. ALI:  Yes.

11              HONORABLE JUDGE CAHILL:  -- and say,

12        You don't have enough support?

13              MR. ALI:  Right, the GNP is supposed

14        to have this opportunity to do that.

15              And then it says, The applicant will

16        have additional time to obtain the

17        required documentation; however, if the

18        applicant has not produced the required

19        documentation by the required date (at

20        least 90 calendar days from the date of

21        notice), the application will be

22        considered incomplete.

23              So there are a number of

24        opportunities for the applicant to garner

25        the political -- the support, the
```

 1   endorsements, along the way.

 2   At the end of the day, that

 3   support -- you know, that's a soft

 4   requirement. I mean, governments change,

 5   political whims change, as we've seen.

 6   At the end of the day, the technical

 7   and financial criteria cannot change

 8   because those two elements go to the core

 9   functioning of the Internet stability and

10   integrity.

11   PRESIDENT BARIN: Now, in Procedural

12   Order Number 18 -- we don't have to stick

13   to that -- we said we would ask you

14   questions after Mr. LeVee is done with

15   his presentation.

16   I do have some questions for you.

17   So I'm happy to ask them now or wait

18   until Mr. LeVee --

19   MR. LEVEE: That's your pleasure.

20   PRESIDENT BARIN: Okay.

21   While we have you, Mr. Ali, let's --

22   MR. ALI: I'm not going anywhere.

23   PRESIDENT BARIN: -- let's ask you,

24   because then -- then, if my colleagues

25   have any questions, then they can

 1   follow-up.

 2   I would like you to do -- well, I

 3   have a couple of questions. One of them

 4   is the following -- you can also take the

 5   time to amend if you wish.

 6   If you look at Article IV, Section 3

 7   of the ICANN rules -- sorry -- Bylaws, I

 8   want to know how you would assist the

 9   Panel in reconciling what Section 3,

10   Subparagraph 4 says with Section 11.

11   So -- and you -- put the screen up

12   yourself, if you will.

13   MR. ALI: So Bylaws, Article IV?

14   PRESIDENT BARIN: Right.

15   MR. ALI: Article IV, Section 3?

16   PRESIDENT BARIN: Article IV,

17   Section 3, that's Subparagraph 4, which

18   says, Requests for independent review

19   shall be referred to the IRP, which shall

20   be charged with comparing contested

21   actions of the Board through the Articles

22   of Incorporation and Bylaws, and then

23   declaring whether the Board has acted --

24   and then the questions that it sets out.

25   Then, if you turn to Subsection 11,

 1   it says, The IRP Panel shall have the

 2   authority to.

 3   And you, yourself, put up, I guess,

 4   a number of these. And one of them in

 5   11.c. says, Declare whether an action or

 6   inaction of the Board was consistent with

 7   the Articles of Incorporation or Bylaws.

 8   So is the IRP -- my question to you

 9   is, Is the IRP allowed to do all of that,

10   do a combination of 4 and 11? And where

11   do you draw in terms of any limits there

12   are in terms of what the IRP can or

13   cannot do?

14   Is my question clear?

15   MR. ALI: I think sufficiently for

16   me to give you an answer now. And I will

17   certainly reflect upon what you've asked.

18   And this was a question -- a very

19   similar question that was put to us by

20   the Schwebel Panel, and it's something

21   that's very, I think, to a certain

22   degree, controversial because of the way

23   in which ICANN has designed its

24   accountability mechanisms.

25   Given how much of a mess the

 1   accountability system is at ICANN -- and

 2   ICANN is now undergoing a full review of

 3   its accountability mechanisms in light of

 4   the fact that it has been heavily

 5   criticized for what it has done -- I

 6   think that you are at a certain liberty

 7   to try and to put order within -- you

 8   know, that applies to the particular case

 9   that's before you. But to take the

10   construct, the construct that is provided

11   by the Bylaws, that's provided -- keeping

12   in mind that the Bylaws are supposed to

13   reflect the principles reflected in the

14   Articles of Incorporation -- and apply

15   those within the Board of construct or

16   the dispute resolution framework, that

17   you are free to and have so far

18   constructed that is appropriate for the

19   particular case at hand.

20   Now, with respect to what you can

21   do, you are testing Board action and

22   inaction. To use the terminology that

23   was provided by Mr. LeVee, what the Board

24   knew and what the Board should have

25   known, what the Board did and what the

 1   Board should have done with reference to

 2   the principles that are set out in the

 3   Articles and the Bylaws and the Applicant

 4   Guidebook.

 5   So, from our perspective,

 6   particularly when you -- you know, when

 7   you cradle all of this within the

 8   principles of international law that, to

 9   me, also include fundamental principles

10   of -- of -- of procedure and due process,

11   allows you to -- allows you considerable

12   amplitude and latitude in terms of what

13   it is that that you can do.

14   Now, at one level, you could be

15   looking at the particular Bylaw and say,

16   Well, technically, yes, this was

17   breached, and that was not breached; or

18   this was breached, and that was not

19   breached. But I think that you have a

20   more significant role, and that more

21   significant role is -- is motivated,

22   informed -- and informed by

23   the -- the -- the Articles of

24   Incorporation and the Bylaws, themselves.

25   PRESIDENT BARIN: Are you, in

 1   essence, saying -- and I will obviously

 2   put the same question to you,

 3   Mr. LeVee -- are you, in essence, saying

 4   that, if you will, Subparagraph 4 gives

 5   us a framework, but that then Sub 11

 6   gives us the broad powers to decide what

 7   we need to -- perhaps in light of the

 8   facts and circumstances that you've given

 9   us?

10   Is that a fair characterization?

11   MR. ALI: That's a fair

12   characterization --

13   PRESIDENT BARIN: Okay.

14   MR. ALI: -- but, ultimately, I

15   believe that you have the latitude that

16   you need to do what it is that's really,

17   at its core, applying the standards and

18   the Bylaws.

19   And every regulator will say, Let's

20   take a look specifically at what my rules

21   say, but, you know, at the end, they have

22   to be applied in good faith in accordance

23   with the core values.

24   And who is there to police the core

25   values?

1   PRESIDENT BARIN: As a follow-up to

2   that -- and I appreciate that I'm sort of

3   throwing this at you now, but maybe when

4   you sit down and reflect on it -- I would

5   be interested in -- in seeing where you

6   could find support -- maybe it goes

7   without saying, but if, for example,

8   staff or people involved in a -- in an

9   organization do certain things or do not

10   do certain things or whatever they are,

11   that ultimately then sort of either goes

12   up or down to -- to the Board -- the

13   action or inaction.

14   So to the extent that you can give

15   the Panel some support for that, either

16   Bylaws and Articles of Incorporation, I

17   would be interested in that -- in seeing

18   that.

19   MR. ALI: Absolutely.

20   I will respond, but I would like to

21   think about that, because I think I have

22   a -- a good response. But I want to

23   articulate it since it is in a more

24   coherent fashion than I have answered

25   your last question.

 1   PRESIDENT BARIN: In all fairness,

 2   that's why I asked it now as opposed to

 3   later.

 4   I have one other question for you,

 5   and, again, you may reflect on this.

 6   I want you to tell us, Mr. Ali, what

 7   it is exactly that -- and I want this

 8   articulated clearly -- what it is exactly

 9   the DCA Trust is asking this Panel to do.

10   I have put up on my own screen the

11   relief requested in your Amended Notice

12   of IRP, and I have also put up on my own

13   screen the conclusion and the -- what I

14   would say, the relief that you have

15   requested in the DCA Memorial on the

16   Merits.

17   And I think the Panel would be

18   grateful if it has a very clear

19   indication from you as to what it is that

20   DCA Trust is seeking. Because,

21   admittedly, I understand what the relief

22   sought is in the Amended Notice of IRP;

23   but when I read what is being sought in

24   the Merits Memorial, it perhaps goes

25   beyond what the initial request is.

 1   MR. ALI: Sorry? Beyond?

 2   PRESIDENT BARIN: It goes beyond the

 3   initial request, if you will.

 4   And maybe that's my misunderstanding

 5   or maybe my characterization; but if I'm

 6   wrong, I would like to know that.

 7   HONORABLE JUDGE CAHILL: Yes.

 8   It's important we know what you're

 9   asking us to do.

10   MR. ALI: Yes. Let me review this

11   specifically. Thinking of being more

12   specific with respect to what we had put

13   in the amended request, I will view the

14   requests in light of the question you

15   just put to me and, of course, also

16   consult Ms. Bekele as to the precise

17   relief we're requesting.

18   HONORABLE JUDGE CAHILL: On Page 56

19   and 57 of your client's declaration, she

20   also states what she's seeking. And I --

21   not all -- we want it to be consistent,

22   so we want to be very clear what you're

23   seeking and she's seeking.

24   Okay?

25   MR. ALI: Okay.

 1   ARBITRATOR KESSEDJIAN: May I add on

 2   this particular problem?

 3   The way I read your submissions was

 4   that, basically, what is here in Page 30,

 5   3-0, of your Memorial of the Merits was

 6   superceding, in a way, or, kind of, you

 7   know, the -- the actual --

 8   MR. ALI: It's an evolution, yes, of

 9   what was in the amended request. So it

10   is more -- it is a -- it is a more

11   precise articulation, at least that's how

12   we'd intended it, of what it is that we

13   wanted.

14   The way I would put it, both with

15   respect to the amended request, as well

16   as with respect to Ms. Bekele's

17   statement, is that the amended request,

18   the statement ultimately reflected an

19   articulation of the requested relief at

20   Paragraph 56.

21   But I will --

22   ARBITRATOR KESSEDJIAN: Fifty-six?

23   I was reading that only.

24   So in your response later on, you

25   must tell us whether I was correct or

 1   whether we should do something else.

 2   MR. ALI: Yes, absolutely.

 3   PRESIDENT BARIN: And, again, I'm

 4   going to insist on that, because we have

 5   to walk away from this knowing exactly

 6   what it is that's being sought --

 7   MR. ALI: Absolutely.

 8   PRESIDENT BARIN: -- so depending on

 9   what your answer is and how you

10   articulate it, then I will certainly have

11   some questions for you --

12   MR. ALI: Okay.

13   PRESIDENT BARIN: -- but I'd rather

14   give you the time to reflect on that, and

15   then we can come back to it.

16   MR. ALI: I must consult with my

17   client to make sure we've got it down

18   with the requisite precision.

19   PRESIDENT BARIN: I understand.

20   HONORABLE JUDGE CAHILL: When I

21   first read it, I was wondering whether we

22   had the power to do some of the things

23   you were asking for, even if we agree

24   with you on the standard of care, the

25   standard review and everything else.

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 1             It seemed like there was some --

 2             MR. ALI:  Fair question.

 3             And that's, again, what we will be

 4    discussing with Ms. Bekele and relay that

 5    to the Panel.  A very fair question.

 6             HONORABLE JUDGE CAHILL:  Okay.

 7             PRESIDENT BARIN:  Okay.

 8             Thank you.

 9             MR. ALI:  Thank you.

10             PRESIDENT BARIN:  Would you like a

11    little break?

12             MR. LEVEE:  I would like a very

13    short break so I can deal with the

14    computer issues and get everything

15    switched around.

16             PRESIDENT BARIN:  Okay.

17             Great.  So maybe --

18             MR. LEVEE:  Ten minutes is fine.

19             PRESIDENT BARIN:  -- 10 minutes?

20             10:30?

21             MR. LEVEE:  Thank you.

22                       -  -  -

23               (Whereupon, a brief recess was taken

24                from 10:23 a.m. to 10:35 a.m.)

25                       -  -  -
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 1   PRESIDENT BARIN: Mr. LeVee.

 2   - - -

 3   CLOSING STATEMENT ON BEHALF OF RESPONDENT

 4 INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS

 5   - - -

 6   MR. LEVEE: Thank you,

 7   Mr. President.

 8   Let me begin my closing by

 9   acknowledging that the Members of the

10   Panel, opposing counsel, everyone has put

11   in an enormous amount of effort into this

12   matter.

13   On behalf of ICANN, we very much

14   appreciate the effort and the attention

15   you paid, and we -- we do appreciate that

16   very much.

17   I know there's more to do, but this

18   is the culmination of a -- particularly

19   for the two of you, a very long period of

20   time, much longer than ICANN hopes in

21   these situations.

22   But we did have a death of a

23   panelist and things happen, so we're very

24   pleased to have reached this point.

25   I'm going to do three things in my

 1   opening -- in my closing -- if I'm doing

 2   my opening, I'm a little late, I

 3   suppose -- first, I'm going to run

 4   through, pretty quickly, a couple of the

 5   Bylaws, provisions that you were looking

 6   with Mr. Ali.

 7   Secondly, in the opening statement

 8   that DCA presented to you, they listed

 9   what they believe the various Bylaws and

10   Guideline breaches were. I think there

11   were seven of them. And I'm going to

12   review them one by one with you.

13   And then, third, I'm going to

14   return, again, briefly, to the

15   assumptions that I laid out for you in my

16   opening statement and demonstrate to you

17   that after the testimony that we've had,

18   that it is, in fact, the case that each

19   of DCA's assumptions is false.

20   And so while DCA makes a number of

21   arguments, each of those arguments is

22   based on these assumptions. And if the

23   Panel finds the assumptions false, then

24   it should find in ICANN's favor.

25   First, you have already referred to

1   and quoted this provision of the Bylaws

2   on multiple occasions, but Article IV,

3   Section 3, Paragraph 2 does say that Any

4   person materially affected by a decision

5   or action by the Board that he or she

6   asserts is inconsistent with the Articles

7   or Bylaws may request an independent

8   review.

9   The person must suffer injury or

10   harm that is directly or causally

11   connected to the Board's alleged

12   violation of the Bylaws or the Articles

13   of Incorporation, and not as a result of

14   third parties acting in line with the

15   Board's action.

16   So you asked a question yesterday,

17   Well, what about the GAC?

18   And the answer is that an

19   Independent Review Proceeding does not

20   exist to test whether the GAC conformed

21   to the ICANN Bylaws or the Articles, or,

22   candidly, even to its own operating

23   principles. So we're not here under the

24   Bylaws to test whether the GAC got it

25   right.

 1   That's not to say that the GAC isn't

 2   relevant. Clearly, it is. Because the

 3   GAC issued consensus advice -- I'll call

 4   it "consensus advice," recognizing that

 5   there's a dispute -- and that advice went

 6   to the Board.

 7   And then the question is, Did the

 8   Board deal with the advice consistent

 9   with the Guidebook, the Articles and the

10   Bylaws?

11   But looking at whether the GAC does

12   things really or whether the GAC has good

13   operating principles or what -- what

14   happened inside that room, it's not for

15   this Panel to decide.

16   Next --

17   HONORABLE JUDGE CAHILL: Can I ask

18   you a question about that?

19   MR. LEVEE: Of course.

20   HONORABLE JUDGE CAHILL: Is it your

21   position that the Board has nothing --

22   has no -- let me try this again.

23   The powers that the GAC have, where

24   do they come from? The Board?

25   MR. LEVEE: The GAC. The GAC makes

 1   its own rules.

 2   These are governments. The

 3   governments have no interest in having

 4   ICANN lay down rules or set rules.

 5   The GAC determines its rules.

 6   Ms. Dryden said that yesterday.

 7   HONORABLE JUDGE CAHILL: No. I

 8   remember that.

 9   PRESIDENT BARIN: Let me just follow

10   up on that, then.

11   Who is responsible for the GAC?

12   MR. LEVEE: The GAC.

13   PRESIDENT BARIN: And does the GAC

14   report to anybody?

15   MR. LEVEE: When you say "report,"

16   the GAC issues communiqués to ICANN.

17   You've seen one of them, but it does so

18   in almost every meeting of the Board.

19   It then has a nonvoting liaison, the

20   Chair, who participates in ICANN

21   meetings, but not as a voting member.

22   But it doesn't really report to

23   anyone. It -- it -- the GAC is -- is --

24   it is its own body.

25   PRESIDENT BARIN: Okay. But then --

1   then help me out in terms of trying to

2   understand.

3   If the GAC then issues the

4   communiqué, is the communiqué of the GAC

5   of any significance without the approval

6   of the Board?

7   MR. LEVEE: The communiqué has

8   significance to the governments, and then

9   the communiqué is transmitted to the

10   Board.

11   Now, it depends what the communiqué

12   says. The communiqué can say to ICANN,

13   We recommend that you look at something.

14   The communiqué can say to ICANN, We wish

15   that we be involved in policy relating to

16   something.

17   You have seen only GAC communiqué

18   that relates to specific advice relating

19   to the new gTLD program. That advice

20   does get transmitted to the Board, and it

21   creates what we've seen, the strong

22   presumption if the advice should be

23   accepted.

24   But that's only one piece of what

25   the GAC has done.

 1   Historically, prior to the new gTLD

 2   program, the GAC issued communiqués on

 3   all sorts of subjects, and they were

 4   transmitted to ICANN. And, typically,

 5   they were in the form of requesting

 6   information, requesting that ICANN do

 7   something, requesting that ICANN take

 8   things into account. And ICANN would

 9   listen and ask.

10   PRESIDENT BARIN: But, you know,

11   let's be very specific about this,

12   because --

13   MR. LEVEE: Sure.

14   PRESIDENT BARIN: -- the communiqué

15   that's issued by the GAC, if it's just a

16   communiqué and it goes nowhere, then it's

17   simply a reflection or, I guess, a -- a

18   reprint of what transpired as -- you

19   know, in a certain event, right?

20   I mean, does it have any more

21   meaning than that? In other words --

22   MR. LEVEE: To be clear, all GAC

23   communiqués are transmitted to the Board.

24   PRESIDENT BARIN: Right.

25   And if they're transmitted to the

1   Board, to the extent that the Board then

2   acts on them, does it not create, I

3   guess, the value that that GAC -- GAC

4   communiqué then brings forward? In other

5   words, without the approval of the Board,

6   what is the value of the GAC communiqué?

7   MR. LEVEE: I get your point.

8   You're exactly right. The advice of

9   the GAC can only be acted on by the

10   Board, particularly in the sense of

11   advice not -- that a particular

12   application should not proceed.

13   But sometimes -- I'm just trying to

14   be clear that sometimes the GAC is

15   issuing communiqués that the GAC is

16   saying, We wish to be involved. Even

17   with the new gTLD program, the GAC

18   periodically said, Hey, you guys are

19   doing something. We, as governments,

20   would like to be involved. And so we

21   hereby notify ICANN to, you know, talk to

22   us.

23   PRESIDENT BARIN: But in this

24   case -- specifically in this case, when

25   GAC says, for example, We are objecting

 1   to it or there's an objection to an

 2   application --

 3   MR. LEVEE: Yes.

 4   PRESIDENT BARIN: -- if the Board

 5   does not approve that, then is the

 6   decision of the GAC of any value?

 7   MR. LEVEE: No. With these two

 8   caveats: first, the Guidebook says that

 9   the -- the issuance of consensus advice

10   by the GAC creates a strong presumption

11   that the Board should follow.

12   Then the Bylaws -- separate and

13   apart from the Guidebook, the Bylaws have

14   a provision that says that if ICANN is

15   not going to follow GAC advice, there's

16   then a process that has to occur where

17   the parties talk to one another -- and

18   that's in my first -- in my opening

19   statement, I had -- it was part of my

20   opening statement yesterday -- so the

21   parties would have to talk to each other.

22   ICANN cannot simply say, Thank you,

23   GAC, for recommending something, nah, and

24   we're done. There's a process --

25   PRESIDENT BARIN: Okay.

 1   MR. LEVEE: -- but, otherwise, I'm

 2   not -- I think I'm answering your

 3   question. I'm just not sure.

 4   PRESIDENT BARIN: No; you are. You

 5   are.

 6   But I just want to follow up just on

 7   one more thing.

 8   If -- if the Board gets a communiqué

 9   from the GAC and thinks that it should

10   follow up, as you say, on the communiqué,

11   or perhaps something was followed or not

12   followed, or whatever, it can then go

13   back and say, Why was this done this way

14   or not done this way? Or is that

15   possible?

16   MR. LEVEE: I do believe that the

17   Board has the power to ask the GAC to

18   clarify advice. I'll be candid. I've

19   never seen it happen, but I do believe

20   the Board has the power to ask the GAC,

21   Why did you send me this advice or Could

22   you amplify on it?

23   I certainly believe that that's one

24   thing within the Board's --

25   HONORABLE JUDGE CAHILL: There's no

 1   way to answer that question from the

 2   testimony we heard because she doesn't

 3   have an idea of what the reasons are.

 4   She just accepts the --

 5   MR. LEVEE: I think Ms. Dryden was

 6   worried about dealing with it

 7   hypothetically, because there's so many

 8   different scenarios that come up.

 9   From the GAC's perspective, when the

10   GAC issues advice, they do so at a place

11   and time, and it is their advice.

12   Governments change, policies change,

13   advisors and representatives change. And

14   so she can never be confident that

15   something that the GAC says in March

16   would be the same outcome of what the GAC

17   might say in August, because the people

18   in the room are different and the

19   governments might have changed policy --

20   I'm sorry.

21   ARBITRATOR KESSEDJIAN: Sorry. I

22   didn't want to interrupt.

23   MR. LEVEE: -- so her whole --

24   Ms. Dryden's whole point was that she

25   doesn't -- there can be communication --

 1   HONORABLE JUDGE CAHILL: Right.

 2   MR. LEVEE: -- but when the GAC

 3   issues something, they view it as final.

 4   Now, if the Board comes back to the

 5   GAC and says, Well, we want to discuss

 6   something or We need your rationale, the

 7   GAC could then choose to provide it or

 8   not. The GAC would have -- would be

 9   under no obligation to -- to say, Well,

10   the Board has asked me to clarify

11   Section 2 that I issued on the communiqué

12   in April, but we choose not to.

13   PRESIDENT BARIN: Sorry.

14   ARBITRATOR KESSEDJIAN: Go ahead.

15   PRESIDENT BARIN: Let me follow on

16   this, because these are important

17   questions.

18   MR. LEVEE: I'm with you.

19   PRESIDENT BARIN: To the extent

20   that -- and I'm putting a hypothetical to

21   you -- to the extent that the Board then

22   adopts a view or a communiqué of GAC

23   without taking the time to perhaps either

24   look at it closely or analyze it or do

25   further examination of it, and approves

 1   it, then is it not then the Board's

 2   decision, and the consequences then

 3   follow from that? In other words, where

 4   else can the issue be put to if it's not

 5   to the Board?

 6   MR. LEVEE: Yes. So applied here --

 7   and that's what I was trying to make

 8   clear -- applied here -- I'm not saying

 9   at all that the Board's decision

10   vis-a-vis the GAC advice on DCA's

11   application is not reviewable by this

12   Panel; it is.

13   The Board did something. It acted.

14   It approved the GAC advice. It had a

15   Guidebook that said there was a strong

16   presumption that it should. It reviewed

17   various materials. It reached that

18   conclusion. That conclusion is

19   reviewable by this Panel, undoubtedly.

20   Have I clarified that?

21   PRESIDENT BARIN: You have. Thank

22   you.

23   HONORABLE JUDGE CAHILL: But -- I'm

24   sorry. Go ahead.

25   ARBITRATOR KESSEDJIAN: I'll be

 1   patient.

 2   No, no. You may ask the same

 3   question as I have in mind. And if so,

 4   then I will be quiet; but if not, I will

 5   go after you.

 6   HONORABLE JUDGE CAHILL: I think I

 7   forgot my question now.

 8   DCA is arguing that the GAC, when it

 9   made its decision to stop the

10   application, basically killed the

11   project -- killed DCA's project.

12   Does the Board have any

13   responsibility? Because the Board is

14   supposed to evaluate the applications

15   based on financial, technical, all that,

16   but that never happened because of what

17   happened at the GAC. And --

18   MR. LEVEE: Well, there was some

19   evaluation, but once the GAC ruled and

20   then the Board adopted the GAC advice, it

21   is correct that, at that point, the

22   application evaluation terminated.

23   The -- but I'm not sure I'm

24   answering your question.

25   If -- the killing that Mr. Ali was

1   referring to is the fact that because of

2   the strong presumption, there has to be

3   an awfully good reason for the Board not

4   to accept the GAC advice.

5   DCA, under the Guidebook, was given

6   an opportunity to respond to the GAC

7   advice. It did with a 15-page response.

8   It's in the exhibits that I gave to you

9   yesterday.

10   The Board considered -- the NGPC

11   considered that response along with the

12   GAC advice, along with the Guidebook, and

13   made a decision; it accepted the advice.

14   So the killing, I suppose -- I don't

15   like using the word --

16   HONORABLE JUDGE CAHILL: I know.

17   MR. LEVEE: -- but the decision to

18   suspend evaluation of that application

19   was done by the Board, and that is

20   certainly a decision that the Panel can

21   review.

22   HONORABLE JUDGE CAHILL: And review

23   in what way? That we can say -- we can

24   go back and look at the GAC process and

25   decide -- have an opinion as to whether

 1   GAC did its job right?

 2   MR. LEVEE: No. That's what --

 3   HONORABLE JUDGE CAHILL: That's

 4   where we're stuck here.

 5   MR. LEVEE: -- the -- and that's

 6   why -- let me lay out -- it's actually in

 7   the next slide, although I don't want to

 8   jump ahead.

 9   ARBITRATOR KESSEDJIAN: I have a

10   question.

11   HONORABLE JUDGE CAHILL: You have a

12   different one?

13   MR. LEVEE: If you have a different

14   one, let's go there. And the next slide

15   answers the next question.

16   PRESIDENT BARIN: I assure you, you

17   will have all the time you need.

18   MR. LEVEE: Turn off the watch.

19   HONORABLE JUDGE CAHILL: You have

20   48 minutes.

21   PRESIDENT BARIN: We are asking you

22   questions, but these are important

23   questions, so . . .

24   MR. LEVEE: I've always encouraged

25   you to interrupt.

 1   ARBITRATOR KESSEDJIAN: Okay. So my

 2   question goes to your Slide Number 2 --

 3   if we could have it on the screen -- and

 4   your last -- actually, the slide on the

 5   screen is not the one we have in our --

 6   there's something missing --

 7   HONORABLE JUDGE CAHILL: That's

 8   Number 2.

 9   ARBITRATOR KESSEDJIAN: -- the last

10   bullet.

11   That's it. That's it.

12   HONORABLE JUDGE CAHILL: I see. I

13   see.

14   There I am.

15   ARBITRATOR KESSEDJIAN: So you are

16   telling us that we do not have the

17   mandate to review GAC's conduct?

18   MR. LEVEE: Correct.

19   ARBITRATOR KESSEDJIAN: Now, several

20   questions: One, what is the legal

21   basis -- where in the Bylaws, Articles of

22   Incorporations or Guidebook do you see

23   the basis for this assumption, for

24   this --

25   MR. LEVEE: In the paragraph I quote

 1   above and the paragraph on the next

 2   slide.

 3   ARBITRATOR KESSEDJIAN: The

 4   paragraph above does not say what you

 5   say.

 6   MR. LEVEE: Obviously, we're

 7   disagreeing.

 8   ARBITRATOR KESSEDJIAN: What you're

 9   saying is that your interpretation of

10   Article IV, 3, 2 --

11   MR. LEVEE: And -- and Article IV,

12   3, 4, which is --

13   ARBITRATOR KESSEDJIAN: Where does

14   it say?

15   MR. LEVEE: That's the next -- you

16   can look. It's on the next page --

17   ARBITRATOR KESSEDJIAN: Okay --

18   MR. LEVEE: -- it says --

19   ARBITRATOR KESSEDJIAN: -- so your

20   basis -- the legal basis for you is IV,

21   3, 2 and IV, 3, 4?

22   MR. LEVEE: And, really, if you look

23   in the entirety of Section IV -- so

24   here -- why are we here today?

25   We're here because ICANN created

1   what we've -- you and I have had this

2   discussion before -- ICANN created this

3   very unusual process that says We're

4   going to permit Independent Review Panels

5   to evaluate things.

6   ICANN's position is these are

7   unique, we get to decide the rules.

8   Now, to be clear, these rules were

9   created with thousands of public

10   comments, accountability panels, experts,

11   all of that. It's not the Staff and I

12   sitting in a room wishing for an outcome.

13   But the decision was made to adopt

14   this particular form of independent

15   review.

16   We could have adopted a form of

17   independent review that specifically

18   says, By the way, we're also going to

19   review what the Staff does.

20   That exact proposal is under

21   consideration as we speak, but it's not

22   what these Bylaws say.

23   ARBITRATOR KESSEDJIAN: I have

24   follow-up.

25   Now I know what's your answer to my

 1   first question.

 2   My second question is, If it were

 3   true that the GAC's conduct cannot be

 4   reviewed by us, why in the world you ask

 5   Ms. Dryden to be a witness?

 6   You were the ones who gave us the

 7   declaration, and it's because you did

 8   this that we went on and on and on

 9   discussing what the GAC was doing and

10   what the processes in the GAC were --

11   were done.

12   So I don't understand the rationale

13   behind your procedure or strategy.

14   MR. LEVEE: I can tell you exactly.

15   We had this exact discussion.

16   The application challenged the

17   Board's decision to accept the GAC

18   advice, and it said that the GAC advice

19   was not consensus advice.

20   That was DCA's amended notice,

21   which, by the way, was all I had at the

22   time Ms. Dryden -- we had to make the

23   decision.

24   I had a 25-page piece of paper that

25   said, Here's what Mr. Buruchara had

 1   written in an e-mail. He objected to GAC

 2   advice.

 3   He wasn't at the meeting. He may or

 4   may not have been the GAC representative

 5   from Kenya. He may or may not have the

 6   authority to do what he was e-mailing

 7   about. But their notice said, Here's

 8   what we've got.

 9   So I called Ms. Dryden. I said,

10   This seems like an incomplete picture.

11   Can you tell me what actually happened?

12   And she did.

13   By submitting her declaration, I

14   then explained to you that the Board

15   should have had and did have confidence

16   that what the GAC told the Board was

17   accurate.

18   The GAC did issue consensus advice,

19   according to Ms. Dryden.

20   We can debate -- I know the Panel

21   will ultimately look at these issues

22   fresh -- but Ms. Dryden's view is that

23   it's not a close call.

24   She explained to you how you issue

25   consensus advice and it was done.

 1   That's why we gave you her

 2   declaration, to demonstrate that the

 3   Board's reliance on the GAC advice was --

 4   was a good thing, was accurate, was

 5   within its realm.

 6   Because if I had given you no

 7   declaration and we had just this

 8   assertion that the GAC advice was not GAC

 9   advice, then I think it would be

10   reasonable for somebody to say, Well, if

11   the Board was on notice that the GAC

12   advice was not, in fact, consensus

13   advice, why didn't the Board do its own

14   investigation?

15   ARBITRATOR KESSEDJIAN: Would you

16   agree, nonetheless, that at least, as you

17   say, as far as the Board's way of taking

18   its decision, the GAC conduct is

19   pertinent?

20   MR. LEVEE: It is. I'm not

21   suggesting that it's not.

22   ARBITRATOR KESSEDJIAN: Thank you.

23   HONORABLE JUDGE CAHILL: I think she

24   did a better job than me.

25   Go ahead.

 1   PRESIDENT BARIN: I just want to

 2   complete one circle coming back to

 3   Professor Kessedjian's question.

 4   If you look at the last bullet

 5   point, where you say GAC conduct is not

 6   the proper subject of an IRP.

 7   If I was to ask you to complete that

 8   sentence in saying GAC conduct is the

 9   proper subject of what review --

10   MR. LEVEE: In this instance,

11   there's no specific accounting mechanism

12   to challenge GAC advice that is

13   separate -- in other words, the GAC

14   issues advice, and no one does anything

15   with it.

16   So take my previous example where

17   the GAC says, I want to be involved in

18   the creation of the New GTLD Program.

19   Somebody might think that's a bad thing

20   for governments to do. There would be no

21   basis to challenge that.

22   The only basis would be when the

23   Board adopts or does not adopt specific

24   GAC advice, you are clearly free to look

25   at the Board's decision. And in that

 1   regard, if you were to find that the

 2   Board was on notice that the GAC just

 3   fell down, that there was no GAC needed,

 4   that the -- you know, that the

 5   representative of Kenya walked into the

 6   Board meeting and said, Wait a second, I

 7   was at the GAC meeting and I jumped up

 8   and down, and Ms. Dryden refused to

 9   recognize me when I tried to oppose the

10   issuance of GAC advice, if those types of

11   things had happened, then you would say

12   maybe the Board didn't do due diligence

13   because the applicant submits a response

14   to the Board, and the Board reads it, and

15   maybe the Board didn't do due diligence

16   in evaluating it.

17   Instead, what we know is what

18   Ms. Dryden testified in her declaration

19   and testified to the Panel, and she does

20   attend the Board -- these meetings as a

21   liaison. She's doesn't remember this

22   particular meeting. I'm not surprised.

23   She's attended literally hundreds of

24   meetings during her tenure as the GAC

25   Chair.

 1   And while what brings us here today

 2   is important for all of us, what I heard

 3   her say yesterday was that there are a

 4   lot of other things that are also very

 5   important, much more complicated

 6   politically for her to deal with.

 7   So I don't know that this was the

 8   most important thing that ever happened

 9   to her at the GAC.

10   PRESIDENT BARIN: So, in other

11   words, if I was to say it in my way, the

12   GAC decision and conduct is whatever it

13   is, and it's not really reviewable or

14   subject to any, if you will, analysis up

15   until the time it's then put up to the

16   Board?

17   And then the Board accepts it or

18   approves it or acts on it --

19   MR. LEVEE: Yes.

20   PRESIDENT BARIN: -- at which point

21   in time, it becomes something that has

22   value, at which point in time, it becomes

23   subject to the IRP?

24   MR. LEVEE: Yes.

25   HONORABLE JUDGE CAHILL: You require

 1   actual notice to the Board if something

 2   is going wrong in the GAC, right?

 3   MR. LEVEE: I didn't hear you.

 4   HONORABLE JUDGE CAHILL: You would

 5   require -- for instance, Mr. Ali's

 6   arguing that the -- there was just this

 7   quiet, you know -- very quickly, it was

 8   approved -- the issue was tabled and

 9   there was consensus on it --

10   MR. LEVEE: Yes.

11   HONORABLE JUDGE CAHILL: -- and it

12   basically sounds like it happened in a

13   minute, but -- and that's one of the

14   things he really has been hitting us on.

15   Does the Board -- you're saying that

16   the Board doesn't know that or know that

17   objection, then the Board is reasonable

18   to accept the GAC's recommendation --

19   MR. LEVEE: What the Board in this

20   instance had, it had a communiqué from

21   the GAC saying we have issued consensus

22   advice against the Application Number so

23   forth. It then had Ms. Bekele's response

24   to the GAC advice, 15 pages, in which she

25   explains why she thinks the GAC advice

 1   should not sway the Board and was

 2   improperly issued.

 3   The Board then meets -- it has this

 4   information. It meets. It approved the

 5   GAC advice.

 6   So the Board is not operating in a

 7   vacuum, say, taking the GAC advice and

 8   not listening to anybody else. It had a

 9   thorough response from the applicant that

10   did not persuade the Board.

11   And Ms. Dryden -- one of the

12   purposes of Ms. Dryden's declaration was

13   to explain to you that the objection that

14   DCA made was not, in fact, accurate.

15   ARBITRATOR KESSEDJIAN: Mr. LeVee,

16   the Board has records and minutes?

17   MR. LEVEE: It does.

18   ARBITRATOR KESSEDJIAN: Do we have

19   those in the binder?

20   MR. LEVEE: We do. They were in the

21   binder I gave to you yesterday,

22   the minutes of that particular meeting

23   showing what the Board reviewed.

24   I'll get you the exhibit number.

25   But it's the minutes of the

1   meeting that show -- it's Exhibit R-1.

2   It's the formal minutes of the ICANN NGPC

3   meeting of June 2013, and it says what

4   the Board looked at.

5   HONORABLE JUDGE CAHILL: So you

6   would say, with all due respect to

7   Mr. Ali, the fact that you think that the

8   GAC operated unfairly is really

9   irrelevant to what my job is to do here

10   because you -- no matter what they did,

11   they had the other side of the story?

12   MR. LEVEE: Okay. Let me come to it

13   now. I was going to come to it later.

14   I have a completely different

15   perspective of whether the GAC acted

16   fairly or unfairly.

17   The GAC had an agenda that had been

18   generated three weeks in advance of the

19   meeting, according to Ms. Dryden's

20   testimony yesterday. Three countries

21   placed on the agenda their interest in

22   having a consensus advice objection

23   issued vis-a-vis DCA's application.

24   Ms. Dryden, her job is then to go

25   through the agenda. She goes through the

 1   agenda.   Redacted - GAC Designated Confidential
                              Information

13   We went from a few minutes to a

14   nanosecond during Mr. Ali's closing --

15   HONORABLE JUDGE CAHILL: Fair

16   enough.

17   MR. LEVEE: -- but whatever

18   second -- however much time it takes, I

19   don't think it takes a long time to

20   register that no one opposes.

21   In fact, no one opposes. The

22   request carries, at which time, there is

23   applause in the room, according to

24   Ms. Dryden. So people were paying

25   attention.

 1   So I think the GAC advice was issued

 2   exactly as it was supposed to be.

 3   There isn't necessarily supposed to

 4   be tons of debate at the meeting. What

 5   Ms. Dryden said is we put these things on

 6   the agenda three weeks in advance so that

 7   the government officials can go back to

 8   their own countries and get instructions.

 9   And then they come to the meeting.

10   If there is consensus, it will be

11   reflected at the meeting. There's

12   nothing more to do. There's no debate to

13   have.

14   Redacted - GAC Designated Confidential Information

19   We know Mr. Katundu, who is the

20   representative from Kenya, he's

21   physically in Beijing. He's physically

22   attending GAC meetings. And all

23   Ms. Dryden told you was, Look, I've got a

24   lot of these meetings. There's 70 to 150

25   people in the room. I can't tell you at

 1   the moment whether he was there or not.

 2   HONORABLE JUDGE CAHILL: So if the

 3   GAC -- Mr. Ali argues that the GAC

 4   procedures were flawed and the result was

 5   not fair, that's -- that, to you, no

 6   matter what the answer to that question

 7   is, we don't get to look at that?

 8   MR. LEVEE: No, you don't --

 9   HONORABLE JUDGE CAHILL: Okay.

10   MR. LEVEE: -- and there -- first of

11   all, this is the first time I'm hearing

12   that the notion of issuing consensus

13   advice is unfair --

14   HONORABLE JUDGE CAHILL: He said the

15   procedure -- the procedure is what he's

16   talking about.

17   MR. ALI: -- but this is how the GAC

18   has been operating since Ms. Dryden was

19   involved in 2007. That's her testimony.

20   And there's no indication that the

21   GAC has ever operated in any other

22   fashion.

23   HONORABLE JUDGE CAHILL: Well, she

24   said this is the first time that this was

25   done this way.

 1   MR. LEVEE: For gTLDs --

 2   MR. ALI: Fair enough.

 3   MR. LEVEE: -- the GAC has issued

 4   consensus advice many, many times.

 5   It's the first time that a gTLD --

 6   and she also said there were several

 7   other gTLDs on the agenda, one of which

 8   got consensus advice, another of which

 9   did not.

10   ARBITRATOR KESSEDJIAN: Mr. LeVee,

11   have you attended a GAC meeting ever?

12   MR. LEVEE: A long time ago, not

13   recently.

14   ARBITRATOR KESSEDJIAN: Okay. So is

15   my assumption correct that each

16   government has a flag, has a --

17   MR. LEVEE: No. They actually made

18   a decision some time ago not to have

19   flags.

20   ARBITRATOR KESSEDJIAN: No, I mean

21   flags -- something with their name or

22   something with the name of the country.

23   MR. LEVEE: Like a name tag or a

24   card?

25   ARBITRATOR KESSEDJIAN: Yeah.

 1   MR. LEVEE: No, I don't think they

 2   even do that now. They didn't when I was

 3   there. I don't think they do that now.

 4   Ms. Dryden knows everyone in the

 5   room.

 6   ARBITRATOR KESSEDJIAN: So you

 7   answered the question that was coming.

 8   MR. LEVEE: Yes.

 9   ARBITRATOR KESSEDJIAN: So how do

10   you reconcile that to the fact that she

11   says that she didn't know whether Katundu

12   was there or not? She knows everybody.

13   She says it's the Chair's job to know

14   everybody.

15   MR. LEVEE: She does know everyone.

16   I think Ms. Dryden was being

17   incredibly honest. She was saying -- I

18   wanted her to say, Wasn't he in the

19   room --

20   ARBITRATOR KESSEDJIAN: I'm not

21   asking you that. I'm not asking you to

22   rehearse what she said.

23   MR. LEVEE: Why doesn't she

24   remember? I think it's easy.

25   There are so many people in these

1   rooms -- she did not say one thing I wish

2   she would have said, which is to explain

3   that the GAC meeting sometimes go on for

4   eight, 10, 12 hours. People are coming

5   and going.

6   She did say that a lot of the real

7   work of the GAC is done --

8   ARBITRATOR KESSEDJIAN: You should

9   have been on the stand instead of her.

10   MR. LEVEE: She -- what she said was

11   that people are coming and going, and a

12   lot of the work is done outside.

13   When I asked her, when we were

14   sitting together drafting her

15   declaration, and I said, Can you place

16   him in the room?

17   She said, Look, there are so many

18   meetings that I cannot, at that meeting,

19   say that he was there.

20   I know he didn't speak at the

21   meeting because, if he did, I would

22   remember that he was there.

23   But I have no fault for Ms. Dryden

24   not remembering that a particular

25   individual -- it turned out to be

 1   important to us whether the

 2   representative from Kenya was in the room

 3   or not, but it was not something she

 4   would have known at the time to even look

 5   for.

 6   HONORABLE JUDGE CAHILL: Okay. So

 7   the authority for us that we read, we

 8   have no power to evaluate what the GAC

 9   did is in what you have given us in

10   Article IV, right?

11   PRESIDENT BARIN: Let me -- I just

12   want to clarify one last question.

13   When the Board -- and the minutes

14   are there. I've looked at them, but you

15   can perhaps help -- when the Board looks

16   at the consensus advice that's being put

17   before it in this case for DCA Trust --

18   and you earlier said, if I understood

19   correctly, that there was, of course, the

20   submission, if you will, of DCA Trust or

21   its opposition --

22   MR. LEVEE: Yes.

23   PRESIDENT BARIN: -- that the Board

24   was then able to compare, and then based

25   on that, I believe your position was that

 1   then the Board took its decision -- was

 2   the Board privy to also what happened in

 3   that meeting that Ms. Dryden was at and

 4   the particular facts or the explanations

 5   that she gave when that request was

 6   raised?

 7   MR. LEVEE: The Board members would

 8   not ordinarily be attending the GAC

 9   meetings where those issues are

10   addressed. They're actually excluded.

11   They attend other meetings.

12   So if you're asking whether Board

13   members were in attendance, the answer

14   would be no.

15   PRESIDENT BARIN: No.

16   Did the Board members ask questions

17   from Ms. Dryden, who was there and who

18   was the --

19   MR. LEVEE: They have the ability to

20   do so.

21   Ms. Dryden's testimony was that she

22   didn't remember that there was discussion

23   or not. She just didn't remember.

24   PRESIDENT BARIN: And there's

25   nothing reflected in the minutes?

 1   MR. LEVEE: Correct.

 2   ARBITRATOR KESSEDJIAN: Am I correct

 3   to think that the -- the NGPC had Ms.

 4   Bekele answer, so 15 pages?

 5   MR. LEVEE: Yes.

 6   ARBITRATOR KESSEDJIAN: And I see --

 7   I'm reading R-1.

 8   MR. LEVEE: Yes. It's highlighted

 9   on Page 4 of 5 what the NGPC had before

10   it.

11   Do you see that?

12   ARBITRATOR KESSEDJIAN: Okay.

13   There's nothing highlighted in the copy I

14   have, but it's okay. I will read it

15   thoroughly.

16   MR. LEVEE: It is on Page 5. And

17   I'm sorry that yours is not highlighted.

18   PRESIDENT BARIN: I can explain why.

19   In your copy yesterday, I remember

20   clearly it was highlighted. You were

21   absolutely right, Mr. LeVee.

22   But then copies were made for us. I

23   asked your colleague to make -- and these

24   are probably the new copies that we got

25   that don't have the highlighting, which

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 1        explains why.
 2             MS. ZERNIK:  That's a copy of all
 3        our exhibits.
 4             ARBITRATOR KESSEDJIAN:  So we should
 5        take the copy in the opening statement?
 6             PRESIDENT BARIN:  Right --
 7             MR. LEVEE:  That's the version
 8        that's highlighted.
 9             PRESIDENT BARIN:  -- and then you
10        will have a highlighted version there.
11             MR. LEVEE:  Okay.
12             ARBITRATOR KESSEDJIAN:  Got it.
13             PRESIDENT BARIN:  I just want to
14        clarify this was the first -- the one and
15        only time, in the case of a gTLD, that
16        this issue of a consensus advice was
17        being put up.
18             MR. LEVEE:  It was the first and the
19        second at the same meeting.  In other
20        words, there were two gTLDs that received
21        consensus advice at that meeting.
22             It was the first time that the GAC
23        had taken up any of the applications.
24             The -- the -- the applications were
25        not published to the world until June of
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 1   2012.

 2   This was the GAC meeting in April of

 3   2013. It was the first time they had

 4   been, in essence, digesting and going

 5   through the applications.

 6   Subsequently, there had been more,

 7   but it was the first time that they had

 8   done this.

 9   PRESIDENT BARIN: Okay. So I'm

10   going to put a very hard question to you.

11   And I realize it's a hard question,

12   Mr. LeVee, but I want to do it for the

13   Panel and for what this Panel does.

14   Do you think the Board did what it

15   should have and it could in light of all

16   the facts that it had when an application

17   was put up for the first time for the

18   gTLD with the actual, if you will, Chair

19   of the gTLD being present at that -- at

20   that Board meeting in arriving at the

21   conclusion or the decision that it

22   reached?

23   MR. LEVEE: Absolutely.

24   Now, you guys obviously have a very

25   different perspective --

 1   PRESIDENT BARIN: I don't want you

 2   to think we have any perspective, because

 3   at this point, we don't.

 4   MR. LEVEE: I will be candid. You

 5   won't like my answer, but I don't view

 6   this as a close call. I know you do.

 7   This is why I don't: The GAC has a

 8   process for issuing consensus advice. It

 9   does it all the time. Yes, this was the

10   first time it issued consensus advice

11   vis-a-vis a particular application, but

12   it followed the policy that it always

13   follows. Ms. Dryden laid that out for

14   you.

15   You put an item on the agenda. It

16   allows governments to deliberate. And

17   then you do -- then you come at the

18   meeting.

19   What happens at the meeting is what

20   happens. And there are a lot of

21   political reasons for that, because

22   literally -- as she said, you're taking a

23   decision at a place and time.

24   So I think what the GAC did was

25   absolutely appropriate.

1   Did it have a consequence?

2   Absolutely, it did. It was intended to.

3   The Guidebook gave the GAC the ability

4   that the GAC had not previously had,

5   which was to give ICANN advice that ICANN

6   was almost forced to take into account.

7   It created a -- a so-called "strong

8   presumption." That language didn't exist

9   previously with the GAC. The GAC had

10   requested the ability to have that kind

11   of influence over the course of

12   several years of negotiating the

13   Guidebook.

14   The GAC got that influence. It

15   exercised that influence.

16   I -- the fact that it's the first

17   time doesn't mean that -- that we ought

18   to give it a bogey and say, Well, we

19   really think you should do it again. I

20   think they did it exactly how they were

21   supposed to.

22   PRESIDENT BARIN: All right.

23   Understood.

24   But how do you then reconcile, if

25   you will, what we understood -- and,

1   again, subject to being corrected -- but

2   the GAC end of it was perhaps, if you

3   will, the consensus, the political, the

4   endorsements, the views that were being

5   expressed by Members that were there --

6   MR. LEVEE: Yes.

7   PRESIDENT BARIN: -- there is then

8   what I call the sort of technical,

9   financial, all of the ability and the

10   time and know-how and the $185,000 that

11   goes into this application, all of that

12   sort of gets by the wayside because you

13   have a decision of the GAC that says --

14   or a proposal by the GAC that says,

15   Somebody raised their hand and said, This

16   application should not go forward?

17   MR. LEVEE: The answer to your

18   question --

19   PRESIDENT BARIN: I told you it was

20   a tough question.

21   MR. LEVEE: Again, I don't view it

22   as a tough question.

23   -- the answer to your question is

24   the Guidebook is very clear that any

25   applicant that applies subject to GAC

 1   advice -- any applicant could have put

 2   in years and years of time, passed all of

 3   the other evaluations, been the best TLD

 4   that anyone could have ever imagined for

 5   the entire world, and if the GAC issues

 6   advice that creates the strong

 7   presumption, the Board adopts it, that's

 8   how -- that's the rule.

 9   You may say you don't like the rule.

10   I get that.

11   But if ICANN is following the rule,

12   what did it do wrong?

13   ARBITRATOR KESSEDJIAN: We don't

14   contest that this is the rule. We

15   contest the way -- I mean -- we contest.

16   Sorry -- we -- we are puzzled at this --

17   I am puzzled by the way it was done.

18   I see the rule. I'm totally with

19   you with the rule. And it happens that I

20   know, because I have studied the

21   Guidebook for other cases, so I know what

22   they are.

23   But what the perception is to this

24   moment is that the accumulation of a

25   number of hiccups in the process may end

 1   up giving the conclusion that the -- the

 2   Bylaws -- the exact words in your

 3   Bylaws -- the ICANN Bylaws, that the

 4   process -- the processes must be fair,

 5   must be transparent, must be neutral.

 6   I mean, you have set up -- the "you"

 7   being ICANN -- ICANN has set up for

 8   itself a very high standard --

 9   MR. LEVEE: Yes, it has.

10   ARBITRATOR KESSEDJIAN: -- and what

11   I am struggling with, because I don't

12   want to speak for my colleagues, of

13   course, on the Panel -- but what I'm

14   struggling with is did -- in this

15   particular case, did we respect those

16   high standards?

17   And, you know, when you -- when you

18   point out our attention to R-1 and you

19   want us to be just satisfied by those

20   three little paragraphs that say

21   nothing -- I'm sorry, they say nothing

22   that you have highlighted in the -- in

23   the -- now I found the highlighted

24   version -- how do you want us to -- to

25   make a decision on this?

 1   MR. LEVEE: But that's how ICANN

 2   does minutes. It does not do minutes by

 3   having a scribe write down what everybody

 4   says.

 5   So there are so many meetings, so

 6   many decisions by the Board that ICANN

 7   literally -- and it's very public about

 8   what it does.

 9   You would like for the minutes to

10   say there was an objection, the Board

11   talked about the consensus advice, the

12   Board asked Ms. Dryden 50 questions, and

13   there was an hour-long discussion.

14   I don't actually know whether any of

15   that did or did not happen, but it gets

16   encapsulated in the minutes. And that's

17   what ICANN does.

18   ARBITRATOR KESSEDJIAN: I'm used to

19   organizations who are more prolific in

20   their --

21   MR. LEVEE: There are times where

22   ICANN has transcripts, full Board

23   meetings, various other meetings that do

24   get posted. Not every meeting and not

25   every NGPC meeting.

 1   But let me posit one other scenario.

 2   I was going to save this for last, but --

 3   the fairness issue, I think, comes back

 4   to the question that you asked Ms. Bekele

 5   yesterday about the time and the effort

 6   and so forth that went into this.

 7   I respect that. She did a lot of

 8   work. I get that.

 9   And maybe the AUC took her idea and

10   made it its own. And -- and that's too

11   bad.

12   I don't see anything in the

13   Guidebook that tells me they couldn't do

14   that.

15   But there's one thing that we do

16   know, which is that Ms. Bekele knew that

17   she had lost the AUC support. She goes

18   ahead and applies, and she submits with

19   her application the 2009 letter from the

20   AUC. But she knew in 2011 that the AUC

21   had stopped supporting her -- actually,

22   she knew in 2010. She asked for a

23   reinstatement in 2011. She didn't get

24   it.

25   One question you might ask is, Why

 1   did she proceed?

 2   Did she believe in good faith that

 3   she had the ability to get 60 percent of

 4   the countries of Africa to support her

 5   when the AUC, which was her main trump

 6   card at the beginning, had withdrawn the

 7   card to go elsewhere?

 8   So fairness is in the eyes of the

 9   beholder. My only point is that ICANN --

10   and it's in the rest of the slides. I'll

11   try to get through them -- ICANN did

12   treat the applicants equally pursuant to

13   the terms of the Guidebook.

14   When -- it wasn't ICANN that said Go

15   to the GAC. There's no evidence of that.

16   It wasn't ICANN that put the AUC on the

17   GAC. It wasn't -- and by the way, the

18   AUC didn't even put the issue on the

19   GAC's agenda.

20   Redacted - GAC Designated Confidential Information

24   MR. LEVEE: -- so the GAC then

25   issues consensus advice. None of this

1   has happened as a result of a single

2   thing that ICANN did.

3   The only piece of evidence that --

4   that DCA has ever pointed to is

5   Dr. Crocker's letter, which I am more

6   than happy to rely on, because it

7   factually says what the Guidebook says.

8   So ICANN did not maneuver this.

9   What happened is that the AUC decided to

10   support one particular proposal. It

11   issued an RFP. DCA didn't respond -- she

12   explained her view as to why she did

13   that -- and then it submits an

14   application.

15   And the countries of Africa then

16   say, Well, we want to support the AUC.

17   Sixteen of them issue Early Warning

18   notices that say we want what the AUC is

19   doing.

20   ARBITRATOR KESSEDJIAN: Mr. LeVee,

21   there's something that I don't understand

22   what you just said to us.

23   The AUC is not an applicant.

24   MR. LEVEE: They supported an

25   applicant.

 1   ARBITRATOR KESSEDJIAN: Well, they

 2   supported an applicant but they are not

 3   an applicant --

 4   MR. LEVEE: Correct.

 5   ARBITRATOR KESSEDJIAN: -- and that

 6   makes a fairly strong difference.

 7   There's another thing that you are

 8   not saying here, as Ms. Bekele testified

 9   yesterday, that -- and it is in her

10   written statement, so we didn't hear it

11   yesterday, that ICANN went to Africa -- I

12   don't remember the country, Dakar or

13   whatever -- explained to a bunch of

14   people in the room how to do it -- they

15   didn't know how to do it, so how to do

16   it -- bypassing DCA.

17   The person from ICANN, the employee

18   from ICANN got a reprimand, got a

19   novation -- I don't know how Ms. Bekele

20   characterized the whole thing. I call it

21   a reprimand.

22   So you are saying here ICANN didn't

23   do anything, ICANN is a virgin. But I

24   hear from the other side, that, in fact,

25   ICANN did a number -- again, the

1   impression I get -- and I hope you

2   understand my point. I'm trying the best

3   I can to be fair myself.

4   And, therefore, what I'm hearing is

5   every single step may not -- as of

6   itself, if it were isolated, may not be

7   of such a nature to actually trigger a

8   problem for ICANN, but it's the

9   accumulation of everything, the fact that

10   DCA has not been called to certain

11   meetings where they should have been

12   called, the way they have been treated,

13   the fact that -- I mean, I have not heard

14   from you -- of course, we have asked you

15   a lot of questions, so you were not

16   able -- but that is the one question I

17   would like you to address.

18   Madam Bekele said yesterday that

19   even ZACR didn't have the proper support.

20   So why is ZACR treated one way and

21   DCA is treated another way?

22   MR. LEVEE: It is in the slides, but

23   let me -- let me respond to the one thing

24   about ICANN going to Africa with a

25   proposal.

1   I also heard the testimony

2   yesterday. If we were in a court of law,

3   as you know, none of that testimony gets

4   admitted. It's entirely hearsay.

5   I have no way of challenging it.

6   There's not a single piece of paper that

7   anyone has produced -- not in our files,

8   and DCA didn't produce it -- that says

9   that ICANN, in the fall of 2011, went to

10   Africa and said, Here's how you do it,

11   you get a reserve name.

12   All I know is that when the AUC

13   asked ICANN formally to reserve the name,

14   ICANN said no.

15   So I'll be candid. That testimony

16   is very puzzling to me. I, personally,

17   have no basis to credit it because

18   there's not any corroborating evidence --

19   PRESIDENT BARIN: But --

20   MR. LEVEE: -- and even if it

21   occurred, what I don't know is did

22   ICANN -- like, when Mr. -- when

23   Dr. Crocker, Chairman of the Board of

24   ICANN, writes a nine-page letter to the

25   African Union answering all of their

 1   requests, not giving them what they want,

 2   but telling them a bunch of other things,

 3   that letter is 100 percent accurate.

 4   What I don't know is if there was a

 5   meeting of people who I never met -- so I

 6   don't know who they are, other than the

 7   possibility that someone from the AUC

 8   then reported it -- I don't know if that

 9   person from the AUC was at the meeting,

10   but then they reported it, apparently, to

11   Ms. Bekele -- I don't know if the same

12   basic presentation wasn't given, which

13   is, if Africa wants to have a name, there

14   are ways of going about doing that, which

15   would have been a completely factually

16   based presentation.

17   I simply don't know.

18   What I do know is this: There's no

19   reason that one particular applicant

20   should be the only applicant. Ms. Bekele

21   acknowledged that there was nothing

22   improper for the AUC to sponsor ZACR for

23   their application. And I don't know -- I

24   just -- I don't understand why that

25   alleged event causes anyone to feel that

1   something happened that was unfair.

2   If ICANN communicated factually, we

3   have a New GTLD Program. It's about

4   to -- our application window is about to

5   open. If you are interested, we're happy

6   to come talk to you.

7   What's wrong with that?

8   Nothing.

9   So I also hear --

10   ARBITRATOR KESSEDJIAN: Do you do

11   that with all applicants?

12   MR. LEVEE: Any applicant that

13   wanted information, absolutely. People

14   ask questions of ICANN -- ICANN provided

15   a ton of information in addition to the

16   Guidebook.

17   ARBITRATOR KESSEDJIAN: Do you meet

18   with potential applicants?

19   MR. LEVEE: ICANN would -- I don't

20   remember meetings.

21   There were -- I don't attend. I

22   know Amy is not -- my understanding is

23   that anyone that had questions about the

24   application process, a letter to apply,

25   did, in fact, and was encouraged to, meet

 1   with ICANN.

 2   And, in fact, some of the senior

 3   officials of ICANN went all over the

 4   world explaining to people what this

 5   program was. There was a whole

 6   communications program that ICANN adopted

 7   to let people know about this program,

 8   because they wanted people to apply.

 9   And ICANN has gotten some prominence

10   now, but back in 2011, nobody knew

11   anything about ICANN. So it was trying

12   to get people aware of this opportunity.

13   And if ICANN went to Africa and said

14   to people in those countries that they

15   have the ability to apply for a domain

16   name, including .africa, that would have

17   been a good thing, not a bad thing.

18   PRESIDENT BARIN: I'm very mindful,

19   Mr. LeVee, that you have to -- that

20   you've got slides that you want to go

21   through.

22   So, please, do you want to take a

23   few minutes to gather your thoughts or

24   just go?

25   MR. LEVEE: No; I'm fine.

 1   I'm fine. Let's keep moving.

 2   PRESIDENT BARIN: I do want you to

 3   get to the end of your --

 4   MR. LEVEE: Yeah.

 5   HONORABLE JUDGE CAHILL: Sorry. But

 6   we're clear that the authority that we

 7   have not the ability to review the GAC is

 8   in the slides you gave us, right?

 9   MR. LEVEE: Yes.

10   So this provision and the previous

11   slide, that's the authority that says you

12   look at what the Board has done, and then

13   it says here, The IRP Panel must apply a

14   defined standard review to the IRP

15   request focusing on -- and then those --

16   the three things that I'm not going to

17   read in full.

18   Then -- and, Professor Kessedjian,

19   you asked, Well, what about Paragraph 11,

20   a little bit farther down, which says,

21   The IRP Panel shall have the authority

22   to: c., declare whether an action or

23   inaction of the Board was consistent

24   [verbatim] with the Articles of

25   Incorporation or Bylaws --

 1   ARBITRATOR KESSEDJIAN: That was the
 2   Chair.
 3   MR. LEVEE: Oh, it was the Chair.
 4   My apology.
 5   -- and the answer is absolutely,
 6   there's no inconsistency. You do have
 7   the ability to declare whether an action
 8   or inaction of the Board was inconsistent
 9   with the Bylaws.
10   What Paragraph 4 is doing is -- we
11   want you to focus on these three things,
12   but you have every right -- if the Board
13   makes a decision, you have every right to
14   declare that decision, in your view,
15   right or wrong, as in consistent or
16   inconsistent with the Bylaws.
17   I'll note that in Paragraph d -- I
18   don't have a slide for this, I
19   apologize -- the Panel -- and by the way,
20   Paragraph 11 is the authority of the
21   Panel, what you have the authority to
22   do --
23   ARBITRATOR KESSEDJIAN: It's
24   Paragraph 11 of the Bylaws?
25   MR. LEVEE: Correct, we're in the

 1   Bylaws. It's Article IV, Section 3.

 2   ARBITRATOR KESSEDJIAN: Yes.

 3   MR. LEVEE: And this is what the

 4   Panel has the authority to do.

 5   You asked Mr. Ali, to come back,

 6   Well, what do you want us to do? This

 7   paragraph tells you what you have the

 8   authority to do.

 9   And in d., it says that you can

10   recommend that the Board stay any action

11   or decision or that the Board take any

12   interim action until such time as the

13   Board reviews and acts upon the opinion

14   of the IRP.

15   I'm not going to get into, today,

16   the question of whether it's binding --

17   your Panel's declaration is binding or

18   not. You've already made a preliminary

19   ruling on that. We don't have to discuss

20   it --

21   HONORABLE JUDGE CAHILL: Yeah,

22   whatever.

23   MR. LEVEE: -- my point is that

24   these are the specific things that the

25   Panel is authorized to do. And I do urge

 1   you to look at Paragraph 11 when you make

 2   the decision.

 3   One other thing that we now have --

 4   HONORABLE JUDGE CAHILL: Let me

 5   ask -- sorry -- Mr. Ali makes the

 6   argument that there's an obligation in

 7   the Bylaws of ICANN for transparency,

 8   accountability, fairness and equitable

 9   treatment.

10   Does that apply to the GAC?

11   MR. LEVEE: No.

12   I think the GAC tries to do all of

13   those things, but I don't think it's

14   bound to do any of those things.

15   HONORABLE JUDGE CAHILL: Okay.

16   MR. LEVEE: We have a declaration

17   that another IRP Panel made in March.

18   And I don't view any IRP decision as

19   binding, but the Articles do say that

20   they are -- that they do provide

21   precedent and -- much like developing

22   case law.

23   We have a decision in the

24   Booking.com matter, and, basically, what

25   it says that it's not for the Panel to

1   opine on whether the Board could have

2   acted differently. The IRP Panel's role

3   is to assess whether the actions of the

4   Board were consistent with the applicable

5   rules found in the Bylaws -- Articles,

6   Bylaws and Guidebook. Nor, as stated, is

7   it for us to purport to appraise the

8   policies and procedures established by

9   ICANN in the Guidebook.

10   And my point here is simply, it's

11   easy to second-guess anything that's in

12   the Guidebook and wish that something was

13   done differently. Indeed, the

14   Booking.com Panel raised questions for

15   ICANN to look at for the next Guidebook.

16   And there will be another one some -- a

17   few years for the next round.

18   But the Panel made it clear, We're

19   going to look at the current Guidebook;

20   we're going to look at ICANN's conduct

21   vis-a-vis the current Guidebook.

22   And all I would ask this Panel is to

23   do the same.

24   PRESIDENT BARIN: Can I then maybe

25   stop you for a second?

 1   MR. LEVEE: You can stop me anytime.

 2   PRESIDENT BARIN: I did take the

 3   time to read, at your suggestion,

 4   particularly when you introduced it at --

 5   as an exhibit, if you will, in this case,

 6   this very paragraph in the Booking.com

 7   case.

 8   I would need your help, Mr. LeVee,

 9   to reconcile the bold sentence that you

10   have put there that says, In other

11   words -- well, I think you have to start

12   from That -- that -- That being said, we

13   also agree with ICANN to the extent that

14   in determining the consistency of Board

15   action with the Articles, Bylaws and

16   Guidebook.

17   Now, an IRP Panel is neither asked

18   to, nor allowed to. The "asked to," I

19   understand.

20   The "nor allowed to substitute its

21   judgment for that of the Board," in other

22   words, it is not for the Panel to opine

23   on whether the Board could have acted

24   differently than it did, how would you

25   then reconcile that with 11.c. of the

 1   Bylaws, which says, to you, The IRP shall

 2   have the -- the authority to declare

 3   whether an action or inaction of the

 4   Board was consistent or inconsistent with

 5   the Articles of Incorporation or Bylaws?

 6   MR. LEVEE: I think they say exactly

 7   the same thing.

 8   PRESIDENT BARIN: So do you agree

 9   that the Panel can decide whether there

10   was an action or inaction?

11   MR. LEVEE: Oh, absolutely.

12   PRESIDENT BARIN: Okay. I don't get

13   quite the same thing, then, from what the

14   Booking.com, the bolded sentence --

15   MR. LEVEE: What I think the Panel

16   in Booking was saying is that the

17   applicant in Booking said, We think

18   that -- it was a string similarity case.

19   ICANN had a vendor that determined that

20   .hotels, H-O-T-E-L-S, and .hoteis,

21   H-O-T-E-I-S, were so similar that they

22   should not be both put into the Internet

23   root.

24   Booking did not like the process

25   that the Guidebook had established for

 1   the string similarity test. And Booking

 2   said, You know, we have our own expert,

 3   and he comes to a different conclusion.

 4   What the Panel said was, We're not

 5   going to opine as to whether the Board

 6   could have set up things differently or

 7   whether, in this instance, the Board

 8   could have done something differently.

 9   In that case, the Board didn't even

10   review the decision. String similarity

11   Panel said, These two are two confusingly

12   similar. And under the Guidebook, it's

13   automatically disqualifying for both.

14   One of them will get to proceed, but not

15   both.

16   So there was, actually, not even

17   Board action. But what Booking was

18   arguing -- that's the reason for the

19   language -- Booking was saying, You

20   should find that the process that the

21   Board established was inconsistent with

22   the Bylaws.

23   And the Panel said, No, we're not

24   going to second-guess what the Board did.

25   You could -- you could have set it up

1   differently, but the way you set it up

2   was consistent with the Guidebook and the

3   Articles and the Bylaws.

4   PRESIDENT BARIN: Yeah. And I guess

5   the point is that a Panel is entitled to

6   do that. But when you look at a

7   situation objectively, what I was trying

8   to point out to you is that 11.c., for

9   example, says that the Panel can decide

10   whether there was an inaction on the

11   Board -- on the part of the Board,

12   "inaction" meaning it could have done

13   things differently.

14   MR. LEVEE: I see what you're --

15   you're focusing on the word "inaction"?

16   PRESIDENT BARIN: Right.

17   MR. LEVEE: I understand.

18   If -- if you think, in this

19   instance, that the Board had a duty to do

20   something and it didn't, then I think

21   that is an inaction.

22   We've had difficulty with the word

23   "inaction" over the years because there

24   are frequently situations where people

25   write letters to ICANN, I'm unhappy, my

 1   domain doesn't work, and ICANN does

 2   nothing, because it's not something ICANN

 3   does. It doesn't deal with people whose

 4   computers don't work.

 5   And people say, We're going to

 6   initiate an IRP, it's a Board inaction.

 7   We say No, No. It's not a Board

 8   inaction, because there's no duty to act.

 9   Here, I agree, the word "inaction"

10   is in the Bylaws, and if you find an

11   inaction where you felt there was an duty

12   to act, then I think you have

13   the -- the -- the legal ability under the

14   Bylaws to so say.

15   PRESIDENT BARIN: Thank you.

16   MR. LEVEE: Okay. So here's what

17   I'm going to do: I'm going to cut this

18   short by doing it this way:

19   I'm not going to discuss -- I will

20   explain to you what I'm going to do. I

21   had -- at the back of the opening -- of

22   my closing exhibit slides, I repeated the

23   five assumptions that I made, and then I

24   consolidated my responses to them.

25   I'm not going to cover that. Some

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 1        of them I've already done.

 2             I'm going to leave you -- you guys

 3        are reading everything --

 4             ARBITRATOR KESSEDJIAN:  We have --

 5        we have it.

 6             MR. LEVEE:  -- you have it.  You can

 7        look at it.

 8             PRESIDENT BARIN:  That I can assure

 9        you, we do read and have read --

10             MR. LEVEE:  It's clear --

11             PRESIDENT BARIN:  -- everything that

12        you've given us --

13             MR. LEVEE:  -- it's clear.

14             HONORABLE JUDGE CAHILL:  --

15        especially here.

16             MR. LEVEE:  -- what I do want to

17        do is -- and I will do this briefly -- go

18        to DCA's opening Slide 9.

19             So, again, just as a reminder, DCA's

20        opening Slide Number 9 was the slide that

21        is entitled Summary of ICANN's Actions in

22        Breach of the Bylaws.

23             HONORABLE JUDGE CAHILL:  That

24        Number 5 -- oh, their 9.

25             MR. LEVEE:  Their Number 9.
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 1            PRESIDENT BARIN:  I'm not following

 2       you.

 3            Hold on one second.

 4            MR. LEVEE:  It's from yesterday,

 5       their opening, their Slide Number 9.

 6            You don't even have to go find it --

 7       it's Slide 9.

 8            ARBITRATOR KESSEDJIAN:  That's

 9       DCA's, not ICANN's?  DCA's?

10            MR. LEVEE:  Yeah, DCA's.

11            This is what Mr. Ali and his

12       colleagues allege were the breaches --

13            PRESIDENT BARIN:  Right.

14            MR. LEVEE:  -- and I just want to go

15       through those.

16            So if you turn to the next slide,

17       Slide 6, right at the top, I'm repeating,

18       at the top, so DCA, colon, this is what

19       they say on Slide 9 --

20            ARBITRATOR KESSEDJIAN:  It's each of

21       the bullets --

22            MR. LEVEE:  Correct, the --

23            ARBITRATOR KESSEDJIAN:  -- of DCA's

24       slides --

25            MR. LEVEE:  Correct.
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 1   ARBITRATOR KESSEDJIAN: -- so this

 2   is Slide 9, first bullet?

 3   MR. LEVEE: Correct.

 4   PRESIDENT BARIN: Sorry. Just one

 5   minute.

 6   Can you help me? I'm not following.

 7   HONORABLE JUDGE CAHILL: Here.

 8   ARBITRATOR KESSEDJIAN: You take

 9   Slide 9 of DCA of the -- of the opening?

10   HONORABLE JUDGE CAHILL: The

11   opening?

12   ARBITRATOR KESSEDJIAN: Okay. Got

13   it.

14   So each bullet is the title of --

15   PRESIDENT BARIN: Great. Thank you.

16   MR. LEVEE: Okay.

17   I'll run through these fairly

18   quickly because, to some degree, I think

19   I've already done it.

20   The first allegation of the Bylaws

21   breach was that the Board directed the

22   AUC on using the GAC to quash DCA's

23   competing application.

24   I've already told you and Ms. Dryden

25   told you that ICANN has no authority over

 1   GAC membership.

 2   By the way, we were requested to

 3   produce, and we did produce, every

 4   communication between the GAC relating in

 5   any way to the AUC, relating in any way

 6   to .africa. There is no evidence of some

 7   correspondence or conspiracy.

 8   The only evidence was Dr. Crocker's

 9   letter, Exhibit C-24.

10   I'm not going to go through it.

11   It's on the next slide.

12   The guts of the letter say, you want

13   to reserve .africa. You can't. But the

14   countries of Africa can have significant

15   influence over the outcome. Of course,

16   they could. Any string that was going to

17   be named Africa had to have support of

18   60 percent of the governments.

19   Now, Dr. Crocker did not say, Go

20   join the GAC. He did not say, And when

21   you do, you can issue -- get the GAC to

22   issue consensus advice.

23   It's not in the letter, and there's

24   no evidence of any other communication

25   saying the same.

 1   So I skipped the next slide because

 2   that was just discussing the letter.

 3   Second, DCA alleges as a breach that

 4   the NGPC failed to investigate the many

 5   overt indications that the GAC advice was

 6   not consensus advice.

 7   I think I covered this in some

 8   considerable amount in answers to earlier

 9   questions. But Ms. Dryden told you how

10   consensus advice works.

11   You may not like that. You may wish

12   that the -- that the people had to speak

13   at length before consensus advice would

14   be issued. But the GAC has a process,

15   and the process worked.

16   Redacted - GAC Designated Confidential Information

24   Now, if you turn to the next slide,

25   Section 3.1 of the Guidebook provides

 1   that the GAC advice is intended to

 2   address applications that are identified

 3   by governments to be problematic, e.g.,

 4   that potentially violate national law or

 5   raise sensitivities.

 6   The Panel had questions yesterday as

 7   to what that means, problematic,

 8   violating national law, raising

 9   sensitivities.

10   Now, the GAC advice can be raised

11   with respect to any application that a

12   government, for whatever reason, deems

13   problematic. We've heard that there are

14   no restrictions for which GAC advice may

15   be issued.

16   And the GAC is not required to

17   provide a rationale.

18   But we know something else. We know

19   that 16 individual African governments

20   had issued Early Warning notices. And in

21   those notices, they said they want

22   .africa to be managed by the AUC for the

23   benefit of the African region.

24   That was the reasons that they gave

25   for issuing the Early Warning notices,

 1   and that clearly falls within the

 2   sensitivities that would be perfectly

 3   appropriate for the GAC to issue

 4   consensus advice.

 5   Now, as Ms. Dryden explained, the

 6   GAC doesn't give a rationale. There's no

 7   appendix. So it -- it doesn't feel that

 8   it has to do that.

 9   But we know that the governments,

10   themselves, that issued the

11   Early Warnings, they very much had a

12   rationale.

13   Finally -- you have to turn to the

14   next slide -- DCA, in the opening

15   statement, says that the NGPC failed to

16   investigate these indications and that

17   the Committee itself should have done

18   more.

19   Let's be clear that when the -- when

20   ICANN's Board received the consensus

21   advice, it created a, quote/unquote,

22   strong presumption that DCA's application

23   should not proceed.

24   The New gTLD Committee acted in

25   accordance with the Bylaws; it acted in

1   accordance with the Guidebook; it

2   reviewed the materials that Ms. Bekele

3   submitted; and it made a decision.

4   Now, the Guidebook also says that

5   the Board may consult with an independent

6   expert. And DCA has argued that we

7   should have. I get that.

8   But nothing an independent expert

9   would have done here would have addressed

10   DCA's main concern, which was that they

11   did not think the consensus advice, in

12   fact, was consensus.

13   No independent expert, somebody who

14   didn't even attend the meeting, could

15   have shed light on that issue.

16   So where the Board has discretion

17   whether to retain an expert, the failure

18   to do so in an instance where the

19   applicant can't even tell you what

20   exactly the expert could have shed light

21   on can't possibly be a violation of the

22   Guidebook.

23   The next bullet in the opening was

24   that ICANN Staff improperly coordinated

25   with the Geo Names Panel.

 1   First, we haven't heard any

 2   connection to the Board on this, only

 3   that the Staff interacted, but let's get

 4   past that.

 5   The evidence presented by DCA

 6   actually disproves the notion that ICANN

 7   coordinated with the AUC with respect to

 8   .africa.

 9   If there was coordination, surely,

10   ICANN would have said right at the outset

11   that the AUC's support was sufficient for

12   60 percent name -- 60 percent support

13   requirement. Instead, there was a lot of

14   back-and-forth, by the way, applied to

15   both applicants.

16   Why? Because DCA had submitted the

17   2009 letter of support, even though that

18   support had been withdrawn.

19   There was great confusion as to who

20   AUC was supporting. So, yes, it did take

21   a long time to sort out who we're going

22   to talk to, what we're going to ask and

23   what we're going to accept.

24   If the AUC's support had been

25   counted right off the bat, the AUC's

 1   endorsed candidate, ZACR, would have

 2   passed the Geo Names review almost

 3   immediately. And, by the way, DCA would

 4   have then failed at that same time.

 5   Instead, the process was -- took a

 6   long time. By the way, ICANN received

 7   1930 applications. They weren't staffed

 8   to be prepared to process that many, and

 9   it did take a long time to evaluate.

10   DCA argued (but provided no actual

11   evidence) that ICANN received the ICC's

12   recommendation to count the AUC's

13   endorsement only after the GAC advice was

14   accepted by ICANN's Board.

15   We have already given to you in our

16   briefs -- and this is part of the reason

17   I -- I just didn't accept all of these

18   arguments yesterday, because it's

19   literally addressed in two pages of all

20   of the briefing that DCA submitted.

21   We responded in our brief. It's on

22   Page 23. We cite an exhibit, C-R-16, and

23   others. We make it clear that ICANN

24   accepted the ICC's recommendations

25   sometime before April 26, 2013, while

 1   DCA's application was still pending.

 2   So the timing is not nefarious. The

 3   timing is not evidence that we're trying

 4   to support one or the other. The timing

 5   reflects that it takes time.

 6   Moving along. The next bullet

 7   continues that ICANN Staff improperly

 8   coordinated with the Geo Names Panel.

 9   The evidence that you have been

10   provided makes it clear that the Staff

11   expressed concern that both applicants for

12   .africa be treated equally and be given the

13   same opportunity to demonstrate the

14   requisite support.

15   Now, ultimately, this issue then

16   becomes irrelevant for DCA, because the

17   DCA's application didn't proceed once the

18   Board accepts the GAC advice.

19   Nothing that the Geo Names Panel could

20   ever have done would have changed that.

21   Now, I do want to address -- you

22   asked, this morning, the Panel -- there was

23   a reference that you could submit stuff

24   later.

25   And there's two slides in the -- in

1   the closing that Mr. Ali gave you, and I

2   wanted to just note that it's not the case

3   that you could submit your application and

4   then have some unlimited amount of time to

5   go get support of the governments.

6   What these slides were saying -- it

7   says --

8   HONORABLE JUDGE CAHILL: Which ones

9   are they?

10   MR. LEVEE: I'm on 31 and 32 --

11   HONORABLE JUDGE CAHILL: Thank you.

12   ARBITRATOR KESSEDJIAN: Of the

13   closing?

14   MR. LEVEE: -- of Mr. Ali's closing.

15   PRESIDENT BARIN: Sorry.

16   When you say 31 and 32, I have only

17   got Page 27.

18   HONORABLE JUDGE CAHILL: Well, I've

19   got 27.

20   ARBITRATOR KESSEDJIAN: That must be

21   the opening.

22   MR. LEVEE: And you have the

23   opening?

24   PRESIDENT BARIN: No; I have the

25   closing.

 1   HONORABLE JUDGE CAHILL: No. The

 2   closing is Page 27.

 3   MR. LEVEE: I have, at the bottom,

 4   Slide 31.

 5   ARBITRATOR KESSEDJIAN: So that must

 6   be the opening.

 7   MR. LEVEE: My apology. You are

 8   correct. This is the opening.

 9   PRESIDENT BARIN: So it's the

10   opening?

11   HONORABLE JUDGE CAHILL: You were

12   just testing us.

13   MR. LEVEE: I'm testing myself, I

14   think.

15   HONORABLE JUDGE CAHILL: This is

16   what you're talking about (indicating)?

17   PRESIDENT BARIN: We're still alert.

18   MR. LEVEE: Now --

19   HONORABLE JUDGE CAHILL: This one

20   (indicating) is what you're talking

21   about?

22   MR. LEVEE: Correct.

23   HONORABLE JUDGE CAHILL: Okay.

24   MR. LEVEE: -- Slide 31 address a

25   situation where an application for a

 1   string representing a name -- if there's

 2   more than one application, and the

 3   applications have the requisite

 4   government approvals -- so you have a

 5   situation where two applicants each have

 6   the requisite Government approvals.

 7   That's not this case.

 8   The AUC did -- was not endorsing

 9   DCA's application on the day Ms. Bekele

10   submitted it. And although she submitted

11   it, it -- this paragraph has nothing to

12   do with these facts.

13   Only if the two applicants both had

14   the requisite support would you then set

15   it aside.

16   The next page, Slide 32 from the

17   opening yesterday, is the other provision

18   that Mr. Ali said gives me more time --

19   gives DCA more time.

20   This is, again, only in a situation

21   where the applicant has not provided the

22   required documentation. The applicant

23   will be contacted and given additional

24   time.

25   So, as you know, the support letters

1   had to say certain things. The AUC's

2   original support didn't, so, ultimately,

3   it had to be corrected.

4   If an applicant submits

5   documentation, but it's not the required

6   documentation, ICANN said, Look, we're

7   going to give you some more time. You

8   can go have additional time and -- and

9   get us the language that is correct.

10   Again, that's not the issue for DCA.

11   It's not that she had or -- had all of

12   the documentation submitted and the

13   documents were wrong; it's that she did

14   not actually have the support of the

15   governments or the AUC that she said.

16   I'm almost done.

17   PRESIDENT BARIN: You can take your

18   time, Mr. LeVee.

19   MR. LEVEE: The next bullet was

20   the -- DCA argued that the Staff drafted

21   a passing letter of endorsement for

22   ZACR's application.

23   I want to be clear. This was

24   entirely appropriate. There's absolutely

25   nothing wrong with ICANN and an entity

 1   that wants to support an application

 2   working together to write the correct

 3   words.

 4   It sounds -- they make it sound

 5   nefarious, but it's also appropriate if

 6   the entity is struggling to figure out

 7   how to do it.

 8   There's a sample attached to the

 9   Guidebook but nothing untoward.

10   But even more importantly, it just

11   doesn't matter here, because DCA's

12   application had already been stopped.

13   And so it doesn't affect the evaluation

14   of DCA's application.

15   Finally, there's a bullet that says

16   that BGC failed to undertake an

17   independent investigation.

18   I've quoted in this slide the

19   provision of the Bylaws that says what

20   the BGC is supposed to do. It then

21   issued an 11-page recommendation saying

22   that DCA had not met the standard.

23   I want to emphasize one thing.

24   DCA's request for consideration focused

25   on one topic, the Board's decision not to

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 1        get an expert.

 2              DCA's reconsideration did not raise

 3        the GAC advice issue.  It did not raise

 4        the conflict of interest issue.  So there

 5        was nothing for the BGC to do.

 6              DCA said, We want you to reconsider

 7        and, in doing so, we think you ought to

 8        get an expert.

 9              BGC said, No.  You haven't told us

10        what an expert could say.

11              The very last bullet.

12              DCA argued yesterday that the New

13        gTLD Program Committee reviewed and

14        approved its own decision.  And that's

15        what happened, and I want to tell you

16        why.

17              The Bylaws provide that the BGC is

18        to review all reconsideration requests.

19              For reconsideration requests that

20        involve Board action, as opposed to Staff

21        action -- that's what happened here,

22        Board action -- the BGC does not make the

23        final determination; it makes a

24        recommendation to the Board.

25              But something else had happened
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 1   here, which is that the Board had created

 2   the New gTLD Program Committee consisting

 3   of Members who did not have a conflict

 4   relative to the program.

 5   ARBITRATOR KESSEDJIAN: There's so

 6   many acronyms.

 7   MR. LEVEE: Way too many. I can't

 8   keep the acronyms straight.

 9   Why, oh, why would you send the

10   BGC's recommendation to a Board that

11   consisted of people who had declared

12   conflicts?

13   Instead, what -- as Mr. Chalaby

14   testified, the New gTLD Program Committee

15   was delegated all decision-making

16   authority with respect to the program.

17   So the Board resolved that in instances

18   that relate to the New gTLD Program,

19   including Board Governance request

20   recommendations, we're going to send

21   those to the NGPC, because that's the

22   committee that is not conflicted.

23   That's what happened, and that's

24   what should have happened.

25   Now, I'm going to skip to my

 1   conclusion.

 2   So all the other slides that I had

 3   addressing DCA's assumptions, you can

 4   read them separately. But it's a summary

 5   of what I said yesterday and the accuracy

 6   of those things.

 7   So here's the conclusion slide.

 8   You can look at it in your book.

 9   ARBITRATOR KESSEDJIAN: That's okay.

10   MR. LEVEE: DCA had five assumptions

11   --

12   PRESIDENT BARIN: Are you on

13   Page 33?

14   MR. LEVEE: Pardon me?

15   PRESIDENT BARIN: Are you on

16   Page 33?

17   MR. LEVEE: I am on Page 33.

18   PRESIDENT BARIN: Okay.

19   MR. LEVEE: -- each of DCA's

20   assumptions is false. The evidence

21   yesterday confirmed that.

22   None of the purported breaches

23   identified by DCA that I just went

24   through represent Board action that

25   violated the Articles, the Guidebook or

1   the Bylaws.

2   The AUC was entitled to sponsor an

3   application for .africa. And that's

4   where all of this goes sideways for

5   Ms. Bekele, and I understand that.

6   And it can be argued whether that

7   was fair to her or not, but it had

8   nothing to do with ICANN.

9   ICANN didn't say, Oh, there's --

10   Ms. Bekele is doing something here, and

11   you should go trump her.

12   The AUC made an independent decision

13   to sponsor an application for .africa.

14   And they were entitled to do that, as

15   Ms. Bekele confirmed when she testified.

16   Nothing in the Guidebook says that

17   that sponsorship created a conflict of

18   interest or, at that point, relieves any

19   of the parties who are applying from the

20   requirement that they get 60 percent of

21   the support of the countries.

22   Whether the outcome is fair is truly

23   not the issue. Many applicants have

24   devoted years to this process but did not

25   obtain a gTLD.

 1   DCA knew the risks, knew in

 2   April 2010 that it had lost the AUC

 3   support and knew that it did not have

 4   support of 60 percent of the governments

 5   of Africa.

 6   It also knew that its application

 7   could be the subject of GAC advice. It

 8   was right there in the Guidebook.

 9   ICANN took no actions to tilt the

10   "playing field" -- I put it in quotes

11   because that's what Mr. Ali said in his

12   opening -- in favor of AUC or ZACR.

13   ICANN followed the rules.

14   The outcome may seem unfair to the

15   applicant, but it does not create conduct

16   inconsistent with the Bylaws.

17   I don't know if I've exhausted you.

18   I have myself. But if you have other

19   questions, I'd be more than prepared.

20   The only other thing I wanted to say

21   is I know Mr. Ali is going to tell you

22   now specifically what he seeks. And

23   there were a couple of other questions.

24   I may wish to reserve three or four

25   minutes to respond.

 1   Other than that, I don't have

 2   anything else.

 3   PRESIDENT BARIN: Absolutely,

 4   Mr. LeVee.

 5   HONORABLE JUDGE CAHILL: I do have

 6   one question.

 7   MR. LEVEE: Oh, okay.

 8   HONORABLE JUDGE CAHILL: Yesterday,

 9   I asked you about constituent bodies,

10   including the GAC --

11   MR. LEVEE: Yes.

12   HONORABLE JUDGE CAHILL: -- and in

13   the closing argument I got from Mr. Ali,

14   there's a Page 9 that quotes it, and they

15   say this -- they argued your answer to be

16   yes, the GAC is a constituent body.

17   Your first answer was, Yeah. Okay.

18   Then what you talked about -- what

19   you then said was that Independent Review

20   Proceedings don't apply to GAC --

21   MR. LEVEE: Yes.

22   HONORABLE JUDGE CAHILL: -- so is

23   GAC a constituent body or --

24   MR. LEVEE: GAC is a constituent

25   body.

 1   HONORABLE JUDGE CAHILL: So why

 2   wouldn't it apply to the --

 3   MR. LEVEE: The -- the GAC set up

 4   its own operating principles. And so

 5   it -- I'm not saying that the -- maybe I

 6   said it inartfully before. I'm not

 7   saying that -- where the Guidebook refers

 8   to the constituent bodies and their

 9   obligations, that those don't apply to

10   the GAC; they do.

11   The -- what I'm saying is that the

12   Board has no mechanism to determine,

13   verify things that are happening in the

14   GAC so that -- to know whether the GAC

15   has done something right or wrong or

16   otherwise.

17   So the GAC -- the GAC is supposed to

18   have -- operate neutrally, operate

19   fairly, all those things.

20   The GAC, because it's a political

21   body, set up its own rules. And I think

22   it does a -- an excellent job, but it

23   is --

24   HONORABLE JUDGE CAHILL: So if that

25   is part of the ICANN Bylaws, why wouldn't

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 1         the -- this Panel be able to look and see

 2         whether the GAC, as a constituent body,

 3         was feasible, open and transparent?

 4              MR. LEVEE:  Because the IRP process,

 5         which is defined in a different section,

 6         lays out what the purpose of the Panel

 7         is, which we went over.

 8              HONORABLE JUDGE CAHILL:  Okay.

 9              MR. LEVEE:  So, yeah, there are

10         multiple constituent bodies within

11         ICANN --

12              HONORABLE JUDGE CAHILL:  Okay.

13              MR. LEVEE:  -- none of the conduct

14         of -- you know, I gave you one of them,

15         which was the Generic Names Supporting

16         Organization, which came up with the

17         policy for this whole thing, the whole

18         program.

19              We've never had an IRP challenging

20         something that they do; it's only Board

21         action.

22              HONORABLE JUDGE CAHILL:  Okay.

23              PRESIDENT BARIN:  Just before you

24         go, Mr. LeVee -- but I think you also

25         told us there is nothing there; in other
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1   words, there's no process in place that

2   can, in any way, examine or evaluate what

3   the GAC does. In other words, the GAC

4   can do whatever it wants to do and

5   however it wants to do it.

6   MR. LEVEE: I think that's fair.

7   PRESIDENT BARIN: Is that a fair

8   statement?

9   MR. LEVEE: Yes, yes. That's why I

10   said -- I think that's right.

11   ARBITRATOR KESSEDJIAN: Then how do

12   you explain that the Chair of the GAC is

13   a liaison? If you -- if ICANN has felt

14   important to have a liaison, to have

15   somebody from the GAC who is not anybody

16   from the GAC, it's the Chair, she is the

17   one who organizes the meetings, who makes

18   sure the agenda is what the agenda is.

19   So how -- are you saying -- why and

20   how can you say that the Board doesn't

21   have the means to review?

22   MR. LEVEE: What I'm saying is -- so

23   there are five liaisons to the -- to the

24   Board, not just the GAC Chair.

25   The GNSO has a liaison, all of the

 1   supporting organizations have liaisons --

 2   ARBITRATOR KESSEDJIAN: The

 3   committees.

 4   MR. LEVEE: -- it's the means of

 5   liaisoning -- that's probably not a right

 6   word -- liaise? -- what I'm saying is

 7   that the Board does not have the -- the

 8   power to say to the GAC, You must do

 9   something --

10   ARBITRATOR KESSEDJIAN: No; but,

11   remember, it is only a presumption the --

12   the decision taken by the GAC is only a

13   presumption. We are lawyers, so let's be

14   clear on what it is.

15   Yes, it is a strong presumption, but

16   it's still a presumption --

17   MR. LEVEE: Yes, I agree.

18   ARBITRATOR KESSEDJIAN: -- so the

19   Board -- because the Board has the

20   authority not to accept the GAC's advice,

21   it seems, to me -- and because the Chair

22   is here in the room, it seems, to me,

23   that the Board has the possibility to

24   review what the GAC has done.

25   MR. LEVEE: Oh, if I left a

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 1        different impression than that, I

 2        apologize.

 3              ARBITRATOR KESSEDJIAN:  You agree

 4        with me?

 5              MR. LEVEE:  I agree with you,

 6        absolutely.  The Board can review what

 7        the GAC did; the Board can ask questions;

 8        the Board can say, GAC, we need more

 9        clarity --

10              ARBITRATOR KESSEDJIAN:  Okay.

11              MR. LEVEE:  -- the Board can do all

12        of that.

13              And it can ask Ms. Dryden, We're a

14        little confused.  Can you tell us what

15        happened at the meeting?  The Board has

16        the ability to do all of that.

17              ARBITRATOR KESSEDJIAN:  And then

18        refuse the advice?

19              MR. LEVEE:  And in the past, the GAC

20        has done certain things, and the Board

21        said, You know what, we don't really like

22        that; we're not going to do it.

23              Even when the Guidebook was being

24        prepared, the GAC took multiple positions

25        of things that it wanted, and ICANN said,
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 1   No, we're not going to give that to you.

 2   So what happened was there were

 3   meetings -- Ms. Stathos was at a lot of

 4   them -- there were meetings where they

 5   tried to sort it out, but the GAC would

 6   say things, and the Board would say, I

 7   don't really like that.

 8   PRESIDENT BARIN: Before you leave,

 9   there's just one last question.

10   Is it also possible for the Board to

11   do that as part of the reconsideration

12   process?

13   MR. LEVEE: To do?

14   PRESIDENT BARIN: To, in other

15   words, look at an application or an issue

16   that's come up through the GAC, for

17   example?

18   MR. LEVEE: The reconsideration

19   process is much narrower under the

20   Bylaws. It is -- because they don't

21   want -- every time someone has a decision

22   made at the Board level, they don't want

23   people basically appealing that decision.

24   So the reconsideration process was

25   intentionally designed under the Bylaws.

 1   We've put up the specific Bylaw. It was

 2   internally designed to be much narrower,

 3   where there are things you could have

 4   said, things that you could have done,

 5   things that you know the Board should

 6   have looked at but didn't.

 7   So it's a much narrower nature of

 8   review.

 9   PRESIDENT BARIN: Understood, in

10   terms of explanation.

11   But in terms of the process, is it

12   possible that -- is it possible for a

13   reconsideration application to review

14   what the GAC has done?

15   MR. LEVEE: I don't believe so --

16   PRESIDENT BARIN: Okay.

17   MR. LEVEE: -- it's very

18   hypothetical, but it -- yeah.

19   PRESIDENT BARIN: Hypothetically, I

20   ask, because if you look at the

21   reconsideration provisions, which, again,

22   I looked at carefully because it is part

23   of the accounting and review process

24   here, it says to you, The Board has

25   designated the Board Governance Committee

 1   to review and consider any such

 2   reconsideration requests. The Board

 3   Governance Committee shall have the

 4   authority to conduct whatever factual

 5   investigation is deemed appropriate.

 6   MR. LEVEE: Yes.

 7   PRESIDENT BARIN: So, to me, that

 8   seems that if the Board considers that

 9   perhaps something isn't done, should --

10   should have been done or could have been

11   done differently, or whatever else, it's

12   part of that process.

13   MR. LEVEE: Within the defined

14   standard of the mandate of the Board

15   Governance Committee, absolutely, they

16   have the right to go figure out what

17   happened.

18   PRESIDENT BARIN: So in this case,

19   could they have if they wanted to?

20   MR. LEVEE: They weren't asked to,

21   and that was part of the -- the -- it was

22   important. They weren't asked to find

23   out anything about the GAC advice. They

24   weren't asked to look into the conflict

25   issue. They were asked why didn't the

 1   Board hire an expert.

 2   PRESIDENT BARIN: And who would have

 3   had to ask that?

 4   MR. LEVEE: The applicant, DCA.

 5   HONORABLE JUDGE CAHILL: Sorry.

 6   That raises one more.

 7   You know, we have the issue about

 8   the conflict, and the -- and the

 9   ombudsman said at the time that there's

10   been no discussion about .africa;

11   therefore, at this time, there's no

12   conflict.

13   And we had this discussion yesterday

14   about the new fact, where the .africa

15   comes in and it starts being discussed by

16   the people who -- and objected to.

17   Whose responsibility would it be

18   then to check to see at that time whether

19   or not there was a conflict or not?

20   It could be you-all, because you

21   have this higher standard, or it could be

22   you don't respond unless the applicant

23   asks you to.

24   But if it turns out that when they

25   start talking about it, then it's got to

 1   be reevaluated again, doesn't it?

 2   MR. LEVEE: The -- the -- there are

 3   two things going on simultaneously: One

 4   is that each Board member is supposed to

 5   be updating his forms --

 6   HONORABLE JUDGE CAHILL: Yes.

 7   MR. LEVEE: -- and the second is

 8   that if an applicant is concerned, the

 9   applicant is supposed to be saying

10   something.

11   HONORABLE JUDGE CAHILL: All right.

12   And they -- okay.

13   So they say something, and it's

14   clearly --

15   MR. LEVEE: They said something in

16   2012.

17   HONORABLE JUDGE CAHILL: Yeah.

18   But -- yeah, but -- you know, I'm not

19   sure whether there's an actual conflict.

20   Perceived conflict is a much more squishy

21   concept, but it's kind of determined by

22   outside people sometimes --

23   MR. LEVEE: Yeah.

24   HONORABLE JUDGE CAHILL: -- but when

25   the time came to look at the perceived

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 1          conflict later, nobody asked you to do

 2          it, and you don't feel as though there

 3          was any obligation for the ombudsman or

 4          anyone else to look at that?

 5               MR. LEVEE:  The ombudsman usually

 6          only acts in response to a complaint.  He

 7          doesn't initially investigate --

 8               HONORABLE JUDGE CAHILL:  So DCA

 9          should have made a new complaint?

10               MR. LEVEE:  Yes.

11               Now, you know, we -- I skipped over

12          this whole part because -- not in the

13          slides, but the -- what we have in this

14          situation is that because of the way it

15          came up, where there was a speech,

16          somebody thanked Mr. Disspain and

17          Mr. Sadowsky, and another Board member

18          said, Hey, shouldn't we just reconfirm

19          this?

20               HONORABLE JUDGE CAHILL:  Yeah.

21               MR. LEVEE:  There was a very

22          extensive process.  We can debate the

23          nature of the investigation and whether

24          more or less should have been done --

25               HONORABLE JUDGE CAHILL:  Yeah.
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 1   MR. LEVEE: -- but there was a very

 2   extensive process that was done at that

 3   time, all knowing that the Board's

 4   approval was unanimous.

 5   But even so, they wanted to check,

 6   because if there were people conflicted,

 7   those people should not be voting.

 8   HONORABLE JUDGE CAHILL: I

 9   understand that.

10   I'm not worried about the second

11   one. That seems, to me, like it was

12   handled properly.

13   MR. LEVEE: The conflicts policy

14   does not really address your scenario of

15   how this came up --

16   HONORABLE JUDGE CAHILL: Okay.

17   Right.

18   MR. LEVEE: -- it did come up in

19   some way as happenstance, but the Members

20   were asked twice, once at the meeting and

21   then once at the next meeting.

22   HONORABLE JUDGE CAHILL: It only

23   came up once for Mr. Silber. That was

24   the first time.

25   The second time, Mr. Silber was not

1   one of the two people in the statement

2   that was made at the meeting, so

3   Mr. Silber was not looked at a second

4   time.

5   But even though --

6   MR. LEVEE: Actually, Mr. Chalaby

7   said that he was.

8   HONORABLE JUDGE CAHILL: That's

9   right, he did say that. Yep.

10   MR. LEVEE: Because he had been part

11   of the first challenge.

12   HONORABLE JUDGE CAHILL: That was

13   for an actual conflict, not a perceived

14   conflict?

15   MR. LEVEE: Well, they knew there

16   had been a challenge to Silber and

17   Disspain.

18   HONORABLE JUDGE CAHILL: They knew

19   that it was one day --

20   MR. LEVEE: Earlier.

21   HONORABLE JUDGE CAHILL: -- yeah,

22   one day earlier.

23   MR. LEVEE: So they looked at Silber

24   and Disspain again. That's what Mr.

25   Chalaby testified.

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 1              HONORABLE JUDGE CAHILL:  I know.  He

 2      looked at them for actual conflicts, it

 3      sounded to me, not for perceived

 4      conflicts.

 5              MR. LEVEE:  That's not how I heard

 6      it.

 7              HONORABLE JUDGE CAHILL:  Okay.

 8      Well, it's all there in pixel form.

 9              By the way, I have no more

10      questions.

11              MR. LEVEE:  Thank you very much.

12              PRESIDENT BARIN:   Thank you,

13      Mr. LeVee.

14              How much --

15              MR. ALI:  Five minutes.

16              PRESIDENT BARIN:  Five minutes?

17              MR. ALI:  Yes.

18              PRESIDENT BARIN:  Do we need a

19      break, perhaps?

20              ARBITRATOR KESSEDJIAN:  If it is

21      five minutes.

22              HONORABLE JUDGE CAHILL:  It's not

23      going to be five minutes when we ask

24      questions.

25              MR. ALI:  We can take a break
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 1          and . . .

 2                  PRESIDENT BARIN:  Do you need a

 3          break?

 4                  HONORABLE JUDGE CAHILL:  I'm fine.

 5                  PRESIDENT BARIN:   So let's

 6          continue.

 7                  HONORABLE JUDGE CAHILL:  The one

 8          thing I need to hear is what your

 9          response to we have no authority as this

10          Panel to look at the -- the GAC conduct.

11                  MR. ALI:  That was going to be my

12          second --

13                  HONORABLE JUDGE CAHILL:  Let me be

14          quiet and let you do your job.

15                  MR. ALI:  Your wish is my command.

16                  HONORABLE JUDGE CAHILL:  No.

17                            -  -  -

18  CLOSING STATEMENT (CONTINUED) ON BEHALF OF CLAIMANT

19                  DOTCONNECTAFRICA TRUST

20                            -  -  -

21                  MR. ALI:  So we had Mr. LeVee,

22          yesterday and today, confirm that the GAC

23          is a constituent body of ICANN.  So that

24          is now uncontroversial.

25                  The -- the second thing that I -- as
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 1   you, Judge Cahill, pointed out, is

 2   Article III, Section 1 of the Bylaws. It

 3   says, ICANN and its constituent bodies

 4   shall operate, to the maximum extent

 5   feasible, in an open and transparent

 6   manner and consistent with the procedures

 7   designed to ensure fairness.

 8   And then Mr. LeVee pointed us to

 9   Article IV on Accountability and Purpose.

10   And Article IV, Section 1 states, In

11   carrying out -- previously, what I just

12   read out was Article III, Section 1. So,

13   here, I'm in Article IV, Section 1.

14   And I quote, In carrying out its

15   mission as set out in these Bylaws, ICANN

16   should be accountable to the community

17   for operating in a manner that is

18   consistent with these Bylaws and with due

19   regard for the core values set forth in

20   Article I of these Bylaws.

21   So that's, overall, the accounting

22   framework.

23   The provisions of this Article,

24   creating processes for reconsideration

25   and independent review of ICANN actions

 1   and periodic review of ICANN's structures

 2   and procedures, are intended to reinforce

 3   the various accountability mechanisms

 4   otherwise set forth in these Bylaws,

 5   including the transparency provisions of

 6   Article III and the Board and other

 7   selection mechanisms set forth throughout

 8   these Bylaws.

 9   Now, that is the only place where we

10   can find a connection between the

11   accountability mechanisms set forth in

12   Article IV and the obligations of

13   fairness and transparency that are also

14   imposed on the -- on the constituent

15   bodies.

16   I would submit to you that it was

17   the intention of the drafters that the

18   IRP be a mechanism through which the

19   transparency and fairness, as set out in

20   Article III, Section 1 of the Bylaws, be

21   given effect and -- and enforced.

22   Otherwise, this is meaningless,

23   simply because, as has been pointed out,

24   there is no other mechanism foreseen,

25   either in the GAC operating principles or

 1   within the context of the Bylaws, whereby

 2   the GAC is held accountable.

 3   So reading Article IV and

 4   Article III together, and based on the

 5   principle that rules or text or statutes

 6   must be read in a way that allows for

 7   them to be -- to be given effect in a

 8   F-A-O-T law, whatever the -- would be

 9   the -- the equivalent effective utility

10   or to implement, I think that therein

11   lies your avenue for reviewing the GAC

12   processes.

13   We're not talking about, here,

14   again, as was in Booking.com, whether or

15   not somebody actually likes the Guidebook

16   or not. We're talking about

17   implementation --

18   HONORABLE JUDGE CAHILL: Right.

19   MR. ALI: -- and that implementation

20   is tested at two levels: It is tested

21   through Article IV and Article III, as

22   I've just explained. And I think it's

23   tested on the other side by virtue of the

24   fact, as Ms. Dryden put it yesterday,

25   that the Board interprets the outputs of

1   the -- of the GAC.

2   As you were pointing out, there's

3   strong presumptions, but, ultimately, the

4   NGPC has a duty. And as Mr. LeVee

5   pointed out, if there is a duty, as you

6   just indicated, then -- or he indicated

7   in responding to your question,

8   Mr. President, is that -- that the -- the

9   discharge of that duty can be evaluated

10   by you.

11   And in this particular instance,

12   given the controversy, given the

13   sensitivities, given the politics, given

14   the fact that we had this imbalance in

15   the application process, the Board had a

16   duty, an absolute duty, to conduct

17   additional diligence and to make

18   inquiries as to what it is that had

19   happened.

20   What -- they might have just asked

21   one question of Ms. Dryden. We have an

22   agenda, which we haven't seen, that was

23   drafted three to four weeks before the

24   GAC meeting.

25

1 Redacted - GAC Designated Confidential Information

1

10   But the Board, what does the Board

11   know -- why would the Board ask those

12   questions?

13   ARBITRATOR KESSEDJIAN: They have

14   the 15-page of --

15   MR. ALI: It has to be incumbent

16   upon Ms. Dryden, as the liaison, to have

17   provided them with the background

18   briefing as to how the consensus advice

19   emerged.

20   I mean, it seems, to me, that as a

21   decision is about to be taken of great

22   consequence and import to an applicant,

23   that Ms. Dryden, as the liaison for the

24   GAC, might have provided even a brief

25   summary of what had taken place in the

 1   process.

 2   Or Mr. Chalaby, given, again, the

 3   context of these applications, given the

 4   first time, this is new, we have a

 5   controversial set of circumstances

 6   surrounding these applications that

 7   everybody knows about, that it might --

 8   might've occurred to somebody, Heather,

 9   could you please provide us some

10   background on what took place and how is

11   it that we've come to this point?

12   Not very difficult. But we have

13   absolutely no evidence to that effect.

14   All we know is that a perfunctory line is

15   included in a Board minute that says it

16   was considered.

17   HONORABLE JUDGE CAHILL: If that had

18   been done and the Board just said, Okay,

19   I got it, and they list -- that -- that

20   -- that -- we can't second-guess that

21   decision had that been done, right?

22   MR. ALI: I can't tell you what it

23   is that would have subsequently happened.

24   What I can tell you is what you have just

25   inquired about didn't happen. There was

1   no inquiry.

2   The Board had a duty. The Board has

3   a duty. The Board is the curator of this

4   system.

5   If the GAC is not subject to your

6   review, then, somehow within this -- then

7   the Board, as Ms. Dryden tells you, has

8   the power to interpret and implement what

9   the GAC is -- what the GAC's consensus

10   advice is.

11   So thereby exists the control

12   mechanism, which means a duty to

13   investigate, a duty to make inquiries,

14   even some inquiry. And that wasn't done.

15   So you can approach it from two

16   different ways: either it's the GAC

17   review, Article IV and Article III; or it

18   is through the Board mechanism.

19   So just on this issue of -- of --

20   very quickly on the Staff. I would just

21   point you to the fact that the -- that

22   this litigation waiver that is found in

23   AGB Module 6.6 also covers the Staff; it

24   covers consultants; it covers everybody.

25   So I think, for purposes of IRPs,

1   you have to look at the conduct as a

2   whole, everybody that is part of this

3   ICANN system that is administering, that

4   is overseeing, that is implementing, that

5   is caretaking the application of the

6   Bylaws, the Articles and the Applicant

7   Guidebook.

8   If it is a rule book, somebody

9   implements those rules. Those rules are

10   being implemented by ICANN Staff on a

11   day-to-day basis. Hence, the litigation

12   waiver covers everybody, including ICANN

13   affiliates.

14   So I would -- it would suggest that

15   Module 6.6, for purposes of the IRP, at

16   least, would provide a basis for you to

17   consider the action of Staff.

18   It also says that DCA didn't know

19   what was going on between the Geo Names

20   Panel -- the Geographic Names Panel and

21   ICANN Staff. DCA had no way of knowing

22   what was going on in these internal

23   e-mails.

24   But DCA did raise on a number of

25   occasions that their -- that ICANN Staff

1   was taking actions that were not fair to

2   DCA, and they raised this with the NGPC.

3   And we have Ms. Bekele's testimony to --

4   to that effect.

5   But the NGPC never made any

6   inquiries as to what is going on with

7   respect to Staff's Interactions With

8   The -- With The -- With The Geo Names

9   Panel.

10   So I think that Staff has to be

11   covered. They're the very important

12   implementers of the direction of the

13   Board.

14   And if one were to simply say, Well,

15   the Staff can do one thing, but the

16   Board's actions are nonreviewable on the

17   Board -- they're reviewable, but the

18   Board is not responsible for Staff's

19   actions, particularly when the CEO would

20   be Staff and is on the Board, would be a

21   really surprising outcome.

22   Again, on the issue of support, I

23   think the easiest path for you here, as

24   opposed to the debate that we're having

25   as to what was the right support from the

1   beginning, what was the right support at

2   the end, is just to look at the

3   correspondence that was taking place

4   between the Geo Names Panel, a panel that

5   was retained in order to conduct an

6   independent evaluation. Its views, its

7   recommendations and what it was saying

8   was considered to be support.

9   The fact of the matter is that ZACR

10   didn't have 60 percent support when it

11   filed its applications from individual

12   governments. And at the point in time

13   when it entered into contract

14   negotiations and the application was --

15   was -- was approved, it still didn't have

16   60 percent support from the individual

17   governments.

18   What it did have was support from

19   the AUC, which, again, you recall, was

20   initially not considered to be support.

21   It subsequently becomes support.

22   And if that support is applicable, then

23   the support that .africa had -- or DCA

24   has should also be subject to somebody's

25   evaluation and interpretation.

 1   Now, the answer that we're given by

 2   Mr. LeVee to the letter, I think, is

 3   something that perhaps applies as the

 4   capstone to this entire proceeding, at

 5   least from our perspective.

 6   Mr. LeVee said, What's wrong with

 7   helping an entity that is struggling to

 8   figure it out?

 9   I hope you recall him saying that.

10   HONORABLE JUDGE CAHILL: Um-hum.

11   MR. ALI: I just simply say, Let's

12   substitute the word "entity" for what's

13   wrong with helping applicant that is

14   struggling to figure it out?

15   There's everything wrong, because

16   you're helping out one applicant, opening

17   every door all along the way for that

18   applicant but closing the door for the

19   other applicant.

20   So what's wrong with helping out one

21   applicant that is struggling to figure it

22   out?

23   Everything, because it's unfair,

24   it's inequitable, it's discriminatory,

25   and it's a violation of the Articles of

 1   Incorporation, Bylaws, the Applicant

 2   Guidebook, international law and just --

 3   and general principles of good faith and

 4   fairness.

 5   And so, with that, I have nothing

 6   more to add, except that I owe you the

 7   final relief requested, which is being

 8   specified with our client.

 9   So this will be the document.

10   This may be an appropriate time to

11   take a break. I'll finalize it, give to

12   Mr. LeVee and then bring it back.

13   HONORABLE JUDGE CAHILL: Okay.

14   PRESIDENT BARIN: Mr. LeVee, do you

15   want an opportunity to respond to what --

16   MR. LEVEE: Just very quickly on

17   Staff -- the question of whether an IRP

18   covers Staff --

19   PRESIDENT BARIN: I was going to ask

20   you a question.

21   MR. LEVEE: -- I mean, it's a policy

22   argument, right?

23   Mr. Ali's arguing he doesn't think

24   it's right that the Staff should have a

25   litigation waiver, but the language of

1   Article IV is very precise. It says, The

2   Board --

3   PRESIDENT BARIN: But you don't

4   disagree that the Board is ultimately

5   responsible for the conduct of the Staff?

6   I mean, otherwise, who else is?

7   MR. LEVEE: No, no. In any

8   corporate setting, the Board is

9   ultimately responsible. But when a Staff

10   member sends a letter or shows up in

11   Africa to a meeting that may or may not

12   have occurred, the Board may have some

13   legal responsibility, but it's not for

14   conduct --

15   PRESIDENT BARIN: I understand.

16   MR. LEVEE: -- that's the point I'm

17   making. It's only Board conduct that's

18   reviewable in an IRP. And ICANN did not

19   want --

20   HONORABLE JUDGE CAHILL: But if the

21   conduct is not supervising the personnel,

22   isn't that --

23   MR. LEVEE: Well, you could argue

24   that. You could also argue that it was

25   the manager's responsibility.

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 1            No board that I'm aware of is

 2     responsible for each event that an

 3     employee does.

 4            HONORABLE JUDGE CAHILL:  That's

 5     probably right, but we'd have to have

 6     more facts.  So . . .

 7            MR. LEVEE:  We would have to have

 8     more facts.

 9            HONORABLE JUDGE CAHILL:  Yeah,

10     right.

11            PRESIDENT BARIN:  Anything else?

12            MR. LEVEE:  No.

13            PRESIDENT BARIN:  Okay.

14            What I suggest, then, is while we

15     wait for Mr. Ali and his team --

16            MR. ALI:  It shouldn't take more

17     than a few minutes.

18            PRESIDENT BARIN:  That's fine.  We

19     can take a break.

20            We do have a few things.

21            HONORABLE JUDGE CAHILL:  We have

22     things to talk about.

23            PRESIDENT BARIN:  It's 12:30.

24            If we were to resume -- I don't

25     know --
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 1   MR. LEVEE: Ten minutes.

 2   PRESIDENT BARIN: -- 10 minutes?

 3   Fifteen minutes? Is that okay?

 4   MR. LEVEE: Ten minutes would be

 5   better.

 6   PRESIDENT BARIN: In 15 minutes, it

 7   will ten to 1:00.

 8   In 15 minutes.

 9   MR. LEVEE: Very good.

10   PRESIDENT BARIN: Thank you.

11   Mr. Ali and Mr. LeVee, I do want to

12   speak to the Panel Members first, but it

13   may be that I would ask you to come and

14   join us again for a few seconds.

15   MR. LEVEE: I'm not going anywhere.

16   (Whereupon, at 12:34 p.m., a

17   luncheon recess was taken.)

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 1    A F T E R N O O N          S E S S I O N

 2                                  (1:03 p.m.)

 3              PRESIDENT BARIN:  We're back on the

 4      record.

 5              Okay.  Mr. Ali, during the break,

 6      you provided the Panel with a copy of

 7      what's entitled the Claimant's Final

 8      Request for Relief.

 9              MR. ALI:  That's right,

10      Mr. President.

11              And we also provided a copy during

12      the break to ICANN.

13              PRESIDENT BARIN:  Okay.  Perfect.

14              What we'll do is we'll just mark

15      this as Exhibit 4 so that it's there as a

16      record.

17              MR. ALI:  Yes.

18              PRESIDENT BARIN:  Hearing Exhibit 4.

19                          -  -  -

20          (Whereupon, Hearing Exhibit Number 4

21            was marked for identification

22            purposes.)

23                          -  -  -

24              MR. ALI:  That's acceptable.

25              PRESIDENT BARIN:  So it's there.
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 1   And I don't have any questions. It

 2   seems clear to me in terms of what you're

 3   asking.

 4   MR. LEVEE: Since it has arrived as

 5   we were about to go on, in the event that

 6   ICANN has anything to say about it, may

 7   we send a very short letter to the Panel

 8   over the next several days?

 9   PRESIDENT BARIN: Sure.

10   MR. LEVEE: I don't know that we

11   will.

12   PRESIDENT BARIN: That's fine. I

13   don't see a problem if you do have

14   something that you want to say. You're

15   just getting it at the hearing, so,

16   that's fine, as long as it's to the point

17   and brief.

18   HONORABLE JUDGE CAHILL: It will be

19   brief.

20   MR. LEVEE: Understood.

21   MR. ALI: As you see, it's

22   effectively the same as what we've

23   previously provided.

24   PRESIDENT BARIN: That's fine.

25   But in all fairness, he's just

 1   getting it now, so he can react to it.

 2   MR. ALI: Yes.

 3   PRESIDENT BARIN: Okay.

 4   So are we done then, now, in terms

 5   of closing arguments?

 6   MS. BEKELE: Mr. Chair, if I could

 7   just address the Panel one last time

 8   before we adjourn, I would appreciate

 9   that.

10   PRESIDENT BARIN: Do you have any

11   objection?

12   MR. LEVEE: I would object.

13   PRESIDENT BARIN: What's the nature

14   of the --

15   MS. BEKELE: I just wanted to thank

16   the Panel for all the work they're doing.

17   MR. LEVEE: I have no objection to

18   that.

19   HONORABLE JUDGE CAHILL: For your

20   side --

21   PRESIDENT BARIN: I just wanted to

22   make sure that I heard what she was going

23   to say first before I --

24   ARBITRATOR KESSEDJIAN: You object

25   before she said anything, just in case.

 1   MR. LEVEE: I was envisioning

 2   something different.

 3   HONORABLE JUDGE CAHILL: Yeah, me,

 4   too.

 5   I do a lot of arbitrations, and

 6   these are as good a lawyers as they get.

 7   So whatever -- sorry. Don't tell them

 8   that I said that.

 9   PRESIDENT BARIN: In terms of house

10   cleaning -- and we'll get to that --

11   we'll get to that, too --

12   HONORABLE JUDGE CAHILL: Housekeeping

13   .

14   PRESIDENT BARIN: -- housekeeping --

15   there's one other -- one last item

16   that -- Mr. LeVee, the Panel would like

17   to request from ICANN, and, that is, we

18   understood yesterday that there are

19   recordings of Board meetings of ICANN

20   that are kept.

21   Now, whether they're available or

22   not is a question that I put to you.

23   To the extent that the recordings

24   are available, the Panel would appreciate

25   getting the recording that relates to the

 1   Board meeting of June 4, 2013, that's

 2   Exhibit R-1, and the main agenda for

 3   which was the Consideration of

 4   Nonsafeguard Advice in GAC's Beijing

 5   Communiqué and Rationale for Resolution

 6   of 2013/06/04. So if that's available.

 7   MR. LEVEE: I will respond in the

 8   same time that I respond to the Panel's

 9   request for the other document relating

10   to the Ethics Panel that we discussed

11   yesterday.

12   PRESIDENT BARIN: Okay.

13   And, of course, you'll have a

14   chance, Mr. Ali, to comment.

15   I note that there was a

16   transcription of this proceeding. So

17   what I suggest is that you will get a --

18   a copy of that transcription, probably.

19   And if counsel can sort of accord on the

20   final text that gets to us.

21   Then you can have a look at it in

22   the period that you do, but as long as we

23   get a copy that we don't have to then be

24   concerned as to whether there are any

25   comments on it or not --

1   MR. ALI: Of course.

2   MR. LEVEE: That's fine.

3   PRESIDENT BARIN: -- in terms of the

4   transcript.

5   MR. LEVEE: Yes.

6   And, yesterday, we discussed that we

7   will not plan on closing briefs.

8   I just wanted to confirm that that

9   remains the Panel's preference.

10   PRESIDENT BARIN: Well, to be

11   perfectly candid, I don't think the Panel

12   had any preference in particular, but --

13   but I don't think one is necessary,

14   unless -- if you want to put one in,

15   we're not going to say no.

16   MR. LEVEE: The parties did not

17   believe that additional briefing was

18   necessary.

19   HONORABLE JUDGE CAHILL: Thank you.

20   PRESIDENT BARIN: But to follow

21   that, what we will do, though, is --

22   because we will have an important job now

23   going forward deliberating on this -- and

24   it will take us as long as it'll take

25   us -- if we do need information,

1   documents or anything else, including

2   submissions, then we will come back to

3   you, perhaps, put it to you by written

4   question. We'll evaluate it as we go

5   forward.

6   MR. LEVEE: We have no objection to

7   that at all.

8   PRESIDENT BARIN: Okay.

9   ARBITRATOR KESSEDJIAN: Could we

10   have an idea of the calendar for

11   the -- for the transcript? When are you

12   going to send the drafts?

13   MR. LEVEE: We have a draft from

14   last night already.

15   THE COURT REPORTER: It looks like

16   June 8th and 9th.

17   ARBITRATOR KESSEDJIAN: Then you

18   will have to work on it?

19   MR. ALI: Maybe a week or so or to

20   confirm, maybe faster than that. But as

21   soon as we get the clean from Ms. Sebo,

22   we'll --

23   ARBITRATOR KESSEDJIAN: So around

24   the 20th of June -- around the 20th of

25   June, approximately, a clean transcript

 1   for us?

 2   MR. LEVEE: That's fine.

 3   ARBITRATOR KESSEDJIAN: We will be

 4   able for us to plan our deliberations?

 5   PRESIDENT BARIN: The 20th of June

 6   is a Saturday, so maybe the 19th, on or

 7   about.

 8   How's that?

 9   MR. ALI: We'll work it out. We

10   understand why you need it, and we'll try

11   and get it to you as quickly as we can.

12   PRESIDENT BARIN: So on or about

13   June 19th, we'll get a final version of

14   the -- of the transcript.

15   Okay. Any other issues? No?

16   Questions?

17   HONORABLE JUDGE CAHILL: Not me, no.

18   I'm fine.

19   PRESIDENT BARIN: I do have a

20   question for you.

21   And the question to both of you is

22   that I trust you're happy with the way

23   the Hearing went, that you're satisfied

24   with the ability to make your

25   presentations and an opportunity to make

 1   your points known in as full of a manner

 2   as you could under the circumstances?

 3   ARBITRATOR KESSEDJIAN: If you're

 4   not, it's too late.

 5   MR. ALI: Thank you.

 6   And from DCA Trust side, absolutely.

 7   Thank you.

 8   HONORABLE JUDGE CAHILL: What are

 9   you going to say?

10   MR. LEVEE: Likewise.

11   PRESIDENT BARIN: The issue is if

12   there's anything that you want to do that

13   you haven't been able to do, this is the

14   time to do it.

15   HONORABLE JUDGE CAHILL: The appeals

16   say otherwise, that's fine, because --

17   it's kind of a -- a loaded question.

18   PRESIDENT BARIN: Then that brings

19   me to two last items, and that is I want

20   to thank our stenographer, Cindy Sebo --

21   I think I pronounced that perfectly

22   well --

23   HONORABLE JUDGE CAHILL: Perfectly

24   well.

25   PRESIDENT BARIN: -- from

 1   TransPerfect, who has been sitting here

 2   the last one-and-a-half day, long days,

 3   for what she's done. So thank you.

 4   And then I wanted to personally --

 5   and I'm sure my colleagues will

 6   definitely have their only words to

 7   say -- thank your -- the counsel, both

 8   Mr. LeVee and Mr. Ali, for -- and --

 9   pardon me -- and your team --

10   MR. ALI: Far more importantly.

11   PRESIDENT BARIN: -- some of whom,

12   you said yesterday, were presenting for

13   the first time. I think the Panel agrees

14   that it was a very good job.

15   Well done.

16   HONORABLE JUDGE CAHILL: You'll

17   probably always remember that, so good

18   job.

19   PRESIDENT BARIN: I particularly

20   want to commend you for -- for being

21   extremely civil.

22   Sometimes these issues are not easy,

23   but in the complete, thorough and, I

24   think, excellent way -- and I say this in

25   your front of your clients, both of your

 1   clients -- the -- the Panel is very

 2   thankful and grateful.

 3   We enjoyed being here, and we will

 4   go into the deliberations for the next

 5   however long it takes. So --

 6   HONORABLE JUDGE CAHILL: Thanks for

 7   choosing the three of us. We get along

 8   very well.

 9   ARBITRATOR KESSEDJIAN: We decided

10   to propose at the end of this that we

11   will form a permanent tribunal.

12   MR. LEVEE: ICANN has been looking

13   for a permanent tribunal.

14   HONORABLE JUDGE CAHILL: Wait till

15   you see what we do, because we don't know

16   what we're going to do. Maybe you will

17   want us back or maybe not.

18   PRESIDENT BARIN: With that, I wish

19   you a good day, and have a great, long

20   weekend.

21   MR. LEVEE: Thank you.

22

23   - - -

24   (Whereupon, the Hearing on the

25   Merits concluded at 1:12 p.m.)

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 1                  CERTIFICATE OF

 2   CERTIFIED REGISTERED MERIT REAL-TIME COURT REPORTER

 3        I, CINDY L. SEBO, Registered Merit Reporter,

 4   Certified Real-Time Reporter, Registered

 5   Professional Reporter, Certified Shorthand Reporter,

 6   Certified Court Reporter, Certified LiveNote

 7   Reporter, Real-Time Systems Administrator and

 8   LiveDeposition Authorized Reporter, do hereby

 9   certify that the foregoing transcript is a true and

10   correct record of the Hearing on the Merits, that I

11   am neither counsel for, related to, nor am employed

12   by any of the parties to the action; and further,

13   that I am not a relative or employee of any attorney

14   or counsel employed by the parties thereto, nor

15   financially or otherwise interested in the outcome

16   of the action.

17

18

19        Signed this 2nd day of June 2015.

20

21        _____

22             CINDY L. SEBO, RMR, CRR, RPR, CSR,
               CCR, CLR, RSA, LiveDeposition
23                Authorized Reporter

24

25
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